CITATION: Keewatin v. Minister of Natural Resources 2011 ONSC 4801
Court File No. 05-CV-281875PD
Date: 20110816

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ANDREW KEEWATIN JR. and JOSEPH WILLIAM FOBISTER on their own behalf and on behalf of all other members of GRASSY NARROWS FIRST NATION Plaintiffs	)	*Robert J.M. Janes, Karey Brooks, Barbara Harvey* for the Plaintiffs
- and -	)	
	)	
MINISTER OF NATURAL RESOURCES and ABITIBI-CONSOLIDATED INC. Defendants	)	*Michael R. Stephenson, Peter Lemmond, Christine Perruzza, Mark Crow* for the Defendant Minister of Natural Resources
	)	
	)	*Christopher J. Matthews, Marina Sampson* for the Defendant Abitibi-Consolidated Inc.
- and -	)	
	)	
THE ATTORNEY GENERAL OF CANADA Third Party	)	*Gary Penner, Michael McCulloch, Barry Ennis* for the Third Party
	)	
	)	**HEARD:** September 14-16; October 5-6, 9, 13-16, 19-23; November 16-18, 23-27; December 1-4, 7, 9-10, 14-16, 2009; January 14, 15, 18-22, 25-29; February 16-19, 22-26; March 1; April 19-22, 26-30; May 1, 3, 2010

M.A. SANDERSON J.

REASONS FOR JUDGMENT

Table of Contents

1. INTRODUCTION

[1] At issue here is the interpretation of a Harvesting Clause (the "Harvesting Clause") in a treaty (the "Treaty" or "Treaty 3") made in 1873 between Canada and the ancestors of the Plaintiffs including the following:

> …they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the said tract surrendered as hereinbefore described … and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof, duly authorized therefor by the said Government.

[2] On June 28, 2006, Spies J. ordered a trial of the following two issues:

> Question One:
> Does Her Majesty the Queen in Right of Ontario have the authority within that part of the lands subject to Treaty 3 that were added to Ontario in 1912, to exercise the right to "take up" tracts of land for forestry, within the meaning of Treaty 3, so as to limit the rights of the Plaintiffs to hunt or fish as provided for in Treaty 3?
>
> Question Two
> If the answer to question/issue 1 is "no," 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? [provided that the question of whether or not the particular statutes and statutory instruments at issue in this action in fact justifiably infringe the treaty rights shall not be determined and shall be reserved for the trial of the rest of this proceeding.]
> [Emphasis added.]

[3] The Plaintiffs are members of the Grassy Narrows First Nation, who entered into litigation with Ontario after it issued licenses to the Defendant Abitibi-Consolidated Inc. ("Abitibi") to clear cut forests on Crown lands in the Plaintiffs' trap line areas, allegedly significantly interfering with their Harvesting Rights under the Treaty.

[4] "Harvesting Rights" encompasses the entirety of traditional resource harvesting activities in pursuit of the seasonal round.

[5] "Treaty Rights" includes Harvesting Rights and all other rights granted under the Treaty.

[6] Initially, the Plaintiffs moved to set aside the forestry licenses issued by Ontario. However, that application was turned into an action in which the present trial of the two issues was ordered.

[7] The answers to Questions One and Two will affect the issues to be determined in the next phase of this litigation.

Ontario's Position

[8] Ontario apparently sees this case as a bulwark against encroachment of its Constitutional right to manage and receive all revenues from its Crown lands without meddling by the federal

government. It positions itself as any other property owner, entitled to enjoy the benefits of its lands. While it acknowledges it must respect Treaty Harvesting Rights, it interprets them narrowly, asserting that as owner it can unilaterally restrict or extinguish them under the Treaty by "taking up" lands/authorizing uses visibly incompatible with them.

[9] Ontario posits that the present difficulties in interpreting the Harvesting Clause stem from the Treaty Commissioners' mistaken assumption in 1873 that the Treaty 3 lands were and would always be owned by Canada. That assumption was proven incorrect in 1888, when the Judicial Committee of the Privy Council ("JCPC") in *St. Catherine's Milling* determined that Ontario owned the southerly 2/3 of the Treaty 3 lands (the "Disputed Territory"), and in and after 1912 when the northerly 1/3 of the Treaty 3 lands (the "Keewatin Lands") were annexed to Ontario. Ontario asserts that as **owner**, only Ontario can "take up" its own lands and exercise proprietary rights in respect thereof.

[10] Ontario warns this Court that to hold otherwise would represent a "massive incursion" upon its exclusive proprietary rights over lands in Ontario.

[11] In essence, Ontario asks this Court to disregard the reference in the Harvesting Clause to "taking up by the Dominion," and to interpret it as if it read "taking up" [which it submits means "authorizing land uses" by the owner of the land, i.e., by Ontario.]

The Ojibway Position

[12] For the Ojibway, this litigation is all about Harvesting Rights and the meaning (in both senses of the word) to be given to the Treaty: (1) how should it be interpreted? (2) will their Treaty Harvesting Rights be recognized and affirmed by Canadian Courts, or will Ontario be allowed to disregard and violate the promises Canada made to induce them to enter into the Treaty? Will the Courts ignore the plain wording of the Treaty deliberately inserted by the federally appointed Commissioners to protect their Harvesting Rights?

[13] The Plaintiffs submit that the reference in the Harvesting Clause to the Dominion is a reference to the federal government, the party that negotiated the Treaty with them, the branch of government with s. 91(24) jurisdiction to make treaties and enforce treaty rights.

[14] The Plaintiffs ask this Court to require the Defendants not only to honour but also to enforce the Harvesting Rights promise, to give effect to the plain meaning of the Harvesting Clause (i.e., to hold that "taking up" by the Dominion of Canada means taking up by Canada and that "taking up by any of the subjects thereof duly authorized therefor by the said Government" means that "taking up" by anyone other than the Dominion must be authorized by the Dominion of Canada), to require Ontario and Canada to act honourably in interpreting and enforcing the Treaty, and to recognize and affirm their Treaty Rights under s. 35 of the Constitution.

[15] The Plaintiffs submit that this Court should not allow Ontario and Canada to ignore/read out a critical promise the Commissioners deliberately made, a crucial consideration that the Ojibway imposed as a pre-condition to entering into the Treaty. They would not have made the Treaty had the promises of continued harvesting not been made.

[16] The Treaty clearly specifies that without federal authorization, Ontario cannot interfere with their Treaty-protected Harvesting Rights. Only the federal government, the government specifically charged with their welfare under the Constitution, had jurisdiction in 1873 and has jurisdiction today to limit (or before 1982, to extinguish) these Rights. When the Commissioners mentioned that the Dominion must authorize any elimination of their Treaty Harvesting Rights, they meant Canada.

[17] From the Ojibway perspective, Ontario's extreme focus on its own property rights is unwarranted and legally incorrect.

[18] While Ontario can, apart from the Treaty, authorize uses of Crown lands under s. 109 that do not significantly interfere with their Treaty Harvesting Rights, it cannot authorize uses that do. Only Canada can grant such authorizations because only Canada has s. 91(24) jurisdiction over their Harvesting Rights. Under the Treaty, Ontario needs approval from Canada or federal legislation allowing an activity that significantly interferes with Harvesting Rights.

The Issues to be Decided

Question One

[19] All parties agree that as beneficial owner of lands now in Ontario, Ontario has jurisdiction to issue forestry licences under s. 109 of the Constitution. The question is whether Ontario can limit Harvesting Rights. The Plaintiffs submit Question One does not ask whether Ontario as owner is entitled to pursue its s. 109 rights in respect of those lands. It can, but only as long as by so doing, its activities do not violate Treaty Harvesting Rights. Ontario's s. 109 rights are limited by Treaty Harvesting Rights. Unless the Treaty specifically authorized Ontario to do so, and the Plaintiffs submit that it does not, Ontario lacks jurisdiction to significantly interfere with Treaty Harvesting Rights. Both under the Treaty and the Constitution, Canada can limit (or before 1982 extinguish) Treaty Rights. To the extent that Ontario authorizes forestry activities that significantly infringe the hunting and trapping rights constitutionally guaranteed, it intrudes impermissibly into federal jurisdiction.

[20] Counsel for Ontario concede that it must respect Treaty Rights but submit that the Treaty allows Ontario to "take up" lands in Ontario and by so doing, to limit the area where the Ojibway have Treaty Rights to hunt, fish and trap.

[21] Counsel for Ontario submit that in 1873, the Ojibway understood and agreed that their Harvesting Rights would be progressively and increasingly limited by "taking up"/use/ occupation of land as time passed.

[22] Counsel for the Plaintiffs submit that the Commissioners promised that the Ojibway would have their Harvesting Rights as in the past, knowing that Canada could permit their limitation, or before 1982, their extinguishment.

[23] In 1891 Canada passed legislation that the Plaintiffs contend extinguished Treaty 3 Harvesting Rights on lands "taken up" in the Disputed Territory.

[24] Counsel for Ontario submit that when Ontario became the owner of the Keewatin Lands in 1912, the 1891 Legislation became applicable to the Keewatin Lands as well.

[25] Counsel for the Plaintiffs submit the annexation of Keewatin had no effect on the Treaty Rights of the Treaty 3 Ojibway in Keewatin. This Court must decide whether Ontario is correct in submitting that Ojibway Treaty 3 Harvesting Rights were affected upon the annexation of Keewatin to Ontario. In other words, were the Ojibway's rights under the Treaty adversely impacted by the 1891 legislation, which had been passed to deal with problems arising from the Boundary Dispute, even though the Keewatin Lands had not been the subject of that Dispute?

Question Two

[26] Even if the Treaty or the 1891 Legislation did/does not allow Ontario to limit or extinguish Ojibway Harvesting Rights by authorizing land uses within Ontario, can Ontario nevertheless pass laws that infringe Treaty Harvesting Rights if they can be justified under the *Sparrow* test?

Evidentiary Matters

[27] It should go without saying that the fact-finding process here was atypical. As Treaty 3 was made in 1873, obviously neither the Commissioners nor the Chiefs were alive to provide firsthand evidence about their intentions and understanding of the Treaty Harvesting Clause in 1873.

[28] In cases such as this, the higher Courts have directed trial judges to strive to ascertain the understanding not only of the Euro-Canadian parties, but also of the Aboriginal parties. They must look beyond the formal wording of the treaties and delve into the circumstances and the context in which each particular treaty was made.

[29] With the exception of the evidence of Mr. Fobister, a named Plaintiff, the oral evidence here consisted entirely of expert evidence. The experts will be referred to by their surnames throughout these Reasons.

[30] The parties agreed that the voluminous reports of the experts would be entered into evidence and treated as if they had been given *viva voce*. As a result, their oral evidence consisted largely of cross-examination.

[31] This Court heard much ethno-historical and anthropological evidence, adduced primarily to assist in interpreting the historical documents and in gleaning the understanding and intentions of the parties, particularly the Aboriginal parties. It also heard historical and political expert evidence, primarily relevant to the intentions and understanding of the Euro-Canadian Treaty Commissioners at the time the Treaty was negotiated. The evidence included theories, expositions and opinions on the reasons for the formation of Canada, the s. 91(24) placement under federal jurisdiction of "Indians and Lands Reserved for the Indians" and of the Constitutionality of a treaty provision specifying that Canada would "take up" land or authorize

the "taking up" of land (relevant to Question One) and of any Ontario act or legislation significantly and adversely interfering with Treaty Harvesting Rights (relevant to Question Two.)

[32] While the experts generally agreed on the timing of events and the authenticity of documents, they disagreed in their interpretations of various events and documents, especially as they related to the parties' intentions, understanding of the Treaty terms and even the identity of the Treaty parties.

[33] The documentary evidence included Sir John A. Macdonald's handwritten notes relating to s. 91(24), taken at the Quebec Conference, as well as thousands of pages of letters, reports and newspaper accounts generated both pre- and post-1873, arguably relevant to intention and understanding.

[34] The experts opined as to the correct interpretations of those documents, and attempted to assist this Court in comprehending and assessing the historical, cultural and political context in which the Treaty was made.

[35] They agreed that it is easier to glean from the English language documents the intention and understanding of the English speaking Treaty party than of the Ojibway. Most of the documents in evidence, generated as they were by Euro-Canadians, reflect the Euro-Canadian perspective. Caution and contextual evidence are required in assessing Ojibway understanding and intent because differences in Euro-Canadian and Ojibway discourse can give rise to the potential for misunderstanding.

[36] Chartrand wrote in his report, Ex. 60, at p. 30:

> The fact that the only documents available are in English, and report only the English interpretations of statements and queries by Ojibway spokespersons, limits the scope of sources of information for directly reconstructing a complete Aboriginal understanding of the Treaty provisions.

[37] I have underlined mentions of Government and The Queen in the documents, to make it easier to find them when considering whether the Ojibway understood they were dealing with the Queen, the Government of Canada or some generic government.

2. THE ORGANIZATION OF THESE REASONS

[38] These Reasons are organized under the following sections:

(1) Introduction.
(2) The Organization of these Reasons.
(3) Overview.
(4) Euro-Canadian History 1758-1871 - History/Evidence Relevant to Euro-Canadian Perspective - Treaty Objectives/ Understanding and Intention.
(5) The Ojibway Perspective – Ojibway History – History/Evidence Relevant to Treaty 3 Ojibway Perspective
(6) The Lead-Up to the 1873 Negotiations.
(7) The 1873 Treaty Negotiations.
(8) Analysis of the Historical Evidence as it relates to the Interests of the Parties.

(9) Credibility of the Experts – Findings.
(10) Findings of Fact Part I relate generally to evidence on matters up to and including the signing of Treaty 3, including findings on Mutual Intention and Understanding of the Parties as to the Meaning of the Harvesting Clause and the Identity of the Treaty parties in 1873. It contains factual findings as to whether the Commissioners' reference to taking up by Canada was deliberate (as submitted by the Plaintiffs) or a mistake (as submitted by Ontario) and as to whether the Commissioners regarded the power to limit Harvesting Rights as a power of the owner or of Canada under s. 91(24). It includes findings on the Treaty Commissioners' perceptions in 1873 about Canada's s. 91(24) powers and duties and as to whether they considered the existence of the Boundary Dispute and its possible implications to be relevant in drafting the Harvesting Clause. Addressing the interpretation that best reconciles the interests of both parties at the time the Treaty was made involved the assessment of some evidence of intention not directly related to the negotiations themselves. I placed these findings on mutual intention in the section of these Reasons immediately after the details of the negotiations, because many of my conclusions on understanding and intent also related to the content of the discussions at the negotiations. My findings were not based simply on the contemporaneous documents alone, but also on the expert evidence with regard to context. To the extent I felt it appropriate, I referred to that evidence and explained my findings in the same section of these Reasons. I then separately addressed whether the Ojibway understood that Canada could abridge their Harvesting Rights.
(11) Post-Treaty Events: History/Developments 1873-to the Present, including the Boundary Dispute and its fallout; Political, Jurisprudential and Statutory Developments 1891-1894; the Annexation of Keewatin to Ontario in 1912; Relevant Present-Day Circumstances.
(12) Findings of Fact Part II: Post-Treaty matters.
(13) The Answer to Question One, including Application of Law to Facts; the Meaning of the Treaty as of 1873; the Effect of the 1891-1894 Legislation/ Agreement in the Disputed Territory; Treaty Interpretation in Keewatin after its annexation to Ontario in 1912.
(14) The Answer to Question Two.
(15) The Effect of the Answers to Questions One and Two.
(16) The Honour of the Crown.
(17) The Next Stage of this Litigation.
(18) Final Observations.
(19) Disposition.

[39] These Reasons also include Appendix A, a document prepared by counsel at my request, setting out the procedural history; Appendix B, an Agreement regarding Historical Documents; and Appendix C. a Table of Cases listed alphabetically by the short form used in these Reasons. The full cites only appear in Appendix C, rather than at any point in the Reasons.

3. OVERVIEW

[40] When Treaty 3 was finally signed in 1873, Canada was only six years old.

[41] 1873 was a time of promise and the making of promises, a time when nation building was in high gear. The country's course was still being charted.

[42] In the six short years since Confederation, Canada had already acquired its own "empire." Through annexation of Rupert's Land and the Northwest Territories (the "West"), it had expanded from an area of approximately 400,000 square miles at Confederation to more than 3,300,000 square miles (including 2,700,000 square miles in the newly added Northwest Territories and 200,000 square miles in the newly added British Columbia.)

[43] Although much had been accomplished, much still needed to be done.

[44] In the years preceding 1867, particularly in present-day Ontario where a scarcity of arable land had been a major political issue since at least 1818, politicians had clamoured for the opportunity to annex the West, then under license and charter to the Hudson's Bay Company ("HBC Territories.") During the 1850s, for reasons detailed later in these Reasons, it had become evident that Britain might be prepared to transfer the West to an expanded British North American polity (hereinafter "Canada"), were Canada to shoulder its costs. In the late 1850s and early 1860s, leading politicians in Canada increasingly saw Confederation as the best means to achieve the expansion they so fervently desired. However, promises first had to be made to satisfy conditions to transfer imposed by Great Britain, including promises to protect the First Nations in those territories.

[45] At Confederation, in anticipation of the transfer of the West/HBC Territories, Canada took responsibility for Indians and Indian lands. At this trial, the experts disagreed about the rationale for the assignment of s. 91(24) jurisdiction to Canada. However, they agreed that the Fathers of Confederation understood that treaties with the First Nations in the West would need to be made before it could be settled or developed.

[46] The vast Treaty 3 lands, covering an area of about 55,000 square miles, have often been called "the lands between" because they were located between the settled areas of Canada to the East and the fertile areas targeted for settlement to the West.

[47] In 1868, even before it started to negotiate Treaty terms, Canada had begun to build an immigrant travel route (the "Dawson Route") to move settlers westward across Treaty 3 lands and waters. In 1871, to induce British Columbia to join the country, Canada had promised to build a transcontinental railroad that would also traverse the Treaty 3 territory.

[48] There was agreement on most of Canada's reasons for wanting to conclude Treaty 3.

[49] In each of 1871 and 1872, Canada had sent treaty commissioners to negotiate with the Treaty 3 Chiefs, without success. Counsel for the Plaintiffs submitted that as time passed, Canada's need to complete the Treaty became more acute.

[50] By 1872, the Dawson Route was open. Settlers were already crossing through the Treaty 3 territory enroute to the West. The Treaty 3 Ojibway were feeling violated. By 1873, the security of travellers over the Dawson Route and of surveyors preparing for the construction of the Canadian Pacific Railway ("CPR") was a concern. Canada feared it would have to incur the costs of stationing troops in the area. The CPR needed to be completed between the Red River and Lake Superior by December 31, 1876.

[51] In 1873, Canada sweetened its offers. It perceived that the Ojibway were being particularly "obstinate." Many of the Ojibway Chiefs were known to oppose entering into a treaty agreement that would allow for a permanent Euro-Canadian presence on Treaty 3 lands.

[52] After three days of intense negotiations, which will be detailed later in these Reasons, Treaty 3 was finally signed on October 3, 1873.

[53] Given the differing interpretations of the Harvesting Clause, one of my principal tasks has been to assess all of the evidence, including the historical documentation, to determine the mutual understanding and intent of the Commissioners and the Ojibway in respect of the Treaty Harvesting promise in 1873, and to arrive at the interpretation of common intention that best reconciles the interests of the parties at the time the Treaty was signed.

[54] It is uncontroverted that during the Treaty negotiations, the Commissioners specifically promised the Ojibway that reserves would be established for their exclusive use that would include the areas they had previously used for gardening/agricultural purposes and for sturgeon fishing. In the years immediately following the conclusion of the Treaty, Canada purported to set up reserves and took other steps to implement and enforce the Treaty.

[55] After the Treaty was concluded, wrangling between Canada and Ontario over the boundary between Ontario and the Northwest Territories ("the Boundary Dispute") led to serious negative repercussions for the Treaty 3 Ojibway.

[56] The Treaty Commissioners' knowledge of the existence and potential implications of the Boundary Dispute in 1873 is relevant to their intentions and motivations in drafting the Treaty provision under consideration.

[57] The experts agreed that in 1873 the Treaty Commissioners knew that Ontario was asserting a claim of ownership of the Disputed Territory. They disagreed about the effect of knowledge of the Boundary Dispute on the drafting of the wording of the Treaty document, including the Harvesting Clause.

[58] In the immediate aftermath of the Treaty, Canada actively protected the Ojibway's hunting and fishing rights.

[59] In late 1888, the JCPC in *St. Catherine's Milling* held that Ontario owned the Disputed Territory. Ontario then claimed that Canada had had no jurisdiction to set up Treaty 3 reserves within the Disputed Territory without its consent. It asserted that as owner, it could "take up" lands within the Disputed Territory unburdened by the Ojibway's traditional Harvesting Rights

under the Treaty. Put differently, Ontario contended that it could authorize uses of lands within the Disputed Territory and by so doing, extinguish Ojibway Treaty Harvesting Rights on those lands. It asserted that it could progressively extinguish Treaty Harvesting Rights/ diminish the geographical area available for traditional harvesting by authorizing land uses incompatible with Harvesting Rights and without regard to them.

[60] Negotiations from 1889 to 1891 between Canada and Ontario culminated in reciprocal legislation, the 1891 Legislation ratified by the Agreement in 1894 (the "1891 Legislation"), which in effect provided that Ontario could remove Ojibway Harvesting Rights from any lands within the Disputed Territory that it had "taken up" in the past or would "take up" in the future, even if the uses so authorized would significantly interfere with Ojibway Harvesting Rights. Under the 1891 Legislation, Canada has/had no continuing role in authorizing the use of lands within the Disputed Territory.

[61] In other words, Canada passed legislation that the Plaintiffs submit amended the 1873 Treaty to allow "taking up" by Ontario within the Disputed Territory without any authorization by Canada.

[62] It must be emphasized at the outset that the lands in issue in this litigation are **not** in the Disputed Territory but in Keewatin, which at the time was unaffected by the 1891 Legislation. If the 1912 annexation did not affect it, the 1873 Treaty Harvesting Rights continue in respect of Keewatin to this day.

[63] When Keewatin was annexed to Ontario in 1912, Canada and Ontario did not pass legislation expressly allowing Ontario to "take up" lands in Keewatin without authorization from Canada. Ontario submitted the 1891 Legislation applied to Keewatin after 1912. The Plaintiffs submitted it did not.

[64] Canada submitted that federal legislation, passed in 1912 in respect of Indians when Keewatin was annexed to Ontario, had the effect of devolving all of Canada's s. 91(24) duties and responsibilities to Ontario.

[65] From a legal perspective I see my task as follows:

Question One

(a) To apply the principles of Treaty interpretation mandated by the higher courts;
(b) To consider the arguments of Ontario that the Plaintiffs' submissions do not square with Constitutional reality and should be rejected for that reason; and
(c) To consider the effect of the annexation of Keewatin to Ontario in 1912.

[66] Counsel for Ontario submitted that the answer to Question One should be Yes. Under Treaty 3 Ontario can unilaterally limit the Ojibway hunting rights by "taking up" lands in Ontario. A "Yes" answer to Question One would give effect to the mutual intention of the parties alleged by Ontario, including an Ojibway understanding and agreement that as time passed and development was authorized, their Harvesting Rights would be incrementally diminished. A

"Yes" answer would give effect to the Ojibway understanding alleged by Ontario that they were dealing, not with Canada, but with the Queen. Even if this Court finds Ontario could not "take up" lands in 1873, upon annexation of the Keewatin Lands to Ontario in 1912, it has been able to "take up" lands under the Treaty in all of Ontario. The 1891 Legislation extinguishing Treaty Harvesting Rights on lands "taken up" by Ontario applied in Keewatin.

[67] Counsel for the Plaintiffs submitted that in 1873 the mutual understanding and intention of the parties was that (away from the Dawson Route and CPR right of way), Canada would not allow the Euro-Canadians to significantly interfere with Ojibway Harvesting Rights, at least not without actively considering whether such interference should be allowed and giving federal authorization to allow it under the Treaty and s. 91(24). While the Treaty Commissioners understood that if Canada lost the Boundary Dispute, Ontario would be able, under s. 109, to unilaterally authorize development of lands within Ontario, they also anticipated and deliberately provided that if such development would significantly interfere with Harvesting Rights, Canada would be able to require the user of land to obtain authorization from Canada for that use before it could proceed with such development.

[68] Counsel for the Plaintiffs submitted that Ojibway Treaty Harvesting Rights in Keewatin are unaffected by the 1891 and 1912 Legislation. Canada did not intend the adverse effects of the Boundary Dispute imposed on the Treaty 3 Ojibway in the Disputed Territory to be applied to Keewatin, an area unaffected by the Boundary Dispute.

Question Two

> If the answer to Question One is "No" and Ontario cannot access the taking up clause in the Treaty, does Ontario nevertheless have authority under the Constitution to significantly infringe Treaty Harvesting Rights by meeting the criteria for infringement set out in *Sparrow*?

[69] Counsel for Ontario submitted that if it can meet the *Sparrow* test, Ontario can justifiably infringe Treaty Harvesting Rights. The doctrine of inter-jurisdictional immunity does not apply in the circumstances here.

[70] Citing the combined effect of the doctrine of inter-jurisdictional immunity and of s. 88 of the *Indian Act*, counsel for the Plaintiffs submitted that only Canada can justifiably infringe Treaty Rights if it can satisfy the *Sparrow* test; Ontario cannot.

[71] At this stage in the litigation, this Court is not being asked to determine whether Ontario has breached the Treaty. If the answer to Question 2 is Yes, Ontario will still have to meet the *Sparrow* test. If the answer to Question 2 is No, at the next stage it will still be necessary to determine whether Ontario's proposed activities constitute *prima facie* infringement of Treaty Harvesting Rights.

4. EURO-CANADIAN HISTORY 1758-1871

The Historical/Political Evidence

[72] In gleaning the perspective and understanding of the Treaty Commissioners at the time of the negotiations and signing of Treaty 3 in 1873, the historical and political evidence is relevant.

[73] Later in these Reasons, Alexander Morris' understanding of Canada's role vis-à-vis Indians under s. 91(24) is examined in the context of the 1873 Treaty negotiations and his mention of the Dominion in the Harvesting Clause.

[74] Morris would have had firsthand knowledge of the contemporaneous historical matters covered here. They are relevant to his and Canada's understanding and intent at the time the Treaty was made.

[75] Professor Milloy ("Milloy"), a Professor of History and Canadian Studies, was called to give expert evidence by counsel for the Plaintiffs. He was qualified as an historian with particular expertise in Canadian history and the history of the development of Indian policy in Canada. He provided context, not only with regard to the reasons for the assignment to the federal government of s. 91(24) of the Constitution, but also about the Treaty Commissioners' intent and their understanding of Canada's proper role vis-à-vis Indians/Indian lands.

[76] Professor Saywell ("Saywell"), a retired Professor in Canadian History, was called by counsel for Ontario and was qualified as "an expert in the political and Constitutional history of Canada, particularly as it relates to federalism and federal/provincial relations, including the period from Confederation to 1912." His evidence was given in advance of trial pursuant to Rule 36.

[77] Professor Vipond ("Vipond"), called to give evidence by counsel for Canada, was qualified as a political scientist who studies constitutions. He gave evidence about federal-provincial relations in the period following Confederation.

Factors Leading to Federal Control Over Indian Affairs

[78] In interpreting the Treaty, the history behind the placement of s. 91(24), Indians and Lands Reserved for Indians, under federal jurisdiction is germane to intent and understanding of the Treaty Commissioners in 1873.

1756 - Confederation

British Military Policies

[79] Milloy gave evidence about why the federal government assumed responsibility for Indians and Indian lands at Confederation, the perceived scope of s. 91(24) and the Treaty Commissioners' understanding in 1873 of Canada's role vis-à-vis Indians. That evidence was

pertinent to whether they deliberately mentioned the Dominion Government in the Harvesting Clause at least in part to protect Treaty Harvesting Rights.

[80] Milloy also provided background about the history of British/Indian relations in British North America, including the American colonies prior to the American Revolution. He said the Imperial government deliberately placed the administration of Indian Affairs under centralized control and kept it out of the hands of local colonists. It was a firmly established Imperial policy, informed by various factors and circumstances that he outlined during his evidence.

[81] He said that at the beginning of the Seven Years War, to further its North American military interests the British Imperial Government created a department in 1756 to cultivate good relations with the Indians. It had learned that the Indians would align with the French if they were treated poorly by the British. (Milloy, October 9, 2009.)

[82] Even after Quebec and Montreal fell in 1759 and 1760 and the British became militarily dominant in what had been New France, the defence of North America continued to be fraught with difficulty. Due to ongoing hostilities on the frontier, Indian Superintendent Sir William Johnson met with Indian tribes at Detroit in 1761, in an unsuccessful attempt to broker a peace arrangement. In 1763, Indian massacres of civilians and soldiers and attacks over several months on Forts Niagara, Pitt and Detroit, among others were causing panic across the frontier.

[83] The Board of Trade, the advisor to the Imperial Government on colonial matters, suggested that Britain's continuing difficulty in managing and recruiting North American Indians as allies was stemming from interference by local settlers and governments. It rejected a military approach, favouring "conciliating the minds of the Indians by the mildness of His Majesty's Government," and recommended that the Imperial Government interpose itself between the Indians and colonial governments/merchants/traders. It should manage its relationships with the Indians from the top, i.e., directly from Whitehall. Prevention of local interference in Indian matters, together with the recognition of Indian tenure to unceded lands and their preservation as Indian hunting grounds, would be the cornerstone of conciliation.

The Royal Proclamation of 1763

[84] The Royal Proclamation of 1763 that resulted from that recommendation included the following:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies … do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments… that no Governor or Commander in Chief in any of our other Colonies or Plantations in America … until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever,

> which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, **for the use of the said Indians**, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.
>
> And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained
>
> And We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.
>
> And whereas Great Frauds and abuses have been committed in purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians; In order, therefore, to prevent such irregularities for the future, and to the End that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, we do, with the advice of our Privy Council strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, we have thought proper to allow settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for us, in our name, at some public meeting or assembly of the said Indians, to be held for the purpose by the Governor or Commander in Chief of our Colonies respectively within which they shall lie. [Emphasis added.]

[85] Superintendent Johnson read the Proclamation to the collected Indians at Fort Niagara in August of 1764, setting out that the lands reserved to them as their hunting grounds would be protected from occupation by private persons.

[86] The procedures to be followed were fleshed out in subsequent Orders, notably Lord Dorchester's Instructions dated December 24, 1794, directing that treaty negotiations must be held in public with "great solemnity and ceremony" according to the customs of the Indians; that the Crown would be represented by the Imperial Department of Indian Affairs; an interpreter would be present; deeds of conveyance including a description of the lands being surrendered and other terms would be signed, witnessed and provided to all parties; and payments would be delivered "with the greatest possible notoriety."

[87] In summary, the elements of Imperial Indian Affairs management were: (1) exclusive Imperial jurisdiction in the colonies – conciliatory activities of the Indian Department, including diplomatic attention to tribal concerns; distribution of presents; negotiation of treaties; and, where treaties had been made, payment of annuities and protection of reserves; (2) exclusion of colonial governments from involvement in Indian Affairs; and (3) respect for tribal self-government.

[88] In British North America between 1763 and the early 1800s, the Imperial authorities kept direct control over Indian affairs, insulating the Indians from local interference. They prohibited settlers from dealing directly with Indians or taking possession of lands reserved to the Indians as their hunting grounds.

[89] The Imperial government reaped military benefits from the conciliation policy during the American Revolution and again in 1812, when the First Nations rallied in the defence of Upper Canada against the Americans.

[90] Milloy gave evidence that these Imperial policies were uniformly followed in Upper Canada (hereinafter "Ontario.") In the eastern portion of British North America (New Brunswick, Nova Scotia and Prince Edward Island), where Indians were not perceived as a serious military threat, they were not. In the Maritimes, some Peace and Friendship Treaties were made, which were not instruments of surrender but of peace. They provided for the cessation of hostilities; the return of captives; maintenance of good relations; non-molestation of settlers and continuation of various harvesting rights. Von Gernet conceded these treaties were used as precedents in some respects by the Treaty Commissioners in framing Treaty 3. (Milloy, October 9, 2009 at pp. 131-135; Von Gernet, December 4, 2009 at p. 19.)

[91] After the Napoleonic Wars ended in 1815, cost-cutting initiatives ensued as a result of widespread concerns in Britain about the high level of debt that had been incurred. At about the same time, British interest in its North American Empire was beginning to wane, partly as a result of its costs, and partly as a result of Britain's move from mercantilism to free trade (mentioned later in the section of these Reasons on Circumstances Leading to Confederation.) Saywell said (April 6, 2009 at p. 59) that after the War of 1812, England became increasingly unwilling to bear the costs of maintaining the military and the costs of Indians in Canada.

[92] However, the rise of the humanitarian movement provided a new impetus and rationale for continuing central Imperial control of Indian affairs. After British Parliament passed the anti-slavery law in 1833 (*Slavery Abolition Act 1833 (U.K.)*, 3 & 4, William IV c. 73), the large British humanitarian community founded the Aborigines Protection Society in 1837 to protect and foster the interests of the indigenous peoples throughout the Empire.

[93] Milloy's evidence on October 9, 2009 contains the following at pp. 80-81, 83, 87:

> …One of the things that Wilberforce is reputed to have said as he left the chamber that night [the night that they passed the anti-slavery law], he supposedly turned to his colleague and said, "Who do we liberate next?"… "What's the next …challenge?" We have the formation of these societies in Great Britian that are terribly interested in what's going on in terms of the relationship between the Empire and its manifestations overseas, the settlers, business people and the treatment of indigenous people, and really want that to be humanitarian, really want that to be benevolent for First Nations people in the various colonies.

[94] The humanitarian approach that Milloy described as a "policy of civilization" involved the continuation of the making of presents, an increased emphasis on education (arming the Aborigines with skills in reading, writing and arithmetic), the encouragement of agriculture and

other European modalities aimed at promoting Indian self-sufficiency. (Milloy, October 9, 2009 at pp. 104-106)

[95] Milloy gave evidence that in 1837, after a Parliamentary Select Committee on the Aborigines of the Empire held hearings to develop principles of conduct for the Empire, it concluded that the threat of colonial governments to indigenous people increased in proportion to their powers. The Committee concluded that colonial legislatures could not be trusted to treat indigenous people fairly. It recommended that the Imperial government continue to stand between the Indians and colonial governments/settlers. The humanitarians persuaded Imperial officials that the central government should maintain control over Indian affairs to ensure protection of Aboriginal people against exploitation by colonial governments and their constituents.

[96] Reserve creation, where the "alchemy" of transforming "uncivilized" Indians into productive yeoman farmers could be carried out, was an important means of implementing the policy of civilization. (Milloy, October 9, 2009.)

[97] Counsel for Ontario relied on the evidence of Von Gernet that in Ontario as settlement progressed, the Imperial Government transferred responsibility for Indian matters increasingly to the local government.

[98] Counsel for the Plaintiffs submitted that in Ontario until 1860, Imperial authorities continued to insulate the Indians even after it achieved responsible government. Milloy gave evidence that in the late 1840s, there was a dispute between Euro-Canadians and Ojibway over mining on unsurrendered lands north of Lake Huron and Lake Superior. The colonial government of Ontario disputed the Ojibway claims to territorial rights. The Governor General, Lord Elgin, acting on the advice of Imperial Indian Affairs, ordered Imperial officials to conduct an investigation into the validity of the Indian claims. The Vidal Anderson Commission gathered information at his request and then reported that the claims of the Indians were legitimate. A treaty was negotiated.

[99] In cross-examination on January 20, 2010, Chartrand conceded the Imperial role, as follows:

> Q. … what we see …is the Imperial officials in relation to an imperial matter, where there's the potential of colonial interference, initiating an investigation to first ascertain …the facts on the ground…?
> A. Yes. And this was in specific response to information, this report, 1847 report, that had come to [Lord Elgin's] attention, that he found unsatisfactory.

Circumstances Leading to Confederation and the Post-Confederation Treaties

British Economic Policies

[100] Milloy gave evidence that much of the impetus for Confederation resulted from a wholesale change in British economic policy from a mercantile to a free-trade structure,

signalled in 1846 by the repeal of the Corn Laws. That change had huge economic/political implications for the people who lived in Britain's remaining North American colonies.

[101] In a mercantile economy, colonists were required to send/sell all their produce to the mother country and to purchase all their goods from it. If it cost them $1.00 to produce and ship a quantity of goods from Nova Scotia to London, and a producer in the United States could produce and ship the same for $.50, the British would impose a tariff of at least $0.51 to make the American goods more expensive than the colonial goods. That tariff was thought to be beneficial to the colonial merchants because they would not otherwise have been able to compete with non-colonial producers. Since Britain required the shipment of all colonial goods to it, it had no need to purchase goods produced elsewhere. It could use its huge trade surpluses to cover the costs of its Empire, including defence, administration and Indian expenses.

[102] However, as Britain moved from an agricultural to a largely commercial/industrial economy, goods with tariffs applied to them became more and more expensive for members of its increasingly urban-based workforce, people who did not grow but purchased their own food. When they demanded higher wages to meet their costs, industrialists lobbied the government to abolish tariffs and allow the inflow of the cheapest possible food/commodities. Free trade legislation was eventually passed.

[103] Once free trade was implemented, the trade surpluses inherent in a mercantile economy were no longer available to pay the costs of Empire. Once the economic benefits of Empire were diminished, lobbyists (most notably members of the Little England Movement) urged the British government to trim the costs of Empire, including the costs of conciliating and civilizing the Indians.

[104] Saywell said (April 6, 2009 at p. 60) that "with the triumph of free trade, the end of mercantilism, the British forced [us] to pay for the Indians ourselves."

[105] Milloy gave evidence that at the same time, in some areas, as the settler populations were increasing, settler militias were diminishing the need for military alliances with the Indians. Nevertheless, until 1860 in Ontario, Britain continued to negotiate and honour treaties and to protect Indians from frauds and abuses by local settlers and governments. If Indians didn't choose to become civilized, its policy was to allow them to follow their old ways.

Euro-Canadian Contact with the Treaty 3 Ojibway from the Euro-Canadian Perspective

The HBC Territories

[106] Milloy gave evidence that in Britain from the mid to late 1840s through the mid-1860s, there was increasing concern about the HBC Territories. While reluctant to pay defense and other costs for the reasons just mentioned, Britain nevertheless wanted to preserve them as British territories. The HBC held Rupert's Land under its 17th century Charter; the Northwest Territories were held by it pursuant to Imperial trading licences.

[107] During the 1850s, the Imperial and Financial Society that had purchased the HBC shares, Charter and licenses unsuccessfully lobbied to establish a colony in the HBC Territories and for Great Britain to assume the costs. To use Milloy's words (October 9, 2009), at that point, the "question of administration" of Rupert's Land and the Northwest Territories became "a crisis of administration."

[108] At the same time that Britain was facing concerns about the costs of Empire within British North America, especially within the political class in Ontario, there was a marked increase in interest in the West, which was now being perceived as an area with settlement and resource development potential. George Brown ("Brown"), reform politician and publisher of *The Globe*, began to publish editorials and letters about Canada's destiny/expansion to the West. The Toronto Board of Trade became involved. Other supporters of western expansion included William McDougall, publisher of *The North American*, as well as early members of the Liberal Party. In Canada East, Cartier was a promoter.

[109] By 1858, Alexander Morris (who was to become the lead Treaty Commissioner in 1873) was already making speeches characterizing the HBC as an obstacle to progress, and promoting westward expansion and Confederation. Morris' 1858 speech, reproduced in Ex. 130, *Nova Brittania* at pages 29-30 and 32, contains the following:

> Will the gathering of a few peltries compensate for the withdrawal of such a region [a paradise of fertility] from the industry of our race? Assuredly not. … It will suffice to express my confident belief that Canada has only to express in firm but respectful tones her demands to that vast territory and those will be cheerfully acceded to by Great Britain … [a] comprehensive appreciation of the requirements of the country, and a proper sense of the responsibilities to be assumed in regard to the well being of the native and other inhabitants…
> [Emphasis added.]

The Hind & Palliser Expeditions

[110] Given the wakening interest in the West, in 1857 both Britain and Canada West sent expeditions, headed by Palliser and Hind respectively, to investigate and gauge the potential of the HBC Territories.

[111] Before 1857, the only Euro-Canadian presence in the Treaty 3 area was the HBC, with permanent posts at Rat Portage (now Kenora, at the north end of the Lake of the Woods) and Fort Frances (on the Rainy River.)

[112] Von Gernet in his report Ex. 44 set out the motivation for the Palliser expedition sent by Britain:

> Her Majesty's Government being anxious to obtain correct information with respect to the facilities or difficulties of communication between the Canadas and the country west of Lake Superior and north of the 49th parallel, determined early in the year 1857 to send out an expedition to examine the present route of travel with a view to ascertain whether it could be either shortened or rendered less formidable by any reasonable outlay, and whether if such an expenditure of capital were devoted to that object there was any prospect of a result favourable to emigration or agriculture commensurate with the sacrifice.

[113] Chartrand gave evidence that members of both the Palliser and Hind Expeditions filed reports on the feasibility of constructing an immigrant travel route from the western shore of Lake Superior to the Red River settlement. Palliser concluded it would be cost prohibitive.

[114] Simon Dawson ("Dawson"), who was to become another Treaty Commissioner in 1873, first came into contact with the Ojibway living in "the lands between" as a member of the Hind Expedition. At that time he reported on the possibility of building an immigrant travel route connecting Lake Superior to the Red River Settlement.

[115] In 1858, understanding that it would be unlikely that Britain would transfer the HBC Territories to the United Provinces of Canada alone, at hearings held in England to consider whether the HBC licenses should be renewed, Chief Justice Draper representing the United Canadas suggested that Canada would be a safe haven for the Territories if there were a Confederative deal. Britain eventually agreed that if a confederated Canada were brought into existence, it would transfer the HBC Territories to Canada, provided that Canada would agree to fulfill specified conditions, including "to protect the Indians within the Territories in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the Aborigines, and payment of the associated costs." [Emphasis added.]

1860: Transfer of Imperial Administration of Indian Affairs to the United Canadas

[116] Despite the resistance of the Imperial civil secretaries, in 1860 Imperial authorities relinquished control over Indian Affairs in the United Provinces.

[117] At that time, many of the personnel of the Imperial Indian Affairs Department transferred from the employ of the Imperial Government (the Civil Secretary of the Governor, the Senior Imperial Representative) to the employ of the United Provinces of Canada (the Office of the Crown Lands Department.) For instance, William Spragge ("Spragge"), mentioned later in the context of the Treaty negotiations, began his career in the Imperial Indian Department and moved to the employ of the United Canadas in 1860. In 1862, he became the Deputy Superintendent of Indian Affairs of the United Canadas. [After 1867, he transferred to the Canadian Indian Affairs Department, then part of the Department of the Secretary of State, where he would become the Deputy Superintendent of Indian Affairs of Canada, a position he held as of 1873.]

1861-1867

[118] In the 1860s, Canadian interest in the West remained strong. However, public affairs were dominated by the American Civil War, discussions about Confederation and political gridlock in the United Canadas.

[119] Vipond gave evidence (February 23, 2010 at p. 52) that the impetus for political consolidation included deadlock in the Upper Canadas, fear of American invasion (1864-1865 was the height of the Fenian raids), British unwillingness to financially support the Empire and the prospect of economic opportunity from western expansion.

[120] In 1864, concerns escalated about protecting the West against American aggression when a large number of Sioux warriors fled from the United States into southern Manitoba, with the American cavalry in hot pursuit.

The Lead Up To Confederation

Negotiations re Annexation of the West

[121] The evidence was uncontradicted that in British North America, there were differences of public opinion over the advisability of acquiring the HBC Territories. French Québec was ambivalent, the Maritime Provinces lukewarm to hostile. Nevertheless, Ontario pressed ahead.

Discussions re Jurisdiction over Indians / Indian Lands

[122] When the leaders of the Maritime Provinces met at Charlottetown in 1864 to discuss a possible maritime union, the United Canadians crashed the conference, advocating a broader union.

[123] At the Charlottetown and Québec Conferences of 1864, the groundwork for the creation of the Dominion of Canada was laid.

[124] Since Confederation was initially largely an Ontario initiative, the blueprint for Canada was based primarily on the Ontario experience. John A. Macdonald and others from Ontario proffered the first suggested division of powers.

[125] There was general agreement that Canada would be a federal state and that Parliament would have jurisdiction over matters of national concern, the local legislatures over local matters.

