APPLICANT'S MEMORANDUM OF ARGUMENT FOR LEAVE TO APPEAL

PART I: ISSUES OF NATIONAL IMPORTANCE AND STATEMENT OF FACTS

Issues of National Importance: Antiquated Approach to the Division of Powers and Treaty Interpretation Principles Turned on their Head

1. This case concerns the roles of Canada and Ontario in limiting treaty rights that burden provincial lands and resources and the interpretation of historic treaties. In particular, the proposed appeal raises the following issues of national importance:

   a. whether provincial powers over natural resources excludes any treaty guaranteed role for Canada to control how, when and to what degree treaty rights are limited by provincial conduct;

   b. whether the principle of constitutional evolution can be applied to unilaterally modify a historic treaty; and

   c. whether the intentions of the parties to a historic treaty should be understood in light of a contemporary view of the division of powers.

2. After reviewing an extensive factual record, the trial judge determined that the harvesting promise contained in Treaty 3 reserved a role for Canada when Ontario authorized land use that significantly interfered with the Ojibway harvesting rights. The Ontario Court of Appeal overturned that decision on the basis that Ontario has exclusive jurisdiction over natural resources.

3. The Court of Appeal's decision is contrary to this Court's jurisprudence that requires cooperation between federal and provincial governments in exercising jurisdiction within certain spheres of legislative power. After making its holding that Ontario has exclusive jurisdiction over land and resource management, the Court of Appeal proceeded to misapply settled treaty and statutory interpretation principles established to level the playing field for Aboriginal people, by applying them in favour of the Crown. This misapplication was particularly severe as it was made contrary to findings of fact made by the trial judge and as such undermined the importance of the trial process in Aboriginal rights litigation.

Statement of Facts

Treaty Clause Requiring Interpretation

4. This case involved interpreting the harvesting clause in Treaty 3 and specifically the intention of the parties in including the following words: "Her said Government of the Dominion of Canada." The harvesting clause reads as follows:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.[1]

5. It was Grassy Narrow's position, agreed to by the trial judge, that the reference to the Dominion of Canada was included specifically to reserve a continuing role for the federal government in implementing the harvesting promise by determining when, where and how harvesting rights could be limited.

Key Historical Facts

6. Treaty 3 was negotiated between the Ojibway and three federal treaty commissioners over three days in 1873.[2] Treaty 3 covers an area of about 55,000 square miles in what is now northwest Ontario. The lands were referred to as "the lands between" because they were situated between the settled areas of Canada to the east and fertile areas intended for settlement to the West.[3] The lands were generally not suitable for agriculture, and there was virtually no European settlement at the time the Treaty was signed. Canada wanted to conclude a Treaty over these lands, primarily, so that it could fulfill its promise to British

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[1] *Treaty No 3, Made October 3, 1873 and Adhesions, Report, etc*, Ottawa: Queen's Printer, 1966.
[2] *Keewatin v Minister of Natural Resources* 2011 ONSC 4801 at para 52, [2011] OJ No 3907 [the *"Trial Reasons"*], Application Record ["AR"] Vol 1 83; *Keewatin v Ontario (Natural Resources)* 2013 ONCA 158 at paras 30-33, [2013] OJ No 1138 [the *"Appeal Reasons"*], AR Vol 2 96-97.
[3] *Trial Reasons, supra* note 2 at para 46, AR Vol 1 82.

Columbia to build a transnational railway.[4] Peaceful relations with the Ojibway were necessary to achieve this goal.

7. Both before and after the Treaty was signed, the southern 2/3 portion of Treaty 3 lands were at the centre of an ongoing territorial dispute between the Canada and Ontario (the "Disputed Territory").[5] There was never any dispute that the northern 1/3 of the territory fell within Canada's jurisdiction (the "Keewatin Lands").

8. In 1871 and 1872 Canada tried unsuccessfully to negotiate a treaty with the Ojibway.[6] The Ojibway were in no rush to negotiate a treaty and felt no compulsion to do so.[7] In 1873 federal treaty commissioners tried again. This time the Ojibway were willing to share their lands in exchange for certain material benefits and promises that the treaty would be kept.[8] Since the federal commissioners saw little long-term use for the lands, they were willing to make unusual promises that they might not have been prepared to make in a more promising environment.[9]

9. After three days of negotiation, on October 3, 1873, the parties reached an agreement, which included the harvesting clause set out above. There was no dispute that the phrase "Government of the Dominion of Canada" referred to the federal government.

