Court File No. 35379

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

BETWEEN:

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

APPLICANTS

-and-

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

RESPONDENTS

AND BETWEEN:

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

APPLICANTS

-and-

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

RESPONDENTS

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(Pursuant to s. 40 of the *Supreme Court Act* and Rule 27 of the *Rules of the Supreme Court of Canada*)

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APPLICANTS

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RESPONDENTS

CERTIFICATE OF COUNSEL FOR THE RESPONDENT, MINISTER OF NATURAL RESOURCES
(pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

I, **MICHAEL R. STEPHENSON**, counsel for the Respondent Minister of Natural

Resources, hereby certify that

(a) There is no sealing or order or ban on the publication evidence or the names or identity of a party or a witness;

(b) There is no confidential information on the file that should not be accessible to the public by virtue of specific legislation.

Dated at Toronto this 14th day of June, 2013.

for: **MICHAEL R. STEPHENSON**
ONTARIO MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office - Civil

Counsel for the Respondent,
Minister of Natural Resources

MEMORANDUM OF ARGUMENT

PART I – Overview and Facts

Overview

1. The plaintiffs in this litigation sought to establish that for those Treaty 3 lands added to Ontario in 1912 (referred to in this case as the "Keewatin Lands"), a literal reading of the Treaty 3 taking-up clause requires federal approval for any land uses having more than a *de minimis* impact on the plaintiffs' ability to exercise Treaty 3 harvesting rights. For "settlement, mining, lumbering" and other land uses falling within provincial jurisdiction, the plaintiffs argued that the Treaty contemplated and imposed a two-step land use regime, under which the federal government is required to supervise Ontario's administration and control of off-reserve public lands.

2. The decision of the trial judge accepted this argument, in large part based on her reading of the Treaty text and unsupported, speculative findings regarding the intentions of the Treaty 3 Commissioners, particularly the lead commissioner, Lieutenant Governor Alexander Morris.

3. In a unanimous decision written by the Court (Sharpe, Gillese and Juriansz JJ.A.), the Court of Appeal for Ontario correctly concluded that Ontario has the jurisdiction to manage public lands and forests within the Keewatin Lands, without federal supervision, pursuant to ss. 109, 92(5) and 92A of the *Constitution Act, 1867*.[1]

4. The leave to appeal applications put forward by Andrew Keewatin Jr. and Joseph William Fobister for Grassy Narrows First Nation ("Grassy Narrows") and Leslie Cameron for Wabauskang First Nation ("Wabauskang"), seek to raise various issues concerning: Canada's constitutional division of powers; the effects of constitutional and

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[1] *Constitution Act, 1867* (UK), 30 & 31 Vic., c. 3 ("*Constitution Act, 1867*"), s. 109, **Application for Leave to Appeal of the Applicants, Grassy Narrows First Nation, et al. ("Grassy Narrows Application"), Vol. 2, Tab 10, pp. 207-208**, and *Constitution Act, 1867,* ss. 92(5) and 92A, **Joint Response of the Respondent, Minister of Natural Resources ("MNR Response"), pp. 39-43**.

administrative developments in the Keewatin Lands; and principles governing the determination of facts in Aboriginal matters.

5. None of the issues raised by the applicants warrant the granting of leave to appeal, for the following reasons:

(a) Properly understood, the decision of the Court of Appeal raises no genuine, unsettled proposition of law, much less one that has national importance or otherwise merits the attention of this Court.

(b) The issues raised by the applicants reflect significant misapprehensions of the nature of the decision of the Court of Appeal, the decision's import, and related doctrines including co-operative federalism – as explained in Part III below. Only these misapprehensions give the appearance of raising issues of national importance.

(c) The Court of Appeal applied long established principles articulated by this Court and the Privy Council to arrive at a result which accords with Canada's constitutional division of powers as it has been understood and acted upon for well over a century. In the context of an express internal limitation to a treaty harvesting right (the Treaty 3 taking up clause), the Court of Appeal's recognition of Ontario's jurisdiction does not offend any of the constitutional principles relied on by the applicants. The valid exercise of provincial jurisdiction within the ambit of a taking up clause does not infringe the treaty right or intrude on federal jurisdiction.

(d) The Court of Appeal correctly recognized that the interpretation of the Treaty 3 taking up clause advanced by the plaintiffs and accepted by the trial judge, "said to be based upon the literal wording of the harvesting clause, cannot be reconciled with the text …",[2] because a literal interpretation provides for no provincial role whatsoever.

[2] *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158 ("Appeal Reasons"), **Grassy Narrows Application, Vol. 2, Tab 8, p. 131, para. 143**.

(e) The Court of Appeal's sound and detailed analysis of the critical factual findings of the trial judge provides an independent basis for its decision, raises no issues of law, and effectively precludes arriving at a different result on the law. This analysis was based on the highest standard of deference applicable to appellate review, palpable and overriding error. No genuine issue arises from the Court of Appeal having used that standard to review the trial judge's findings of fact. The Court of Appeal's application of that standard raises no issue of national significance.

(f) While scarcely mentioned by the applicants, reciprocal legislation passed in 1891[3] and 1912,[4] and a federal-provincial agreement made in 1894,[5] provide a further sound and independent basis for the Court of Appeal's resolution of this case, pursuant to established principles of statutory interpretation.

(g) The historical circumstances giving rise to this case – factual, legislative and jurisdictional, including the reciprocal legislation and agreement noted immediately above – are largely unique to the Keewatin Lands, greatly limiting any potential for national significance.

6. The decision of the Court of Appeal places Ontario in the same position with respect to the administration and control of the Keewatin Lands that it is in with respect to the other Treaty 3 lands in the Province, and that all provinces are in with respect to the administration and control of lands ceded pursuant to the post-Confederation "numbered treaties" entered into between the Crown and First Nations in the late 19th and early 20th centuries, and the Robinson Treaties of 1850 (which served as a precedent for the numbered treaties).

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[3] *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands* (CA), 54 & 55 Vict., c. 5, **Grassy Narrows Application, Vol. 2, Tab 10, pp. 200-203**; *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands* (ON), 54 Vict., c. 3 (the "1891 Legislation"), **Grassy Narrows Application, Vol. 2, Tab 10, pp. 196-200**.

[4] *The Ontario Boundaries Extension Act, S.C. 1912*, 2 Geo. V, c. 40, **Grassy Narrows Application, Vol. 2, Tab 10, pp. 221-222***; An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province* (ON), 2 Geo V., c. 3, **MNR Response, pp. 36-38**, (together, "the 1912 Legislation"). These remain in force today.

[5] The 1891 Legislation included a Schedule, containing a draft agreement addressing the two issues. The draft agreement was executed by both governments in 1894 (the "1894 Agreement").

7. The Court of Appeal also confirmed a critical proposition that has been accepted law since the Privy Council's decision in *St. Catherine's Milling*,[6] and which is entirely consistent with the text of all these treaties: treaties are solemn agreements between the Aboriginal parties and the Crown, not solely the Crown in right of Canada.[7]

8. As correctly held by the Court of Appeal, and as acknowledged by Ontario throughout this proceeding, this proposition implies that in administering the Keewatin Lands on behalf of the Crown, Ontario is constitutionally bound to respect Treaty 3 harvesting rights pursuant to the Treaty itself, the honour of the Crown, the terms of s. 109 of the *Constitution Act, 1867,* and s. 35 of the *Constitution Act, 1982*.[8] Specifically, pursuant to this Court's decision in *Mikisew Cree*, Ontario is required to consult with and where applicable accommodate Treaty 3 First Nations when making decisions that may adversely affect treaty harvesting rights, and must ensure that Treaty 3 First Nations continue to enjoy a meaningful ability to exercise their harvesting rights.[9]

Facts

9. Ontario relies on the facts as set out by the Court of Appeal in its decision. Of these, the following uncontested facts are particularly significant:

(a) As noted above, this litigation relates to the "Keewatin Lands" (those lands subject to Treaty 3 that were added to Ontario in 1912, generally lying north of the English River: see maps attached as Appendix A). In 1873, the Keewatin Lands were outside Ontario, and within federal territory.[10]

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[6] *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, [1888] J.C.J. No. 1 (JCPC), aff'g [1887] 13 S.C.R. 577, aff'g (1886), 13 O.A.R. 148 (C.A.), aff'g (1885), 10 O.R. 196 (Ch. Div.) ("*St. Catherine's Milling*"), **Book of Authorities of the Applicants, Grassy Narrows First Nation, et al. ("Grassy Narrows Authorities"), Tab 12**.

[7] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 120, 124, paras. 113, 126**.

[8] *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1892* (UK), 1982, c. 11, s. 35, **Grassy Narrows Application, Vol. 2, Tab 10, p. 215**.

[9] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R 388, 2005 SCC 69 at paras. 33-34, 48 and 57-65 ("*Mikisew Cree*"), **Book of Authorities of the Respondent, Minister of Natural Resources ("MNR Authorities"), Tab 7**; Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 153, paras. 209-212**.

[10] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 95, para. 25**.

