File No. 35379

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM A JUDGMENT OF 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**
(Plaintiffs)

-and-

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

**RESPONDENTS**
(Defendants)

-and-

**THE ATTORNEY GENERAL OF CANADA**

**RESPONDENT**
(Third Party)

-and-

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

**RESPONDENT**
(Interveners)

-and-

**GOLDCORP INC.**

**RESPONDENT**
(Intervener)

(Style of cause continues inside cover pages)

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**FACTUM OF THE RESPONDENT (THIRD PARTY)**
**THE ATTORNEY GENERAL OF CANADA**

---

**AND BETWEEN**:

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## PART I – CONCISE STATEMENT OF FACTS

### *Overview*

1. Treaty 3 was made between representatives of Her Majesty and the Ojibway Indians in 1873. The treaty is the product of extensive and well-documented negotiations. There is no doubt that the Aboriginal parties understood that after the treaty, the Crown would be entitled to take up lands for settlement, mining, lumbering and other purposes. This exercise of Crown authority was not restricted to a particular order of government. The trial judge made fundamental errors in deciding otherwise and imposing a two-step process whereby Canada is to stand between the First Nations and the Province of Ontario in any taking up of land. The Court of Appeal properly corrected these palpable and overriding errors and correctly interpreted the historical record and the treaty.

2. Like all of the numbered treaties, Treaty 3 is an instrument that seeks to balance competing interests. At issue particularly in this case is the balance that is to be achieved between the right of the Aboriginal parties to continue to hunt and fish, and the authority of the Crown to take up surrendered land for public purposes. In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),*[1] the Court addressed this issue directly and provided clear guidance as to how the requisite balance is to be achieved: in taking up land, the Crown is obliged to act honourably, in conformity with the principles articulated in *Haida Nation v British Columbia (Minister of Forests).*[2]

3. The treaty must be implemented in a manner which reflects the constitutional division of powers. This means that provincial Crown land can be taken up for settlement and development by the Crown in right of the province, acting under sections 92(5), 92A and 109 of the *Constitution Act, 1867*. The treaty did not reserve any residual right to the federal Crown to allow or disallow provincial land use decisions.

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[1] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 at paras 31-35, 48 ["*Mikisew Cree*"] [Canada's Book of Authorities ["CBA"] Tab 14].

[2] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 733, [2004] 3 SCR 511 ["*Haida*"] [CBA Tab 7].

4. In exercising its authority to take up land, the Crown is obliged to act honourably. In its land use decisions, Ontario must respect the treaty right to hunt and fish, and must comply with the duty to consult. Land may be taken up without infringing treaty rights as long as First Nations retain a meaningful right to hunt and fish within their traditional territories. The doctrine of interjurisdictional immunity does not operate to displace provincial jurisdiction over provincial Crown land. However, any taking up that does infringe treaty rights must be justified. Section 35 of the *Constitution Act, 1982* applies equally to both orders of government, and both orders of government are obliged to uphold the honour of the Crown and foster reconciliation in their respective dealings with Aboriginal peoples.

***Facts***

5. The appellants' facts present an inaccurate and incomplete account of the historical record in important respects. Furthermore, the reasons of the trial judge ignored the essential finding of the Judicial Committee of the Privy Council in 1889, in *St Catherine's Milling v The Queen,*[3] that Treaty 3 is an agreement between the Saulteaux Tribe of the Ojibway ("Ojibway") and Her Majesty ("Crown"), and not with a particular order of government. It is important to have an accurate understanding of the historical record in order to properly address the issues arising in this appeal.

6. Most importantly, the historical facts show that the treaty commissioners clearly stated to the Ojibway that they represented the Crown in negotiating and signing the treaty and the treaty is with the Crown, not a particular order of government.

***Fundamental errors in the appellants' facts***

7. The appellants' inaccurate presentation of facts comes, in part, from their extensive reference to passages in the trial judgment, which itself contains many errors and matters of speculation, as noted by the Court of Appeal.[4]

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[3] *St Catherine's Milling and Lumber Company v The Queen (Attorney General for Ontario)* (1888), 14 AC 46 (PC) ["*St Catherine's Milling*"] [AA Vol II Tab 37].

[4] Court of Appeal Reasons for Judgment of the Honourable Justices Sharpe, Gillese and Juriansz, March 18, 2013, at paras 23, 156-172 ["CA RFJ"] [Appellants' Record ["AR"] Vol 2, Tab 3, at 9-10, 50-54].

8. A fundamental error that the appellants seek to perpetuate is that the treaty commissioners said they represented the federal government. The historical record makes clear that the commissioners told the Ojibway that they represented Her Majesty, and the treaty was to be between the Queen and the Indians. The appellant Keewatin is wrong in stating otherwise in paragraph 18 and elsewhere in his factum. The Ojibway understood that their treaty was with the Crown, and not just with the federal government. This is confirmed by what the Ojibway said in their 1884 petition to the Governor General. The petition was in response to unauthorized cutting of timber on reserve. In the petition submitted by the chiefs, including Chief Mawandoponase (the chief spokesperson for the Ojibway in the 1873 treaty negotiations), the Ojibway referred to Treaty 3 as "our treaty with the 'Great Mother,' and 'much loved Queen,' beyond the 'Big Salt lake,' whereby we surrendered our lands with the exception of certain reservations which were to be held in trust for us."[5]

9. The appellant Keewatin is further mistaken when he says at paragraph 22 of his factum that the 1873 "negotiations did not focus on the meaning of the Taking-up Clause" and "this is consistent with the treaty commissioners' repeated assurances that they were there to secure friendly relations with the Ojibway and their compliance with the law." In fact, the commissioners emphasized that the Ojibway could continue their hunting and fishing on lands until such time as may be needed for settlement or development.[6] As *The Manitoban* reported Governor Morris saying on the first day of the negotiations, "it may be a long time before the other lands are wanted, and in the meantime you will be permitted to fish and hunt over them."[7]

10. In paragraphs 23 and 24 of his factum the appellant Keewatin presents argument in the guise of facts by attributing intent to the treaty commissioners that only Canada could take up lands, largely relying on the trial judgment to say this. There is no evidence to support this conclusion and the appellant and trial judge are plainly wrong. In his account of the numbered treaties, Morris says that in return for the surrender of their Aboriginal right and title to lands, the Indians obtained permission to hunt over the ceded territory ..."excepting such portions of the

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[5] October 1884 Petition, Ojibway to Governor General, at 118 [Canada's Extract Book ["CEB"] Tab 1].
[6] The Manitoban at 3 ["*Manitoban*"] [AEB 18]; Notes taken at Indian Treaty, North West Angle, Lake of the Woods, from September 30, 1873 to close of Treaty, by Simon Dawson at 2-3 ["*Dawson Notes*"] [AEB 40].
[7] *Manitoban* at 3 [AEB Tab 18].

territory as pass from the Crown into the occupation of individuals or otherwise."[8] Moreover and importantly, the treaty commissioners, as representatives of Her Majesty, had authority to negotiate a surrender in favour of the Crown, but they did not have authority nor did they purport to take away from Ontario interests and jurisdiction assigned to the province by the *Constitution Act, 1867*. The historical record overwhelmingly shows that when the Treaty 3 lands became part of Ontario the province was to have authority to take up land.[9]

***Respondent Canada's facts***

11. The following summary of the facts provides the necessary historical context and the essential findings of the courts below. The respondent Canada also relies on the summary of facts set out in the Court of Appeal Reasons for Judgment.[10]

***The treaty and the appellants***

12. Treaty 3 was signed by Her Majesty's treaty commissioners and the Ojibway at the North-West Angle of the Lake of the Woods on October 3, 1873.[11] It is a treaty within the meaning of section 35 of the *Constitution Act, 1982*. The Treaty 3 area is in present-day northwestern Ontario and southeastern Manitoba, centred around the Lake of the Woods and the Rainy River and extending northward of Kenora. The treaty encompasses approximately 140,000 square kilometres (55,000 square miles) or an area almost twice the size of New Brunswick.[12]

13. Each of the appellants is a member of either the Grassy Narrows or Wabauskang First Nations, whose members are descendants of the treaty signatories. The appellants' ancestors traditionally lived in the Treaty 3 area, including in the northwest quadrant of the territory north

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[8] Morris, Alexander, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, at 111-112 ["*Morris Text*"] [CEB Tab 2].
[9] Cross-examination of Robert Vipond, February 23, 2010, Vol 17, at 7335, lines 3-19 [CEB Tab 3]; Cross-examination of Robert Vipond, February 26, 2010, Vol 18, at 7693, lines 3-11 [CEB Tab 4].
[10] CA RFJ at paras 24-71 [AR, Vol 2, Tab 3, at 10-20].
[11] CA RFJ at para 1, Appendix "A" [AR, Vol 2, Tab 3, at 3, 78]; The Manitoba Free Press, October 18, 1873 ["*Manitoba Free Press*"] [AEB Tab 41].
[12] CA RFJ at para 2 [AR, Vol 2, Tab 3, at 4].

of the English River in that part of the Treaty 3 area that was added to Ontario in 1912 ("the Keewatin Lands").[13]

14. The treaty commissioners appointed by Her Majesty's Dominion Government were authorized and empowered, on behalf of Her Majesty:

> to negotiate, make and conclude with the several bands or tribes of Indians the necessary Treaties for the cession to us, our heirs and successors, of all and every their respective *rights, titles and claims to and in the said lands and every of them.*[14] (emphasis added)

15. Treaty 3 provides that the Ojibway agreed to a complete surrender and extinguishment of all their aboriginal "rights, title and privileges whatsoever" to the Treaty 3 tract of land.[15] In exchange for the surrender, the Crown paid $12 to every man, woman and child and promised other benefits, including the setting aside of reserves and payment of annuities (which was done).[16]

16. The Ojibway were also promised the treaty 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 [Majesty's] Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefore by the said Government.[17]

17. There are similar harvesting and taking up clauses in the Robinson-Superior and Robinson-Huron treaties dated, respectively, September 7 and 9, 1850, and in Treaties 4 through 11 entered into from 1874 to 1921.[18]

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[13] CA RFJ at para 25 [AR, Vol 2, Tab 3, at 10]; *An Act to Extend the Boundaries of the Province of Ontario*, SC 1912, 2 Geo V, c 40 ["*Ontario Boundaries Extension Act, 1912*"] [AEB Tab 2].
[14] CA RFJ at para 34 [AR, Vol 2, Tab 3, at 12]; Letter, Atkins to Commissioners, June 16, 1873 [CEB Tab 5].
[15] *Manitoba Free Press* [AEB Tab 41].
[16] *Manitoba Free Press* [AEB Tab 41].
[17] CA RFJ at para 8 [AR, Vol 2, Tab 3, at 6]; *Manitoba Free Press* [AEB Tab 41].
[18] Harvesting provisions of the Robinson and Numbered Treaty texts [CEB Tab 6].

***The lands that are within Treaty 3***

18. The historical context is important to the proper interpretation of the treaty, and specifically the taking up clause. In 1869, Canada acquired administration and control of Rupert's Land and the North-western Territory from the Imperial Crown. Rupert's Land had previously been administered on behalf of the Crown by the Hudson's Bay Company. In 1870, these two territories were amalgamated to form the North-West Territories.[19] Prior to Confederation, the Province of Upper Canada (which later became Ontario) had disputed the Hudson's Bay Company's claim to a significant portion of these lands, some of which are located in present-day northwestern Ontario in the Treaty 3 area. When Canada acquired Rupert's Land and the North-Western Territory in 1869, Canada inherited the Hudson's Bay Company's side in its dispute with Ontario.

19. Like the Hudson's Bay Company before it, Canada argued for a more easterly boundary for the North-West Territories, while Ontario sought a more westerly boundary. This dispute went on for 20 years before Ontario's position was finally confirmed by Imperial statute in 1889.[20]

20. In 1873, at the time of the treaty negotiations, Canada was of the view that all of the Treaty 3 territory was located in the North-West Territories. Canada was also of the view that the Treaty 3 lands, including the Keewatin Lands, became part of the federal District of Keewatin in 1876 when the District of Keewatin was formed. The Treaty 3 lands lying immediately to the south of the Keewatin Lands were subsequently determined to be within the boundaries of Ontario when Ontario's position in the boundary dispute prevailed in 1889. The Keewatin Lands, which are subject of this appeal, became part of Ontario when the province's boundaries were further extended by reciprocal legislation in 1912.[21]

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[19] Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union, June 23, 1870 ["Order in Council, June 23, 1870"] [CEB Tab 7].