[126] There is no extant record of a debate or any other document that clearly explains why Canada took responsibility for Indians.

[127] Von Gernet reviewed the papers from the Charlottetown conference and found no mention of Indians. He located the first mention of Indians in documents from the Québec Conference held about a month later, in October 1864.

[128] Macdonald's papers from the Québec Conference, some of which are in evidence in this case, contain the handwritten words "and lands reserved for Indians" beside the word "Indians." From those papers it seems evident that the original resolution stating that "It shall be competent for the general legislature to pass laws" did not mention Indians. By the end of the conference, under the powers of "the general Parliament," "Indians and lands reserved for Indians" had been included as Number 29. (Ex. 1, Vol. 18, tab 884, "Resolution regarding the division of powers," October 29, 1864; Milloy, October 15, 2009)

[129] Milloy gave evidence that by the time of the Québec conference, there was general agreement that the annexation of Rupert's Land would take place when a confederated Canada

had been brought into existence. It was noted in the Québec Resolutions that the federal government would be responsible for making that happen.

[130] The final details of Confederation were negotiated at conferences held in London in 1866 and early 1867.

The Provenance of S. 91(24)

[131] Section 91(24) of the *BNA Act* of 1867 gave the federal government responsibility over "Indians and Lands reserved for Indians."

[132] Because Milloy could find no direct evidence in the historical record to illuminate the intentions of the Fathers of Confederation as to the meaning and intent of s. 91(24) and the rationale for its placement, he followed a standard historical approach, contextualizing an event within its larger surroundings. He considered two factors to be most relevant: (1) the availability of the HBC Territories; and (2) the existence of an Indian policy tradition dating from the mid-18th century to Confederation.

1. Availability of the HBC Territories

[133] Milloy opined that when Canada contemplated its new Western Empire and turned its attention to security and defence issues, given the strength and arms of the western tribes and the sparseness of Euro-Canadian settlement in the West, the Fathers of Confederation (just like their Imperial predecessors) considered Indians to be vitally important for strategic and security reasons.

[134] In addition, to convince Britain to transfer the HBC Territories to it, Canada was required to agree to protect the Indians who lived there. Resolution: Schedule B to the Order-in-Council dated June 23, 1870, admitting Rupert's Land and the North-Western Territory into the union, contained the following:

> … upon the transference of the territories in question to the Canadian Government, it will be the duty of the Government **to make adequate provision for the protection of the Indian tribes** whose interests and well-being are involved in the transfer.
>
> [U]pon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.
> [Emphasis added.]

[135] The 1868 HBC Deed of Surrender read in part as follows:

> And claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government, and the Company shall be relieved of all responsibility in respect to them.

[136] On October 9, 2009, Milloy gave the following historical summary with respect to the link between Rupert's Land and the placement of s. 91(24) at pp. 53, 58-59:

> A. Boiling it down to a summary, the imperial government was worried about the defence of the territory, and for those reasons I explained, would not take on its administration. The Hudson's Bay Company wanted out of the administration ... It was expensive, and there were growing doubts that they were able to defend the area.
>
> The Canadians – and by that I mean the … united Canadians… were willing to take it on as part of the – of part of the development of the Confederation scheme, largely for economic reasons as well.
>
> And so that meant that one had to decide where it went. And the only reasonable place to put it would be on the federal list. There are no colonies out there, and the federal government would be then best placed to develop administrative structures and facilitate its development.
>
> As one of the central challenges to administration and the development of that territory was the worrisome state of First Nations people there, particularly plains people south of the Saskatchewan River, as they were a considerable military force. It made sense as well the that s.91(24), or the responsibility for Indians and lands reserved for the Indians, would also be put on the … federal list. And that's where you get to – they think that's how this development with respect to Rupert's Land and the reorganization of the economic foundation of Empire and its political ramifications of Canada lead you directly to placing 91(24) on the list, on the federal list, rather than in any other place in the Constitution.

2. The Existence of Indian Policy Tradition

[137] To establish a model for the management of Indian Affairs, the Fathers of Confederation looked to the long established Imperial model that had been faithfully followed in Ontario dating back to at least the Proclamation of 1763.

[138] Milloy opined that the Fathers of Confederation understood that treaties were needed in the West to meet national priorities. Conciliation was crucial to nation-building.

[139] When s. 91(24), the assignment of "Indians and Lands reserved for Indians" was put on the federal list, it was assumed as a matter of national importance that relationships with First Nations should be administered centrally from the top of the organizational pyramid. Milloy said the placement of s. 91(24) represented a continuation of direct control of Aboriginal administration from the top, following a tradition of insulating/separating Indians from settler and local legislatures for strategic reasons, a "replication of a system of protection that allowed an honest broker…to stand between settlers…and tribal groups."

[140] Macdonald, Brown, Rose and Mackenzie (the second prime Minister) believed that the federal government should protect individuals and minorities against arbitrary acts by local governments.

[141] Professor Hogg [Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Vol. 1. (Toronto: Thomson Carswell, 2007)] writes at 756:

> The main reason for section 91(24) seems to have been a concern for the protection of the Indians against local settlers, whose interests lay in an absence of restrictions on the expansion of European settlement. The idea was that the more distant level of government, the federal government, would be more likely to respect the Indian reserves that existed in 1867, to respect the treaties with the Indians that had been entered into by 1867, and generally to protect the Indians against the interests of local majorities.

The Federal/Provincial Relationship

[142] The challenge for the Fathers of Confederation was to reconcile sovereignty with control over local affairs and to provide continuity with cherished Constitutional principles. (Vipond, February 23, 2010 at p. 55.)

[143] Vipond gave evidence that the centralists and provincial autonomists had two different visions of the federal/provincial relationship.

[144] Proponents of strong central government like Macdonald and Morris hoped to avoid the recent U.S. experience where a decentralized government had resulted in civil war. They wanted the federal Parliament to have the tools to enforce its will, including a power of disallowance. Section 56 of the *BNA Act* described the Imperial power of disallowance and s. 90 provided in effect that the federal government would have the same power vis-à-vis the provinces.

[145] At Confederation the centralists, including Macdonald, Morris and the majority of the members of the Euro-Canadian elite, disagreed with the provincial autonomists with regard to the hierarchy of governments or, to put it differently, whether the federal government was superior or whether the federal government and the provincial governments were equal when exercising their respective jurisdictions.

[146] Macdonald and Morris were of the view that the Dominion Government should be a superior government, and the powers of the provinces, delegated powers. The centralists wanted the federal government to be clearly sovereign. At the same time, they wanted local governments to have control over local affairs.

[147] Milloy gave evidence that Macdonald's centralist theories of federalism had their roots in Hobbsean political theory, which rejected the idea of multiple sovereigns and posited that to avoid conflict between sovereigns, one sovereign should have power to enforce its will. Macdonald [and Morris as *Nova Brittania* evidences] advocated a structure of distribution of powers similar to that of the Imperial government: control over the colonies and the power to intervene in colonial affairs generally not to be exercised unless mandated by Imperial concerns.

[148] Before Confederation, thinking about Canadian federalism had evolved to include a concept that distinct governments could serve the same Crown. The early idea of one monarch served by a single government had developed into the concept of multiple independent colonial governments with defined jurisdictions and responsibilities, drawing upon the resources of their own treasuries and responsible to their own electorates.

[149] The provincial autonomists did not view provinces as inferior to the federal government. From their perspective, the provinces derived their powers from the Queen, who was as much a representative of a province for provincial purposes as of Canada for federal purposes. They advocated that the sovereign constituent, the indivisible authority, was the Queen in the Imperial Parliament through the *BNA Act*. In their view, the two levels of government in Canada were independent and sovereign within the spheres granted to them by the *BNA Act*.

[150] Vipond summarized their perspective on February 23, 2010 at p. 63 as follows:

> The provinces are equally capable of self-government, fully clothed, independent legislative and governmental bodies; that federalism requires non-interference in areas not within a government's jurisdiction.

[151] Vipond gave evidence that the provincial autonomist's conception of relations between the federal government and the provincial government was that they were to be treated as if they were two foreign entities engaged in diplomacy. The fact that there was one Crown did not change the fact that they were two governments with different powers, different assets, etc.

[152] While the differences in vision between the centralists and provincial autonomists existed and became the source of major conflict in the 1880s and 1890s, both camps recognized that each level of government had a legitimate role to play. Even strong provincialists such as Mowat, Blake and Mills recognized that provincial jurisdiction in respect of matters such as education and lands was not so open ended that the federal powers could not limit the provinces' range of action. (Vipond, February 26, 2010 at p. 63.)

[153] As of 1867, three levels of government having various roles within any particular province were to serve the same Crown: the provincial governments, the federal government and in the background, the Imperial Government. The political players knew it was important to specify which government had jurisdiction to deal with which issues. If the Government of Canada made a contract with a private individual, the treasury of the Government of Canada would be called upon to "make good" on that contract. Government officials entering into contracts needed to clearly identify the government being committed to fulfill their terms (Saywell, April 6, 2009 at pp 61, 64-5, 67.)

Confederation - 1867

[154] Canada came into being upon Royal Assent to the *British North America Act* of 1867 on July 1, 1867.

Other Events After Confederation Relevant to the Parties' Understanding of Canada's Powers and Obligations to Indians in 1873

Establishment of a Canadian Department of Indian Affairs

[155] After Confederation, many of the same ex-employees of the Imperial Indian Department who had transferred to the Indian Department of the United Canadas in 1860 moved to the Indian Department of the Dominion of Canada. Under the *1868 Department of Secretary of State Act*, the Secretary of State became Superintendent General of Indian Affairs with responsibility for directing the management of Indian lands and Indians.

[156] From its inception, Canada/the Canadian Indian Department retained Indian Agents to work with the Indians at the local level and involve themselves in every aspect of Indian life, including distributing presents and annuities, assisting in establishing reserves, ensuring that agricultural implements and provisions were provided, schools were built and teachers were

hired and monitored. They reported regularly to Ottawa on the state of each band and communicated instructions from Ottawa to band members.

Other Developments

[157] Chartrand gave evidence that immediately after Confederation, Canada pursued negotiations with Britain and the HBC for the transfer of the HBC Territories.

[158] Before and from the time of transfer, there was uncertainty about the location of the boundary between Ontario and the HBC Territories.

[159] Chartrand in his report, Ex. 60, wrote the following at pp 305-307:

> At Confederation, the Province of Ontario was recognized to have the same boundaries as the former Province of Upper Canada). Lands to the north of Upper and Lower Canada, and of the later Province of Canada, were deemed to be included within Rupert's Land, the charter territory of the Hudson's Bay Company. The HBC claimed that its charter bestowed title to lands extending to the height of land defining the Hudson and James Bay watershed. However, the exact limits of this charter territory had been subject to long-standing colonial disputes between England and France dating to the 17th century. Attempts by the colonial powers to settle competing claims to land, such as the 1713 Treaty of Utrecht, did not provide definitive resolutions as France continued to challenge the HBC's (and England's) territorial claims.
>
> British colonial rule after 1763 largely ignored the issue, and by the 1791 creation of Upper and Lower Canada, the northern and northwestern boundary of Upper Canada was simply assumed to correspond to the main height of land separating the upper Great Lakes watershed from the Hudson and James Bay watershed. This assumption was maintained with the unification of Upper and Lower Canada into the Province of Canada, and with the creation of the Province of Ontario in 1867.
> …
> However, only a few years later, the Province of Canada would initiate historical and legal research and analysis challenging the long assumed validity of the HBC's charter territory claims. In 1857 the Commissioner of Crown Lands submitted a memorandum to the House of Assembly arguing that historical and legal evidence existed supporting potential rights of the former Province of Upper Canada to lands that were, by the mid-1850s, assumed to form part of the North-West Territories and under the HBC charter. The matter was referred to a Committee of the House of Commons appointed by Chief Justice Draper in May 1857 to conduct a formal enquiry to investigate the legal foundation of HBC's charter territory claims, and the extent of lands to which Indians west of Fort William had extinguished their title by the Robinson-Superior Treaty.
>
> At the time, the Province of Canada sought to challenge the interpretation of the 1670 Charter as conveying title to lands, and dispute the claim by the HBC that such title extended to the height of land defining the Hudson and James Bay watershed. While the Province of Canada did not develop a formal legal challenge to the HBC's claims, shortly after Confederation, the new Dominion government utilized the body of research and analysis compiled in the late 1850s, in its initial negotiations with the HBC for the transfer of Rupert's Land.
>
> Negotiators for the Dominion government challenged the territorial claims of the HBC to the effect that the southern boundary of its trading territory corresponded to the main height of land separating the Upper Great lakes watershed from the Hudson and James Bay watershed. As historian Morris Zaslow describes:
>
> > Among the grounds raised against the Company were the arguments that Canada had inherited the claims of the French Crown based on the discoveries of explorers like La

> Vérendrye or the establishment of posts at places like Abitibi; that the Company's charter did not automatically extend its territorial bounds as British sovereignty in North America was enlarged through the fortunes of war and diplomacy, but only through its own endeavours at occupying and settling territory; and that numerous acts of the British parliament and of the Crown subsequent to 1760 had extended and recognized the authority of Canada beyond the height of land.
>
> The Dominion Government and the HBC could not agree to the terms of the transfer, and the parties took their respective arguments to the British Colonial Secretary.
> [Emphasis added; references omitted.]

[160] Shortly after Confederation, to facilitate the passage of settlers through Canadian territory between Thunder Bay and the Red River Settlement, Canada started to build a series of primitive roads to connect the bodies of water, including Rainy Lake, Rainy River and Lake of the Woods located in Treaty 3 territory. After Canada put Simon Dawson in charge of its construction, it became known as the Dawson Route. Over the next several years, Canada built the infrastructure needed, as well as steamers to ply the waterways, and carts to carry travellers and goods over the land portions of the Route.

[161] Chartrand's report, Ex. 60, contains the following at pp. 52-53:

> Simon J. Dawson, who had been hired as a surveyor to the 1857 Hind-Gladman expedition and worked as a civil engineer in the Department, was placed in charge of supervising the construction of the main segment of route, from Fort William on Lake Superior to the Northwest Angle of the Lake of the Woods. This segment consisted of a 45 mile overland wagon road from present-day Thunder Bay to Lake Shebandowan (adjacent to but west of the Lake Superior watershed), and over 300 miles of navigation along a series of lakes and rivers from lower Shebandowan Lake to the Northwest Angle of the Lake of the Woods via Rainy Lake and Rainy River. The water travel portion of this segment included 11 Portages.
> [References omitted.]

1868

[162] Following Confederation, Macdonald addressed the use of the disallowance power in a memorandum dated 1868 that was ultimately adopted as an Order-in-Council. In it, he made it clear that even he believed the use of the disallowance power should be constrained/confined to situations where a province either exceeded its jurisdiction or interfered with a matter of interest to the whole Dominion. In the first decade following Confederation, for the most part it was used to confine the provincial governments to their jurisdictions. (Vipond, February 26, 2010, pp. 47-50. Also Ex. 131, "Disallowance Correspondence.")

[163] Vipond gave evidence on February 26, 2010 with regard to that 1868 policy memorandum at pp. 46-47 as follows:

> Q. … disallowance is interesting [in] that it gives us actually an insight into the political thought around what is the relationship between the federal and provincial government and how should that be policed?
> A. That's how I've treated it.
> Q. …here we actually get an insight into the political mind?
> A. Yes.
> …

> Q. …in the second paragraph at page 61… the role that the federal government will play vis-à-vis the provinces is analogous to the role that the imperial government previously played vis-a-vis the individual colonists?
> A. That's the way I've described it in my work, yes, as an analogy.
> [Emphasis added.]

[164] In 1868, with a view to making recommendations to ensure problem-free construction, Dawson met with the Ojibway around Fort Frances. On April 20, 1868, in a Report [to Ottawa] On The Line of Route Between Lake Superior and the Red River Settlement (Ex. 45 at p. 261), he described their social organization, character, customs and economic practices:

> ... They are very intelligent and are extremely jealous as to their right of soil and authority over the country which they occupy ...
>
> The chief danger which could arise on coming into unfriendly relations with Indians … would be from having large parties of workmen in the vicinity of their encampments ... as a rule, extreme prudence will always have to be observed by the officers in charge of men to keep them from coming in contact with the Indians...
>
> In appearance, these Indians are tall and well formed and, in bearing, independent; sometimes, even a little saucy, but, in their intercourse with strangers, they are hospitable and kind. Their morality is said to be of a high order…
>
> They are, in general, keen traders, and seem to know the value of what they get and give, as well as any people in the world. Some of those who assemble at Rainy River for the sturgeon fishing, in summer, come from Red Lake in the neighbouring state of Minnesota, where they possess hunting grounds; and, among these latter,are some that have been parties to treaties with the United States for relinquishing certain tracts for settlement, for which they are now in the receipt of annual payments. The experience they have thus gained has rendered them expert diplomatists, as compared to Indians who have never had such advantages, and they have not failed to impress on their kindred and tribe, on Rainy River, the value of the lands which they hold on the Line of Route to Red River ...
>
> Any one who, in negotiating with these Indians,should suppose he had mere children to deal with, would find himself mistaken. In their manner of expressing themselves, indeed, they make use of a great deal of allegory, and their illustrations may at times appear childish enough, but, in their actual dealings, they are shrewd and sufficiently awake to their own interests, and, if the matter should be one of importance, affecting the general interests of the tribe, they neither reply to a proposition, nor make one themselves, until it is fully discussed and deliberated upon in Council of all the Chiefs.
>
> The Chiefs are fond of asking any travelers, whom they believe to be of importance, to attend a Grand Council...
> …
> All this goes to show a certain stability of character, and the degree of importance attached to what they say, on such occasions, themselves, as well as to what they hear from others. The word of the Chiefs once passed, too, seems to be quite reliable, and this augurs well for the observance of any treaty that may be made with them ...
>
> For my own part, I would have the fullest reliance as to these Indians observing a treaty and adhering most strictly to all its provisions, if, in the first place, it were concluded after full discussion and after all its provisions were thoroughly understood by the Indians, and if, in the next, it were never infringed upon by the whites, who are generally the first to break through Indian treaties.
> …
> From what I have said, I trust it will be seen that some sort of a treaty should be arrived at with the Indians. They are, as I have stated, desirous of seeing the communication opened, believing that it

> will conduce to their advantage, and I think a treaty with them should, in the first instance, be confined to this one point, namely, RIGHT OF WAY. This they expressed their willingness to accord many years ago, but the question of relinquishing land for settlement was always taken by them *en delibre*. In this latter respect, what they are afraid of is, that settlers would interfere with the fisheries, from which they derive their chief means of subsistence, and I think it would, in the first instance, be imprudent to introduce settlement in the particular section which they occupy. The first great point is to get the communication opened, and the first treaty should be confined, as I have said, simply to *right of way*. By combining it with the land question, surveys of townships for settlement, reserves for the Indians, and so forth, complications might arise which would prove embarrassing. [Emphasis added.]

1869

[165] In an 1869 report (Ex. 1, Vol. 4, tab 53), Dawson wrote:

> Although the principal line of traffic at one time passed through their territory, they have for half a century but little intercourse with the white man. Missionaries have made no impression upon them and, in many respects, they have shown themselves to be less amenable to the influences of civilization, than Indians usually are. They, in fact, take pride in maintaining their distinctive Indian character, are deeply imbued with traditions of what they believe to be an honorable past history, and would look with disdain on any community becoming christian.
>
> They have a sort a government, consider themselves great *braves*, and occasionally send war parties to fight the Sioux on the plains. The international boundary line passes through their territory, and some of them live on the United States side and some on the British. The permanent residents, however, are almost entirely on the British side, those from the United States making their appearance in considerable numbers only in the summer, during the fishing season. The country on either side is in a state of nature, wild and unsettled.
>
> They are sufficiently organized, numerous and warlike, to be dangerous if disposed to hostility; and standing as they do in the gateway to the territories to the North West, it is of the highest importance to cultivate amicable relations with them.
>
> One of the first necessary steps to be taken, will be to arrive at a distinct understanding as to Right of Way, and have the same embodied in a formal treaty. …
> …
> On the opening of the communications, last year, the chiefs of the tribe sent one of their number, attended by a party of his followers, to Fort William, to ascertain what was being done, and to learn the intentions of the Government in regard to opening the communication. No information, on the subject of his enquiries, could at that time be given to him, but the fact of the tribe having sent such a messenger, and for such as purpose, shews [shows] the deep interest which they take in the present movement. They would be keenly alive to any imagined slight in opening a highway, with regard to them, through a territory of which they believe themselves to be sole lords and masters, and to which, if a lengthened period of occupation can give a claim, they have unquestionably some title. [Emphasis added.]

[166] Dawson noted that the Treaty 3 Ojibway were "very different from the timid and cringing creatures who are now the sole representatives of the Indian Race in the back settlements of Canada…." (Lovisek report, Ex. 28 at p. 33.)

The 1869 Demand Document

[167] The Ojibway Chiefs the Fort Frances and the Lake of the Woods Chiefs prepared a demand document ("the 1869 Demands") (Ex. 4, p. 131) on January 22, 1869, which reads as follows:

> We, the undersigned leaders of the various bands of Indians in the vicinity of Fort Frances and the Lake of the Woods, will agree to make the Treaty with the Queen's Commissioners, at the following conditions.
> 1st That every chief gets a pay of fifty dollars every year.
> 2nd That every member of Council gets a pay of Twenty dollars every year.
> 3rd That every first soldier of each chief gets a pay of Fifteen dollars every year.
> 4th That every second soldier of each chief gets a pay of Fifteen dollars every year.
> 5th That every heads of Indian men, women, and children gets a pay of $15 for the first payment and every subsequent year ten dollars.
> 6th That every head of Indians gets a suit of clothes from the 1st Chief to the last Indian according to their rank every year.
> 7th That every chief gets a double barrelled gun every four years, and every man gets one single barrel gun during the same period.
> 8th That every chief gets 100 lbs of Powder, three hundred lbs of shot, flints & caps, according to the quantity of munitions every year.
> 9th That every chief gets a yoke of oxen, plough, harrow, and utensils for cultivation every 4 years.
> 10th That every chief gets ten cows and eight [sic] one bull every eight years.
> 11th That every chief gets a team of Horses, Buggy and Harness every four years.
> 12th That every chief gets a she and a he lamb, and one sow and one Boar every year.
> 13th That every married woman gets fishing twine and cord line to make four nets every year.
> 14th That every chief gets a set of carpenter's tools, pitsaws included every six years.
> 15th That every chief gets one cooking stove and utensils every 4 years.
> 16th That every member of the Council, first soldier & second grade soldier gets one Box stove every 4 years.
> 17th That every chief gets 20 sacks of Flour, 10 Barrels of Pork, 1 Big Chest Tea and 100 lbs sugar every year.
> 18th That every chief gets 30 bushels of wheat, 20 bushels Peas and various kinds of Garden seeds every 8 years.
> 19th That every chief gets one ox every year, and rations for all the Indians during the time of the payment each year.
> 20th That all the aforesaid demands should last, if granted, for ever, that is to say during all the time that an Indian will be alive in this part of the country.
>
> For the Land Reserves of the various bands of Indians will be treated verbally from we the undersigned and the Queen's Commissioners (Here follow the marks of the chiefs, named below).
>
> Indian Demands as Terms of Treaty, January 22, 1869, Ex. 4, p. 131

[168] At trial there was conflicting expert evidence as to whether the 1869 Demands were made in relation to a right of way or a broader cession of lands, and whether they were given to any representatives of the Canadian Government before they were presented (or re-presented) to the Treaty Commissioners on October 2, 1873 during the 1873 negotiations.

[169] Von Gernet and Chartrand opined that the 1869 Demands related to a complete treaty of cession. They reasoned that if they did not relate to a larger area, the Ojibway would not have

asked for reserves. They opined that the 1869 Demands were not presented to representatives of Canada before October 2, 1873.

[170] Lovisek opined that the 1869 Demands, made only by the Chiefs in the vicinity of the Dawson Route/Right of Way and not from throughout the whole Treaty 3 area, related to a right of way. She said the Ojibway were requesting reserves in the area of the right of way because they wanted to ensure their sturgeon fishing and garden areas were safeguarded for their own exclusive use.

Progress on the Construction of the Dawson Route

[171] In a report to the Minister of Public Works dated May 1, 1869, Dawson noted that with the aid of the Indians, a line practicable for a road from Fort Garry to the Lake of the Woods had been located.

[172] On August 13, 1869, the Chief Engineer of Public Works reported [Ex. 1, Vol. 4, tab 59] to the Civil Engineer at Ottawa that that road was under construction.

Insurrection at the Red River

[173] Once it became clear that Rupert's Land and the North-West Territory would soon be admitted into the Dominion of Canada, Canada passed the *Temporary Government of Rupert's Land Act, 1869*. In it, William McDougall was appointed Lieutenant-Governor of the "North-West Territories" and instructed to familiarize himself with the situation on the ground before the transfer, then scheduled for December 1, 1869.

[174] In October 1869, a number of Métis protesters including Louis Riel resolved to block his entry to Fort Garry and proclaimed the establishment of a provisional government. (Von Gernet report, Ex. 44, at p. 37-39; also Chartrand's report, Ex. 60 at p. 58.)

[175] Chartrand's report, Ex. 60, contains the following:

> At pp. 52-53:
> …As an agreement between the Dominion government and the HBC was apparently settled and a transfer planned for December 1, 1869, the question of title to lands was further complicated by two intervening developments. First, in a speech from the throne on November 3, 1869, the Province of Ontario determined to launch formal inquiries into determining the true location of the northwestern boundaries of the province, issues that had been raised in relation to original inquiries by the Province of Canada in 1857 and during 1868-1869 negotiations between the Dominion government the HBC for the Rupert's Land transfer. Second, by 1869 the lack of recognition for Métis land and cultural rights in the Rupert's Land transfer negotiations had raised serious concerns among some Métis leaders at Red River. As the transfer appeared imminent, Louis Riel and other leaders initiated an armed insurrection at Red River in the fall of 1869.
>
> At pp 307-308:
> The settlement with respect to the transfer of title of Rupert's Land did not include a legal determination of the location of the HBC's southern boundary. Ontario had a clear interest in having this issue resolved since it had inherited the western and northern boundaries of 'Canada West' / Upper Canada. As Zaslow elaborates:

> The impending transfer made the question of the western and northern limits of Ontario a timely one for the government of the new province. The Speech from the Throne of November 3, 1869, in the Ontario legislature mentioned the desirability of defining Ontario's boundary in view of the Dominion's forthcoming succession to the Hudson's Bay Company's estate.
>
> [References omitted]

[176] In a letter dated December 17, 1869 to the Minister of Public Works (Ex. 4, p. 133, tab 61], Dawson expressed concern that "the people now in insurrection at the Red River Settlement might endeavour to excite a feeling similar to that by which they are themselves actuated among the ... Indians on the Line of the Route." He recommended that Canada should station "a cautious and prudent agent at Fort Frances," in the hope that "keeping up a friendly intercourse with the Chiefs would frustrate any attempt to tamper with them" and he suggested that Pither, a former HBC employee who had spent many years among the Indians, be sent to Fort Frances "as soon as possible" to "keep up friendly relations with the Indians and disabuse their minds of any idle reports they might share in the meantime."

[177] I note that in essence, Canada was being urged to covertly appoint Pither as an Indian Agent in the Treaty 3 area even before a treaty had been signed.

1870

[178] The Secretary of State and Superintendent of Indian Affairs, Joseph Howe ("Howe"), accepted Dawson's recommendation. On January 6, 1870, Dawson wrote Pither (Ex. 4, p. 135) instructing him "to establish and keep up such intercourse with the Indians who resort to that place [Fort Frances] as will ensure a continuance of friendly relations between them and the Government" and to lay the groundwork for a treaty:

> In the natural course of things a treaty must soon be made with the Indians and negotiations to that end will likely be entered into early next summer. In the meantime, you can ascertain what they particularly desire and impress upon the Chiefs that they will be liberally and fairly dealt with as the Indians ever have been within British Territory.
> [Emphasis added.]

Dawson warned Pither about possible attempts by insurgents at the Red River to enlist the Treaty 3 Ojibway to their cause:

> The point above all others on which you will have to exercise vigilance is the risk of their being tampered with by emissaries from the insurgents at the Red River Settlement …

[179] Howe also wrote Pither on March 11, 1870 (Ex. 4, p. 136) about his "delicate and confidential mission," instructing him to "secure a favourable reception for the Government Commissioner on his arrival" and to represent the views of the Government of Canada to the Ojibway. He emphasized security concerns:

> The unfortunate occurrences at Fort Garry during the months of November and December past have led the Government to the conclusion that it was desirable that some person of experience and influence with the Saulteaux Indians in the neighborhood of Fort Frances should be at that place when the Chiefs assemble there in the Spring, in order to keep up a friendly intercourse with them and disabuse their minds of any idle reports they might hear as to the views and intentions of the Government of Canada in reference to them. [Emphasis added.]

[180] On April 23, 1870, Mr. Weymess Simpson, formerly an HBC trader but by then the MP for Algoma, wrote to Howe on April 23, 1870 (Ex. 4, p. 138), proposing that he [Simpson] be appointed to negotiate a right-of-way agreement with the Ojibway:

> I am aware that for some years the Indians of that part of the country have been anxious to know why the Government have been making roads through their lands, and knowing as I do, that this tribe have always been most turbulent and hard to manage, I think the time has arrived to conciliate them and **make a treaty for the right-of-way** to the North-West Territory. …
> [Emphasis added.]

[181] In May 1870, Howe gave Simpson narrower instructions, i.e., to ensure that the Ojibway allowed Canadian troops, led by Colonel Wolseley ("Wolseley") and already on their way to quash the ongoing Red River rebellion, to cross the Treaty 3 territory. Howe wrote, "The Government have reason to believe that Mr. Pither has been entirely successful with the Indians that they are now very favourably disposed towards the Canadian Government."

[182] When Wolseley and his troops arrived at Fort Frances a few weeks after Simpson had met with the Ojibway, he described meeting Crooked Neck, the principal chief of the Ojibway, ("a hideous old fellow," "a cunning old savage"):

> … [H]e [had] refused to accept the presents that Mr. Simpson had brought for him, such as gaudy red shirts and coats and caps, just the thing to catch the eye of an Indian, and please his fancy. "Am I a pike," said he with virtuous indignation, "to be caught with such a bait as that? Shall I sell my land for a bit of red cloth? We will let the pale-faces **pass through** our country, but we will sell them none of our land, nor have any of them to live amongst us."
> Ex. 44, Von Gernet's report, pp 65-66:

[183] Huyshe, who accompanied Wolseley, wrote the following (Ex. 1, Vol. 4, tab 104):

> Although I do not think it possible that they could ever combine in any large numbers for such a purpose, yet there is no doubt that 100 determined men might have inflicted tremendous loss on the troops with comparative impunity; for, thoroughly acquainted with the vast network of lakes, they could have fired on the boats as they passed through narrow channels, or blocked up portages, and done much mischief in a variety of ways, while to have attempted to pursue them through the woods and lakes would have been madness. They move about in the neatest possible little birchbark canoes, just large enough to hold three men, and so light as to be portaged by one man with ease for long distances.

[184] In his report (Ex. 4, p. 145) about that June meeting [not written until August 19, 1870], Simpson made a number of pejorative comments about the Ojibway. He noted they had resisted efforts to Christianize or "civilize" them, and had maintained their way of life. They were quite "incapable of understanding gratitude." He emphasized they posed a real security threat:

> By the night of the 19th about 1500 had collected (that is men women and children) … These people if ill used or provoked would become a most serious bar to the settlement of the North West and could prevent any but strongly armed parties from going through their lands.
> [Emphasis added.]

He theorized that the Métis and Indians at the Red River had been tampering with the Ojibway:

> However I found they would not work and would not act as guides to the Troops. The Half-Breeds & Indians of Red River had been tampering with them telling them that the Troops were going to the

> Settlement to take their lands from them by force & advising the Rainy Lake Indians not to assist the soldiers make any treaty or receive any presents this year.

[185] In his report, Ex. 60, Chartrand noted that Simpson in his report to Howe (Ex. 4 at pp. 145-146) had presented a verbatim or near verbatim quote of the Head Chief:

> The head chief said "I do not intend to try and stop the Soldiers from passing through my Lands on their way to Red River, but I expect a present and if Mr. Dawson is to make roads through our country I expect to be paid for the right of way. The surveyors burn our woods and we know that when they once come settlers will follow. We have consulted and have come to the determination of asking the Government for the following, that is, $10[.00] per head each man woman and child per annum, to last as long as the sun shines and a present of a 10 bags-- 50 Bls flour 7 half barrels pork or lard 2 cases tea 2 cases tobacco, to be divided as [at] a feast at the time of the annual payment of $10.00 per head. That **we expect an answer to our demand sent to Mr. Pither during the winter, so that we may know how to act and when to assemble for the payment. For this we are willing to allow the Queen's subjects the right to pass through our lands to build and run steamers, build canals and railroads, and to take up sufficient land for building for Government use, but we will not allow farmers [*to settle*] on our lands.** We want to see how the Red River Indians will be settled with, and whether the soldiers will take away their lands, we will not take your presents, they are a bait, and if we take them you will say we are bound to you…" [Emphasis added.]

[186] Simpson advised the Ojibway that they were demanding too much, an amount he thought was sufficient to pay for their lands in full, not to pay for a mere right of way.

[187] Chartrand's report, Ex. 60, contains the following at p. 93:

> By 1870, following two years' experience with the construction of an immigrant travel route to Red River, the Ojibway understood that Simon Dawson was directly responsible for its construction. Furthermore, the Chief who addressed Wemyss Simpson at Fort Frances in June that year, indicated that he expected that some lands along the Dawson route would be required "for Government use". The terms presented for a permanent right-of-way agreement were also understood to being presented to this "government". In documents alluding to the Chief's address, the specific identity of this government is not explicitly detailed: available records do not allude to the Chief as referring explicitly to a "Dominion government", but instead document references to a generic government.

[188] After the Red River insurgency was resolved, the Northwest Territories and Rupert's Land were finally transferred to Canada effective July 15, 1870. The *Manitoba Act* came into effect the same day. (Von Gernet's report, Ex. 44, at p. 37-39.)

[189] Chartrand in his report, Ex. 60, wrote the following at pp 307-308

> The resolution of the Red River rebellion included a negotiated settlement for the creation of the Province of Manitoba, within a land mass that continued to be officially assumed as forming part of the North-West Territories. The original boundaries of Manitoba comprised a relatively small area, centred around the Red River settlement. As a post-Confederation creation of the Dominion government, the Province of Manitoba was not deemed to have the same constitutional status as the four founding provinces. One of the key differences between Manitoba and the original provinces created by the 1867 BNA Act concerned jurisdiction over natural resources:
>
> > While Manitoba became technically a province, it received a kind of special status in reverse. Land and other natural resources remained under the control of central authorities. Canada could thus develop the North-West in an imperial way...
>
> [References omitted.]

[190] Unlike the original four provinces, upon becoming a province and until 1930, Manitoba did not stand to receive the benefit of revenue from the sale of land within its boundaries. The federal government retained administration and control of Crown lands in Manitoba, Saskatchewan and Alberta until 1930, when they were granted powers equivalent to those enjoyed from 1867 by the original provinces under s. 109.

[191] After the July 15, 1870 transfer, the HBC retained its fur trading posts and continued to do business with the Ojibway in the Treaty 3 area.

[192] As noted earlier, when Canada acquired Rupert's Land and the Northwest Territories, the location of the border between the Territories and Ontario remained uncertain. The extent of the HBC lands had never been tested in court. Had HBC's claims that Rupert's Land extended to the height of land/sources of all rivers flowing into Hudson's Bay been accepted, Ontario would have been confined to the St. Lawrence-Great Lakes drainage basin (Saywell report, pp. 7 and 12.) However, Ontario was claiming that the extent of the HBC Territories was more limited and that its western boundary was located as far west as the forks of the Saskatchewan River.

[193] The portion of the Treaty 3 lands subject to the Boundary Dispute/the Disputed Territory was west of the height of land.

[194] In the summer of 1870, Adams G. Archibald ("Archibald") was appointed Lieutenant-Governor of Manitoba. On August 2, 1870, Canada passed an Order-in-Council approving preliminary instructions (Ex. 4, p. 143) addressed to Archibald, including the following:

> You will also make a full report upon the state of the Indian Tribes now in the Province, their numbers, wants and claims… [to] be accompanied by any suggestions you may desire to offer with reference to their protection and to the improvement of their condition.
> [Emphasis added.]

[195] On November 12, 1870, Archibald described "the land between" in a letter (Ex. 1, Vol. 4, tab 100) to Joseph Howe:

> As regards the land, my journey to this Country has enabled me to form a judgment for myself and I have no hesitation, in declaring that I have never passed through a country so unmistakably stamped by the hand of God with a destiny of perpetual sterility.
>
> From the Shebandowan to the North West Angle of the Lake of the Woods the general character of the Country is a succession of rocky hills covered, when covered at all, with the shallowest possible soil, seldom exceeding two or three inches in depth. It was difficult to find anywhere a place where one could drive a tent peg, and I have been repeatedly foiled in finding in my camping ground enough soil to place a stick upright for holding a candle to read by. The wildest imagination can never conceive this to be a country fitted for settlement, or in which a population could be sustained by the produce of the Soil. The wood on these hills is of poor quality and of small dimensions and could not be utilized for any purpose.
>
> The only exception to the general desolation of this region is on the Rainy River, where a narrow belt described as of two or three miles in width skirts each side of the River.
>
> The river banks indicate a soil much like that of the prairie ground here and the timber growing on it is of better size than any to be found in the country to the east. But unfortunately these strips only extend a few miles, and that on the southern side of the river is American territory.

> So far therefore, as the question of the value of Indian claims depends on the character of the soil between the North West Angle of the Lake of the Woods and the Eastern shore of the Shebandowan, I should not consider the fee simple of the entire Country, for agricultural purposes, worth as much as 100 acres of the prairie of Red River.
> [Emphasis added.]

[196] In the fall of 1870, Dawson had several meetings with the Chiefs and leading men of the Ojibway at the Lake of the Woods and Fort Frances. On December 19, 1870, in a letter to Langevin, the Minister of Public Works (Ex. 1, Vol. 4, tab 103), he wrote:

> As I returned from Red River last fall, I had several meetings with the Chiefs and leading men of the tribe at the Lake of the Woods and Fort Frances. They expressed themselves as being quite open to treat **with the Dominion Government** for right of way, or the cession of their lands, under conditions to be agreed on. At Fort Frances, the principal chief, who no doubt gave expression to the sentiments of the whole tribe, for the matters of which he spoke had been much discussed among them, remarked that the Indians were not averse to entering into negotiations **with the Dominion Government**. We want, he said, much that the White man has to give, and the White man on his part wants roads and land, when we meet next summer you must be prepared to tell us where your roads are to pass, and what lands you require.
> [Emphasis added.]

On the assumption "that laws and regulations… in operation in respect to Indians … will be made applicable in this case and that these Indians will be treated as minors under the care and protection of the Government," Dawson recommended:

> that certain areas [in the area of the right-of-way] "which they have long occupied which are necessary to them in carrying on their fishing and gardening such as the Islands in the Lake of the Woods and their clearings at the Rapids on Rainy River …be set aside for their sole and exclusive use, with the reservation that such sections as might be required for public works may, at any time, be apportioned by the Government." [Also cited in Chartrand's report, Ex. 60, at p. 178.]

1871

[197] The winter of 1870-71 was harsh. After Dawson suggested that the Canadian government should provide assistance to the Ojibway, Archibald despatched James McKay (who later figured prominently in the 1873 negotiations) to the Treaty 3 area.

[198] McKay was a Red River Métis, the son of an Indian or Métis mother and a Euro-Canadian father. By reason of his background and Euro-Canadian education, he was able to act as a cultural intermediary between the Canadians and the Ojibway. At the time of the 1873 negotiations, he was a member of the Executive Council of the Legislature of Manitoba and a member of Morris' entourage. (Chartrand, December 15, 2009 at pp. 50-51.)

[199] Lovisek's report, Ex. 28, contains the following at p. 51:

> James McKay was of Cree, Scottish and French-Canadian ancestry who spoke English, French, Cree, Saulteaux and Sioux. He was president of the Manitoba Executive Council from 1871 to 1874, and a member of the Manitoba Legislative Council until the Upper House was abolished in 1876, and was the Speaker until 1874. McKay was later the Minister of Agriculture in the provincial government of Robert Davis from 1874 to 1878, and represented the Lake Manitoba district in the Legislative

> Assembly in 1877 and 1878. McKay would visit the Saulteaux at the Lake of the Woods region three times during the winter previous to 1873 treaty negotiations to encourage support for the treaty. Footnotes omitted.

[200] On February 18, 1871, the *Manitoban* newspaper reported (Ex. 1, Vol. 5, tab 114) as follows:

> The Hon. James McKay returned from Lake of the Woods on the evening of the 13th [of February]. A good cart road to NorthWest Angle had been so nearly finished when he left, that by next week it would be complete ... Among the workmen at present doing good service on the road, are a number of Indians from the vicinity of Lake of the Woods, who were, very wisely, given employment at Mr. McKay's suggestion …

[201] Lovisek's report, Ex. 28, contains the following at pp 50-51:

> On March 7, 1871 Archibald informed Howe that his assistant, Métis trader James McKay, recommended that the Government should tell the Indians of their plan to open communications on the Dawson Route and send a commissioner to deal with their claims. Unless this was done, the Indians would prevent passage of the mail and travelers. Archibald authorized McKay to inform the Indians that they would receive a reply from the Government in the spring. In an earlier correspondence of February 28, 1871, Archibald described McKay as: "better acquainted with the habits and wishes of the Indians of that region than any other person I am acquainted with, except, perhaps, Mr. Pither, of Fort Frances…"
> Footnotes omitted.

[202] During the winter and early spring of 1871, Archibald had been communicating with Pither about conditions on the ground. In March of 1871, Archibald recommended that Pither be formally retained as the Indian Agent at the Lake of the Woods. Since early 1870, Pither had been serving "confidentially" as an *ad hoc* Indian Agent.

[203] Chartrand opined that by the spring of 1871, the Treaty 3 Ojibway were likely aware that the conflict at the Red River had been peacefully resolved.

[204] Archibald sent a letter to Howe dated April 7, 1871, mentioning that Pither was of the view that the Ojibway would surrender the whole country for much the same price they would ask for a right of way. [Chartrand gave evidence in effect that Pither's impression must have been mistaken. He did not connect Pither's impression to knowledge of the 1869 Demands.]

[205] On April 19, 1871, based on Archibald's intelligence, Howe prepared a report to the Privy Council recommending offering treaty terms under which the Ojibway would "retain what they desired in Reserves at certain localities where they fish for sturgeon." He wrote as follows:

> … it is thought [they would] be willing to surrender, for a certain annual payment, their lands to the Crown. The American Indians to the south of them surrendered their lands to the Government of the United States for an annual payment which has been stated to the undersigned (but not on authority) to amount to ten dollars per head for each man, woman and child, of which six dollars is paid in goods and four in money.
>
> … It is also further submitted that it will add much to the usefulness of the Commissioner among[st] the Indian tribes if he be allowed to wear a[n] uniform without which they are slow to believe that anyone having the Queen's Authority can be sent to treat with them.

[206] The Dominion Government appointed Simpson (and later Dawson and Pither) to negotiate a treaty of cession. On May 6, 1871, Howe instructed Simpson (Ex. 1, Vol. 5, tab 131) as follows:

> The number of Indians assumed to inhabit this tract of country, is estimated at about 2,500, and the maximum amount which you are authorized to give, is twelve dollars per annum for a family of five, with a discretionary power to add small sums in addition when the families exceed that number. … It is desirable that you should be at Fort Frances not later than the middle of June, as the Indians usually assemble there about that time. …

[207] Details of the 1871 Treaty Negotiations are included in Section 5 of these Reasons.

