PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. This application for leave to appeal raises no issue of public importance that has not already been fully considered, answered and affirmed by this Court and the Privy Council before it.[1]

2. In *St. Catherine's Milling*,[2] the Privy Council determined that Canada did not have the authority to take up any of the Treaty 3 ceded lands situated within the boundaries of Ontario for provincial purposes such as lumbering: only Ontario could take up those lands pursuant to s. 109 of the *Constitution Act, 1867*. In *Smith*,[3] this Court confirmed the authority of *St. Catherine's Milling* on this point.[4] In *Mikisew Cree*,[5] this Court in interpreting the nearly identical harvesting provision in Treaty 8 held that the Crown's exercise of its taking up power acts as an internal limit on the treaty harvesting right without infringing the right, provided that the Crown in exercising its proprietary right to take up leaves the affected First Nation with a meaningful right to hunt and fish.[6] At trial, the trial judge failed to apply this well-established jurisprudence, finding instead that in that part of the Treaty 3 area known as the Keewatin Lands, Ontario does not have the right to limit treaty harvesting rights by taking up lands "under the Treaty" unless authorized by Canada exercising its s. 91(24) jurisdiction.[7]

3. The Ontario Court of Appeal rejected the trial judge's conclusion, found that she "made many errors" and allowed the appeal. Applying the well-settled principles of treaty interpretation, constitutional law and statutory interpretation that arise in this case, the Court of Appeal correctly held as follows:

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[1] See, in particular, the following cases: *St. Catherines Milling and Lumber*; *Ontario Mining v. Seybold*; *Smith v. the Queen*; *R. v. Marshall*; *Haida Nation*; *Mikisew Cree*.
[2] *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (JCPC) ("*St. Catherine's Milling*").
[3] *Smith v. The Queen*, [1983] 1 S.C.R. 554 (S.C.C.) ("*Smith*").
[4] Justice Estey wrote: "The authority of that decision has never been challenged or indeed varied by interpretations and application": *Smith*, p. 562. See also *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158, at para. 130, Grassy Narrows' Application Record, Vol. 2, pp. 87-169 ("Appeal Reasons").
[5] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69 ("*Mikisew Cree*").
[6] See Appeal Reasons, paras. 207 & 226.
[7] Appeal Reasons, paras. 75, 76 & 82.

a) Immediately upon the surrender and extinguishment of aboriginal title, lands within provincial boundaries come under the exclusive administration and control of the province "without further burden by reason of s. 91(24)."[8]

b) Absent a clear and plain expression of legislative intention to the contrary, by operation of law the same principle applies equally to federal Crown lands subsequently added to a province;[9]

c) In exchange for the cession of their aboriginal title, all of the First Nation signatories to Treaty 3 received, amongst other benefits, the right to continue to hunt and fish over surrendered territory <u>except</u> where and until such time as the Crown takes up the same said lands for settlement, mining, lumbering or other purposes;[10]

d) "Taking up" by the Crown so as to limit harvesting rights does not constitute a treaty "infringement," thereby attracting the *Sparrow* test, as long as a meaningful right to harvest remains. Rather, in accordance with this Court's decision in *Mikisew Cree*, the honour of the Crown is engaged when "taking up." Honourable management of Crown lands requires that the government having the authority to take up such lands must consult and, where appropriate, accommodate the First Nation's treaty rights before reducing the area over which the First Nation's members may continue to pursue their treaty harvesting rights.[11]

e) Consistent with this Court's decision in *Haida Nation v. British Columbia (Minister of Forests)*[12] and pursuant to the terms of s. 109 of the *Constitution Act, 1867*, a province takes the Crown's lands subject to the same constitutional duty that would apply to the Dominion administering federal lands: to respect

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[8] Appeal Reasons, para. 130; *Smith*, p. 562. The issue of which government can "regulate" the treaty harvesting right was not before the Privy Council in *St. Catherine's Milling*. Rather, the issue was the authority of the Province to exercise proprietary rights over provincial Crown lands, thereby "limiting" the geographical area over which the treaty harvesting right can be exercised.

[9] Appeal Reasons, paras. 140, 179, 182 and 197.

[10] Appeal Reasons, para. 1; See also *St. Catherine's Milling*, pages 51-52

[11] Appeal Reasons, para. 226; *Mikisew Cree*, paras. 31, 48 & 56.

[12] [2004] 3 S.C.R. 511, 2004 SCC 73 ("*Haida*").

treaty rights and consult with First Nations when treaty rights are potentially affected by taking up.[13]

4. The trial decision not only fails to apply this Court's settled jurisprudence, but the Court of Appeal also found that the decision would lead to "undesirable and absurd consequences" in the treatment of Treaty 3 lands.[14] Under the trial decision, Ontario's "constitutional obligation" to obtain the approval of Canada before taking up Crown land arises only in respect of Treaty 3 lands that were added to Ontario in 1912 (the "Keewatin Lands"). The result would be that different parts of the Treaty 3 lands within Ontario would be subject to different land use regimes for the purposes of taking up.[15]

5. The Ontario Court of Appeal thoroughly reviewed the relevant evidence and case law and applied this Court's well-established jurisprudence to conclude that Ontario has the right to "take up" lands in the Keewatin Lands as long as it does so honourably, and there is neither a practical need nor a constitutional requirement to involve Canada.

6. In reaching the only possible result in this case, the decision of the Ontario Court of Appeal raises no issue of public importance. The application for leave to appeal should therefore be dismissed.

B. NEGOTIATION OF TREATY 3

7. In June 1873, the Government of the Dominion of Canada passed an Order in Council establishing a Board of Indian Commissioners and appointed as its commissioners Alexander Morris and two others.[16] At the time of his appointment, Alexander Morris was Lieutenant-Governor of Manitoba and the North-West Territories.

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[13] Appeal Reasons, paras. 153-154.
[14] Appeal Reasons, para. 195.
[15] Indeed, this inconsistent treatment of the Treaty 3 lands would apply to lands used by members of the Grassy Narrows First Nation, itself, some of which fall with the Keewatin Lands and others of which do not: see Appeal Reasons, para. 195.
[16] *Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801, at para. 297, Grassy Narrows' Application Record, Vol. 1, pp. 69-301, & Vol. 2, pp. 1-86 ("Trial Reasons"). In September 1873 Simon Dawson was appointed to replace one of the other two treaty commissioners: Trial Reasons, para. 303; Appeal Reasons, para. 33.