10. Between 1873 and 1894 Ontario and Canada engaged in protracted dispute over the ownership of the Disputed Territory and the effect of Treaty 3. It is in this context that *St. Catherine's Milling* and *Seybold* were decided.[10] This dispute was eventually resolved in favour of Ontario and the governments passed reciprocal legislation in 1891 and executed an agreement in 1894 to settle the issues arising out of this dispute.[11]

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[4] *Trial Reasons*, *supra* note 2 at paras 757 and 760, AR Vol 1 227.
[5] *Appeal Reasons*, *supra* note 2 at paras 25-26, AR Vol 2 95-96.
[6] *Ibid* at para 28, AR Vol 2 96.
[7] *Trial Reasons*, *supra* note 2 at paras 770-772, AR Vol 1 229.
[8] *Ibid* at para 775, AR Vol 1 230.
[9] *Ibid* at para 916, AR Vol 1 235.
[10] *St Catherine's Milling and Lumber Co v The Queen*, (1888) 14 App Cas 46, [1888] JCJ No 1 (PC) ["*St Catherine's Milling*"]; *Ontario Mining Co v Seybold* (1899), 31 OR 386, [1899] OJ No 113 (OHCJ); *Ontario Mining Co v Seybold*, [1903] AC 73, [1902] JCJ No 2 (PC).
[11] *Appeal Reasons*, *supra* note 2 at para 67, AR Vol 2 104. See also *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands* (CA), 54 & 55 Vict, c 5; *An Act for the settlement of questions between Governments of Canada and Ontario respecting Indian Lands* (ON), 54 Vict, c 3 (the "*1891 Legislation*").

11. Between 1905 and 1912 Canada and Ontario negotiated the extension of Ontario's boundaries, which would encompass remaining northern portion of Treaty 3 lands, the Keewatin Lands. These negotiations largely focused on Ontario securing a northern port and, for the most part, Ontario viewed these lands, to which they had no claims, as a "gift horse."[12] An agreement was reached in 1912 to extend the boundaries of Ontario to include the Keewatin Lands. The implementing statute contained the following caveat:

> 2(a) That the province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders;
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> …
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> (c) That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament.[13]

12. The reference to "trusteeship of the Indians" was a reference to Canada's jurisdiction under s.91(24) of the *Constitution Act, 1867*.[14]

13. There was little development in the Keewatin Lands after 1912, except for localized development at Red Lake where a major mine was developed, until large scale industrial forestry activity began to impinge on the territory in the late 20th century.[15] In response, Grassy Narrows sought redress to protect its treaty rights, including through this litigation.

Procedural History

Application for Judicial Review (Mister Justice Then)

14. Grassy Narrows initially brought an application for judicial review seeking a range of remedies, including declarations of invalidity against the instruments authorizing the impugned logging. This application was quashed, in part, because the treaty interpretation

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[12] *Trial Reasons*, *supra* note 2 at paras 1059 and 1421, AR Vol 1 279 and Vol 2 39.
[13] *The Ontario Boundaries Extension Act*, SC 1912, 2 Geo V, c 40, s 2 [the "*Extension Act*"] [emphasis added].
[14] *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, s 91(24) [the "*Constitution Act, 1867*"]; *Trial Reasons*, *supra note 2* at para 1431, AR Vol 2 40.
[15] *Trial Reasons*, *supra* note 2 at para 1124, AR Vol 1 291.

issues and constitutional division of powers issues were of such complexity and importance that they could only be resolved at trial. The court gave leave to Grassy Narrows to raise the same issues in an action.[16]

Advance Costs and Trial of Issues Order (Madam Justice Spies)

15. Grassy Narrows commenced an action and sought an advance costs order. The Case Management Judge granted the order in part by ordering the trial of two "threshold issues" and ordering advance costs in respect of the trial of those issues.[17] The issues to be tried were:

    a. Does Her Majesty the Queen in Right of Ontario have the authority within that part of the lands subject to Treaty 3 that were added to Ontario in 1912, to exercise the right to "take up" tracts of land for forestry, within the meaning of Treaty 3, so has to limit the rights of the plaintiffs to hunt or fish as provided for in Treaty 3?

    b. If the answer to question one is "no," does Ontario have the authority pursuant to the division of powers between Parliament and the legislatures under the *Constitutional Act, 1867* to justifiably infringe the rights of the plaintiffs to hunt and fish as provided for in Treaty 3.[18]

16. Grassy Narrows was awarded advance costs on the basis that, among other things, the issues were of "great public importance."[19]

The Trial Decision (Madam Justice Sanderson)

17. The matter proceeded to trial after extensive disclosure of documents, written examinations for discovery, oral examinations for discovery, exchanges of expert reports and a pre-trial *de bene esse* examination. The trial took approximately 70 days and included expert testimony on colonial and early post-confederation Indian policy, the ethnography of the Ojibway, the history of treaty making in Canada and the surrounding region, the history of

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[16] *Keewatin v Ontario (Minister of Natural Resources)* (2003), 66 OR (3d) 370 at para 64, [2003] OJ No 2937 (ON Div Ct).
[17] *Keewatin v Ontario (Minister of Natural Resources)*, [2006] OJ No 3418, 2006 CarswellOnt 6463 (ONSC), AR Vol 1 7.
[18] Order of Justice Spies, dated June 28, 2006, Schedule "A" to the Judgment of Justice Sanderson, dated August 16, 2011, AR Vol 1 52.
[19] *Keewatin v Ontario (Minister of Natural Resources)*, [2006] *supra* note 17 at para 234, AR Vol 1 53.

the negotiations, the history of the Ontario-Canada boundary dispute, including the *St.Catherine's Milling* decision and subsequent negotiations, and the history of post-treaty relations between the Ojibway and the governments as well as the development of the Ojibway lands. The trial judge wrote a carefully reasoned 300 plus page judgment.

