File No. 35379

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

BETWEEN:

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

Appellants

- and -

MINISTER OF NATURAL RESOURCES, RESOLUTE FP CANADA INC. (formerly ABITIBI-CONSOLIDATED INC.), THE ATTORNEY GENERAL OF CANADA and GOLDCORP INC.

Respondents

-and -

ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, 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 the COWICHAN TRIBES, LAC SEUL FIRST NATION and SANDY LAKE FIRST NATION, ASSEMBLY OF FIRST NATIONS/NATIONAL INDIAN BROTHERHOOD (PROPOSED INTERVENER)

Interveners

AND BETWEEN:

LESLIE CAMERON, ON HIS ON BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF WABAUSKANG FIRST NATION

Appellants

- and -

MINISTER OF NATURAL RESOURCES, RESOLUTE FP CANADA INC. (formerly ABITIBI-CONSOLIDATED INC.), THE ATTORNEY GENERAL OF CANADA and GOLDCORP INC.

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Interveners

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The decision of the Court of Appeal for Ontario ("OCA") provides a clear and concise application of well-settled law to the facts of this case. It is not in conflict with the decisions of this court or with other Canadian appellate courts. It confirms long-standing constitutional practice and promotes, rather than hinders, the reconciliation process.

2. The trial judge determined that only the federal government could validly authorize the "taking-up" of lands for "settlement, mining, lumbering, and other purposes" within the Keewatin Lands.[1] The trial decision effectively found that Ontario had acted without jurisdiction, from the time the Keewatin Lands were added to Ontario in 1912, in authorizing land uses that might interfere with hunting, trapping or fishing.

3. In reversing the trial decision, the OCA has restored the land use regime that has existed in the Keewatin Lands for over 100 years. It accords with the allocation and division of powers between the federal and provincial governments, which has been understood and acted upon since the Privy Council's 1888 decision in *St. Catherine's Milling*.[2]

4. Contrary to the submissions of the appellants, the OCA decision neither changes the federal government's section 91(24) jurisdiction, nor modifies Treaty 3. [3] In particular:

(a) The OCA decision does not take away or modify Canada's responsibility for treaties under section 91(24). The decision is consistent with both Canada's on-going jurisdiction for treaties and Ontario's jurisdiction to administer lands within its borders. The appellants confuse the taking up of lands under the treaty as being either an impairment of treaty rights or the regulation of harvesting activities. It is neither. The taking-up is actually an implementation of the treaty.

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[1] The taking up (or harvesting) clause reads as follows:

> ... the said Indians shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered ... 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, or by any of the subjects thereof duly authorized therefor, by the said Government.

[2] *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 AC 46 (JCPC), Resolute Brief of Authorities, ("RBA"), Tab 25

[3] Grassy Narrows Factum, paragraph 66, Wabauskang Factum, paragraph 109

(b) The OCA decision does not create inconsistencies in the law. In fact, it is consistent with constitutional practice across the country, including in the areas of Ontario and Canada that have similarly worded treaties. When a private party, such as Resolute FP Canada Inc., wishes to obtain a forestry licence, it deals with the government that administers the land. This court's decision in *Mikisew* requires such government to consult with and where applicable accommodate First Nations, if granting such a licence may adversely affect harvesting. There is no need for a two step process that includes an additional federal authorization. At paragraph 153 of its reasons, the OCA states:

> *The two-step process is unnecessary to protect the Aboriginal Treaty Harvesting Right because when the Crown, through Ontario, takes up land, it must respect the Treaty Right.* [4]

(c) The OCA decision does not modify Treaty 3. The power to take up land can only be, and was always meant to be, exercised by the government that has control of the land. When Treaty 3 was signed, the Government of the Dominion of Canada was believed to have beneficial ownership of the land, and therefore the power to take up land.[5] This power to take up land emanated from beneficial ownership, not from its section 91(24) jurisdiction.

(d) The OCA decision does not change the division of powers. When the Keewatin Lands were added to Ontario in 1912, the province merely exercised powers already vested in it by section 109 of the constitution with respect to lands within its borders. The only change was the "level of government on whose advice the Crown acts". [6]

(e) The OCA decision correctly finds that an approval process that requires federal government involvement whenever there is an allegation that harvesting may be adversely affected is contrary to the goal of reconciliation. The OCA found that the two-step authorization process would render provincial power "illusory". Both Ontario and the private interests seeking land use authorizations would always be

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[4] Appeal Reasons, paragraph 153, Appellants' Record, Volume 2, Tab 3
[5] Appeal Reasons, paragraph 145
[6] Appeal Reasons, paragraph 136

susceptible to a claim that there was, or will be, a significant interference with harvesting. Merely making the claim would involve the federal government, and may cause further litigation and uncertainty.

5. This court's decision will affect not only the interests of Resolute and other forestry industry participants, it will affect the ownership, operations and management of natural resources and property throughout the Keewatin Lands. The trial judge stated that the effect of her judgment "may not be as significant as might appear at first blush". She also said that the Keewatin Lands are "largely undeveloped" and "virgin territory". These statements fail to take into account the fact that there are many residential settlements, forestry operations, transportation infrastructure, mining operations and other natural resource developments, all of which are regulated by Ontario. Numerous private interests have relied upon, and continue to rely upon, the patents, permits and licences that have been granted by Ontario.

6. The trial decision is inconsistent with Canada's constitutional practice. If it is restored, it may affect private interests in other areas of Ontario and Canada covered by treaties that contain similar language to Treaty 3. The provinces of Manitoba, Saskatchewan and Alberta are in the same position as Ontario in that Treaties 4, 5, 6, 7 and 8 have similar or identical taking up clauses to Treaty 3.

B. STATEMENT OF FACTS

7. Resolute relies on the facts and factual analysis set out in the reasons of the OCA. Resolute does not agree that the OCA "accepted" or "left undisturbed" certain findings of fact of the trial judge, including (as stated by Wabauskang) the "common intentions of the parties to Treaty 3". The OCA did not accept such findings. Wabauskang misapprehends the OCA's identification of the trial judge's findings as a recitation of accepted facts. The OCA merely identified the findings before it explained why they could not stand.[7]

8. Resolute further relies on the facts stated in the facta of the Minister of Natural Resources, the Attorney General of Canada and Goldcorp Inc. In addition, Resolute relies on the facts set out in the following paragraphs.

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[7] Appeal Reasons, paragraphs 23, 73-75, 134, 159, 160, 162; Wabauskang Factum, paragraphs 22, 43, 44

a) Resolute's interest

9. The respondent Resolute FP Canada Inc. ("Resolute") was formerly known as Abitibi-Consolidated Inc. Resolute owns and operates a (currently idled) paper mill in Fort Frances. It also operated a paper mill in Kenora until it was closed in 2005. Fort Frances and Kenora are located on land subject to Treaty 3, although they are not part of the Keewatin Lands.

10. Resolute was named as a defendant in this litigation because forestry operations carried out in certain parts of the Whiskey Jack Forest (some of which is in the Keewatin Lands), under the authority of Resolute's Sustainable Forest Licence ("SFL"), were considered by Grassy Narrows to be an infringement of Treaty 3 harvesting rights. The SFL was granted by Ontario. Its issuance was considered by Grassy Narrows to be a taking-up of land for forestry purposes that Ontario had no jurisdiction to carry out.[8]

11. Resolute and other private entities have processed wood harvested from the Whiskey Jack Forest, as well as other forest management units in the Kenora area, including the "Trout", "Red Lake", "Kenora" and "Lac Seul" Forests. These forests are located at least in part in the Keewatin Lands. Forestry operations were commenced in the Keewatin Lands by the Keewatin Lumber Company and Minnesota-Ontario Lumber Company in the early 1920s.[9]

12. In September 2008, Resolute entered into discussions with Ontario leading to the surrender of the Whiskey Jack Forest SFL. These were concluded on September 29, 2009. In April 2009, Resolute entered into protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). Resolute participated in the trial of this matter commencing September 14, 2009 but withdrew from further participation on November 16, 2009. Resolute was thereafter successfully reorganized, and it emerged from creditor protection on December 9, 2010.[10] It participated fully in the appeal of the trial judgment to the OCA.

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[8] Appeal Reasons, paragraphs 5 and 15

[9] *Description of Nature and Scope of Commercial Forestry Operations in the Treaty 3 Area from 1873 through to 1930, Ontario Portion*, dated June 23, 2008 ("Williams Report"), Exhibit 98, Appeal Record ("AR"), Volume 74, Tab 183, Resolute Extract Book ("REB,"), Tab 11

[10] Appeal Reasons, paragraph 15

b) Levels of Government in the Treaty 3 area

i) Imperial, Colonial, Dominion, Provincial and Territorial

13. The Dominion of Canada was six years old at the time Treaty 3 was negotiated. Much of the lands at issue had become part of Ontario in 1867 or, with respect to the Keewatin Lands, added to the Dominion of Canada in 1870. The people who led the federal government had only recently led provincial governments.[11]

14. Between 1763 (the date of the Royal Proclamation) and 1873, there had been at least five forms of government (Imperial, Colonial, Provincial, Dominion and Territorial) representing the Queen in what is now north-western Ontario. As the OCA found, however, and in accordance with *St. Catherine's Milling*, the underlying legal estate remained vested in the Crown. [12] Beneficial ownership, on the other hand, devolved to the different levels of government that administered the various lands, including the Province of Canada in 1840, the Province of Ontario in 1867 (albeit subject to dispute until 1888) , the federal government (as administrator of the North-West Territories) in 1870, and (with respect to the Keewatin Lands) Ontario again in 1912

15. There is no evidence that the Ojibway distinguished between levels of government at any time up to 1873. There is evidence, however, that they wanted the discussions to be taken seriously by the people who came to negotiate with them. Commissioner Dawson in his memorandum to H.L. Langevin, Minister of Public Works, on June 2, 1873, describes what he understands to be the Ojibway desire for governmental "ceremony and display" in the up-coming treaty discussions:

> *They feel and know that the treaty is the matter of the greatest importance to them and when they see the Commissioners coming unattended as they have so far done, ... they are led to the belief that the government of Canada attaches but little importance to the negotiations which are to them of the greatest moment. The appearance amongst them of the Governor of a Province attending with the becoming retinue would entirely do away with this idea ...*[13]

16. The "Governor of the Province" is Alexander Morris, Lieutenant Governor of Manitoba (and the North-West Territories). In 1870, the Parliament of Canada created the requisite

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[11] Trial Reasons, paragraph 40, Appellants' Record, Volume 1, Tab 2
[12] Appeal Reasons, paragraphs 115, 116 and 139
[13] Memorandum of Commissioner Dawson dated June 2, 1873, Exhibit 1, AR, Volume 19, Tab 69, REB, Tab 15

machinery for the government of the Province of Manitoba and the North-West Territories, respectively. Manitoba was given a Lieutenant Governor and legislature and the North-West Territories was given a Lieutenant Governor and Council. The Lieutenant Governor of Manitoba was *ex officio* Lieutenant Governor of the North-West Territories.[14] Accordingly, even if the Ojibway had enquired about the particular government represented by Morris, the answer may have been confusing.