He subsequently played a leading role in the negotiation of Treaties 3, 4, 5 and 6.[17]

8. 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" of their rights, titles and claims to the lands.[18]

9. In late September 1873 the commissioners arrived at the North-West Angle of the Lake of the Woods[19] and over the course of the first three days in October, Treaty 3 was negotiated between the treaty commissioners, led by Alexander Morris, and the leading chiefs of the Saulteaux Tribe of the Ojibway Indians (the "Ojibway").[20]

10. The treaty territory covers an area of approximately 55,000 square miles situated in what is now northwestern Ontario and eastern Manitoba.[21] At the time of the negotiations, Canada claimed ownership of all of the territory covered by Treaty 3. Part of the territory, the Keewatin Lands, was unquestionably under Canada's jurisdiction in 1873; another part of the territory was disputed with Ontario (the "Disputed Lands") and subsequently found to be part of Ontario.[22]

11. On October 1, Governor Morris made an offer to the Ojibway which included the following:

> I told you I wanted to make a treaty with you on account of my mistress the Queen and on your account. That is the reason I am here. ... We are all children of the same Great Spirit and I want to settle all matters so that the white and red men will always be friends. I want to have lands for farms reserved for your own use so that the white man cannot interfere with them. 1 square mile for every family of 5 or thereabouts. <u>It may be a long time before the other lands are wanted and you will have the right to hunt and fish over them until the white man wants them</u>. ...[23]

12. Following an impasse in negotiations on October 2nd, which was broken by the

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[17] Appeal Reasons, para. 31.
[18] Appeal Reasons, para. 34.
[19] Appeal Reasons, para.38.
[20] Appeal Reasons, para. 35.
[21] Appeal Reasons, paras. 1 & 2.
[22] Appeal Reasons, para. 2.
[23] Trial Reasons, para. 341; Appeal Reasons, para. 44, emphasis added.

willingness of Chief Sah-Katch-eway of Lac Seul to make a deal, Governor Morris presented an improved offer to the Ojibway Chiefs on October 3rd that included "agricultural implements, fishing nets, twine and an increase in the monetary terms."[24] In response, the Ojibway negotiators raised a number of additional issues, including "the privilege of travelling about the country where it is vacant".[25]

13. Joseph Nolin, a Métis who took notes of the negotiations in French on behalf of the Ojibway, recorded the following promise in his notes: "The Indians will be free, as by the past, for their hunting and rice harvest."[26] In submitting his official report of the treaty negotiations to Ottawa on October 14, 1873, Alexander Morris attached a copy of Treaty 3 together with an English translation of Nolin's notes,[27] thereby confirming that Morris saw no inconsistency between Nolin's notes and the written provisions of Treaty 3.

14. Following negotiations on each of the many points raised by the Ojibway, Treaty 3 was concluded on October 3, 1873 between the Crown (Queen Victoria, "Her Most Gracious Majesty of Great Britain and Ireland") and the Saulteaux.[28]

15. By entering into Treaty 3, the Ojibway surrendered their interest in the treaty lands in exchange for reserves, payments and other benefits. Treaty 3 contains a harvesting clause by virtue of which the Ojibway retain the "right to pursue their avocations of hunting and fishing throughout the tract surrendered" except on tracts "as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her [Majesty's] Government of the Dominion of Canada."[29]

16. The text of the treaty harvesting provision is consistent with Governor Morris' original offer on Day 1 of the treaty negotiations, in which he promised that on lands not reserved for the Ojibway's own use, "you will have the right to hunt and fish over them

[24] Appeal Reasons, paras. 47 & 49.
[25] Appeal Reasons, paras. 50 & 51.
[26] Appeal Reasons, paras. 35 & 53; Trial Reasons, para. 380.
[27] Trial Reasons, para. 320; Appeal Reasons, para. 36.
[28] Appeal Reasons, para. 54 & Appendix "A", at first paragraph.
[29] Appeal Reasons, para. 1.

until the white man wants them."[30]

C. Post-Treaty 3 Understanding of Treaty 3 Harvesting Provision

(i) The Boundary Dispute

17. 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 or Manitoba, under the administration and control of the Dominion of Canada. Ontario took the position that its boundaries extended to the west of its then current boundary, taking in much of what became Treaty 3 lands.[31]

18. Within one year of Treaty 3's signing, in June 1874, the federal and Ontario governments agreed to resolve their boundary dispute through arbitration and reached a provisional boundary agreement to provide legal certainty for development in the disputed area.[32]

19. Under the 1874 Provisional Boundary Agreement, it was agreed that for lands within the Disputed Territory to the east and south of the provisional boundary, Ontario would grant patents, whereas to the west and north, Canada would grant patents. If it were subsequently determined that these lands were not in Ontario or federal territory, the applicable government would ratify the patents issued by the other government and account for the proceeds of such lands.[33]

20. In essence, the 1874 Provisional Boundary Agreement reflected the common understanding of both governments of the day: that the right to take up Treaty 3 surrendered lands was a <u>proprietary right</u> flowing from the cession to the Crown of all aboriginal rights and title to the lands and belonging to whichever government was

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[30] *Supra*, footnote 23.
[31] Appeal Reasons, para. 55.
[32] 1874 Provisional Boundary Agreement, June 26, 1874, Trial Exhibit 4, pp. 126-127, Respondent's Application Record, pp. 53-54. See Appeal Reasons, para. 59.
[33] Appeal Reasons, paras. 60 & 61.

found to have administration and control of those lands.[34]

21. Ontario's position in the boundary dispute was accepted in August 1878 by a panel of arbitrators, confirming that most of the Treaty 3 area (the bulk of the territory south of the English River) was within Ontario's boundaries. However, Prime Minister Macdonald refused to honour the arbitration decision and the matter was not finally determined until 1884, with the Privy Council endorsing the arbitrators' ruling. Ontario's boundaries were confirmed by Imperial legislation in 1889.[35]

(ii) THE *ST. CATHERINE'S MILLING* DECISION

22. Despite the Privy Council's decision in the boundary dispute, Macdonald continued to assert Canada's administration and control over the entire Treaty 3 lands, based on the argument that having taken the surrender of the aboriginal title in Treaty 3 pursuant to its s. 91(24) authority, Canada was now the owner of the Treaty 3 lands.[36] Canada then issued timber permits that Ontario challenged. The dispute led to the Privy Council's 1888 decision in *St. Catherine's Milling and Lumber Co. v. The Queen*[37] in which the Privy Council struck down the federal timber licence and held that Ontario had exclusive power to authorize forestry on its off-reserve Treaty 3 lands.[38]

23. By its decision in *St. Catherine's Milling* the Privy Council determined that the "Government of the Dominion of Canada" did not have the authority to "take up" any of the Treaty 3 ceded lands situated within the boundaries of Ontario for provincial purposes such as lumbering – notwithstanding the literal words of the Treaty 3 harvesting provision – nor the authority to authorize St. Catherine's Milling and Lumber Co. to "take up" any such lands. Only the Province of Ontario, having administration

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[34] See Appeal Reasons, para. 169: "Plainly, the 1874 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."

