File No. 35379

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

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

APPELLANTS
(Plaintiffs)

- and -

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

RESPONDENTS
(Defendants)

- and -

THE ATTORNEY GENERAL OF CANADA

RESPONDENT
(Third Party)

- and -

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

RESPONDENT
(Interveners)

- and -

GOLDCORP INC.

RESPONDENT
(Intervener)

(Style of Cause continues inside cover pages)

APPELLANTS' FACTUM

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

AND BETWEEN:

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

APPELLANTS
(Interveners)

- and -

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

RESPONDENTS
(Plaintiffs)

- and -

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

RESPONDENTS
(Defendants)

- and -

THE ATTORNEY GENERAL OF CANADA

RESPONDENT
(Third Party)

- and -

GOLDCORP INC.

RESPONDENT
(Intervener)

Robert J.M. Janes
Janes Freedman Kyle Law Corporation
Suite 340
1122 Maindland Street
Vancouver, British Columbia
V6B 5L1

Tel.: 250 405-3460
Fax: 250 381-8567
rjanes@jfklaw.ca

Counsel for Andrew Keewatin Jr. and Joseph William Fobister and all other members of Grassy Narrows First Nation

Guy Régimbald
Gowling Lafleur Henderson LLP
26th Floor
160 Elgin Street
Ottawa, Ontario
K1P 1C3

Tel.: 613 786-0197
Fax: 613 563-9869
guy.regimbald@gowlings.com

Agent for Andrew Keewatin Jr. and Joseph William Fobister and all other members of Grassy Narrows First Nation

Michael Stephenson
Peter R. Lemmond
Mark Crow
Candice Telfer
Crown Law Office – Civil
8th Floor
720 Bay Street
Toronto, Ontario
M5G 2K1

Tel: 416 326-4008 / 416 326-4155
Fax: 416 326-4181
michael.R.Stephenson@ontario.ca
peter.Lemmond@ontario.ca
candice.Telfer@ontario.ca

Counsel for Minister of Natural Resources

Robert E. Houston, Q.C.
Burke-Robertson LLP
Suite 200
441 MacLaren Street
Ottawa, Ontario
K2P 2H3

Tel.: 613 236-9665
Fax: 613 235-4430
rhouston@burkerobertson.com

Agent for Minister of Natural Resources

Mark R. Kindrachuk, Q.C.
Mitchell R. Taylor, Q.C.
Attorney General of Canada
10th Floor
123 2nd Ave. S.
Saskatoon, Saskatchewan
S7K 7E6

Tel.: 306 975-4765
Fax: 306 975-6240
mark.kindrachuk@justice.gc.ca
mitch.taylor@justice.gc.ca

Counsel for Attorney General of Canada

Christopher M. Rupar
Attorney General of Canada
Suite 500, Room 557
50 O'Connor Street
Ottawa, Ontario
K1P 6L2

Tel.: 613 941-2351 / 613 370-6290
Fax: 613 954-1920
christopher.rupar@justice.gc.ca

Agent for Attorney General of Canada

Bruce McIvor
Kathryn Buttery
First Peoples Law
Suite 300
111 Water Street
Vancouver, British Columbia
V6B 1A7

Tel.: 604 685-4240
Fax: 604 681-0912
bmcivor@firstpeopleslaw.com
kbuttery@firstpeopleslaw.com

Counsel for Leslie Cameron and all other members of Wabauskang First Nation

Guy Régimbald
Gowling Lafleur Henderson LLP
Suite 2600
160 ElginStreet
Ottawa, Ontario
K1P 1C3

Tel.: 613 786-0197
Fax: 613 563-9869
guy.regimbald@gowlings.com

Counsel for Leslie Cameron and all other members of Wabauskang First Nation

Christopher J. Matthews
Aird & Berlis LLP
Brookfield Place, Suite 1800, Box 754
181 Bay Street
Toronto, Ontario
M5J 2T9

Tel.: 416 863-4146
Fax: 416 863-1515
cmatthews@airdberlis.com

Counsel for Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.)

K. Scott McLean
Dentons Canada LLP
Suite 1420
99 Bank Street
Ottawa, Ontario
K1P 1H4

Tel.: 613 783-9600
Fax: 613 783-9690
scott.mclean@fmc-law.com

Agent for Resolute FP Canada Inc. (formerly Abitibi-Consolidated Inc.)

William J. Burden
Linda I. Knol
Erin Craddock
Cassels Brock & Blackwell LLP
Scotia Plaza
Suite 2100
40 King Street West
Toronto, Ontario
M5H 3C2

Tel.: 416 869-5963
Fax: 416 640-3019
bburden@casselsbrock.com
lknol@casselsbrock.com
ecraddock@casselsbrock.com

Counsel for Goldcorp Inc.

Patricia J. Wilson
Osler, Hoskin & Harcourt LLP
Suite 1900
340 Albert Street
Ottawa, Ontario
K1R 7Y6

Tel.: 613 787-1009
Fax: 613 235-2867
pwilson@osler.com

Agent for Goldcorp Inc.

TABLE OF CONTENTS

PART I – CONCISE STATEMENT OF FACTS

1. On October 3, 1873, federal treaty commissioner Morris shook hands with Chief Mawedopenais, principal spokesman for the Saulteaux Ojibway,[1] and agreed to keep all his promises, "in the firm belief that the Treaty now to be signed will bind the Red man and the white man together as friends forever."[2] With that handshake and the signing of Treaty 3, the Ojibway were promised that they would have harvesting rights on their lands, except on tracts "taken-up" by or with the authority of the federal government. In 1912 when the boundaries of Ontario were extended to include all of the Treaty 3 lands, Canada and Ontario agreed that the rights of the aboriginal people would be protected and that the federal government would retain the trusteeship of the Indians.

2. The Trial Judge held after a complex trial that Treaty 3 meant what it said: the rights of the Ojibway to harvest could only be removed if the federal government authorized the conflicting land use. She further held Ontario could not unilaterally infringe the Treaty rights. While the federal government could not deprive the provincial government of its ownership rights, the province's ownership rights could not limit the Ojibway's Treaty rights without the cooperation of the federal government. The Court of Appeal reversed this decision, holding that provincial management of lands and resources was so exclusive that the Treaty rights of the Ojibway had to evolve to accommodate that power and the federal government's powers devolved to the province to enable it to limit the Treaty rights. In doing so, the Court of Appeal misapplied basic constitutional principles concerning overlapping federal and provincial roles, disregarded principles of treaty interpretation, and usurped the role of the Trial Judge. Grassy Narrows asks that the trial judgment be restored as properly representing the Treaty promises and the constitutional structure of our country.

Overview

3. Treaty 3 promised the Ojibway the right to continue their traditional harvest:

> 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

---

[1] The Saulteaux Ojibway are referred to throughout as the "Ojibway", except where they are distinguished from other Ojibway groups and referred to as "Saulteaux".

[2] Reasons for Judgment of Sanderson J ["RFJ"] at para 368; *Morris' Official Report,* p 231 [Appellants' Extract Book ["AEB"], Tab 1] ["*Morris Report*"].

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.*[3] [Emphasis Added] [Underlining in the original]

4. In 1912, Ontario's boundaries were extended to include lands previously in the Northwest Territories[4] subject to two conditions: that Ontario recognize the rights of the Indians as Canada had and that Canada's "trusteeship" of the Indians, subject to the supervision of "Parliament", would continue. The implementing statute reads as follows:

> 2(a) … That the province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent … as the Government of Canada has heretofore recognized such rights …;
>
> (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.[5]

5. The Ojibway were not asked to modify or change the Treaty in 1912.

6. The questions before the courts below were (1) whether the Treaty and/or the ***Ontario Boundaries Extension Act, 1912*** authorized Ontario to limit the Harvesting Rights unilaterally; and (2) if not, whether Ontario could infringe these rights in any event. The Trial Judge answered "no" to both questions. The Court of Appeal reversed the answer on the first question and declined to answer the second.

The Background to the Treaty Negotiations

7. 1873 was a time of hope and uncertainty for a young country. As the trial judge explained, it was "a time of promise and the making of promises... The country's course was still being charted".[6] In 1869, Canada, in an effort to expand its new nation, purchased Rupert's Land and the Northwest Territories from the Hudson's Bay Company. The Métis of the Red River resisted this change and took control of Fort Gary, refusing to allow the governor to enter. To suppress the resistance, the federal government sent troops, which needed to pass through Ojibway territory, so it appointed

---

[3] The italicized passage will be referred to as the "Taking-up Clause", while the whole passage will be referred to as the "Harvesting Rights".

[4] The entirety of the added lands will be referred to as the "Extension Lands", while the portion that was subject to Treaty 3 will be referred to as the "Keewatin Lands".

[5] *An Act to extend the Boundaries of the Province of Ontario*, SC 1912, c 40 [AEB Tab 2] ["*Ontario Boundaries Extension Act, 1912*"].

[6] RFJ at paras 40-41.

Weymess Simpson to negotiate a right-of-way arrangement to secure safe passage. The federal government realized that good relations with the Ojibway were critical to maintaining an effective travel route to the west and a treaty was needed.[7]

8. Around this time, Canada also became involved in a boundary dispute with Ontario. Ontario had long disputed the Hudson's Bay Company's claim to much of the land in (now) Northwestern Ontario. As a result, after the Rupert's Land transfer, Canada inherited this dispute. It argued for a further east boundary for the Northwest Territories, while Ontario argued for a further west boundary.[8] These lands, which encompassed the southern two thirds of Treaty 3 lands, became known as the "Disputed Lands" and the battles between Canada and Ontario over ownership and control of these lands dominated their relationship for close to 25 years. No one disputed, however, that the Keewatin Lands (the northern third) were in the exclusive control of Canada.

The Treaty 3 Negotiations

9. When Canada first approached the Ojibway to negotiate a comprehensive treaty, the Ojibway demanded compensation for Canada's past use of their land and breaches of past promises. This stymied treaty negotiation attempts in 1871 and 1872.[9] In 1873 Canada tried again and this time appointed new treaty commissioners:[10] Alexander Morris (Lieutenant-Governor of Manitoba and the Northwest Territories, member of the Indian Affairs Management Board, and lead negotiator), Simon Dawson (employee of the Department of Public Works, in charge of the construction of the Dawson Route, who had regular contact with the Ojibway since 1868), and Joseph Albert Norbert Provencher (lawyer and employee of the Department of Indian Affairs).[11] James

---

[7] RFJ at paras 173-188, 201-207. Letter, *Dawson to Minister of Public Works*, Dec. 17, 1869 [AEB Tab 3]; ["*Dawson to MPW*"]; Letter, *Dawson to Pither*, Jan. 8, 1870 [AEB Tab 4]; Letter, *Howe to Pither*, March 11, 1870 [AEB Tab 5]; Letter, *Simpson to Howe*, April 23, 1870 [AEB Tab 6]; Joan A. Lovisek, Expert Report, ["*Lovisek Report*"] [AEB Tab 7]; Letter, *Instructions from Secretary of State to Commissioners*, [AEB Tab 8].

[8] RFJ at paras 192-193.

[9] RFJ at paras 258-265, 275-287, Letter, *Commissioners to Secretary of State*, July 11, 1871, ["*Commissioners' Report 1871*"] [AEB Tab 9]; *The Globe*, July 13, 1872 [AEB Tab 10]; Letter, *Commissioners to Secretary of State*, July 17, 1872, [AEB Tab 11]; *The Globe*, July 17, 1872 [AEB Tab 12]; Memorandum, *Spragge*, Sept. 5, 1872 [AEB Tab 13].

[10] RFJ at para 297, Order-in-Council, June 16, 1873[AEB Tab 14] [*"Order-in-Council"*].

[11] RFJ at paras 392, 441 and 451.