(b) In 1871 and 1872, Canada sent Treaty Commissioners to negotiate with the Treaty 3 Chiefs, but they were unable to conclude a treaty.[11]

(c) Canada renewed its efforts to negotiate a treaty in 1873. Three Treaty Commissioners were ultimately appointed: Alexander Morris; Joseph Provencher and Simon Dawson.[12]

(d) The lead Commissioner was Alexander Morris, a founder of Confederation and political ally of Sir John A. Macdonald. He served as a federal cabinet member and briefly as a judge before his appointment as Lieutenant-Governor of Manitoba and the North-West Territories. Morris was sent as Prime Minister Macdonald's confidant to negotiate the Treaty and was very close to the Prime Minister.[13]

(e) The Commissioners were authorized, on behalf of the Crown, "to negotiate, make and conclude with the several bands or tribes of Indians the necessary Treaties for the cession to us, our heirs and successors, of all and every their respective rights, titles, and claims to and in the said lands and every of them".[14]

(f) The parties gathered at the North-West Angle of the Lake of the Woods on September 30 and negotiations began in earnest on October 1, 1873.[15]

(g) Throughout the negotiations, the Commissioners referred to the Queen, emphasizing that they represented her. They also made reference to the Queen's government, which Morris referred to as being located in Ottawa, and to authorities in Ottawa.[16]

(h) Nothing in the record suggests that any representation was made to the Ojibway that the taking up clause would be subject to a process requiring the approval of two levels of government, or that Morris communicated to the

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[11] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 96, para. 28**.
[12] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 96, para. 30**.
[13] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 97, 139, paras. 31, 166**.
[14] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p.97, para. 34**.
[15] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 99, para. 39**.
[16] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 99, para. 40**.

Ojibway an intention to require Canada's approval of taking up by Ontario.[17] Ontario was never mentioned.

(i) Following negotiations on many points, Treaty 3 was concluded and signed on behalf of the parties on October 3, 1873.[18] It included the following "harvesting clause" that is central to this litigation:

> 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. *[Emphasis added.]*[19]

(j) Treaty 3 was negotiated amidst controversy over the location of Ontario's western and northern boundaries. At the time Treaty 3 was negotiated, the federal government's position was that all of the Treaty 3 lands were in the North-West Territories, under the administration and control of the Dominion of Canada. Ontario took the position that its boundaries extended to the west of its current boundary, taking in much of what became Treaty 3 lands (the "Disputed Territory").[20]

(k) With a more conciliatory Liberal government in Ottawa and a Liberal government in Ontario, in June 1874 the two sides agreed to resolve the boundary dispute through arbitration and reached a provisional boundary agreement to provide legal certainty for development in the Disputed Territory. The provisional boundary ran north-south through the eastern part of the Treaty 3 area.[21]

(l) Under the 1874 Provisional Boundary Agreement, it was agreed that for Treaty 3 lands within the Disputed Territory to the east and south of the

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[17] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 136-137, paras. 160-161**.
[18] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 101, para. 54**.
[19] *Treaty No. 3, Made October 3, 1873 and Adhesions, Report, etc.*, Ottawa: Queen's Printer, 1966, **Grassy Narrows Application, Vol. 2, Tab 10, pp. 225-227**
[20] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 101-102, para. 55**.
[21] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 102, paras. 59-60**.

provisional boundary, Ontario would grant patents; to the west and north, Canada would grant patents. If it was subsequently found that the actual boundary differed from the provisional boundary, the applicable government would ratify the patents issued by the other government for such lands and account for any proceeds derived from such lands.[22]

(m) Ontario's position in the boundary dispute was accepted in August 1878 by a panel of arbitrators, resulting in most of the Treaty 3 area being in Ontario.[23]

(n) Matters changed with Macdonald's return to power in October 1878. He refused to honour the arbitration decision. The Ontario boundary dispute case was heard by the Judicial Committee of the Privy Council in 1884, which essentially endorsed the 1878 arbitrators' ruling. Ontario's original boundaries, as determined by the Privy Council in 1884, were not confirmed by Imperial legislation until 1889: *Canada (Ontario Boundary) Act, 1889* (U.K.), 52-53 Vict., c. 28.[24]

(o) Despite the Privy Council's 1884 decision, Macdonald continued to assert Canada's administration and control over the entire Treaty 3 lands. The federal government now took the position that, because it had obtained the cession of Aboriginal title in the Treaty 3 lands, Canada was the owner of the surrendered Crown lands. Ontario strongly contested that claim and asserted that the province was entitled to the beneficial ownership of the lands pursuant to s. 109 of the *Constitution Act, 1867*.[25]

(p) Canada issued timber permits that Ontario challenged. The dispute led to the Privy Council's 1888 decision in *St. Catherine's Milling*. The Judicial Committee decided in Ontario's favour; it struck down the federal timber licence, upheld Ontario's s. 109 claim, and held that the Province had

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[22] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 102-103, 139, paras. 61, 168**.
[23] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 103, para. 62**.
[24] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 103, paras. 63-64**.
[25] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 103-104, para. 65**.

exclusive power to authorize forestry on (off-reserve) Treaty 3 lands in the province.[26]

(q) Negotiations from 1889 to 1891 between Canada and Ontario culminated in reciprocal legislation. It dealt with the selection and confirmation by Ontario of Treaty 3 reserves and confirmed Ontario's authority to take up (off-reserve) Treaty 3 lands situated within its boundaries. The 1891 Legislation included a Schedule setting out a draft agreement addressing these issues, which became the 1894 Agreement when executed.[27]

(r) Article 1 of the 1894 Agreement provides that with respect to lands "taken up for settlement, mining, lumbering or other purposes ... it is hereby conceded and declared" that as the lands belong to Ontario, the Indian harvesting rights "do not continue with reference to any tracts which have been, or from time to time may be, required to be taken up for settlement, mining, lumbering or other purposes by the Government of Ontario or persons duly Authorized by the said Government of Ontario".[28]

(s) Ontario's boundaries were extended by reciprocal legislation passed by Canada and Ontario in 1912. The 1912 Legislation extended Ontario's boundaries to their present locations, bringing the Keewatin Lands (*inter alia*) into the Province.

(t) When explaining the effect of the 1912 Legislation in the House of Commons, Prime Minister Robert Borden stated the land is always vested in the Crown and the "only question is by whose advice shall that land be administered.... This land, like the rest of the land within the limits of Ontario, will be administered by the Crown on the advice of the provincial government": House of Commons Debates, 12th Parl., 1st Sess., No. 2 (27 February 1912), at p. 3906.[29]

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[26] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 104, para. 66**.
[27] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 104, para. 67**.
[28] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 105, para. 68**.
[29] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 105, 129, paras. 69, 139**.

(u) Apart from projects falling within federal jurisdiction (e.g. inter-provincial railways), development, patenting and leasing of Crown lands in the Treaty 3 area have been exclusively authorized by Ontario – in the Disputed Territory since the late 1880s and in the Keewatin Lands since 1912. In the more than 100 years since the Keewatin Lands became part of Ontario, lands have been taken up by Ontario for those purposes without any suggestion that Ontario required Canada's approval or that Treaty 3 mandated a two-step land use regime.[30]

10. The Court of Appeal also reached the following critical findings of fact regarding why the text of the Treaty 3 harvesting clause refers to the Dominion Government, overturning the trial judge's contrary findings as reflecting palpable and overriding error:

(a) The Treaty 3 negotiations were very well-documented. Morris himself wrote extensively on the negotiation of Treaty 3 and other treaties. There is nothing in this thorough documentation, which includes his reports and correspondence on his treaty-making activities, to support the thesis that Morris intentionally drafted the harvesting clause to require Canada's approval for Ontario's taking up should Ontario become the beneficial owner of the ceded lands.[31]

(b) The fact that in 1873, Canada claimed beneficial ownership of all the lands subject to Treaty 3, provides by far the most likely explanation for the reference to the Government of the Dominion of Canada in the text of the harvesting clause. The Commissioners, who were appointed by Canada, and in particular Morris, would not have wished to undermine Prime Minister Macdonald's position that all of the Treaty 3 lands were within federal territory.[32]

(c) The 1874 Provisional Boundary Agreement reflected a contemporary understanding that the right to take up lands attached to the level of

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[30] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 105, 140, paras. 71, 171**.
[31] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 137-138, para. 163**.
[32] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 131, 138-139. paras. 145, 165-166**.

government that enjoyed beneficial ownership of the lands. There is no reference to any requirement that Ontario obtain Canada's approval for taking up lands.[33]

PART II – Question in Issue

11. Does the decision of the Court of Appeal for Ontario in this matter raise any issues of national significance or which otherwise merit the attention of this Court?

