Court File No. 35379

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

B E T W E E N:

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

Appellants

-and-

MINISTER OF NATURAL RESOURCES, RESOLUTE FP CANADA (formerly Abitibi-Consolidated Inc.), THE ATTORNEY GENERAL OF CANADA, LESLIE CAMERON on his own behalf and on behalf of all other members of WABAUSKANG FIRST NATION, and GOLDCORP INC.

Respondents

A N D B E T W E E N:

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

Appellants

-and-

ANDREW KEEWATIN JR. and JOSEPH WILLIAM FOBISTER on their own behalf and on behalf of all other members of GRASSY NARROWS FIRST NATION, MINISTER OF NATURAL RESOURCES, RESOLUTE FP CANADA (formerly Abitibi-Consolidated Inc.), THE ATTORNEY GENERAL OF CANADA, and GOLDCORP INC.

Respondents

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PART I – Overview and Facts

Overview

1. This appeal concerns the relationship between the exercise of treaty harvesting rights within the portion of the Treaty 3 area added to Ontario in 1912 (the "Keewatin Lands", see Appendix "B" Maps) and the provincial Crown's management of public lands and forests. This Court has established a robust framework for reconciling two critical aspects of the harvesting promises contained in the post-Confederation numbered treaties – the Crown's ability to take up land (within an express internal limitation to the harvesting right, provided it does so honourably) and the meaningful ability of First Nations to exercise their harvesting rights.

2. There is no reason to depart from this established framework in the Keewatin Lands and impose a novel and duplicative approach requiring federal supervision of provincial land use decisions. Ontario is and should be part of the Treaty 3 relationship, recognizing – as the Court of Appeal did – that Canada's Aboriginal treaties are with the Crown, placing obligations on all Crown governments as they operate within their respective areas of jurisdiction.

3. At the heart of this case is the proper interpretation of Treaty 3 – concluded on October 3, 1873 between the Crown and the Ojibway – and, in particular, the proper interpretation of the taking up limitation that forms part of the Treaty 3 "Harvesting Promise":

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and *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.* (the "taking up" limitation, or clause, in italics)

4. The Court of Appeal correctly concluded that Ontario can validly take up lands for forestry within the Keewatin Lands, notwithstanding the reference in the Harvesting Promise to the Queen's "Government of Her Dominion of Canada". The Treaty Commissioners used this language based on the federal government's mistaken insistence in 1873 that all of the Treaty 3 lands were outside Ontario. Its use did not represent a meaningful term of the treaty bargain for either party; it was descriptive, not prescriptive.

5. The Crown view in 1873 was that authority to take up land rested with whatever level of government had administration and control of the ceded lands, as evidenced by the Provisional

Boundary Agreement entered into by the federal government and Ontario in 1874, and consistent with the understanding of all governments before and after Confederation that the beneficial ownership of ceded lands carries with it the jurisdiction to take up or authorize the taking up of lands. The Ojibway did not consider the matter in 1873, as they were concerned about protecting their culture in the face of the coming tide of newcomers, not about the legal authority under which newcomers would be authorized to use ceded lands (federal or provincial).

6. The appellants, Grassy Narrows First Nation ("Grassy Narrows") and Wabauskang First Nation ("Wabauskang"), seek to reverse the Court of Appeal's decision and impose a federal land use regime that would require federal approval for all but insignificant provincial land use decisions. This would amount to a profound federal incursion on provincial autonomy, opposed by the federal government itself. Such a regime would be contrary to leading jurisprudence from this Court and the Judicial Committee of the Privy Council (the "Privy Council") regarding Canada's constitutional division of powers, which was partly established in the Treaty 3 context.

7. The regime proposed by the appellants does not follow from the intentions of the Treaty parties or otherwise from a proper interpretation of the Treaty, or the circumstances and conditions under which the Keewatin Lands were added to Ontario in 1912. Nor does it follow from the doctrine of interjurisdictional immunity ("IJI"), much less s. 88 of the *Indian Act*.

8. Critically, this proposed regime would also impede rather than promote reconciliation, the overarching objective of Aboriginal law. Providing constitutional space for direct dialogue between Ontario and Treaty 3 First Nations over the management of public lands and forests and the exercise of traditional harvesting rights in the Keewatin Lands will lead to understanding and accommodation, and is therefore the better path to achieve reconciliation in this context.

Facts

9. There were few disputes between the parties at trial regarding primary facts; e.g., the basic chronology, what was done, said and written, who was involved. The real issues of fact concerned what inferences should be drawn from facts disclosed by the evidence, particularly with respect to the intentions, interests and understandings of the relevant historical actors. The facts set out below were not in dispute in the courts below, except where noted, and should not be in dispute now; many are drawn from the trial judge's treatment of historical background. There are a significant number of errors in the facts as recited by Grassy Narrows, however. Those of

concern for the issues raised on appeal are addressed below, either directly or simply by setting out the corresponding facts accurately. In addition to the facts below, Ontario relies on the facts set out by the Court of Appeal and the other respondents.

10. Treaty 3 was negotiated amidst a dispute over Ontario's western and northern boundaries. The federal government of Sir John A. Macdonald vigorously asserted that all of the lands between the Lake Superior basin and British Columbia fell within the North-West Territories and Manitoba; Ontario argued that its boundaries extended west of the Lake of the Woods, taking in much of what became the Treaty 3 area.[1]

11. At that time, the federal and Ontario governments understood and proceeded on the basis that resolution of the Ontario boundary dispute would determine which government "owned" the disputed lands, and therefore would be the government issuing patents, leases, timber permits and other interests in land, outside reserves, once the lands had been ceded by treaty.[2] These were the only Crown instruments used to authorize the taking up of land at the time; regulatory land use regimes were unknown.

12. Following the commencement in 1868 of work on an immigrant route from Lake Superior (Thunder Bay) to the Red River (known as the "Dawson Route"), the federal government appointed Crown Treaty Commissioners to negotiate with the Ojibway for a treaty dealing with what would become the Treaty 3 lands. The Commissioners were instructed to negotiate a treaty of cession to secure the Dawson Route and "to throw open to settlement any portion of the land included in this area which may be susceptible of improvement and profitable occupation". Their efforts in 1871 and 1872 proved unsuccessful. In early 1873 federal officials authorized significantly increased payments and annuities, and appointed a new set of Commissioners led by Alexander Morris, Lieutenant Governor of Manitoba and the North-West Territories. Simon

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[1] *Keewatin v Ontario (Minister of Natural Resources)*, 2011 ONSC 4801 ("*SCJ*"), **Appellants' Record ("AR"), Vol. 1, Tab 2, pp. 48, 52-53, 104, 200-201, paras. 192, 212, 400, 960**; 2013 ONCA 158 ("*OCA*"), **AR, Vol. 2, Tab 3, pp. 16-17, paras. 55-56**. See Dr. John T. Saywell, *Conflict and Resolution - The Political/Jurisdictional Controversies among Canada, Ontario and Manitoba 1867-1912*, Dec. 2008 ("*Saywell Report")*, **Extract Book of the Respondent, Minister of Natural Resources ("OEB"), Tab 14, pp. 21-23**. All page numbers refer to pagination in the AR or the **Record of the Respondent, Minister of Natural Resources ("ORR").**

[2] *SCJ*, **AR, Vol. 1, Tab 2, pp. 195-196, paras. 940-941**; *OCA*, **AR, Vol. 2, Tab 3, p. 17, paras. 59-61**; Jean-Philippe Chartrand, "*Historical and Ethnohistorical Research Report: Understandings By Treaty 3 Signatories"*, June 18, 2008 ("*Chartrand Main Report*"), **OEB, Tab 11, pp. 103-104**; Dr. Robert Vipond, "Third Party's Expert Report - Report of Professor Robert Vipond", June 11, 2008, **OEB, Tab 10**; Provisional Boundary Agreement, June 26, 1874 ("*Provisional Boundary Agreement*"), **OEB, Tab 6**

Dawson was later appointed as a Commissioner, serving with Morris and Joseph Provencher.[3]

The 1873 Negotiations – the Making of Treaty 3

13. The 1873 negotiations that resulted in the making of Treaty 3 are reflected in a core body of contemporaneous or near-contemporaneous documents, as noted by Grassy Narrows at paragraph 16 of its factum. Their content is largely consistent. Regarding two of them:

(a) The record of the discussions taken by a shorthand reporter was published in *The Manitoban* newspaper, and is the longest and apparently most complete record of the negotiations. An edited version was subsequently published by Morris in his 1880 text on Indian Treaties in Manitoba and the North-West Territories.[4]

(b) Notes were made by Joseph Nolin, a Métis retained for that purpose by the Ojibway (the "*Nolin Notes*"). These represent an attempt to summarize promises and other positive responses made by the Commissioners. Contrary to the Grassy Narrows factum, it is not clear that all of the points mentioned relate to issues raised by the Ojibway on the final day of the negotiations, Oct. 3rd.[5] Some items – including annuities, payments to Chiefs and Headman, and reserves – record part of the offer made by Morris on October 1st.

14. Morris arrived at the North-West Angle of the Lake of the Woods on September 24th or 25th. Following preliminary discussions on September 30th, during which Morris explained to the Ojibway Chiefs "the object of the meeting", and three days of negotiations, Treaty 3 was concluded on October 3, 1873.[6] Contrary to the Grassy Narrows factum, no evidence suggests that Morris chose to negotiate late in the season to pressure the Ojibway, or that this was the last possible opportunity to conclude a treaty.[7]

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[3] *SCJ*, **AR, Vol. 1, Tab 2, pp. 22-23, 40, 50-51, 61-62, 64-65, 69-70, paras. 47-51, 160, 205-206, 258-259, 261, 277-280, 297**; *OCA*, **AR, Vol. 2, Tab 3, pp. 11-12, paras. 27-34**; Alexander Morris' *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, (Toronto: Willing & Williamson, 1880), "The North-West Angle Treaty" ("*Morris Treaty Text, Ch. 5*"), **OEB, Tab 7, pp. 73-74**; Howe [Secretary of State for the Provinces'] to Simpson, Pither and Dawson, May 6, 1871, **OEB, Tab 3**

[4] Two articles entitled "Indian Treaty" were published in *The Manitoban* on Oct. 11, 1873 and Oct. 18, 1873, with the latter covering the final day of treaty negotiations in more detail. The transcribed version of the Oct. 11 article located in the **Appellant's Extract Book ("AEB") at Tab 18,** includes the original text as printed in *The Manitoban*, and shows the changes made in the slightly edited version which appears in the *Morris Treaty Text, Ch. 5*, located at **OEB, Tab 7, pp. 81-105**. Images of the original articles can be found at **AR, Vol. 21, Tab 70, pp. 53-56, 111-112**

[5] *Nolin's Notes*, **AEB, Tab 51**

[6] *SCJ*, **AR, Vol. 1, Tab 2, pp. 23, 74-76, paras. 52, 327, 329-331**; *OCA*, **AR, Vol. 2, Tab 3, pp. 13-14, 15-16, paras. 38-39, 48-49, 54**

[7] *SCJ*, **AR, Vol. 1, Tab 2, p. 71, paras. 305-306**: Morris was not ready to start negotiations earlier because he was occupied with "dealing with the aftermath of violent outbreaks which had lead to a massacre of the Assiniboine by American whiskey traders at Cypress Hills in June 1873" and "also had to deal with the arrest of Louis Riel…" Because of the "growing fear in Fort Garry that Riel would be elected", Morris also was under pressure to conclude the treaty negotiations in a timely manner, but this did not preclude the possibility of renewed treaty negotiations at a later date.

15. These negotiations, like the unsuccessful negotiations of 1871 and 1872, were conducted through translation.[8] Pursuant to established treaty-making tradition, the Commissioners referred to the Queen on many occasions during the negotiations, emphasizing that they represented the Queen (which they did). As the discussions continued they also referred on a number of occasions to the Queen's government, a "great council", which Morris referred to as being located in Ottawa, and to authorities in Ottawa.[9]

16. At the outset of the negotiations on October 1st, the Ojibway negotiators took the position that they were unwilling to proceed with discussions regarding a treaty until compensation had been agreed upon for outstanding complaints regarding the Dawson Route. Morris insisted that he be allowed to speak to all matters at once – i.e. to speak to the treaty he was instructed to negotiate – and was ultimately permitted to do so, putting forward an opening proposal.[10]

17. Morris' October 1st proposal included, *inter alia*, monetary payments, schools should a band ask for one, and reserves "not exceeding in all a square mile for every family of five or thereabouts." His proposal for reserves was immediately followed by a statement recorded in *The Manitoban* and *Dawson's Notes*, respectively, as follows:

> "It may be a long time before the other lands are wanted, and in the meantime you will be permitted to hunt and fish over them."
>
> "It may be a long time before the other lands are wanted and you will have the right to hunt and fish over them until the white man wants them."[11]

18. After breaking for a day to permit the Ojibway to discuss this proposal,[12] negotiations resumed on October 2nd. The Ojibway presented a list of written demands apparently dating from 1869 as requirements to obtain a treaty. These terms greatly exceeded what Morris had offered the previous day, and his mandate. The Ojibway repeatedly pressed the "1869 Demands" through the day; Morris repeatedly rejected them, on each occasion referring back to the terms he had proposed on October 1st as the basis on which he was prepared to reach agreement, ultimately

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[8] *SCJ*, **AR, Vol. 1, Tab 2, pp. 56-57, paras. 231, 233**; *OCA*, **AR, Vol. 2, Tab 3, pp. 13-14, para. 38**
[9] *SCJ*, **AR, Vol. 1, Tab 2, pp. 76-81, 84-88, 90-99, 102, paras. 332 -333, 337, 340-341; 349-351, 366-370, 384**; *OCA*, **AR, Vol. 2, Tab 3, p. 14, para. 40**; Handwritten notes made during the treaty negotiations that are generally accepted to be the notes of Treaty Commissioner Simon Dawson ("*Dawson's Notes"*), **AEB, Tab 40**; *Morris Treaty Text, Ch. 5*, **OEB, Tab 7**
[10] *SCJ*, **AR, Vol. 1, Tab 2, pp. 76-81, paras. 335, 337, 340-341**; *OCA*, **AR, Vol. 2, Tab 3, p. 14, para. 41**
[11] *SCJ*, **AR, Vol. 1, Tab 2, pp. 77-81, paras. 337, 340-341**; *OCA*, **AR, Vol. 2, Tab 3, pp. 14-15, paras. 42-44**; *Dawson's Notes*, **AEB, Tab 40, p. 176**; *Morris Treaty Text, Ch.5*, **OEB, Tab 7, p. 87**. See also: Terms Proposed and Responding Positions stated during the Negotiation of Treaty 3 in the Fall of 1873 ("*Terms Proposed & Responses*"), **OEB, Tab 25, pp. 2-4**
[12] *SCJ*, **AR, Vol. 1, Tab 2, pp. 77-81, paras. 337, 340-341**; *OCA*, **AR, Vol. 2, Tab 3, p. 15, para. 45**

making it clear that he did not have authority to agree to the 1869 Demands.[13] In making this point he referenced both the Queen, and the government he served, which he likened to an Ojibway council: a "great council that governs a great Empire", as reported in *The Manitoban*. This phrase was edited years later to read: a "great council that governs a great Dominion" in the *Morris Treaty Text*,[14] the source quoted by Grassy Narrows.