[208] On July 29, 1871, the *Manitoban* newspaper reported (Ex. 1, Vol. 5, tab 146) that the road at the eastern end of the Dawson Route from Prince Arthur's Landing to Shebandowan was:

> … in splendid order … and two other large steamers …for Rainy River and Lake of the Woods and the other for Rainy Lake, and by next summer, beyond [illegible] will be running at the navigable sections, while … a cheap …journey to Manitoba will be within reach of all… From the North-West Angle of the Lake of the Woods to Fort Garry, the road is now passable for wheeled vehicles and is said to be in fair order except about 3 ___ near the North West Angle… The roads leading to the Red River Valley are literally covered with emigrant wagons …

[209] Chartrand in his report, Ex. 60, wrote the following:

> At pp. 307-310:
> 7.1.2 Attempt at Negotiation (1871-1872)
> …
> By the summer of 1871, as initial treaty negotiations with Ojibway at Fort Frances were undertaken, the immigrant travel route from Lake Superior to Red River was officially opened. From Ontario's perspective, the opening of the Dawson Route and the flow of immigrants to the prairies required that immediate attention be given to settle, in law and with finality, the question of the location of its boundaries.
>
> As the route opened in the summer of 1871, the Ontario Government approached Dominion authorities with the suggestion that a clear and final delineation of its western and northern boundaries was now advisable.
>
> > On July 14, 1871, Premier J.S. Macdonald appealed for action, alleging that "the thoroughfare over which numbers of emigrants and others are making their way from Thunder Bay towards Red River requires that they should be protected en route, and the jurisdiction to which authority of this Government extends ought to be clearly defined in view of that end."
>
> …
> At p. 312:
> …The two governments were under steadily growing pressure to reach an agreement by the end of 1871. As Armstrong points out, by December:
>
> > ... the importance of reaching an understanding had already been pointed up by applications from private parties for mining licences west of Lake Superior.
>
> One of these mining license applications may have concerned a proposed site at Shebandowan Lake, where miners were confronted and expelled by local Ojibway Chief Blackstone in the spring of 1872. [References omitted.]

[210] A December 29, 1871 Ontario Order in Council (Ex. 1, Vol. 5, tab 159) included the following:

> The Committee of Council have had under consideration the communication of the Secretary of State dated 30th November 1871 on the subject of the granting of Mining Licenses and Patents for lands in the neighborhood of Lake Shebandowan and in places about the Head of Lake Superior – and which with the copy of a report of the Committee of the Privy Council of Canada has been referred for Report to the Honorable Commissioner of Crown Lands.
>
> The Committee advise that pending such reference no patents or mining licenses issue from Lake Shebandowan westward -

[211] Lovisek's report, Ex. 28, contains the following at pp. 62-63:

> The Ontario Order in Council referred to two documents: a communication of the Secretary of State dated November 30, 1871; and a report of the committee of the Privy Council of Canada… Howe informed Howland that he was transmitting a copy of letter from the Governor General in Council on the subject of granting mining licenses and patents for lands in the neighbourhood of Shebandowan Lake and in locations about the head of Lake Superior. Howe requested that Howland "communicate their views thereon for the information of His Excellency in Council."

1872

[212] Chartrand's report Ex. 60, contains the following

> At pp. 312-313
> Despite pressure from increasing immigrant travels along the Dawson Route and applications for licenses and patents to land by development interests, the Dominion and Ontario Commissioners remained deadlocked by the beginning of 1872. On March 26th, Ontario notified the Dominion that negotiations had reached an impasse and could not proceed as the different viewpoints on the western boundary location were too extremely divided. On April 19th, the Province passed an Order-in-Council communicating to the Dominion Government its formal claim for a western boundary location, beginning at a point west of Lake of the Woods where the international boundary with the United States was intersected by a line drawn north from the source of the Mississippi river.
>
> At pp. 313-315:
> 7.1.3 Response to Further Dominion Government Proposals and Shift Towards Arbitration (1872 - 1874)
>
> The Dominion responded to the failed negotiation by suggesting that both governments take their arguments to a Judicial Committee of the Privy Council hearing (hereafter 'JCPC'). The recommendation was officially drafted in a memorandum of the Department of Justice dated May 1, 1872, signed by Prime Minister John A. Macdonald.
> …
> The basic course of action suggested by Macdonald was to negotiate a temporary joint system for the administration of lands in the disputed territory pending a final legal decision of the JCPC on the question of the location of Ontario's northern and western boundaries.
> …
> Party politics also became a factor in the dispute by that time. In 1872 Ontario voters had elected a new liberal government headed by Oliver Mowat, which soon embarked on a political platform to strengthen provincial rights and provincial governmental powers in the still relatively new constitutional framework of the Dominion. John A. Macdonald, a conservative, was staunchly opposed to this platform and would struggle to develop and maintain centralized power at the Federal level, at the expense of provinces. As Macdonald biographers J.K. Johnson and P.B. Waits note, at Confederation in Macdonald's view:

> It was not just that a provincial government was to be "a subordinate legislature". The provincial governments, he maintained, had been made fatally weak and were ultimately to cease to exist. He envisaged a Canada with one government and , as nearly as possible, one homogeneous population sharing common institutions and characteristics.
>
> [References omitted.]

[213] Saywell opined that by 1872, it was well known by the political actors of the day that there was an active dispute between Ontario and Canada over where the boundaries were located. Saywell said that in 1873 it was likely that all three Commissioners were aware of the Boundary Dispute. (Saywell, April 7 and 9, 2009)

5. THE OJIBWAY PERSPECTIVE - OJIBWAY HISTORY

[214] As mentioned earlier, most of the extant documentation available to this Court is written in English by Euro-Canadians and obviously reflects the Euro-Canadian perspective.

[215] In considering mutual intention in 1873, it would not be acceptable, without more, to uncritically adopt Euro-Canadian interpretations of Ojibway perception contained in the contemporaneous documentation. Since the Ojibway could not speak or write English, and since the memory record of the negotiations taken by an Ojibway recorder has not survived, expert historical, ethno-historical and anthropological evidence was called to assist this Court in gleaning the Aboriginal understandings, intentions, interests and objectives: in short, the Ojibway perspective at the time Treaty 3 was entered into.

[216] Dr. Joan Lovisek ("Lovisek") was called to give expert evidence by counsel for the Plaintiffs. She was qualified as an anthropologist with expertise about the Aboriginal peoples of Canada, especially the Ojibway of the Boundary Waters Region, and with respect to the application of the ethno-historical method. She provided an ethnographic overview of the way of life of the Treaty 3 Ojibway, an ethno-historical analysis of the negotiations and of the Ojibway understanding of Treaty 3 in 1873. She also gave interpretive evidence on developments after the Treaty was signed, alleged by the Defendants to be relevant to that understanding.

[217] Dr. Alexander von Gernet ("Von Gernet") was called to give expert evidence by counsel for Ontario. His speciality is ethno-history and archaeology of Aboriginal peoples in North America. Von Gernet was qualified as "an anthropologist and ethno-historian specializing in the use and analysis of archaeological evidence, written documentation and oral traditions to reconstruct the past cultures of Aboriginal peoples as well as the history of contact between Aboriginal peoples and European newcomers throughout Canada and parts of the United States." He gave evidence about the ethno-historical context of the 1873 Treaty negotiations, focused generally on the Aboriginal understanding of the *raison d'être* of treaty making. He also offered an historical opinion on the background and purpose of s. 91(24) in reply to Milloy's evidence.

[218] Mr. J.P. Chartrand ("Chartrand") was called to give expert evidence by counsel for Ontario. He was qualified as an expert anthropologist and ethno-historian with particular experience regarding the Algonquian peoples of Ontario, including the Ojibway. He provided an

ethnographic analysis of the documentary record of the Treaty 3 negotiations and the dealings of the Ojibway with Euro-Canadians.

The Life and Culture of the Ojibway/European Contact to 1871

[219] Lovisek's uncontradicted evidence was that the Ojibway were well-established in the area around the Lake of the Woods well before 1873, as shown on a series of maps published by anthropologist Dr. C. Bishop entitled "Ojibway Distribution Maps 1649 to 1775."

[220] She described Ojibway society, culture, values and understanding of the 1873 Treaty over many days of evidence.

Social Structure

[221] Basic Ojibway social units were clans, named after animals and fish. Because clan members did not marry within their own clan, each clan included those who had been born into other clans.

Governance

[222] The basic Ojibway political unit was the band.

[223] The Grand Council of Chiefs and leading men made decisions on important matters, including the allocation of resources to be harvested, matters of war, HBC relations and treaty deliberations.

[224] The Ojibway lived according to precepts they believed had come to them from the Great Spirit. They ascribed to egalitarian principles. They valued consensus, both at the band and Grand Council levels. They had no top-down authority as in European societies. Although the Chiefs and leading men had great powers of persuasion and their advice was usually taken, in the event of a failure to reach consensus, members of Grand Council did not have the authority to enforce their will. That would have been unacceptable in Ojibway culture.

[225] Dawson reported in 1868 (Ex. 1, Vol. 4, tab 53) that on important matters affecting general interests, "they neither reply to a proposition nor make one themselves, until it is fully discussed and deliberated upon in Council by all the Chiefs…"

Religion

[226] The Ojibway believed, not in a sky God, but in an underwater God. They followed rules provided to them by the Great Spirit. They believed that their shamans could engage with the spirits of various objects, animate and inanimate. (Lovisek, October 23, 2009.)

[227] By 1857, when the Treaty 3 Ojibway came into contact with the Palliser and Hind expeditions mentioned earlier, they had already rejected Christianity. Lovisek's evidence on October 20, 2009 includes the following:

> Q. And can you give me a sense of what the Ojibway reaction… in the Boundary Waters area … to the arrival of Christianity was?
> A. …The Ojibway, according to the missionary records that we have, engaged in almost philosophical studies with these missionaries, but they rejected Christianity They felt that the Midewiwin was their religion and they didn't need another ...
> There are descriptions of when I think Peter Jacobs tried to build a church … the Ojibway would just take the boards down.
> But given the culture of the Ojibway and their particular form of etiquette, the Ojibway did not repel the missionaries from their area forcibly. They simply used rather polite language. I can recall, for example, one expression being quoted, "We gently bar the door against you."
> This …led the missionaries [to leave] the area and …call [it]… "the headquarters of Heathenism" …
> …
> Q. And did the resistance to the arrival of Christianly continue to the early 1870s?
> A. Yes. …

[228] In his report, Ex. 60, Chartrand at p. 38 quoted ethno-historians Waisberg and Holzkamm as follows:

> After a decade of discussion with Catholic and Methodist missionaries, the Grand Council proscribed Christianity in 1849, forbidding a planned mission station and school on the Rainy River; a warning was issued that an attempt to build would be met by soldiers who would dismantle any structures.

The Seasonal Round

[229] From season to season, the Ojibway moved from area to area, travelling by birch bark canoe in summer, snow shoe in winter. They gathered resources for their sustenance whenever and wherever they were available.

[230] In a letter to the Minister of Public Works dated December 19, 1870 [Ex. 1, Vol. 4, tab 103], to which I have earlier referred in other respects in the section on Euro-Canadian perspective, Dawson, anticipating that after the Treaty was made, the Ojibway would be treated as minors and that they would come under the care of the Dominion Government, provided a detailed description of their habits and means of obtaining their subsistence:

> In spring, as the navigation opens, the Indians leave their hunting grounds, and betake themselves to the Lakes and Rivers and, as the fish literally swarm in these inland waters, in the early part of Summer, they then have no difficulty in obtaining food, and the means of communication being easy to their light canoes, they can congregate in considerable numbers. Rainy River is the Chief resort, and it is there that their Councils are held, and their Feasts celebrated, but Rainy River, although the Sturgeon abound in its waters, cannot support the whole tribe, and the number which assemble there is generally limited to 600 or a thousand people, including men, women and children. Last summer, however, the number was greater than usual, there having been at one time full 1500 people in the vicinity of Fort Frances.
> …
> … early in Summer, the grand occupation is fishing, and this is to them the happiest season of the year, as they have then an opportunity of uniting after a long winter of isolation. Food is abundant and the time passes pleasantly under circumstances of peculiar fascination to the Savage. With his gun in readiness for the wild fowl, and his spear for the fish, he can, with little labour, secure enough for his immediate wants, and the future troubles him not. The produce of the winter's hunt affords him the means of renovating his garments and bedecking himself to his tastes; marriages and dances are the order of the day with the young, and the old and experienced meet in Council to deliberate on

> the affairs of the Community, while matrons with some regard to the future, dry the flesh of the sturgeon in the sun, and store it past a day of want.
>
> The fishing season lasts til the rivers began to fall, in the beginning of July, and the busy season commences, numbers then proceed to sandy plains, or rocky islets, where blueberries are in such abundance. These the women and children gather in great quantities and dry in the sun, or compress into cakes which they store past for future use; but a still more important harvest than that of berries soon waits them, and the whole tribe sets off for the rice fields.
>
> In certain parts of the Lake of the Woods, and on the upper reaches of the Winnipeg, the water spreads out into vast lagoons or shallow marshes, and in these the wild rice grows up from the bottom and rises high over the water, covering extensive areas ... When this crop is ripe,the canoes are perfectly watertight and pushed at will through the standing rice, the method of securing it being to bend it over the gunwale and thresh the ears out with sticks, the grain falling on mats prepared to receive it in the bottom of the canoe; meantime the harvest is disputed by other gleaners in the shape of vast flocks of aquatic fowl, and of these the Indians can easily secure all that they can consume.
>
> At the time of the rice harvest, the authority and patience of the Chiefs are put to the test, in deciding disputed claims and meting out justice to all ...
>
> It may be maintained that the rice is not always a sure crop. If the water should be too high, it in a measure fails, and even when it promises well, if heavy rains and strong gales occur when it is ripening, it is beaten down to the water and rendered valueless, and the moment it begins to ripen the wild fowl attack it, sometimes in such numbers as to impair the harvest.
>
> Besides the resources as far enumerated, the Indians have crops other than those which nature unaided produces. When the first French explorers came among them they found them growing maize on the banks of the Rainy River, and on the islands of the Lake of the Woods. Two centuries have since elapsed and Indian corn is still grown in the little gardens which produced it then, although not to the same extent. But the Indians have now added to the growth of maize, the culture of potatoes and this at least shows some taste for farming operations, which if properly encouraged, might lead to important results.
>
> When the rice harvest is gathered, and autumn approaching, the Indians having provided themselves with ammunition, and such articles of clothing as they can get at the trading posts, set out for their hunting grounds, in single families, and are once more separated, not to meet again until the following summer. …

Communication and Language

[231] In 1873 [and until after European education became commonplace], the Treaty 3 Ojibway could neither speak English nor read or write in Ojibwe. Their communication was entirely oral. They were innumerate.

[232] Dawson commented (Ex. 1, Vol. 4, tab 53) on their ability to remember details of what had been said:

> At these gatherings [Grand Council meetings] it is necessary to observe extreme caution in what is said, and, although they have no means of writing, there are always those present; charged to keep every word in mind. As an instance of the manner in which records are in this way kept, without writing, I may mention that, on one occasion, at Fort Frances, the principal of a Chief of the tribe commenced an oration, by repeating almost verbatim, what I had said to him two years previously ...

[233] Prior to the making of the Treaty and for some time thereafter, communication between the Ojibway and Euro-Canadians was often facilitated by Métis who spoke both Ojibwe and English or Ojibwe and French.

European Contact

[234] Chartrand gave evidence that compared to Aboriginal groups to the east and west, the nature of the Treaty 3 landscape had insulated the Treaty 3 Ojibway from regular Euro-Canadian contact. Until the arrival of the Palliser and Hind Expeditions, their relationship with Euro-Canadians had for all intents and purposes been limited to contact with fur traders. At the time of the 1873 Treaty negotiations, the HBC had trading posts at Fort Frances [on the Rainy River near Rainy Lake] and at Rat Portage [on the Lake of the Woods.]

The Contact with Palliser and Hind Expeditions

Palliser Expedition

[235] On July 1, 1857, on behalf of the British expedition, Palliser recorded (Ex. 1, Vol. 3, tab 44) that when he met with about 200 Ojibway in the neighbourhood of the HBC post at Fort Frances, a number of them pressed forward to shake hands, in "such a manner as to leave it doubtful whether the honour was done to us or by us:"

> An old chief spoke. "Perhaps," said he, "You wonder who I am that I should address you. My arms extend far back into time; my father and his father were the chiefs of this once mighty tribe. Their graves are in our lands ... All around me I see the smoke of the pale faces to ascend; but my territories I will never part with; they shall be my poor children's hunting fields when I am dead. .. You are our equals, so do not deceive us, but inform us of the true reason for your visit and whither you are about to proceed from here."

[236] The extent of the Ojibway information about events occurring elsewhere was remarkable. I have already mentioned hearings in Britain about the renewal of the HBC licenses and the possible transfer of the HBC Territories to Canada. Palliser reported that the old Chief said: "I want you to declare to us truthfully what the great Queen of your country intends to do to us when she will take the country from the fur company's people."

[237] Palliser represented (Ex. 1, Vol. 3, tab 44):

> We … were only passing through their country on our route to much further lands … if any body of people should wrest their lands from them, our great Queen would send her soldiers to drive those people back, and would restore their lands to them again.
> … I told him confidently that if he did not wish to part with his lands, and also if he and his people behaved as always they had done, that is, quietly and peaceably, with the white faces, I would assure him that The Queen would never send soldiers to deprive them of their lands by force.

Hind Expedition

[238] In July-August 1857, when the Hind expedition travelled from Canada West, some of its members did not follow the classic fur trade route through the Treaty 3 territory. The Ojibway stopped and questioned them about their activities, including the taking of rock and botanical

samples, and then directed them to take the main route. (Henry Hind, Ex. 1, Vol. 3, tab 42; Ex. 45 at p. 250.)

[239] Chartrand noted that while the Ojibway did not have Euro-Canadian concepts of buying or selling land, comments they made during the Palliser, Hind [and Wolseley] expeditions about selling land reflected their ability to engage, to a limited extent, in cross-cultural communication. At the same time, the Ojibway emphasized that they were refusing to engage in similar practices.

Relations and Contacts with Other Ojibway

American Ojibway

[240] Von Gernet, Chartrand and Lovisek all opined that by reason of their social, cultural and kinship ties, the Ojibway were aware of the experiences of their Chippewa kin who lived in Minnesota just south of the U.S.-Canada border/the "Medicine line."

[241] I have already mentioned Dawson's observation made in 1868 (Ex. 1, Vol. 4, tab 53), five years after the conclusion of the Old Crossing Treaty between their American kin and the United States government, as follows:

> Some of those who assemble at Rainy River for the sturgeon fishing, in summer, come from Red Lake, in the neighbouring State of Minnesota, where they possess hunting grounds; and, among these latter, are some who have been parties to treaties with the United States for relinquishing certain tracts for settlement, for which they are now in the receipt of annual payments. The experience they have thus gained, has rendered them expert diplomatists, as compared to Indians who have never had such advantages, and they have not failed to impress on their kindred and tribe, on Rainy River, the value of the lands which they hold on the line of route to Red River.
> (Ex. 35, Old Crossing Treaty with the Red Lake and Pembina Bands of Chippewa, 1863-1864; Lovisek, November 17, 2009 at p.56; Von Gernet, December 3, 2009 at pp. 126; See also Chartrand report, Ex. 60, at pp 34 and 36.)

[242] During the Old Crossing negotiations, Commissioner Ramsay advised their American relatives that the United States government was only interested in the land for the purpose of obtaining a right of way and he proposed a low price. He hoped they would propose a higher price for a broader cession. In the discussion that followed, Ramsay assured them about their traditional harvesting activities. Von Gernet's cross-examination on December 4, 2009 includes the following at pp. 157-160:

> Q. But then we go on and read what he says -- this is Ramsey speaking, correct?
> A. Yes.
> Q. (Reading):
> "When a man sells his horse, he loses the use of him, and has to do without a horse or buy another; but in this case we pay them the value of the horse, and then give them back the horse, to use as much as they choose. So we buy their land, and then permit them to use it as heretofore, to hunt for game in the woods and prairies, and to fish in the streams. So that they lose nothing whatever by the arrangement which they now possess, while they will gain many things of great value to them which they do not now have."
> [Emphasis added.]

[243] Von Gernet agreed (December 7, 2009) that Ramsey was attempting to assuage their concerns about the loss of their traditional livelihood in the event they entered into the treaty.

While he characterized the Old Crossing Treaty as a sale of land, he ultimately agreed on December 7, 2009 that the surrender was not presented as the surrender of traditional harvesting rights:

> And in this particular …instance, I think the Ojibway would have appreciated that, yes, they're not losing their hunting and gathering rights because Commissioner Ramsey keeps saying that, he reiterates it several times. He's saying, you know, don't worry, you know, things are going to stay the way that you're used to seeing them.

Ojibway to the East

[244] The experts agreed that the Treaty 3 Ojibway, especially those living in the easterly portion of the Treaty 3 territory, had had contact with the Ojibway who had signed the Robinson Treaties in September 1850.

[245] Chartrand report, Ex. 60, contains the following at pp 48-49:

> Although the boundary waters Ojibway had little direct experience with government officials prior to Confederation, they were clearly aware that neighboring groups east of the Lake Superior watershed and south of the American border had entered into treaty relationships involving land cessions and compensation for Euro-Canadian and Euro-American settlement. This knowledge was obtained either through occasional travels to Fort William and / or interactions with bands or band members signatory to those treaties.
>
> Between 1847 and 1854 a series of land cession treaties were negotiated with Ojibway occupants of lands west of Lake Superior. One of these treaties, the Robinson-Superior treaty involved Ojibway living within the boundaries of the Province of Canada. The treaty was negotiated at Sault Ste. Marie in September 1850 by William Robinson for a surrender of title to lands along the north shore of Lake Superior, from Batchewana Bay to the Pigeon River and inland to the height land defining the Lake Superior watershed. As compensation for surrendering title to these lands, the treaty provided Ojibway signatories with defined reserve lands for bands, monetary compensation in the form of a gratuity (one time payment) and perpetual annuities, rights to hunt and fish over the ceded territory excepting lands sold or leased and occupied among other stipulations.
> [References omitted.]

[246] As noted earlier, the signing of the Robinson Treaties had been preceded by a colonial report suggesting that the Ojibway had no valid claim to the land. In 1848 when mining companies sought to develop mines in Treaty 3 territory north of Lake Huron and Lake Superior, where no treaty had been concluded, Lord Elgin, the Governor General acting in the capacity of Imperial official, had directed an inquiry into the Aboriginal claims to the territory that the colonial government had already rejected. At his behest, the Anderson-Vidal Commission met with the Chiefs, gathered information and submitted a report to the Governor-General and the Imperial Indian Department, concluding that the Ojibway claims were legitimate and recommending a treaty be negotiated.

[247] In their report dated December 5, 1849 (Ex. 51), the Anderson-Vidal Commissioners wrote about their perception that a cession would have limited impact on Indian harvesting activities, as follows at p 6:

> It will not be advisable to propose the cession of a narrow strip upon the Lake shore, merely including the present mining tracts … Little if any difference, need be made in the terms offered, for all that is known to be of value is situated on the front, and they will still retain undisturbed

> possession of their hunting grounds in the interior: -- in fact, whatever may be given to them for the surrender of their right, they must be gainers, for they relinquish nothing but a mere nominal title, they will continue to enjoy all their present advantages and will not be the poorer because the superior intelligence and industry of their white brethren are enabling them to draw wealth from a few limited portions of their territory, which never were nor could be, of any particular service to themselves.
> [Emphasis added.]

[248] During the Robinson Treaty negotiations, when the Ojibway complained they were being offered less than Indians further south had received, Commissioner Robinson advised them that they could not expect to receive the amounts paid to those Indians, because unlike lands further south, their lands were "barren and sterile," unsuitable for settlement and unlikely to be developed. Robinson promised the Robinson Treaty Ojibway they would still be able to hunt and fish after the treaties were signed. Ex. 9 contains the following at p. 17:

> I explained to the Chiefs in Council the difference between the lands ceded heretofore in this Province, and those then under consideration. They were of good quality and sold readily at prices which enabled the Government to be more liberal. They were also occupied by the whites in such a manner as to preclude the possibility of the Indians hunting over or having access to them: Whereas the lands now ceded are notoriously barren and sterile, and will in all probability never be settled except in a few localities by mining companies, whose establishments among the Indians, instead of being prejudicial, would prove of great benefit as they would afford a market for any things they may have to sell, and bring provisions and stores of all kinds among them at reasonable prices.

[249] The uncontradicted evidence was that the text of the two 1850 Robinson Treaties differed significantly from the standard form of treaties used earlier in Southern Ontario, which had contained no express provision ensuring the continuation of hunting rights. The Robinson Superior Treaty did. Ex. 9 contains the following at p. 303:

> And the said William Benjamin Robinson of the first part, on behalf of Her Majesty and the Government of this Province, hereby promises and agrees … to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the provincial government.

[250] Chartrand gave evidence (January 20, 2010) about the level of accommodation anticipated, saying at p. 65 that at the time of the Robinson Treaties:

> A. the scale and the nature of Euro-Canadian activity that was at the time expected to take place was of a different character than the scale and nature of activity that had taken place in the more southerly part of Upper Canada, Canada West at the time.

[251] Counsel for the Plaintiffs submitted that based on that evidence, as of 1873, the Treaty 3 Ojibway would have perceived that Robinson's representation in 1850, that the lands would in all probability never be settled except by mining companies in a few localities, had been borne out. The little settlement that had occurred on the Robinson Treaty lands had mainly been restricted to the vicinity of Sault Ste. Marie and Prince Arthur's Landing and to a few mining locations. There had been limited development. The Indians remained in undisturbed possession of their hunting grounds in the interior, continuing to hunt and fish as before. At the same time they had received treaty annuities. (Von Gernet, December 4, 2009; Epp, January 29, 2010.)

Post-Confederation Contact with Euro-Canadians in the Treaty 3 Area

[252] The Treaty 3 Ojibway had expressed concerns about the building of the Dawson Route even before construction began.

[253] From 1868, when the best location for the Route was being determined, to the date of the Treaty, Dawson and numerous other Euro-Canadians had been present in the Treaty 3 area over extended periods. They had built buildings and other infrastructure at various locations along the Route. They had cut wood and built steamboats to carry travellers over the waterways. They had employed Ojibway to assist with the construction, to move travellers over the Route by canoe or barge, and to cut wood to fuel the steamboats after the Route was opened.

[254] Lovisek opined that the Ojibway likely viewed the payments they received for those activities as being akin to the tolls they were accustomed to charging. Although they benefited from those payments, they were happy to observe that the travellers were not remaining in their territory, but merely passing through it.

Territorial Concepts

[255] Prior to the making of Treaty 3, the Ojibway exclusively controlled their territories. They monitored access and charged tolls to any travellers passing through.

[256] Lovisek opined and Chartrand agreed that the Ojibway concept of territoriality was focused not on a Euro-Canadian concept of land ownership, but on exclusive control of use by outsiders. They had no concept of selling land. Lovisek said it was natural resources, including game animals, fish, wild rice, corn, other crops, etc., that were important to the Ojibway, not land *per se*.

[257] Chartrand agreed the Ojibway did not have a practice of buying and selling lands, either at the individual or at the collective level. They did not conceive of territorial rights in the Euro-Canadian sense of owning land and certainly not at the individual level. The Treaty 3 Ojibway concept of territoriality was focused on having the ability to control the use of land by outsiders. He gave evidence that the Ojibway did have a strong sense of territorial rights over the lands they had traditionally occupied and used. They understood they had an ability to exclusively control the use of their lands and waterways. They drew on the knowledge that they controlled a key transport route between the East and the West to their benefit by controlling access and charging tolls. (Chartrand, December 15 at pp. 59 and 63.)

1871 Treaty Negotiations

[258] On April 19, 1871, in a recommendation (Ex. 1, Vol. 5, tab 122, p. 301) to the Privy Council [approved April 25, 1871] Howe wrote that he thought the Ojibway would "be willing to surrender, for a certain annual payment, their lands to the Crown." The American Indians to the south of them had "surrendered their lands to the Government of the United States for an annual payment… stated …to amount to ten dollars per head for each man, woman and child…" Howe proposed that the Commissioner be "authorized, if need be, to give as much as twelve dollars…

for each family not exceeding five…for the surrender of the land…" (Ex. 45 at p. 300; Ex. 1, Vol. 5, tab 127 and Ex. 45 at p. 304.)

[259] Simpson, Dawson and Pither were appointed treaty commissioners in 1871.

[260] Chartrand wrote at p. 233 of his report, Ex. 60:

> Although a few bands in the boundary waters region had experienced disruptions to traditional subsistence harvesting due to the passage of the Wolseley expedition, at the onset of treaty negotiations in 1871 the traditional economy of the Ojibway remained viable, the strength of the traditional economic base of the society placed the Ojibway in a good position to promote serious negotiations with Crown representatives.

[261] The 1871 negotiations were unsuccessful. The Commissioners' report dated July 11, 1871 includes the following:

> We have the honor to inform you that we have had repeated interviews with the Sau[*l*]teaux tribe of the Ojib[*b*]eway Indians, at Shebandowan Lake and at this place [i.e., Fort Frances].
>
> The Indians in anticipation of negotiations being entered into with them had collected in larger numbers than usual and we had in consequence of favourable opportunity of explaining the intentions of the Government as ***to obtaining a surrender of their Territorial rights***. **They preferred claims in regard to promises which had heretofore been made to them for 'right of way' through their country**. These we admitted to a limited extent and have made them presents in provisions and clothing, we are also to pay them a small amount in money, and it is fully and distinctly understood by the Indians, that these presents and payments are accepted by them as an equivalent for all past claims whatever.
>
> The Government is thus at the present moment clear of any Indian claims for the past, in the section of country intervening between the Height of Land and the Lake of the Woods.
> [Emphasis added.]

[262] The 1871 Commissioners' report did not provide details of the discussion about a surrender of their "territorial rights." Chartrand gave evidence that the Commissioners' explanations were probably largely limited to conceptual explanations and core concepts, and did not likely extend to exact offers in regards to annual payments, reserve lands to be set aside, etc.

[263] Lovisek opined that in 1871 the Ojibway were continuing to focus on a right of way agreement. Given the position the Ojibway took the next year at the 1872 treaty negotiations, she said the Commissioners' observation that "the Government was clear of any Indian claims for the past" suggests they misunderstood what the Ojibway had been telling them.

[264] Both Lovisek and Chartrand gave evidence that by that time, the Ojibway perceived that there could be benefits from a Euro-Canadian presence in their territory, in the form of markets, employment, improved transportation and other opportunities.

[265] Nevertheless, that perception did not translate into a willingness to enter into a treaty of cession. Unlike their kin at the Stone Fort and Manitoba Post, who had much better lands, they refused to enter into a treaty in 1871.

Ojibway to the West (Treaties 1 and 2)

[266] In 1871, Simpson [not Simpson, Dawson and Pither] was given a separate commission to treat with "several tribes of Indians so occupying and claiming lands in our said Province of Manitoba, and in our said Northwestern Territory." By correspondence dated May 5, 1871 (Ex. 4, p. 166), Howe instructed Simpson as follows:

> [A]s soon as you have completed your labours at Fort Frances as a Commissioner jointly with Mr. Dawson & Mr. Pither, (for with the Indians in that neighbourhood it will be necessary first to deal) you will without loss of time proceed to Fort Garry to confer with the Lieutenant Governor of Manitoba and enter upon your duties as sole Commissioner with the Indian Tribes to the West of the Province.

[267] The circumstances of the Red River Ojibway and Cree in 1871 were very different from those of the Treaty 3 Ojibway. The fertile Red River lands were the destination of many of the travellers crossing the Dawson Route. The Red River Indians were facing not only great influxes of Euro-Canadian settlers but also the imminent extinction of their primary source of sustenance, the buffalo.

[268] While the Treaty 3 Ojibway had been relatively isolated, the Red River Ojibway and Cree had had regular contact with Euro-Canadians dating back at least to the founding of the Selkirk settlement in 1817.

[269] Chartrand gave evidence that by late 1871, the Treaty 3 Ojibway knew about Treaties 1 and 2 made with Ojibway to the West in July 1871.

[270] Chartrand opined that evidence regarding the 1873 negotiations including representations made to the Treaty 3 Ojibway in 1873 is more relevant to the understanding and intention of the Treaty 3 Ojibway than representations made by a different commissioner to other treaty signatories under different circumstances at a different time. However, there was evidence that despite the significant differences in their circumstances, the promises made by the Commissioners during the Treaty 1 and 2 negotiations were likely communicated to the Treaty 3 Ojibway and for that reason may be somewhat relevant to their understanding in 1873.

[271] Despite their marginal relevance, I mention them briefly here. In the 1871 negotiations at the Red River, before introducing Treaty Commissioner Simpson, Lieutenant-Governor Archibald said (Ex. 4, p. 178) to the Treaty 1 Ojibway and Cree:

> When you have made your treaty, you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation. Much of it that is wooded, beyond the places where the white man will require to go, at all events for some time to come. Till these lands are needed for use, you will be free to hunt over them and make all the use of them which you have made in the past. But when the lands are needed to be tilled or occupied, you must not go on them anymore. There will still be plenty of land that will be neither tilled nor occupied where you can go and roam and hunt as you have always done. And if you wish to farm, you will go to your own reserves where you will find a place ready for you to live on and cultivate.

[272] Lovisek opined that if the translation were adequate, the Treaty 1 Ojibway and Cree would have understood that they would be able to indefinitely continue to hunt and fish as they had always done over much of the land they were ceding.

[273] Von Gernet conceded in cross-examination on December 7, 2009 that from what was said, they would have understood that there would be an area where there would be cultivation and settlement but there would remain plenty of land that would always be available for their traditional use.

[274] I note that Simpson told the Treaty 1 and 2 Ojibway that he had told the Treaty 3 Ojibway their land was "unfit for settlement."

1872 Negotiations

[275] Euro-Canadian mining activity near the height of land west of Thunder Bay in early 1872 caused a confrontation between Chief Blackstone and the miners, providing an additional impetus to Treaty 3 negotiations.

[276] On June 5, 1872, in a letter (Ex. 4, p. 193) to the Minister of Public Works, obviously concerned about the safety of travellers, Dawson described the Ojibway as "numerous, armed and excitable" and opined that the treaty negotiations were "very important matters, as regards the prosecution of the works." Increasing traffic over the Dawson Route and the advent of surveying parties for the CPR were further underscoring the importance of getting a treaty done.

[277] On July 13, 1872, *The Globe* (Ex. 11, Vol. 5, tab 181) reported that Simpson, Dawson and Pither had again been appointed to attempt to negotiate a treaty:

> The Bands which have now to be dealt with are those who live on the waters between Lake Superior and Lake Winnipeg and as far north as Lake Seul. The Dawson Route, therefore, goes through one part of the territory that is to be ceded, while the Canadian Pacific surveyors are exploring through the other parts. The Bands affected by the Dawson Route have always had more or less inflated ideas of the importance of their property…
>
> The Chippeways of Rainy Lake District are unlike the Chippeways of Manitoba and the North West in that they are cranky, obstinate, and difficult to manage. They have constant communication with their Yankee brethren of Red Lake and Vermillion, and the evil communication has corrupted the good manners for which ... they were once distinguished ... they arrogate to themseves the most unlimited supremacy of the surrounding rock, wood and water…

[278] The negotiations held at Fort Frances starting on July 14, 1872 did not go well. In the words of Von Gernet, they were "nothing short of a fiasco and nearly collapsed into a brawl." The Ojibway forcefully refused to deal.

[279] The Ojibway leadership was deeply divided even about the desirability of entering into a treaty. By the end of the 1872 negotiations, the Commissioners and various contemporaneous commentators were sceptical that a treaty agreement could be reached in the near future.

[280] In their official report dated July 17, 1872 (Ex. 4, pp. 194-195), the Commissioners conceded that the 1872 negotiations went nowhere:

> We have the honour to inform you that during the past sixteen days we have had repeated interviews with Saulteux [**Salteaux**] Indians of this place, and have done everything in our power to negotiate a Treaty with them in conformity with the views of the Government as conveyed to us through your Department, but regret to say that, in this we have not been successful.

> The Indians could not be induced to go into the discussion of the provisions made in the various articles of the treaty, and notwithstanding the clear understanding had with them last year, to the effect that the payments and presents, then made were to cover all claims real or supposed up to that time, have advanced the most extravagant demands for roads made on their lands and wood taken for steamers and buildings.
>
> Besides inadmissible claims of this kind, there have been other causes in operation, of a nature to mar the negotiations, and among these we may mention the fact that they are well informed as to the discovery of gold and silver to the west of the watershed, and have not been slow to give us their views as to the value of that discovery. "You offer us" said they, "$3 per head and you have only to pick up gold and silver from our rocks to pay it many times over". The chief of the section where the discoveries have taken place was emphatic in expressing his determination to keep miners from his country until he had been paid for his land.
>
> Last year treaties were made with the Indians in Manitoba, but it was in the presence of a military force, and with Indians long accustomed to intercourse with the white man.
>
> The Indians here are quite untamed and in their native state. We must however say for them that they have behaved themselves, except on the occasion to which we have alluded, with great propriety and circumspection. They seem fully alive to their own interests and evince no small amount of intelligence in maintaining their views. We have made them liberal presents of provisions, tobacco, etc and have parted with them on amicable terms, with the understanding that we are not to negotiate with separate bands, but that, if further propositions are to be made, we are to call a general council of the Chiefs, but we do not believe that under existing circumstances any good could arise from further Councils.
> [Emphasis added.]

[281] On July 17, 1872, the *Globe* correspondent (Ex. 1, Vol. 5, tab 183) reported as follows:

> I am sorry to say that the Indians of this district are persistent in their refusal to enter into treaty negotiations with the Government. … They stand on their natural rights as lords of the land …. This business is likely to be the beginning of a great Indian trouble.
> …
> In the evening when a Council was held in hopes that even then something might be arranged—for the good intentions of one chief were known by the Commissioners—the Indians of the Rainy Lake—a small part of the route only—expressed their desire to accede to the terms offered by the Commissioners. The speaker, who had privately told a gentleman here that he would probably lose his life for consenting, was interrupted by several other bands; but courageously continued to speak, though surrounded by angry eyes and angry hands, until one of his own band came up and whispered to him. The result was that his good intentions were all upset; but the sort of ground on which the whole mob were at ending may be judged of from the fact that when the Indian I refer to was touched from behind by his friend, his hand flew to the handle of his scalping knife, for he thought the time for the row had come.
> …
> It turned out that the temporary absence from the proceedings of the resident agent was caused by his wanting his revolver, and another gentleman admitted that he had shifted the position of his pistol so that he could seize it at a moment. For myself, I determined that the next time I went amongst these Indians I'd bring my revolver also.
>
> The commissioners, therefore, have nothing to do but take their departure … and so the treaty with the Rainy Lake Indians is a thing of the future. What the consequences of there being no treaty may be I do not know, nor can anyone exactly foretell; but the proceedings here have given support to ideas which I have heard from nearly every old resident of the Indian country.

> They say: you cannot treat with Indians, nor can you hold the Indian country for many years at least, without the presence of troops ...
>
> It is probable that the works on the road here will be stopped by the Indians. … it is the opinion not only of the Commissioners but everyone here, that until troops are sent into the district and permanently kept there during the summer at any rate, the route will not be safe, and the Government works are liable at any moment to be destroyed. The Indians must be afraid of the white people or they will very soon make the white man fear them. Mr. Commissioner Simpson publicly said that he would not again come here to negotiate with the Indians without the presence of troops; and Mr. Dawson declared that to carry on the public works without them was impossible ...

[282] On July 27, 1872, the *Manitoban* newspaper reporter characterized the situation as "dire:"

> The Indians
> Since the inception of Canadian connection with Rupert's Land difficulties have been generated ... when all at once we have a new development in the form of an Indian difficulty ... No wish to frighten people ... unless the utmost caution be taken and the utmost skilll of manipulation is exercised, <u>any day may find us plunged into ... an Indian war</u>... Mr. Commissioner Simpson has been obliged to depart from Fort Frances without effecting a treaty<u>, leaving the Indians in an attitude approximating something very like hostility. The Dawson Route will be rendered too unsafe to be used, and the whole work of Indian treaties has been brought to a termination at least for (illegible)</u>
>
> <u>As things now stand, Commissioner Simpson dare no more go amongst the</u> [illegible] <u>Indians and propose a treaty than he dare go and denounce polygamy in the hall of the Sultan of Turkey ... the attempt would be futile ... the Indian logic and motive of action, the following: We don't want Canada's money. … All we wish is the white man to keep away</u> … With a good many people, when the Indian question is brought up, there seems to be an impression that there are only two ways of dealing with it, either treating the Indians as children or treating them as outlaws ...
>
> To the idea of exterminating them, the matter assumes a much more serious aspect ... nothing is so simple as to send 100 men to Fort Frances ... Suppose these tribes became hostile, what would 100 men do .?..
>
> But is coercion necessary? ... We would suggest to the Ottawa Government that were they to appoint a commission of such men ... who are thoroughly acquainted with the Indian character ... to deal with the Indians ... with ample powers ... to appreciate anything beyond a three dollar annuity. [Emphasis added.]

[283] Saywell's evidence on April 6, 2009 contains the following:

> Q. … there was concern in Canada about the Indians and the Métis taking …military action against the Canadian government and settlers in the west; is that fair?
> A. Well, it's not just concern. There was military action against the Canadians in Red River.
> Q. Is it that there was an out-and-out uprising which required an expedition from the east to put down; is that fair?
> A. Yes…
> …
> Q. But when we look back to the 1870's…[a large scale military uprising by the Indians] was a very real concern?
> A. Yes … the events south of the border suggested that North American Indians were still capable of opposing European advances…
> Q. …But I take it that the concern probably had two aspects to it. … the lesser concern -- of a successful uprising. … I would suggest that underneath all of this, there would be great expense

> attached to putting down these uprisings and that that expense would have to be borne by the Governments of Canada. Is that fair?
> A. It may be a fair statement. …
> Q. There was a concern about the expense associated with financing and maintaining military expeditions to deal with the Indians. Let me suggest that to you.
> A. I have no evidence of that. It makes common sense to me that it would, yes.
> Q. …[W]hen we look back at something like Treaty 3, … we have to bear in mind that some of the preoccupations we have today about the Indians may be very different than the preoccupations that the political classes and even the ordinary people would have had about the Indians at that time; is that fair?
> A. I think that's fair.

[284] *The Globe* report of the 1872 negotiations dated August 5, 1872 contained the following:

> The Indians flatly, firmly declined to enter into treaty with the government until they've been paid for the road ... they decline to have anything to do with any treaty until a present of food and clothing for each one has been set before them and an assurance given that this will be repeated annually. In fact, the demands are such as no government or no people would endorse, and **that's** demands, be it remembered that are only a prelude to others which would follow in the case of a negotiation for a treaty ... they won't sign any treaty unless impossible demands are first complied with.
> [Emphasis added.]

[285] When the report of the Commissioners was received in Ottawa, Spragge wrote a memo ((Ex. 4, p. 197) dated September 5, 1872:

> It will be perceived that Mr. Simpson attributes the obstacles he has met with, preventing so far the obtaining a surrender from the Salteaux Indians, to the reported valuable discoveries of the precious metals within the territory, a cession of which has been the object of their negotiations, the knowledge of which has reached those Indians, and who have taken serious umbrage at lands being sold and patented by the Government of the Province of Ontario, while as yet the Indian Title thereto remains unextinguished. [Emphasis added.]

[286] Since abandonment of negotiations was not an option, Spragge began to formulate a new offer. He recommended the introduction of a system patterned on the Maritime Peace and Friendship treaties, of assigning salaries to the head chief of each band not exceeding $25/year and to the second chief not exceeding $15/year.

[287] On December 2, 1872, Morris was appointed Lt. Governor of Manitoba and the Northwest Territories and personal representative of John A. Macdonald, replacing Archibald.

6. LEAD-UP TO THE 1873 NEGOTIATIONS

[288] On March 1, 1873 the *Manitoban* newspaper (Ex. 1, Vol. 6, tab 211) contained the following:

> Canada Pacific Railway
> The text of the contract entered into between the Government and the Canada Pacific Railway to the Company has been published ... the Government undertake also to extinguish the Indian title to lands needed by the Company
> … the scheme is one of immense magnitude and of utmost importance to the Dominion at large.
> [Emphasis added.]

[289] On May 17, 1873, the same newspaper (Ex. 1, Vol. 6, tab 214) contained the following:

> North West route

> As the season is about to open for travel ... Canadian route to our North West province ... from Fort William to Fort Garry ... there is now, according to Mr. Dawson, a fairly practicable road over the land parts of the route...
>
> The Thunder Bay road has been graded and in many parts gravelled, so emigrants can be comfortably conveyed in the wagons provided by the authorities ... according to the promises of Mr. Dawson we may look for the emigrants to Manitoba by the Canadian route being accomplished, during the season.

[290] On May 31, 1873, the *Manitoban* reported, "The passenger traffic now by stage and steamboat ... more than 200 people having come over the Route."