PART III – Statement of Argument

12. The somewhat overlapping issues raised by the applicants in support of their applications for leave to appeal can be grouped under the following headings: (i) the constitutional division of powers; (ii) the effects of constitutional and administrative developments in the Keewatin Lands; and (iii) the principles governing the determination of facts in Aboriginal matters. These will be addressed in turn, followed by a short discussion of the 1891 Legislation, 1894 Agreement and 1912 Legislation.

i. Constitutional Division of Powers

13. The Court of Appeal preserved an appropriate balance between provincial jurisdiction over public lands and forests and the protection of Aboriginal treaty harvesting rights, relying on established principles set out by this Court and the Judicial Committee of the Privy Council in cases extending from *St. Catherine's Milling* to *Mikisew Cree*,[34] and without intruding upon exclusive federal jurisdiction to directly regulate treaty harvesting rights (as discussed by this Court in *Morris*).[35]

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[33] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 140, para. 169**.

[34] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 117-128, paras. 102-135** (applying *St. Catherine's Milling*, *supra*; *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637 (JCPC), **Grassy Narrows Authorities, Tab 3**, aff'g (1909) 42 S.C.R. 1, **MNR Authorities, Tab 4**, rev'g 10 Ex. C.R. 445 (the "*Treaty 3 Annuities*" Case); *Smith v. The Queen*, [1983] 1 S.C.R. 554 ("*Smith*"), **MNR Authorities, Tab 19**; and *Ontario Mining Co. v. Seybold*, [1903] A.C. 73 (JCPC), **Grassy Narrows Authorities, Tab 7**; aff'g (1901), 32 S.C.R. 1, **MNR Authorities, Tab 11**; aff'g (1900), 32 O.R. 301 (Div.

14. The issues raised by the applicants in relation to Canada`s division of powers are discussed below under the following sub-headings: Ongoing Role for the Federal Government; Co-operative Federalism; Interjurisdictional Immunity; Federal Legislative Power and Provincial Proprietary Power.

(a) *Ongoing Role for the Federal Government*

15. Grassy Narrows asserts that the Ontario Court of Appeal's key legal error of national significance lies in finding "that Ontario's jurisdiction over provincial lands and resources was exclusive of federal jurisdiction of Indians and Lands reserved for Indians when provincial resource management decisions limit the application of or infringe treaty rights".[36]

16. Wabauskang adopts a more extreme point of departure, arguing that the federal government has "exclusive responsibilities to Aboriginal peoples to ensure that the historical treaties are honoured and implemented".[37] For Wabauskang, the key problem with the decision of the Court of Appeal appears to be that it allows room for any provincial role whatsoever in relation to treaty rights.

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

Ct.), aff'g (1899), 31 O.R. 386 (Ch. Div.) ("*Seybold*")); Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 153-154, paras. 206-212** (applying *Mikisew Cree*, *supra*).

[35] *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59, at paras. 1, 41-55 ("*Morris*"), **MNR Authorities, Tab 13**.

[36] Memorandum of Argument of the Applicants, Grassy Narrows First Nation, et al. ("Grassy Narrows Memo"), **Grassy Narrows Application, Vol. 2, Tab 10, pp. 180-181, paras. 23 and 26a**.

[37] Memorandum of Argument of the Applicants, Wabauskang First Nation, et al. ("Wabauskang Memo"), **Application for Leave to Appeal of the Applicants, Wabauskang First Nation, et al. ("Wabauskang Application"), Vol. II, p. 432, paras. 32-34**.

18. Canada plays various roles in the Treaty 3 lands. Pursuant to s. 91(24) of the *Constitution Act, 1867*, the federal government has authority over "Indians" throughout Ontario and "lands reserved for the Indians", i.e. reserve lands.[38] In addition, Canada has jurisdiction with respect to other heads of federal power which may apply to the Treaty 3 lands, for example fisheries, the environment, and authorizing the taking up of land for federal purposes such as "the establishment of national parks, railways, harbours, airports, military bases, etc." – as recognized by the Court of Appeal at para. 110. Contrary to the assertions of the applicants, the Court of Appeal does not displace the federal role under s. 91(24), but rather affirms the responsibilities that Canada holds as treaty maker, *vis-a-vis* those of Ontario as the beneficial owner of ceded public lands.

19. Ontario's constitutional authority includes the taking up of non-reserve lands for provincial purposes, such as those purposes listed in the taking up clause of Treaty 3: settlement, mining and lumbering (subject to the limitations and obligations articulated by this Court in relation to the Crown's ability to take up lands).[39] Drawing on the established jurisprudence of the Privy Council and this Court, the Court of Appeal affirmed that these responsibilities fall to the province as the emanation of the Crown designated as advisor on such matters under the division of powers; ownership of the land itself being vested in the Crown.[40] Ontario, in exercising these powers, must honour the promises and obligations of the Crown.

20. Given the "Threshold Issues" that had been the focus of the trial in this matter, once the Court of Appeal recognized that Ontario is able to take up lands under the taking up clause, it was not necessary to consider division of powers issues relating to justification under the *Sparrow* test (the focus of the second Threshold Issue).[41] This makes sense in the context of this case, given that no party advanced the position that the forestry operations challenged by the plaintiffs deprived the plaintiffs of a meaningful

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[38] *Constitution Act, 1867,* s. 91(24), **Grassy Narrows Application, Vol. 2, Tab 8, pp. 205-206**.
[39] *Mikisew Cree*, *supra,* at paras. 33-34, 48 and 57-65, **MNR Authorities, Tab 7**.
[40] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 130, para. 140**.
[41] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1111-1120, **MNR Authorities, Tab 15**; Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 90-91, para. 7**.

ability to harvest – the threshold for infringement of treaty harvesting rights that are internally limited by a taking up clause, as established by this Court in *Mikisew Cree*.[42]

21. In response to the applicants' expansive conception of the proper ambit of federal jurisdiction relating to treaty harvesting rights, the Court of Appeal correctly recognized that "such an expansion of s. 91 (24) jurisdiction would render illusory provincial jurisdiction over the disposition and management of public lands and forests under ss. 109, 92(5) and 92A", and would be "contrary to the Supreme Court's emphasis on balanced federalism and the interdiction that a 'federal head of power cannot be given a scope that would eviscerate a provincial legislative competence'".[43]

(b) *Co-operative Federalism*

22. Both applicants argue that the decision of the Court of Appeal undermines the principles of co-operative federalism by "reviving Lord Atkin's 'water-tight compartments' approach".[44]

23. This is incorrect. To the contrary, the Court of Appeal's decision preserves co-operative federalism. Co-operative federalism is balanced federalism – sometimes referred to as flexible federalism – under which each level of government exercises its jurisdiction within its constitutionally assigned sphere. As this Court stated in *Canadian Western Bank*:

> [F]lexible federalism [is what] the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. … Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.[45]

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[42] *Mikisew Cree, supra,* at paras. 33-34, 48 and 57-65*,* **MNR Authorities, Tab 7**; Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 151-156, paras. 201-215**
[43] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 152-153, para. 205**.
[44] Grassy Narrows Memo, **Grassy Narrows Application, Vol. 2, Tab 10, pp. 183-187, paras. 31-40**; Wabauskang Memo, **Wabauskang's Application, Vol. II, pp. 431-432, 440-441, paras. 29-34, 63-64**.
[45] *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 ("*Canadian Western Bank*"), at para. 42, **MNR Authorities, Tab 2**.

24. Co-operative federalism does not require that both levels of government be involved in decision-making when a decision will have an incidental effect on an area within the jurisdiction of the other level of government: "…incidental intrusions into matters subject to the other level of government's authority are proper and to be expected".[46] Moreover, as discussed below,[47] the valid exercise of provincial jurisdiction within the ambit of an internal limitation to a treaty right, in this case the taking up clause, does not infringe the treaty right or intrude on federal jurisdiction.

25. The Court of Appeal did not use a "watertight compartments" approach to the division of powers. Instead, the Court recognized that federal s. 91(24) jurisdiction does not extend to controlling the use of non-reserve lands ceded by treaty for provincial purposes such as settlement, mining and lumbering – the enumerated taking up purposes set out in Treaty 3. As already discussed, federal jurisdiction continues on Treaty 3 lands with respect to federal areas of jurisdiction, such as fisheries, reserve lands, railways, airports, etc.

