File No. 35379

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

ANDREW KEEWATIN JR. and
JOSEPH WILLIAM FOBISTER on their own behalf and on
behalf of all other members of GRASSY NARROWS FIRST NATION

Appellants
(Plaintiffs)

– and –

MINISTER OF NATURAL RESOURCES and
RESOLUTE FP CANADA INC. (FORMERLY ABITIBI-CONSOLIDATED INC.)

Respondents
(Defendants)

– and –

THE ATTORNEY GENERAL OF CANADA

Respondent
(Third Party)

– and –

LESLIE CAMERON on his own behalf and
on behalf of all other members of WABAUSKANG FIRST NATION

Respondents
(Interveners)

– and –

GOLDCORP INC.

Respondent
(Intervener)

(Style of Cause continues inside cover pages)

FACTUM OF THE RESPONDENT GOLDCORP INC.

– and –

ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF SASKATCHEWAN
ATTORNEY GENERAL OF ALBERTA
THE GRAND COUNCIL OF TREATY #3
BLOOD TRIBE, BEAVER LAKE CREE NATION, ERMINESKIN CREE NATION, SIKSIKA NATION and WHITEFISH LAKE FIRST NATION #128
FORT MCKAY FIRST NATION
TE'MEXW TREATY ASSOCIATION
OCHIICHAGWE'BABIGO'INING FIRST NATION, OJIBWAYS OF ONIGAMING FIRST NATION, BIG GRASSY FIRST NATION and NAOTKAMEGWANNING FIRST NATION
MÉTIS NATION OF ONTARIO
COWICHAN TRIBES, represented by CHIEF WILLIAM CHARLES SEYMOUR, on his own behalf and on behalf of the members of COWICHAN TRIBES
LAC SEUL FIRST NATION
SANDY LAKE FIRST NATION

Interveners

AND BETWEEN:

LESLIE CAMERON on his own behalf and
on behalf of all other members of WABAUSKANG FIRST NATION

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(Interveners)

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– and –

GOLDCORP INC.

Respondent
(Intervener)

– and –

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OCHIICHAGWE'BABIGO'ININGFIRST NATION, OJIBWAYS OF ONIGAMING FIRST NATION, BIG GRASSY FIRST NATION and NAOTKAMEGWANNING FIRST NATION
MÉTIS NATION OF ONTARIO
COWICHAN TRIBES, represented by CHIEF WILLIAM CHARLES SEYMOUR, on his own behalf and on behalf of the members of COWICHAN TRIBES
LAC SEUL FIRST NATION
SANDY LAKE FIRST NATION

Interveners

William J. Burden
Brian P. Dominique
Linda I. Knol
CASSELS BROCK & BLACKWELL LLP
Scotia Plaza, Suite 2100
40 King Street West
Toronto, ON M5H 3C2

Tel: 416.869.5963
Fax: 416.640.3019
bburden@casselsbrock.com
bdominique@casselsbrock.com
lknol@casselsbrock.com

Thomas F. Isaac
OSLER, HOSKIN & HARCOURT LLP
TransCanada Tower
450 – 1st St. S.W., Suite 2500
Calgary, AB T2P 5H1

Tel: 403.260.7060
Fax: 403.260.7024
tisaac@osler.com

COUNSEL FOR GOLDCORP INC.

Patricia J. Wilson
OSLER, HOSKIN & HARCOURT LLP
340 Albert Street
Suite 1900
Ottawa, ON K1R 7Y6

Tel: 613.787.1009
Fax: 613.235.2867
pwilson@osler.com

AGENT FOR GOLDCORP INC.

Robert J.M. Janes **JANES FREEDMAN KYLE LAW CORPORATION** 1122 Mainland Street Suite 340 Vancouver, BC V6B 5L1 Tel: 250.405.3460 Fax: 250.381.8567 rjanes@jfklaw.ca Counsel for Andrew Keewatin Jr. and Joseph William Fobister, on their own behalf and on behalf of all other members of Grassy Narrows First Nation	**Guy Régimbald** **GOWLING LAFLEUR HENDERSON LLP** 160 Elgin Street 26th Floor Ottawa, ON K1P 1C3 Tel: 613.786.0197 Fax: 613.563.9869 guy.regimbald@gowlings.com Agent for Andrew Keewatin Jr. and Joseph William Fobister, on their own behalf and on behalf of all other members of Grassy Narrows First Nation
Bruce McIvor **Kathryn Buttery** **FIRST PEOPLES LAW** 300 – 111 Water Street Vancouver, BC V6B 1A7 Tel: 604.685.4240 Fax: 604.681.0912 bmcivor@firstpeopleslaw.com kbuttery@firstpeopleslaw.com Counsel for Leslie Cameron, on his behalf and on behalf of all other members of Wabauskang First Nation	**Guy Régimbald** **GOWLING LAFLEUR HENDERSON LLP** 160 Elgin Street 26th Floor Ottawa, ON K1P 1C3 Tel: 613.786.0197 Fax: 613.563.9869 guy.regimbald@gowlings.com Agent for Leslie Cameron, on his behalf and on behalf of all other members of Wabauskang First Nation
Michael R. Stephenson **Peter Lemmond** **Mark Crow** **Christine Perruzza** **ATTORNEY GENERAL OF ONTARIO** 720 Bay Street, 8th Floor Toronto, ON M5G 2K1 Tel: 416.326.4155 Fax: 416.326-4181 michael.r.stephenson@ontario.ca peter.lemmond@ontario.ca mark.crow@ontario.ca christine.perruzza@ontario.ca Counsel for Minister of Natural Resources	**Robert E. Houston, Q.C.** **BURKE-ROBERTSON** 441 MacLaren Street Suite 200 Ottawa, ON K2P 2H3 Tel: 613.236.9665 Fax: 613.235.4430 rhouston@burkerobertson.com Agent for Minister of Natural Resources

Christopher J. Matthews **AIRD & BERLIS LLP** Barristers & Solicitors Brookfield Place 181 Bay Street Suite 1800, Box 754 Toronto, ON M5J 2T9 Tel: 416.863.4146 Fax: 416.863.1515 cmatthews@airdberlis.com Counsel for Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.)	**K. Scott McLean** **DENTONS CANADA LLP** 1420 – 99 Bank Street Ottawa, ON K1P 1H4 Tel: 613.783.9600 Fax: 613.783.9690 scott.mclean@dentons.com Agent for Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.)
Mark R. Kindrachuk, Q.C. **Mitchell R. Taylor, Q.C.** **ATTORNEY GENERAL OF CANADA** 123 – 2nd Avenue S., 10th Floor Saskatoon, SK S7K 7E6 Tel: 306.975.4765 Fax: 306.975.6240 mark.kindrachuk@justice.gc.ca mitchell.taylor@justice.gc.ca Counsel for Attorney General of Canada	**Christopher M. Rupar** **ATTORNEY GENERAL OF CANADA** 50 O'Connor Street Suite 500, Room 557 Ottawa, ON K1P 6L2 Tel: 613.670.6290 Fax: 613.954.1920 christopher.rupar@justice.gc.ca Agent for Attorney General of Canada
Michael Conner **ATTORNEY GENERAL OF MANITOBA** Constitutional Law Branch 1205 – 405 Broadway Winnipeg, Manitoba R3C 3L6 Tel: 204.945.6723 Fax: 204-945-0053 mconner@gov.mb.ca Counsel for the Intervener Attorney General of Manitoba	**Henry S. Brown, Q.C.** **GOWLING LAFLEUR HENDERSON LLP** 2600 – 160 Elgin St. Box 466, Station D Ottawa, ON K1P 1C3 Tel: 613.233.1781 Fax: 613.788.3433 henry.brown@gowlings.com Agent for the Intervener Attorney General of Manitoba

Paul E. Yearwood **ATTORNEY GENERAL OF BRITISH COLUMBIA** Legal Services Branch Aboriginal Litigation and Research Group 3rd Floor, 1405 Douglas Street P.O. Box 9270, Station Prov Govt Victoria, BC V8W 9J5 Tel : 250.356.6519 Fax : 250.387.0343 paul.yearwood@gov.bc.ca Counsel for the Intervener Attorney General of British Columbia	**Nadia Effendi** **BORDEN LADNER GERVAIS LLP** World Exchange Plaza 100 Queen Street, Suite 1300 Ottawa, ON K1P 1J9 Tel: 613.237.5160 Fax: 613.230.8842 neffendi@blg.com Agent for the Intervener Attorney General of British Columbia
Richard James Fyfe **ATTORNEY GENERAL FOR SASKATCHEWAN** Constitutional Law Branch, 8th Floor 82 – 1874 Scarth St. Regina, SK S4P 4B3 Tel: 306.787.7886 Fax : 306.787.9111 jfyfe@justice.gov.sk.ca Counsel for the Intervener Attorney General of Saskatchewan	**Brian A. Crane, Q.C.** **GOWLING LAFLEUR HENDERSON LLP** 2600 – 160 Elgin St. P.O. Box 466, Station D Ottawa, ON K1P 1C3 Tel: 613.233.1781 Fax: 613.563.9869 brian.crane@gowlings.com Agent for the Intervener Attorney General of Saskatchewan
Douglas B. Titosky **ATTORNEY GENERAL OF ALBERTA** Aboriginal Law 1000 -10025 – 102A Avenue Edmonton, AB T5J 2Z2 Tel: 780.643.0858 Fax: 780.643.0852 doug.titosky@gov.ab.ca Counsel for the Intervener Attorney General of Alberta	**Henry S. Brown, Q.C.** **GOWLING LAFLEUR HENDERSON LLP** 2600 – 160 Elgin St. P.O. Box 466, Station D Ottawa, ON K1P 1C3 Tel: 613.233.1781 Fax: 613.788.3433 henry.brown@gowlings.com Agent for the Intervener Attorney General of Alberta

Peter W. Hutchins **Zachary Davis** **Robin Campbell** **HUTCHINS LEGAL INC.** 204, rue du Saint-Sacrement, Suite 300 Montreal, QC H2Y 1W8 Tel: 514.849.2403 Fax: 514.849.4907 phutchins@hutchinslegal.ca zdavis@hutchinslegal.ca rcampbell@hutchinslegal.ca Counsel for the Intervener The Grand Council of Treaty #3	**Brian A. Crane, Q.C.** **GOWLING LAFLEUR HENDERSON LLP** 2600 – 160 Elgin St. P.O. Box 466, Station D Ottawa, ON K1P 1C3 Tel: 613.233.1781 Fax: 613.563.9869 brian.crane@gowlings.com Agent for the Intervener The Grand Council of Treaty #3
Meaghan M. Conroy **Abram B. Averbach** **MACPHERSON LESLIE & TYERMAN LLP** 10235 – 101st Street Suite 2200 Edmonton, AB T5J 3G1 Tel: 780.969.3500 Fax: 780.969.3549 mconroy@mlt.com aaverbach@mlt.com Counsel for the Interveners Blood Tribe, Beaver Lake Cree Nation, Ermineskin Cree Nation, Siksika Nation and Whitefish Lake First Nation #128	**Marie-France Major** **SUPREME ADVOCACY LLP** 100 – 340 Gilmour Street Ottawa, ON K2P 0R3 Tel: 613.695.8855 ext. 102 Fax: 613.695.8580 mfmajor@supremeadvocacy.ca Agent for the Interveners Blood Tribe, Beaver Lake Cree Nation, Ermineskin Cree Nation, Siksika Nation and Whitefish Lake First Nation #128

Karin Buss **HENNING BYRNE LLP** 1450-10405 Jasper Avenue Edmonton, AB T5J 3N4 Tel : 780.421.1707 Fax : 780.425.9438 kbuss@k2blaw.com **Kirk Lambrecht, Q.C.** **SHORES JARDINE LLP** 10104 103 Avenue Suite 2250 Edmonton, AB T5J 0H8 Tel: 780.448.9275 Fax: 780.423.0163 kirk@shroesjardine.com Counsel for the Intervener Fort McKay First Nation	**Marie-France Major** **SUPREME ADVOCACY LLP** 100 – 340 Gilmour Street Ottawa, ON K2P 0R3 Tel: 613.695.8855 ext. 102 Fax: 613.695.8580 mfmajor@supremeadvocacy.ca Agent for the Intervener Fort McKay First Nation
Karey Brooks **JANES FREEDMAN KYLE LAW CORPORATION** 1122 Mainland Street Suite 340 Vancouver, BC V6B 5L1 Tel: 604.687.0549 Fax: 604.687.2696 kbrooks@jfklaw.ca Counsel for the Intervener Te'mexw Treaty Association	**Brian A. Crane, Q.C.** **GOWLING LAFLEUR HENDERSON LLP** 2600 – 160 Elgin St. P.O. Box 466, Station D Ottawa, ON K1P 1C3 Tel: 613.233.1781 Fax: 613.563.9869 brian.crane@gowlings.com Agent for the Intervener Te'mexw Treaty Association

Donald R. Colborne Barrister & Solicitor 1125 Fort St. Victoria, BC V8V 3K9 Tel: 807.344.6628 Fax: 807.983.3079 drcolborne@shaw.ca Solicitors for the Interveners Ochiichagwe'Babigo'Ining First Nation, Ojibways of Onigaming First Nation, Big Grassy First Nation, and Naotkamegwanning First Nation	**Brian A. Crane, Q.C.** **GOWLING LAFLEUR HENDERSON LLP** 2600 – 160 Elgin St. P.O. Box 466, Station D Ottawa, ON K1P 1C3 Tel: 613.233.1781 Fax: 613.563.9869 brian.crane@gowlings.com Agent for the Interveners Ochiichagwe'Babigo'Ining First Nation, Ojibways of Onigaming First Nation, Big Grassy First Nation, and Naotkamegwanning First Nation
Jason Madden **Nuri G. Frame** **PAPE SALTER TEILLET** 546 Euclid Avenue Toronto, ON M6G 2T2 Tel: 416.916.2989 Fax: 416.916.3726 jmadden@pstlaw.ca nframe@pstlaw.ca Counsel for the Intervener Métis Nation of Ontario	**Henry S. Brown, Q.C.** **GOWLING LAFLEUR HENDERSON LLP** 2600 – 160 Elgin St. P.O. Box 466, Station D Ottawa, ON K1P 1C3 Tel: 613.233.1781 Fax: 613.788.3433 henry.brown@gowlings.com Agent for the Intervener Métis Nation of Ontario
David M. Robbins **WOODWARD & COMPANY** 844 Courtney Street, 2nd Floor Victoria, B.C. V8W 1C4 Tel: 250.383-2356 Fax : 250.380.6560 david@woodwardandcompany.com Counsel for the Intervener Cowichan Tribes, represented by Chief William Charles Seymour, on his own behalf and on behalf of the members of Cowichan Tribes	**Henry S. Brown, Q.C.** **GOWLING LAFLEUR HENDERSON LLP** 2600 – 160 Elgin St. P.O. Box 466, Station D Ottawa, ON K1P 1C3 Tel: 613.233.1781 Fax: 613.788.3433 henry.brown@gowlings.com Agent for the Intervener Cowichan Tribes, represented by Chief William Charles Seymour, on his own behalf and on behalf of the members of Cowichan Tribes

David G. Leitch **KESHEN & MAJOR** 120 Second Street South Suite 200 Kenora, ON P9N 1E9 Tel: 807.468.3073/416.322.3037 Fax: 807.468.4893 davidgleitch@sympatico.ca Counsel for the Intervener Lac Seul First Nation	**Christopher Rootham** **NELLIGAN O'BRIEN PAYNE LLP** 1500 - 50 O'Connor Street Ottawa, ON K1P 6L2 Tel: 613.231.8311 Fax: 613.788.3667 christopher.rootham@nelligan.ca Agent for the Intervener Lac Seul First Nation
David G. Leitch **KESHEN & MAJOR** 120 Second Street South Suite 200 Kenora, ON P9N 1E9 Tel: 807.468.3073/416.322.3037 Fax: 807.468.4893 davidgleitch@sympatico.ca Counsel for the Intervener Sandy Lake First Nation	**Christopher Rootham** **NELLIGAN O'BRIEN PAYNE LLP** 1500 - 50 O'Connor Street Ottawa, ON K1P 6L2 Tel: 613.231.8311 Fax: 613.788.3667 christopher.rootham@nelligan.ca Agent for the Intervener Sandy Lake First Nation

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PART I – OVERVIEW AND FACTS

OVERVIEW

1. The Appellants are asking this Court to overturn the well-reasoned decision of the Court of Appeal and, along with it, 125 years of settled case law. There is no basis to do so. The Court of Appeal correctly held that while the Appellants may look to the Crown to keep the Treaty 3 promises, they must do so within the framework of the division of powers under the Constitution.

2. The Crown's authority to take up lands in Keewatin does not emanate from Treaty 3; it emanates from the *Constitution Act, 1867*. Treaty 3 cannot alter the division of powers between Parliament and the provincial legislatures. The *Constitution Act, 1867* gives Ontario, not Canada, the authority to take up lands in Keewatin for settlement, mining, lumbering and other provincial purposes. This authority is independent of the take-up clause in Treaty 3.