[20] CA RFJ at para 56 [AR, Vol 2, Tab 3, at 17]; *An Act to declare the Boundaries of the Province of Ontario in the Dominion of Canada*, 1889, 52-53 Vict, c 28 (UK) ["*Canada (Ontario Boundary) Act, 1889*"] [CEB Tab 8].

[21] CA RFJ at para 25 [AR, Vol 2, Tab 3, at 10]; *Ontario Boundaries Extension Act, 1912* [AEB Tab 2]; *An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the limits of the Province*, SO 1912, 2 Geo V, c 3 ["*Ontario Boundaries Extension Consent Act, 1912*"] [CEB Tab 9].

***The negotiations in 1873***

21. Prior to treaty negotiations in the area covered by Treaty 3, Canada had begun to build an immigrant travel route known as the Dawson Route to move settlers westward across the territory that became Treaty 3 lands.[22] As well, in 1871 Canada promised to build a transcontinental railroad across these lands in order to induce British Columbia to join Confederation.[23]

22. Canada's objective in negotiating a treaty were to establish peaceful relations with the First Nations, open up lands for settlement and development, open an overland and waterways travel route for settlers going to the Prairies (via the Dawson Route) and open a route for the railway from central Canada westward.[24] The Ojibway's interests were to ensure that they could continue their way of life in harvesting resources from the land and obtain economic and other benefits from the government and non-Aboriginal settlers.[25]

23. In 1871 and 1872, Canada sent treaty commissioners to negotiate with the Ojibway, but they were unable to conclude a treaty.[26]

24. By 1872 the Dawson Route was open and settlers were crossing through the territory heading west to the Prairies.[27] Canada was concerned about the security of travellers over the Dawson Route and surveyors preparing for the construction of the railroad.[28]

25. On June 16, 1873, Her Majesty's Dominion Government passed an Order in Council establishing a Board of Indian Commissioners "for the due management of Indian Affairs in the Province of Manitoba and in our North-West Territories respectively in our said Dominion of Canada" and appointed three commissioners: Alexander Morris, the Lieutenant-Governor of Manitoba and the North-West Territories; Lindsay Russell, Assistant Surveyor-General of Dominion Lands; and Joseph Provencher, Indian Agent.[29] Mr. Russell was soon replaced by

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[22] CA RFJ at para 27 [AR, Vol 2, Tab 3, at 11].
[23] CA RFJ at para 27 [AR, Vol 2, Tab 3, at 11].
[24] Appellant Keewatin's Factum at para 12.
[25] Appellant Keewatin's Factum at para 11.
[26] CA RFJ at para 28 [AR, Vol 2, Tab 3, at 11].
[27] CA RFJ at para 29 [AR, Vol 2, Tab 3, at 11].
[28] CA RFJ at para 29 [AR, Vol 2, Tab 3, at 11].
[29] CA RFJ at paras 30-33 [AR, Vol 2, Tab 3, at 11-12]; Order in Council, June 16, 1873 [AEB Tab 14];

Simon Dawson as one of the Treaty 3 commissioners.[30] The commissioners were to negotiate and conclude the necessary treaties with several bands or tribes inhabiting those lands and on terms contained in correspondence from the Minister of Interior to Governor Morris.[31]

26. Commissioner Provencher called for the Indians to meet at the North-West Angle of the Lake of the Woods at the end of September 1873.[32]

27. Governor Morris and two newspapers (*The Manitoban* and *The Manitoba Free Press*) provided detailed reports on the negotiations.[33] As well, a record of discussions was taken by a shorthand reporter, handwritten notes were made during the negotiations by Commissioner Dawson, and notes of the negotiations were taken in French by Joseph Nolin, a Métis, on behalf of the Ojibway.[34] Mr. Nolin's notes were then translated into English and attached to Governor Morris' report dated October 14, 1873.[35]

28. Importantly, most chiefs from the Treaty 3 area were present and participated in the treaty negotiations and there is a good record of the negotiations.[36] The chiefs were also accompanied by an Aboriginal reporter whose duty was to commit to memory all that was said at the negotiations.[37]

29. On September 30, 1873, in his opening address to the Ojibway, Governor Morris informed "the Queen's subjects" that it was the Queen who had sent him to the North-West Angle to meet with them. Morris said "I am one of her servants. I am her Governor in this great

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[30] CA RFJ at para 33 [AR, Vol 2, Tab 3, at 12]; Letter, Minister of Interior to Dawson, September 3, 1873 [CEB Tab 10].
[31] CA RFJ at para 34 [AR, Vol 2, Tab 3, at 12]; Letter, Minister of Interior to Governor Morris, August 5, 1873 [CEB Tab 11].
[32] Letter, Deputy Superintendent to Provencher, August 2, 1873 [CEB Tab 12].
[33] CA RFJ at para 36 [AR, Vol 2, Tab 3, at 13]; Morris' Official Report, October 14, 1873 at 101-104 ["*Morris' Official Report*"] [CEB Tab 13]; *Manitoban* [AEB Tab 18]; *Manitoba Free Press* [AEB Tab 41].
[34] CA RFJ at paras 35-36 [AR, Vol 2, Tab 3, at 12-13]; *Dawson Notes* [AEB Tab 40]; Notes taken by J Nolin of Terms of Treaty ["*Nolin Notes*"] [AEB Tab 51].
[35] CA RFJ at para 36 [AR, Vol 2, Tab 3, at 13]; *Nolin Notes* [AEB Tab 51]; *Morris' Official Report* at 104 [CEB Tab 13].
[36] CA RFJ at paras 35-36 [AR, Vol 2, Tab 3, at 12-13].
[37] CA RFJ at para 35 [AR, Vol 2, Tab 3, at 12-13]. Note, no record of the oral history survives.

country and she has sent me here to see and talk with you" and that "the Queen's Government wish to have a treaty with you."[38]

30. Further, on October 2, 1873, in response to a counter proposal from the Ojibway, Governor Morris said that he was only a servant of the Queen and could give only what she tells him – he had no power to do more. He confirmed that he was there "to represent the Queen's Government" and to say "what the Queen was willing to do for you."[39]

31. The appellant Keewatin says that Governor Morris sometimes said he spoke for the Queen and sometimes said he was there on behalf of the "Council of a Great Dominion" or the "Queen's government." This use of different terminology is of no legal consequence. He clearly represented the Queen. The treaty was negotiated and signed by Her Majesty's representatives on her behalf.

32. Negotiations took place between the Ojibway Chiefs and headmen and Her Majesty's representatives over three days.[40] The Ojibway's initial demands for money to be paid on an annual basis to band members and for specified goods and implements exceeded the commissioners' mandate.[41] By October 3, 1873, the Ojibway and the commissioners were close to agreement, with the Crown to provide additional benefits, such as agricultural assistance, ammunition, twine, carpentry tools and suits of clothing for the chiefs and headmen.[42]

33. Of particular note, the Ojibway were assured that they would continue to "have the privilege of travelling about the country where it is vacant."[43] This was a confirmation of Governor Morris' statement on day one of the negotiations that on lands not reserved for the Ojibway's own use, "you will have the right to hunt and fish over them until the white man wants them."[44]

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[38] CA RFJ at paras 39-40 [AR, Vol 2, Tab 3, at 14]; *Dawson Notes* at 1 [AEB Tab 40].
[39] CA RFJ at paras 40, 41, 46, 47; *Dawson Notes* at 3-4 [AEB Tab 40]; *Manitoban* at 4 [AEB Tab 18].
[40] CA RFJ at paras 38-54 [AR, Vol 2, Tab 3, at 13-16].
[41] Demands made by the Indians as their terms for Treaty, January 22, 1869 ["*Demands by Indians, 1869*"] [CEB Tab 14].
[42] *Manitoban* at 5, 7 [AEB Tab 18]; *Dawson Notes* at 5 [AEB Tab 40].
[43] *Morris Text* [CEB Tab 15].
[44] *Dawson Notes* at 3 [AEB Tab 40].

34. The chiefs and Governor Morris then shook hands. The conference "adjourned for an hour to enable the text of the treaty to be completed in accordance with the understanding arrived at."[45] The treaty was then duly signed on October 3, 1873.[46]

***The tract of land and the extension of the boundary of Ontario***

35. Treaty 3 was negotiated amid disagreement over the location of Ontario's western and northern boundaries.[47] The land covered by the treaty was believed by Canada to form part of the North-West Territories that had been transferred to Canada in 1870 by the *Rupert's Land and North-Western Territory Order*.[48] Thus, at the time the treaty was concluded in 1873 the federal government understood, albeit incorrectly as it later turned out, that the entire tract of land in the North-West Territories was under federal administration and control.[49]

36. The Province of Ontario took a different view, however, saying that its boundaries extended to the west so that the bulk of the southern portion of the treaty lands (the "Disputed Territory") were within the boundaries of the Province in 1873.[50] The Disputed Territory did not include the Keewatin Lands themselves, but they were in the same locale.

37. Canada's understanding that as of 1873 all of the territory to be covered by Treaty 3 was in the North-West Territories and under federal administration and control is set out explicitly in an Order in Council dated June 16, 1873 and correspondence dated August 9, 1873. In that correspondence, the Minister of Interior says that the purpose of the treaty negotiation was to obtain "the extinguishment of the Indian title to the lands between the western boundary of the Province of Ontario and the eastern boundary of Manitoba."[51] At the time, Canada said the western boundary of Ontario did not extend past the head of Lake Superior.

38. In June 1874, Ontario and Canada agreed to submit the boundary dispute to arbitration and reached a provisional boundary agreement to provide legal certainty for development in the

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[45] *Morris' Official Report* [AR Vol 21, Tab 170, at 103] [AEB Tab 1].
[46] *Morris' Official Report* at 230-233 [AR Vol 21, Tab 70, at 103] [AEB Tab 1].
[47] CA RFJ at para 55 [AR, Vol 2, Tab 3, at 16-17].
[48] Order in Council, June 23, 1870 [CEB Tab 7].
[49] CA RFJ at para 55 [AR, Vol 2, Tab 3, at 16-17].
[50] CA RFJ at para 55 [AR, Vol 2, Tab 3, at 16-17].
[51] Letter, Minister of Interior to Acting Minister of Militia, August 9, 1873 [CEB Tab 16]; Order in Council, June 16, 1873 [AEB Tab 14].

Disputed Territory.[52] The provisional boundary ran north-south through the eastern part of the Treaty 3 area.[53] The Keewatin Lands, which included some of the appellants' traditional territories, were located to the west and north of the provisional boundary and were not part of the Disputed Territory.

39. Under the 1874 provisional boundary agreement, it was agreed that for lands within the Disputed Territory to the east and south of the provisional boundary, Ontario would grant patents; to the west and north, Canada would grant patents.[54] If it were subsequently found that these lands were not in Ontario or federal territory, the applicable government would ratify the patents issued by the other government and account for the proceeds of such lands.[55] The terms of this agreement illustrate that at that time the two Crown governments of Canada and Ontario viewed the right to take up tracts of the surrendered Treaty 3 lands (by, for example, granting Crown patents on the surrendered territory) as belonging to the emanation of the Crown that had administration and control of the lands.

