File No 35379

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

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

APPELLANTS (Plaintiffs)

- and-

MINISTER OF NATURAL RESOURCES

-and-

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

RESPONDENTS (Defendants)

- and-

THE ATTORNEY GENERAL OF CANADA

RESPONDENT (Third Party)

- and-

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

RESPONDENT (Interveners)

- and-

GOLDCORP INC.

RESPONDENT (Intervener)

(Style of Cause continues inside cover pages)

JOINT MEMORANDUM OF ARGUMENT BY LAC SEUL FIRST NATION and SANDY LAKE FIRST NATION, INTERVENERS

-and –

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Interveners

AND BETWEEN:

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

APPELLANTS
(Interveners)

- and -

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and
JOSEPH WILLIAM FOBISTER
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and
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RESPONDENTS
(Defendants)

and

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- and -

GOLDCORP INC.

RESPONDENT
(Intervener)

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PART I FACTS AND OVERVIEW

1. For these Interveners, the issues before this Court are whether the Court of Appeal erred in reaching two conclusions. First, the Court concluded: "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."[1] Second, the Court concluded: "... we decline to accede to any suggestion that this proceeding be stayed or adjourned until consultation has taken place, as these appeals are properly before us".[2]

2. With respect to the Court's first conclusion, these Interveners submit that in addition to their Treaty right to involve the federal government in such consultations, they and the Appellants have separate constitutional rights to involve the federal government in those consultations if they engage *either* the federal government's exclusive jurisdiction to regulate Treaty harvesting rights *or* its exclusive jurisdiction to justify the infringement of such rights.

3. With respect to the Court's second conclusion, these Interveners accept the Crowns' right to propose a legal régime in which the federal Crown has no role in the taking up of tracts in the lands added to Ontario in 1912. However, this proposal would adversely affect the Interveners' and the Appellants' Treaty and constitutional rights to involve Canada. The Crowns' proposal therefore triggered their duty to consult all affected First Nations. The Interveners submit that before this proposal became the Crowns' position in this litigation, it should have been the subject of consultations with all affected First Nations.

PART II – ISSUES

4. The Interveners' position is set out above.

PART III(i) ARGUMENT: **The Treaty Right to Involve the Federal Government**

5. The Court of Appeal accepted that: "As the trial judge found, the Ojibway were no doubt concerned that the Treaty promises would be kept and they naturally looked to Canada, their

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[1] *Keewatin v. Ontario (Minister of Natural Resources)* 2013 ONCA 158 at par. 153

[2] *Keewatin v. Ontario (Minister of Natural Resources)* supra footnote 1 at par. 231

Treaty partner, for that assurance."[3] In other words, *as the First Nations understood it*, the Treaty created a relationship between them and Canada, a relationship in which Canada's role was to assure that the Treaty promises were kept. The record below confirms that this relationship was entered into through a process of formal, face-to-face, negotiations that began with the smoking of the peace pipe and ended with the signing of solemn written promises.

6. These Interveners submit that this negotiation process created a "special relationship" between the First Nations and the government of Canada, the only Crown government involved in or referred to during the negotiations. In *Little Salmon*, the majority stated: a "treaty is part of a special relationship: 'In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably' (*Haida Nation*, at para. 17") (underlining added by the Court in *Little Salmon*).[4] It follows that the Crown's duty to conduct itself honourably continued to apply at each stage of the implementation of the Treaty.

7. A critical stage was reached when the Judicial Committee of the Privy Council released its decision in *St. Catherine's Milling.*[5] The *St. Catherine's Milling* decision fundamentally altered the "special relationship" the First Nations thought they had with Canada, their Treaty partner, by forcibly injecting Ontario into that relationship. These Interveners submit that if this change was required by Canada's constitution, the Honour of the Crown required Canada and Ontario to re-engage with the First Nations to seek an amendment to the taking up clause of Treaty 3 so that it would reflect what the Crowns now say was the result of the *St. Catherine's Milling* decision. A second critical stage of treaty implementation was reached when Treaty 3 and Treaty 5 lands were transferred from Canada to Ontario in 1912. Again, the Honour of the Crown required Canada and Ontario to re-engage with the affected First Nations to seek an amendment to the taking up clauses of Treaties 3 and 5 (which were and remain identical[6]) so that these clauses would reflect what the Crowns now say was the result of this transfer.