3. The jurisprudence of this Court makes it clear that all provinces have the constitutional authority to limit treaty rights up to the point of infringement. Accordingly, the answer to Question One is "Yes": Ontario has the authority to take up lands in Keewatin so as to limit the Plaintiffs' right to hunt and fish under Treaty 3.

4. The take-up clause in Treaty 3 constitutes a geographical limitation on the Ojibway's right to hunt and fish. As held by this Court in *Mikisew*, a take-up clause in a treaty is relevant to determining if the taking up of a particular tract of land infringes a treaty harvesting right. Thus, while Ontario has the authority to take up lands in Keewatin under the *Constitution Act, 1867*, the issue that arises is whether Ontario also has the right to rely on the take-up clause in Treaty 3 when taking up such lands.

5. After the annexation of Keewatin from Canada to Ontario in 1912, Canada no longer had the constitutional authority to take up lands in Keewatin for settlement, mining or lumbering; only Ontario, as beneficial owner, had that authority. Thus, either Ontario can rely on the take-up clause in Treaty 3 when taking up lands in Keewatin, or no level of government can.

6. The Court of Appeal correctly held that the right to rely on the take-up clause passed from Canada to Ontario at the time of the annexation. In particular, Ontario obtained the right to rely on the take-up clause: (i) by operation of law, as the representative of the Crown with the constitutional authority to take up Treaty 3 lands; (ii) by way of legislation passed in 1891,

which gave Ontario the right to rely on the take-up clause when taking up Treaty 3 lands within its boundaries; and/or (iii) by way of the 1912 legislation that effected the annexation.

7. The purpose of the annexation was for Ontario rather than Canada to administer the annexed land, not for Ontario and Canada to jointly administer the annexed land, or for the Crown to lose its ability to rely on the take-up clause when taking up land in Keewatin. It is presumed that the legislature does not intend to produce absurd consequences, and it would be an absurd consequence if, 39 years after the Treaty was entered into, the Crown lost the right to rely on the take-up clause in Treaty 3 merely because Keewatin was annexed from one representative of the Crown (Canada) to another (Ontario).

8. Since Ontario has the right to rely on the take-up clause in Treaty 3, this Court's decision in *Mikisew* establishes the test for determining whether Ontario's taking up of a particular tract in Keewatin infringes the Treaty 3 harvesting right. Under that test, Ontario has the authority to take up land in Keewatin for settlement, mining, lumbering or other provincial purposes provided that Ontario: (i) engages in appropriate consultation with the Treaty 3 First Nations that may be affected by a particular taking up of land; and (ii) does not take up so much land that the right to hunt and fish in an affected First Nation's traditional territory is rendered meaningless.

9. Ontario's right to take up land in accordance with the test from *Mikisew* is consistent with the intention of the Treaty 3 parties. The evidence in relation to mining – which was erroneously ignored by the trial judge – demonstrates that the Treaty 3 parties intended that land would be taken up for settlement, mining and lumbering, and that the Ojibway's harvesting right would be restricted to lands not taken up. Thus, even if this Court were to conclude that Ontario does not have the right to rely on the take-up clause, it is still appropriate to apply the test from *Mikisew* to determine if a particular taking up of land by Ontario infringes the Treaty 3 harvesting right.

10. Ontario's right to rely on the take-up clause does not prejudice the Ojibway's harvesting rights. Specifically: (i) Ontario is bound by the Honour of the Crown, the same as Canada; (ii) Ontario is bound by the annexation legislation to respect harvesting rights; and (iii) Treaty rights are protected by s. 35(1) of the *Constitution Act, 1982*. There is no reason to impose, more than 100 years after the annexation, a cumbersome and inefficient two-tier approval structure involving both Canada and Ontario, particularly when: (i) the harvesting rights are otherwise protected; and (ii) the imposition of such a structure will cast significant uncertainty over the legitimacy of the land uses that Ontario has authorized in Keewatin over the past 100 years.

FACTS

11. Goldcorp Inc. ("**Goldcorp**") does not accept the Statement of Facts set out in the Appellants' facta. Goldcorp accepts the facts contained in the facta of the Minister of Natural Resources (the "**MNR**"), the Attorney General of Canada (the "**AG Canada**") and Resolute FP Canada Inc. ("**Resolute**"). Goldcorp also relies on the facts set out below.

A. Goldcorp's interest in the proceeding

12. Goldcorp is a leading gold producer engaged in the operation, exploration, development, and acquisition of precious metal properties in Canada, the United States, Mexico, and Central and South America. Red Lake Gold Mines ("**RLGM**"), which is situated in Keewatin (in northwest Ontario near the Manitoba border), is a material asset of Goldcorp. Its business operations rely on permits from both the Ontario and federal governments.[1]

13. RLGM is the largest gold mine in Canada. Since 1949, RLGM has produced over 20 million ounces of gold, and it continues to be one of the highest-grade gold mines and lowest cost producers of gold in the world. RLGM is a prolific mine and Goldcorp expects it to continue to operate for many years to come.[2]

14. Although the factual basis of the litigation arose from Ontario's issuance of a forestry license, the threshold issues that were determined by the lower courts extend well beyond forestry and have the potential to impact all provincial grants of right or interest in Keewatin, including Goldcorp's mining operations. Accordingly, Goldcorp sought, and was granted, status to intervene as a party in the appeal before the Court of Appeal. Goldcorp did not participate in the trial before Justice Sanderson.

(i) History of Goldcorp's mining in Red Lake

15. Although Justice Sanderson refers to Keewatin as "largely virgin territory" and being in a "largely undeveloped state",[3] there has been extensive mining and other exploration and

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[1] Affidavit of Christopher Cormier sworn June 14, 2012 ("Cormier Affidavit") at para. 3-5, 8 [Goldcorp's Extract Book ("GEB"), Vol. I, Tab 1, p. 2, 3]. By the Order of Justice Sharpe dated July 3, 2012, Goldcorp was permitted to file this affidavit, redacted to exclude evidence related to Goldcorp's history of consultation with First Nations, for the sole purpose of explaining to the court the basis for Goldcorp's intervention in the appeals [Order of Justice Sharpe dated July 3, 2012 at para. 3; Appellants' Record Book ("ARB"), Volume 3, Tab 30, p. 203]

[2] Cormier Affidavit at para. 19, 20 [GEB, Vol. I, Tab 1, p. 5]

[3] Reasons for Judgment of the Honourable Justice Sanderson ("Trial Reasons") at para. 1574, 1575 [ARB, Vol. 1, Tab 2, p. 308]

development activities in the area for almost a century by, amongst others, Goldcorp and its predecessors in title.[4]

16. RLGM consists of three main components: the Red Lake Mine, the Campbell Mine, and the Cochenour Project. The first recorded prospecting in the Red Lake district occurred in 1887. Mining began in earnest in Red Lake in 1926 during the Red Lake gold rush, when both the Red Lake Mine and the Campbell Mine were first staked. The Red Lake Mine and the Campbell Mine began production in the 1940s. In 2006, Goldcorp acquired the Campbell Mine and combined it with Goldcorp's existing Red Lake Mine to form the new RLGM in 2007. Since 2006, Goldcorp has invested billions of dollars to acquire and grow its investments in Red Lake.[5]

17. The Cochenour Project is situated on the Cochenour-Willans property. Claims were first staked on the Cochenour-Willans property in 1926 and 1927. Production at the mine started in 1939. The mine remained in production for 32 years until 1971, when it went into a period of inactivity. Goldcorp purchased the Cochenour-Willans property in 1997. In 2003, Goldcorp allowed the mine to flood and, after a dewatering in 2010, there was renewed access to Cochenour-Willans's underground operations.[6]

18. The Gold Eagle Property, which is now part of the Cochenour Project, was originally staked in 1926. Production began in 1937. The mine subsequently closed in 1941. In 2003, a joint venture between Exall Resources Ltd. and Southern Star Resources Inc. commenced modern exploration at the site. This exploration led to the discovery of the Bruce Channel and Western Discovery Zone (the "**Bruce Channel Discovery**") in 2004.[7]

19. In September 2008, Goldcorp acquired the Bruce Channel Discovery (for $1.5 billion in total consideration), and thereby secured control of eight kilometres of strike length along the Red Lake trend. The Bruce Channel Discovery is now part of the Cochenour Project, which will eventually be combined with the Red Lake Mine and the Campbell Mine as part of RLGM. A recent scoping study for the Cochenour Project anticipates an approximate 20-year mine life.[8]

(ii) Additional mining companies in Red Lake

20. Goldcorp is the largest of several mining companies that have operations in Red Lake.

[4] Cormier Affidavit at para. 7 [GEB, Vol. I, Tab 1, p. 3]
[5] Cormier Affidavit at para. 8-11, 13 [GEB, Vol. I, Tab 1, p. 3-4]
[6] Cormier Affidavit at para. 14-16 [GEB, Vol. I, Tab 1, p. 4]
[7] Cormier Affidavit at para. 17 [GEB, Vol. I, Tab 1, p. 4-5]
[8] Cormier Affidavit at para. 18 [GEB, Vol. I, Tab 1, p. 5]

There are numerous other mining companies in the area, including Rubicon Minerals Corporation, Premier Gold Mines Ltd., Sabina Gold and Silver Corp., Halo Resources Ltd., Mega Precious Metals Inc., AurCrest Gold Inc., Planet Mining Exploration Inc., Conquest Resources Ltd., Skyharbour Resources Ltd., MPH Ventures Corp., and Cypress Development Corp.[9]

(iii) Goldcorp is an integral part of the Red Lake community

21. Goldcorp's facilities in and around Red Lake are the cornerstone of its business and are essential to the Red Lake and Ontario economies. Goldcorp is the largest employer in the Red Lake area and a significant contributor to the local and regional economies. Goldcorp employs approximately 1,300 people at RLGM, including contractors, and spends hundreds of millions of dollars in the Red Lake area every year on operations and new capital investments.[10]

22. Goldcorp makes substantial infrastructure contributions to the local Red Lake community. For example, Goldcorp operates the Goldcorp Recreation Centre in Balmertown, is actively involved in developing new housing opportunities in the municipality of Red Lake, owns employee housing in Ear Falls (a local municipality), and is involved in health care initiatives. Goldcorp has also made substantial investments in an electrical transmission line and natural gas pipeline that will assist in providing additional energy to the Red Lake community.[11]

(iv) Impact of this proceeding on Goldcorp and the Red Lake community

23. To the best of Goldcorp's knowledge, there is no single private enterprise in Red Lake that will be more affected than Goldcorp if Justice Sanderson's decision is upheld. Goldcorp, like any other business, must plan for future years' operations, but can only do so when it can make reliable predictions about its future operational activities.[12]

24. For Goldcorp, a change to the fundamental premise that Ontario has the constitutional authority to issue the rights that Goldcorp requires to operate RLGM will create significant uncertainty. In particular, such a change will render uncertain the validity of the interests in land that Goldcorp has already obtained from Ontario and is relying on to conduct its operations, and it will render uncertain the process that Goldcorp must follow when acquiring or renewing such

[9] Cormier Affidavit at para. 22 [GEB, Vol. I, Tab 1, p. 6]
[10] Cormier Affidavit at para. 21, 31 [GEB, Vol. I, Tab 1, p. 5, 7]
[11] Cormier Affidavit at para. 32, 38-59 [GEB, Vol. I, Tab 1, p. 7-8, 9-14]
[12] Cormier Affidavit at para. 60 [GEB, Vol. I, Tab 1, p. 15]

rights in the future. Commercial realities dictate that, in such an environment, Goldcorp's operations and investments will necessarily suffer, which will have a significant negative impact on the Red Lake economy.[13]

B. Background facts

(i) The Treaty

25. On October 3, 1873, Her Majesty the Queen, by three commissioners appointed by the Government of Canada ("**Canada**"), entered into a treaty ("**Treaty 3**" or the "**Treaty**") with the Salteaux tribe of the Ojibbeway Indians (the "**Ojibway**"). Under the terms of the Treaty, the Ojibway agreed to:[14]

> cede, release, surrender, and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits ….

Thereafter followed a description of land comprising approximately 55,000 square miles, the majority of which is situated in what is now Northern Ontario.

26. In exchange for the surrender of the lands, Her Majesty the Queen agreed, among other things, to set up reserves for the Ojibway's exclusive use and to pay annuities. In addition, Treaty 3 contained the following clause (the "**Harvesting Clause**", with the underlined portions referred to as the "**Take-up Clause**"):[15]

> Her Majesty further agrees with her said Indians, that they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and <u>saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes, by Her said Government of the Dominion of Canada</u>, or by any of the subjects thereof duly authorized therefor by the said Government.

(ii) The boundary dispute over the Disputed Lands

27. The land included in the surrender can be broadly placed into two categories: (i) the "**Disputed Lands**"; and (ii) "**Keewatin**". The Disputed Lands comprise about 33,000 square

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[13] Cormier Affidavit at para. 60- 63 [GEB, Vol. I, Tab 1, p. 15-16]

[14] Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* at p. 322 [GEB, Vol. II, Tab 40E, p. 12]

[15] Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* at p. 323 [emphasis added] [GEB, Vol. II, Tab 40E, p. 13]

miles that, at the time of Treaty 3, were the subject of a dispute between Canada and the Government of Ontario ("**Ontario**"), with both levels of government claiming ownership.[16]

28. Following a lengthy dispute, the Judicial Committee of the Privy Council ("**JCPC**") decided that the Disputed Lands were beneficially owned by Ontario (with legal ownership being in the Crown). The JCPC further decided that, since Ontario beneficially owned the Disputed Lands, Canada had neither the authority nor the power to exercise any control over such lands. That authority belonged to Ontario under section 109 of the *Constitution Act, 1867*.[17]

29. Since Canada entered into Treaty 3 without Ontario's approval, various issues arose after the JCPC decided that Ontario owned the Disputed Lands. By way of reciprocal legislation in 1891, and an agreement in 1894 (the "**1891/1894 Legislation/Agreement**"), Canada and Ontario came to a "just and friendly understanding" in relation to matters involving Treaty 3. In particular, Canada and Ontario "conceded and declared" that, with the exception of reserve lands, the rights of the First Nations to hunt and fish throughout the surrendered lands "do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering or other purposes" by Ontario.[18]

(iii) The annexation of Keewatin

30. Keewatin comprises approximately 22,000 square miles. Canada beneficially owned these lands at the time of Treaty 3. In 1912, Canada annexed Keewatin to Ontario (the "**Annexation**") under the authority of section 3 of the *Constitution Act, 1871*, which provides that Canada, with the consent of the legislature of a province, may increase the limits of such province upon such terms and conditions as may be agreed upon.[19]

31. The Annexation was part of a larger annexation in which Canada annexed land to each of Manitoba, Ontario and Quebec, thereby extending their northern boundaries. It was not feasible

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[16] Trial Reasons at para. 192, 193 [ARB, Vol. 1, Tab 2, p. 48]

[17] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 109 [GEB, Vol. I, Tab 17, p. 95]; *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46 at p. 51-52, 57-60 (JCPC) [Grassy Narrow's Book of Authorities ("GN BA"), Vol. II, Tab 37]

[18] *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands*, 54 Vict., c. 3 [Appellants' Extract Book ("AEB"), Tab 72]; *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, 54-55 Vict., c. 5 [GEB, Vol. I, Tab 29, p. 116-118]; Agreement between Canada and Ontario dated April 16, 1894 [AEB, Tab 73]

[19] *Constitution Act, 1871*, 34 & 35 Victoria, c. 28, s. 3 [GEB, Vol. I, Tab 18, p. 96]

to create a new province with the annexed land due to climate and soil conditions.[20] As stated by Prime Minister Laurier in the House of Commons in July 1908, Canada had two choices: (i) Canada could continue to administer the territory, with Canada's administration to that date being "practically nil"; or (ii) Canada could annex the land to the provinces so that it could "be brought within the purview of their provincial and municipal organizations". The latter option was considered "the more reasonable, the more practical and the more expedient … so that there might be the usual provincial and municipal administration as their development takes place".[21] Prime Minister Laurier made it clear that the annexed land was to be administered by Ontario:[22]

> You cannot hope, with territory you now have in your hands, to make it into new provinces; and if that is so, the policy should be to bring this territory under the supervision and jurisdiction of the provinces to which geographically it belongs. That is the view we take and the policy we are pursuing at the present time. Can anything be more reasonable than that the territory which today lies north of the province of Ontario should belong to Ontario? Is it not in the best interests of the country that Ontario should have the administration of that territory?