19. There was no discussion during the negotiations of other governments in Canada, or of the role any government would play in the taking up of lands outside reserves. It does not appear that the Ojibway were aware of an Ontario government, or were aware that there was more than one government of the Queen in Canada.[15] No representation was made to the Ojibway that the taking up of lands might require the approval of two governments, or that taking up of lands by Ontario would require the approval of Canada.[16]

20. Towards the end of the negotiations on October 2nd, after the parties had reached an impasse, Chief Sakatchaway of Lac Seul spoke, making certain requests but otherwise demonstrating a willingness to accept Morris' terms. Morris responded that "[w]hat the Chief has said is reasonable", and the negotiations were adjourned.[17] The Ojibway representatives held a council through the evening of October 2nd and into the morning of the 3rd. There is no verbatim record of what was said at this council, but *The Manitoban* reported:

> The Council broke up at this point, [the afternoon of October 2nd] and it was extremely doubtful whether an agreement could be come to or not. The Rainy River Indians were careless about the treaty, because they could get plenty of money for cutting wood for the boats, but the northern and eastern bands were anxious for one. The Governor decided that he would make a treaty with those bands that were willing to accept his terms, leaving out the few disaffected ones. A Council was held by the Indians in the evening, at which Hon. James McKay, Pierre Léveillée, Charles Nolin, and Mr. Genton were present by invitation of the Chiefs. After a very lengthy and exhaustive discussion, it was decided to accept the Governor's terms, and the final meeting was announced for Friday morning.[18]

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[13] *SCJ*, **AR, Vol. 1, Tab 2, pp. 83-88, paras. 348-351**; *OCA*, **AR, Vol. 2, Tab 3, p. 15, paras.46-47**; List of treaty demands dated January 22, 1869 ("*1869 Demands*"), **OEB, Tab 1**; *Dawson's Notes*, **AEB, Tab 40, pp. 176-177**; *Morris Treaty Text, Ch. 5*, **OEB, Tab 7, pp. 88-94, esp. p. 89**

[14] *SCJ*, **AR, Vol. 1, Tab 2, pp. 84-86, 89, paras. 349 and 357**; *OCA*, **AR, Vol. 2, Tab 3, p. 14 para. 40**; Original copy of "Indian Treaty" in *The Manitoban* at final page, left hand column, approx. ½ down the column at **OEB, Tab 5**; edited version at *Morris Treaty Text, Ch. 5*, **OEB, Tab 7, p. 89**

[15] *SCJ*, **AR, Vol. 1, Tab 2, pp. 145-146, 185-186, 188, paras. 621, 868-869, 881**; MNR Read-Ins Brief, **OEB, Tab 24, pp. 186-188**

[16] *OCA*, **AR, Vol. 2, Tab 3, pp. 51-52, paras. 160-161**

[17] *SCJ*, **AR, Vol. 1, Tab 2, pp. 83-88, 90, paras. 348-351, 361-362**; *OCA*, **AR, Vol. 2, Tab 3, p. 15, para. 47**; *Morris Treaty Text, Ch. 5*, **OEB, Tab 7, pp. 92-93**

[18] *SCJ*, **AR, Vol. 1, Tab 2, pp. 90-94, 99, paras. 364-366, 371-372**; *OCA*, **AR, Vol. 2, Tab 3, p. 15, para. 48**; *Morris Treaty Text, Ch. 5*, **OEB, Tab 7, p. 94**

21. By the morning of October 3rd, 1873 the Commissioners had agreed amongst themselves to offer certain additional and improved terms: "a small sum for ammunition and twine for nets – yearly"; "agricultural implements and seeds for any band actually farming or commencing to farm"; and "to increase the money payment by $2 dollars per head if it should be found necessary in order to secure a treaty, maintaining the permanent annuity at the sum fixed". Morris presented these terms shortly after negotiations recommenced on October 3rd.[19]

22. Over the following hours the Ojibway negotiators raised more than twenty further issues, varying greatly in importance, which the Commissioners responded to in turn.[20] The ninth issue raised by the Ojibway on October 3rd is reported in *The Manitoban* and *Dawson's Notes* as a qualified demand, or a question, regarding freedom to travel, to which James McKay (who attended with Morris and was fluent in Ojibway) is reported in *The Manitoban* as saying: "Of course, I told them so." The response recorded in *Dawson's Notes* is simply "Yes." The *Nolin Notes* state only: "The Indians will be free, as by the past, for their hunting and rice harvest."[21]

23. During a further exchange on October 3rd, Morris assured the Ojibway that the government would hear complaints from the Ojibway should they feel that officers of the government were not keeping the Treaty promises.[22]

24. Following negotiation on each of the points raised by the Ojibway, agreement on the Treaty was reached. The Treaty text was then completed and signed on behalf of the parties. The *Morris Report* and the Treaty text record that before the document was signed, it was read and explained to the Ojibway by James McKay; there is no record of how this was done.[23]

Post-Treaty Conduct and Events

25. Morris closed his report on the Treaty 3 negotiations by suggesting to the federal government that "no patents should be issued, or licences granted, for mineral or timber lands, or

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[19] *SCJ*, **AR, Vol. 1, Tab 2, pp. 96-98, para. 368**; *OCA*, **AR, Vol. 2, Tab 3, pp. 15-16, para. 49**; Morris Official Report of October 14, 1873 ("*Morris Report*"), **AEB, Tab 1, p. 103**. Also found at *Morris Treaty Text, Ch.5*, **OEB, Tab 7, pp. 78-79**

[20] *SCJ*, **AR, Vol. 1, Tab 2, pp. 90-102, paras. 366-370, 374, 376, 379-380**; *OCA*, **AR, Vol. 2, Tab 3, p. 16, paras. 50-54**; *Terms Proposed & Responses*, **OEB, Tab 25, pp. 12-28**

[21] *SCJ*, **AR, Vol. 1, Tab 2, pp. 100-102, paras. 379-380**; *OCA*, **AR, Vol. 2, Tab 3, p. 16, paras. 51-53**; *Morris Treaty Text, Ch. 5*, **OEB, Tab 7, p. 99**; *Dawson's Notes*, **AEB, Tab 40, p. 179**; *Nolin's Notes*, **AEB, Tab 51**

[22] *SCJ*, **AR, Vol. 1, Tab 2, pp. 187-188, 189, paras. 879-880, 892**; *OCA*, **AR, Vol. 2, Tab 3, pp. 51-52, para. 161**; *Morris Treaty Text, Ch. 5*, **OEB, Tab 7, p. 101**; *Dawson's Notes*, **AEB, Tab 40, pp. 6-179-180**. See also *Terms Proposed & Responses* item 15, **OEB, Tab 25, pp. 24-25**

[23] *SCJ*, **AR, Vol. 1, Tab 2, pp. 73, 96-98, 103, 182, paras. 317, 368, 385-387, 856-857**; *Morris Report*, **AEB, Tab 1, p. 103**. Also found at *Morris Treaty Text, Ch.5*, **OEB, Tab 7, p. 80**; *Treaty 3 Text*, **Factum of the Respondent, Minister of Natural Resources ("ORF"), Tab 5**. Colour copy of original and corresponding transcription at **OEB, Tab 4**

other lands, until the question of the reserves has been adjusted", i.e. until the Treaty 3 reserves had been laid out – a process that took many years.[24] By early 1874, settlers were already beginning to occupy portions of the Treaty 3 lands, especially in the Rainy River area and Fort Frances. The federal government began leasing timber limits in 1875.[25]

26. In June 1874 the governments of Ontario and Canada agreed to resolve the Ontario boundary dispute through arbitration, and reached an agreement to provide legal certainty for development in the disputed area, consistent with an interim arrangement Prime Minister Macdonald had proposed in 1872; running a provisional boundary north-south through the Treaty 3 area. Pursuant to this "Provisional Boundary Agreement", Ontario would administer and dispose of Crown lands to the east of the provisional boundary, including a portion of the Treaty 3 area, meaning that Ontario would be the government issuing patents, licences and other authorizations over Crown lands that would lead to the occupation and development of the lands. Only if Ontario's boundary was determined to be east of the provisional boundary, would the Dominion confirm Ontario's instruments authorizing the taking up of land.[26]

27. Shortly thereafter Morris wrote to Ottawa emphasizing the importance of taking care to honour the Treaty promises.[27] No evidence suggests that Morris or anyone else considered the Provisional Boundary Agreement to conflict with Treaty 3.

28. Ontario's position in the boundary dispute was accepted in 1878 by a panel of arbitrators, resulting in most of the Treaty 3 area being in Ontario. Macdonald refused to honour the decision, but it was ultimately confirmed by the Privy Council in 1884. The federal government then asserted that it retained administration and control of all Treaty 3 lands within Ontario, leading to *St. Catherine's Milling*, which reached the Privy Council in 1888. That case was also determined in Ontario's favour, striking down a federal timber licence and ruling that Ontario has exclusive authority to authorize forestry on Treaty 3 lands in the province (off-reserve).[28]

29. Shortly after the Privy Council's ruling in *St. Catherine's Milling*, Ontario Premier Oliver

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[24] *SCJ*, **AR, Vol. 1, Tab 2, pp. 96-98, para. 368**; *Morris Report* at *Morris Treaty Text*, *Ch. 5*, **OEB, Tab 7, p. 81**
[25] *SCJ*, **AR, Vol. 1, Tab 2, p. 231, paras. 1126, 1133**; *Chartrand Main Report*, **OEB, Tab 11, pp. 7-8**; Dr. Jeremy Williams, "Description of Nature and Scope of Commercial Forestry Operations in the Treaty 3 Area from 1873 through to 1930, Ontario Portion", June 23, 2008, **OEB, Tab 13**
[26] *SCJ*, **AR, Vol. 1, Tab 2, pp. 195-196, paras. 940-941**; *Provisional Boundary Agreement*, **OEB, Tab 6**. The provisional boundary is illustrated on the map at p. 23 of the *Saywell Report*, **OEB, Tab 14**
[27] *SCJ*, **AR, Vol. 1, Tab 2, p. 198, para. 949**
[28] *SCJ*, **AR, Vol. 1, Tab 2, pp. 202-203, 205, 208, 264, 300, paras. 967-969, 975, 982-984, 999, 1002, 1333, 1524**; *OCA*, **AR, Vol. 2, Tab 3, pp. 18-19, paras. 62-66**; *Canada (Ontario Boundary) Act* (U.K.), *1889*, 52-53 Vict., c. 28, **OEB, Tab 8**

Mowat wrote to the federal government to obtain certainty over a proposition he viewed as having been settled by that case: that the treaty right to hunt and fish over the lands ceded by Treaty 3 did not extend to lands within Ontario taken up under provincial authority – i.e. that Ontario could take up lands under Treaty 3.[29] Premier Mowat's letter ultimately led to Article 1 of the 1894 Agreement, as enabled by the 1891 Legislation, which explicitly "conceded and declared" this.[30] These instruments also included arrangements under which Ontario would confirm Treaty 3 reserves in the province, and cooperate in negotiating future treaties.

30. Ontario's boundaries were extended in 1912 by legislation passed by Canada and Ontario, which had the effect of adding the Keewatin Lands to Ontario (they formed only a small part of the extension lands).[31] Political discussions leading up to the 1912 Legislation do not appear to have referenced either Treaty 3 or treaty harvesting rights, but the boundary extension was subject to conditions relating to First Nations, including:

> (a) That the Province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof and the said Province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders;
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> …
>
> (c) That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament.[32]

31. Since 1912 it has been accepted by Canada and Ontario that Ontario's powers within the extension lands are the same as within its original boundaries; Prime Minister Borden expressly confirmed this understanding in Parliament, consistent with the subsequent expression of opinion on point by Deputy Minister of Justice Edward Newcombe. It was understood by the relevant federal and provincial political actors in 1912 and thereafter that Ontario had authority to take up or authorize taking up of land within the area added to the Province, including the Keewatin

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[29] *SCJ*, **AR, Vol. 1, Tab 2, p. 208, para. 1003**; Mowat to Dewdney [Minister of the Interior], Jan. 17 1889, **AEB, Tab 70**

[30] *SCJ*, **AR, Vol. 1, Tab 2, pp. 213-214, 215, 276, paras. 1028-1029, 1037-1038, 1397**; *OCA*, **AR, Vol. 2, Tab 3, pp. 19, 56-59, paras. 67, 175-180**; *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands* (CA), 54 & 55 Vict., c. 5, **ORF, Tab 1**; *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands* (ON), 54 Vict., c. 3, **ORF, Tab 2** (together the "1891 Legislation"); 1894 Agreement, **AEB, Tab 73**

[31] *SCJ*, **AR, Vol. 1, Tab 2, pp. 218-219, paras. 1055, 1059-1061**; *OCA*, **AR, Vol. 2, Tab 3, pp. 10, 20, 60, paras. 25, 69, 183-184**; *The Ontario Boundaries Extension Act, S.C. 1912*, 2 Geo. V, c. 40, **ORF, Tab 4***; An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province* (ON), 2 Geo V., c. 3, , **ORF, Tab 3** (together the"*1912 Legislation"*) These remain in force today.

[32] *SCJ*, **AR, Vol. 1, Tab 2, p. 223, para. 1080**; *OCA*, **AR, Vol. 2, Tab 3, pp. 60-61, para. 185**; *1912 Legislation*, **ORF, Tabs 3 & 4**; *Constitution Act, 1871*, 34 & 35 Victoria, c. 28 (U.K.), s. 3, ("*Constitution Act, 1871"*), **OBA, Vol. III, Tab C(3)**

Lands, without federal supervision.[33]

32. Grassy Narrows states that Ontario sought to prohibit Ojibway hunting or fishing in the 20th century. This is incorrect. Like other provinces and the federal government, Ontario did for a time in the 20th century take regrettable steps to enforce hunting and fishing regulations on the mistaken basis that such laws applied to treaty rights holders in the same way they applied to others.[34] As noted by Grassy Narrows, towards the middle of the 20th century there were Ojibway complaints regarding enforcement of such laws and questions raised about how Ontario could have the authority to enforce them. None of these complaints, however, involved the taking up of land.

33. Apart from projects falling within federal jurisdiction (such as inter-provincial railways, airports, national parks, etc.), development, patenting and leasing of Crown lands in the Treaty 3 area have been exclusively authorized by Ontario; south of the Keewatin Lands, since the late 1880s, and in the Keewatin Lands since 1912.[35] Prior to this litigation, the Ojibway do not appear to have ever complained about development on the basis that Ontario (or the Crown generally) has no ability to take up land without breaching Treaty 3.[36]

PART II – Respondent's Position on Appellants' Questions

34. The central issue in this litigation is whether Ontario can validly "take up" lands for forestry within the Keewatin Lands, notwithstanding the reference in the Treaty 3 taking up clause to the Queen's "Government of Her Dominion of Canada", or whether the federal government must authorize all taking up of land in this area, even for provincial purposes such as those mentioned in the Treaty text: settlement, mining and lumbering. This is captured by the first of the two "Threshold Issues" which were the subject of the proceedings below:

> Does the Province of Ontario have the authority, within that part of the lands subject to Treaty 3 that were added to Ontario in 1912, to exercise the right to take up tracts of land for forestry within the meaning of Treaty 3, so as to limit the geographic area over which the plaintiffs are

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[33] *SCJ*, **AR, Vol. 1, Tab 2, pp. 220-221, 278, 281, paras. 1063, 1411, 1431**; *OCA*, **AR, Vol. 2, Tab 3, pp. 20, 44, 61-62, paras. 71, 139, 189**; *Saywell Report*, **OEB, Tab 14, pp. 80-81; 99-100, 102**; Newcombe [Deputy Minister of Justice] to Cory [Deputy Minister of the Interior], Sept. 17, 1913, **OEB, Tab 9**

[34] Grassy Narrows' factum, **p. 11, para. 26**; The constitutionalization of Aboriginal and treaty rights in 1982 ushered in a new era. Canadian governments do not operate on this basis today.

[35] *SCJ*, **AR, Vol. 1, Tab 2, pp. 229, 231-232, 249, paras. 1115, 1134-1135, 1239**; *OCA*, **AR, Vol. 2, Tab 3, p. 20, para. 71**; MNR Read-Ins Brief, **OEB, Tab 24, p. 153**

[36] *OCA*, **AR, Vol. 2, Tab 3, p. 55, para. 171**; MNR Read-Ins Brief, **OEB, Tab 24, p. 213**

> entitled to exercise their rights to hunt or fish as provided for in Treaty 3?[37]

35. The correct answer to this question is "Yes", as found by the Court of Appeal. Ontario has the jurisdiction in the Keewatin Lands to authorize land uses that are visibly incompatible with Treaty 3 harvesting rights, without federal authorization. In light of this Court's jurisprudence on taking up under the numbered treaties, Ontario does not infringe the Treaty in so doing, provided that it honours the substantive and procedural limitations and obligations this Court has developed with respect to the Crown's ability to take up lands.[38] As the lands are taken up pursuant to an internal limitation to the Treaty 3 Harvesting Promise – the taking up limitation – IJI is not triggered. Provincial laws authorizing taking up apply of their own force, and s. 88 of the federal *Indian Act* is therefore not required to re-invigorate the provincial laws as federal law.

36. The second Threshold Issue sent to trial reads:

> If the answer to the immediately preceding question (a) is "no", does the Province of Ontario have the authority under the Constitution to justifiably infringe the rights of the plaintiffs to hunt and fish as provided for in Treaty 3 so as to validly authorize forestry operations?

37. The Court need not address this question unless it reverses the Court of Appeal and rules that the answer to the first Threshold Issue is "No". Should the Court need to address the question, the correct answer is "Yes"; Ontario has the constitutional capacity to authorize land uses for provincial purposes so as to infringe treaty harvesting rights, if and to the extent it can satisfy the test for justification established in *R. v. Sparrow*. IJI does not prevent this, and therefore s. 88 of the *Indian Act* is irrelevant. IJI has never applied to the exercise of proprietary powers. This Court's decision in *Morris* is distinguishable on that and other grounds or, in the alternative, should be revisited in order to properly balance treaty rights and exclusive provincial jurisdiction over public lands and forests.

38. Ontario does not agree with the appellants' characterization of the issues. Grassy Narrows incorrectly states that the Court of Appeal decision held that Ontario "had the exclusive right to limit" Treaty 3 harvesting rights. The Court of Appeal recognized that Canada has the jurisdiction to limit treaty rights through regulation and to take up lands for federal purposes.

