File Number: 35379

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

BETWEEN:

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

APPELLANT
(Intervener)

and

**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/Respondents)

and

**MINISTER OF NATURAL RESOURCES**

RESPONDENT
(Defendant/Appellant)

and

**RESOLUTE FP CANADA INC.**
**(formerly ABITIBI-CONSOLIDATED INC.)**

RESPONDENT
(Defendant/Appellant)

and

**THE ATTORNEY GENERAL OF CANADA**

RESPONDENT
(Third Party/Appellant)

and

**GOLDCORP INC.**

RESPONDENT
(Intervener)

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# FACTUM OF THE APPELLANT, LESLIE CAMERON on his own behalf and on behalf of all other members of WABAUSKANG FIRST NATION

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# MEMORANDUM OF ARGUMENT

## PART I- OVERVIEW AND FACTS

(a) Concise Summary of Argument

1. This case is about whether or not Canada remains responsible for ensuring that the solemn treaty promises made to the Ojibway in 1873 are respected.

2. The trial judge concluded that the answer is yes. After a lengthy trial with extensive documentary and expert evidence, she held that Canada is ultimately responsible for ensuring that treaty promises are respected based on the common intention of the treaty partners and the constitutional division of powers.

3. The Court of Appeal disagreed. For the Court of Appeal, the common intention of the treaty partners in 1873 was irrelevant because the Constitution has evolved to allow Ontario to 'step into Canada's shoes'—the federal government no longer has a role in ensuring treaty promises are respected.

4. The Appellant, Leslie Cameron on his own behalf and on behalf of all other members of Wabauskang First Nation ("Wabauskang") submits that the Court of Appeal erred by:

- invoking a 'constitutional evolution' theory that is without historical or legal support;
- misapplying this Court's decision in *Mikisew*;[1]
- disregarding the common intention of the treaty partners;
- ignoring the historical and legal reality of the federal government's responsibility for treaties;

[1] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew*]

- assuming a province can consult about and justify a law that is constitutionally inapplicable;
- elevating provincial property interests to a trump card that nullifies Canada's authority under section 91(24); and
- ignoring the principles of cooperative federalism.

5. The appeal should be allowed and the matter remitted to trial on the primary issue of whether the impugned legislation impairs the exercise of the treaty right so as to trigger the doctrine of interjurisdictional immunity. Should the legislation be found at trial to be inapplicable, workable solutions exist to address the consequences.

(b) Facts

6. Wabauskang relies on the following facts.

7. Wabauskang is a Treaty 3 First Nation whose community is based on reserve land near Ear Falls, Ontario. Wabauskang holds the same constitutionally-protected treaty rights as Grassy Narrows First Nation ("Grassy Narrows") and exercises those rights within the Keewatin Lands in Treaty 3 territory.[2]

8. Wabauskang took no part in the trial of this matter. At the Ontario Court of Appeal Wabauskang was granted Party Intervener status on the basis that "[m]embers of the Wabauskang First Nation enjoy and exercise precisely the same Treaty Harvesting Rights and they are affected by precisely the same licenses and logging activities as Grassy Narrows."[3]

(i) The trial decision

9. This case started as a challenge to Ontario's authority to utilize the take up clause under Treaty 3. Litigation was initially commenced as an application for judicial review by members of Grassy Narrows when the Ontario Minister of Natural Resources issued a sustainable forest

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[2] For the purposes of this litigation, the "Keewatin Lands" are defined as lands within Treaty 3 which lie north of the English River and east of Ontario's current boundary with Manitoba. The Keewatin Lands were added to the province of Ontario pursuant to the *Ontario Boundaries Extension Act* in 1912.

[3] *Keewatin v Ontario (Natural Resources)*, 2012 ONCA 472 (CanLII) [Intervener Decision] at para 20. See also *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158 (CanLII) [Appeal Decision] at paras 17, 236.

licence in 1997 to Abitibi-Consolidated Inc. to conduct clear-cut logging in the Keewatin Lands. In 2005, Grassy Narrows commenced an action in respect of the issues in this litigation.

10. In 2006, the case management judge divided the trial into two phases and directed that the first phase would involve two questions.[4] The first question was whether Ontario has the authority to exercise the Treaty 3 take up clause in the Keewatin Lands so as to limit the harvesting right. The second question, which was only to be addressed if the answer to the first question was "no," was whether Ontario has the authority to justifiably infringe the harvesting right pursuant to the constitutional division of powers. The 2011 trial decision, which was more than 300 pages in length, answered both questions in the negative.

11. Based on an exhaustive review of historical evidence and expert testimony, the trial judge concluded that Ontario did not have the authority to exercise the take up clause in Treaty 3 so as to limit the Ojibways' harvesting right without first obtaining Canada's approval:

> In Keewatin, Ontario does not have the right to limit Treaty Rights by "taking up lands under the Treaty." It can issue land authorizations under s. 109 apart from the Treaty, but only in compliance with s. 109, i.e., only so long as the authorizations do not have the effect of substantially interfering with Treaty Harvesting Rights. To authorize uses that significantly interfere with Treaty Harvesting Rights under the Treaty, Ontario, or users of land already authorized by Ontario to use the land, must also obtain the authorization of Canada.[5]

12. In identifying the common intention of the Ojibway and Canada at the time of treaty, the trial judge considered the overall context of the treaty, including the perspective and understandings of the Aboriginal signatories.[6] The trial judge held that Treaty 3 was an agreement between Canada and the Ojibway and that the Ojibway understood that in the future they could look to the federal government to ensure that the Crown's treaty obligations were respected and fulfilled.[7]

13. Based on her review of the historical evidence, the trial judge concluded that the Ojibway understood that Canada was "directing the Treaty negotiations and promising to address their

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[4] *Keewatin v Ontario (Minister of Natural Resources* (28 June 2006), Toronto 05-CV-281875PD (Ont Div Ct).
[5] *Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801 [Trial Decision] at para 1452 (emphasis in original).
[6] Trial Decision at paras 1288-93.
[7] Trial Decision at para. 1199.

concerns 'so long as the sun shone and the waters flowed.'"[8] The Ojibway did not contemplate that other levels of government would have the right to administer the treaty promises. Instead, on entering into Treaty 3, the Ojibway "were relying only on the Government of Canada to implement and enforce the Treaty."[9] According to the trial judge, the Ojibway:

> knew the Commissioners were from Canada. They were dealing with Canada. Canada was promising to implement and enforce the Treaty. They were content with that.[10]

14. The trial judge concluded that Canada entered into Treaty 3 with the intention of maintaining sole responsibility for the ongoing administration of the treaty promises:

> While the Commissioners understood in a broad sense that Her Majesty the Queen was being named in the Treaty, it was clear to them that "Indians and Land Reserved for the Indians" were exclusively a Canadian federal responsibility. Canada was not looking to [sic] Government of the United Kingdom, the Queen or the Government of Ontario to fulfill the Treaty promises they were making on behalf of Canada. They intended the reference to the Dominion in the Harvesting Clause to be to Canada.[11]

15. The trial judge was unequivocal that the common intention that best reconciled the interests of the parties to Treaty 3 was that Canada promised to protect the treaty harvesting right and that the Ojibway looked to Canada alone to enforce and implement the treaty.[12] Neither party intended that Ontario or any other entity would be entitled to take up lands so as to significantly interfere with treaty rights unless authorized by Canada.[13]

16. The trial judge rejected Canada and Ontario's contention that Ontario was entitled to exercise the take up clause and infringe the harvesting right based on this Court's decision in *Mikisew*. The trial judge held that the principles established in *Mikisew* were not applicable to the case at bar because the scope and context of treaty rights should only be determined "based upon a careful consideration of the specific circumstances in which the particular treaty was made."[14] Accordingly the legal obligations owed in respect of Treaty 3 are dependent "on the specific

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[8] Trial Decision at para 884. See also para. 895.
[9] Trial Decision at para 1292 (emphasis in original).
[10] Trial Decision at para 874.
[11] Trial Decision at para 908. See also para. 924.
[12] Trial Decision at para. 1310.
[13] Trial Decision at para. 1310.
[14] Trial Decision at para 1467.

