File Number: 35379

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

BETWEEN:

LESLIE CAMERON ON HIS OWN BEHALF AND ON
BEHALF OF ALL OTHER MEMBERS OF WABAUSKANG FIRST NATION

Applicant
(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

Respondent
(Plaintiffs/Respondents)

and

MINISTER OF NATURAL RESOURCES

Respondent
(Defendant/Appellant)

and

RESOLUTE FP CANADA INC. (FORMERLY ABITIBI-CONSOLIDATED INC.)

Respondent
(Defendant/Appellant)

and

THE ATTORNEY GENERAL OF CANADA

Respondent
(Third Party/Appellant)

and

GOLDCORP INC.

Respondent
(Party Intervener)

REPLY FACTUM
(LESLIE CAMERON ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF WABAUSKANG FIRST NATION, Applicant/ Party Intervener)

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Memorandum of Argument in Response

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APPLICANT'S MEMORANDUM OF ARGUMENT IN RESPONSE

PART I

1. The Applicant Chief Leslie Cameron, on his own behalf and on behalf of all members of Wabauskang First Nation (the "Applicant"), provides this factum in reply to the Respondents the Ontario Minister of Natural Resources ("Ontario"), the Attorney General of Canada ("Canada") and Resolute FP Canada Inc. ("Resolute").

2. The Applicant submits that the Respondents:

- rely on a series of unmeritorious reasons for why this Court should not consider the issues of national and public importance raised by the proposed appeal;

- raise additional issues which emphasize the national and public importance of the proposed appeal; and

- make submissions which are not relevant to the application and which would be properly made on appeal, should leave be granted.

A. The Respondents seek to avoid the central questions to be addressed by this Court on the proposed appeal

3. The Respondents raise a number of reasons why this Court should avoid addressing the issues of national and public importance which are the subject of the proposed appeal — all of them without merit.

(a) The case management judge's threshold questions do not fetter this Court's discretion

4. The Respondents suggest that this Court is precluded from considering which level of government bears responsibility for administering the historical treaties by virtue of how Justice Spies framed and sequenced the threshold questions for the trial of this litigation.[1]

5. This Court's jurisdiction to consider an issue of national importance cannot be fettered by the case management judge's framing of the questions for trial. Regardless of how the threshold questions were asked, the issue of Canada's role in ensuring the protection of treaty rights when Ontario seeks to exercise the Treaty 3 take up clause is an issue of national and public importance that deserves consideration by this Court.

(b) Canada and Ontario cannot avoid the division of powers issue by characterizing themselves as "advisors" to the Crown

6. The proposed appeal asks this Court to clarify Canada and Ontario's respective constitutional authority in relation to the ongoing fulfillment of solemn promises made to Aboriginal peoples pursuant to historical treaties. The Respondents rely on the Court of Appeal's characterization of Canada and Ontario as "advisors to the Crown"[2] to argue that this Court need not consider this issue.[3] Based on the Respondents' arguments, neither the federal nor provincial government make any decisions themselves that might affect the exercise of treaty rights — they simply advise a faceless 'Crown' which is ultimately responsible.

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[1] Response of the Ontario Minister of Natural Resources [Ontario Response] para. 20, Response of the Attorney General of Canada [Canada Response] para. 47

[2] *Keewatin v. Ontario (Natural Resources)*, 2013 ONCA 158 [Appeal Decision] para. 136, 139-140

[3] Ontario Response para. 10(t), 17, 19; Canada Response para. 57(b); Response of the Respondent Resolute FP Canada Inc. [Resolute Response] para. 4(d)

7. The Respondents' argument would eliminate the practical importance of the division of powers. Canada's responsibilities pursuant to section 91(24) of the *Constitution Act, 1876*[4] would become general responsibilities of the abstract Crown acting on advice from both the federal and provincial governments.

8. The Applicant respectfully submits that this specious argument provides no basis for this Court not to consider the profound division of powers issues raised in the proposed appeal.

(c) The significance of the Court of Appeal's decision is not limited to the Keewatin lands

9. The Respondents assert that the issues raised in the proposed appeal are specific to Treaty 3 and narrowly unique to the Keewatin lands.[5] Based on this line of argument, the relevance of this Court's decision in *Haida*[6] is restricted to a few islands off the west coast of Canada.