32. There was an approximate four-year delay before the Annexation was effected. Manitoba took the opportunity to re-open the financial arrangements under which it became a province. Further, there was a dispute between Ontario and Manitoba concerning where the boundary between the two provinces should lie, with Ontario wanting access to a port on the Hudson's Bay.[23] At one point, Ontario offered for Manitoba to have extra land in exchange for access to a port.[24] However, Ontario reconsidered this position when it became apparent that the extra land it had offered was likely to contain valuable minerals.[25] The debate was resolved by Canada granting Ontario a strip of land five miles wide from the Manitoba/Ontario boundary to the Nelson River, which could be used to build a railway, thereby granting rail access to a port.[26]

33. In 1912, Canada and Ontario were ready to proceed with the Annexation and the issue

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[20] Official Report of the Debates of the House of Commons of the Dominion of Canada dated July 13, 1908 at p. 12777 [GEB, Vol. I, Tab 30A, p. 120]
[21] Official Report of the Debates of the House of Commons of the Dominion of Canada dated July 13, 1908 at p. 12777-12778 [GEB, Vol. I, Tab 30A, p. 120]
[22] Official Report of the Debates of the House of Commons of the Dominion of Canada dated July 13, 1908 at p. 12822-12823 [emphasis added] [GEB, Vol. I, Tab 30B, p. 121-122]
[23] Letter from Sir James P. Whitney to Sir Wilfrid Laurier dated March 16, 1909 [GEB, Vol. I, Tab 31, p. 123-124]; Letter from Sir Wilfrid Laurier to Sir James P. Whitney dated March 18, 1909 [GEB, Vol. I, Tab 32, p. 125]
[24] Letter from Sir James P. Whitney to Sir Wilfrid Laurier dated November 11, 1909 [AEB, Tab 77]; Letter from Sir Wilfrid Laurier to Sir James P. Whitney dated November 22, 1909 [GEB, Vol. I, Tab 33, p. 126-128]; Letter from Sir James P. Whitney to R.P. Roblin dated November 25, 1909 [GEB, Vol. I, Tab 34, p. 129-130]
[25] Letter from Sir James P. Whitney to Frank Cochrane dated January 26, 1912 [GEB, Vol. I, Tab 35, p. 131-132]
[26] Report of John T. Saywell edited December 2008 at p. 55-56 [GEB, Vol. II, Tab 46, p. 145-146]

again came before the House of Commons. On February 27, 1912, when questioned about the effect of the Annexation, Prime Minister Borden explained that the land that would be annexed to Ontario would be administered by Ontario. Specifically, the following exchange took place:[27]

> Mr. MacDonald. I was asking in regard to the title of lands in what would be New Ontario; does the federal government exercise the title or is it given to the province?
>
> Mr. Borden. It passes as the other lands within the province of Ontario. It is to be administered by the Crown on the advice of the government of Ontario.
>
> Mr. MacDonald. In the right of Ontario?
>
> Mr. Borden. Of course, my hon. friend understands that there is never any transfer made in such cases because the land is vested in the Crown in the one case as much as in the other. The only question is by whose advice shall that land be administered, by the advice of the federal government or by the advice of the provincial government. This land, like the rest of the land within the limits of Ontario, will be administered by the Crown on the advice of the provincial government.

34. In April 1912, Canada passed *The Ontario Boundaries Extension Act*, which increased the limits of Ontario to include Keewatin, on the following terms and conditions:[28]

(a) That the province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders;

(b) That no such surrender shall be made or obtained except with the approval of the Governor in Council;

(c) That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament.

35. In April 1912, Canada also passed legislation that annexed land to Quebec and Manitoba. While the legislation that annexed land to Quebec[29] was similar to *The Ontario Boundaries Extension Act*, the legislation that annexed land to Manitoba (the "**Manitoba Annexation Legislation**")[30] was very different. Until 1930, Canada – not Manitoba – beneficially owned the

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[27] Official Report of the Debates of the House of Commons of the Dominion of Canada dated February 27, 1912 at p. 3906 [emphasis added] [GEB, Vol. I, Tab 36, p. 134]
[28] *The Ontario Boundaries Extension Act*, 2 Geo. V., c. 40, s. 2 [AEB, Tab 2]
[29] *The Quebec Boundaries Extension Act, 1912*, 2 Geo. V., c. 45 [GEB, Vol. I, Tab 38, p. 138-140]
[30] *The Manitoba Boundaries Extension Act, 1912*, 2 Geo. V., c. 32, s. 6 [GEB, Vol. I, Tab 37, p. 137]

public lands within Manitoba's borders.[31] As a result, Manitoba could not use the public lands to raise revenue by, for example, issuing patents, mining licenses and timber licenses.

36. In the Manitoba Annexation Legislation, Canada made it clear that it was retaining beneficial ownership and administration over the public land included in that annexation.[32] The legislation also provided for the payment of annuities by Canada to Manitoba to offset various administrative costs that Manitoba would incur by reason of additional land being added to its boundaries.[33] Neither the Ontario nor Quebec annexation legislation contained these types of provisions or purported to retain any type of beneficial interest or administrative control by Canada over the public lands being annexed to Ontario or Quebec.

37. In April 1912, Ontario passed legislation in which it consented to *The Ontario Boundaries Extension Act*.[34] By means of the reciprocal legislation of Canada and Ontario (collectively, the "**Annexation Legislation**"), Ontario became the beneficial owner of Keewatin and obtained legislative authority over Keewatin. Since that time, Ontario has administered Keewatin by, for example, issuing patents and licenses, without any involvement of Canada.

(iv) The litigation

38. The Appellants Grassy Narrows First Nation ("**Grassy Narrows**") brought a judicial review application in which they challenged a sustainable forest license that the Minister of Natural Resources had issued to the predecessor of Resolute pursuant to the *Crown Forest Sustainability Act, 1994*[35] (the "***CFSA***") on the basis that the license infringed their harvesting rights under Treaty 3. The license relates in part to lands situated in Keewatin. Justice Then quashed the application, with leave to commence an action.[36]

39. Grassy Narrows thereafter commenced an action. Among their primary allegations were that: (i) only Canada, and not Ontario, has the right to "take up" lands in Keewatin under the Take-up Clause in Treaty 3; and (ii) Ontario has no authority to infringe their Treaty rights.[37]

40. On June 28, 2006, Justice Spies made a case management order that divided the trial into

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[31] *The Manitoba Boundaries Extension Act, 1912*, 2 Geo. V., c. 32, preamble [GEB, Vol. I, Tab 37, p. 135]
[32] *The Manitoba Boundaries Extension Act, 1912*, 2 Geo. V., c. 32, s. 6 [GEB, Vol. I, Tab 37, p. 137]
[33] *The Manitoba Boundaries Extension Act, 1912*, 2 Geo. V., c. 32, s. 5 [GEB, Vol. I, Tab 37, p. 136]
[34] *An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province*, 2 Geo. V., c. 3 [GEB, Vol. I, Tab 39, p. 141-142]
[35] *Crown Forest Sustainability Act, 1994*, S.O. 1994, c. 25
[36] Reasons for Decision of the Court of Appeal for Ontario ("CA Reasons") at para. 5 [ARB, Vol. 2, Tab 3, p. 5]
[37] Amended Statement of Claim at para. 1 [ARB, Vol. 2, Tab 4, p. 88-90]

two phases, with Phase I involving a determination of the following two threshold issues:[38]

> **Question One:** Does Her Majesty the Queen in Right of Ontario have the authority within that part of the lands subject to Treaty 3 that were added to Ontario in 1912 to exercise the right to "take up" tracts of land for forestry, within the meaning of Treaty 3, so as to limit the rights of the Plaintiffs to hunt or fish as provided for in Treaty 3?
>
> **Question Two:** If the answer to question/issue 1 is "no", does Ontario have the authority pursuant to the division of powers between Parliament and the legislatures under the *Constitution Act, 1867* to justifiably infringe the rights of the Plaintiffs to hunt and fish as provided for in Treaty 3?

41. Justice Sanderson, who presided over Phase I of the trial, answered both questions in the negative. The Court of Appeal overturned Justice Sanderson's decision, by answering Question One in the affirmative and holding it was therefore unnecessary to answer Question Two.

42. To date, there has been no determination as to whether the forestry license issued to Resolute's predecessor (and since surrendered by Resolute's predecessor[39]) infringes Grassy Narrows' Treaty rights. That determination was left for Phase II of the trial.

C. The evidence in relation to mining demonstrates that the Treaty 3 signatories intended for the Ojibway's harvesting rights to be restricted to lands not taken up by the Crown

43. Important evidence was presented at the Phase I trial in relation to mining that provides significant insight into the intention of the parties to Treaty 3. This evidence – which was largely ignored by Justice Sanderson in her reasons for judgment – demonstrates that:

a) Canada: (i) was aware of the presence of valuable minerals in the Treaty 3 lands; and (ii) intended to take up Treaty 3 lands for settlement, mining and lumbering.

b) The Ojibway: (i) were aware of the presence of valuable minerals on their lands before the Treaty 3 negotiations; (ii) increased their demands during the Treaty 3 negotiations due to the presence of those minerals; (iii) signed Treaty 3 with full knowledge that they would not be entitled to any minerals located off-reserve; (iv) knew that, post-Treaty, Euro-Canadians would explore the Treaty 3 lands for minerals; and (v) knew that they would not be entitled to exercise their harvesting rights on lands taken up by the Crown for settlement, mining and lumbering.

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[38] Order of the Honourable Justice Spies dated June 28, 2006 at para. 1, 2 [ARB, Vol. 2, Tab 6, p. 122-123]
[39] CA Reasons at para. 15 [ARB, Vol. 2, Tab 3, p. 7]

(i) The Crown intended to take up Treaty 3 lands for settlement, mining and lumbering

44. Prior to the Treaty 3 negotiations, Canada knew that the Treaty 3 lands contained valuable timber and mineral resources. Lovisek (Grassy Narrows' expert) opined that "the shift in purpose for a treaty from that of a right of way for a land surrender was growing recognition on part of the Dominion Government of the value of minerals."[40]

45. In 1869, Dawson reported to the Minister of Public Works that gold had been discovered in the area and that Rainy River would likely become the centre of a mining district.[41] Dawson advised that, "[w]ith a vast district covered with groves of pine timber to the east, a large tract of the finest conceivable land to the west, and a region likely to prove rich in minerals in close proximity, Fort Frances must soon become a place of importance."[42]

46. In December 1871, Attorney General Henry J.H. Clarke commented on the timber and minerals in the area, and the economic development that had already commenced in the area, in a report to the Lieutenant Governor of Manitoba and the North West Territories:[43]

> From Pointe du Chene to the North West Angle there is all the timber that could be required for railroad purposes for fifty years to come…White and Red Pine…that can be made available for building and manufacturing purposes. […]
>
> The Rainy River is beautiful…through a country that is very well adapted for cultivation …its water powers will give vitality to hundreds of factories, that will find a market for their productions in the mineral regions that stretch away from the lake of the Woods through to Lake Superior […].
>
> …lakes are sprinkled with beautiful islands…most of them well wooded…very few years this route will be overrun with summer tourists…give employment and wealth to hundred of thousands of agriculturists and manufacturers…
>
> At Thunder Bay, we got on board…the "Manitoba"…delighted to see large numbers of men employed in fishing and curing fish on the lake…whilst mining and lumbering establishments are springing up in all directions.

47. In May 1872, John A. MacDonald advised the Department of Justice that "the mineral

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[40] Report of Joan A. Lovisek dated July 9, 2008 at p. 62 [GEB, Vol. II, Tab 41A, p. 21]
[41] Report of Alexander von Gernet dated June 2008 at p. 45, quoting Dawson (1869) *Report on the Line of Route Between Lake Superior and the Red River Settlement* [GEB, Vol. II, Tab 42, p. 25]
[42] Report of Alexander von Gernet dated June 2008 at p. 46, quoting Dawson (1869) *Report on the Line of Route Between Lake Superior and the Red River Settlement* [GEB, Vol. II, Tab 42, p. 26]
[43] Letter from Henry J.H. Clarke to Lieutenant Governor Adams G. Archibald dated December 30, 1871 [GEB, Vol. I, Tab 19, p. 97]

wealth in the north-west country is likely to attract a large immigration into those parts."[44] In July 1872, Dawson advised the Minister of Public Works that settlers on the Treaty 3 lands around the lakes region could find a market for their produce from the lumber trade that was "sure to arise" and from the development of mines.[45] Dawson also reported on the discovery of minerals and timber, and the settlement that these discoveries would generate, as follows:[46]

> The mineral districts at Thunder Bay, and on various parts of the route, promise soon to become of great importance. Numerous silver mines are being opened in the Lower Silurian strata and trap upheavals at and in the vicinity of Prince Arthur's Landing. Gold, iron and copper have been found in the Huronian schists of Shebandowan. Bismuth is to be had on the Seine, apparently in large quantity, and the Silurian rocks, in the lower reaches of Rainy Lake, give promise of proving rich in the precious metals. The importance of these discoveries occurring, as some of them do, in what was believed to be the most barren sections of the route, cannot be overrated, for they will be the means of drawing populations to districts which might otherwise remain undeveloped for an indefinite period.
>
> Valuable, however, as these discoveries may become, they are scarcely equal in importance to the pine forests which cover extensive tracts in the wide region intervening between the height of land and Fort Frances. … I have only further to say, on this subject, that these pine woods present an inviting field to the enterprise of capitalists. …

48. Patents, mining and timber licenses were key sources of Crown revenue, particularly in the 1880s and early 1900s. Vipond (Canada's expert) testified that, in the early 1900s, timber licenses accounted for 30% of the general revenue of Ontario.[47]

(ii) The Ojibway were familiar with mining before the Treaty 3 negotiations

49. The Ojibway were aware of mining and of the presence of valuable minerals on Treaty 3 lands before the Treaty negotiations commenced. Mining was occurring on land that had been surrendered under the Robinson Treaty in 1850. Lovisek testified that the Ojibway would have known about these mining activities.[48] Chartrand (Ontario's expert) opined that the Ojibway would have become aware of the consequences of the Robinson Treaty, including the

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[44] Letter from John A. MacDonald to the Department of Justice dated May 1, 1872 [GEB, Vol. I, Tab 20, p. 100]
[45] Report from S.J. Dawson to Hon. H.L. Langevin, Minister of Public Works dated July 18, 1872 at p. 135 [GEB, Vol. I, Tab 22, p. 104]
[46] Report from S.J. Dawson to Hon. H.L. Langevin, Minister of Public Works dated July 18, 1872 at p. 136-137 [GEB, Vol. I, Tab 22, p. 105]
[47] Vipond, Examination-in-chief held February 23, 2010 at p. 7360, l. 4 – 7361 1. 1 [GEB, Vol. I, Tab 16, p. 87-88]
[48] Lovisek, Cross-examination held October 23, 2009 at p. 2006, l. 9 – p. 2007, l. 20 [GEB, Vol. I, Tab 3, p. 21-22]

"intensification of taking up of lands … for mining, lumbering and settlement."[49]

50. In the Spring of 1872, Chief Blackstone (the chief of one of the Ojibway signatories to Treaty 3) discovered that a mining camp had been set up in unceded territory occupied by his band. Chief Blackstone directed the miners to leave. He was emphatic in his determination to keep miners off his land until he was paid for it.[50] In August 1872, *The Globe* reported that the Ojibway were taking the position that they must be paid for the "wealth" being taken out of their rocks before they would consent to any treaty.[51]

51. On October 3, 1872, Chief Blackstone and two other chiefs wrote to the Governor General to inquire about making a treaty. The Chiefs complained that "persons are constantly upon the territory exploring and surveying our lands, as well as mining etc."[52] In response, on October 17, 1872, the Deputy Superintendent General of Indian Affairs instructed as follows:"[53]

> Inform Chief Blackstone … that the Government have given full power to its Commissioners … to make agreements with the Indians of the various bands of the Salteaux and Ojibeway Indians for conveying to the Crown the lands which they respectively have considered to belong to them, and with permission to retain as Reserves such limited portions of them as it might be necessary to have set apart for their future use, and allowing the Indians likewise to hunt and fish over those lands which they do convey to the Queen so long as they are not sold and become occupied by white settlers ….

(iii) The Ojibway increased their demands during the Treaty 3 negotiations due to the presence of minerals on their lands

52. During Treaty negotiations in 1872, the Ojibway considered the Crown's annuity offer to be inadequate due to the value of the minerals on their lands. Dawson commented on the Ojibway's position in his July 1872 report to Ottawa, as follows:[54]

> [T]here have been other causes in operation, of a nature to mar the negotiations, and among these we may mention the fact that they are well informed as to the discovery of gold and silver to the west of the watershed, and have not been slow

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[49] Report of Jean-Philippe Chartrand dated June 18, 2008 at p. 49, 237 [GEB, Vol. II, Tab 43A, p. 29; Tab 43C, p. 34]

[50] Commissioners' Report to Secretary of State dated July 17, 1872 [GEB, Vol. I, Tab 21, p. 102]; Chartrand, Examination-in-chief held December 16, 2009 at p. 4759, l. 10 – p. 4761, l. 12 [GEB, Vol. I, Tab 12, p. 70-72]; Lovisek, Cross-examination held November 17, 2009 at p. 2394, l. 24 – p. 2398, l. 20 [GEB, Vol. I, Tab 7, p. 42-46]

[51] Letter from Fort Frances dated July 17, 1872 at p. 1 [AEB, Tab 12]

[52] Letter from Chiefs Blackstone, Ba-pa-ma-jos and Ka-ba-gua to the Governor General, Quebec dated October 3, 1872 [GEB, Vol. I, Tab 23, p. 106]

[53] Memorandum from W. Spragge as to Answer to be sent to Chief Blackstone dated October 17, 1872 [emphasis added] [GEB, Vol. I, Tab 24, p. 108]

[54] Commissioners' Report to Secretary of State dated July 17, 1872 [emphasis added] [GEB, Vol. I, Tab 21, p. 102]

> to give us their views as to the value of that discovery. "You offer us", said they "$3 per head, and you have only to pick up gold and silver from our rocks to pay it many times over."

