APPLICANT'S MEMORANDUM OF ARGUMENT

PART I – STATEMENT OF FACTS

A. Introduction

1. In *St. Catherine's Milling and Lumber Co. v The Queen,* the Privy Council confirmed Ontario's right to the beneficial interest in the lands of Treaty 3.[1] Left unanswered were questions arising from the tension between the province's interest in the land and the federal government's promises to the Ojibway at Treaty 3 that they would be able to hunt and fish over the same lands. 125 years later, the proposed appeal asks this Court to answer what Lord Watson described as the "questions behind" the issues settled in *St. Catherine's Milling.*[2]

2. The Applicant Chief Leslie Cameron, on his own behalf and on behalf of all members of Wabauskang First Nation, seeks leave to appeal the judgment of the Ontario Court of Appeal rendered March 18, 2013, in respect of the province's authority to exercise the right to take up land under the taking up clause in Treaty 3 (the "taking up clause") so as to infringe rights to hunt and fish guaranteed under Treaty 3. If leave to appeal is granted, the Applicant will ask this Court to determine whether the federal government remains responsible for fulfilling promises made to Aboriginal peoples pursuant to the historical treaties, or if the Ontario Court of Appeal was correct that the federal government no longer has a role to play in the ongoing implementation of treaty promises.

B. Background

3. Between 1871 and 1923, the federal government and First Nations negotiated 11 numbered treaties with Aboriginal peoples from Ontario to British Columbia.[3] These treaties formed a central and necessary component of Canada's nation-building process.

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[1] *St. Catherine's Milling and Lumber Co. v The Queen* (1888), 14 AC 46 (PC) [*St. Catherine's Milling*].
[2] *St. Catherine's Milling* at 60.
[3] *R. v Sundown*, [1999] 1 SCR 393 para. 5 [*Sundown*].

In the case of Treaty 3, which was agreed to in 1873, the Ojibway were promised the right to continue their traditional harvesting activities on lands not "required or taken up for settlement, mining, lumbering or other purposes by [the] Government of the Dominion of Canada."[4] The texts of the numbered treaties are similar to one another, and with slight variations, the Aboriginal signatories' right to continue traditional harvesting activities (the "harvesting right") and the government's right to take up land are included in most of the numbered treaties.[5]

4. Treaty 3 and the other numbered treaties are solemn agreements between Aboriginal peoples and Canada and as such are key to achieving the reconciliation of the Crown's assertion of sovereignty with the fact of pre-existing Aboriginal societies.[6] Reconciliation through the numbered treaties is unfinished. The proposed appeal raises issues of national importance which ask this Court what role, if any, Canada maintains in this ongoing process of reconciliation.

C. Procedural History

(a) The Judicial Review

5. This case started as a challenge to Ontario's authority to utilize the taking up clause under Treaty 3. Litigation was commenced by members of Grassy Narrows First Nation ("Grassy Narrows") when the Ontario Minister of Natural Resources issued a sustainable forest licence in 1997 to Abitibi-Consolidated Inc ("Abitibi") to conduct clear-cut logging in the "Keewatin Lands" in Treaty 3 territory.[7]

6. In 2000, Grassy Narrows brought an application for judicial review at the Ontario Divisional Court for an order setting aside all the licences, permits, management plans

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[4] *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801, para. 1 ["Trial Decision"].
[5] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which they were based* (Toronto: Belfords, Clark & Co., 1994).
[6] *R. v Calder*, [1996] 1 SCR 660; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew*].
[7] 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.

and work schedules Ontario had granted to Abitibi on the basis that Ontario did not have the authority to infringe Grassy Narrows' Treaty 3 harvesting rights.

7. The Divisional Court concluded that the application raised complex issues of fact and law that could only be resolved at trial and so quashed the application for judicial review. The Court held that the adjudication of the issues in the application required "consideration of a wide range of historical, anthropological, ecological, biological and economic evidence," and that the complexity of the evidence was "compounded by the challenges posed by the special evidentiary dimensions of aboriginal and treaty rights cases."[8] The Court concluded that a trial was necessary so that the facts at issue could be determined based on "direct exposure to evidence tendered at trial."[9] The Court explicitly recognized the public interest and importance of the constitutional issues raised by the applicants' challenge to Ontario's authority to infringe the harvesting right.[10]

(b) Commencement of the Action

8. Grassy Narrows commenced an action in respect of the issues in this litigation in 2005. In 2006, the case management judge divided the trial into two phases and directed that the first phase would involve two questions.[11] The first question was whether Ontario had the authority to exercise the Treaty 3 taking 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 had the authority to justifiably infringe the harvesting right pursuant to the constitutional division of powers.