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[37] Order of Spies J. dated June 28, 2006, **AR, Vol. 2, Tab 6, pp. 122-124**

[38] *R. v. Badger* [1996] 1 S.C.R. 771 ("*Badger*"), **Book of Authorities of the Respondent, Minister of Natural Resources ("OBA"), Vol. II, Tab A(33)**; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R 388 ("*Mikisew*"), **OBA, Vol. I, Tab A(24)**

Nor did the Court of Appeal use "the doctrines of treaty evolution and devolution" to modify treaty rights. The change in 1912 to the government advising the Crown regarding administration of the Keewatin Lands did not materially alter the Harvesting Promise, as properly interpreted. Further, the Court of Appeal did not usurp the fact-finding role of the trial judge; it correctly set aside palpable and overriding errors with respect to the intentions of the Treaty parties, particularly the Crown, resulting in an interpretation of Treaty 3 that properly takes into account the parties' intentions.

39. With respect to IJI as it relates to s. 91(24), Wabauskang is incorrect to state that the Court of Appeal failed to consider whether Ontario's forestry legislation is inapplicable because of IJI. When the Crown takes up land within an internal limit to the Treaty harvesting rights – the taking up clause – there is no infringement or impairment of those rights, provided Ontario honours the substantive and procedural limitations on the Crown's ability to take up lands. IJI is therefore not triggered; Ontario's laws apply of their own force.

PART III – Statement of Argument

A. Standard of Review

40. Treaty interpretation requires an enquiry regarding both historical facts, including the intentions of the parties, and distinct legal issues.[39] The applicable standard of review for findings on questions of law is that of correctness. This includes legal findings based on findings of fact.[40] The interpretation of treaties is ultimately a legal issue, reviewable on a standard of correctness, even when informed by findings of fact that will be reviewable on the deferential standard properly applicable to factual determinations.[41]

41. The standard of review for factual determinations of a trial judge is palpable and overriding error, as applied by the Court of Appeal. Although the palpable and overriding error standard to reverse findings of fact is a high one, appellate courts have reversed findings of fact in Aboriginal law cases.[42] In *Mitchell*, for instance, this Court stated that: "[s]parse, doubtful and

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[39] See discussion of treaty interpretation principles below, at paras. 56-59, 77 and 100

[40] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, **OBA, Vol. I, Tab A(20), paras. 8-9** (majority) **and para. 105** (minority); *R. v. Marshall (1999)*, 3 S.C.R. 456 ("*Marshall No. 1"*), **OBA, Vol. II, Tab A(39), paras. 18-21 and 39-40**; *R. v. Van der Peet.*, [1996] 2 S.C.R. 507 ("*Van der Peet*"), **OBA, Vol. II, Tab A(44), para. 82**

[41] *Marshall No. 1, supra*, **OBA, Vol. II, Tab A(39), paras. 18-21 and 39-40**; *Van der Peet, supra*, **OBA, Vol. II, Tab A(44), para. 82**

[42] e.g. *Mitchell v. M.N.R*, [2001] 1 S.C.R. 911 ("*Mitchell*"), **OBA, Vol. I, Tab A(25), paras. 29-54**; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, **OBA, Vol. I, Tab A(22), paras. 40-41**; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, **OBA, Vol. I, Tab**

equivocal evidence cannot serve as the foundation for a successful claim", overturning the findings of the trial judge because of "the application of a very relaxed standard of proof" and "an unreasonably generous weighing of tenuous evidence".[43] The Court of Appeal properly relied on these statements to reverse palpably incorrect findings of the trial judge.

B. Threshold Issue 1 – Ontario can Take up Lands under Treaty 3

42. A proper interpretation of the Treaty 3 Harvesting Promise leads to the conclusion reached by the Court of Appeal that Ontario can take up lands for provincial purposes under Treaty 3, without federal supervision, including in the Keewatin Lands.

43. This interpretation flows from this Court's existing jurisprudence on the balancing exercise engaged when the Crown takes up land under the numbered treaties and on modern principles of treaty interpretation; from the text of the Treaty 3 Harvesting Promise (which provides for a one-step taking up process); from the evidence of the parties' intentions, including the parties' subsequent conduct (which also does not support a two-step taking up process); and from consideration of Canada's constitutional framework.

44. Such an interpretation is also consistent with the 1891 Legislation and the 1894 Agreement, Article 1 of which expressly "conceded and declared" Ontario's ability to take up Treaty 3 lands in the province, and the 1912 Legislation under which the Keewatin Lands were added to Ontario, including the conditions of that legislation speaking to Ontario's recognition of treaty and Aboriginal rights.

45. Critically, this interpretation promotes reconciliation, the overarching goal of Aboriginal law, by fostering direct dialogue between the provincial Crown and First Nations over contemplated takings up of land that may adversely impact Treaty harvesting rights.

i. Taking Up Jurisprudence Robustly Protects Treaty Harvesting Rights

46. This Court has consistently held that the underlying purpose of the numbered treaties, from the Crown perspective, was the opening up of the Canadian west for settlement and development, consistent with clear language set out in each of the treaties.[44] At the same time,

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A(16), paras. 80 and 108; see also **paras. 53-54** discussing Lambert J.A.'s approach to this issue in the BCCA
[43] *Mitchell, supra,* **OBA, Vol. I, Tab A(25), paras. 29-54** (quotes taken from para. 51)
[44] *Beckman v. Little Salmon/Carmacks First Nation,* [2010] 3 S.C.R. 103 ("*Little Salmon*"), **OBA, Vol. I, Tab A(3), para. 8**; *Mikisew, supra,* **OBA, Vol. I, Tab A(24), para. 24**; *R. v. Sundown,* [1999] 1 S.C.R. 393, **Book of Authorities of the Appellant, Wabauskang First Nation ("WBA"), Tab 11, para. 5**; *Badger, supra,* **OBA, Vol. II, Tab A(33), para. 39**

the treaties guarantee continued First Nation harvesting (hunting, fishing, trapping or gathering) on ceded lands that are not "taken up" at a given point in time. Following enactment of the *Constitution Act, 1982*, this Court has developed jurisprudence to balance and reconcile these objectives.

47. The trial judge erred in her understanding of this jurisprudence and its implications for the first Threshold Issue, mistakenly starting her analysis on the basis that taking up land under a treaty represents an infringement – or even extinguishment – of treaty harvesting rights.[45] In contrast, the Court of Appeal properly understood the governing jurisprudence.

48. The "taking up of lands" was not a technical concept in the 19th century. It meant: "To take (land) into occupation; to begin to occupy, settle upon."[46] Consistent with that historical understanding, this Court in *Badger* described the Crown's ability to take up lands as a geographic limitation on harvesting rights, and established that lands are taken up only when and to the extent they are put to a use that is visibly incompatible with continued First Nation harvesting.[47] This has significant implications for the proper characterization of forestry operations, where visible incompatibility will be quite limited in both scope and duration.

49. *Mikisew* confirmed those principles and made it clear that taking up lands under a treaty does not constitute infringement of treaty rights, much less extinguishment. Even more significantly, that case articulated substantive limitations and "procedural" obligations on the Crown's ability to take up treaty lands, thereby defining a balanced regime that reconciles the rights and interests of the parties.[48]

50. Where a proposed activity or disposition may negatively affect treaty harvesting activities, the honour of the Crown requires consultation with those First Nation communities that may be affected. Depending on the magnitude of potential impacts, the duty to consult may oblige the Crown to engage in "deep consultation", and to accommodate treaty rights, potentially

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[45] e.g. Proceeding on the basis that "Had Ontario been held to have the right to 'take up' lands in Ontario under the Treaty, the Courts would have had no jurisdiction to protect Harvesting Rights in respect of those lands" at *SCJ*, **AR, Vol. 1, Tab 2, p. 313, para. 1608**; and misunderstanding Ontario's position as implying that "Ontario can interfere with where the Ojibway hunted, how they hunted, and when they hunted" at *SCJ*, **AR, Vol. 1, Tab 2, p. 291, para. 1476**; see also *SCJ*, **AR, Vol. 1, Tab 2, pp. 261-262, 272, 302, 310, 314, paras. 1316, 1371, 1545, 1586, 1588, and 1611**

[46] *A New English Dictionary on Historical Principles*, (Oxford: Clarendon Press, 1919) at p. 47 (the original *Oxford English Dictionary*), **OBA, Vol. III, Tab B(1)**

[47] *Badger*, *supra*, **OBA, Vol. II, Tab A(33), paras. 53, 54, 67 and 68**

[48] *Mikisew*, *supra*, **OBA, Vol. I, Tab A(24), paras. 31, and 44-57**; *OCA*, **AR, Vol. 2, Tab 3, p. 27, para. 89**; see also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 ("*Carrier Sekani*"), **OBA, Vol. II, Tab A(48)**; *Little Salmon*, *supra*, **OBA, Vol. I, Tab A(3)**; *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557, **OBA, Vol. I, Tab A(31)**

to the point of significantly limiting or even abandoning the proposed activity or disposition. The geographic scope of an enquiry regarding these obligations must focus on the lands used by potentially impacted First Nations; it is not sufficient for the Crown to say that plenty of untouched land remains in the treaty area, hundreds of kilometres away.[49]

51. The Crown's ability to take up lands is also subject to a substantive limitation; a taking up clause does not permit the Crown to take up lands to the point that a First Nation's treaty harvesting rights can no longer be meaningfully exercised. Taking up beyond this point would not be taking up under a treaty; it would constitute infringement of treaty harvesting rights, requiring justification under *Sparrow*.[50] No party in this case has contended that Resolute's forestry operations imperiled the plaintiffs' meaningful ability to exercise their harvesting rights.

52. *Mikisew* did not, however, place the federal Crown under a fiduciary or "trusteeship" duty *vis-à-vis* the taking up of land.[51] Such a relationship will not characterize many aspects of the dealings between the federal government and First Nations.[52] As discussed below, the Crown's ability to take up ceded lands, off-reserve, has never been seen as impressed with such obligations.

53. The harvesting promises in the numbered treaties represent solemn Crown promises that First Nations will continue to be able to meaningfully engage in traditional harvesting activities. Recognizing that lands will be taken up from time to time, the right is not a right to hunt and fish in specific locations. It is the activities of hunting and fishing that are protected, not the ability to do so in specific locations.[53]

54. Ontario is bound by the *Badger/Mikisew* regime defined by this Court, as recognized and confirmed by the Court of Appeal. Where Ontario authorizes the taking up of land for provincial purposes, there is no role or need for the federal government, absent valid federal legislation requiring a federal approval for the proposed development.

55. The *Badger/Mikisew* regime has brought about enormous change in how governments

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[49] *Mikisew*, *supra*, **OBA, Vol. I, Tab A(24), paras. 44-57**
[50] *Mikisew*, *supra*, **OBA, Vol. I, Tab A(24), para. 48**; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 ("*Sparrow*"), **OBA, Vol. II, Tab A(43)**
[51] *Mikisew*, *supra*, **OBA, Vol. I, Tab A(24), para. 51**
[52] *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, **OBA, Vol. II, Tab A(59), paras. 81-100**
[53] *R. v. Lefthand*, 2007 ABCA 206, [2007] 10 W.W.R. 1, **OBA, Vol. II, Tab A(37), para. 178**: "Neither Treaty No. 7 nor the NRTA guarantees a right to fish in every stream at all times, and I agree with my colleagues that it is the **activity of fishing** and not the **geographical site** which is protected." (emphasis in original); see also **paras. 120-35 and 190**.

and private actors deal with First Nations regarding off-reserve land use decisions. Ontario and other provinces are bound by the obligations placed on the Crown, and are critical players in this dialogue. Tremendous progress has been made, and many projects have been modified to reflect First Nation concerns and to provide for First Nation participation through mechanisms including training and employment, sub-contracting, partnership and equity participation. Treaty 3 First Nations have obtained such benefits. As this Court recently noted in *Carrier Sekani,* Aboriginal concerns over development often rest with appropriate and meaningful participation in the contemporary economy, given "the reality that often Aboriginal peoples are involved in exploiting the resource".[54]

ii. Treaty Text Provides for a One-Step Process

56. Treaties are contracts of a very special kind. The overarching goal of treaty interpretation is to "choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed."[55]

57. A court should start by examining the specific words used in the treaty text, although the text alone is not determinative. It must then examine extrinsic evidence of the historical and cultural context of the treaty.[56] "[I]f there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms".[57]

58. Words in a "treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted,"[58] and where a technical construction of an agreement is advanced by an Aboriginal party.[59]

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[54] *Carrier Sekani*, *supra*, **OBA, Vol. II, Tab A(48), para. 34**
[55] *Marshall No. 1*, *supra*, **OBA, Vol. II, Tab A(39), paras. 78 and 83** (McLachlin J., as she then was, dissenting, but not on this point) **and para. 14** (majority); *R. v. Sioui*, [1990]1 S.C.R. 1025, **OBA, Vol. II, Tab A(42), pp.** 1068 and 1069, 1071-1072 ("*Sioui*"); *R. v. Morris*, [2006] 2 S.C.R. 915 ("*Morris*"), **OBA, Vol. II, Tab A(41), paras. 18, 33-38 and 56-58** (majority) **and para. 107** (minority)
[56] *Marshall No. 1*, *supra*, **OBA, Vol. II, Tab A(39), paras. 5, 11-14 and 41** (majority) **and paras. 82-83** (minority); *Badger*, *supra*, **OBA, Vol. II, Tab A(33), para. 52**
[57] *Marshall No. 1*, *supra*, **OBA, Vol. II, Tab A(39), para 11**, (quoting from *R. v. Taylor and Williams (1981)*, 34 O.R. (2d) 360 (O.C.A), **Book of Authorities of the Appellant, Grassy Narrows First Nation, ("GBA"), Vol. 2, Tab 30, p. 367**)
[58] *Badger*, *supra*, **OBA, Vol. II, Tab A(33), para. 52**
[59] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 ("*Blueberry River Indian Band*"), **OBA, Vol. I, Tab A(4), paras. 6-7**; *St. Mary's Indian Band v. Cranbrook*, [1997] 2 S.C.R. 657,

59. While it has been accepted that "ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians," [60] this interpretive maxim is subordinate to the overarching goal of treaty interpretation noted above.[61] "Generous rules of interpretation should not be confused with a vague sense of after-the-fact largesse."[62]

60. Treaty 3 is expressly an agreement between the Crown and the Ojibway.[63] It provides for a cession of lands to the Queen, and expressly recites that: "the said Indians have been notified and informed … that it is the desire of Her Majesty to open up [the Treaty 3 lands] for settlement, immigration, and other such purposes as to Her Majesty may seem meet…"

61. The presence of a taking up clause in the Harvesting Promise is a natural reflection of those provisions, and a taking up limitation would have been implied if not expressly stated.[64] On that basis, amongst others, it does not make sense to limit the Crown's ability to take up land under the Treaty to only one Crown government.

62. The trial judge concluded that, on a plain reading, the Treaty 3 taking up clause contemplates a two-step approval process for taking up lands within Ontario. That conclusion of law was plainly incorrect. As found by the Court of Appeal, a plain reading of the taking up clause stipulates a single-step process, involving only the federal government – suggesting the clearly inappropriate result that in Ontario (and Manitoba) no government can take up lands for the purposes set out in the Treaty.[65]

iii. Treaty Parties did not intend a Two-Step Process

(a) Aboriginal Intention

63. The trial judge did not find that the Ojibway intended to exclude Ontario from the taking

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OBA, Vol. II, Tab A(55), paras. 15-16

[60] *Sioui*, *supra*, **OBA, Vol. II, Tab A(42), p.** 1035; *Badger*, *supra*, **OBA, Vol. II, Tab A(33), para. 41** (citing *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, **OBA, Vol. I, Tab A(28), pp.** 36-37, which itself draws from the U.S. Supreme Court treaty interpretation case of *Jones v. Meehan* (1899), 175 U.S. 1, **OBA, Vol. I, Tab A(21), p. 11**); *Marshall No. 1*, *supra*, **OBA, Vol. II, Tab A(39), para. 78** (McLachlin J., as she then was, dissenting, but not on this point)

[61] *Marshall No. 1*, *supra*, **OBA, Vol. II, Tab A(39), paras. 78 and 83** (McLachlin J., as she then was, dissenting, but not on this point) **and para. 14** (majority); *Sioui*, *supra*, **OBA, Vol. II, Tab A(42), pp.** 1068 and 1069; *Morris*, *supra*, **OBA, Vol. II, Tab A(41), paras. 18, 33-38 and 56-58** (majority) **and para. 107** (minority)

[62] *Marshall No. 1*, *supra*, **OBA, Vol. II, Tab A(39), para. 14**

[63] *OCA*, **AR, Vol. 2, Tab 3, pp. 35, 44-45, paras. 113, 139, 140**; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (JCPC), **GBA, Vol. I, Tab 20**; aff'g (1887), 13 S.C.R. 577, **OBA, Vol. II, Tab A(53)**; aff'g (1886), 13 O.A.R. 148 (CA), **OBA, Vol. II, Tab A(53)**; aff'g (1885), 10 O.R. 196 (Ch. Div.), **OBA, Vol. II, Tab A(54),** ("*St. Catherine's Milling*") JCPC **p. 60**

[64] *Sioui*, *supra*, **OBA, Vol. II, Tab A(42), pp.** 1071-1072*; R. v. Ireland* (1990), 1 O.R. (3d) 577 (Gen. Div.), **OBA, Vol. II, Tab A(35), pp.** 589-91

[65] *OCA*, **AR, Vol. 2, Tab 3, p. 47, para. 148;** *St. Catherine's Milling*, *supra*, OCA – Burton J.A., **OBA, Vol. II, Tab 53, p. 167**

up of land, or that they intended or were promised a federal land use regime controlling provincially authorized land uses. There was no basis on which she could do so. Nothing in the evidence from the negotiations suggests that provinces were mentioned. Further, it does not appear that the Ojibway were aware of an Ontario government, or that there was more than one government of the Queen in Canada – as conceded by the plaintiffs on discovery.[66] The Ojibway thus had no intention that Canada would supervise taking up of land by another government.