53. Chartrand opined that this comment indicated the following:

a) The Obijway understood that the Treaty negotiations pertained to compensation for allowing the Crown to control lands and certain resources on the lands, and to generate revenue from these resources.[55]

b) The Ojibway perceived the minerals on their lands to be fairly extensive, and that the minerals were highly valued by Euro-Canadians. Thus, they considered the monetary compensation that was offered to be grossly inadequate.[56]

c) If satisfactory compensation was offered, the Ojibway would, under the Treaty, consent to the Crown receiving revenue from the sale of mineral resources and allow resource development (mining) to be established on Treaty lands.[57]

54. During the second day of the Treaty negotiations in 1873, the Ojibway Chiefs reiterated their belief concerning the value of their lands, as follows:[58]

> My terms I am going to lay down before you; the decision of our Chiefs; ever since we came to a decision you push it back. The sound of the rustling of the gold is under my feet where I stand; we have a rich country; it is the Great Spirit who gave us this; where we stand upon is the Indians' property, and belongs to them. If you grant us our requests you will not go back without making the treaty.

55. The experts' opinions were consistent concerning the meaning of this comment:

a) Lovisek testified that "minerals were considered to be important to the Ojibway in their negotiating"[59], and that this comment indicated the Ojibway appreciated that the value the Crown attached to the land was affected by the discovery of

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[55] Reply Report of Jean-Phillipe Chartrand dated March 12, 2009 at p. 88 [GEB, Vol. II, Tab 44A, p. 44]

[56] Chartrand, Examination-in-chief held January 14, 2010 at p. 4796, l. 21 – p. 4798, l. 7 [GEB, Vol. I, Tab 13, p. 73-75]; Chartrand, Examination-in-chief held December 15, 2009 at p. 4635, l. 16 – p. 4636, l. 14 [GEB, Vol. I, Tab 11, p. 64-65]; Chartrand, Examination-in-chief held December 16, 2009 at p. 4759, l. 10 – 4761, l. 12 [GEB, Vol. I, Tab 12, p. 70-72]

[57] Reply Report of Jean-Phillipe Chartrand dated March 12, 2009 at p. 88 [GEB, Vol. II, Tab 44A, p. 44]; Chartrand, Examination-in-chief held December 15, 2009 at p. 4635, l. 16 – p. 4636, l. 14 [GEB, Vol. I, Tab 11, p. 64-65]

[58] Treaty 3 negotiations of September 30, 1873 to October 2, 1873 as recorded by the Shorthand Reporter and published in the Manitoban at p. 5 [emphasis added] [AEB, Tab 18]

[59] Lovisek, Cross-examination held November 17, 2009 at p. 2417, l. 22 – p. 2418, l. 12 [GEB, Vol. I, Tab 8, p. 53-54]

minerals in the area.[60] Lovisek also testified that there were discoveries of gold, and "the Ojibway were making claims to higher amounts of annuities on the basis of those mineral findings."[61]

b) Chartrand testified that the Chief made this statement to emphasize the mineral wealth of the territory in order to justify the demands that had been made in 1869 and during the 1873 Treaty negotiations.[62]

c) Von Gernet (Ontario's expert) opined that the Ojibway were trying to take advantage of the recent discoveries of mineral wealth, and that it was a common strategy for Ojibway negotiators to point to certain mineral wealth and state that they think their land is worth more.[63]

(iv) The Commissioners made it clear during the Treaty 3 negotiations that the Ojibway were not entitled to minerals off the reserves

56. All four written accounts of the October 1873 Treaty negotiations report that, on the last day of the Treaty negotiations, the Ojibway were advised that they would not be entitled to any minerals that were found on non-reserve lands:

a) The official report of Governor Morris, the lead Commissioner/negotiator of Treaty 3, contained the following statement:[64]

> They asked if the mines would be theirs. I said if they were found on their Reserves it would be to their benefit, but not otherwise. They asked if an Indian found a mine would he be paid for it? I told them he could sell his information if he could find a purchaser, like any other person.

b) The notes prepared by Dawson (one of the three Commissioners) stated:[65]

> [Chief] "Manitobiness" … If they should discover gold or silver would they have a right to it?

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[60] Lovisek, Cross-examination held November 23, 2009 at p. 2669, l. 22 – p. 2670, l. 25 [AEB, Tab 29]
[61] Lovisek, Examination-in-chief held October 21, 2009 at p. 1750, l. 17-24 [GEB, Vol. I, Tab 2, p. 20]
[62] Chartrand, Examination-in-chief held January 14, 2010 at p. 4829, l. 11 – p. 4830, l.9 [GEB, Vol. I, Tab 14, p. 80-81]
[63] Von Gernet, Examination-in-chief held December 1, 2009 at p. 3317, l. 17 – p. 3318, l. 3 [GEB, Vol. I, Tab 10, p. 60-61]
[64] Letter from Governor Morris to Secretary of State reporting on Completion of Treaty dated October 14, 1873 at p. 230 [emphasis added] [GEB, Vol. I, Tab 25, p. 111]
[65] Notes of Simon Dawson taken at Indian Treaty, North West Angle of the Woods from September 30, 1873 to close of Treaty at p. 6 [emphasis added] [AEB, Tab 40]

> Gov. Morris If minerals were found on the Reserve the mine would be administered for their benefit, otherwise, the Indians could not claim it.

c) Notes prepared by Nolin, a Métis hired by the Ojibway chiefs, stated:[66]

> If some gold or silver mines be found in their Reserves it will be to the benefit of the Indians, but if the Indians find any gold or silver mines out of their Reserves, they will be paid for the finding of the mines.

d) The account prepared by a shorthand reporter that was published in the *Manitoban* newspaper (the "**Shorthand Reporter Account**") included the following exchange:[67]

> Chief – "Should we discover any metal that was of use, could we have the privilege of putting our own price on it?"
>
> Governor [Morris] – "If any important minerals are discovered on any of their Reserves the minerals will be sold for their benefit with their consent, but not on any other land that discoveries may take place upon; as regards other discoveries, of course, the Indian is like any other man. He can sell his information if he can find a purchaser."

57. As noted by Chartrand, there is no evidence in the records of the Treaty 3 negotiations that Governor Morris's answer to the Chief's question concerning minerals was misunderstood by the Ojibway. Also, at no point during the 1873 negotiations did the Ojibway indicate that they would object in principle to Euro-Canadian mining activity off the reserves.[68]

58. Lovisek did not dispute that the Ojibway knew they did not have a right to share in minerals off-reserve. She testified that the Ojibway understood that minerals on reserves would be theirs, but minerals that were off the reserves would be obtained by "non-aboriginal people".[69]

(v) The Ojibway were told during the Treaty 3 negotiations that their harvesting rights would be restricted to lands not taken up by the Crown

59. During the October 1873 Treaty negotiations, Governor Morris told the Ojibway that their harvesting rights would be restricted to lands that were not being used by "the white man". Specifically, Dawson's notes record the following statement by Governor Morris during the first

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[66] Notes taken by J. Nolin of Terms of Treaty [AEB, Tab 51]
[67] Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* at p. 70 [emphasis added] [GEB, Vol. II, Tab 40B, p. 3]
[68] Reply Report of Jean-Phillipe Chartrand dated March 12, 2009 at p. 117-118 [GEB, Vol. II, Tab 44C, p. 47-48]
[69] Lovisek, Cross-examination held October 23, 2009 at p. 2094, l. 9 – p. 2095, l. 22 [GEB, Vol. I, Tab 5, p. 31-32]

day of the October 1873 Treaty negotiations:[70]

> I want to have lands for farms reserved for your own use so that the white man cannot interfere with them. 1 square mile for every family of 5 or thereabouts. It may be a long time before the other lands are wanted and you will have the right to hunt and fish over them until the white man wants them.

60. Similarly, the Shorthand Reporter Account indicates that Governor Morris made the following statement:[71]

> I have authority to make reserves such as I have described, not exceeding in all a square mile for every family of five or thereabouts. It may be a long time before the other lands are wanted, and in the meantime you will be permitted to fish and hunt over them.

61. This statement by Governor Morris on the first day of the Treaty 3 negotiations is consistent with Governor Morris's summary of the main features of the numbered treaties in his 1880 book, *The Treaties of Canada with the Indians*, as follows (in part):[72]

> The treaties are all based upon the models of that made at the Stone Fort in 1871 and the one made in 1873 at the north-west angle of the Lake of the Woods [i.e., Treaty 3] …. They may be summarized thus:
>
> 1. A relinquishment, in all the great region from Lake Superior to the foot of the Rocky Mountains, of all their right and title to the lands covered by the treaties, saving certain reservations for their own use, and
>
> 2. In return for such relinquishment, permission to the Indians to hunt over the ceded territory and to fish in the waters thereof, excepting such portions of the territory as pass from the Crown into the occupation of individuals or otherwise.

62. The Shorthand Reporter Account also includes the following exchange as taking place on the third and last day of the October 1873 negotiations:[73]

> Chief – … In this river, where food used to be so plentiful for our subsistence, I perceive it is getting scarce. We wish that the river should be left as it was formed from the beginning – that nothing be broken."
>
> Governor – "This is a subject that I cannot promise."

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[70] Notes of Simon Dawson taken at Indian Treaty, North West Angle of the Woods from September 30, 1873 to close of Treaty at p. 3 [emphasis added] [AEB, Tab 40]

[71] Treaty 3 negotiations of September 30, 1873 to October 2, 1873 as recorded by the Shorthand Reporter and published in the Manitoban at p. 3 [emphasis added] [AEB, Tab 18]

[72] Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* at p. 285-286 [emphasis added] [GEB, Vol. II, Tab 40D, p. 6-7]

[73] Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* at p. 73-74 [emphasis added] [GEB, Vol. II, Tab 40C, p. 4-5]

> Mr. Dawson – "Anything that we are likely to do at present will not interfere with the fishing, but no one can tell what the future may require, and we cannot enter into any engagement."

63. Governor Morris's report to the Secretary of State concerning the Treaty 3 negotiations makes it clear that he anticipated the Crown would take up land for settlement, mining and lumbering purposes. In his report, Governor Morris describes the ceded land as "an extensive lumber and mineral region"[74] and makes the following recommendation:[75]

> I would suggest that instructions should be given to Mr. Dawson to select the Reserves with all convenient speed; and to prevent complications I would further suggest that no Patents should be issued, or licenses granted, for mineral or timber lands or other lands, until the question of the Reserves has been first adjusted.

64. Despite this evidence, Justice Sanderson found (erroneously in Goldcorp's submission) that the Ojibway were promised "perpetual harvesting rights as in the past throughout their territory",[76] and that the Ojibway "did not agree to losing their hunting rights whenever land was wanted".[77] In making this finding, Justice Sanderson ignored the Take-up Clause in the Treaty, ignored the evidence in relation to mining, disregarded the evidence that indicated Governor Morris expressly told the Ojibway their harvesting rights would be restricted to land not wanted by the "white man", and instead placed great reliance on the following sentence contained in notes prepared by Nolin concerning the 1873 Treaty negotiations: "The Indians will be free, as by the past, for their hunting and rice harvest."[78]

65. Dawson's notes of the Treaty 3 negotiations contain a similar notation: "'[Chief] Manitobiness' Would they have the privilege of travelling through the Country? -- Yes."[79] (Lovisek opined, and Justice Sanderson accepted, that the reference to "travelling" was equivalent to "harvesting."[80]) However, the Shorthand Reporter Account – which was the most

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[74] Letter from Governor Morris to Secretary of State reporting on Completion of Treaty dated October 14, 1873 at p. 231 [GEB, Vol. I, Tab 25, p. 111]
[75] Letter from Governor Morris to Secretary of State reporting on Completion of Treaty dated October 14, 1873 at p. 232 [GEB, Vol. I, Tab 25, p. 112]
[76] Trial Reasons at para. 822 [ARB, Vol. 1, Tab 2, p. 176]
[77] Trial Reasons at para. 833 [ARB, Vol. 1, Tab 2, p. 179]
[78] Trial Reasons at para. 820 [ARB, Vol. 1, Tab 2, p. 176]; Notes taken by J. Nolin of Terms of Treaty [AEB, Tab 51]
[79] Notes of Simon Dawson taken at Indian Treaty, North West Angle of the Woods from September 30, 1873 to close of Treaty at p. 6 [AEB, Tab 40]
[80] Trial Reasons at para. 820 [ARB, Vol. 1, Tab 2, p. 176]

comprehensive of all the accounts and which Governor Morris accepted as accurate[81] – indicates that an important limitation was placed on the harvesting right:[82]

> Chief – "We must have the privilege of travelling about the country where it is vacant."
>
> Mr. McKay – "Of course, I told them so."

66. In each of Nolin's notes, Dawson's notes and the Shorthand Reporter Account, the notation in relation to harvesting/travelling immediately preceded the notation relating to mining, referenced in paragraph 56 above, where it was made clear to the Ojibway that Euro-Canadians rather than the Ojibway would be entitled to the minerals off-reserve. It also precedes the notation in the Shorthand Reporter's Account, referenced in paragraph 62 above, where the Ojibway were advised that no promises could be made that the river would be left unchanged.

67. Despite the reference to harvesting over only "vacant" lands being consistent with other statements made by the Commissioners during the Treaty 3 negotiations, the context/factual matrix in which Treaty 3 was entered into, and the Ojibway's post-Treaty conduct (described below), Justice Sanderson disregarded (erroneously in Goldcorp's submission) the phrase "where it is vacant" in the Shorthand Reporter's Account.

(vi) The Ojibway's post-Treaty conduct reflects an understanding that their harvesting rights were restricted to lands not taken up by the Crown

68. After Treaty 3 was entered into, the Ojibway did not oppose settlement on non-reserve lands. Lovisek testified that the Ojibway understood that they did not have the right to hunt and fish on settled land.[83] Specifically, Lovisek testified as follows:[84]

> Q. But they understood once farmland – once land is actually cleared and it's an operating farm, they're not going to have the same hunting and fishing rights over that land as they do over virgin bush some miles away, isn't that right?
>
> A. No, certainly while there were – there was areas where they could continue their hunting and fishing, they had no objection.

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[81] Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* at p. 52 [GEB, Vol. II, Tab 40A, p. 2]

[82] Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* at p. 70 [emphasis added] [GEB, Vol. II, Tab 40B, p. 3]

[83] Lovisek, Cross-examination held October 23, 2009 at p. 2110, l. 13 – p. 2112, l. 3 [GEB, Vol. I, Tab 6, p. 37-39]

[84] Lovisek, Cross-examination held October 23, 2009 at p. 2111, l. 22 – p. 2112, l. 3 [emphasis added] [GEB, Vol. I, Tab 6, p. 38-39]

69. The Ojibway's post-Treaty conduct also indicates they understood and accepted that mining and lumbering would take place on the ceded lands. On March 19, 1874 (approximately five months after Treaty 3 was entered into), twenty Ojibway chiefs wrote to Governor Morris to request that reserves be set up because lumbering activities were already taking place:[85]

> And, sir, we should like that it might be as soon as possible, so that we may be able to locate ourselves, as we notice that already there are Whites exploring our "wood for sawing." We do not wish to trouble them if they come to place themselves here; but once they get a hold on our Reserves, they will take them where they like.

As noted by Chartrand, this letter "stands in marked contrast" to the Ojibway's pre-Treaty conduct. Post-Treaty, the "Chiefs were no longer claiming broad rights to the lands, or threatening to remove non-Aboriginal parties, or demanding payments for rights-of-way. Rather, they were indicating an urgency in having their reserves surveyed and determined with finality, prior to the setting up of non-Aboriginal lumbering operations."[86]

70. In a similar vein, on May 31, 1974 (approximately eight months after Treaty 3 was entered into), two Ojibway Chiefs sent a request to the Lieutenant Governor, as follows:[87]

> All the Indians who were parties to the last Treaty wish to have an understanding about the land Reserves, that being the most important part of the Treaty. After we have selected our claims, then the white man can go about and search for minerals, etc.