17. By the mid-1890's, the Ojibway knew that there was more than one government in Canada. They also knew that the Ontario government, as opposed to the federal government, was authorizing the taking up of land in parts of the Treaty 3 area. Other parts of Treaty 3 were in Manitoba, the District of Keewatin (established in 1876) or, after 1905, the North-West Territories. In 1912, the Keewatin Lands became part of Ontario and all of Treaty 3 was then in either Ontario or Manitoba. The federal government continued to administer that part of Treaty 3 in Manitoba until the NRTAs came into effect in 1930.[15]

c) Morris' view of Treaty 3 and other treaties

18. Morris wrote extensively on the treaties for which he was a commissioner (Treaties 3, 4, 5 and 6) and made a number of statements reflecting his overall views.[16] His comments relating to Treaty 3 must be considered when determining the understanding and intentions of the federal government. The following examples are noteworthy:

> *... The treaties are all based upon the models of that made at the Stone Fort in 1871 [Treaty 1] and the one made in 1873 at the north-west angle of the Lake of the Woods with the Chippewa tribes, [Treaty 3] and these again are based, in many material features, on those made by the Honourable W.B. Robinson with the Chippewas dwelling on the shores of Lakes Huron and Superior in 1860. [Robinson Huron Treaty and Robinson Superior Treaty]*
>
> *These 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*

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[14] Morris Treaty Text, Exhibit 9, AR, Volume 59, Tab 89, page 10, REB, Tab 16
[15] Chartrand examination in chief, January 18, 2010, Volume 12, page 5046, lines 15-21, REB, Tab 17; *Understandings by Treaty 3 Signatories*, dated June 18, 2008 ("Chartrand Report"), Exhibit 60, AR, Volumes 70, Tab 141, page 409, REB, Tab 17; Natural Resource Transfer Agreements, REB, Tab 17
[16] Appeal Reasons, paragraph 163

> *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 passed from the Crown into the occupation of individuals or otherwise. ...*
>
> *... 4. The allotment of lands to the Indians, to be set aside as reserves for them for homes and agricultural purposes*
>
> *[Treaty 3] was one of great importance, as it not only tranquilized the large Indian population affected by it, but eventually it shaped the terms of all the treaties four, five, six and seven ...*[17]

i) Robinson Superior Treaty

19. The Robinson Superior Treaty referred to by Morris includes the following:

> *And the said William Benjamin Robinson of the First Part, on behalf of Her Majesty and the Government of this Province, hereby promises ... to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the Provincial Government. (emphasis added)*

ii) Treaty 1

20. Treaty 1 does not contain a harvesting or taking up clause. Nonetheless, the following is included in the memorandum made by Lieutenant Governor Archibald as to what he said in the negotiations:

> *When you have made your treaty you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond the place where the white man will require to go, at all events for some time to come. Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when the lands are need to be tilled or occupied, you must not go on them any more. ...*[18]

iii) Treaty 3

21. The Treaty 3 taking up clause reads:

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[17] Morris Treaty Text, Exhibit 9, AR, Volumes 58 and 59, Tab 89, pages 45, 285-288, 303, REB, Tab 18

[18] Memorandum of Lieutenant Governor Archibald, Exhibit 1, Tab 145, AR, Volume 17, Tab 68, REB, Tab 20; Morris Treaty Text, Exhibit 9, AR, Volume 59, Tab 89, page 29, REB, Tab 20

> *Her Majesty further agrees with Her said Indians that they, the said Indians, shall have 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, saving and excepting such tracts as may from time to time be required or taken for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government. (emphasis added)*[19]

22. Morris is reported to have made the following statement during the negotiations on October 1, 1873. He never resiled from it:

> *... It may be a long time before the other lands [outside the reserves] are wanted and in the meantime you will be permitted to fish and hunt over them.*[20]

iv) Treaty 4

23. The Treaty 4 taking up clause reads:

> *And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes under grants or other right given by Her Majesty's said Government.*[21] *(emphasis added)*

24. Morris is reported to have said the following during the negotiations of Treaty 4:

> *... We have come through the country for many days and we have seen hills but little wood and in many places little water, and it may be a long time before there are many white men settled upon this land, and you will have the right of hunting and fishing just as you have now until the land is actually taken up. ...*
>
> *... Lieut-Gov Morris – "Do we understand that you want the same terms which were given at the Lake of the Woods (The Indians assented). I have the Treaty here in a book. ... Now I have told you the terms we gave at the North-West Angle of the Lake of the Woods, and you will see that the only difference of any consequence between there and what we offered you is in the money payment that we gave as a present.*[22]

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[19] Morris Treaty Text, Exhibit 9, AR, Volume 59, Tab 89, page 323, REB, Tab 21
[20] Morris Treaty Text, Exhibit 9, AR, Volume 58, Tab 89, page 58, REB, Tab 22
[21] Morris Treaty Text, Exhibit 9, AR, Volume 59, Tab 89, page 333, REB, Tab 23
[22] Shorthand notes of Commissioner Dickieson, Secretary to the Commissioners, Morris Treaty Text, Exhibit 9, AR, Volume 58, Tab 89, pages 96 and 120-121, REB, Tab 24

v) Treaty 5

25. The Treaty 5 taking up clause reads as follows. It is identical to the Treaty 3 wording:

> *Her Majesty further agrees with her said Indians that they, the said Indians shall have 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 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, or by any of the subjects thereof duly authorized therefor by the said Government ...*[23] *(emphasis added)*

26. Morris writes in regard to Treaty 5:

> *The terms of the treaty were identical with those of Treaties Nos. 3 and 4, except that a smaller quantity of land is granted to each family ...*[24]

vi) Treaty 6

27. The Treaty 6 taking up clause reads as follows. It is identical to the Treaty 3 wording.

> *Her Majesty further agrees with her said Indians that they, the said Indians, shall have 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 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, or by any of the subjects thereof, duly authorized therefor, by the said Government.*[25] *(emphasis added)*

28. Morris wrote that Treaty 6 contained different terms regarding the provision of food than did the other numbered treaties. Otherwise, he stated:

> *The other terms were analogous to those of the previous treaties ...*[26]

29. In regard to Treaty 6, the following statements were included in Morris' report and in the report of the speeches:

> *[Lt-Gov. Morris] ... Understand me, I do not want to interfere with your hunting and fishing. I want you to pursue it through the country as you have heretofore done ... The country is wide and you are scattered, other people will come in. Now unless the places where you would like to live are secured soon, there might be*

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[23] Morris Treaty Text, Exhibit 9, AR, Volume 59, Tab 89, page 346, REB, Tab 25
[24] Morris Treaty Text, Exhibit 9, AR, Volume 58, Tab 89, page 145, REB, Tab 26
[25] Morris Treaty Text, Exhibit 9, AR, Volume 59, Tab 89, page 353, REB. Tab 27
[26] Morris Treaty Text, Exhibit 9, AR, Volume 58, Tab 89, page 178, REB, Tab 28

difficulty. The white man might come and settle on the very place where you would like to be.[27]

[Lt. Gov. Morris] ... This is the seventh time in the last five years that her Indian children have been called together for this purpose; this is the fourth time that I have met my Indian brothers, and standing on this bright day with the sun above us, I cast my eyes to the East down to the great lakes and I see a broad road leading from there to the Red River, I see it stretching on to Ellice, I see it branching there, the one to Qu'Appelle and Cypress Hills, the other by Pelly to Carlton; it is a wide and plain trail. ... All along that road I see Indians gathering, I see gardens growing and houses building; I see them receiving money from the Queen's commissioners to purchase clothing for their children; at the same time, I see them enjoying their hunting and fishing as before, I see them retain their old mode of living with the Queen's gift in addition. [28]

vii) Treaty 7

30. The Treaty 7 taking up clause reads as follows:

And Her Majesty the Queen hereby agrees with her said Indians, that they shall have right to pursue their vocations of hunting throughout the tract surrendered as heretofore described, subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty; and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, trading or other purposes by Her Government of Canada, or by any of her Majesty's subjects duly authorized therefor by the said Government. (emphasis added)[29]

31. Although Morris was not involved in the negotiation of Treaty 7, he wrote about it as follows in relation to Treaties 3 and 4:

The terms of the treaty were substantially the same as those contained in the North-West Angle and Qu'Appelle Treaties, except that as some of the bands were disposed to engage in pastoral pursuits, it was arranged to give them cattle instead of agricultural implements.[29]

viii) Treaty 8

32. Morris took no part in negotiating or reporting on Treaty 8. Nonetheless, its taking up clause is considered in *Mikisew* and in the trial reasons. The Treaty 8 taking up clause reads as follows:

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[27] Report of the Speeches by A.G. Jackes, Secretary to the Commission, Morris Treaty Text, Exhibit 9, AR, Volume 58, Tab 89, page 204, REB, Tab 29

[28] Morris Treaty Text, Exhibit 9, AR, Volume 59, Tab 89, page 231, REB, Tab 29

[29] Morris Treaty Text, Exhibit 9, AR, Volume 59, Tab 89, pages 369, 250, REB, Tab 31

> *And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes (emphasis added)*

33. The trial judge contrasted the terms and negotiations of Treaty 3 with those of Treaty 8 when she distinguished *Mikisew* from this case. Although the trial judge considered only the comments and evidence about Treaty 8 contained in *Mikisew*, other decisions of this court have discussed the Treaty 8 negotiations. These discussions show that the negotiations were similar in that the harvesting promise (and its limits), were important in both. A chart comparing several of the trial judge's and this court's statements on Treaty 8 are attached as Appendix A.

d) Taking up after 1873

i) Forestry

34. Logging in the Treaty 3 region would have been immediately evident following the signing of Treaty 3. The visible impact on the landscape, particularly at Lake of the Woods, was significant and extensive.[30]