wording and circumstances, the mutual understanding of these parties at the time this Treaty was made and the interpretation that best reconciles their interests."[15]

17. The trial judge found significant differences between the factual circumstances and mutual intention of the parties in *Mikisew* and the present appeal:

- The wording of the treaty clauses in Treaty 3 and Treaty 8 differ. In particular, Treaty 8 contains no "protective process clause."[16]

- Unlike the case at bar, the Court in *Mikisew* did not consider whether the lands had been validly taken up because it was Canada, not the provincial government, taking up land.[17]

- The parties to Treaty 3 and Treaty 8 had different understandings as to the scope and implications of the respective treaties. The Aboriginal signatories to Treaty 8 "understood and accepted that after they signed it, there could be significant interferences with their harvesting rights and that their traditional harvesting rights would be increasingly displaced as 'taking up' increased."[18] This was not the common understanding of the parties to Treaty 3. Unlike in Treaty 8, on entering into Treaty 3 "the Commissioners promised the Ojibway that their Harvesting Rights would continue as in the past."[19]

18. Given these disparities, the trial judge declined to rely on *Mikisew* as authority for the argument that Ontario should be entitled to take up land in Treaty 3 so as to impair the treaty right.

19. The trial judge held that Ontario was also precluded from limiting the treaty harvesting right pursuant to the constitutional division of powers. According to the trial judge, the constitutionally-protected treaty harvesting rights were "at the core of the federal s. 91(24) jurisdiction/central to the Indianness of the Treaty 3 Ojibway and worthy of federal

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[15] Trial Decision at para 1468 (emphasis in original).
[16] Trial Decision at para 1472.
[17] Trial Decision at para 1472.
[18] Trial Decision at para 1472.
[19] Trial Decision at para 1477.

protection under the doctrine of inter-jurisdictional immunity."[20] As a result, Ontario could not significantly infringe the harvesting right.[21] Concomitantly, the trial judge, relying on *St. Catherine's Milling*,[22] concluded that in exercising its exclusive jurisdiction under section 91(24) Canada could affect Ontario's right to the beneficial interest in the land.[23]

(ii) The Court of Appeal decision

20. The Court of Appeal reversed the trial judge's decision and held that Ontario can exercise the take up clause in the Keewatin Lands so as to limit the Treaty 3 harvesting right.[24] Having answered the first question posed by the case management judge in the affirmative, the Court of Appeal concluded it was unnecessary to consider whether Ontario can justifiably infringe the Treaty 3 harvesting right pursuant to the constitutional division of powers.[25]

21. The Court of Appeal recognized that the trial judge's findings were based on a thorough review of the evidence, including numerous documents which detailed the 1873 negotiations for Treaty 3,[26] and that the resulting reasons were "lengthy, detailed and complex...."[27] The Court confirmed that the central finding of the trial judge was that Ontario does not have authority to limit treaty rights through the exercise of the take up clause where doing so would substantially interfere with the harvesting right unless that use was authorized by Canada.[28]

22. The Court of Appeal confirmed the trial judge's findings of fact, as based on the Aboriginal perspective and historical evidence, including that:

- the relationship with the Queen's Government at Ottawa was important to the Ojibway in the context of the treaty negotiations;[29]
- the wording of the harvesting clause in the treaty was deliberately drafted to include a protective role for Canada so that Canada could "police Ontario's

[20] Trial Decision at para 1553.
[21] Trial Decision at para 1564.
[22] *St. Catherine's Milling and Lumber Co. v The Queen* (1888), 14 AC 46 (PC) [*St. Catherine's Milling*].
[23] Trial Decision at para 1547.
[24] Appeal Decision at paras 140, 150, 174.
[25] Appeal Decision at para 234.
[26] Appeal Decision at para 72, 36.
[27] Appeal Decision at para 11.
[28] Appeal Decision at para76.
[29] Appeal Decision at para 73.

taking up of lands pursuant to s. 109 so as to preserve and protect the Ojibway harvesting rights pursuant to Canada's jurisdiction under 91(24);"[30] and

- on entering into Treaty 3, the Ojibway looked to Canada, their treaty partner, for assurance that the treaty promises would be fulfilled.[31]

23. Nonetheless, the Court of Appeal concluded that Treaty 3 was entered into between the Aboriginal signatories and the Crown at large, not the Crown in the right of Canada.[32]

24. The Court of Appeal summarized the trial judge's conclusion on the division of powers issues as follows:

> ....pursuant to the division of powers between Parliament and the legislatures under the *Constitution Act, 1867*, Ontario does not have the authority to justifiably infringe the rights of the plaintiffs to hunt and fish as provided for in Treaty 3.... The trial judge found that treaty harvesting rights are at the core of the federal s. 91(24) jurisdiction over "Indians, and Lands reserved for the Indians," and that it followed that a province, in the exercise of its s. 109 proprietary rights, cannot infringe those rights, even if the infringement can be justified under the legal test a government must satisfy to justify an interference with a right protected by s. 35: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075.[33]

25. Rather than determining the question of the province's constitutional authority, the Court of Appeal focused on the trial judge's finding that Treaty Commissioner Morris intended a two-step approval process for the provincial exercise of the take up clause in the Keewatin Lands.[34] In rejecting the trial judge's 'two-step' process, the Court of Appeal held that Canada's involvement in protecting the treaty harvesting right is not required when Ontario exercises the take up clause.[35]

26. In effect, the Court of Appeal concluded that Ontario's constitutional authority under sections 109, 92(5) and 92A trumps Canada's exclusive authority under section 91(24).

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[30] Appeal Decision at para 75.
[31] Appeal Decision at para 161.
[32] Appeal Decision at para 135.
[33] Appeal Decision at para 93.
[34] Appeal Decision at paras 157-72, 201.
[35] Appeal Decision at para 134.

27. The Court of Appeal relied on its own interpretation of the written text of the treaty document and on what it described as the doctrine of 'constitutional evolution' to conclude that, despite the parties' common intention at the time of treaty, Canada no longer has a role or responsibilities to the Ojibway when Ontario takes up lands under Treaty 3.[36]

28. The Court of Appeal held that the Constitution evolved from the *Royal Proclamation of 1763*, through the creation of Ontario in 1840, the *Constitution Act, 1867* and the extension of Ontario's boundaries in 1912 so as to eliminate Canada's role in honouring the promises made to the Ojibway when Treaty 3 was signed in 1873:

> Responsibility for respecting the Crown's promises falls to be determined by the allocation of powers under the constitution and the location of that responsibility evolves as the constitution evolves. The Crown, acting on the advice of the government of Ontario as the owner and administrator of the lands, is bound to keep the promise it made in the harvesting clause.... The interest assigned to Ontario by s. 109 as beneficial owner carries with it the burden of the harvesting clause imposed by the Treaty. In the exercise of its rights and powers as beneficial owner, Ontario is legally obliged to ensure that its actions on behalf of the Crown are consistent with the promises made by the Crown."[37]

29. Based on the above, the Court of Appeal concluded that "the trial judge erred by failing to apply the governing constitutional principles in her interpretation of the taking up clause."[38] As such, Canada no longer has a role to play in fulfilling the treaty promises because when Ontario "stepped into Canada's shoes by virtue of the process of constitutional evolution," Ontario took the place of Canada as the level of government with the capacity to take up lands in the Keewatin Lands.[39]

30. In contrast to the trial decision, the Court of Appeal applied this Court's decision in *Mikisew* to conclude that Ontario is entitled to take up lands in Treaty 3 up to the point of there being no meaningful ability left to exercise the treaty right.[40] Even in that event, Canada would still have no role in ensuring that the treaty promises are respected:

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[36] Appeal Decision at para 136-41,153.
[37] Appeal Decision at para 140 (emphasis added).
[38] Appeal Decision at para 141.
[39] Appeal Decision at para 150, 153.
[40] Appeal Decision at paras 206-11.