As stated by Chartrand, "this letter also acknowledged that non-Aboriginal parties would be free to use and take up lands for resource exploration and exploitation after the finalization of reserves."[88] This letter also "stand[s] in marked contrast to pre-Treaty claims of territorial control and action, such as that undertaken by Chief Blackstone in the spring of 1872, when the Chief expelled miners from the Lake Shebandowan area and promised at the 1872 negotiations to keep miners away until he had been compensated for his land."[89]

71. There was significant mining activity in the Treaty 3 area starting in the 1880s. Epp (Ontario's expert) dedicated over 90 pages of his report to a discussion of mining operations over

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[85] Letter from Chief Note-na-how-aw, Chief Ke-ta-si-piness, and eighteen other chiefs to Governor Morris dated March 19, 1874 [emphasis added] [GEB, Vol. I, Tab 26, p. 113]
[86] Report of Jean-Philippe Chartrand dated June 18, 2008 at p. 281 [GEB, Vol. II, Tab 43D, p. 35]
[87] Letter from Chiefs Katakepenis and Wawosing to the Lieutenant Governor dated May 31, 1874 [emphasis added] [GEB, Vol. I, Tab 27, p. 114]
[88] Report of Jean-Philippe Chartrand dated June 18, 2008 at p. 281-282 [GEB, Vol. II, Tab 43D, p. 35-36]
[89] Reply Report of Jean-Phillipe Chartrand dated March 12, 2009 at p. 106-107 [GEB, Vol. II, Tab 44B, p. 45-46]

Treaty 3 lands.[90] Mining began around the Lake of the Woods, and expanded to the Seine River basin, the Manitou Lake area, the Wabigoon and Eagle Lakes, across the mainline of the Canadian Pacific Railway to the Sturgeon Lake and Minnetakie area, and into Red Lake.[91]

72. Several mines were so large that the Ojibway could not have overlooked their physical presence. For example, in 1892, the main building of the Sultana Mine's stamp mill was 65 feet by 30 feet, and the mine had a 2½ story office building. [92] Other mines in the area had lodging, tramways, and wagon roads.[93] Some of the mines were discovered by Aboriginal peoples.[94] The noise (or "dull rumble") involved in the mining operations would have been audible for a considerable distance.[95] The presence of these structures, and the noise associated with mining, would have indicated to the Ojibway that mining was occurring on Treaty 3 lands, and that mining was inconsistent with the ability to hunt and fish.

73. The Ojibway not only observed that mining activities were being carried out, they reaped the benefits of these activities by working for mining companies. By the 1890s, the employment of Treaty band members in lumber and mining operations was of sufficient economic significance to be noted in the annual reports of the Department of Indian Affairs.[96]

74. Lovisek opined that the Ojibway's written complaints about the non-fulfilment of Treaty promises was one way to determine the Ojibway's understanding of the Treaty.[97] According to Lovisek's research, at no point after Treaty 3 was signed did the Ojibway complain about settlement, mining or forestry activities on non-reserve lands.[98] There was no evidence on the record that anyone viewed the taking up of land off-reserve to be a breach of the Treaty.[99]

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[90] Report of A. Ernest Epp dated June 2008 at p. 151-206 [GEB, Vol. II, Tab 45, p. 50-143]
[91] Report of A. Ernest Epp dated June 2008 at p. 151-152 [GEB, Vol. II, Tab 45, p. 50-51]
[92] Report of A. Ernest Epp dated June 2008 at p. 153 [GEB, Vol. II, Tab 45, p. 53]; Epp, Examination-in-chief held January 28, 2010 at p. 6286, l. 22 – p. 6287, l. 18 [GEB, Vol. I, Tab 15, p. 82-83]
[93] Report of A. Ernest Epp dated June 2008 at p. 168-170, 172, 185-191 [GEB, Vol. II, Tab 45, p. 79-88, 90, 103-113]; Epp, Examination-in-chief held January 28, 2010 at p. 6286, l. 22 – p. 6288, l. 24 [GEB, Vol. I, Tab 15, p. 82-84]; see also Report of Jean-Philippe Chartrand dated June 18, 2008 at p. 364-366 [GEB, Vol. II, Tab 43E, p. 37-39]
[94] Report of A. Ernest Epp dated June 2008 at p. 190, 198 [GEB, Vol. II, Tab 45, p. 112, 128]
[95] Epp, Examination-in-chief held January 28, 2010 at p. 6289, l. 4 – p. 6290, l. 1 [GEB, Vol. I, Tab 15, p. 85-86]
[96] Report of Jean-Philippe Chartrand dated June 18, 2008 at p. 225-227, 368 [GEB, Vol. II, Tab 43B, p. 31-33; Tab 43E, p. 41]
[97] Report of Joan A. Lovisek dated July 9, 2008 at p. 145 [GEB, Vol. II, Tab 41B, p. 22]
[98] Lovisek, Cross-examination held October 23, 2009 at p. 2025, l. 6 – p. 2026, l. 18; p. 2029, l. 14-19 [GEB, Vol. I, Tab 4, p. 25-26, 29]
[99] Lovisek, Cross-examination held November 18, 2009 at p. 2495, l. 18 – p. 2496, l. 20 [GEB, Vol. I, Tab 9, p. 56-57]

PART II – ISSUES

75. The issues that arise on this appeal can be summarized as follows:

a) Did the Court of Appeal err in answering Question One (as set out in the Order of Justice Spies) in the affirmative?

b) If the Court of Appeal did err in answering Question One in the affirmative, did the trial judge err in answering Question Two in the negative?

76. In response to these issues, Goldcorp submits that:

a) The Court of Appeal did not err in answering Question One in the affirmative. In particular:

i) The authority to take up land comes from the *Constitution Act, 1867*, not from the language of any treaty;

ii) Ontario, not Canada, has the constitutional authority to take up lands in Keewatin for settlement, mining, lumbering, and other provincial purposes;

iii) Ontario has the constitutional authority to take up lands in Keewatin so as to limit Treaty 3 harvesting rights up to the point of infringement;

iv) A take-up clause (or geographical limitation) in a treaty may be relevant to determining whether the taking up of a particular tract of land infringes a treaty right;

v) The right to rely on the Take-up Clause when taking up lands in Keewatin passed from Canada to Ontario at the time of the Annexation;

vi) *Mikisew* establishes the test for whether Ontario's taking up of land in Keewatin infringes the Ojibway's Treaty 3 harvesting rights; and

vii) The Court of Appeal did not disregard Canada's role in the Treaty 3 relationship.

b) If the Court of Appeal did err in answering Question One in the affirmative, this Court should decline to answer Question Two because it is hypothetical and should not be answered in the absence of a full evidentiary record.

PART III – ARGUMENT

SUBMISSIONS ON QUESTION ONE

A. Only Ontario has the constitutional authority to take up lands in Keewatin for settlement, mining, lumbering and other provincial purposes

77. At the outset, it is important to recognize that the authority of the federal and provincial governments to take up land emanates from the *Constitution Act, 1867*, not from the language of any treaty. Treaty 3 cannot alter the division of powers between Parliament and the provincial legislatures. Accordingly, the Court of Appeal correctly recognized that the Harvesting Clause must be interpreted within the framework established by the *Constitution Act, 1867*.[100]

78. Section 109 of the *Constitution Act, 1867* gives Ontario beneficial ownership of the public lands within its boundaries, and ss. 92(5) and 92A give Ontario the exclusive legislative authority to manage and sell those public lands.[101] In essence, these sections of the *Constitution Act, 1867* give Ontario the authority to take up public lands within its boundaries for settlement, mining, lumbering, and other provincial purposes.

79. Canada does not have the constitutional authority to take up lands, or authorize uses of lands, that are beneficially owned by Ontario.[102] This was decided by the JCPC in 1888 in *St. Catherine's Milling and Lumber Co.* v. *The Queen*,[103] reiterated by the JCPC in 1902 in *Ontario Mining Co.* v. *Seybold*,[104] and confirmed by this Court in 1983 in *Smith* v. *The Queen*.[105] It has been the law for 125 years.

80. Ontario obtained beneficial ownership of Keewatin in 1912 by way of the Annexation. Accordingly, after the Annexation, Ontario – not Canada – has the constitutional authority to take up lands in Keewatin for settlement, mining, lumbering, and other provincial purposes.

B. Ontario has the constitutional authority to take up lands in Keewatin so as to <u>limit</u> Treaty 3 harvesting rights

81. It is settled law that all provinces, including Ontario, can <u>limit</u> treaty rights up to the point

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[100] CA Reasons, para. 102 [ARB, Vol. 2, Tab 3, p. 32]
[101] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3, ss. 92(5), 92A and 109 [GEB, Vol I, Tab 17, p. 92, 93, 95]
[102] Other than for valid federal purposes, such as the establishment of national parks, railways, harbours, airports and military bases.
[103] *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46 at 51-52, 57-60 (JCPC) [GN BA, Vol. II, Tab 37]
[104] *Ontario Mining Co.* v. *Seybold* (1902), [1903] A.C. 73 at 79, 81, 82 (JCPC) [GN BA, Tab 20]
[105] *Smith* v. *The Queen*, [1983] 1 S.C.R. 554 at 561-565 [Goldcorp's Book of Authorities ("GA"), Tab 21]

of infringement. Such authority emanates from the *Constitution Act, 1867*. It is not dependent on the language of any treaty.

82. In *R.* v. *Morris*, this Court held that "provincial laws or regulations that place a modest burden on a person exercising a treaty right or that interfere in an insignificant way with the exercise of that right do not infringe the right."[106] Such laws apply to First Nations *ex proprio vigore* or by incorporation under s. 88 of the *Indian Act*.[107]

83. Accordingly, the answer to Question One is "Yes": Ontario has the authority to take up lands in Keewatin so as to limit the rights of the Plaintiffs to hunt or fish under Treaty 3 up to the point of infringement.[108] The issue then becomes: when does the taking up of lands by Ontario infringe those rights? This issue is addressed in the sections below.

C. The right to rely on the Take-up Clause when taking up lands in Keewatin passed from Canada to Ontario at the time of the Annexation

84. The Take-up Clause in Treaty 3 constitutes a geographical limitation on the Ojibway's right to hunt and fish.[109] In particular, Treaty 3 gives the Ojibway the right to hunt and fish over the surrendered lands except those lands that "may from time to time be required or taken up for settlement, mining, lumbering or other purposes" by the "Dominion of Canada".

85. However, as observed by the Court of Appeal,[110] after the Annexation, Canada lacked the constitutional authority to take up lands in Keewatin for settlement, mining, lumbering, and other provincial purposes. Thus, either Ontario can rely on the Take-up Clause when taking up lands in Keewatin (without requiring authorization from Canada), or no level of government can.

86. As held by this Court in *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, a take-up clause is relevant to determining if the taking up of a particular tract of land infringes a treaty right.[111] Thus, while Ontario has the authority to take up lands in Keewatin under the *Constitution Act, 1867*, the issue that arises is whether Ontario also has the right to rely on the Take-up Clause in Treaty 3 when taking up lands in Keewatin.

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[106] *R.* v. *Morris*, [2006] 2 S.C.R. 915 at para. 50 [GA, Tab 14]
[107] *R.* v. *Morris*, [2006] 2 S.C.R. 915 at para. 53 [GA, Tab 14]
[108] Whether or not Ontario can justifiably infringe the Plaintiffs' Treaty 3 harvesting rights is the subject of Question Two.
[109] *R.* v. *Badger*, [1996] 1 S.C.R. 771 at para. 40 [GA, Tab 8]; *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para. 24, 42 [GA, Tab 4]
[110] CA Reasons at para. 148 [ARB, Vol. 2, Tab 3, p. 47]
[111] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para. 30-32, 42-48 [GA, Tab 4]

87. The Court of Appeal correctly held that the right to rely on the Take-up Clause passed from Canada to Ontario at the time of the Annexation, such that the Ojibway's right to harvest in Keewatin is restricted to land not taken up by Canada before the Annexation and by Ontario after the Annexation. In particular, Ontario obtained the right to rely on the Take-up Clause when taking up lands in Keewatin: (i) by operation of law, as the representative of the Crown with the constitutional authority to take up Treaty 3 lands; (ii) by way of the 1891/1894 Legislation/Agreement; and/or (iii) by way of the Annexation Legislation.

(i) Ontario obtained the right to rely on the Take-up Clause by operation of law as the representative of the Crown with the constitutional authority to take up lands in Keewatin

88. As held by the Court of Appeal,[112] and as detailed in the facta of the MNR and the AG Canada: (i) Treaty 3 is between the Ojibway and the Crown, not between the Ojibway and Canada; and (ii) the Treaty 3 promises were made by the Crown, not by a particular level of government. Thus, while the "Ojibway may look to the Crown to keep the Treaty promises, they must do so within the framework of the division of powers under the constitution."[113]

89. Prior to the Annexation in 1912, Canada was the level of government and Crown representative with the constitutional authority to take up lands in Keewatin. Thus, Canada had the right to rely on the Take-up Clause when taking up such lands. By way of the Annexation, beneficial title of Keewatin was transferred from Canada to Ontario. As a result: (i) the constitutional authority to take up lands in Keewatin passed from Canada to Ontario; and (ii) Ontario – as the Crown's representative with the constitutional authority to take up lands in Keewatin – obtained the right to rely on the Take-up Clause when taking up such lands.

(ii) Ontario obtained the right to rely on the Take-up Clause by way of the 1891/1894 Legislation/Agreement

90. As held by the Court of Appeal,[114] and as detailed in the factum of the MNR, Ontario obtained the right to rely on the Take-up Clause by way of the 1891/1894 Legislation/Agreement. That legislation expressly gave Ontario the right to rely on the Take-up Clause when taking up lands surrendered by Treaty 3. That legislation applied to Keewatin when Ontario obtained beneficial ownership of Keewatin.

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[112] CA Reasons at para. 135 [ARB, Vol. 2, Tab 3, p. 42-43]
[113] CA Reasons at para. 135-141 [ARB, Vol. 2, Tab 3, p. 42-45]
[114] CA Reasons at para. 182-192 [ARB, Vol. 2, Tab 3, p. 59-62]

(iii) Ontario obtained the right to rely on the Take-up Clause by way of the Annexation Legislation

91. An examination of the intention of Parliament and the Ontario Legislature in enacting the Annexation Legislation, and the text of the Annexation Legislation, makes it clear that Ontario obtained the right to rely on the Take-up Clause by way of the Annexation Legislation.

(1) Parliament and the Ontario Legislature intended for Ontario to have the right to rely on the Take-up Clause

92. While statutes involving First Nations are generally to be construed in favour of First Nations, this Court has cautioned against blindly applying this principle. The relevant inquiry is to determine legislative intent. The court must reconcile the interpretation of the statute with the policies that the legislation is seeking to promote.[115]

93. After the Annexation, Canada no longer had the constitutional authority to take up lands in Keewatin for provincial purposes; only Ontario has that authority. Thus, either Ontario can rely on the Take-up Clause when taking up lands in Keewatin, or no level of government can.

94. It cannot possibly have been the intention of Parliament and the Ontario Legislature that neither level of government could rely on the Take-up Clause when taking up lands in Keewatin. There is no evidence to support such an anomalous conclusion, and the available evidence indicates otherwise. Further, such a conclusion would be contrary to the presumption that "the legislature does not intend to produce absurd consequences".[116] It would be an absurd consequence if the geographical limitation on the Ojibway's right to harvest was rendered inoperative 39 years after the Treaty was entered into merely because Keewatin was annexed from one representative of the Crown (Canada) to another (Ontario).

95. This Court has held that, in order to determine legislative intent, the courts may review the debates that took place in the House of Commons concerning the legislation at issue.[117] As detailed in paragraphs 31 to 33 above, the debates in the House of Commons concerning the Annexation Legislation paint a clear picture of Parliament's intention in enacting the Annexation

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[115] *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 at 142-143 [GA, Tab 6]; *Osoyoos Indian Band* v. *Oliver (Town)*, [2001] 3 S.C.R. 746 at para. 49 [GA, Tab 7]

[116] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 27 [GA, Tab 19]

[117] *Kitkatla Band* v. *British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146 at para. 53 [GA, Tab 3]; *Canadian Western Bank* v. *Alberta*, [2007] 2 S.C.R. 3 at para. 27 [GA, Tab 2]

Legislation. In particular, as stated by Prime Minister Borden:[118]

> The only question is by whose advice shall that land be administered, by the advice of the federal government or by the advice of the provincial government. This land, like the rest of the land within the limits of Ontario, will be administered by the Crown on the advice of the provincial government.

96. Canada had no supervisory role in authorizing Ontario's land uses for any land within the limits of Ontario. In addition, the "rest of the land within the limits of Ontario" included the Disputed Lands that were also the subject of Treaty 3 and for which Ontario was entitled to rely on the Take-up Clause, as confirmed in the 1891/1894 Legislation/Agreement.

97. Accordingly, the purpose of the Annexation was for Ontario rather than Canada to administer the annexed land, not for Ontario and Canada to jointly administer the annexed land, or for the Crown to lose its ability to rely on the Take-up Clause when taking up land in Keewatin. Ontario was to have the same powers to administer Keewatin as the rest of the land within its boundaries, including: (i) the authority to take up land without the involvement or authorization of Canada; and (ii) the right to rely on the Take-up Clause.