35. The vast majority of the mature pine in the Treaty 3 area was harvested by the first decade of the 20th century. It is estimated that the volume of wood in the Treaty 3 area was reduced from 26 billion board feet in or about 1878 to approximately 2 billion board feet by 1908.[31] The majority of early pine harvesting in the Treaty 3 area, starting just after 1873, took place on the islands along the shores and tributary rivers of Lake of the Woods, Rainy Lake and Rainy River. This included the establishment of the Lake of the Woods Milling Company. As the economy developed, most accessible stands of pine were cut. As a result, lumbering operations expanded north of the boundary waters regions and into the Keewatin Lands by 1890. Before the

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[30] Williams Report, Exhibit 98, AR, Volume 74, Tab 183, pages 71-72, REB, Tab 34; Williams examination in chief, February 18, 2010, Volume 16, page 6928, lines 3-14, REB, Tab 34

[31] Williams Report, Exhibit 98, AR, Volume 74, Tab 183, pages 8-9, REB, Tab 35; Williams examination in chief, February 18, 2010, Volume 16, page 6909, line 3 – page 6910, line 9; page 6912, lines 3-21, REB, Tab 35; 1908 report, Exhibit 1, Tab 736, AR, Volume 47, Tab 79, REB, Tab 35

end of the first decade of the 20th century, forestry operations were employing English River area band members.[32]

36. In comparison to modern forestry practices, there were virtually no conservation efforts undertaken during the period from 1873-1930. For instance, there were no buffer strips left along lakes, rivers and ecological or archaeological features, as there are today. There was no requirement to leave timber standing nor enforcement of diameter limits.[33]

37. Forestry activity in the Treaty 3 area was authorized by the federal government from 1875 through 1885, when it was forced to stop issuing licences for the Treaty 3 area as a result of the decision in *St. Catherine's Milling*. Ontario became involved in forestry in the Treaty 3 area in the early to mid-1880s, monitoring and enforcing the law, initiating a fire prevention control program, charging duties and issuing licences to salvage burnt timber. By 1890, the province was actively selling timber limits and issuing forestry licences.[34]

38. Sawmills were established in the early 1880s both at Keewatin and Fort Frances. Both areas allowed these industries to take advantage of the considerable water power flowing from Lake of the Woods (at Keewatin) and from Rainy Lake (at Fort Frances).[35]

39. This water power was put to further use when pulp and paper mills were developed at Kenora, Dryden and Fort Frances. These operations were planned through the early years of the 20th century and put into production in or around 1914.[36] By 1891, there were six large sawmills in Keewatin, Norman and Rat Portage capable of supplying Winnipeg with fifty railcars per day of lumber.[37]

ii) Transportation

40. The Canadian Pacific Railway was completed through the Treaty 3 Lands in 1883. In addition, the Canadian Northern Railway was constructed through the Rainy River area in 1901 and completed in 1902. The Canadian National Railway, constructed north of the CPR, was

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[32] Chartrand Report, Exhibit 60, AR, Volume 70, Tab 141, page 365, REB, Tab 35; Williams Report, Exhibit 98, AR, Volume 74, Tab 183, pages 31, 69 and 72, REB, Tab 35; Williams examination in chief, February 18, 2010, Volume 16, page 6924, line 20 – page 6927, line 2, REB, Tab 35; Epp examination in chief, January 27, 2010, Volume 14, page 6119, lines 17-21, REB, Tab 35

[33] Williams cross-examination, February 19, 2010, Volume 16, pages 6988, line 5 – page 6990, line 11, REB, Tab 36

[34] Williams Report, Exhibit 98, AR, Volume 74, Tab 183, pages 29, 33, REB, Tab 37

[35] Epp examination in chief, January 28, 2010, Volume 15, page 6178, line 1 – page 6179, line 24, REB, Tab 38

[36] Epp examination in chief, January 28, 2010, Volume 15, page 6297, line 9 – page 6298, line 18; page 6299, lines 8-21, REB, Tab 39

[37] Williams examination in chief, February 18, 2010, Volume 16, page 6900, lines 3-18, REB, Tab 39

commenced in approximately 1905 and was completed through to Winnipeg by 1911. Each of these railways had significant impacts on the development of the Treaty 3 Lands. They facilitated movement of people, goods, freight, manufactured products and raw materials, and opened markets for agriculture and forestry.[38]

41. The government of Ontario recognized the need for improvements to overland transportation in new areas of settlement and a number of colonization roads were built in the Treaty 3 area, starting in 1890. The needs of miners led to the construction of several mining roads and trails in the late-1890s as Ontario assisted mine developers in linking their operations to the line of the CPR.[39]

iii) Mining

42. Mining development commenced almost immediately following the signing of Treaty 3. It began in the Lake of the Woods areas, particularly with the large Sultana Mine on Sultana Island. It spread to the Seine River basin, to the Manitou Lake, Wabigoon and Eagle Lake areas. The Canadian Pacific Railway made it possible to expand to Sturgeon Lake and Minnetakie and the eastern part of Shoal Lake. There were also mines at Red Lake, located north of the English River in the Keewatin Lands.[40]

43. In addition, the growth of mining brought with it development of mining communities, including homes, schools, commercial services, and government services. By 1901, these communities in the Treaty 3 area had a population of over 2,200 people.[41]

44. Mines and development were visible on the landscape as they would have required the clearing of lands and the building of shaft houses. The tailings and other waste from the mines would be visible above ground. The noise that resulted from mining operations would have been audible for some considerable distance around the location of the mine.[42]

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[38] Epp examination in chief, January 28, 2010, Volume 15, page 6206, line 6 – page 6207, line 6; page 6219, line 10 – page 6222, line 21; page 6223, lines 12-23; page 6227, line 22 – page 6228, line 7, REB, Tab 40

[39] *Euro-Canadian activities on the Treaty 3 lands within Ontario, 1873-1930*, dated June 2008 ("Epp Report"), Exhibit 74, AR, Volume 73, Tab 156, pages 224-225, 231, REB, Tab 41

[40] Epp Report, Exhibit 74, AR, Volume 73, Tab 156, pages 151, 154, 206, REB, Tab 42; Epp examination in chief, January 28, 2010, Volume 15, page 6276, line 22 – page 6278, line 22; page 6300, lines 7-13, REB, Tab 42

[41] Epp Report, Exhibit 74, AR, Volume 73, Tab 156, page 247, REB, Tab 43; Epp examination in chief, January 29, 2010, Volume 15, page 6317, line 1 – page 6318, line 15, REB, Tab 43

[42] Epp examination in chief January 28, 2010, Volume 15, page 6289, line 7 – 6294, line 11, REB, Tab 44

iv) Settlement

45. Urban development occurred initially at Fort Frances particularly in the 1876-1879 period and at Rat Portage (now Kenora) in the early 1880's. By 1891, a number of other urban areas in the Treaty 3 region had developed north of Lake of the Woods, along the railway line and in the Rainy River area. The total population of these urban centres was over 7,000 people. This was significant in comparison to the Ojibway population around the time of the Treaty, which was approximately 3,000-3,500.[43]

46. By 1911, there were almost 12,000 people in the main urban centres. By 1931, there were 18,000 people. The urban development represented an obvious and permanent taking up of land in the Treaty 3 region, much of which continues to the present day. The plaintiffs' witness William Fobister, Sr. agreed that much of these lands would have been considered hunting grounds prior to urban development.[44]

v) Agriculture

47. Agricultural development was commenced in the Rainy River Valley in the 1870s. Ontario began actively to promote settlement in the Rainy River in the summer of 1886 by initiating construction of a colonization road west from Fort Frances and undertaking surveys of the area and land from Rainy River. After 1889, the province began to issue free land grants in the Rainy River Valley. The area around the Town of Dryden also offered land with agricultural potential, and settlers took up lands in these townships through the first decades of the 20th century.[45]

48. These developments involved the visible and permanent taking-up of land. Much of this development occurred on lands that, according to the plaintiff William Fobister, Sr., would have been considered good hunting grounds prior to their having been taken up for agricultural development.[46]

PART II – ISSUES IN APPEAL

49. Resolute responds to the issues stated by the appellant Grassy Narrows as follows:

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[43] Epp Report, Exhibit 74, AR, Volumes 72 and 73, Tab 156, pages 246, 111, REB, Tab 45; Chartrand Report, Exhibit 60, AR, Volume 70, Tab 141, page 202, REB, Tab 56

[44] William Fobister, Sr. cross-examination, November 25, 2009, Volume 8, page 2973, line 12-page 2974, line 17, REB, Tab 66

[45] Epp Report, Exhibit 74, AR, Volume 72, Tab 156, page 96, REB, Tab 47; Chartrand Report, Exhibit 60, AR, Volume 70, Tab 141, page 364-365, REB, Tab 47

[46] William Fobister, Sr. cross-examination, November 25, 2009, Volume 8; page 2974, line 18 – page 2975, line 6, REB, Tab 48

(a) **Did the Court of Appeal err in holding that the province had the exclusive right to limit the Harvesting Rights?**

The OCA did not make such a finding, as the federal government may limit harvesting rights through regulations or through the taking up of land for national purposes. The OCA did not err, however, in holding that Ontario has the right to take up lands for forestry and other provincial purposes within the meaning of Treaty 3, so as to limit harvesting rights. In doing so, it answered affirmatively Question 1 of the trial Threshold Issues.

(b) **Did the Court of Appeal err in setting aside the Trial Judge's findings of fact concerning the interpretation of the Treaty and so fail to ascertain the actual intention of the parties at the time the Treaty was made?**

The OCA did not err in setting aside the trial judge's findings concerning the interpretation of the treaty. The findings are not, in any case, wholly findings of fact that attract a standard of deference, as they are "mingled with her assessment of the effect of legislation and principles of treaty interpretation". Even if they are adjudicative "findings of fact", the OCA determined that the trial judge made palpable and overriding errors in her determination of the parties' intention.

(c) **Did the Court of Appeal err in applying the doctrines of evolution of treaty rights and devolution to modify the Harvesting Rights in 1912?**

The OCA referred only to the "constitutional evolution" that occurs when there is a change in the level of government on whose advice the Crown acts. Such evolution occurred when the Keewatin Lands were added to Ontario in 1912. There was no modification of the treaty or the harvesting rights.

(d) **Was the Trial Judge correct in holding that Ontario cannot infringe on Harvesting Rights?**

This question, which is similar to Question 2 of the trial Threshold Issues, need not be answered unless this court reverses the OCA's finding that Ontario has the power to take up lands with the meaning of Treaty 3. Should it be necessary to address this question, the trial judge was not correct. If Ontario is not permitted to take up lands with the meaning of Treaty 3, it nonetheless has authority to

infringe on harvesting rights, provided it justifies the activity pursuant to the *R. v. Sparrow* test.