40. This view was shared by Governor Morris as can be seen from the concluding chapter in his text, *The Treaties with the Indians of Manitoba and the North-West Territories*, where he says that in return for the relinquishment of all their right and title to the lands covered by the numbered treaties, the Indians received:

> ...permission to the Indians to hunt over the ceded territory and to fish in the waters thereof, excepting such portions of the territory as pass from the Crown into the occupation of individuals or otherwise.[56]

41. In 1878 the arbitrators released their decision on the boundary dispute which was almost entirely in Ontario's favour, resulting in the majority of the Treaty 3 area, but not the Keewatin Lands, being in Ontario.[57]

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[52] CA RFJ at para 59 [AR, Vol 2, Tab 3, at 17]; Memorandum of Agreement for Provisional Boundary in Respect of Patents of Lands, June 26, 1874 ["*Provisional Boundary Agreement*"] [CEB Tab 17].
[53] CA RFJ at para 60 [AR, Vol 2, Tab 3, at 17].
[54] CA RFJ at para 61 [AR, Vol 2, Tab 3, at 17-18]; *Provisional Boundary Agreement* [CEB Tab 17].
[55] CA RFJ at para 61 [AR, Vol 2, Tab 3, at 17-18]; *Provisional Boundary Agreement* [CEB Tab 17].
[56] *Morris Text* at 111-112 [CEB Tab 2].
[57] CA RFJ at para 62 [AR, Vol 2, Tab 3, at 18]; Dr John Saywell, "Conflict and Resolution: The Political Jurisdictional Controversies among Canada, Ontario and Manitoba, 1867-1912" (1998, York University) at

42. Canada refused to accept the arbitrators' decision and referred the matter to the Privy Council, which in 1884 affirmed the arbitrators' decision.[58] Still, the dispute continued. Relying on its section 91(24) jurisdiction, Canada now took the position that all of the Treaty 3 lands remained under federal administration and control, even though those lands had been found to be within the boundaries of Ontario.[59]

43. Meanwhile, in the early 1880s, Canada issued timber permits that Ontario challenged. The dispute led to the Privy Council's decision in 1888 in *St Catherine's Milling* where the Privy Council rejected Canada's position and struck down the federal timber permits. Their Lordships held that notwithstanding the Dominion Government had negotiated the surrender of Treaty 3 lands to the Crown pursuant to its section 91(24) jurisdiction, under the constitutional division of powers the province had exclusive power to authorize forestry on off-reserve Treaty 3 lands in the province.[60] Importantly, Lord Watson explicitly rejected Canada's position and held that Treaty 3 was an agreement between the First Nation signatories and the Crown, not the federal government.[61] The Privy Council further held that upon the lifting of the burden of Indian title by means of the surrender clause in Treaty 3, the beneficial interest in the tract of land came under Ontario's authority to administer and control in accordance with section 109 of the *Constitution Act, 1867*.[62]

44. The final resolution of the boundary issue was the passage of an Imperial statute in 1889, which confirmed the boundaries of Ontario in accordance with the 1884 decision of the Privy Council.[63] The lands to the west of the provisional boundary were now confirmed to be under Ontario's administration and control.

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24-26 ["Dr Saywell Report"] [CEB Tab 18]; Ontario-Manitoba Boundary Case, Award of the Arbitrators, August 3, 1878 [CBA Tab 30].

[58] Trial Reasons for Judgment of Sanderson J, August 16, 2011, at para 982-983 ["Trial RFJ"] [AR, Vol 1, Tab 2, at 190]; CA RFJ at paras 63-64 [AR, Vol 2, Tab 3, at 18]; Dr J Saywell Report at 44 [CEB Tab 19]; Ontario-Manitoba Boundary Case, Imperial Order in Council, August 11, 1884, embodying Her Majesty's Decision on the Report from the Judicial Committee of Her Privy Council, July 22, 1884 [CBA Tab 31].

[59] CA RFJ at para 65 [AR, Vol 2, Tab 3, at 18-19]; *St Catherine's Milling*, *supra* note 3 at 59 [AA Vol II Tab 37].

[60] CA RFJ at para 66 [AR, Vol 2, Tab 3, at 19]; *St Catherine's Milling*, *supra* note 3 at 59-60 [AA Vol II Tab 37].

[61] CA RFJ at para 119 [AR, Vol 2, Tab 3, at 37]; *St Catherine's Milling*, *supra* note 3at 60 [AA Vol II Tab 37].

[62] *St Catherine's Milling*, *supra* note 3 at 57, 59 [AA Vol II Tab 37].

[63] CA RFJ at para 64 [AR, Vol 2, Tab 3, 18]; *Canada (Ontario Boundary) Act, 1889* [CEB Tab 8].

45. Canada and Ontario passed reciprocal legislation in 1891, establishing a mechanism for the selection of Indian reserves confirming that Ontario had authority to take up Treaty 3 surrendered lands situated within its boundaries and thereby limit the exercise of the Ojibway harvesting rights over the lands so taken up.[64]

46. The reciprocal legislation contained a draft agreement which was signed by both governments in 1894 and which provided in Article 1 that with respect to lands:

> "taken up for settlement, mining, lumbering or other purposes … it is hereby conceded and declared" that as the lands belong to Ontario, the Indian harvesting rights "do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario or persons duly authorized by the said Government of Ontario."[65]

47. The Keewatin Lands became part of Ontario in 1912 when Ontario's boundaries (as well as those of Quebec and Manitoba) were further extended by reciprocal legislation passed by Canada and Ontario.[66] This enlarged Ontario's boundaries northward beyond the English River and westward to the present Ontario-Manitoba border.[67] The 1912 legislation did not expressly recognize the right of Ontario to "take up" lands in Keewatin – it was silent on the point.[68] However, when questioned in Parliament about the intent of the Bill, Prime Minister Borden made clear that the territory being added to the Province would be "administered by the Crown on the advice of the government of Ontario" on the exact same basis as "the rest of the land within the limits of Ontario."[69]

48. Apart from projects falling within federal jurisdiction (such as interprovincial railways, harbours and national parks), development, patenting and leasing of Crown lands in the Treaty 3

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[64] CA RFJ at para 67 [AR, Vol 2, Tab 3, at 19]; *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, SO 1891, 54 & 55 Vict c 5 ["*Indian Lands Settlement Questions Act, c 5"*] [CEB Tab 20]; *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands*, SO 1891, 54 Vict c 3 ["*Indian Lands Settlement Questions Act, c 3*"] [AEB Tab 72].

[65] CA RFJ at para 68 [AR, Vol 2, Tab 3, at 20]; *Indian Lands Settlement Questions Act, c 3* [AEB Tab 72].

[66] CA RFJ at para 25 [AR, Vol 2, Tab 3, at 10]; *Ontario Boundaries Extension Act, 1912* [AEB Tab 2]; *Ontario Boundaries Extension Consent Act, 1912* [CEB Tab 9].

[67] CA RFJ at para 69 [AR, Vol 2, Tab 3, at 20]; *Ontario Boundaries Extension Act, 1912* [AEB Tab 2]; *Ontario Boundaries Extension Consent Act, 1912* [CEB Tab 9].

[68] CA RFJ at para 70 [AR, Vol 2, Tab 3, at 20].

[69] CA RFJ at para 139 [AR, Vol 2, Tab 3, at 44]; Official Report of the Debates of the House of Commons of the Dominion Canada, February 27, 1912, at 134 [CEB Tab 21].

area have been exclusively authorized by Ontario in the Disputed Territory (westward of the provisional boundary) since the late 1880s and in the Keewatin Lands since 1912.[70]

***The forest licence issued by Ontario in 1997 which gave rise to this litigation***

49. From and after 1912 through to the 1990s Ontario issued many forestry licences over tracts in the Keewatin Lands and elsewhere in the Treaty 3 territory that went unchallenged. In 1997, Ontario's Minister of Natural Resources (Ontario) issued a sustainable forest licence, which enabled Abitibi-Consolidated Inc. ("Abitibi"), a pulp and paper manufacturer, to carry out forestry operations in certain parts of the Keewatin Lands portion of the Treaty 3 territory.[71]

50. In 2000, Grassy Narrows First Nation applied for judicial review to set aside all licences, permits, management plans and work schedules that Ontario had granted to Abitibi, alleging that the forestry operations were in violation of the Treaty 3 harvesting clause.[72] The Divisional Court quashed the application for judicial review on the grounds that it lacked the jurisdiction to grant certain relief sought and that there were complex issues that required a trial.[73] Grassy Narrows First Nation was permitted to bring an action raising the same issues.[74] The present action, from which this appeal arises, was launched in 2005.[75]

***The case management order***

51. In 2006, the case management judge divided the trial into two phases. The first phase involved the trial of two issues:

> Question One: Does Her Majesty the Queen in right of Ontario have the authority within that part of the lands subject of Treaty 3 that were added to Ontario in 1912, to exercise the right to "take up" tracts of land for forestry, within the meaning of Treaty 3, so as to limit the rights of the plaintiffs [appellants] to hunt or fish as provided for in Treaty 3?

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[70] CA RFJ at para 71 [AR, Vol 2, Tab 3, at 20].
[71] CA RFJ at para 4 [AR, Vol 2, Tab 3, at 4-5].
[72] CA RFJ at para 5 [AR, Vol 2, Tab 3, at 5].
[73] CA RFJ at para 5 [AR, Vol 2, Tab 3, at 5].
[74] CA RFJ at para 5 [AR, Vol 2, Tab 3, at 5]; *Keewatin v Ontario (Minister of Natural Resources)* (2003), 66 OR (3d) 370 (Div Ct) [CBA Tab 9].
[75] CA RFJ at para 6 [AR, Vol 2, Tab 3, at 5].

> Question Two: If the answer to question/issue 1 is "no", does Ontario have the authority pursuant to the division of powers between Parliament and the legislatures under the *Constitution Act, 1867* to justifiably infringe the rights of the plaintiffs [appellants] to hunt and fish as provided for in Treaty 3?[76]

***The lower court judgments***

52. In the result, the trial judge answered both questions, no. The Court of Appeal overturned the trial judgment and answered Question One, yes, and said it did not need to answer Question Two.

53. The trial judge concluded that the proper interpretation of Treaty 3 is that the treaty commissioners and the Ojibway mutually intended that Canada stand between Ontario and the Ojibway to police Ontario's taking up of lands and preserve and protect the Ojibway's harvesting rights. The trial judge came to this conclusion despite the fact that at the time of the treaty, the Keewatin Lands were exclusively federal lands in the North-West Territories, and therefore beyond the constitutional reach of Ontario, and the other Treaty 3 lands south of the English River were also believed by Canada to be exclusively federal lands situated in the North-West Territories.

54. This conclusion of the trial judge led to her further finding that the taking up clause in Treaty 3 imposed a two-step process, requiring Canada's authorization in order for Ontario to take up Crown lands which otherwise were within exclusive provincial administration and control pursuant to section 109 of the *Constitution Act, 1867*. The trial judge also concluded that federal authority over "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*, gave Canada a residual right to authorize Ontario's taking up of provincial Crown land, a conclusion that is in direct contradiction with the Privy Council decisions in *St Catherine's Milling* and *Ontario Mining Co v Seybold* and this Court's decision in *Smith v The Queen*.[77] On the second question, the trial judge held that Ontario could not

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[76] CA RFJ at para 7 [AR, Vol 2, Tab 6, at 5-6]; Order of the Honourable Madam Justice Spies (entered August 28, 2006) re: Threshold Issues [AR Vol 2, Tab 6]. Note, the wording of the Questions in the case management order entered August 28, 2006 differs somewhat from the wording used by the Court of Appeal at para 7.

[77] *Ontario Mining Company v Seybold*, [1903] AC 73 (PC) ["*Seybold*"] [AA Vol I Tab 20]; *Smith v The Queen*, [1983] 1 SCR 554 ["*Smith*"] [CBA Tab 28].

justifiably infringe the treaty right to hunt and fish, which she determined to be within the core of exclusive federal jurisdiction under section 91(24).

55. The Court of Appeal set aside the trial decision, holding that Ontario can exercise its power to take up land under Treaty 3 without authorization by Canada. Having answered "yes" to the first question, the Court of Appeal held that it did not need to answer the second question, although it explicitly stated that it should not be taken as having approved the trial judge's reasoning or result in respect of the second question. The Court of Appeal concluded that the trial judge made fundamental, palpable and overriding errors in her interpretation of Treaty 3 by failing to take proper account of the governing constitutional framework, failing to follow binding judicial precedent that has already interpreted Treaty 3 and its implications for Canada's constitutional division of powers, and by misapplying the facts.[78]

## PART II – RESPONDENT'S POSITION ON APPELLANTS' QUESTIONS

56. With respect to the issues stated by the appellants Keewatin and Fobister:

a) the Court of Appeal correctly concluded that Ontario may take up land within the Treaty 3 area without Canada's approval or permission;

b) the Court of Appeal was correct in finding that this result conforms with the common intention of the parties to Treaty 3 and the requirements of the Constitution;

c) the Court of Appeal correctly concluded that after Ontario's boundaries were extended in 1912, Ontario became entitled to exercise the taking up power under Treaty 3 in relation to the Keewatin Lands.