[291] Chartrand's report (Ex. 60) contains the following:

> At p. 99:
> …by 1873 it was increasingly imperative for the Dominion government to obtain a treaty agreement regarding lands between the Lake Superior watershed and the Province of Manitoba. Construction work on the Dawson route resumed in the spring of 1873 aiming to improve travel and transport conditions. In addition, since 1871 it was understood that further lands would be required for the construction of a national railway line to British Columbia, promised to that province as a condition for its entry into Confederation. A newspaper article dating to early March 1873 reported that the railway link from Lake Superior was scheduled to be completed by the end of 1876.
>
> At. p. 194:
> Since March 1873, it was public knowledge that an eastern segment of the Canadian Pacific Railway linking Lake Superior and Winnipeg was expected to be completed within less than three years, by December 31 st, 1876. The CPR created an added sense of urgency for the Dominion to succeed in negotiating a treaty for the surrender of title to lands by the Ojibway. As Daugherty points out:
>
> > On the 17th of July, Sir John A. Macdonald telegraphed Lieutenant-Governor Morris who replaced the retired Lieutenant-Governor Archibald, that the railway from Pembina to Red River would be completed by December 31, 1874, and the section from Lake Superior to Red River by the same day in 1876. Since the latter section would have to pass through the as yet unceded territory of the Saulteaux, it became imperative that this area be secured.
>
> [Emphasis added; references omitted.]

[292] Lovisek's report (Ex. 28) contains the following at p. 74:

> By the time of the 1873 treaty negotiations, the Dominion Government's interest in entering into Treaty 3 was disposed to the securing of land and rights of way for the Canadian Pacific Railway [CPR]. The added pressure was that the section of the CPR from Lake Superior to the Red River was to be completed by December 31, 1876. The Dominion Government now faced two right of way issues, the Dawson Route and the Railway.
> [Emphasis added; footnotes omitted.]

[293] In the spring and early summer of 1873, Canadian officials proposed revised treaty terms, different Treaty Commissioners and a new location for the treaty negotiations.

[294] A Spragge memorandum dated May 31, 1873 (Ex. 4, pp. 212-213) contains the following:

> … with the object of re-opening negotiations for a Treaty, and cession of lands, with the Indians who assemble periodically at Fort Frances… it is respectfully submitted that in view of the terms already proposed to them not having been accepted … that authority be given to place before the Indians a somewhat different proposition than heretofore offered them.

> They have refused an annuity of $3 a head as inadequate, although a gratuity of corresponding amount was tendered with it, and they argue that the discoveries of precious metals within the territories which they claim as hunting grounds entitle them to more generous treatment.
>
> … from the best information which can be obtained, it is to be assumed that it would be wasting time to repeat the same offers. It is accordingly proposed that if found absolutely necessary, the annuity per head be made $5, to be continued at that rate for a period of 15 years, and then to be reduced to $3 per head, and as a gratuity on concluding a Treaty is invariably expected, that it be made on this occasion $4. … It will, of course, be necessary to consent to such Reserves of moderate extent, and in the same ratio as provided for in the Treaties alluded [Treaties 1 and 2], being set apart …

[295] On June 2, 1873, Dawson recommended (Ex. 4, p. 210) comparatively more generous terms:

> In order to effect a treaty ... it will be necessary that the commissioners should have it in their power to make ... more liberal offers than they were enabled to do last year ...
>
> In suggesting that His Honour, the Governor of Manitoba, should meet the commissioners and Indians at the Northwest Angle ... with the company of ... troops now stationed at Fort Garry, I would say in explanation, that the ... Indians having ... had but little intercourse with the white man, are still but savages and like all Indian tribes in a primitive condition, much impressed by ceremony and display. They feel and know that the treaty is a matter of the greatest importance to them and when they see the commissioners coming unattended as they have so far done, to treat with them and observe the utmost parsimony, manifested, even in dealing them out a few day's rations, as has hitherto been the case, they are led to the belief that the Government of Canada attaches but little importance to negotiations which are to them of the gravest moment ... [Emphasis added.]

He also recommended that the Commissioners be empowered to offer a present equal to $14 per person [vs. $4 per person] plus annual payments up to Ten Dollars [$10] per person [vs. $5 per person for 15 years then $3 per person.]

[296] Apparently without having reviewed Dawson's recommendations, Spragge's recommendations in a memorandum [Ex. 1, Vol. 6, tab 219] to the Minister of Public Works dated June 5, 1873, were adopted by Order in Council dated June 16, 1873.

[297] On the same day, June 16, 1873, an Order in Council (Ex. 4, pp. 213-214) was passed (to which Chartrand referred as the authority for the 1873 Treaty 3 Commissioners), which contained the following:

> Whereas we have thought it expedient for the due management of Indian Affairs in the Province of Manitoba and in our North-West Territories respectively in our said Dominion of Canada that a Board of Commissioners should be appointed for suggesting, reporting on and arranging the general principles and bases upon which all the negotiations and Treaties (**whether for the cession to us of lands or otherwise**), between us and the several Indian bands or tribes in the said Province of Manitoba and the North-West Territories of our said Dominion of Canada, and upon which all questions of general policy in Indian Affairs as regards the said Province and territory should be settled.
>
> Now therefore know ye that ... the said the Hon. Alexander Morris, Lindsay Russell and Joseph Albert Norbert Provencher, have thought fit to ... appoint you ... to be our commissioners for suggesting, reporting on and arranging the several principles and bases upon which all the negotiations and treaties (whether for the cession to us of lands or otherwise) between us and the several Indian bands or tribes in the said province of Manitoba and the Northwest Territories of our

> said Dominion of Canada, and upon which all questions of general policy in Indian affairs as regards the said province and territory should be settled [Emphasis added.]
>
> And we do hereby authorize and empower you …for us and our successors, and in our name from time to time to negotiate, make and conclude with the several bands or tribes of Indians the necessary Treaties for the cession to us, our heirs and successors, of all and every their respective rights, titles and claims to and in the said lands and every of them.
>
> Provided always, and it is our Royal will and pleasure that the powers and authority, by these our Royal Letters Patent given to and conferred upon you … with and by the assent and approval of our Governor-General of Canada and not otherwise howsoever.
> [Emphasis added.]

[298] Alexander Campbell ("Campbell"), the Minister of the Interior, who had recently become Superintendent of Indian Affairs, had begun to take a hand in the negotiations. Bearing in mind Dawson's recommendations, and concerned that they might fail if the Commissioners were hamstrung by the earlier Order in Council endorsing Spragge's recommendations of June 5, 1873, he wrote a letter to his ex-Parliamentary colleague, Morris, on July 31, 1873 that included the following:

> …I would recommend a military escort being sent and I have no doubt it will be done ...
> Dawson has recommended that the sum to be given to the Indians as an actual gift be augmented from $5-$14 a head, and that the Commissioners have discretionary power to go as high as $10 per annum per head by way of annuity, instead of five dollars as at present, and I am going to bring these two points before Council this afternoon.
> [Emphasis added.]

[299] On August 6 1873, Canada passed an Order in Council (Ex. 4, p. 220) reflecting Campbell's recommendations as follows:

> … the Minister of the Interior believes that it will be necessary to give larger sums to the Saulteaux tribe than those mentioned in the Order in Council above referred to and he recommends …discretion to augment the immediate present to the Indian to … not [exceed] $15 a head of the population, and that in regard to the annual payments to be subsequently made, the Commissioners … discretionary power, with a limit of seven dollars per head of the population.
> The minister … believes from the information before him, that a treaty cannot be negotiated ... without the discretionary powers as above recommended being given to the Commissioners …
> [Emphasis added.]

[300] Campbell wrote Ex. 4, p. 219 to Morris as follows:

> The Order-in-Council, you will observe, gives the Commissioners discretionary power to go as high as $15 per head as a cash payment, and as high as $7 per head as an annuity to each Indian. While, however, it has been thought desirable (with a view to prevent the possible failure of the negotiations) to give the Commissioners such large discretionary powers, the Government rely that every effort will be made … to secure a Treaty on more favourable terms …

[301] By letter dated August 9, 1873 (Ex. 4, p. 221), Campbell requested the acting Minister of Militia and Defense to arrange for troops to attend the Treaty negotiations:

> ... not because of any danger to be apprehended from the Indians, but because of the effect which is produced upon them by the presence of the surroundings, which in their minds should accompany the representatives of the Sovereign who are sent to deal with them.

[302] On August 26, 1873, Dawson, apparently realizing he had not been re-appointed a Treaty Commissioner, wrote Ex. 4, p. 224 to Campbell:

> … they have for some years past observed the whitemen in unaccustomed numbers pursuing their avocations quietly and unobtrusively, and if they are now disposed to enter into a treaty with the Government, as I believe them to be, I can safely say that it is in no small measure due to the fact that from observing the proceedings of the people on the Works they have begun to look with favour on the altered position in which they are being placed by the opening up of their country… [Emphasis added.]

[303] Over August, difficulties developed in respect of Lindsay Russell's appointment as Treaty Commissioner. On September 3, Campbell appointed Dawson to replace Russell (although not as a member of the Management Board of Commissioners appointed June 16, 1873.)

[304] Campbell specifically instructed Morris that Dawson was "not to negotiate the treaty at the North West Angle. You are, with the other Indian commissioners."

[305] In his capacity as Lieutenant Governor of Manitoba and the Northwest Territories, Morris had had a busy summer. He had not been ready to start the negotiations earlier.

[306] Lovisek's report (Ex. 28) contains the following at page 81:

> Lieutenant-Governor Morris was not ready to enter Treaty 3 negotiations just then, for he was dealing with the aftermath of violent outbreaks which had lead to a massacre of the Assiniboine by American whiskey traders at Cypress Hills in June 1873. As a result of the violence, settlers, who were afraid that the Dakota (Sioux) might attack Fort Garry, urged Morris to remove the Dakota (Sioux) to reserves. Since Morris had received permission to negotiate a treaty with the Dakota in the spring of 1873, he dispatched a former HBC employee, Pascal Breland to speak with the Dakota. The urgency of settling Indians on reserves was further compounded by increasing tensions between the Dakota, Métis and other native groups like the Saulteaux and Cree. Violence had escalated by July 1873. If this wasn't enough, Morris also had to deal with the arrest of Louis Riel for "inspiring insurrection."
>
> Under the weight of these political considerations, Lieutenant-Governor Morris insisted that troops accompany the Commissioners to the Treaty 3 negotiations. This reason for a military presence at Treaty 3 negotiations, differs from that originally proposed by Campbell based on information received from Dawson, which was that the troops would add the necessary ceremony and decorum to demonstrate to the Saulteaux that the Dominion Government took treaty negotiating seriously. Morris, however, was unable to obtain as many troops as he wanted because the military was needed for disturbances elsewhere. Walmark has interpreted Morris' perception of treaty negotiations in view of what Morris faced in Manitoba at the time:
>
> > Morris knew he would have to settle the Treaty Three negotiations quickly; he did not have the luxury of time to deal with the Saulteaux. The growing fear in Fort Garry that Riel would be elected only intensified the need to conclude the Treaty Three negotiations. The Lieutenant-Governor was under intense pressure as he travelled to the Lake of the Woods determined to sign an agreement with the Saulteaux….
>
> [Emphasis added; footnotes omitted.]

[307] The previous negotiations in 1870, 1871 and 1872 had all been at Fort Frances. The 1873 negotiations were to take place at the North West Angle; Pither was asked to arrange for the Ojibway to assemble there by September 10. After the Ojibway objected to the new location, Morris directed them that negotiations would commence there on September 25, 1873. He continued to insist that troops be present.

7. THE 1873 NEGOTIATIONS

The Documents

[308] The extant documents relating to the 1873 negotiations are voluminous. They include the following:

1. The Shorthand Reporter's Account/The *Manitoban* Newspaper Account

[309] According to Morris, the Shorthand Reporter's Account (Ex. 1, Vol. 7, tab 282) was prepared by an anonymous soldier who accompanied him to the North West Angle for the Treaty negotiations. It was published in *The Manitoban* newspaper in several editions in October 1873. The reporter's original notes are no longer extant.

[310] Morris later copied the *Manitoban* account (beginning at p. 52) in Ex. 9, his 1880 book, *Treaties of Canada with the Indians*. He added the following preamble:

> Attention is called to the ensuing report of the proceedings connected with the treaty, extracted from the *Manitoban* newspaper of the [11th and] 18th October, 1873, published at Winnipeg. The reports of the speeches therein contained were prepared by a short-hand reporter and present an accurate view of the course of the discussions, and a vivid representation of the habits of Indian thought.

[311] In these Reasons, the additions and substitutions that Morris made are bolded; his deletions are shown in italics.

[312] There was disagreement in the evidence about the objectivity of the *Manitoban*, the Defendants contesting the Plaintiffs' suggestion that it was an "organ" of the Manitoba government.

[313] In his report, Ex. 60, Chartrand noted that there has been speculation, for example, that Morris and the author of the *Manitoban* article colluded to ensure consistency between the published account and Morris' Official October 14, 1873 Report.

2. The Nolin Notes

[314] The Nolin Notes (Ex. 1, Vol. 6, tab 275) in English, were taken by Joseph Nolin, a Métis employed by the Ojibway Chiefs. After editing them, Morris attached a copy to his Official Report of October 14, 1873 without comment.

3. The Dawson Notes

[315] Commissioner Dawson took longhand notes [Ex. 1, Vol. 6, tab 268] during the negotiations. His lengthy association with the Ojibway enabled him to identify many of the Ojibway speakers whom the Shorthand Reporter had not.

4. Indian Reporter.

[316] During the Treaty negotiations a Chief told the Commissioners, "You must remember that our hearts and our brains are like paper; we never forget." Although the memory record apparently taken by an anonymous Indian Reporter has not survived, Lovisek opined it was likely transmitted orally to other Ojibway and may have been reflected in surviving written complaints that are included in the historical record.

5. The Treaty/Morris Document

[317] The formal, English language Treaty text, signed by the parties on October 3, 1873, the document the Commissioners would have understood to be "the Treaty;" was attached to Morris' October 14, 1873 Official Report and approved by Privy Council Order on October 31, 1873. It is reproduced (with a transcription) in Ex. 1, Vol. 7, tab 276. A type-set copy appears in Ex. 9, Morris' text, at pages 320-32.

[318] Lovisek's report (Ex. 28) contains the following at pp. 105-106:

> The Morris Document was in part a "fill in the blank" treaty….
> …
> It is likely that the Morris Document, which was completed "in an hour", included the actual drafting of selected additional text to an already prepared template.
> [Footnotes omitted]

[319] I note that in the handwritten document, the reference to the Dominion in the Harvesting Clause is underlined.

6. Morris' Official Report

[320] Morris' Official Report to Ottawa of the Treaty negotiations (Ex. 1, Vol. 7, tab 284) is dated October 14, 1873. To it he attached the Nolin Notes and the Treaty.

[321] Lovisek's report (Ex. 28) contains the following at p. 107:

> On October 14, 1873, Commissioner Morris prepared an official report of the Treaty 3 negotiations. He also attached documents which he considered important and as part of the treaty of record. The official report was prepared for publication in the Annual Report of the Department of the Interior for the Year Ended 30th June 1874.
> [Footnotes omitted]

7. The Manitoba Free Press Account, October 18, 1873

[322] An account of the negotiations published in *The Manitoba Free Press*, Ex. 67/67A, came to light part-way through the trial.

8. Exhibit 31 Handwritten Proposed Articles of Treaty

[323] Exhibit 31, archived with Morris' papers, appears to be notes made by former Treaty Commissioner W. Simpson.

[324] Lovisek's report, Ex. 28, contains the following at pp. 103-4:

> The Proposed Articles of Treaty is a document which appears to be in the handwriting of former Treaty Commissioner W. Simpson and which had likely been prepared prior to the 1871 Treaty 1 and 2 negotiations. A copy of the Proposed Articles of Treaty is retained in Morris' papers. Although the Proposed Articles of Treaty is dated October 3, 1873, the handwriting of the date is different from the handwriting of the document and was likely added at a later time to the document. October 3, 1873 corresponds to the last day of Treaty 3 negotiations.
>
> The Proposed Articles of Treaty contains various articles and a list of descriptions written in colloquial language divided into several sections and subjects. … The articles included the statements:
>
> > No provincial legislature will have the right to change the treaty.
>
> [Footnotes omitted]

10. Draft Treaty [Exhibit 32]

[325] In 1873, Morris appears to have reviewed and then edited a draft treaty that included a metes and bounds description of the Treaty 3 territory, various suggested treaty provisions and spaces for insertion of further provisions including descriptions of the lands to be allotted as reserves. The dates and the names of the signatories were left blank.

Arrival of the Treaty Parties at the NorthWest Angle – late September 1873

[326] It was unusual for treaty negotiations to be held so late in the annual Ojibway seasonal round. The 1871 and 1872 negotiations had been held at Fort Frances during the summer fishing season, where and when food was abundant. The 1873 negotiations were being held at a place and time in the seasonal cycle that were more difficult for the Ojibway.

[327] Chartrand gave evidence that when the Commissioners, along with a contingent of troops, arrived at the North West Angle toward the end of September 1873, the Ojibway were not yet fully assembled.

[328] The *Manitoba Free Press* report Ex. 67/67A contains the following:

> This is the third time the government [has] [sent] … Indian commissioners to negotiate **a** treaty with the tribes eastward of Manitoba. In 1871, a meeting took place at Fort Frances, when the Indian having been fed and provided with six dollars each, departed. In 1872 another meeting took place at Fort Frances, when much satisfaction was expressed at the Commissioners coming, but the Indians, having eaten everything there was to, declined to make any treaty and went off after coming as near as their natures would allow them to an open fight. After considerable difficulty and with much coaxing, these same people agreed to meet the Lieutenant-Governor and the Commissioners at the Northwest Angle, and everything that could be done to bring the matter to a conclusion has been done by the authorities. Ample provisions were sent out, presents were sent out from Canada, troops were sent out from Fort Garry to add the pomp of military display, tents were provided for those Indians who were without them, and yet up to the present time it has been found impossible to persuade the Indians even to meet the Lieutenant Governor at a Council. [Emphasis added.]
> …

[329] The *Manitoban* newspaper account, as later annotated by Morris in Ex. 9, his 1870 book, with his additions and substitutions in bold and his deletions in italics, contains the following:

North-West Angle, Sept**[ember]** 30, 1873.

The Lieutenant-Governor and party, and the other Commissioners appointed to negotiate a treaty with the Indians, arrived here on Thursday, 24th inst…
…
It was at first thought probable that the serious business of the meeting would be begun on Friday, but owing to the non-arrival of a large body of Rainy River and Lac Seul representatives, it was decided to defer it until next day. Saturday came, and owing to the arrival of a messenger from the Lac Seul band asking the Governor to wait for their arrival, proceedings have further stayed until Monday. But "hope deferred maketh the heart sick;" so the advent of Monday brought nothing but disappointment, and this, coupled with the disagreeable wet and cold weather that prevailed, made every one ill at ease if not miserable. The Chiefs were not ready to treat – they had business of their own to transact, which must be disposed of before they could see the Governor; and so another delay was granted. But Monday did not find them ready, and they refused to begin negotiations. An intimation from the Governor that unless they were ready on the following day he would leave for home on Wednesday, hurried them up a little – they did wait on him to-day, Tuesday, but only to say they had not finished their own business, but that they would try and be ready to treat on Wednesday. And so the matter stands at present …
…
The whole number of Indians in the territory is estimated at **[1]**4,000, and are represented here by Chiefs of the following bands:
1. North-West Angle.
2. Rat Portage.
3. Lake Seul.
4. White Fish Bay on Lake of the Woods.
5. Sha-bas-kang, or Grassy Narrows.
6. Rainy River.
7. Rainy Lake.
8. Beyond Kettle Falls, southward.
9. Eagle Lake.
10. Nepigon.
11. Shoal Lake (three miles to the north of this point).

[330] Morris' Official Report dated October 14, 1873 (Ex. 1, Vol. 7, tab 284; Ex. 4 at p. 228) contains the following:

I left here for the Angle on the 23rd Sept.[**ember**] and arrived there on the 25th, when I was joined by Messrs. Provencher and Dawson, the last named of whom I was glad to find had been associated with the Commissioners in consequence of the resignation of Mr. Lindsay Russell, thereby giving us the benefit as well of his knowledge of the country to be dealt with, as of the several bands of Indians resident therein. Mr. *Pither* [**Pether**], of Fort Frances, was also in attendance, and Mr. Provencher was accompanied by Mr. St. John of his department.

On arriving, the Indians who were already there came up to the house I occupied, in procession headed by braves bearing a banner & [**and**] a Union Jack, & accompanied by others beating drums. They asked leave to perform a dance in my hono[*u*]r, after which they presented to me the pipe of peace. They were then supplied with provisions and returned to their camp. As the Indians had not all arrived and for other reasons, the 26th, 27th and 28th were passed without any progress, but on the 29th I sent them word that they must meet the Commissioners next morning. Accordingly, on the 30th they met us in a tent the use of which I had obtained from the military authorities. I explained to them the object of the meeting, but as they informed me that they were not ready to confer with us, I adjourned the meeting until next day.

Commencement of Proceedings on September 30, 1873

[331] From the records alone, the dates of the negotiations are unclear. However, as Morris appears to have been in error in his October 14 report about the dates of the negotiations, based on the weekdays specified, it appears that they started in a formal sense on September 30, 1873, when the Ojibway Chiefs and the Treaty Commissioners met. Morris introduced himself. The Chiefs indicated they needed more time to prepare. The meeting broke up.

[332] The *Manitoba Free Press* (Ex. 67/67A) contains the following:

> The Lieutenant Governor informed the Indians of his object in calling them together and explained that **he and Mr. Provencher had been instructed to speak to them on behalf of the Queen**, and referred in an easy manner, but with evident sincerity to the regard which he had always felt towards the native tribes of the Northwest. … He invited the chiefs to come forward to shake hands with him and then to speak what was it in their minds. There was not anything in their minds except the determination to dodge the interview for another day; for no sooner had the Governor ceased speaking, when the spokesman of the party came forward and on behalf of all the Indians present declared that they had nothing to say today but would deliberate on what the Governor had said until tomorrow. The Governor then told them that his time was much occupied, but that in the belief that they would come to some determination tomorrow they would wait over ....

[333] Dawson's notes record Morris' introductory comments as follows:

> Gov. Morris said, "I am very glad to be here today amongst **the Queen's subjects** I see before me. I have been sent here with Mr. Provencher to see you all - to shake hands with you and to wish you well. I can tell you that **the Queen has always loved her Indian subjects** -- she is always kind to them and they have been kind to her in return. **She has sent me to see you. I am one of her servants. I am her Governor** in this great country and **she has sent me here to see and talk with you.** I am glad of the honor of meeting you here to-day.
>
> The reason I am here today is that the **Queen's Government wish to have the treaty** with you to take you by the hand and never let your hand go. If you wish to make a treaty with me and my friends I wish you would present your chiefs and headmen.
>
> "Powassan" said "what we have heard today we cannot answer until further consideration."
>
> Gov. Morris said, "I cannot remain here long but will stay until 11 o'clock on Wednesday morning." [Underlining emphasis added.]

[334] I note that in his opening statement, it appears that Morris did not mention that Dawson was also there to speak to them. He only mentioned Provencher.

October 1, 1873

[335] The *Manitoba Free Press* describes the proceedings on October 1, 1873 as follows:

> The real opening of negotiations commenced today. Indians came up in grand procession, and the business commenced by an intimation from the Governor that he was ready to receive and shake hands with the chiefs. Instead, however, of proceeding in the manner expected of them, the Indians, …. preferred an indictment against Mr. Dawson. When the question was examined however, the indictment …fell to the ground and the accusers made a change of ground. They wanted certain payments and gifts for the Dawson Road before they would consider the question of the treaty at all. This is exactly the ground they took last year at Fort Frances. Altogether ignoring the fact that in

> 1871 they had received six dollars per head of population in liquidation of all past demands, they yesterday stated that they required payment for two steamboats built at Fort Frances, besides other matters connected with the road. The Governor however declined to separate the two questions, and briefly informed them of the terms which he was commissioned to offer and after some unimportant remarks the council broke up until tomorrow morning. These terms were - to each man, woman, and child the gratuity this year of $10. For subsequent years five dollars a head. Each chief to receive instead of the above $25 a year, and each head man [counselor] $15. The reservations to comprise one square mile for each family of five.

[336] I note that this record makes no mention of a statement by Morris that the Ojibway could hunt and fish on the lands until they were wanted.

[337] Morris' October 14, 1873 Official Report contains the following:

> On the [*1st*] they again assembled, when I again explained the object of the meeting through [**Mr.**] McPherson, an intelligent half breed trader whose services I secured. M. Chatelan, the Government interpreter, was also present. They had selected three spokesmen and had also an Indian reporter whose duty was to commit to memory all that was said. They had also secured the services of M. Joseph Nolin, of Pointe du Chene to take notes in French of the negotiations, a copy of which notes I obtained from him and herewith enclose. The spokesmen informed me they would not treat as to the land until we settled with them as to the Dawson Route, with regard to which they alleged Mr. Dawson had made promises which had not been kept, and that they had not been paid for the wood used in building the steamers, nor for the use of the route itself. Mr. Dawson explained that he had paid them for cutting wood, but had always asserted a common right to the use of wood and the water way. He asked them what promise had not been kept, and pointed out that the Government had twice before endeavored to treat with them for a settlement of all matters. He referred them to me as to the general question of the use of the route. They were unable to name any promises which had not been kept. Thereupon **I told them I came on behalf of the Queen and the Government of the Dominion of Canada** to treat with them with regard to the lands and all other matters, but that they refused to hear what I had to say; [**they**] had closed my mouth and, as we would not treat except for the settlement of all matters past and future I could not speak unless they asked me to do so. They conferred among themselves and seeing that we were quite firm, the spokesmen came forward and said that they would not close my mouth, after which they would make their demands. The Commissioners had had a conference and agreed, as they found there was no hope of a treaty for a less sum to offer [*$5*] [**five dollars**] per head, a present of [*$10*] [**ten dollars**], and reserves of farming and other lands not exceeding one square mile per family of [5] [**five**], or in that proportion, sums within the limits of our instructions, though I had private advices if possible not to give the maximum sum named, as the Government had been under a misapprehension as to amounts given to the Bands in the United States. The Chiefs heard my proposal and the meeting adjourned until next day. [Underlining added.]

[338] Chartrand gave evidence that none of the Dawson Notes, the Manitoban newspaper or the Manitoba Free Press corroborate a reference by Morris to the Government of the Dominion of Canada (although I note that Dawson's notes refer to the Queen's Government.)

[339] The October 14 Official Report makes no mention of a statement by Morris that the Ojibway could hunt and fish on the lands until they were wanted.

[340] The *Manitoban* newspaper contains the following with respect to the negotiations of October 1, 1873:

> North-West Angle, Oct**[ober]** 1, 1873.

The assembled Chiefs met the Governor this morning, as per agreement, and opened the proceedings of the day by expressing the pleasure they experienced at meeting the Commissioners on the present occasion. Promises had many times been made to them, and, said the speaker, unless they were now fulfilled they would not consider the broader question of the treaty.

Mr. S.J. Dawson, one of the Commissioners, reciprocated the expression of pleasure used by the Chiefs through their spokesman. He had long looked forward to this meeting, when all matters relating to the past, the present, and the future, could be disposed of so as to fix permanently the friendly relations between the Indians and the white men. It was now, he continued, some years since the white men first came to this country – they came in the first place at the head of a great military expedition; and when that expedition was passing through the country all the chiefs showed themselves to be true and loyal subjects – they showed themselves able and willing to support their Great Mother the Queen. Subsequently, when we began to open up the road, we had to call upon the Indians to assist us in doing so, and they **[always]** proved themselves very happy to help in carrying out our great schemes. He was, he continued, one of the Commission employed by the Government to treat with them and devise a scheme whereby both white men and Indians would be benefited. We made to the Indians the proposals we were authorized to make, and we have carried out these proposals in good faith. This was three years ago. What we were directed to offer we did offer, but the Indians thought it was too little, and negotiations were broken off. Since this I have done what was in my power to bring about this meeting with new terms, and consider it a very happy day that you should be assembled to meet the Governor of the Territory as representative of Her Majesty. He would explain to them the proposals he had to make. He had lived long amongst them and would advise them as a friend to take the opportunity of making arrangements with the Governor. When we arrange the general matters in question, should you choose to ask anything, I shall be most happy to explain it, as I am here all the time.

The Chief in reply said his head men and young men were of one mind, and determined not to enter upon the treaty until the promises made in the past were fulfilled, they were tired of waiting. What the Commissioners called "small matters" were great to them, and were what they wished to have settled.

The route that had been built through the country proved this, and the Commissioners promised something which they now wanted.

This was taking the Commissioners on a new tack, but Mr. Dawson promptly undertook to answer the objections. He said all these questions had been discussed before; but if he had made any promises that remained unfulfilled, he would be happy to learn their nature. The Chief replied that all the houses on the line, and all the big boats on the waters, were theirs, and they wanted to be recompensed for them.

Mr. Dawson continued, saying he was glad they had now come to a point on which they could deal. The Indians questioned the right of the Government to take wood for the steamers. This was a right which the speaker had all along told them was common to all Her Majesty's subjects. He then referred them to the Governor if they had anything more to say on that subject. Wood on which Indians had bestowed labor was always paid for; but wood on which we had spent our own labor was ours.

His Excellency then addressed them at some length. He understood that they wanted to have the questions in which they were interested treated separately. This was not what he came there for. Wood and water were the gift of the Great Spirit, and were made alike for the good of both the white man and red man. Many of his listeners had come a long way, and he, too, had come a long way, and he wanted all the questions settled at once, by one treaty. He had a message from the Queen, but if his mouth was kept shut, the responsibility would rest on the Indians, and not with him if he were

prevented from delivering it. He had authority to tell them what sum of money he could give them in hand now, and what he could give them every year: but it was for them to open his mouth. He concluded his remarks, which were forcibly delivered, with an emphatic "I have said."

The Chief reiterated that he and his young men were determined not to go on with the treaty until the first question was disposed of. What was said about the trees and rivers was quite true, but it was the Indian's country, not the white man's. Following this the Governor told the Council that unless they would settle all the matters, the big and little, at once, he would not talk. He was bound by his Government, and was of the same mind to treat with them on all questions, and not on any one separately.

On seeing His Excellency so firm, and feeling that it would not do to allow any more time to pass without coming to business the Chief asked the Governor to open his mouth and tell what propositions he was prepared to make.

His Excellency then said – "I told you I was to make the treaty on the part of our Great Mother the Queen, and I feel it will be for your good and your children's. I should have been very sorry if you had shut my mouth, if I had had to go home without opening my mouth. I should not have been a true friend of yours if I had not asked you to open my mouth. We are all children of the same Great Spirit, and are subject to the same Queen. I want to settle all matters both of the past and the present, so that the white and red man will always be friends. I will give you lands for farms, and also reserves for your own use. I have authority to make reserves such as I have described, not exceeding in all a square mile for every family of five or thereabouts. It may be a long time before the other lands are wanted, and in the meantime you will be permitted to fish and hunt over them. I will also establish schools whenever any band asks for them, so that your children may have the learning of the white man. I will also give you a sum of money for yourselves and every one **[of your wives and children]** for this year . I will give you $10 **[ten dollars]** per head of the population, and for every other year $5 **[five dollars]** a-head. But to the chief men, not exceeding two to each band, we will give $20 **[twenty dollars]** a-year for ever. I will give to each of you this year a present of goods and provisions to take you home, and I am sure you will be satisfied.

After consultation amongst themselves, the Councillors went to have a talk about the matter … [Underlining emphasis added.]

[341] Dawson's Notes re October 1, 1873 contain the following:

1st Oct.
"Pow-as-san" addressing Mr. Dawson said,
The promises you have made we want to see fulfilled. Look to where the waters separate. The trees you have taken &c, are the property of those you see before you -

Gov. Morris – will ask Mr. Dawson to reply to the question they have put. I am here for the purpose of arranging all matters with their nation.

Mr. Dawson said,
He was extremely happy to meet the chiefs on the present occasion. I have been trying for a long time to bring about this meeting as that the Indians could assemble before His Excellency the Governor and arrange matters for the future. Now that we have met here I will take occasion to relate the connections between us and the Indians. It is now some years since the first white man came through their territory - they came with a military expedition. When that expedition was passing through the country **the Indians shewed themselves loyal subjects of Her Majesty**. They extended the right hand of fellowship and gave every assistance in their power to the soldiers and their white friends. When we began to open the road, we entered into closer relations with the Indians and from the commencement of this works up to this time no serious breach was occurred with the Indians.

Apart from carrying on the works I was one of the Commissioners appointed to make a treaty between the Indian and the whites. **We made the offers as instructed by the Government** in good faith what we were authorized to offer, we offered- they thought that too little and, in consequence, negotiations were broken off. Since then I have done all in my power to bring about what I see to-day – **the Indians assembled to meet Her Majesty's representative, the Governor** of these Territories. His Excellency will propose the terms he will make to them. I have travelled among them for many years and I now would give them the advice of a friend, one who has their interests at heart, not to let this opportunity pass of making a treaty. When they have arranged the general matters and introduced their Chiefs to the Governor I will be very happy to answer any questions, in detail, which may be asked.

"Pow-as-san" said
I have presented you the first question. All our warriors and young men want these matters settled first, other subjects we will leave to another time. We are tired waiting for what you promised long ago. What you call the small matter is what we wish settled. You have talked to our chiefs and made them promises.

Mr. Dawson wishes to know what promises he has made? Mr. Pither was my associate when these things were talked of before, would like to know what particular promises they refer to.

"Posh-knig-on" said
We want to be recompensed for the large boats you have on the waters.--

Mr. Dawson is extremely glad they have come to a point. They question the right of the Government to take wood for steamers. **Wood and water are the common rights of all the subjects of Her Majesty** and on this would refer them to His Excellency. Wood on which they bestowed labor they were paid for.

Gov. Morris, said
I understand that the nation here want separate questions. I am not here for that purpose. I tell them that the water is the gift of the Great Spirit and the wood belongs to red and white man alike. Many of you have come a long distance, so have I, to make a Treaty and shake hands. You have not only to think of yourselves but your wives and children and I have come to make a Treaty with you.
I have a message from the Queen to you, but if you shut my mouth I cannot tell you. **I am here to tell you what the Great Mother thinks.** I have authority to tell you what sum of money I can give you now and hereafter and what presents I can make.

"Posh-king-on" said
All are of one mind. What you said with regard to trees and water we know is the Great Spirit's power. This is the Indians' not the white man's country, we are determined to finish the first question.

Gov. Morris said
If the Indians will not address him on the subjects he will not deal with them. He will deal with them on all questions or none.

"Posh-King-on" said
The warriors and headmen have talked it over and come to one mind. We would like to hear first what is the offer you have to make us. We do not wish to shut his mouth. We have made a Council. After he has made his offer we will present our demands.

Gov. Morris said
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. I would have been very sorry if you had shut my mouth and

had let me return without opening it. 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. 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. I am glad to learn that some of you wish your children to learn the [?] of the white man and, on application of a Band, a school will be established. I am authorized to give you a present of goods and provisions to take home with you after a treaty has been made. I am ready to give each of you a sum of money in your hands $10- per head this year. After this year we will agree to pay you $5 for every man, woman & child. I have told you what I have power to do and as I can't stay with you very long would be glad to know if you can meet me this afternoon or to-morrow morning – Each Chief is to get $25 and 3 Head men each $15.--

"Posh-king-on" said
Once more we come before you to let you know of one mind of what you have set before us. We have one mind to go and think over what you have said and I hope it will never end during our lives. Two Chiefs are sitting here who are the greatest chiefs and we are now going to hold a Council so that there may be no jealously among them.
2nd Meeting then adjourned.— [Underlining added.]

[342] Lovisek's report, Ex. 28, contains the following at pp. 84-86:

Treaty negotiations finally commenced on October 1, 1873 but not until Morris threatened the Saulteaux that he would return to Fort Garry if they did not meet by that date. At the assembly of October 1, 1873, Morris explained his purpose by making an opening offer which was translated by George McPherson, who, according to Morris, was "an intelligent half-breed trader whose services I secured - Mr. Chastelain, the Government Interpreter, was also present."

Morris stated that the Indians had selected three spokesmen and an Indian reporter: "whose duty was to commit to memory all that was said." The Saulteaux had also secured the services of Mr. Joseph Nolin of Pointe de Chene. Also present were Joseph's two brothers, Charles and August.

The Saulteaux spokesperson said that they would not discuss the treaty until issues concerning the Dawson Route were settled. These issues involved promises made by Dawson which the Saulteaux said were not kept. The Saulteaux also said that they had not been paid for the wood used in building steamers or for the use of the Dawson route itself. Mr. Dawson responded that he had paid them for cutting wood but asserted a common right to the use of the wood and the waterway. Why Dawson took this apparently uncompromising position on wood has been interpreted as an "unpalatable compromise" that may have been an attempt to silence "further accusations against his [Dawson's] past handling of Native affairs from either the Native or non-Native side…."

Dawson then asked the Saulteaux what promise had not been kept. According to Morris, the Saulteaux were unable to name any promises which had not been kept, however, the Saulteaux may or may not have been given time to respond before Morris through his translator, George McPherson, launched into his opening offer.

Resources (such as wood and minerals) and tolls in the form of payments and presents for use of the right of way were issues of great and long standing importance to the Saulteaux in the previous failed treaty negotiations….

…

The taking of wood by Euro-Canadians was a constant complaint of the Saulteaux, and was remarked upon by observers like Reverend Grant in 1872 and Burton Marshall in 1872, when not raised by the Saulteaux themselves.

[343] Lovisek gave evidence that gleaning Ojibway understanding of the Harvesting promise includes consideration of differences between Euro-Canadian and Ojibway discourse. Unlike the Ojibway, the Commissioners used a manner of communication similar to present day Euro-Canadian discourse, in which the absence of an expression of disagreement is sometimes assumed to suggest a lack of disagreement. In Ojibway discourse, silence or absence of open express disagreement is **not** a basis for assuming Ojibway assent. They were extremely polite and would not voice objections in the form of outright denial or rejection. Instead, they would typically change the subject or even make a "contradictory statement of agreement." For example, on October 2, the Ojibway agreed with Morris' earlier statement that they owned the water and wood in their territory in common with Canada but later said it is our wood and water.

[344] She noted that although the Ojibway did not directly challenge Morris' statements that wood and water were the common rights of all the subjects of Her Majesty, they did assert that the country was their country and the trees and the water were theirs. She gave evidence that instead of saying to Morris, "You are wrong about the wood and water," the Ojibway responded in an almost classic Ojibway manner. They said:

> What was said about the trees and rivers was quite true, but it was the Indian's country, not the white man's.

[345] Lovisek noted that during the negotiations, Morris never clearly told the Ojibway what he wanted from them. He did not use phrases such as "if you sell us your lands" or "if you give up your lands" then "I will do certain things for you." Like Dawson, he said he wanted to settle "all matters of the past and the present, so that the white and red man will always be friends." She opined that the Ojibway would not have understood from what he said that he was seeking a surrender of the right to harvest renewable natural resources on those lands.

[346] Von Gernet gave evidence that an explanation was not necessary, since the Ojibway already understood what he wanted.

[347] Lovisek's report (Ex. 28) contains the following at pp. 86-87

> In his opening offer Lieutenant-Governor Morris offered the Saulteaux a bundle of items including friendship, reserves, schools, money, presents of goods and provisions. One offer in the bundle of terms includes reference to hunting and fishing:
>
> > I want to settle all matters both of the past and the present, so that the white and red man will always be friends. I will give you lands for farms, and also reserves for your own use. I have authority to make reserves such as I have described, not exceeding in all a square mile for every family of five or thereabouts. *It may be a long time before the other land are wanted, and in the meantime you will be permitted to fish and hunt over them.* I will also establish schools whenever any band asks for them, so that your children may have the learning of the white man. I will also give you a sum of money for yourselves and every one of your wives and children for this year. I will give you ten dollars per head of the population, and for every other year five dollars a-head. But to the chief men, not exceeding two to each band, we will give twenty dollars a year for ever. I will give to each of you this year a present of goods and provisions to take you home, and I am sure you will be satisfied. [Emphasis in report.]
>
> Morris' statement : "It may be a long time before the other land are wanted, and in the meantime you will be permitted to fish and hunt over them" will be the only statement Morris makes during the

three days of recorded oral negotiations that refers to the taking-up clause as drafted by Morris. Morris makes this reference as one of many offers which ranged from the intangible (friendship) to the tangible (farm lands, reserves, schools, money, payments for chiefs, goods and provisions).

The Saulteaux responded to Morris' offer with silence. Silence is not an indication of consent for the Saulteaux. Consent for the Saulteaux was only possible after a council in which consensus was reached. As noted, Commissioner Dawson acknowledged this point in his 1868 report:

> Any one who, in negotiating with these Indians, should suppose he had mere children to deal with, would find himself mistaken. In their manner of expressing themselves, indeed, they make use of a great deal of allegory, and their illustrations may at times appear childish enough, but, in their actual dealings, they are shrewd and sufficiently awake to their own interests, and, the matter should be one of importance, affecting the general interests of the tribe, they neither reply to a proposition, nor make one themselves, until it is fully discussed and deliberated upon in Council by all the Chiefs

Negotiations adjourned to the next day, October 2, 1873, presumably to allow the Saulteaux to discuss Morris' offer in council. …

October 2, 1873

[348] The *Manitoba Free Press* (Ex. 67/67A) reported the events of October 2 as follows:

> "Well, that cuss's paper pretty nigh busted the whole concern"
>
> This outside commentary accurately described the proceedings of today. At the meeting of the Council the Indians lost no time in explaining that the terms offered by the Governor were by no means acceptable. An Indian gentleman, stamping on the ground as he spoke, asked whether we heard the gold and silver rattling under his feet?
>
> No one had heard the metallic sound, so the Indian proceeded to give us a most gratifying account of what we should find as soon as we had made this treaty. With the views held by him there can be no doubt that he would make a most valuable immigration agent …, however, a friend of his … now stepped forward and presented a catalogue of articles which the Indians with one mind, as he said, had determined to have in addition to the terms offered by the Governor.
>
> This was the paper referred to above. Which was "well nigh busting the whole concern," for of course it was out of the question. Indeed, most persons smiled as the Governor read it out, for which levity a severe rebuke was administered by the Indian who presented the paper.
>
> The following is the contents of the paper which the governor read as the terms asked by the Indians:

Here was included the content of the 1869 Demands set out earlier. The *Manitoba Free Press* report continued as follows:

> …
> It is not necessary to say much about this averment. That cuss's paper is certainly the best way of regarding it.
>
> As the Indians were departing however, one chief stepped forward and said that he and his band were prepared to accept the terms offered by the Governor if a few things which the Indians could not otherwise obtain were given them. These were principally agricultural implements and wants which the white man is only too glad to supply. Then came the passage of arms between Mr. Dawson and

this Shebandowan Indian – Blackstone. The effect of which was very felicitous, and the Council then broke up for the purpose of enabling the Indians once more to consider the matter.

The Governor told them that he was not permitted to accede to their demands, was … departing if they did not accept his terms, and advised them strongly for the sake of their families to accept what was offered them. …

[349] The *Manitoban* report (again showing Morris' additions in bold and deletions in italics as before) contains the following:

THIRD DAY. [Oct 2]
Proceedings were opened at 11 **[eleven]** o'clock by the Governor announcing that he was ready to hear what the Chiefs had to say. The Fort Frances Chief acted as spokesman **[assisted by another Chief, Powhassan]**.

Ma-ni-to-bah-sis **[Ma-we-do-pe-nais]** – I now lay down before you the opinions of those you have seen before. We think it a great **[th]**ing to meet you here. What we have heard yesterday, and as you represented yourself, you said the Queen sent you here, the way we understood you as a representative of the Queen. All this is our property where you have come. We have understood you yesterday that her Majesty has given you the same power and authority as *she* has, to act in this business; you said the Queen gave you her goodness, her charitableness in your hands. This is what we think, that the Great Spirit has planted us on this ground where we are… **We think where we are is our property.** I will tell you what he said to us when he **[he]** planted us here; the rules that we should follow –us Indians – He has given us rules that we should follow to *[]* govern **[us]** rightly. We have understood you that you have opened your charitable heart to us like a person taking off his garments and throwing them to all of us here. Now, first of all, I have a few words to address to this gentleman (Mr. Dawson). When he understood rightly what was my meaning yesterday, he threw himself on your help. I think I have a right to follow him to where he flew when I spoke to him on the subject yesterday. We will follow up the subject from the point we took it up. I want to answer what we heard from you yesterday, in regard to the money that you have promised us yesterday to each individual. I want to talk about the rules that we had laid down before. It is four years back since they **[we]** have made these rules. …a Council that has been agreed upon by all the Indians. I do not wish that I should be regarded **[required]** to say twice what I am now going to lay down. We ask $15 **[fifteen]** dollars for all that you see, and for the children that are to be born in future. This year only we ask for $15 **[fifteen dollars]**; years after $10 **[ten dollars];** our Chiefs $50 **[fifty dollars]** per year for every year **[and other demands of large amounts in writing, say $125,000 yearly]**.