McKay, a Red River Métis, acted as a translator and cultural intermediary between the commissioners and the Ojibway, travelled with the commissioners.[12]

10. The Ojibway, who Dawson warned were "expert diplomatists", gathered to prepare before meeting the treaty commissioners. They appointed three chiefs to lead their negotiations. The lead was Mawedopenais, who was assisted primarily by Powassan and Blackstone. Blackstone, who lived in the far eastern reaches of the territory, had been actively leading resistance to mining there, complaining to Ottawa and driving prospectors out. Sakatcheway, the chief of Lac Seul in the far north of the territory, played a critical role in bringing the parties back together when it appeared negotiations were about to break off on the third day (October 2, 1873).[13]

The Parties' Interests in Treaty Negotiations

11. As the shorthand reporter observed in the *Manitoban*, the Ojibway were "careless" about obtaining a treaty and the treaty commissioners recognized that the Ojibway could walk away from the negotiations.[14] Ojibway interests in a treaty reflected their intention to maintain their way of life while benefitting from Canada's use of their lands. First, the Ojibway loved their lands and their lives – they were intent on maintaining their way of life and their right to pursue their use of the land, their hunting and fishing. They insisted that this be recognized, and secured ammunition and twine to enhance their harvest. The treaty commissioners recognized assuring these rights was critical.[15] Second, the Ojibway sought to diversify their economy by gaining material goods from the government and taking advantage of the opportunities that the Dawson Route and the railway would present.[16] Finally, the Ojibway sought to ensure that they

---

[12] RFJ at paras 197-198; *Chartrand in Chief*, Dec. 15, 2009 [AEB Tab 15]; *Chartrand Cross*, Jan. 20, 2010 [AEB Tab 16].

[13] RFJ at paras 241, 275, 349, 361-362, 485; *Lovisek Report* [AEB Tab 17]; *Manitoban* [AEB Tab 18] ["*Manitoban*"].

[14] RFJ at paras 349, 770 and 912; *Manitoban* [AEB Tab 18].

[15] RFJ at paras 379, 475, 477, 520-521, 747, 772, 1482; T.E. Holzkamm, L.G. Waisberg, and J.A. Lovisek, *"Stout Athletic Fellows": The Ojibwa During the "Big Game Collapse" in Northwestern Ontario 1821-71*, [AEB Tab 19]; *Lovisek in Chief*, Oct. 21, 2009 [AEB Tab 20]; *Lovisek in Chief*, Oct. 22, 2009 [AEB Tab 21]; *Milloy in Chief*, Oct. 13, 2009 [AEB Tab22].

[16] RFJ at paras 484-488, 803; *Commissioners' Report 1871* [AEB Tab 23]; *Lovisek Report* [AEB Tab 24], *Lovisek Cross*, Oct. 23, 2009 [AEB Tab 25 and 26]; *Lovisek Cross* Nov.17, 2009 [AEB Tab 27]; *Lovisek Cross*, Nov. 18, 2009 [AEB Tab 28].

were dealing with the highest power in the land and that power would be committed to keeping and enforcing the treaty promises.[17]

12. Canada's primary interest was in establishing peaceful relations with the Ojibway and securing their consent to the Dawson Route and the CPR. Canada was driven by the imperative of gaining unfettered access to the west to satisfy its constitutional obligation to build a railway to British Columbia.[18] Canada also wanted to open the lands to the west for settlement, and recognized that given the geography of the region, a hostile Ojibway force could be a significant obstacle to the CPR and immigrant travel. Canada also wanted to ensure the Ojibway could continue to support themselves and not become dependent upon the government.[19]

13. In the circumstances, these various interests could be reconciled. First, the crown's approach to treaty negotiations had significantly evolved by the 1850s, when the Robinson Treaties were negotiated with the Ojibway to the east of the Saulteaux Ojibway. In those negotiations, the Ojibway to the east demanded payment on a basis similar to that obtained by aboriginal people in southern Ontario who had surrendered lands previously. Commissioner Robinson rejected this position, pointing out that in the south the Indians soon lost the use of the lands, while in this region settlement would be sparse. The Ojibway would lose nothing and only gain as they could still use their lands and would now have a market for their game. This position reflected the reality that the land in the region was ill-suited for agriculture, as were the lands of the Saulteaux.[20] This paralleled negotiations between the Americans and the Ojibway to the south of the Saulteaux, who were told they lost nothing by ceding their lands, for they were free to use them as they wished (i.e. they were trading a horse for the use of a horse).[21]

---

[17] RFJ at paras 591-595; *Lovisek Cross*, Nov. 23, 2009 [AEB Tab 29].

[18] *Dominion of Canada v Province of Ontario*, [1910] AC 637 (PC), at 645["*Annuities Case*"]; affirming (1909), 42 SCR 1; reversing (1907) 10 Ex CR 445 (Exch Ct) at 6-11, 99, 106, 122-124 of SCR. [Appellants' Authorities ("AA") Tab 7]

[19] RFJ at paras 182-184, 455, 720-724, 750-760; George L. Huyshe, *The Red River Expedition* [AEB Tab 30]; Letter, *Simpson to Howe*, Aug. 19, 1870 [AEB Tab 31] ["*Simpson Report*"].

[20] RFJ at paras 244-251, Alexander Morris, *Treaties of Canada with the Indians* ["*Morris Text*"] [AEB Tab 32]; *Anderson-Vidal Report,* Dec. 5, 1849 [AEB Tab 33].

[21] RFJ at paras 242, 497 and 686; *von Gernet Cross*, Dec. 4, 2009 [AEB Tab 34].

14. Second, the land in the boundary area was of minimal interest for settlement or timber harvest. The agricultural land was around the Rainy River and Ojibway interests there could be dealt with through the establishment of reserves.[22] Third, the Ojibway had observed that the Dawson Route brought little interference with their lives and gave them opportunities for gain through the sale of wood and labour (and use of the steamers).[23] Finally, the Ojibway interest in securing a commitment from the senior government could be assured because Canada believed it owned the land and could impose its will, at least in Indian affairs, on the province.[24]

The 1873 Negotiations

15. The federal government knew that this might be the last chance to make a treaty and failure would necessitate sending troops to protect the immigrants. Therefore it gave the treaty commissioners a significantly improved financial mandate to compensate the Saulteaux.[25] Dawson also cautioned that the Ojibway would expect the government to fully honour the promises made in the negotiations.[26]

16. A vivid picture of the treaty negotiations comes from a variety of sources. Reporters from the *Manitoban* and the *Manitoba Free Press* kept detailed notes of what transpired in the negotiations and in the government's camps and published accounts in their newspapers in October 1873.[27] Morris reported on the negotiations immediately following their conclusion and several years later in his book on the history of negotiating Treaties 1 to 7.[28] Notes were kept, believed to be by Simon Dawson, that recount much of what was said when he was not speaking.[29] In 1888, as a Member of Parliament, Dawson also spoke in Parliament about his understanding of the promised rights.[30] The Ojibway had a reporter present whose job was to remember what had been

---

[22] RFJ at paras 471, 504, 755-758, 806.
[23] RFJ at paras 253-254, 486; *Lovisek in Chief*, Oct. 21, 2009 [AEB Tab 35].
[24] RFJ at paras 566, 850-852, 919, 921-923.
[25] RFJ at para 299; *Order-in-Council* [AEB Tab 36].
[26] RFJ at paras 164, 442-445, *Dawson Report on the Line of Route between Lake Superior and the Red River Settlement* ["*Dawson Report*"] [AEB Tab 37].
[27] *Manitoban*, [AEB Tab 18]; *The Manitoba Free Press*, Oct. 18, 1873 [AEB Tab 41] ["*Manitoba Free Press*"].
[28] *Morris Report* [AEB Tab 1]; *Morris Text* [AEB Tab 32].
[29] *Dawson's Notes* [AEB Tab 40] ["*Dawson Notes*"].
[30] RFJ at paras 547, 997, 1092, 1220; *Lovisek Report*, [AEB Tab 38].

said, but this account is long lost. A partial view of the Ojibway perspective on the negotiations is extant through the Métis translator, Joseph Nolin, who kept notes of what transpired on the last day for the Ojibway.[31]

17. Morris tried to gain the upper hand in the negotiations from the outset. Rather than meet the Ojibway in their summer gathering place of Fort Frances, he called the meeting to be held at the Northwest Angle in early October. There, the Ojibway would be low on supplies and keen to move out to their winter hunting grounds, and so quick to settle. The Ojibway were not willing to be pushed by Morris into holding hasty negotiations. When they gathered at the Northwest Angle, they insisted on meeting amongst themselves for several days to develop their positions and choose their negotiators, keeping an impatient Morris waiting.[32]

18. Negotiations did not begin auspiciously. The Ojibway pressed their claims for past promises they said had been broken, and this quickly turned to a discussion concerning Morris and the treaty commissioners' authority. At the outset of the negotiations, Morris had represented himself as speaking for the Queen. The Ojibway turned this to their advantage, saying that if he had all the Queen's powers he had the power to redress their grievances and meet their demands. Morris avoided the Ojibway's stratagem by making clear he did not represent the Queen directly but came to speak on behalf of the "Council of a Great Dominion." He explained that he was bound to follow the direction of this council in the same way that one of their "braves" would be required to follow the direction of the Council of the Ojibway. In making the source of his authority and position clear, Morris made careful analogies and references that were appropriate to the Ojibway. Thereafter, he largely stopped referencing the "Queen" or "Great Mother" and instead referenced the "government" or the "government at Ottawa." The term "government" was likely rendered in Ojibway as "council".[33]

---

[31] RFJ at paras 314 and 316; *Nolin's Notes* ["*Nolin Notes*"] [AEB Tab 51].

[32] RFJ at paras 326-333; *Morris Report* [AEB Tab 39]; *Dawson Notes* [AEB Tab 40]; *Manitoba Free Press*, [AEB Tab 41].

[33] RFJ at para 349, 356-357, 589-590, 595-620, *Chartrand Cross*, Jan. 25, 2010 [AEB Tab 42]; *Chartrand Cross*, Jan. 26, 2010 [AEB Tab 43, 44]; *von Gernet Cross*, Dec. 10, 2009 [AEB Tab 45, 46]; *von Gernet Cross*, Dec. 3, 2009 [AEB Tab 47]; *Manitoban* [AEB Tab 18]; *Manitoba Free Press* [AEB Tab 41].

19. On the third day (Oct. 2, 1873), the negotiations nearly failed as the parties reached an impasse over the material benefits of the treaty. As it appeared negotiations were about to break off, Sakatcheway intervened and suggested that the offer could be improved, particularly if additional agricultural benefits were added and a commitment made to educate the Ojibway children. The treaty commissioners improved their offer and the Ojibway council met that night together with the Métis.[34]

20. On the morning of the fourth day (Oct. 3, 1873), negotiations resumed. The Ojibway focused their negotiations on three broad areas: (1) they tried to improve the material terms of the treaty; (2) they confirmed the promises that had been made; and (3) they obtained clear assurances that they could depend upon the government to implement the treaty and ensure that the promises made were kept. On the last point, the treaty commissioners repeatedly assured the Ojibway that the government would hear their complaints (the "Ear of the Queen's government will always be open") and that the federal government (the "government at Ottawa") would ensure that the treaty was carried out. The treaty commissioners made it clear that this would be done by the appointment of a local Indian agent to deal with the Ojibway and address their concerns.[35]

21. The Ojibway sought the assurance of the treaty commissioners that they would be free to use their lands as before. McKay assured them they would; the Nolin notes state the Ojibway were promised they would be "free as by the past for their hunting and wild rice harvest."[36] Morris received Nolin's notes at the end of the negotiations, included them in his official report and asked that they be included with the official record of the Treaty.[37] At no point in the negotiations did the federal treaty commissioners inform the Ojibway they would be giving up their way of life or even surrendering their lands. The closest allusion to the Taking-up Clause came in Morris' first proposal on the first day of negotiations where he said: "[*i*]*t may be a long time before the other lands are*

---

[34] RFJ at paras 361-364, 371-372; *Lovisek Report* [AEB Tab 48]; *Manitoban* [AEB Tab 18].
[35] RFJ at paras 365-370; *Manitoban* [AEB Tab 49]; *Dawson Notes* [AEB Tab 40], *Morris Report* [AEB Tab 50].
[36] RFJ at paras 370, 379-380; *Nolin Notes* [AEB Tab 51].
[37] RFJ at para 314, 320.