50. Resolute responds to the issue stated by the appellant Wabauskang as follows:

(a) **Did the Court of Appeal err in failing to consider whether Ontario's provincial forestry legislation is constitutionally applicable in so far as it impairs Canada's exclusive jurisdiction pursuant to section 91(24)?**

This question was not before either the trial judge or the OCA. In any case, the OCA did not err, as a taking up through the operation of the *Crown Forest Sustainability Act*, does not infringe on Treaty 3 rights, nor does it impair federal jurisdiction. Section 91(24) is not engaged when forestry operations are authorized. The province is exercising its proprietary power and is not seeking to regulate aboriginal harvesting. Second, authorizing forest operations does not impair the core of federal jurisdiction over Indians under section 91(24).

PART III – STATEMENT OF ARGUMENT

A. Treaty Interpretation

i) Not "frozen in time"

51. When considering a treaty, the court takes into account the context in which the treaty was negotiated, concluded and committed to writing. Treaties do not always record the full extent of the oral agreement, nor were they translated in written form into the languages of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction.[47]

52. The court's obligation is to choose from among the various possible interpretations of the common intention at the time the treaty was made, the one which best reconciles the Ojibway interest, the interest of the Crown, and, it is submitted, those of third parties.[48]

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[47] *R. v. Badger*, [1996] 1 S.C.R. 771, RBA, Tab 13, at paragraph 52
[48] *R. v. Marshall*, [1999] 3 S.C.R. 456, RBA, Tab 16, at paragraphs 14 and 112

53. The interpreting court must "update treaty rights to provide for their modern exercise". This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context. Treaty provisions should be interpreted "in a flexible way that is sensitive to the evolution of changes in normal practice." The courts should not take a "frozen in time" approach to treaty rights.[49]

ii) Ambiguities – what is "favourable"?

54. It is well settled that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. At the same time, this does not imply automatic acceptance of a given construction simply because the Indians favour it over any other competing interpretation. Even a generous interpretation must be realistic, and reconcile the interests and reflect the intentions of both parties. [50]

55. In applying these principles, the OCA found that the language in the treaty was not ambiguous. It also cited *R. v. Marshall*, stating that "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse."[51] In any case, it is submitted that adding another layer of approval for taking up, or substituting one for the other, is not favourable to anyone.

iii) Evidence supporting claim

56. In *Mitchell v. MNR,* Chief Justice McLachlin states:

> *Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gambit of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. ... While the evidence presented by aboriginal claimants should not be undervalued simply because the evidence does not conform precisely with the evidentiary standards that would be applied in, for example, private law torts cases, neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.*[52]

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[49] *R. v. Marshall, supra*, RBA, Tab 16, at paragraph 78; *R. v. Sundown*, [1999] 1 S.C.R. 393, RBA, Tab 21, at paragraph 32
[50] *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, RBA, Tab 12, at page 36; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, RBA, Tab 11, at page 109; *R. v. Morris*, 2006 SCC 59, RBA, Tab 17, at paragraph 18
[51] Appeal Reasons, paragraph 151
[52] *Mitchell v. MNR*, 2001 SCC 33, RBA, Tab 10, at para 39; *R. v. Van der Peet.* [1996] 2 S.C.R. 507, RBA, Tab 23, at paragraph 68

57. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim. Where the trial judge finds little direct evidence to support her determination of an aboriginal right:

> *... it suggests the application of a very relaxed standard of proof (or, perhaps, more accurately, an unreasonably generous weighing of tenuous evidence).*[53]

iv) Standard of review

58. The standard of review on the appeal of an interpretation of a treaty or contract is correctness. In examining findings of fact as to the context of a treaty negotiation, the court should not simply apply the "palpable and overriding error" test as it would, for instance, in a negligence action. In this case, as in most treaty interpretation cases, the trial judge did not receive direct evidence from the parties involved, nor did she make findings of credibility (other than the credibility of experts). The appellate court must examine whether the findings of facts are based on compelling evidence. If so, the palpable and overriding error test applies. If the findings are based on competing inferences or interpretations of the documentary record, then the test is closer to the "correctness" end of the spectrum.[54]

59. Here, the OCA did not find it necessary to engage in a detailed consideration of the applicable standard of review. It found that the trial judge's finding of a two-step authorization was wrong in both law and in fact and "cannot survive scrutiny even under the deferential "palpable and overriding error standard".[55] Nonetheless, it is submitted that a less deferential test is appropriate in this case, given that all of the trial judge's key findings are based on competing inferences or interpretation of the documents.

B. WERE THE OJIBWAY CONCERNED ABOUT JURISDICTIONAL ISSUES?

i) Dominion government not the only government

60. The learned trial judge found that the Ojibway knew they were making a treaty with the Queen's councillors from Ottawa, and that they looked to Ottawa and federally appointed Indian agents to implement the treaty. More importantly, however, it is established law, relied upon by

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[53] *Mitchell v. MNR, supra*, RBA, Tab 10, at paragraph 51
[54] *Housen v. Nikolaisen* 2002 SCC 33, RBA, Tab 8, at paragraphs 8-9 and 105; *Bell Canada v. The Plan Group*, 2009 ONCA 548, RBA, Tab 2, at paragraphs 20, 27 and 30-31; *Bedford v. Canada (Attorney General)*, 2012 ONCA 186, RBA, Tab 1, at paragraphs 109 and 127-128
[55] Appeal Reasons, paragraphs 158 and 172

the OCA, that the Ojibway's treaty partner is the Crown, not Canada. The federal government was merely the Crown's representative in making the treaty.[56]

61. Even if the Ojibway knew they were dealing with councillors from Ottawa, this does not mean that the Ojibway knew or intended that the federal government would be the only government they would deal with. For instance, they knew that there was "another governmental power or force" in Manitoba and knew Morris was the Lieutenant Governor of Manitoba and based in Fort Garry.[57]

62. There is no evidence or suggestion that the Ojibway had any indication of how Ottawa's connection with Ontario or Manitoba differed constitutionally. The post-treaty conduct of the Ojibway (in particular, the lack of complaints concerning provincial taking up) supports the argument that the Ojibway, in fact, placed no importance on the particular level of government that authorized the taking up of lands, and which limited hunting and fishing.

63. Subsequent conduct of the parties is relevant to the interpretation of aboriginal treaties. If there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.[58]

64. None of the expert witnesses could point to any complaints from the Ojibway, either before or after the Ontario boundary was settled, suggesting that Ontario could not take up lands. This was despite the fact that there was extensive and visible taking up of lands in the Treaty 3 area under authorizations issued by Ontario, and that such Euro-Canadian developments took place without any consultation or discussion with the Ojibway signatories. Grassy Narrows refers in its factum to several complaints by Treaty 3 Ojibway in the 1930's to the effect that they did not want Ontario to regulate their harvesting activities, including requiring them to have fishing licences. These complaints were not, however, concerned with Ontario exercising its

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[56] Appeal Reasons, paragraphs 119, 128 and 135; *St. Catherine's Milling*, *supra*, RBA, Tab 25, at page 60

[57] Trial Reasons, paragraph 905

[58] *R. v. Marshall*, *supra*, RBA, Tab 16, at paragraph 11; *R. v. Taylor and Williams* (1981), 34 O.R. (2nd) 360 (C.A.); leave to appeal denied ([1981] 2 S.C.R. xi), RBA, Tab 22, at page 367; *R v. Sioui*, [1990] 1 S.C.R. 1025, RBA, Tab 18, at page 1045

power to take-up land. The complaints concerned regulation of harvesting activities, an entirely different exercise of power.[59]

65. Until this case was commenced, there was no suggestion that Ontario had to obtain Canada's approval to access the taking-up clause. It cannot be doubted that in the more than 100 years since the Keewatin Lands became part of Ontario, lands had been taken up by Ontario for those purposes without any suggestion that Ontario required Canada's approval or that Treaty 3 mandated a two-step land use regime.[60]

ii) No modification of treaty - change in governmental authority not material

66. Grassy Narrows argues that the constitutional evolution referred to by the OCA "unilaterally" modifies the treaty. The treaty has not been modified in any way, nor did the OCA suggest that any modification was necessary.

67. The "constitutional evolution" is, in these circumstances, merely the change in Ontario's boundaries, with the result that the lands added to Ontario in 1912 came under provincial, rather than federal, jurisdiction.

68. A change in governmental authority has been considered by this court not to contradict the spirit of a treaty. As stated by Cory, J. in *R. v. Horseman* (in relation to Treaty 8):

> *Obviously at the time the Treaty was made only the Federal Government had jurisdiction over the territory affected and it was the only contemplated "government of the country". The Transfer Agreement of 1930 changed the governmental authority which might regulate aspects of hunting in the interests of conservation. This change of governmental authority did not contradict the spirit of the original Agreement as evidenced by federal and provincial regulations in effect at the time. Even in 1899, conservation was a matter of concern for the governmental authority.*[61]

69. *Horseman* concerns the changes made to harvesting rights by the Natural Resources Transfer Agreements of 1930, which transferred the beneficial interest in the lands from the federal government to the provinces of Manitoba, Saskatchewan and Alberta. The decision

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[59] Grassy Narrows factum, paragraph 81; and AEB, Tabs, 86, 87 and 88; Read-Ins from Discovery of Plaintiffs (MNR), Exhibit 139, No. 131, Tab 30, AR, Volume 82, Tab 242, REB, Tab 64; Chartrand examination in chief, January 18, 2010, Volume 12, page 5061, line 5 – page 5062, line 2, REB, Tab 64; Lovisek cross-examination, November 23, 2009, Volume 7, page 2651, line 3 – page 2652, line 2, REB, Tab 64

[60] Appeal Reasons, paragraph 171

[61] *R. v. Horseman*, [1990] 1 S.C.R. 901, at page 935-936, RBA, Tab 15

interprets the "government of the country" clause in Treaty 8 as it relates to regulation of hunting, as opposed to Treaty 8's taking up clause. Nonetheless, Cory, J.'s reasoning may be applied to the change of governmental authority when the Keewatin Lands were added to Ontario in 1912. The change to Ontario authority did not contradict the spirit of Treaty 3, as it was known that the lands would be taken up for settlement, mining and lumbering. In 1912, land was already being taken up by Ontario for settlement and lumbering in the other Treaty 3 areas that were already part of Ontario. Further, other changes in governmental authority, without complaint, had occurred in 1874 (Provisional Boundary agreement), 1881 (temporary expansion of Manitoba boundary) and 1889 (settlement of boundary dispute).