> It is important to distinguish between a provincial taking up that would leave no meaningful harvesting right in a First Nation's traditional territories from a taking up that would have a lesser impact than that. The former would infringe the First Nations' treaty rights, whereas the latter would not. Where it is claimed that a taking up will infringe a treaty right, *Mikisew* makes it clear that the remedy is to bring an action for treaty infringement: see para. 48. An action for infringement does not engage Canada in a supervisory role.[41]

31. The Court of Appeal further held that notwithstanding the federal government's jurisdiction over treaty rights pursuant to section 91(24) of the *Constitution Act, 1867*, Canada has no continuing role in respect of the take up clause because Canada's section 91(24) responsibilities to Aboriginal people do not allow it to intrude on the province's authority under sections 92(5), 92A and 109 of the Constitution.[42]

## PART II- ISSUES

32. The following issue arises on this appeal:

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

## PART III –ARGUMENT

33. The Court of Appeal's overriding error was its failure to recognize that before it could consider whether or not Ontario is entitled to exercise the take up clause, it first had to determine whether the application of Ontario's forestry legislation would potentially exceed the province's legislative jurisdiction. The treaty interpretation is secondary because, as Sopinka J. observed in *Badger,* a treaty cannot "alter the constitutionally entrenched division of powers."[43]

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[41] Appeal Decision at para 207.
[42] Appeal Decision at paras 204- 05.
[43] *R v Badger*, [1996] 1 SCR 771 [*Badger*] at para 5.

34. Regardless of the sequence of the questions at trial, the primary question is whether Ontario's forestry legislation is constitutionally applicable to the Treaty 3 harvesting right pursuant to the division of legislative authority under the *Constitution Act, 1867*.

(i) The Court of Appeal erred by relying on an unsupported theory of 'constitutional evolution'

35. The Court of Appeal's decision rests on the erroneous conclusion that through an amorphous process of 'constitutional evolution' Canada's exclusive jurisdiction under section 91(24) has been curtailed and Ontario has 'stepped into the shoes of Canada' to fulfil the solemn treaty promises made to the Ojibway in 1873.

36. Section 91(24) is not a vestige. Its continued scope and application is central to our constitutional democracy. The federal government's exclusive jurisdiction under section 91(24) is a manifestation of the constitutionalism principle which ensures "that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against assimilative pressures of the majority."[44] As the Court has confirmed, the protection of the rights of Aboriginal peoples reflects "an important underlying constitutional value."[45]

37. Section 91(24) is a shield, not a sword. One of the driving rationales for Parliament's constitutional responsibility for Aboriginal peoples was "concern for the protection of the Indians against local settlers."[46] By virtue of section 91(24), "the federal government was placed between First Nations and future settlers"[47] to ensure the protection of Aboriginal interests from encroaching local populations. As remote and undeveloped areas in Treaty 3 increasingly become the focus of development and resource extraction, the exercise and maintenance of Canada's exclusive jurisdiction and responsibility under section 91(24) becomes ever more important to ensure that treaty promises are not sacrificed in the name of local economic development and political expediency.

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[44] *Reference re Secession of Quebec,* [1998] 2 SCR 217 [*Reference re Secession of Quebec*] at para 74.
[45] *Reference re Secession of Quebec* at para 82.
[46] Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, loose-leaf ed. Scarborough, Ont.: Carswell, 1992 (updated 2002, release 1) at p.27-2 cited in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 (CanLII) at para 1008.
[47] Henderson James Y., *Treaty Rights in the Constitution of Canada* (Toronto: Carswell, 2007) at p. 466.

38. Aboriginal peoples have long understood, and courts have recognized, that the solemn promises made pursuant to the historical treaties were made by Canada on behalf of the Crown.[48] Canada's exclusive jurisdiction to ensure the protection and ongoing implementation of the treaty is necessary to maintain the integrity of the Crown and the Crown's fiduciary obligation to Aboriginal peoples.[49] The federal government's exclusive authority must be protected through the division of powers and the doctrine of interjurisdictional immunity in order to enable Parliament "to achieve the purpose for which exclusive legislative jurisdiction was conferred."[50]

39. The Court of Appeal's bald assertion that the Constitution has evolved to eliminate the federal government's role in ensuring treaty promises are fulfilled is unsupported by either law or evidence. In *Reference re Securities Act,* Canada relied on a similar argument in regards to "the securities market having evolved from a provincial matter to a national matter affecting the country as a whole...."[51] The Court rejected the argument, noting that the "propriety of such a constitutional realignment cannot simply be assumed."[52] Mere conjecture is insufficient to conclude that the division of powers under the Constitution has 'evolved'—evidentiary support is required.[53]

40. As a 'living tree,' the Constitution evolves, "but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all parties to be respected and reconciled."[54] The Court of Appeal's theory of constitutional evolution emasculates the federal government's responsibilities under section 91(24). It is antithetical to the constitutional principles established by this Court.

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[48] *Badger* at para 22; *The Queen v Sutherland et al.,* [1980] 2 SCR 451 [*Sutherland*] at p. 460; *Canada v Brokenhead First Nation*, 2011 FCA 148 (CanLII) (FCA) [*Brokenhead First Nation*] at para 3.

[49] See for example *Badger* at para 9 in respect of treaty interpretation: "The key interpretative principles which apply to treaties are first, that any ambiguity in the treaty will be resolved in favour of the Indians and, second, that treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward aboriginal peoples."

[50] *Canadian Western Bank v Alberta,* [2007] 2 SCR 3, 2007 SCC 22 [*Canadian Western Bank*] at para. 77; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536 [*COPA*] at para 35.

[51] *Reference re Securities Act*, [2011] 3 SCR 837 [*Reference re Securities Act*] at para 4.

[52] *Reference re Securities Act* at para 5.

[53] *Reference re Securities Act* at para 116.

[54] *Reference re Secession of Quebec* at para 76.

41. The Court of Appeal's theory of constitutional evolution exemplifies what Professor Brian Slattery labelled nearly 20 years ago as the "Imperial Model of the Constitution."[55] The Imperial Model systematically denies the perspective and role of Aboriginal peoples in Canada's constitutional landscape by portraying "governmental authority as stemming ultimately from a single source, the Crown."[56] Canadian courts' continued application of the Imperial Model results from an "attachment to the conception of the Constitution deeply rooted in Canada's colonial past" which provides "the tacit matrix for much legal thinking about the Constitution."[57] The Court of Appeal's decision is a stark reminder that the Imperial Model continues to inform decisions of Canadian courts where Aboriginal rights are at stake.

42. This appeal presents an opportunity for this Court to recognize and reaffirm that while the Constitution is a living tree, modern constitutional interpretation need not remain "grounded in imperial history." [58] Rather, it should grow and flourish through respect for the division of powers and the fulfilment of the solemn promises made to Aboriginal peoples pursuant to the historical treaties.

(ii) The Court of Appeal erred by disregarding the common intention of the parties to Treaty 3

43. The Court of Appeal's theory of 'constitutional evolution' disregards the Aboriginal perspective and the trial judge's uncontested findings of fact as to the common intention of the parties to Treaty 3.

44. The trial judge's conclusion as to the common intention of the parties to Treaty 3 was clear and uncontested by the Court of Appeal. Based on her extensive review of the historical evidence and consideration of the Aboriginal perspective, the trial judge found that the parties understood that Canada would protect the treaty harvesting right and that the Ojibway could rely on Canada to enforce and implement the treaty.[59] The Court of Appeal ignored the trial judge's conclusion not because there was an error in her findings, but because it understood the Constitution to have evolved in such a way as to make the treaty partners' common intention

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[55] Slattery, Brian, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996). *Osgoode Hall Law Journal*, Vol. 34, pp. 101-112 [Slattery] at p. 103.
[56] Slattery at p.106.
[57] Slattery at p. 103.
[58] Slattery at p.107.
[59] Trial Decision at para 1310.

irrelevant. The Court of Appeal's theory of constitutional evolution cannot override the common intention of the treaty partners.

