Boundary disputes: The price of federalism

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Deflecting criticism:

Lest you be tempted to dismiss this topic as irrelevant to New Zealand (i.e. boundary disputes/federalism? Say what?), let's address three truisms. The first truism: There are significantly fewer boundary disputes in New Zealand than in Canada, even after normalizing for population, number of parcels, frequency of subdivision and rate of transfer.[1] There are many explanations for this – including the ubiquity of mortgage surveys in Canada on fee simple lands[2] – but there are two assertions here: That federalism contributes to boundary disputes for parcels of Aboriginal lands in Canada, and that this is of interest to you.[3]

The second truism: There is a significantly different statutory and constitutional context in New Zealand than in Canada. Canada has nothing to compare to the Treaty of Waitangi; NZ has nothing to compare to the Constitution Act (1982). From the perspective of Aboriginal rights in land, the Constitution is a very good thing, for it entrenches such rights in s.35: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." This means that the Crown does not have the unfettered authority to extinguish such rights; rather the Crown has a duty to conduct itself honourably.

The third truism: New Zealand is not bedeviled by federalism, not being a creature of a confederation of existing colonies and having long-ago jettisoned the provinces. Canada is a creature of federalism, whereby the respective powers of the federal Crown and the provincial Crowns are set out in the Constitution. Indeed, confederation was often driven (or impeded) by issues of land tenure, parcels and boundaries. For example, Ontario's interest in expanding west was one of the primary reasons for Confederation in 1867.[4] Conversely, Prince Edward Island's reluctance to join Canada in 1867 was based on its desire to retain its antiquated lease-hold system.[5]

Despite these differences between New Zealand and Canada, this examination of federalism causing boundary disputes is relevant to New Zealand because of four constants between the two countries:

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[1] Conyers. Why New Zealand has fewer title and boundary disputes than Ontario. Paper for Survey 455H. University of Toronto. December 1993. The extents to which Ontario is a proxy for Canada and 1993 is a proxy for 2003 are now being tested.

[2] Such surveys often "start a fight" because they rouse sleeping dogs: Interview of George Walker by Charlie Weir. *ALS News*. p51. June 2013.

[3] Federalism is also indicted as contributing to boundary disputes in harbours and in the offshore: Ballantyne: *Water bounds of riparian lands: That fuzzy shadowland.* SGB. 50pp. 2013.

[4] Sprague. The Manitoba land question. *The Prairie West: Historical readings*. pp118-135. 1992.

[5] Bitterman & McCallum. Fishery reserves in Prince Edward Island. 28 *Dalhousie LJ* 385. Fall 2005.

- The nature of conflicts between Crown and Aboriginal peoples over land.
- The legal and ethical principles that apply to resolving such conflicts.
- The onus upon land surveyors to proffer only impartial expertise.[6]
- The methodology for re-establishing boundaries.[7]

Thus, what follows shoud resonate for Maori land, for Aboriginal title in New Zealand and for New Zealand surveyors. Also, of course, it's a window into an enchanting world.

Cross-pollination:

There is much cross-pollination between New Zealand and Canada on surveying issues, as they pertain to Aboriginal title (and rights) and to boundaries (and parcels). This cross-pollination is to be expected, to the extent that the principles of the English common law were to apply in both jurisdictions,[8] so far as they were applicable to the circumstances of the region.[9] For example, the mantra from an 1886 New Zealand case[10] – "Neither the words of a deed, nor the lines and figures of a plan, can absolutely speak for themselves. They must in someway or other, be applied to the ground" – is regularly invoked in Canada. In the other direction, Hayes' recent monograph on the law of movable water boundaries[11] borrows generously from Canada – the epigraph from Lambden and 15 pages from Ontario legislation.