[35] Appeal Reasons, paras. 62-64.

[36] Lord Watson, in *St. Catherine's Milling and Lumber Co. v. The Queen*, assailed this argument, finding that the surrender was "from beginning to end a transaction between the Indians and the Crown". Further, while the treaty commissioners "had full authority to accept a surrender to the Crown", they had "neither authority or power to take away from Ontario the interest which had been assigned to [it]" by the Constitution: see p. 60; and see Appeal Reasons, para. 113.

[37] (1888), 14 A.C. 46 (JCPC).

[38] Appeal Reasons, paras. 65 & 66.

and control of these lands pursuant to s. 109 of the *Constitution Act, 1867*, had the authority to take up these lands and the right to their beneficial use.

24. Although the Privy Council had decided "who" could take up the Treaty 3 ceded lands situated within Ontario's boundaries, it explicitly acknowledged that it did not decide "to what extent" those lands over which the Indians exercised "the qualified privilege of hunting and fishing mentioned in the treaty"[39] could be taken up for settlement or other purposes.[40] This was a question for future determination, thereby presaging this Court's decision in *Mikisew Cree* more than a century later.[41]

(iii) 1891 RECIPROCAL LEGISLATION

25. In January 1889, shortly after the Privy Council released its decision in *St. Catherine's Milling*, Ontario Premier Oliver Mowat wrote to the federal Minister of the Interior, Edward Dewdney, setting out his understanding of the legal consequence of the Privy Council's decision on Ontario's ability to "take up" ceded Treaty 3 lands situated within Ontario and proposing that legislation be passed to confirm this view:

> By the North West Angle Treaty No. 3 ... it was provided that the Indians would have the right of hunting and fishing throughout the surrendered territory ... except as to tracts required or taken up for settlement, mining, lumbering or other purposes. The meaning of course was that such matters should be determined by the authority, whatever it was, from which grants for settlement &c., should come and as this has now been decided to be the Province, the Province becomes the rightful authority to make grants &c., free from the Indian right of hunting and fishing. ...[42]

26. Negotiations from 1889 to 1891 between Canada and Ontario culminated in reciprocal legislation that confirmed Ontario's authority to take up Treaty 3 surrendered lands situated within its boundaries.[43]

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[39] *St. Catherine's Milling*, p. 52.
[40] *St. Catherine's Milling*, p. 60.
[41] Appeal Reasons, paras. 121-124.
[42] Trial Reasons, para. 1003.
[43] *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands* (Canada), 54 & 55 Vict. C. 5; *An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands* (Ontario), 54 Vict. C.3; Appeal Reasons, para. 67.

27. The 1891 legislation included a Schedule, containing a draft agreement that was executed by both governments in 1894. Article 1 of the 1894 Agreement provides that with respect to those Treaty 3 lands situated within Ontario, "it is hereby conceded and declared" that as the lands belong to Ontario, the Indian harvesting rights on off-reserve lands do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario or by persons duly authorized by the Government of Ontario.[44]

(iv) THE 1912 ONTARIO BOUNDARIES EXTENSION ACT

28. In 1912, Ontario's boundaries were extended northward by reciprocal legislation passed by Canada and Ontario, as a result of which the Keewatin Lands were added to Ontario.[45]

29. In discussing the proposed legislation in Parliament in February 1912, Prime Minister Borden made clear that the territory being added to the province would be under the administration and control of Ontario on the exact same basis as the rest of the land within the limits of Ontario:

> 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, shall be administered by the Crown on the advice of the provincial government.[46]

30. Borden's statement was informed by the advice he had received from the Deputy Minister of Justice, Edmund Newcombe, earlier in February 1912, in relation to Manitoba's boundary extension:

> I am of opinion that the constitution of the province as at present existing becomes, by mere force of the statute enlarging its boundaries, the

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[44] Appeal Reasons, para. 68; 1894 Agreement, Article 1.

[45] *An Act to extend the Boundaries of the Province of Ontario* (Canada), 2 George V. Chap. 40; *An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province* (Ontario), 2 George V. Chap. 3; Appeal Reasons, para. 69.

[46] House of Commons Debates, 12th Parl., 1st Sess., NO. 2 (27 February 1912), at p. 3906, cited at Appeal Reasons, para. 139.

constitution of the enlarged province...[47]

31. The territory added to Ontario by the 1912 reciprocal legislation was added subject to the following condition:

> (a) That the province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent ... as the Government of Canada has heretofore recognized such rights...[48]

Ontario thereby agreed to recognize the rights of the Treaty 3 Ojibway to hunt and fish over the ceded territory located in the Keewatin Lands until such time as those lands were required or taken up by Ontario or any of its duly authorized subjects.

32. Apart from projects falling within federal jurisdiction (such as interprovincial railways, national parks, harbours), development, patenting and leasing of Crown lands in the Treaty 3 territory have been exclusively authorized by Ontario in the Disputed Territory since the late 1880's and in the Keewatin Lands since 1912.[49]

D. THE TRIAL DECISION

33. The trial judge's central finding was that in the Keewatin Lands, Ontario does <u>not</u> have the right to limit treaty harvesting rights by taking up lands "under the Treaty".[50] She found that away from the vicinity of the Dawson Route and the CPR, the treaty commissioners promised that the Ojibway's harvesting rights would not be significantly interfered with <u>unless authorized by Canada</u>[51] exercising its s. 91(24) jurisdiction.[52]

34. In support of her central finding the trial judge found that Alexander Morris deliberately tailored the wording of the harvesting clause to ensure that in the event Ontario was successful in asserting its claim to the Disputed Territory, the "Government of the Dominion of Canada" could stand between Ontario and the Ojibway to police Ontario's taking up of lands so as to preserve and protect the Ojibway harvesting