9. The decision of the Ontario Court of Appeal is limited to the first phase of the trial. If the litigation were to proceed, the second phase of the trial would determine Grassy Narrows' claim with respect to the validity of the specific forestry licences on which the original application for judicial review was based.

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[8] *Keewatin v Ontario (Minister of Natural Resources)* (2003), 66 OR (3d) 370, para. 45 (Ont Div Ct) ["Judicial Review Decision"].
[9] Judicial Review Decision, para. 45.
[10] Judicial Review Decision, para. 61.
[11] *Keewatin v Ontario (Minister of Natural Resources* (28 June 2006), Toronto 05-CV-281875PD (Ont Div Ct).

(c) The Advance Costs Order

10. Grassy Narrows was granted an advanced cost order.[12] In making the order the Court recognized the trial decision's potential to impact the administration of the historical treaties across Canada:

> The interpretation of the taking up clause has not been judicially considered before. A determination of this issue will affect the other Treaty 3 First Nations as well as the forestry and possibly other authorizations issued by the province for activities that "take up" Treaty 3 land. This case will also have implications for the other numbered treaties, which reference "the Government of the Country" either in the "taking-up" or regulation clause.[13]

(d) The Trial Decision

11. The trial at the Ontario Superior Court of Justice took place over 70 days and involved a complex evidentiary record and two weeks of examination of expert witnesses. The 2011 trial decision, which was more than 300 pages, answered in the negative the two questions as set out in the case management order. 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 taking 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.[14]

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[12] *Keewatin v Ontario (Minister of Natural Resources)*, 2006 CanLII 35625 (ON SC) ["Advance Costs Order"].
[13] Advance Costs Order, para. 224.
[14] Trial Decision, para. 1452 [emphasis in the original].

12. The trial judge's view of Canada's role in the administration of the treaty was based on her findings of fact in regards to the parties' common intention in 1873 and on her analysis of the constitutional division of powers.

13. 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.[15] The trial judge held that Treaty 3 was an agreement between Canada and the Ojibway, and that the Ojibway understood when the treaty was signed that in the future they could look to the federal government to ensure that the Crown's obligations under the treaty were respected and fulfilled.[16] According to the trial decision, as the original treaty partner in Treaty 3, Canada retains an ongoing role in ensuring that the treaty is administered in accordance with the treaty promises made to the Ojibway.

14. The trial judge also held that 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 protection under the doctrine of inter-jurisdictional immunity."[17] As a result, Ontario could not significantly infringe the harvesting right.[18] In exercising its exclusive jurisdiction under section 91(24), Canada could affect Ontario's right to the beneficial interest in the land, a right which had been confirmed in *St. Catherine's Milling*.[19]

15. Ontario, Canada and Abitibi (now Resolute FP Canada Inc) appealed the trial decision.

(e) The Intervener Decision

16. In 2012, the Ontario Court of Appeal granted party intervener status to the Applicant and to Goldcorp Inc., and intervener friend of the court status to a number of

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[15] Trial Decision, para. 1288-1293.
[16] Trial Decision, para. 1199.
[17] Trial Decision, para. 1553.
[18] Trial Decision, para. 1564.
[19] Trial Decision, para. 1547.

other First Nation interveners, including the Grand Council of Treaty 3 and several Treaty 6 First Nations from Alberta and Saskatchewan.[20]

17. In granting party intervener status to the Applicant, Justice Sharpe recognized 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."[21]

18. Justice Sharpe's decision to grant intervener friend of the court status to a number of Treaty 6 First Nations was based on the commonalties in the numbered treaties across Canada.[22]

(f) The Appeal Decision

19. In 2013, after an eight-day hearing in which the Court of Appeal heard submissions from ten sets of parties and interveners, the Court of Appeal reversed the trial judge's decision.[23]