10. Although only a few months old, the Ontario Court of Appeal's decision is already having an impact across the country on the determination of Canada's role as a treaty partner. In the recent *Chartrand* decision from the B.C. Supreme Court respecting a challenge by the Kwakiutl First Nation to provincial authority to manage forestry lands, the Court considered federal jurisdiction under section 91(24) in relation to two 1851 Douglas Treaties on Vancouver Island and the province's constitutional authority to manage and dispose of Crown lands.[7] The Court quoted extensively from the Ontario Court of Appeal's conclusions in *Keewatin* regarding there being no continuing role for Canada under section 91(24) in implementing the historical treaties and that involving

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[4] *Constitution Act, 1867* (UK), 30 & 31 Vic., c. 3
[5] Ontario Response para. 9; Canada Response para. 49(b)
[6] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*]
[7] *Chartrand v. The District Manager*, 2013 BCSC 1068 [*Chartrand*]

Canada would be complicated and awkward. Weatherill J. concluded that the Ontario Court of Appeal's "principles apply with equal force to the circumstances of this case and I adopt them in their entirety."[8]

11. As the *Chartrand* decision indicates, because the Court of Appeal's decision in *Keewatin* goes to the very core of the ongoing process of reconciliation through the historical treaties, it will have a profound impact on Canada's role in the implementation of the historical treaties throughout Canada.

(d) The proposed appeal raises unsettled questions of law

12. Contrary to the Respondents' submissions, the question of provincial authority to manage and regulate Crown lands in the light of the federal government's exclusive legislative authority under section 91(24) remains an unsettled issue of national and public importance.

13. Canada's submission that in 1888 the Privy Council in *St. Catherine's Milling*[9] answered for all time the issues of national importance raised in the proposed appeal does not withstand scrutiny.[10] While *St. Catherine's Milling* is recognized as the first major Canadian decision to address the Aboriginal title question, this Court confirmed in *Delgamuukw*[11] that many of the Privy Council's conclusions simply no longer accord with subsequent developments in the common law.[12]

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[8] *Chartrand* para. 198
[9] *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, [1888] J.C.J. No. 1 (JCPC), aff'g [1887] 13 S.C.R. 577, aff'g (1886), 13 O.A.R. 148 (C.A.), aff'g (1885), 10 O.R. 196 (Ch. Div.) [*St. Catherine's Milling*]
[10] Canada Response para. 50
[11] *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010
[12] *Delgamuukw* para. 112-114

14. While the common law on Aboriginal rights and the division of powers has evolved significantly since *St. Catherine's Milling*, important issues remain unsettled. The B.C. Court of Appeal in *Behn* identified the issue of the provinces' right to infringe treaty rights when exercising a take up clause under a historical treaty as a "profoundly important question of constitutional law."[13] Yet the question was not addressed by this Court in its recent decision upholding the Court of Appeal's decision.[14]

15. Furthermore, Canada's exclusive legislative authority under section 91(24) and the operation of the doctrine of interjurisdictional immunity in relation to provincial forestry legislation form the basis for one of the two constitutional questions in this Court's pending hearing in *William*.[15]

16. Contrary to the Respondents' assertions, no decision to date has determined the scope of Canada's ongoing responsibilities in respect of a province's exercise of the take up clause in a historical treaty.[16] The Respondents point to this Court's decisions in *Horseman*[17] and *Mikisew*,[18] neither of which were decided in a context analogous to Treaty 3.[19]

17. *Horseman* was determined on the basis of the *Natural Resources Transfer Agreement (NRTA)*, a constitutional instrument that amended the numbered treaties in the prairie provinces. It is not applicable to Treaty 3 lands in Ontario where the *NRTA* does not apply.

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[13] *Moulton Contracting Ltd. v. British Columbia*, 2011 BCCA 311 para.67
[14] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26
[15] *Roger William, et al v. HMQ-BC* (Order of the Chief Justice, March 15, 2013, SCC Docket #34986)
[16] Ontario Response para.5(a); Canada Response para.2
[17] *R. v. Horseman*, [1990] 1 SCR 901 [*Horseman*]
[18] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew*]
[19] Resolute Response para. 26-30; Canada Response para. 24, 54-55; Ontario Response para.8, 13

18. Similarly, *Mikisew* was about a federal government decision to build a road through lands controlled by the federal government, Wood Buffalo National Park. *Mikisew* did not address the provincial government's authority to exercise the Treaty 8 take up clause. Consequently, it did not consider or decide the constitutional division of powers issues raised in the proposed appeal.

19. Finally, contrary to Canada's submissions, *Smith*[20] did not address the issues raised in the proposed appeal.[21] *Smith* was about Canada's section 91(24) interest in reserve lands after those lands had been surrendered by a First Nation. The proposed appeal is about Canada's section 91(24) responsibilities in relation to the exercise of treaty rights on Crown lands outside of reserves.