57. With respect to the issue stated by the appellant Cameron, Ontario has the constitutional authority to authorize land use through the enactment of the *Crown Forest Sustainability Act, 1994* and other measures.[79] Such legislation is not made constitutionally inapplicable by the exclusive legislative authority conferred on Parliament by section 91(24) of the *Constitution Act, 1867*.

[78] CA RFJ at paras 156-173 [AR, Vol 2, Tab 3, at 50-56].
[79] *Crown Forest Sustainability Act*, SO 1994, c 25 [CBA Tab 29].

## PART III – STATEMENT OF ARGUMENT

### *The standard of review*

58. The trial judgment is lengthy and weaves together findings of fact, mixed fact and law, and law in relation to the historical record leading up to the treaty negotiations, the negotiations themselves, and the interpretation of the treaty. Throughout, the trial judge makes fundamental and palpable and overriding errors. The standard of review on issues of fact is palpable and overriding error, and on issues of law is correctness. Questions of mixed fact and law are to be reviewed on a standard of palpable and overriding error, unless there has been an extricable error of law.[80]

59. In 1888, some 15 years after Treaty 3 was signed, in *St Catherine's Milling*, the Privy Council determined that the Ojibway made the treaty directly with the Crown, and not with a particular order of government.[81] This essential finding was made at a time when the applicable evidence was fresh and not historical, was reiterated in subsequent decisions.[82] The Privy Council further decided that Ontario had the ownership of public lands in the province to the exclusion of any federal interest, by virtue of section 109 of the *Constitution Act, 1867*. The trial judge ignored these essential and well-established findings of mixed fact and law or of law. In doing so, the trial judge made a fundamental error meeting any applicable standard of appellate review.

60. In overturning the trial judge's findings, the Court of Appeal expressly applied the standard of palpable and overriding error, although the court noted that as the trial judge's findings of fact are mingled with determinations of law, it is arguable that some or all of her findings would attract a less deferential standard.[83]

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[80] *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at paras 5-8, 26-36 [CBA Tab 8]; *HL v Canada (Attorney General)*, 2005 SCC 25, [2005] 1 SCR 401 at paras 16, 55-56, 69, 74-75, 110 [CBA Tab 6].

[81] *St Catherine's Milling*, *supra* note 3 at 60 [AA Vol II Tab 37].

[82] *Attorney General for the Dominion of Canada v Attorney-General for Ontario*, [1897] AC 199 at 204 (PC) [CBA Tab 1]; *Dominion of Canada v Province of Ontario*, [1910] AC 637 at 644-646 (PC) [AA Vol I Tab 8].

[83] CA RFJ at para 158 [AR, Vol 2, Tab 3, 51].

***Fundamental errors made by the trial judge that the Court of Appeal corrected***

61. The trial judge misinterpreted or overlooked critical historical facts in her treatment of the historical record, misinterpreted or misapplied relevant jurisprudence, failed to apply appropriate principles of treaty interpretation, misinterpreted the *Ontario Boundaries Extension Act, 1912*, and failed to give effect to the division of powers under the *Constitution Act, 1867*. The Court of Appeal correctly held that the trial judge's central findings and conclusions cannot stand.[84]

62. Having failed to apply the Privy Council's decision in *St Catherine's Milling*, that Ontario had the right to administer and control public lands in the province,[85] the trial judge then embarked on a lengthy consideration of historical documents, misinterpreting some and overlooking others completely. Moreover, the trial judge engaged in speculation and drew inferences that are simply unsupported by the record. By any standard, the trial judgment is so fundamentally flawed that it cannot stand.[86]

63. The Treaty 3 negotiations were very well documented. There is nothing to support the trial judge's thesis that Canada was to approve any taking up of land by Ontario, should the lands eventually become part of the Province.[87] The trial judge's conclusion that a two-step process involving Canada was contemplated is pure invention and inconsistent with the evidentiary record.[88]

64. Furthermore, the trial judge paid little attention to the treaty terms or the historical record when interpreting the treaty, and reached conclusions that are clearly at odds with the historical evidence and the applicable jurisprudence. Put simply, Treaty 3 provides that when lands are taken up and used by the Crown in a way that is incompatible with traditional harvesting activities, the Ojibway will no longer have the right to hunt and fish on those lands. Therefore, taking up land under the treaty does not constitute an infringement of a treaty right.[89] Despite this, the trial judge concluded that the Ojibway were promised precisely the opposite: "the

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[84] CA RFJ at paras 23, 113, 123-128 [AR, Vol 2, Tab 3, at 9, 35, 38-40].
[85] *St Catherine's Milling*, *supra* note 3 at 51 [AA Vol II Tab 37].
[86] CA RFJ at para 172 [AR, Vol 2, Tab 3, at 55].
[87] CA RFJ at para 163 [AR, Vol 2, Tab 3, at 52].
[88] CA RFJ at para 162 [AR, Vol 2, Tab 3, at 52].
[89] *Mikisew Cree, supra* note 1 at para 38 [CBA Tab 14].

Ojibway did not agree to a progressive limitation of the geographical area where they could hunt."[90] This is plainly wrong.

65. The trial judge recognized that the 1912 legislation transferred administration and control over the subject lands from Canada to Ontario. Despite this and notwithstanding that the Privy Council had rejected Canada's claim to have a continuing interest in the land, the trial judge held that Ontario could not take up lands under the treaty without Canada's authorization.[91] Again, the trial judge was plainly wrong.

***The constitutional context***

66. The issues in this appeal require consideration of both the terms of the treaty and the scope of provincial authority under sections 92(5), 92A and 109 of the *Constitution Act, 1867*. It is the *Constitution Act, 1867*, not the treaty, that is the source of provincial authority to control the use of provincial Crown lands. Treaty 3 must therefore be understood as operating within the context of the constitutional division of powers. The Crown rights and obligations arising under the treaty fall to be exercised or performed by the order of government to which the relevant authority is assigned by the terms of the Constitution. This is not a modification of the treaty, but simply the implementation of the treaty in conformity with the constitutional framework. Within the division of powers, both the Crown in right of Canada and the Crown in right of Ontario have a continuing relationship with the appellants.[92]

***Principles of treaty interpretation***

67. Treaties between the Crown and Aboriginal peoples are interpreted in a purposive fashion, informed by the honour of the Crown.[93] The purposive approach to treaty interpretation requires the identification of the common intention of the parties at the time the treaty was made.[94] In determining the common intention of the parties a court is to choose, from among the various possible interpretations of common intention, that which best reconciles the interests of

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[90] Trial RFJ at para 1472(d) [AR, Vol 1, Tab 2, at 289].
[91] Trial RFJ at paras 570, 1379-8, 1452, 1587-89 [AR, Vol 1, Tab 2, at 135, 273, 285, 310].
[92] *Haida*, *supra* note 2 at paras 57-59 [AA Vol I Tab 11].
[93] *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 at para 76 ["*MMF*"] [CBA Tab 12].
[94] *R v Marshall*, [1999] 3 SCR 456 at paras 14, 59 ["*Marshall 1*"] [CBA Tab 20]; *R v Sioui*, [1990] 1 SCR 1025 at 1069 ["*Sioui*"] AA Vol II Tab 29].

the parties at the time the treaty was made.[95] This is the fundamental objective of the interpretive exercise.

68. The honour of the Crown is a central principle of Aboriginal law and a fundamental component of treaty interpretation.[96] The honour of the Crown serves the ultimate purpose of reconciling the pre-existing Aboriginal presence with the assertion of Crown sovereignty.[97] In the interpretation of treaties, the honour of the Crown is to be presumed.[98]

69. The starting point for the interpretation of a treaty is the examination of the specific words used in the written text of the treaty.[99] Words used in the text of a treaty are to be given the meaning they would naturally have had for the parties at the time the treaty was made; technical or contractual interpretations are to be avoided.[100] The text is to be construed generously or liberally, and ambiguities or doubtful expressions resolved in favour of the Aboriginal parties.[101] However, in generously construing a treaty the terms of the treaty should not be altered and the interpretation should not exceed what is possible or realistic on the basis of the language of the treaty.[102] The interpretation of the treaty must remain anchored in the text of the treaty itself, and in the mutual intention of the parties and the original purposes for which they entered into the treaty.[103] The interpretation of the treaty must reflect its original terms, not seek to revise them to achieve different purposes.

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[95] *Sioui*, *supra* note 93 at 1068-1069 [AA Vol II Tab 29].
[96] *Mikisew Cree*, *supra* note 1 at para 51 [CBA Tab 14]; *Haida*, *supra* note 2 at para 19 [CBA Tab 7].
[97] *R v Van der Peet*, [1996] 2 SCR 507 at para 248 per McLachlin J (as she then was) (dissenting in the result) [CBA Tab 25]; *MMF*, *supra* note 92 at paras 66-67 [CBA Tab 12].
[98] *MMF*, *supra* note 92 at para 66 [CBA Tab 12]; *Marshall 1*, *supra* note 93 at para 4 [CBA Tab 20]; *R v Badger*, [1996] 1 SCR 771 at para 41 ["*Badger*"] [AA Vol II Tab 24].
[99] *Marshall 1*, *supra* note 93 at para 5 [CBA Tab 20].
[100] *Badger*, *supra* note 97 at para 52 [AA Vol II Tab 24]; *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36 [AA Vol I Tab 19]; *Marshall 1*, *supra* note 93 at para 78 per McLachlin J (as she then was) (dissenting in the result) [AA Vol II Tab 27]; *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 at para 29 ["*Morris*"] [CBA Tab 22]; *R v Horseman*, [1990] 1 SCR 901 at 907 ["*Horseman*"] [CBA Tab 19].
[101] *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at para 138 [CBA Tab 15]; *Simon v The Queen*, [1985] 2 SCR 387 at 402 [CBA Tab 27]; *Badger*, *supra* note 97 at para 52 [AA Vol II Tab 24].
[102] *Badger*, *supra* note 97 at para 76 [CBA Tab 17]; *Sioui*, *supra* note 93 at 1069 [AA Vol II Tab 29]; *Horseman*, *supra* note 99 at 907 [CBA Tab 19].
[103] *Mikisew Cree*, *supra* note 1 at para 57 [CBA Tab 14].

70. Contextual evidence can be relevant and of significant assistance in determining the common intention of the parties.[104] The conduct of the parties in the time following the making of the treaty may be part of this context.[105] In determining the parties' understandings and intentions, cultural and linguistic differences must be considered.[106]

71. This Court's jurisprudence demonstrates that the interpretation of the terms of a treaty requires consideration of the following elements:[107]

a) examining the words of the treaty provision at issue to determine the meaning of the treaty on its face;

b) determining the range of possible interpretations of the treaty provision in order to develop a preliminary framework for the consideration of the historical context, keeping in mind the need to avoid an unduly restrictive interpretation;

c) considering the meaning of the words of the treaty in the historical and cultural context, and applying the historical context to determine which of the possible interpretations best reflects the parties' common intention – the interpretation which best reconciles the parties' interests and accomplishes the intended purposes of the treaty;

d) considering the issue from the perspective of the honour of the Crown in order to ensure that the interpretation furthers the reconciliatory purpose of section 35 of the *Constitution Act, 1982*.

***The text of Treaty 3***

72. The written text of Treaty 3 clearly articulates both the nature and scope of the surrender of Aboriginal rights and title, and the exercise of the treaty right to hunt and fish. When these

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[104] *Horseman, supra* note 99 at 907 [CBA Tab 19]; *R v Sundown*, [1999] 1 SCR 393 at para 25 [CBA Tab 24]; *Badger, supra* note 97 at para 52 [AA Vol II Tab 24]; *Marshall 1, supra* note 93 at paras 9-13 [CBA Tab 20].

[105] *Marshall 1, supra* note 93 at paras 11, 97, 99, 106 [CBA Tab 20].

[106] *Badger, supra* note 97 at paras 52-54 [AA Vol II Tab 24]; *Horseman, supra* note 99 at 907 [CBA Tab 19].