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[3] *Keewatin v. Ontario (Minister of Natural Resources)* supra footnote 1 at par. 161

[4] *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources* 2010 SCC 53 at par. 62

[5] *St. Catherine's Milling & Lumber Co. v. R.* (1889) L.R, 14 App. Cas 46

[6] Morris Treat Text, Exhibit 9, AR, Volume 59, Tab 89, page 346, REB, TAB 25

8. The Interveners submit that since those Treaties were never amended, they were given constitutional force, as written, by section 35 of the *Constitution Act, 1982*. The result is not that these Treaties rewrite the law governing the division of powers in Canada but nor is it, as the Court of Appeal found, that these Treaties were silently rewritten by "operation of law" with no notice to or participation of First Nations. A Treaty should only be amended with the same "measure of solemnity" as it was created, as explained by the majority in the *Manitoba Métis* decision.[7] At most, these Treaties and the division of powers conflict, a conflict that should be resolved, as the Honour of the Crown requires, through further negotiations with affected First Nations. It is not too late to redeem the Honour of the Crown.

9. This result also conforms to the rules of treaty interpretation as confirmed by *Marshall No. 1*: the common intention of the parties to those Treaties is to be determined *when they were made*.[8] Treaty 3 and Treaty 5 were negotiated by Alexander Morris, in 1873 and 1875, respectively. When those Treaties were made, Canada still retained beneficial ownership of both the Treaty 3 Keewatin Lands and the Treaty 5 lands that were later added to Ontario in 1912. These lands are shown on the maps included in Ontario's Factum. It follows that if, in accordance with the Court of Appeal's reasoning, the right to take up lands belonged to the Crown government with beneficial ownership *of those lands*, all of the parties correctly understood, *at Treaty time*, that Canada was the Crown government with beneficial ownership and the right to take up lands. The Crowns' proposal/position to remove the federal Crown from *any* involvement in the taking up of tracts in those lands is, therefore, contrary to a correct application of those Treaties to the lands added to Ontario in 1912.

PART III(ii) ARGUMENT: **The Section 91(24) Right to Involve the Federal Crown**

10. While the *St. Catherine's' Milling* decision rejected Canada's argument that section 91(24) gave it the power to dispose of timber on ceded lands, it also confirmed that Canada has "exclusive power to regulate the Indians' privilege of hunting and fishing" over ceded lands.[9] Nonetheless, the Court of Appeal ignored the submission that Canada must, therefore, be

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[7] *Manitoba Metis Federation Inc. v. Canada (Attorney General)* 2013 SCC 14 at par. 71

[8] *Marshall v. Canada (Marshall No. 1)* [1999] 3 S.C.R. 446 at pars. 14 and 78

[9] *St. Catherine's Milling & Lumber Co. v. R.*, supra at footnote 5 at par. 17

involved in any consultation in which there is a potential relationship or overlap between the regulation of Treaty hunting rights, on the one hand, and the taking up of lands or the visible occupation of lands, on the other. The potential for such a relationship was explained by Justice Finch in *Halfway River First Nation* in the context of Treaty 8:

> ... the Indians' right to hunt granted to the signatories of Treaty 8, and the Crown's right to regulate, and to require or take up lands, cannot be given meaning without reference to one another. They are competing, or conflicting rights as has been recently affirmed in *R. v. Sundown* (1999), 132 C.C.C. (3d) 353 (S.C.C.). The Indians' right to hunt is subject to the "geographical limitation", and the Crown's right to take up land cannot be read as absolute or unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless.[10]

11. Moreover, the history of the regulation of treaty hunting rights demonstrates why Ontario is wrong when it asserts: "The absence of any challenge to or complaint about Ontario's ability to take up Treaty 3 lands prior to this litigation strongly suggests that the appellants' position does not stem from any historical Ojibway understanding of the Treaty."[11] Yet, Ontario does not dispute Grassy Narrows' assertions that "the chiefs of Treaty 3 were amongst those who wrote to Parliament complaining about Ontario's persistent refusal to respect treaty rights". [12] It nevertheless maintains, without any evidentiary reference, that "none of these complaints involved the taking up of land." [13] This assertion ignores the reality that when Indians complained that they could no longer hunt where they traditionally hunted (a right recognized by Justice Binnie in *Mikisew*[14]), they were complaining about the "geographical limitation(s)" placed on their treaty right to hunt. Whether those limitations were imposed by provincial hunting regulations or by the provincial taking up of lands, the effect on Indians was the same and the source of their complaints was the same: the loss of hunting grounds.