20. The Court of Appeal held that Ontario does have authority to exercise the Treaty 3 taking 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 concluded that it was unnecessary to consider whether Ontario had the authority to justifiably infringe the Treaty 3 harvesting right pursuant to the constitutional division of powers.[25]

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[20] *Keewatin v Ontario (Natural Resources)*, 2012 ONCA 472 (CanLII) ["Intervener Decision"]. The Court granted intervener friend of the court status to the Grand Council of Treaty 3 and the following individual Treaty 3 First Nations: Lac Seul First Nation, Big Grassy First Nation, Ochiichagwe'Babigo'Ining Ojibway Nation, Ojibways of Onigaming First Nation, Naotkamegwanning First Nation and Shoal Lake #40 First Nation. The Court also granted intervener friend of the Court status to the following Treaty 6 First Nations; Ermineskin Cree Nation, Muskeg Lake Cree Nation #102, Whitefish (Goodfish) Lake First Nation #128 and Samson Cree Nation.

[21] Intervener Decision, para. 20.

[22] Intervener Decision, para. 10.

[23] *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158 (CanLII) ["Appeal Decision"].

[24] Appeal Decision, para. 140, 150, 174.

[25] Appeal Decision, para. 234.

21. The Court of Appeal's decision relied heavily on its own interpretation of the written text of the treaty document and on what it described as the doctrine of "constitutional evolution" in support of its conclusion that Canada has no role or responsibilities when Ontario takes up lands under Treaty 3 so as to infringe the treaty rights promised by Canada to the Ojibway in 1873.[26]

22. The Court of Appeal substituted its own findings for the trial judge's findings of fact that at its core Treaty 3 was a solemn agreement between the Ojibway and the federal government. While the trial judge specifically considered the perspective and understandings of the Aboriginal parties at the time the treaty was negotiated,[27] the Court of Appeal concluded that notwithstanding the Aboriginal signatories' understanding of the treaty relationship, the historical treaties were entered into between Aboriginal people and the Crown at large, not the Crown in the right of Canada.[28]

23. The Court of Appeal also relied on Justice Binnie's caution in *R v Marshall* that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse"[29] as a further basis on which to override both the Aboriginal perspective on the treaty and the findings of the trial judge.[30]

24. Based on what it considered the evolving nature of the Constitution, the Court of Appeal held that Canada no longer has a role to play in land use decisions affecting treaty rights.[31] According to the Court of Appeal, when Ontario assumed the right to the beneficial interest to the Keewatin Lands in 1912, "Ontario stepped into the shoes of Canada" for the purpose of the harvesting clause such that Canada is now no longer responsible for fulfilling the obligations set out in Treaty 3.[32]

25. The Court of Appeal concluded that Ontario is free to exercise the taking up clause in Treaty 3 in the Keewatin Lands, with the only limit being if so much land is

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[26] Appeal Decision, para. 136-41,153.
[27] Trial Decision, para. 1288-1293.
[28] Appeal Decision, para. 135.
[29] *R. v Marshall*, [1999] 3 SCR 456, para. 14 [*Marshall*].
[30] Appeal Decision, para. 151.
[31] Appeal Decision, para. 153.
[32] Appeal Decision, para. 174.

taken up that no meaningful opportunity to exercise the treaty right remains. Even in that event, according to the Court, Canada would still have no role in ensuring that the treaty promises are respected:

> 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.[33]

26. 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 taking up clause because Canada cannot intrude on the province's authority under sections 92(5), 92A and 109 of the Constitution.[34]

27. The Court of Appeal's decision disregards findings of fact by the trial judge which were based on an extensive and detailed review of historical evidence and the Ojibway perspective on Treaty 3. It exemplifies inconsistencies and uncertainty in the law across Canada with respect to a province's authority to infringe treaty rights. The Court's conclusion absolves Canada from any continuing obligations in fulfilling the Crown's original treaty promises and denies Canada a role in achieving reconciliation between Aboriginal peoples and the Crown with respect to the historical treaties. If allowed to stand, the Court of Appeal's decision will mark a fundamental shift in the understanding and implementation of historical treaties across the country.

