SCC File No. 35379

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

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 and RESOLUTE FP CANADA INC. (formerly known as Abitibi-Consolidated Inc.)

Respondents
(Appellants)

AND:

THE ATTORNEY GENERAL OF CANADA

Respondent
(Appellant/Third Party)

AND:

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

Respondent
(Intervener Party)

AND:

GOLDCORP INC.

Respondent
(Intervener Party)

JOINT REPLY OF THE APPLICANTS, ANDREW KEEWATIN JR. and JOSEPH WILLIAM FOBISTER on their own behalf and on behalf of all other members of GRASSY NARROWS FIRST NATION TO THE RESPONSES OF THE RESPONDENTS, THE ATTORNEY GENERAL OF CANADA, MINISTER OF NATURAL RESOURCES and RESOLUTE FP CANADA INC.

AND BETWEEN:

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

Applicants (Party Intervener)

AND:

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

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MINISTER OF NATURAL RESOURCES and RESOLUTE FP CANADA INC. (formerly known as Abitibi-Consolidated Inc.)

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REPLY

PART I – OVERVIEW AND STATEMENT OF FACTS

1. Grassy Narrows is providing one factum in reply to the facta of the Respondents Ontario, Canada and Resolute, each of whom deny the national importance of the issues raised by Grassy Narrows.[1]
2. No facts other than those raised in the Applicants' Memorandum of Argument for Leave to Appeal are required for this Reply.

PART II – POINTS AT ISSUE

3. In their arguments, the opposing parties make the following four common mistaken assertions:
   a. This case is simply an application of the *Mikisew* internal limits principle;
   b. The issues in this case are settled by the decisions in *Smith*[2] and *Seybold*[3];
   c. The decision of the Court of Appeal is primarily factual; and
   d. This case is resolved by the *1891 Legislation*,[4] *1894 Agreement*,[5] and the 1912 *Extension Act*[6].

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[1] All defined terms have the meaning assigned to them in the Appellant's Memorandum of Argument for Leave to Appeal.
[2] *Smith v Canada*, [1983] 1 SCR 554, 147 DLR (3d) 237 ["*Smith*"].
[3] *Ontario Mining Co v Seybold*, [1903] AC 73, [1902] JCJ No 2 (PC) ["*Seybold*"].
[4] *An Act for the Settlement of Certain Questions between the Governments of Canada and Ontario Respecting Indian Lands* (CA), 54 & 55 Vict, e 5; *An Act for the Settlement of Questions Between the Governments of Canada and Ontario respecting Indian Lands* (ON), 54 Vict, c 3 [together, the "*1891 Legislation*"].
[5] Included as a Schedule to the *1891 Legislation* and executed in 1894 by both governments.
[6] *The Ontario Boundaries Extension Act*, SC 1912, 2 Geo V, c 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* (ON), 2 Geo V, c 3 [together, the "*Extension Act*"].

PART III – ARGUMENT

A. Mistaken Assertion #1: This Case is an Application of the *Mikisew* Internal Limits Principle

4. The Respondents argue that the decision of the Court of Appeal merely amounts to an application of the principle in *Mikisew* that the use of an internal geographic limit of the harvesting right (the "taking up clause") is not an infringement of a treaty right and therefore this appeal raises no issue of national importance.[8]

5. The Respondents' argument is built on the erroneous assumption (which underscores the importance of this Court hearing this appeal) that every treaty contains the same internal limit. Whether a treaty harvesting right contains an internal limit is a matter of factual inquiry into the parties' intentions during the relevant treaty negotiations.

6. In *Mikisew*, the Court found that the aboriginal signatories to Treaty 8 agreed to an internal limitation whereby the Crown could limit the areas subject to the harvesting rights up to the point of "no meaningful right to hunt." However, there was no evidence regarding which level of government was to be involved in limiting these harvesting rights. Unlike Treaty 3, the taking up clause considered in *Mikisew* did not expressly refer to the Dominion and the appropriate level of government was not at issue since it was the federal government seeking to limit the right, the project being a federal project on federal lands.

7. The factual findings concerning the internal limit in this case were fundamentally different from those in *Mikisew*. First, the Trial Judge found that the parties intended that only the federal government could limit harvesting rights.[9] Second, the Trial Judge found that the Ojibway did not agree that their rights could be limited up to the point where they had no meaningful right to hunt.[10] Instead, the Trial Judge found there was a common

[8] Joint Response to the Respondent, The Attorney General of Canada, To the Applications for Leave to Appeal at para 57(f) and (g); Joint Response to the Respondent, The Minister of Natural Resources, To the Applications for Leave to Appeal at para 30 ["Ontario's Response"]; Joint Response to the Respondent, Resolute FP Canada Inc, To the Applications for Leave to Appeal at para 23.