26. Balanced federalism is a central element of the "federalism principle" in Canada. While the federal government in the decades after Confederation took the position that the provinces were subordinate to it, the Privy Council rejected this view over a century ago in the *Maritime Bank* case (1892), holding that the provinces retained their "independence and autonomy" in the new federation and are "sovereign" within their areas of jurisdiction.[48]

27. The doctrine of mutual modification is one of the principal means to achieve balanced federalism. This doctrine requires that the grants of power made to the federal government in the *Constitution Act, 1867* be "read together" with the grants of power made to the provinces, "and the language of one interpreted, and, where necessary, modified, by that of the other … so as to reconcile the respective powers …

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[46] *Canadian Western Bank*, *supra*, at para. 28 (see also paras. 29-31), **MNR Authorities, Tab 2.**
[47] See below at paras. 30, *et seq*.
[48] *Liquidators of the Maritime Bank v. The Queen*, [1892] A.C. 437, [1892] J.C.J. No. 1, at paras. 4-6 (JCPC), **MNR Authorities, Tab 6**. See also *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 56, **MNR Authorities, Tab 16**: "In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided."

and give effect to all of them."[49] In other words, as this Court recently stated in the *Securities Reference*:

> The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other. As a consequence, a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence. This is one of the principles that underlies the Constitution …[50]

28. It is an important role of the courts, as "the final arbiters of the division of powers", to ensure that balanced federalism is maintained in Canada:

> As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers.[51]

29. The Court of Appeal's approach did exactly this, reading the Constitution as a whole to preserve a meaningful space for the Province to exercise its powers under ss. 92(5), 92A and 109 of the *Constitution Act, 1867*. As Iddington J. noted in one of the majority decisions of this Court in the *Treaty 3 Annuities* case, it is the Province's duty to administer public lands and forests, including, where it deems it appropriate, to facilitate the land's development:

> …when the cloud [of Aboriginal title] was removed the duty devolved, as of course, on its government to facilitate the land's development. … The province did nothing but discharge those duties of government of which settling, selling, leasing or improving lands are in new countries such expensive, but common, incidents. It is not the case of an individual who could refrain from acting or accepting. The duty which arose, the only

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[49] *Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96, [1881] J.C.J. No. 1, at para. 15 (JCPC), **MNR Authorities, Tab 3**; see also *Reference re Waters and Water-Powers*, [1929] S.C.R. 200 at 215-216 ("*Water Powers Reference*"), **MNR Authorities, Tab 18**.

[50] *Reference re Securities Act*, [2011] 3 S.C.R. 837, 2011 SCC 66 at para. 71 ("the *Securities Reference*"), **MNR Authorities, Tab 17**.

[51] *Canadian Western Bank*, *supra*, at para. 24 (see also the general discussion of objectives and principles of federalism at paras. 21-32), **MNR Authorities, Tab 2**.

> duty the province owed the Dominion, was to do all these things when given a chance.[52]

(c) *Interjurisdictional Immunity not Engaged*

30. Grassy Narrows argues, relying primarily on this Court's decision in *Morris*, that the interjurisdictional immunity doctrine is triggered with respect to s. 91(24) of the *Constitution Act, 1867* when Ontario takes up Treaty 3 lands, so that in order for provincial forestry laws to be constitutionally applicable they must be referentially incorporated into federal law by s. 88 of the *Indian Act.*[53] Grassy Narrows further argues that s. 88 is of no assistance to the province with respect to treaty rights.[54] Wabauskang develops a similar argument at paras. 50-60 of its written submissions. These arguments are incorrect because Ontario takes up Treaty 3 lands pursuant to an internal limitation to the Treaty 3 harvesting rights: the taking up clause.

31. This Court unanimously held in *Morris* that actions pursuant to an internal limit to a treaty right do not impair that right. As a result, the doctrine of interjurisdictional immunity is not triggered, and therefore s. 88 of the *Indian Act* is irrelevant (being a federal remedial provision for legal vacuums created by the interjurisdictional immunity doctrine under s. 91(24)). This principle was succinctly summarized in *Morris* by McLachlin C.J. and Fish J. (dissenting, but not on this point) at para. 100:

> Valid provincial laws that fall outside of the scope of the treaty right, by virtue of an internal limit on the treaty right, do not go to "core Indianness", and thus apply *ex proprio vigore* [of their own force]. They do not need to be incorporated by s. 88.[55]

32. The Ontario Court of Appeal was therefore entirely correct not to discuss interjurisdictional immunity, *Morris* or s. 88 in its reasons.

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[52] *Treaty 3 Annuities* case, (1909) 42 S.C.R. 1, at p. 111, **MNR Authorities, Tab 4**.
[53] *Indian Act*, R.S.C. 1985, c. I-5, s. 88, **Grassy Narrows Application, Vol. 2, Tab 10, p. 220**.
[54] Grassy Narrows Memo, **Grassy Narrows Application, Vol. 2, Tab 10, pp. 183, 185, paras. 31-32, 36-37**.
[55] *Morris, supra,* at para. 100. See also *Morris* majority decision at paras. 36-38, and *Morris* minority decision at paras. 64, 82, 92-94, 99, 106-07, 119 and 122, **MNR Authorities, Tab 13**. The trigger for the interjurisdictional immunity doctrine was raised from 'affects' to 'impairs' by this Court shortly after *Morris* was decided, in *Canadian Western Bank*, *supra,* paras. 48-49, **MNR Authorities, Tab 2**.

33. Wabauskang primarily bases its arguments that the Court of Appeal should have applied *Morris,* on three appellate court decisions: *Moulton Contracting*, *Paul* and *Tsilhqot'in Nation*.[56] None of these cases assist the applicants.

34. In relation to *Moulton Contracting*, Wabauskang states: "In considering the taking up clause in Treaty 8, the British Columbia Court of Appeal concluded that the *Morris* analysis is applicable".[57] The B.C. Court of Appeal reached no such conclusion. The trial judge had reached the opposite conclusion: "Treaty 8 specifically permits the provincial Crown to 'take up' lands for logging purposes [u]nlike the Douglas Treaties discussed in *R. v. Morris* … therefore the doctrine of interjurisdictional immunity cannot apply".[58] The B.C. Court of Appeal declined to rule on this issue (on a pleadings motion),[59] and this Court did not comment on the issue.

35. *Paul* is readily distinguishable as the treaty at issue there did not have a taking up clause, as conceded by Wabauskang.[60] Accordingly, internal limitations to treaty rights were not considered. In any event, the passage relied on by Wabauskang was simply a summary of *Morris* by the New Brunswick Court of Appeal in a paragraph discussing s. 88 of the *Indian Act*. Further, in the sentence immediately following that quoted by Wabauskang, the Court concluded: "However, it is obvious that s. 88 of the *Indian Act* does not come into play until a treaty right is established." The Court remitted the matter to trial to determine whether in fact there was a relevant treaty right at issue.[61]

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[56] Wabauskang Memo, **Wabauskang Application, Vol. II, pp. 438-439, paras. 53-57**, referencing *Moulton Contracting Ltd. v. British Columbia*, 2011 BCCA 311 ("*Moulton Contracting*") **MNR Authorities, Tab 10**; *R. v. Paul,* [2007] N.B.J. No. 67, 2007 NBCA 15 ("*Paul*"), **MNR Authorities, Tab 14**; *Tsilhqot'in Nation v. British Columbia*, 2012 BCCA 285, aff'g 2007 BCSC 1700, leave to appeal granted [2012] S.C.C.A. No. 399 ("*Tsilhqot'in Nation*"), **MNR Authorities, Tab 20**.
[57] Wabauskang Memo, **Wabauskang Application, Vol. II, p. 439, para. 57**.
[58] *Moulton Contracting Ltd. v. British Columbia*, 2010 BCSC 506 at para. 76, **MNR Authorities, Tab 9**.
[59] *Moulton Contracting, supra,* at para. 66, **MNR Authorities, Tab 10**.
[60] Wabauskang Memo, **Wabauskang Application, Vol. II, p. 439, para. 56**.
[61] *Paul, supra,* at paras. 5 and 9, **MNR Authorities, Tab 14**.

36. *Tsilhqot'in Nation*, a case currently under appeal to this Court (File No. 34986), is also readily distinguishable because it is an Aboriginal title and Aboriginal rights case, as also conceded by Wabauskang.[62] It therefore does not consider treaty rights or the division of powers consequences of internal limits to treaty rights.

37. The trial judge also relied on Aboriginal title cases – *Delgamuukw*[63] and *Haida Nation*[64] (see trial decision paras. 1360-68) – and the Court of Appeal was correct to view these cases as not relevant to the circumstances of this case. Prior to the cession of Aboriginal title, there is s. 91(24) jurisdiction over the lands themselves and the province's s. 109 interest is severely fettered by the Aboriginal title interest. After a cession, however, s. 91(24) jurisdiction over the lands themselves comes to an end (other than for reserve lands) and the burden on the province's s. 109 proprietary interests is lifted. The province's uses of the lands are subject to continuing obligations under the Treaty, the honour of the Crown, the terms of s. 109 itself, and s. 35 of the *Constitution Act, 1982*, but these are of an entirely different legal character than Aboriginal title. Cession of Aboriginal title is a bright line event triggering the disencumbering of the province's beneficial ownership of public lands and forests.

(d) *Federal Legislative Power and Provincial Proprietary Power*

38. Wabauskang further argues that the Court of Appeal's decision is contrary to the Judicial Committee of the Privy Council's decision in the *Fisheries Case* and this Court's decision in the *Water Powers Reference*. Wabauskang asserts that there is a conflict between these cases, and that the Court of Appeal's reliance on the *Securities Reference* amounts to an issue of national significance.[65] In reality, the Court of Appeal's decision is entirely consistent with all three of these authorities.

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[62] Wabauskang Memo, **Wabauskang Application, Vol. II, p. 438, para. 53**; *Tsilhqot'in Nation, supra* at para. 1, **MNR Authorities, Tab 20**.
[63] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, **Grassy Narrows' Authorities, Tab 2**.
[64] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 at paras. 5-6, **MNR Authorities, Tab 5**.
[65] Wabauskang Memo, **Wabauskang Application, Vol. II, pp. 440-441, paras. 61-65**.

