The White Man's Burden, The Crown's Burden: Local, National, and International Implications for the 2014 Supreme Court decision re: *Keewatin v. [Ontario] Ministry of Natural Resources*.

Abstract:

Canada has signed numerous comprehensive free trade agreements since NAFTA. In its deliberations the federal government has neglected to consult with Aboriginal leaders and policy critics. The Crown has thereby abrogated its fiduciary duty to act in according to the interests of the Aboriginal inhabitants of these lands. Aboriginal and Treaty rights are "recognized and affirmed" in the Constitution, but the precise nature of those rights remain constitutionally undefined. The provincial and Supreme Courts have therefore been largely left to interpret the import and practicability of those rights. The courts' interpretations are bound by their adherence to the fundamental interests of the colonial state. Nonetheless the Supreme Court of Canada has over time evolved and has offered important interpretations defending and defining the practicability of Aboriginal and Treaty rights. An example is the 2014 *Keewatin v. MNR* Supreme Court decision which reinforces the Crown's duty to consult and meaningfully accommodate in regard to resource extraction. This could have important implications for the exercise of the Crown's fiduciary duty if applied honorably. If informed, all citizens of Treaty territories can use their voices in defense of Aboriginal and Treaty rights. In the face of comprehensive free trade deals, citizens can compel their governments to temper their tendencies to act as careless extraction licensing bodies at the expense of our collective needs for safe and sustainable ecologies and economies, and at the expense of the health and self-determination of Canada's indigenous peoples. As was often quoted during the height of Idle No More, Aboriginal and Treaty rights could serve as Canadians' 'last best hope' to develop sustainable and ethical economies. Canada's Aboriginal people are leading this clarion call in Canada. They are thereby positioning themselves as crucial agents in the great multi-polarity within the complex gamut of international, national and local interests.

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> Take up the White Man's burden, Send forth the best ye breed
> Go bind your sons to exile, to serve your captives' need;
> To wait in heavy harness, On fluttered folk and wild—
> Your new-caught, sullen peoples, Half-devil and half-child.
>
> Take up the White Man's burden, In patience to abide,
> To veil the threat of terror And check the show of pride;
> By open speech and simple, An hundred times made plain
> To seek another's profit, And work another's gain.

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[1] Aboriginal and Treaty rights are essentially fundamental rights to continue cultural and economic practices on traditional territories. In short, they are inherent rights to use the land in ways that allow for economic, political, and cultural self-determination.

[2] *Grassy Narrows v. Ontario (Natural Resources), 2014 SCC 48*. Full Supreme Court of Canada transcript available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14274/index.do

--excerpt from Rudyard Kipling's "The White Man's Burden", 1899

Rudyard Kipling's famous poem was originally intended for Queen Victoria's Diamond Jubilee, but was instead published in the United States with the subtitle, "The White Man's Burden: The United States and the Philippine Islands." The import and intent of Kipling's stanzas are the same in either case – to exalt in the noble burden by Europeans and their white descendants to civilize the "new-caught peoples, Half-devil and half-child"; the indigenous peoples of the world. The U.S. machinery of colonial expansion abroad and westward in North America rolled out at the same time and to similar effect as Canada's colonial expansion under the "bounty and benevolence" of Queen Victoria herself.[3] The result is a totalizing[4] legacy of land dispossession and concomitant forms of institutional, economic, psychological and spiritual abuse for Canada's First Nations, Metis and Inuit. It might seem that the colonial project is complete. But the white man in this country has another burden to shoulder [and by 'white man' I now refer to all non-Aboriginal Canadians and civil servants of government]: that is the burden of the Crown's fiduciary duty to act in accordance with the expressed interests of the Aboriginal peoples.

The government of Canada officially proclaims on its webpage outlining 'The Crown's Fiduciary Relationship with Aboriginal Peoples' that the latter "have always held a unique legal and constitutional position."[5] The government here conveniently scuttles past the fact that indigenous leaders had to in fact fight for their Aboriginal and Treaty rights to be recognized and affirmed under the 1982 Constitution, which they eventually were under Section 35.

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[3] From the text of Treaty 3: "And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purpose as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them so that there may be peace and good will between them and Her Majesty and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence." Alexander Morris' account of treaty three deliberations and full text of Treaty Three can be accessed online at http://www.gutenberg.org/files/7126/7126-h/7126-h.htm

[4] Peter Kulchyski has harnessed the conceptualizations of hegemony and totalization by Jean-Paul Sartre, Theodor Adorno, and Fredric Jameson to articulate the economic and cultural reality for Aboriginal peoples in Canada: "The homogenization that comes with capitalism, and is increased exponentially in the latest phase of capitalist development, is an expression of the totalizing exigencies at the structural core of the dominant system. Totalization has been experienced by Aboriginal peoples in Canada as a State policy, charaterized by many scholars as "assimilation," which has worked to absorb them into the established order." *Like the Sound of a Drum: Aboriginal Cultural Politics in Denendeh and Nunavut*, (University of Manitoba Press, 2005), 23-24.