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[47] Memorandum for Prime Minister Borden dated February 10, 1912, Trial Exhibit 128, p. 4, Respondent's Application Record, pp. 58-62.
[48] *An Act to extend the Boundaries of the Province of Ontario* (Canada), 2 George V. Chap. 40, s. 2 (a).
[49] Appeal Reasons, para. 71.
[50] Appeal Reasons, para. 76.
[51] Appeal Reasons, para. 82.
[52] Appeal Reasons, para. 75.

rights.[53] Consequently,

> ...Where Canada is not the owner of the land, the words of the Treaty on their face contemplate a two-step approval process in the event that land uses threaten to interfere with Harvesting Rights: (1) authorization to use the land from the owner of the land; and (2) additional authorization from Canada.[54]

35. The trial judge then found that the 1891 reciprocal legislation did not apply to the Keewatin Lands when those lands were added to Ontario in 1912, and that the 1912 legislation on its own did not give Ontario the right to "take up" lands in the Keewatin Lands under the Treaty without obtaining authorization from Canada.[55]

E. DECISION OF THE ONTARIO COURT OF APPEAL

(i) TREATY INTERPRETATION AND THE CANADIAN CONSTITUTION

36. In overturning the trial decision, the Court of Appeal concluded that the trial judge's factual finding that the treaty commissioners deliberately contemplated and intended a two-step authorization process should any of the Treaty 3 lands become part of Ontario "cannot survive scrutiny even under the deferential 'palpable and overriding' error standard."[56] The Court of Appeal found the factual finding of the trial judge on this point at odds both with the thorough documentary record and with the plain wording of the treaty harvesting clause, which does not reflect or contemplate a two-step approval process for taking up lands requiring the Dominion Government's approval in the event that administration and control of the treaty lands passes to a provincial government.[57]

37. Consistent with both the treaty text and the case law interpreting Treaty 3, the Court of Appeal found that the Ojibway's treaty partner was and is the Crown, not the Dominion Government. While the Ojibway may look to the Crown to keep the treaty promises, the Crown must do so "within the framework of the division of powers under

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[53] Appeal Reasons, para. 75.
[54] Appeal Reaons, para. 84, emphasis added.
[55] Appeal Reasons, paras. 90 & 91.
[56] Appeal Reasons, para. 172.
[57] Appeal Reasons, paras. 144 & 163.

the constitution."[58]

38. The Court of Appeal found that taking up of public lands in Ontario for provincial purposes occurs pursuant to ss. 109, 92(5) and 92A of the *Constitution Act, 1867*, by which forestry, mining, settlement and other land uses within provincial jurisdiction are authorized. Ontario's beneficial ownership, combined with the exclusive legislative authority to manage and sell the lands, embraces all those things that would amount to "taking up" under the Treaty.[59]

39. The Court of Appeal correctly held that both beneficial ownership and the legal authority to take up lands are derived from the Constitution, not the "taking up" clause in the Treaty. When the "beneficial ownership was transferred to Ontario,[60] Ontario took the place of Canada as the level of government with the capacity to take up lands, subject to the rights guaranteed by the Treaty."[61]

40. Accordingly, the Court of Appeal determined that only Ontario had the constitutional authority to take up lands in the Keewatin area, thereby limiting the geographical scope of the treaty harvesting right, provided that in so doing Ontario complies with the requirement to act honourably by consulting with the First Nation and accommodating the Treaty harvesting right as set out in *Mikisew Cree*. As long as a meaningful harvesting right remains, Ontario's exercise of its taking up authority would limit treaty harvesting rights without infringing them, and would therefore not engage Canada's s. 91(24) jurisdiction.[62]

(ii) EFFECT OF 1891 AND 1912 RECIPROCAL LEGISLATION

41. The Ontario Court of Appeal rejected the trial judge's finding that the 1891 reciprocal legislation expressly amended Treaty 3 so as to give Ontario the unilateral right to take up in the Disputed Territory.[63] In the Court of Appeal's view, the legislation was declaratory and "merely confirmed Ontario's right to take up under Treaty 3 without

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[58] Appeal Reasons, para. 135.
[59] Appeal Reasons, paras. 110 & 111.
[60] By virtue of the process of constitutional evolution.
[61] Appeal Reasons, para. 150.
[62] Appeal Reasons, paras. 206-212.
[63] See Appeal Reasons, para. 90.

Canada's approval or permission in the Disputed Territory."[64]

42. The Court of Appeal was further of the view that once the Keewatin Lands became part of Ontario in 1912, "Ontario was, by operation of law, entitled to exercise the taking up power under Treaty 3 in relation to the Keewatin Lands."[65]

43. Finally, the Court of Appeal applied three well-established principles of statutory interpretation to reinforce its view that "it was unnecessary for the 1912 Legislation to contain similar language to that in article 1 of the 1894 Agreement."[66]

(iii) ACHIEVING RECONCILIATION

44. The Court of Appeal applied the principles established by this Court in *Mikisew Cree*[67] and found that Ontario, as the emanation of the Crown having the beneficial ownership of the public lands ceded by Treaty 3, is required to respect the treaty harvesting right. Its s. 109 powers are subject to these rights:

> Ontario must respect those rights and manage changes to them in accordance with the honour of the Crown and s. 35 of the *Constitution Act, 1982.* Ontario cannot take up lands so as to deprive the First Nation signatories of a meaningful right to harvest in their traditional territories. Further, honourable management requires that Ontario, as the government with the authority to take up in the Keewatin Lands, must consult with First Nations and accommodate their treaty rights whenever they are sufficiently impacted by the taking up.[68]

45. In scrutinizing the trial judge's interpretation of the harvesting provision, the Court of Appeal found that her interpretation produces a process that is "unnecessary, complicated, awkward and likely unworkable."[69] The Court held:

> The two-step process is unnecessary to protect the Aboriginal Treaty harvesting right because when the Crown, through Ontario, stepped into Canada's shoes by virtue of the process of constitutional evolution, the legal standard that binds the Crown did not change and the Treaty right

[64] Appeal Reasons, paras. 173 & 174.
[65] Appeal Reasons, paras. 182, 186 & 190-191.
[66] Appeal Reasons, paras. 193-196
[67] See Appeal Reasons, paras. 206-209.
[68] Appeal Reasons, paras. 210-212.
[69] Appeal Reasons, para. 153.