[9] *Keewatin v Ontario (Minister of Natural Resources)* 2011 ONSC 4801 at paras 869, 872, 874, 881, 884, 888, 891, 904 and 908-911, [2011] OJ No 3907 [the "*Trial Reasons*"].

[10] *Ibid* at para 1472(g).

understanding that any interference with the harvesting right would be limited based upon the expected compatibility of the uses in 1873.[11]

8. Therefore, the Respondents' argument, adopted by the Court of Appeal, proceeds on the false premise that the signatories' understanding of the taking up clause in Treaty 3 (or any treaty) was the same as in Treaty 8. To reach this conclusion, the Court of Appeal rejected the findings of the Trial Judge in favour of a legal framework that applied (on its approach) as a matter of law following *St. Catherine's Milling*[12] and *Smith*. Grassy Narrows submits that the question of whether Ontario can rely on the internal limit of the harvesting right in Treaty 3 (or any province pursuant to any treaty) was not definitively resolved by *Mikisew*. It is consequently an issue of national significance.

B. Mistaken Assertion #2: *Smith* and *Seybold* Settle This Case

9. Canada argues that *Smith* and *Seybold* settled the question left unanswered by *St. Catherine's Milling* regarding the federal role in resource management where treaty harvesting rights apply. However, the issue raised in this case—the power to limit harvesting rights—was not an issue in either *Smith* or *Seybold*. Those cases concerned whether the federal government had any proprietary interest in surrendered reserve lands.

10. *Smith* concerned whether the federal government retained a proprietary interest in surrendered reserve land where the transfer of the underlying title had not been sufficient to support a claim for trespass and the recovery of land. This Court held that the effect of the surrender extinguished any federal proprietary interest in the land or any right to legislate in respect of the proprietary interest. The Court summarized its findings as follows:

> By reason of the surrender of these lands in 1895 the burden of s. 91(24) disappeared and the legal and beneficial interest, unencumbered thereby, continued in the Province of New Brunswick. The Federal Government thereafter had no interest in the said lands legislatively under s. 91(24), and of course the Crown in the right of Canada at no time had a beneficial interest in the ownership of the said lands, nor did that government hold any right to dispose of the said lands. The ownership of the Province in

[11] *Ibid* at paras 808-810 and 865.

[12] *St Catherine's Milling and Lumber Co v The Queen,* (1888) 14 App Cas 46, [1888] JCJ No 1 (PC) ["*St Catherine's Milling*"].

> these lands was in no way affected by the agreement of 1958, nor did the Federal Government acquire any interest therein under that agreement.[13]

11. *Smith* addresses ownership, beneficial interest and the power to dispose of lands, but it does not address the power to limit or remove treaty rights – that power is not an "interest in land" in the property law sense. As a result, *Smith* does nothing more than restate the holding in *St. Catherine's Milling* that the underlying legal ownership of Crown land is vested in the provinces and not in the federal government.

12. In *Seybold*, the issue was whether the federal government had the power to dispose of the beneficial interest in surrendered reserve land. Consistent with *St. Catherine's Milling*, the Privy Council held that the beneficial interest in Crown land could only be dealt with by the Province. The comments of Justice Street of the Divisional Court—quoted by the Privy Council—make it clear that the case concerned the power to legislate or exercise executive power with respect to the beneficial interest in land:

> … but it is equally plain that <u>its ownership of the tract of land</u> covered by the tract of land covered by the treaty is so complete so as to exclude the Government of the Dominion from exercising any power or authority <u>over it</u>.[14]

13. Plainly "over it" is not a reference to hunting or fishing rights, but a reference to provincial ownership of land. The respective powers of the federal and provincial governments to legislate in respect of or manage treaty harvesting rights was not at issue in *Seybold*. Instead, the Privy Council affirmed that those rights continued as a burden on the Crown's title.[15]

14. The Respondents' position—that no issue of national importance is raised by this proposed appeal—is untenable because *St. Catherine's Milling*, *Seybold* and *Smith* do not settle the federal and provincial governments' respective powers to limit and manage treaty harvesting rights. These cases do not deal with treaty harvesting rights, but with attempts by the federal government to appropriate the beneficial interest in provincial land that had been surrendered.