39. The Court of Appeal rejected the trial judge's holding that federal s. 91(24) legislative power "encompasses a continuing role for Canada in respect of the taking up of lands for provincial purposes" on several grounds, including the constitutional division of powers and the doctrine of constitutional evolution,[66] as discussed above. The Court of Appeal additionally found that the trial judge's holding would be contrary to the principle of balanced federalism, by allowing a federal head of power to "eviscerate a provincial legislative competence", as this Court expressly warned against in the *Securities Reference*.[67] It is to this additional ground that Wabauskang would draw this Court's attention, claiming it creates a conflict with the *Fisheries Case* and the *Water Powers Reference*.

40. The *Fisheries Case* established the principle that the exercise of federal legislative power can impact provincial proprietary rights. However, the Privy Council also held in that case that the federal provision authorizing "the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion, but to the provinces", was *ultra vires* Parliament.[68]

41. Similarly, in the *Water Powers Reference*, this Court – while affirming and applying the *Fisheries Case* – also discussed the limits to the exercise of federal legislative power impacting provincial proprietary rights, including in relation to s. 91(24):

> [T]he authority granted by s. 91(24), "Indians and lands reserved for the Indians," while it enables the Dominion to legislate fully and exclusively upon matters falling strictly within the subject "Indians," including, *inter alia*, the prescribing of residential areas for Indians, does not, as we have seen, embrace the power to appropriate a tract of provincial Crown land for the purposes of an Indian reserve, without the consent of the Province (*Ont. Mining Co. v. Seybold*, [1903] A.C. 73).[69]

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[66] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 151-152, paras. 202-204**.
[67] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 152-153, para. 205**; the *Securities Reference*, *supra* at para. 71, **MNR Authorities, Tab 17**, (see para. 27 above).
[68] *Attorney General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia*, [1898] A.C. 700 (J.C.P.C.), p. 714 ("*Fisheries Case*"), **MNR Authorities, Tab 1**.
[69] *Water Powers Reference* at p. 214, **MNR Authorities, Tab 18**; see also the further discussion of similar limits to federal regulatory power in the context of s. 91(12) ("Sea Coast and Inland Fisheries") and s. 91(10) ("Navigation and Shipping") at p. 214-215 and of railways and canals at pp. 220-224.

42. There is no conflict in the jurisprudence. The *Fisheries Case* and the *Water Powers Reference* only authorize federal legislative incursions into provincial proprietary rights subject to a very strict threshold that does not call into question the general exclusive areas of constitutional authority of the provinces. This Court's decision in the *Securities Reference* further supports the interdiction against wholesale evisceration of provincial legislative competence. The underlying concern in all three cases is to maintain a balanced approach to federalism.

43. The decision of the Court of Appeal does not depart from the existing jurisprudence relating to the constitutional division of powers and accordingly does not give rise to an issue of national significance.

ii. The Effects of Constitutional and Administrative Development

44. Grassy Narrows argues that the decision of the Ontario Court of Appeal is of national significance because it recognizes a principle of constitutional evolution that "can unilaterally modify a material aspect of a Treaty…"[70] Wabauskang goes further by arguing that the Court of Appeal wrongly applied the "living-tree" doctrine to "re-write the Constitution so as to erase Canada's exclusive responsibilities that the historical treaties are honoured and implemented."[71]

45. Both positions reflect a fundamental misapprehension of the Court of Appeal's decision, which does not stand for the proposition that a material aspect of a treaty can be unilaterally and incidentally modified by subsequent constitutional developments. The Court rejected the applicants' arguments that federal authorization of takings up in the Keewatin Lands amounted to a material aspect of the Treaty, in part by affirming that "when the Crown, through Ontario, takes up land, it must respect the Treaty right."[72]

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[70] Grassy Narrows Memo, **Grassy Narrows Application, Vol. 2, Tab 10, p. 181, para. 26 c**.
[71] Wabauskang Memo, **Wabauskang Application, Vol. II, pp. 431-432, paras. 29, 32**.
[72] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 134, para. 153**.

46. The principle of constitutional evolution as applied by the Court of Appeal does not modify Treaty terms. It recognizes that boundary changes may affect which level of government gives effect to the terms of a treaty, not that such changes modify treaty terms.[73] It is concerned with the implementation of treaties, not their modification.

47. Wabauskang's argument essentially attempts to resurrect a federal enclave theory by recognizing exclusive federal jurisdiction over all aspects of Indian treaties, which fails for the reasons discussed above. Furthermore, the Court of Appeal did not rewrite the Constitution in any way. It simply recognized that the change in Ontario's boundary expanded the territory over which the Province held the beneficial ownership under s. 109 of the *Constitution Act, 1867*. This necessarily involved a change in the level of government managing public lands and forests in the Keewatin Lands. As noted by the Court of Appeal, Prime Minister Borden explained in the House of Commons in 1912, that this was the intended administrative consequence of the boundary extension.[74]

iii. Principles Governing Findings of Fact in Aboriginal Matters

48. Both Grassy Narrows and Wabauskang assert that the decision of the Court of Appeal raises significant issues concerning the principles governing findings of fact in Aboriginal matters, including appellate review of factual findings made by a trial judge. This assertion is without merit.

(a) *A "Vague Sense of After-the-Fact Largesse"*

49. Waubaskang argues that Justice Binnie's admonition in *Marshall No. 1*[75] that "'[g]enerous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse" needs to be clarified by this Court.[76] This submission ignores the fact that this passage has already been explained by McLachlin C.J., writing for the majority of this Court in *Mitchell*:

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[73] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 128-130, paras. 136-141**.
[74] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 129, para. 139**.
[75] *R. v. Marshall*, [1999] 3 S.C.R. 456 ("*Marshall No. 1*"), at para. 14, **MNR Authorities, Tab 12**.
[76] Wabauskang Memo, **Wabauskang Application, Vol. II, p. 433, paras. 36-37**.

> [I]t must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense"…
>
> …
>
> There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. *As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse"* (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14) **...** If this is an obvious proposition, it must nonetheless be stated.[77] [emphasis added]

50. At para. 51 of the same judgment, McLachlin C.J. reiterates:

> As discussed in the previous section, claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim. With respect, this is exactly what has occurred in the present case… While appellate courts grant considerable deference to findings of fact made by trial judges, I am satisfied that the findings in the present case represent a "palpable and overriding error" warranting the substitution of a different result (*Delgamuukw*, *supra*, at paras. 78-80)...

51. The Court of Appeal directly relied on this amplification of Binnie J.'s caution from *Marshall No. 1* in addressing the trial judge's findings of fact, remarking that "[s]parse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim", and "findings based on 'the application of a very relaxed standard of proof' and 'an unreasonably generous weighing of tenuous evidence' will be set aside".[78] As this Court recognized in *Mitchell*, this proposition is obvious and a matter of common sense, and coincides with the well-established general standard governing appellate review of findings of fact.

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[77] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33 ("*Mitchell*"), at paras. 38-39, **MNR Authorities, Tab 8**.

[78] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 137, para. 162**, specifically quoting from this Court's statement in *Mitchell*, *supra*, at para. 51, **MNR Authorities, Tab 8**.

52. The only cogent question that arises from consideration of this proposition is whether the evidence on which the trial judge based her conclusions of fact was sparse, doubtful, equivocal or tenuous, and therefore interpreted by the trial judge in a manner that was overly generous or too relaxed. Whether the specific evidence relating to Treaty 3 considered by the trial judge was too sparse or doubtful to sustain her conclusions is not a question of national importance. Nor is the further question of whether the Court of Appeal – after closely scrutinizing the trial record and applying the highest standard of review – was correct in finding that the evidence was too doubtful to support the trial judge's findings of fact.

(b) *Appellate Review of Findings of Fact in Aboriginal Matters*

53. Wabauskang argues that this Court should ask "[s]hould there be an enhanced burden on appellate courts to justify overturning findings of fact by a trial judge in Aboriginal law cases?"[79] This question also is without substance. The "palpable and overriding error" standard governing appellate review of findings of fact made at trial defers to such findings as far as is reasonably possible. The question proposed by Wabauskang really amounts to asking whether findings of fact made at trial concerning Aboriginal matters – at least when an Aboriginal litigant is successful at trial – should be generally immunized from appellate review. Nothing in this Court's jurisprudence suggests this question is open; the principles articulated by this Court in *Marshall* and *Mitchell*, as discussed above, confirm otherwise. Notwithstanding Wabauskang's submissions, the Court of Appeal's conventional treatment of the trial judge's findings of fact does not give rise to a serious question imbued with national significance.

(c) *Consistency Between Constitutional and Factual Findings*

54. Contrary to the arguments of Grassy Narrows, the Court of Appeal did not hold or otherwise proceed on the basis that "findings of fact concerning the context, history and negotiation of treaties must be consistent with contemporary understandings of the

[79] Wabauskang Memo, **Wabauskang Application, Vol. II, pp. 433-434, para. 38**.

constitutional structure of Canada"[80] – whether one interprets "contemporary" in this context as referring to 1873 or today.