18. With respect to threshold question one, the trial judge found that Canada and the Ojibway negotiated a treaty that promised that the Ojibway's hunting, trapping and fishing rights could only be signficiantly interfered with by the federal government. She also determined that when the borders of Ontario were extended in 1912, Canada and Ontario agreed, statutorily, to continue the existing federal role in respect of Treaty 3 harvesting rights.

19. With respect to the threshold question two, the trial judge found that Ontario had no power to infringe the Treaty 3 harvesting rights given the operation of the doctrine of interjurisdictional immunity in respect of Canada's jurisdiction over "Indians and Lands reserved for the Indians."

20. As a result of her decision, the trial judge held that Ontario could authorize land uses that did not significantly interfere with Treaty 3 harvesting rights and could authorize more significant interferences through cooperative action either with the Ojibway or Canada.[20] The trial judge held that her decision was consistent with this Court's approach to the division of powers – that under the Constitution there are overlapping heads of power and jurisdiction, which may require (or demand) the engagement of both levels of government to achieve certain ends, particularly when the interests of minorities are implicated.[21]

21. In reaching her decision the trial judge gave particular consideration to the political and legal events surrounding the *St. Catherine's Milling* decision and held that while it dealt with the question of ownership of the underlying lands it did not deal with the issue of which level of government had the power under the treaty or Constitution to limit or infringe the treaty rights.[22] She found support in her decision by the words of Lord Watson in *St. Catherine's Milling* where he stated the JCPC left other questions behind, including

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[20] *Trial Reasons, supra* note 2 at para 1452, AR Vol 2 44.
[21] *Ibid* at para 1587, AR Vol 2 68-69.
[22] *Ibid* at paras 1352-53, AR Vol 2 27.

whether the land was free and clear of the qualified privilege of hunting and fishing mentioned in Treaty 3:

> 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.[23]

22. As a result of her analysis the trial judge answered "no" to both questions set by the Case Management Judge and issued declarations accordingly.

Court of Appeal Decision (Sharpe, Gillese, Jurianz JJA)

23. The Ontario Court of Appeal overturned the decision of the trial judge.[24] The primary holding made by the Court of Appeal is that provincial jurisdiction over the management of natural resources excludes any role for Canada, including under s. 91(24) of *the Constitution Act, 1867*, in decisions concerning the use and management of provincial lands, even when those decisions adversely impact on treaty rights.[25] The Court of Appeal held this issue was resolved in *St. Catherine's Milling* and that the passage cited above - that the JCPC left other questions behind - referred to the duty to consult as set out in *Mikisew*.[26]

24. In interpreting the Treaty, the Court of Appeal held that to the extent that the trial judge's findings concerning the actual understanding and intentions of the parties in 1873 conflicted with this current understanding of the division of powers, they were palpable and overriding errors.[27]

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[23] *St. Catherine's Milling*, *supra* note 10 at para 16; *Trial Reasons*, *supra* note 2 at para 1526, AR Vol 2 59.
[24] *Appeal Reasons*, *supra* note 2, included in AR Vol 2 87.
[25] *Ibid* at paras 111, 204-05, AR Vol 2 119 and 152.
[26] *Ibid* at paras 122-124, AR Vol 2 123-24; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 ["*Mikisew*"].
[27] *Appeal Reasons*, *supra* note 2 at paras 159-172, AR Vol 2 136-40.

25. Finally, the Court of Appeal held that even if the power to limit treaty rights vested in the Canada under Treaty 3, the principle of constitutional evolution applied to modify the Treaty when Ontario's boundaries were extended in 1912.[28]

Errors that Raise Issues of National Importance

26. Grassy Narrows submits the Court of Appeal made three errors each of which, separately, vitiate its decision and give rise to issues of national importance:

    a. The Court of Appeal erred in holding that Ontario's jurisdiction over provincial lands and resources was exclusive of federal jurisdiction over Indians and Lands Reserved for the Indians when provincial resource management decisions limit the application of or infringe treaty rights.

    b. The Court of Appeal erred in holding that findings of fact concerning the context, history and negotiation of treaties must be consistent with contemporary understandings of the constitutional structure of Canada. This holding diminishes the integrity of the trial process, undermines the Aboriginal perspective and ignores the historical context in treaty interpretation cases.

    c. The Court of Appeal erred in holding that the principle of "constitutional evolution" can unilaterally modify a material aspect of a Treaty (the power to significantly interfere with harvesting rights). This is an unprecedented application of the principle in the context of treaty interpretation, which is designed to uphold the honour of the Crown.

27. Fundamentally, the Court of Appeal adopted a view of exclusive provincial control over lands and natural resources that is at odds with the constitutional principles established by this Court - that most matters have double aspects and that provincial jurisdiction may be limited by the doctrines of paramountcy and interjurisdictional immunity. In doing so the Court of Appeal undermined this Court's approach to the division of powers that is designed to protect local minorities (such as Indians (s. 91(24)), immigrants (s. 91(25)) and dissident religious groups (s. 93) from local majorities by requiring coordinated

[28] *Appeal Reasons*, *supra* note 2 at paras 136-141, AR Vol 2 128-130.

government action in some cases. The Court of Appeal's decision runs against jurisprudence encouraging cooperative federalism over federal or provincial unilateralism.