However, let's focus on the Crown-Aboriginal nexus at the parcel boundary, with one caveat: I do not intend to set out the New Zealand context for dealing with Maori land and boundaries of such parcels. Such carrying-of-coal-to-Newcastle is both wearying and overweening. Suffice to say that the procedures available for Aboriginal land grievances are similar between the two countries – negotiate directly, litigate or appeal to statutory tribunal.[12] Courts on both sides of the Pacific lean heavily on principles from the other jurisdiction.[13] The Supreme Court of Canada defined meaningful consultation with First Nations as obliging the Crown to make changes to its proposed action based on information gleaned, and relied on New Zealand's *Guide for Consultation with Maori* for insight.[14] Conversely, the New Zealand courts have, since at least 1987, referred to decisions of the Supreme Court of Canada in defining and discussing fiduciary duty, the honour of the Crown and the nature of Aboriginal rights and title.[15]

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[6] The advice must not be influenced by deep pockets (clients) or trousering (bribes): Ballantyne. *Expertise at the boundary: Vox expertorum*. ALSA Seminar. April 2010.
[7] Generally Accepted Surveying Principles.
[8] Durie. FW Guest Memorial Lecture 1996. Will the settler settle: Cultural conciliation and law. University of Otago. September 25, 1996.
[9] NZ: *English Laws Act* 1858; Canada: *North-West Territories Act* 1886.
[10] *Equitable Building & Investment Co. v. Ross* (1886), 5 NZLR 229.
[11] Hayes. *Elements of the law on movable water boundaries*. MAF. 2007.
[12] NZ: Waitangi Tribunal, established by the *Treaty of Waitangi Act*, 1975. Canada: Specific Claims Tribunal, established by the *Specific Claims Tribunal Act*, 2008.
[13] Frame. The fiduciary duties of the Crown to Maori. *Waikato Law Review*. v13. pp70-87. 2005.
[14] Ministry of Justice Guide: *Haida Nation v British Columbia* [2004] 3 SCR 511, at para 46.
[15] *New Zealand Maori Council v. AG* [1987] NZLR 641; *McRitchie v. Tarankai Fish and Game Council*, [1999] 2 NZLR 139.

Admittedly, there is some difference as to what sort of duty is owed by the Crown to First Nations and to Maori, respectively: a fiduciary duty or some duty analogous to a fiduciary duty. A fiduciary duty arises in situations where one party (such as a First Nation) is in a vulnerable position compared to another party (such as the Crown). The distinction, from the perspective of reestablishing boundaries of parcels, is largely irrelevant. Both duties are characterized by a partnership:

- Founded on good faith, honour, trust, mutual cooperation, openness, consultation, reasonableness and fairness;[16] and
- Rooted in persuading Maori and First Nations that their rights were best protected by reliance on the Crown[17] (at a time when there was military parity)[18]

What is relevant is that the Crown must act honourably towards Aboriginal land in both countries: "emphasis on the honour of the Crown is important, the Treaty of Waitangi being a positive force in the life of the nation.[19]

Minimal impairment of land:

Canadian federalism is reflected in the division of powers between the federal Crown and the 10 provincial Crowns. The former has responsibility for Indians, and lands reserved for the Indians, by virtue of s.91(24) of the Constitution. The latter has responsibility for property and civil rights in the Province by virtue of s.92(13) of the Constitution. This means that Canada (the federal Crown) has responsibility for 3,100 Indian Reserves with an area of some 35,524 sq km, allocated across 575 First Nations having a population of about 370,000. The provinces have responsibility for the abutting lands; either directly as ungranted Crown land or indirectly by patenting and administering lands in fee simple. Between these two Constitutionally-distinct types of land, of course, is a boundary.

In the context of Reserves, the Crown owes a duty to First Nations thrice:

- Prior to creating a Reserve, the Crown must mediate between Aboriginal peoples and others.[20]

- After creating a Reserve, the Crown has an "obligation to protect and preserve the Band's interests from invasion or destruction."[21] Although the Crown might well have a public duty to expropriate Reserve lands it must take "only the minimum interest required" to ensure "minimal impairment of the use and enjoyment of Indian lands by the First Nation."[22] This means that after a decision is made to take the land in the public interest, the Crown must turn its mind to the terms of

[16] *NZ Maori Council v. AG* [2007] NZCA 269.
[17] *Wewaykum Indian Band v Canada,* [2002] 4 SCR 245.
[18] Belich. *I shall not die: Titokowaru's War, 1868-1869.* 1996.
[19] *Ruahine v. Bay of Plenty Regional Council,* [2012] NZHC 2407; *AG v Mair,* [2009] NZCA 625.
[20] *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245.
[21] *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
[22] *Osoyoos Indian Band v. Oliver (Town),* [2001] 3 S.C.R. 746.