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[13] *Smith*, *supra* note 2 at 580.
[14] *Ontario Mining Company v Seybold*, [1900] OJ No 126 at para 10, 32 OR 301, cited in *Seybold*, *supra* note 3 at para 9.
[15] *Seybold*, *supra* note 3 at para 3.

15. In contrast, the decisions of the Supreme Court of Canada in *Morris*,[16] *Sioui*[17] and *Simon*[18] strongly affirm the principle that the federal government has primary legislative jurisdiction in respect of treaty harvesting rights, that the provincial government cannot interfere with these rights in a significant way, and that this protection is affirmed and reinforced by section 88 of the *Indian Act*.[19]

16. Consequently, the primary issue in this proposed appeal—"how do federal and provincial powers with respect to treaty rights and lands and resources, respectively, interact"—has not been directly addressed in previous cases and is an issue of national significance. This question forms the core of both the division of powers and treaty interpretation issues before the Court in this case.

C. Mistaken Assertion #3: The Court of Appeal's Decision is Primarily Factual

17. Ontario argues that the Court of Appeal's substituted findings of fact attack the heart of the Trial Judge's findings and largely reduce this proposed appeal to a factual dispute.[20] However, read as a whole, the ratio of the Court of Appeal's decision does not turn on these factual findings – it is driven by the Court of Appeal's view that the power to limit the treaty harvesting rights devolved to Ontario "by operation of law."[21] Furthermore, the Court of Appeal characterized the Trial Judge's findings as "palpable and overriding" errors (and substituted facts accordingly) because they conflicted with its approach to the division of powers and the federal role in respect of the treaty rights.[22]

18. The substituted findings relied upon by Ontario are noteworthy for the reason that they state nothing about the <u>aboriginal</u> perspective. Each substituted fact is a re-evaluation of what government actors would have thought, expected or intended. These facts substituted by the Court of Appeal did not address the findings of the Trial Judge that the Ojibway understood that there were other governments in Canada,[23] that they were

[16] *R v Morris* 2006 SCC 59, [2006] 2 SCR 915 ["*Morris*"].
[17] *R v Sioui*, [1990] 1 SCR 1025, [1990] SCJ No 48 ["*Sioui*"].
[18] *R v Simon*, [1985] 2 SCR 387, [1985] SCJ No 67 ["*Simon*"].
[19] *Indian Act*, RSC 1985, c I-5, s 88.
[20] Ontario's Response, *supra* note 8 at para 58(a)–(f).
[21] *Keewatin v Ontario (Minister of Natural Resources)* 2013 ONCA 158 at para 197, [2013] OJ No 1138 [the "*Appeal Reasons*"].
[22] *Ibid* at para 172.
[23] *Trial Reasons*, *supra* note 9 at paras 904-05.

dealing with the federal government, that it mattered to them that they deal with the senior government, and that the senior government alone would be responsible for ensuring that the treaty promises were implemented and carried out.[24] Furthermore, these substituted facts did not address the Trial Judge's findings that the Ojibway understanding was induced and confirmed by the Treaty Commissioners at the time of treaty making and by the administration of the Treaty through the Indian Agents and Indian Affairs bureaucracy post-Treaty.[25] The substituted facts illustrate the Court of Appeal's misunderstanding of the principles of treaty interpretation and the role of an appellate court in reviewing factual findings made by a trial judge. The task of treaty interpretation requires courts to consider the perspective of <u>both</u> aboriginal peoples and the Crown to determine the parties' intentions with respect to the taking up clause <u>at the time that the treaty was made</u>.

19. In addition, the substituted facts do not address the Trial Judge's key finding of fact: <u>at the time the treaty was made</u>, the intention of both the Ojibway and the Crown was that only the federal government would have the power to limit the treaty rights. Instead, the Court of Appeal's substituted facts address the following: the federal government's reason for limiting that power to the federal government; and what the federal government would have intended if the level of government administering the underlying title changed.[26]

20. Assuming that the Court of Appeal was allowed to substitute its findings of fact on these issues, its reconsideration of why the federal government specified the federal government at the time does not change the fact that this was the <u>mutual</u> intention of the parties. Further, regarding the federal government's intentions if the level of government administering the underlying title changed, the substituted findings ignore the fact that the Treaty Commissioners did not advise the Ojibway that (1) there could be a change to which government would administer the lands, (2) there could be a change to which level of government would administer the harvesting rights, or (3) there could be a change to

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[24] *Ibid* at paras 634-35.
[25] *Ibid* at paras 887, 892 and 1199.
[26] *Appeal Reasons*, *supra* note 21 at paras 163-72.

which level of government would have the power to take away those rights, limited only by the constraint that the right could not be rendered "meaningless".