Another Chief – I take my standing point from here. Our councillors have in Council come to this conclusion, that they should have $20 **[twenty dollars]** each; our warriors, $15 **[fifteen dollars]**; our population, $15 **[fifteen dollars]**. We have now laid down the conclusion of our Councils by our decisions. We tell you our wishes are not divided. We are all of one mind. (Paper put in before the Governor for these demands.) [The 1869 Demands were reproduced but are omitted here]:

…

[Lake Seul] Chief – I now let you know the opinions of us here. We would not wish that anyone should smile at our affairs, as we think our country is a large matter to us. If you grant us what is written on that paper, then we will talk about the reserves; we have decided in Council for the benefit of those that will be born hereafter. If you do so the treaty will be finished, I believe.

Governor – I quite agree that this is no matter to smile at. I think that the decision of to-day is one that affects yourselves and your children after, but you must recollect that this is the third time of negotiating. If we do not shake hands and make our Treaty to-day, I do not know when it will be done, as the Queen's Government will think you do not wish to treat with her. You told me that you understood that I represented the Queen's Government to you and that I opened my heart to you, but you must recollect that if you are a Council there is another great Council that governs a great

Dominion, and they hold their councils the same as you hold yours. I wish to tell you that I am a servant of the Queen. I cannot do my own will; I must do hers. I can only give you what she tells me to give you. I am sorry to see that your hands were very wide open when you gave me this paper. I thought what I promised you was just, kind and fair between the Queen and you. It is now three years we have been trying to settle this matter. If we do not succeed to-day I shall go away feeling sorry for you and for your children that you could not see what was good for you and for them. I am ready to do what I promised you yesterday. My hand is open and you ought to take me by the hand and say, "yes, we accept of your offer." I have not the power to do what you ask of me. I ask you once more to think what you are doing, and of those you have left at home, and also of those that may be born yet, and I ask you not to turn your backs on what is offered to you, and you ought to see by what the Queen is offering you that she loves her red subjects as much as her white. I think you are forgetting one thing, that what I offer you is to be while the water flows and the sun rises. You know that in the other country **[United States]** they only pay the Indian for 20 **[twenty]** years, and you come here to-day and ask for ever more than they get for 20 **[twenty]** years. Is that just? I think you ought to accept my offer, and make a treaty with me as I ask you to do. I only ask you to think for yourselves, and for your families, and for your children and children's children, and I know **[that]** if you do that you will shake hands with me to-day.

Chief – I lay before you our opinions. Our hands are poor but our heads are rich, and it is riches that we ask so that we may be able to support our families as long as the sun rises and the water runs.

Governor – I am very sorry; you know it takes two to make a bargain; you are agreed on the one side, and I for the Queen's Government on the other. I have to go away and report that I have to go without making terms with you. **[I doubt if]** the Commissioner**[s]** will be sent again to assemble this nation. I have only one word more to say; I speak to the Chief and to the head men to recollect those behind them, and those they have left at home, and not to go away without accepting such liberal terms and without some clothing.

Chief – My terms I am going to lay down before you; the decision of our Chiefs; ever since we came to a decision you push it back. The sound of the rustling of the gold is under my feet where I stand; we have a rich country; it is the Great Spirit who gave us this; where we stand upon is the Indians' property, and belongs to them. If you grant us our requests you will not go back without making the treaty.

Another Chief – We understood yesterday that the Queen had given you the power to act upon, that you could do what you pleased, and that the riches of the Queen she had filled your head and body with, and you had only to throw them round about; but it seems it is not so, but that you have only half the power that she has, and that she has only half filled your head.

Governor – I do not like to be misunderstood. I did not say yesterday that the Queen had given me all the power; what I told you was that I was sent here to represent the Queen's Government, and to tell you what the Queen was willing to do for you. You can understand very well; for instance, one of your great chiefs asks a brave to deliver a message, he represents you, and that is how I stand with the Queen's Government.

Chief – It is your charitableness that you spoke of yesterday – Her Majesty's charitableness that was given you. It is our chiefs, our young men, our children and great grand-children, and those that are to be born, that I represent here, and it is for them I ask for terms. The white man has robbed us of our riches, and we don't wish to give them up again without getting something in their place.

Governor – For your children, grandchildren, and children unborn, I am sorry that you will not accept of my terms. I shall go home sorry, but it is your own doing; I must simply go back and report the fact that you refuse to make a treaty with me.

Chief – You see all our chiefs before you here as one mind; we have one mind and one mouth. It is the decision of all of us; if you grant us our demands you will not go back sorrowful; we would not refuse to make a treaty if you would grant us our demands.

Governor – I have told you already that I cannot grant your demands; I have not the power to do so. I have made you a liberal offer, and it is for you to accept or refuse it as you please.

Chief – Our chiefs have the same opinion; they will not change their decision.

Governor – Then the Council is at an end.

Chief **[(of Lac Seul)]** – I understand the matter that he asks; if he puts a question to me as well as to others, *[and]* I say so as well as the rest. We are the first that were planted here; we would ask you to assist us with every kind of implement to use for our benefit, to enable us to perform our work; a little of everything and money. We would borrow your cattle; we ask you this for our support; I will find whereon to feed them. The waters out of which you sometimes take food for yourselves, we will lend you in return. If I should try to stop you – it is not in my power to do so; even the Hudson's Bay Company – that is a small power – I cannot gain my point with it. If you give what I ask, the time may come when I will ask you to lend me one of your daughters and one of your sons to live with us; and in return I will lend you one of my daughters and one of my sons for you to teach what is good, and after they have learned, to teach us. If you grant us what I ask, although I do not know you, I will shake hands with you. This is all I have to say.

Governor – I have heard and I have learned something. I have learned that you are not all of one mind. I know that your interests are not the same – that some of you live in the north far away from the river; and some live on the river, and that you have got large sums of money for wood that you have cut and sold to the steamboats; but the men in the north have not this advantage. What the Chief has said is reasonable; and should you want goods I mean to ask you what amount you would have in goods, so that you would not have to pay the traders' prices for them. I wish you were all of the same mind as the Chief who has just spoken. He wants his children to be taught. He is right. He wants to get cattle to help him to raise grain for his children. It would be a good thing for you all to be of his mind, and then you would not go away without making this treaty with me.

Blackstone (Shebandowan) – …The people at the height of land where the waters came down from Shebandowan to Fort Frances, are those who have appointed me to lay before you our decision. We are going back to hold a Council."
…
Governor – "I think the nation will do well to do what the Chief has said. I think he has spoken sincerely, and it is right for them to withdraw and hold a Council among themselves."
…
The Council broke up at this point, and **it was extremely doubtful whether an agreement could be come to or not**.[Bolding added.] The Rainy River Indians were careless about the treaty, because they could get plenty of money for cutting wood for the boats, but the northern and eastern bands were anxious for one. The Governor decided that he would make a treaty with those bands that were willing to accept his terms, leaving out the few disaffected ones.
[Underlining added. Bolding added where indicated. Most bolding and all italics in original.]

[350] Dawson's notes of the October 2 proceedings contained the following:

In regards to the money offered to each I will now answer. Four years ago they made a point and they wish to abide by it, it is a council agreed in by all the Indians. I don't wish to say twice what I now speak. We ask $15 for all that you see & for the children that are to be born in the future. This year only we ask $15, years after $10, our chiefs $50.

"Manito-biness" said
We have councilled in regard to this. we have come to the conclusion that $20 for chiefs $15 for our warriors and lieutenants.- We have now laid down the conclusion of our council and all are of one mind.

"Can-ta-go-wa-[?]iny" said
If you grant us what is asked for in that paper we will talk about the reserves. If you grant us what is written there, to-day the treaty will be made.-

Gov. Morris said
If we don't shake hands to-day I don't know when it will be done. You told me that you understood I represented the Queen here and that I had opened my heart. You must remember there is another council larger than yours and governed as yours. I am only a servant of the Queen and can only give what she tells me. I am sorry to say that your hands were very wide open when you gave me this paper. I thought that what I promised you was just and fair between the Queen and you. Three years we have been trying to settle this matter. If we don't succeed to-day I will go away sorry for you and your children. I am ready to do what I promised yesterday and you ought to take me by the hand and accept. I have no power to do more. I ask you once more to think what you are doing and not to turn your backs on what I offered justly. I think you are forgetting that what I offer you is while the water flows and the sun rises. You know that in the other Country they only pay for 20 years and now you ask as much for ever as they do for that time

"Can-ta-go-wa-[?]iny" said
I am come to lay before you the opinions of our chiefs. Our hands are [?] our [?] are rich and what we ask is to support our families as long as the waters run.

Gov. Morris said
It takes two to make a bargain. You wont accept my terms and I will be obliged to go away and tell my friends that your ideas were too rich, and I do not know that we shall ever assemble again to meet this nation. I have only one word more to say and speak to the chiefs and headmen, not to go away without agreeing to such favorable terms.--

"Posh-king-on" said
It was the Great Spirit that gave us this property and it belongs to the Indians. If you were to grant our requests we would make a treaty.

"Canta-go-wa-[?]iny" said
They understood yesterday that the Queen had given him all the power she had.

Gov. Morris said
I don't like to be misunderstood. I would be very sorry to say that the Queen had given me all her power. What I said was "to tell you what the Queen was willing to do for you".--One of our great Chiefs gives a Brave a message. He does as he is told. That is the way I stand.

"Can-ta-go-wa-[?]iny" said
We make this demand because Her Majesty has given you her charitableness. It is our chiefs – our warriors – our young men I represent here and it is for them we present our demands.

Gov. Morris said
I think for you and your children and am sorry for you. I will go back and report that you refuse to make a treaty with me.--

> "Can-ta-go-wa-[?]iny" said
> You see all our Chiefs before you. We are all of one mind about our demands. If you grant our demands you will not go back sorrowful. We would not refuse to make a treaty if you would grant them.
>
> Gov. Morris said
> I have no power to grant your demands, act as you please.
>
> "Can-ta-go-wa-[?]iny" said
> Our chiefs have the same opinion.
>
> Gov. Morris
> Then the Council is at an end.
> …
> Meeting then adjourned.
> [Underlining added.]

[351] Morris' Official Report dated October 14, 1873 contained the following concerning the October 2 proceedings:

> On the [*1st*] [2**nd**] October the chiefs again assembled and made a counter proposition, of which I enclose a copy, being the **demand they have urged since 1869**.[Bolding added.] I also enclose an estimate I had made of the money value of the demands amounting to $125,000 per annum. On behalf of the Commissioners I at once peremptorily refused the demand. The spokesmen returned to the chiefs who were arranged on benches, the people sitting on the ground behind them, and on their return they informed me that the chiefs, warriors and braves were of one mind, that they would make a treaty only if we acceded to their demand[*s*]. I told them if so the conference was over, that I would return and report that they had refused to make a reasonable treaty, that hereafter I would treat with those bands who were willing to treat, but that I would advise them to return to the Council and reconsider their determination before next morning, when, if not, I should certainly leave. This brought matters to a crisis. The chief of the Lac Seul band came forward to speak. The others tried to prevent him, but he was secured a hearing. He stated that he represented four hundred people in the north; that they wished a treaty; that they wished a schoolmaster to be sent them to teach their children the knowledge of the white man; that they had begun to cultivate the soil and were growing potatoes and Indian corn, but wished other grain for seed and some agricultural implements and cattle. This Chief spoke under evident apprehension as to the course he was taking in resisting the other Indians, and displayed much good sense and moral courage. He was followed by the Chief "Blackstone", who urged the other Chiefs to return to [**the**] Council and consider my proposals, stating that he was ready to treat, though he did not agree to my proposals or to those made to me. I then told them that I had known all along they were not united as they had said; that they ought not to allow a few chiefs to prevent a treaty, and that I wished to treat with them as a nation and not with separate bands as they would otherwise compel me to do, and therefore urged them to return to their council promising to remain another day to give them time for consideration.
> [Underlining added. Bolding added where indicated. Most bolding and all italics in original.]

[352] Lovisek's report (Ex. 28) contains the following at pp 88-89:

> Treaty negotiations resumed the next day, October 2, 1873. It was now the Saulteaux's turn to present their terms for a treaty. The principal spokesperson, Chief Mawedopenais, countered Morris' offer by presenting him with a list of demands which had been prepared January 22, 1869 (and which had evidently surfaced at the previous treaty negotiations). The 1869 List of Demands included amongst other things, reference to items which indicate the importance the Saulteaux attached to hunting and fishing. Items 7, 8 and 13 of the 1869 List of Demands requested:
>
> > 7th.That every chief gets a double barrelled gun every four years, and every man gets one single barrel gun during the same period

> 8th. That every chief gets 100 Ibs of powder, three hundred lbs of shot, flints and caps, according to the quantity of munitions every year -
> 13th. That every married women gets fishing twine and cord line to make four nets every year -
>
> The 1869 List of Demands also stipulated that these and the other items would last: "forever, that is to say during all the time that an Indian will be alive in this part of the country." The List identified what the Saulteaux would accept from a treaty. The terms had not changed since 1869. The 1869 List of Demands makes no mention what if anything the Saulteaux were prepared to "give up" in return for the requested items.
> … [Underlining added.]

[353] The Ojibway, asserting that they owned the Treaty 3 territory, presented their demands, emphasizing that the proposal they were making had been developed by their Council and represented the will of all the Ojibway. They emphasized that the 1869 Demands /the "rules" they had laid down four years earlier had been developed in "a Council … agreed upon by all the Indians."

[354] On October 2, the Ojibway challenged Morris' authority:

> What we have heard yesterday, and as you represented yourself,you said the Queen sent you here, the way we understood you as a representative of the Queen. We have understood you yesterday that her Majesty has given you the same power and authority as she has, to act in this business; you said the Queen gave you her goodness, her charitableness in your hands ...

[355] Lovisek, Von Gernet and Chartrand all agreed that when the Ojibway referred to Her Majesty having given Morris her power and authority, they were attempting to put Morris in a position where he could not reasonably refuse their demands.

[356] On cross examination on January 26, 2010, Chartrand referred to Chief Mawedopenais' challenge to Morris' authority/his relationship with the Queen, as they were advancing a more aggressive demand. They were asserting that if Morris had the Queen's power, he could meet their demands.

[357] It was in this context that Morris said, "You must recollect that if you are a Council, there is another great Council that governs a Great Dominion and they hold their Councils the same as you hold yours."

[358] The experts disagreed about what the Ojibway understood from that statement. The details of that disagreement are detailed and analyzed later in these Reasons in the sections on the Identity of the Treaty Parties and Mutual Intention.

[359] On October 2, the Ojibway continued to press their 1869 Demands.

[360] As noted earlier, there was disagreement among the experts as to whether the 1869 Demands had been presented to representatives of Canada before 1873 and whether they were in connection with a surrender of right of way and land in the vicinity of the right of way, or with all of the Treaty 3 lands. The disagreements among the experts are summarized and analyzed later in these Reasons in the section on the 1869 Demands.

[361] When the Chiefs continued to press the 1869 Demands on October 2, there was a near impasse.

[362] However, after Chief Sa-katche-way indicated that he might be open to making a treaty, Morris said:

> I have heard you and learned something. I know that you are not all of one mind. I know that your interests are not the same – that some of you live in the north far away from the river; and some live on the river, and that you have got large sums of money for wood that you have cut and sold to the steamboats; but for the men in the north have not this advantage.
> Morris, Ex. 9, pp. 63-64

[363] Blackstone recommended a break in the negotiations for the Ojibway to hold a Council. Morris acceded to that suggestion. He also threatened to treat with any bands who were prepared to enter into a treaty, whether or not others were prepared to do so.

[364] When the formal negotiations ended for the day, "it was extremely doubtful whether an agreement could be come to or not." The Rainy River Indians were "careless about the treaty." The Ojibway withdrew to their own Council, which was attended, at least for a portion of the time, by a number of Métis, including McKay from the Treaty Commissioners' party and Nolin. The council lasted all night. (Lovisek's report, Ex. 28, at pp 91-92.)

October 3, 1873

[365] Morris' Official Report dated October 14, 1873 contains the following:

> … [N]ext morning, having received a message from M. Charles Nolin, a French half breed, that they were becoming more amenable to reason, I requested the Hon. James McKay (who went to the Angle three times to promote this Treaty), Charles Nolin and Pierre Levailler, to go down to the Indian Council, and, as men of their own blood, give them friendly advice. They accordingly did so and were received by the Indians, and in about half an hour afterwards, were followed by Messrs. Provencher and St. John, who also took part in the interview with the Council of Chiefs.
> [Emphasis added.]

[366] The Shorthand Reporter's account, published in the *Manitoban* (Winnipeg) on October 18, 1873 includes the following with respect to the proceedings on October 3, 1873, (again showing Morris' additions/substitutions in bold, his deletions in italics.) Where I have added bolding I have put a note to that effect:

> *[Indian Treaty Closing Proceedings]*
>
> When the council broke up last (Thursday) night **3rd October [sic] [this addition by Morris was incorrect as Oct. 3, 1873 was a Friday]**, it looked very improbable that an understanding could be arrived at, but the firmness of the Governor, and the prospect that he would make a treaty with such of the bands as were willing to accept his terms, to the exclusion of the others, led them to reconsider their demands. The Hon. James McKay, and Messrs. Nolin, Genton, and Leveilee were invited in to their Council, and after a most exhaustive discussion of the circumstance in which they were placed, it was resolved to accept the Governor's terms, **with some modifications.** [Bolding added.] Word was sent to this effect, and at 11 **[eleven]** o'clock on Friday, conference was again held with His Excellency.
> …
> Chief – I am going to tell you the decision of all before you. I want to see your power and learn the most liberal terms that you can give us.

Governor – I am glad to meet the chiefs, and I hope it will be the last time of our meeting. I hope we are going to understand one another to-day, and that I can go back and report that I left my Indian friends contented, and that I have put into their hands the means of providing for themselves and their families at home; and now I will give you my last words. When I held out my hands to you at first, I intended to do what was just and right, and what I had the power to do at once, - not to go backwards and forwards, but at once to do what I believe is just and right to you. I was very much pleased yesterday with the words of the chief of Lac Seul. I was glad to hear that he had commenced to farm and to raise things for himself and family, and I was glad to hear him ask me to hold out my hand. I think we should do everything to help you by giving you the means to grow some food, so that if it is a bad year for fishing and hunting you may have something for your children at home. If you had not asked it, the Government would have done it all the same, although I had not said so before. I can say this, that when a band settles down and actually commences to farm on their lands, the Government will agree to give two hoes, one spade, one scythe, and one axe for every family actually settled; one plough for every ten families; five harrows for every twenty families; and a yoke of oxen, a bull and four cows for every band; and enough barley, wheat and oats to plant the land they have actually broken up. This is to enable them to cultivate their land, and it is to be given them on their commencing to do so, once for all. There is one thing that I have thought over, and I think it is a wise thing to do. That is, to give you ammunition, and twine for making nets, to the extent of $1,500 per year, for the whole nation, so that you can have the means of procuring food – Now, I will mention the last thing that I can do. I think that the sum I have offered you to be paid after this year for every man, woman and child now, and for years to come, is right and is the proper sum. I cannot **[will not]** make any change in that, but we are anxious to show you that we have a great desire to understand you – that we wish to do the utmost in our power to make you contented, so that the White and the Red man will always be friends. This year, instead of $10 **[ten dollars]** we will give you $12 **[twelve dollars],** to be paid you at once as soon as we sign the Treaty. This is the best I can do for you. I wish you to understand we do not come here as traders, but as representing the Crown, and to do what we believe is just and right. We have asked in that spirit, and I hope you will meet me in that spirit and shake hands with me to-day and make a treaty forever. I have no more to say.

Chief – I wish to ask some points that I have not properly understood. We understood **[understand]** that our children are to have $2 **[two dollars]** extra. Will the $2 **[two dollars]** be paid to our principal men as well? And these things that are promised will they commence at once and will we see it year after year?

Governor – I thought I had spoken fully as to everything, but I will speak again. The ammunition and twine will be got at once for you, this year, and that will be for every year. The Commissioner will see that you get this at once; with regard to the things to help you to farm, you must recollect, in a very few days the river will be frozen up here and we have not got these things here now. But arrangements will be made next year to get these things for those who are farming, it cannot be done before as you can see yourselves very well. Some are farming, and I hope you will all do so.

Chief – One thing I did not say that is most necessary – we want a cross-cut saw, a whip saw, grindstone and files.

Governor – We will do that, and I think we ought to give a box of common tools to each Chief of a Band.

Chief – Depending upon the words *[that]* you have told us, and stretched out your hands in a friendly way, I depend upon that. One thing more we demand – a suit of clothes to all of us.

Governor – With regard to clothing, coats **[suits]** will be given to the chiefs and head men, and as to the other Indians there is a quantity of goods and provisions here that will be given them at the close of the treaty. The coats of the Chiefs will be given every three years.

Chief – Once more; powder and shot will not go off without guns. We ask for guns.

Governor – I have shown **[shewn]** every disposition to meet your views **[view]**, but what I have promised is as far as I can go.

Chief – My friends, listen to what I am going to say, and you, my brothers. We present you now with our best and our strongest compliments. We ask you not to reject some of our children who have gone out of our place; they are scattered all over, a good tasted meat hath drawn them away, and we wish to draw them all here and be contented with us.

Governor – If your children come and live here, of course they will become part of the population, and be as yourselves.

Chief – I hope you will grant the request that I am going to lay before you. I do not mean those that get paid on the other side of the line, but some poor Indians who may happen to fall in our road. If you will accept of these little matters, the treaty will be at an end. I would not like that one of my children should not eat with me, and receive the food that you are going to give me.

Governor – I am dealing with British Indians and not American Indians; after the treaty is closed we will have a list of the names of any children of British Indians that may come in *in* **[during]** two years and be ranked with them; but we must have a limit somewhere.

…

Chief – I hope you will not drop the question; we have understood you to say that you came here as a friend, and represented your charitableness, and we depend upon your kindness. You must remember that our hearts and our brains are like paper; we never forget. There is one thing that we want to know. If you should get into trouble with the nations, I do not wish to walk out and expose my young men to aid you in any of your wars.

Governor – The English never call the Indians out of their country to fight their battles. You are living here and the Queen expects you to live at peace with the white men and your red brothers, and with other nations.

Another Chief – I ask you a question --I see your roads here passing through the country, and some of your boats – useful articles that you use for yourself. Bye and bye we shall see things that run swiftly, that go by fire – carriages – and we ask you that us Indians may not have to pay their passage on these things, but can go free.

Governor – I think the best thing I can do is to become an Indian. I cannot promise you to pass on the railroad free, for it may be a long time before we get one; and I cannot promise you any more than other people.

Chief – I must address my self to my friend here, as he is the one that has the Public Works.

Mr. Dawson – I am always happy to do anything I can for you. I have always given you a passage on the boats when I could. I will act as I have done though I can give no positive promise for the future.

Chief – We must have the privilege of travelling about the country where it is vacant. [Bolding added.**]**

Mr. McKay – Of course, I told them so. [Bolding added]

Chief – Should we discover any metal that was of use, could we have the privilege of putting our own price on it?

Governor – If any important minerals are discovered on any of their Reserves the minerals will be sold for their benefit with their consent, but not on any other land that discoveries may take place upon; as regards other discoveries, of course, the Indian is like any other man. He can sell his information if he can find a purchaser.

Chief – It will be as well while we are here that everything should be understood properly between us. All of us – those behind us – **[wish to]** have their reserves marked out, which they will point out, when the time comes. There is not one tribe here who has not laid it out.

Commissioner Provencher (the Governor being temporarily absent) – As soon as it is convenient to the Government to send surveyors to lay out the reserves they will do so, and they will try to suit every particular band in this respect.

Chief – We do not want anybody to mark out our reserves, we have already marked them out.

Commissioner – There will be another undertaking between the officers of the Government and the Indians among themselves for the selection of the land; they will have enough of good farming land, they may be sure of that.

Chief – Of course, if there is any particular part wanted by the public works they can shift us. I understand that; but if we have any gardens through the country, do you wish that the poor man should throw it right away?

Commissioner – Of course not.

Chief – These are matters that are the wind-up. I begin now to see how I value the proceedings. I have come to this point, and all that are taking part in this treaty and yourself. I would wish to have all your

names in writing handed over to us. I would not find it to my convenience to have a stranger here to transact our business between me and you. It is a white man who does not understand our language that is taking it down. I would like a man that understands our language and our ways. We would ask your Excellency as a favor to appoint him for us.

Governor – I have a very good feeling to Mr. C. Nolin, he has been a good man here; but the appointment of an Agent rest**[s]** with the authorities at Ottawa and I will bring your representation to them, and I am quite sure it will meet with the respect due to it.

Chief – As regards the fire water, I do not like it and I do not wish any house to be built to have it sold. Perhaps at times if I should be unwell I might take drop just for medicine; and shall any one insist on bringing it where we are, I should break the treaty.

Governor – I meant to have spoken of that myself, I meant to put it in the Treaty. He speaks good about it. The Queen and her Parliament in Ottawa here **[have]** passed a law prohibiting the use of it in her **[this]** territory, and if any shall be brought in for the use of you as medicine it can only come in by my permission.

Chief – Why we keep you so long is that it is our wish that everything should be properly understood between us.

Governor – That is why I am here. It is my pleasure, and I want when we once shake hands that it should be forever.

Chief – That is the principal article. If it was in my midst the fire water would have spoiled my happiness, and I wish it to be left far away from where I am. All the promises that you have made me, the little promises and the money you have promised, when it comes to me year after year – should I see that there is anything wanting, th**[r]**ough the negligence of the people who **[that]** have to see after these things, I trust it will be in my power to put them in prison.

Governor – The ear of the Queen's Government will always be open to hear the complaints of her Indian people, and she will deal with her servants that do not do their duty in a proper manner. [Bolding added]

Chief – Now, you have promised to give us all your names. I want a copy of the treaty that will not be rubbed off, on parchment.

Governor – In the meantime I will give you a copy on paper, and as soon as I get back I will get you a copy on parchment.

…

Chief – You have come before us with a smiling face, you have shown us great charity – you have promised the good things; you have given us your best compliments and wishes, not only for once but for ever; let there now for ever be peace and friendship between us. It is the wish of all that where our reserves are peace should reign, that nothing shall be there that will disturb peace. Now, I will want nothing to be there that will disturb peace, and will put every one that carries arms, - such as murderers and thieves – outside, so that nothing will be there to disturb our peace.

Governor – The Queen will have policemen to preserve order, and murderers and men guilty of crime will be punished in this country just the same as she punishes them herself.

…

Chief – I will tell you one thing.-- You understand me now, that I have taken your hand firmly and in friendship. I repeat twice and **[that]** you have done so, that these promises that you have made, and the treaty to be concluded, let it be as you promise, as long as the sun rises over our head and as long as the water runs. One thing I find, that deranges a little my kettle. In this river, where food used to be plentiful for our subsistence, I perceive it is getting scarce. We wish that the river should be left as it was formed from the beginning – that nothing be broken.

Governor – This is a subject that I cannot go into **[promise].**

Mr. Dawson – Anything that we are likely to do at present will not interfere with the fishing, but no one can tell what the future may require, and we cannot enter into any engagement.

Chief – We wish the Government would assist us in getting a few boards for some of us who are intending to put up houses this fall, from the mill at Fort Frances **[Francis].**

Governor – The mill is a private enterprise, and we have no power to give you boards from that.

Chief – I will now show you a medal that was given to those who made a treaty at Red River by the Commissioner. He said it was silver, but I do not think it is. I should be ashamed to carry it on my breast over my heart. I think it would disgrace the Queen my Mother to wear her image on so base a metal as this. [Here the Chief held up the medal and struck it with the back of his knife. The result was anything but the "true ring" and made every man ashamed of the petty meanness that had been practised.] Let the medals you give us be of silver – medals that shall be worthy of the high position our Mother the Queen occupies.

Governor – I will tell them at Ottawa what you have said, and how you have said it.

Chief – I wish you to understand you owe the treaty much to the half-breeds.

Governor – I know it. I sent some of them to talk with you, and **am proud** that all the half-breeds from Manitoba, who are here, gave their Governor their cordial support.

The business of the treaty having now been completed, the Chief **Mawedopenais,** who, with Powhassan, had with such wonderful tact carried on the negotiations, stepped up to the Governor and said--

Now you see me stand before you all; what has been done here to day has been done openly before the Great Spirit, and before the nation, and I hope that I may never hear any one say that this treaty has been done secretly; and now, in closing this council, I take off my glove, and in giving you my hand, I deliver over my birth-right and lands; and in taking your hand, I hold fast all the promises you have made, and I hope they will last as long as the sun goes round and the water flows, as you have said.

The Governor then took his hand and said: I accept your hand and with it the lands, and will keep all my promises, in the firm belief that the treaty now to be signed will bind the Red man and the white together as friends forever.

A copy of the treaty was then prepared and duly signed, after which a large amount of presents, consisting of pork, flour, clothing, blankets, twine, powder and shot, etc., were distributed to the several bands represented on the ground.

On Saturday, Mr. Pether, Local Superintendent of Indian affairs at Fort Frances **[Francis],** and Mr. Graham of the Government Works, began to pay the treaty money – an employment that kept them busy far into the night. Some of the Chiefs received as much as $170 **[one hundred and seventy dollars]** for themselves and families. *[The total amount disbursed was $.]*

…

One very wonderful thing that forced itself on the attention of every one was the perfect order that prevailed throughout the camp, and which more particularly marked proceedings in the council. Whether the demands put forward were granted by the Governor or not, there was no petulance, no ill-feeling, evinced; but everything was done with a calm dignity that was pleasing to behold, and which might be copied with advantage by more pretentious deliberative assemblies.

…

The Governor and party left on Monday morning, the troops, under command of Capt. **[Captain]** McDonald … having marched to Fort Garry on Saturday morning.

[Underlining added. Bolding added where indicated. Most bolding and all italics in original.]

[367] Dawson's Notes for October 3 contain the following:

Oct. 3rd

"Manitobiness," said, I am going to lay before you the opinions of those you see before you. We want to see your power – we want to know your most liberal terms and give us your utmost. This is all.

Gov. Morris said: I am glad to meet the chiefs once more and I hope it will be the last meeting. That I can go back and report that I have put in the hands of my Indian friends what will make them and their children more comfortable. I will give you my last words. When I held out my hand at the first I did not want to bargain with you but to give you what was right and just. I was very much pleased yesterday with the words of Sa-ga-the-way and that his people had begun to farm and that he wishes me to hold out my hand to help them. I think we should do everything to help you to grow food so that in case of ill success in fishing & hunting you would have something for those at home. If you had not asked it the Government would have done it all the same. When a Band settles down &

actually begins to farm the Government will give them hoes &c. bull & cows enough to begin farming with, 2 hoes for every family, 1 spade, 1 plough for 10 families, 5 harrows for 20 families, a yoke of oxen for every Band, a Bull & 4 Cows for every Band, a scythe & axe for every family. Barley, Oats &c. enough to plant the land broken up. This is to encourage them and will be given on their commencing to cultivate the lands. Mr. Provencher has suggested, and I approve of it, that we will be able to give you $1500 - a year in twine & ammunition. Now I will mention the last thing I can do. I think the sum I have offered after this year and for years to come is right. I cannot make any change in that. But we are anxious to show you that we understand you and now for this year we are prepared to pay you $12. This is the best I can do for you.

I wish you to understand we did not come here to bargain but to act for the crown and hope that you will meet me to-day and make a treaty with our Queen for ever. I have no more to say.

"Manitobiness" said He wished to know if all the promises made to them should commence at once to be fulfilled?

Gov. Morris said The ammunition & twine will be got this year and continued every year. The farming implements are not here and the waters will soon be frozen but next year these things will be got for those who are actually farming.

"Manitobiness" There is one thing I don't see – a cross cut saw, a grindstone and an auger.

Gov. Morris We will give a box of tools to each chief.-

"Manitobiness" Depending on the words, you have told us, there is one thing we demand, a suit of clothes for all our people.

Gov. Morris With regard to clothing. Coats will be given to Chiefs & head men and at the close of the Treaty a number of presents will be given. Coats to the Chiefs every 3 years.

"Manitobiness" Powder & shot will not go off without guns. We want guns.

Gov. Morris I have made every advance I could. I have no more power.

"Manitobiness" My friends listen to what I am going to say. We present you now our best compliments. We ask you not to neglect some of our children who are scattered. We wish our children back again and we want you to count them with us.

Gov. Morris If their children live here they will be counted in.

"Manitobiness" Once more, I wish you to grant the request I make. In future I may see a person that may be in want, can I help him? I would not like that one of my children could not eat of the same food with me.

Gov. Morris I am dealing with British and not with American Indians. Any children of British Indians who come in within 2 years will be received.-

"Manitobiness" We wish that our half breed children should receive the same benefits as we do.

Gov. Morris Would promise them that he would refer the matter to the Government.

"Manitobiness" We have understood you to say you came here as a friend to show the Indians your kindness. Our memories are good. There is one thing we want, if you should get into trouble with other nations I do not wish to turn out with my warriors.

Gov. Morris The Indians were never called upon to go out of their country and fight. They will be expected to live at peace with their neighbours.

"Manitobiness" I ask my questions so freely that I thank you for your answer. Your road passes through our country, by and by carriages driven by fire will pass through and we want free passes.

Gov. Morris Cannot promise them this.

Mr. Dawson Would always be happy to do what he could to help the Indians.

"Manitobiness" **Would they have the privilege of travelling through the Country? -- Yes.** [Bolding added.] -- If they should discover gold or silver would they have a right to it?

Gov. Morris If minerals were found on the Reserve the mine would be administered for their benefit, otherwise, the Indians could not claim it.

"Manitobiness" It will be good while we meet here that everything should be understood between us. We have all reserves which we will point out at the proper time.--

Mr. Provencher The commissioner will come to a settlement with each one. The Govt would send surveyor to measure the land and the selection would be made between the Commissioner and themselves.

"Manitobiness" We have small gardens here and there and hopes they will not be taken away. -- No -- These are the winding up matters. I would like to have the names in writing of those present at this Treaty. I have one point to lay before you. I would like to have a stranger here to look after the matters between you and us. Mr. Nolin.--

Gov. Morris I have a good opinion of Mr. Nolin, here present, and will recommend his appointment to the Government.

"Manitobiness" I don't like fire water myself and don't want it where I live. Perhaps at times I might take some for medicine but should any one insist that we should have it I will break the kegs & destroy the houses where it is sold.

Gov. Morris Was glad to hear him speak so. There was a Law against bringing it into the Country.

"Manitobiness" We have now spoken on principal past. We want to see the promises fulfilled. If they are not I will hunt up the person neglecting his duty.

Gov. Morris The Queen's ear would always be open to hear her Indian subjects.

"Manitobiness" You have promised to give all your names, and now I want a copy of the Treaty. –Yes-- I do not wish to be treated as those in Red River. I would like that provisions be given us when we meet.

Gov. Morris Provisions are always given at a meeting.

"Manitobiness" You have come before us with a smiling face, you have promised us good things - you have given us your best wishes and we have done the same in return, let it be now forever peace & friendship. It is the wish of all wherever our Reserves be that peace should reign. Any one carrying arms, murderers &c will be put out of the reserves.

Gov. Morris Murderers would be punished according to Law.

"Manitobiness" If I see any of the Hudson Bay Co. men surveying my reserve I will put them off.

Gov. Morris The Hudson Bay Co. have their rights, you have yours. The Queen will do justice between you.

"Manitobiness" I am going to tell you one thing. I take your hand in a friendly way. Let the promises you have made and the business concluded last as long as the sun is over our heads. I shew this medal given at the Treaty in Red River – they called it silver – I do not. I would be ashamed to wear it on my breast. I would not disgrace the Queen

Gov. Morris I will tell the Government what you say and how you said it.

"Manitobiness" Here I stand before the face of the nation and of the Commissioners. I trust there will be no grumbling. The words I have said are the words of the nation and have not been said in secret but openly so that all could hear and I trust that those who are not present will not find fault with what we are about to do to-day. And, I trust, what we are about to do to-day is for the benefit of our nation as well as for our white brothers - that nothing but friendship may reign between the nation and our white brothers. And now I take off my glove to give you my hand and sign the Treaty and now before you all, Indians and whites, let it never be said that this has been done in secret. It is done openly and in the light of day.-

This, and the signing of the Treaty brought it to a close.—

[Underlining added. Bolding added where indicated; most bolding & all italics in original]

[368] Morris' Official Report dated October 14, 1873 contains the following:

…The Chiefs were summoned to the conference by the sound of [**a**] bugle[*s*], and again met us when they told me that the determination to adhere to their demands had been so strong a bond that they did not think it could be broken, but that they had now determined to see if I [*could*] [**would**] give them anything more.

The Commissioners had had a conference [bolding added], and agreed previously to offer a small sum for ammunition and twine for nets, yearly, a few agricultural implements and seeds, for any

Band actually farming or commencing to farm, and to increase the money payment by [*$2*] [**two dollars**] per head if it should be found necessary in order to secure a treaty, maintaining the permanent [*annuity*] [**annuities**] at the sum fixed. The Indians, on the other hand, had determined on asking [*$15*] [**fifteen dollars**] with some other demands. In fixing the [*$10*] [**ten dollars**] the Commissioners had done so as a sum likely to be accepted in view of [*$3*] [**three dollars**] per head having been paid the Indians the first year that the Dawson route was used, and that they had received nothing since.

In reply to the Indians, I told them I was glad that they had reconsidered their decision, and that as they had done so, being desirous of inducing them to practice agriculture and to have the means of getting food if their fishing and hunting failed, we would give them certain implements, cattle and grain, once for all, and the extra [*$2*] [**two dollars**] per head of a money payment. This proposal was received favorably, but the spokesmen again came forward and said that **they had some questions to ask before accepting my proposal** [bolding added]. They wanted suits of clothing every year for all the Bands, and [*$50*] [**fifty dollars**] for every chief annually. This I declined, but told them that there were some presents of clothing and food which would be given them this year at the close of [*the*] treaty. They then asked free passes forever over the Canada Pacific Railway which I refused. They then asked that no "firewater" should be sold on their reserves, and I promised that a regulation to this effect should be introduced into the treaty. They then asked that they should not be sent to war, and I told them the Queen was not in the habit of employing the Indians in warfare. They asked that they should have power to put turbulent men off their reserves, and I told them the law would be enforced against such men. They asked what Reserves would be given them, and were informed by Mr. Provencher that reserves of farming and other lands would be given them as previously stated, and that any land actually in cultivation by them would be respected. They asked if the mines would be theirs. I said if they were found on their Reserves it would be to their benefit, but not otherwise. They asked if an Indian found a mine would he be paid for it. I told them he could sell his information if he could find a purchaser, like any other person. They explained that some of their children had married in the States, and they wished them to return and live among them, and wanted them included in the Treaty. I told them the Treaty was not for American Indians, but any bona fide British Indians of the class they mentioned who should within two years be found resident on British soil would be recognized.

… They asked that Mr. Charles Nolin should be employed as an Indian agent and I stated that I would submit his name to the Government with favourable mention of his services on that occasion. They asked that the Chiefs and headmen as in other Treaties should get an official suit of clothing, a flag, and a medal, which I promised. Mawedopenais produced one of the medals given to the Red River chiefs, said it was not silver and they were ashamed to wear it, as it turned black, and then with an air of great contempt, struck it with his knife. I stated that I would mention what he had said and the manner in which he had spoken. They also stated the Hudson Bay Company had staked out ground at Fort Frances, on part of the land they claimed to have used and to be entitled to, and I promised that enquiry would be made into the matter. They apologized for the number of questions put me which occupied a space of some hours, and then the principal spokesman, Mawedopenais, came forward and drew off his gloves and spoke as follows. "Now, you see me stand before you all. What has been done here to-day, has been done openly before the Great Spirit and before the nation, and I hope that I may never hear anyone say that this Treaty has been done secretly. And now, in closing this Council, I take off my glove and in giving you my hand, I deliver over my birthright and lands, and in taking your hand I hold fast all the promises you have made, and I hope they will last as long as the sun goes round, and the water flows, as you have said." To which I replied as follows: "I accept your hand, and with it the Lands, and will keep all my promises, in the firm belief that the Treaty now to be signed will bind the Red man and the white man together as friends forever."

The conference then adjourned for an hour to enable the text of the treaty to be completed in accordance with the understanding arrived at. At the expiration of that period the conference was resumed, and after the reading of the Treaty, and an explanation of it in Indian by the Hon. James McKay, it was signed by the Commissioners and by the several chiefs, the first signature being that of a very aged hereditary chief. … The negotiation was a very difficult and trying one, and required, on the part of the commissioners, great patience and firmness. On the whole, I am of opinion that the issue is a happy one. With the exception of two bands in the Shebandowan District ,whose adhesion was secured in advance, and the signature[**s**] of whose chiefs Mr. Dawson left to secure, the Indian title has been extinguished over the vast tract of country comprising 55,000 square miles lying between the upper boundary of the Lake

Superior treaty, and that of the treaty made by Mr. Commissioner Simpson at Manitoba Post, and embracing within its bounds the Dawson route, the route of the Canada Pacific Railway, and an extensive lumber and mineral region. It is fortunate, too, that the arrangement has been effected, as the Indians along the Lakes and Rivers were dissatisfied at the use of the waters, which they considered theirs, having been taken without compensation, so much so indeed that I believe if the Treaty had not been made, the Government would been compelled to place a force on the line next year.

Before closing this despatch I have much pleasure in bearing testimony to the hearty co-operation and efficient aid the Commissioners received from the Metis who were present at the Angle, and who, with one accord, whether of French or English origin, used the influence which their relationships to the Indians gave them, to impress them with the necessity of their entering into the treaty.

I must also express my obligations to the detachment of troops under the command of Captain Macdonald, assigned me as an escort, for their soldierly bearing and excellent conduct while at the angle. Their presence was of great value, and had the effect of deterring traders from bringing articles of illicit trade for sale to the Indians, and moreover exercised a moral influence which contributed most materially to the success of the negotiations. I have further to add that it was found impossible, owing to the extent of the country treated for, and the want of knowledge of the circumstances of each band, to define the reserves to be granted to the Indians. It was, therefore, agreed that the Reserves should be hereafter selected by officers of the Government, who should confer with the several bands, and pay due respect to lands actually cultivated by them.

A provision also was introduced to the effect that any of the Reserves, or any interest in them, might hereafter be sold for the benefit of the Indians by the Government with their consent.

I would suggest that instructions should be given to Mr. Dawson to select the Reserves with all convenient speed, & to prevent complication[*s*], I would further suggest that no patents should be issued, or licenses granted, for mineral or timber lands, or other lands, until the question of the reserves has been first adjusted.

I have the honour to be,
Sir,
Your obedient Servant,
Alexander Morris

[Underlining added. Bolding added where indicated. Most bolding and all italics in original.]

[369] The *Manitoba Free Press* article described October 3, the last day of the Treaty negotiations, as follows:

Friday

…Those terms are expressed in the treaty, a copy of which is herewith given. The Indians then retired for a final Council to determine yea or nay, but the success of the commission was greatly aided by the timely announcement of a chief of the English River that whatever the determination of the others might be, he had resolved upon accepting the terms of the white chief. … At a subsequent meeting on the same day the leading spokesman enumerated a number of points on which they desired emphatic that information, and these were answered seriatim. We apologized for occupying so much time, but wisely observed that it was better to spare a little time now than to run the risk of misunderstanding and complaints hereafter. If any one has possessed this amount of wisdom at the first treaties what a world of trouble and discontent would have been avoided.

[Underlining added.]

[370] Nolin's Notes for October 3, 1873 read as follows:

The following are the terms of the Treaty held at Northwest Angle the Third day of October, Eighteen Hundred, and Seventy Three, viz:

1. The Government will give when Indians will be settled, Two Hoes, one Plough for every ten families, Five Harrows for every twenty families, one yoke of Oxen, one Bull and four Cows for every band, one scythe and one axe for every family and enough of wheat, Barley and oats, for the land broken up this is to encourage them at the beginning of their la[ ]bour once for all.