[107] Cf *Marshall 1, supra* note 93 at paras 82-83 per McLachlin J (as she then was) (dissenting in the result) [AA Vol II Tab 27].

provisions are considered together, it is clear that the hunting and fishing rights are not unlimited in scope; the area over which they can be exercised is defined with reference to the Crown's ability to take up lands for other purposes:

> The Saulteaux tribe of the Ojibbeway Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender, and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits….
>
> …
>
> 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 the 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 therefore by the said Government.[108]

73. The terms of the treaty clearly indicate that the taking up of tracts of land is expected to limit the geographical scope of the hunting and fishing rights. When lands are taken up by the Crown and used in a way that is incompatible with hunting and fishing, the Aboriginal parties will no longer have the right to hunt and fish on those lands to the extent and for the duration of the visible incompatible use. The taking up of land in conformity with the terms of the treaty does not infringe treaty rights.

74. Such an interpretation is entirely consistent with what this Court decided in *Mikisew Cree*, where it interpreted the parallel provisions of Treaty 8. The Court recognized that the Crown's authority to take up land is what determines the geographical scope of the treaty harvesting rights; the proper exercise of that authority does not constitute an infringement:

> [N]ot every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly

[108] *Morris Text* at 147-149 [CEB Tab 22].

> justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands "not required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.[109]

***The historical context***

75. The evidence of the course of the treaty negotiations confirms that the text of the treaty accurately reflects the understanding of the parties with respect to the effect of the surrender and scope of the harvesting rights. The record of the negotiations demonstrates that:

a) the Ojibway understood in 1873 that the intent of the Crown's representatives was to obtain a complete surrender of their territorial rights;[110]

b) the Ojibway understood that such a surrender would open up the Treaty 3 area to use and development and that this would likely conflict with their own traditional uses of the territory;[111]

c) that this was the Ojibway understanding is further confirmed by the fact that the 1873 negotiations constituted the third attempt in three years to negotiate a complete surrender of the Ojibway's territorial rights;

d) on the first day of the negotiations, the commissioners explained the implications of a surrender to the Ojibway. The explanation explicitly confirmed that the advance of settlement was expected to involve interference with the Ojibway's traditional uses of their territory. This is why reserves were offered, "so the white man cannot interfere with them." Outside the boundaries of the reserves, the Ojibway would remain able to hunt and fish on any lands that were not taken up for use by the "white man";[112]

e) an impasse developed between the parties on the second day of negotiations as to the monetary compensation that would be provided in exchange for the surrender;

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[109] *Mikisew Cree, supra* note 1 at para 31 (emphasis in original) [AA Vol I Tab 15].
[110] von Gernet, Alexander, "Treaty Number Three (1871)" (2008, University of Toronto) at 82-83] [CEB Tab 23]; von Gernet, Alexander, examination-in-chief, November 27, 2009, at 3246-3247 [CEB Tab 24].
[111] See, for example, *Manitoban*, cited to reproduction in *Morris Text* at 131-132 [CEB Tab 25].
[112] *Dawson Notes* at 3 [AEB Tab 40].

Throughout the second day, the Ojibway raised no concern about the effect a surrender would have on their hunting and fishing rights; they clearly sought to secure the best possible monetary payment from the Crown;[113]

f) when the Ojibway realized that the Crown might choose to conclude a treaty only with those individual bands which were willing to accept its terms, they collectively "resolved to accept the Governor's terms, with some modifications." The modifications included enhancing the Crown's original offer by providing a greater initial monetary compensation and by providing agricultural implements and tools. There was no indication, however, of any modification of the hunting and fishing rights;[114]

g) after agreement was reached, the commissioners retired in order to complete the treaty document so that it reflected "the understanding arrived at." The treaty text was then read and translated for the Ojibway chiefs before they affixed their signatures.[115]

76. However, the general language of the taking up clause, referring to the "Government of the Dominion of Canada" does not support the conclusion that the treaty obliged or entitled the federal Crown to remain involved in the administration of lands that might be added to a province, or that it was expected that the development of such lands would require the approval of two orders of government. There is no evidence that this was discussed or contemplated at the time the treaty was made.

77. Moreover, although section 3 of the *Constitution Act, 1871* made express provision for the addition of territory to the boundaries of existing provinces, at the time of the treaty the federal government did not contemplate adding the Treaty 3 lands to the province of Ontario. To the contrary, the federal government strongly asserted ownership over the lands. It was not until after the *St Catherine's Milling* decision, 15 years later, that the federal government changed its position in the face of an adverse decision from the court of last resort.

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[113] *Morris' Official Report*, cited to reproduction in *Morris Text* at 77-78, 89] [CEB Tab 26]; *Dawson Notes* at 3-4 [AEB Tab 40]; *Manitoban*, cited to reproduction in *Morris Text* at 88-92] [CEB Tab 27]; *Demands made by the Indians as their terms for Treaty*, January 22, 1869 [CEB Tab 14].
[114] *Manitoban*, cited to reproduction in *Morris Text* at 94-96] [CEB Tab 28].
[115] *Morris' Official Report*, cited to reproduction in *Morris Text* at 80 [CEB Tab 29].

78. The common intention of the parties in 1873 was clearly that some parts of the surrendered lands would be taken up by the Crown and used for settlement and development, and that this would limit the geographical scope of the treaty right to hunt and fish. The purpose of the treaty provisions was to effect a surrender to the Crown, and to define the nature and scope of the hunting and fishing rights that would continue to be exercised after that surrender. The purpose of the taking up clause was not to grant the Crown authority to take up land, or to define the manner in which Crown authority would be exercised pursuant to the constitutional division of powers. Those issues, then as now, were governed by the terms of the *Constitution Act, 1867* and by subsequent constitutional instruments.

***Judicial interpretation of Treaty 3***

79. The Privy Council's decisions in *St Catherine's Milling* and *Seybold* confirm that the Crown's authority to take up surrendered lands for settlement and other purposes flows from the Constitution. Once the surrender of Aboriginal rights and title is given, the Crown's proprietary rights are freed from the burden of Aboriginal title, and can be exercised "freed from encumbrance of any kind, save the qualified privilege of hunting and fishing."[116] But as between the Dominion and the province, the authority to issue timber licenses in respect of provincial Crown lands, or any other land use authorization within the province, is an exercise of the proprietary rights of the Crown in right of the province, not the Dominion.[117]

80. In *St Catherine's Milling* the Privy Council came to the following conclusions:

a) in Treaty 3, the Ojibway surrendered the territory so that "it might be opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit;"[118]

b) while certain treaty terms make reference to the "Government of the Dominion of Canada" the treaty is "from beginning to end a

[116] *St Catherine's Milling, supra* note 3 at 52 [AA Vol II Tab 37].
[117] *St Catherine's Milling, supra* note 3 at 60 [AA Vol II Tab 37]; *Seybold*, supra note 77 at para 17 [AA Vol I Tab 20].
[118] *St Catherine's Milling, supra* note 3 at 60 [AA Vol II Tab 37].

transaction between the Indians and the Crown," not any particular order of government;[119]

c) the effect of the surrender is to free the underlying estate of the Crown from the burden of Aboriginal title;

d) after the surrender, the Crown's proprietary rights over the Treaty 3 lands were subject only to the "qualified privilege" of hunting and fishing provided for by the Treaty;"[120]

e) Ontario has the authority to exercise the proprietary rights of the Crown over provincial Crown lands within its boundaries. The treaty cannot be construed so as to deprive Ontario of the constitutional authority to administer Crown lands within its boundaries, and the commissioners "had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the Imperial Statute of 1867;"[121]

81. Following the decision in *St Catherine's Milling*, it is clear that both Canada and Ontario believed that the question of which order of government had administration and control of the Disputed Territory had been resolved. In 1891, both Canada and Ontario passed reciprocal legislation which included, as a schedule, a draft agreement between the two orders of government. The agreement was formally concluded in 1894 and provided that:

> it is hereby conceded and declared that, as the Crown lands in the surrendered treaty have been decided to belong to the Province of Ontario, or to Her Majesty in right of the said Province, the rights of hunting and fishing by the said Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been taken up for settlement, mining, lumbering, or other purposes by the Government of Ontario or persons duly authorized by the said Government of

[119] *St Catherine's Milling, supra* note 3 at 60[ AA Vol II Tab 37].
[120] *St Catherine's Milling, supra* note 3 at 52 [AA Vol II Tab 37].
[121] *St Catherine's Milling, supra* note 3 at 60 [AA Vol II Tab 37].

> Ontario, and that the concurrence of the Province of Ontario is required in the selection of the said reserves.[122]

82. The reciprocal legislation was declaratory in nature. Its purpose was to recognize the decision in *St Catherine's Milling* and to resolve any uncertainty that might possibly arise in the future.[123] The legislation simply confirmed provincial administration and control of the Disputed Territory, including the right of Ontario to take up provincial Crown lands. When the 1912 legislation extended Ontario's boundaries to their present dimensions, the additional territory, including the Keewatin Lands, became subject to provincial administration and control as well.[124]

83. In *Seybold*, the Privy Council confirmed that Ontario had the exclusive authority to make dispositions of Crown land within the Disputed Territory. *Seybold* dealt with Indian Reserve 38B, which Canada had purported to set aside without Ontario's concurrence. Part of the reserve was surrendered to the Crown in 1886, and Canada subsequently made a grant of title to the surrendered land. The Privy Council confirmed the result of its decision in *St Catherine's Milling*: upon the making of Treaty 3, "the province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty."[125] As Canada had no authority to set the reserve lands aside, it also had no authority to issue title to a portion of those lands that was subsequently surrendered to the Crown. The Privy Council concluded that "the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated…"[126]

***Treaty implementation and the honour of the Crown***

84. The honour of the Crown infuses all of the Crown's dealings with Aboriginal people. It requires government to consider the impact which the taking up of land may be expected to have on the exercise of treaty rights, and requires government to consult with Aboriginal people and

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[122] *Indian Lands Settlement Questions Act, c 5* [CEB Tab 20].
[123] Letter, Premier Mowat to Minister of the Interior, January 17, 1889 [AEB Tab 70].
[124] CA RFJ at paras 193-200 [AR, Vol 2, Tab 3, at 63-66].
[125] *Seybold, supra* note 77 at para 3 [AA Vol I Tab 20].
[126] *Seybold, supra* note 77 at para 3 [AA Vol I Tab 20]; see also *Smith, supra* note 77 at 561, 562, 565 [CBA Tab 28].

accommodate their interests in appropriate cases. As this Court held in *Haida*, this obligation is grounded in the assertion of Crown sovereignty and applies to both orders of government.[127]

85. In *Mikisew Cree*, this Court found that the terms of a similar treaty place a significant limitation on the Crown: the Crown may not take up lands to such an extent that the treaty right to hunt and fish is made meaningless.[128] In accordance with *St Catherine's Milling*, it is settled that Ontario is the order of government with exclusive administration and control of the lands at issue here pursuant to section 109 of the *Constitution Act, 1867*. As a result, under the principles enunciated in *Haida*, Ontario is obliged to comply with the Crown's duty to consult and accommodate in exercising its administration and control.[129]

86. In accordance with *Mikisew Cree*, Ontario may take up provincial Crown land without infringing the treaty as long as First Nations continue to retain a meaningful right to hunt and fish within their traditional territories. Any taking up to a greater extent would infringe the treaty right and would require justification under the test in *R v Sparrow*.[130]

87. This result is entirely consistent with the terms of Treaty 3 and with the Constitution. It reflects an understanding which reconciles the interests of the parties to the treaty and fully accomplishes the treaty's intended purposes. When the Crown in the right of Ontario takes up land, it must respect the treaty right to hunt and fish, and it must act honourably and comply with the duty to consult.

88. This Court has identified the objectives of modern Aboriginal law as the resolution of historic grievances, the reconciliation of Aboriginal and non-Aboriginal interests, and the fostering of relationships and dialogue.[131] The result here furthers these objectives, as the Court of Appeal explained:

> Leaving meaningful constitutional space for the exercise of provincial jurisdiction under ss. 109, 92(5) and 92A, without federal control under s.