21. The Trial Judge found that, applying the principles of treaty interpretation (which are grounded in the honour of the Crown), Ontario could not benefit from the failure the Treaty Commissioners' to inform the Ojibway of these matters.[27] Ultimately, she preferred the evidence that the Treaty Commissioners failed to discuss these possibilities because they understood it would be the federal government and only the federal government that would be charged with the implementation of the Treaty rights.[28]

22. The Court of Appeal's substituted facts do not assist the Crown. They establish that the Treaty Commissioners and the federal government expected and intended that the federal government would have control of the Treaty 3 lands and the harvesting rights. At best, the substituted facts provide an alternate theory for why the federal government intended and expected that it would control the harvesting rights. The Court of Appeal's substituted facts do not explain why the Treaty Commissioners did not negotiate an arrangement to deal with the transition, or what the Treaty Commissioners would have done if they had negotiated such terms and done nothing to address the Ojibway understanding of what was intended.

23. Finally, the substituted facts illustrate the Court of Appeal's misunderstanding of its role as an appellate court. The substituted facts are inferences about the Commissioners' motivation in referencing the federal government in the taking up clause, and the Commissioners' intentions if the ownership of the Treaty 3 lands transferred to another province. The arguments considered by the Court of Appeal were made at trial and considered by the Trial Judge. The inferences chosen by the Trial Judge were not impossible or non-sensical. The Court of Appeal rejected them in light of its view of the law not because of any inconsistency with the evidence.

24. Furthermore, the Trial Judge's inferences were made in the context of numerous findings of fact that were not addressed or considered by the Court of Appeal. For example, the Court of Appeal relied upon the 1874 Provisional Boundary Agreement to show that the

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[27] *Trial Reasons*, *supra* note 9 at paras 899-900.
[28] *Ibid* at para 923.

federal government had a different intention than that found by the Trial Judge. The Court of Appeal ignored the Trial Judge's findings that:

a. in the 1870s the federal government expected limited development in the relevant area,

b. the federal government expected most development would be compatible with the Treaty rights, and

c. the part of the land that would be administered by the Province under the Agreement would be limited.

These are critical findings with respect to whether the Provisional Boundary Agreement would be likely to require the removal of rights. The Court of Appeal ignored the fact that the Provisional Boundary Agreement was a joint federal-provincial initiative that anticipated federal confirmation of provincial decisions. As a result, it cannot be held up as supporting the proposition that the federal government agreed that the Province could unilaterally limit the Treaty harvesting rights.

25. Ultimately, the Court of Appeal engaged in a partial, decontextualized reconsideration of the evidence in light of an erroneous legal conclusion, an undertaking this Court has repeatedly said is improper for an appellate court. Particularly egregious in this case is the Court of Appeal's reexamination of the evidence through a narrow Eurocentric lens, which excluded any consideration of the aboriginal perspective or the onus placed on the Crown to act honourably. This approach to the facts highlights the importance of addressing the overarching correctness of the Court of Appeal's approach to treaty interpretation.

D. Mistaken Assertion #4: This Case is Resolved Simply by the *1894 Agreement*

26. Ontario argues that the *1891 Legislation*, *1894 Agreement*, and the *Extension Act* 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 appeal which… is highly particular to the circumstances of Treaty 3 and the Keewatin Lands."[29]

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[29] Ontario's Response, *supra* note 8 at para 61.

27. The Trial Judge held that the *1891 Legislation* and *1894 Agreement* were designed to effect a settlement in the Disputed Territory to the problems created by the decision in *St. Catherine's Milling*, and that they were not intended to apply outside of the Disputed Territories.[30] On appeal the Crown argued, and the Court of Appeal accepted, that Article 1 of the *1894 Agreement* confirmed the view held by Premier Mowatt of Ontario that the intention of the taking up clause was to allow whichever government held the land to limit the application of the Treaty 3 Harvesting Rights.[31]

28. The Court of Appeal considered Article 1 of the *1894 Agreement* declaratory. Its reasoning therefore turns on whether the "declaration" in Article 1 correctly reflects the actual intention of the Parties at the time of Treaty. If the Court of Appeal is wrong in this respect, then the *1894 Agreement* does not assist the Respondents as it does not effect a change in the meaning of the Treaty.