> Fifteen Dollars every year to Councillor First Soldier and Messenger. Twelve Dollars [~~**every year**~~] for the first payment to every head of Indians, and every subsequent year Five [~~**years**~~] Dollars. Fifteen Hundred Dollars every year in twine and *ammunition* [**munitions**]. Twenty five dollars to every Chief every year.
>
> The farming implements will be provided for during the winter to be given next year to those that are farming and to those that are anxious to imitate the farmers, a set of Carpenter's tools will be also given.
>
> Coats will be given to the Chiefs and their headmen every three years; with regard to the other Indians there is goods here to be given to them.
>
> If their children that are scattered come inside of two years and settle with you they will have the same privilege as you have.
>
> I will recommend to the authorities at Ottawa, assisted by the Indian Commissioner, the Half Breeds that are living with you, to have the same privilege as you have.
>
> The English Government never calls the Indians to assist them in their battles but [**he**] expects you to live in peace, with Red and White people.
>
> Mr. Dawson said he would act as *in* [**by**] the past about the *Indians passing on* [**Indian passage in**] his road. ***The Indians will be free as by the past [~~an~~] for their hunting and rice Harvest.** [Bolding added.] If some gold or silver mines be found in their Reserves it will be to the benefit of the Indians, but if the Indians find any gold or silver mines out of their Reserves they will [**only**] be paid the finding of the mines.
>
> The Commissioner *&* [**and**] an agent will come to an understanding with the Indians about the Reserves, *&* [**and]** *it* shall be surveyed by the Government. The Commissioners do not wish that the Indians leave their harvest immediately to step into their reserves. About the Indian Commissioner, the Commission is pending upon the authorities at Ottawa. I will write to Ottawa and refer Mr. Charles Nolin.
>
> The *sale* [**sell**] of intoxicating *liquors* is prohibited in this part of the country as well as in other parts, it is the greatest pleasure for me to hear you, and when we shake hands, it must be forever. It will be the duty of the English *Government* [**Gov^{nt}**] to deal with the Commissioners if they act wrong towards the Indians. I will give you a copy of the Agreement now, and when I reach my residence I will send you a copy in parchment.
>
> You will get rations during the time of the payment every year. The Queen will have Her policemen to preserve order and wherever there is Crime and murder the guilty must be punished. This Treaty will last as long as the sun shines and water runs that is to say forever.
>
> Copy of the notes taken by M. Joseph Nolin, on behalf of the Indians at the Treaty made at the North West Angle of the Lake of the Woods.
> [Underlining added. Bolding added where indicated. Most bolding and all italics in original.]

[371] It is clear from the Shorthand Reporter's account in the *Manitoban* that at the end of the negotiations on October 2, it seemed "extremely doubtful" that an agreement would be reached. "The Rainy River Indians were careless about a treaty." The Commissioners held a conference. McKay and Nolin were invited to the Ojibway Council that continued overnight "and after a most exhaustive discussion of the circumstances in which they were placed, it was resolved to accept the Governor's terms **with some modifications**."

[372] However, the exact content of the Chiefs' discussion overnight between October 2 and October 3 is unknown.

[373] At about 11 a.m. the negotiations between the Ojibway and the Commissioners resumed.

[374] The Treaty Commissioners, having held their own conference, had already decided to sweeten their offer. Morris outlined the improved terms:

> …I think we should do everything to help you by giving you the means to grow some food so that if it is a bad year for fishing and hunting, you may have something for your children at home. [Emphasis added.]

[375] Lovisek's report (Ex. 28) contains the following at pp. 92-94:

> The next day, October 3, 1873, the parties returned to negotiations. It had now been two days of negotiations and the only reference to the taking-up clause was in the opening offer made by Morris on the first day: "It may be a long time before the other land are wanted, and in the meantime you will be permitted to fish and hunt over them."
>
> On what would be the final day of negotiations, Morris offered an increased amount of annuities, agricultural assistance and a perpetual payment of $1500 for ammunition and twine. In offering the perpetual payment of $1500 for ammunition for hunting and twine for fishing, Morris was actually offering less than what the Saulteaux had requested based on Morris' estimation of the cost in the 1869 List of Demands. Morris had estimated the cost of the ammunition and twine demanded by the Saulteaux in the 1869 List of Demands and concluded that these costs would comprise a substantial amount of money. According to his calculation, the cost of twine alone, excluding annuity payments, amounted to the second largest expenditure. Morris estimated that powder (ammunition) would cost $1,500 and twine, $13,600 per year. The largest expenditure, excluding annuity payments, was for food (pork, flour and tea) which Morris estimated at $14,250. The Saulteaux, who did not understand the relative value of money, were in no position to assess the value of $1500 of ammunition and twine or what it amounted to. They knew what ammunition and twine would be used for, and that Morris was offering it to them every year to support their hunting and fishing.

[376] In addition to providing twine and ammunition, Morris offered to increase the gratuity from ten to twelve dollars per person.

[377] He made it clear (in Von Gernet's words) that this was no mere "real estate deal:"

> I wish you to understand we do not come here as traders, but as representing the Crown and to do what we believe is just and right.
> Morris, Ex. 9, page 67; Cross-examination of von Gernet, December 10, 2009

[378] Counsel for the Plaintiffs submitted that while Morris did not specifically articulate the concept of the Honour of the Crown during the negotiations, it is clear he understood that these were not hard bargaining sessions in which the Crown was free to be as aggressive, devious or tough as it could have been if negotiating with well-educated English-speaking persons represented by counsel.

[379] The Ojibway then made a series of requests to which Morris or one of the other Commissioners responded. With one noteworthy exception, the documents consistently reflect discussion of the following topics sequentially:

[a] The amount of the gratuity payment.
[b] Annual payments for ammunition and twine.
[c] The delivery of farming implements.
[d] The provision of tools.
[e] The provision of provisions and clothing for the Chiefs.
[f] A request for guns.
[g] Treatment of Ojibway from the United States [*The Manitoban* and the Dawson notes refer to a promise to allow the children of British Indians [not American

Indians] returning within two years to benefit under the Treaty. The Nolin Notes read as follows: if there are children that are scattered come inside of two years and settle with you he will have the same privilege as you have.]

[h] Morris promised to make a recommendation on the treatment of Half-Breeds to the "Government at Ottawa."

[i] A promise that the Ojibway will not be called to war.

[j] An expectation that the Ojibway will live in peace.

[k] A request for free passage on the railway. (Denied.)

[l] A request that Dawson act as he has in the past in respect of the Dawson Route [i.e., give Indians free passage.] Dawson replied, "I am always happy to do anything I can for you. I have always given you passage on the boats when I could. I will act as I have done, though I can give no positive promise for the future." Dawson wrote, "I would be happy to do what I could to help the Indians." Nolin wrote, "Mr. Dawson said he would act as by the past about the Indian passage in his road."

[m]A request for an assurance that the Ojibway will be free to travel about the country. According to Morris' version of *The Manitoban* report recorded in Ex. 9 a chief asked: "We must have the privilege of traveling about the country where it is vacant." Mr. McKay said, "I told them so."

Dawson recorded the question and answer as follows: "Would they have the privilege of traveling through the country?" [No reference to where it is vacant. Chartrand said it is "moot" whether "where it is vacant" formed part of the question. January 14, 2010 at p. 58.] "Yes, they will." Nolin's note of the exchange reads as follows: "The Indians will be free as by the past for their hunting and rice harvest."

[n] Ojibway entitlement to minerals and mines.

[o] A creation of reserves and inclusion of gardens. The Chiefs said they wanted to mark out their own reserves. Provencher replied that when it was convenient for the Government to send out surveyors, they would try to accommodate the Indians. Lovisek opined that on October 3, the Ojibway specifically raised an issue important to them - protection of their existing gardens primarily situated on islands in Lake of the Woods and along the fertile area of Rainy River from potential interference by others.

[p] Taking of land for public works.

[q] A request for the names of the Commissioners' party in writing.

[r] A request that C. Nolin be appointed Indian Agent and Morris' promise to make that recommendation to the "authorities at Ottawa."

[s] A request that Alcohol be banned and Morris' assurance that the Queen and "her Parliament at Ottawa" have passed a law to this effect.

[t] A request for punishment of officials breaking the Treaty and Morris' promise that "The ear of the Queen's government will always be open to hear the complaints of her Indian people, and she will deal with her servants that do not do their duty in a proper manner."

[u] A request for a copy of the Treaty in writing on parchment.

[v] A request for provisions with Treaty payments was made. Dawson notes: "I would like that provisions be given us when we meet." Gov. Morris: "Provisions are

> always given at a meeting." Nolin: "You will get Rations during the time of the payment every year."

[380] The only significant discrepancy among the various records relates to item (m), the entry recorded in the Nolin Notes as, "the Indians will be free as by the past for their hunting and rice harvest." This reference does not appear in that form in any of the other notes of the October 3 discussions.

[381] Later in these Reasons I analyze the differing evidence about the significance or insignificance of item (m). The experts disagreed about whether Nolin was recording Morris' comment on October 1 that "it may be a long time before the other lands are wanted and in the meantime you will be permitted to hunt and fish over them," or whether he was recording new and more extensive promises made on October 3.

[382] After the discussion of specific terms, closing speeches were made. Morris reported them as follows:

> Chief Mawedopenais:
>
> You have come before us with a smiling face. You have shown us great charity-you have promised the good things; you have given us your best compliments and wishes, not only for once **but forever; let there now for ever be peace and friendship between us.** [Bolding added.] …
>
> Now you see me stand before you all; what has been done here to-day has been done openly before the Great Spirit, and before the nation, and I hope that I may never hear anyone say that this treaty has been done secretly; and now in closing this Council, I take off my glove, and in giving you my hand, I deliver over my birthright and lands, **and in taking your hand, I hold fast all the promises you have made, and I hope that they will last as long as the sun goes round and the water flows, as you have said**.
>
> Morris:
>
> I accept your hand and with it the lands, **and will keep all my promises** in the firm belief that the treaty now to be signed will bind the red man and the white together as friends forever.
> Morris, Ex. 9, p. 75
> [Underlining emphasis added, and bolding where noted.]

[383] Lovisek's report (Ex. 28) contains the following at p. 94:

> Despite the Morris Document having already been prepared ahead of the negotiations, Morris omitted to include several provisions that were agreed to by both parties during the final hours of negotiations. These provisions included the request by the Saulteaux for exemption from military conscription, that minerals found on reserves would be sold for the benefit of the Saulteaux, and the inclusion of Saulteaux who had migrated to the United States but who returned within two years into the treaty.
> [Footnotes omitted.]

[384] During the trial the *Free Press* version of that speech surfaced, which read as follows:

> Finally, winding up his speech with a peroration of more than usual ability, he held out his hand to the Governor, explaining as he did so that in that grasp he surrendered the country which the white man deserved, and which the Indians had inherited from their ancestors, into the hands of the Government of the Great Mother ...
> [Underlining added.]

[385] They then adjourned for an hour so that Morris could complete the text of the formal Treaty. Morris' October 14 report contains the following:

> At the expiration of that period, the conference was resumed, and after the reading of the treaty and an explanation of it in Indian by the Honourable James McKay, it was signed by the commissioners and by the several chiefs…

[386] The experts disagreed as to how McKay explained the Treaty in Ojibwe to the Indians. Later in these Reasons, I summarize and analyze that evidence later in these Reasons.

[387] After McKay's explanation, the Treaty was signed.

[388] The Treaty was approved by a federal Order in Council on October 31, 1873.

8. ANALYSIS OF THE HISTORICAL EVIDENCE AS IT RELATES TO THE INTERESTS OF THE PARTIES

The Interests of Canada

[389] As noted earlier, there was much documentary and *viva voce* evidence before this Court relevant to Canada's interests in completing the 1873 Treaty. I have already reviewed much of the relevant historical evidence.

[390] Here I shall first review the specific evidence as to the background and knowledge of each of the Treaty Commissioners.

What Morris Knew

[391] By 1873, Alexander Morris, the lead treaty negotiator in 1873, was already an important figure in Canadian history.

[392] At the time of the negotiations, Morris was the Lieutenant-Governor of Manitoba and the Northwest Territories, and a member of the Indian Affairs Management Board that also included a Commissioner of Crown Lands and a representative of Indian Affairs. As a member of that Board, he knew by its make-up it contemplated communication and cooperation among various federal departments, including Indian Affairs and Crown lands (Ex. 4, p. 213.)

[393] Counsel for the Plaintiffs submitted that because of his background in political and public affairs and his interest in history, the historical evidence already covered in these Reasons would have been known to Morris.

[394] In the lead-up to the 1873 negotiations and as they progressed, Morris was aware of the challenges of developing the Canadian nation, including linking the East to the Prairies and British Columbia.

[395] Vipond gave evidence (February 23, 2010 at p. 11) that Morris was a "public intellectual," a keen student of Canadian history, especially Canadian Imperial history, who wrote grandly and thought big thoughts. His world-view was of "a heroic British empire."

[396] Morris was "a trained Constitutional lawyer" (*Nova Brittania*, Ex. 130 at p. 147.) He studied law at McGill University, then in 1848 articled with John A. Macdonald. In 1849 he joined the British American League comprised for the most part of young and enthusiastic members of the Conservative Party, rallying around the Macdonald banner. Morris was closely connected to Macdonald and the federal Conservatives.

[397] Pre-Confederation, he played a significant role in developing support for western expansion, annexation of the HBC Territories and settlement of the West.

[398] *Nova Brittania* (Ex. 130), a collection of Morris' essays and speeches in book form, provides information about Morris' life and philosophy.

[399] Confederation was a dream of Morris' boyhood. At an age when most boys were skating or on the cricket field, he "loved to bury himself in the pages of Lord Durham's Report." As early as 1858, in speeches reproduced in Ex. 130, Morris advocated for Confederation and the creation of a British North American country spanning from Atlantic to Pacific, with a central government strong enough to resist absorption by the United States.

[400] In an 1858 lecture entitled the "Hudson's Bay and Pacific Territories," he outlined his views that the HBC was standing in the way of progress, settlement and development to the detriment of the Canadian people. Consistent with the colonial position at the time, but contrary to the position advanced by Canada after Confederation, he advanced arguments as to why the boundary of what is now Ontario should be determined to be as far west as the Saskatchewan River (i.e., he was contending in effect in 1858 that the HBC Territories did not include/that Ontario already included a huge portion of the territory purportedly added to Canada as of July 15, 1870. Morris' 1858 speech is one of the earliest documented arguments favouring the position that Ontario at Confederation already included the Disputed Territory.)

[401] In a speech in Parliament on the acquisition of the Northwest Territories, reproduced in *Nova Brittania* (Ex. 130 at p. 141), Morris said that he thought the HBC Territories should be handed over to the Dominion subject to a reservation of the rights of the Indians.

[402] He knew Canada had promised Britain as follows:

> [U]pon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.
> [Emphasis added.]

[403] Morris was cognizant of the competing theories on the best structure for a Canadian "federalism." Like Macdonald, he advocated a strong central government having jurisdiction to override and overrule the provinces. Vipond opined (February 24, 2010 at p. 28) that Morris' centralist views "out-Macdonalded" Macdonald's.

[404] In 1862, Morris was elected to the Parliament of the United Canadas. He realized his boyhood dream by playing an important role in bringing about Confederation, having reportedly

brokered the deal between John A. Macdonald and George Brown that led to the formation of the "Great Coalition" and to the Charlottetown and Quebec City conferences.

[405] After Confederation, he was elected to the Parliament of Canada. In November 1869, he became Minister of Inland Revenue and was a Cabinet Minister in Macdonald's government until 1872. He was present at a Cabinet meeting on May 1, 1872 when the implications of the Boundary Dispute were discussed.

[406] Von Gernet's evidence (December 9, 2009) contains the following:

> Q. [Ex. 1] Tab 174, we see the memorandum of …Sir John A. Macdonald, … the Prime Minister essentially highlighting how serious this problem is … that's what brings us to the Privy Council meeting that's recorded at Tab 175, correct? .... And Alexander Morris is in Cabinet while all of this is happening, isn't he?
> A. Well, he's listed as present.
> …
> Q. And so I suggest to you that, at least as of 1872, whatever date in May that that particular document is, 16th of May, 1872, Alexander Morris is fully aware of the boundary dispute and aware that it has implications with respect to who can make grants of land and with respect to the administration of justice; isn't that fair?
> A. Yes.
> Q. And it's not long after that that he is appointed as the Chief Justice of the Queen's Bench of Manitoba, correct?
> A. Yeah….
> …
> Q. And you're not suggesting to me that by the time we get to 1873 that Morris has somehow forgotten all this, has he?
> A. I never made that suggestion, and I wouldn't suggest that to you.
> Q. So when we go into these 1873 negotiations, we've got Morris knowing full well that there's a real question about who has the power to grant land in the area he's negotiating a treaty over, correct?
> A. He's aware that the -- that the matter is in dispute.

[407] In 1872 Morris left Parliament and was appointed the first Chief Justice of Manitoba. On December 8, 1872, he became the Lt. Governor of Manitoba and the Northwest Territories, and "personal representative to Prime Minister Macdonald."

[408] *Nova Brittania,* Ex. 130, contains the following at p. 147:

> By 1872… the Red River Settlement had been erected into a distinct Province, under the name of Manitoba. It was necessary that some trained Constitutional lawyer should proceed to that Province in the capacity of Chief Justice to organize a judicial and municipal system.

[409] While Canada's perspective about the importance of Indians changed later, in 1873 Morris, like Prime Minister Macdonald, the Minister in charge of Indian Affairs Campbell, Dawson and Provencher, recognized Canada's strategic need to seek and gain the cooperation of the Treaty 3 Ojibway.

The Relationship of the Federal and Provincial Governments

[410] Counsel for the Plaintiffs submitted that Milloy's, Saywell's and Vipond's evidence on the relationship between the federal and provincial governments and their respective roles at

Confederation and on evolving concepts of federalism is relevant in considering Morris' understanding and intent in 1873, and in considering and interpreting the words he used when he drafted Treaty 3.

[411] Vipond gave evidence (February 24, 2010 at p. 30) that in 1873 Morris understood the fundamental division between the Queen in Right of a province and the Queen in Right of the federal government.

Morris' View of Canada's s. 91(24) Powers and Duties

[412] Von Gernet conceded (December 10, 2009) that Morris, given his background, understood Canada's and Ontario's legislative powers under the *BNA Act*. He acknowledged that Morris understood that the Government of Canada had the obligation to protect and deal with the interests of the Indians, arising out of the Rupert's Land order and also out of its assumption of responsibility for Indians and lands reserved for the Indian under s. 91(24). In the somewhat archaic language of the day, it viewed the Indians as wards or pupils of the Crown. Section 91(24) was often understood to confer the responsibility on the federal government to carry out the duties associated with that wardship or pupilage.

[413] Saywell said (April 7, 2009) that the words "trustee" and "trust" had been mentioned emphatically and explicitly in the establishment of the department of the Secretary of State, the department then responsible for Indians. Langevin mentioned it and McDougall spoke, on the seventh resolution of the address to Her Majesty, December 1867, of the particular responsibility of the central government under s. 91(24). The Indians were in a state of pupillage vis-à-vis the federal government, children, heathens, uncivilized. The federal government was responsible for looking out for them and managing their affairs.

[414] Vipond gave evidence (February 25, 2010 at pp. 143 and 150) that Morris knew that a number of the Fathers of Confederation, including his mentor Macdonald, George Brown, Rose and Alexander Mackenzie (the second prime Minister) were of the view that one of the federal government's functions was to protect individual and minority rights against arbitrary acts of local governments. For example, they expected the federal government to have a role in protecting minority religious education. He agreed that part of the reason for assigning Indian matters to the federal government was to protect a vulnerable local minority; the Indians.

[415] Milloy gave evidence that jurisdiction was given to the federal government (i.e., the more distant level of government) as a way of protecting local minorities against local majorities. The Indians, wards of Canada, were members of a vulnerable minority.

[416] Morris knew that his mentor Macdonald viewed protection of Indians as important.

[417] Milloy gave evidence specifically on Morris' view of the role of the Canadian government under s. 91(24). Morris believed that under s. 91(24), Canada had jurisdiction to negotiate and enter into treaties with the Indians. Canada had jurisdiction over and responsibility for Indians and Lands Reserved for the Indians. He was generally of the view that the federal government was expected to be the protector of the Indians. He believed the white man should

"civilize," educate and uplift the red man to the higher cultural level of the white man. He assumed if those of the superior culture helped them learn white cunning, civics, English, agriculture, trades and Christianity, the Indians would gladly, thankfully, and voluntarily embrace Euro-Canadian ways and enter the Canadian mainstream. During his evidence Milloy read from Morris' book:

> And instead of the Indian melting away … as snow before the sun, we will see our Indian population loyal subjects of the Crown, happy, prosperous and self-sustaining, and Canada will be enabled to feel that in a truly patriotic spirit, our country has done its duty by the red men of the northwest, and thereby to herself …
> …
> They are wards of Canada: Let us do **our duty** by them and repeat in the Northwest the success which has attended our dealings with them in old Canada for the last hundred years. Among the Indian tribes, let us have a wise and paternal government faithfully carrying out the provisions of our treaties and doing its utmost to help and elevate the Indian population who have been cast upon our care…
> [Emphasis added.]

[418] Milloy quoted another passage from Morris' 1880 book (Ex. 9 at p. 231):

> I see all the Indians. I see the Queen's Councillors taking the Indian by the hand saying we are brothers, we will lift you up, we will teach you, if you will learn, the cunning of the white man. All along that road I see Indians gathering, I see gardens growing and houses building; I see them receiving money from the Queen's Commissioners to purchase clothing for their children; at the same time I see them enjoying their hunting and fishing as before, I see them retaining their old mode of living with the Queen's gift in addition.
> [Emphasis added.]

[419] Milloy then commented on that passage on October 13, 2009 as follows:

> A. Well, I think that that quote… summarizes …what they took to mean Section 91(24) to be, with respect to the constitutional organizational chart that was implied … that in the constitutional sense the federal government was now the senior government with control over these people…responsible for the question of treaties …that the federal government had taken on with respect to lands and resources the responsibility to preserve, mediate, manage the promise of off-reserve resource access in terms of hunting territories, and that there was in all this, despite its … realpolitik structure and realpolitik motivation …dealing with Indians is part of creating a structure in western Canada that allows Western Canada to play its economic role in the development of a free Canadian economy, which goes all the way back to why we started on this Confederation project in the first place, that despite those bones being everywhere evident in this vision, that there is on top of that a vision, and that is that the senior government, representing a senior superior Christian culture, would protect its children, First Nations people, in the way in which we raise our own children, to be capable to move into adult life, to be self-sufficient -- self-supporting, excuse me, to have the cunning of the White man, which was assumed to be cunning that no one else had, superior to all else, and that they would indeed be good citizens of the developing nation, both in terms of fulfilling a positive economic role but, indeed, being good citizens in terms of being Canadian, normalized as Canadians.
> [Emphasis added.]

[420] After the negotiation of several treaties during the 1870s, Treaty Commissioner Morris commented in Ex. 9: "The provisions of these treaties must be carried out with the utmost good faith and the nicest exactness."

[421] Vipond gave evidence that the documentation generated shortly after 1873 by provincial autonomists interpreting ss. 91(24) and 109 vis-à-vis Indians Harvesting Rights provides insight

into contemporary thinking and suggests that not only centralists like Macdonald and Morris but also provincial autonomists like Blake and Fournier all understood at the time that Canada could act within its s. 91(24) jurisdiction to protect the Indians even if by so doing, it adversely affected provincial proprietary rights and that s. 109 rights would be limited by Treaty Harvesting Rights.

[422] I later refer to a memo regarding disallowance, prepared by Bernard shortly after the Treaty was signed, which demonstrated that even the strongest of provincial autonomists were of the view that Canada could use the disallowance power when a province had exceeded its jurisdiction. Vipond said in effect that whatever the disagreement between centralists and provincial autonomists about the complete extent of federal power from Confederation, everyone agreed that Canada could impinge upon provincial rights when exercising a valid s. 91 power. This indicates that in 1873, everyone, including Morris, understood that at the very least, Canada, in exercising its valid jurisdiction over Indians, could affect proprietary rights.

[423] Vipond agreed [February 25, 2010 at p. 111] when Canada was exercising a power squarely within its jurisdiction, it was not acting unconstitutionally. It was not improperly interfering with Ontario's exercise of its proprietary powers.

[424] In other words, in 1873, even though Morris may have wanted Canada to have broad powers, he knew Canada's jurisdiction to interfere in provincial matters simply because provincial legislation was against national interests was controversial. At the same time, he also knew that everyone, even the provincial autonomists, agreed that Canada could interfere with provincial legislation in the course of a valid exercise of federal jurisdiction.

[425] The uncontradicted evidence was that in 1873, a strong centralist like Morris would have understood that even the provincial autonomists appreciated the difference between federal actions clearly exercised under a valid federal jurisdiction and federal actions purporting to interfere with provincial actions in the absence of a valid federal power to do so. Everyone, centralist and provincial autonomist alike, understood in 1873 that valid exercise of federal s. 91(24) jurisdiction was Constitutional. No one would have viewed a valid exercise of federal jurisdiction that affected provincial rights as unconstitutional meddling or supervision.

Morris' Understanding of Section 109

[426] Section 109 of what is now *The Constitution Act*, reads as follows:

> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, **subject to** any Trusts existing in respect thereof, and to **any Interest other than that of the Province in the same**. [Emphasis added.]

[427] In 1873, Morris was aware of the content of s. 109 of the *BNA Act*, which gave Ontario as one of the four original Canadian provinces the right to receive all the revenues from Crown lands in Ontario. He was aware it provided that s. 109 rights were subject to any other interest other than the interest of the province in the same.

[428] Counsel for the Plaintiffs submitted that a number of memos and cases shed light on contemporaneous understandings, and therefore Morris' likely understanding, of s. 109 in 1873.

[429] Again, Vipond gave evidence that the reasoning of provincial autonomists Fournier, Blake and Bernard with respect to British Columbia legislation in relation to Indians in 1875 and 1876 highlights what everyone understood about federal powers, even before *St. Catherine's Milling* was decided. Morris may have viewed federal powers as broader, but centralists and provincial autonomists alike understand from the wording of s. 109 that provincial powers over land could be qualified by pre-existing interests. In recommending disallowance of British Columbia legislation, Bernard, a provincial autonomist who had narrower views about the proper scope of federal jurisdiction than Morris, analyzed the role of s. 109 in protecting the rights and interests of the Indians in lands located in a province with s. 109 power. He concluded that the province's ownership rights over provincial Crown land were qualified by a "trust existing of in respect thereof" or an "interest other than that of the province alone." Bernard opined that Indian rights qualified the province's ownership rights. Vipond presumed protection of existing Indian interests was "built into s. 109." His evidence of February 26, 2010 contains the following:

> Q. … looking at this through the eyes of a politician, not as a lawyer… what this memorandum is getting at is the idea that the provincial government does not have an unqualified ownership in land because of Section 109. It … takes its interest subject to the interests of others that may exist.
> A. That's how it appears upon reading it, yes.
> Q. … highlighting this as something that actually has a role in protecting the rights of the Indians, whatever the nature of those rights are. …?
> A. That's what it appears, yes.
> Q. … that's something that would not be remarkable to the Liberals or reformers, because they… strongly believed in the idea that individuals's rights should not be displaced by the sovereign leviathan… is that people's rights should be respected, particularly in respect of land?
> A. Yes, at the extreme, when those rights are deprived ...
> Q. …you pointed at Section 109 when you were discussing *St. Catherines* and … highlighted … the importance of Section 109 as affirming provincial ownership of land.
> A. Yes.
> Q. But another part of that, built right into it, is the protection of existing interests in those lands, correct?
> A. Yes.
> Q. And that includes the Indian interests, correct?
> A. I presume. …

[430] The perception that the wording of s. 109 of the *Constitution Act, 1867* would protect the interests of the Indians and that Treaty Harvesting Rights would be an interest to which provincial interests were subject, was affirmed in a series of cases decided in the late 19th century. Vipond said that jurisprudence is relevant to contemporary understanding. For instance, in the *St. Catherine's Milling* decision, it was acknowledged that Indian title was "an interest in land other than that of the province in the same," a burden on the Crown's title until such time as it was removed.

[431] Later in these Reasons, I refer to the reasoning of Dean Gérard La Forest (as he then was) set out in *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969).

Morris' Understanding About Involvement of Dual Governments in Land Use Matters

[432] Counsel for Ontario submitted it was "inconceivable" that in 1873 Morris would have contemplated the possibility of federal in addition to provincial involvement in authorizing uses of land within a province. He submitted that that is a recent development.

[433] Counsel for the Plaintiffs submitted that early case law supports his contention that involvement of dual governments in authorizing land uses because of intersecting jurisdiction is not a recently developed concept.

[434] Chancellor Boyd's reasoning in *Seybold* provides an early example. In 1903, the Harvesting Clause was being analyzed and its implementation was being understood to possibly involve both provincial and federal governments. As the trial judge in *St. Catherine's Milling,* Boyd would have understood that the 1873 surrender had given Ontario all the beneficial interest in the surrendered lands. He had read the Treaty and seen the express reference to the Dominion Government in the Harvesting Clause. He understood the reference to Canada was to its role under s. 91(24), not as owner. He understood the role of the Dominion Government vis-à-vis the Indians, even inside a province. He made it clear that in his view, both the federal government and the provincial government could have different roles, at p. 397:

> The true method of both governments, however, appears to be not to stand at arm's length, but to engage in a joint or tripartite transaction whereby the rights of the Indians will be secured through the intervention of their protector, the central government …
>
> … and the interests of Ontario guarded in respect to the ultimate enjoyment of the proceeds of the surrendered land …
> …
> …in case the band of Indians cease to exist. Such a combination of parties is also desirable in order that the land may be sold to the satisfaction of the Indians and on proper terms. It is the business of the Dominion to protect the interest of the Indians and to see that the best price is obtained for the land, and so far the price is concerned that is also the concern of Ontario. …
>
> The question is left open in the *St. Catherines Milling and Lumber Company* case as to "other questions behind", i.e., with respect to the right to determine to what extent and at what periods the territory over which the Indians hunt and fish, is to be taken up for settlement and other purposes. I infer that these rights will be transacted by means of and upon the intervention of both general and local governments, although the central government may choose to deal ex parte with the Indians for the extinction of their claims to land. Still it appears preferable, for the sake of the Indians themselves, as well as for present and future peace, that the allocation of particular or treaty reserves as well as the sales of surrendered lands should be upon conference with the band and with the approval and co-operation of the Crown in its dual character as represented by the general and the provincial authorities.
> [Emphasis added.]

He inferred from the question left open by the JCPC that the right to determine to what extent and even what periods the territory over which the Indians hunt and fish would be "transacted by means of and upon the intervention of both general and local governments."

Morris' Awareness of the Boundary Dispute

[435] In 1873, Morris was aware of the Boundary Dispute between Canada and Ontario. He had been present at the 1872 Cabinet discussion in his capacity as Minister of Inland Revenue, when the implications of the Boundary Dispute were discussed, including its potential effects on federal interests and the validity of patents and licenses issued by Canada within the Disputed Territory.

[436] As a "trained Constitutional lawyer," Morris understood that the outcome of the Boundary Dispute would determine ownership of the land in the Disputed Territory. If Ontario won the Boundary Dispute, as beneficial owner it would have proprietary rights under s. 109. Whether or not Ontario won the Boundary Dispute, he knew that by reason of the 1871 Constitutional amendments, Ontario or another province could in due course receive s. 109-like powers.

[437] By 1873, Morris was aware that litigation between Ontario and Canada would likely be required to settle the issue of ownership of the Disputed Territory. (Saywell, April 7, 2009 p. 160.)

[438] Although in 1873, Morris could not have known whether Ontario or Canada would prevail, if Morris' arguments made in 1858 (Ex. 130 at pp. 82-84) had been accepted, it would have been determined that at Confederation, the Disputed Territory was not part of the HBC Territories, but part of Ontario. By 1873, Morris clearly wanted Ontario to lose the Boundary Dispute, but he was also aware that there were arguments to be made as to why Canada could lose, since he himself had made arguments before Confederation that were useful to Ontario after Confederation. (Vipond, February 23, 2010 at pp 3-20.)

What Dawson Knew

[439] Dawson was the only Treaty Commissioner in 1873 who had previously served in that capacity in earlier treaty negotiations.

[440] I have already quoted Dawson's letters and memos written to Ottawa between 1857 (when he first came into contact with some Treaty 3 Ojibway as a member of the Hind expedition) and June 1873 (when, having not been appointed as a Treaty 3 Commissioner, he wrote to Ottawa providing advice with respect to the upcoming negotiations.)

[441] As mentioned earlier, from 1868 Dawson had been in regular contact with the Ojibway, as the employee of the Canadian Department of Public Works in charge of construction of the Dawson Route between Prince Arthur and the Red River Settlement. For several years, Dawson had been stressing the urgency and difficulty of entering into a treaty with the Ojibway. In Ex. 1, Vol. 4, tab 53, he stressed the situation was exceptional:

> These Indians occupy a peculiar and somewhat exceptional position. They are a community by themselves, and are essentially wood Indians, although going on hunting or fighting expeditions to the prairies. They are *of the same tribe as the Indians at Red River, speak the same language, and regard them as their kindred; but they seldom see them, and have but little intercourse with them.*

> Although the principal line of traffic at one time passed through their territory, they have for half a century but little intercourse with the white man. Missionaries have made no impression upon them and, in many respects, they have shown themselves to be less amenable to the influences of civilization, than Indians usually are. They, in fact, take pride in maintaining their distinctive Indian character, are deeply imbued with traditions of what they believe to be an honorable past history, and would look with disdain on any community becoming Christian.
>
> They are sufficiently organized, numerous and warlike, to be dangerous if disposed to hostility; and standing as they do in the gateway to the territories to the North West, it is of the highest importance to cultivate amicable relations with them.
> [Emphasis added.]

[442] In his many reports, Dawson had commented favourably on their intelligence and integrity and had repeatedly urged the Government to conciliate them and to ensure they thoroughly understood the terms of any treaty they were being asked to sign. He made it clear he believed that if the treaty terms were fully explained, the Ojibway would keep their promises. On April 20, 1868 (Ex. 1, Vol. 4, tab 53), he had written: "I have the fullest reliance as to these Indians observing a treaty and adhering most strictly to all its provisions, if in the first place, it were concluded after full discussion and after all its provisions were thoroughly understood by the Indians."

[443] From his many discussions with the Ojibway, Dawson was keenly aware that traditional harvesting was a critical component of their life and culture. He knew the Ojibway would seek to protect their Harvesting Rights, and their fisheries and gardens. He had earlier, in a letter to Langevin (Ex 1, Vol. 4, tab 103) dated December 19, 1870 recommended that "certain areas, which they have long occupied, and which are necessary to them in carrying on their fishing and gardening operations, such as the Islands in the Lake of the Woods, & their clearing at the Rapids on Rainy River, should be set aside for their sole & exclusive use."

[444] Von Gernet gave evidence in chief that Dawson understood that for Canada to have amicable and friendly relationships with the Ojibway, it was necessary to promise to preserve their traditional livelihood.

[445] In his June 2, 1873 correspondence Dawson had commented that the Ojibway had been unimpressed by the "utmost" parsimony of the Commissioners in 1871 and 1872, and were of "…the belief that the Government of Canada attached but little importance to the negotiations…"

[446] As he entered the 1873 negotiations, Dawson was very concerned about the threat the Ojibway posed to the security of the Dawson Route. After the end of the 1872 negotiations, he had co-signed a joint report of the 1872 Commissioners recommending a military presence be installed in the area to ensure security.

[447] Despite his knowledge of and familiarity with the Treaty 3 Ojibway, he was appointed as a Commissioner in 1873 only after Lindsey Russell needed to be replaced.

[448] Given the fact that he had initially been by-passed as an 1873 Commissioner, Dawson seems to have come to the 1873 negotiations somewhat chastened.

[449] I have already noted that in his introductory statement to the Ojibway, Morris did not acknowledge Dawson's presence. He mentioned that he and Provencher were the Commissioners. Just before the commencement of the negotiations, Campbell had directed Morris to ensure that he, not Dawson, conducted the negotiations.

[450] At the same time, even when it had not been the intention of the Canadian government to formally appoint him as a Commissioner, Dawson had been asked to attend the 1873 negotiations. His extensive experience, knowledge and understanding of the Ojibway were clearly recognized.

What Provencher Knew

[451] Commissioner Provencher, a lawyer, journalist and public servant, was, in 1873, an employee of the Department of Indian Affairs. On February 28, 1873, he had been given responsibility for administration and implementation of treaty promises. (Lovisek report, Ex. 28, p. 75.) In June 1873, he had also been appointed as a member of the Board of Indian Management for the Northwest Territories.

[452] In those capacities and with his background, he clearly had knowledge of Canada's s. 91(24) powers and responsibilities with respect to Indians and Indian lands.

[453] [In 1878, less than five years after the Treaty was signed, Provencher would be dishonourably dismissed from office by the federal government, after being investigated for corruption and incompetence in his dealings with the Indians, creating fictitious accounts, providing the Indians with poor quality, unwholesome food and equipment that was unfit for use, avoiding meetings with the Indians and harsh and improper treatment of the Indians.]

Canada's Interests

[454] In late September 1873, as the Commissioners travelled to the North West Angle to begin the Treaty negotiations, all the Treaty Commissioners knew that to the Ojibway, protection of their rights to continue to hunt, fish and collectively use the resources on their lands was paramount.

[455] From Canada's perspective, a treaty needed to be completed. Canada needed to be able to ensure that settlers could safely pass through the Treaty 3 territory on their way to the fertile agricultural areas on the prairies and points further west. It needed to be able to ensure that the CPR surveyors and builders could do their work in safety. The Commissioners knew Canada needed a treaty to honour its commitment to British Columbia to build a transcontinental railway, and that the portion between Thunder Bay and Fort Garry was scheduled to be completed by December 31, 1876. Canada also needed to honour its promises to protect the Indians made to Great Britain as a condition of annexation of the HBC lands.

[456] Saywell gave evidence that peaceful relations with the Indians were for Canada a practical necessity (Saywell, April 6, 2009 at p. 42.)

[457] They knew reaching agreement would not be easy. In 1871 and 1872, the Ojibway had pointedly refused to enter into a treaty. Unlike the Ojibway/Cree in the Treaty 1 and 2 areas, the Treaty 3 Ojibway had repeatedly resisted the overtures of the Canadian government. Ontario's written argument contains the following: The Ojibway "were articulate and forceful in pursuing what they saw as their interests, and quite capable of saying, "No."

[458] Counsel for Ontario urged this Court to reject Milloy's evidence that the Treaty Commissioners were aware they were working within a tradition of placing the protection and guardianship of Indians in the hands of a higher government and as a result they took care to frame the language of the Treaty to allow "the federal government to mediate, in the post-Treaty period ... the possibly conflicting interests of a hunting versus an exploitative settler economy in the service of both development and the protection of the tribes affected by the transfer." He urged this Court to find that to Canada, "protection" meant "assimilation." He submitted that key aspects of the broader context of Indian policy and Constitutional, administrative, and institutional arrangements that shaped the making of Treaty 3, weighed against the drawing of that inference and rendered it implausible. Morris would have known that the federal government wanted to assimilate the Indians. He would have known that Canada's overall Indian policies were against continuation of traditional Indian lifestyle, including hunting and fishing, and in favour of the adoption of an agricultural lifestyle.

[459] Milloy opined that while it was generally true that federal Indian policy at the time encouraged assimilation and the adoption of an agricultural mode of life, general policy considerations often gave way to more pressing priorities. In 1873, the importance of Canada's policy of assimilating Indians paled against its biggest post-Confederation challenge, that of assimilating its huge new Western Empire. Given the precarious security in the West due to Indian-related concerns, Canada, like the Imperial Government before it, recognized the wisdom of continuing the policies and strategies that had been behind the Proclamation of 1763, and of centralized control to further Canada's national priorities. Those responsible for Canadian Indian Affairs returned to the policy of "conciliation" and to the making of promises of protection necessary to achieve conciliation.

[460] Counsel for the Plaintiffs submitted that the particular circumstances behind the Treaty 3 negotiations differed from those of the other numbered treaties to Canada. Getting title to the Treaty 3 land so it could be settled and developed was much less important than securing access through the land. Chartrand agreed in cross-examination (January 21, 2010 at p. 117) that the major impetus for Treaty 3 was securing the immigrant travel route, unlike Treaty 1, for example, where it was acquiring the land so the fertile Red River area could be settled.

[461] Whatever the agricultural potential in the localities of other numbered treaties, apart from the Rainy River, the Treaty 3 area had little agricultural potential. I note that lands on the south side of the Rainy River were in the United States. The Treaty Commissioners and the Ojibway both recognized that reality. Most of the 55,000 square mile Treaty 3 area was generally viewed as unpromising for agricultural development.

[462] As noted earlier, on November 12, 1870 Archibald had written Howe, opining that the land was stamped with a destiny of "perpetual sterility:"

> … the wildest imagination can never conceive this to be a country fitted for settlement, or in which the population could be a sustained by the produce of the soil. …
>
> The only exception to the general desolation of this region is on the Rainy River, where a narrow belt described as of two or three miles in width skirts each side of the river.
>
> The river banks indicate a soil much like that of the prairie ground here … But unfortunately these strips extend only a few miles, and …on the south side of the river is American territory ...
>
> ... I should not consider the fee simple of the entire country, for agricultural purposes, worth as much as 100 acres of the prairie of Red River ...
> [Emphasis added.]

[463] Simpson had expressed similar views in a report to Howe in 1870, in which he had written the following:

> "I took the line of country by the Mattawin and Shebandowan Rivers, so that I might judge for myself as to its adaptability for settlement, and I am now more fully of opinion than I was before that it is utterly unfit, it being all rock, swamp and lakes; from the end of Thunder Bay road in Lake Shebandowan to Fort Frances, Rainy Lake, there is not enough land to make a Township."
> [Emphasis added.]

[464] On July 22, 1871, Archibald wrote (Ex. 4, p. 174) to Ottawa highlighting the differences between the quality of the land at the Red River and in the Treaty 3 area:

> …Nor indeed would it be right, if we look to what we receive, to measure the benefits we derive from coming into possession of a magnificent territory we are appropriating here [the Red River lands], by what would be fair to allow for the rocks and swamps and muskegs of the Lake country east of this Province… [the Treaty 3 lands]

[465] As mentioned earlier, Lovisek noted in her report (Ex. 28) at p. 128 that Simpson told Treaty 1 and 2 Ojibway during the Treaty 1 and 2 negotiations that he had advised the Treaty 3 Indians in July 1871 that their lands (i.e., the Treaty 3 lands) were "unfit for settlement."

[466] Grant, who had travelled with Sanford Fleming on his 550 mile trip from Lake Superior to Red River in 1872, had remarked that the only land in the Treaty 3 area he considered suitable for agriculture was along Rainy River and perhaps around Lake of the Woods. (Lovisek's report, Ex. 28, at p. 71.)

[467] Dawson had limited his rosy descriptions of agricultural potential to the Rainy River area: "…and on Rainy River there are areas where a soil of unsurpassed fertility awaits the agriculturalist." (Lovisek's report, Ex. 28, at p. 49.)

[468] In his evidence, Chartrand did not suggest that agriculture was expected throughout the Treaty 3 territory. Rather, he said the Commissioners were likely envisioning that farming and agricultural settlement would happen along the Rainy River Valley, certainly as one prime area.

[469] It would have been unrealistic for the Commissioners to encourage most of the Ojibway to try to completely supplant their traditional resource-based economy with an agricultural one.

[470] While in his 1880 book (Ex. 9), Morris did refer to the advantages to the Indians of an agricultural lifestyle, he referred to agriculture as a supplement to their continuing traditional harvesting. He wrote at p. 288 as follows:

> They recognize the fact that they must seek part of their living from the mother earth … Such a disposition as this should be encouraged. Induce the Indians to erect houses on their farms and plant 'their gardens' as they call them and then, while away on their hunts, their wives and children 'will care for their patches of corn and potatoes.'

[471] The Commissioners understood that apart from the Rainy River area, the Treaty 3 lands would be of little interest to Euro-Canadian agriculturally-motivated settlers.