45. The Court of Appeal also criticized the trial judge's conclusion on the common intention of the treaty partners as an example of "after-the-fact largesse" in favour of the Aboriginal parties.[60] Justice Binnie's caution in *Marshall* is not applicable.[61] The trial judge's findings of fact did not expand the treaty right beyond what was reasonably contemplated at the time of treaty, as was the issue in *Marshall*. Nor did the trial judge engage in an act of generosity by interpreting the treaty in favour of the Aboriginal parties. She made a finding of fact as to the parties' common intention to limit access to the take up clause to Canada.

46. The Court of Appeal's disregard of the parties' common intention at Treaty 3 is inconsistent with the trial judge's findings with respect to Canada and the Aboriginal signatories' understanding of the treaty. It negates Canada's ongoing responsibility for administering the treaty pursuant to section 91(24) in favour of an unsupported theory that the Constitution has evolved such that there is no remaining federal role in respect of the treaty promises.

(iii) The Court of Appeal erred in concluding that Canada is no longer responsible for fulfilling treaty promises

47. The Court of Appeal's conclusion that Canada has no role to play when provincial laws impair the exercise of a treaty right is contrary to the law and the Aboriginal perspective.

48. The question of Canada's responsibility for administering the historical treaties was addressed by the English Court of Appeal in *Secretary of State*.[62] The Court held that the federal government had acquired jurisdiction to administer the treaties with Aboriginal peoples.[63] The English Court's decision has subsequently been relied on in Canada in support of the principle

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[60] Appeal Decision at para 151.
[61] *R. v Marshall*, [1999] 3 SCR 456 at para 14; Appeal Decision at para 151.
[62] *R. v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others*, [1982] 2 All ER 118 [*Secretary of State*].
[63] *Secretary of State* at p. 433.

that since 1867, the Crown in right of Canada is responsible for the administration of the treaties.[64]

49. The Court of Appeal misapplied *Secretary of State*. The decision does not support the conclusion that the provinces can step into Canada's shoes in fulfilling treaty promises.[65] It stands for the opposite. The English Court repeatedly affirmed Canada's central and ongoing role in the administration of the treaties.[66] In respect of Canada's obligation to uphold its promises under the treaties, the English Court held that the promise to respect and protect treaty rights had passed from the Crown in respect of the United Kingdom to the Crown in respect of Canada, not the provinces:

> There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada. But, in case there should be, the discussion in this case will strengthen their hand so as to enable them to withstand any onslaught. They will be able to say that their rights and freedoms have been guaranteed to them by the Crown—originally by the Crown in respect of the United Kingdom—now by the Crown in respect of Canada—but, in any case, by the Crown. No Parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada "so long as the sun rises and the river flows." That promise must never be broken.[67]

50. *Secretary of State* affirms rather than denies Canada's constitutional and treaty obligation to fulfil the promises made to the Aboriginal parties of the treaties.

51. The Court of Appeal's conclusion that the province has "stepped into the shoes of Canada" in the treaty relationship with First Nations contradicts this Court's identification of the federal government as the entity responsible for the ongoing fulfilment of the treaty promises.[68] In *Sundown* this Court found that the 11 numbered treaties were "concluded between the federal government and various First Nations."[69] In *Horseman,* Justice Wilson in dissent, but not on this issue, described Canada's role in fulfilling the treaty promises and the Aboriginal understanding of Canada's obligations, stating that:

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[64] *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, [2000] 4 CNLR 1 (BCSC) at para. 82.
[65] Appeal Decision at para 138.
[66] See for example p. 449.
[67] *Secretary of State* at p.434 (emphasis added).
[68] *Badger* at para 22; *Sutherland* at p. 460; *Brokenhead First Nation* at para 3.
[69] *R v Sundown*, [1999] 1 SCR 393 [*Sundown*] at para 5.

> ...it seems to me to be of particular significance that the Treaty 8 Commissioners, historians who have studied Treaty No. 8, and Treaty 8 Indians of several different generations unanimously affirm that the government of Canada's promise that hunting, fishing and trapping rights would be protected forever was the sine qua non for obtaining the Indians' agreement to enter into Treaty No. 8. Hunting, fishing and trapping lay at the centre of their way of life. Provided that the source of their livelihood was protected, the Indians were prepared to allow the government of Canada to "have title" to the land in the Treaty 8 area.[70]

52. Canada's ongoing role in ensuring the honourable implementation of the historical treaties is a longstanding tenet of Aboriginal peoples' understanding of the treaty relationship. Since the treaties were first negotiated, Aboriginal peoples have understood that their treaty partner was either the Queen or the Crown in right of Canada, and that they could look to the federal government to fulfil the Crown's obligations under the treaties. This relationship was recognized by the Royal Commission on Aboriginal Peoples:

> In Canada, Parliament has the primary legislative authority and the federal government executive responsibility for fulfilling the treaties, but many treaty issues involve matters within provincial jurisdiction and ownership, particularly lands and natural resources.[71]

53. The Aboriginal perspective on Canada's role in the historical treaties was acknowledged in the Ipperwash Inquiry where the Honourable Sidney B. Linden stated:

> I am aware that some First Nations and political organizations in Ontario, probably most, have concerns about the propriety of any provincial legislation with respect to First Nation policing. They believe that their treaty relationship is with the federal Crown and that federal legislation is more appropriate. These are legitimate considerations.[72]

54. The Court of Appeal's decision is at odds with history and jurisprudence.

(vi) The Court of Appeal erred through its misapplication of *Mikisew*

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[70] *R v Horseman*, [1990] 1 SCR 901] [*Horseman*] at p. 911-12 (emphasis added).
[71] Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples,* Vol. 2 "Restructuring the Relationship" (Ottawa: Minister of Supply and Services Canada, 1996).
[72] *Report on the Ipperwash Inquiry*, Vol. 2 (Ontario: Ministry of the Attorney General, 2007) at 262, cited in *Pitawanakwat v Wikwemikong Tribal Police Service*, 2010 FC 917 (CanLII) at para 43.

55. The Court of Appeal misapplied *Mikisew* to conclude there is no role for the federal government when a provincial law impairs or infringes a treaty right.[73]

56. According to the Court of Appeal, *Mikisew* stands for the proposition that a take up clause in a numbered treaty, including Treaty 3, represents an inherent limit on the exercise of the harvesting right. The inherent limit means that not every effect on a treaty right equals a *prima facie* infringement of the right requiring justification under the *Sparrow/Badger* analysis. In the absence of a *prima facie* infringement, the division of powers analysis is never triggered and the province is at liberty to unilaterally exercise the take up clause.[74]

57. The Court of Appeal misunderstood *Mikisew*. First and most importantly, unlike the case at bar, *Mikisew* was not a division of powers case. *Mikisew* involved a federal government decision about the use of federal lands. The province's jurisdiction to affect treaty rights by exercising the take up clause was not at issue. *Mikisew* is of no assistance in deciding the question of whether Ontario can rely on the take up clause to impair the exercise of the harvesting right.

58. Second, the Court of Appeal disregarded the fact that there are significant differences between the treaty at issue in the present case and the treaty in *Mikisew*. The trial judge in this case confirmed that Treaty 3 and Treaty 8 are worded differently, were entered into for different purposes, and that the common intention of the parties to those treaties diverged significantly.[75] *Mikisew* cannot be relied on in respect of Ontario's right to take up land pursuant to Treaty 3.

59. Third, the Court in *Mikisew* did not conclude that in a take up clause situation there will be no *prima facie* infringement up until the point of there being no meaningful right to hunt. What the Court said was that not <u>every</u> effect on a treaty right equals a *prima facie* infringement.[76] The Court did not elaborate on what the standard is for a *prima facie* infringement in a take up clause situation because it decided the matter on the preliminary issue of whether the federal government had met its duty to consult obligations.[77] Since it had not, the

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[73] Appeal Decision at paras 211-12.
[74] Appeal Decision at paras 206-07.
[75] Trial Decision at para. 1472.
[76] *Mikisew* at para 32.
[77] *Mikisew* at para 59.