28. The issues raised in this case transcend the interests of Grassy Narrows. The interpretation of Treaty 3 extends to all Treaty 3 First Nations and potentially affects a wide range of industries and economic activities in the Keewatin Lands. Treaty 3 also served as the basis for Treaties 4 to 11 and Treaties 4 to 7 contain a similar harvesting clause to Treaty 3. While the subsequent numbered treaties have different histories and may be affected differently by instruments such as the *Natural Resources Transfer Agreements*[29] the decision in this case will have profound implications for the future interpretation of these treaties, especially with respect to the role of Canada in ensuring that the off-reserve rights guaranteed in those treaties are respected.

29. The decision will also have significant implications for the meaning and purpose of s. 91(24) of the *Constitution Act, 1867*, particularly in respect to the management and protection of off-reserve harvesting rights. The trial judge found that the purpose of s. 91(24) was inextricably tied to the architecture of division of powers as a means of protecting minorities and local interests by dividing authority between the local and national government.[30] While this Court has addressed the operation of s. 91(24) on a number of occasions it has not squarely addressed the purpose of s. 91(24) and specifically the basis for its inclusion on the federal list of powers. It is a matter of public interest to understand whether the trial judge's findings with respect to the purpose of s. 91(24) are correct and how this applies in the context of provincial resource development.

PART II: QUESTIONS IN ISSUE

30. This application gives rise to the following issues:

    a. Whether leave should be granted to appeal the decision of the Court of Appeal dated March 18, 2013, setting aside the decision of the Superior Court of Ontario, dated August 16, 2013;

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[29] *Natural Resources Transfer Agreement, being Schedule 1 (Manitoba), Schedule 2 (Alberta) and Schedule 3 (Saskatchewan) to the Constitution Act, 1930*, 20-21 Geo V, c 26 (UK), reprinted in RSC 1985 Appendix II, No 26.
[30] *Trial Reasons, supra* note 2 at paras 139-141, 414-415, 735-736, 743-745, AR Vol 1 96, 166, 224-226.

b. If leave is granted, whether the Respondent the Minister of Natural Resources should pay the costs of Grassy Narrows in advance, in any event of the cause.

PART III: STATEMENT OF ARGUMENT

Issue #1: The Court of Appeal's Holding that Ontario Has Exclusive Power to Manage Resources is Contrary to this Court's Jurisprudence and the Desire to Avoid Exclusivity

31. The Court of Appeal held that the provinces have absolute exclusivity over lands and natural resources.[31] It was this finding that led the Court of Appeal to conclude that neither Treaty 3 - despite its reference to "the Government of the Dominion of Canada" in the harvesting promise - or the *Ontario Boundaries Extension (1912) Act* - despite its reference to the continued "trusteeship of the Indians" by Canada – could be interpreted as leaving any role for Canada, even if provincial decisions significantly interfere with treaty rights.[32] To arrive at its conclusion of exclusivity, the Court of Appeal took a watertight compartment approach to the division of powers, which is contrary to the jurisprudence concerning cooperative action between the provinces and Canada and the notion that treaty rights are at the core of s. 91(24).

32. Over the last two decades the courts have rejected the "watertight compartments" theory and articulated an approach to the division of powers that allows for significant overlap between federal and provincial jurisdictions, recognizing that many subject matters have a double aspect. Jurisdictional conflicts are governed by a variety of tools including: pith and substance (to ensure an appropriate basis for federal or provincial legislation), paramountcy (to resolve legislative conflicts) and interjurisdictional immunity (to protect the core of a federal jurisdiction over federal persons, places or things). The Court of Appeal's decision undermines this approach to cooperative federalism. It grants the provinces exclusive jurisdiction and displaces any federal role - even to exercise its s. 91(24) powers.[33]

33. A watertight compartment approach to the division of powers in the treaty context also puts in jeopardy the constitutional protection afforded to treaty rights against provincial

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[31] *Appeal Reasons*, *supra* note 2 at paras 111, 204-205, AR Vol 2 119 and 152.
[32] *Ibid* at paras 142-155, 199, AR Vol 2 130-135, 150-151.
[33] *Ibid* at paras 204-205, AR Vol 2 152.

infringement. Until the introduction of s. 35 of the *Constitution Act, 1982*, the only protection from provincial infringement afforded to treaty rights was through the division of powers and s. 88 of the *Indian Act*.[34] This protection reflected two important historic responsibilities Canada assumed from the Imperial Crown vis-à-vis First Nations: (1) responsibility for making treaties and (2) responsibility as "guardian of the Indians."[35] The constitutional protection of treaty rights against provincial infringement through the division of powers also reflects the protection envisioned by the Framers of Confederation. In creating a federal and provincial list of powers the Framers believed the interests of minorities would be best protected by dividing responsibility for their affairs between two levels of government.[36]

34. Constitutional protections over treaty rights have been further augmented by modern developments such as s. 35 of the *Constitution Act, 1982,* the duty to consult, and the evolving law concerning the honour of the Crown. Different constitutional protections for treaty rights lead to profoundly different forms of engagement. On the one hand, the jurisdictional limits imposed by the division of powers creates substantive limits on provincial powers that can be overcome through cooperative federalism or negotiation with the Ojibway. On the other hand, consultation is a decision oriented procedural protection that places the power to decide in the hands of one party (the Crown) with the Ojibway engaging in a process over which they have limited control.