C. WHY DOES THE TAKING UP CLAUSE IDENTIFY THE "GOVERNMENT OF THE DOMINION OF CANADA"?

70. Perhaps the most significant finding of the trial judge was that Morris included the "Government of the Dominion of Canada" in the taking-up clause in order to ensure that the federal government would have to authorize land uses, should the Treaty 3 lands become part of Ontario.

71. The OCA noted that the "clearest statement" on this point is found at paragraph 1454 of the trial judge's reasons as follows:

> *The Commissioners deliberately provided in the Harvesting Clause that in the event that Ontario won the Boundary Dispute or a new province with section 109 powers were formed under section 3 of the 1871 Constitution Act, authorization of "taking-up" by Canada would be needed in addition to Ontario's or that new province's authorization under section 109. In that event, the Commissioners did contemplate and intend that a two-step authorization process would need to be followed. [emphasis in original]*[62]

72. The OCA thoroughly examined this finding and found it "not only speculative but also inconsistent with the available evidence". It said the finding "cannot survive scrutiny". [63] Without such a finding, the trial judge's disposition of this case cannot be restored.

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[62] Appeal Reasons, paragraph 157
[63] Appeal Reasons, paragraphs 162 and 172

i) Canada claimed beneficial ownership

73. Even if Morris did intend a two-step authorization process, his subjective intention could not have any impact upon the proper legal interpretation of the treaty. It was conceded by Grassy Narrows on the appeal that there is no evidence to suggest that Morris communicated to the Ojibway an intention to require Canada's approval of taking up by Ontario.[64]

74. The OCA found that the available evidence pointed to one reason only why the taking up clause specified the Government of the Dominion of Canada:

> *There can be no doubt that the reference to the Government of the Dominion of Canada reflects the fact that in 1873, Canada claimed beneficial ownership of all lands governed by Treaty 3. The Keewatin Lands were unquestionably Canada's and Canada strongly asserted it claim to beneficial ownership of the Disputed Territory.*[65]

75. The OCA also noted that Morris wrote extensively on the negotiation of Treaty 3 and other treaties. There is nothing in this documentation to support the thesis that Morris intentionally drafted the harvesting clause to require Canada's approval for Ontario's taking up, should Ontario become the beneficial owner of the lands.[66] In fact, the numerous comments he made in respect to Treaty 3, when reporting on Treaties 4, 5, 6 and 7, make no reference whatsoever to the boundary dispute or the possibility of provinces exercising the power to take-up.

ii) Morris a trained constitutional lawyer

76. Although there is no direct evidence to support it, the trial judge found that the boundary dispute was relevant to Morris and that, being a "trained constitutional lawyer", he "understood what he was doing in mentioning Canada". In particular, she says Morris knew that:

> *... a loss of the on-going Boundary Dispute ... could have negative implications for Canada's wards, the Ojibway, especially if their Treaty Harvesting Rights were not expressly protected by the wording of the Treaty.*[67]

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[64] Appeal Reasons, paragraphs 160 and 161
[65] Trial Reasons, paragraph 919, Appeal Reasons, paragraph 145
[66] Appeal Reasons, paragraph 163
[67] Trial Reasons, paragraph 566

77. The trial judge placed significant emphasis on the fact that Morris was a trained constitutional lawyer. It is very difficult, however, to reconcile this with the actual text of the harvesting clause.[68] Indeed the Court of Appeal found that:

> *Morris' legal background detracts from rather than supports the trial judge's findings ... It is difficult to imagine how or why an expert constitutional lawyer would have drafted the clause as he did, had his intention been as described by the trial judge.*[69]

78. In particular, the following factors are inconsistent with such an intention:

(a) Would a trained constitutional lawyer fail to make a distinction between the jurisdictions of Ontario and Canada, given that Morris could not have expected that all of Treaty 3 would be added to Ontario? He presumably knew that Ontario did not claim all of the Treaty 3 area.

(b) Would a trained constitutional lawyer have used the identical language in the taking up clauses of Treaties 5 and 6, which covered areas where there was no boundary dispute? Would he have used different language with respect to Treaty 4 (where the power to take up is "under the authority of the Government of country acting under the authority of Her Majesty") without noting anywhere in his report or later writings that the protection of the Indians in that treaty was somehow different?

(c) Would a trained constitutional lawyer draft the taking up clause in terms of the Dominion being the government to "require or take up" lands for federal "purposes", even though his concern was that Ontario would be the government that required the lands for Ontario's purposes?

iii) Federal government fails to protect Ojibway after 1873

79. Part of the rationale for the trial judge's finding of the two-step authorization process stems from her view as to the origins of section 91(24). The trial judge accepted the evidence of Professor John Milloy, who stated that the responsibility for Indians and lands reserved for Indians was placed with the federal government through section 91(24) in order to protect the Indians from local settlers and local governments. Professor Milloy agreed, however, that in

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[68] Appeal Reasons, paragraph 164
[69] Appeal Reasons, paragraph 164

reality the federal government failed to protect those interests, particularly hunting and fishing, almost immediately after Treaty 3 was signed.[70]

80. In 1873, the federal government was responsible for dealings with the Treaty 3 Ojibway, as well as with the settlers and the timber and land speculators. Its constituency also included the corporate interests that wanted to exploit the mining and timber resources, build the railway and establish settlements.[71]

81. In 1875 alone, the federal Department of the Interior (the same department that had responsibility for Indians) reported that 30 townships were subdivided in the Treaty 3 area, with 1,020 miles of block lines marked. Additional surveys were also in progress at the Lake of the Woods. Timber limits bordering on the Lake of the Woods and Rainy Lake were sold by the Dominion government. It was reported in 1880 that these timber limits were estimated to contain 600,000,000 feet of lumber.[72] These activities, it is submitted, are not consistent with an intention to protect Indians from the interests of settlers.

iv) Provisional Boundary agreement

82. Less than one year after the Treaty was signed, the federal and Ontario governments entered into the 1874 Provisional Boundary agreement. It was agreed that for lands to the east of the provisional boundary, Ontario alone would be the government granting patents. Canada alone would grant patents to the west. If it were subsequently found that these lands were not in Ontario or federal territory, respectively, the applicable government would ratify the patents issued by the other government and account for the proceeds of such lands. [73]

83. In his report suggesting that Ontario and Canada enter into a provisional boundary agreement, the Minister of the Interior, David Laird, said that the negotiation of such an arrangement had been postponed:

> ... *until a treaty was concluded with the Indians.*

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[70] Trial Reasons, paragraphs 734-735; Milloy cross-examination, October 16, 2009, Volume 4, page 1350, line 22 - page 1351, line 7; page 1352, line 20 – page 1357, line 6, REB, Tab 79

[71] Milloy cross-examination, October 16, 2009, Volume 4, page 1340, lines 8-16; page 1341, line 3 - page 1345, line 12, REB, Tab 80

[72] Report of the Department of the Interior dated October 31, 1875, Exhibit 1, Tab 382, AR, Volume 24, Tab 71, REB, Tab 81; Report of the Stipendiary Magistrates with Respect to the Northerly and Westerly Parts of the Province of Ontario, Exhibit 1, Tab 432, AR, Volume 24, Tab 71, REB, Tab 81

[73] Appeal Reasons, paragraph 61; Provisional Boundary agreement between Canada and Ontario dated June 26, 1874, Exhibit 1, Tab 325, AR, Volume 25, Tab 71, REB, Tab 82

> *That barrier being now removed ... it is desirable in the meantime to agree upon conventional boundaries, otherwise the development of that important portion of Canada lying between Lake Superior and Lake of the Woods will be severely retarded, as applications to take up lands in that section are being constantly made, and the inability to obtain recognition of claims from either the Government of Ottawa or Toronto is impeding the settlement of the country.*[74]

84. There is no evidence that Morris, or anyone else, suggested this arrangement might conflict with the terms or spirit of Treaty 3. In fact, the conduct of the two governments was consistent with what was already occurring with respect to the lands ceded under the Robinson Superior Treaty. There, the federal government had responsibility for Indians under section 91(24), but Ontario had the power to sell or lease lands and thereby displace harvesting rights.

85. The 1874 agreement reflects an understanding, almost immediately after Treaty 3 was signed, that the right to take up lands attached to the level of government that enjoyed beneficial ownership. There is no reference to any requirement that Ontario obtain Canada's approval for taking-up lands. The Provisional Boundary Agreement is, in fact, entirely inconsistent with such a requirement.[75]

v) Morris and Macdonald

86. The learned trial judge made much of the fact that Morris was a strong proponent of a central government. Even if the boundary dispute was in the forefront of his (or the drafter's) mind when constructing the taking up clause, he may have used the words the "Government of the Dominion of Canada" because he believed Canada would continue to administer the lands regardless of the results of the boundary dispute. Although this view was not consistent with the governments' position at the time, it may have presaged the view to which Sir John A. Macdonald eventually came after Canada lost the boundary dispute. Macdonald said in Parliament in 1880:

> *The province of Ontario after all, perhaps, will not get as much as it expected, because a great portion of the Indian title to the lands is not extinguished; while, in regards to those portions that are extinguished, if the award was consistent, they have the right of sovereignty, and the title belongs to the Indians or the assignee of the Indians, which is the Dominion Government.*

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[74] Report of the Minister of the Interior, dated June 2, 1874, Exhibit 1, Tab 321, AR, Volume 22, Tab 71, REB, Tab 83
[75] Appeal Reasons, paragraph 169

Accordingly, Morris could have referred to the Dominion government in an effort to leave control in the hands of the Dominion, regardless of any boundary dispute. *St. Catherine's Milling* showed that this view was in error. In any case, it is doubtful Morris would have referred to the Dominion government because of the boundary dispute, as suggested by the trial judge. Even recognizing the possibility that any of the Treaty 3 lands were in Ontario would have "undermined Prime Minister Macdonald's position on the Disputed Territory". The Court of Appeal found that it was "highly unlikely" Morris would have done such a thing.[76]

D. PROPRIETARY POWERS AND LEGISLATIVE JURISDICTION

87. The appellants take the position that the OCA misapprehends the law of the division of powers. They agree with the trial judge that, on a taking-up "there is an ongoing federal jurisdiction with respect to hunting and fishing". There is a significant difference, however, between recognizing an ongoing federal jurisdiction and extending that jurisdiction to the power to take up land.[77]

i) No Change to Division of Powers

88. The appellants incorrectly characterize the OCA decision as narrowing or displacing Canada's section 91(24) jurisdiction. On the one hand, Grassy Narrows argues that the OCA incorrectly put Ontario's section 109 powers beyond the reach of Canada's section 91(24) jurisdiction. On the other hand, Wabauskang claims that the decision has taken away Canada's exclusive obligation to ensure the proper implementation of the treaty pursuant to section 91(24).