Court did not consider further the issue of whether the decision represented a *prima facie* infringement of the treaty right.[78]

60. As for the Court's reference in *Mikisew* to a situation where there would be no meaningful treaty right, the Court did not intend that to be the new standard for a *prima facie* infringement in a take up clause situation. The taking up of land to the point that there is no meaningful right is virtually equivalent to the extinguishment of the right. To accept the Court of Appeal's reasoning would be to accept that in *Mikisew* this Court intended to change the standard for triggering the *Sparrow/Badger* analysis from *prima facie* infringement to *prima facie* extinguishment—this was not and could not have been the Court's intention. The more plausible explanation is that the Court in *Mikisew* was giving an example of an effect on a treaty right that would obviously require justification or more.[79] It is analogous to giving directions by telling someone if they drive off the cliff they have gone too far—such a direction tells the driver nothing about where to turn.

61. The Court of Appeal's misapplication of *Mikisew* is understandable. The confusion stems from the discussion of the *prima facie* infringement standard in *Morris*.[80] Subsequently, lower courts have assumed that the standard for triggering the federal government's exclusive section 91(24) jurisdiction over treaty rights is a *prima facie* infringement. Since a take up clause in a treaty may alter the *prima facie* infringement threshold, the Court of Appeal assumed this means that it also alters the threshold for triggering the federal government's exclusive jurisdiction over treaty rights.

62. This line of reasoning leads to error. It fails to differentiate and keep separate the division of powers analysis for section 91(24) from the *Sparrow/Badger* analysis for section 35. The question of whether a decision results in a *prima facie* infringement arises in the context of a decision-maker acting pursuant to his or her valid constitutional authority. By contrast, the question of whether a decision results in an unacceptable intrusion on another level of government's exclusive legislative authority addresses the preliminary, upstream question of

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[78] *Mikisew* at paras 65-8.
[79] *Mikisew* at para 48.
[80] *R v Morris,* (2006) SCC 59, [2006] 2 SCR 915 [*Morris*].

whether the decision falls within the decision-maker's constitutional sphere in the first place. These are distinct issues requiring separate analyses and determinations.

63. The Court of Appeal misunderstood and misapplied *Mikisew*. The trial judge's application of *Mikisew* was correct.

(v) The Court of Appeal erred by assuming consultation and justification can occur without determining constitutional legislative authority

64. The Court of Appeal's decision rests on the mistaken assumption that consultation and justification can occur without determining whether the province is acting within its constitutional legislative authority. Regardless of where the threshold for a *prima facie* infringement lies, there can be no consultation and no justifiable infringement if the Crown decision-maker is not acting within the scope of his or her constitutionally-mandated authority.[81] The necessity of first determining whether Ontario's forestry legislation is constitutionally applicable flows from the constitutionalism principle—all government action must comply with the Constitution.[82] The provincial law must first be found to be applicable based on the division of powers. This principle is not altered by a treaty take up clause or an inherent limit on exercising a treaty right.

65. The Court of Appeal found that where Ontario takes up land in Treaty 3, there is no need for federal involvement pursuant to section 91(24) because the province is required to carry out the Crown's responsibilities under section 35 of the *Constitution Act, 1982*.[83] This conclusion is incorrect. Section 35 obligations cannot displace the basic division of powers in section 91 and 92 of the *Constitution Act, 1867* "which is the primary textual expression of the principle of federalism in our Constitution, agreed upon at Confederation."[84]

66. The question of whether a law violates a treaty right has "no bearing on the division of powers analysis."[85] A law can only infringe a treaty right if it is enacted and applied pursuant to constitutionally valid authority. The B.C. Court of Appeal in *Alphonse* distinguished a review of

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[81] *Morris* at para 55.
[82] *Reference re Secession of Quebec* at para 72.
[83] Appeal Decision at para 211-12.
[84] *Reference re Secession of Quebec* at para 47.
[85] *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783 at para 56.

legislation on the basis of the division of powers versus a review on the basis of an alleged infringement of section 35 rights as follows:

> Any infringement of aboriginal rights must withstand scrutiny under s.35 of the *Constitution Act, 1982.* If incorporated legislation unjustifiably interferes with aboriginal rights, it will have no force or effect by reason of s.52 of the *Constitution Act, 1982.* However, that analysis stands as a separate and subsequent review, which is properly done after division of powers issues have been resolved.[86]

67. This principle was reiterated and confirmed by this Court in *Morris*:

> The purpose of the *Sparrow/Badger* analysis is to determine whether an infringement by a government acting within its constitutionally mandated powers can be justified. This justification analysis does not alter the division of powers, which is dealt with in s. 88.[87]

68. The same principle applies equally to the *Haida/Taku* analysis. The Crown's consultation and accommodation obligations under section 35 have no effect on the division of powers.

69. Where a Crown decision has the potential to affect Aboriginal or treaty rights, the decision-maker must first determine if he or she is acting pursuant to valid constitutional authority.[88] A similar approach is required in respect of courts' review of *Charter* claims, wherein the first question to be answered is whether the law is within the jurisdiction of the enacting body, and the second is whether it is consistent with the *Charter.*[89] The same principle applies in respect of the question of whether the provincial legislation will impair federal jurisdiction pursuant to section 91(24).

70. The underlying division of powers issues have not been resolved in this case. The Court of Appeal failed to appreciate the necessity of first determining the constitutional validity of the impugned legislation. If adopted, the Court of Appeal's approach leads to the illogical conclusion that a provincial government can consult and accommodate for an effect on a treaty right (or justifiably infringe a treaty right) due to constitutionally inapplicable legislation.

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[86] *R v Alphonse* (1993), 80 BCLR (2d) 17 (CA) at para 51 (emphasis added).
[87] *Morris* at para 55.
[88] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 10 at para 48.
[89] Hogg, Peter W. *Constitutional Law of Canada* (4th ed.) (Thompson Carswell: Scarborough, 1997)(looseleaf), pp. 15-2- 15-5.

(vi) The Court of Appeal erred by assuming provincial property interests trump the division of powers

71. Contrary to the Court of Appeal's reasons, it is settled law that a province's property interests under the Constitution do not trump the division of powers.

72. The limits imposed by the *Constitution Act, 1867* on the exercise of a province's proprietary interests apply regardless of whether the province exercises its powers pursuant to section 92(13) or some other head of provincial power.[90]

73. The Court of Appeal's elimination of Canada's role pursuant to section 91(24) privileges Ontario's interest in property over federal jurisdiction to ensure the protection of treaty rights. The Court of Appeal's decision rests on the very mischief section 91(24) is intended to address—the prospect of local populations undertaking development and other activities without regard for treaty rights and in the absence of federal protection of treaty rights.

74. Ontario's right to the beneficial use of property pursuant to the *Constitution Act, 1867* is not, as the Court of Appeal suggested, equivalent to a right to unilateral provincial legislative jurisdiction over Treaty 3 lands. As recognized in *St. Catherine's Milling,* the *Constitution Act, 1867* provides for a provincial right to the beneficial use of Crown lands, not the beneficial interest itself:

> In construing these enactments, it must always be kept in view that, whenever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its Legislature, the land itself being vested in the Crown.[91]

75. Ontario's right to the beneficial use of property and lands in Treaty 3 does not eliminate Canada's continued exclusive legislative jurisdiction pursuant to section 91(24). The province's property right continues to be subject to the federal government's exclusive legislative authority based on the division of powers.

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[90] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 SCR 86 [*Lafarge*] at para 41.
[91] *St. Catherine's Milling* at p. 56.