wanted, and in the meantime you will be permitted to fish and hunt over them."[38] This is consistent with the treaty commissioners' repeated assurances that they were there to secure friendly relations with the Ojibway and their compliance with the law. The commissioners insisted that the Ojibway were not to molest the Queen's subjects and were themselves to be protected by the Queen's officers. Furthermore, the Ojibway were not to take the enforcement of the Treaty into their own hands but were to rely upon the "Queen's Government" (the Dominion Government) and the agent sent by the Dominion Government to protect them.[39] The importance of establishing "friendly relations" is emphasized throughout the negotiations.[40]

22. The negotiations did not focus on the meaning of the Taking-up Clause. This was consistent with the common understanding between the parties that there would be largely compatible land uses between the Ojibway and Euro-Canadians.[41] Unlike in the Prairies, agricultural land on the Canadian Shield was very limited. The trees were smaller and the rivers flowed north, the wrong way to get them to market. Much of the region was water, rock and muskeg, and unsuitable for settlement.[42] The Ojibway had a varied economy with access to large areas of land, a variety of resources, including wild rice, sturgeon, whitefish and copious wildlife.[43] Both parties understood reserves would be established to protect Ojibway settlements and gardens in areas of likely conflict.[44] The Ojibway saw the Dawson Route and the railway as relatively small intrusions with potential benefits in terms of employment opportunities and improved means of travel (at the treaty negotiation the Ojibway tried to negotiate free passage on both). Post-Treaty land use activities showed the parties' understanding of compatible uses was correct.[45]

---

[38] RFJ at para 340-341, the *Manitoban* (emphasis added) [AEB Tab 18].
[39] RFJ at paras 869, 879-881, 915, *Dawson Notes* [AEB Tab 40].
[40] RFJ at para 726, *Morris Text* [AEB Tab 52]; *Morris Report* [AEB Tab 1].
[41] RFJ at para 793.
[42] RFJ at para. 195, 461, 473, 754-758, Letter, *Archibald to Howe,* Nov. 12, 1870 [AEB Tab 53];
[43] RFJ at para 229-230, Letter, *Dawson to Minister of Public Works*, Dec. 19, 1870 [AEB Tab 54].
[44] RFJ at para 54, 637, 779, 808-809.
[45] RFJ at paras 379, 1231.

Common Intention Regarding Taking-up Clause at Time of Treaty

23. When the Treaty was signed, Canada intended that only the federal government could limit the Harvesting Rights through exercise of the Taking-up Clause. The federal government and Ojibway agreed that the federal government would be responsible for implementing the Treaty and ensuring the promises were kept.[46]

24. There was no agreement that Ontario could use the Taking-up Clause to limit the Treaty rights – the federal government simply did not raise the issue.[47] The federal treaty commissioners assumed that the federal government would control *both* the management of Indian Affairs and the granting of land, mining, timber and other rights in the Treaty 3 Lands. Furthermore, given Morris and Macdonald's view of the paramountcy of the federal government over the provincial government in matters of federal jurisdiction at that time, it is also likely that Morris assumed this would be the case in the Disputed Lands regardless of the outcome of the dispute – that is, that Canada would continue to be the government that had exclusive control over the rights and affairs of the Indians, including their Treaty rights.[48]

Events Following the Signing of the Treaty

Implementation of the Indian Agency System

25. Canada's conduct after the Treaty was consistent with an understanding that it owed the Ojibway a duty to enforce the promises made to them. The federal government immediately appointed Indian Agents and later Indian Superintendents to deal with all issues, on or off reserve, raised by the Indians.[49] Over the following five decades a number of issues were raised by the Ojibway with respect to interference with both off-reserve fishing and hunting. In all cases the federal government made it clear that the Ojibway were not to deal with these issues themselves but were expected to deal with the federal government.[50]

---

[46] RFJ at paras. 566, 899, 1281, 1310, 879-881.

[47] RFJ at paras. 618, 888, 890; *Chartrand Cross*, Jan. 26, 2010 [AEB Tab 55].

[48] RFJ at paras 144, 146, 403, 424-425, 850-852, 919-923.

[49] RFJ at para 943, 1094.

[50] RFJ at paras 953-954, 957, 1053, 1090-1091, 1095, 1184-1186, 1189; *Chartrand Cross*, Jan. 19, 2010, [AEB Tab 56]; *Lovisek Report* [AEB Tab 57].

26. In the case of off-reserve hunting, the principal issue facing the Ojibway was the decades-long attempt by Ontario to prohibit the Ojibway from hunting or transporting game. Ontario took the position that the Indians would not be permitted to live off Ontario's game and that it would be up to the federal government to provide for the Ojibway. When the Ojibway proposed dealing with Ontario directly, the federal government discouraged them and instead dealt (ineffectively) with the Ontario government itself. Officials of the Department of Indian Affairs in the 1920s specifically commented on the fact that the wording of Treaty 3 indicated only the Dominion government could limit the Harvesting Rights and that it was unacceptable that the federal government was standing aside, leaving it to the Ojibway to choose between starvation or being sent to jail.[51]

27. The destruction of the sturgeon fishery by American overfishing and the attempts on the part of the Ontario government to prevent the Ojibway from fishing became a major issue of contention from the 1880s into the 20th century. The Ojibway complained to the federal government regularly, observing in 1890 that under the Treaty they did not give up their right to fish.[52] The controversy reached such a height that it was debated in the House of Commons in May 1888 when Dawson was a Member of Parliament. The loss of the Ojibway sturgeon fishery led Dawson to comment that the clear intention in 1873 was to guarantee the Ojibway the continuation of their right to fish as they formerly had: to be "at liberty to hunt and fish in every direction". Prime Minister John A. Macdonald promised to have the Minister of Fisheries look into the issue. Dawson had raised the issue in Parliament in 1887 and did so again in 1889 and 1890.[53]

28. The federal government also began the process of establishing the reserves. Disputes about where the reserves were to be situated, particularly in relation to important fishing sites, were ongoing. At one point in 1875, Col. Dennis, who was

---

[51] RFJ at paras 1139-1152; *Chartrand Cross*, Jan. 19, 2010 [AEB Tab 58]; Letter, *Indian Agent Edwards*, April 15, 1939 [AEB Tab 59].Memo, *Bury to Deputy Minister of Indian Affairs* [AEB Tab 60]; *Lovisek Report* [AEB Tab 61]; Letter, *Spencer to Secretary of Indian Affairs*, Sept. 27, 1938 [AEB Tab 62].

[52] See RFJ at paras 989, 995, 1010, 1053, 1087-1089, 1192-1193, 1217; *Lovisek Report* [AEB Tab 63]; Letter, *Pither to Superintendent General of Indian Affairs, on behalf of Chiefs in the Rat Portage Agency*, July 18, 1892 [AEB Tab 64]; *Annual Report of Department of Indian Affairs*, Nov. 18, 1890 [AEB Tab 65] ["*Annual Report*"].

[53] RFJ at paras 547, 997, 1092, 1220; *Lovisek Report* [AEB Tab 38].

charged with establishing the reserves, recommended that the Ojibway be compensated for interference by public works with fishing locations that were located off-reserve.[54]

29. Looked at as a whole, the post-Treaty period shows the federal government establishing a bureaucracy designed to be a "one-stop shopping"[55] location for the Ojibway to bring all their concerns about the Treaty as well as concerns about the behaviour of government officials, other citizens, fishermen (American and Canadian) and provincial officials. This agency (the Indian Agent system) was concerned not just with on-reserve matters, but also with the state of the fishing, hunting and trapping off-reserve and how the provincial government was interfering with these matters. Although the federal government dealt with these matters in a largely ineffectual manner, it did not view them as outside of its purview, and actively discouraged the Ojibway from dealing directly with others on subjects related to their Treaty rights.[56]

The Resolution of the Boundary Dispute

30. After the Treaty was signed, the federal and provincial governments continued the long and contentious process of resolving the outstanding boundary issues. In 1874, under the new Liberal government, an arrangement was made whereby Canada and Ontario agreed to a joint process for granting titles and licences in the Disputed Lands. A conventional boundary was established and the governments agreed that Ontario would manage grants and licences to the east of the boundary, while Canada would manage grants to the west. Once the question of the boundary was settled, the governments agreed that whatever grants were made would be ratified by the appropriate government. This joint approach involving both governments drew a line that was in the east of Treaty 3 territory. A relatively small part of Treaty 3 then fell within the part controlled by Ontario. The agreement contemplated arbitration proceedings to settle the issue between the governments. The arbitration proceedings were decided against the federal government but by this time the Conservatives were back in power. Macdonald refused to ratify the outcome of the arbitration and the dispute between the two governments became heated. The matter was referred to the

---

[54] RFJ at paras 950-953; J.P. Chartrand, *Historical and Ethnohistorical Research Report*, June 18, 2008 ["*Chartrand Report*"] [AEB Tab 66].

[55] RFJ at para 954, *Chartrand Cross*, Jan. 19, 2010 [AEB Tab 67].

[56] RFJ at paras 1209-1230.

Privy Council for resolution, which in 1884 decided against the federal government and upheld the arbitration award.[57]

The St. Catherine's Milling Dispute

31. After the Privy Council's decision, the federal government advanced a new claim to ownership of part of the Disputed Lands. It argued that Treaty 3 acted as a conveyance of legal and/or beneficial title to these lands from the Ojibway to the federal crown. As such, the federal government was still entitled to make grants of land and licences on the basis of its legal and beneficial title, and in fact it continued to do so.[58] This led to the ***St. Catherine's Milling*** litigation in which it was ultimately held that s. 109 of the ***Constitution Act, 1867*** vested legal title to the Disputed Lands in Ontario from the outset, subject to the pre-existing rights of the Ojibway, and that the Treaty extinguished the pre-existing aboriginal title and replaced it with the Harvesting Rights set out in the Treaty rather than conveying ownership rights.[59]

The 1891-1894 Arrangements in the Disputed Lands

32. By 1889 Macdonald had suffered consistent defeats in his battle for ownership of the Disputed Lands and was now concerned that Ontario might not respect the Treaty or would obstruct the creation of reserves. Conversely, the premier of Ontario, Oliver Mowat, was concerned that there could be a further controversy about Ontario's right to remove the Harvesting Rights from the Disputed Lands (or exercise the Taking-up Clause) given the wording of the Treaty. On January 17, 1889, Mowat wrote to the Dominion government proposing the passage of an order-in-council confirming Ontario's power to remove the Treaty rights from the land. Macdonald demurred and as a result, federal-provincial negotiations ensued.[60]

33. In 1891, around the time of Macdonald's death, Canada and Ontario settled on an approach for dealing with the issues that arose from the resolution of the Boundary Dispute. Rather than passing a general law, Parliament and the legislature passed reciprocal legislation (the "Reciprocal Legislation") enabling the two governments to

---

[57] RFJ at paras 940, 967-969, 982; *Chartrand Report* [AEB Tab 68].

[58] RFJ at para 984, *Chartrand Report* [AEB Tab 69].

[59] *St. Catherine's Milling v the Queen*, (1888), 14 AC 46 (JCPC) at 51-52, 54-55, 57-60 ["*St. Catherine's Milling*"] [AA Tab 37]

[60] RFJ at paras 1003, 1012, 1384-1394; Letter, *Mowat to Dewdney*, Jan. 17, 1889 [AEB Tab 70]; John T. Saywell, Expert Report ["*Saywell Report*"] [AEB Tab 71].

sign an agreement (the "1894 Agreement") with a view to reaching "friendly and just understanding in respect of the said matters" (the "said matters" being determination of the boundaries and related issues).[61]

34. This agreement between the two governments provided as follows:

> ...[w]ith respect to the tracts to be, from time to time, taken up for settlement, mining, lumbering or other purposes ... 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 ... 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 said Government of Ontario. [Emphasis added][62]

35. As discussed below, the words "conceded and declared" appear to reflect the view of Mowat and the federal officials in 1891 that it was in fact the intention of the Treaty parties that Ontario would be able to limit the Treaty rights.