12. In the modern context, if the conflict between the meaningful right to hunt and the taking up of lands can be mitigated through hunting regulations that only the federal government can

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[10] *Halfway River First Nation v. B.C.*, 1999 BCCA 470 at par. 134

[11] Memorandum of Argument of the Minister of Natural Resources at par. 67

[12] Memorandum of Argument of Grassy Narrows at par. 95

[13] Memorandum of Argument of the Minister of Natural Resources at par. 32

[14] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69 at par. 48.

adopt and enforce, then the consultations preceding the taking up of those lands "would be improved by involving both levels of government", contrary to the Court of Appeal's conclusion.

PART III(iii) ARGUMENT: **The Section 35 Right to Involve the Federal Crown**

13. Canada's constitutional evolution did not stop in 1888 with the *St. Catherine's Milling* decision, as the Court of Appeal appeared to assume. On the contrary, it lept forward dramatically when treaty and aboriginal rights were recognized and affirmed by section 35 of the *Constitution Act, 1982*. With respect, Lord Watson could not have anticipated this evolution in 1888. Neither his decision in *St. Catherine's Milling*, nor this Court's decision a hundred years later in *R. v. Smith*,[15] shed any light on what section 35 means; both decisions were based on the law as it existed before section 35 took effect and said nothing about what that section means.

14. It was not until this Court's 1990 decision in *R. v. Sparrow*[16] that we learned what section 35 means; it means that Treaty rights cannot be infringed unless those infringements are justified and that prior consultation is an important element in determining whether the infringement can be justified. It is worth noting that this Court's own analysis in *Sparrow* made no mention of either *St. Catherine's Milling* or *Smith*. Then, in its 2006 decision in *Morris*, a majority of this Court held that provinces cannot justify the infringement of treaty rights under section 35: "Where a *prima facie* infringement of a treaty right is found, a province cannot rely on s. 88 by using the justification test from *Sparrow* and *Badger* in the context of s. 35(1) of the *Constitution Act, 1982*."[17] This was consistent with the pre-*Sparrow* authorities that held that it is "within the exclusive power of Parliament under s. 91(24) of the Constitution Act, 1867 to derogate from rights recognized in a treaty agreement made with the Indians". see *R. v. Simon.*[18]

15. Despite being asked to consider the implications of this, the Court of Appeal did not address the issue of justification. It declined to answer Question 2, where the question was explicitly raised, and in answering Question 1, it only asked itself: "Does Ontario's use of the

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[15] *R. v. Smith* [1983] 1 S.C.R. 554
[16] *R. v. Sparrow* [1990] 1 S.C.R. 1075
[17] *R. v. Morris* 2006 SCC 59 at par. 55
[18] *R. v. Simon* [1985] 2 S.C.R. 387 at par. 51

taking up clause, *short of infringement*, engage s. 91(24)?"[19] It was not until near the end of its judgment that the Court said: "Where it is claimed that a taking up will infringe a treaty right, *Mikisew Cree First Nation* 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."[20]

16. This statement constitutes a serious misreading of *Mikisew* which establishes, as explained further below, that consultation must precede any litigation about infringement and justification. But the Court was also wrong to assert that "an action for infringement does not engage Canada". Whether or not its role is "supervisory", Canada would have a central role in any action about whether the taking up of lands by Ontario would infringe a treaty right and, if so, whether that infringement could be justified. That is because Canada is the only level of government capable of justifying infringements in Ontario even when it is not, as it was in *Mikisew*, the level of government exercising the taking up power.

17. For the same reason, these Interveners submit that where the First Nation(s) allege infringement of treaty rights, the consultation process must also involve Canada. Telling First Nations that the federal Crown *never* has any role in consultations, even when they allege that their Treaty harvesting rights will be infringed, is equivalent to telling them, before consultations have even begun, that they are wrong: Canada *never* needs to be involved because neither the proposed taking up nor *any* taking up of lands could *ever* cause an infringement that Canada could be called upon to justify. This can only undermine the legitimacy of consultation.