55. Nor did the panel hearing the appeal make determinations of fact simply because "it sought to bring the factual findings in line with its holding that provincial power of *(sic)* natural resources is exclusive", without considering the evidence or identifying errors in the trial judge's analysis of the facts – as suggested by Grassy Narrows.[81]

56. The Ontario Court of Appeal overturned the trial judge's key finding of fact "that the Commissioners deliberately contemplated and intended a two-step process and that Canada would have to authorize taking up by Ontario",[82] because on a careful consideration of the trial record and a number of well-supported facts, the trial judge's key finding "cannot survive scrutiny even under the deferential 'palpable and overriding error' standard".[83]

57. In reaching this conclusion, the Court of Appeal correctly recognized that the "trial judge's conclusion that Ontario could not exercise the taking up clause without Canada's approval was largely based on certain factual findings",[84] remarking that "the trial judge's key finding is expressed in a variety of ways in her judgment, but perhaps the clearest statement is that found at para. 1454":

> The Commissioners deliberately provided in the Harvesting Clause that in the event Ontario won the Boundary Dispute or a new province with s. 109 powers were formed under s. 3 of the *1871 Constitution Act*, authorization of "taking up" by Canada would be needed in addition to Ontario's or that new province's authorization under s. 109. In that event, the Commissioners did contemplate and intend that a two-step authorization process would need to be followed.[85] *[Emphasis in original.]*

58. After correctly observing that Governor Morris' subjective intent would in any event not have been determinative of the treaty interpretation exercise, in the absence of any relevant discussion with the Ojibway, the Court of Appeal set aside this finding

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[80] Grassy Narrows Memo, **Grassy Narrows Application, Vol. 2, Tab 10, p. 181, para. 26 b**.
[81] Grassy Narrows Memo, **Grassy Narrows Application, Vol. 2, Tab 10, pp. 190-191, para. 51**.
[82] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 140, para. 172**.
[83] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 140, para. 172**.
[84] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 135, para. 156**.
[85] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 135, para. 157**.

because the "trial judge's factual finding as to Morris's intention was not only speculative but also inconsistent with the available evidence".[86] It based this conclusion on a number of factual and evidentiary observations, including:

(a) "The Treaty 3 negotiations were very well-documented" and "[t]here is nothing in this thorough documentation…to support the thesis that Morris intentionally drafted the harvesting clause to require Canada's approval for Ontario's taking up should Ontario become the beneficial owner of the lands";[87]

(b) "Morris's legal background detracts from rather than supports the trial judge's findings, because it is very difficult to reconcile the actual text of the harvesting clause with the trial judge's finding. It is difficult to imagine how or why an expert constitutional lawyer would have drafted the clause as he did had his intention been as described by the trial judge";[88]

(c) "The most likely explanation for the text of the harvesting clause and the reference to the Government of the Dominion of Canada is that, in 1873, there was no other government to whom the Commissioners appointed by Canada could conceivably refer … the Keewatin Lands were unquestionably not in Ontario, and Canada vigorously contested Ontario's claim to the Disputed Territory";[89]

(d) "Morris was sent as Prime Minister Macdonald's confidant to negotiate the Treaty and he was very close to the Prime Minister. It is highly unlikely he would have done anything that would have undermined Prime Minister Macdonald's position on the Disputed Territory. To recognize in the language of the Treaty the possibility that all or part of the Treaty 3 lands might belong to Ontario would be inconsistent with and would undermine Prime Minister Macdonald's position";[90]

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[86] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 137, para. 162**.
[87] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 137-138, para. 163**.
[88] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 138, para. 164**.
[89] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 138, para. 165**.
[90] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 139, para. 166**.

(e) "The trial judge's interpretation is also inconsistent with the available evidence as to the contemporary understanding of the harvesting clause. As described above, within a year of the signing of the Treaty, Canada and Ontario entered into the 1874 Provisional Boundary Agreement". This "agreement reflects a contemporary understanding that the right to take up lands attached to the level of government that enjoyed beneficial ownership of the lands. There is no reference to any requirement that Ontario obtain Canada's approval for taking up lands";[91] and

(f) "…until this case was commenced, there was no suggestion that Ontario had to obtain Canada's approval to access the taking up clause … it cannot be doubted that in the more than 100 years since the Keewatin Lands became part of Ontario, lands have been taken up by Ontario for those purposes without any suggestion that Ontario required Canada's approval or that Treaty 3 mandated a two-step land use regime".[92]

59. These observations resulted from a careful examination of a very extensive and complex evidentiary record. A significant portion of the eight days of oral submissions before the Court of Appeal and the approximately 500 pages of parties' written submissions focussed on the trial judge's findings of fact as measured against the trial record. This trial record includes transcripts from approximately 62 days of testimony (almost entirely from experts), 14 expert reports (totalling approximately 1600 pages, which formed part of the expert's evidence in chief) and approximately a thousand historical documents cited by the expert witnesses. If this Court is to evaluate whether the Court of Appeal erred in addressing the facts that are central to this case, it will be necessary for it to carefully sift through and weigh this considerable body of evidence to confirm, as the Court of Appeal did, that no credible evidence supports the key findings of fact made by the trial judge, while clear evidence and common sense conflict with those findings.

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[91] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 139-140, paras. 167-169**.
[92] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 140, para. 171**.

60. The decision of the Ontario Court of Appeal does not reflect the application of a general principle that findings of fact concerning the context, history and negotiation of treaties must be consistent with contemporary understandings of the constitutional structure of Canada. Rather, the Court of Appeal's factual determinations are highly specific to the particular historical circumstances of Treaty 3 and the administration of the Keewatin Lands, and as such are of limited general significance. Moreover, these findings of fact, which were correctly arrived at applying the highest standard of appellate deference, effectively preclude arriving at a different result on the law.

iv. The 1891 Legislation, 1894 Agreement and 1912 Legislation

61. Grassy Narrows and Wabauskang only lightly touch upon the 1891 Legislation, 1894 Agreement and 1912 Legislation, as an aspect of their arguments concerning constitutional evolution. These instruments, however, should figure directly in this Court's deliberation over whether to grant leave to appeal, as they provide a straightforward and complete answer to the proposed appeals which, like the Court of Appeal's determination of facts, is highly particular to the circumstances of Treaty 3 and the Keewatin Lands.

62. The Court of Appeal concluded that, on its face, the 1894 Agreement (which is given the force of a statute by the 1891 Legislation) was intended to confirm that "in respect of the harvesting rights identified in Treaty 3 … Ontario could take up Treaty 3 lands within its territorial boundaries as those stood in 1894", and the "1894 Agreement explicitly declared and confirmed that the Treaty 3 regime operated in conformity with the law: Ontario, the government with the administration, control and beneficial ownership of the Disputed Territory, was the government with the exclusive authority to exercise the taking up power in Treaty 3".[93] This reflects a conventional, purposive approach to statutory interpretation that properly considers the plain language of the statutory instruments, informed by their preamble and surrounding historical circumstances.[94]

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[93] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 141-144,** paras. 175-180.
[94] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 142,** para. 177.

63. The Court of Appeal further concluded that "[g]iven our analysis of the doctrine of constitutional evolution and the 1894 Agreement, it follows as a matter of law that in 1912, when legislation extended to their present dimensions the territorial boundaries of the province of Ontario, subject to certain terms and conditions, Ontario was, by operation of law, entitled to exercise the taking up power under Treaty 3 in relation to the Keewatin Lands".[95] In its view, "the text of, and rationale for, the 1894 Agreement are both consonant with our view that provincial (or provincially-authorized) taking up activity in respect of the Keewatin Lands in and after 1912 was effective, pursuant to article 1 of the 1894 Agreement, in relation to Treaty 3 harvesting rights".[96]

64. This analysis by the Court of Appeal represents an uncomplicated application of the 1891 and 1894 instruments in conjunction with the expansion of Ontario's boundaries through the 1912 legislation. It has the additional advantage of being entirely consistent with the intentions expressed by Prime Minister Borden in Parliament. As noted by the Court of Appeal and referred to above, the Prime Minister confirmed in 1912 that the "only question is by whose advice shall that land be administered.... This land, like the rest of the land within the limits of Ontario, will be administered by the Crown on the advice of the provincial government".[97]

65. The Court of Appeal's analysis in relation to the 1891 Legislation, 1894 Agreement and 1912 Legislation provides a complete answer to the questions raised in this matter, but one which is of no relevance outside those portions of the Treaty 3 lands that are within Ontario, especially the Keewatin Lands, and therefore is not of national significance.

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[95] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 144-145,** para. 182.
[96] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 147,** para. 192.
[97] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 105, 129,** paras. 69, 139.