89. Both arguments are grounded on the assumption that the province is not competent to protect and implement treaty promises, even when the activity is squarely within provincial responsibility, such as the authorization of land uses.

90. The appellants' arguments are reminiscent of those made by Canada in *St. Catherine's Milling*. One of Canada's claims was that section 91(24) jurisdiction was inconsistent with the province's beneficial ownership. The Privy Council disagreed.[78] Here, the appellants appear to be making the same mistake as Canada did in 1888. The power to take up land is not, and has

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[76] Trial Reasons, paragraph 975; Appeal Reasons, paragraph 166
[77] Trial Reasons, paragraph 1326
[78] *St. Catherine's Milling, supra*, page 59, RBA, Tab 25

never been, a section 91(24) duty or subject to section 91(24) supervision. A taking up does not engage federal jurisdiction, unless the lands are beneficially owned by the federal government. Nonetheless, Ontario must honour the obligations of the Crown when exercising its section 109 powers, as required by section 109, the 1912 *Ontario Boundaries Extension Act*, section 35 of the *Constitution Act, 1982* and by *Mikisew*.[79]

91. If the appellant Wabauskang is correct, then any taking up that interferes with harvesting rights will require federal authorization, regardless of the wording of the treaty. In fact, as the federal government has section 91(24) jurisdiction across the country, the logical extension of Wabauskang's position is that federal involvement or authorization is required any time a provincial land use may interfere with any treaty harvesting rights. This is contrary to the process established in *Mikisew*, whereby the entity seeking to take up lands must consult with the First Nation and address the concerns.[80]

92. A second mistake that the appellants make is to characterize Treaty 3 (as Canada did in *St. Catherine's Milling*) as an agreement between the Ojibway and the federal government. The OCA followed *St. Catherine's Milling*, and the text of the treaty itself, in finding that the treaty partner was and is "the Crown", not the federal government.[81] By the same token, the OCA did not find (as Wabauskang submits it did) that the provinces are the Aboriginal peoples' treaty partner.

93. This Court has consistently found that the Aboriginal people have relationships with both the federal and provincial Crown. For instance, the following statement of Chief Justice Dickson is instructive:

> *... the Indians' relationship with the Crown or sovereign has never depended on the particular representative of the Crown involved. From the aboriginal perspective, any federal provincial divisions that the Crown has imposed on itself*

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[79] Appeal Reasons, paragraph 153; *Constitution Act,* 1867 (UK), 30 & 31 Vic, c-3, ss 91(24), 109; *Ontario Boundaries Extension Act*, S.C. 1912, 2 Geo. V, c.40; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (UK), 1982, c.11, s. 35; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, RBA, Tab 9, paragraphs 50, 51 and 56; *Boniferro Mill Works v. Ontario*, 2009 ONCA 75, RBA, Tab 3, at paragraph 31; *Brooks-Bidlake and Whittall Ltd. v. British Columbia*, [1923] 2 D.L.R. 189 (P.C.), RBA, Tab 4, at page 192

[80] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), supra*, RBA, Tab 9, paragraph 64; *Smith v. The Queen*, [1983] 1 S.C.R. 554, RBA, Tab 24, at page 578

[81] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) supra*, RBA, Tab 9, paragraph 64,

are internal to itself and do not alter the basic structure of the Sovereign-Indians relations.[82]

94. Further, this court has confirmed that, under section 109, aboriginal rights are an interest in land other than the underlying title belonging to the province.[83] An allegation against the province of interference with an aboriginal or treaty right does not engage federal jurisdiction when the province is acting within its sphere of authority. For instance, in *Delgamuukw*, the consultation that the court contemplated be carried out by a province did not involve the federal government, either alone or in tandem with the province. The honour of the Crown and its section 35 obligations can be met by the province.[84]

95. Even if a claim is made that a provincial taking up infringes the treaty by leaving "no meaningful right to hunt or fish", the remedy is not to bring in the federal government. It is to bring an action for treaty infringement, including a demand for a *Sparrow* justification.[85]

96. The trial judge and the appellants fail to distinguish between provincial actions that "extinguish" or amend the rights under the treaty, and actions to take up land pursuant to the treaty, where the right to hunt or fish may be geographically limited or displaced in a specified area through the internal limitation provided by the treaty itself. The former would be beyond provincial jurisdiction. The latter, however, is within Ontario's section 109 powers.[86]

97. For instance, Grassy Narrows confuses these concepts when relying on cases such as *Sutherland*, in which Manitoba legislation specifically prohibiting aboriginal hunting was struck down by this court. Contrary to the submissions of Grassy Narrows, the court did not attack the exercise of Manitoba's proprietary power in deeming land to be "occupied". What was objectionable was the complete prohibition of hunting directed solely at the aboriginal population.[87]

E. CONSISTENCY OF CANADIAN CONSTITUTIONAL PRACTICE - SECTION 109 AND NATURAL RESOURCES TRANSFER AGREEMENTS

98. Section 109 of the *Constitution Act, 1867* includes the following:

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[82] *Mitchell v. Peguis Indian Band, supra*, RBA, Tab 11, page 109
[83] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, RBA, Tab 7, at paragraph 59
[84] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, RBA, Tab 6, at paragraphs 167-168; *Haida Nation v. British Columbia (Minister of Forests), supra*, RBA, Tab 7, at paragraphs 57-59
[85] *Mikisew, supra*, RBA, Tab 9. at paragraph 48; Appeal Reasons, paragraph 207
[86] *Delgamuukw, supra*, RBA, Tab 6, at paragraph 178
[87] *The Queen v. Sutherland et al* [1980] 2 SCR 451, RBA, Tab 26, at 455-456

> ***109.*** *All Lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union ... shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, New Brunswick ... subject to ... any Interest other than that of the Province in the same. (emphasis added)*

99. Ontario's rights under section 109 are "subject to ... any interest other than that of the Province in the same." The rights of Manitoba, Saskatchewan and Alberta under the NRTAs are also subject to "any interest other than that of the Crown in the same". [88]

100. When Manitoba, Saskatchewan and Alberta were first established as provinces, they did not have the same authority over their lands as did the first four provinces of Ontario, Quebec, New Brunswick and Nova Scotia. Under the statutes that established the prairie provinces, the federal government continued to administer the lands vested in the Crown. The provinces did not effectively own the beneficial interests in the lands. This situation changed by virtue of the Natural Resources Transfer Agreements (the "NRTAs"), which were given force by the *Constitution Act*, 1930.

101. The NRTAs include the following:

> ***Transfer of public lands generally***
>
> *1. In order that the Province may be in the same position as the original Provinces of Confederation are in by virtue of section one hundred and nine of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province ... belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof ... (emphasis added)*
>
> *... 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.* [88]

102. The purpose of the NRTAs was to put the prairie provinces on the same footing as Ontario, Quebec, New Brunswick, Nova Scotia and British Columbia, and the rights expressly

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[88] Section 1, Natural Resource Transfer Agreements

given to them by sections 92(5) and 109 of the *Constitution Act, 1867* (or, with respect to B.C., the *British Columbia Terms of Union*). These rights include the power to administer lands, subject to treaty harvesting rights.[89]

103. Through the NRTAs, the federal government unilaterally changed certain aspects of the harvesting rights. The NRTAs did not, however, replace or modify the level of government referred to in the taking up clauses of the applicable treaties, clauses that are similar or identical to Treaty 3.[90] It was not necessary to expressly modify the taking up power, just as it was not necessary to do so in the 1912 *Ontario Boundaries Extension Act.* The change in governmental authority did not contradict the spirit of the treaty. More importantly, the taking-up clause, by operation of law, is exercised only by the government that administers the land.[91]

104. If the trial judge and the appellants are correct in stating that the taking up of lands under the treaty by Ontario is subject to federal government authorization and section 91(24) jurisdiction, then the governments of Alberta, Saskatchewan and Manitoba are in a similar situation. They must also seek authorization from the federal government if they wish to take up lands that may interfere with treaty harvesting rights. These rights remain reserved with the "Government of the Dominion of Canada" (Treaties 3, 5 and 6) or the "Government of Canada" (Treaty 7).

105. The better view, it is submitted, is that there is no such two step process required throughout these areas of the country. As in Ontario, the taking up power is exercised by the government that administers the lands. The addition of the Keewatin Lands to Ontario in 1912, like the transfer of beneficial ownership to the provinces under the NRTAs, was an example of the constitutional evolution discussed by the OCA. As Canada evolved, there were changes in the level of government on whose advice the Crown acts.[92] This did not require a modification to the treaty or effect a change in the division of powers.

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[89] Section 1, Natural Resource Transfer Agreements, *British Columbia Terms of Union, 1871*, section 10

[90] *R. v. Badger*, *supra*, RBA, Tab 13, at paragraph 51; *R. v. Smith* [1935] 2 W.W.R. 433 (Sask. C.A.), RBA, Tab 19, at pages 436-438; *R. v. Horse*, [1988] 1 S.C.R. 187, RBA, Tab 14, at page 197

[91] *R. v. Badger*, *supra*, RBA, Tab 13, at paragraph 51; *R. v. Smith*, *supra*, RBA, Tab 19, at pages 436-438; and *R. v. Horse*, *supra*, RBA, Tab 14, at page 197-198

[92] Appeal Reasons, paragraph 136

106. This result, as the OCA states, "fosters direct dialogue between the province and Treaty 3 First Nations. Such dialogue is key to achieving the goal of reconciliation."[93]

F. RECIPROCAL LEGISLATION OF 1891 AND 1924

107. The 1891/1894 reciprocal legislation and agreement, as interpreted by the OCA, confirms that the taking up clause is exercised, by operation of law, by the government that has beneficial ownership of the lands.[94]

108. This understanding was again confirmed in the *Indian Lands Act, 1924*, which was also reciprocal legislation passed by Ontario and Canada. The Act deals primarily with reserves but the preamble confirms the continuing understanding that only Ontario administers the land in the context of Indians Rights. The preamble includes the following:

> *Whereas from time to time treaties have been made with the Indians for the surrender for various consideration 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, ...*[95]

109. The preamble of a statute shall be read as a part of the enactment intended to assist in explaining its purport and object.[96]

G. ANALYSIS OF PAST AND FUTURE TAKING UP

110. The trial judge noted that neither of two expert witnesses called by Ontario, Dr. Epp and Dr. Williams, could comment on the impact on Ojibway traditional harvesting rights of the many years of development and taking up by Ontario in the Keewatin Lands. If the trial decision is restored, an analysis will have to be undertaken in order to determine whether any land uses granted by Ontario have significantly interfered with harvesting rights and have thereby been authorized without jurisdiction. This exercise will do little to move the parties towards reconciliation.