76. In the *Fisheries Case* the Judicial Committee of the Privy Council confirmed the practical effect of Canada's exclusive jurisdiction under section 91, including section 91(24)—it is legally permissible for Canada to exercise its exclusive authority in such a way so as to restrict the provincial proprietary interest.[92] The principle from the *Fisheries Case* was confirmed in *Reference re Waters and Water-Powers*[93] and adopted in *Sparrow* in the context of Aboriginal rights.[94]

77. The Court of Appeal relied, erroneously, on this Court's statement in *Reference re Securities Act* that "a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence"[95] as a basis for dismissing the trial judge's finding that federal jurisdiction over treaty rights includes an ongoing role for Canada in relation to the province's exercise of the take up clause.[96] *Reference re Securities Act* does not support the Court of Appeal's decision—it supports the arguments of the Appellant.

78. The concerns that gave rise to the caution against federal "evisceration" of provincial jurisdiction in *Reference re Securities Act* are not applicable here. The consequence of preserving the federal government's exclusive jurisdiction pursuant to section 91(24) is not equivalent to the "wholesale takeover" of provincial competence by the federal government that was at issue in *Reference re Securities Act.*[97] The Aboriginal parties in the present appeal seek confirmation that the federal government must continue to enforce and implement the treaty. They do not propose that the federal government implement a scheme that would prevent the province from legislating within its constitutional sphere.

79. *Reference re Securities Act* supports Wabauskang's submission that the Court of Appeal disregarded Canada's exclusive authority under section 91(24) and consequently eviscerated Canada's responsibility for ensuring treaty rights are respected:

> It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively

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[92] *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia*, [1898] A.C. 700 (P.C.) [the *Fisheries Case*] at p. 712-13.
[93] *Reference re: Waters and Water-Powers*, [1929] SCR 200 at p. 212.
[94] *R v Sparrow* (1990), 70 D.L.R. (4th) 385 (SCC) at p. 1097-98.
[95] *Reference Re Securities Act* at para 71.
[96] Appeal Decision at paras 204-05.
[97] *Reference re Securities Act* at para 128.

> eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres.[98]

80. Finally, *Reference re Securities Act* went to a very different issue than the primary issue in the present appeal. The ultimate question in that case was whether the proposed federal legislation was valid under the pith and substance analysis. There is no dispute in the case at bar that the *Crown Forests Sustainability Act* is valid legislation. The question is whether in its application it intrudes on the federal government's exclusive jurisdiction under section 91(24). Properly construed, *Reference re Securities Act* reflects the Court's reluctance to privilege the federal paramountcy doctrine. It neither affects nor questions the Court's recent decisions supporting the continuing relevance of interjurisdictional immunity.

81. Contrary to the Court of Appeal's decision, a province's property interests under the Constitution do not trump the division of powers.

(vii) The Court of Appeal erred by ignoring the principles of cooperative federalism

82. The Court of Appeal's decision is the antithesis of cooperative federalism.

83. The Court of Appeal's conclusion that for Canada to retain an ongoing role in respect of the regulation of the treaty would "render illusory provincial jurisdiction over the disposition and management of public lands and forests under ss. 109, 92(5) and 92A"[99] heralds a return to Lord Atkins' "water-tight compartments" approach in relation to the division of powers.[100]

84. Lord Atkins' exclusive powers approach to federalism has given way to modern federalism characterized by flexibility, cooperation and accommodation of overlapping legislative jurisdictions.[101] This Court in *Reference re Securities Act* called for an approach

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[98] *Reference re Securities Act* at para 7 (emphasis added).
[99] Appeal Decision at para. 205.
[100] *Attorney-General for Canada v Attorney-General for Ontario*, [1937] AC 326 at 354; Appeal Decision at para 205.
[101] *Reference re Securities Act* at paras 56-7.

which emphasizes "cooperative solutions that meet the needs of the country as a whole as well as its constituent parts:"[102]

> Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government has for each other's own sphere of jurisdiction. Cooperation is the animating force. The federalism principle upon which Canada's constitutional framework rests demands nothing less.[103]

85. Cooperative federalism requires a balance between federal and provincial jurisdiction which "allows the federal Parliament and the provincial legislatures to act effectively in their respective spheres."[104] Federal and provincial governments should exercise their legislative powers in a spirit of collaboration and coordination while respecting and maintaining exclusive areas of legislative authority pursuant to the division of powers.

86. The dominant tide of cooperative federalism was never intended, and should not be allowed, to submerge either federal or provincial exclusive core competencies. While "flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers."[105] The "'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state."[106]

87. The Court has warned of the effect of ignoring, as the Court of Appeal did, the division of powers: one level of government "could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally."[107]

88. In this case, the effect of the trial decision was not, as suggested by the Court of Appeal, to paralyze Ontario's legislative authority under section 92. The trial decision left open the door for Canada and Ontario to exercise their respective constitutional powers over treaty rights and

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[102] *Reference re Securities Act* at para 132.
[103] *Reference re Securities Act* at para 133.
[104] *Reference re Securities Act* at para 7.
[105] *Reference re Securities Act* at para. 61.
[106] *Reference re Securities Act* at para. 62.
[107] *Reference re Secession of Quebec* at para 74.

forestry "harmoniously, in the spirit of cooperative federalism"[108] provided that there is sufficient political will, intergovernmental cooperation, and legislative and regulatory drafting to "embrace the principles of flexible, cooperative federalism."[109]

89. The Court of Appeal's conclusion that the federal government has no role to play pursuant to section 91(24) in fulfilling treaty promises privileges provincial property interests over Canada's exclusive constitutional jurisdiction and defeats the principles and values of cooperative federalism.

(viii) The Court of Appeal erred by failing to consider the modern doctrine of interjurisdictional immunity

90. Ontario cannot step into section 91(24).

91. The division of powers cannot be avoided through reinterpretation of the take up clause or the process of 'constitutional evolution.' Regardless of the wording or order of the questions posed by Spies J., it was incumbent on the Court of Appeal to consider the doctrine of interjurisdictional immunity and the issue of whether Ontario's forestry legislation was constitutionally applicable in the circumstances.

92. Federalism is a core constitutional principle.[110] It is through the division of powers that the federalism principle is realized. The federalism principle is the courts' lodestar.[111] It remains a "central organizational theme" of the Constitution.[112] Constitutional principles, including federalism "are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and government."[113]

93. Interjurisdictional immunity is one of the primary doctrines which ensures the continued operation of the division of powers and the federalism principle. As much as some may wish it otherwise, interjurisdictional immunity is here to stay. It is indispensable to preserving the

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[108] *Reference re Securities Act* at para. 9.
[109] Wilkins, Kerry, Dancing in the Dark: Of Provinces and Section 35 Rights After 2010 (2011). Supreme Court Law Review, Vol. 54, pp. 529-562 [Wilkins] at p. 556.
[110] *Reference re Secession of Quebec* at para 55.
[111] *Reference re Secession of Quebec* at para 56.
[112] *Reference re Secession* of *Quebec* at para 57.
[113] *Reference re Secession of Quebec* at para 54.

intention of the framers of the Constitution that as between the federal government and the provinces, certain legislative powers are exclusive.[114] The continuing application of the doctrine of interjurisdictional immunity "is supported both textually and by the principles of federalism."[115]

94. While the Court is reluctant to broaden the application of the doctrine, it has confirmed that "the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal 'activities'" and that "the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances."[116] The Court recently confirmed that "while the doctrine of interjurisdictional immunity has been narrowed, it has not been abolished."[117] The "recognition of previously established exclusive cores of power" remains important to the proper functioning of the division of powers.[118]

95. The Court in *Lafarge* reiterated its support for interjurisdictional immunity and confirmed that "there are circumstances in which the powers of one level of government must be protected against intrusions, even incidental ones, by the other level."[119] Bastarache J. in *Lafarge* considered and rejected calls for the elimination of interjurisdictional immunity and concluded that there is both a "doctrinal and a practical need to conserve the doctrine of interjurisdictional immunity as an essential legal test...."[120]

96. Justice Bastarache's analysis is a pointed rebuke to the oft stated criticism that interjurisdictional immunity is a blunt instrument. To the contrary, as Bastarache J. explained, without it the courts would be unable to retain a law's application to matters within a province's jurisdiction by reading it down to not apply to federal matters. Instead, the law would be susceptible to being struck down altogether through the pith and substance analysis. Further, without interjurisdictional immunity there would be no means by which to prevent the