the taking. If an easement will suffice, then a fee simple interest must be eschewed, thus leaving the parcel within the Reserve.[23]

- First Nations sometimes surrender parts of Reserve (although absolute surrenders are rare). The Crown owes a fiduciary duty to a First Nation when it participates in the removal of land from a Reserve,[24] so as to prevent "exploitative bargains."[25] A free and informed decision is a necessary but not a sufficient condition to surrender. If the transaction is exploitative, then the Crown must "withhold its own consent."[26]

Outside the Reserve context, both Crowns – federal and provincial – have a legal duty to consult and possibly accommodate First Nation, Métis or Inuit communities, when the Crown has knowledge of a an established or potential Aboriginal right and contemplates conduct that might affect that right.[27]

Typology of boundary disputes:

I work for the federal Crown, which has an obligation to protect First Nations' interests in Reserves from invasion or destruction. This duty to minimally impair Reserve lands guides us as we re-establish Reserve boundaries and as we confront eight types of federalism-centric boundary disputes:

- Province as active opponent of Canada ("It's ours, piss off"): Example A - The Qu'Appelle Valley in Saskatchewan meanders across a wide flood plain, meaning that there are both gradual and sudden shifts in the boundaries of Reserves that abut the river. The bed of the river is vested in the province, and the parcels across the river from the Reserves are mostly patented in fee simple by the province. Owing to a provincial regulation that extinguished the doctrine of accretion in 1966, the province now refuses to consent to Canada's survey plan[28] that show the Reserves getting larger through accretion. Example B - The Rama Reserve in Ontario is bounded and bisected by a few watercourses. The Ontario Court of Appeal[29] held that non-tidal watercourses vest in the riparian parcel; that *ad medium filum* carries the day regardless of navigability. In response, Ontario enacted legislation in 1911 that vests navigable watercourses in the province at the time of Crown grant, and now argues that such legislation applies to the Reserve that was created in 1850. Thus, although Canada has re-established the Reserve as running to the middle thread, the province argues that the boundaries are at water's edge.

[23] *BC Tel v. Seabird Island Indian Band*, 2002 FCA 288.
[24] *Halfway River First Nation v. BC Ministry of Forests*, 1999 CanLII 470 (BC CA).
[25] *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344.
[26] *Semiahhmoo Indian Band v. Canada*, 1997 CanLII 6347 (F.C.A.).
[27] *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511; Taku *River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550; Mikisew *Cree First Nation v. Canada*, [2005] 3 S.C.R. 388.
[28] It is Surveyor General policy that a province consent to all survey plans of Reserve boundaries before such plans are confirmed, pursuant to the *Canada Lands Surveys Act*, s.29(3).
[29] *Keewatin v. Kenora*, (1908) 16 OLR 184.

- Province as implicit opponent of Canada ("It's ours by default, we dare you to argue otherwise"): In 1938, British Columbia transferred to Canada the title to all Reserves in the province, with the exception of travelled roads through Reserves. It is now difficult to ascertain whether a road that is travelled in 2013 was travelled in 1938. The province, however, consistently argues that current travel is the best indicator of travel in 1938, and claims such roads. The effect is often that Canada argues that there is no boundary (by virtue of there being no evidence of a road in 1938) while the province argues that there are two boundaries (either side of such a road).

- Province as mild irritant ("We might concede that it's yours, if you jump through some hoops"): All parties agreed that land had physically accreted to Opaskwayak Cree Nation Reserve. However, Manitoba refused to consent to a survey plan of the Reserve, on the grounds that provincial legislation required that a separate survey be done of the accreted area. Given that the legislation pertained only to provincial Crown land, the province's position meant that the area would have to be transferred from Manitoba to Canada and then added to the original Reserve (both through Orders in Council). Canada argued successfully that the provincial legislation had no application to Reserve land, but the debate consumed much energy over three years.