B. The Respondents raise additional issues of national and public importance

20. The Respondents raise the following additional issues of national and public importance which warrant consideration by this Court.

(a) Does the section 91(24) division of powers analysis precede the *Sparrow/Badger* infringement analysis under section 35?

21. According to the Respondents, this is not a division of powers case. Rather, this case is solely about the Crown's obligations under section 35 of the *Constitution Act, 1982*[22] based on the honour of the Crown, the duty to consult and the *Sparrow/Badger* infringement analysis.

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[20] *Smith v. The Queen* (1983), 147 D.L.R. (3d) 237 (S.C.C.) [*Smith*]
[21] Canada Response para. 51
[22] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11

22. The Respondents' arguments beg the question: does the division of powers analysis precede a consideration of section 35? That was certainly the view of the B.C. Court of Appeal in *Alphonse*,[23] where the Court held that a section 35 infringement analysis "stands as a separate and subsequent review, which is properly done after division of powers issues have been resolved."[24]

23. If leave to appeal is granted, this Court will be asked to consider whether the courts must first determine if a province is acting within its constitutional legislative authority before there can be any question of relying on the duty to consult and the *Sparrow/Badger* analysis to assess the province's conduct. This is an issue of national and public importance which deserves to be considered by this Court and which is properly raised in the present case.

(b) Should the incidental effect test be applied in a situation of a take up clause under a historical treaty?

24. According to Ontario, the Court of Appeal's decision stands for the proposition that "co-operative federalism does not require that both levels of government be involved in decision-making when a decision will have an incidental effect on an area within the jurisdiction of the other level of government."[25]

25. Ontario's submission raises the question of whether, in the situation of a government exercising authority under a take up clause, there must be an analysis of whether the effect of the decision will have more than an incidental effect on treaty rights.

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[23] *Regina v. Alphonse*, 1993 CanLII 4517 (BC CA) [*Alphonse*]
[24] *Alphonse* para. 51
[25] Ontario Response, para. 24

26. The Court of Appeal in this case did not apply such a test. Nor was such a test considered by this Court in *Mikisew*. In the recent *Chartrand* decision, the B.C. Supreme Court did refer to the application of an incidental effect test in relation to a province's jurisdiction to take up lands under a historical treaty.[26]

27. It is for this Court, as part of the decision on the proposed appeal, to provide guidance for courts across the country as to whether such a test should be applied and the consequences of a conclusion that provincial legislation will have more than an incidental effect on a treaty right.

(c) How does an internal limitation on a treaty right operate within the division of powers?

28. Ontario raises the important and unsettled question of the operation of an internal limitation on a treaty right within the division of powers.[27]

29. The principle of an internal limitation on a treaty right was identified in *Morris*[28] and *Badger*[29] in the context of there being no right to hunt unsafely, and in *Marshall 1 and 2*[30] in the context of there being no treaty right to more than a moderate livelihood. These decisions stand for the proposition that certain activities, such as unsafe hunting and unlimited commercial operations, exist outside the treaty right. Such activities do not raise division of powers issues because they do not involve a treaty right. It is unclear how the reasoning in *Morris, Badger* and *Marshall 1 and 2* can or should apply in the present case where there is no argument that the activities, hunting and fishing, which the Applicant seeks to defend against provincial encroachment are treaty rights.

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[26] *Chartrand* para. 198-99
[27] Ontario Response para. 24
[28] *R. v. Morris,* 2006 SCC 59, [2006] 2 SCR 915 [*Morris*] para. 64, 82
[29] *R. v. Badger,* [1996] 1 SCR 771 [*Badger*] para.93
[30] *R. v. Marshall,* [1999] 3 S.C.R. 456; *R. v. Marshall,* [1999] 3 S.C.R. 533

30. In *Mikisew*, the Court further identified Canada's right to take up lands under Treaty 8 as an additional internal limit on a treaty right.[31] The Court in *Mikisew* did not consider the issue of an internal limitation in respect of a province's right to exercise a take up clause.

31. Also, *Mikisew* was about the take up clause in Treaty 8, not the take up clause in Treaty 3. As the minority decision in *Morris* emphasized, the "scope of a treaty right and its internal limits is essentially a matter of treaty interpretation, which in turn refers us back to the intention of the parties to the treaty."[32]

32. Based on her extensive review of the evidence of the intention of the parties at the signing of Treaty 3, the trial judge's finding of fact was that the Ojibway did not understand that there would be significant limitations on their harvesting rights and that any limitation that did occur would involve the federal government.[33]

33. Importantly, the Court of Appeal did not refer to and did not rely on an internal limitation analysis. If Ontario is correct that this case can be decided based on an internal limitation on a treaty right, the Applicant submits that the Court should consider the issue because the Court of Appeal did not and it is an issue of national importance.