[472] I note that in his Official Report after the completion of Treaty 3, dated October 14, 1873, Morris referred to a "lumber and mineral region," and made no reference to agriculture or settlement. He wrote: "[T]he Indian title has been extinguished over the vast tract of country comprising 55,000 square miles … and embracing within its bounds the Dawson Route, the route of the Canada Pacific Railway and an extensive lumber and mineral region."

[473] The Plaintiffs submitted that the Commissioners perceived that the Treaty 3 area held dim prospects for successful widespread lumbering activities. Simpson had commented, "The timber is small and not fit for market, even if could be got out." [The rivers flowed north and west, away from settled Canada.]

[474] While it was hoped that mining could be pursued, the Commissioners anticipated it would occur on a spotty basis and would be unlikely to interfere significantly with traditional harvesting activities.

The Interests of the Ojibway/What the Ojibway Knew

[475] Lovisek gave evidence that in 1873, the Ojibway were primarily concerned about preserving their way of life, including their right to continue hunting, fishing and trapping as in the past. They valued their seasonal round, the pursuit of their livelihood through traditional harvesting. Their culture and identities were intimately connected with hunting, trapping, fishing and harvesting wild rice as their ancestors had done since time immemorial.

[476] The experts disagreed about the mindset of the Treaty 3 Ojibway as they entered into the 1873 negotiations, especially with respect to (1) whether they perceived they needed to make a treaty at all, and (2) whether they understood and accepted that they would be required to change their way of life after the Treaty was entered into.

1. Whether They Needed a Treaty

[477] Counsel for the Plaintiffs, based in part on the evidence of Lovisek, submitted the Ojibway felt no need to enter into a treaty. They were under no immediate threat. They had already repeatedly refused to accept Euro-Canadian terms for their "barren and sterile land" that other First Nations who held magnificent fertile prairie lands had found to be acceptable in

Treaties 1 and 2. Unlike other First Nations, they had rejected Christianity. They loved their culture, lifestyle and religion, and had no desire to change.

[478] The *Globe* had reported the "Indian logic" in 1872 as follows: "We don't want Canada's money. All we wish is for the white man to keep away."

[479] The Shorthand Reporter reported in the *Manitoban* that the Rainy River Chiefs were "careless" about a treaty.

[480] Counsel for Ontario submitted based on the evidence of Chartrand and Von Gernet that they had "a negative consciousness of their condition."

[481] Chartrand opined (December 15, 2009 at p. 76) that the Ojibway were concerned they were facing inevitable, ongoing, Euro-Canadian influxes of people involving settlement and resource use. They perceived that the tide of Euro-Canadian movement was unstoppable, except perhaps by warfare. The increasing movement toward the West would eventually result in a presence on their traditional lands. His report, Ex. 60, contains the following at p. xii:

> In this context, there is no doubt that the Ojibway understood that they were negotiating terms and conditions for a surrender of their title to lands when they met Treaty Commissioners at the Northwest Angle of the Lake of the Woods in 1873. The 1871 report of the Treaty Commissioners and a letter from Simon Dawson preceding the 1873 negotiations, both indicate that the Ojibway understood, in the context of growing use of the Dawson route by travelling immigrants, that a surrender of their lands was now inevitable.
> [Emphasis added.]

[482] In cross-examination (January 25, 2010 at pp. 15-17), Chartrand conceded that the early academic literature, positing that treaties were forced upon the Ojibway, has largely been supplanted by scholarship positing that the Ojibway had their own agenda and were able to shape their interactions with the Euro-Canadians. He agreed there is disagreement in the literature as to whether the Ojibway accepted that their way of life was passing. He conceded they believed that there would not be a massive movement and intrusion of the Euro-Canadians into the Treaty territory as a whole.

[483] The concerns they had expressed to members of the Palliser and Hind expeditions had been somewhat allayed because of events between 1858 and 1873. They had moved from fear for their very survival, to guarded optimism that under the right conditions, they could successfully adapt and that a Euro-Canadian presence would not lead to their eradication or the end of their culture. They wanted to fully understand the practical consequences of any treaty and to secure material benefits before it was too late to do so. While they understood that there could be benefits to be derived from a treaty, they also understood that over time, as land was taken up, their hunting and fishing rights would be increasingly diminished/negatively impacted.

[484] The 1871 Commissioners had noted in their official 1871 report (Ex. 4, p. 171) that the Indians looked upon the emigrants and others now passing through their country with evident satisfaction.

[485] Both Chartrand and Lovisek agreed that before the Treaty was made, the Ojibway drew on their knowledge that the transportation route to the Red River was important to the Euro-Canadians. In effect, they understood it put them in a favourable bargaining position. Dawson had written:

> They are in general, keen traders, and seem to know the value of what they get and give, as well as any people in the world. Some of those who assemble at Rainy River for the sturgeon fishing, in summer, come from Red Lake, in the neighbouring State of Minnesota, where they possess hunting grounds; and, among these latter, are some who have been parties to treaties with the United States for relinquishing certain tracts for settlement, for which they are now in the receipt of annual payments. The experiences they have thus gained, has rendered them expert diplomatists, as compared to Indians who have never had such advantages, and they have not failed to impress on their kindred and tribe, on Rainy River, the value of the lands which they hold on the line of route to Red River.
> (Lovisek report, Ex. 28 at pp 29-30)

[486] Lovisek opined that the Treaty 3 Ojibway understood in 1873 that their altered position was favourable. They had observed that the settlers were passing through their territory, not staying to settle on it. They perceived that a Euro-Canadian presence would not interfere much overall with their way of life. The Commissioners did not advise and they did not accept that their way of life must change. They perceived there was room to share their resources, without affecting their subsistence harvesting. They did not foresee that sharing would cause resource depletion. At the same time, they believed there could be benefits to be derived from a Euro-Canadian presence. Her evidence on October 21, 2009 contains the following:

> A. Well, their altered position relates to the Ojibway prior to the construction of the Dawson Road not having large-scale interactions with non-native people and now having observed the actions of white people through their area have essentially had a different perspective or altered perspective about what that interaction involved.
> Q. And what is it about the behaviour of white people that has led the Saulteaux, in Mr. Dawson's view, to adopt a favourable view of their altered state, their altered position?
> A. Probably … as Dawson described -- that the activities by the white people were unobtrusive … didn't interfere with actions of the Ojibway, and … provided benefits for the Ojibway, and for this the Ojibway had a favourable view about the white people coming into their territory.
> Q. And what are the benefits that accrued to the Ojibway?
> A. Well, I think I described some of them yesterday. The Ojibway would be provided with work opportunities such as canoeing some of the barges of immigrants packages, parcels and other related migration materials. They would be also selling some of their wood for the steamships and for other purposes being used in the construction of the Dawson road, and … related activities to the construction of the Dawson Road where they would find employment.
> …
> Q. Now I'd like you to step back … and … put this … in the **context of the Ojibway approach** to assessing circumstances or events.
> A. … it's a characteristic of the Ojibway that has been described in the academic literature, particularly by a linguist … Dr. Mary Black Rogers. And she described this characteristic using a technical term called percept ambiguity, which actually means that the Ojibway tend to adopt a wait-and-see attitude towards changes that occur in their environment. So with respect to the construction of the Dawson Road and the prior treaty negotiations, this is an example where the Ojibway have watched and observed what's been happening in a portion of their territory and have decided that the activities by these people have not interfered with their use of the land and, in fact, have added benefits.
> [Emphasis added.]

[487] Lovisek gave evidence that the Ojibway understood that the lands the government wanted were the land related to the construction and operation of the Dawson Route, and the land needed for the construction of the Canadian Pacific railway. They understood that away from the Dawson Route and the CPR right-of-way, their way of life would not change. Despite what they considered to be their favourable existing circumstances and their lack of a need for a Treaty, some of the Chiefs envisaged benefits from establishing an alliance with a treaty partner.

[488] The gist of Lovisek's evidence was that the Ojibway would have refused to enter into a treaty if they had perceived that the detriments would outweigh the benefits.

2. Whether They Understood They Would Be Required to Change Their Way of Life

[489] The experts disagreed about the understanding of the Ojibway of the implications of a treaty at the time they entered into the negotiations.

[490] Lovisek and Chartrand agreed that Morris never clearly explained to the Ojibway what he wanted from them. Morris never identified what lands were wanted (Lovisek, October 23, 2009 at p. 83.) He never discussed "taking up for settlement, mining, lumbering" etc. with them. He did not use phrases such as "if you give up your lands," "if you sell your lands." Like Dawson, he told them he wanted to settle all matters of the past and present so that the white and red man will always be friends. Lovisek opined that the Ojibway would not have understood from what Morris said that the Commissioners were seeking not only a surrender of all of their lands, but also a surrender of their right to harvest renewable natural resources on those lands, in 1873 or at any time in the future.

[491] While the experts agreed that Morris did not clearly explain what the Ojibway were being asked to give up, they disagreed as to whether such an explanation was necessary.

[492] Von Gernet opined (December 10, 2009 at p. 102) no explanation was needed because the Plaintiffs already understood the negative implications of land cessions. It was the general understanding of Aboriginals at the time that after a treaty was signed, Euro-Canadians would unilaterally undertake development on ceded lands and that there would be no further consultation with them. The Ojibway already understood and accepted that after the Treaty, when Euro-Canadians occupied their lands, they would no longer be able to hunt on them.

[493] Von Gernet opined (December 10, 2009 at p. 102) that the Ojibway understanding of the implications of treaty making was primarily based upon early Aboriginal experience in other areas. By 1873, over 300 land cession treaties had been entered into in the United States. There had been "dozens" in Upper Canada.

[494] In cross-examination, he conceded that the Treaty 3 lands were much larger than those covered by the early Upper Canada treaties (which did not contain clauses expressly protecting Aboriginal harvesting rights.) They had differing agricultural potential. At the time the treaties in southerly Upper Canada had been negotiated and concluded, the First Nations there understood that widespread agricultural settlement was imminent.

[495] There was evidence that of the earlier Canadian treaties, the circumstances of the 1850 Robinson Treaties were most similar to the Treaty 3 circumstances. Chartrand agreed (January 21, 2010 at p. 72) that because of kinship relations, before the 1873 negotiations, the Treaty 3 Ojibway had received information about the Robinson Treaties. The Treaty 3 Ojibway knew their lands were more similar to the Robinson Treaty lands than to the more southerly lands in Upper Canada. Commissioner Robinson had explained the difference between the Robinson Treaty lands and lands further south. The more southerly lands had much better agricultural potential. Occupation on them by Euro-Canadian farmers in a manner that would preclude hunting had been immediate on them. The Treaty 3 Ojibway knew Commissioner Robinson had told the Robinson Treaty Ojibway that their lands were "notoriously barren and sterile" and "would in all probability never be settled except in a few localities by mining companies" and that they would be able to retain possession of their hunting grounds in the interior as follows: they would relinquish nothing but a mere nominal title and would be able to "continue to enjoy all their present advantages ..."

[496] Von Gernet opined that the Ojibway Robinson Treaty signatories would not have accepted those specific assurances. He said on December 7, 2010 p 24, "That's what they're told. But they are not stupid. They understand that settlers come."

[497] The experts all agreed that the Treaty 3 Ojibway had their closest ties with relatives south of the American border, the Red Lake and Pembina Chippewas, who had signed the Old Crossing Treaty in 1863. During the Old Crossing Treaty negotiations, Commissioner Ramsey made the following representation:

> When a man sells his horse, he loses the use of him and must make do without a horse or buy another. But, in this case we pay ... the value of the horse ... and [you] get back the horse to use as much as [you] choose. We buy the … lands and then permit [you] ... to use [them] as before, to hunt for game in the woods and prairies and to fish in the streams. So that [you] lose nothing whatever by the arrangement ... while [you] will gain many things of great value which [you] do not have ...

[498] Of that assurance to the Chippewas, Von Gernet said on December 7, 2009 at p. 24, "They are not going to buy into this."

The Ojibway Understanding of What They Were Being Asked to Give Up

[499] Unlike Von Gernet who inferred that the Ojibway understood Euro-Canadian type concepts related to land and already understood they were giving up their lands, as noted earlier in Part 5, The Ojibway Perspective – Ojibway History. Lovisek and Chartrand both agreed that while the Ojibway had a strong sense of territory they had no Euro-Canadian type concept of buying or selling lands (Lovisek October 22, 2009 at p. 82; October 23, 2009 at p. 91.) In contrast to the signatories of Treaties 1 and 2, for instance, who had lived in the vicinity of Euro-Canadians since at least 1817, the Treaty 3 Ojibway had no experience with Euro-Canadian land transactions. The idea of surrender of land was "alien to the Ojibway understanding" (Lovisek, October 23, 2009.)

[500] Lovisek opined that the Ojibway understood that the interests of the Euro-Canadians were narrowly focused on the vicinity of the Dawson Route and the CPR right-of-way, that the

Government wanted (1) land in the area of the Dawson Route related to its construction and operation and (2) land needed for the construction of the railway. (October 23, 2009 at p. 80.) The Ojibway understood that Euro-Canadian activities along the Dawson Route would have some impact on their fishing. That is why they sought and obtained the assurance that their sturgeon fisheries along the Route would be incorporated into their reserves for their own exclusive use. (Dawson's correspondence indicated that for some time they had been discussing the need to protect their gardens and fisheries in the Dawson Route area.) However, except in the vicinity of the Dawson Route and the CPR, they did not understand or agree that such sharing would interfere with their traditional sustenance way of life. Away from the Dawson Route, the Commissioners and the Ojibway expected compatibility between Euro-Canadian uses and continuing Ojibway harvesting.

[501] Lovisek said "land did not have the same connotation of value as resources." The ability to harvest resources on the land was what was important. Their primary concern was the availability of resources for their collective use, not what we would describe as "ownership" of land. Apart from some lands and resources in the vicinity of the Dawson Route and the CPR, the Ojibway did not understand that the Commissioners were asking them to give up using the resources on their lands. They did not understand that resources could be what Euro-Canadians would describe as "owned." The Ojibway did not perceive that resources went with the land (October 23, 2009 at pp. 127-128.)

[502] Lovisek gave evidence that some historians have questioned whether the Ojibway would have paid much attention to a statement that they would be allowed to hunt and fish because they already had the right to hunt and fish, and Morris did not advise them of any intention to take away that right. The Ojibway may have understood Morris' use of the words "before the other lands are wanted" to imply that a further request would be made if and when lands were wanted. She noted he did not specify the lands that might be wanted or identify any reason why lands might be wanted.

[503] In cross-examination on January 26, 2010 Chartrand said the following at pp 156-157:

> A. But in terms of how the Ojibway would have conceived their ability to engage in renewable resource harvesting activities, they would have conceived that as being practices that they believed could be conducted with impunity within their traditional territories. That this was something that not only could they do, but this was part of their way of life.
> And so to get back to the characterization of the practice as a right, I think that the position of the Ojibway was that these were practices that were part of how they went about making a living. [Emphasis added.]

[504] I have already noted that in 1871, Simpson had advised the Treaty 1 Indians that he had informed the Treaty 3 Indians that their land was "unfit for settlement" (Lovisek report, Ex. 28 at p. 128.) The Ojibway did not expect widespread Euro-Canadian agricultural activity and agricultural settlement would occur in most of their territory, i.e., their lands located away from the Rainy River/Rainy Lake/Dawson Route area. They expected reserves to be created to protect their gardening, hunting and fishing activities in the Rainy River area and at the same time they expected to derive additional benefits from Euro-Canadian activities. Most of their lands were located on the Canadian Shield, where subsistence by agriculture alone would have been

difficult. As they did not believe that agriculture could replace it, they saw it as a supplement to, not a substitute for, traditional harvesting.

[505] Chartrand's cross-examination contains the following:

> Q. …they appreciate, by this time now, they've had conversations with two rounds of treaty commissioners, with Dawson, they've seen the Red River area, and I'm going to suggest to you that they certainly now appreciate that physically their territory on its whole is quite different in character than the Red River territory?
> A. Yes, overall I believe that that would be known to the Ojibway.

[506] Chartrand gave evidence on January 19, 2010 at p. 64 that the Ojibway understood that under a treaty agreement, they would allow the presence of Euro-Canadian outsiders on their lands. They understood that Euro-Canadians would come into the treaty territory and use and occupy certain lands. They acknowledged and agreed to "a land cession of some sort as they understood it within the framework of their own culture." [Emphasis added.] He agreed the loss of exclusive use of land did not necessarily imply the loss of their harvesting rights *per se*. He said in contrast to lands in a general sense, they conceived that what was being given up under the Treaty was something of a different order than an ongoing ability to harvest.

[507] Chartrand's evidence on January 19 and 26, 2010, contains the following, which sheds light on why the Ojibway expected compatibility between post-Treaty traditional harvesting and Euro-Canadian land uses:

> Q. And I think you'd also agree with me that we'd have to be careful not to view the phrase subsistence practices in some derogatory near-starvation sense; is that fair?
> A. That's correct.
> Q. Is that, in fact, looked at from an Ojibway perspective, subsistence practices describe being able to harvest to satisfy needs, to maintain one's way of life and consuming what one harvests?
> A. Yes, that was the nature of the understanding of what we call a subsistence economy.
> Q. But as such, they would not harvest to maximize their harvest *per se*?
> A. Absolutely not.
> Q. So in other words, for example, if we look at the fisheries, they would not just keep on harvesting fish as long as they could. Instead they would harvest fish to satisfy their need for fish?
> A. That's correct.
> …
> Q. But going further than that is that that would also suggest that there would be resources potentially available for other people?
> A. Yes. There would be.
> Q. So that the continuation of a traditional life, I'd suggest to you, would leave room for other people to also enjoy the resources off of the Ojibway's lands. And that's leaving aside the question of territoriality for a moment.
> A. Yes. Up to an extent I think that that would have been a fairly reasonable assumption on the part of the Ojibway.
> …
> Q. Right. So it's -- in a sense is that allowing others to be part of the land and to use the land does not necessarily imply the loss of their Harvesting Rights?
> A. Not the loss of the right *per se*. …
> Q. … the Ojibway framework is that there was room to accommodate other people because they were not pursuing activities that consumed all the resources, that is, the Ojibway weren't, there were resources left available, right? That's the first step in this analysis, correct?
> A. That may have been. …

> …
> Q. And they want to continue to access fish into future generations?
> A. This is what the chief is stating as being his desire regarding succeeding generations…. It's into an indefinite future.
> [Emphasis added.]
>
> …
>
> A. The shoreline of Rainy River would not necessarily have been taken up by family hunting territories. There would have been areas that were of shared band usages as being an area where, for example, bands would re-congregate or proximate to Fort Frances multiple bands would congregate to hold spring and summer ceremonials and take part in the fisheries.
> By and large, we have pretty consistent evidence to the effect that family hunting territories, for the most part, were situated inland.

[508] Chartrand said on December 15, 2009 at pp 71-72 that the Ojibway reference to sale of land, made during the Palliser and Hind expeditions, reflected their ability to engage to a limited extent in cross-cultural communication, but at the same time demonstrated their refusal to engage in similar practices.

[509] In judging whether Euro-Canadian activities significantly interfered, they understood they would consider benefits as well as detriments. If they were benefiting from Euro-Canadian activities, they would be likely to view some interference with their harvesting as acceptable. For example, Lovisek said she would expect complaints if forestry were damaging or interfering with their activities.

[510] Lovisek said that she was not saying that the Ojibway understood that they were only giving up exclusive territorial rights in respect of the area of the Dawson Route and the CPR. They understood and agreed to give up their exclusive use of the whole Treaty 3 territory. Her evidence on October 23, 2009 contains the following at pp. 133-135:

> THE COURT: What if somebody wanted to put a house on a piece of their -- or on a piece of the Ojibway territory?
> THE WITNESS: Well, after the treaty, there was no objection to a house going on to a certain area. They weren't taking down houses like they were previous to the treaty. They accepted this. There was no objection to that.
> THE COURT: And that wasn't just on the what we've been referring to as the right-of-way?
> THE WITNESS: That's right.… They were willing to share certainly that land portion with settlers and their resources with settlers as long as they benefited from whatever activities the settlers were engaged in.
> Q. Sorry, what land portion were they willing to share with settlers?
> A. Well, if the settlers set up a house, for example, that wasn't on the right-of-way, they wouldn't have an objection to that, as long as it didn't interfere with a hunting or fishing area or an area which they had used for gardening.

The Meaning of the Harvesting Clause

What did the Ojibway and the Commissioners Understand on October 3 about whether Morris' October 1 Proposal was Accepted? Had it been Superseded by a Different Promise by the time the Treaty was Signed on October 3?

[511] Lovisek's report (Ex. 28) contained the following with respect to Morris' October 1 proposal, at pp. 86-87:

> In his opening offer Lieutenant-Governor Morris offered the Saulteaux a bundle of items including friendship, reserves, schools, money, presents of goods and provisions. One offer in the bundle of terms includes reference to hunting and fishing:
>
> > I want to settle all matters both of the past and the present, so that the white and red man will always be friends. I will give you lands for farms, and also reserves for your own use. I have authority to make reserves such as I have described, not exceeding in all a square mile for every family of five or thereabouts. It may be a long time before the other lands are wanted, and in the meantime you will be permitted to fish and hunt over them. I will also establish schools whenever any band asks for them, so that your children may have the learning of the white man. I will also give you a sum of money for yourselves and every one of your wives and children for this year. I will give you ten dollars per head of the population, and for every other year five dollars a-head. But to the chief men, not exceeding two to each band, we will give twenty dollars a year for ever. I will give to each of you this year a present of goods and provisions to take you home, and I am sure you will be satisfied.
>
> Morris' statement : "It may be a long time before the other lands are wanted, and in the meantime you will be permitted to fish and hunt over them" will be the only statement Morris makes during the three days of recorded oral negotiations that refers to the taking-up clause as drafted by Morris. Morris makes this reference as one of many offers which ranged from the intangible (friendship) to the tangible (farm lands, reserves, schools, money, payments for chiefs, goods and provisions).
>
> The Saulteaux responded to Morris' offer with silence. Silence is not an indication of consent for the Saulteaux. …
> [Emphasis added.]

[512] Von Gernet and Chartrand mentioned Morris' statement on October 1 that "it may be a long time until the other lands are wanted" and that "in the meantime you will be permitted to hunt and fish on them" as his clearest reference at any time during the negotiations to the Harvesting Clause.

[513] The experts agreed there was no reference on October 2, 1873 to continuing hunting and fishing.

[514] They disagreed about whether there was a discussion about harvesting before the Treaty was signed on October 3, 1873.

[515] Chartrand maintained throughout his evidence that the only discussion of Harvesting Rights was on October 1. In cross-examination he said (January 21, 2010 at p. 86) his opinion that the Ojibway knew that "taking up" was "something the Treaty was concerned about" focused on the "direct explanation" given by Morris on October 1. He said the Ojibway did agree on October 3 to Morris' October 1 proposal.

[516] Lovisek said they did not. She expressed her view that this Court should not assume or conclude that the Ojibway agreed with Morris' October 1 proposal that they would be able to hunt and fish until the lands are wanted, in the absence of their positive and specific affirmation of it. Without an express statement of agreement, the Commissioners could not, and this Court should not, conclude that the Ojibway agreed to the proposal that they would lose those rights when the lands were wanted.

[517] In considering whether the Ojibway accepted the October 1 proposal, Lovisek opined that all of the circumstances must be considered in context. The Ojibway were extremely polite. They would not voice objections in the form of outright denial or rejection. Instead, they would typically change the subject or even make a "contradictory statement of agreement." That is what they did on October 2, 1873 when they responded to Morris' statement that the water and wood in their territory was owned in common. In an almost classic Ojibway manner, they said, "What was said about the trees and rivers was quite true, but it was the Indian's country, not the white man's. It is our wood and water." They did not say to Morris, "You are wrong about the wood and water." Without directly challenging Morris' statements that wood and water were the common rights of all the subjects of Her Majesty, they did assert that the country was their country and the trees and the water were theirs.

[518] Lovisek concluded that on October 3, 1873 the Ojibway did not accept the bundle of terms Morris had presented on October 1. She expressed the view that while this Court should not ignore Morris' October 1 statement, it should not consider it in isolation. The Ojibway made no reply on October 2 to Morris' October 1 offer. They never positively affirmed they were accepting the October 1 offer. They did specifically present Treaty terms that they found acceptable: "They must have the privilege of travelling through the country." Those terms (that they must have the privilege of travelling through the country) did not include any limits on their Harvesting Rights (Lovisek, November 16 and 23, 2009.)

[519] The Commissioners knew the Ojibway Chiefs could not agree to a proposal until they had discussed and agreed to it in Council. Also relevant are the Commissioners' offer of ammunition and twine in perpetuity on October 3, Nolin's reference in his Notes to a discussion on October 3 about the Ojibway being free "as by the past" for their hunting and wild rice harvesting, Dawson's recollections of promises made to induce the Ojibway to enter into the Treaty and Dawson's lack of any mention of any "taking up" provision.

The Promise of Ammunition and Twine

[520] Lovisek opined that the Commissioners' promise on October 3 to provide ammunition and twine on an ongoing basis is directly relevant to the Ojibway understanding of the harvesting promise. She said (October 22, 2009) the Ojibway would have understood from that promise that they were being assured that after the Treaty was made, their Harvesting Rights would continue indefinitely.

[521] Milloy gave evidence on October 13, 2009 about the history and significance of the offer of ammunition and twine:

> A. … the …negotiating model …used by the Canadian government really is the old fur trade model ... So it tells you that practice is continuing and indeed that they expect that practice to continue, that is, hunting, gathering, trapping, trading …
> [Emphasis added.]

The Nolin Note

[522] Lovisek wrote in her report (Ex. 28) at p 119:

> The greatest inconsistency between the Nolin Notes, Dawson Notes and the Morris Document is the term: "free as by the past for their hunting and rice harvest."

[523] The experts disagreed on the sequence, significance and content of a discussion recorded in contemporaneous notes prepared by Nolin on October 3: "the Indians will be free as by the past for their hunting and rice harvest."

[524] All the records indicate that Nolin made the note on October 3 after a Chief mentioned they must have the privilege of travelling through the country.

[525] The reference to the Indians being free for their hunting and wild rice harvest does not appear in that form in any of the other notes of the October 3 discussions. The experts attempted to provide explanations for this discrepancy.

[526] Chartrand gave evidence (January 14, 2010 at p. 71) that Nolin's note is "ethno-historically problematic" because "Setting aside the Nolin notes, the available documentary evidence suggests the only time at which a harvesting promise was made was October 1."

[527] Chartrand opined that on October 3, Nolin was recording Morris' statement made two days earlier on October 1 that it may be a long time until the lands are wanted, and in the meantime the Ojibway would be permitted to hunt and fish on them (January 14, 2010 at pp. 68-69.]

[528] Lovisek gave evidence that the Chief's demand, made in Ojibwe and interpreted into English as, "They must have the privilege of travelling through the country" was practical and important, related to their being able to carry on their traditional subsistence activities. It was critical to the Ojibway that they be assured that their practice of travelling over the land to harvest rice, to fish and hunt, to pick berries and attend at their annual religious and cultural ceremonies would not change. She gave the following evidence on October 22, 2009:

> A. … The best interpretation that I have seen for what this actually means comes from linguistic work by Dr. John Nichols, who translated some of the Chippewa treaties. His view is when you have a conjunction such as hunting and wild rice gathering, which are disjunctive terms, when they are placed together in the Ojibwe language, what they mean is making a living. So the hunting and rice gathering would mean that they have rights to make a living from resources, rather than being specific to just hunting or wild rice.
> [Emphasis added.]

[529] While Chartrand agreed (December 15, 2009 at p. 88) that the Ojibway believed they would be able to travel through the country for a full range of traditional social and cultural purposes, including traditional harvesting activities, he asserted that the Chief's demand on October 3 about travelling about the country should be interpreted literally, as relating to travel, not maintenance of Harvesting Rights. (January 14, 2010 at pp 68-9.) His evidence on January 14, 2010 also includes the following at pp. 60 and 62:

> A. …And so I believe that at that point, when one of the chiefs places **the demand** in regards to having the privilege of travelling about the country where it is vacant, James McKay points out to the commissioners that this is something that he has already discussed and confirmed with them.
> Q. So who was McKay talking to when he makes the statement that's reported here?

> A. I believe -- I've always read and interpreted the -- this flow of reporting in The Manitoban account as indicating that McKay was addressing the Commissioners.
> …
> Q. Do you think McPherson would have translated this statement by McKay into Ojibwe?
> A. I see no reason to believe that he would not have. The account goes on to report a new question dealing with a different issue altogether. And so presumably McKay's statement, "Of course, I told them so," having been interpreted in Ojibwe, satisfied the Ojibway.
> …
> So the Ojibway at that point, after the interpreting of **the demand** in English, would have seen McKay explain to the commissioners something in English that presumably gets interpreted back into Ojibwe and presumably as a satisfactory answer…
> [Emphasis added.]

[530] Counsel for the Plaintiffs submitted, based on Lovisek's evidence, that McKay understood the Chief's demand to mean, "We must have the right to make a living from resources." Nolin recorded McKay's response made **in Ojibwe**, "You will be free as by the past for your hunting and rice harvest," (as recorded by Nolin.) McKay then said to the Commissioners **in English,** "Of course, I told them so." In other words, McKay on behalf of the Commissioners in their presence and with their knowledge, responded to the demand with an unqualified assurance that they would be able to carry out their subsistence harvesting as in the past.

[531] Chartrand agreed in cross-examination that "hypothetically," on October 3 Nolin recorded a different discussion about traditional harvesting than the one that had taken place on October 1. However, despite his concession (January 25, 2010 at p. 113) that the sequence of the matters covered in Nolin's Notes almost perfectly matched the sequence of agreed-upon promises on October 3, he maintained (January 25, 2010 at p. 125) that when the Ojibway Chief said, "We must have the privilege of travelling about the country," no one provided him with an answer because Nolin was busily recording Morris' October 1 statement (using a reference to wild rice when Morris had not mentioned wild rice on October 1.) Rather than responding to the Chief's demand, McKay turned to the Commissioners and said, "Of course I told them so."

[532] In cross-examination counsel for the Plaintiffs suggested to Chartrand that if McKay, having heard the question in Ojibwe, understood it to be a demand for an assurance they would be able to use the country as they had before to make a living from harvesting, and if McKay had responded using the words recorded by Nolin in his Notes, "the Indians will be free as by the past for their hunting and wild rice harvest" in Ojibwe to the Ojibway, then said to the Commissioners in English, "Of course I told them so," there would have been nothing more in English for McPherson the translator to translate or for the Shorthand Reporter to record.

[533] Chartrand's cross-examination on January 25, 2010 contains the following at pp. 131-133:

> A. … if we're working from the assumption that there is an Ojibwe language discussion happening between McKay and the Ojibway respecting being free as by the past for hunting and rice harvesting, then we have to come up with an alternate explanation as to why that does not get interpreted into English.

> To put it bluntly, George McPherson, who up to this point has, by all accounts, been doing a good job in keeping up with the discussions, we have -- we have different wording between sources, but, I mean, that reflects the writing ability of -- of the document producers, but --
> Q. Well, I suggest the obvious explanation, which is that Mr. McKay provided them with an answer. … there was …no need for McPherson to translate it because McKay turned to the commissioners and told them "of course, I told them so".
> A. Well, why would McPherson not interpret in English the discussion taking place between McKay and the Ojibway?
> Q. Well, that's only problematic, I suggest to you, if you take the comment about travelling about the country to be quite literalistic, that it's only a question about walking about or snowshoeing about or canoeing about the country. If we take the alternate hypothesis that I put to you that it's a reference to being free to use the country as before, then it's all been translated, correct?
> A. And yet why do we have two independent records presenting a very consistent reference to not general use of the country but a reference to travelling about the country?
> Q. No, I'm not saying that the word travelling wasn't used in the translation, but that everybody there knew that … travel for these people was intimately tied up with using their lands. This was no secret to Morris or Dawson or Provencher, was it?
> A. No, I certainly agree with that proposition.

[534] Chartrand continued to posit that on October 3, Nolin was recording a statement made by Morris two days before. Nolin did not write down any answer McKay gave because at that point he was "recalling a very important promise made on October 1 and this is what he was trying to jot down to the best of his ability."

[535] Chartrand maintained on January 25, 2010 that his assumption that Nolin was referring to Morris' October 1 statement was preferable because:

> At p. 138
> "it's an explanation that allows us to make fewer assumptions as to what is transpiring between McKay and the Ojibway, and McKay and Morris… It allows us to have Nolin record a harvesting promise for which we have two independent records indicate it was made on October 1st…."
>
> At p. 143:
> A. … the hypothesis that I put forth … allows a reconstruction of the different records, and a reconciliation at an explanatory level that…involves …the fewest assumptions about what transpired between the parties prior to October 3 entering that specific exchange.

[536] His cross-examination on January 25, 2010 contains the following at pp. 140-141:

> Q. Now, I take it you'll agree with me that if, in fact, you're wrong about this, and the quotation at page 233 of Ex. 4 from the Nolin notes that says:
> "The Indians will be free, as by the past, for their hunting and rice harvest."
> Turns out to be McKay's words -- so that's a hypothetical I'd like you to take -- I also suggest to you then that that would be evidence of how McKay would explain the harvesting clause?
> A. Well, not necessarily. Not in terms of specifics. I don't see how that would be exactly how McKay would go about referencing the harvesting clause in Treaty 3. …We're wrestling with an English-language statement that is at odds with what the text of Treaty 3 says, and is at odds with available accounts of how Morris alluded to the harvesting promise on October 1st. …
> [Emphasis added.]

[537] Chartrand initially agreed that Morris saw Nolin's Note. He was aware of Nolin's entry that the Indians "would be free as by the past in their hunting and wild rice harvest." He attached the Notes, without comment, to his Official Report dated October 14, 1873. The content of the Nolin Note was not a secret to government officials (January 25, 2010 at pp 110-111).

[538] Lovisek wrote in her report (Ex. 28) at p. 114: "More importantly Morris saw no inconsistency between what Nolin had recorded during the treaty negotiations and what Morris considered had actually transpired. No official in Ottawa commented in writing about any discrepancies between the Nolin Notes and the Morris Document."

[539] Chartrand could not explain why Morris did not comment if he believed the Ojibway had accepted his October 1 offer. However, he said later, "The only document on which I recall Morris placing any weight is the account in the *Manitoban* newspaper" and still later, "I don't think he would have scrutinized the alternate records to that extent." (January 25, 2010 at pp. 134 and 136.)

[540] Von Gernet said on December 1, 2009 at p. 83 that by attaching a copy of the Nolin Notes, Morris implicitly saw them as being either complementary or in accord with his own understanding and descriptions of events. He said on December 2, 2010 at p. 14 that Morris included the Nolin Notes and the *Manitoban* clippings and suggested they needed to be kept as part of the Treaty record: "He [was] not trying to hide any of this ... he [was] being as open as possible about it." While Von Gernet said they were consistent with what was happening in the other evidence he also said, "they should not be used proactively."

[541] Chartrand posited if McKay understood the Ojibway were referring to continuing their traditional harvesting as in the past, it was unlikely that he would have said, "Of course I told them so," since that would have been contrary to what his boss Morris had said two days earlier. His re-examination on January 27, 2010 contains the following at pp 3-4:

> Q. And is it likely, in your opinion, if you have an opinion, that Mr. McKay would have explained the harvesting promise at any time to the Indians in the unqualified way we see reported in the Nolin notes?
> …
> THE WITNESS: I think it's unlikely. I think that James McKay would have, and I believe I made a comment to that effect, would have provided some presentation of the harvesting promise that would have been consistent, at least with the harvesting promise that Alexander Morris gave on October 1st. [Emphasis added.]

[542] There were discrepancies among the various records as to whether the Chief's demand on October 3 about travelling about the country included the words "where it is vacant." Chartrand gave evidence (January 14, 2010 at p. 58 and January 25, 2010 at p. 125) that it is "debatable" and "moot" whether it included those words.

[543] Dawson referred only to "the privilege of travelling through the country."

Dawson's Post-Treaty Recollections of the Treaty Negotiations relevant to the Intent and Meaning of the Harvesting Clause

[544] As noted earlier, Dawson had long insisted that the Ojibway fully understand the terms of any treaty they were being asked to sign and predicted that if they did, they would abide by its terms.

[545] Given his long association with the Ojibway, his participation as Treaty Commissioner in 1871, 1872 and 1873, Lovisek opined (October 22, 2009 at p. 113) that Dawson's recollections are significant in shedding light on what was promised to the Ojibway and understood by them.

[546] I have referred to Dawson's post-Treaty recollections here, because they specifically relate to what transpired at the 1873 negotiations. They provide important information about what was represented by the Commissioners and what was understood by the Ojibway.

[547] In the 1880s Dawson was a federal Member of Parliament. Concerns about the threats to Treaty 3 fishing as a result of commercial fishing were raised in Parliament. On May 19, 1888, Dawson's remarks were recorded in Hansard and quoted by Lovisek in Ex. 28 at pp. 165-166:

> In response to a query from Sir Charles Tupper in the House of Commons about Treaty 3, Dawson reiterated his understanding of the taking-up clause:
>
> > The treaty stipulates that the Indians shall have the right of fishing all over the territories as they formerly had. Xxx What becomes of that stipulation if the white man is allowed to go wherever he likes, and to make a speculation in sweeping the fish out of the lakes & sending them to the markets of the world?
>
> Sir John A. MacDonald joined the discussion by adding:
>
> > The treaty, as the Hon gentleman says, provides that the Indians who come under it shall have the right to fish in all the waters within the area surrendered. That, however, does not give them exclusive rights to fish, & it appears the Indians do not object to ordinary fishing being done in those waters by other parties, & they do not seek to prevent settlers from fishing there…
>
> The debate ended when another Member of Parliament asserted that fisheries belonged to the Provinces. The Prime Minister disagreed with the Member but stated that whatever his Minister did would have to comply with federal jurisdiction. Dawson…kept up his efforts to protect Saulteaux fishing rights. …
>
> …
>
> Dawson … raised this issue before the House of Commons in 1887, 1888, 1889 and 1890.

[548] Dawson set out his understanding of the Harvesting Promise in a letter to the Deputy Minister of Indian Affairs dated May 28, 1888 (Ex. 1, tab 552) as follows:

> In regards to the clause of the Treaty which you quote, taken by itself, it [the treaty] does convey to the Indians the right to pursue their avocations of hunting and fishing and of course this right, so conveyed, has in equity to be considered not from the wording, alone, but from the evident spirit and meaning of the Treaty, as well as from the **discussions explanatory of the wording which took place at the time the Treaty was being negotiated …**
>
> …
>
> **I am in a position to say that as an inducement to the Indians to sign the Treaty, the Commissioners pointed out to them that along with the land reserves and money payments, they would forever have the use of their fisheries. This point was strongly insisted upon and it had great weight with the Indians, who for some years previously had persistently refused to enter into any treaty.** Now upon the back of this, the white man is allowed to bring into play the appliances of modern science and recent discoveries in the mechanical arts of fish catching and so sweep the waters of every living thing down to a minnow, what becomes of the stipulation in [illegible.]
>
> …
>
> With respect to the Lake of the Woods, the Government of Ontario should, I think, be asked to reserve the whole Lake for the use of the Indians.

> Not to … prevent settlers catching fish for domestic use but certainly in such a manner as to guard against the use of destructive appliances which fish traders use in securing car loads of fish for export.
> [Bold and underlining emphasis added.]

[549] Dawson wrote a letter (Ex. 1, Vol. 14, tab 630) to Indian Affairs dated April 26, 1896:

> 'It was distinctly held out to them that they would have the right to pursue their ordinary avocations of hunting and fishing throughout the tract they were about to surrender and stipulation embodying this understanding appears in Treaty 3'"
> …
> And further, to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing….
> [Emphasis added.]

I have already noted that given their own practice of harvesting only what they needed, the Ojibway had had no experience with resource depletion. Dawson's letter continued: "[I]n view of the stipulation it could never in reason or justice have been supposed that the Government, through its Commission, had intended to deprive the Indians of their chief means of subsistence."

[550] Chartrand's cross-examination (January 26, 2010 at pp 45-50) contains the following with respect to Dawson's April 26, 1896 letter. First, a portion of the letter was recited:

> "In reply to your letter of the 18th inst., I beg to say that, during the negotiations with the Indians of Rainy River and the Lake of the Woods, it was distinctly held out to them by the Commissioners acting for the Government that they would have the right to pursue their ordinary avocations of hunting and fishing throughout the tract they were about to surrender and a stipulation embodying this understanding appears in the Treaty (No. 3).
> …
> In those days it was never contemplated that there would be such a run on their fisheries by the white man as has since occurred. Otherwise, the clause in favour of the Indians would have been made stronger."

> A. Well, in terms of impact, it would -- what's being discussed here is the scale and intensity of the activity and its effect on the Ojibway economy and the intentions of the Commissioners at the time regarding what they wanted to have secured to the Aboriginal peoples in the context of Euro-Canadian presence and activity.
> Q. And he's suggesting that if there'd been the kind of significant impacts we were seeing in the fishery, the Commissioners would have drafted stronger protections than appeared in the document, correct?
> A. Absolutely. And the whole point, I think this is very evident even from the 1873 negotiation records and other documents, it was fully the intention on the part of the federal government, the Treaty Commissioners and certainly of the Ojibway, to remain self-sufficient after the Treaty.
> Q. Right. But Dawson's letter, in terms of helping us understand the reference at page 58, I'm going to suggest to you, is actually putting forward the proposition that the language in the written document should have been stronger than actually appears?
> A. Well, it should have been stronger if the intensity of fishing activity had been foreseen to have the impact that it was having by the 1880s and 1890s.

[551] In his correspondence outlining his understanding of the Commissioners' understanding and intentions in 1873 with respect to the Harvesting Clause, Dawson never mentioned the "taking up" provision in the Harvesting Clause. Instead, he emphasized the content and

importance of the Treaty promise/the inducement to the Ojibway that they would "forever" have Harvesting Rights.

Why Did Morris Refer to the Dominion Government in the Harvesting Clause?

[552] A major issue in this case is the significance or insignificance of Morris' mention of the Dominion when he drafted the Harvesting Clause.

[553] An understanding by Morris that Canada was and would be the owner of Treaty 3 lands is key to Ontario's argument that Morris was not invoking Canada's s. 91(24) jurisdiction in mentioning Canada in the Harvesting Clause.

[554] As I see it, there are several questions to answer. Was Morris thinking only of Canada's ownership rights? Did he refer to Canada simply because he assumed Canada would be the beneficial owner and administrator of Treaty 3 lands? Did he have other more complicated reasons for mentioning Canada?

[555] In this section, I shall review the evidence relating to Morris' intention in that regard.

[556] Counsel for Ontario in effect submitted that Morris' reference to Canada was all about an assumption of "ownership." He relied on Chartrand's evidence that the June 16, 1873 Order in Council appointing the 1873 Commissioners specifically mentioned the Treaty 3 lands being in the Northwest Territories. Chartrand opined the mention of Canada was simply based on the assumption that Canada as owner would always have the power to grant patents, issue licenses and "take up" or authorize "taking up" of the Treaty 3 lands.

[557] Chartrand opined (January 22, 2010 at p. 29) that in drafting the Harvesting Clause, Morris assumed Canada owned the lands because the June 16, 1873 Order in Council appointing the 1873 Commissioners mentioned the Treaty 3 lands were in the Northwest Territories:

> Q. Now, I also take it from the way you've structured your opinion that you understand the Treaty 3 Commissioners' powers to negotiate Treaty 3 to arise out of this commission?
> A. That their fundamental authority, yes.

[558] Given that assumption, the timing of the appointment and the instrument under which they were appointed may be of relevance. Counsel for the Plaintiffs cross-examined Chartrand on that assumption and submitted that that June 16, 1873 Order in Council did not specifically appoint the Commissioners to negotiate Treaty 3 and Morris knew it. On June 23, 1873, Spragge was still apparently of the view that the Treaty 3 negotiations had not yet been placed into the hands of Morris, Russell and Provencher. He wrote a memorandum on that day containing the following:

> Taking into consideration the whole of the circumstances it is respectfully proposed that the management of the negotiations be placed in the hands of the Board of Commissioners recently appointed by Order in Council consisting of the Lieutenant Governor, the Chief officer for Indian affairs or the Northwest Territories and the Head Officer in Manitoba of the Dominion land granting department, with such assistance from Mr. Dawson as it may be in his power to afford and aided whenever they may desire his services by Mr. Pither, the Indian agent resident at Fort Frances. [Emphasis added.]