Conclusion

66. The Court of Appeal applied long-standing constitutional law and treaty interpretation principles, and the most deferential standard of appellant review regarding findings of fact, to correctly conclude that Ontario has the jurisdiction to manage the public lands and forests in the Keewatin Lands without federal supervision, as provinces do elsewhere in Canada.

67. As recognized by the Court of Appeal, the interpretation of the Treaty 3 taking up clause advanced by the plaintiffs and accepted by the trial judge, "… produces a process that is unnecessary, complicated, awkward and likely unworkable"; one that "… could undermine, rather than advance, reconciliation."[98]

68. The decision of the Court of Appeal remains true to the allocation of provincial authority over public lands and resources under the *Constitution Act, 1867* (as established by the Judicial Committee of the Privy Council in the late 19th and early 20th centuries and subsequently affirmed by this Court on numerous occasions), and is also infused by a deep awareness of the profoundly important responsibilities of the Crown relating to treaty rights, as articulated by this Court in recent years.[99]

69. The result below applies the modern legal framework protecting treaty rights to the jurisdictional circumstances of the Keewatin Lands as they have existed since 1912. It is fully in keeping with the decisions of this Court framing the ongoing realization of treaty promises, especially as demarcated in *Mikisew Cree*, *supra*, and is fully supported by the evidence. Nothing in it gives rise to a real issue or controversy meriting the further attention of this Court.

PART IV – Submissions Concerning Costs

70. Ontario does not seek costs in this proceeding.

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[98] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, p. 134,** paras. 153-154.
[99] Appeal Reasons, **Grassy Narrows Application, Vol. 2, Tab 8, pp. 153-154,** paras. 209-212.

PART V – Order Sought

71. Ontario requests that the leave applications be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF JUNE, 2013

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PART VI – Table of Authorities

PART VII – Table of Statutes & Treatises

Statutes & Treatises		Paragraphs
1.	*An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands* (CA), 54 & 55 Vict., c. 5.	5(f)
2.	*An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands* (ON), 54 Vict., c. 3.	5(f)
3.	*An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province* (ON), 2 Geo V., c. 3.	5(f)
4.	*Constitution Act, 1867* (UK), 30 & 31 Vic., c. 3, ss. 91(24), 92(5), 92A, 109.	3, 8, 18
5.	*Constitution Act, 1982,* being Schedule B to the *Canada Act, 1892* (UK), 1982, c. 11, s. 35.	8
6.	*Indian Act*, R.S.C. 1985, c. I-5, s. 88.	30
7.	*The Ontario Boundaries Extension Act, S.C. 1912*, 2 Geo. V, c. 40.	5(f)
8.	*Treaty No. 3, Made October 3, 1873 and Adhesions, Report, etc.*, Ottawa: Queen's Printer, 1966.	9(i)

STATUTES

OF THE

PROVINCE OF ONTARIO

PASSED IN THE SESSION HELD IN THE

Second Year of the Reign of His Majesty KING GEORGE V.,

Being the First Session of the Thirteenth Legislature of Ontario,

BEGUN AND HOLDEN AT TORONTO ON THE SEVENTH DAY OF FEBRUARY IN THE YEAR OF OUR LORD ONE THOUSAND NINE HUNDRED AND TWELVE

HIS HONOUR
SIR JOHN MORISON GIBSON, K.C.M.G.,
LIEUTENANT-GOVERNOR.

TORONTO:
PRINTED AND PUBLISHED BY L. K. CAMERON,
Printer to the King's Most Excellent Majesty.
1912

CHAPTER 3.

An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province.

Assented to 16th April, 1912.

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

Consent to increase of limits.

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

Consent to effect and operation of such increase.

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

SCHEDULE.

AN ACT TO EXTEND THE BOUNDARIES OF THE PROVINCE OF ONTARIO.

Preamble.

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

Short title.

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

Boundaries extended.

2. The limits of the Province of Ontario are hereby increased so that the boundaries thereof shall include, in addition to the present territory of the said province, the territory bounded and described

described as follows:—Commencing at the most northerly point of the westerly boundary of the Province of Ontario as determined by *The Canada (Ontario) Boundary Act, 1889*, Chapter 28, of the Statutes of 1889 of the United Kingdom, (the said westerly boundary being the easterly boundary of the Province of Manitoba); thence continuing due north along the same meridian to the intersection thereof with the centre of the road allowance on the twelfth base line of the system of Dominion Land Surveys; thence northeasterly in a right line to the most eastern point of Island Lake as shown in approximate latitude 53° 30′ and longitude 93° 40′ on the railway map of the Dominion of Canada, published, on the scale of thirty-five miles to one inch, in the year one thousand nine hundred and eight, by the authority of the Minister of the Interior; thence northeasterly in a right line to the point where the eighty-ninth meridian of west longitude intersects the southern shore of Hudson Bay; thence easterly and southerly following the shore of the said Bay to the point where the northerly boundary of the Province of Ontario as established under the said Act intersects the shore of James Bay; thence westward along the said boundary as established by the said Act to the place of commencement; and all the land embraced by the said description shall, from and after the commencement of this Act, be added to the Province of Ontario, and shall, from and after the said commencement, form and be part of the said Province of Ontario; upon the following terms and conditions and subject to the following provisions: U. K. 1889, c. 28.

(*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; Indian rights in new territory.

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

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

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

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

CHAPTER

REVISED STATUTES OF CANADA, 1985

Prepared under the authority of the Statute Revision Act

APPENDICES

LOIS RÉVISÉES DU CANADA (1985)

Révision réalisée sous le régime de la Loi sur la révision des lois

APPENDICES

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

[Note: Legislative authority has also been conferred by the *Rupert's Land Act, 1868* (No. 6 *infra*), *Constitution Act, 1871* (No. 11 *infra*), *Constitution Act, 1886* (No. 15 *infra*), *Statute of Westminster, 1931* (No. 27 *infra*) and section 44 of the *Constitution Act, 1982* (No. 44 *infra*), and see also sections 38 and 41 to 43 of the latter Act.]

28. L'établissement, le maintien, et l'administration des pénitenciers.

29. Les catégories de sujets expressément exceptés dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.

Et aucune des matières énoncées dans les catégories de sujets énumérés dans le présent article ne sera réputée tomber dans la catégorie des matières d'une nature locale ou privée comprises dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.

[Note : Ont aussi conféré une compétence législative au Parlement l'*Acte de la Terre de Rupert, 1868* (n° 6 *infra*), la *Loi constitutionnelle de 1871* (n° 11 *infra*), la *Loi constitutionnelle de 1886* (n° 15 *infra*), le *Statut de Westminster de 1931* (n° 27 *infra*) et l'article 44 de la *Loi constitutionnelle de 1982* (n° 44 *infra*). Voir aussi les articles 38 et 41 à 43 de cette dernière loi.]

Exclusive Powers of Provincial Legislatures

Subjects of exclusive Provincial Legislation

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

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

[Note: Class 1 was repealed by the *Constitution Act, 1982* (No. 44 *infra*). The subject is now provided for in section 45 of that Act, and see also sections 38 and 41 to 43 of the same Act.]

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

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

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and

Pouvoirs exclusifs des législatures provinciales

Sujets soumis au contrôle exclusif de la législation provinciale

92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

1. L'amendement de temps à autre, nonobstant toute disposition contraire énoncée dans le présent acte, de la constitution de la province, sauf les dispositions relatives à la charge de lieutenant-gouverneur;

[Note : Cette catégorie a été abrogée par la *Loi constitutionnelle de 1982* (n° 44 *infra*). La teneur s'en retrouve maintenant à l'article 45 de la *Loi constitutionnelle de 1982*. Voir aussi les articles 38 et 41 à 43 de cette loi.]

2. La taxation directe dans les limites de la province, dans le but de prélever un revenu pour des objets provinciaux;

3. Les emprunts de deniers sur le seul crédit de la province;

4. La création et la tenure des charges provinciales, et la nomination et le paiement des officiers provinciaux;

5. L'administration et la vente des terres publiques appartenant à la province, et des bois et forêts qui s'y trouvent;

6. L'établissement, l'entretien et l'administration des prisons publiques et des maisons de réforme dans la province;

for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:—

a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

b. Lines of Steam Ships between the Province and any British or Foreign Country:

c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

7. L'établissement, l'entretien et l'administration des hôpitaux, asiles, institutions et hospices de charité dans la province, autres que les hôpitaux de marine;

8. Les institutions municipales dans la province;

9. Les licences de boutiques, de cabarets, d'auberges, d'encanteurs et autres licences, dans le but de prélever un revenu pour des objets provinciaux, locaux, ou municipaux;

10. Les travaux et entreprises d'une nature locale, autres que ceux énumérés dans les catégories suivantes:—

a. Lignes de bateaux à vapeur ou autre bâtiments, chemins de fer, canaux, télégraphes et autres travaux et entreprises reliant la province à une autre ou à d'autres provinces, ou s'étendant au-delà des limites de la province;

b. Lignes de bateaux à vapeur entre la province et tout pays dépendant de l'empire britannique ou tout pays étranger;

c. Les travaux qui, bien qu'entièrement situés dans la province, seront avant ou après leur exécution déclarés par le parlement du Canada être pour l'avantage général du Canada, ou pour l'avantage de deux ou d'un plus grand nombre des provinces;