35. These combined constitutional protections have resulted in a divided jurisdiction over managing natural resources and treaty rights and have led to an era of modern treaty making and cooperative federal and provincial law making. Remarkably, these protections have not only encouraged cooperative federalism but have also resulted in tripartite engagement between Canada, the provincial governments, and First Nations. Thus, this cooperative action has achieved this Court's preferred approach to resolving jurisdictional issues – through cooperative federalism – and its preferred method of dealing with aboriginal issues – through good faith negotiations.

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[34] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 1, s 35 ["*Constitution Act, 1982*"]; *Indian Act*, RSC 1985, c I-5, s 88.
[35] *Trial Reasons*, *supra* note 2 at para 1450, AR Vol 2 43-44.
[36] *Ibid* at paras 414-415, 743-745, AR Vol 1 166, 225-226.

36. In this case, however, the Court of Appeal has eliminated the protection of treaty rights on a division of powers basis in favour of the duty to consult. Not only will this decision have the affect of discouraging cooperative action and tripartite engagement, but it is contrary to this Court's decision in *Morris,* which confirmed that s.35 of the *Constitution Act, 1982* did not alter the protections given to treaty rights by the division of powers and s.88 of the *Indian Act.*[37] The Court of Appeal's holding is also contrary to *Moses*, where this Court found that a modern treaty allowed for a continued role for Canada in the approval of projects on ceded land, preferring a co-ordinated approach to federal and provincial environmental assessments.[38]

37. The Court of Appeal suggests that the decision of the trial judge would "eviscerate" provincial jurisdiction over lands and resources.[39] This is incorrect. First, as noted by the trial judge, Canada's jurisdiction does not extend to the provincial aspect of land and resource proprietary powers (for example such as decisions relating to when and to whom to dispose of the resources, or to appropriate the interest).[40] Second, as noted by the trial judge, the doctrine of interjurisdictional immunity (a substantive limit on the province's powers) is engaged if and only if there is an impairment of the treaty rights (eg: a *prima facie* infringement).[41] Rather than recognize a federal role when treaty rights are infringed by a province the Court of Appeal chose to eviscerate federal jurisdiction under s. 91(24) and the trial judge's careful consideration of the evidence concerning the intention of the parties to the treaty negotiations.

38. The Court of Appeal appears to have been driven by an overarching concern that the trial judge's decision would sterilize the province's power to make land and resource use decisions (or render that power "illusory").[42] Again, this is incorrect. First, the trial judge found that not all land and resource use decisions would significantly interfere with treaty harvesting rights and require federal involvement.[43] Interference depends on the activity and the degree of existing land use. Indeed, it was this question that was specifically left

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[37] *R v Morris,* 2006 SCC 59 at para 55, [2006] 2 SCR 915 ["*Morris*"].
[38] *Quebec (Attorney General) v Moses,* 2010 SCC 17 at para 53, [2010] 1 SCR 557 ["*Moses*"].
[39] *Appeal Reasons, supra* note 2 at para 205, AR Vol 2 152.
[40] *Trial Reasons, supra note 2* at paras 1379.
[41] *Ibid* at para 1556, AR Vol 2 64.
[42] *Appeal Reasons, supra* note 2 at para 205, AR Vol 2 152.
[43] *Trial Reasons, supra* note 2 at para 1234, AR Vol 1 8.

for the second phase of the trial.[44] Second, it ignores the fact that it is open to the province to negotiate arrangements with the Ojibway or the federal government that would allow for the lawful use of provincial power.

39. The decision of the Court of Appeal on this issue is not confined to the Treaty 3 harvesting rights. It also affects federal jurisdiction with respect to Aboriginal harvesting rights. Aboriginal harvesting rights apply to provincial land under s. 109 of the *Constitution Act, 1867*. Since Aboriginal rights are not subject to any "taking up" clause, any significant provincial interference with the rights is dealt with in the context of infringement. Under the traditional analysis these interferences are *prima facie* barred by the operation of interjurisdictional immunity but then invigorated by operation of s. 88 of the *Indian Act*. The decision of the Court of Appeal is contrary to requirement that federal legislation is necessary to give legal effect to provincial land or resource management decisions. Here, the Court of Appeal decided such a federal role is at odds with exclusive provincial control of resources.