PART II – QUESTIONS IN ISSUE

28. If leave to appeal is granted, the proposed appeal will ask this Court to determine whether Canada has an ongoing role in the administration of the historical treaties and the promotion of reconciliation between Aboriginal peoples and the Crown.

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[33] Appeal Decision, para. 207.
[34] Appeal Decision, para. 204-05.

PART III – STATEMENT OF ARGUMENT

A. The proposed appeal raises issues of national importance with respect to the constitutional division of powers

(a) Can the "living tree" doctrine operate to eliminate Canada's responsibilities to fulfill its treaty promises?

29. At issue in the proposed appeal is whether the Court of Appeal was correct that the Constitution has evolved such that the provinces can now encroach on Parliament's exclusive authority over treaty rights. The Applicant will ask this Court to clarify whether, in context of rights guaranteed under the historical treaties with Aboriginal peoples, Canada has been discharged from its responsibilities under the Constitution completely, or if there are inherent limits on the evolution of the Constitution which must be respected.

30. The Court of Appeal's reliance on what it called the "doctrine of constitutional evolution" is incompatible with this Court's jurisprudence. Specifically in relation to the numbered treaties, this Court has emphasized that the "living tree" doctrine must be interpreted within its historical context and applied within the natural limits of the text of the Constitution.[35] This Court has insisted on the primacy of the written Constitution because it "promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review."[36]

31. This Court has further held, with respect to the interplay of federal and provincial powers, that "the evolution of society cannot serve as a pretext for changing the nature of the division of powers, which is a fundamental component of the Canadian federal system."[37] Rather, the constitutional power at issue must be interpreted in a "manner consistent with its legal context, having regard to relevant historical elements."[38]

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[35] *R. v Blais*, [2003] 2 SCR 236, para. 40, citing *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, para 117.
[36] *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 53.
[37] *Confédération des syndicates nationaux v Canada (Attorney General)*, 2008 SCC 68, [2008] 3 SCR 511, para. 30 [*Confédération des syndicates nationaux*].
[38] *Confédération des syndicates nationaux*, para. 30.

32. The Court of Appeal's disregard for these principles of constitutional interpretation creates a precedent that puts at risk the established special relationship between Aboriginal peoples and the federal government, a relationship grounded in the Royal Proclamation of 1763. If the decision is not considered by this Court, it stands to be relied on across the country as a basis on which to re-write the Constitution so as to erase Canada's exclusive responsibilities to Aboriginal peoples to ensure that the historical treaties are honoured and implemented.

(b) How does the principle of cooperative federalism apply to the historical treaties?

33. The proposed appeal raises the issue of the application of the principle of cooperative federalism to treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*. Recent decisions of this Court emphasize an approach which "accommodates overlapping jurisdiction and encourages intergovernmental cooperation."[39] By contrast, the Court of Appeal's decision repudiates cooperative federalism by reviving Lord Atkin's "water-tight compartments" approach in relation to sections 92(5) and 92A of the *Constitution Act, 1867*.[40]

34. The question for this Court is where the balance lies, as part of the ongoing process of reconciliation, between allowing provinces to exercise control over provincial Crown lands and resources and ensuring that the federal government fulfills its exclusive obligations under section 91(24) to honour and protect treaty promises.

B. The proposed appeal raises issues of national importance with respect to treaty interpretation

35. The proposed appeal raises three issues of treaty interpretation of importance to First Nations and governments across Canada:

- What are the necessary limits of the applicability of Justice Binnie's caution in *Marshall* against "after-the-fact-largesse" when interpreting treaties?

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[39] *Reference re Securities Act*, [2011] 3 SCR 837, para. 57 [*Reference Re Securities Act*].
[40] *Attorney-General for Canada v Attorney-General for Ontario*, [1937] AC 326 at 354.

- When Aboriginal and treaty rights are at stake, should there be an enhanced burden on an appellate court to justify overturning findings of fact by the trial judge which rely on the perspective of the Aboriginal people?
- Was Canada ever a treaty partner in the historical treaties?