11. L'incorporation des compagnies pour des objets provinciaux;

12. La célébration du mariage dans la province;

13. La propriété et les droits civils dans la province;

14. L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;

15. L'infliction de punitions par voie d'amende, pénalité, ou emprisonnement, dans le but de faire exécuter toute loi de la province décrétée au sujet des matières tombant dans aucune des catégories de sujets énumérés dans le présent article;

16. Généralement toutes les matières d'une nature purement locale ou privée dans la province.

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

Ressources naturelles non renouvelables, ressources forestières et énergie électrique

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

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

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

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

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

Compétence provinciale

92A. (1) La législature de chaque province a compétence exclusive pour légiférer dans les domaines suivants :

a) prospection des ressources naturelles non renouvelables de la province;

b) exploitation, conservation et gestion des ressources naturelles non renouvelables et des ressources forestières de la province, y compris leur rythme de production primaire;

c) aménagement, conservation et gestion des emplacements et des installations de la province destinés à la production d'énergie électrique.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Exportation hors des provinces

(2) La législature de chaque province a compétence pour légiférer en ce qui concerne l'exportation, hors de la province, à destination d'une autre partie du Canada, de la production primaire tirée des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production d'énergie électrique de la province, sous réserve de ne pas adopter de lois autorisant ou prévoyant des disparités de prix ou des disparités dans les exportations destinées à une autre partie du Canada.

Authority of Parliament

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

Pouvoir du Parlement

(3) Le paragraphe (2) ne porte pas atteinte au pouvoir du Parlement de légiférer dans les domaines visés à ce paragraphe, les dispositions d'une loi du Parlement adoptée dans ces domaines l'emportant sur les dispositions incompatibles d'une loi provinciale.

Taxation of resources

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

(*a*) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(*b*) sites and facilities in the province for the generation of electrical energy and the production therefrom,

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

Taxation des ressources

(4) La législature de chaque province a compétence pour prélever des sommes d'argent par tout mode ou système de taxation :

a) des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production primaire qui en est tirée;

b) des emplacements et des installations de la province destinés à la production d'énergie électrique, ainsi que de cette production même.

Cette compétence peut s'exercer indépendamment du fait que la production en cause soit ou non, en totalité ou en partie, exportée hors de la province, mais les lois adoptées dans ces domaines ne peuvent autoriser ou prévoir une taxation qui établisse une distinction entre la production exportée à destination d'une autre partie du Canada et la production non exportée hors de la province.

"Primary production"

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

Existing powers or rights

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

[Note: Added by section 50 of the *Constitution Act, 1982* (No. 44 *infra*).]

«Production primaire»

(5) L'expression «production primaire» a le sens qui lui est donné dans la sixième annexe.

Pouvoirs ou droits existants

(6) Les paragraphes (1) à (5) ne portent pas atteinte aux pouvoirs ou droits détenus par la législature ou le gouvernement d'une province lors de l'entrée en vigueur du présent article.

[Note : Ajouté aux termes de l'article 50 de la *Loi constitutionnelle de 1982* (n° 44 *infra*).]

Education

Education

Legislation respecting Education

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

[Note: Altered for Manitoba by section 22 of the

Législation au sujet de l'éducation

93. Dans chaque province, la législature pourra exclusivement décréter des lois relatives à l'éducation, sujettes et conformes aux dispositions suivantes:—

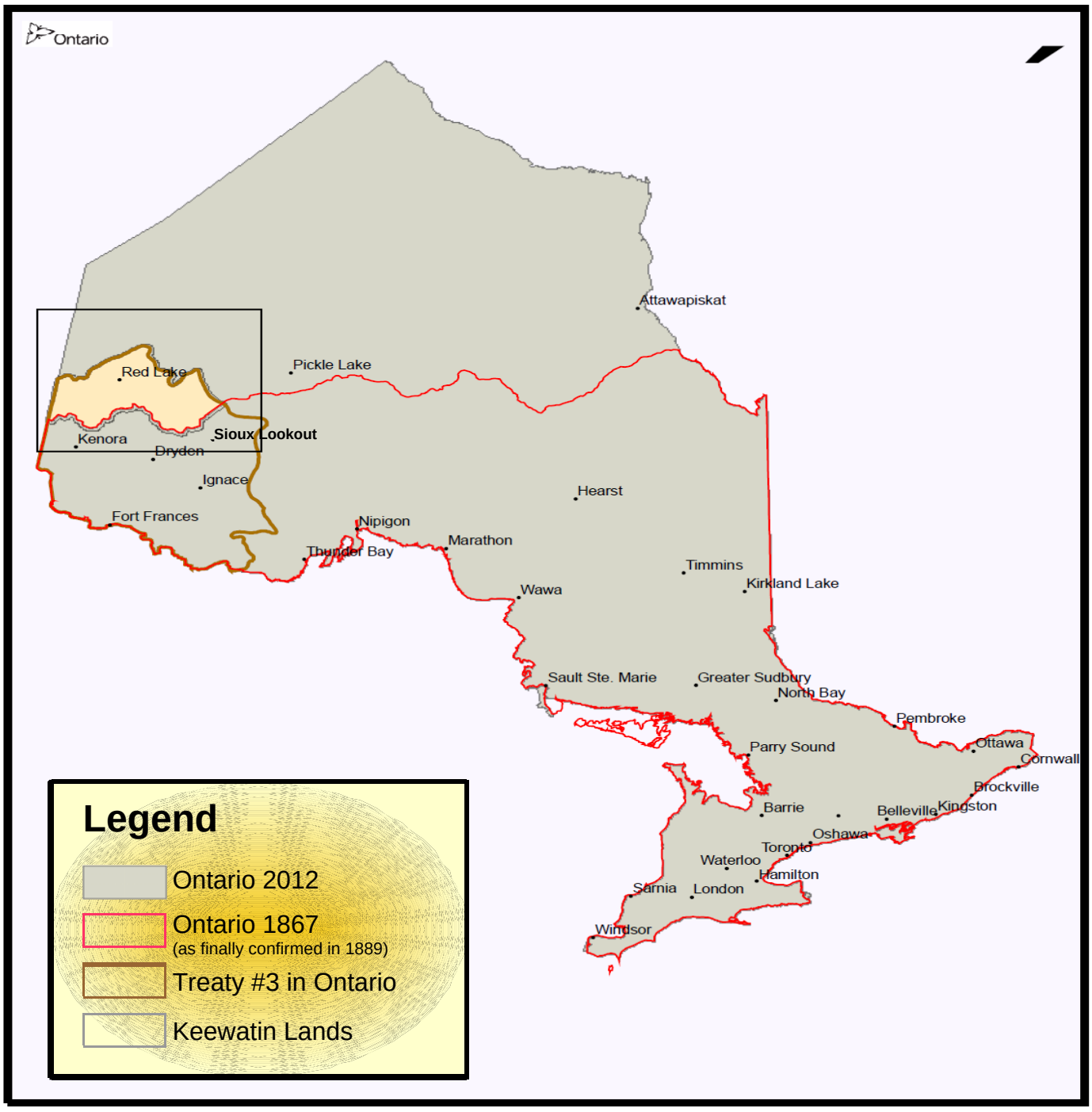
(1) Rien dans ces lois ne devra préjudicier à aucun droit ou privilège conféré, lors de l'union, par la loi à aucune classe particulière de personnes dans la province, relativement aux écoles séparées (*denominational*);

(2) Tous les pouvoirs, privilèges et devoirs conférés et imposés par la loi dans le Haut-Canada, lors de l'union, aux écoles séparées et aux syndics d'écoles des sujets catholiques romains de Sa Majesté, seront et sont par la présente étendus aux écoles dissidentes des sujets protestants et catholiques romains de la Reine dans la province de Québec;

(3) Dans toute province où un système d'écoles séparées ou dissidentes existera par la loi, lors de l'union, ou sera subséquemment établi par la législature de la province—il pourra être interjeté appel au gouverneur-général en conseil de toute loi ou décision d'aucune autorité provinciale affectant aucun des droits ou privilèges de la minorité protestante ou catholique romaine des sujets de Sa Majesté relativement à l'éducation;

(4) Dans le cas où il ne serait pas décrété telle loi provinciale que, de temps à autre, le gouverneur-général en conseil jugera nécessaire pour donner suite et exécution aux dispositions du présent article,—ou dans le cas où quelque décision du gouverneur-général en conseil, sur appel interjeté en vertu du présent article, ne serait pas mise à exécution par l'autorité provinciale compétente—alors et en tout tel cas, et en tant seulement que les circonstances de chaque cas l'exigeront, le parlement du Canada pourra décréter des lois propres à y remédier pour donner suite et exécution aux dispositions du présent article, ainsi qu'à toute décision

APPENDIX A – Map # 1 - *The "Keewatin Lands"*



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

APPENDIX A – Map # 2 – *Canada's Historical Indian Treaties*