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[127] *Haida, supra* note 2 at para 59 [AA Vol I Tab 11].
[128] *Mikisew Cree, supra* note 1 at paras 47-48 [CBA Tab 14].
[129] *Haida, supra* note 2 at paras 57-59 [AA Vol I Tab 11].
[130] *Mikisew Cree, supra* note 1 at para 48 [CBA Tab 14]; *R v Sparrow*, [1990] 1 SCR 1075 [CBA Tab 23].
[131] *Mikisew Cree, supra* note 1 at para 1 [AA Vol I Tab 15]; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 at para 38 [CBA Tab 26].

> 91(24), fosters direct dialogue between the province and Treaty 3 First Nations. Such dialogue is key to achieving the goal of reconciliation.[132]

***Scope of provincial power – justified infringement***

89. Further support for the conclusion that Ontario has constitutional authority to take up lands for settlement, mining, lumbering or other such purposes comes from the jurisprudence confirming that provinces can limit or regulate the exercise of treaty rights.[133] No matter how the treaty interpretation question is resolved, Ontario has the constitutional authority to regulate the use of provincial Crown land and resources, although any resulting infringement of treaty rights must be justified.

90. Ontario can regulate forest activities through legislation and licences and, in doing so, may limit the exercise of the appellants' treaty harvesting rights. Whether the impugned legislation and licence at issue in this litigation go so far as to infringe the treaty right can only be decided based on a full evidentiary record at a later phase of the trial.[134] However, in principle, provincial legislation and forest licences do not constitute an impermissible interference with the exercise of the treaty right.

91. This Court's decision in *R v Morris* is consistent with the proposition that provincial governments can justifiably infringe treaty rights through legislation that has the effect of regulating or limiting the exercise of the right while still allowing for a meaningful right to hunt and fish under the treaty. Properly understood, *Morris* stands for the proposition that provincial legislation cannot prohibit the exercise of a treaty right, nor can a provincial legislature fundamentally alter or purport to extinguish an Aboriginal or treaty right.

92. *Morris* dealt with an outright prohibition against hunting at night with illuminating devices. The majority of this Court found that this is an activity protected by one of the Douglas Treaties, which cover portions of Vancouver Island in British Columbia. The majority held that the impugned provincial legislation – a complete ban on night hunting with illumination – is

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[132] CA RFJ at para 154 [AR, Vol 2, Tab 3, at 49-50].

[133] *R v Marshall*, [1999] 3 SCR 533 ["*Marshall 2*"] at paras 24, 37 [CBA Tab 21]; *Marshall 1, supra* note 93 at para 64 [AA Vol II Tab 27]; *Badger, supra* note 97 at para 79 [CBA Tab 17].

[134] *Marshall 2, supra* note 132 at paras 24, 37 [CBA Tab 21]; *Morris, supra* note 99 at paras 4, 14, 36, 42, 46, 49, 51, 53, 55, 60, 82, 99 [CBA Tab 22].

overbroad and an impermissible infringement of the treaty right.[135] Conversely, another legislative provision considered in *Morris* which prohibited hunting or trapping "without reasonable consideration for the lives, safety or property of other persons" was found to be a limit that did not impermissibly interfere with the exercise of the treaty right.[136]

***Scope of provincial power – doctrine of interjurisdictional immunity***

93. In *Morris*, this Court refers to both "impairment" and "*prima facie* infringement" as the demarcation between permissible and impermissible provincial regulation. This Court appears to equate these terms for purposes of deciding the permissible constitutional reach of provincial authority over the exercise of treaty rights. Unlike *Morris* however, in cases where there is less than a complete prohibition, fundamental alteration or extinguishment of rights, it is important to differentiate between "impairment" and "infringement."

94. The notions of "impairment" and "infringement" are distinct concepts in constitutional law, with the former relating to interjurisdictional immunity and the latter relating to the analysis under section 35 of the *Constitution Act, 1982*. Laws that regulate natural resources on public lands may in certain cases "infringe" the exercise of treaty rights and thus require section 35 justification, but they will not "impair" the exercise of federal legislative authority for the purposes of interjurisdictional immunity so long as they do not extinguish, redefine or alter the substance of the treaty right. To a degree, the reasoning in *Morris* conflates infringement and impairment and, by extension, injects an element of uncertainty into the analysis under section 35 (justified infringement) and the division of powers (impairment). The use of the concept of infringement to oust provincial laws in a division of powers context as suggested in *Morris* is overbroad and should be reconsidered in light of recent jurisprudence on interjurisdictional immunity.

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[135] *Morris, supra* note 99 at paras 4, 38, 40, 43, 46 [CBA Tab 22].
[136] *Morris, supra* note 99 at para 14 [CBA Tab 22].

95. By doing so this Court can affirm that provincial laws of general application can have a significant effect on Indians without running afoul of the principles enunciated in *Morris* or being *ultra vires*.[137]

96. In this case, the trial judge fell into error in considering that the core of exclusive federal authority pursuant to section 91(24) is so broad as to extend to all aspects of the exercise of treaty rights. The appellants seek to perpetuate this error.

***Development of the doctrine of interjurisdictional immunity***

97. If *Morris* cannot be reconciled in this way, then some of the reasoning in *Morris*, but not the result as applied to the circumstances addressed there, should be revisited in line with recent jurisprudence addressing the doctrine of interjurisdictional immunity.

98. Interjurisdictional immunity exists to protect the "basic, minimum and unassailable content" or the core of the "exclusive classes of subject" created by sections 91 and 92 of the *Constitution Act, 1867*. It is not meant, nor should it be applied, to create broad enclaves of exclusive federal or provincial jurisdiction where both levels of government have constitutional authority over a subject area. As this Court has stated, a broad application of the doctrine is inconsistent with a flexible and pragmatic approach to federalism.[138] The jurisprudence has developed to the point where the doctrine has a limited application.[139]

99. In *Canadian Western Bank v Alberta*, this Court undertook a detailed analysis of the doctrine and concluded that it should be applied with restraint.[140] Further, in *Marine Services International Ltd v Ryan Estates*, this Court recently held that while a provincial statute trenched on the core of the federal power over navigation and shipping, it nonetheless did not impair the exercise of the federal power over navigation and shipping, nor did it alter the uniformity of maritime law. Merely affecting the exercise of federal power is insufficient to trigger

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[137] *Kitkatla Band v British Columbia*, 2002 SCC 31, [2002] 2 SCR 146 at para 70 [CBA Tab 10]; *Kruger and al v The Queen*, [1978] 1 SCR 104 at 110 [CBA Tab 11].

[138] *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44 at para 50 ["*Marine Services"*] [CBA Tab 13].

[139] *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at paras 33-34 ["*Canadian Western Bank"*] [AA Vol I Tab 5]; *Marine Services, supra* note 137 at para 50 [CBA Tab 13].

[140] *Canadian Western Bank, supra* note 138 at para 67 [CBA Tab 3].

interjurisdictional immunity.[141] The Court reached this conclusion notwithstanding that there was prior authority favouring the application of interjurisdictional immunity to the subject matter of the appeal in *Marine Services.*[142]

100. This Court's decision in *Marine Services* provides authority for revisiting when interjurisdictional immunity applies, and for concluding in this appeal that Ontario has the authority to enact forestry legislation and undertake forest management practices, including issuing licenses. In principle, accepting that the Ontario forestry legislation and the issuance of forest licences "affects" the exercise of the treaty harvesting right to some degree, this level of intrusion should be insufficient to trigger interjurisdictional immunity.

101. If required, this Court should now reassess the principles set out in *Morris* in light of recent jurisprudence and in line with a flexible and pragmatic approach to federalism.[143]

102. In matters arising under section 91(24) of the *Constitution Act, 1867,* any incompatibility between the operational effects of provincial legislation and federal legislation is better resolved through the doctrine of paramountcy. According to this doctrine, when the operational effects of valid provincial legislation are incompatible with valid federal legislation, the federal legislation prevails and the provincial legislation is rendered inoperative to the extent of the incompatibility.[144] This Court has stated its preference to resolve matters involving the division of powers on the basis of the paramountcy doctrine rather than through the application of interjurisdictional immunity. [145]

103. In this case, the doctrine of paramountcy is not engaged because there is no inconsistency between provisions in provincial and federal legislation. Specifically, there is no federal legislation dealing with forestry practices or licences in Ontario, much less any federal legislation which is inconsistent or conflicts with the provincial *Crown Forest Sustainability Act.*

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[141] *Marine Services, supra* note 137 at paras 60, 62 [CBA Tab 13].
[142] *Marine Services, supra* note 137 at para 51 [CBA Tab 13]; *Ordon Estate v Grail,* [1998] 3 SCR 437 at paras 84-85, 87-90, 92-93 [*"Ordon"*] [CBA Tab 16].
[143] *Marine Services, supra* note 137 at para 64 [CBA Tab 13].
[144] *Marine Services, supra* note 137 at para 65 [CBA Tab 13].
[145] *British Columbia (Attorney General) v LaFarge Canada Inc,* 2007 SCC 23, [2007] 2 SCR 86 at para 4 [CBA Tab 2].

***Indian Act, section 88***

104. This appeal can be decided on the basis of the foregoing submissions and it is unnecessary to consider section 88 of the *Indian Act* to decide the issues in this appeal. The appellants' submissions ignore the fact that provincial laws can apply *ex proprio vigore*, and that section 88 only operates to make applicable those provincial laws that otherwise would not apply of their own force and effect because of interjurisdictional immunity.[146] The approach taken in the appellants' facta seeks to transform section 88 from a vehicle for the application of provincial laws into a means to oust the application of provincial laws, a result which is contrary to the language of the statute and the intention of Parliament.

105. Further, section 88 of the *Indian Act* does not trigger the doctrine of paramountcy in as much as there is no inconsistency or incompatibility between section 88 and provincial legislation; rather, section 88 referentially incorporates certain provincial laws.

***Section 35 and justified infringement***

106. Although the doctrine of interjurisdictional immunity should not invalidate a provincial law that affects but does not prohibit, fundamentally alter or extinguish a treaty right, this does not leave First Nations without strong protection for their rights. The provinces, like the federal Crown, are required by section 35 to recognize existing Aboriginal and treaty rights, and to give effect to them in accordance with the principles and requirements enunciated in *Sparrow*, *Haida* and *Mikisew Cree*, including the honour of the Crown, consultation and accommodation, and the justification of Crown infringements.

107. Aboriginal and treaty rights are not absolute and may be infringed, although any infringement of a treaty right must be justified. The requirement of justification ensures that the First Nation beneficiaries of the treaty right are assured of the meaningful right to hunt. At the same time, this allows for treaty rights to operate within the fabric of federalism without creating legislative vacuums or creating enclaves.

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[146] Appellant Keewatin's Factum at paras 91, 95, 96; Appellant Cameron's Factum at paras 67, 109; *Dick v The Queen*, [1985] 2 SCR 309 at 326-327 [CBA Tab 5].

108. The notion of enclaves was firmly rejected by this Court in *Cardinal v Attorney General of Alberta* and in *R v Francis*.[147] In *Cardinal*, this Court said that section 91(24) should not be construed to create enclaves within a province within which provincial legislation could have no application.[148]

109. While *Cardinal* dealt with the applicability of provincial wildlife legislation on an Indian reserve, the same principle applies with even greater force to provincial lands that are covered by a treaty.

110. Large portions of Ontario, all of the Prairie provinces and parts of British Columbia and the Northwest Territories are covered by numbered treaties, and there are other historic treaties covering other parts of Ontario, Quebec, the Maritime provinces and Vancouver Island. In some circumstances, provinces may need to be able to justifiably infringe section 35 rights in order to manage the public lands and resources within their boundaries.

111. The fact that land may be covered by a treaty does not change its constitutional character or status as provincial land and resources under section 92(5), 92A and 109 of the *Constitution Act, 1867*, nor does it alter the division of powers. One of the fundamental objectives of federalism is to reserve meaningful powers to the local level and to foster cooperation among governments and legislatures for the common good.[149]

112. Few things are more fundamental for provincial governments in order to manage the territory within their boundaries and raise revenue for the common good than the regulation and management of public lands and resources by means of, inter alia, forestry legislation, licences and forest management. From the time of Confederation to the present day, it was envisaged and remains the case that provinces will derive much of their revenue from public lands and resources. That is why public lands and resources were vested in the provinces.