64. In fact, the trial judge was correct that there was no discussion with the Ojibway regarding the role any government would play in the taking up of land, outside the contemplated reserves. Far and away the clearest articulation of the Harvesting Promise in the Treaty 3 negotiations was Morris' statement of October 1, noted above, which made no reference to any government being involved in the taking up of land.[67]

65. There was evidence that the Ojibway understood the concept of rank, and preferred to deal with persons of higher rank and authority. But this says nothing about any preference to deal with one Crown government rather than another, as Grassy Narrows suggests, much less a Treaty promise to that effect.

66. The trial judge correctly found that Morris assured the Ojibway that the government would hear complaints from the Ojibway should they feel that officers of the government were not keeping Treaty promises. This was an important consideration in the trial judge's finding that the Ojibway expected the government to be accountable for Treaty promises. This evidence is not reasonably capable, however, of supporting a conclusion that the Ojibway were told or promised that the government – any government – would necessarily be involved in taking up land, much less that the federal government would supervise all taking up of lands.[68]

67. The absence of any challenge to or complaint about Ontario's ability to take up Treaty 3 lands prior to this litigation strongly suggests that the appellants' position does not stem from any historical Ojibway understanding of the Treaty.[69] The Ojibway were principally concerned with on-the-ground, practical considerations, rather than jurisdictional issues; in particular, that they would continue to enjoy a meaningful right to hunt and fish. This lack of concern regarding

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[66] *SCJ*, **AR, Vol. 1, Tab 2, pp. 145-146, 185-186, 188, paras. 621, 868-869, 881**; *OCA*, **AR, Vol. 2, Tab 3, pp. 51-52, paras. 160-161**; MNR Read-Ins Brief, **OEB, Tab 24, pp. 187- 188**

[67] See para. 17, *supra*, discussing Morris' October 1 statement.

[68] *Morris Treaty Text, Ch. 5*, **OEB, Tab 7, p. 101**; *Dawson's Notes*, **AEB, Tab 40, pp. 179-180**. See also *Terms Proposed & Responses*, **OEB, Tab 25, pp. 24-25**

[69] *OCA*, **AR, Vol. 2, Tab 3, p. 55, para. 171**; MNR Read-Ins Brief, **OEB, Tab 24, p. 213**

which government was authorizing land uses is consistent with the views of Chief Justice Dickson that:

> …the Indians' relationship with the Crown or Sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations.[70]

(b) Crown Intention

68. In the absence of any possible Ojibway intention to create a two-step land use regime, the trial judge focussed on the intentions of the Commissioners, particularly Alexander Morris.

69. No direct evidence establishes what motivated the Commissioners to refer to the Dominion in the taking up clause of Treaty 3, and all of the witnesses who spoke to the issue conceded that it was not possible to reach a definitive conclusion. Two explanations were advanced at trial: (i) the federal government intended to create a federal land use regime for lands within Ontario in order to protect Treaty 3 harvesting rights; or (ii) the federal government's insistence in 1873 that all of the Treaty 3 lands were in the North West Territories.

70. The trial judge adopted the first explanation,[71] contrary to all prior judicial findings on point,[72] and without noting those contrary findings. No credible evidence supported this conclusion, and all of the expert witnesses who spoke to this issue agreed that the second explanation, ultimately accepted by the Court of Appeal, provided the simplest and most compelling explanation for the reference to the Dominion in the taking up clause.[73]

71. The Court of Appeal correctly overruled the trial judge's conclusion as to why the Dominion was referenced in the Treaty 3 taking up clause as a palpable and overriding error, accepting the alternative explanation advanced at trial:

> The most likely explanation for the text of the harvesting clause and the reference to the

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[70] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, **OBA, Vol. I, Tab A(26), p. 109** (Dickson C.J. concurring in the result),– the majority decision in *Mitchell* does not contradict Dickson C.J. on this point, as LaForest J. only considered modern First Nation understanding of the Crown (made clear from his opening qualification: "in this day and age"), not the historical understanding that Dickson C.J. refers to. See also *R. v. Horseman*, [1990] 1 S.C.R. 901, **OBA, Vol. II, Tab A(34), pp. 935-936**: "This change of governmental authority did not contradict the spirit of the original Agreement…"

[71] *SCJ*, **AR, Vol. 1, Tab 2, pp. 18, 180-181, 258-260, paras. 16, 839, 846, 849, 1296, 1305, 1308-1310, 1585-1588, and 1630-1631**

[72] See Appendix A: Additional Evidence on Lack of Crown Intention for Two-Step Process at para. 5

[73] Cross Examination of John Milloy ("*Milloy Cross"*), Vol. 4, October 16, 2009, **OEB, Tab 18**; Cross-Examination of Alexander von Gernet ("*von Gernet Cross*"), Vol. 10, December 9, 2009, **OEB, Tab 20**; Examination-in-Chief of Jean-Philippe Chartrand ("*Chartrand in Chief*"), Vol. 12, January 18, 2010, **OEB, Tab 22**; Cross Examination of Jean-Philippe Chartrand *("Chartrand Cross"*)Vol. 13, January 21, 2010, **OEB, Tab 23**

> Government of the Dominion of Canada is that, in 1873, there was no other government to whom the Commissioners appointed by Canada could conceivably refer…Canada vigorously contested Ontario's claim to the Disputed Territory…Morris was sent as Prime Minister Macdonald's confidant to negotiate the Treaty and he was very close to the Prime Minister. It is highly unlikely he would have done anything that would have undermined Prime Minister Macdonald's position on the Disputed Territory. To recognize in the language of the Treaty the possibility that all or part of the Treaty 3 lands might belong to Ontario would be inconsistent with and would undermine Prime Minister Macdonald's position.[74]

72. The Court of Appeal discussed several additional factors in support of its conclusion that the trial judge's contrary finding on this critical point was palpably in error. Nothing in the extensive documentation regarding the Treaty 3 negotiations, or Morris' writings on Indian treaties, supports the trial judge's finding. Moreover, as an expert constitutional lawyer, Morris would not have drafted the Harvesting Promise as it appears in the Treaty 3 text had he wanted to create a two-step regime.[75]

73. Critically, the Court of Appeal also recognized that the 1874 Provisional Boundary Agreement – signed less than a year after the negotiation of Treaty 3, and based on a model proposed by Prime Minister Macdonald prior to the negotiation of Treaty 3 – "reflects a contemporary understanding that the right to take up lands attached to the level of government that enjoyed beneficial ownership of the lands".[76] Ontario would be taking up Treaty 3 lands under this arrangement, without federal supervision or approval. Neither Morris nor anyone else raised a concern that this Agreement violated the Treaty 3 Harvesting Promise.

74. There are numerous other reasons as to why the trial judge's finding that the Crown intended a two-step taking up regime under Treaty 3 for lands within Ontario is a palpable and overriding error. These reasons and related evidence are briefly set out in Schedule A: Additional Evidence on Lack of Crown Intention for Two-Step Process.

75. The reference to Canada in the Treaty 3 taking up clause was intended to be descriptive of a state of affairs regarding the government that would have administration and control of the Treaty 3 lands; albeit a description that was largely mistaken in 1873, and incorrect for the Keewatin Lands after 1912. It was never intended to be prescriptive.

76. Contrary to the appellants' suggestion, in overruling the trial judge's key conclusion on

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[74] *OCA*, **AR, Vol. 2, Tab 3, pp. 53-54, paras. 165-166**
[75] *OCA*, **AR, Vol. 2, Tab 3, pp. 52-53, paras. 163-164**
[76] *OCA*, **AR, Vol. 2, Tab 3, pp. 54-55, paras. 167-169**

Crown intention the Court of Appeal did not merely prefer one inference over another.[77] It overruled the finding of the trial judge on the basis of a careful consideration of the relevant facts and evidence, properly concluding that it was "based on a palpable and overriding error".[78]

iv. Court of Appeal Correctly Understood Canada's Constitutional Framework

77. It is axiomatic that a treaty should be interpreted so as to accord with the constitutional framework in which it was made and must operate.[79] The Court of Appeal correctly applied the governing constitutional principles in holding that Ontario has the exclusive jurisdiction pursuant to ss. 109, 92(5) and 92A of the *Constitution Act, 1867* to honourably take up ceded Treaty 3 lands for forestry, mining, settlement and other exclusively provincial matters without federal supervision – principles first charted by the courts' analysis of Treaty 3 and the constitutional division of powers over Treaty 3 lands in Ontario.[80]

(a) Provincial jurisdiction

78. Section 109 was a cornerstone of the bargain of Confederation, as it assigned to the original provinces the beneficial ownership of lands and resources within their borders – a critical source of funding to pay for provincial responsibilities at that time.[81] To complement s. 109, s. 92(5) – and later s. 92A – of the *Constitution Act, 1867* granted exclusive legislative and executive [82] authority to the province over "The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon." [83]

79. Ontario acknowledges, and has acknowledged from the outset of this litigation, that its s.

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[77] Grassy Narrows Factum, **pp. 29-30, para. 75**
[78] *OCA*, **AR, Vol. 2, Tab 3, pp. 52, 55, paras. 162, 172**
[79] *St. Catherine's Milling, supra*, JCPC, **GBA, Vol. I, Tab 20, p. 60**; *OCA*, **AR, Vol. 2, Tab 3, p. 32, para. 102**; *Caldwell v. Fraser (unreported) (*Ontario High Court of Justice, January 31, 1898) ("*Caldwell*"), **OBA, Vol. I, Tab A(10), pp. 7-8** (of typed decision, which is without page numbers)
[80] *OCA*, **AR, Vol. 2, Tab 3, pp. 32-43, paras. 102-135**
[81] See *Attorney-General of Ontario v. Mercer* (1883), 8 App. Cas. 767 (JCPC), **OBA, Vol. I, Tab A(2), p. 778**: "The general subject of the whole section [109] is of a high political nature; it is the attribution of royal territorial rights, for purposes of revenue and government, to the provinces in which they are situate, or arise."; see also Gerard V. LaForest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) ("LaForest"), **OBA, Vol. III, Tab B(3), pp. xi-xiii**
[82] The division of executive powers between the federal and provincial governments was held to follow substantially the same lines as the legislative division of powers in *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566 (JCPC), **OBA, Vol. I, Tab A(5), p. 580**; see also David W. Mundell, "Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions between them" (1960) 2 Osgoode Hall L.J. 56, **OBA, Vol. III, Tab B(2), p. 69**
[83] On s. 92(5) see *Smylie v. The Queen* (1900), 27 O.A.R. 172 (CA) ("*Smylie*"), **OBA, Vol. II, Tab A(52), pp. 180 and 192**; on s. 92A see Peter Meekison, Roy Romanow and William Moull, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal: The Institute for Research on Public Policy, 1985), **OBA, Vol. III, Tab B(6)**; see also *Boniferro Mill Works ULC v. Ontario*, 2009 ONCA 75 ("*Boniferro*"), **OBA, Vol. I, Tab A(6), para. 31**, referencing both ss. 92(5) and 92A

109 interests are "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same". This includes treaty harvesting rights, as well as Aboriginal title. Prior to cession of Aboriginal title, there is s. 91(24) jurisdiction over the lands themselves and the province's s. 109 interest is significantly restricted by the Aboriginal title interest. Contrary to the submissions of Grassy Narrows, Ontario agrees that B.C.'s s. 109 arguments to the contrary were properly rejected by this Court in *Delgamuukw* and *Haida*.[84]

80. After a cession, however, s. 91(24) jurisdiction over the lands themselves comes to an end – other than for lands lawfully established as reserves – and the proprietary burden on the province's s. 109 interests is lifted. As the Privy Council stated in *St. Catherine's Milling*:

> … the power of legislating for Indians, and for lands which are reserved to their use … is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.[85]

Although the province's uses of the lands are subject to continuing obligations pursuant to the honour of the Crown, the terms of s. 109 itself and s. 35 of the *Constitution Act, 1982*, these are of an entirely different legal character than Aboriginal title. Cession of Aboriginal title is a bright line event triggering the disencumbering of the province's beneficial ownership of public lands.

81. The Court of Appeal correctly applied the long line of authority establishing the governing constitutional framework post-cession, beginning with *St. Catherine's Milling*, which held that only Ontario could issue forestry permits for (off-reserve) Treaty 3 lands in the province. Neither the Privy Council nor any of the courts below stated in *St. Catherine's Milling* that additional federal authorization would be required before a provincial forestry permit could be acted upon. The courts struck down the federal forestry licence with a full understanding that, as a result, Ontario would be issuing forestry licences, patents and other land use authorizations thereafter. If federal approval of these instruments was required, it would have been stated.

82. It was viewed as a public duty for the provinces to use their administration and control of public lands and forests to foster settlement and development within their borders. Justice Idington, writing with the majority of this Court, referred to this obligation in the *Treaty 3 Annuities Case*:

> …when the cloud [of Aboriginal title] was removed the duty devolved, as of course, on its

[84] Grassy Narrows Factum, **p. 23, para. 57**; *Delgamuukw*, *supra*, **OBA, Vol. I, Tab A(16), para. 175**; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, **GBA, Vol. 1, Tab 11, paras. 58-59**
[85] *St. Catherine's Milling*, *supra*, (JCPC), **GBA, Vol. I, Tab 20, p. 59**; quoted by the *OCA*, **AR, Vol. 2, Tab 3, p. 37, para. 118**

> government to facilitate the land's development. … The province did nothing but discharge those duties of government of which settling, selling, leasing or improving lands are in new countries such expensive, but common, incidents. It is not the case of an individual who could refrain from acting or accepting. The duty which arose, the only duty the province owed the Dominion, was to do all these things when given a chance.[86]

Administration and control of public lands and forests, which is the common legal description of the rights that flow from holding the beneficial ownership of public lands and forests, has always been understood to include the ability to sell (patent), lease and licence such lands and forests.[87]

83. The establishment of First Nation reserves on ceded lands was held by the Privy Council in *Seybold* [88] to require provincial action because, post-cession, the province has complete control – *vis-à-vis* the federal government – over the use of the ceded lands, notwithstanding the Treaty 3 promise to the contrary. This Court expressly confirmed this proposition, post-1982, in *Smith*:

> In the *St. Catherine's* case the surrender was made in a Treaty under one term of which the Indians retained rights to hunt and fish on the surrendered lands. This did not qualify or limit the effect of the surrender. … The effect of a complete release, therefore, would be the withdrawal of these lands from Indian use within the contemplation of s. 91(24) of the *Constitution Act*. As found in *St. Catherine's*, the title of the Province would be unencumbered by any operation of s. 91(24).[89]

84. The Court of Appeal correctly applied this long line of authority – which in the words of this Court in *Smith* "has never been challenged or indeed varied by interpretations and application"[90] – relying on the following foundational elements:

(a) treaties with First Nations are made on behalf of the Crown;
(b) cession treaties change the "nature and character of the Indian interest in the lands";

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[86] *Dominion of Canada v. Province of Ontario*, (1907) 10 Ex. C.R. 445; rev'd (1909), 42 S.C.R. 1; aff'd [1910] A.C. 637 (JCPC) (commonly known as the "*Treaty 3 Annuities Case*", where it was held that Ontario was not liable to Canada for the costs of implementing the Treaty 3 promises), SCC, **OBA, Vol. I, Tab A(X), p.** 111

[87] *Smylie*, *supra*, **OBA, Vol. II, Tab A(52)**; *Saskatchewan Natural Resources Reference*, [1932] A.C. 28 (JCPC), **OBA, Vol. II, Tab A(50)**; *Attorney General of Canada v. Higbie*, [1945] S.C.R. 385, **GBA, Vol. 1, Tab 2**; Peter W. Hogg, Constitutional Law of Canada, 5th ed. (looseleaf) (Toronto: Carswell, 2011 update) ("Hogg"), **OBA, Vol. III, Tab B(7), para. 29.3**

[88] *Seybold*, [1903] A.C. 73 (JCPC), **GBA, Vol. I, Tab 20**; aff'g (1901), 32 S.C.R. 1; aff'g (1900), 32 O.R. 301 (Div. Ct.), **OBA, Vol. I, Tab A(29),;** aff'g (1899), 31 O.R. 386 (Ch. Div.), **GBA, Vol. I, Tab 21**. See also *The Ontario and Minnesota Power Company v. The King* (SCC, unreported, reasons for Judgment, May 1, 1923); aff'd (1924), [1925] A.C. 196 (JCPC), **OBA, Vol. II, Tab 56, pp. 357,** where Idington J. cited Street J.'s decision on this issue in *Seybold* (Ont. Div. Ct. at **OBA, Vol. I, Tab 29, p. 304**) with approval.