[5] "The Crown's Fiduciary Relationship with Aboriginal Peoples." http://www.parl.gc.ca/content/lop/researchpublications/prb0009-e.htm

Nonetheless, the federal government duly traces its fiduciary duty back to the Royal Proclamation of 1763, which provided that it was

> just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, *and who live under our Protection*, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. (*emphasis* added)

The Royal Proclamation's proviso for proper cession of land to the Crown codified in large part the Dominion of Canada's obligation to negotiate treaties. The Proclamation also expressly includes an acknowledgement of the importance of the hunt – in other words the use of land in traditional ways – and the implication should be that traditional land use be protected. Section 94(1) of the 1867 Articles of Confederation provide that the federal government is responsible for "Indians and land reserved for Indians." This clause, as well as the inaugural Indian Act of 1876 accord the Crown its protector status, inasmuch as they are also paternalistic and disastrously prescriptive and oppressive. Lastly, as mentioned, Aboriginal and Treaty rights are begrudgingly recognized and affirmed in Section 35 of the 1982 Constitution.

The honour of the Crown rests in its commitment – in Kipling's words – "to serve [the] captives' need." Canada's indigenous peoples have been voicing their need for respective economic and cultural self-determination since Contact, through all available means and channels. One prevalent avenue in the past half-century is the use of the legal system. The 2014 *Keewatin v. MNR* Supreme Court case – instigated by trappers and land users of Grassy Narrows First Nation – holds important implications for the white man's burden in the form of the Crown's fiduciary duty.

The *Keewatin* case was a challenge to Ontario's provincial authority to issue logging licenses on Grassy Narrows First Nation's traditional land use area. In contention was the federally administered district of Keewatin as it was known before the 1912 provincial adhesion which brought the expansion of Ontario's borders from a relatively small east-west swath to the vast region we know today. Prior to 1912 the Keewatin district formed part of Treaty Three territory, but not a part of Ontario. Ontario's 1912 border expansion came to include the Keewatin lands and no First Nation signatories were consulted. Grassy Narrows litigants contend that because Treaty Three was a nation-to-nation agreement between the First Nations and the federal Crown, the resources in what was Keewatin should remain off-limits to the province of Ontario, which entity did not sign the Treaty. Any resource allocation should rather be protected by the federal fiduciary duty.

Ontario's provincial court decided in favour of Grassy Narrows. This would have had massive implications across Canada because all of the provincial resources assumed by the 1912 adhesions across the country would be considered off limits to provincial extraction licenses. It is not surprising that Ontario was granted its appeal because Canada's resource allocation paradigm would have had to be revised. Section 109 of the 1867 Articles of Confederation grant provinces jurisdiction over resources. To retroactively annul the applicability of Section 109 would have occasioned a constitutional overhaul, and it is beyond the purview of the courts to

mandate constitutional revision. Their mandate is to interpret the law, including the Constitution, not to change the Constitution itself.

In the *Keewatin* case, the Supreme Court of Canada looked to the 1888 legal precedent known as *St. Catherine's Milling*. That case was the first to pit the federal crown's jurisdiction over treaty territories and logging revenues therefrom – in this case also, Treaty Three lands - against the Section 109 provincial jurisdiction over resources. The Privy Council in England at that time decided in favour of the province. Incidentally but importantly, no First Nation signatory body or individual was consulted or invited into those proceedings either.

The *St. Catherine's Milling* precedent helped influence the Supreme Court to decide again in favour of the province of Ontario in the 2014 *Keewatin* decision. The judge found that though Treaty Three was signed by the federal Crown and not the province, the federal Crown through the Articles of Confederation were bound to bequeath resource jurisdiction to the provincial Crown. In terms of total jurisdiction, in other words, the Supreme Court interprets the federal and provincial Crowns to be one unified entity.

The *Keewatin* decision may on the surface appear to be a victory by the province. However other Supreme Court precedents regarding resource extraction were also summoned to create limitation on the Crown; the 2004 decision *Haida Nation v. British Columbia (Minister of Forests)* and the 2005 decision *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage.* These two cases reinforce the obligation by provinces to consult and meaningfully accommodate affected First Nations faced with resource extraction on their traditional land use areas. That the province of Ontario in the *Keewatin* decision is interpreted as unified with the federal Crown implies that the province must also assume the Crown's fiduciary duty to act in the best interests of the Aboriginal peoples. Ontario cannot be selective about which Crown responsibilities it wishes to honour and which to ignore.