113. Summing up on this point, the principle of recognition and affirmation of existing Aboriginal and treaty rights embodied in section 35 serves to protect the treaty harvesting right

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[147] *Cardinal v Attorney General of Alberta*, [1974] SCR 695 at 702-703 ["*Cardinal*"] [CBA Tab 4]; *R v Francis*, [1988] 1 SCR 1025 at 1028 [CBA Tab 18].
[148] *Cardinal*, *supra* note 146 at 696, 703 [CBA Tab 4].
[149] *Canadian Western Bank*, *supra* note 138 at para 22 [CBA Tab 3].

in issue in this appeal without the necessity of resorting to the doctrine of interjurisdictional immunity. At the same time, reliance on section 35 as the guardian of any unjustified infringements of treaty rights serves to foster cooperative federalism, reconciliation of Aboriginal and treaty rights with non-Aboriginal interests and the avoidance of enclaves.

***Conclusion***

114. For the reasons above, the respondent Canada submits that the Crown in right of Ontario may take up land within the Treaty 3 area without federal approval or permission. Canada further submits that Ontario has the constitutional authority under the division of powers and section 35 to enact forestry legislation, and to issue the forestry licences. This conclusion can be reached either by applying the above analysis of this Court's decision in *Morris* or through the principle of justified infringement of treaty rights.

**PART IV – COST SUBMISSION**

115. The respondent Canada does not seek costs in this appeal.

116. By order dated December 16, 2013, this Court awarded the appellants Keewatin and Fobister their costs of this appeal, on a partial indemnity basis, in advance and in any event of the cause.

117. The respondent Canada does not oppose the request by the appellant Cameron for an order for his reasonable costs of the application for leave to appeal and the appeal on the same basis as the appellants Keewatin and Fobister.

118. The respondent Canada submits that it should not be required to pay any further costs to any party or intervener.

**PART V - ORDER SOUGHT**

119. The Respondent Canada requests that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated the 9th day of April, 2014

for Mark Kindrachuk, Q.C.

Mitchell Taylor, Q.C.

Counsel for the Respondent, The Attorney General of Canada

## PART VI – LIST OF AUTHORITIES

**OTHER:**

## PART VII – SCHEDULE OF STATUTES

| STATUTE | Paragraph |
|---|---|
| *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian* Lands, SO 1891, 54 & 55 Vict, c 5 | 45, 81 |
| Reproduced at Appellants' Record, Volume 37, Tab 76, at 166-169 | |
| *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, SO 1891, 54 Vict, c 3 | 45, 46 |
| Reproduced at Appellants' Record, Volume 37, Tab 76, at 148-151 | |
| *An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the limits of the Province*, SO 1912, 2 Geo V, c 3 | 20, 47 |
| Reproduced at Appellants' Record, Volume 49, Tab 80, at 194-195 | |
| *Canada (Ontario Boundary) Act*, 1889, 52 & 53 Vict, c 28 (UK) | 19, 44 |
| Reproduced at Appellants' Record, Volume 36, Tab 75, at 130 | |
| *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 | 3, 10, 42, 43, 54, 57, 59, 61, 66, 71, 78, 85, 96, 98, 102, 108, 111 |
| *Constitution Act, 1871*, 34 & 35 Vict, c 28 | 77 |
| *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 | 4, 12, 94, 106, 110, 113, 114 |
| *Crown Forest Sustainability Act*, SO 1994, c 25 | 57, 103 |
| *Indian Act*, RSC 1985, C I-5 | 104, 105 |
| *Ontario Boundaries Extension Act*, SC 1912, 2 Geo V, c 40 | 13, 20, 47, 61, 65, 82 |
| Reproduced at Appellants' Record, Volume 49, Tab 80, at 185-187 | |

Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

## VI. Distribution of Legislative Powers

### *Powers of the Parliament*

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 herein-after enumerated; that is to say,—

*Amendment as to legislative authority of Parliament of Canada*

*1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: Provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.*

[Note: Class 1 was added by the *British North America Act (No. 2), 1949* (No. 33 *infra*) and repealed by the *Constitution Act, 1982* (No. 44 *infra*).]

## VI. Distribution des pouvoirs législatifs

### *Pouvoirs du parlement*

Autorité législative du parlement du Canada

**91.** Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

*Modification concernant l'autorité législative du parlement du Canada*

*1. La modification, de temps à autre, de la constitution du Canada, sauf en ce qui concerne les matières rentrant dans les catégories de sujets que la présente loi attribue exclusivement aux législatures des provinces, ou en ce qui concerne les droits ou privilèges accordés ou garantis, par la présente loi ou par toute autre loi constitutionnelle, à la législature ou au gouvernement d'une province, ou à quelque catégorie de personnes en matière d'écoles, ou en ce qui regarde l'emploi de l'anglais ou du français, ou les prescriptions portant que le parlement du Canada tiendra au moins une session chaque année et que la durée de chaque chambre des communes sera limitée à cinq années, depuis le jour du rapport des brefs ordonnant l'élection de cette chambre; toutefois, le parlement du Canada peut prolonger la durée d'une chambre des communes en temps de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, si cette prolongation n'est pas l'objet d'une opposition exprimée par les votes de plus du tiers des membres de ladite chambre.*

[Note : La catégorie 1 a été ajoutée par l'*Acte de*

1A. The Public Debt and Property.

[Note: Re-numbered 1A by the *British North America Act (No. 2), 1949* (No. 33 *infra*).]

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance.

[Note: Added by the *Constitution Act, 1940* (No. 28 *infra*).]

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

*l'Amérique du Nord britannique (nº 2), 1949* (nº 33 *infra*) et abrogée par la *Loi constitutionnelle de 1982* (nº 44 *infra*).]

1A. La dette et la propriété publiques.

[Note : Renuméroté 1A par l'*Acte de l'Amérique du Nord britannique (nº 2), 1949* (nº 33 *infra*).]

2. La réglementation du trafic et du commerce.

2A. L'assurance-chômage.

[Note : Ajouté par la *Loi constitutionnelle de 1940* (nº 28 *infra*).]

3. Le prélèvement de deniers par tous modes ou systèmes de taxation.

4. L'emprunt de deniers sur le crédit public.

5. Le service postal.

6. Le recensement et les statistiques.

7. La milice, le service militaire et le service naval, et la défense du pays.

8. La fixation et le paiement des salaires et honoraires des officiers civils et autres du gouvernement du Canada.

9. Les amarques, les bouées, les phares et l'île de Sable.

10. La navigation et les bâtiments ou navires (*shipping*).

11. La quarantaine et l'établissement et maintien des hôpitaux de marine.

12. Les pêcheries des côtes de la mer et de l'intérieur.

13. Les passages d'eau (*ferries*) entre une province et tout pays britannique ou étranger, ou entre deux provinces.

14. Le cours monétaire et le monnayage.

15. Les banques, l'incorporation des banques et l'émission du papier-monnaie.

16. Les caisses d'épargne.

17. Les poids et mesures.

18. Les lettres de change et les billets promissoires.

19. L'intérêt de l'argent.

20. Les offres légales.

21. La banqueroute et la faillite.

22. Les brevets d'invention et de découverte.

23. Les droits d'auteur.

24. Les Indiens et les terres réservées pour les Indiens.

25. La naturalisation et les aubains.

26. Le mariage et le divorce.

27. La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

[Note: Legislative authority has also been conferred by the *Rupert's Land Act, 1868* (No. 6 *infra*), *Constitution Act, 1871* (No. 11 *infra*), *Constitution Act, 1886* (No. 15 *infra*), *Statute of Westminster, 1931* (No. 27 *infra*) and section 44 of the *Constitution Act, 1982* (No. 44 *infra*), and see also sections 38 and 41 to 43 of the latter Act.]

28. L'établissement, le maintien, et l'administration des pénitenciers.

29. Les catégories de sujets expressément exceptés dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.

Et aucune des matières énoncées dans les catégories de sujets énumérés dans le présent article ne sera réputée tomber dans la catégorie des matières d'une nature locale ou privée comprises dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.

[Note : Ont aussi conféré une compétence législative au Parlement l'*Acte de la Terre de Rupert, 1868* (n° 6 *infra*), la *Loi constitutionnelle de 1871* (n° 11 *infra*), la *Loi constitutionnelle de 1886* (n° 15 *infra*), le *Statut de Westminster de 1931* (n° 27 *infra*) et l'article 44 de la *Loi constitutionnelle de 1982* (n° 44 *infra*). Voir aussi les articles 38 et 41 à 43 de cette dernière loi.]

### *Exclusive Powers of Provincial Legislatures*

Subjects of exclusive Provincial Legislation

**92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

*1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.*

[Note: Class 1 was repealed by the *Constitution Act, 1982* (No. 44 *infra*). The subject is now provided for in section 45 of that Act, and see also sections 38 and 41 to 43 of the same Act.]

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and

### *Pouvoirs exclusifs des législatures provinciales*

Sujets soumis au contrôle exclusif de la législation provinciale

**92.** Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

*1. L'amendement de temps à autre, nonobstant toute disposition contraire énoncée dans le présent acte, de la constitution de la province, sauf les dispositions relatives à la charge de lieutenant-gouverneur;*

[Note : Cette catégorie a été abrogée par la *Loi constitutionnelle de 1982* (n° 44 *infra*). La teneur s'en retrouve maintenant à l'article 45 de la *Loi constitutionnelle de 1982*. Voir aussi les articles 38 et 41 à 43 de cette loi.]

2. La taxation directe dans les limites de la province, dans le but de prélever un revenu pour des objets provinciaux;

3. Les emprunts de deniers sur le seul crédit de la province;

4. La création et la tenure des charges provinciales, et la nomination et le paiement des officiers provinciaux;

5. L'administration et la vente des terres publiques appartenant à la province, et des bois et forêts qui s'y trouvent;

6. L'établissement, l'entretien et l'administration des prisons publiques et des maisons de réforme dans la province;

for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:—

*a*. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

*b*. Lines of Steam Ships between the Province and any British or Foreign Country:

*c*. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

7. L'établissement, l'entretien et l'administration des hôpitaux, asiles, institutions et hospices de charité dans la province, autres que les hôpitaux de marine;

8. Les institutions municipales dans la province;

9. Les licences de boutiques, de cabarets, d'auberges, d'encanteurs et autres licences, dans le but de prélever un revenu pour des objets provinciaux, locaux, ou municipaux;

10. Les travaux et entreprises d'une nature locale, autres que ceux énumérés dans les catégories suivantes:—

*a*. Lignes de bateaux à vapeur ou autre bâtiments, chemins de fer, canaux, télégraphes et autres travaux et entreprises reliant la province à une autre ou à d'autres provinces, ou s'étendant au-delà des limites de la province;

*b*. Lignes de bateaux à vapeur entre la province et tout pays dépendant de l'empire britannique ou tout pays étranger;

*c*. Les travaux qui, bien qu'entièrement situés dans la province, seront avant ou après leur exécution déclarés par le parlement du Canada être pour l'avantage général du Canada, ou pour l'avantage de deux ou d'un plus grand nombre des provinces;

11. L'incorporation des compagnies pour des objets provinciaux;

12. La célébration du mariage dans la province;

13. La propriété et les droits civils dans la province;

14. L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;

15. L'infliction de punitions par voie d'amende, pénalité, ou emprisonnement, dans le but de faire exécuter toute loi de la province décrétée au sujet des matières tombant dans aucune des catégories de sujets énumérés dans le présent article;

16. Généralement toutes les matières d'une nature purement locale ou privée dans la province.

*Non-Renewable Natural Resources, Forestry Resources and Electrical Energy*

*Ressources naturelles non renouvelables, ressources forestières et énergie électrique*

Laws respecting non-renewable natural resources, forestry resources and electrical energy

**92A.** (1) In each province, the legislature may exclusively make laws in relation to

(*a*) exploration for non-renewable natural resources in the province;

(*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Compétence provinciale

**92A.** (1) La législature de chaque province a compétence exclusive pour légiférer dans les domaines suivants :

*a*) prospection des ressources naturelles non renouvelables de la province;

*b*) exploitation, conservation et gestion des ressources naturelles non renouvelables et des ressources forestières de la province, y compris leur rythme de production primaire;

*c*) aménagement, conservation et gestion des emplacements et des installations de la province destinés à la production d'énergie électrique.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Exportation hors des provinces

(2) La législature de chaque province a compétence pour légiférer en ce qui concerne l'exportation, hors de la province, à destination d'une autre partie du Canada, de la production primaire tirée des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production d'énergie électrique de la province, sous réserve de ne pas adopter de lois autorisant ou prévoyant des disparités de prix ou des disparités dans les exportations destinées à une autre partie du Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Pouvoir du Parlement

(3) Le paragraphe (2) ne porte pas atteinte au pouvoir du Parlement de légiférer dans les domaines visés à ce paragraphe, les dispositions d'une loi du Parlement adoptée dans ces domaines l'emportant sur les dispositions incompatibles d'une loi provinciale.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(*a*) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(*b*) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

Taxation des ressources

(4) La législature de chaque province a compétence pour prélever des sommes d'argent par tout mode ou système de taxation :

*a*) des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production primaire qui en est tirée;

*b*) des emplacements et des installations de la province destinés à la production d'énergie électrique, ainsi que de cette production même.