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[114] *Canadian Western Bank* at para 32.
[115] *Canadian Western Bank* at para 33.
[116] *Canadian Western Bank* at paras 42, 47.
[117] *Canada (Attorney General) v. PHS Community Services Society,* 2011 SCC 44, [2011] 3 SCR 134 [*PHS Community Services Society*] at para 65.
[118] *PHS Community Services Society* at para. 65.
[119] *Lafarge* at para 41, citing *Canadian Western Bank* at para 32.
[120] *Lafarge* at para 101.

application of an otherwise valid provincial law to a federal matter when there is no competing federal law.[121]

97. As for interjurisdictional immunity supposedly being out of step with the dominant tide of cooperative federalism, as Deschamps J. recently explained in *Lacombe*, the Court has already accounted for this tension by limiting the operation of interjurisdictional immunity through discouraging new applications and introducing the impairment standard.[122]

98. In *COPA* the Court again confirmed the continuing importance and applicability of the doctrine of interjurisdictional immunity:

> Among the reasons for rejecting a challenge to the existence of the doctrine is that the text of the *Constitution Act, 1867*, itself refers to exclusivity: *Canadian Western Bank*, at para. 34. The doctrine of interjurisdictional immunity has been criticized, but has not been removed from the federalism analysis. The more appropriate response is the one articulated in *Canadian Western Bank* and *Lafarge Canada*: the doctrine remains part of Canadian law but in a form constrained by principle and precedent. In this way, it balances the need for intergovernmental flexibility with the need for predictable results in areas of core federal authority.[123]

99. Given the Court's decision in *COPA,* the frequent criticism that interjurisdictional immunity creates legal vacuums has also lost its power to persuade. In *COPA* the Court evidenced no concern with the legal vacuum created by reading down the provincial law. Instead, the Court concluded that the provincial law could not apply because in the absence of interjurisdictional immunity the federal government would be forced to regulate to protect its own legislative powers.[124]

100. The doctrine of interjurisdictional immunity is a fixture of Canadian constitutional law. While its fortunes have waxed and waned since its seeds were planted over a hundred years ago by the JCPC in *Bonsecours*, it has proven resilient and indispensable.[125] Interjurisdictional immunity is the fundamental tool under the division of powers to ensure the preservation of those core areas of constitutional authority which have been recognized as exclusive between the

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[121] *Lafarge* at para. 103
[122] *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 SCR 453 at para 107.
[123] *COPA* at para 58.
[124] Wilkins at p. 543; *COPA* at paras 53, 60.
[125] *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367.

federal government and the provinces. The Court of Appeal erred by failing to consider the application of the doctrine of interjurisdictional immunity.

(ix) The issue in the case at bar can be answered through the straightforward application of the doctrine of interjurisdictional immunity

101. The Court of Appeal erred through its failure to recognize that the division of powers was the unavoidable, primary issue on appeal and that this Court's recent decisions are determinative.

102. The issue of the province's ability to intrude on treaty rights protected under section 91(24) was considered and unambiguously answered in *Morris.* While the dissenting justices disagreed with the majority as to whether appellants had been exercising a treaty right, the Court was unanimous on the question of the province's inability to affect treaty rights beyond the *prima facie* infringement standard.

103. Similarly, the continuing relevance of the doctrine of interjurisdictional immunity was considered and answered in *Canadian Western Bank* and *Lafarge* in 2007 and confirmed again in 2010 in *COPA*. As recently as 2013 in *Marine Services,* this Court reaffirmed that interjurisdictional immunity will apply where provincial legislation impairs the exercise of the core of federal power.[126]

104. Where an issue has been recently addressed by this Court, the decision should be accepted as resolving that issue in respect of subsequent decisions.[127]

105. As the Court has explained, the interjurisdictional immunity analysis begins with determination of the pith and substance of the impugned legislation in question.[128] If the legislation is valid, the next step is to analyze whether the provincial law trenches on a core area

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[126] *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at para 64.
[127] See for example *Badger* at para 46, where the Court emphasized that the issue of the effect of the NRTA upon treaty rights had been decided six years earlier in *Horseman* and that *Horseman* "was a recent decision which should be accepted as resolving the issues which it considered."
[128] *Canadian Western Bank* at para 25.

of federal competence.[129] Where provincial legislation results in an unacceptable interference on the exercise of the core federal competency, interjurisdictional immunity will apply.[130]

106. In *Morris* and *Canadian Western Bank*, the Court confirmed the continuing relevance and importance of interjurisdictional immunity specifically in regards to section 91(24). In the context of section 91(24), interjurisdictional immunity will be triggered where provincial legislation purports to "regulate indirectly matters within exclusive federal competence, that is, to alter rights and obligations."[131] Where a provincial law impairs the "basic, minimum and unassailable content" of the federal power over "Indians" in section 91(24), it will be rendered inapplicable to the extent of the impairment.[132]

107. In the case at bar there is no disagreement that Ontario's forestry legislation falls within its constitutional legislative jurisdiction and as such is valid provincial law. The issue is whether, and to what extent, the provincial legislation interferes with the federal government's exclusive legislative authority under section 91(24).

108. The question of whether the treaty harvesting right is part of the core of exclusive federal jurisdiction pursuant to section 91(24) is settled law.[133] The Court has repeatedly recognized the fundamental responsibility of the federal government for the implementation of the rights of Aboriginal peoples.[134] Authority to regulate treaty rights falls squarely within the core of exclusive federal jurisdiction established by the division of powers and confirmed by this Court. This principle was articulated fifty years ago by Dave J.A. in *White and Bob* based on Lord Watson's decision in *St. Catherine's Milling*:

> Legislation that abrogates or abridges the hunting rights reserved to Indians under the treaties and agreements by which they sold their ancient territories to the Crown and to the Hudson's Bay Company for white settlement is, in my respectful opinion, legislation in relation to Indians because it deals with rights peculiar to them. Lord Watson's judgment in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 58 L.J.P.C. 54, if any authority is needed, makes that clear. At p. 60 he observed that

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[129] *COPA* at para 27.
[130] *COPA* at para 63.
[131] *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585 at para 19.
[132] *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 (CanLII), [2010] 2 SCR 696 at paras 70-1.
[133] *Canadian Western Bank* at para. 61; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para 178.
[134] See for example *Canadian Western Bank* at para 61.

> the plain policy of the B.N.A. Act is to vest legislative control over Indian affairs generally in one central authority. On the same page he spoke of Parliament's exclusive power to regulate the Indians' privilege of hunting and fishing. In my opinion, their peculiar rights of hunting and fishing over their ancient hunting grounds arising under agreements by which they collectively sold their ancient lands are Indian affairs over which Parliament has exclusive legislative authority, and only Parliament can derogate from those rights.[135]

109. Similarly, this Court held in *Simon* that it is "within the exclusive power of Parliament under s. 91(24) of the *Constitution Act, 1867*, to derogate from rights recognized in a treaty agreement made with the Indians."[136] Since at least 1982, it has been established law in Ontario that a provincial law that impairs the exercise of a treaty right is constitutionally inapplicable due to the operation of the division of powers and section 88 of the *Indian Act*.[137] Where there is a conflict between provincial legislation and treaty rights, the terms of the treaty will prevail.[138]

110. The trial judge correctly concluded that provincial legislation cannot impair the federal government's exclusive jurisdiction pursuant to section 91(24):

> In Keewatin, Ontario does not have the right to limit Treaty Rights by "taking up lands under the Treaty." It can issue land authorizations under s. 109 apart from the Treaty, but only in compliance with s. 109, i.e., only so long as the authorizations do not have the effect of substantially interfering with Treaty Harvesting Rights. To authorize uses that significantly interfere with Treaty Harvesting Rights under the Treaty, Ontario, or users of land already authorized by Ontario to use the land, must also obtain the authorization of Canada.[139]

111. The Court of Appeal's focus on the trial judge's conclusion that the treaty required a two-step approval process such that Canada's approval would be required before Ontario could take up lands was misplaced.[140] Regardless of the correctness of the two-step process, the trial judge arrived at the correct ultimate conclusion—Ontario cannot unilaterally take up lands to impair the Treaty 3 harvesting right.

