PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The Court of Appeal for Ontario (the "OCA") has rendered a decision in this matter that is consistent with Canadian constitutional practice and with the decisions of this Court. As a result, there are no issues of public or national importance that warrant this Court's consideration.

2. The trial judge determined that only the federal government could validly authorize the "taking-up" of lands for "settlement, mining, lumbering, and other purposes" within the Keewatin Lands.[1] The decision effectively found that Ontario had acted without jurisdiction, from the time the Keewatin Lands were added to Ontario in 1912, in authorizing land uses that might interfere with hunting, trapping or fishing.

3. In reversing the trial decision, the OCA has restored the land use regime that has existed in the Keewatin Lands for 100 years. It accords with the allocation and division of powers between the federal and provincial governments, which has been understood and acted upon since the Privy Council's 1888 decision in *St. Catherine's Milling*.[2]

4. The applicants argue that the decision of the OCA has modified the treaty, changed the division of powers, and is inconsistent with constitutional jurisprudence. They are incorrect for the following reasons:

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[1] The taking up (or harvesting) clause reads as follows:

> ... the said Indians shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered ... 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.

[2] *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 AC 46 (JCPC), Resolute Book of Authorities, ("RBA"), Tab 9

(a) The decision does not take away or modify Canada's responsibility for treaties under section 91(24). The decision is consistent with both Canada's on-going jurisdiction for treaties and Ontario's jurisdiction to administer lands within its borders. The applicants confuse the taking up of lands under the treaty with an infringement of treaty rights. The taking-up is actually an implementation of the treaty.[3]

(b) The decision does not create inconsistencies in the law. In fact, it is consistent with constitutional practice across the country, including in the areas of Ontario and Canada that have similarly worded treaties. When a private party, such as Resolute FP Canada Inc., wishes to obtain a forestry licence, it deals with the government that administers the land. This court's decision in *Mikisew Cree* requires such government to consult with and where applicable accommodate First Nations, if granting such a licence may adversely affect treaty harvesting rights. There is no need for an additional federal authorization. At. Paragraph 153 of its reasons, the OCA states:

> The two-step process is unnecessary to protect the Aboriginal Treaty Harvesting Right because when the Crown, through Ontario, takes up land, it must respect the Treaty Right. [4]

(c) The decision does not modify Treaty 3. The power to take up land can only be, and was always meant to be, exercised by the government that has control of the land. When Treaty 3 was signed, the Government of the Dominion of Canada was believed to have beneficial ownership of the land, and therefore the power to take

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[3] Wabauskang Memorandum of Argument, paragraph 21, Wabauskang Application for Leave ("WAL"), page 429
[4] Appeal Reasons, paragraph 153, Keewatin Application for Leave ("KAL"), Tab 8, page 134, WAL, Tab 5, page 387

up land.[5] This power to take up land did not emanate from its section 91(24) jurisdiction.

(d) The decision does not modify the division of powers. When the Keewatin Lands were added to Ontario, the province merely exercised powers already vested in it by section 109 of the constitution with respect to lands within its borders. The only change was the "level of government on whose advice the Crown acts". [6]

(e) The decision correctly finds that an approval process that requires federal government involvement whenever there is an allegation that harvesting may be adversely affected is contrary to the goal of reconciliation. The OCA found that the two-step authorization process would render provincial power "illusory". Both Ontario and the private interests seeking land use authorizations would always be susceptible to a claim that there was, or will be, a significant interference with harvesting. Merely making the claim would involve the federal government, and may cause further litigation and uncertainty.

B. STATEMENT OF FACTS

5. Resolute relies on the facts and factual analysis sets out in the reasons of the OCA. In addition, Resolute highlights the following points.

6. The appellant Resolute FP Canada Inc. ("Resolute") was formerly known as Abitibi-Consolidated Inc. Resolute owns and operates a paper mill in the Treaty 3 area. It was named as a defendant in this litigation because forestry operations carried out in certain parts of the

[5] Appeal Reasons, paragraph 145, KAL, Tab 8, page 131; WAL, Tab 5, page 384
[6] Appeal Reasons, paragraph 136, KAL, Tab 8, page 131; WAL, Tab 5, page 384

Whiskey Jack Forest, under the authority of Resolute's Sustainable Forest Licence ("SFL"), were considered by Grassy Narrows to be an infringement of Treaty 3 harvesting rights. The SFL was granted by Ontario. Its issuance was considered by Grassy Narrows to be a taking-up of land for forestry purposes that Ontario had no jurisdiction to carry out.[7]

7. The OCA considered and analysed the key findings of the trial judge. The most significant of these findings was that Lieutenant-Governor Morris ("Morris") included the "Government of the Dominion of Canada" in the taking-up clause in order to ensure that the federal government would have to authorize land uses, should the Treaty 3 lands become part of Ontario.