(2) The text of the Annexation Legislation confirms that the right to rely on the Take-up Clause passed from Canada to Ontario

98. Matters involving First Nations were expressly addressed in the Annexation Legislation. Under clause 2(a) of the Schedule to this legislation, Ontario agreed to "recognize the rights of the Indian inhabitants in the [annexed lands] to the same extent … as the Government of Canada has heretofore recognized such rights".[119] Accordingly, by way of this clause, Ontario agreed to recognize the Ojibway's right under Treaty 3 to hunt and fish over the surrendered lands except for lands that may be from time to time taken up for settlement, mining, lumbering, or other purposes. Ontario, in effect, "stepped into Canada's shoes" for purposes of: (i) relying on the Take-up Clause when taking up lands in Keewatin; and (ii) honouring the right of the Ojibway to hunt and fish over any surrendered lands that are not taken up.

99. Under clauses 2(b) and 2(c) of the Annexation Legislation, Canada, in effect, took the

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[118] Official Report of the Debates of the House of Commons of the Dominion of Canada dated February 27, 1912 at p. 3906 [GEB, Vol. I, Tab 36, p. 134]

[119] *The Ontario Boundaries Extension Act*, 2 Geo. V., c. 40, s. 2 [AEB, Tab 2]; *An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province*, 2 Geo. V., c. 3, Schedule [GEB, Vol. I, Tab 39, p. 142]

unnecessary precaution of expressly retaining its legislative powers under s. 91(24) over "Indians, and Lands reserved for the Indians". Thus, it is apparent that if Canada intended to retain any involvement in the taking up of lands in Keewatin, there would be express language to that effect. The absence of such language must be viewed as deliberate.

100. In the Manitoba Annexation Legislation, Canada made it clear that it was retaining beneficial ownership and administrative control over the public land included in that annexation.[120] This also supports the conclusion that if Canada intended to retain any interest in, or administrative authority over, the public land in Keewatin, there would be express language in the Ontario Annexation Legislation to that effect. The absence of such language must again be viewed as deliberate.

(iv) Ontario's right to take up lands in Keewatin without authorization from Canada is consistent with how Canada and Ontario have always dealt with the taking up of lands

101. On various other occasions, Canada and Ontario have entered into an agreement and/or enacted reciprocal legislation involving Treaty 3 lands. On each occasion, it was agreed or conceded that Ontario has the right to take up Treaty 3 lands without requiring Canada's authorization. At no time has Canada asserted otherwise, and at no time prior to this litigation have the First Nation signatories to Treaty 3 asserted otherwise.

102. First, in June 1874 – less than one year after Treaty 3 was entered into – Canada and Ontario entered into the "Provisional Boundary Agreement".[121] The agreement created a provisional boundary pending resolution of the dispute between Canada and Ontario over ownership of the Disputed Lands. Canada and Ontario agreed that only Ontario would issue patents and licenses for lands to the east of the provisional boundary, and only Canada would issue patents and licenses for lands to the west of the provisional boundary. Nothing in the agreement suggested that Canada had to authorize the patents or licenses issued by Ontario.

103. Second, following the determination of the boundary dispute, Canada and Ontario came to a "just and friendly understanding" in relation to matters involving Treaty 3. By way of reciprocal legislation in 1891, and an agreement in 1894, Canada and Ontario "conceded and

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[120] *The Manitoba Boundaries Extension Act, 1912*, 2 Geo. V., c. 32, s. 6 [GEB, Vol. I, Tab 37, p. 137]

[121] Memorandum of Agreement for Provisional Boundary in Respect of Patents of Lands dated June 26, 1874 [GEB, Vol. I, Tab 28, p. 115]

declared" that, with the exception of reserve lands, the rights of the First Nations to hunt and fish throughout the surrendered lands "do not continue with reference to any lands which have been, or from time to time may be, required or taken up for settlement, mining, lumbering or other purposes" by Ontario. Neither the 1891 legislation nor the 1894 agreement provided for any role by Canada in the taking up of these lands by Ontario.[122]

104. Third, in 1924, Parliament and the Ontario Legislature passed reciprocal legislation that dealt primarily with reserves. The preamble to that legislation confirmed that only Ontario would administer ceded non-reserve treaty lands within its boundaries, as follows:[123]

> Whereas from time to time treaties have been made with the Indians for the surrender for various considerations of their personal and usufructuary rights to territories now included in the Province of Ontario ….
>
> And whereas, except as to such Reserves, the said territories were by the said treaties freed, for the ultimate benefit of the Province of Ontario, of the burden of the Indian rights, and became subject to be administered by the Government of the said Province for the sole benefit thereof, … .

105. Fourth, following the Annexation, and for the last 100 years, Ontario has administered Keewatin without any involvement of Canada. This is the strongest possible evidence that neither Parliament nor the Ontario Legislature intended that Canada would authorize Ontario's land uses. Consistent with past practice and the *Constitution Act, 1867*, it was intended that Ontario would administer the annexed lands, and rely on the Take-up Clause when taking up tracts in the annexed lands, without requiring Canada's authorization. If Parliament intended otherwise, it would have raised the issue long ago. Instead, Canada supports Ontario's position that Ontario has the right to take up lands in Keewatin without Canada's authorization.

106. Grassy Narrows' assertion that the Court of Appeal erred in relying on this additional legislation and conduct[124] is incorrect, for two reasons. First, the statutory interpretation principle of *in pari materia* presumes a harmony, coherence and consistency between statutes

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[122] *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands*, 54 Vict., c. 3 [AEB, Tab 72]; *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, 54-55 Vict., c. 5 [GEB, Vol. I, Tab 29, p. 116-118]; Agreement between Canada and Ontario dated April 16, 1894 [AEB, Tab 73]

[123] The *Indian Lands Act, 1924*, S.C. 1924, c. 48, Schedule; *The Indian Lands Act*, S.O. 1924, c. 15, Schedule A [emphasis added]

[124] Factum of Andrew Keewatin Jr. and Joseph William Fobister on their own behalf and on behalf of all other members of Grassy Narrows First Nation at para. 76-79

dealing with the same subject matter.[125] In particular, "where there are different statutes in *pari materia* though made at different times, … they shall be taken and construed together … and as explanatory of each other."[126] Accordingly, the fact that three other pieces of reciprocal legislation acknowledge that Ontario can take up Treaty 3 lands without Canada's authorization supports a conclusion that the Annexation Legislation should be interpreted in a similar manner.

107. Second, when determining what Parliament and the Ontario Legislature intended by the Annexation Legislation, it was permissible for the Court of Appeal to examine the conduct of Canada and Ontario to see whether it was consistent with, or contrary to, an intention that Ontario would take up lands in Keewatin without Canada's authorization.[127] The fact that Ontario has, for the last 100 years, taken up lands in Keewatin without Canada's authorization supports a conclusion that, when Parliament and the Ontario Legislature enacted the Annexation Legislation, they intended for Ontario to take up lands in Keewatin without requiring Canada's authorization.

(v) The Court of Appeal did <u>not</u> give insufficient consideration to the intention of the Treaty 3 signatories

108. Grassy Narrows' submission that the Court of Appeal gave insufficient consideration to the common intention of the parties at the time of Treaty 3[128] is erroneous. As set out in the facts section, and discussed further in paragraph 122 below, the Treaty 3 parties intended for the Crown to take up non-reserve land for settlement, mining, lumbering and other purposes, and for the Ojibway's harvesting rights to be restricted to land that had not been taken up.

109. The Court of Appeal was correct to overturn Justice Sanderson's fact finding that Governor Morris deliberately inserted "Dominion of Canada" in the Take-up Clause so that Canada could use its legislative powers under s. 91(24) to protect the Treaty 3 harvesting right. As held by the Court of Appeal, and as detailed by Ontario and Resolute in their facta, there was no evidence to support such a conclusion.[129]

110. Moreover, even if it was Governor Morris's intention to have Canada authorize Ontario's

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[125] *R.* v. *Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 at para. 52 [GA, Tab 18]
[126] *Sharbern Holding Inc.* v. *Vancouver Airport Centre Ltd.*, [2011] 2 S.C.R. 175 at para. 117 [GA, Tab 20]
[127] *Bayshore Shopping Centre* v. *Nepean*, [1972] S.C.R. 755 at 767-768 [GA, Tab 1]
[128] Factum of Andrew Keewatin Jr. and Joseph William Fobister on their own behalf and on behalf of all other members of Grassy Narrows First Nation at para. 67-81
[129] CA Reasons at para. 156-172 [ARB, Vol. 2, Tab. 3, p. 50-55]

land uses, he was wrong as a matter of constitutional law and no effect can be given to his intention. As stated by Lord Watson in *St. Catherine's Milling and Lumber Co.* v. *The Queen*, "the Commissioners who represented Her Majesty, while they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the Imperial Statute of 1867."[130]

111. Further, at the time of Treaty 3, Canada owned Keewatin. Ontario did not obtain ownership of Keewatin until 1912. Thus, what is relevant is not the intention of Governor Morris and the Ojibway at the time of Treaty 3, but the intention of Parliament and the Ontario Legislature at the time of the Annexation. As indicated, the intention of the Annexation Legislation was for Ontario to administer Keewatin, and to rely on the Take-up Clause when taking up lands in Keewatin, without the involvement or authorization of Canada.

112. Grassy Narrows' contention that allowing Ontario to rely on the Take-up Clause constitutes an extinguishment or modification of the Treaty 3 harvesting right[131] is erroneous. As was stated by this Court in *Mitchell* v. *Peguis Indian Band*:[132]

> [T]he Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations.

Similarly, in *R.* v. *Horseman*, this Court held that a change in governmental authority does not contradict the spirit of a treaty.[133] Accordingly, transferring the right to rely on the Take-up Clause from Canada to Ontario did not modify or extinguish the Treaty 3 harvesting right.

113. In any event, prior to 1982, Parliament had the unilateral authority to modify or extinguish treaty rights.[134] Thus, if transferring the right to rely on the Take-up Clause from Canada to Ontario does constitute a modification of the Treaty right, then Parliament had the authority to effect that modification by way of the Annexation Legislation. As was stated by this Court in *R.* v. *Horseman*, in relation to modifications made to the harvesting rights contained in

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[130] *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46 at 60 (JCPC) [GN BA, Tab 37]
[131] Factum of Andrew Keewatin Jr. and Joseph William Fobister on their own behalf and on behalf of all other members of Grassy Narrows First Nation at para. 82-86
[132] *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 at 109 [GA, Tab 6]
[133] *R.* v. *Horseman*, [1990] 1 S.C.R. 901 at 935-936 [GA, Tab 10]
[134] *R.* v. *Horseman*, [1990] 1 S.C.R. 901 at 934 [GA, Tab 10]; *R.* v. *Marshall*, [1999] 3 S.C.R. 456 at para. 48 [GA, Tab 12]

Treaty 8 by way of the *Natural Resources Transfer Agreement, 1930* (Alberta):[135]

> [A]lthough it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native peoples affected, nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned and has not been challenged in this case.

(vi) Ontario's right to rely on the Take-up Clause does not prejudice the Ojibway's Treaty rights

114. Ontario's right to rely on the Take-up Clause does not prejudice the Ojibway's harvesting rights under Treaty 3. Specifically: (i) Ontario is bound by the Honour of the Crown, the same as Canada; (ii) Ontario is bound by the Annexation Legislation to respect Treaty 3 harvesting rights; and (iii) the Treaty rights are protected by s. 35(1) of the *Constitution Act, 1982*.

115. There is no reason to impose, more than 100 years after the Annexation, a cumbersome and inefficient two-tier approval structure involving both Canada and Ontario, particularly when: (i) the Ojibway's harvesting rights under Treaty 3 are protected without such a structure; and (ii) the imposition of such a structure casts significant uncertainty over the legitimacy of the land uses that Ontario has authorized in Keewatin over the past 100 years.

D. *Mikisew* established the test for determining if the taking up of a particular tract of land infringes the Ojibway's Treaty 3 harvesting right

(i) The *Mikisew* Test

116. In *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, this Court explained how the existence of a take-up clause (or geographical limitation) in a treaty is relevant to determining if the taking up of a particular tract of land infringes a treaty harvesting right. Importantly, not all taking up of land constitutes an infringement.

117. Where the lands have been surrendered, and the treaty provides that the right to hunt and fish is limited to lands that have not been taken up, then the taking up of land will not infringe the treaty harvesting right if: (i) as a procedural matter, there is appropriate consultation with the First Nation(s) that may be affected by the taking up; and (ii) as a substantive matter, the Crown does not take up so much land that the right to hunt and fish in the particular First Nation's

[135] *R.* v. *Horseman*, [1990] 1 S.C.R. 901 at 934 [GA, Tab 10]

traditional territories is rendered meaningless (the "***Mikisew* Test**").[136]

118. This approach was confirmed in *R.* v. *Morris*. Chief Justice McLachlin and Justice Fish (who dissented but not on this point) stated that "[l]egislation which engages the internal limits of a treaty right does not affect the treaty right at all, and therefore, a *fortiori*, does not constitute a *prima facie* infringement."[137]

119. The concerns Wabauskang First Nation expressed in its factum in relation to the *Mikisew* Test are unfounded. Wabauskang submits that the "taking up of land to the point that there is no meaningful right is virtually equivalent to the extinguishment of the right", and thus this Court cannot have intended this to be the standard for a *prima facie* infringement.[138]

120. Contrary to Wabauskang's submission, requiring the Crown to not take up so much land that the particular First Nation's harvesting right is rendered meaningless is not virtually equivalent to the extinguishment of the harvesting right. The Crown must ensure that the First Nation retains a meaningful right to harvest, in its traditional territories. Further, the Crown must engage in consultation with the First Nations that may be impacted by a taking up of land, and must accommodate their treaty rights where appropriate.[139]

(ii) Ontario can take-up lands in Keewatin in accordance with the *Mikisew* Test

121. Since Ontario has the right to rely on the Take-up Clause in Treaty 3, the *Mikisew* Test applies when determining if Ontario's taking up of a particular tract in Keewatin infringes the Ojibway's harvesting right. In other words, Ontario has the authority to take-up land in Keewatin for settlement, lumbering, mining and other provincial purposes, without the involvement or authorization of Canada, provided that Ontario: (i) engages in appropriate consultation with the Treaty 3 First Nations that may be affected by a particular taking up of land; and (ii) does not take up so much Treaty 3 land that the right to hunt and fish in an affected First Nation's traditional territory is rendered meaningless.

122. As was the case with Treaty 8, which was the subject of this Court's decision in *Mikisew*,

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[136] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para. 30-32, 42-48 [GA, Tab 4]
[137] *R.* v. *Morris*, [2006] 2 S.C.R. 915 at para. 99 [emphasis added] [GA, Tab 14]
[138] Factum of Leslie Cameron on his own behalf on and behalf of all other members of Wabauskang First Nation at para. 60
[139] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para. 30-32, 42-48 [GA, Tab 4]

the language of Treaty 3 "could not be clearer in foreshadowing change."[140] Also, as was the case with Treaty 8, "it was contemplated by all parties that 'from time to time' portions of the surrendered land would be 'taken up' and transferred from the inventory over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not."[141] This is evident from the factual matrix within which Treaty 3 was entered into, and any findings of Justice Sanderson to the contrary constitute palpable and overriding error. In particular, as is detailed more fully in the facts section at paragraphs 43 to 74 above:

a) Canada knew that the Treaty 3 lands contained valuable timber and mineral resources, and that these resources would attract developers and settlers.

b) The Ojibway knew their lands contained valuable minerals, and took steps to prevent mining by Euro-Canadians on their lands prior to making a treaty.

c) The Ojibway increased their demands during the Treaty 3 negotiations because the presence of minerals made their lands more valuable to the Crown.

d) The Ojibway were told, in clear terms, during the Treaty 3 negotiations that they would not be entitled to any minerals found on non-reserve lands.

e) The Ojibway were told, in clear terms, during the Treaty 3 negotiations that their harvesting rights would be restricted to land not taken up by the Crown.

f) The Ojibway were told, in clear terms, during the Treaty 3 negotiations, that the Crown could not promise that the river (and therefore their fishing) would remain unchanged.

g) Post-treaty, Commissioner Morris urged Canada to establish reserves as soon as possible so that suitable land would be set aside before land was taken up for settlement, mining and lumbering.

h) The Ojibway similarly urged Canada to set up their reserves, stating, "[a]fter we have selected our claims, then the white man can go about and search for minerals, etc."[142]

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[140] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para. 31 [GA, Tab 4]

[141] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para. 30 [GA, Tab 4]

[142] Letter from Chiefs Katakepenis and Wawosing to the Lieutenant Governor dated May 31, 1874 [GEB, Vol. I, Tab 27, p. 114]

i) Lovisek (Grassy Narrows expert) testified that, provided the Ojibway had "areas where they could continue their hunting and fishing, they had no objection"[143] to not being able to harvest over land that had been taken up for settlement.

j) There was no evidence on the record that anyone viewed the taking up of land for settlement, mining or lumbering off-reserve to be a breach of the Treaty.

123. Even if this Court were to conclude that the right to rely on the Take-up Clause did not pass from Canada to Ontario by way of the Annexation, Goldcorp submits that it is still appropriate to apply the *Mikisew* Test when determining if Ontario's taking up of a particular tract in Keewatin infringes the Ojibway's Treaty 3 harvesting right.