36. However, none of the treaty negotiators participated in the negotiation of the 1894 Agreement. Morris had been long retired and died in 1889. No evidence exists of Dawson participating in the negotiation of the agreement. The Superintending Inspector of Indian Agencies noted that only two of the great chiefs involved in negotiating the Treaty still lived in 1890 (the death of the most prominent chiefs had "effectually broken the conjuring chain of traditional pagan observances" between the making of the Treaty and the present).[63] The Ojibway were not consulted and were not asked to agree to the Reciprocal Legislation or the 1894 Agreement.[64] Given the approach adopted, it appears that the two governments were content to deal with this matter between themselves and did not try to bind the Ojibway to their agreement.

The Extension of the Ontario Boundaries

37. In 1905, Canada and Ontario began discussing extending the boundaries of Ontario to James Bay, spurred by Manitoba's interest in extending its borders northward to obtain a port on Hudson's Bay. Canada recognized this likely could not be done

---

[61] RFJ at para 1028-1029; *An Act for the Settlement of Questions Between the Governments of Canada and Ontario Respecting Indian Lands,* S.O. 1894 (May 4, 1891) [AEB Tab 72].
[62] RFJ at para 1029; *1894 Settlement Agreement*[AEB Tab 73].
[63] RFJ at paras 1007, 1021; *Annual Report* [AEB Tab 65].
[64] RFJ at para 1016, 1027.

without also extending the boundaries of Ontario and Quebec.[65] The Premier of Ontario recognized that the province had no legal claim to the land, that it was essentially a "gift horse", and Ontario was in a weak bargaining position.[66] There was an issue between Canada and Ontario over this proposed extension as Ontario also wanted to obtain the same port that Manitoba desired. Eventually a compromise was reached and the annexation moved forward.[67]

38. Federal officials recognized that parts of the extension lands were subject to Treaties 3 and 5 and included significant areas of unceded lands along the James Bay coast. To protect the Indians' interests, conditions were imposed on the inclusion of the Keewatin Lands in Ontario, including the assurance: *"[t]hat 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*".[68] This language appears in both the federal and provincial versions of this legislation.

39. No discussion occurred within the federal government, between the federal and provincial governments, or in Parliament about extinguishing or modifying in any way the rights provided for in Treaty 3. Professor Saywell (Ontario's witness) opined that the reference to "trusteeship" was a reference to the relationship that the federal government had with the Indians. The Trial Judge found that the intention of Parliament in imposing ss. 2(a) and (c) was to affirm and not modify the existing rights and to ensure the continuation of federal responsibility for the welfare and guardianship of the Indians in the Extension Lands.[69] Ontario accepted these conditions.

The Development of Treaty 3 Lands – 1873 to 1930

40. Treaty 3 lands were the "Land Between": the lands between the major settlements of the old Canadian colonies and the new emerging settlements on the Prairies. Between 1873 and 1930 the Treaty 3 lands were subject to very limited development. While some

---

[65] RFJ at paras 1059-1060; Rule 36 Examination of John T. Saywell (April 7, 2009) Ex. 137.4 ["*Saywell Examination*"] [AEB Tab 74]; Robert Vipond, Expert Report ["*Vipond Report*"] [AEB Tab 75].

[66] RFJ at para 1421-1422, Letters, *Whitney to Laurier*, Mar. 16, 1909 [AEB Tab 76] and Nov. 11, 1909 [AEB Tab 77].

[67] RFJ at paras 1419, 1446.

[68] *Ontario Boundaries Extension Act, 1912.* (emphasis added) See para 4, above.

[69] RFJ at para 1063, 1446-1450, *Saywell Report* [AEB Tab 78]; *Saywell Examination* [AEB Tab 79].

agriculture, settlement, timber harvesting, mining and road-building occurred, the evidence led shows that the actual disturbance caused by this development was minor and likely did not significantly interfere with the Ojibway's exercise of their hunting and trapping rights.[70] This reflected the fact that, as noted earlier, agricultural lands were limited, the timber small and the watershed unfavourable. Mining prospects were largely disappointing outside of a few isolated cases.

41. The most extensive logging that occurred in this period was associated with the federal government's construction of the CPR and thus was federally authorized and, in fact, anticipated by all parties at the time that the Treaty was made. The most significant mine during this time was the Sultana Mine (the subject of the ***Seybold***[71] litigation), which was situated on a reserve that was surrendered by the Ojibway for the purpose of building the mine. Thus, while the Ojibway experience with interference with Treaty fishing rights had been unexpectedly disruptive, the experience with development on their lands was limited, as all parties had expected when the Treaty was made.[72]

The History of These Proceedings

The Threshold Issues Trial

42. In the face of encroaching forestry, Grassy Narrows challenged Ontario's forestry operations in an application for judicial review. Justice Then quashed this application, in part, because the issues could only be resolved at trial. [73] Grassy Narrows commenced a new action raising the same issues. Justice Spies (the case management judge) granted an advanced costs order directing that the matter proceed as a trial of two issues: first, whether Ontario could limit the Treaty rights by taking-up lands; and second, if not, whether Ontario could infringe the rights.[74]

43. The trial took approximately 75 days, plus three days of pre-trial depositions and produced 9,440 pages of transcript. Grassy Narrows called two expert witnesses, an ethnohistorian and a historian, and an elder witness. The Minister called four expert

---

[70] RFJ at paras 1124, 1176-1177, 1231-1234.

[71] *Ontario Mining Co v Seybold*, [1903] AC 73 cited to QL at para. 2 ["*Seybold*"] [AA Tab 20].

[72] RFJ at para 1231.

[73] *Keewatin v Minister of Natural Resources et al*, 2003 CanLII 43991 (Ont Div Ct) at para 63 [AA Tab 13].

[74] *Order of the Honourable Madam Justice Spies Re: Threshold Issues*, June 28, 2006 [Appellants' Record Book, Vol. 2, p. 122-125].

witnesses, two ethnohistorians, a historian and a forester. Canada called one political scientist. Additionally, 3,710 pages of documentary evidence were filed, largely by agreement. A number of primary documents described the 1873 negotiations, including the Treaty document itself; a report from a shorthand reporter that was later published (after being reviewed by Morris) in the *Manitoban* and also published in an edited form in Morris' book on the negotiation of the Numbered Treaties; a report from the *Manitoba Free Press*, notes that are presumed to have been made by Dawson; the notes of the last day made by Nolin, the Métis translator retained by the Ojibway; the post-negotiation reports of Morris; and the after-the-fact recollections of Dawson from 1890.[75] These reports each provide similar descriptions of the event, but with important differences arising out of the perspectives, motivations and situations of each author.

44. The Trial Judge found in favour of Grassy Narrows on virtually all issues. On the first question, after considering a wide range of direct and circumstantial evidence concerning what was said, what was understood, and the political and cultural assumptions of each side, she found that at the time of Treaty the Ojibway and the treaty commissioners intended only that the federal government would be able to deal with or limit the Harvesting Rights. She found no agreement that Ontario or any other province or government could limit the Harvesting Rights. She went further and found that the treaty commissioners expected that only the federal government could limit the Treaty rights using the Taking-up Clause, even if the land was within a province. She found that the conditions imposed on the 1912 Boundary Extension maintained the federal government's role in this regard and that the doctrine of devolution did not apply. Finally, she held that, given its purpose and terms, the 1894 Agreement simply did not apply to the Keewatin Lands.[76]

45. In respect of the second question, the Trial Judge applied the decisions of this Court in ***Morris***,[77] ***Sioui***[78] and ***Simon***[79] to say that the combined effect of interjurisdictional immunity and s. 88 of the ***Indian Act*** meant that Ontario could not

---

[75] See para 16, above.
[76] RFJ at paras 1303-1310, 1407-1424, 1444-1451 and 1458.
[77] *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 ["*Morris*"] [AA Tab 28].
[78] *R v Sioui*, [1990] 1 SCR 1025 ["*Sioui*"] [AA Tab 29].
[79] *Simon v the Queen*, [1985] 2 SCR 387 ["*Simon*"] [AA Tab 35].

authorize infringements of the Harvesting Rights. Furthermore, Ontario's ownership rights could not be used to authorize such infringements as they are subject to the Harvesting Rights under s. 109 of the ***Constitution Act, 1867***.[80]

The Appeal and the Decision of the Court of Appeal

46. The Minister, Canada and Resolute appealed. Goldcorp, the operator of a major mine in Red Lake was granted standing as a party intervener and appellant. Wabauskang First Nation, another Treaty 3 Nation situated in the Keewatin Lands, was added as a party intervener and respondent. The appeal proceeded for eight days before Sharpe, Gillese and Juriansz JJA.

47. The Court of Appeal set aside the trial decision, holding that the power to take-up land within the provinces was vested entirely and exclusively in the provincial government by s. 91(5), s. 92A and s. 109 the ***Constitution Act, 1867***.[81] They further held that the decisions in ***St. Catherine's Milling***, ***Seybold*** and ***Smith***[82] meant provincial ownership of land was free of any federal burden by virtue of s. 91(24). The Court of Appeal agreed that at the time of Treaty only the federal government could exercise the power to take-up land and so limit Treaty rights. The Court of Appeal also agreed that nothing had been mentioned to the Ojibway about the provincial government being able to limit Treaty rights. However, based on its finding that the power to take-up was exclusively provincial and given the after-the-fact conduct of subsequent governments, the Court of Appeal found that the Trial Judge had made a palpable and overriding error in holding that the treaty commissioners and federal government intended that the federal government would have a continuing role when the lands fell within a province.[83]

48. The Court of Appeal held that as the ability to disencumber land of the Harvesting Rights was intended to be an incident of ownership of the land, the effect of the ***Ontario Boundary Extension Act, 1912*** caused the right to use the Taking-up

---

[80] RFJ at paras 1505-1507 and 1523-1565; *Indian Act*, R.S.C. 1985, c. I-5, s. 88
[81] Court of Appeal Decision, at paras 107-111 ["CA"].
[82] *Smith v Canada*, [1983] 1 SCR 554 ["*Smith*"] [AA Tab 36].
[83] CA at paras 112-135, 144-145, 150, 165-166 and 172.

Clause to devolve to Ontario by operation of law.[84] The Court of Appeal held that as the ability to disencumber land of the Harvesting Rights was intended to be an incident of ownership of the land, the effect of the ***Ontario Boundary Extension Act, 1912*** caused the right to use the Taking-up Clause to devolve to Ontario by operation of law. The Court further held that the Harvesting Rights would evolve so as to allow the province to limit the Treaty rights as owner and regulator of the lands.[85] As a result, the Court of Appeal answered the first question "yes" and did not answer the second.

PART II – ISSUES ON APPEAL

49. The following issues arise on this appeal:

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

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

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

d. Was the Trial Judge correct in holding that Ontario cannot infringe the Harvesting Rights?

PART III - ARGUMENT

Overview

50. ***Mikisew*** held the Taking-Up Clause in Treaty 8 was not a reflection of the power to infringe a treaty right but rather a negotiated limitation of the area subject to the treaty right.[86] Therefore understanding a taking-up clause is first and foremost an exercise in treaty interpretation. In the circumstances of Treaty 3, where the Ojibway sought and received assurances that the federal government would be responsible for implementing and enforcing the Treaty; where the Ojibway insisted they deal with the highest authority; where the Taking-up Clause was downplayed and poorly explained; and where the Treaty document expressly provides that the Ojibway have the right to harvest except where the federal government takes-up land or authorizes taking-up of land, the

---

[84] CA at para 135, 140, 197.

[85] CA at paras 136-141.

[86] *Mikisew Cree First Nation v Canada*, [2005] 2 SCR 388 at para 30 ["*Mikisew*"] [AA Tab 15].

Trial Judge properly found it was the federal government as treaty-maker that controlled where the Treaty 3 Harvesting Rights could take place. The Court of Appeal, by contrast, put too great an emphasis on the provincial government as owner and regulator of land and neglected Canada's continued legitimate interest in the lands where treaty rights are legitimately engaged. This misconception led the Court of Appeal to make a number of fundamental errors and its decision should be set aside.