8. The OCA noted that the "clearest statement" on this point is found at paragraph 1454 of the trial judge's reasons as follows:

> The Commissioners deliberately provided in the Harvesting Clause that in the event that Ontario won the Boundary Dispute or a new province with section 109 powers were formed under section 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 section 109. In that event, the Commissioners did contemplate and intend that a two-step authorization process would need to be followed. [Emphasis in Original][8]

9. The OCA thoroughly examined this finding and found it "not only speculative but also inconsistent with the available evidence". [9]

10. Even if Morris did intend a two-step authorization process, his subjective intention could not have any impact upon the proper legal interpretation of the Treaty. It was conceded by

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[7] Appeal Reasons, paragraphs 5 and 15, KAL, Tab 8, page 90 and 92-93; WAL, Tab 5, page 343 and 345-346
[8] Appeal Reasons, paragraph 157, KAL, Tab 8, page 135; WAL, Tab 5, page 388
[9] Appeal Reasons, paragraph 162, KAL, Tab 8, page 137; WAL, Tab 5, page 390

Grassy Narrows on the appeal that there is no evidence to suggest that Morris communicated to the Ojibway an intention to require Canada's approval of taking up by Ontario.[10]

11. The OCA noted these further inconsistencies with the trial judge's finding:

(a) Morris wrote extensively on the negotiation of Treaty 3 and other treaties. There is nothing in this 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.[11]

(b) The trial judge placed significant emphasis on the fact that Morris was a trained constitutional lawyer. It is very difficult, however, to reconcile this with the actual text of the harvesting clause. An expert constitutional lawyer would not have drafted the clause as Morris did, had his intention been as described by the trial judge.[12]

(c) The most likely explanation for the reference to the Government of the Dominion of Canada in the harvesting clause is that, in 1873, there was no other government to whom the Commissioners appointed by Canada could conceivably refer.[13]

(d) The trial judge's interpretation is inconsistent with Canada's and Ontario's contemporaneous understanding of the harvesting clause. The 1874 *Provisional Boundary Agreement* provided that Ontario would grant patents for lands east and south of the provisional boundary and that Canada would grant patents for the

[10] Appeal Reasons, paragraphs 160 and 161, KAL, Tab 8, page 136-137; WAL, Tab 5, page 389-390
[11] Appeal Reasons, paragraph 163, KAL, Tab 8, page 137-138; WAL, Tab 5, page 390-391
[12] Appeal Reasons, paragraph 164, KAL, Tab 8, page 138; WAL, Tab 5, page 391
[13] Appeal Reasons, paragraph 165, KAL, Tab 8, page 138; WAL, Tab 5, page 391

western and northern portion of the lands. If the provisional boundary was subsequently determined to be wrong, the government found to have jurisdiction over the lands would ratify any patents that had been issued by the other government.[14] The 1874 agreement reflects an understanding, almost immediately after Treaty 3 was signed, that the right to take up lands attached to the level of government that enjoyed beneficial ownership. There is no reference to any requirement that Ontario obtain Canada's approval for taking-up lands.[15]

(e) The 1891 legislation and the 1894 agreement confirmed Ontario's right to take up lands under Treaty 3 without Canada's approval or permission in the Disputed Territory.[16] The legislation and agreement did not bestow such rights.

(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 had 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.[17]

12. For the above reasons, the OCA determined that the trial judge's finding that the commissioners deliberately contemplated and intended a two-step authorization process "cannot

[14] Appeal Reasons, paragraphs 167 and 168, KAL, Tab 8, page 139; WAL, Tab 5, page 392
[15] Appeal Reasons, paragraph 169, KAL, Tab 8, page 140; WAL, Tab 5, page 393
[16] Appeal Reasons, paragraph 174, KAL, Tab 8, page 141; WAL, Tab 5, page 394
[17] Appeal Reasons, paragraph 171, KAL, Tab 8, page 140; WAL, Tab 5, page 393

survive scrutiny even under the deferential 'palpable and overriding' error standard."[18] Without such a finding, the trial judge's disposition of this case cannot stand.