124. As held by this Court on numerous occasions, treaty rights are not absolute. They must be read together with the Crown's authority to govern.[144] The interpretation of a treaty "must be realistic and reflect the intentions of both parties, not just that of the [First Nation]."[145]

125. In *R.* v. *Sioui*, this Court interpreted a treaty that gave the Hurons the freedom to carry on their religion, customs and trade. No geographical limitation was contained in the treaty. This Court held that the Hurons could exercise their treaty rights over their entire traditional territories "so long as the carrying on of the customs and rites is not incompatible with the particular use made by the Crown of this territory."[146] In other words, in the absence of a take-up clause or other express geographical limitation, this Court held that the Hurons' treaty rights were limited to land that had not been taken up by the Crown.

126. *R.* v. *Ireland* involved a treaty that gave First Nations the right to "have free hunting … for ever".[147] There was no take-up clause or geographical limitation in the treaty. Justice Gautreau of the Ontario General Division stated:[148]

> There are two rights in opposition here: the Crown's ownership and consequent rights to use and develop the land and the Indians' right to hunt freely. There are

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[143] Lovisek, Cross-examination held October 23, 2009 at p. 2111, l. 22 – p. 2112, l. 3 [GEB, Vol. I, Tab 6, p. 38-39]
[144] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1109 [GA, Tab 17]; *R.* v. *Badger*, [1996] 1 S.C.R. 771 at para. 11, 74 [GA, Tab 8]; *R.* v. *Nikal*, [1996] 1 S.C.R. 1013 at para. 91-93 [GA, Tab 15]. See also *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911 at para. 115 [GA, Tab 5] where Justice Binnie stated: "The *Constitution Act, 1982* ushered in a new chapter but it did not start a new book."
[145] *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1069 [GA, Tab 16]; *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para. 28 [GA, Tab 4]
[146] *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1070 [GA, Tab 16]
[147] *R.* v. *Ireland* (1990), 1 O.R. (3d) 577 at 581 (Gen. Div.) [GA, Tab 11]
[148] *R.* v. *Ireland* (1990), 1 O.R. (3d) 577 at 589 (Gen. Div.) [GA, Tab 11]

> no limiting factors in the treaty. Therefore one can reason that the Indians may hunt anywhere in the territory and this includes private property. This could lead one to suppose that they might hunt racoons in the backyard of a private home. With respect, I believe that this goes beyond what the parties intended or what is reasonable. To permit it would be to trample on the Crown's ownership rights. On the other hand, it would be equally unreasonable for the Crown to argue that its legal title and its right to use, develop and enjoy lands can frustrate, and in effect abolish, the hunting rights of the Indians.

As a precursor to *Mikisew*, Justice Gautreau went on to hold that "the Crown's right [to use and develop the territory] can be exercised to the extent that it does not make the Indians' right of free hunting meaningless".[149] Thus, in the absence of a take-up clause, Justice Gautreau applied what later became the *Mikisew* Test in recognition that First Nations' harvesting rights must be reconciled with the Crown's authority to govern.

127. The reasoning from *Sioui* and *Ireland* applies equally to Treaty 3. Even if the Take-up Clause was not contained in Treaty 3 (or if it has been rendered inoperative due to Ontario's inability to rely on it), the proper interpretation of Treaty 3 is that the Ojibway's right to hunt and fish is limited to lands that have not been taken up by Canada (before the Annexation) and Ontario (after the Annexation). Provided such taking up has not rendered the First Nation's right to harvest meaningless, and the Crown has engaged in appropriate consultation with the affected First Nation(s), then such taking up does not infringe the Treaty 3 harvesting right.

E. The Court of Appeal did not disregard Canada's role in the Treaty 3 relationship

128. The primary submission put forward by both Grassy Narrows and Wabauskang is that, contrary to the modern law concerning the division of powers, the decision of the Court of Appeal left no role for Canada in the Treaty 3 relationship. This submission is erroneous.

129. The Court of Appeal held (correctly) that Canada does not have the jurisdiction to take up lands, or to authorize uses of lands, that are owned by Ontario. That holding does <u>not</u> equate to Canada having no role in the Treaty 3 relationship.

130. It was not necessary for the Court of Appeal to define Canada's role in the Treaty 3 relationship – beyond concluding that Canada does not have the jurisdiction to supervise Ontario's use of the public lands in Keewatin – in order for it to decide the issues on appeal. As a result, it was not an error for the Court of Appeal to not define Canada's role.

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[149] *R.* v. *Ireland* (1990), 1 O.R. (3d) 577 at 590-591 (Gen. Div.) [GA, Tab 11]

131. In any event, the authorities make it clear that Canada's role is legislative, not proprietary. Section 91(24) of the *Constitution Act, 1867* gives Canada the exclusive authority to legislate in relation to "Indians, and Lands reserved for the Indians." However, as was made clear in *St. Catherine's Milling*, *Seybold* and *Smith*,[150] Canada's legislative authority under s. 91(24) cannot be conflated into a proprietary right.

132. Canada has exercised its legislative authority under s. 91(24) by enacting the *Indian Act*. In particular, s. 88 of the *Indian Act* provides as follows:[151]

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

133. The decisions of this Court establish that, under s. 88 of the *Indian Act*, provincial laws of general application that would not otherwise apply to Indians due to Canada's exclusive legislative authority under s. 91(24) are made applicable to Indians as incorporated federal law provided they do not infringe a treaty right (and otherwise satisfy the criteria in s. 88).[152]

134. Contrary to Wabauskang's assertion,[153] there is nothing in the Court of Appeal's decision that suggests Ontario has the right to infringe the Treaty. The Court of Appeal was very careful in the way it conducted its analysis of Question One. In particular, the Court of Appeal examined the following issue: "Does Ontario's use of the taking up clause, short of infringement, engage s. 91(24)?"[154] Consistent with the jurisprudence of this Court, the Court of Appeal answered this question in the negative. The Court of Appeal declined to answer Question Two – whether Ontario can justifiably infringe a treaty right – on the basis that it was not necessary to do so in the circumstances of the appeal.

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[150] *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46 at 51-52, 57-60 (JCPC) [GN BA, Tab 37]; *Ontario Mining Co.* v. *Seybold* (1902), [1903] A.C. 73 at 79, 81, 82 (JCPC) [GN BA, Tab 20]; *Smith* v. *The Queen*, [1983] 1 S.C.R. 554 at 561-565 [GA, Tab 21]

[151] *Indian Act*, R.S.C. 1985, c. I-5, s. 88 [emphasis added]

[152] *R.* v. *Morris*, [2006] 2 S.C.R. 915 at para. 44, 45, 100 [GA, Tab 14]

[153] Factum of Leslie Cameron on his own behalf on and behalf of all other members of Wabauskang First Nation at para. 55

[154] CA Reasons, title heading before para. 201 [emphasis added] [ARB, Vol. 2, Tab 3, p. 66]

SUBMISSIONS ON QUESTION TWO

A. Question Two should not be answered at this stage of the proceeding

135. Based on the wording of the questions set out by Justice Spies, Question Two was to be answered only if the answer to Question One was "No". Since the answer to Question One is "Yes", the Court of Appeal correctly held that it was not necessary to answer Question Two.

136. In the event this Court concludes that the answer to Question One is "No", Goldcorp submits that this Court should decline to answer Question Two, as it is a hypothetical question and should not be answered in a factual vacuum.

(i) Question Two is a hypothetical question

137. In *R.* v. *Morris*, this Court established a two-step framework for analyzing if a provincial law constitutes a *prima facie* infringement of a treaty right: (i) determine whether the impugned provisions of the provincial law impair the treaty right; and (ii) analyze whether the impugned provisions are valid and applicable under ss. 91 or 92 of the *Constitution Act, 1867* and under s. 88 of the *Indian Act* (the "***Morris* Framework**").[155]

138. The *Morris* Framework has not been followed in this proceeding. In particular, the first step of the *Morris* Framework was left to Phase II of the trial. If during Phase II, the court determines that the license that Ontario issued to Resolute does not infringe Grassy Narrows' Treaty rights, then the court will not need to determine whether Ontario could seek to justify an infringement of the Treaty rights. Question Two is, therefore, a hypothetical question.

139. This Court has consistently declined to answer hypothetical questions, and indeed, has declined to answer a similar hypothetical question on two occasions. In *R.* v. *Côté*, this Court held that the impugned provincial regulation did not infringe the appellants' treaty right. The Court held that it was "therefore unnecessary to further consider the scope of protection of s. 88, particularly in relation to whether the provision incorporates a justification defence similar to that outlined in *Sparrow*."[156] Similarly, in *R.* v. *Morris*, the minority concluded that the impugned legislation did not infringe the appellants' treaty right; they therefore declined to consider the issue of whether the province could have sought to justify the infringement because

[155] *R.* v. *Morris*, [2006] 2 S.C.R. 915 at para. 14, 15 [GA, Tab 14]
[156] *R.* v. *Côté*, [1996] 3 S.C.R. 139 at para. 88 [GA, Tab 9]

it was a hypothetical question that did not need to be answered to dispose of the appeal.[157]

(ii) Question Two should not be answered in a factual vacuum

140. As this Court has cautioned on numerous occasions, important constitutional issues should be decided only on a full evidentiary record. For example, in *Kitkatla Band* v. *B.C. (Min. of Small Business, Tourism and Culture)*, this Court held that "[c]onstitutional questions should not be discussed in a factual vacuum. Even in a division of powers case, rights must be asserted and their factual underpinnings demonstrated."[158] Similarly, in *R.* v. *Marshall*, this Court stated that it is not appropriate "to transform a prosecution on specific facts into a general reference seeking an advisory opinion of the Court on a broad range of regulatory issues ...."[159]

141. The law is clear that where a provincial law may potentially affect a treaty right, the correct approach requires a fact-based analysis of the specific, impugned provisions of the provincial law at issue. In this case, there has been neither a fact-based analysis of the impugned provisions of the *CFSA* nor a determination as to whether the impugned provisions infringe the Plaintiffs' Treaty rights. This analysis and determination was left for Phase II of the trial. As a result, the determination of Question Two should also be left for Phase II of the trial, and should be answered only if the Plaintiffs establish a *prima facie* infringement of their Treaty rights.

PART IV – COST SUBMISSIONS

142. Goldcorp does not seek any costs and asks that no order for costs be made against it.

PART V - ORDER SOUGHT

143. Goldcorp requests an order dismissing the appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of April, 2014.

William J. Burden
Thomas F. Isaac
Brian P. Dominique
Linda I. Knol

Counsel for the Respondent Goldcorp Inc.

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[157] *R.* v. *Morris*, [2006] 2 S.C.R. 915 at para. 135 [GA, Tab 14]
[158] *Kitkatla Band* v. *British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146 at para. 46, 47 [GA, Tab 3]
[159] *R.* v. *Marshall*, [1999] 3 S.C.R. 533 at para. 31 [GA, Tab 13]

PART VI – TABLE OF AUTHORITIES

AUTHORITY	**Cited in Factum at Paragraph No.**
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AUTHORITY	**Cited in Factum at Paragraph No.**
Sharbern Holding Inc. v. *Vancouver Airport Centre Ltd.*, [2011] 2 S.C.R. 175	106
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PART VII - SCHEDULE OF STATUTES

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The Indian Lands Act, 1924, S.C. 1924, c. 48, Schedule	104
The Indian Lands Act, S.O. 1924, c. 15, Schedule A	104

CANADA

CONSOLIDATION

CODIFICATION

Indian Act

Loi sur les Indiens

R.S.C., 1985, c. I-5

L.R.C. (1985), ch. I-5

Current to March 16, 2014

À jour au 16 mars 2014

Last amended on April 1, 2013

Dernière modification le 1 avril 2013

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:

(*a*) the interest of an Indian or a band in reserve lands or surrendered lands; and

(*b*) the personal property of an Indian or a band situated on a reserve.

Idem

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

Idem

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(*a*) or (*b*) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

R.S., 1985, c. I-5, s. 87; 2005, c. 9, s. 150; 2012, c. 19, s. 677.

cière des premières nations, les biens suivants sont exemptés de taxation :

a) le droit d'un Indien ou d'une bande sur une réserve ou des terres cédées;

b) les biens meubles d'un Indien ou d'une bande situés sur une réserve.

Idem

(2) Nul Indien ou bande n'est assujetti à une taxation concernant la propriété, l'occupation, la possession ou l'usage d'un bien mentionné aux alinéas (1)*a*) ou *b*) ni autrement soumis à une taxation quant à l'un de ces biens.

Idem

(3) Aucun impôt sur les successions, taxe d'héritage ou droit de succession n'est exigible à la mort d'un Indien en ce qui concerne un bien de cette nature ou la succession visant un tel bien, si ce dernier est transmis à un Indien, et il ne sera tenu compte d'aucun bien de cette nature en déterminant le droit payable, en vertu de la *Loi fédérale sur les droits successoraux*, chapitre 89 des Statuts revisés du Canada de 1952, ou l'impôt payable, en vertu de la *Loi de l'impôt sur les biens transmis par décès*, chapitre E-9 des Statuts revisés du Canada de 1970, sur d'autres biens transmis à un Indien ou à l'égard de ces autres biens.

L.R. (1985), ch. I-5, art. 87; 2005, ch. 9, art. 150; 2012, ch. 19, art. 677.

LEGAL RIGHTS

General provincial laws applicable to Indians

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

R.S., 1985, c. I-5, s. 88; 2005, c. 9, s. 151; 2012, c. 19, s. 678.

DROITS LÉGAUX

Lois provinciales d'ordre général applicables aux Indiens

88. Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou la *Loi sur la gestion financière des premières nations* ou quelque arrêté, ordonnance, règle, règlement ou texte législatif d'une bande pris sous leur régime, et sauf dans la mesure où ces lois provinciales contiennent des dispositions sur toute question prévue par la présente loi ou la *Loi sur la gestion financière des premières nations* ou sous leur régime.

L.R. (1985), ch. I-5, art. 88; 2005, ch. 9, art. 151; 2012, ch. 19, art. 678.

Restriction on mortgage, seizure, etc., of property on reserve

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

Inaliénabilité des biens situés sur une réserve

89. (1) Sous réserve des autres dispositions de la présente loi, les biens d'un Indien ou d'une bande situés sur une réserve ne peuvent pas faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécu-

ACTS

OF THE

PARLIAMENT

OF THE

DOMINION OF CANADA

PASSED IN THE SESSION HELD IN THE

FOURTEENTH AND FIFTEENTH YEARS OF THE REIGN OF HIS MAJESTY

KING GEORGE V

BEING THE

THIRD SESSION OF THE FOURTEENTH PARLIAMENT

Begun and holden at Ottawa, on the Twenty-eighth day of February, 1924, and closed by Prorogation on the Nineteenth day of July, 1924.

HIS EXCELLENCY THE MOST NOBLE

JULIAN HEDWORTH GEORGE, BARON BYNG OF VIMY

GOVERNOR GENERAL

VOL. I

PUBLIC GENERAL ACTS

OTTAWA
PRINTED BY F. A. ACLAND
LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
ANNO DOMINI 1924

CHAP. 48.

An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands.

[*Assented to 19th July, 1924.*]

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Agreement binding, and Governor in Council authorized to carry out its provisions.

1. The agreement between the Dominion of Canada and the Province of Ontario, in the terms set out in the schedule hereto, shall be as binding on the Dominion of Canada as if the provisions thereof had been set forth in an Act of this Parliament, and the Governor in Council is hereby authorized to carry out the provisions of the said agreement.

SCHEDULE.

MEMORANDUM OF AGREEMENT made in triplicate this 24th day March 1924.

BETWEEN the Government of the Dominion of Canada, acting herein by the Honourable Charles Stewart, Superintendent General of Indian Affairs, of the first part,

AND the Government of the Province of Ontario, acting herein by the Honourable James Lyons, Minister of Lands and Forests, and the Honourable Charles McCrea, Minister of Mines, of the second part.