Issue #1: The Court of Appeal Adopted an Incorrect View of the Exclusivity of Provincial Control over the Taking-up of Lands

51. "Taking-up" refers not to the **ownership** of land but to the **use** of land[87] in a way that is visible and incompatible with the use of the same land for treaty purposes.[88] Thus land and resources can be disposed of and owned by a third party and even subsequently transferred without the land being "taken-up". The treaty right is only limited once the land is actually put to an incompatible use by an owner. Thus, the use of the phrase "taken up" in Treaty 3 was to tie the power to limit Treaty rights not to the ownership of land and proprietary rights, but to the use of the land and the power to control land use. This was a further evolution of the limitation seen in the Robinson Treaties, which stated that the treaty rights were excluded from tracts owned or leased by third parties and occupied with the consent of the government.[89]

52. The Court of Appeal's analysis starts with the premise that the combined effect of s. 109, s. 92(5) and s. 92A of the ***Constitution Act, 1867*** is that:

> Ontario's beneficial ownership, combined with the exclusive legislative authority to manage and sell the lands, embraces the things that would amount to taking up lands governed by Treaty 3 'for settlement, mining, lumbering or other purposes', including in the Keewatin lands.[90]

53. The Court states further that, as a result of the decision of this Court in ***Smith*** (applying ***St. Catherine's Milling*** and ***Seybold***), on surrendered lands provincial ownership is no longer burdened by any interest as a result of s. 91(24). Thus "[a]t the moment that the Keewatin lands became part of Ontario, s.109 of the ***Constitution Act, 1867***, applied and Ontario gained beneficial ownership of the lands 'unencumbered by

---

[87] RFJ at para 569-573.
[88] *R v Badger*, [1996] 1 SCR 771 at para. 53 ["*Badger*"] [AA Tab 24].
[89] RFJ at para 570; *Morris Text* [AEB Tab 80].
[90] CA at para 111.

any operation of s. 91(24)'."[91] The Court of Appeal held that a continued s. 91(24) role in respect of the management or disposition of provincial lands would "eviscerate" an area of provincial competence.[92] In reaching these conclusions the Court of Appeal (1) ignored both the findings and context of ***St. Catherine's Milling***, ***Seybold*** and ***Smith***; (2) ignored the proper application of the double aspect doctrine; and (3) ignored important contrary case law.

54. The starting point of the modern law governing the division of powers is that federal and provincial heads of power are not perfectly exclusive. They have large areas of overlap and the laws and powers of both levels of government should be allowed to operate harmoniously to the extent possible. Potential conflicts should be resolved first by considering whether a conflict exists between a federal statute and a provincial statute, in which case the federal statute prevails to the extent of the conflict (paramountcy). If paramountcy does not apply, then in a limited range of cases (including s. 91(24)) provincial laws may be ineffective even in the absence of conflicting legislation because they impair the core of a federal head of power.[93]

55. Private and provincial land use within the provinces can thus be controlled by valid federal laws within the scope of a federal head of power. For example, since the ***Inland Fisheries Reference***[94] it has been understood that inland fisheries are owned by the provinces (or private parties) but can be regulated by the federal government under s. 91(12) of the ***Constitution Act, 1867***. On this reasoning, federal laws regulating the use of provincial lands by banning harms to fish habitat or the discharge of deleterious substances into provincial waters are constitutionally valid despite interfering with provincial ownership and legislative rights provided there is a sufficient link to federal jurisdiction over fisheries.[95] Similarly provinces cannot legislate so as to interfere with the public right of navigation, despite their ownership of lands and rivers within the

---

[91] CA at para 130, 197.

[92] CA at para 205.

[93] *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at paras 33-47 ["*Canadian Western Bank*"][AA Tab 5]; See also *British Columbia (Attorney General) v Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 SCR 86 at paras 41-43 [AA Tab 3].

[94] *Attorney-General for the Dominion of Canada v Attorneys-General for the Provinces of Ontario, and Nova Scotia,* [1898] AC 700 (PC) at 714-716 ["*Inland Fisheries Reference*"][AA Tab 1].

[95] *Fisheries Act*, RSC 1985, c F-14, as amended, s 35 & 36 [AA Tab 43]; *Northwest Falling Contractors LRFJ v The Queen*, [1980] 2 SCR 292 at p 301 [AA Tab 17].

province and legislative authority over the same, and property and civil rights within the provinces. The federal government may lawfully manage the construction of provincial and private uses of land within provinces that interfere with navigation.[96] Uranium and other nuclear materials belonging to the province cannot be mined or processed without a federal permit.[97] The federal government zones the use of provincial and private lands in the vicinity of airports under its jurisdiction over aeronautics, despite such lands being clearly subject to provincial regulation under s. 92 and, in the case of crown lands, ownership under s. 109.[98]

56. Contrary to the view expressed by the Court of Appeal, this double aspect principle applies in respect of provincially owned and regulated lands and resources and federal jurisdiction under s. 91(24). In ***Delgamuukw*** the Supreme Court of Canada applied ***St. Catherine's Milling*** to hold that although aboriginal title constituted a right to beneficial ownership and right to control land that was legally vested in the province, aboriginal title itself was a s. 91(24) interest and as such within the legislative jurisdiction of Parliament under s. 91(24).[99] In ***Saanichton Marina***, the British Columbia Court of Appeal held that a land use (construction of a marina) authorized by the provincial government could not proceed because s. 88 of the ***Indian Act*** prevented land uses which interfered with a treaty right.[100] Similarly, in ***Sioui***, the Supreme Court of Canada held that Section 88 of the ***Indian Act*** prevented the province of Quebec from limiting the treaty rights of the Hurons to cut provincially owned trees and set fires on provincially owned lands.[101] In ***Sutherland,*** this court held that Manitoba could not use its ownership and legislative powers over crown land to deem land "occupied" (that is "taken-up") for the purpose of limiting aboriginal hunting. The Supreme Court of Canada held that this was legislation in respect of the Indians as it was targeted at

---

[96] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 56 [AA Tab 9]; *Queddy River Driving Boom Co v Davidson* (1883), 10 SCR 222 cited to QL at 5 [AA Tab 22].

[97] *Nuclear Safety and Control Act* SC 1997, c 9, s 26(a) [AA Tab 48].

[98] *Aeronautics Act* RSC, 1985, c A-2, s 5.4 [AA Tab 41]; and for example, *Ottawa Macdonald-Cartier International Airport Zoning Regulations*, SOR/2009-231 [AA Tab 49], s. 2; *Re Walker et al and Minister of Housing for Ontario Re Walker and City of Chatham* [1983] OJ No 2949 (CA) at paras 30-34 (cited to QL) [AA Tab 40]

[99] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, paras 173-175 ["*Delgamuukw*" [AA Tab 6]].

[100] *Saanichton Marina LRFJ v Claxton*, 1989 CanLII 2721 (BC CA) at para 43 ["*Saanichton Marina*"] [AA Tab 33].

[101] *R v Sioui*, [1990] 1 SCR 1025 at 1065 [AA Tab 29].

limiting their constitutionally guaranteed hunting rights.[102] None of these cases could stand if the decision of the Court of Appeal was correct that provincial ownership and management of lands by virtue of s. 109, 92(5) and s. 92A was free of any federal s. 91(24) burden. As the Court held in the ***Annuities Case***, the Crown as treaty maker is distinct from the Crown as land owner.[103]

57. The Court of Appeal committed an error criticized repeatedly by the Supreme Court of Canada. The view that provincial ownership of land is exclusive of federal interests based on aboriginal or treaty rights has been rejected. The Supreme Court of Canada in ***Delgamuukw*** rejected the proposition that provincial ownership of crown land permitted a province to extinguish aboriginal title through the issuance of fee simple titles, leases, licences or permits to third parties by noting that while s. 109 vests ownership in the provincial crown it qualifies that ownership by making it subject to "any Interest other than that of the province in the same."[104] Similarly, in ***Haida***, the proposition that the provinces could not be subjected to duties based upon aboriginal rights and title was rejected on the basis that the province's ownership rights are subject to aboriginal rights and aboriginal title and it therefore took its lands subject to those pre-existing rights.[105] While ***Haida*** was concerned with the question of the duty to consult, as illustrated by ***Delgamuukw***, nothing limits the principle that provinces accept those burdens when they accept the lands subject to those rights. In this case, when Ontario accepted the Keewatin lands subject to the Harvesting Rights and subject to the federal government continuing its trusteeship of the Indians under the control of Parliament, it accepted the corresponding jurisdictional burdens.

58. This principle is also reflected in ***St. Catherine's Milling*** and ***Seybold***. In ***St. Catherine's Milling*** Lord Watson noted that provincial ownership did not imply the right to regulate the Harvesting Rights, a right reserved to the federal government. He then went on to defer the determination of the very issue raised in this case saying:

---

[102] *The Queen v Sutherland et al*, [1980] 2 SCR 451 at 455-456 [AA Tab 38].
[103] *Annuities Case* at 646 [AA Tab 8].
[104] *Delgamuukw*, at paras 23-24, 173-175 [AA Tab 6].
[105] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at paras 58-59 ["*Haida*"] [AA Tab 11].

> There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit.[106]

59. ***Seybold*** held that the Harvesting Rights were a burden on the province's title:

> It was decided by this Board in the ***St. Catherine's Milling*** case, that prior to that surrender the province of Ontario had a proprietary interest in the land, under the provisions of s. 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land **subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty**.[107]

60. At trial, Chancellor Boyd (who also decided ***St. Catherine's***) addressed the issue at bar:

> [t]he question is left open in the St. Catherine's Milling and Lumber Company case (1888), 14 A.C. 46, as to "other questions behind" i.e., with respect to the right to determine to what extent and at what periods the territory over which the Indians hunt and fish, is to be taken up for settlement and other purposes. **I infer that these rights will be transacted by means of and upon the intervention of both general and local governments** ...[108]

61. These cases hold that treaty rights continue as a burden on provincial title, subject to whatever their agreed upon internal limitations and the federal government's power to authorize infringement of treaty rights. Treaty rights have consistently been held to be at the core of s. 91(24) and unquestionably a federal subject matter.[109] This makes sense in light of the purpose of s. 91(24) in the division of powers. As Professor Peter W. Hogg explains, s. 91(24) protects a local minority (Indians) within the provinces, from a local majority by putting legislative powers over the affairs of that local minority in the hands of the more distant level of government.[110]

62. Professor Robert Vipond testified that, in part, the division of powers was designed to protect minority interests. This was achieved by giving power to the provinces (thus turning national minorities into provincial majorities) and power to the

---

[106] *St. Catherine's Milling* at 60 [AA Tab 37].

[107] *Seybold* at para 3 (cited to QL) (citations omitted) [AA Tab 20].

[108] *Ontario Mining Co v Seybold*, 31 OR 386, [1899] OJ No 113 at para 36 (cited to QL) [AA Tab 21].

[109] See e.g. *Delgamuukw* at paras 177-178 [AA Tab 6]; *Morris* at paras 90-91 [AA Tab 28].

[110] Peter W. Hogg, *Constitutional Law of Canada,* 5th ed, looseleaf (Toronto: Carswell, 2007) at 28-2 [AA Tab 52].

federal government over local minorities.[111] Professor John Saywell agreed the historic understanding of s. 91(24) was that it manifested a protective role understood as trusteeship or guardianship.[112] Professor John Milloy noted that this mirrored the earlier Imperial model, where the management of Indian Affairs was vested in the Imperial government rather than the colonial government.[113] The trial decision reflects this: the federal government is vested with a jurisdiction that includes treaty rights – rights that are at the core of maintaining the aboriginal people's way of life and are a part of the consideration offered by the federal government in exchange for entering into a treaty. By contrast, the Court of Appeal's decision would leave no room for the federal government and thus leave no room for the federal role where it is most needed, where there is a potential conflict between federal interests and provincial interests.