PART II – QUESTION IN ISSUE

13. Does this case raise issues of national or public importance warranting leave to appeal?

PART III – STATEMENT OF ARGUMENT

14. The decision of the OCA provides a clear and concise application of well-settled law to the facts of this case. It is not in conflict with the decisions of this Court or with other Canadian appellate courts. It confirms long-standing constitutional practice and promotes, rather than hinders, the reconciliation process.

15. Resolute disagrees with the applicants that the OCA decision changes the federal government's section 91(24) jurisdiction, or that it modifies Treaty 3. These issues are examined below.

A. NO CHANGE TO DIVISION OF POWERS

16. The applicants incorrectly characterize the OCA decision as narrowing or displacing Canada's section 91(24) jurisdiction. On the one hand, Grassy Narrows argues that the OCA has put Ontario's section 109 powers and Canada's section 91(24) jurisdiction in "watertight compartments". On the other hand, Wabauskang claims that the decision has taken away Canada's exclusive obligation to ensure the proper implementation of the treaty pursuant to section 91(24).

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[18] Appeal Reasons, paragraph 172, KAL, Tab 8, page 140; WAL, Tab 5, page 140

17. Both arguments are grounded on the assumption that the province is not competent to protect and implement treaty promises, even when the activity is squarely within provincial responsibility, such as the authorization of land uses.

18. The applicants' arguments are reminiscent of those made by Canada in *St. Catherine's Milling*. Canada claimed the beneficial ownership of the Treaty 3 lands on the basis that its exclusive section 91(24) jurisdiction to legislate for "Indians, and lands reserved for Indians" carried with it the Crown's beneficial interest in the ceded lands. The Privy Council disagreed, and found that section 91(24) jurisdiction was not inconsistent with the province's beneficial ownership.[19]

19. Here, the applicants appear to be making the same mistake as Canada did in 1888. The power to take up land is not, and has never been, a section 91(24) duty or subject to section 91(24) supervision. A taking up does not engage federal jurisdiction, unless the lands are beneficially owned by the federal government. Nonetheless, Ontario must honour the obligations of the Crown when exercising its section 109 powers, as required by section 109, the 1912 *Ontario Boundaries Extension Act*, section 35 of the *Constitution Act, 1982* and by *Mikisew Cree*.[20]

20. A second mistake that the applicants make is to characterize Treaty 3 (as Canada did in *St. Catherine's Milling*) as an agreement between the Ojibway and the federal government. The OCA followed *St. Catherine's Milling*, and the text of the treaty itself, in finding that the treaty

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[19] *St. Catherine's Milling, supra*, page 59, RBA, Tab 9

[20] *Constitution Act*, 1867 (UK), 30 & 31 Vic, c-3, ss 91(24), 109; *Ontario Boundaries Extension Act*, S.C. 1912, 2 Geo. V, c.40; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (UK), 1982, c.11, s. 35; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, RBA, Tab 3, paragraphs 50, 51 and 56

partner was and is "the Crown", not the federal government.[21] By the same token, the OCA did not find, as Wabauskang submits, that the provinces are the Aboriginal peoples' treaty partner.

21. This Court has consistently found that the Aboriginal people have relationships with both the federal and provincial Crown. For instance, the following statement of Chief Justice Dickson is instructive:

> ... the Indians' relationship with the Crown or sovereign has never depended on the particular representative of the Crown involved. From the aboriginal perspective, any federal provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of the Sovereign-Indians relations.[22]

22. Furthermore, this Court has confirmed that, under section 109, aboriginal rights are an interest in land other than the underlying title belonging to the province.[23] It is established practice that an allegation against the province of interference with an aboriginal or treaty right does not engage federal jurisdiction. For instance, in *Delgamuukw*, the consultation that the court contemplated be carried out by a province did not involve the federal government, either alone or in tandem with the province. The honour of the Crown and its section 35 obligations can be met by the province.[24]

23. Even if the plaintiffs claim that a provincial taking up infringes the treaty by leaving "no meaningful right to hunt or fish", the remedy is not to bring in the federal government. It is to bring an action for treaty infringement, including a demand for a *Sparrow* justification.[25]

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[21] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) supra*, paragraph 64, RBA, Tab 3
[22] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 RBA, Tab 4, page 109
[23] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at paragraph 59, RBA, Tab 2
[24] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paragraphs 167-168, RBA, Tab 1, *Haida Nation v. British Columbia (Minister of Forests)*, *supra*, RBA, Tab 2, at paragraphs 57-59
[25] *Mikisew*, *supra*, paragraph 48, RBA, Tab 3 and Appeal Reasons, paragraph 207, KAL, Tab 8, page 153; WAL, Tab 5, page 406

B. NO MODIFICATION OF TREATY

24. Grassy Narrows argues that the "constitutional evolution" referred to by the OCA "unilaterally" modifies the treaty. The treaty has not been modified in any way, nor did the OCA suggest that any modification was necessary.