WHEREAS from time to time treaties have been made with the Indians for the surrender for various considerations of their personal and usufructuary rights to territories now included in the Province of Ontario, such considerations including the setting apart for the exclusive use of the Indians of certain defined areas of land known as Indian Reserves;

AND WHEREAS, except as to such Reserves, the said territories were by the said treaties freed, for the ultimate benefit of the Province of Ontario, of the burden of the Indian rights, and became subject to be administered by the Government of the said Province for the sole benefit thereof;

AND WHEREAS the surrender of the whole or some portion of a Reserve by the band of Indians to whom the same was allotted has, in respect of certain Reserves in the Provinces of Ontario and Quebec, been under consideration in certain appeals to the Judicial Committee of the Privy Council, and the respective rights of the Dominion of Canada and the Province of Ontario, upon such surrenders being made, depend upon the law as declared by the Judicial Committee of the Privy Council and otherwise affecting the Reserve in question, and upon the circumstances under which it was set off;

AND WHEREAS on the 7th day of July, 1902, before the determination of the last two of the said appeals, it had been agreed between counsel for the Governments of the Dominion of Canada and the Province of Ontario, respectively, that, as a matter of policy and convenience, and without thereby affecting the constitutional or legal rights of either of the said Governments, the Government of the Dominion of Canada should have full power and authority to sell, lease and convey title in fee simple or for any less estate to any lands forming part of any Reserve thereafter surrendered by the Indians, and that any such sales, leases or other conveyances as had theretofore been made by the said Government should be confirmed by the Province of Ontario, the Dominion of Canada, however, holding the proceeds of any lands so sold, leased or conveyed subject, upon the extinction of the Indian interest therein and so far as such proceeds had been converted into money, to such rights of the Province of Ontario as might exist by law;

AND WHEREAS by the said agreement it was further provided that, as to the Reserves set aside for the Indians under a certain treaty made in 1873 and recited in the Schedule to the Dominion Statute, 54-55 Victoria, chapter 5, and the Statute of the Province of Ontario, 54 Victoria, chapter 3, the precious metals should be considered to form part thereof and might be disposed of by the Dominion of Canada in the same way and subject to the same conditions as the land in which they existed, and that the question whether the precious metals in the lands included in Reserves set aside under other treaties were to be considered as forming part thereof or not, should be expressly left for decision in accordance with the circumstances and the law governing each;

NOW THIS AGREEMENT WITNESSETH that the parties hereto, in order to settle all outstanding questions relating to Indian Reserves in the Province of Ontario, have mutually agreed, subject to the approval of the Parliament of Canada and the Legislature of the Province of Ontario, as follows:—

1. All Indian Reserves in the Province of Ontario heretofore or hereafter set aside, shall be administered by the Dominion of Canada for the benefit of the band or bands of Indians to which each may have been or may be allotted; portions thereof may, upon their surrender for the purpose by the said band or bands, be sold, leased or otherwise disposed of by letters patent under the Great Seal of Canada, or otherwise under the direction of the Government of Canada, and the proceeds of such sale, lease or other disposition applied for the benefit of such band or bands, provided, however, that in the event of the band or bands to which any such Reserve has been allotted becoming extinct, or if, for any other reason, such Reserve, or any portion thereof is declared by the Superintendent General of Indian Affairs to be no longer required for the benefit of the said band or bands, the same shall thereafter be administered by, and for the benefit of, the Province of Ontario, and any balance of the proceeds of the sale or other disposition of any portion thereof then remaining under the control of the Dominion of Canada shall, so far as the same is not still required to be applied for the benefit of the said band or bands of Indians, be paid to the Province of Ontario, together with accrued unexpended simple interest thereon.

2. Any sale, lease or other disposition made pursuant to the provisions of the last preceding paragraph may include or may be limited to the minerals (including the precious metals) contained in or under the lands sold, leased or otherwise disposed of, but every grant shall be subject to the provisions of the statute of the Province of Ontario entitled "The Bed of Navigable Waters Act", Revised Statutes of Ontario, 1914, chapter thirty-one.

3. Any person authorized under the laws of the Province of Ontario to enter upon land for the purpose of prospecting for minerals thereupon shall be permitted to prospect for minerals in any Indian Reserve upon obtaining permission so to do from the Indian Agent for such Reserve and upon complying with such conditions as may be attached to such permission, and may stake out a mining claim or claims on such Reserve.

4. No person not so authorized under the laws of the Province of Ontario shall be given permission to prospect for minerals upon any Indian Reserve.

5. The rules governing the mode of staking and the size and number of mining claims in force from time to time

 in

in the Province of Ontario or in the part thereof within which any Indian Reserve lies shall apply to the staking of mining claims on any such Reserve, but the staking of a mining claim upon any Indian Reserve shall confer no rights upon the person by whom such claim is staked except such as may be attached to such staking by the Indian Act or other law relating to the disposition of Indian Lands.

6. Except as provided in the next following paragraph, one-half of the consideration payable, whether by way of purchase money, rent, royalty or otherwise, in respect of any sale, lease or other disposition of a mining claim staked as aforesaid, and, if in any other sale, lease or other disposition hereafter made of Indian Reserve lands in the Province of Ontario, any minerals are included, and the consideration for such sale, lease or other disposition was to the knowledge of the Department of Indian Affairs affected by the existence or supposed existence in the said lands of such minerals, one-half of the consideration payable in respect of any such other sale, lease or other disposition, shall forthwith upon its receipt from time to time, be paid to the Province of Ontario; the other half only shall be dealt with by the Dominion of Canada as provided in the paragraph of this agreement numbered 1.

7. The last preceding paragraph shall not apply to the sale, lease or other disposition of any mining claim or minerals on or in any of the lands set apart as Indian Reserves pursuant to the hereinbefore recited treaty made in 1873, and nothing in this agreement shall be deemed to detract from the rights of the Dominion of Canada touching any lands or minerals granted or conveyed by His Majesty for the use and benefit of Indians by letters patent under the Great Seal of the Province of Upper Canada, of the Province of Canada or of the Province of Ontario, or in any minerals vested for such use and benefit by the operation upon any such letters patent of any statute of the Province of Ontario.

8. No water-power included in any Indian Reserve, which in its natural condition at the average low stage of water has a greater capacity than five hundred horse-power, shall be disposed of by the Dominion of Canada except with the consent of the Government of the Province of Ontario and in accordance with such special agreement, if any, as may be made with regard thereto and to the division of the purchase money, rental or other consideration given therefor.

9. Every sale, lease or other disposition heretofore made under the Great Seal of Canada or otherwise under the direction of the Government of Canada of lands which were at the time of such sale, lease or other disposition included in any Indian Reserve in the Province of Ontario, is hereby confirmed, whether or not such sale, lease or

other disposition included the precious metals, but subject to the provisions of the aforesaid statute of the Province of Ontario entitled "The Bed of Navigable Waters Act", and the consideration received in respect of any such sale lease or other disposition shall be and continue to be dealt with by the Dominion of Canada in accordance with the provisions of the paragraph of this agreement numbered 1, and the consideration received in respect of any sale, lease or other disposition heretofore made under the Great Seal of the Province of Ontario, or under the direction of the Government of the said Province, of any lands which at any time formed part of any Indian Reserve, shall remain under the exclusive control and at the disposition of the Province of Ontario.

10. Nothing herein contained, except the provision for the application of "The Bed of Navigable Waters Act" aforesaid, shall affect the interpretation which would, apart from this agreement, be put upon the words of any letters patent heretofore or hereafter issued under the Great Seal of Canada or the Great Seal of the Province of Ontario, or of any lease or other conveyance, or of any contract heretofore or hereafter made under the direction of the Government of Canada or of the Province of Ontario.

IN WITNESS WHEREOF these presents have been signed by the parties thereto the day and year above written.

Signed on behalf of the Government of Canada by the Honourable Charles Stewart, Superintendent General of Indian Affairs, in the presence of

CHARLES STEWART.

DUNCAN C. SCOTT.

Signed on behalf of the Government of the Province of Ontario by the Honourable James Lyons, Minister of Lands and Forests, and by the Honourable Charles McCrea, Minister of Mines, in the presence of

JAS. LYONS.

C. MCCREA.

W. C. CAIN.

(SEAL)

(SEAL)

OTTAWA: Printed by F. A. ACLAND, Law Printer to the King's Most Excellent Majesty.

STATUTES

OF THE

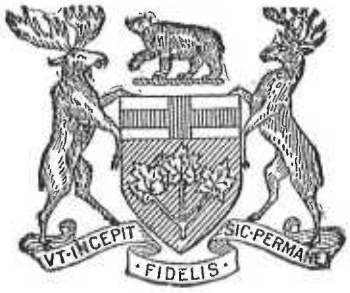
PROVINCE OF ONTARIO

PASSED IN THE SESSION HELD IN THE

Fourteenth Year of the Reign of His Majesty KING GEORGE V

Being the First Session of the Sixteenth Legislature of Ontario

BEGUN AND HOLDEN AT TORONTO ON THE SIXTH DAY OF FEBRUARY IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND TWENTY-FOUR.



HIS HONOUR HENRY COCKSHUTT
LIEUTENANT-GOVERNOR

TORONTO:
Printed and Published by Clarkson W. James, Printer to the King's Most Excellent Majesty
1924

CHAPTER 15.

An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands.

Assented to 17th April, 1924.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title.

1. This Act may be cited as *The Indian Lands Act, 1924.*

Agreement with Dominion as to minerals in Indian lands.

2. The agreement between the Dominion of Canada and the Province of Ontario, in the terms set out in Schedule "A" hereto, shall be as binding on the Province of Ontario as if the provisions thereof had been set forth in an Act of this Legislature, and the Lieutenant-Governor in Council is hereby authorized to carry out the provisions of the said agreement.

SCHEDULE "A".

Memorandum of Agreement made in triplicate this 24th day of March, 1924.

Between:

THE GOVERNMENT OF THE DOMINION OF CANADA, acting herein by the Honourable Charles Stewart, Superintendent General of Indian Affairs,

of the first part,

—and—

THE GOVERNMENT OF THE PROVINCE OF ONTARIO, acting herein by the Honourable James Lyons, Minister of Lands and Forests, and the Honourable Charles McCrea, Minister of Mines,

of the second part.

Whereas from time to time treaties have been made with the Indians for the surrender for various considerations of their personal and usufructuary rights to territories now included in the Province of Ontario, such considerations including the setting apart for the exclusive use of the Indians of certain defined areas of land known as Indian Reserves;

And whereas, except as to such Reserves, the said territories were by the said treaties freed, for the ultimate benefit of the Province of Ontario, of the burden of the Indian rights, and became subject to be administered by the Government of the said Province for the sole benefit thereof;

And

And whereas the surrender of the whole or some portion of a Reserve by the band of Indians to whom the same was allotted has, in respect of certain Reserves in the Provinces of Ontario and Quebec, been under consideration in certain appeals to the Judicial Committee of the Privy Council, and the respective rights of the Dominion of Canada and the Province of Ontario, upon such surrenders being made, depend upon the law as declared by the Judicial Committee of the Privy Council and otherwise affecting the Reserve in question, and upon the circumstances under which it was set off;

And whereas on the 7th day of July, 1902, before the determination of the last two of the said appeals, it had been agreed between counsel for the Governments of the Dominion of Canada and the Province of Ontario, respectively, that, as a matter of policy and convenience, and without thereby affecting the constitutional or legal rights of either of the said Governments, the Government of the Dominion of Canada should have full power and authority to sell, lease and convey title in fee simple or for any less estate to any lands forming part of any Reserve thereafter surrendered by the Indians, and that any such sales, leases or other conveyances as had theretofore been made by the said Government should be confirmed by the Province of Ontario, the Dominion of Canada, however, holding the proceeds of any lands so sold, leased or conveyed subject, upon the extinction of the Indian interest therein and so far as such proceeds had been converted into money, to such rights of the Province of Ontario as might exist by law;

And whereas by the said agreement it was further provided that, as to the Reserves set aside for the Indians under a certain treaty made in 1873 and recited in the Schedule to the Dominion Statute, 54-55 Victoria, chapter 5, and the Statute of the Province of Ontario, 54 Victoria, chapter 3, the precious metals should be considered to form part thereof and might be disposed of by the Dominion of Canada in the same way and subject to the same conditions as the land in which they existed, and that the question whether the precious metals in the lands included in Reserves set aside under other treaties were to be considered as forming part thereof or not, should be expressly left for decision in accordance with the circumstances and the law governing each.

Now this agreement witnesseth that the parties hereto, in order to settle all outstanding questions relating to Indian Reserves in the Province of Ontario, have mutually agreed, subject to the approval of the Parliament of Canada and the Legislature of the Province of Ontario, as follows:—

1. All Indian Reserves in the Province of Ontario heretofore or hereafter set aside, shall be administered by the Dominion of Canada for the benefit of the band or bands of Indians to which each may have been or may be allotted; portions thereof may, upon their surrender for the purpose by the said band or bands, be sold, leased or otherwise disposed of by letters patent under the Great Seal of Canada, or otherwise under the direction of the Government of Canada, and the proceeds of such sale, lease or other disposition applied for the benefit of such band or bands, provided, however, that in the event of the band or bands to which any such Reserve has been allotted becoming extinct, or if, for any other reason, such Reserve, or any portion thereof, is declared by the Superintendent General of Indian Affairs to be no longer required for the benefit of the said band or bands, the same shall thereafter be administered by, and for the benefit of, the Province of Ontario, and any balance of the proceeds of the sale or other disposition of any portion thereof then remaining under the control of the Dominion of Canada shall, so far as the same is not still required to be applied for the benefit of the said band or bands of Indians, be paid to the Province of Ontario, together with accrued unexpended simple interest thereon.

2. Any sale, lease or other disposition made pursuant to the provisions of the last preceding paragraph may include or may be limited to the minerals (including the precious metals) contained in or under the lands sold, leased or otherwise disposed of, but every grant shall be subject to the provisions of the Statute of the Province of Ontario entitled, "The Bed of Navigable Waters Act," Revised Statutes of Ontario, 1914, Chapter 31.

3. Any person authorized under the laws of the Province of Ontario to enter upon land for the purpose of prospecting for minerals thereupon shall be permitted to prospect for minerals in any Indian Reserve upon obtaining permission so to do from the Indian Agent for such Reserve and upon complying with such conditions as may be attached to such permission, and may stake out a mining claim or claims on such Reserve.

4. No person not so authorized under the laws of the Province of Ontario shall be given permission to prospect for minerals upon any Indian Reserve.

5. The rules governing the mode of staking and the size and number of mining claims in force from time to time in the Province of Ontario or in the part thereof within which any Indian Reserve lies shall apply to the staking of mining claims on any such Reserve, but the staking of a mining claim upon any Indian Reserve shall confer no rights upon the person by whom such claim is staked except such as may be attached to such staking by The Indian Act or other law relating to the disposition of Indian Lands.

6. Except as provided in the next following paragraph, one-half of the consideration payable, whether by way of purchase money, rent, royalty or otherwise, in respect of any sale, lease or other disposition of a mining claim staked as aforesaid, and, if in any other sale, lease or other disposition hereafter made of Indian Reserve lands in the Province of Ontario, any minerals are included, and the consideration for such sale, lease or other disposition was to the knowledge of the Department of Indian Affairs affected by the existence or supposed existence in the said lands of such minerals, one-half of the consideration payable in respect of any such other sale, lease or other disposition, shall forthwith upon its receipt from time to time, be paid to the Province of Ontario; the other half only shall be dealt with by the Dominion of Canada as provided in the paragraph of this agreement numbered 1.

7. The last preceding paragraph shall not apply to the sale, lease or other disposition of any mining claim or minerals on or in any of the lands set apart as Indian Reserves pursuant to the hereinbefore recited treaty made in 1873, and nothing in this agreement shall be deemed to detract from the rights of the Dominion of Canada touching any lands or minerals granted or conveyed by His Majesty for the use and benefit of Indians by letters patent under the Great Seal of the Province of Upper Canada, of the Province of Canada or of the Province of Ontario, or in any minerals vested for such use and benefit by the operation upon any such letters patent of any statute of the Province of Ontario.

8. No water power included in any Indian Reserve, which in its natural condition at the average low stage of water has a greater capacity than 500 horse-power, shall be disposed of by the Dominion of Canada except with the consent of the Government of the Province of Ontario and in accordance with such special agreement, if any, as may be made with regard thereto and to the division of the purchase money, rental or other consideration given therefor.

9. Every sale, lease or other disposition heretofore made under the Great Seal of Canada or otherwise under the directions of the Government of Canada of lands which were at the time of such sale, lease or other disposition included in any Indian Reserve in the Province of Ontario, is hereby confirmed, whether or not such sale, lease or other disposition included the precious metals, but subject to the provisions of the aforesaid statute of the Province of Ontario entitled "The Bed of Navigable Waters Act," and the consideration received in respect of any such sale, lease or other disposition shall be and continue to be dealt with by the Dominion of Canada in accordance with the provisions of the paragraph of this agreement numbered 1, and the consideration received in respect of any sale, lease or other disposition heretofore made under the Great Seal of the Province of Ontario, or under the direction of the Government of the said Province of any lands which at any time formed part of any Indian Reserve, shall remain under the exclusive control and at the disposition of the Province of Ontario.

10. Nothing herein contained, except the provision for the application of The Bed of Navigable Waters Act aforesaid, shall affect the interpretation which would apart from this agreement, be put upon the words of any letters patent heretofore or hereafter issued under the Great Seal of Canada or the Great Seal of the Province of Ontario, or of any lease or other conveyance, or of any contract heretofore or hereafter made under the direction of the Government of Canada or of the Province of Ontario.

In witness whereof these presents have been signed by the parties thereto the day and year above written.

Signed on behalf of the Government of Canada by the Honourable Charles Stewart, Superintendent General of Indian Affairs, in the presence of:

DUNCAN C. SCOTT.

CHAS. STEWART.

Signed on behalf of the Government of the Province of Ontario by the Honourable James Lyons, Minister of Lands and Forests, and by the Honourable Charles McCrea, Minister of Mines, in the presence of:

W. C. CAIN.

JAMES LYONS (L.S.)

C. MCCREA (L.S.)

CHAPTER