[89] *Smith v. The Queen*, [1983] 1 SCR 554 ("*Smith*"), **OBA, Vol. II, Tab A(51), pp. 563-564**: See also *Cardinal v. Attorney General of Alberta* (1973), [1974] SCR 695, **OBA, Vol. I, Tab A(12), p. 715**, per Laskin J., as he then was, dissenting, but not on this point, who expressed a similar understanding of the ratio of *St. Catherine's Milling* and *Seybold*. In the context of aliens, another federal head of power over a group of people, see *Morgan v. A.G. (P.E.I.)* (1975), [1976] 2 SCR 349, **OBA, Vol. I, Tab A(27), p. 363**: "s. 91(25) did not empower the Dominion to regulate the management of the public property of the Province", citing *Brooks-Bidlake and Whittall Ltd. v. B.C. (A.G.)*, [1923] 2 D.L.R. 189 (JCPC) ("*Brooks-Bidlake*"), **OBA, Vol. I, Tab A(9), p. 192**

[90] *Smith*, *supra*, **OBA, Vol. II, Tab A(51), p. 562;** While the Canadian constitutional structure established by this long line of authority has never been varied, *St. Catherine's Milling's* description of the legal nature of Aboriginal title was, of course, modernized by this Court in *Delgamuukw*, *supra*, **OBA, Vol. I, Tab A(16)**

(c) while ownership of public lands is always with the Crown, post-cession the jurisdiction to administer and control those lands passes to the province under s. 109, "subject to … any Interest other than that of the Province" (including the qualified Treaty 3 harvesting rights); and

(d) post-cession, the taking up of lands for provincial purposes – such as forestry, mining and settlement – occurs pursuant to s. 109, 92(5) and 92A, while the federal government retains a residual ability to take up lands for federal purposes, such as national parks, railways, harbours, airports, military bases, etc.[91]

85. Contrary to Grassy Narrows' submissions, the Court of Appeal also correctly: (i) explained Lord Watson's dictum at the end of *St. Catherine's Milling*, by noting that "the more plausible interpretation" is that these issues left open were the very issues dealt with by this Court in *Mikisew*;[92] and (ii) distinguished Chancellor Boyd's musing on this dictum in *Seybold* (at first instance), by noting that Chancellor Boyd's comments are "inconsistent" with the Privy Council's decisions in both *St. Catherine's Milling* and *Seybold*.[93]

(b) Federal Jurisdiction

86. In Upper Canada, it had long been Imperial policy to negotiate treaties for the cession of land before settlement could begin.[94] The negotiation of such treaties is an executive act that was assigned to the federal government at Confederation under s. 91(24).[95]

87. It was entirely appropriate for the federal government to guarantee First Nation hunting and fishing on the ceded Treaty 3 lands and waters. What the federal government could not control was the use of the ceded lands in Ontario, as this jurisdiction was assigned to the provinces under ss. 109 and 92(5) (and now s. 92A). Post-cession, Canada's jurisdiction under s. 91(24) applies to the *activities* of hunting and fishing carried out by First Nations on the ceded lands, not to the lands themselves.[96] In other words, the federal government has jurisdiction to regulate the exercise of treaty harvesting rights on public lands in Ontario, but not to control the

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[91] *OCA*, **AR, Vol. 2, Tab 3, at (a) pp. 35, 37, 39, paras. 113, 119, 126; (b) p. 36, para. 116; (c) pp. 35-36, paras. 113-114, 116-117; and (d) p. 34, para. 110**

[92] *OCA*, **AR, Vol. 2, Tab 3, pp. 38-39, paras. 123-124**. It should also be noted that the other half of Lord Watson's dicta in the final paragraph of *St. Catherine's Milling* – that Ontario should pay for the Treaty 3 annuities – was discounted by the JCPC itself when it reached the opposite result in the *Treaty Annuities* case.

[93] *OCA*, **AR, Vol. 2, Tab 3, pp. 41-42, paras. 132-133**. Furthermore, *Seybold* was about reserve creation and Chancellor Boyd is clearly discussing reserve issues in this passage, not the taking up of lands off-reserve.

[94] *Royal Proclamation of 1763* (October 7, 1763), **OBA, Vol. III, Tab C(7)**

[95] *St. Catherine's Milling, supra*, JCPC, **GBA, Vol. I, Tab 20, pp. 53-54**; *Church v. Fenton* (1878), 28 U.C.C.P. 384, (Ont. Ct. Common Pleas), aff'd (1879) 4 O.A.R. 159 (C.A.), aff'd (1880) 5 S.C.R. 239, **OBA, Vol. I, Tab A(13), paras. 26-28 (QL)**

[96] This is consistent with the other internal limitation to the Treaty 3 harvesting promise, the regulation limitation: "…subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada…"

taking up of ceded lands for provincial purposes.[97]

88. The administration and control of public lands and forests in the province is a matter of exclusive provincial jurisdiction. Contrary to Grassy Narrows' argument, it is not an area of double aspect. Instead, it is an area of incidental effects. When the province administers public lands and forests it may have incidental effects on treaty rights. As this Court stated in *Canadian Western Bank*, such effects are to be expected in a federal system.[98]

89. Ontario agrees that the federal government may legislate pursuant to its assigned heads of powers in ways that have incidental effects on the province's ownership and exclusive legislative jurisdiction over public lands and forests. As the appellants note, the federal government has enacted laws with respect to fisheries, airports, navigation, uranium, etc. that subject the exercise of provincial proprietary rights to true regulatory restrictions. Critically, however, the federal government has not enacted valid legislation seeking to regulate the taking up of land.

90. Furthermore, contrary to Wabauskang's submissions, even where the federal government enacts legislation it cannot do so in a manner that results in exclusive federal control of public lands or forests. In the *Fisheries Case*, where the principle that the exercise of federal legislative power can impact provincial proprietary rights was established, the Privy Council also held that the federal provision authorizing "the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion, but to the provinces" was *ultra vires* Parliament.[99] Here, interpreting Treaty 3 to maintain exclusive federal control over all takings up of lands ceded under the Treaty is akin to granting the federal government the right to bestow a property interest under the guise of the exercise of its s. 91(24) regulatory authority. Federal legislative authority to deal with provincial property and its incidents is exceptional and subject to strict

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[97] *St. Catherine's Milling*, *supra*, JCPC, **GBA, Vol. I, Tab 20, p. 60**: "The fact, that [the Dominion] still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario." See also *Caldwell*, **OBA, Vol. I, Tab A(10), pp. 7-8** (of typed decision, which is without page numbers): "The right to take up lands for mining or lumbering was not in the Dominion before the treaty, nor was it given by the treaty, nor, as it appears, was the treaty held any the less valid, although there was in it an abortive attempt to confer such right upon the Dominion."

[98] *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 ("*Canadian Western Bank*"), **OBA, Vol. I, Tab A(11), para. 28**

[99] *Attorney General of Canada v. Attorney General of Ontario*, [1898] A.C. 700 (JCPC), **GBA, Vol. 1, Tab 1, p. 714** (commonly known as the *Fisheries Case*). See also *Reference re Waters and Water-Powers*, [1929] S.C.R. 200 ("*Water Powers Reference*"), **OBA, Vol. II, Tab A(47), pp. 211 and 214**: "…while [s. 91(24)] enables the Dominion to legislate fully and exclusively upon matters falling strictly within the subject "Indians," including, *inter alia*, the prescribing of residential areas for Indians, does not, as we have seen, embrace the power to appropriate a tract of provincial Crown land for the purposes of an Indian reserve, without the consent of the Province…"

tests.[100] As discussed below, this limited federal authority is necessary to respect the principle of balanced federalism.

91. The appellants' argument that the Court of Appeal decision leaves no role for Canada with respect to upholding the Treaty 3 promises made by the Crown is also incorrect. Both levels of government play important roles in upholding Crown treaty promises and the reconciliation process. These roles flow from their respective obligations as advisors to the Crown pursuant to the division of powers and s. 35 of the *Constitution Act, 1982*.

92. Canada plays a number of roles in the Treaty 3 lands. Pursuant to s. 91(24) of the *Constitution Act, 1867*, the federal government has authority over "Indians" throughout Ontario and "lands reserved for the Indians", i.e. reserves and lands subject to Aboriginal title.[101] In addition, Canada has jurisdiction with respect to other heads of federal power that may apply to the Treaty 3 lands, for example fisheries, the environment, and the taking up of land for federal purposes. Contrary to the assertions of the appellants, the Court of Appeal did not displace the federal role under s. 91(24); it affirmed the responsibilities that Canada holds as treaty maker, *vis-a-vis* those of Ontario as the beneficial owner of ceded public lands and the government with exclusive legislative jurisdiction over public lands and forests in the province.

(c) Court of Appeal did not overlook IJI or s. 88

93. The appellants argue, relying primarily on this Court's decision in *Morris*, that the Court of Appeal erred by failing to consider the protections given to treaty rights by IJI and s. 88 of the *Indian Act*. These arguments are incorrect. When Ontario takes up or authorizes the taking up of land under Treaty 3, it does so pursuant to an internal limitation in the Treaty 3 Harvesting Promise: the taking up clause. The resulting effects on the exercise of Treaty 3 harvesting rights are therefore expressly contemplated under the Treaty.

94. This Court unanimously held in *Morris* that actions pursuant to an internal limit to a treaty right do not impair that right. As a result, the doctrine of IJI is not triggered. Section 88 is a federal remedial provision that referentially incorporates provincial laws rendered inapplicable by IJI into federal law, where those laws come within the enabling language of s. 88. Since IJI is

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[100] *Water Powers Reference*, *supra*, **OBA, Vol. II, Tab A(47),** discussing limits of federal legislative jurisdiction over fisheries (**p. 214**), harbours (**pp. 214-15**), railways and canals (**p. 218**) to interfere with provincial proprietary rights

[101] The federal government historically exercised its s. 91(24) legislative authority primarily through the *Indian Act*, but today does so through a wide range of additional laws such as the *First Nations Commercial and Industrial Development Act*, S.C. 2005, c. 53, **OBA, Vol. III, Tab 4**

not triggered here, s. 88 is irrelevant.[102] This principle was succinctly summarized in *Morris* by McLachlin C.J. and Fish J. (dissenting, but not on this point) at para. 100:

> Valid provincial laws that fall outside of the scope of the treaty right, by virtue of an internal limit on the treaty right, do not go to "core Indianness", and thus apply *ex proprio vigore* [of their own force]. They do not need to be incorporated by s. 88.[103]

95. For this reason, Ontario has not relied on s. 88 in this case. The Court of Appeal therefore did not err by failing to apply IJI or s. 88 in answering the first Threshold Issue.

(d) Balanced Federalism

96. In response to the appellants' expansive conception of federal jurisdiction relating to treaty harvesting rights, the Court of Appeal correctly recognized that "such an expansion of s. 91 (24) jurisdiction would render illusory provincial jurisdiction over the disposition and management of public lands and forests under ss. 109, 92 (5) and 92A", and would be contrary to this Court's "emphasis on balanced federalism and the interdiction that a 'federal head of power cannot be given a scope that would eviscerate a provincial legislative competence'."[104]

97. The doctrine of mutual modification is one of the principal means to achieve balanced federalism. This doctrine requires that the grants of power made to the federal government in the *Constitution Act, 1867* be "read together" with the grants of power made to the provinces "and the language of one interpreted, and where necessary modified, by that of the other so that the respective powers are reconciled and both given effect."[105]

98. In this case, balanced federalism requires that meaningful constitutional space be given to ss. 109, 92(5) and 92A of the *Constitution Act, 1867*. To expand s. 91(24) to ground federal control over all takings up in the Keewatin Lands would eviscerate these provincial heads of power; it would leave provinces no recourse if the federal government were to make a policy decision highly restrictive of takings up for provincial purposes.

99. The appellants argue that the decision of the Court of Appeal undermines the principles of

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[102] *Dick v. The Queen* (1984), [1985] 2 S.C.R. 309, **OBA, Vol. I, Tab A(17)**

[103] *Morris, supra,* **OBA, Vol. II, Tab A(41), para. 100**. See also majority decision at **paras. 36-38**, and minority decision at **paras. 64, 82, 92-94, 99, 106-07, 119 and 122**. The trigger for the IJI doctrine was raised from 'affects' to 'impairs' by this Court after *Morris* was decided, in *Canadian Western Bank, supra,* **OBA, Vol. I, Tab A(11), paras. 48-49**

[104] *OCA,* **AR, Vol. 2, Tab 3, pp. 67-68, para. 205**, citing *Reference re: Securities Act,* [2011] 3 SCR 837, **WBA, Vol. 2, Tab PP, para. 71**; see also *Reference re Assisted Human Reproduction Act,* [2010] 3 SCR 457, **OBA, Vol. II, Tab A(46)**

[105] *Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96 (JCPC), **OBA, Vol. I, Tab A(14), p. 109**; see also *Water Powers Reference, supra,* **OBA, Vol. II, Tab A(47), p. 216**

co-operative federalism by reviving Lord Atkin's 'water-tight compartments' approach.[106] This is incorrect; the Court of Appeal's decision preserves co-operative federalism. Co-operative federalism is balanced federalism;[107] it does not require the federal government to be involved in every provincial decision that will have an incidental effect on an area of federal jurisdiction. There would be no incidental effects doctrine if this were the case.

v. Reciprocal Legislation of 1891 and 1912

100. Since a treaty between the Crown and Aboriginal peoples is intended to endure indefinitely, treaty rights, and limitations on such rights, are capable of logical evolution in response to changing circumstances; "They are not frozen at the date of signature."[108] For instance, Indian bands have merged or split over time, and the successor bands continue to hold the treaty rights of their ancestors.[109] While logical evolution has most commonly been applied to the means chosen by Aboriginal people to exercise treaty rights, it also applies to the Crown side of the bargain, for instance to evolving conservation and safety concerns.[110]

101. Following the final determinations of the Ontario boundary dispute and *St. Catherine's Milling*, the federal and Ontario governments recognized that for Treaty 3 lands within Ontario, the reference to the Dominion government in the taking up clause was inaccurate and potentially confusing. Article 1 of the 1894 Agreement therefore deliberately [111] put to rest any possible future controversy regarding Ontario's ability to take up Treaty 3 lands in the province:

> With respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf as in the said Treaty mentioned, 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 Indians throughout the tract surrendered, not including the Reserves to be made thereunder, 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.[112]

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[106] Wabauskang Factum, **p. 22, para. 83**.
[107] See *Canadian Western Bank*, **OBA, Vol. I, Tab A(11), para 42**
[108] *Marshall No. 1*, *supra*, **OBA, Vol. II, Tab A(39), para. 78** (McLachlin J., as she then was, dissenting, but not on this point); *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, **OBA, Vol. II, Tab A(40), para. 25**
[109] See e.g. *Blueberry River Indian Band*, **OBA, Vol. I, Tab A(4), para. 29**. Similarly, changes to the government advising the Crown may occur over time: *R. v. Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta*, [1982] 2 All E.R. 118 (CA) (UK), **GBA, Vol. 2, Tab 39, pp. 127-130**
[110] See *Morris*, *supra*, **OBA, Vol. II, Tab A(41), paras. 30-35** (majority) **and paras. 112-17** (minority)
[111] Mowat to Dewdney, Jan. 17, 1889, **AEB, Tab 70, pp. 34-35**. The 1894 Agreement was attached as a Schedule to the 1891 Legislation, though not signed until 1894.
[112] Article 1 has the force of both federal and provincial law by virtue of the reciprocal 1891 Legislation: see e.g. *British Columbia*

102. The best interpretation of "Article 1", as incorporated into the 1891 Legislation, is that it is declaratory legislation, consistent with the Court of Appeal's ruling that these instruments "confirmed Ontario's right to take up under Treaty 3 without Canada's approval".[113]

103. Declaratory legislation has been accepted as valid by Canadian courts,[114] and there is no reason to doubt the ability of Parliament and the Ontario Legislature, prior to 1982, to effectively declare the law as stated in Article 1, even if a different regime would have been in place otherwise. The 1891 Legislation and 1894 Agreement therefore provide an independent basis on which to dismiss these appeals, although the Court of Appeal did not find it necessarily to consider this.