25. The "constitutional evolution" is, in these circumstances, merely the change in Ontario's boundaries, with the result that the lands added to Ontario in 1912 came under provincial, rather than federal, jurisdiction.

26. A change in governmental authority has been considered by this Court not to contradict the spirit of a treaty. As stated by Cory, J. in *R. v. Horseman* (in relation to Treaty 8):

> Obviously at the time the Treaty was made only the Federal Government had jurisdiction over the territory affected and it was the only contemplated "government of the country". The Transfer Agreement of 1930 changed the governmental authority which might regulate aspects of hunting in the interests of conservation. This change of governmental authority did not contradict the spirit of the original Agreement as evidenced by federal and provincial regulations in effect at the time. Even in 1899, conservation was a matter of concern for the governmental authority.[26]

27. The *Horseman* decision concerns the changes made to harvesting rights by the Natural Resources Transfer Agreements of 1930 (the "NRTAs") which transferred the beneficial interest in the lands from the federal government to the provinces of Manitoba, Saskatchewan and Alberta. These provinces did not have section 109 rights when they entered Confederation but obtained such rights once the NRTAs became part of the constitution.[27]

28. The NRTAs did not replace or modify the taking up clauses in the applicable treaties, clauses that are similar or identical to Treaty 3. It was not necessary to do so, just as it was not

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[26] *R. v. Horseman*, [1990] 1 S.C.R. 901, at page 935-936, RBA, Tab 7
[27] Natural Resource Transfer Agreement (1930), paragraph 1 and 12

necessary to do so in the 1912 *Ontario Boundaries Extension Act.* The change in governmental authority did not contradict the spirit of the treaty. More importantly, the taking-up clause, by operation of law, may be exercised only by the government that administers the land.[28]

29. The addition of the Keewatin Lands to Ontario in 1912, like the transfer of beneficial ownership to the provinces under the NRTAs, was an example of the constitutional evolution discussed by the OCA. As Canada evolved, there were changes in the level of government on whose advice the Crown acts.[29] This did not require a modification to the treaty or effect a change in the division of powers.

30. This result, as the OCA states, "fosters direct dialogue between the province and Treaty 3 First Nations. Such dialogue is key to achieving the goal of reconciliation."[30]

31. For these reasons, Resolute submits that there is no issue of public importance or significance that warrants granting leave to appeal.

PART IV – SUBMISSIONS CONCERNING COSTS

32. Resolute does not seek costs in these applications for leave to appeal.

PART V – ORDER SOUGHT

33. Resolute requests that the applications for leave be dismissed.

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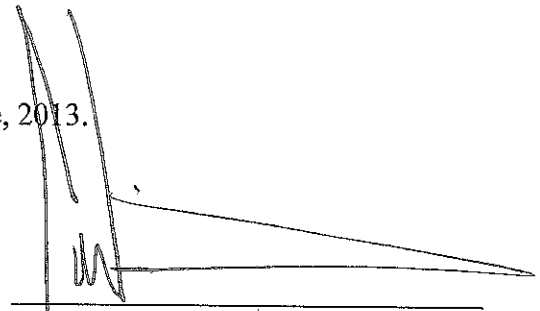
[28] *R. v. Badger*, [1996] 1 S.C.R. 771, at paragraph 51, RBA, Tab 5; *R. v. Smith* [1935] 2 W.W.R. 433 (Sask. C.A.), at pages 436-438, RBA, Tab 8; and *R. v. Horse*, [1988] 1 S.C.R. 187, at page 197-198, RBA, Tab 6
[29] Appeal Reasons, paragraph 136, KAL, Tab 8, page 128; WAL, Tab 5, page 381
[30] Appeal Reasons, paragraph 154, KAL, Tab 8, page 134-135; WAL, Tab 5, page 387-388

All of which is respectfully submitted this 17th day of June, 2013.



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