40. Finally, he Court of Appeal read *St. Catherine's Milling* as holding not only that Ontario has beneficial ownership of the Treaty 3 lands, but that it also has exclusive authority to limit the Ojibway Treaty 3 harvesting rights.[45] Grassy Narrows does not accept this reading, nor did the trial judge. However, if it is correct, this obiter aspect of *St. Catherine's Milling* should not be followed for the following reasons:

    a. It is inconsistent with the modern view of overlapping federal and provincial jurisdiction and reflects the outdated "watertight compartments" approach;

    b. The Ojibway were not a party to the decision. It would be inappropriate to settle a significant issue concerning their rights without their participating in the proceedings, even by 19th century legal standards;

    c. The decision did not apply modern principles of treaty interpretation such as upholding the honour of the Crown or considering the aboriginal perspective; and

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[44] *Trial Reasons*, *supra* note 2 at paras 1521-22, AR Vol 2 58.
[45] *Appeal Reasons*, *supra* note 2 at paras 123-24, AR Vol 2 123-24.

d. The Privy Council and Supreme Court of Canada have narrowed the application of *obiter* or incidental principles drawn from *St. Catherines Milling*, including the *Treaty 3 Annuities* case (which declined to follow the Lord Watson's suggestion that Ontario should compensate Canada for Treaty annuities[46]), *Guerin* (which rejected the political trust approach to Crown-aboriginal relations[47]), and *Delgamuukw* (which rejected Lord Watson's "personal and usufructuary rights" description of aboriginal title[48]).

Issue #2: Extending the Principle of Constitutional Evolution to Modify the Treaty in Favour of the Crown is Unprecedented

41. To overcome the fact that the Treaty 3 was negotiated with Canada; referenced only Canada in the harvesting clause, and that only Canada could limit the harvesting rights in the Keewatin Lands before 1912, the Court of Appeal relied on the principle of constitutional evolution, also referred to as the "living tree" doctrine, to hold that treaty "evolved" to permit Ontario to remove Treaty 3 harvesting rights.[49] In doing so, the Court of Appeal subverted the principle of evolution by applying it to unilaterally modify the Treaty in favour of the Crown.

42. The principle of constitutional evolution, as applied to treaties, has only been applied to ensure that treaty rights are not frozen in time and that aboriginal people are able to exercise their rights in a meaningful way. For example, aboriginal people may use modern weapons and transportation to hunt and not limit themselves to bows and arrows or canoes. However, the principle of evolution cannot be used to fundamentally change the right.[50] For example, a traditional right to harvest for sustenance cannot evolve into a right to harvest for commercial purposes. This is consistent with the limitations of "living tree" doctrine generally which cannot be used to change the nature of the power to suit evolving societal views.[51] The limits of the doctrine was discussed in *R v Blais* as follows:

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[46] *Dominion of Canada v Province of Ontario*, [1910] AC 637 at para 10, [1910] JCJ No 1 (PC) ["*Treaty 3 Annuities*"].
[47] *Guerin v The Queen*, [1984] 2 SCR 335 at pages 375-76, 13 DLR (4th) 321.
[48] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 112 and 116, 153 DLR (4th) 193.
[49] *Appeal Reasons, supra* note 2 at paras 136-141, AR Vol 2 128-130.
[50] *Lax Kw'alaams Indian Band v Canada (Attorney General)* 2011 SCC 56 at paras 8 and 59, [2011] 3 SCR 535.
[51] *Daniels v Canada (Minister of Indian Affairs and Northern Development)* 2013 FC 6 at para 543, [2013] FCJ No 4.

> This Court has consistently endorsed the living tree principle as a fundamental tenet of constitutional interpretation. Constitutional provisions are intended to provide "a continuing framework for the legitimate exercise of governmental power": *Hunter v Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), *per* Dickson J. (as he then was), at p. 155. But at the same time, this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision. As emphasized above, we must heed Dickson J.'s admonition "not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart, supra*, at p. 344; see Côté, *supra*, at p. 265. Dickson J. was speaking of the *Charter*, but his words apply equally to the task of interpreting the *NRTA*. Similarly, Binnie J. emphasized the need for attentiveness to context when he noted in *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.), at para. 14, that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse." Again the statement, made with respect to the interpretation of a treaty, applies here.[52]

43. Thus, the principle should not be used to alter the division of powers, or as in this case change a right held by Canada (as treaty partner and the government charged with protecting "Indians") into a right held by Ontario (as landowner). The Court of Appeal improperly applied the principle to find the 1912 extension of Ontario's boundaries caused the treaty to "evolve" so that Canada's power to limit the harvesting rights evolved to Ontario. The Court of Appeal, therefore, used this principle to modify the treaty relationship, contrary to the intention of the parties (the trial judge found the Ojibway expected to deal with Canada specifically[53]) and the wording of the treaty itself. Further, since limiting harvesting rights through the use of the taking up clause is not an infringement under *Mikisew*, this reliance on "evolution" removes any constitutional protection of treaty rights from provincial interference under the division of powers.