Cette compétence peut s'exercer indépendamment du fait que la production en cause soit ou non, en totalité ou en partie, exportée hors de la province, mais les lois adoptées dans ces domaines ne peuvent autoriser ou prévoir une taxation qui établisse une distinction entre la production exportée à destination d'une autre partie du Canada et la production non exportée hors de la province.

"Primary production"

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

[Note: Added by section 50 of the *Constitution Act, 1982* (No. 44 *infra*).]

(5) L'expression «production primaire» a le sens qui lui est donné dans la sixième annexe.

«Production primaire»

(6) Les paragraphes (1) à (5) ne portent pas atteinte aux pouvoirs ou droits détenus par la législature ou le gouvernement d'une province lors de l'entrée en vigueur du présent article.

Pouvoirs ou droits existants

[Note : Ajouté aux termes de l'article 50 de la *Loi constitutionnelle de 1982* (nº 44 *infra*).]

*Education*

Legislation respecting Education

**93.** In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

[Note: Altered for Manitoba by section 22 of the

*Education*

**93.** Dans chaque province, la législature pourra exclusivement décréter des lois relatives à l'éducation, sujettes et conformes aux dispositions suivantes:—

Législation au sujet de l'éducation

(1) Rien dans ces lois ne devra préjudicier à aucun droit ou privilège conféré, lors de l'union, par la loi à aucune classe particulière de personnes dans la province, relativement aux écoles séparées (*denominational*);

(2) Tous les pouvoirs, privilèges et devoirs conférés et imposés par la loi dans le Haut-Canada, lors de l'union, aux écoles séparées et aux syndics d'écoles des sujets catholiques romains de Sa Majesté, seront et sont par la présente étendus aux écoles dissidentes des sujets protestants et catholiques romains de la Reine dans la province de Québec;

(3) Dans toute province où un système d'écoles séparées ou dissidentes existera par la loi, lors de l'union, ou sera subséquemment établi par la législature de la province—il pourra être interjeté appel au gouverneur-général en conseil de toute loi ou décision d'aucune autorité provinciale affectant aucun des droits ou privilèges de la minorité protestante ou catholique romaine des sujets de Sa Majesté relativement à l'éducation;

(4) Dans le cas où il ne serait pas décrété telle loi provinciale que, de temps à autre, le gouverneur-général en conseil jugera nécessaire pour donner suite et exécution aux dispositions du présent article,—ou dans le cas où quelque décision du gouverneur-général en conseil, sur appel interjeté en vertu du présent article, ne serait pas mise à exécution par l'autorité provinciale compétente—alors et en tout tel cas, et en tant seulement que les circonstances de chaque cas l'exigeront, le parlement du Canada pourra décréter des lois propres à y remédier pour donner suite et exécution aux dispositions du présent article, ainsi qu'à toute décision

Appropriation from Time to Time

**106.** Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

**106.** Sujet aux différents paiements dont est grevé par la présente loi le fonds consolidé de revenu du Canada, ce fonds sera approprié par le parlement du Canada au service public.

Emploi du fonds consolidé

Transfer of Stocks, etc.

**107.** All Stocks, Cash, Banker's Balances, and Securities for Money belonging to each Province at the Time of the Union, except as in this Act mentioned, shall be the Property of Canada, and shall be taken in Reduction of the Amount of the respective Debts of the Provinces at the Union.

**107.** Tous les fonds, argent en caisse, balances entre les mains des banquiers et valeurs appartenant à chaque province à l'époque de l'union, sauf les exceptions énoncées à la présente loi, deviendront la propriété du Canada et seront déduits du montant des dettes respectives des provinces lors de l'union.

Transfert des valeurs, etc.

Transfer of Property in Schedule

**108.** The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

**108.** Les travaux et propriétés publics de chaque province, énumérés dans la troisième annexe de la présente loi, appartiendront au Canada.

Transfert des propriétés énumérées dans l'annexe

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.

[Note: The Provinces of Manitoba, British Columbia, Alberta and Saskatchewan were placed in the same position as the original provinces by the *Constitution Act, 1930* (No. 26 *infra*).

Newfoundland was also placed in the same position by the *Newfoundland Act* (No. 32 *infra*).

With respect to Prince Edward Island, see the Schedule to the *Prince Edward Island Terms of Union* (No. 12 *infra*).]

**109.** Toutes les terres, mines, minéraux et réserves royales appartenant aux différentes provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick lors de l'union, et toutes les sommes d'argent alors dues ou payables pour ces terres, mines, minéraux et réserves royales, appartiendront aux différentes provinces d'Ontario, Québec, la Nouvelle-Écosse et le Nouveau-Brunswick, dans lesquelles ils sont sis et situés, ou exigibles, restant toujours soumis aux charges dont ils sont grevés, ainsi qu'à tous intérêts autres que ceux que peut y avoir la province.

[Note : Les provinces du Manitoba, de la Colombie-Britannique, d'Alberta et de la Saskatchewan ont été placées dans la même situation que les provinces originaires par la *Loi constitutionnelle de 1930* (nº 26 *infra*).

Terre-Neuve a également été placée dans la même situation par la *Loi sur Terre-Neuve* (nº 32 *infra*).

Quant à l'Île-du-Prince-Édouard, voir l'annexe aux *Conditions de l'adhésion de l'Île-du-Prince-Édouard* (nº 12 *infra*).]

Propriété des terres, mines, etc.

Assets connected with Provincial Debts

**110.** All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

**110.** La totalité de l'actif inhérent aux portions de la dette publique assumées par chaque province, appartiendra à cette province.

Actif et dettes provinciales

Canada to be liable for Provincial Debts

**111.** Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

**111.** Le Canada sera responsable des dettes et obligations de chaque province existantes lors de l'union.

Responsabilité des dettes provinciales

Debts of Ontario and Quebec

**112.** Ontario and Quebec conjointly shall be liable to Canada for the Amount (if any) by which the Debt of the Province of Canada exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

**112.** Les provinces d'Ontario et Québec seront conjointement responsables envers le Canada de l'excédent (s'il en est) de la dette de la province du Canada, si, lors de l'union, elle dépasse soixante-deux millions cinq cent mille piastres, et tenues au paiement de l'intérêt de

Responsabilité des dettes d'Ontario et Québec

Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

aucune province de cette Puissance, et il pourra, lors de cet établissement, décréter des dispositions pour la constitution et l'administration de toute telle province et pour la passation de lois concernant la paix, l'ordre et le bon gouvernement de telle province et pour sa représentation dans le dit Parlement.

Alteration of limits of Provinces

**3.** The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

**3.** Avec le consentement de toute province de la dite Puissance, le Parlement du Canada pourra de temps à autre augmenter, diminuer ou autrement modifier les limites de telle province, à tels termes et conditions qui pourront être acceptés par la dite législature, et il pourra de même avec son consentement établir les dispositions touchant l'effet et l'opération de cette augmentation, diminution ou modification de territoire de toute province qui devra la subir.

Changement des limites des provinces

Parliament of Canada may legislate for any territory not included in a Province

**4.** The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

**4.** Le Parlement du Canada pourra de temps à autre établir des dispositions concernant la paix, l'ordre et le bon gouvernement de tout territoire ne formant pas alors partie d'une province.

Pouvoir du Parlement Canadien de légiférer pour tout territoire non compris dans une province

Confirmation of Acts of Parliament of Canada, 32 & 33 Vict. (Canadian) cap. 3, 33 Vict. (Canadian) cap. 3

**5.** The following Acts passed by the said Parliament of Canada, and intituled respectively,—"An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada;" and the "Manitoba Act, 1870," shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.

**5.** Les textes suivants passés par le dit Parlement du Canada et respectivement intitulés: «Acte concernant le Gouvernement provisoire de la Terre de Rupert et du Territoire du Nord-Ouest, après que ces territoires auront été unis au Canada,» et «Loi de 1870 sur le Manitoba» seront et sont considérés avoir été valides à toutes fins à compter de la date où, au nom de la Reine, ils ont reçu la sanction du Gouverneur-Général de la dite Puissance du Canada.

Confirmation des Actes du Parlement Canadien 32 et 33 Vic., c. 3, et 33 Vic., c. 3

Limitation of powers of Parliament of Canada to legislate for an established Province

**6.** Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly and to make laws respecting elections in the said Province.

**6.** Excepté tel que prescrit par le troisième article de la présente loi, le Parlement du Canada n'aura pas compétence pour changer les dispositions de la loi en dernier lieu mentionné du dit Parlement en ce qui concerne la Province de Manitoba, ni d'aucune autre loi établissant à l'avenir de nouvelles provinces dans la dite Puissance, sujet toujours au droit de la législature de la Province de Manitoba de changer de temps à autre les dispositions d'aucune loi concernant la qualification des électeurs et des députés à l'Assemblée Législative, et de décréter des lois relatives aux élections dans la dite province.

Limites des pouvoirs du Parlement Canadien dans la législation pour une province établie

PART II

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.

[Note: Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983* (No. 46 *infra*).]

Commitment to participation in constitutional conference

**35.1** The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

[Note: Added by the *Constitution Amendment Proclamation, 1983* (No. 46 *infra*).]

PART III

EQUALIZATION AND REGIONAL DISPARITIES

Commitment to promote equal opportunities

**36.** (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

PARTIE II

DROITS DES PEUPLES AUTOCHTONES DU CANADA

Confirmation des droits existants des peuples autochtones Définition de «peuples autochtones du Canada»

**35.** (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

(2) Dans la présente loi, «peuples autochtones du Canada» s'entend notamment des Indiens, des Inuits et des Métis du Canada.

Accords sur des revendications territoriales

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

Égalité de garantie des droits pour les deux sexes

(4) Indépendamment de toute autre disposition de la présente loi, les droits—ancestraux ou issus de traités—visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

[Note : Les paragraphes 35(3) et (4) ont été ajoutés aux termes de la *Proclamation de 1983 modifiant la Constitution* (n° 46 *infra*).]

Engagement relatif à la participation à une conférence constitutionnelle

**35.1** Les gouvernements fédéral et provinciaux sont liés par l'engagement de principe selon lequel le premier ministre du Canada, avant toute modification de la catégorie 24 de l'article 91 de la «*Loi constitutionnelle de 1867*», de l'article 25 de la présente loi ou de la présente partie:

*a*) convoquera une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même et comportant à son ordre du jour la question du projet de modification;

*b*) invitera les représentants des peuples autochtones du Canada à participer aux travaux relatifs à cette question.

[Note : Ajouté aux termes de la *Proclamation de 1983 modifiant la Constitution* (n° 46 *infra*).]

PARTIE III

PÉRÉQUATION ET INÉGALITÉS RÉGIONALES

Engagements relatifs à l'égalité des chances

**36.** (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à :

*a*) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;

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

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

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

Idem

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

Idem

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

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

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

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

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

Idem

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

Idem

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

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

## LEGAL RIGHTS

## DROITS LÉGAUX

General provincial laws applicable to Indians

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

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

Lois provinciales d'ordre général applicables aux Indiens

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

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

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

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

Inaliénabilité des biens situés sur une réserve

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