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[135] *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613; 52 W.W.R. 193 (B.C.C.A.) at p.6.
[136] *Simon v. The Queen*, [1985] 2 S.C.R. 387 [*Simon*] at p. 411.
[137] *R. v. Taylor and Williams*, (1982), 34 O.R. (2d) 360 (leave to SCC refused).
[138] *Simon* at p. 413. See also *Sundown* at para 47.
[139] Trial Decision at para 1452 (emphasis in original).
[140] Appeal Decision at para 153.

112. By repeatedly questioning the trial judge's two-step process and focusing on the process of 'constitutional evolution,' the Court of Appeal committed a critical error—it overlooked the fundamental question of Ontario's constitutional authority to impair the federal government's section 91(24) jurisdiction.

(x) The primary question for trial is whether the provincial legislation impairs the exercise of the treaty right

113. If the Court of Appeal had considered and applied *Morris*, *Canadian Western Bank*, *Lafarge*, *COPA* and *Marine Services* it would have been led to the inevitable conclusion that the primary outstanding issue for trial is whether, in these particular circumstances, the application of the provincial forestry legislation impairs the exercise of the Treaty 3 harvesting right such that the doctrine of interjurisdictional immunity is engaged.

114. Ultimately, the effect of the provincial legislation on the Treaty 3 harvesting right can only be determined on the basis of an evidentiary record at trial. Wabauskang submits that it is for this Court to clarify that the first and primary question to be determined at the second phase of trial is whether or not the provincial forestry legislation impairs the exercise of the treaty so as to invoke the doctrine of interjurisdictional immunity.

115. The secondary question is whether the effect equals a *prima facie* infringement of the treaty right so as to trigger the *Sparrow/Badger* analysis. In practice, it may be that the standards to be applied are similar, if not identical, but this does not obviate the necessity to maintain the separation between the two analyses—the *Sparrow/Badger* analysis cannot displace or substitute for the required section 91(24) division of powers analysis. The division of powers question must be determined before a decision is made as to whether provincial legislation results in *prima facie* infringement.

116. The division of powers analysis must necessarily be determined in priority of the infringement analysis in order to establish whether the provincial forestry legislation was enacted pursuant to valid constitutional authority. This authority—or lack thereof—is the foundation for any subsequent infringement analysis. The distinction between the impairment and infringement enquiries is essential for the protection of the harvesting right and for the preservation of the

federal Crown's exclusive responsibility to regulate treaty rights pursuant to the division of powers.

(xi) Workable solutions exist

117. Contrary to the Court of Appeal's reasons, workable solutions exist that would respect the division of powers and the common intention of the parties at Treaty 3 while allowing Ontario to administer and benefit from Crown lands. One such option is for the provincial and federal governments to develop a cooperative regulatory scheme for the use of land in Treaty 3. Long established examples of similar cooperative schemes exist.

118. Since 1898, the federal and provincial governments have worked together to respect the division of powers in the fisheries context to develop and implement a workable regulatory scheme.[141] The regulatory scheme has been recognized as a constitutionally-valid example of cooperative federalism.[142] A similar arrangement exists in respect of provincial enforcement of the provisions of federal legislation regarding migratory birds.[143] In both cases, the federal and provincial governments can legislate pursuant to valid constitutional authority provided that one does not unacceptably interfere with the other. The same opportunity exists here to develop a cooperative scheme which allows the provincial and federal governments to legislate within their own respective constitutional spheres.

119. Similarly, there are processes available in the event that the parties to Treaty 3 conclude that our modern political reality calls for Ontario's involvement in the take up of Treaty 3 lands. These include, but are not limited to, the renegotiation or amendment of Treaty 3 by mutual agreement of the original treaty partners and Ontario. Whatever process is pursued, it must be

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[141] Following the decision in the *Fisheries Case*, Parliament enacted fisheries legislation, now the *Fisheries Act* as amended from time to time, and included provisions that enabled the Governor in Council to make fishery regulations in relation to each province. See section 43(1) of the *Fisheries Act*, R.S.C., 1985, c. F-14. These regulations sub-delegate to provincial Ministers the administration of the regulations. For instance, in Ontario the relevant legislation is the *Ontario Fishery Regulations, 2007*, SOR/2007-237. The *Ontario Fishery Regulations* are administered by the Ministry of Natural Resources under the *Fish and Wildlife Conservation Act, 1997*, SO 1997, c. 41, and its regulations. The validity of this sub-delegation was upheld by both the Ontario Court of Appeal and the Supreme Court of Canada in *Re Peralta et al. and The Queen in right of Ontario et al., Peralta et al. v. Warner et al.*, (1985) 49 O.R. (2d) 705, 1985 CanLII 2082 (ON CA), *aff'd* in *Peralta v. Ontario*, [1988] 2 S.C.R. 1045.

[142] *Jackson v. Ontario* 2009 ONCA 846 at para 7.

[143] *Migratory Birds Convention Act*, 1994, S.C. 1994, c. 22; *Migratory Birds Regulations*, C.R.C., c. 1035; *(Ontario) Fish and Wildlife Conservation Act*, 1997 S.O. 1997, Chapter 41.

grounded in transparent, good faith negotiations involving the federal and provincial governments and the Ojibway.

120. For 125 years, Ontario has proceeded on the assumption that it has the right to take up lands and limit the harvesting right in Treaty 3. The fact that Ontario has assumed its right to exercise the take up clause thus far does not confer constitutional authority for it to continue to do so. "A power may be exercised even in the absence of a right to do so, but if it is, then it is exercised without legal foundation."[144] To create a valid constitutional role for Ontario in respect of Treaty 3 requires that Ontario and the parties to Treaty 3 revisit the relationship at the core of the treaty to determine how the promises made to the Ojibway in 1873 are to be fulfilled going forward. This is the process necessary to establish the legal foundation for Ontario to exercise the take up clause. It cannot be avoided for the sake of political expediency or through what the Court of Appeal calls 'constitutional evolution.'

121. Reconciliation can only be achieved through meaningful, good faith dialogue which honours the Aboriginal perspective on the treaty relationship, the common intention of the treaty partners and ensures the ongoing protection of the rights promised under Treaty 3. It is for this Court to confirm Canada's obligations to fulfil its solemn treaty promises under Treaty 3 and pursuant to the constitutional division of powers so that the parties can move forward through a respectful, inclusive process of reconciliation.

## PART IV –COSTS

122. The Court of Appeal concluded that Wabauskang's "position is very similar to that of the respondents"[145] and that "the reasons for ordering costs in favour of the respondents apply to Wabauskang as well."[146] Wabauskang seeks costs of the application for leave to appeal and of the appeal on the same basis as the Appellant Grassy Narrows and in any event of the cause.

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[144] *Reference re Secession of Quebec* at para 106.
[145] Appeal Decision at para 236.
[146] Appeal Decision at para 236.

## PART V – ORDER SOUGHT

123. On this appeal Wabauskang seeks an order:

i. that the appeal is allowed;

ii. that the Court of Appeal's decision in respect of the issue of whether Ontario can unilaterally take up lands in Treaty 3 without Canada's involvement is set aside;

iii. that the two issues to be determined at the second phase of trial in this case are:

1. whether the impugned provincial legislation impairs the federal government's exclusive jurisdiction pursuant to section 91(24), and

2. whether the impugned provincial legislation equals a *prima facie* infringement of the Treaty 3 harvesting right; and

iv. that Wabauskang be entitled to costs on the application for leave to appeal and the appeal on the same basis as the Appellant Grassy Narrows.

All of which is respectfully submitted this 14th day of February, 2014.

Bruce McIvor

Kathryn Buttery

## PART VI – TABLE OF AUTHORITIES

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**PART VII – STATUTES AND OTHER REFERENCES**

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