(a) The Court's caution against "after-the-fact-largesse" should not be used to neutralize the principles of treaty interpretation

36. The Chief Justice's summary of the principles of treaty interpretation in *Marshall* has become the touchstone for the interpretation of treaties with Aboriginal people.[41] At the same time, Justice Binnie's caution against "after-the-fact-largesse" in treaty interpretation has become a simple and effective justification for limiting the scope and content of treaty rights.[42] The proposed appeal will ask the Court to clarify the necessary limits of Justice Binnie's caution and how it is to be applied in practice.

37. On the proposed appeal, the Applicant will submit that the Court of Appeal's decision is an example of Justice Binnie's caution against "after-the-fact-largesse" being applied so as to undermine, or even neutralize, the Aboriginal perspective and fundamental principles of treaty interpretation. It is open to this Court, as an issue of national importance, to determine whether courts are at liberty to invoke Justice Binnie's caution so as to disregard both Aboriginal peoples' understanding of the treaties and established treaty interpretation principles, or if the principles of treaty interpretation, including the recognition of the Aboriginal perspective, must be respected.

(b) Should there be an enhanced burden on appellate courts to justify overturning findings of fact by a trial judge in Aboriginal law cases?

38. It is trite law that findings of fact are not to be reversed by an appellate court unless the trial judge has made "a palpable and overriding error."[43] This principle recognizes that appellate courts are not well-suited to assess and determine factual

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[41] *Marshall*, para. 78.
[42] *Marshall*, para. 14. See, for example, *Hiawatha First Nation v Ontario (Minister of the Environment)*, 2007 CanLII 3485 (ON SCDC); *Canada v Benoit*, 2003 FCA 236 (CanLII).
[43] *Stein v The Ship "Kathy K"*, [1976] 2 SCR 802 at 808.

matters, and that it is important to conserve public and judicial resources and to preserve confidence in the litigation process.[44] This Court has confirmed that the deferential standard of appellate review applies to factual findings in cases involving Aboriginal rights.[45]

39. Cases where Aboriginal people must seek confirmation of their constitutional rights are litigated at significant judicial and public expense, and as in this case, are sometimes funded by advance costs orders which are intended to allow Aboriginal people an opportunity for a full and fair hearing at trial.

40. In the proposed appeal, the Applicant will submit that the principles of deference on appellate review should be strictly applied when, as here, a trial judge undertakes a thorough and painstaking consideration of historical evidence as to the common intention of government and Aboriginal people to enter into treaty. The Applicant will ask the Court to explicate the particular principles of deference for appellate review of Aboriginal law trials and to conclude that an appellate court has a heightened responsibility to explain a decision to overturn findings of fact by a trial judge based on an extensive historical record and informed by the Aboriginal perspective.

(c) Is Canada a treaty partner?

41. The Court of Appeal's decision stands for a novel proposition: for Aboriginal people with historical treaties, the provinces, not Canada, are their treaty partners. The proposition is contrary to the historical and current understanding of most, if not all, treaty Aboriginal people in Canada. If allowed to take root, the proposition will signal a fundamental shift in how, and whether, the historical treaties are honoured and implemented across the country.

42. The Court of Appeal's conclusion on the question of whether Canada was and remains a partner in the historical treaties runs counter to established judicial approaches

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[44] *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33, para. 14; *Gottardo Properties (Dome) Inc. v Toronto (City of)*, 1998 CanLII 6184 (ON CA), (1998) 162 DLR (4th) 574, para. 48.
[45] *Van der Peet*, para. 81.

to treaty interpretation and is an issue on which Canada, the provinces and First Nations across the country would benefit from direction from this Court.

43. The question of Canada's responsibility for administering the historical treaties was addressed by the English Court of Appeal in *R. v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others.*[46] The Court concluded that after Canada obtained independence, the obligations owed by the Crown to Aboriginal peoples became obligations owed by the Crown in right of Canada. The Court held that it was the federal government that acquired jurisdiction to administer the treaties with Aboriginal peoples.[47] The English Court's decision has subsequently been relied on in Canada in support of the principle that since 1867, the Crown in right of Canada has maintained responsibility for the administration of the treaties.[48]

44. If leave to appeal is granted, the Applicant will ask this Court to decide whether, notwithstanding the *Secretary of State* decision, Aboriginal people are no longer entitled to demand that Canada fulfill the solemn promises of the historical treaties.