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[93] Appeal Reasons, paragraph 154
[94] Appeal Reasons, paragraphs 179 and 186
[95] *Indian Lands Act*, S.C. 1924, C. 48 and S.O. 1924, c. 15; Appeal Reasons, paragraph 199
[96] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 13

111. Professor Von Gernet and Mr. Chartrand were able to comment on what this analysis would entail. The trial judge recounted their evidence as follows:

> *Von Gernet and Chartrand both gave evidence that to assess impacts on Treaty Harvesting Rights would be a complex and difficult exercise. To properly gauge impact, a detailed analysis would be necessary, involving an assessment of multiple factors, including the location of Ojibway harvesting activities and the type of Euro-Canadian land uses; the extent of Euro-Canadian resource exploitation; the difficulty of accommodating the Euro-Canadian activities; the availability to the Ojibway of alternative resources; the benefits the Ojibway were deriving from Euro-Canadian land uses, the cumulative effects on Ojibway harvesting of other Euro-Canadian land uses (because an isolated Euro-Canadian activity that might not have been objectionable when the land was largely untouched, might have become objectionable by 2010, given intervening diminishment of other resources and territorial encroachment.)*[97]

H. THE OJIBWAY KNEW THEIR HARVESTING RIGHTS WOULD BE AFFECTED

112. The OCA determined that the trial judge made no finding to the effect that the treaty commissioners promised the Ojibway unlimited and perpetual harvesting rights outside of the Dawson Route and the CPR. The OCA referred to Ontario's and Canada's submissions that she did make such a finding as a "straw man" argument. It found that, in the context of the pleadings, and the whole of the trial judge's reasons, that she actually found that harvesting throughout all of the Treaty 3 lands was subject to the internal limit of the taking up clause (albeit through the two-step authorization process). Resolute accepts the OCA's analysis. Nonetheless, should this court find it necessary to examine the trial judge's findings on the harvesting promise, her errors in dealing with the evidence should be noted.

113. At paragraph 831 of her reasons, the trial judge states:

> *I find the representation <u>was</u> made that the Ojibway would "forever" have their traditional Harvesting Rights as in the past.*

The trial judge found that the Treaty 3 commissioners "did not require the Ojibway to agree ... that their harvesting area would decrease over time". She distinguished *Mikisew* by stating that the Treaty 8 Cree had "very different perspectives and interests from the Treaty 3 Ojibway." She said the Cree "agreed to geographic displacement of hunting rights, while the Treaty 3 Ojibway did not".[98] The trial judge is incorrect. As the chart attached at Appendix A demonstrates, a

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[97] Trial Reasons, paragraph 1122

[98] Trial Reasons, paragraphs 1472(h) and (i); Chart at Appendix A

comparison of the trial judge's statements on the Treaty 8 negotiations with those of this court shows that the perspectives and interests of Treaty 3 and Treaty 8, particularly with regard to the harvesting promise, are very similar.

114. At paragraph 865, the trial judge finds that:

> *Morris did not advise the Ojibway on October 3 and they did not understand, that Canada could authorize land uses inconsistent with Harvesting Rights and pass legislation to extinguish or limit Harvesting Rights.*[99]

These findings are based on speculation as to what was meant by the following reference in the Nolin Notes:

> *The Indians will be free as by the past for their hunting and wild rice harvesting.*

The shorthand report of the proceedings noted the comment differently:

> *We must have the privilege of travelling about the country where it is vacant.*

In response, the shorthand report notes that the Hon. James McKay (who was fluent in the Ojibway language) said:

> *Of course, I told them so.*

115. The OCA accepts these statements were made but does not treat them as being evidence that the Ojibway had demanded an unqualified harvesting right, nor that the commissioners had granted it.[100]

116. The trial judge found that Morris and the treaty commissioners decided to make an unqualified harvesting promise on the night of October 2, 1873 in order to secure a deal. There is no evidence, or expert opinion, to support any such communication being made. Such a promise is not consistent with Morris' opening statement of October 1st, 1873, nor with the wording of the treaty. In fact, it is inconsistent with all the evidence of what the commissioners or the federal government thought the treaty provided.

117. Having made such a finding, the trial judge should have discounted the taking up clause as being inconsistent with the agreement. Rather than doing so, however, she leaves rooms for it to be imposed later by stating:

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[99] Trial Reasons, paragraphs 865, 863
[100] Appeal Reasons, paragraphs 50-54

> *... although the Ojibway were not advised about Canada's powers, the Commissioners knew it would be Constitutionally open to the federal government to pass legislation limiting or extinguishing the Treaty Rights ...*[101]

118. The end result, according to these comments, is that the treaty commissioners made a specific promise for unlimited harvesting rights but, at the same time, included the taking up clause without the Ojibway's consent or knowledge. They did so because they knew they could renege on the promise through federal legislation. [102] This is an untenable finding and is entirely contrary to all of Morris' writings and statements.

119. In addition, the trial judge's comments on unlimited harvesting rights beyond the Dawson Route and CPR are inconsistent with the evidence showing that both the Ojibway and the treaty commissioners knew that all of the Treaty 3 lands were wanted, and would be subject to the treaty's internal limit on harvesting.

120. Contrary to the submissions of the appellant Grassy Narrows, it was well known to both the Ojibway and the federal government, that what would become the Treaty 3 lands were rich in forest and mineral resources. Simon Dawson, who had been authorized by the federal government in 1868 to construct an immigrant travel route, was also asked to investigate the development potential of the area. He repeatedly gave positive reports on timber and mining resources, and the excellent farm land in the Rainy River Valley.[103] By the same token, Ojibway chiefs and representatives were aware of the settlers' desire for wood and minerals, given their concerns over trees being felled and mining activities occurring on unceded territory.[104]

121. Prior to 1873, the Ojibway had received information about treaty negotiations in other parts of Ontario and the United States. In fact, Dawson described them as "expert diplomatists". For instance, the Ojibway received information in relation to the negotiation of the Robinson Treaties of 1850 and the American Old Crossing Treaty of 1863, which were explicitly treaties of cession.[105]

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[101] Trial Reasons, paragraphs 837 and 866
[102] Trial Reasons, paragraph 919
[103] Grassy Narrows Factum, para 14; Trial Reasons at para. 467; Trial Decision at para. 196; Dawson to Langevin [Minister of Public Works], Dec. 19, 1870, Exhibit 1, Tab 103, AR, Volume 16, Tab 71, REB, Tab 120
[104] Chartrand Report, AR, Volume 70, Tab 141, at pages 49 and 237; Commissioners report to Secretary of State dated July 17, 1872, Exhibit 1, Tab 184, AR, Volume 18, Tab 71, REB, Tab 121
[105] Trial Reasons, paragraphs 244 and 686

122. The appellant Grassy Narrows likens the Treaty 3 negotiations to those of the Old Crossing Treaty in that the lands in both cases were supposedly "ill suited" for agriculture or settlement. The appellant alludes to the fact that the American treaty commissioner told the Chippewa that, in effect, they would not lose the use of their lands; that "they were trading a horse for the use of a horse". The appellant fails to note, however, that the commissioner also told them the lands would "probably" not be "wanted for settlement" for a long time, thereby confirming that lands would, ultimately, be taken up.[106]

123. The federal government had determined by 1871 to negotiate a treaty for the cession of all of the lands that ultimately became subject to Treaty 3. Royal Letters Patent were issued appointing Wemyss Simpson, Dawson and Robert Pither as treaty commissioners. Their instructions set out the purposes underpinning the intended treaty, explaining that in addition to securing the Dawson Route, the treaty was intended to, "throw open to settlement any portion of the land ... which may be susceptible of improvement and profitable occupation".[107] By 1873, when Lt. Gov. Alexander Morris, Joseph Provencher and Dawson were appointed commissioners, their instructions were to obtain cession of "all and every of their respective rights, titles and claims to and in the said lands and every of them"[108]

124. During the negotiation of Treaty 3, numerous comments were made by Ojibway chiefs and representatives about the rich resources that would become available to settlers and the Crown should a treaty be concluded. For instance, the proceedings opened with a discussion as to who had the right to take wood from the forests. Later, a chief stated that "the sound of the rustling of the gold is under my feet where I stand; we have a rich country."[109]

125. The following exchange at the conclusion of the agreement, as recorded in *The Manitoban*, indicates the Ojibway's knowledge that all of the lands were ceded and subject to the treaty:

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[106] Grassy Narrows Factum, para 13; Old Crossing Treaty with Red Lake and Pembina Bands of Chippewa, 1863-64, page 20, AR, Volume 64, Tab 115 ("It would not probably be wanted for settlement before the youngest man among them was a grey-headed old man"), REB, Tab 122

[107] Trial Decision at paras. 205-206, 258-259; Howe [Secretary of State for the Provinces] to the Privy Council, April 17, 1871, Exhibit 1, Tab 122 AR, Volume 17, Tab 71; Howe to the Privy Council, April 19, 1871, Exhibit 1, Tab 123, AR, Volume 17, Tab 71; Order in Council, April 25, 1871, Exhibit 1, Tab 124, AR, Volume 17, Tab 71; Commission to Simpson, Dawson and Pither, ("*Treaty Commission 1871*"), Exhibit 1, Tab 127, AR, Volume 17, Tab 71; Howe to Simpson, Dawson and Pither, May 6, 1871, Exhibit 1, Tab 131, AR, Volume 17, Tab 71, REB, Tab 123

[108] Appeal Reasons, paragraph 34

[109] Morris Treaty Text, Exhibit 9, AR, Volume 58, Tab 89, pages 57 and 62, REB, Tab 124

Chief Mawedopanais: "... and now, in closing this Council, I take off my glove, and in giving you my hand, I deliver over my birth-right and lands; and in taking your hand, I hold fast all the promises you have made, and I hope they will last as long as the sun goes round and the water flows, as you have said."

The Governor then took his hand and said: "I accept your hand and with it the lands, and will keep all my promises, in the firm belief that the treaty now to be signed will bind the red man and the white together as friends for ever." [110]

I. DOES ONTARIO HAVE AUTHORITY TO JUSTIFIABLY INFRINGE FOR A VALID PROVINCIAL PURPOSE? IS INTERJURISDICTIONAL IMMUNITY ENGAGED?