44. The Court of Appeal's application of the principle of evolution undermines its intended use in treaty interpretation cases. Instead of providing a means to enable Aboriginal people to meaningfully exercise their rights, without changing the nature of the rights, the Crown now has a means to modify the treaty and avoid the constitutional protection provided by the division of powers. Further, the principle of constitutional evolution was applied in the

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[52] *R v Blais* 2003 SCC 44 at para 40, [2003] 2 SCR 236.
[53] *Trial Reasons, supra* note 2 at para 874, AR Vol 1 247.

context of a statute (the *Boundary Extension Act, 1912*) that expressly stated Canada would remain the trustee of the Indians and expressed no intention to modify the treaty rights.[54]

45. Applied in this way, treaties can be modified to accommodate changes in Crown policy or law and the Crown can avoid the constitutional protections given to treaty rights in certain circumstances. The practical effect of this is to create a disincentive for the Crown to accommodate change through negotiation or by way of justification where the Crown acts unilaterally.

46. As a final misstep in the evolution analysis, in purporting to apply the principle of evolution, the Court of Appeal actually applied the doctrine of devolution, which also has no application in this case. This is seen in the Court's description of the principle of evolution where it states: "In formal terms, what changes with constitutional evolution is the level of government on whose advice the Crown acts."[55] (The Court of Appeal then went on to describe how the principle is applied in the context of treaties with First Nations, referring to the "living tree" doctrine, the misapplication of which is describe above.[56]) Devolution emerged as a principle as former colonies gained increasing levels of independence from Great Britain. Under this doctrine, which was articulated in *Alberta Indians*,[57] former Imperial Crown obligations to a colony devolve to the Crown of the new independent colony. Thus, devolution deals with the process of gaining colonial independence - it does not deal with the division of powers within one nation.

47. Whether under the principle of evolution or devolution, the Court of Appeal's application was unprecedented and subverted the intention of either principle. Both before and after 1912 it was Canada that advised the Crown how to act in respect of treaties and treaty rights.

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[54] *Extension Act*, *supra* note 13, s 2(c); *Trial Reasons*, *supra* note 2 at para 1432, AR Vol 2 40.
[55] *Appeal Reasons*, *supra* note 2 at para 136, AR Vol 2 128.
[56] *Ibid* at para 137, AR Vol 2 128.
[57] *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta,* [1982] 2 All ER 118 (CA) (UK), [1981] 4 CNLR 86 at pp.17-20 ["*Alberta Indians*"].

Issue #3: Incorrect Approach to Treaty Interpretation and the Integrity of the Trial Process Compromised

48. The modern approach to aboriginal law has introduced two important principles largely absent from the earlier case law. First, the Aboriginal perspective must be considered in any treaty interpretation exercise, including Aboriginal understandings of the representations and actions of the Crown viewed in the historical context and circumstances of the Aboriginal people. At a practical level, this means treaties are to be interpreted generously, having regard to all the evidence, with ambiguities being resolved in favour of aboriginal people. At its highest level it ensures that the honour of the Crown is upheld in making and interpreting treaties. The underlying objective is to ensure that treaties are given meaning in the eyes of aboriginal people.

49. The trial process is a means to achieve this modern approach to treaty interpretation - to ensure that a comprehensive evidentiary record is developed, which includes consideration of evidence beyond the treaty document, since the written treaty was prepared by the Crown and unreadable by Aboriginal people. The trial process allows for the deliberate consideration of expert, lay, and documentary evidence. This process is particularly important in Aboriginal cases, which often require overcoming stereotypical beliefs about aboriginal people in their early relations with the Crown and the newcomers.

50. Closely associated with the emphasis on the trial process in Aboriginal cases is the concept of appellate deference to findings of fact by a trial judge. This Court has repeatedly noted that appellate courts must defer to the findings of fact of trial judges and that aboriginal people are not exempt from such rules. The Crown also is bound by this principle.

51. Both of these principles (the importance of the trial process and deference to the findings of the trial judge) are in jeopardy in this case. The Divisional Court quashed the original application for judicial review in part because the treaty and division of powers issues required examination at trial given their complexity. (Advanced costs for the trial was awarded because under the *Okanagan* test the case raised issues of "great public importance."[58]) This determination was made despite the fact that the key interpretation

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[58] *British Columbia (Minister of Forests) v Okanagan Indian Band* 2003 SCC 71, 233 DLR (4th) 577 ["*Okanagan*"]; *Keewatin v Ontario (Minister of Natural Resources)*, [2006] *supra* note 17 at para 234, AR Vol 1 53.

issue focused on an unambiguous reference in the treaty, prepared by the Crown, that the "Government of the Dominion of Canada" was the only government identified with the power to limit the harvesting rights.

52. A substantial part of the trial judge's analysis is dedicated to understanding the Ojibway perspective with respect to who they were dealing with, whether they understood they were dealing with a government, and whether it mattered to them if they did. The Crown adopted a stereotypical view of aboriginal people - that they only understood the concept of a Queen (the "Great Mother") and had no knowledge of and/or were indifferent as to which level of government they were dealing with.[59] The trial judge found that the Ojibway, who had close to 200 years of contact with Europeans, had an understanding of government; appreciated there were different governments; ensured they were dealing with Canada, the most senior government; and secured a commitment from Canada to enforce and implement the treaty.[60] For the Ojibway, Treaty 3 was about forming an alliance and a relationship and who they were dealing with mattered to them.[61]

53. The trial judge made these findings after weighing the documentary and expert evidence, and making credibility findings specifically on this point. In making her findings the trial judge specifically addressed the Aboriginal perspective on the treaty. Her conclusions were consistent with the unambiguous and express wording of the treaty itself.