45. The Court of Appeal's conclusion that the province has "stepped into the shoes of Canada" in the treaty relationship with First Nations contradicts established jurisprudence of this Court which has identified the federal government as the treaty partner in the context of the historical treaties.[49] For example, in *R v Sundown,* this Court found that the 11 numbered treaties were "concluded between the federal government and various First Nations."[50] In *R v Horseman,* Justice Wilson in dissent, but not on this issue, described both Canada's role as the treaty partner and the significance of the Aboriginal parties' understanding of the treaty relationship, stating that:

> ...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

[46] *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*].
[47] *Secretary of State* at 125.
[48] *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al,* [2000] 4 CNLR 1 (BCSC), para. 82.
[49] *R v Badger,* [1996] 1 SCR 771, para 22; *The Queen v Sutherland et al.,* [1980] 2 SCR 451 at 460; *Canada v Brokenhead First Nation,* 2011 FCA 148 (CanLII) (FCA), para 3.
[50] *Sundown,* para 5.

> 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.[51]

46. Canada's role as the treaty partner in the historical treaties is a significant and 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 the Crown in right of Canada, and that they could look to the federal government to fulfill 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.[52]

47. The Aboriginal perspective on Canada's role in the historical treaties was also acknowledged in the Ontario 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.[53]

48. The Court of Appeal's decision represents a significant departure from pre-existing jurisprudence which has interpreted the treaty relationship as between Aboriginal peoples and Canada. It is for this Court to decide whether the Court of Appeal correctly concluded that Canada has no direct role in the historical treaties, or if the understanding of the Aboriginal signatories to Treaty 3 of Canada's role as the treaty partner, as

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[51] *R v Horseman*, [1990] 1 SCR 901, para. 14 [emphasis added].
[52] 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).
[53] *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), para. 43.

confirmed by the trial judge on the evidence before her, should be recognized and respected.

C. The Court of Appeal's decision creates inconsistencies in the law

49. The Court of Appeal's decision highlights and reinforces inconsistencies in the law across Canada on the following issues:

- the application of the doctrine of interjurisdictional immunity;
- the threshold for a *prima facie* infringement of a treaty right; and
- the ability of the federal government's legislative powers to affect a province's interest in Crown lands.

(a) When does the *Morris* interjurisdictional immunity analysis apply?

50. The proposed appeal asks this Court to clarify when the interjurisdictional immunity analysis set out in *R v Morris*[54] applies. More specifically, does it apply to treaties with a taking up clause? If it does, is there a different threshold for triggering the doctrine of interjurisdictional immunity for treaties with taking up clauses than the threshold identified in *Morris* and *Canadian Western Bank v Alberta?*[55]

51. The Court in *Morris* held that the doctrine of interjurisdictional immunity operates to render provincial legislation inapplicable to the extent that it results in a meaningful diminution of a treaty right or, to put it another way, the legislation has more than an insignificant effect on a treaty right. Courts across the country have been inconsistent in their application of the *Morris* interjurisdictional immunity analysis to Aboriginal title, rights and treaty rights.

52. In the case at hand, the Ontario Court of Appeal did not directly address the applicability of the Court's *Morris* analysis. Instead the court below held that because of the taking up clause in Treaty 3, provincial forestry legislation under section 92A of the *Constitution Act, 1867* could apply well past a meaningful diminution of the harvesting

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[54] *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 [*Morris*].
[55] *Canadian Western Bank v Alberta* [2007] 2 SCR 3, 2007 SCC 22.

right and up to the point that there would be no meaningful ability to exercise the treaty right. Put simply, the Ontario Court of Appeal's view was that a taking up clause in a treaty leaves no room for the application of the doctrine of interjurisdictional immunity.