- Province as misguided passive-aggressor ("It's yours, you deal with it"): Papaschase Reserve in Alberta was surrendered in 1889, and the 39 sq mile parcel was subdivided into 183 smaller parcels (each of 160 acres) and patented by Canada to settlers. Recently, the province has advised the City of Edmonton that wetlands were not patented, but remain vested in Canada as unsold, surrendered lands. Edmonton, as a consequence, has issued stop-work order to subdivision developers on the basis that they did not have title to the wetlands,[30] and put the onus on Canada to demonstrate otherwise. Canada resolved the imbroglio in favour of the developer. There is nothing in the legislation, the policies of the day or in the patents to suggest that the wetlands were reserved by (or excepted to) the Crown; moreover, Edmonton had no evidence to suggest otherwise.

- Province as innocent bystander ("Say what?"): In 1878 the Nanoose Reserve on Vancouver Island was surveyed, and the First Nation has resided there since. Sadly, in 1884 a survey of abutting provincial Crown land erred in re-establishing the east boundary of the Reserve, such that a few fee simple parcels now encroach onto Reserve by a few metres. The error was revealed in 1998, and the two Crowns - federal and provincial - agreed that the 1878 boundary was correct. The encroachments remain, however. The fee simple owners argue that the Reserve boundary was not established until 1938 (when British Columbia transferred all Reserves to Canada), after the establishment of their parcel boundaries in 1884.

[30] Ecologists agree that these wetlands have no ecological value.

- Province as unwitting dupe ("They don't want it"): A parcel of fee simple land was added to Membertou Reserve in Nova Scotia in 2012; the parcel is bisected by a creek. Provincial legislation (dating to 1917) vests the beds of all watercourses in the province, regardless of navigability. It is the Surveyor General's opinion that the creek was not part of the fee simple parcel, and thus is not part of the reserve. However, land administrators within the federal Crown argue that the trivial nature of the creek means that the province has no interest and that the creek is part of the Reserve. The bun-fight is retarding the surrender of part of the Reserve, needed for constructing a highway interchange.

- Province as lesser of two evils ("Pick your poison"): Treaty 8 was negotiated in 1898/99 between First Nations and the Crown, and had as its westerly boundary "the central range of the Rocky Mountains." The boundary was never surveyed. A group of First Nations now argues that the boundary is the Arctic-Pacific watershed; British Columbia argues that that the boundary is the central range within the Rocky Mountains – the Rocky Mountain watershed where the water flows on one side to the east and on the other side to the west. The distance between the two boundaries is 100 km. Owing as much to litigation fatigue as to boundary principles, Canada chose to oppose the province.

- Province as implicit dropper-of-the-ball ("OMG"): The Tsilhqot'in Nation is in the throes of litigation claiming aboriginal title to various parcels of land in central British Columbia.[31] Canada has opposed the claim, despite it being over unceded provincial Crown land, because of a regulatory lacuna. To wit, there is a gold mine in the claim area. To the extent that it is provincial Crown land, then provincial mining and environmental regulations apply. However, should the court grant Aboriginal title, then the lands fall within the exclusive jurisdiction of Canada, a jurisdiction that imposes a responsibility as a fiduciary.[32]

To sum up:

This is not an indictment of federalism. Rather, the law of unintended consequences applies, because federalism also leads to conflicts between the two levels of government as to the spatial extent of the lands of Aboriginal peoples.[33] Indeed, such conflicts might well be inevitable. Nor do I suggest that the provincial Crown is always (or even, mostly) the bad guy. Rather, I suggest that the boundary disputes arise simply because there are two Crowns - a function of federalism - each with differing responsibilities.

[31] For the unsubstantiated assertion that parcels are foreign to the Tsilhqot'in Nation, because "the idea of boundaries is a Eurocentric principle" see: MacLaren, et al. Tsilhqot'in Nation v. British Columbia. *Survey Review*. 43. pp.123-136. April 2011.
[32] *William v. British Columbia*, 2002 BCSC 1904, at para 30.
[33] A topic for another discussion is the extent to which federalism encourages surveyors from the two Crowns to ally; a tyranny of the profession akin to the camaraderie felt between opposing criminal lawyers.