63. The Court of Appeal's error is rooted in a mistaken understanding of a comment in ***Smith***. In ***Smith*** Estey J said:

> [t]he 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 [...] [a]s found in *St. Catherine's*, the title of the Province would be unencumbered by any operation of s. 91(24).[114]

64. The Court of Appeal applied this passage to reach the conclusion it did concerning exclusive provincial control.[115] This analysis ignores the fact that neither ***St. Catherine's Milling***, nor ***Seybold*** nor ***Smith*** were concerned with the Harvesting Rights or the jurisdictional limits arising out of the Harvesting Rights. Instead they were concerned with federal claims for **proprietary** rights within the provinces. In ***St. Catherine's Milling*** the issue was whether the federal government gained a proprietary right in the lands and timber from the Ojibway through Treaty 3 sufficient to allow it to grant timber rights to third parties. In ***Seybold*** the issue was whether the federal government had a proprietary right in a surrendered reserve that allowed it to grant mining rights. In ***Smith*** the issue was whether the federal government had a sufficient proprietary interest in a surrendered reserve to found a claim for possession of land and

---

[111] RFJ at para 414, *Vipond Cross*, Feb 25, 2010 [AEB Tab 81].
[112] RFJ at para 413, *Saywell Examination* [AEB Tab 82].
[113] RFJ at paras 80, 95, 459; *Milloy in Chief*, Oct. 9, 2009 [AEB Tab 83].
[114] *Smith* at 564 [AA Tab 36].
[115] CA at para 130-135, 197.

removal of an occupant. In each case the courts held that no such proprietary interest existed. It is in this sense – as a reference to proprietary rights – that Estey J's use of the word "encumbered" must be understood.

65. As this Court has noted in cases such as ***Côté,***[116] ***Adams***,[117] and ***Delgamuukw,***[118] aboriginal and treaty harvesting rights are not proprietary rights that give rise to rights to the land even though crown land may be subject to those rights. Once this is taken into account, Estey J's comments can be understood in their proper context – the reference to "burden" is a reference to a proprietary burden and was not intended to comment on the federal government's broader jurisdiction with respect to s. 91(24) and treaty rights.

66. This answers the Court of Appeal's criticism of the Trial Judge's "two-step" analysis as being wrong in law. The Trial Judge's "two-step" analysis is merely a restatement of the double aspect doctrine. She is saying that to the extent that it is proposed that land be "taken-up" so as to displace or limit the federally-promised Treaty rights, both aspects of the land or resource must be addressed (the provincial aspect of land *qua* proprietary rights and the federal aspect of the resource as subject to a treaty right). First, it is obvious that no land or resource can be used without the consent or permission of the owner of the resource. Second, the Treaty rights as a proper federal subject matter must be addressed – in accordance with the express terms of the Treaty – by the federal government. Holding that the federal government has a continuing role in regulating or controlling the use of land within the provinces where those uses interfere with or limit treaty rights no more offends the division of powers than holding the same with respect to fisheries, navigable waters, aeronautics or nuclear materials.

Issue #2: The Court of Appeal's Erroneous Approach to Determining the Intentions of the Parties in Making the Treaty

Principles of Treaty Interpretation

67. The primary objective in interpreting a historic treaty is to determine the common intention of the parties at the time the treaty was made. Given the crown's approach to treaty-making is assumed to be honourable, the Court is "to make honourable sense of

---

[116] *R v Côté*, [1996] 3 SCR 139 at paras 38-39 [AA Tab 25].
[117] *R v Adams*, [1996] 3 SCR 101 at paras 26, 30, 49 [AA Tab 23].
[118] *Delgamuukw* at paras 112-113, 125 [AA Tab 6].

the treaty arrangement."[119] In determining common intention, the court should not focus solely on the crown's intentions and interests, but give equal attention and sensitivity to the intentions and interests of the aboriginal signatories. Therefore in determining the common intention of the parties, the court must consider the historical context and interpret ambiguous matters generously and in favour of the aboriginal people.[120]

68. The Trial Judge properly followed the principles of treaty interpretation. She carried out a detailed analysis of the historical evidence to ascertain the intentions of Canada and the Ojibway in inserting the harvesting clause in the Treaty. She found a positive intention on the part of both parties to empower the federal government only to manage or limit the Harvesting Rights. She also analyzed the post-Treaty conduct and found it supported her findings with respect to the parties' intentions.[121] She then held that the division of powers allows for a role for both levels of government in making resource decisions that may interfere with treaty rights. In those circumstances, provincial conduct triggers a legitimate federal interest under s. 91(24).[122]

Applicable Standard of Review

69. The treaty interpretation process is primarily factual, involving the consideration of the treaty document, the words spoken at treaty negotiations, and the surrounding cultural and political circumstances.[123] Such factual findings attract the same deference as other findings of fact, even if these facts can be described as social or legislative facts, and may only be set aside if a palpable and overriding error is found.[124] Applying this standard is essential to respecting the basic division of powers between trial and appellate judges repeatedly emphasized by this court.[125] The palpable and overriding error standard is onerous, requiring that the impugned fact-finding be "clearly wrong",

---

[119] *R v Marshall* (1999), 3 SCR 456 at para 14 ["*Marshall*"] [AA Tab 27].
[120] *Sioui* at 1068 [AA Tab 29]; *Badger* at paras 41 and 52 [AA Tab 24].
[121] RFJ at paras 1200-1230, 1249-1268 and 1288-1314.
[122] RFJ at paras 1484-1567.
[123] *Marshall* at paras 82-83 [AA Tab 27].
[124] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 52-56 ["*Bedford*"] [AA Tab 4]; *Housen v Nikolaisen*, 2002 SCC 33, 2002 SCC 33, [2002] 2 SCR 235 at paras 24-25 ["*Housen*"] [AA Tab 12].
[125] *Bedford* at para 49 [AA Tab 4].

"unreasonable" or "unsupported by the evidence."[126] Appellate judges are enjoined from re-evaluating or rebalancing the evidence, or drawing alternative inferences.[127]

The Court of Appeal Misidentified the Key Issue: Alleged Error Was Not Overriding

70. The brunt of the Court of Appeal's criticism was directed at the "two-step" conclusion that the Court of Appeal characterizes as the Trial Judge's central finding. On the question of treaty interpretation this misses the mark. The issue before the Trial Judge was the common intention at the time of treaty as to which government could limit the Treaty rights. The key finding in this regard is that at the time the Treaty was made both the federal government and the Ojibway understood that it was only the federal government that could limit the Treaty rights.[128] This is supplemented by the finding that the treaty commissioners and the Ojibway did not discuss how the province would be able to limit treaty rights. The existence of any role for the province (particularly to the exclusion of the federal government) was not discussed at all.[129] The Court of Appeal, the Trial Judge and Ontario's own witness agree that this was the situation at the time the Treaty was made.[130] This disposes of the treaty interpretation issue: an unchallenged finding of fact is that the only government empowered to limit the Treaty rights at the time of treaty was the federal government.

71. The Trial Judge's discussion of the "two-step" process went beyond what was required to explain how this would operate where the province controlled the land. She correctly found that both governments could have a legitimate role in regulating land use provided that their roles were confined to constitutionally legitimate purposes.[131] Even if the Court of Appeal is correct that as a matter of law only Ontario can play any role in taking-up land and the federal government is excluded, this does not change the agreement made in 1873. It merely means that the federal government now cannot limit the rights because it cannot take-up land and the province cannot limit the rights because

---

[126] *H.L. v Canada (Attorney General),* 2005 SCC 25, [2005] 1 SCR 401 at paras 4, 55, 68-69 and 110 [AA Tab 10].
[127] *Housen* at para 22 [AA Tab 12].
[128] See para 44, above.
[129] See para 24, above.
[130] RFJ at para. 890; CA at para 147; *Chartrand Cross*, Jan. 26, 2010 [AEB Tab 84].
[131] RFJ at paras 1305, 1355 and 1452.

it was not the government empowered under the Treaty to do so.[132] This would mean that conflicts between land uses and the Treaty rights would be decided in the normal division of powers and the ***Sparrow-Marshall*** infringement framework.[133] Thus any error in respect of the two-step analysis (which is actually favourable to the crown as it allows it to use the Taking-up Clause) is not an overriding error.

The Trial Judge Did Not Make a Palpable Error with Respect to the Two-Step Process

72. A palpable error is one that is "clearly wrong", "unreasonable", or "unsupported on the evidence". If there is any error in respect of the Trial Judge's conclusion with respect to the "two-step" process it is not with her finding that authority from the province or the owner of land is needed – this is the ratio of ***St. Catherine's Milling*** and ***Seybold***.[134] Therefore any palpable and overriding error must lie in the second branch of the process, namely that authorization from the federal government is needed to limit the Harvesting Rights within the province.

73. The Court of Appeal did not disturb the Trial Judge's key findings that: (1) at the time that the Treaty was made the common intention of the Ojibway and the federal government was that only the federal government could limit the Treaty rights using the Taking-up Clause; (2) the express language of the Treaty reflects this; and (3) the Treaty commissioners did not discuss the possibility of Ontario or any province limiting the Treaty rights. Thus at the time the Treaty was made, the federal government promised a Treaty right that could only be limited by the federal government.

74. The Court of Appeal departed from the Trial Judge's finding that the federal government would have a continuing role in limiting the rights once the lands fell within a province. The Court of Appeal erred in this regard in a number of significant ways.

75. First, it criticizes Morris for choosing inapt language: "[i]f the text of the harvesting clause is to be read literally, that would mean that *only* Canada can take up lands."[135] This is a misreading of the clause, as the Treaty speaks to what is needed to limit the Treaty rights, not which level of government can authorize land uses. This

---

[132] Not all treaty rights have internal taking-up limitations. For example, the fishing rights at issue in the *Saanichton Marina* case were not subject to an internal taking-up limitation, at para 33 [AA Tab 33].
[133] *Marshall* at para 64 [AA Tab 27].
[134] See paragraphs 58-61, above.
[135] CA at para 148.

criticism also reflects the Court's mistaken finding that "taking-up" is exclusively within the jurisdiction of the province as owner, overlooking the fact that the federal government can have a legitimate role in taking-up provided it is linked to an appropriate head of federal power. The Court critiques the fact that Morris made no express reference to this in his correspondence, but in doing so they overlook express words of the Treaty. The Court also overlooks the fact that the alternate inference (that the federal government was included in the text to protect Canada's assertion of ownership) is unstated in any of Morris' reports. The Court of Appeal is merely preferring one inference over another, a choice not open to it on appeal.

76. The remainder of the Court of Appeal's critique of the Trial Judge's decision erroneously focuses on after-the-fact conduct by subsequent governments, in particular, (1) the decision of the Mackenzie government to enter into the 1874 Provisional Boundary Agreement; (2) the 1891 Reciprocal Legislation and 1894 Agreement; and (3) the 100 years of land grants after 1912.[136] This Court has cautioned against the use of after-the-fact evidence in treaty interpretation in ***Sioui*** since the failure to observe treaty rights may simply be consistent with those rights being overlooked.[137] This is particularly true when considering the post-treaty conduct of government officials decades after a treaty has been made. Section 35 is intended to remedy the failure of governments to treat aboriginal and treaty rights as legal rights. This purpose would be frustrated if the post-treaty conduct of the crown neglecting treaty rights was given significant weight in interpreting those rights.

77. This error is made worse by the fact that the Court of Appeal's review of the facts did not do justice to the actual evidence. For example, in dealing with the Mackenzie government's 1874 Provisional Boundary Agreement as evidence of the intention of the Macdonald government in making the Treaty in 1873, the Court of Appeal fails to (1) point to any evidence that the Taking-up Clause was considered and (2) address the Trial Judge's observation that the Agreement did not deal with the question of limiting rights.

---

[136] CA at paras 167-172.

[137] *Sioui* at 1060 [AA Tab 29].