> is fully protected. To require both levels of government to be engaged in a two-step process is, on its face, complicated and awkward. It is difficult to see how the process of consultation, which is required when the Treaty harvesting right is affected by taking up, would be improved by involving both levels of government.[70]

46. Furthermore, the Court of Appeal held that the trial judge's conclusion that Canada retains a supervisory role in Ontario's exercise of the taking up provision "could undermine, rather than advance, reconciliation" because direct dialogue between the province having *de facto* control of the land and resources and the Treaty 3 First Nations is key to achieving the goal of reconciliation.[71] Ontario is not subject to federal supervision in carrying out its constitutional obligations.[72]

47. Having answered the first threshold issue in the affirmative, the Court of Appeal, in accordance with the terms of reference for the threshold questions set by Madam Justice Spies, held it was not necessary to answer the second threshold question, "Does Ontario have the authority pursuant to the division of powers between Parliament and the legislatures under the Constitution Act, 1867 to justifiably infringe the rights of the plaintiffs to hunt and fish as provided for in Treaty 3?"[73]

PART II – QUESTIONS IN ISSUE

48. Does the decision below raise any issue of public importance that would warrant the intervention of this Court?

PART III – STATEMENT OF ARGUMENT

49. Canada submits that this application does not meet the test for leave applications. The application raises no issue of public importance that would warrant the intervention of this Court, for the following reasons:

(a) The Ontario Court of Appeal properly applied this Court's settled

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[70] Appeal Reasons, para. 153.
[71] Appeal Reasons, para. 154. See also see *Haida*, para. 32 & paras. 57-59.
[72] Appeal Reasons, para. 212.
[73] Appeal Reasons, para. 215. The second threshold question engages the issue of interjurisdictional immunity. Where Ontario takes up so as to "limit" the harvesting right without infringing the treaty, the issue of interjurisdictional immunity does not arise.

jurisprudence regarding the standard of appellate review of findings of fact, treaty interpretation, the division of powers and statutory interpretation, and made reasonable and correct findings in determining the issue before it. No further direction is required on these issues.

(b). The Applicants are seeking to establish a land use regime in the Keewatin Lands that would apply uniquely to the Keewatin Lands[74] and be anomalous with the provincial land use regime in place not only in the rest of Treaty 3 but throughout the rest of Canada.

A. COURT OF APPEAL CORRECTLY APPLIED WELL-ESTABLISHED LEGAL PRINCIPLES

(i) TREATY INTERPRETATION

50. Other than the question common to all the numbered treaties of how to honourably reconcile the treaty harvesting right with the development of lands, which this Court fully addressed in *Mikisew Cree*, all of the treaty interpretation issues relevant to this case were considered and resolved by the Privy Council in 1888 in *St. Catherine's Milling and Lumber Co*. The Privy Council subsequently revisited and reaffirmed its interpretation of Treaty 3 in 1903 in *Ontario Mining Company v. Seybold*,[75] and again in 1910 in *The Treaty 3 Annuities Case*.[76] The Privy Council's consistent interpretation of Treaty 3 in all of these decisions was as follows:

a) Pursuant to Treaty 3 the Crown obtained a surrender from the Saulteaux so that the territory might be "opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit."

b) While certain treaty terms make reference to the "Government of the Dominion of Canada," the treaty is "from beginning to end a transaction between the Indians and the Crown," not the federal government.

c) The effect of the surrender was to free the underlying estate of the Crown from

[74] As well as to a very small portion of Treaty 5 territory, lying immediately to the north of the Keewatin Lands, that was also added to Ontario in 1912.
[75] [1903] A.C. 73 (JCPC) ("*Seybold*").
[76] *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637 (JCPC).

the burden of aboriginal title.

d) Following the cession, the Crown's proprietary rights over the Treaty 3 lands were subject only to the "qualified privilege" articulated in the treaty harvesting provision.

e) Because only Ontario has jurisdiction to exercise the proprietary rights of the Crown within its provincial boundaries, only Ontario has the authority to issue timber licenses in that portion of Treaty 3 that lies within those boundaries (at the time, the "Disputed Territory"). As the Privy Council observed, the treaty cannot be construed so as to deprive Ontario of the constitutional authority to administer lands within its own boundaries. The commissioners "had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the Imperial Statute of 1867."[77]

51. The Privy Council's decisions interpreting Treaty 3 were revisited by this Court in its 1983 decision in *Smith v. The Queen*.[78] Writing on behalf of the Court, Justice Estey recognized and accepted that "the authority of [*St. Catherine's Milling*] has never been challenged or indeed varied by interpretations and application."[79] While acknowledging there have been and will be cases that raise doubts as to whether a particular surrender was ever intended, for Justice Estey Treaty 3 was not one of those cases. Like the Privy Council before him, Estey J. embraced Treaty 3 as emblematic of the treaty relationship: a valid surrender to the Crown resulting in an extinguishment of aboriginal rights and title. Justice Estey also addressed the constitutional implications of extinguishment:

> The law therefore came to recognize the right and ability of the benefitted Indians to give up their relationship to lands theretofore devoted to their use and occupation, and the result of such a process is the revival or restoration of the complete beneficial ownership in the Province without further burden by reason of s. 91(24).[80]

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[77] *St. Catherine's Milling*, page 60.
[78] *Smith v. The Queen*, [1983] 1 S.C.R. 554 (S.C.C.).
[79] p. 562.
[80] p. 562.

52. In support of this conclusion, Justice Estey endorsed the comments of Justice Street of the Divisional Court of Ontario in *Ontario Mining Company v. Seybold* (a case concerning ownership of surrendered "Indian reserve" land situated in the Treaty 3 area), wherein Street J. said:

> The [1873] surrender was undoubtedly burdened with the obligation imposed by the treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it; but it is equally plain that its ownership of the tract of land covered by the treaty was <u>so complete as to exclude the Government of the Dominion from exercising any power or authority over it</u>. ...[81]

53. As the Ontario Court of Appeal appropriately noted, the trial judge's conclusions regarding the fundamental issues in this case could not be reconciled with *St. Catherine's Milling* and *Smith*, and she erred in failing to accept that these decisions were binding on her.

MIKISEW CREE

54. The remaining Treaty 3 interpretation issue not addressed in the *St. Catherine's Milling* line of cases was subsequently addressed by this Court in *Mikisew Cree*. Therein, this Court addressed the apparent tension between the words of the treaty limiting the geographical extent of the right to gather and the oral assurances of the treaty commissioners that the First Nations would continue to have the same means of earning a livelihood after the treaty as existed before. The oral promise made by the Crown in Treaty 8 is essentially the same promise as that recorded by Joseph Nolin in his notes of the Treaty 3 negotiations: "The Indians will be free, as by the past, for their hunting and rice harvest."[82]

55. *Mikisew Cree* resolved this tension, not by disregarding the terms of the treaty, but by finding that the Crown could not take up lands for use so as to deprive the First

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[81] *Smith*, p. 565 (emphasis added)
[82] See para. 13, above, in our Memorandum.