126. Resolute submits that it is not necessary to answer this question if the decision of the OCA is affirmed. Nonetheless, if Ontario is not permitted to take up lands within the meaning of Treaty 3, it still has the authority to infringe treaty harvesting rights, provided it justifies the forestry operations pursuant to the *Sparrow* test.[111]

127. Ontario's constitutional capacity to justifiably infringe section 35 rights are limited only by the doctrines of federal paramountcy or interjurisdictional immunity. Paramountcy does not apply here. This is not in dispute. It is submitted that the doctrine of interjurisdictional immunity is also not engaged in these circumstances.

128. Interjurisdictional immunity protects the "core" of a limited number of federal legislative powers, including section 91(24). It may prevent provincial laws from impairing the core of the federal power.[112] The doctrine has no application where the provincial laws or regulations are based on the province's proprietary powers, rather than its legislative responsibilities under section 92 of the Constitution. [113]

129. Even if interjurisdictional immunity applies to the exercise of Ontario's proprietary powers, a taking up of land to authorize forestry operations does not affect the "core" of federal jurisdiction over "Indians" in section 91(24). The provincial authorizations are not laws that purport to regulate Indians or change the treaty. They do not tramp on federal jurisdiction. The

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[110] Trial Decision at paras. 366-367, 384; "Indian Treaty", *The Manitoban*, Oct.18, 1873, Exhibit 1, Tab 287, AR, Volume 21, Tab 71, also found at Morris Treaty Text, Exhibit 9, AR, Volume 58, page 75. The reference to delivering over lands is not mentioned in Dawson's Notes, but is in substance corroborated in The Manitoba Free Press article: "The Indian Treaty", Manitoba Free Press, Oct. 18, 1873, Exhibit 67A at pages 4-5; Terms Proposed & Responses, REB, Tab 125

[111] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, RBA, Tab 20, at pages 1113-1114 and 1119

[112] *Canadian Western Bank v. Alberta*, 2007 SCC 22, RBA, Tab 5, at paragraphs 48-49

[113] *Brooks-Bidlake and Whittall Ltd. v. British Columbia, supra*, RBA, Tab 4 at page 192

authorizations may have an effect on Indian harvesting rights, but the province is obliged to justify any infringement by virtue of section 35 and the honour of the Crown.[114]

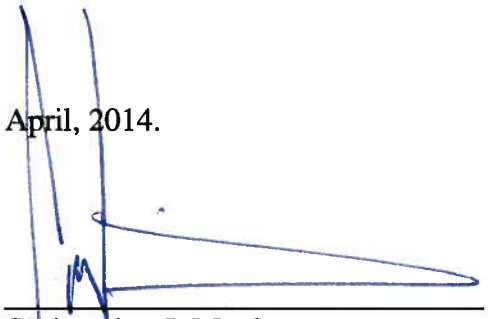
PART IV – SUBMISSIONS CONCERNING COSTS

130. Resolute does not seek costs of this appeal and submits that it should not pay costs to any party or intervenor.

PART V – ORDER SOUGHT

131. Resolute requests that the appeals be dismissed.

All of which is respectfully submitted this 17th day of April, 2014.



For: Christopher J. Matthews
Of Counsel for the Respondent
Resolute FP Canada Inc. (formerly
Abitibi-Consolidated Inc.)

[114] *R. v. Sparrow*, *supra*, RBA, Tab 20, at pages 1108-1110; *Delgamuukw*, *supra*, RBA, Tab 6, at paragraph 178

APPENDIX A
COMPARISON OF TREATMENT OF TREATY 8
(TRIAL DECISION & SCC DECISIONS)

TRIAL DECISION	TREATY TEXT AND SCC DECISIONS
TREATY PROMISES MADE BY THE COMMISSIONERS [para. 1472] [emphasis added] e) In *Mikisew* there **was no factual finding that the Treaty 8 Aboriginal signatories had been induced to enter into the treaty by specific promises about the perpetual continuation of their subsistence Harvesting Rights as in the past over the whole territory**. There was no finding that the Cree did not understand that Canada could unilaterally interfere with their rights. h) **In the particular circumstances of Treaty 3, I have found that to get the Treaty done, the Commissioners did make promises to the Treaty 3 Ojibway that went beyond those found by the Court to have been made to the Cree signatories in Mikisew.** The Commissioners did not require the Ojibway to agree, as a term of the Treaty, that their harvesting areas would decrease over time.	***R. v. Badger*, SCC 1996.** Cory J. for lead majority, at para. 39: ... However, it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap. The Commissioners wrote: There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. . . . We pointed out . . . that the *same means of earning a livelihood would continue after the treaty as existed before it*, and that the Indians would be expected to make use of them. ..... at Para. 55: ...Commissioner David Laird, as cited in Daniel, "The Spirit and Terms of Treaty Eight", at p. 76, told the Lesser Slave Lake Indians in 1899: Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. *Indians who take treaty will be just as free to hunt and fish all over as they now are.* *In return for this the Government expects that the Indians will not interfere with or molest any miner, traveller or settler.*

TRIAL DECISION	TREATY TEXT AND SCC DECISIONS
ABORIGINAL UNDERSTANDING [para. 1472] [emphasis added] c) The two treaties were negotiated under very different circumstances. Treaty 8 was not negotiated by Morris. **The Treaty 8 Cree had very different perspectives and interests from the Treaty 3 Ojibway**. d) ...the evidence led at the Mikisew trial supported a finding that in the year Treaty 8 was negotiated, 1899, **the Cree understood that after the treaty was signed, when land was put to a use that was visibly incompatible with the exercise of their right to hunt, they would no longer be able to hunt on that land.** In other words, there was a factual finding that the Aboriginal signatories of Treaty 8 understood, intended and accepted that the geographical limits of their hunting areas would shrink as lands were "taken up"/transferred from the inventory of lands over which they had treaty rights to hunt, fish and trap, to the **inventory of lands where they did not have those rights. I have found that in Treaty 3, the Ojibway and the Commissioners had a much different intent and understanding**. Canada's primary interest in negotiating Treaty 3 was not opening the Treaty 3 area to settlement and development. **The Ojibway did not agree to a progressive limitation of the geographical area where they could hunt.** i) While the *Mikisew* Cree agreed to geographical displacement of hunting rights, the Treaty 3 Ojibway did not.	***R. v. Horseman*, 1990 SCC**. Wilson J. in dissent, but not on this point, at pages 104 – 105: Mr. Daniel's study of these negotiations reveals that the Indians were especially concerned that the most important aspect of their way of life, their ability to hunt and fish, not be interfered with... ...it seems to me to be of particular significance that the Treaty 8 Commissioners, historians who have studied Treaty No. 8, and Treaty 8 Indians of several different generations unanimously affirm that the government of Canada's promise that hunting, fishing and trapping rights would be protected forever was the sine qua non for obtaining the Indians' agreement to enter into Treaty No. 8.

TRIAL DECISION	TREATY TEXT AND SCC DECISIONS
ANTICIPATED NON-ABORIGINAL USE OF THE TREATY LANDS: [para. 1472] [emphasis added] d) ....I have found that in Treaty 3, the Ojibway and the Commissioners had a much different intent and understanding. **Canada's primary interest in negotiating Treaty 3 was not opening the Treaty 3 area to settlement and development.** j) Binnie J. found at paragraph 25 of *Mikisew* that there was anticipation of an "uneasy tension between the First Nations' essential demand that they continue to be as free to live off the land after the treaty as before **and the Crown's expectation of increasing numbers of non-Aboriginal people moving into the surrendered territory" in the Treaty 8 area. I have found that in the Treaty 3 area, there was no such "uneasy tension."** The parties did not see from the beginning that their ongoing relationship would be difficult to manage. **Apart from the right of way area they mutually anticipated little permanent settlement in the Treaty 3 area**. Canada understood that if it won the Boundary Dispute, the relationship would be relatively easy to manage since cooperation among the federal departments involved was expected. If Ontario won the Boundary Dispute and a conflict in uses developed, Morris had provided that Canada would be able to manage the situation by refusing to authorize proposed uses that crossed the line.	***Mikisew Cree First Nation v. Canada*, 2005 SCC.** Binnie J. for the Court at Para. 30: ...Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, "the same means of earning a livelihood would continue after the treaty as existed before it". ***R. v. Badger*, SCC 1996**. Cory J. for lead majority, at Para. 55: ...Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area... Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights... ***R. v. Horseman*, 1990 SCC**. Wilson J. in dissent, but not on this point., at Page 103 (bottom): In one of the most detailed studies of the history of the negotiations leading up to Treaty No. 8, As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939 (1973), R. Fumoleau explains why the Canadian government sought an agreement with the Treaty 8 Indians. The Klondyke gold rush gave rise to serious problems throughout 1897 and 1898, with miners travelling through territory occupied by the Indians and paying little respect to their traditional way of life. Inevitably conflict broke out as the Indians retaliated. The government of Canada quickly realized that it was necessary to reach an understanding with the Indians about future relations. Commissioners Laird, Ross and McKenna were therefore sent out to negotiate a treaty with the Indians.

PART VI – Table of Authorities

Cases	Cited at paragraphs
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Natural Resource Transfer Agreement (1930), paragraphs 1 and 12	17, 101
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PART VII - SCHEDULE OF STATUTES AND RULES AT ISSUE

NATURAL RESOURCE TRANSFER AGREEMENT (1930), PARAGRAPHS 1 AND 12

Transfer of Public Lands Generally

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the Constitution Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries therefore provided, however, that the said Indians shall have the rights, which Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

CONSTITUTION ACT, 1867 (UK), 30 & 31 VIC, C-3, SS 91(24), 109

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ...

24. Indians, and Lands reserved for the Indians.

Property in Lands, Mines, etc.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same. (57)

ONTARIO BOUNDARIES EXTENSION ACT, S.C. 1912, 2 GEO. V, C.40

1. This Act may be cited at *The Ontario Boundaries Extension Act.*

2. The limits of the province of Ontario are hereby increased so that the boundaries thereof shall include, in addition to the present territory of the said province ...

(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.

CONSTITUTION ACT, 1982, BEING SCHEDULE B TO THE *CANADA ACT 1982*, (UK), 1982, C.11, S. 35

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. (96)

BRITISH COLUMBIA TERMS OF UNION, 1871

10. The provisions of the "British North America Act, 1867" shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to and only affect one and not the whole of the Provinces now comprising the Dominion, and except so far as the same may be varied by this Minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other Provinces of the Dominion, and as if the colony of British Columbia had been one of the Provinces originally united by the said Act.

INTERPRETATION ACT, R.S.C. 1985 C.I-21, S. 13

Preamble

13. The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.

INDIAN LANDS ACT, S.C. 1924 C.48 AND S.O. 1924 C.15

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

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,

- a n d -

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 consideration 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 lands know 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;