78. Similarly, the Court erred in observing that for "more than 100 years since the Keewatin Lands became part of Ontario, lands have been taken up by Ontario."[138] The reality is that the crown led no useful evidence to support this finding. The crown's evidence on this topic was limited to the pre-1930 period. The Court erred in failing to deal with the evidence that there was limited development in the area until after 1920, when prospecting began, and the finding of fact based upon the evidence of Bill Fobister that harvesting in the Grassy Narrows area was undisturbed into at least the 1960s.[139]

79. The Court of Appeal put a great deal of reliance on the 1891-1894 Arrangements as being confirmatory of the government's understanding of the meaning of the Treaty in 1873.[140] While this may have been the intention of the political actors in 1891-1894, this is meaningless in respect of what was meant in 1873. Morris died in 1889. Macdonald died in 1891. Most of the Ojibway Chiefs had died by 1890 and the government's efforts to "civilize" the Ojibway were well underway. The political climate had changed, the CPR was built, Indian Affairs was less important, the importance of Treaty 3 issues had dwindled, and the legal battles of 20 years were over.[141] Further, the Ojibway were not consulted with respect to the 1891-1894 Arrangements. Thus there was ample evidence the understanding of the Treaty in 1873 was different than in 1894 regardless of the purported 'confirmatory' intent of the Arrangements. The Court of Appeal failed to deal with this evidence meaningfully.

80. Finally, the Court of Appeal erred in its analysis by failing to consider the aboriginal perspective, as required by law. While the Trial Judge meticulously examined the Ojibway perspective on each of the facts cited and incorporated it into her analysis, the Court of Appeal did not. The Court of Appeal only considers the perspective of government officials, most of whom were not involved in the treaty negotiations and, in the case of provincial officials, effectively denied the Treaty rights. As Binnie J. noted in ***Marshall*** it is an error of law to fail to give adequate weight to the aboriginal

---

[138] CA at para 171.
[139] RFJ at paras 1154-1180.
[140] CA at paras 179-181.
[141] RFJ at paras 1007-1009, 1021-1022, 1032-1033; *Annual Report* [AEB Tab 65]; *Chartrand Cross*, Jan. 19, 2010 [AEB Tab 85].

perspective and, conversely, to give excess weight to the crown perspective.[142] This reflects the general principle that the modern law of aboriginal title requires that the aboriginal perspective be taken into account. This is a bedrock principle that marks the primary distinction of modern aboriginal law: that aboriginal people and their views have a place in understanding the meaning of their rights. In this case the aboriginal perspective is clear and unquestioned. It mattered to the Ojibway that they had secured the commitment of the highest level of government in Canada to uphold and maintain their rights. The Court of Appeal fails to factor this into its analysis.

81. The imbalance in the Court of Appeal's approach can be seen by contrasting the weight it places on the activities of government officials in Ottawa and Toronto with its silence on the counterbalancing aboriginal activities in the same period. For instance, Chief Ross at Lac Seul (in the Keewatin Lands) stated "[s]ince we made the Treaty with the Government of Canada we believe that we should not be forced to have any dealings with the Province of Ontario."[143] On October 3, 1938 (the anniversary of the Treaty) the Organized Indians of the Northwest Angle wrote a letter insisting that the Indian Agent (federal) protect them from the Game Warden (provincial) who had no right to stop them from hunting or trapping.[144] Earlier in 1938 another Treaty 3 group, the Organization of Amalgamated Indians, complained to their local Indian agent: "[n]ow the Ontario Government has taken over, but it was the Dominion Government they made the Treaty with. … the Indians should have the fishing in the lake and also the game."[145] While the Trial Judge considers these actions and factors them into her factual analysis, the Court of Appeal mentions none of this evidence in its cursory overview of the facts.

Issue #3: The Misapplication of the Doctrines of the Evolution of Treaty Rights and Devolution in the Context of the *Ontario Boundaries Extension Act, 1912*

82. In 1912, the situation is clear: consistent with the common understanding in 1873 and the language of the Treaty, only the federal government can limit the rights

---

[142] *Marshall* at para 19 [AA Tab 27].

[143] RFJ at para 1152; Letter, *Chief John Ross and Councillors to Norman Liquors*, Sept. 16, 1946 [AEB Tab 86].

[144] RFJ at para 1146; Letter, *Organized Indians of the North West Angle Treaty 3 to Crerar*, Oct. 3, 1938 [AEB Tab 87].

[145] RFJ at para 1143; Memorandum, *Meeting held by the Organization of Amalgamated Indians*, June 11, 1938 [AEB Tab 88].

promised in Treaty 3. The question then is: did the ***Ontario Boundaries Extension Act, 1912*** change this arrangement so that Ontario could limit the Treaty rights? The answer demands the application of aboriginal law principles that are fundamental to upholding the honour of the crown. First, to the extent that any crown act extinguishes or modifies a treaty it must, given the solemn and sacred nature of these promises, express its intention to do so clearly and plainly and requires strict proof.[146] Second, to the extent that a law impairs an aboriginal or treaty right it will be construed narrowly. Third, legislation intended to protect aboriginal people is to be interpreted generously and ambiguities resolved in favour of the aboriginal people.[147] The Ojibway perspective on how the Treaty may be changed is summarized by Jim Netamequon of the Assabaska band in 1927: "we were told when first treaty made time we Shake hands we Said that we never have any change and if it happens to be change we will talk it over again."[148]

83. A strict burden lies on the crown to show a positive intention existed to modify the Treaty rights in order to effect such a change. This does not mean that the crown must have intended every consequence of continuing the rights: in most cases that would have been unlikely since historically governments did not consider the effects on aboriginal and treaty rights, as they largely ignored them as legal rights.[149]

84. Additionally, in 1912, the only constitutional protection given to treaty rights flowed from the control over and responsibility for those rights vested in the federal government, which was viewed as the "guardian" or "trustee" of the Indians. In 1912 arguably no constraints were placed on Canada, which could abrogate or even extinguish treaty rights.[150] Therefore a transfer of control over the power to limit treaty rights to Ontario with the boundary extension in 1912 would mean that until 1982 no limit was placed on the power given to Ontario. When the Court of Appeal states that Ontario could take-up the Keewatin Lands under the Treaty "only to the same extent that

---

[146] *Badger* at para 41 [AA Tab 24]; *Sioui* at1061 [AA Tab 29].

[147] *Nowegijick v The Queen*, [1983] 1 SCR 29, at p 36 [AA Tab 19]; *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, at pp 142-43 [AA Tab 16]; *Badger* at para 41 [AA Tab 24]; *R. v Sparrow*, [1990] 1 SCR 1075 at 1107["*Sparrow*"] [AA Tab 32].

[148] RFJ at para 1141, *Lovisek Report* [AEB Tab 89]

[149] *Sparrow* at 1103-1105 [AA Tab 32].

[150] See *Sikyea v The Queen*, [1964] SCR 642 at 646; aff'g [1964] NWTJ No 1 at paras 28-32, 38, 41-43 (NWT CA) [AA Tab 34]; *R v George*, [1966] SCR 26 at 280-281 [AA Tab 26].

Canada could validly do so before 1912,"[151] it would mean that there was no limit on that power. As such, transferring the power to "take-up" lands to Ontario in 1912 would be to transfer them without limits and leave the rights without protection until 1982.

85. There is no record of any discussion of extinguishing or modifying the Treaty 3 rights.[152] Instead, the evidence indicates that ss. 2(a)-(c) of the ***Ontario Boundaries Extension Act, 1912*** became part of the discussions out of concern on the part of the government to **protect** the existing rights of the Indians, including Treaty 3 rights.[153] The analogous language to s. 2(a)-(c) in the ***Quebec Boundaries Extension Act, 1912*** has been described by this Court in ***Sparrow*** as being designed to recognize and protect existing rights.[154] The evidence is that the reference to the phrase "[t]hat the trusteeship of the Indians and 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" is a reference to a continuation of the federal role that would have been understood as being reflected in s. 91(24).

86. Given the totality of this evidence, the 1912 legislation did not amend the Treaty, change the Treaty rights or eliminate whatever role Canada had. The Court of Appeal erred by saying that s. 2(c) could not be construed as "creating or retaining" a role in the taking-up process.[155] The Court of Appeal misses the point: Canada's intention was to keep the same role with respect to the Ojibway after the extension as it had been before. While Canada and Ontario may not have appreciated the implications of the wording and meaning of the Taking-up Clause as it existed before 1912, they agreed not to change those rights or Canada's role with respect to those rights.

87. The doctrine of evolution of treaty rights does not apply in these circumstances for three reasons. First, to allow the doctrine of evolution to apply to significantly modify the terms of a treaty as a result of a legislative act would subvert the requirement that a statute must demonstrate a clear and plain intent to modify a treaty. Second, the

---

[151] CA at para 198.
[152] RFJ at para 1431.
[153] RFJ at para 1064-1067, 1431; *Vipond Cross*, Feb. 25, 2010 [AEB Tab 90]; Memo, *Deputy Minister to Minister of Lands re Indian Affairs,* Sept. 20, 1911[AEB Tab 91]; *Saywell Report* [AEB Tab 92].
[154] *Sparrow* at 1103-1104 [AA Tab 32].
[155] CA at para 199.

doctrine of evolution is a limited doctrine that has been applied to allow aboriginal people to exercise their rights in changing circumstances by adopting modern means to do so.[156] It is not a doctrine that has allowed the crown to extend its powers. Third, even if this doctrine might apply, the doctrine does not allow a fundamental change in the nature of the right – a sustenance right, for example, cannot evolve into a commercial or quasi-commercial right.[157] In this case the doctrine is being applied to change the Treaty relationship fundamentally, from one between the Indians and a unitary federal government responsible for all aspects of implementing their treaty, to a relationship with two governments, one of whom was not a party to the Treaty and now gains the right to limit the Treaty rights.

88. Similarly, the doctrine of devolution cannot apply. The doctrine was articulated in the context of the process of ending colonial governance to address how responsibility for debts, contracts and treaty obligations followed the transfer of legislative and executive power from the Imperial government to the newly independent colonial government.[158] Thus, when the United Kingdom unequivocally transferred legislative and executive power of Indian Affairs to Canada, all duties, responsibilities and liabilities regarding the implementation and enforcement of treaties made by the British government in Canada devolved to the governments in Canada to be dealt with under the terms of the ***Constitution Act, 1867***. The question of what obligations, responsibilities and liabilities are devolved must be addressed by examining what executive and legislative powers are devolved. Thus for example, the power to amend the Constitution and make international treaties did not devolve to Canada in 1867, given the terms of the ***Constitution Act, 1867***.

89. This court has characterized devolution as progressive, irrevocable delegation of legislative and executive power.[159] This is inapt in the context of relations between the federal and provincial governments where irrevocable delegations of power between the

---

[156] *Sparrow* at 1093 [AA Tab 32]; *Marshall* at para 78 [AA Tab 27].
[157] *Lax Kwalaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, [2011] 3 SCR 535, at paras 51, 56 [AA Tab 14].
[158] RFJ at 1438-1443; *Nova Scotia v. Attorney General of Canada*, [1951] SCR 31, p. 45-46 [AA Tab 18]; *Attorney-General of Canada v Higbie*, [1945] SCR 385, p 433-434 ["*Higbie*"] [AA Tab 2].
[159] *Higbie* at 433-434 [AA Tab 2]

two levels of government are impermissible. This was the understanding of the government at the time, having received legal advice that made it clear that the division of powers could not be affected by a boundary change under the ***Constitution Act, 1871***.[160] This stands in contrast to the transfer of natural resources in the prairies, which was effected by constitutional amendment.[161]

90. Consequently, devolution does not apply to this context. Ontario did not gain "independence" from Canada in 1912 nor were legislative powers over a subject matter transferred from one government to another in the sense discussed in the ***Indian Association of Alberta*** case.[162] Instead boundaries changed, governed by the division of powers set out in the ***Constitution Act, 1867,*** which maintained legislative powers over Indians (including treaty rights) in the federal government. The ownership rights that came with this boundary extension were also subject to the qualifications set out in s. 109 of the ***Constitution Act, 1867***. Additionally, the reciprocal legislation extending the boundaries made it clear that the federal executive's role as trustee of the Indians had not "devolved", and continued to be subject to the supervision of Parliament. Thus, even to the extent that this situation can be seen as triggering any issue of devolution there is an express exclusion of any form of devolution with respect to the Indians. The devolution argument is merely another back-door way to modify the terms of the Treaty in the absence of legislation that satisfies the "clear and plain" intent requirement.