Nation signatories of a meaningful right to hunt and fish.[83] The Ontario Court of Appeal properly identified *Mikisew Cree* as the appropriate model for interpreting Treaty 3 in a realistic manner that reconciles the interests of both the Crown and the Treaty 3 Ojibway, and the trial judge's failure to follow *Mikisew* was an error in law.

(ii) FINDINGS OF FACT – THE STANDARD OF APPELLATE REVIEW

56. The Ontario Court of Appeal applied the well-established test regarding the standard of appellate review in overturning the trial judge's findings of fact on a standard of palpable and overriding error. Even then, the Court was appropriately circumspect in overturning only those erroneous findings of fact that stood in the way of identifying the common intention that "best reconciles the interests of both parties at the time the treaty was signed" as directed by Chief Justice McLachlin in *R. v. Marshall*.[84] In particular:

a) The Court of Appeal found the trial judge's factual finding concerning Morris's intention in inserting the words "by the Dominion of Canada" into the taking up provision[85] was "not only speculative but also inconsistent with the available evidence." In doing so the Court followed this Court's decision in *Mitchell v. M.N.R.*, that "[s]parse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim" and concluded that the trial judge's finding on this point constituted palpable and overriding error which must be set aside.[86]

b) Similarly, the Court of Appeal found that the trial judge's factual finding that the treaty commissioners deliberately contemplated and intended a two-step authorization process, and that Canada would have to authorize "taking up" by Ontario, could not survive scrutiny even under the deferential "palpable and overriding" error standard.[87]

[83] See *Mikisew Cree*, at para. 48.
[84] [1999] 3 S.C.R. 456 (S.C.C.), para. 78, #3.
[85] See para. 34, above, in our Memorandum.
[86] Appeal Reasons, para. 162.
[87] Appeal Reasons, para. 172.

(iii) ERRORS AND MISSTATEMENTS IN GRASSY NARROWS' MEMORANDUM OF ARGUMENT

57. The Applicant Grassy Narrows makes a number of statements regarding the Ontario Court of Appeal's judgment that mischaracterize that Court's decision. In particular:

a) Paragraphs 1(a) and 43: Grassy Narrows asserts that the treaty "guaranteed" a role for Canada in controlling the Crown's exercise of its taking up power. Following the lead of the Privy Council in *St. Catherine's Milling*, the Ontario Court of Appeal properly rejected this characterization of the treaty, holding that the Ojibway's treaty partner is the Crown, not Canada, and that Morris and the other commissioners who negotiated the treaty had no power or authority to deprive Ontario of the beneficial ownership that devolved to the province when Ontario's borders were expanded.[88]

The historical record also supports this view. Alexander Morris, in his 1880 treaty text on Numbered Treaties One through Six,[89] identifies the right to take up surrendered lands and thereby limit the treaty harvesting rights <u>as belonging to the Crown</u>, not Canada or any other governmental emanation of the Crown:

> These [i.e., the numbered treaties] may be summarized thus:
>
> 1. A relinquishment, in all the great region from Lake Superior to the foot of the Rocky Mountains, of all their right and title to the lands covered by the treaties, saving certain reservations for their own use, and
>
> 2. In return for such relinquishment, permission to the Indians to hunt over the ceded territory and to fish in the waters thereof, <u>excepting such portions of the territory as pass from the Crown</u> into the occupation of individuals or otherwise.[90]

b) Paragraphs 1(b), 25, 26(c) and 41: Grassy Narrows argues that the principle of

[88] Appeal Reasons, para. 135.
[89] The Treaties of Canada with the Indians of Manitoba and the North-West Territories (Toronto: Belfords, Clarke & Co., 1880).
[90] The Treaties of Canada with the Indians of Manitoba and the North-West Territories (Toronto: Belfords, Clarke & Co., 1880), Trial Exhibit 9, pp. 285-286 (emphasis added), Respondent's Application Record, pp. 55-57. The Court of Appeal notes that "Morris himself wrote extensively on the negotiation of Treaty 3 and other treaties", implicitly referencing Morris's treaty text: see Appeal Reasons, para. 163.

constitutional evolution cannot be applied "to unilaterally modify a historic treaty." In discussing the principle of constitutional evolution, at no point did the Ontario Court of Appeal suggest there had been any modification of the treaty, and rightly so. The Crown's treaty promise remains unchanged: to allow hunting and gathering rights throughout the surrendered tract until such times as the lands are taken up for an incompatible purpose. What changed was the level of government on whose advice the Crown acts when taking up lands.[91]

c) Paragraphs 1(c), 24 and 26(b): Grassy Narrows asserts that the Court of Appeal erred in holding that the treaty has to be interpreted in light of the "contemporary understandings of the constitutional structure of Canada."[92] The Court of Appeal made no such finding. Rather, following *St. Catherine's Milling* and *Smith*, the Court of Appeal held that the treaty needs to be interpreted in accordance with the framework of the division of powers under the Constitution. In the section of the Court of Appeal's judgment referred to by Grassy Narrows,[93] the "contemporary understanding" the Court references is the contemporaneous understanding of the division of powers held by Canada and Ontario at the time they entered into the 1874 Provisional Boundary Agreement,[94] not a present day understanding that Grassy Narrows suggests.

d) Paragraph 3: Grassy Narrows asserts that the Court of Appeal misapplied "settled treaty and statutory interpretation principles . . . in favour of the Crown." The principles referred to by Grassy Narrows only become relevant where there is a finding of ambiguity. The Court of Appeal considered this argument, and properly rejected it. With respect to treaty interpretation, the Court held as follows:

> To the extent the trial judge's interpretation rests on the argument that the language of the harvesting clause is ambiguous, it should be rejected. It is well established that as a rule, ambiguities in treaties are generally to be resolved in favour of the Aboriginal

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[91] Appeal Reasons, paras. 136 & 140.
[92] See Grassy Narrows' Memorandum, para. 26 b.
[93] Appeal Reasons, paras. 159-172
[94] Appeal Reasons, para. 167.