53. In *Tsilhqot'in Nation v British Columbia,* which involved claims for Aboriginal title and rights, the trial judge held that British Columbia did not have jurisdiction under section 92A to regulate forestry on Aboriginal title land because of Canada's exclusive authority under section 91(24) and the operation of the doctrine of interjurisdictional immunity.[56] At the B.C. Court of Appeal, the court declined to comment further on the issue of the scope of the province's power to manage forests on Crown land and the operation of the doctrine of interjurisdictional immunity because it had concluded that the claim for Aboriginal title had not been proven.[57]

54. The B.C. Court of Appeal, however, did address the issue in *Moulton Contracting Ltd v British Columbia* in the context of a taking up clause under a numbered treaty.[58] In *Moulton,* a case dealing with rights guaranteed in Treaty 8, provincial forestry legislation and sections 92(5) and 92A of the *Constitution Act, 1867,* the B.C. Supreme Court took a similar approach to that of the Ontario Court of Appeal in the case at bar. The B.C. Supreme Court struck out sections from the Aboriginal defendants' statement of defence which relied on the *Morris* analysis on the basis that unlike the treaty rights in *Morris*, treaty rights under Treaty 8 were granted subject to the government's right to take up lands such that the doctrine of interjurisdictional immunity did not apply.[59]

55. The B.C. Court of Appeal in *Moulton* declined to uphold the trial judge's conclusion. Describing the issue of the application of the doctrine of interjurisdictional immunity to a taking up clause under a treaty as a profoundly important question of constitutional law, the B.C. Court of Appeal held that a proper consideration of the issue "would require evidence to

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[56] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 (CanLII), para. 1032.
[57] *William v British Columbia*, 2012 BCCA 285 (CanLII), para. 243.
[58] *Moulton Contracting Ltd v British Columbia* [2010] 4 CNLR 132, 2010 BCSC 506 [*Moulton*].
[59] *Moulton,* para. 76-78.

determine the degree of 'taking up;' and the effect of such 'taking up' on the core of the Fort Nelson First Nation's 'Indianness.'"[60]

56. The Ontario Court of Appeal's decision is also contrary to a decision from the New Brunswick Court of Appeal. In *Paul et al. v R*, the New Brunswick Court of Appeal applied this Court's analysis in *Morris* in determining the province's right to take up land pursuant to provincial forestry legislation in the context of a treaty without a taking up clause.[61] The Court of Appeal stated that:

> Succinctly stated the law is as follows: once it is established that a provincial law of general application causes a meaningful diminution of a treaty right (a *prima facie* infringement), as discussed in *R. v. Sparrow*..., the Province cannot invoke the *Sparrow/Badger* justification test set down in *R. v. Sparrow*, *supra*, and *R. v. Badger*....[62]

57. In sum, in considering the taking up clause in Treaty 3, the Ontario Court of Appeal concluded that the *Morris* analysis does not apply. In considering the taking up clause in Treaty 8, the British Columbia Court of Appeal concluded that the *Morris* analysis is applicable. Similarly, in considering the issue of the province's right to take up forestry lands under a historical treaty without a taking up clause, the New Brunswick Court of Appeal concluded that the *Morris* analysis applies.

58. To promote certainty, uniformity and reconciliation, it is important that the Court clarify the applicability of the *Morris* interjurisdictional immunity analysis to the numerous historical treaties with taking up clauses.

(b) Are there different thresholds for a prima facie infringement of a treaty right?

59. According to the court below, this Court's decision in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* established that for historical treaties that include a taking up clause, the threshold for determining whether there has been a *prima*

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[60] *Moulton Contracting Ltd. v Behn*, 2011 BCCA 311 (CanLII), para. 66; aff'd 2013 SCC 26 (CanLII). The issue of the application of the doctrine of interjurisdictional immunity in the context of a taking up clause was not raised at the Supreme Court.
[61] *Paul et al. v R*, 312 NBR (2d) 354; [2007] 3 CNLR 335 [*Paul*].
[62] *Paul*, para. 5 [citations omitted].

facie infringement of a treaty right is whether there has been an interference which would result in there being no meaningful harvesting right left.[63] This application of *Mikisew* is incompatible with the Court's conclusion in *Morris* that a *prima facie* infringement "includes anything but an insignificant interference" with the treaty right.[64]

60. It is for this Court to determine whether the court below correctly interpreted and applied *Mikisew* and if so, how the Court of Appeal's interpretation of the threshold for a *prima facie* infringement is to be reconciled with this Court's holding in *Morris*.

(c) Is the *Fisheries Case* no longer good law?