104. The Privy Council made it clear in *Seybold* that the 1891 and 1894 Instruments have legislative effect and have real significance in that they settled issues of constitutional or general importance on which leave to appeal to the Privy Council had been granted, confirming, it is submitted, that Article 1 has effect as general legislation.[115]

105. The Court of Appeal correctly concluded that the 1891 Legislation and the 1894 Agreement applied to the Keewatin Lands by operation of law upon their annexation to Ontario in 1912.[116] The text of Article 1 does not differentiate between Treaty 3 lands that lay within Ontario's original boundaries and other Treaty 3 lands. Article 1 gives as the reason for Canada's concession and declaration the fact that "the Crown lands in the surrendered tract have been decided to belong to the Province of Ontario". Not all of "the surrendered tract" belonged to Ontario in 1894, including the Keewatin Lands. After 1912, however, the Keewatin Lands became "Crown lands in the surrendered tract" belonging to Ontario under s. 109. Accordingly,

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(Attorney General) v. Canada (Attorney General), [1994] 2 S.C.R. 41, **OBA, Vol. I, Tab A(7), p. 110**

[113] *OCA*, **AR, Vol. 2, Tab 3, p. 56, paras. 174**; see also **p. 59, 179-80**

[114] *Quebec (Attorney General) v. Healey*, [1987] 1 S.C.R. 158, **OBA, Vol. I, Tab A(30), pp. 165-166, 178-179**; *Western Minerals Ltd. v. Gaumont*, [1953] 1 S.C.R. 345, **OBA, Vol. II, Tab A(58), pp. 352-353** *per* Rand J. (SCC), see also **p. 365** *per* Locke J. (conc.), **p. 368** *per* Cartwright J. (conc.); *McCutcheon Lumber Co. v. Minitonas* (1912), 7 D.L.R. 664, **OBA, Vol. I, Tab A(23), pp. 669-670** (C.A.) *per* Cameron J.A, (conc.)

[115] *Seybold*, *supra* (JCPC), **GBA, Vol. I, Tab 20, pp. 78, 83 and 84**. The reference in the 1891 Legislation to the contemplated agreement binding "the Dominion of Canada" and the "Province" does not imply that others are not bound. It is common to confirm in legislation that the Crown is bound, where that is intended, and doing so does not displace the presumption that the legislation binds others.

[116] *OCA*, **AR, Vol. 2, Tab 3, pp. 59-60, para. 182**; see also **pp. 61-62, 64-66, paras. 186-192, 197-199**. See also *R. v. Jameson* (1896), 65 L.J.M.C. 218 (Div. Ct.), **OBA, Vol. II, Tab A(36), p. 226** (UK) (per Lord Russell of Killowen); J.E. Coté, "The Reception of English Law" (1977) 15 Alberta L. Rev. 29, **OBA, Vol. III, Tab B(5), p. 52**; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), **OBA, Vol. III, Tab B(8), p. 135**; *Arrow River & Tributaries Slide & Boom Co. v. Pigeon Timber Co.*, [1932] S.C.R. 495, **OBA, Vol. I, Tab A(1), p. 509**; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008), **OBA, Vol. III, Tab B(9), p. 734**; *Croft v. Dunphy*, [1933] A.C. 156 (JCPC), **OBA, Vol. I, Tab A(15), p. 163**; *Interpretation Act*, R.S.C. 1886, c. 1, s. 7(1); R.S.C. 1906, c. 1, s. 9(1); R.S.C. 1927, c. 1, s. 9(1); R.S.C. 1970, c. I-23, s. 8; R.S.C. 1985, c. I-21, s. 8, **OBA, Vol. III, Tab C(5)**

as of 1912, the rationale expressly offered for Canada's concession and declaration in Article 1 also applied to the Keewatin Lands; the same mischief existed and was remedied.

106. As found by the Court of Appeal, this conclusion is further supported by two interpretive presumptions. First, the legislature does not intend to produce absurd consequences. The drafters of the 1891 Legislation (which included the text of what became the 1894 Agreement) would not have intended that it later be applied in a way that would generate different legal regimes on either side of a former provincial boundary; an "absurd" result. Second, the law is always speaking; legislative provisions are not frozen in the state of affairs at the time of their enactment. Rather, the 1894 Agreement and 1891 Legislation should today be interpreted in the context of Ontario's current boundaries.[117]

107. At all times since Ontario's boundaries were extended in 1912, Ontario has had the same constitutional powers in the extension lands – including the Keewatin Lands – that it has had since Confederation within its original boundaries, under ss. 92, 92A and 109 of the *Constitution Act, 1867*. This has not been contested and was confirmed by the Court of Appeal. The boundary change involved an extension of provincial jurisdiction over the lands transferred from the federal government, which previously had plenary jurisdiction. The Court of Appeal correctly recognized that this extension carried with it the ability to take up lands under Treaty 3.

108. Treaties are living documents, and when changes to borders alter which government of the Crown has administration and control of public lands, the spirit of a treaty is not contradicted by having that Crown government work with First Nations to respect treaty rights exercisable on those lands. Prior to 1912, the federal government was the government with the authority to take up lands in the Keewatin Lands; the area was federal territory outside Ontario. This historical reality did not result in or correspond to a material term of the treaty bargain. Accordingly, when the Keewatin Lands became part of Ontario, treaty rights could and did evolve rationally to correspond to the new constitutional reality that ownership of public lands and exclusive legislative authority to manage public lands and forests had been transferred to the province.[118]

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[117] *OCA*, **AR, Vol. 2, Tab 3, pp. 63-64, paras. 195-196;** On absurd consequences see: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, **OBA, Vol. II, Tab A(45), para. 27**; *Vandekerckhove v. Middleton (Township)*, [1962] 75 S.C.R., **OBA, Vol. II, Tab 57, pp. 78-79**; *R. v. Lewis*, [1996] 1 S.C.R. 921, **OBA, Vol. II, Tab A(38), para. 78**; see also **paras. 66 and 77**; On the law is always speaking see: *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, **OBA, Vol. I, Tab A(32), para. 38**; *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F., s. 63, **OBA, Vol. III, Tab C(6)**; *Interpretation Act*, R.S.C., c. I-21, s. 10, **OBA, Vol. III, Tab C(5)**

[118] *OCA*, **AR, Vol. 2, Tab 3, pp. 49-50, paras. 153-154**

109. Nothing in the 1912 Legislation calls for a different result. As mentioned above, s. 2 of the 1912 federal statute stipulated the following conditions, which Ontario agreed to:

> (a) That the Province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof and the said Province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders;
>
> …
>
> (c) That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament.[119]

110. Ontario promised under s. 2(a) to recognize Treaty 3 rights in the Keewatin Lands "to the same extent … as the Government of Canada has heretofore recognized such rights". This acknowledgment was important in confirming Ontario's acceptance of the Crown's obligations to honour treaty and Aboriginal rights. But Canada's recognition of Treaty 3 harvesting rights in the Keewatin Lands was qualified by the taking up limitation. It follows that the condition by which Ontario promised to recognize Treaty 3 rights in the Keewatin Lands contemplates a right to take up lands under the Treaty (for provincial purposes), just as the federal government could prior to 1912.

111. Contrary to the submissions of Grassy Narrows, s. 2(c) is not inconsistent with this interpretation. Section 2(c) reserved to Canada "the trusteeship of the Indians in the said territory", but – as discussed above – Canada's trusteeship role *vis-à-vis* Indians has never been understood by the federal government to include a duty to control the development of ceded lands, off-reserve. It is certain that neither the federal nor the Ontario government intended in 1912 that Canada would supervise Ontario's management of public lands ceded by treaty after the extension of Ontario's borders.

112. The common government understanding that Ontario has exclusive jurisdiction to administer ceded lands (off-reserve) was acknowledged in additional reciprocal legislation, the *Indian Lands Act*, passed in 1924.[120] The 1891 Legislation and the 1912 Legislation should be interpreted in a manner that is harmonious with this view.

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[119] *1912 Legislation*, **ORF, Tabs 3 & 4** ; *Constitution Act, 1871*, *supra*, s. 3, **OBA, Vol. III, Tab C(3)**

[120] *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48, **OBA, Vol. III, Tab C(1)**; *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.O. 1924, c. 15, **OBA, Vol. III, Tab C(2)**

113. For all of these reasons, the Court of Appeal correctly concluded that Ontario can validly authorize the taking up of public lands for provincial purposes in the Keewatin Lands, without additional authorization by the federal government. This result matches the expectations of the relevant political actors in 1912, as confirmed by comments of Prime Minister Borden in Parliament, and the conduct of Canada and Ontario since 1912.

vi. Interpreting Treaty 3 to Achieve Reconciliation

114. It is the nature of land use activities, together with the nature of consultation and, where appropriate, accommodation, that First Nations in the Keewatin Lands are concerned with, rather than which level of government is involved in authorizing these land use activities. This is consistent with the evidence of former Chief and Grassy Narrows witness Bill Fobister Sr.[121]

115. Reconciliation is achieved through the Crown respecting Treaty harvesting rights so that they can be meaningfully exercised by each Treaty 3 First Nation. The path to accommodation begins with consultation. The *Badger*/*Mikisew* regime discussed above requires meaningful and often intensive engagement amongst First Nation governments, Ontario and proponents. Requiring that Canada be added to this already complex dynamic would make engagement and agreement more difficult.[122] As Ontario is already required to respect treaty rights and uphold the honour of the Crown, mandatory federal supervision would offer no compensating benefits.

116. Because Treaty 3 harvesting rights are exercisable on Crown lands, it makes sense for the government with the beneficial ownership of, and exclusive legislative jurisdiction over, those public lands and forests to directly engage Treaty 3 First Nations with respect to their Treaty harvesting rights. Ontario authorizes the vast majority of public land uses that are of potential concern to First Nations and has the resources on the ground with knowledge of the day-to-day management of those public lands and forests. In contrast, the federal government does not have the staff, knowledge or mandate to meaningfully engage in consultation over all significant Treaty 3 land use decisions.

117. As discussed by the respondents Resolute and Goldcorp, the interpretation of Treaty 3 advanced by the appellants also places the interests of innocent third parties at risk. An interpretation of Treaty 3 that suggests a century of occupation was unauthorized due to the

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[121] Examination-in-Chief of Bill Fobister Sr., who also confirmed his personal understanding that Treaty 3 was with the Queen Vol. 8, Nov. 25, 2009, **OEB, Tab 21**

[122] *OCA*, **AR, Vol. 2, Tab 3, pp. 49-50, paras. 153-154**

absence of federal approval would be of great concern to all of the individuals, communities and businesses who hold legal interests that would be called into question. In this very practical sense, the federal land use regime sought by the appellants would militate against reconciliation.

118. Grassy Narrows has been candid from very early in this litigation that it hopes the legal regime it seeks will lead to a renegotiation of Treaty 3. A legal regime that is so unworkable as to trigger a renegotiation of the Treaty self-evidently does not correspond with the legitimate expectations of the Treaty parties; it cannot be the correct result of a treaty interpretation exercise, or this appeal.

119. Ontario is and should be part of the Treaty relationship, as a government of the Crown under the duty to uphold the honour of the Crown. Like the Court of Appeal, this Court should recognize that Treaty 3 was made with the Crown, not solely the federal government, and allow constitutional space for Ontario to participate in the treaty relationship in the Keewatin Lands through direct engagement with First Nations about uses of public lands, without federal control, as it does elsewhere in the province. As the Report of the Ipperwash Inquiry noted: "One of the lessons of Ipperwash is the realization that all of us in Ontario, Aboriginal and non-Aboriginal, are treaty people."[123] This is a modern, post-s. 35 conception of the treaty relationship. No doubt many historical actors would not have embraced this view, but it is an important step towards reconciliation.

C. Threshold Issue 2 – Interjurisdictional Immunity

> "If the answer to Threshold Issue 1 is 'no', does Ontario have the authority pursuant to the division of powers between Parliament and the legislatures under the *Constitution Act, 1867* to justifiably infringe the rights of the Plaintiffs to hunt and fish as provided for in Treaty 3?"[124]

120. In the normal taking up of lands regime under the numbered and Robinson treaties, Ontario does not need to justify the taking up of land for provincial purposes. This is because it is taking up pursuant to an internal limitation to a treaty, and therefore does not infringe the treaty when it does so – provided a meaningful ability to exercise treaty harvesting rights remains.[125] Justification is a "heavy burden", in the words of this Court in *Sparrow*. To justify an infringement in the Threshold Issue 2 context of not being able to access the Treaty 3 taking up

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[123] Hon. Sidney B. Linden, Commissioner, *Report of the Ipperwash Inquiry: Volume 2, Policy Analysis*, (Toronto: Queen's Printer for Ontario, 2007), **OBA, Vol. III, Tab B(4), p. 44**
[124] Order of Spies J. dated June 28, 2006, **AR, Vol. 2, Tab 6, pp. 122-123**
[125] *Mikisew*, *supra*, **OBA, Vol. I, Tab A(24), para. 48**

limitation, Ontario would be required to establish that a proposed land use authorization or disposition is (a) being made pursuant to a valid objective and (b) will be implemented by appropriate means.[126]

121. Threshold Issue 2 is restricted to the jurisdictional question under the division of powers of whether Ontario can access the s. 35 justification test when authorizing land uses that infringe Treaty 3 harvesting rights. Threshold Issue 2 does not engage the question of how the justification test applies to the particular forestry activities at issue, and accordingly the facts necessary to apply that test have not been entered into evidence.[127]

122. In the event this Court finds that only the federal government can authorize the taking up of lands for provincial purposes under Treaty 3, Ontario submits that it has the constitutional capacity to justify infringement of Treaty 3 rights that would result from Ontario authorizing the taking up of lands for provincial purposes. Ontario's submissions on this issue relate to:

i. The fact that IJI is not applicable to provincial land use dispositions and authorizations;

ii. If IJI is applicable, *Morris* is distinguishable; and

iii. If *Morris* is not distinguishable, it should be revisited.

(i) IJI not applicable to provincial land use dispositions and authorizations

123. The appellants argue that Ontario cannot take up lands under Treaty 3 due to IJI as it relates to s. 91(24) of the *Constitution Act, 1867*, relying heavily on *Morris*.[128] The trial judge accepted this position.[129] The Court of Appeal did not address the issue, having decided the case on Threshold Issue 1, but expressly stated that "nothing in these reasons should be construed as approval of the trial judge's reasoning or result" on this issue.[130]

124. The doctrine of interjurisdictional immunity stems from the fact that the legislative heads of power set out in ss. 91 and 92 of the *Constitution Act, 1867* are stated to be "exclusive". To give meaning to this grant of *legislative* exclusivity, courts began in the late 1800s to read down

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[126] *Sparrow*, *supra*, **OBA, Vol. II, Tab 43, pp. 1113-1114** (valid objective) **and pp. 1114-1115** (appropriate means) **and p. 1119 (**heavy burden)
[127] Order of Spies J. dated June 28, 2006, *supra*, **AR, Vol. 2, Tab 6**: "the question of whether or not the particular statutes and statutory instruments at issue in this action in fact justifiably infringe the treaty rights shall not be determined and shall be reserved for the trial of the rest of this proceeding."
[128] *Morris*, *supra*, **OBA, Vol. II, Tab A(41)**
[129] *SCJ*, **AR, Vol. 1, Tab 2, pp. 300-303, paras. 1523-1547**
[130] *OCA*, **AR, Vol. 2, Tab 3, pp. 70-71, para. 215**

provincial laws that would impair the status or vital part of the operation of federal undertakings and companies. From there, the doctrine expanded to other heads of federal power and today protects the core of a limited number of federal heads of power from impairment by provincial laws, including s. 91(24).[131]

125. The exercise of *proprietary* powers, however, is not dependent on the legislative powers set out in ss. 91 and 92. That is why, for example, Ontario can own and operate a television station, TVO. In the case of public lands and forests, when Ontario exercises its powers as owner under s. 109 it can do anything that a natural person can do with his or her property, subject to compliance with any applicable laws and without regard to the limits imposed on the exercise of legislative authority under the division of powers. As owner of the lands Ontario may deal with its lands as any proprietor can and may even achieve goals through contract that would be *ultra vires* were the terms imposed by virtue of legislative authority rather than proprietary ownership. There is a long line of settled authority to this effect,[132] referred to most recently in this Court's decision in *B.C. v. Lafarge*.[133] As the Ontario Court of Appeal stated in *Boniferro Mill Works*:

> When the Crown is disposing of its own property, it is not bound by limits on its legislative authority. The use and disposition of Crown timber is a common example of the authority of the Crown to dispose of its property as it sees fit.[134]

126. Lord Watson recognized the distinction between legislative and proprietary jurisdiction in *St. Catherine's Milling*, stating:

> There can be no à priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power [s. 91 of the *Constitution Act, 1867*], intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets [s. 109].[135]

127. The fact that the province may exercise its rights as owner by way of legislation enacted under s. 92(5) does not attract the IJI limits that arise from potentially competing heads of

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[131] For a detailed review of the history and content of the doctrine of IJI see *Canadian Western Bank*, *supra*, **OBA, Vol. I, Tab A(11), paras. 33-67** (IJI in relation to s. 91(24) discussed at **paras. 60-61**)
[132] *Smylie*, *supra*, **OBA, Vol. II, Tab A(52), pp. 178-80** (Osler J.A.) and **p. 192** (Moss J.A.); *Brooks-Bidlake*, *supra*, **OBA, Vol. I, Tab A(9), p. 192** (affirming (1922), 63 S.C.R. 466, see **pp. 470-473** on this point); LaForest, *supra*, **OBA, Vol. III, Tab B(3), pp. 164-170**; Hogg, *supra*, **OBA, Vol. III, Tab B(7), paras. 29.2, 29.3, and 30.4(b)**. But see *Saanichton Marina Ltd. v. Tsawout Indian Band* (1989), 57 D.L.R. (4th) 161 (BCCA) ("*Saanichton Marina*"), **OBA, Vol. II, Tab A(49)**, decided prior to *Sparrow* and distinguishable on that and other grounds.
[133] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 SCR 86, **OBA, Vol. I, Tab A(8), para. 56**
[134] *Boniferro*, *supra*, **OBA, Vol. I, Tab A(6), para. 31**
[135] *St. Catherine's Milling*, *supra*, JCPC, **GBA, Vol. I, Tab 20, p. 59**

legislative authority under the federal division of powers.[136] In this context, s. 92(5) is best viewed as confirmatory of provincial legislative jurisdiction to pass laws to regulate how Ontario exercises its proprietary jurisdiction under s. 109, not as an independent source of jurisdiction.