Conversely, the federal Crown – though not responsible for resource jurisdiction – cannot choose to ignore its unity with provincial Crown. It must also consult and meaningfully accommodate Aboriginal peoples in its decision-making. Free-trade agreements provide for foreign investment in the extraction of Canada's resources and obliges the host country to use its means to protect those investments, at the threat of legal action otherwise. These provisions are known as Foreign Investment Protection Agreements, or FIPAs.[6] Canadian-based extraction companies that are registered in the U.S. can also use free-trade provisions under NAFTA, for example, to sue in line with their right to extract.[7] No free-trade negotiation has taken place with

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[6] See the government website for comprehensive list http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng

[7] "Holding one of the revoked licences, Lone Pine Resources, an oil and gas company, is now launching a $250 million lawsuit against the Canadian government over Quebec's fracking moratorium under the North American Free Trade Agreement (NAFTA). Although Lone Pine maintains all its operations in Canada, it's registered in Delaware which allows it to make claims under NAFTA." From "NAFTA Challenge to Quebec Fracking Law Puts Profits Ahead of Water." http://commonsensecanadian.ca/quebec-fracking-nafta-challenge-right-water-right-profit/. Accessed August 25 2015.

the consent of Aboriginal entities. These agreements therefore stand as breaches of the Crown's duty to respect constitutionally protected Aboriginal and Treaty rights. As such, there is an argument that free-trade agreements are violations of Canada's Constitution itself.

Canada's federal government has signed, concluded, and is in more exploratory negotiations toward dozens of bi-lateral free-trade deals.[8] At the fore of controversy at present however are Canada's multi-lateral free-trade agreements including the Comprehensive and Economic Trade Agreement with the European Union (CETA) concluded on August 5th 2014, and the ongoing negotiations around the Trans-Pacific Partnership (TPP) that most prominently features China as investment partner.[9] Incidental to the TPP is the bilateral Canada-China FIPA which was ratified on September 12th 2014. There is much concern amongst critics that the Canada-China FIPA heavily favours China due to the imbalance of foreign investment. China has considerably more capital at its disposal than does Canada and there are fears of massive takeovers of Canadian industry by Chinese investors. This FIPA's negotiation was carried out behind closed doors, and is observed by York University's Osgoode Hall Law School professor Gus Van Harten to be "uniquely secretive because of the international legal right it gives the federal government to keep lawsuits by Chinese investors against Canada confidential until an award has been issued."[10] Dr. Van Harten's fears should be shared by all Canadians.

There was a challenge to the Canada-China FIPA by the Hupacasath First Nation of the unceded territory of the British Columbia's lower mainland. The Hupacasath's concern about impacts on land and culture were ruled by the reviewing body as speculative. Importantly, the review of potential impacts that came out of the Hupacasath challenge focused restrictively on that First Nation in isolation. No grander perspective was granted regarding possible impacts to other First Nations, let alone the rest of Canadians.[11]

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[8] See the federal government website for full list http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=engws

[9] See the government website on the TPP: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/ea-ee.aspx?lang=eng

[10] See Van Harten's articles for full critique of the Canada-China FIPA: "Six Steps to Protect Canadians from Flaws in China Trade Deal" http://thetyee.ca/Opinion/2014/09/30/Flaws-in-FIPA/ and "Taking Apart Tories' Party Line on China-Canada Treaty" http://tcktcktck.org/wp-content/uploads/2012/11/Gus-Van-Harten-Tyee.pdf

[11] Gus Van Harten, "Six Steps to Protect Canadians from Flaws in China Trade Deal." http://thetyee.ca/Opinion/2014/09/30/Flaws-in-FIPA/

Canadians who are informed aware can support these First Nations challenges as a constitutional tool to force the federal government's transparency and fair and equitable dealing. Whether on unceded or Treaty territories, the federal government has a duty to consult and meaningfully accommodate. As soon through the evolution of Idle No More, many Canadians asking what it is that First Nations would declare if consulted are finding that the two sides share many of the same concerns. There are declarations of the need for clean water, land, air, and regenerative watersheds and ecosystems. These are core. As the results of climate change and industrial pollution are upon us, Canadians are observed to be in a value-shift as a whole. The mainstream is becoming more politically, historically, and ecologically aware. They are beginning to see how the exploitation of First Nations and their lands and waters affects all people. Water flows, and the proverbial 'waste' flows downstream.

The 2014 *Keewatin* Supreme Court decision revealed the unity of the federal and provincial Crowns. As such, the Crown as a whole entity must act according to its fiduciary duty. No major economic decisions should take place without Aboriginal consent. Canadians are becoming more aware of the spiritual, economic, political and ecological import of this burden on the Crown. They can harness it to pressure governmental representatives to step back and re-evaluate Canada's trade agreements in order to reflect the constitutional recognition of Aboriginal and Treaty rights. It may seem at times that the banking/industrial complex is too entrenched, too complex – the machinery too automatic for us to dismantle. We cannot put it in reverse, but we can change gears and take a different course. The white man's burden to recognize and respect the spaces where one lives – and people indigenous to these lands -- is possibly Canadians' 'last best hope' to influence the development of ethical and sustainable economies and affirmative relationships with each other locally, nationally, and internationally.

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