61. If leave to appeal is granted, the Applicant will ask this Court to clarify conflicting jurisprudence with respect to the extent to which one level of government can, in the exercise of its legislative powers, affect the beneficial interest of the other in Crown land and resources.

62. In *Attorney-General for the Dominion of Canada v Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (the "*Fisheries Case*"), the Privy Council confirmed that the exercise of Canada's legislative jurisdiction can affect a province's proprietary interests without invalidating Canada's jurisdiction.[65] This fundamental division of powers principle was later confirmed by this Court in *Reference re Waters and Water-Powers*.[66]

63. In the case at hand, however, the Court of Appeal relied 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"[67] as a basis for dismissing the trial

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[63] Appeal Decision, para 207, citing *Mikisew*, para 48.
[64] *Morris*, para 53.
[65] *Attorney-General for the Dominion of Canada v Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia*, [1898] AC 700 (P.C.) at 712-13 [*Fisheries Case*].
[66] *Reference re: Waters and Water-Powers*, [1929] SCR 200 at 484 [*Reference re: Waters and Water-Powers*].
[67] *Reference Re Securities Act*, para 71.

judge's finding that federal jurisdiction over treaty rights includes an ongoing role for Canada in relation to the province's exercise of the taking up clause.[68]

64. The proposed appeal asks this Court to clarify whether the principles set out in the *Fisheries Case* remain valid, or if the Court of Appeal's application of this Court's statement in *Reference re Securities Act* was correct.

65. More specifically, does the potential impairment of a province's right to the beneficial interest in Crown lands through the valid exercise of federal authority, as allowed for based on the *Fisheries Case* and *Reference re Waters and Water-Powers*, constitute the evisceration of a provincial legislative competence as described in *Reference re Securities Act*? If it does, how are these constitutional interpretation principles to be reconciled?

D. Why the proposed appeal is so important

66. Because our Constitution divides legislative authority for the use of Crown lands and resources from the authority to protect and limit treaty rights exercised on those lands, honouring the historical treaties raises issues that go to the very foundation of the Canadian federation.

67. While the Privy Council in *St. Catherine's Milling* brought to a close one of the great constitutional debates of the 19th century, it left unanswered the question of how Ontario's ownership of Crown lands was to be reconciled with the promises Canada made to the Ojibway to hunt and fish, forever, on those same lands.

68. Ever since *St. Catherine's Milling*, Ontario and other provinces have proceeded on the *de facto* assumption that they can authorize uses of Crown lands and resources that affect treaty rights without the involvement of the federal government. Treaty First Nations have looked in vain for Canada, their treaty partner, to ensure that their treaty rights are respected and protected. It is in this climate of uncertainty and distrust that the Applicant applies to this Court for clarity.

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[68] Appeal Decision, para. 204-05.

69. The historical treaties are living documents. The ongoing fulfillment of their solemn promises is both the challenge and the virtue of Canada. The Applicant asks this Court for direction as to where the Aboriginal peoples of Canada are to look to ensure that the spirit and intent of the treaty promises made to their ancestors are fulfilled.

PART IV – SUBMISSIONS CONCERNING COSTS

70. This case has proceeded as a test cast under an advance costs order. At the Ontario Court of Appeal the Applicant was awarded costs on the same basis as the Respondent Grassy Narrows. Because of the national importance and complexity of the issues raised in this case, the Applicant seeks costs of this application, and if leave is granted, costs of the appeal before this Honourable Court, in any event of the cause and on a solicitor-client basis.

PART V – ORDER SOUGHT

71. The Applicant seeks an order granting leave to appeal the judgment of the Ontario Court of Appeal, with costs of the leave application and appeal before this Honourable Court granted to the Applicant in any event of the cause and on a solicitor-client basis.

All of which is respectfully submitted this 16th day of May, 2013.

Bruce Stadfeld McIvor

Kathryn Buttery

Part VI – Table of Authorities

Jurisprudence

Part VII – Statutes and Other References

Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which they were based* (Toronto: Belfords, Clark & Co., 1994).	2
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)	14
Report on the Ipperwash Inquiry, Vol 2 (Ontario: Ministry of the Attorney General, 2007)	14