128. The application of IJI by this Court in *Morris*, holding that a provincial law banning night hunting was inapplicable to First Nation hunters who had a treaty right to hunt at night, considered only provincial legislative authority, not provincial proprietary authority. B.C. was not exercising its proprietary authority in enacting the hunting law at issue, which regulated the activities of hunters.[137]

129. The B.C. Court of Appeal's decision in *Saanichton Marina* is also distinguishable.[138] The proposed marina would have infringed an unqualified right to fish.[139] Further, the B.C. Court of Appeal did not have the benefit of this Court's decision in *Sparrow*, and thus did not know that s. 35 contained a justification test.[140] The B.C. Court of Appeal therefore, inappropriately in Ontario's submission, used IJI instead of s. 35 to protect the fishing rights at issue from impairment. Section 35 applies to the Crown as proprietor or regulator.

130. Although not constrained by the legislative division of powers when dealing with Crown property under the administration and control of the province, Ontario is constrained by the honour of the Crown, the terms of s.109, and s. 35 of the *Constitution Act*, 1982. The trial judge significantly underestimated these protections of treaty rights.[141]

(ii) If IJI is applicable, Morris distinguishable

131. Even if IJI did apply to the exercise of the province's right as an owner to dispose of its property on terms, the doctrine would not be triggered in this case as the infringement does not impair the exercise of Treaty 3 harvesting rights by interfering with their meaningful exercise (the substantive infringement threshold articulated by this Court in *Mikisew Cree*). Instead, what is being justified is that Ontario is taking up or authorizing the taking up of lands instead of the

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[136] Unless provincial contractual or licence terms depend on the exercise of legislative authority, e.g. retroactive imposition of such terms.
[137] *Morris*, *supra*, **OBA, Vol. II, Tab A(41)**; see also the minority's statement at **para. 135**, that they did not find it necessary to determine "the extent to which, if at all, provinces may validly interfere with treaty rights."
[138] *Saanichton Marina*, *supra*, **OBA, Vol. II, Tab A(49)**
[139] *Saanichton Marina*, *supra*, **OBA, Vol. II, Tab A(49), p. 171**: "…the right to fish, unlike the right to hunt, is not qualified or limited to unoccupied lands or qualified in any other respect." – discussing the same treaty that was at issue in *Morris*
[140] *Saanichton Marina*, *supra*, **OBA, Vol. II, Tab A(49), pp. 167-169**, noting that – pre-*Sparrow* – "…the [Supreme] Court has not attempted to define the nature and extent of such rights" beyond their being "unique" and "confer[ring] additional protection on the Indians." (p. 169)
[141] *SCJ*, **AR, Vol. 1, Tab 2, p. 302, paras. 1543-1544**

federal government. While this procedural change clearly affects the Treaty 3 harvesting rights, it does not impair those rights as it does not interfere with their meaningful exercise.

132. In contrast, the provincial law at issue in *Morris* did impair the treaty right so as to trigger IJI because the provincial law enacted a complete ban on night hunting, the right at issue as characterized by this Court. A complete ban clearly impairs the right. Similarly, the proposed location for the marina in *Saanichton Marina* was in "the last remaining undisturbed estuarine environment on the Saanich Peninsula", and thus also would have impaired the fishing rights.[142]

133. The trial judge's resort to IJI led to one of the classic problems associated with the doctrine – the creation of a regulatory vacuum. This Court noted this underlying flaw of IJI in *Canadian Western Bank*, citing it as one of the reasons that the scope of the doctrine should be restrained going forward.[143] By not allowing Ontario access to the s. 35 justificatory regime, the trial judge created a regulatory lacuna that requires federal legislation or some other federal legal mechanism to remedy.[144]

134. Contrary to the assertions of Grassy Narrows, the application of IJI in this case would create a legislative gap.[145] Section 88 does not prevent such a gap. In any event, as discussed above, Ontario does not rely on s. 88 in this case.

(iii) If Morris is not distinguishable, it should be revisited

135. In the further alternative, if *Morris* is not distinguishable, this Court should revisit that decision. Such a re-assessment is necessary in order to properly balance Aboriginal treaty rights and exclusive provincial jurisdiction over public lands and forests. As discussed above, the federal government has legislative jurisdiction under s. 91(24) to enact legislation in relation to the exercise of treaty harvesting rights. It is the paramountcy doctrine, not IJI, that is the preferable doctrine to employ if federal jurisdiction is to render provincial laws in relation to the management of public lands and forests inoperable in particular contexts relating to the exercise of treaty harvesting rights. Ontario adopts the submissions of Canada on this argument, and anticipates that similar submissions will be advanced by the provincial intervenors.

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[142] *Saanichton Marina*, *supra*, **OBA, Vol. II, Tab A(49), p. 172**
[143] *Canadian Western Bank*, *supra*, **OBA, Vol. I, Tab A(11), para. 44**: "interjurisdictional immunity means that despite the absence of law enacted at one level of government, the laws enacted by the other level cannot have even incidental effects on the so-called 'core' of jurisdiction. This increases the risk of creating 'legal vacuums'… Generally speaking, such 'vacuums' are not desirable."
[144] *SCJ*, **AR, Vol. 1, Tab 2, pp. 261, 309-310, paras. 1311, 1585-1589**
[145] Grassy Narrows Factum, **p. 38, para. 96** – although they seem to acknowledge the presence of such a gap at **p. 39, para. 99**

D. Conclusion

136. This Court should affirm the Court of Appeal's holding that the correct answer to the first Threshold Issue, is "Yes"; Ontario can take up lands under Treaty 3 for forestry operations, within the limits that have been articulated by this Court, so long as it discharges the obligations flowing from the honour of the Crown and s. 35. If it is necessary to answer the second Threshold Issue, the correct answer is also "Yes"; Ontario has the constitutional capacity to authorize land uses for provincial purposes that infringe treaty harvesting rights, if and to the extent it can satisfy the test for justification established in *Sparrow*.

137. The appellants and other Treaty 3 beneficiaries have every right to expect that their Treaty 3 harvesting rights will be honoured by whatever government takes up or authorizes the taking up of Treaty 3 lands. For provincial land use decisions, including forestry, this is the Ontario government; for federal land use decisions it remains the federal government. Permitting direct provincial Crown-First Nation dialogue is the better path to reconciliation.

PART IV – Submissions Concerning Costs

138. Ontario does not seek costs in this proceeding. This Court has already made an order with respect to Grassy Narrows' costs of this appeal. Ontario consents to paying 50% of Wabauskang's reasonable costs of the appeal, on a partial indemnity basis. Ontario submits that it should not be required to pay any further costs, to any party or intervenor.

PART V – Order Sought

139. Ontario requests that the appeals be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF APRIL, 2014

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Appendix A: Additional Evidence on Lack of Crown Intention for Two-Step Process

1. The following are examples of prior judicial decisions confirming that Canada made Treaty 3 on the basis of its position that the Treaty 3 lands were situated within the North West Territories, explaining why the Treaty text referred to the Dominion:

> The Dominion authorities assumed to make the treaty in question under the mistaken belief that the lands were beyond the confines of the Province and were consequently Dominion lands… (*St. Catherine's Milling , supra,* OCA, **OBA, Vol. II, Tab A(53), p. 167**)
>
> Unfortunately at that time [1873] the true boundaries had not been ascertained. … The treaty seems clearly to have been made on the assumption that the Dominion had the whole control of the surrendered territory. (*St. Catherine's Milling, supra,* OCA, **OBA, Vol. II, Tab A(53), pp. 157-58**)
>
> As the Dominion claimed this territory at the time of the North-West angle treaty, that treaty was concluded ex parte so far as Ontario is concerned. (*St. Catherine's Milling, supra,* Ch. Div. **OBA, Vol. II, Tab A(54), pp. 234-35**)
>
> By way of clearing the ground it may be premised that the Government of the Dominion dealt with the Indians in 1873 under the supposition that all the territory being surrendered was outside of the boundary of Ontario and within the extra-provincial limits of Canada… (*Seybold , supra,* Ch. Div. **GBA, Vol. 1, Tab 21, p**. 393)
>
> The Dominion authorities held the view that the lands belonged to the Dominion and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiation for the treaty without consulting the Province. (*Treaty 3 Annuities Case,* Ex. C.R.**, OBA, Vol. I, Tab 18, p. 493**)
>
> At the time of the making of the treaty the Dominion no doubt entertained the view that no part of these lands were within the boundaries of Ontario, but that the whole of the tract covered by the treaty belonged to the Dominion...(*Treaty 3 Annuities Case, supra,* SCC **, GBA, Vol. 1, Tab 7, p. 90** (dissenting, but not on this point))
>
> They [the Dominion Government] acted in the belief that the lands were not within the province. (*Treaty 3 Annuities Case, supra,* JCPC, **GBA, Vol. 1, Tab 8, p. 645**)

2. The "two-step" theory adopted by the trial judge rests on the evidence of one of the plaintiffs' expert witnesses, Dr. Milloy.[146] His evidence, however, does not credibly support this theory. Dr. Milloy proposed that *it is possible* that the Commissioners – referring at this point to the Treaty 5 negotiations – may have thought that the federal government should act as an intermediary between First Nations and local governments controlling the taking up of land, and therefore drafted the taking up clause accordingly. He based this tentative hypothesis on high-level social fact evidence regarding Indian policy before and after Confederation, not on analysis of the historical record relating to Treaty 3.[147]

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[146] *SCJ,* **AR, Vol. 1, Tab 2, p. 160, paras. 701-702**

[147] Dr. John S. Milloy, "Contextual History Relevant to Indian Administration and Treaty Making in the Early Years of Confederation" ("*Milloy Report"*), **OEB, Tab 12**, **pp. 18-20, 43-44** (actually referring to Treaty 5 in making this point), **45-46**; Examination-in-Chief of John Milloy ("*Milloy in Chief"*), Vol. 3, Oct. 9, 2009, **OEB, Tab 16**; *Milloy Cross,* Vol. 4, Oct. 16, 2009,

3. On cross-examination, after being led through many of the countervailing facts noted by the Court of Appeal and discussed below, Dr. Milloy apologetically conceded that his hypothesis displayed "too much artifice", while the federal government's position on the boundary dispute offered a simple and compelling explanation for the reference to the Dominion in the taking up clause, so that "it would have been very strange" had the clause said anything else.[148]

4. The fact that the Commissioners proceeded on the basis that they were dealing exclusively with lands in the North West Territories is further confirmed by:

(a) The provision of the Treaty 3 text immediately preceding the Harvesting Promise:

> Her Majesty further agrees … that … all laws…to preserve her Indian subjects inhabiting the reserves, or living elsewhere within her North West Territories, from the evil influence of the use of intoxicating liquors shall be strictly enforced. (*underlining in archival text*); and

(b) The commissions appointing the Commissioners (in 1871 & 1873) provided authority to negotiate a treaty for lands in the North West Territories, without mention of Ontario.[149]

5. The idea that the federal government intended to create a two-step process when Treaty 3 was negotiated does not make sense for the following additional reasons:

(a) A two-step land use regime would have been a remarkable novelty in 1873,[150] never mentioned or utilized by anyone, before or after;

(b) Morris used essentially the same harvesting promise in Treaties 4, 5 and 6, which covered lands that were clearly under exclusive federal control.[151] Similar language was used again in Treaty 7. It was only when drafting Treaty 8, the first numbered treaty recognized by Canada to include lands that it would not own and manage (in B.C.), that the taking up clause was changed to drop any reference to the federal government (the changed clause was then used in Treaties 9-11); and

(c) It was recognized in 1873, as it was in 1912, that the federal government owed trusteeship obligations to Indians. But these obligations have never been conceived as extending to the control of ceded lands, off reserve. Imperial, provincial (between 1860 and 1867) and then federal Indian Department officials dealt with only unceded and reserve lands.[152]

OEB, Tab 19

[148] *Milloy Cross*, Vol. 4, Oct. 16, 2009, **OEB, Tab 18**

[149] Evidence pertaining to Treaty Commissioners' mandate, **OEB, Tab 2**

[150] See *St. Catherine's Milling, supra*, OCA, **OBA, Vol. II, Tab A(53), p. 167** – Burton J.A.

[151] Harvesting Provisions of the Robinson and Numbered Treaty Texts, **OEB, Tab 15**

[152] *SCJ*, **AR, Vol. 1, Tab 2, pp. 159-161, paras. 696, 701-703, 705-707**; *Milloy Cross*, Vol. 3, Oct. 13, 2009, **OEB, Tab 17, pp. 3-32**; Oct. 14, 2009, **OEB, Tab 17, pp. 33-39**;Vol. 4, Oct. 16, 2009, **OEB, Tab 17, pp. 45-53, 74-77**; *Milloy Report*, **OEB, Tab 12**, **pp. 24, 26**

Appendix B: Maps

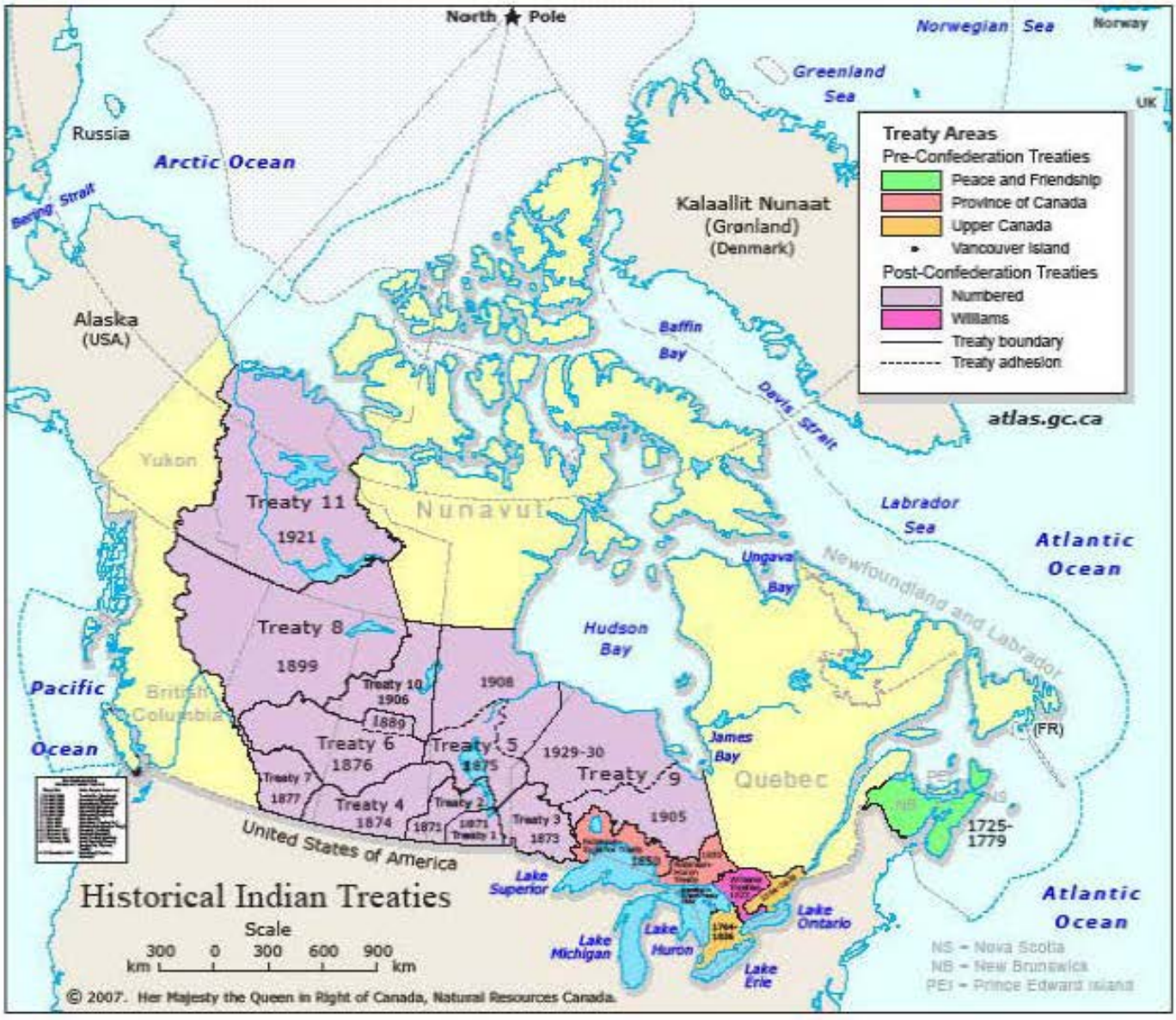
1. The Keewatin Lands

2. Canada's Historical Indian Treaties

MAP # 1 – *The "Keewatin Lands"*

N.B. This map and the following map of Canada's "Historical Indian Treaties" are provided for illustrative purposes only, noting that there is uncertainty over the location of the northern boundary of the Treaty 3 Area.