> treaty partners: see *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41. However, as stated in *R. v. Marshall,* at para. 14, "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse". Even a generous interpretation must be realistic, and reflect the intention of both parties and reconcile their interests: *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1069.[95]

Similarly, no ambiguity or doubtful expression existed in the 1912 Legislation that would justify a liberal construction in favour of the aboriginal perspective. Therefore, the Ontario Court of Appeal was correct in applying well-established principles of statutory interpretation to construe the 1912 legislation as it did, consistently with the 1891/1894 legislation.[96]

e) Paragraph 8: Relying on the conclusion of the trial judge, Grassy Narrows asserts that because the treaty commissioners saw little long-term use for the lands, they were willing to make "unusual promises that they might not have been prepared to make in a more promising environment." There is no basis in fact or in law to support such an assertion. The fact is that the harvesting provision contained in Treaty 3 is essentially the same provision as contained in all of the numbered treaties, the only difference being on which government's advice the Crown acts when taking up lands.

f) Paragraph 26(a): Contrary to Grassy Narrows' assertion, the Ontario Court of Appeal did not hold that Ontario has jurisdiction to make provincial resource management decisions that "infringe treaty rights." Rather, consistent with *Mikisew Cree*, the Court of Appeal held that "Ontario <u>cannot</u> take up lands so as to deprive the First Nation signatories of a meaningful right to harvest in their traditional territories," but taking up so as to limit the geographic area over which a First Nation can hunt and fish does not "infringe" the treaty harvesting right. Honourable management of Crown lands requires that Ontario consult with First Nations and accommodate their treaty rights whenever they are

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[95] Appeal Reasons, para. 151.
[96] See Appeal Reasons, paras. 193-196.

sufficiently impacted by taking up.[97]

g) Paragraph 31: Grassy Narrows distorts the otherwise valid proposition that treaty rights are at the core of s. 91(24) in support of the proposition that the doctrine of interjurisdictional immunity is engaged whenever there is an impairment of the treaty rights. Grassy Narrows does this by equating "impairment" with "infringement." The Ontario Court of Appeal did not make this mistake, properly holding that as long as Ontario exercises its taking-up authority in accordance with the principles articulated by this Court in *Mikisew Cree*,[98] there is no treaty infringement, and the doctrine of interjurisdictional immunity is therefore not engaged:

> It is important to distinguish between a provincial taking up that would leave no meaningful harvesting right in a First Nation's traditional territories from a taking up that would have a lesser impact than that. The former would infringe the First Nations' treaty rights, whereas the latter would not. Where it is claimed that a taking up will infringe a treaty right, *Mikisew* makes it clear that the remedy is to bring an action for treaty infringement: see para. 48. An action for infringement does not engage Canada in a supervisory role.[99]

h) Paragraphs 36 and 37: Grassy Narrows asserts that the Court of Appeal decision eliminates the protection of treaty rights on a division of powers basis in favour of the duty to consult, contrary to this Court's decision in *R. v. Morris*. The issue in *Morris* was whether a province could "regulate" a treaty right to hunt, not an issue that arises in *Keewatin*. In *Keewatin* the Court of Appeal correctly identified *Mikisew Cree* as providing the appropriate analysis for the issue that does arise, balancing the exercise of the taking up power with the treaty harvesting right. *Mikisew Cree* explicitly rejected the application of the *Sparrow* infringement analysis, so long as a meaningful harvesting right remains, not an issue engaged at this stage of the litigation. In the absence of

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[97] Appeal Reasons, paras. 210 & 211, emphasis added.
[98] That is, by consulting and accommodating the affected First Nation's treaty harvesting rights and ensuring that the First Nation retains a meaningful right to harvest in their traditional territories: see Appeal Reasons, para. 211.
[99] Appeal Reasons, paras. 206 & 207, emphasis added.

treaty infringement, the issue of interjurisdictional immunity does not arise.[100] *Haida* then confirms that the provincial Crown is required to act as honourably as the federal Crown.[101]

i) Subparagraphs 40(b) and (c): Grassy Narrows makes the alternative argument that if the Court of Appeal's reading of *St. Catherine's Milling* is correct, *St. Catherine's Milling* itself should not be followed. Grassy Narrows asserts this on the basis that a) the holding in *St. Catherine's Milling* is inconsistent with the modern view of overlapping jurisdiction; b) the Ojibway were not a party to the decision; and c) the decision did not apply modern principles of treaty interpretation such as upholding the honour of the Crown or considering the aboriginal perspective. The fact is that *St. Catherine's Milling*, followed and affirmed by this Court in *Smith*, is the modern view of the division of powers when considering the relationship between s. 91(24) and s. 109 of the *Constitution Act, 1867*. Further, while the Ojibway were not a party to *St. Catherine's Milling*, Grassy Narrows is a party in *Keewatin* and fully presented the aboriginal perspective over the course of an eight-day appeal. The Court of Appeal found no inconsistency between the *Mikisew* understanding of the treaty harvesting right and the Privy Council's interpretation of Treaty 3 in *St. Catherine's Milling*.

j) Paragraph 46: Grassy Narrows asserts that the Court of Appeal "in purporting to apply the principle of evolution actually applied the doctrine of devolution." Grassy Narrows then says that devolution also has no application to this case as it is a doctrine that "deals with the process of gaining colonial independence – it does not deal with the division of powers within one nation." Nowhere in its judgment does the Court of Appeal purport to apply a legal doctrine of "devolution." To the extent that devolution as a concept has any meaning in the context of this case, it is not as a doctrine, but as a descriptive term synonymous with "by operation of law." This is exactly as the Court of Appeal

[100] The second threshold question in *Keewatin* engages the issue of interjurisdictional immunity.
[101] See *Haida*, paragraphs 57-59.

uses it.

> When the beneficial title of the Keewatin Lands was transferred to Ontario by virtue of the 1912 Legislation and the operation of s. 109, by operation of law, the power of Canada as beneficial owner to take up lands devolved to Ontario. The interest assigned to Ontario by s. 109 as beneficial owner carries with it the burden of the harvesting clause imposed by the Treaty. In the exercise of its rights and powers as beneficial owner, Ontario is legally obliged to ensure that its actions on behalf of the Crown are consistent with the promises made by the Crown.[102]

The Court of Appeal's view is synonymous with Deputy Minister of Justice Newcombe's understanding, conveyed to Prime Minister Borden, regarding the effect of the 1912 legislation (see paragraph 30 above): "I am of opinion that the constitution of the province as at present existing becomes, by mere force of the statute enlarging its boundaries, the constitution of the enlarged province."

58. Grassy Narrows' application is based on a series of misstatements and errors in relation to the decision of the Ontario Court of Appeal. It raises a number of issues that are either well-settled or do not properly arise. Accordingly, their application raises no question of public importance.