18. This Court should also keep in mind that the "*prima facie* infringement" test is necessarily imprecise in order to cover all situations. That, however, makes it difficult to apply to particular situations. This can result in litigation about whether the test has been met and whether justification is required. More such litigation is apparently still ahead in this case; we are still only dealing with the "threshold issues". But any court decision will only address the particular fact situation and only bind the parties. These Interveners submit that consultation involving both levels of government and *all the affected First Nations* has the potential to build ongoing

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[19] *Keewatin v. Ontario (Minister of Natural Resources)* supra at footnote 1 at par. 99

[20] *Keewatin v. Ontario (Minister of Natural Resources)* supra at footnote 1 at par. 207

relationships that are better able to identify more comprehensive ways of dealing with all the issues, including the issues that will arise in the future.

PART III(iv) ARGUMENT: **The Role of the Courts when the Honour of the Crown and the Duty to Consult are At Issue**

19. The Court of Appeal arrived at the conclusion the Crowns were seeking, namely, no role *at all* for the federal Crown in the taking up of tracts in the lands added to Ontario in 1912. It did so as a final legal remedy, based entirely on the "operation of law". In granting this remedy, the Court effectively ignored the foundational observation made by this Court in *Haida* even though it quoted that observation: "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*."[21]

20. The "process" for achieving reconciliation was described at some length in *Haida*. The Chief Justice stated that "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests".[22] Later in her judgment, she referred to negotiations as "the preferred process for achieving ultimate reconciliation".[23] The use of the words "preferable" and "preferred" were not meant to indicate that when the Crown's duty to consult is triggered, compliance is optional. As the Chief Justice later wrote the *Rio Tinto* decision, "the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met."[24]

21. But if the duty calls for more negotiation and less litigation, what is the courts' role in this still new area of aboriginal law? The Chief Justice made several comments about this in *Haida*. At par. 11, she wrote: "courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate." At par. 37, she wrote: "The law is capable of differentiating between tenuous claims, claims possessing a strong prima facie case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist." At par. 51, she wrote: "It is open to governments to set up regulatory schemes to

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[21] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 at par 32, quoted at par. 162 of the COA

[22] *Haida Nation v. British Columbia* (Minister of Forests) supra at footnote 21 at par. 14 and par. 38

[23] *Haida Nation v. British Columbia* (Minister of Forests) supra at footnote 21 at par. 38

[24] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at par. 63

address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts." At par. 60, she wrote: "Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review."[25]

22. In sum, the courts' role is to determine, on a case-by-case basis, when the duty is triggered, to order the Crown to consult when it is and to supply any additional guidance necessary to help negotiations work, all with the view to "strengthening the reconciliation process and reducing recourse to the courts". This role requires the courts to be careful not to exercise their jurisdiction over issues that have not been the subject of prior consultation with affected First Nations. If this was not already clear from *Haida*, it was made explicit in *Mikisew*. Justice Binnie declared that the courts must ensure that there is proper consultation before entertaining litigation on the issues of infringement and justification:

> Where, as here, the Court is dealing with a proposed "taking up" it is not correct (even if it is concluded that the proposed measure if implemented would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the process by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.[26]

23. Of course, any complicated set of negotiations is bound to include factual-legal issues of the kind typically decided by courts. The parties to those negotiations must ultimately retain full access to the courts throughout and, of course, the courts must retain ultimate jurisdiction over all issues because there is no guarantee that the negotiations will succeed. But reconciliation through negotiation requires the parties to make good faith efforts to resolve *all* their differences, including the factual-legal ones, *before* seeking recourse to the courts. For it to work, the courts must support the process in the ways described in *Haida* and *Mikisew*, not supplant or frustrate the process by hearing and deciding issues that have not been the subject of prior consultation with affected First Nations.

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[25] *Haida Nation v. British Columbia (Minister of Forests),* supra at footnote 21 at paras. 11, 37, 51, 60

[26] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* supra at footnote 14 at par. 59

24. To be fair, the litigation in this case started in 2000, four years before *Haida*. However, both the order for advance costs[27] and the order setting out the "threshold issues"[28] were issued in the spring of 2006, two years after *Haida* and six months after *Mikisew*. Nonetheless, neither the judge who made those orders nor any of the parties to the litigation appears to have raised any concern about whether further litigation was still the right way to proceed. For her part, the trial judge admitted to struggling with the issue. Towards the end of her long judgment, she wrote: "I grappled with how governments can be expected to promote reconciliation, yet test the limits of their liability in the same way as other litigants are entitled to do."[29]

25. The issue of consultation was raised for the first time by Lac Seul First Nation, an Intervener at the Court of Appeal. Lac Seul maintained that both the provincial Crown and the federal Crown had a duty to consult *all affected First Nations* about their proposal/position to remove the federal Crown from any involvement in the taking up of tracts in the Keewatin Lands. Lac Seul noted that this included some Treaty 5 First Nations whose territories are also located in the area added to Ontario in 1912 and whose Treaty has the same taking up clause as Treaty 3.