29. Additionally, the Court of Appeal rejected the Trial Judge's interpretation of the *1894 Agreement* on the basis that the parties to the treaty were indifferent about what level of government could limit the harvesting rights. This underlying finding cannot stand if the Court of Appeal's core finding that the taking up clause must be interpreted by reference to the principle that the federal government has no jurisdiction over land and resource use decisions is wrong as this fundamentally underpins the Court of Appeal's view of the parties' indifference. The correctness of this aspect of the Court of Appeal's decision depends on the answer to the core issue in the case, one of clear national importance: whether there is a continuing role for the federal government under s. 91(24) jurisdiction in respect of the management and protection of treaty rights.

30. The Respondents also argue that the issues raised are not of national importance because they involve the interpretation of locally applicable legislation. There are two flaws in this reasoning. First, the Court of Appeal's interpretation of both the *1894 Agreement* and the *Extension Act* engaged the larger issues of the constitutional structure of Canada, and the application of treaty interpretation principles. The Court of Appeal held that these instruments operate as they do, in part (if not entirely), because of its finding that the federal government can have no role in resource management decisions within

[30] *Trial Reasons*, *supra* note 9 at paras 1013-17, 1023-29, 1398-99 and 1404.
[31] *Appeal Reasons*, *supra* note 21 at para 180.

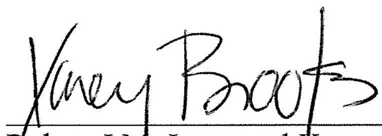
provinces, even when provincial decisions adversely affect treaty rights by reducing their geographic application or by infringing them. Second, every case that reaches the Supreme Court of Canada has aspects that are local or particular to the parties. These aspects do not diminish the national importance of an issue if the treatment of that issue is related to or depends upon the application of a determination in respect of a national issue.

31. The Respondents' arguments reveal the very reason why this Court should hear this appeal. The Court of Appeal drew from a body of case law that was largely settled in the 19th century (before the modern approach to the division of powers and aboriginal law), which did not deal with provincial powers over treaty rights, and which dealt largely with the ownership of land. The Court of Appeal determined how these cases should apply when a province exercises powers that could limit or interfere with treaty rights, and how they should apply to the interpretation of an internal limit to treaty rights.

32. These are novel determinations with broad implications. Courts have already begun to apply this decision as the authority, not only in respect of treaty rights, but also aboriginal rights.[32] This is an issue that touches on every province and every historic treaty. It puts squarely into question why our Constitution has clearly and expressly assigned a special role to the federal government. Given that this case was specifically advanced as a publicly funded test case, it is difficult to see a better context in which to address this national issue.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated the 27th day of June, 2013



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[32] *Chartrand v District Manager* 2013 BCSC 1068 at paras 196-97, 2013 CarswellBC 1805.

TABLE OF AUTHORITIES

Case Law	Tab
Chartrand v The District Manager, 2013 BCSC 1068, paras. 196 and 197	1

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chartrand v. The District Manager,* 2013 BCSC 1068

Date: 20130617
Docket: S-082589
Registry: Vancouver

Between:

Chief Verna Chartrand, suing on her own behalf and on behalf of all members of the Kwakiutl First Nation

Petitioners

And

The District Manager, North Island Central Coast Forest District, The Minister of Forests and Range, The Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia, Western Forest Products Inc. and The Attorney General of Canada

Respondents

Before: The Honourable Mr. Justice Weatherill

Reasons for Judgment

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Counsel for the Respondent, The Attorney General of Canada	E. M. Tully C. Cameron
Counsel for the Respondent, Western Forest Products Inc.	G. Plant Q.C.
Place and Date of Hearing:	Vancouver, B.C. May 6 - 10, 2013
Place and Date of Judgment:	Vancouver, B.C. June 17, 2013

pursuant to s.35 of the *Constitution Act, 1982* fell exclusively within the jurisdiction of the Federal Crown:

> [59] The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty...

[195] After *Haida*, a host of British Columbia Court of Appeal and Supreme Court of Canada decisions have held that the duty to consult regarding potential impacts of provincial decisions on asserted and treaty rights falls upon the Provincial Crown. In *Taku River*, at paras. 21 - 28, the Supreme Court of Canada clearly found that the honour of the Crown extended to the province. In *Rio Tinto*, the Supreme Court of Canada upheld a provincial commission's power to review the issue of whether the province owed a duty to consult to First Nations in regard to an agreement between B.C. Hydro and a third party to purchase electricity. In *West Moberly*, at para. 5, the provincial government conceded it had a duty to consult and limited its argument to the position that its duty had been fulfilled.