(iv) ERRORS AND MISSTATEMENTS IN WABAUSKANG'S MEMORANDUM OF ARGUMENT

59. The Applicant Wabauskang makes a number of statements regarding the Ontario Court of Appeal's judgment that mischaracterize that Court's decision. In particular:

a) Paragraphs 4, 13, 22, 41, 45 and 48: The numbered treaties are not solemn agreements between "Aboriginal peoples and Canada," as asserted by Wabauskang. The Ontario Court of Appeal followed *St. Catherine's Milling* in holding that the Ojibway's only treaty partner is the Crown, not Canada, and that any ongoing role for Canada in administering the treaty has to be understood in relation to the Canadian Constitution and the division of powers

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[102] Appeal Reasons, para. 140 (emphasis added).

contained therein. There is nothing novel about provinces having to respect treaty rights within their jurisdictional sphere.

b) Paragraphs 27 and 32: Wabauskang asserts that the Court of Appeal's decision "absolves Canada from any continuing obligations in fulfilling the Crown's original treaty promises and denies Canada a role in achieving reconciliation between Aboriginal peoples and the Crown with respect to the historical treaties." That is not the logical or legal implication of the fundamental proposition that the historic treaties are between the Crown and Aboriginal peoples. As the Court of Appeal said:

> The Ojibway may look to the Crown to keep the treaty promises, <u>but they must do so within the framework of the division of powers under the constitution.</u>[103]
>
> Throughout the process of constitutional evolution, the Crown and the relationship between the Crown and Canada's Aboriginal peoples remains a constant, central and defining feature. What has evolved is the allocation of legislative and administrative powers and responsibilities to different levels of government. <u>In formal terms, what changes with constitutional evolution is the level of government on whose advice the Crown acts.</u>[104]

c) Paragraph 28: Wabauskang asserts that the question it will ask this Court to determine is "whether Canada has an ongoing role in the administration of the historical treaties and the promotion of reconciliation between Aboriginal peoples and the Crown." The question as posed is an abstract question of law that is not relevant to the issue addressed by the Courts below, which is whether Ontario has the authority in the Keewatin Lands to exercise the right to "take up" tracts of land for forestry, within the meaning of Treaty 3.[105] As an abstract question of law that is irrelevant to the issue before the Court in *Keewatin*, it raises no issue of public importance.

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[103] Appeal Reasons, para. 135, emphasis added.
[104] Appeal Reasons, para. 136, emphasis added.
[105] In posing this question, Wabauskang suggests a proposition that neither the Courts nor Canada has ever endorsed: it is axiomatic that Canada has an ongoing role in the administration of historical treaties and the promotion of reconciliation between Aboriginal peoples and the Crown.

d) Paragraph 35: Wabauskang asserts that a principle of treaty interpretation to be considered by this Court is whether there should be "an enhanced burden on an appellate court to justify overturning findings of fact by the trial judge which rely on the perspective of the Aboriginal people." It cannot be right that an appellate court should defer to findings by the trial judge that are clearly wrong, notwithstanding the subject matter of the litigation. In the present case, the Court of Appeal applied the highest standard of appellate review, overriding and palpable error, in overturning erroneous findings of the trial judge. In so doing, the Court did not err.

60. Like Grassy Narrows, Wabauskang's application is based on a series of misstatements and errors in relation to the decision of the Ontario Court of Appeal. It raises a number of issues that are either well-settled or do not properly arise. Accordingly, their application raises no question of public importance.

B. Leave Application Applies Only to Keewatin and Would be Anomalous

61. The Applicants are seeking to establish a land use regime in the Keewatin Lands that would apply uniquely to the Keewatin Lands and be anomalous with the provincial land use regimes in place throughout the rest of Canada. Consequently, these leave applications do not raise a question of public importance.

62. A reversal of the Ontario Court of Appeal's decision in *Keewatin* would have no bearing on the right of a province to take up provincial Crown lands elsewhere in Canada, including the other Treaty 3 lands situated in Ontario, the Treaty 8 lands located in north-eastern British Columbia, and the other numbered treaty lands in the Prairie Provinces that are governed by their respective *Natural Resource Transfer Agreements*.[106]

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[106] In 1930 when Canada transferred administration and control of Crown lands in the Prairies to the Provinces of Manitoba, Saskatchewan and Alberta, each of those provinces was put into the same position as the original provinces of Confederation by virtue of s. 109 of the *Constitution Act, 1867* (see, for example, paragraph 1 of the Manitoba NRTA). As such, each of the Prairie Provinces acquired the constitutional ability to take up surrendered treaty lands within their respective provinces, subject to the right of the treaty Indians to hunt, trap and fish for food on all unoccupied Crown lands which the Province assures them (see, for example, paragraph 13 of the Manitoba NRTA). As Justice Cory held in *R. v.*

63. It is not in the public interest to create a patchwork system where Treaty 3 harvesting rights would be interpreted differently in different parts of the same region of the Province. As the Court of Appeal held, this would lead to undesirable and absurd consequences:

> ...To interpret the 1912 Legislation so that the Keewatin Lands were not subject to Ontario's unsupervised jurisdiction would create a clear inconsistency with the 1891 Legislation. The result would be that different parts of the Treaty 3 lands would be subject to different regimes for the purposes of taking up. Indeed, there would be inconsistent treatment of the Treaty 3 lands used by members of the Grassy Narrows First Nation, some of which fall with the Keewatin Lands and others of which do not. Our view of the Legislation avoids these undesirable and absurd consequences.[107]

64. Furthermore, a realistic interpretation of the Treaty, establishing that the Crown having the constitutional authority to take up surrendered treaty lands has the duty to deal directly with the Treaty First Nations in consulting with them and accommodating their treaty harvesting rights, "fosters direct dialogue between the province and Treaty 3 First Nations. Such dialogue is key to achieving the goal of reconciliation."[108]

65. For these reasons, Canada submits that it is not in the public interest to grant leave to appeal the Ontario Court of Appeal's decision in *Keewatin*.

PART IV – SUBMISSIONS CONCERNING COSTS

66. Canada does not seek costs in this proceeding.

PART V – ORDER SOUGHT

67. Canada requests that the applications for leave be dismissed.

Badger, [1996] 1 S.C.R. 771 (S.C.C.), at paragraph 96, the effect was to "place the provincial government in exactly the same position which the federal Crown formerly occupied."

107 Appeal Reasons, para. 195, emphasis added.

108 Appeal Reasons, para. 154.

All of which is respectfully submitted this 12th day of June, 2013.

Barry Ennis for

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