Issue #4: Did the Trial Judge Correctly Answer the Second Question?

91. The Court of Appeal did not answer the second question posed at trial, but the Trial Judge's decision should be upheld on this issue. The combined effect of the division of powers and s. 88 of the ***Indian Act*** operate to prevent provincial laws from authorizing infringements of treaty rights. The authorities supporting this commence with ***R v. White and Bob***[163] and continue through ***R. v. Taylor and Williams***,[164] ***Simon***,

---

[160] RFJ at para 1062; Letter, *Newcome to Borden*, Feb. 10, 1912 [AEB Tab 93]; *Vipond Cross*, Feb. 25, 2010 [AEB Tab 94]. *Constitution Act, 1871,* 34 & 35 Victoria, c. 28 (U.K.), s. 3

[161] *Constitution Act, 1930*, 20-21 Geo. V, c. 26 (U.K.) [AA Tab 42]

[162] *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians*, [1981] 4 CNLR 86 (QL) at pp 17-18 (England and Wales, Court of Appeal (Civil Division)) [AA Tab 39].

[163] *R v White and Bob* (1964), [1964] B.C.J. No. 212 at para 9, 15 (BCCA), aff'd (1965) 52 DLR (2d) 481 (SCC) ["*White and Bob*"] [AA Tab 31].

[164] *R v Taylor and Williams*, (1982), [1981] 3 C.N.L.R. 114 at 9 (Ont CA) (cited to QL) [AA Tab 30].

Sioui and most recently ***Morris***. In ***Morris*** the Court divided on the question of whether night hunting was protected by the treaty in question, but the Court unanimously held that treaty rights were a matter at the core of s. 91(24) and therefore protected from impairment by provincial laws of general application by operation of the doctrine of interjurisdictional immunity.[165] The court unanimously held that the opening words of s. 88 – "subject to any treaty …" operate to protect treaty rights from the incorporating effect of s. 88 of the ***Indian Act*** and are engaged when a provincial law meets the threshold of constituting a *prima facie* infringement of the treaty rights.[166]

92. The scope and application of the doctrine of interjurisdictional immunity has been recently re-examined and its application to "Indians and Lands reserved for the Indians" has been confirmed.[167] This is consistent with the traditional approach to controlling local interference with Indian affairs by requiring intervention by the national government (vested with management of Indian affairs) before such rights are infringed.

93. Revisiting or limiting this protection in favour of the protections contained in s. 35 of the ***Constitution Act, 1982*** or in the duty to consult should be approached cautiously. The ***Constitution Act, 1982*** was not intended to diminish the protection extended to treaty rights by the division of powers. Indeed, it would defeat the effect of introducing provisions designed to enhance the protection of aboriginal and treaty rights if it also resulted in a reduction in the existing protections from provincial interference – particularly since the primary conflicts over lands and resources will arise between the aboriginal people and provinces within provincial boundaries.

94. This argument is consistent with the fact that the ***Constitution Act, 1982*** was amended following the constitutional conferences held pursuant to s. 37 to include s. 35.1, which requires a constitutional conference involving aboriginal representatives before s. 91(24) is amended. This indicates a clear intention to approach any revision to s. 91(24) through the amendment process with the participation of the aboriginal people. The courts should not find an abridgement of constitutional rights by abolishing or significantly limiting long-standing protection for treaty rights provided by s. 91(24) of

---

[165] *Morris* at para 43, 90 [AA Tab 28].
[166] *Morris* at paras 44-45, 96-97 [AA Tab 28].
[167] *Canadian Western Bank* at para 60-61 [AA Tab 5].

the ***Constitution Act, 1982*** when that restriction has not been achieved by the constitutionally-required method.

95. This is particularly so as there is an alternative interpretation of s. 88 of the ***Indian Act***, which should be applied in the event that the doctrine of interjurisdictional immunity is abolished. Section 88 is a valid federal law in respect of the subject matter of treaty rights being part of the subject matter of s. 91(24) generally. Therefore, even in the absence of the doctrine of interjurisdictional immunity, the opening words of s. 88 would apply and the doctrine of paramountcy would provide that, to the extent of a conflict with provincial law, the federal law ruled.[168] This is consistent with the history of s. 88, which was introduced after numerous representations to Parliament from aboriginal people expressing a concern about the failure of the provinces to respect treaty rights. Indeed, the chiefs of Treaty 3 were amongst those who wrote to Parliament complaining about Ontario's persistent refusal to respect treaty rights.[169] As described by the Trial Judge, Ontario's traditional position was that the Indians had no right to harvest provincial game on provincial lands and that feeding the Indians and ensuring the fulfilment of the Treaty was Ottawa's problem.[170]

96. Thus whether viewed through the lens of interjurisdictional immunity or through the lens of paramountcy, the effect of s. 88 of the ***Indian Act*** is to extend federal legislative protection to treaty rights against infringing provincial laws. Rather than a legislative vacuum, treaty rights in Canada are protected through a positive federal enactment. In the context of modern treaties a specific replacement for s. 88 is negotiated that makes clear that provincial laws do apply to modern treaties in accordance with the provisions of those treaties dealing with the interplay between federal, provincial and First Nations law.[171] This illustrates how these issues should be

---

[168] See e.g. *Simon* at 413-414 [AA Tab 35]; *White and Bob* at para 9, 15 [AA Tab 31].

[169] See paragraph 27, footnote 51, above.

[170] RFJ at para 1206.

[171] *Nisga'a Final Agreement*, Apr. 27, 1999, Ch 2, s 29 [AA Tab 47] and *Nisga'a Final Agreement Act*, SC 2000, c 7, s 15 [AA Tab 46]; *Tsawwassen First Nation Final Agreement*, Dec. 6, 2007, Ch 2, s 20 [AA Tab 51] and *Tsawwassen First Nation Final Agreement Act*, SC 2008, c 32, s 15 [AA Tab 51]; *Maa-nulth First Nations Final Agreement*, Apr. 9, 2009, Ch 1, s 1.8.8 [AA Tab 45] and *Maa-nulth First Nations Final Agreement Act*, SC 2009, c 18, s 14 [AA Tab 44].

approached to achieve reconciliation – through negotiation, not unilateral crown or judicial fiat.

97. Infringement of treaty rights cannot be authorized by the exercise of the province's proprietary rights as argued by Ontario in the courts below. Section 109 makes it clear that Ontario's proprietary rights remain subject to the remaining interests of the Ojibway in the Harvesting Rights, as noted by the Privy Council in ***Seybold***.[172]

Policy Concerns – Evisceration and Reconciliation

98. The Court of Appeal's judgment is driven by a concern that the trial judgment creates an unworkable solution that "eviscerates" provincial ownership of land and is contrary to the principles of reconciliation and cooperative federalism. Grassy Narrows submits that these concerns are unfounded. The trial judgment does not mean that the crown's ability to develop the Keewatin lands is forever frustrated or sterilized. It means that **where such development infringes the Treaty 3 Harvesting Rights** it will require joint action by the federal and provincial governments, carried out in accordance with s. 35 of the ***Constitution Act, 1982***, either to limit the application of the Treaty rights using the Taking-up Clause or to proceed under the ***Sparrow-Marshall*** infringement framework.

99. The federal government has a range of potential responses that it could bring to bear to address this issue. At one end of the spectrum, it could elect to do nothing, leaving Ontario to ensure that the activities it authorized were non-infringing. Canada could devise a form of federal incorporation that would allow the province to infringe Treaty rights subject to satisfying the ***Sparrow*** justification test (putting treaty rights on the same footing as aboriginal rights). Another approach would be to develop a federal regime to authorize land uses in parallel to the provincial authorizations in those cases where there is a desire to take-up lands. This would parallel the approach adopted in the context of s. 35 of the ***Fisheries Act*** when development is authorized in protected fish habitat. Any combination of these approaches or others may be adopted. This is a choice for Parliament to address in the context of s. 91(24) of the ***Constitution Act, 1867***, s. 35 of the ***Constitution Act, 1982*** and Canada's duties and obligations under the Treaty.

---

[172] *Seybold* at para 3 [AA Tab 20].

100. Whatever route is chosen, the crown will have to comply with the obligations affirmed by s. 35 and the duty to consult. Ideally this will lead to negotiation with Grassy Narrows and the whole of Treaty 3 about how a new tripartite relationship among Canada, Ontario and the Ojibway will operate. Whether this includes amending the Treaty, negotiating an acceptable legislative regime, or adopting some other approach is again, a matter the parties should resolve through honourable negotiations. This is the clearest way to reconciliation in these circumstances. This issue has faced government and First Nations elsewhere in Canada and honourable solutions as to how the interplay of federal and provincial law and treaty rights should work have been resolved. There is no reason to believe it cannot be similarly resolved here.

Part IV - Cost Submission

101. No costs are sought by the Appellant except as provided pursuant to the order of this Court of December 16, 2013.

Part V - Order Sought

102. That the Appeal is allowed, the order of the Court of Appeal set aside, the order of the Superior Court restored, and the matter remitted to the Case Management Judge for directions concerning the conduct of the second phase of the trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated the 17th day of February, 2014

Robert J.M. Janes

PART VI –AUTHORITIES

STATUTES:

TEXT:

44

PART VII – SCHEDULE OF STATUTES & RULES AT ISSUE

***An Act for the Settlement of Questions Between the Governments of Canada and Ontario Respecting Indian Lands*, S.O. 1894 (May 4, 1891)**
Reproduced at Appellants' Record Volume 37, Tab 76, at 148-151

***An Act to extend the Boundaries of the Province of Ontario*, SC 1912, c 40**
Reproduced at Appellants' Record Volume 49, Tab 80 at 185-187

Constitution Act, 1867 [Explanatory Notes]

30 & 31 Victoria, c. 3. (U.K.)

[Reprinted in R.S.C. 1985, App. II, No. 5]

(29th March 1867) / (Consolidated with amendments)

VI. Distribution of Legislative Powers

Powers of the Parliament

SECTION 91.

Legislative Authority of Parliament of Canada

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

...

5. Postal Service.

12. Sea Coast and Inland Fisheries.

24. Indians, and Lands reserved for the Indians.

...

VI. Distribution of Legislative Powers

Exclusive Powers of Provincial Legislatures

SECTION 92.

Subjects of exclusive Provincial Legislation

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

...

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

...

VI. Distribution of Legislative Powers

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

SECTION 92A.

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

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

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

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

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

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of

electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

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

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

> (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
>
> (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

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

"Primary production"

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

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section. Added by the Constitution Act, 1982.

...

VIII. Revenues; Debts; Assets; Taxation

SECTION 109.

Property in Lands, Mines, etc.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same. Manitoba, Alberta and Saskatchewan were placed in the same position as the original provinces by the Constitution Act, 1930, 20-21 Geo. V, c. 26 (U.K.).

These matters were dealt with in respect of British Columbia by the British Columbia Terms of Union and also in part by the Constitution Act, 1930.

Newfoundland was also placed in the same position by the Newfoundland Act, 12-13 Geo. V1, c. 22 (U.K.).

With respect to Prince Edward Island, see the Schedule to the Prince Edward Island Terms of Union.

Constitution Act, 1871

34-35 Victoria, c. 28 (U.K.)

[Reprinted in R.S.C. 1985, App. II, No. 11]

[29th June 1871]

SECTION 3.

Alteration of limits of Provinces

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

Constitution Act, 1982

1982, c. 11, Schedule B (U.K.)

[Reprinted in R.S.C. 1985, App. II, No. 44, Schedule B]

Part II
Rights of the Aboriginal Peoples of Canada

SECTION 35.

Recognition of existing aboriginal and treaty rights

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

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

Land claims agreements

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

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

1982, c. 11, Schedule B (U.K.), s. 35, effective April 17, 1982; SI/84-102.

SECTION 35.1

Commitment to participation in constitutional conference

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

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

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

SI/84-102.

Indian Act

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

LEGAL RIGHTS

SECTION 88.

General provincial laws applicable to Indians

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

R.S.C. 1970, c. I-6, s. 88; S.C. 2005, c. 9, s. 151; S.C. 2012, c. 19, s. 678.