[196] In the recent decision of the Ontario Court of Appeal in *Keewatin v. Ontario (Minister of Natural Resources)*, 2013 ONCA 158, the issue before the court was whether Ontario had the authority to "take up" tracts of land covered by a treaty so as to limit the rights of the First Nations to hunt or fish as provided for in the treaty. In rejecting a similar "two-step process" to that advocated by the KFN in this case, the court stated, at paras. 153 and 154:

> [153] 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. When 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 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.
>
> [154] The trial judge's conclusion that Canada retains a role in Ontario's use of the taking up provision could undermine, rather than advance, reconciliation. Leaving meaningful constitutional space for the exercise of provincial jurisdiction under ss. 109, 92(5) and 92A, without federal control under s. 91(24), fosters direct dialogue between the province and Treaty 3

> First Nations. Such dialogue is key to achieving the goal of reconciliation. As the Supreme Court stated in *Haida Nation v. British Columbia (Minister of Forests)* ... at para. 32:
>
> Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982.* This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.

[197] The Ontario Court of Appeal in *Keewatin* also rejected the notion that there is a residual role for the Federal Crown in respect of the implementation and operation of provincial authority on lands subject to treaty claims (at paras. 205 - 207):

> [205] With respect, 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. As we have already explained, this would be contrary to the decision of the Privy Council in *St. Catherine's Milling* and that of the Supreme Court in *Smith.* It would also 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": see *Reference Re: Securities Act,* 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 71.
>
> [206] Turning to *Mikisew,* the trial judge's conclusion that Canada has a residual s. 91(24) authority over Ontario's use of the taking up clause is at odds with the principles set out by the Supreme Court of Canada in that case.
>
> [207] It is important to distinguish between a provincial taking up that would leave no meaningful harvesting right in a First Nation's traditional territory from a taking up that would have a lesser impact than that. The former would infringe the First Nation's 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.

[198] Those principles apply with equal force to the circumstances of this case and I adopt them in their entirety. The Decisions were not an attempt to determine or regulate an asserted or treaty right. Mere incidental effects of a decision on Aboriginal rights do not make an otherwise constitutional law *ultra vires*: *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at para. 28. As *Morris* made clear, at para. 50:

> Insignificant interference with a treaty right will not engage the protection afforded by s. 88 of the *Indian Act*...provincial laws or regulations that place a

> modest burden on a person exercising a treaty right or that interfere in an insignificant way with the exercise of that right to do not infringe the right.

[199] Any incidental effect on the KFN's rights can and should be addressed by consultation.

[200] The central issue over which this Court has jurisdiction is the question whether a duty to consult was triggered and whether it was adequately carried out. As laudable as the KFN's proposed framework may be, I cannot lose sight of the fact that this is an application for judicial review of decisions of a statutory decision maker. As was stated by the Court in Haida, "the remedy tail cannot wag the liability dog": (*Haida* at para. 55). I have decided this application within the confines of the legal system and principles that bind me. When considering the issues of whether there was a duty to consult and if so, whether that consultation was reasonable, the court is confined to examining whether there were adverse impacts on the KFN's asserted and treaty rights from those decisions: *Rio Tinto* at para. 53. The consultation does not go beyond the proposed decisions and engage the larger issue of how outstanding issues related to the existence of Aboriginal rights and title should be negotiated: *Upper Nicola Indian Band v. British Columbia (Minister of Environment)*, 2011 BCSC 388 at paras. 119 and 123. In my view, the Provincial Crown's duty to consult, if properly undertaken, adequately protects the KFN's asserted and treaty rights.

[201] Further, it is not generally the role of the court to supervise consultation and the court should avoid such involvement: *Adams Lake Indian Band v. Lieutenant Governor in council et al* 2012 BCCA 333 at para. 63.

[202] Courts have stated that particular forms of accommodation should be left to the parties themselves to determine. The courts will not dictate the form. In *Wii'litswx v HMTQ*, 2008 BCSC 1620 ("*Wii'litswx #2*"), Neilson J. stated, at para. 23:

> Third, it is not for the Court to grant declaratory relief that dictates a particular form of accommodating Aboriginal interests. In *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128, 251 D.L.R. (4th) 717 [37 B.C.L.R. (4th) 309, [2005] 2 C.N.L.R. 212] at paras. 99-100 and 104-105, both Hall and Lowry J.J.A. observed that the