(d) Does section 91(24) jurisdiction on non-reserve lands disappear when land is surrendered by treaty?

34. All three Respondents agree that the Court of Appeal's decision stands for the principle that when lands are surrendered through a treaty, Canada's exclusive jurisdiction under section 91(24) no longer applies outside of reserve lands.[34] On this

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[31] *Mikisew* para. 56
[32] *Morris* para. 107
[33] *Keewatin v. Minister of Natural Resources*, 2011 ONSC 4801 para. 802, 909
[34] Ontario Response para 25, Canada Response para 3(a), Resolute Response para. 19

point the Respondents rely on their understanding that provincial beneficial ownership of Crown land trumps federal legislative authority under section 91(24).

35. If, as the Respondents submit, the decision below stands for the principle that section 91(24) does not apply to lands surrendered by treaty, the issue should be considered by this Court because of its obvious national importance and because it appears contrary to this Court's decision in *Morris* which was based on members of the Tsartlip First Nation hunting deer on unoccupied off-reserve lands.[35]

(e) Can administrative challenges trump constitutional principles?

36. The Respondents submit that the Court of Appeal was correct in its conclusion that maintaining an ongoing role for Canada in supervising the exercise of the take up clause would be "complicated, awkward and likely unworkable."[36] As noted above, the B.C. Supreme Court in *Chartrand* recently came to the same conclusion based in part on the Court of Appeal's reasons.

37. Was the Court of Appeal correct that administrative challenges justify ignoring the division of powers? Or, as the Applicant will submit if leave to appeal is granted, should the ongoing challenges of Confederation and reconciliation with First Nations be met head-on as part of renewing Canada's commitment to underlying and fundamental constitutional principles? These are questions of national importance that merit consideration by this Court.

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[35] *Morris* para.10

[36] Canada Response para. 45, Ontario Response para. 67, quoting the Appeal Decision para. 153

C. The Respondents raise arguments that are properly submissions on appeal

38. The Respondents raise the following issues which are not relevant to the application for leave and which properly constitute submissions on appeal if leave is granted.

(a) Does Ontario's history of *de facto* authority over land-use authorizations in the Keewatin lands confirm its legal authority?

39. According to Ontario, the Court of Appeal concluded that Ontario maintains exclusive jurisdiction with respect to the taking up of Treaty 3 lands because it has done so for more than 100 years without seeking Canada's approval.[37]

40. This Court concluded in *Haida* that provincial *de facto* control of Crown lands does not nullify constitutional limitations.[38] A long history of a province operating beyond its legislative authority and the federal government failing to fulfil its constitutional responsibilities to Aboriginal peoples does not amend the constitution.

(b) Is it correct for an appellate court to arrive at its own findings of fact while ignoring evidence of the Aboriginal perspective?

41. Contrary to the Respondents' statements, the Applicant's position is not that a different standard of appellate review of factual findings is appropriate in Aboriginal law cases.[39] Rather, the Applicant asks this Court to consider and clarify whether there should be an enhanced burden on an appellate court to justify a decision to discount factual findings that rely on the Aboriginal perspective. This Court has previously confirmed that

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[37] Ontario Response para. 9(u)
[38] *Haida* para. 32
[39] Ontario Response para. 53, 66; Canada Response para. 59(b)

specific principles are appropriate and necessary for appellate review of Aboriginal treaty and rights trials beyond the general standard of "palpable and overriding error."[40]

(c) Does the 1891 Legislation, 1894 Agreement and 1912 Legislation provide an answer to the proposed appeal?

42. Ontario's argument that the 1891 Legislation, 1894 Agreement and 1912 Legislation provide a "straightforward and complete answer"[41] to the proposed appeal is not an issue that was raised by the Applicant and does not address the question of whether the leave application raises an issue of national or public importance. It is open to the Respondents to make this argument on appeal should leave be granted, but it is not relevant to the present application.

D. Conclusion

43. The questions surrounding Canada's ongoing role in the implementation and protection of treaty rights as identified by the Applicant, and emphasized by the Respondents, raise fundamental issues of constitutional interpretation which merit consideration by this Court.

All of which is respectfully submitted this 24th day of June, 2013.

Bruce Stadfeld McIvor

Kathryn Buttery

[40] *Delgamuuwk* para. 78-82
[41] Ontario Response para. 61

PART II Table of Authorities

Jurisprudence

Part III Statutes and Other References