MAP # 2 – *Canada's Historical Indian Treaties*



PART VI – Table of Authorities

72.	Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002)	105
73.	Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008)	105

PART VII – Table of Statutes & Treaties

***An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands (CA),* 54 & 55 Vict., c. 5**

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: –

(1) It shall be lawful for the Governor in Council, if he shall see fit, to enter into an agreement with the Government of Ontario in accordance with the terms of the draft of a proposed agreement contained in the schedule to this Act, with any modification or additional stipulations which may be agreed to by the two Governments; and such agreement, when entered into, and every matter and thing therein, shall be as binding on the Dominion of Canada as if the same were specified and set forth in an Act of this Parliament; and the Governor in Council is hereby authorized to carry out the provisions of the agreement so to be entered into.

———

SCHEDULE

Agreement made on behalf of the Government of Canada on the one part, and on behalf of the Government of Ontario on the other part.

Whereas by Articles of a Treaty made on the third of October, one thousand eight hundred and seventy-three, between Her Most Gracious Majesty the Queen, by Her commissioners the Honourable Alexander Morris, Lieutenant Governor of Manitoba and the North-West Territories, Joseph Albert Norbert Provencher and Simon James Dawson, on the one part, and the Saulteaux Tribe of the Ojibbeway Indians, inhabitants of the country within the limits thereinafter defined and described, by their chiefs, chosen and named as thereinafter mentioned, of the other part, which said treaty is usually known as the North-West Angle Treaty, No. 3, the Saulteaux Tribe of the Ojibbeway Indians and all other the Indians (sic) inhabiting the country therein defined and described surrendered to Her Majesty all their rights, titles and privileges whatsoever to the lands therein defined and described on certain terms and considerations therein mentioned;

And whereas by the said treaty, out of the lands so surrendered, reserves were to be selected and laid aside for the benefit of the said Indians; and the said Indians were amongst other things hereinafter provided to have the right to pursue their avocations of hunting and fishing throughout the tract surrendered, subject to such regulations as might, from time to time, be made by the Government of the Dominion of Canada, and saving and excepting such tracts as might, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by the said Government of the Dominion of Canada or by any of the subjects thereof duly authorized therefor by the said Government;

And whereas the true boundaries of Ontario have since been ascertained and declared to include part of the territory surrendered by the said treaty, and other territory north of the height of land with respect to which Indians are understood to make a claim as being

occupants thereof, according to their mode of occupying, and as not having yet surrendered their claim thereto or interest therein;

And whereas before the true boundaries had been declared as aforesaid, the Government of Canada had selected and set aside certain reserves for the Indians in intended pursuance of the said treaty and the said Government of Ontario was no party to the selection, and has not yet concurred therein;

And whereas it is deemed desirable for the Dominion of Canada and the Province of Ontario to come to a friendly and just understanding in respect of the said matters, it is therefore agreed as follows: –

1. With respect to the tracts to be, from time to time, taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract 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 Indians throughout the tract surrendered, not including the reserves to be made thereunder, 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; and that the concurrence of the Province of Ontario is required in the selection of the said reserves. …

6. That any future treaties with the Indians in respect of territory in Ontario to which they have not hitherto surrendered their claim aforesaid, shall be deemed to require the concurrence of the Government of Ontario.

***An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands (ON),* 54 Vict., c. 3**

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

(1) It shall be lawful for the Lieutenant-Governor in Council, if he shall see fit, to enter into an agreement with the Government of Canada in accordance with the terms of the draft of a proposed agreement contained in the schedule to this Act, with any modification or additional stipulations which may be agreed to by the two Governments, and such agreement, when entered into, and every matter and thing therein, shall be as binding on this Province as if the same were specified and set forth in an Act of this Legislature, and the Lieutenant-Governor in Council is hereby authorized to carry out the provisions of the agreement so to be entered into.

SCHEDULE

Agreement made on by the _____ on behalf of the Government of Canada on the one part, and on behalf of the Government of Ontario on the other part subject, etc.

Whereas by Articles of a Treaty made on 3rd October, 1873, between Her Most Gracious Majesty the Queen, by Her commissioners the Honourable Alexander Morris, Lieutenant Governor of Manitoba and the North-West Territories, Joseph Albert Norbert Provencher and Simon James Dawson, on the one part, and the Saulteaux Tribe of the Ojibbeway Indians, inhabitants of the country within the limits thereinafter defined and described, by their chiefs, chosen and named as thereinafter mentioned, of the other part, which said treaty is usually known as the North-West Angle Treaty, No. 3; The Saulteaux Tribe of the Ojibbeway Indians and all other the Indians (sic) inhabiting the country therein defined and described surrendered to Her Majesty all their rights, titles and privileges whatsoever to the lands therein defined and described on certain terms and considerations therein mentioned.

And whereas by the said Treaty out of the lands so surrendered, Reserves were to be selected and laid aside for the benefit of the said Indians; and the said Indians were amongst other things hereinafter provided to have the right to pursue their avocations of hunting and fishing throughout the tract surrendered, subject to such regulations as might from time to time be made by the Government of the Dominion of Canada, and saving and excepting such tracts as might from time to time be required or taken up for settlement, mining, lumbering or other purposes by the said Government of the Dominion of Canada or by any of the subjects thereof duly authorized therefor by the said Government.

And whereas the true boundaries of Ontario have since been ascertained and declared to include part of the territory surrendered by the said Treaty, and other territory north of the height of land with respect to which Indians are understood to make a claim as being

occupants thereof, according to their mode of occupying, and as not having yet surrendered their claim thereto or interest therein.

And whereas before the true boundaries had been declared as aforesaid, the Government of Canada had selected and set aside certain Reserves for the Indians in intended pursuance of the said treaty, and the said Government of Ontario was no party to the selection, and has not yet concurred therein.

And whereas it is deemed desirable for the Dominion of Canada and the Province of Ontario to come to a friendly and just understanding in respect of the said matters, it is, therefore, agreed as follows, subject to confirmation as already mentioned: –

1. With respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf as in the said Treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered treaty (sic) 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 Indians throughout the tract surrendered, not including the Reserves to be made thereunder, 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; and that the concurrence of the Province of Ontario is required in the selection of the said reserves. …

6. That any future treaties with the Indians in respect of territory in Ontario to which they have not hitherto surrendered their claim aforesaid, shall be deemed to require the concurrence of the Government of Ontario.

***An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province (ON),* 2 Geo V., c.3**

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

(1) The Legislative Assembly of the Province of Ontario hereby consents to the Parliament of Canada increasing the limits of the Province of Ontario so that the boundaries thereof shall include in addition to the present territory of the Province the territory bounded and described in the Act of the Parliament of Canada set forth in the Schedule to this Act.

(2) The said Legislative Assembly further consents to the Parliament of Canada making provision respecting the effect and operation of such increase of territory in the manner set forth in the said Act.

SCHEDULE [containing federal *Ontario Boundaries Extension Act*, as set out above]

***The Ontario Boundaries Extension Act, S.C. 1912 (CA),* 2 Geo. V, c. 40**

WHEREAS, on the thirteenth day of July, one thousand nine hundred and eight, the House of Commons resolved that the limits of the province of Ontario should be increased by the extension of the boundaries of the province so as to include the territory hereinafter described, as in the said resolution is more particularly set out, upon such terms and conditions as may be agreed to by the Legislature of Ontario and by the Parliament of Canada: Therefore, subject to the consent of the said Legislature, His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: –

(1) This Act may be cited as *The Ontario Boundaries Extension Act*.

(2) The limits of the province of Ontario are hereby increased … upon the following terms and conditions and subject to the following provisions: –

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

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

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

(3) Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company as contained in the conditions under which that company surrendered Ruperts Land to the Crown.

(4) This Act shall come into force on a day to be fixed by proclamation of the Governor in Council published in *The Canada Gazette*, but such proclamation shall not be made until after the Legislature of Ontario shall have consented to the increase of the limits of the province herein provided for, and agreed to the terms, conditions and provisions aforesaid.

THE NORTH-WEST ANGLE TREATY, NUMBER THREE

October 3, 1873

Articles of a Treaty made and concluded this third day of October, in the year of our Lord one thousand eight hundred and seventy-three, between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by her Commissioners, the Hon. Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-West Territories; Joseph Albert Norbert Provencher, and Simon James Dawson, of the one part; and the Saulteaux tribe of the Ojibbeway Indians, inhabitants of the country within the limits hereinafter defined and described, by their Chiefs, chosen and named as hereinafter mentioned, of the other part:

Whereas the Indians inhabiting the said country have, pursuant to an appointment made by the said Commissioners, been convened at a meeting at the North-West angle of the Lake of the Woods, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other;

And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners, that it is the desire of Her Majesty to open up for settlement, immigration, and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence:

And whereas, the Indians of the said tract, duly convened in Council, as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and head men, who should be authorized on their behalf to conduct such negotiations, and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have thereupon named the following persons for that purpose, that is to say: - Kee-tak-pay-pi-nais (Rainy River), Kitihi-gay-lake (Rainy River), Note-na-qua-hung (North-West Angle), Mawe-do-pe-nais (Rainy River), Pow-wa-sang (North-West Angle), Canda-com-igo-wi-ninie (North-West Angle), Pa-pa-ska-gin (Rainy River), May-no-wah-tau-ways-kung (North-West Angle), Kitchi-ne-ka-be-han (Rainy River), Sah-katch-eway (Lake Seul), Muka-day-wah-sin (Kettle Falls), Me-kie-sies (Rainy Lake, Fort Francis), Oos-con-na-geist (Rainy Lake), Wah-shis-kince (Eagle Lake), Rah-kie-y-ash (Flower Lake), Go-bay (Rainy Lake), Ka-me-ti-ash (White Fish Lake), Nee-sho-tal (Rainy River), Kee-gee-go-kay (Rainy River), Sha-sha-gance (Shoal Lake), Shah-win-na-bi-nais (Shoal Lake), Ay-ash-a-wash (Buffalo Point), Pay-ah-be-wash (White Fish Bay), Rah-tay-tay-pa-o-cutch (Lake of the Woods).

And thereupon in open council the different bands having presented their Chiefs to the said Commissioners as the Chiefs and head men for the purposes aforesaid of the respective bands of Indians inhabiting the said district hereinafter described.

And whereas the said Commissioners then and there received and acknowledged the persons so presented as Chiefs and head men for the purposes aforesaid of the respective bands of Indians inhabiting the said district hereinafter described;

And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded as follows, that is to say:

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, that is to say:

Commencing at a point on the Pigeon River route where the international boundary line between the territories of Great Britain and the United States intersects the height of land separating the waters running to Lake Superior from those flowing to Lake Winnipeg, thence northerly, westerly, and easterly, along the height of land aforesaid, following its sinuosities, whatever their course may be, to the point at which the said height of land meets the summit of water-shed from which the streams flow to Lake Nepigon, thence northerly and westerly, or whatever may be its course along the ridge separating the water of the Nepigon and the Winnipeg to the height of land dividing the waters of the Albany and the Winnipeg, thence westerly and north-westerly along the height of land dividing the waters flowing to Hudson's Bay by the Albany or other rivers from those running to English River and the Winnipeg to a point on the said height of land bearing north forty-five degrees east from Fort Alexander at the mouth of the Winnipeg; thence south forty-five degrees west to Fort Alexander at the mouth of the Winnipeg; thence southerly along the eastern bank of the Winnipeg to the mouth of White Mouth River; thence southerly by the line described as in that part forming the eastern boundary of the tract surrendered by the Chippewa and Swampy Cree tribes of Indians to Her Majesty on the third of August, one thousand eight hundred and seventy-one, namely, by White Mouth River to White Mouth Lake and thence on a line having the general bearing of White Mouth River to the forty-ninth parallel of north latitude; thence by the forty-ninth parallel of north latitude to the Lake of the Woods, and from thence by the international boundary line to the place of beginning.

The tract comprised within the lines above described embracing an area of fifty-five thousand square miles, be the same more or less.

To have and to hold the same to Her Majesty the Queen and her successors forever.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians, by the officers of the said Government appointed for that purpose, and such selection shall be so made after conference with the Indians: Provided, however, that such reserve whether for farming or other purposes shall in nowise exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, and such selection shall be made if possible during the course of next summer or as soon thereafter as may be found practicable, it being understood,

however, that if at the time of any such selection of any reserves as aforesaid, there are any settlers within the bounds of the lands reserved by any band, Her Majesty reserves the right to deal with such settlers as she shall deem just, so as not to diminish the extent of land allotted to Indians; and provided also that the aforesaid reserves of lands or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of her Indians, she hereby, through her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred.

And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to her Government of her Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it.

Her Majesty further agrees with her said Indians, that within the boundary of Indian reserves, until otherwise determined by the Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force, or hereafter to be enacted to preserve her Indian subjects inhabiting the reserves, or living elsewhere within her North-West Territories, from the evil influence of the use of intoxicating liquors shall be strictly enforced.

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

It is further agreed between Her Majesty and her said Indians that such sections of the reserves above indicated as may at any time be required for public works or buildings, of what nature soever, may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.

And further, that Her Majesty's Commissioners shall, as soon as possible, after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall in every year ensuing the date hereof at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of five dollars per head yearly.

It is further agreed between Her Majesty and the said Indians, that the sum of fifteen hundred dollars per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition, and twine for nets for the use of the said Indians.

It is further agreed between Her Majesty and the said Indians, that the following articles shall be supplied to any band of the said Indians who are now actually cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say – two hoes for every family actually cultivating; also one spade per family as aforesaid; one plough for every ten families as aforesaid; five harrows for every twenty families as aforesaid; one scythe for every family as aforesaid; and also one axe and one cross-cut saw, one

hand saw, one pit saw, the necessary files, one grindstone, one auger for each band, and also for each Chief for the use of his band, one chest of ordinary carpenter's tools; also for each band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band; also for each band, one yoke of oxen, one bull and four cows; all the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians.

It is further agreed between Her Majesty and the said Indians, that each Chief, duly recognized as such, shall receive an annual salary of twenty-five dollars per annum, and each subordinate officer, not exceeding three for each band, shall receive fifteen dollars per annum; and each such Chief and subordinate officer as aforesaid shall also receive, once in every three years, a suitable suit of clothing; and each Chief shall receive, in recognition of the closing of the treaty, a suitable flag and medal.

And the undersigned Chiefs, on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will, in all respects obey and abide by the law; that they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tract; and that they will not molest the person or property of any inhabitant of such ceded tract, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tract or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

In witness whereof, Her Majesty's said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands, at the north-west angle of the Lake of the Woods, this day and year herein first above-named.

(Signed) Alexander Morris,
Lieutenant-Governor.
J.A.N. Provencher,
Indian Commissioner.
S.J. Dawson,
Indian Commissioner.

Kee-ta-kay-pi-nais.	His x mark.
Kitihi-gay-kake.	" x "
No-te-na-qua-hung.	" x "
Mawe-do-pe-nais.	" x "
Pow-wa-sang.	" x "
Canda-com-igo-wi-ninie.	" x "
Pa-pa-ska-gin.	" x "
May-no-wah-tau-ways-kung.	" x "
Kitchi-ne-ka-be-han.	" x "
Sah-katch-eway.	" x "
Muka-day-wah-sin.	" x "
Me-kie-sies.	" x "

Oos-con-na-geist.	" x "
Wah-shis-kince.	" x "
Rah-kie-y-ash.	" x "
Go-bay.	" x "
Ka-me-ti-ash.	" x "
Nee-sho-tal.	" x "
Kee-jee-go-kay.	" x "
Sha-sha-gance.	" x "
Shah-win-na-bi-nais.	" x "
Ay-ash-a-wash.	" x "
Pay-ah-bee-wash.	" x "
Rah-tay-tay-pa-o-cutch.	" x "

Signed by the Chiefs within named in presence of the following witnesses, the same having been first read and explained by the Honorable James McKay:-

(Signed) James McKay.
Molyneux St. John.
Robert Pither.
Christine V.K. Morris.
Charles Nolin.
A. McDonald, Captain commanding escort to Lieutenant-Governor.
James F. Graham.
Joseph Nolin.
A. McLeod.
George McPherson, Sen.
Sedley Blanchard.
W. Fred Buchanan.
Frank G. Becher.
Alfred Codd, M.D.
Gordon S. Corbault.
Pierre LeVieller.
Nicholas Chatelaine.

We hereby certify that the foregoing is a true copy of the original articles of treaty of which it purports to be a copy.

(Signed) Alexander Morris,
Lieutenant-Governor.
J.A.N. Provencher,
Indian Commissioner.
S.J. Dawson,
Indian Commissioner.