26. Together with Sandy Lake First Nation, a Treaty 5 First Nation, Lac Seul First Nation again submits in this Court that it is of particular significance for the duty to consult that the Crowns' proposal/position would fundamentally alter the role of the federal Crown as set out above. At par. 90 of *Rio Tinto*, the Chief Justice wrote: "In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake *may affect the Crown's future ability to deal honourably with Aboriginal interests.*"[30] (emphasis added) The Interveners submit that the proposal/position to remove the federal Crown from *any future* involvement in the taking up of lands clearly affects the federal Crown's *future ability* to deal honourably with Aboriginal interests in situations when its exclusive jurisdiction is engaged. The Court of Appeal received but ignored these submissions without analysis.

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[27] *Keewatin v. Ontario (Minister of Natural Resources)*, [2006] OJ 3418

[28] Order of Justice Spies, dated June 28, 2006, Schedule "A" to the Trial Judgment of Justice Sanderson

[29] *Keewatin v. Ontario (Minister of Natural Resources)* 2011, ONSC 4801 at para 1620

[30] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, supra at footnote 24 at par. 90

27. The ultimate effect of the Court of Appeal's decision is to *permanently and in all situations* exclude the federal government from having any role in the taking up of tracts in the lands added to Ontario in 1912, including the consultations that must precede such takings up. These Interveners submit that in addition to any other errors in the Court's decision, this result is wrong because it effectively relieved the Crowns of their duty to act honourably by first consulting all affected First Nations about their proposal/position. As Justice Binnie said at in *Little Salmon*: "Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork."[31] Ignoring this admonition, the Court of Appeal rejected in advance any "handiwork" that would make "different parts of the Treaty 3 lands … subject to different régimes for the purposes of taking up". The Court said that this would be an "undesirable and absurd" result.[32] In fact, different legal régimes in different parts of the lands covered by the same treaty are common in Canada. That is because, as with both Treaty 5 and Treaty 3, Treaty boundaries do not follow provincial boundaries and the NRTAs may only apply to some of the lands under the same treaty.

PART IV COSTS

28. The Interveners do not seek an order of costs and submit that no costs be awarded against them.

PARTS V ORDER SOUGHT

29. These Interveners seek an Order requiring both Canada and Ontario to consult all Treaty 3 and Treaty 5 First Nations with traditional territories in the lands transferred to Ontario in 1912 in relation to their proposal/position to exclude Canada from having any role in the process for the taking up of tracts in those territories.

30. The Interveners continue to repeat their request for 10 minutes of oral argument.

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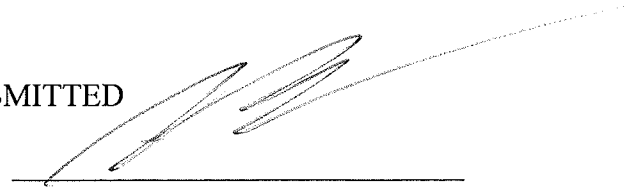
[31] *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources),* supra at footnote 4 at par. 54

[32] *Keewatin v. Ontario (Minister of Natural Resources)* supra at footnote 1 at par. 195

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa this 1st day of May, 2014



David G. Leitch, Counsel to the Interveners Lac Seul First Nation and Sandy Lake First Nation

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File No. 35379

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

BETWEEN:

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

APPELLANTS (Plaintiffs)

- and- -

MINISTER OF NATURAL RESOURCES
-and-
RESOLUTE FP CANADA INC. (formerly ABITIBI-CONSOLIDATED INC.)

RESPONDENTS (Defendants)

ET AL.

JOINT MEMORANDUM OF ARGUMENT BY LAC SEUL FIRST NATION and SANDY LAKE FIRST NATION, INTERVENERS

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