54. The Court of Appeal overturned the trial judge's findings with respect to the parties' intentions. Despite the findings of the trial judge, the Court of Appeal found (asserted) the Ojibway were only interested in whether they were dealing with the Crown – in effect that they were indifferent as to which level of government had the power to deal with their rights[62] and that the Crown actors inserted the reference to the Dominion of Canada simply because "there was no other government to whom the Commissioners appointed by Canada could conceivable refer".[63] In making these findings, the Court of Appeal did not re-consider the evidence or identify an error in the trial judge's analysis of the facts – instead

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[59] *Trial Reasons*, *supra* note 2 at paras 867 and 870, AR Vol 1 245-46.
[60] *Ibid* at paras 869, 872-74, 892, 904, AR Vol 1 246-47, 249, 251.
[61] *Ibid* at para 775, AR Vol 1 230.
[62] *Appeal Reasons*, *supra* note 2 at paras 135 and 161, AR Vol 2 127-28, 136-137.
[63] *Ibid* at para 165, AR Vol 2 138. See also *ibid* at paras 145, 160-164, AR Vol 2 131, 136-138.

it sought to bring the factual findings in line with its holding that provincial power of natural resources is exclusive. In effect, the Court of Appeal created an ambiguity, which it then resolved in favour of the Crown.

55. The Court of Appeal turned the treaty interpretation process on its head: rather than working from a historical context that takes into account the evidence and trial judge's findings of fact to understand the parties' intentions, the Court of Appeal started from a (erroneous) legal conclusion about the division of powers to construct an interpretation of the treaty. On this approach, the trial process is largely irrelevant, including any evidence concerning the actual understanding of the Ojibway or the Crown. Historical understandings of the treaty are simply determined in light of contemporary views of the division of powers rather than what was understood at the time the treaty was signed. Furthermore, this error allows the Court of Appeal to apply principle of evolution in the manner it did - for if the identity of the government mattered it would have been impossible to "evolve" the treaty to change a fundamental term. But if the identity of the government is irrelevant, it is easier to justify this finding.

56. Based on the principles governing the interpretation of treaties and deference to the trial process, the Court of Appeal had no basis to disturb the trial judge's findings of fact concerning the proper interpretation of the treaty.

Issues are Ripe for Determination

57. This case provides an adequate record to address the issues raised. This appeal arises from a 70 day trial that examined the historical and factual background for the development of s.91(24) of the *Constitution Act, 1867,* the negotiation of the treaty, the federal and provincial disputes over the Disputed Territory, and the events leading to the extension of Ontario's boundaries. The record also includes an extensive ethnographic record to address the issues concerning the aboriginal perspective. Furthermore, while the original authorizations in issue in this litigation have lapsed on account of Abitibi surrendering its licence, there are still companies interested in harvesting wood in the Whiskey Jack Forest and the Ministry of Natural Resources is still engaged in the development of a 20 year plan

for timber harvesting. At the Court of Appeal noted: "It is common ground…that the issues raised on this appeal remain alive and require resolution."[64]

PART IV – SUBMISSIONS ON COSTS

58. If leave is granted, Grassy Narrow asks that, consistent with the advance costs order below, the Minister of Natural Resources pay the costs of Grassy Narrows on a partial indemnity basis, in advance, in any event of the cause. Alternatively, Grassy Narrows asks that the Court not deal with costs and that Grassy Narrows be given leave to bring a motion with respect to an order for advance costs.

PART V – ORDER SOUGHT

59. This application for leave be granted; and

60. The Minister of Natural Resources pay the costs of Grassy Narrows on a partial indemnity basis, in advance, in any event of the cause.

Dated the 15th day of May, 2013

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Robert J.M. Janes and Karey M. Brooks
Janes Freedman Kyle Law Corporation
Counsel for Grassy Narrows (the Applicants/Plaintiffs)

[64] *Appeal Reasons*, *supra* note 2 at para 15, AR Vol 2 92.

PART VI – TABLE OF AUTHORITIES

Case Law	Cited at Paragraphs
Daniels v Canada (Minister of Indian Affairs and Northern Development) 2013 FC 6, [2013] FCJ No 4.	42
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R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta, [1982] 2 All ER 118 (CA) (UK), [1981] 4 CNLR 86.	46
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Statutes/Treaties	Cited at Paragraphs
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Indian Act, RSC 1985 c I-5, s 88.	33
The Ontario Boundaries Extension Act, SC 1912, 2 Geo V, c 40, s 2.	31
Treaty No 3, Made October 3, 1873 and Adhesions, Report, etc, Ottawa: Queen's Printer, 1966.	4

PART VII – STATUTES/TREATIES

Copies of provisions of statutes/treaties are provided in the following pages.