[559] On January 22, 2010, Chartrand was referred in cross-examination to Ex. 4, Spragge's June 23, 1873 memo written six days after the Commission upon which the witness was relying had been issued:

> At p. 37:
> Q. And then we also see, subsequent to the appointment of the commission, a separate recommendation being made by the most senior bureaucrat in the Indian administration about who should carry out those negotiations?
>
> At p. 39
> Q. So on June 16th, in the order in the Privy Council report found at page 212, we see a separate Privy Council decision being made to reopen the Treaty 3 negotiations and setting terms for those negotiations, correct?
> A. Yes, that's correct.
> Q. And that Order-in-Council or that report does not identify who is to carry out the negotiations, does it?
> A. No, that's correct.
> Q. And it doesn't identify the negotiations as occurring in the Northwest Territories, does it?
> A. No, it doesn't identify that.
>
> At p. 40:
> Q. Right. And on June 23rd, [Spragge] obviously is of the view that these negotiations are not already in their hands. Otherwise, this recommendation would be superfluous, wouldn't it?
> A. The negotiations of terms.
> [Emphasis added.]

[560] While Chartrand initially resisted (January 22, 2010 at pp. 44-47), he eventually conceded that the Commission on which he was relying, which referred to the Northwest Territories, did not specifically appoint the Commissioners to negotiate Treaty 3:

> At pp. 48-49:
> A. …. So I'd like an opportunity to just clarify what we've been discussing about and articulate my understanding of this June 23 Spragge memorandum.
> **If your questions were aimed** at having me confirm that, as opposed to the June 16, 1873, commission, which simply laid upon the Board broad general powers to undertake negotiations of treaties, that Spragge, on June 23rd, is now, upon receipt of information on terms, recommending that the negotiations of a specific treaty be put in the hands of that Board, then I completely agree.
> [Emphasis added.]

[561] Counsel for the Plaintiffs submitted that it is not clear that the Commission actually appointing the Treaty 3 Commissioners in 1873 mentioned the Northwest Territories.

[562] Chartrand also conceded on January 22, 2010 at pp. 60-62 that Spragge's proposal for terms of treaties to be negotiated in the Northwest Territories, contained in his memorandum dated June 5, 1873 [Ex. 1, Vol. 6, tab 219], was different from his proposal for terms of Treaty 3.

> Q. And if we go to Tab 221, on June 5th, the Cabinet, or the Privy Council, approves the recommendations for -- that are outlined in the June 5th, 1873, memorandum. Correct?
> A. Correct.
> Q. So on the same day, the Privy Council has one set of recommendations in front of them for Treaty 3, and a different set of recommendations for them -- in front of them for treaties to be negotiated in the Northwest Territories. And they approve them both, correct?
> A. Yes.
> Q. They don't approve the same terms for those two sets of treaties?

> A. Correct.
> [Emphasis added.]

[563] He conceded that as of June 16, 1873, the Privy Council was approving **separate** instructions for the negotiation of Treaty 3, different from the negotiation of future treaties in the Northwest Territories.

[564] In cross-examination, Chartrand agreed (January 22, 2010 at pp. 56-57) that Canada did not view itself as having jurisdiction to negotiate treaties only in the Northwest Territories. It had jurisdiction to do so in all of Canada, including Ontario:

> Q. You are not trying to suggest that Canada lost jurisdiction with respect to Indian Affairs in the lands subject to the Dispute?
> A. No.
> …
> Q. Well, you're not suggesting that Canada took the view after the Boundary Dispute that it no longer had responsibility for dealing with matters related to Aboriginal harvesting off-reserve after the Treaty, are you? Just because of the Boundary Dispute?
> A. If we're limiting ourselves to the final determination in 1884, then the answer is no.
> [Emphasis added.]

[565] Chartrand also agreed that the view of the federal government in 1873 was that it could enter into treaties because of its jurisdiction over Indians and lands reserved for the Indians. The Commissioners (particularly given that they were answerable to the Superintendent of Indian Affairs, in respect of the federal government's duties vis-à-vis Indians) understood that the Dominion Government would have the obligation after the Treaty was signed to enforce the Treaty. References to the Dominion Government could have related to the Commissioners' understanding that they were representing the Dominion Government in respect of Indians and lands reserved for the Indians.

[566] Counsel for the Plaintiffs submitted there are more complicated reasons for the mention of the Dominion in the Harvesting Clause than a simple assumption of ownership. Morris was not simply referring to Canada's ownership rights but also to its s. 91(24) obligations. Morris' knowledge of the Boundary Dispute and its implications affected his drafting of the Harvesting Clause. Morris knew the ownership of the lands was in dispute and sought wording that would cover both eventualities: that Canada would be found to own the Northwest Territories or that Ontario would be. He submitted that Morris deliberately referred to the Dominion in the Harvesting Clause bearing the Boundary Dispute in mind. It was no mistake. When he mentioned "Canada" could limit Treaty Harvesting Rights by "taking up" or authorizing "taking up," Morris evidenced that he intended that **only** Canada could limit Treaty Harvesting Rights. Morris, a trained Constitutional lawyer and ex-judge, understood what he was doing in mentioning Canada. He was aware of the historical antecedents to s. 91(24), including the management of Aboriginal matters from the top before 1867 by the Imperial Government and after 1867 by the Canadian government. He was cognizant of the reasons why s. 91(24) jurisdiction had been vested in the federal government, its obligations to Indians and the Constitutional relationship between federal powers and obligations and provincial powers and obligations. At the time the Treaty was being negotiated, he was aware that the four original provinces had agreed less than a decade earlier that their s. 109 powers would be "subject to any

Interest other than that of the province[s] in the same." He understood that Treaty Harvesting Rights were an "interest other than that of the province in the same." He was aware that a loss of the ongoing Boundary Dispute between Canada and Ontario could have negative implications for Canada's wards, the Ojibway, especially if their Treaty Harvesting Rights were not expressly protected by the wording of the Treaty.

[567] Counsel for the Plaintiffs submitted that in 1873, although the Commissioners anticipated compatibility between Aboriginal harvesting and anticipated development, Morris knew if Canada won the Boundary Dispute, it would authorize all land uses in the Treaty 3 area. In the event proposed land uses threatened to interfere with Treaty Harvesting Rights, he expected federal departments to work together to ensure that Canada's security interests would not be undermined because unhappy Indians perceived that Treaty promises were not being kept. He expected Canada to protect the Indians and in turn to protect its own interests. He contemplated consultation and cooperation among government departments. The Commissioners did not expect management of Harvesting Rights to be onerous by reason of the expected compatibility between anticipated Euro-Canadian development and Ojibway harvesting.

[568] On the other hand, if Canada lost the Boundary Dispute, while he understood that Ontario could not turn "swamp and muskeg" into fertile agricultural lands, he also understood that he needed to draft the Treaty in such a way as to protect Ojibway Harvesting Rights and prevent them from being compromised.

The Meaning of "Taking Up"

[569] When drafting the Harvesting Clause, Morris deliberately did not use proprietary language or refer to the Dominion as owner.

[570] Had Morris simply intended the beneficial owner of the land (whether it turned out to be Canada or Ontario) to have the right to unilaterally extinguish Treaty Harvesting Rights by selling or leasing its land, he could have used language similar to that contained in the precedent provided to him, the 1850 Robinson Treaties, as follows:

> … to allow the said chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold or leased to individuals, or companies of individuals, and occupied by them with the consent of the Provincial Government.
> Robinson Superior Treaty, Morris text, Ex. 9, App., p. 303

[571] He chose not to use such language. He knew if Canada lost the Boundary Dispute it would not be the owner but it would have s. 91(24) rights. He used new and different "taking up" wording to specify that Canada, the only level of government with jurisdiction to make treaties and extinguish treaty rights, would have to authorize any transfer of lands that, to use the language of the Supreme Court of Canada in *Mikisew*, moved lands from the inventory of lands protected by Treaty Harvesting Rights to the inventory of lands not so protected.

[572] Counsel for the Plaintiffs submitted that when Morris specified in the Harvesting Clause that only Canada could "take up" lands, he intended "taking up by Canada" in the Harvesting Clause to have roughly the same meaning the Supreme Court of Canada has now given it. Land would be considered "taken up by Canada," not simply when occupied or used *per se*, but when Canada authorized it to be put to a use visibly incompatible with Harvesting Rights.

[573] Put differently, Morris intended to make it clear that under s. 91(24) and the Treaty, Canada, the guardian of Indians, would manage the process to be followed in limiting Treaty Harvesting Rights so it could ensure they would be respected.

[574] If Canada won the Boundary Dispute, it already had in place an Indian Management Board that included highly placed representatives from Crown Lands and Indian Affairs whom he expected would consult, cooperate, coordinate and manage any conflicts between Euro-Canadians and the Indians in the Indians' and the federal interest. If Ontario won the Boundary Dispute, Morris had stipulated the process that must be applied before otherwise unlimited Harvesting Rights could be removed. He had made it clear in the Treaty that Canada was retaining the s. 91(24) jurisdiction necessary to manage and protect Harvesting Rights if it became necessary to do so.

[575] When he drafted Treaty 3, Morris had in his file a document [Ex. 31], likely prepared in 1871 before the negotiation of Treaty 1. Chartrand's cross-examination on January 21, 2010 contains the following at p. 22:

> Q. Now, if we look at the sentence above the one we've just been talking about, we see the words, in the left-hand column:
>
> "Treaty cannot be changed."
>
> And then next to that, we see the words:
>
> "No provincial legislature will have the right to change that treaty."
>
> A. Yes.
>
> [Emphasis added.]

[576] Counsel for the Plaintiffs submitted that the presence of that document in his file is indicative that Morris did consider ways to ensure that local governments/provinces would not be able to interfere with Treaty Rights.

[577] Counsel for the Plaintiffs submitted that Ex. 32, the draft Treaty prepared in 1873, also supports the conclusion that Morris specifically turned his mind to the wording and decided that "taking up by the government of the Dominion or by subjects authorized by the said government" language and should be included. Although he made other changes, he left intact the reference to the Dominion of Canada in the Harvesting Clause.

Evidence Relevant to the Interpretation of the Understanding of the Parties in 1873 with regard to the Identity of the Treaty Parties

[578] A finding by this Court that the Ojibway understood they were dealing with the Queen or a generic Queen's government, not the Government of Canada, is key to Ontario's argument that as an emanation of the Crown, it can access the Harvesting Clause in the Treaty and limit Treaty Harvesting Rights without authorization from Canada.

[579] The ethno-historians disagreed about whether Morris decided during the negotiations to explain that he was not literally representing the Queen/not literally taking his instructions from her, but if so, why, and then how and whether he was able to make the Ojibway understand that he was actually deriving his authority from the Government of Canada and only from the Government of Canada, and then, as to whether the Ojibway understood they would be relying on Canada and only Canada to implement and enforce the Treaty promises.

[580] Counsel for Ontario submitted that from the mention of Her Majesty the Queen in the Treaty text, the fact that the Treaty Commissioners at least initially represented that they were acting on behalf of the Queen, and the preponderance of references to the Queen during the negotiations, the Ojibway understood that the Queen was their Treaty partner. Chartrand said, based in part of the number of references to the Queen in the various negotiations, the Ojibway would have understood they were dealing with the Queen. (January 14, 2010 at pp. 110-111.) He opined the Ojibway were ultimately relying on the Queen to ensure the Treaty promises were fulfilled.

[581] He submitted the Queen's Government in Canada was/is not limited to the Government of Canada but also includes the governments of the provinces, including Ontario. The Ojibway did **not** understand they were treating with the Government of Canada to the exclusion of other Queen's governments in Canada. As an emanation of the Crown, Ontario should be considered a party to the Treaty and be allowed to "take up" lands under the Treaty. To allow Ontario to do so would not violate the Honour of the Crown or the spirit of the Treaty.

[582] The experts all agreed that when Morris referred to the Queen and the Queen's government during the negotiations, he did not intend to refer to the Queen in her personal capacity or any Queen's government other than the Government of Canada. His references to the Queen during the negotiations were to the Queen, acting on the advice of a Council (or cabinet) at Ottawa. When he referred to the Queen's Government, he was only referring to Canada. He knew Canada is a federal state with separate executives accountable to separate legislatures [the federal (or Dominion) government, accountable to the federal Parliament, the provincial governments accountable to their respective local legislatures.] He understood that each level of government has its own distinct powers and duties, its own treasury, its own property and answers to a distinct electorate. Morris and the other Commissioners appreciated that the Government of the Dominion of Canada was separate and distinct from the Government of Ontario and the Government of the United Kingdom.

[583] During an examination under oath on December 1, 2005 read into the record at trial, Chartrand agreed that the "Dominion Government" in the Harvesting Clause had a clear and unambiguous meaning to the Commissioners. To them, "the Queen's Government" was the Dominion Government.

[584] Chartrand's evidence on January 21, 2010 contains the following at p. 125:

> Q. Now, I'm going to suggest to you that Morris had no expectation that he wanted the Ojibway heading off to the Queen in England to complain about the service, did he?
> A. No, I don't think that Morris had that in mind.

Q. Morris really wants them to come to the Queen's government, correct?
A. Yes.
Q. And we've established that when Morris is talking about the Queen's government, he's talking about the Dominion Government, correct?
A. There's no question that this is what Morris understands and has in mind.
Q. And he does not suggest to that at any time that, look, you might have to go to other governments, correct?
A. Correct.

[585] Chartrand conceded in cross-examination on January 19, 2010 that the Treaty Commissioners understood they had been appointed by the federal government and were taking direction from the Department of Indian Affairs. They understood that under the Constitution, the Dominion Government had powers and duties distinct from the provincial governments. The Dominion Government was responsible for making treaties, for the general welfare of the Indians and for paying the costs of fulfilling the Treaty promises out of the Dominion treasury.

[586] Saywell said (April 6, 2009, p. 52) that while the Commissioners appreciated Canada had an undivided Crown, they understood it had divided governments. It was important for the political players to know what governments had the power to deal with which issues. They knew that particular governments were responsible to fulfill and pay for particular commitments. It was very important to identify the government responsible for honouring each commitment.

[587] In 1867 the Commissioners knew Canada had at least three levels of government (Imperial, federal and provincial), two of which were local governments. Under the *BNA Act*, while Morris knew that executive power was vested in the Queen, he knew that as a practical matter it was in the Governor General, advised by the Committee of the Privy Council, that exercised s. 91(24) powers. When Morris used the phrase "Dominion Government" or the "Government of the Dominion of Canada," he was making a clear and unambiguous reference to the federal government and not to any provincial government. (Saywell, April 6, 2009 at pp. 250-254; Chartrand read-ins, Ex. 33, tab 2.)

[588] Counsel for the Plaintiffs challenged Chartrand's approach of counting the number of Morris' references to the Queen, and looking at the "preponderance" of references. He submitted it is necessary to look at the timing of Morris' references to the Queen. While Morris initially believed tying his authority to the Queen would assist Canada (given the positive perception the Ojibway had of the Queen flowing out of the Imperial policy of conciliation since the Proclamation of 1763), part-way through the negotiations, he realized that by doing so he was weakening Canada's bargaining position. He realized the Ojibway believed the Queen's power and charitableness were unlimited. If she had bestowed all her powers on him, he could give them whatever they wanted. Therefore, he had to make it clear the Commissioners were representing the Canadian government, a Government that did **not** have **all** the power and authority of the Queen.

[589] Counsel for the Plaintiffs submitted that the author of the *Manitoba Free Press* report (Ex. 67/67A, "The Indian Treaty," originally published October 18, 1873) clearly perceived at the time that Morris did change tack during the negotiations, did distance himself from the

Queen and did discard the antiquated formula of tying his authority to the Queen. It contained the following:

> At the opening of the negotiations the Governor had deemed it expedient to follow in the path of his predecessors and adopt the traditionary story of the Great Mother's special and anxious interest in her red children and of her having sent her representative etc. etc. This figure of speech seems to be-though heaven alone knows why-the usual one adopted for discussing their affairs with the Indian tribes; and the polite though crafty savage of the Rainy Lake district not only received this intelligence with demonstrations of satisfaction, but made a mental note of information for use in due season. It was not long before he had occasion to use it for when the demands of the Indians had been refused by the Governor on the ground that the offer he had first made them was within his instructions, but that all subsequent demands were altogether beyond his authority, the urbane denizen of the woods pointed out the apparent incongruity in the two statements made by the white chief; the one that he was there representing the Great Mother, and the other that he had the power to deal with the Indians as he himself thought proper. This had puzzled them a great deal-so they said-and they, as recommended by the Governor, had held a further council amongst themselves on the subject of the treaty. As the Governor has said that his power of giving was limited by instructions, perhaps he would now tell them to what extent he was enabled to meet their views expressed in their written demands, to which they still begged leave to adhere. This was not badly put by the untutored mind-if it was untutored on this occasion-for on the one hand the treaty was likely to cost enough without going to the utmost extent of delegated powers, while on the other there was just the danger that by remaining too inflexible the Indians might go off in a huff. With considerable tact Governor Morris evaded the little anamolous theorem which the Indians had presented for his explanation, and probably considering that the Great Mother was a source of strength to the Indian, but of weakness to the Commissioners, wisely discarded this antiquated formula…
> [Emphasis added.]

[590] Chartrand conceded that the *Free Press* reporter perceived on October 2 that Morris was distancing himself from the Queen and that Morris had concluded that tying his authority to the Queen was working to Canada's disadvantage because the Ojibway perceived the Queen's power to be limitless. Morris decided to explain that he represented the Council that Governed a Great Dominion/the Queen's Government at Ottawa because the Ojibway had specifically challenged Morris' authority.

[591] Lovisek opined the Ojibway understood what Morris was telling them. On October 2, after Morris (1) rejected the 1869 demands; (2) was questioned about the extent of his power; (3) said that he represented the Queen's Government; (4) reminded the Ojibway that there was another "great Council that governed a Great Dominion" that held its Councils at Ottawa the same as they held theirs – Morris **had** been able to successfully explain the concept of the Dominion Government in a manner that the Ojibway understood. The Ojibway understood they were not dealing literally with the Queen.

[592] Lovisek opined on November 23, 2009 that when Morris referred to "the Council that governs a Great Dominion," "the Government in Ottawa," a "Council similar to their own," he was clarifying that the Government in Ottawa was providing his authority and would be responsible for implementing and enforcing the Treaty promises. In drawing on Ojibway experience and understanding of Council meetings and in comparing their own Council to the Council that governed the Dominion, Morris was able to make the Ojibway understand that he was acting on behalf of the Government at Ottawa. The Ojibway did understand by the time they signed the Treaty that the Commissioners' authority came from a Council at Ottawa located on

this side of the Great Salt Lake. Morris' explanation could be translated into Ojibwe. The Government of Canada/the Queen's Government/the Government at Ottawa could be translated as the Council at Ottawa. They understood they were dealing with the Council at Ottawa.

[593] On October 2, 1873, they acknowledged that he had advised them he did not have all the powers of the Queen:

> We understood yesterday that the Queen had given you the power to act upon, that you could do what you pleased, and that the riches of the Queen she had filled your head and body with, and you had only to throw round about; but it seems it is not so, but that you have only half the power that she has, and that she has only half filled your head.

[594] On October 2, 1873, the Ojibway understood that in deciding whether to go forward with the Treaty, they would need to satisfy themselves that the Queen's Government at Ottawa, the party with whom they were dealing, not only had the power to authorize the Treaty terms they were seeking, but also had the power to implement and enforce them.

[595] Lovisek gave evidence that by October 3, they had satisfied themselves that the Government at Ottawa/Canada/the Government/Council at Ottawa/the Queen's Government/the Council that governs a Great Dominion was the source of the Commissioners' authority and that it would, to use Morris' words, "take their hand and never let it go." They had satisfied themselves that Canada had adequate power. They were content to rely on Canada. They recognized and accepted that Canada was authorizing the Commissioners to agree to the Treaty terms and Canada would be responsible for fulfilling the promises.

[596] Lovisek also said on November 23, 2009 that some Ojibway references to the Queen were symbolic, some not. It is important to scrutinize each reference in context. They were often symbolic, referring to kinship by virtue of a common connection to the Great Mother.

[597] Lovisek's report (Ex. 28) contains the following at pp. 92-94:

> There are multiple references in the Shorthand Reporter's account of the 1873 Treaty negotiations which invoke the name of the Queen. The Queen was not used in the negotiations to represent a distinct level of government as much as it was used by both parties as a symbol. The use of words like "Queen" and its equivalent "Mother" were used symbolically by both parties to represent kinship and show respect. In *The Manitoban*, a reference is made to the Great Mother the Queen, and that the Commissioners and the Saulteaux were all "children of the same Great Spirit, and are subject to the same Queen…."
> (Footnotes omitted.)

[598] After Morris made the statements about the Council that governs a Great Dominion and compared himself to a brave who carries a message, the Ojibway repeatedly referred to the Government and to the Treaty Commissioners personally. Apart from one exception, which may have been an attempt at humour, "I think it would disgrace the Queen, my Mother, to wear her image on so base a metal as this," they did not again refer to the Queen.

[599] Chartrand agreed in cross-examination on January 26, 2010 at pp 67-68 that when Morris referred to the Council that Governs a Great Dominion, he was beginning to correct the notion that he was taking his instructions from the Queen.

[600] When Morris said, "I did not say yesterday that the Queen had given me all power. What I told you was that I was sent here to represent the Queen's Government ... when you send one of your braves to deliver a message, he represents you; that is how I stand with the Queen's government," he was tying his authority back to the Queen's Government. Chartrand initially suggested that Morris' references to the Council at Ottawa were related to treaty implementation, not the source of the Commissioners' authority. Later Chartrand conceded in cross-examination that some of the matters to which Morris referred on October 3 were in relation not just to implementation but to the source of his authority. In other words, he conceded Morris did refer to the Queen's Government at Ottawa not only as the power that would be implementing some of the terms of the Treaty, but also as the power that was providing the Commissioners' power and authority.

[601] At trial by the end of his cross-examination, Chartrand had conceded that the Ojibway had "an underlying cognition" that they were dealing with sovereigns through various representatives in Canada (January 25, 2010.)

[602] Chartrand conceded that the most likely term used to translate the English word "Government" into Ojibwe was the Ojibwe word for "Council."

[603] Von Gernet gave the following evidence on December 10, 2009 in cross-examination:

> Q. And I suggest to you that the whole reason for him bringing up the discussion of Council is to make it clear that that is a body that has a role in making the rules for a treaty, and I suggest, governing the great Dominion?
> A. Well, he says that: "-- there is another great council that governs a great Dominion, and they hold their councils the same as you hold yours."
> And that he himself is a servant of the Queen and that he can't do his own will, he must do hers. So again, I think it's a combination of both. He's trying to impress upon the Ojibway that they -- that they should not consider him to have the power to give all that they want, that he is -- his power is limited to the Queen and her Council. Now, the analogy is not perfect. Because while the Ojibway have the equivalent of the Council, they do not have the equivalent of the Queen. …
> Q. …I would suggest that the fact that Morris goes out of his way to draw this analogy between the government and the council suggests that he was intending to impress upon the Ojibway the idea that there was a government that governed the great Dominion; isn't that fair?
> A. I think that's what he's trying to do. He's trying to show that there is a -- I mean, as you say, he could have limited it to just simply saying, you know, the Queen ... is the one that's limited my powers. But, you know, a better analogy is to say, well, it's not just the Queen but the Queen's councillors, because a council is something that the Ojibway can identify with, much more readily in terms of their own day-to-day practice and in their own political system.
> [Emphasis added.]

[604] On December 10, 2009, Von Gernet said that by the end of the negotiations the Ojibway understood that the Council to which Morris referred was in Ottawa, at pp. 154-155:

> Q. And I suggest to you at this point in time the Ojibway have, on a number of occasions, been made aware of the fact that that's a government in Ottawa, correct?
> A. Yes.
> Q. And that that's the government that's come to treat with them, correct?
> A. Well, their understanding would have been that the -- they're treating with the Queen through her representatives --
> …

> Q. But in any event, their understanding is that …regardless of where these individuals actually come from, [they] are being sent by the government in Ottawa, correct -- as a practical matter they understand that?
> A. I think they understand that the Queen's councillors that the governor is alluding to are in Ottawa.
> [Emphasis added.]

[605] Although he maintained on December 3, 2010 that the Ojibway believed they were treating with the Queen through her representatives, Von Gernet conceded that by the end of the negotiations, the Ojibway understood that the "Council" to which Morris referred was at Ottawa, that the Queen's Councillors were in Ottawa and that they would be dealing "on an administrative level with the Government, not in England but in Ottawa." [Von Gernet's cross-examination of December 3, 2010.] He noted that Morris clarified any uncertainty that may have existed before the 1873 negotiations:

> A: … They would have understood that there was some kind of Queen's council in Ottawa which effectively was a government that was homologous to one of their own councils …the homology between the two, was only clarified by Morris in 1873. Prior to that I'm not certain how much they really understood. …

[606] From that answer I concluded that Von Gernet agreed with Lovisek that after Morris referred to the Council that Governs a Great Dominion, the Ojibway understood the Queen's government they would be dealing with was the Government at Ottawa.

[607] Chartrand did not initially agree that the Ojibway were relying on the Queen's Government at Ottawa.

[608] Counsel for the Plaintiffs read the following passage from the discovery of Chartrand into the trial record:

> And so the question as to the identity of the government … I agree that they know there is a government operative in Canada, for example, the government that is building the Dawson Road, as it is variously called, and they make an allusion, at least once, anyway, in the record of oral negotiations taken by the shorthand reporter to, again, a request for " the government," stated generically as such, to provide wood to assist in building houses.
> (Plaintiffs' Read-ins, Ex. 33, Tab 6, May 8, 2009, p. 364, Question 1337)

[609] On October 1, Dawson referring to early treaty negotiations, said, "We made offers as instructed by the Government in good faith." Chartrand conceded in cross-examination (January 21, 2010 at p 77) that it is very possible that at the early meetings, Dawson explained the nature of his authority to oversee construction and may have made reference to the Government of Canada/Council at Ottawa.

[610] Chartrand's report (Ex. 60) contains the following at pp. 127-9:

> Between 1868 and 1870, Simon Dawson was employed by the Dominion Government, as a civil engineer in the Department of Public Works, in charge of overseeing construction of the section of the immigrant travel route from Fort William to the Northwest Angle of the Lake of the Woods. The Ojibway interacted with him at council meetings in which he explained the nature and progress of the construction work, sought to obtain their consent for the work to progress and inquired as to their terms for compensation in regards to the construction of the route.

> Detailed verbatim accounts describing how Dawson identified himself to the Ojibway, his source of authority for overseeing construction of the route, and the identity of the Crown, are lacking. However, as documented in an address by a hereditary Chief to Wemyss Simpson at Fort Frances in June 1870, the Ojibway had developed an understanding that the construction of the route proceeded under authority and direction of a "government". In presenting terms for agreeing to a permanent right of way agreement, the Chief indicated that he understood that this "government" would require some lands along the route to service transport and immigrant travellers. The immigrant travellers were identified by this Chief as "the Queen's subjects." This understanding was certainly derived from council meetings and discussions with Simon Dawson.
>
> Robert Pither was appointed as Indian Agent at Fort Frances in early 1870 and began assuming his duties by early spring of that year. …

[611] Pither, sent by the Canadian Government to reside in the Treaty 3 area to foster friendly relations between the Ojibway and the Canadian Government and create a favorable impression of it, had lived among them since January 1870. He had been officially appointed as Indian Agent since 1871. Chartrand said on discovery that for the most part the Ojibway viewed the Indian Agents to be representatives of the Government. They knew that Pither and Provencher were employed by the same government. As mentioned earlier, McKay had acted as a cultural intermediary since 1870 and was actively involved before and during the 1873 negotiations. He was aware of the existence of multiple governments in Canada and had been charged with explaining concepts, Treaty implications and so forth to the Ojibway.

[612] Since 1868, the Ojibway had been dealing regularly with Dawson, in Council and otherwise, whom they knew was charged with building the immigrant travel route for the government at Ottawa.

[613] The Ojibway had seen Canadian troops crossing their territory in 1870 on the way to the Red River.

[614] They understood that the HBC Territories had been annexed to Canada in July 1870.

[615] As mentioned later in the section of these Reasons on Chartrand's credibility, on an examination dated December 2, 2005 Chartrand said:

> Q: And so Mr. Stephenson asked you this question:
>
> > Q: All right. Does it remain your view that the conception of the … Aboriginals negotiating for and ultimately signing Treaty 3, that they were dealing with the Crown? …
> >
> > …
> >
> > A: I do not dispute any contention. In fact, there is very good evidence in the documentary record to the effect that the Ojibway **understood that they were dealing with individuals who belonged to a central government that was established at a place called Ottawa**. On the other hand, again, the totality of the explanation given to the Ojibway indicated that the government had as its ultimate head and source of authority the Queen."
>
> [Emphasis added.]

[616] Chartrand's report, Ex. 60, contains the following at p. ix:

> The sum of the available evidence regarding the understanding by Aboriginal signatories to Treaty 3 of the identity of the Crown signatory to that Treaty, suggests that the Ojibway at the time of negotiations understood that the provisions of the Treaty would be put into effect by a government in

> Canada. Statements attributed to Ojibway spokespersons identify the Dominion government generically as "the government."

[617] In his "corrections" issued after Spies J. referred to that answer in her reasons dated May 23, 2006 and in his cross-examination at trial, Chartrand resiled from those answers.

[618] Despite his earlier answer on December 2, 2005 that the Ojibway understood they were dealing with individuals who belonged to a central government that was established at a place called Ottawa, Chartrand refused in cross-examination on January 26, 2010 to concede the Ojibway knew the Treaty was with the Government at Ottawa, at pp 106-114:

> Q. Okay. And so now it is your evidence that we cannot, in fact, put all of these pieces together to say that they did understand that they were dealing with a government …-- at Ottawa?
> A. That the treaty was with that government, no. That's an opinion --
> Q. That's not -- okay. That's not the question. Because the question is who were they dealing with. That's the answer you gave. You made a very clear distinction in your answer between the treaty being with the Queen but them knowing they were dealing with officials from the Government of Canada? …
> A. Because that account, in my answer, suggested something that, in 2005, in not quite the right words I was trying to express, that I could express more clearly through the benefit of subsequent writing, that there is no evidence indicating that the Ojibway understood that they were dealing with a federal government in the Euro-Canadian sense of federal government.
> …
> Q. My question, though, is, are you saying that the Ojibway could not understand the concept that they were dealing with a government in Ottawa, or a government in Canada, unless they also understood that there were provincial governments?
> A. No. What I'm indicating is that to the best of my knowledge, their concept of this government was a generic entity and that what we don't have in the historical records is … any clear indication at all that the Ojibway understood that the government at Ottawa might be distinct from any other Euro-Canadian government bodies.
> In fact, my opinion since then has evolved somewhat to the extent that it is not at all clear to me that the Ojibway understood that there were distinct Euro-Canadian government bodies operative in Canada.
> Q. But the thing is, my questions haven't been asked to ask if you can agree that they understood there were distinct governments. What I'm getting at is is they understood that there was a government. They may have thought it was a unitary government, but they understood there was a government at Ottawa that they were dealing with?
> A. They understood that this government at Ottawa, as Alexander Morris referred to on four occasions, would have a role to play in the administration of treaty promises that Alexander Morris was making as coming from the Queen, and having the power to offer those promises under authority of the Queen.
> Q. And I think you'll agree with me, then, that they certainly were not led to believe that any other government would have a role in administering the promises?
> A. I believe that I addressed that question in 2005, although I'd be hard-pressed to find the page. In my opinion, that question is not even an ethnohistorical question because we have no evidence that the issue was ever raised.
> …
> Q. So if somebody were to say, look, they were -- they understood that, you know, the government of Ontario could interfere with their treaty rights, the answer would be, no one even explained the government of Ontario to them?
> A. Which is the basis on which I say that the issue is not even an ethnohistorical issue as best I can determine. It was simply not addressed.
> …

> Q. … I'm actually putting I think what's a simple question to you: Ethnohistorically, there is no evidence whatsoever that the Ojibway ever agreed that the government of Ontario could interfere with their rights?
> A. No, there's no specific evidence because the issue was simply not raised.
> Q. There's no evidence, period. Is there?
> A. There's no evidence that the issue was raised.
> I'm sorry if I'm running around in circles. But as an ethnohistorian, that's an important matter. If the Ojibway had no concept of multiple governments operative in Canada and no one had bothered to explain that to them, then we're dealing with a subject matter that the Ojibway could not have raised at the time.
> Q. And could not have objected to at the time?
> A. Or agreed to or done anything because there was no basis for the Ojibway to be in a position to deal with the issue. And so, you know, would it have mattered to them is a question that is not an ethnohistorical question at the time because there was no basis for the Ojibway, in my opinion, to be in a position to understand to attach a significance to that.
> [Emphasis added.]

[619] After he had again virtually conceded that the Ojibway knew they were dealing with a Queen's government in Canada, he opined that the issue of which government they were dealing with was of secondary importance to the Ojibway. Chartrand's report (Ex. 60) contains the following at pp. 133-4:

> The fact that none of the treaty negotiation records allude to Ojibway concerns regarding this matter, suggests that the identity of the party or parties responsible for administering provisions, was a matter of secondary importance to the Ojibway relative to having secure knowledge that they had negotiated an agreement with "the Queen."

[620] At another point during his evidence, Chartrand said on January 26, 2010, p. 82, what the Ojibway understood about the Queen's government is at the core of the issue. Counsel for Ontario conceded in argument that the Ojibway understood that they were dealing with the Queen's government. They recognized there was a government operating in Canada.

[621] Chartrand gave evidence that Morris presented the Queen's Government as a unitary body. During the Treaty negotiations neither he nor any of the other Commissioners suggested to the Ojibway that any Government other than the Government at Ottawa could or would have any role in fulfilling or administering the Treaty promises. Morris never explained what he clearly knew, that there was an ongoing dispute between Canada and Ontario over ownership of a large portion of the Treaty 3 lands where Harvesting Rights were being promised. When he promised that the Ear of the Queen's Government would always be open, he did not explain that Canada might have trouble ensuring that all of the Queen's servants would do their duty in a proper manner. He did not explain that he could direct some but not all of the Queen's servants." Instead, he suggested that the Queen's Government would address their concerns as they arose. Chartrand's evidence of January 19, 2010:

> Q: So he never says, … it may turn out that some of these lands belong to this other group -- is under the control of this other group of Queen's servants, the government of Ontario?
> A: Correct.
> Q: … when you come and talk to the Queen's government, … we won't be able to help you out …?
> A: No. There are no allusions to dual or distinct governments. In fact, there are no allusions to Ontario specifically --
> …

> Q: Right. Morris here gives them no indication that the Queen's -- whether it's the Queen's government or the Queen in Right of Canada or whatever we ultimately want to label that thing in Ottawa, that they won't be able to deal with the full scope of the Ojibway's problems, he never explains that to them, does he?
> A: His explanation, and it's the one consistent feature of the three different accounts, is that there's a unitary body.

The Interests of Ontario

[622] As mentioned earlier, by the time the Treaty was negotiated, the Commissioners knew of the Boundary Dispute between Ontario and Canada and that it would likely have to be litigated.

[623] Ontario postponed negotiations with respect to the boundary until after a treaty was concluded with the Indians.

[624] It did not participate in any of the Treaty 3 negotiations in 1871, 1872 or 1873.

9. CREDIBILITY OF THE EXPERTS

[625] Obviously, my acceptance or rejection of any given piece of evidence relevant to any issue depended on a comparison of that evidence with other evidence relevant to that issue, viewed in the overall context of the evidence as a whole. My reasons for accepting or rejecting specific portions of the evidence are to be found elsewhere in these Reasons.

[626] In this section, I am setting out my more general observations and conclusions with respect to the overall credibility of the various experts.

The Ethno-Historical Witnesses (Lovisek, Chartrand and Von Gernet)

Lovisek

[627] Early in the trial there were times when I found Lovisek's evidence to be difficult to follow. I am now confident that my initial difficulties stemmed principally from my own schooling in European concepts related to ownership of land and my reflexive assumptions based on that knowledge, which led to my inability to immediately appreciate that counsel for Ontario had formulated its case and focused its questions in its cross-examination of Lovisek based on familiar Euro-Canadian land concepts, especially relating to "ownership." Lovisek was trying to respond to counsel's questions based on her extensive knowledge of vastly different Ojibway concepts that did not directly relate to ownership or land *per se*.

[628] Focusing on Euro-Canadian concepts about land ownership, counsel for Ontario in effect asked Lovisek to assume that the Harvesting Clause was all about Euro-Canadian concepts of landowner's rights, including the assumption that the benefits of land ownership include the exclusive right to use the resources on that land to the fullest. Lovisek opined (and Chartrand agreed) that Euro-Canadian concepts of individual land ownership and of the purchase and sale of land were foreign to the Treaty 3 Ojibway.

[629] Focusing on Euro-Canadian concepts of ownership and not on Ojibway concepts of exclusive control before the Treaty and sharing of use after, counsel for Ontario assumed that after the Treaty was signed, the Ojibway would have objected to **any and all** use by Euro-Canadians of Treaty 3 lands. Counsel for Ontario made much of the Ojibway failure to object to every Euro-Canadian use and of Canada's failure to involve itself in every authorization of land use within Ontario by Ontario.

[630] Lovisek, focusing on Ojibway concepts of resource sharing, said she would not have expected the Ojibway to have objected to every post-Treaty Euro-Canadian land use. The uses mutually anticipated by the Commissioners and Ojibway in the Treaty 3 area were expected to be compatible. Euro-Canadian uses were not expected to interfere significantly with Ojibway Harvesting Rights. The Ojibway understood that after the Treaty was signed, they would no longer have exclusive use of their lands and resources. The Ojibway agreed to share as long as such sharing did not significantly interfere with their traditional way of making a living. In assessing the impact of Euro-Canadian land on their harvesting, they would consider the benefits they were obtaining from the Euro-Canadian activity as well as the detriments. (Lovisek, tab 7, pp 77-78.)

[631] Given the disconnect between the underlying focus and assumptions of counsel for Ontario and of Lovisek's (and as I later learned, of Chartrand's) concept of Ojibway understanding of what was happening and what was being promised, I realized that Lovisek's difficulty in answering questions posed in cross-examination was understandable. She was being asked to fit square pegs into round holes. Once I was able to set aside my own reflexive reactions based on Euro-Canadian concepts of land ownership and to focus instead on Ojibway concepts, her answers were comprehensible and crucial to understanding the transaction from the Ojibway perspective. To them, the Treaty was about continuing their way of life. Their focus was on resources to collectively harvest, not on Euro-Canadian preoccupations.

[632] In argument on April 27, 2010, counsel for Ontario criticized Lovisek's evidence on several bases. He submitted that her evidence that the Ojibway had no European-type concepts of alienation of individually owned land was inconsistent with her evidence that the Ojibway "did understand that some of the land along the right of way was being transferred to the Crown." I note that she qualified that statement as follows: not as a transfer so much as an allowance for occupancy. I also note that Chartrand, who was called to give evidence by Ontario, conceded the Ojibway had no European-type concepts of purchase and sale of land by individuals. He commented that when they referred to sale of land during the Palliser and Hind expeditions, the Ojibway were engaging to some extent in cross-cultural communication, but emphasizing they were refusing to engage in similar practices.

[633] Counsel for Ontario submitted that Lovisek was not an objective witness. He characterized portions of her evidence as "expert advocacy." For instance, he referred to the portion of her evidence in chief where she cited Walmark to support her opinion that the Ojibway perceived Commissioner Simpson as an HBC trader, not as a representative of the Dominion Government and to the portion of the cross-examination where he had pointed out to

her that Walmark had actually written that the Ojibway associated Simpson with the HBC, not the Crown.

[634] Lovisek gave evidence that since the Ojibway had a politically ranked society, they understood and appreciated that there were larger (higher ranked) and smaller (lower ranked) Euro- Canadian powers. For example, they viewed the HBC as a "small power." The point she was making in that evidence was that the Ojibway wanted to deal with an entity with sufficient power and authority to make and fulfill the Treaty promises.

[635] Chartrand conceded in cross-examination on January 25, 2010 that the Ojibway concept of power was very complex:

> At pp. 31-32:
> Q. But even for the Ojibway, there is a component to this of expressing the idea that within Euro-Canadian society there are greater powers and lesser powers?
> A. Yes. And -- but, you know, again, it's very important to understand that …our culture thinks of power as being a thing, that is, it's objective, it's fixed. To the Ojibway, everything is situational. So I agree with you to the extent that we have here a chief making a relational allusion to power. And so, you know, again, in terms of this ranking, it's important to understand that fundamentally, power is a situational variable and that, in fact, can very rarely be properly known with certainty.
> Q. And …in this case what's important about the situation is that when it came time to talk about their rights and their future and the making of a treaty, they expected to deal with a power that was great enough to address those matters?
> A. I think I've made that point a number of times.
>
> At p. 37:
> Q. And, again, what I'm going to suggest to you is what we see coming out of this is a sense that the Ojibway understood that within Euro-Canadian society, you didn't just deal with anybody, but that there were different ranks of officials for different purposes?
> A. In general terms, yes.

[636] Given that Lovisek's comment was focused on Ojibway perceptions of ranking, on Simpson's relatively lowly status as an HBC trader and not on the particular emanation of the Crown that was the source of Simpson's authority, and given that Simpson was acting under a Commission issued by the Dominion Government, in my view the criticism that Lovisek was being an expert advocate in incorrectly citing Walmark's opinion was unduly harsh.

[637] Counsel for Ontario criticized Lovisek for emphasizing the importance of statements made by Dawson (Ex. 1, Vol. 14, tab 630) post-Treaty during the 1880s and 1890s about his recollections of the Treaty negotiations, including representations made by the Commissioners to the Ojibway that they would forever have the right to fish, to induce them to enter into the Treaty, without also mentioning Dawson's pre-Treaty comments about Ojibway awareness that the Dawson Route could have negative impacts on their hunting and fishing. I do not accept that criticism as valid. I note that in her evidence, Lovisek did mention that the Ojibway did understand that there could be negative impacts upon their fishing in the vicinity of the Dawson Route. She said that is why they asked for inclusion of their sturgeon fishing areas in their reserves. Before 1873, Dawson **did** recommend that Ojibway concerns could be ameliorated, *inter alia* by incorporating their sturgeon fishing areas into reserves to be set aside for their

exclusive use. Chartrand's evidence was that the Ojibway generally hunted in the interior, away from the Dawson Route.

[638] As is evident later in these Reasons, I have accepted Lovisek's conclusion that Dawson's after-Treaty comments are important.

[639] Counsel for Ontario specifically criticized Lovisek's failure to mention comments made by Dawson pre-1873 about positive agricultural prospects for the Treaty 3 area. Again, I note that those projections related primarily to the Dawson Route area. Both the Ojibway and Canada anticipated some agricultural development along the Rainy River. I also note that Dawson's comments about development prospects in the area were generally perceived as rosier than most. I agree with Lovisek's evidence that Dawson was a promoter of the Route. In a *Globe & Mail* article "A letter from Fort Frances," dated July 11, 1872, written just before the 1872 negotiations began, the reporter poked fun at Dawson, making puns about his "holy" road

> …I feel sure that every mosquito who has been turned out of doors by his parents or has failed to earn a livelihood in other parts of the world, has emigrated to the Dawson Route…
> …
> Mr. Simpson and the writer had together passed over this road in September last, and had then wondered and speculated as to the probable condition of this so-called immigrant route, when the winter's snow and the spring freshets had done their work upon it. The 'Cariboo Muskeg', that mile and half of corduroy undulating to the heavings of a quaking morass, will try their mettle, we thought, "Wait till that last six miles of sandy way through the tamarack swamp is tested by the ordeal of water, and then we shall see a holy road to the North-west Angle."
> (Plaintiffs' Closing Argument, April 22, 2010, page 15 re Ex. 1, Vol 5, Tab 180)

[640] In short, I reject Ontario's submission that Lovisek was generally not an objective witness.

[641] I note that in many important respects, Chartrand's evidence was consistent with Lovisek's.

[642] After hearing, comparing and weighing the evidence of the three ethno-historical witnesses, I am of the view that Lovisek was the most knowledgeable about the Treaty 3 Ojibway. I have relied heavily upon her evidence.

Chartrand

[643] Chartrand impressed me generally as a knowledgeable witness. His evidence was in many respects similar to Lovisek's.

[644] After hearing all of his evidence and comparing it to Lovisek's, I am of the view that although he was generally knowledgeable about Ojibway people, he had less depth of knowledge and was less able to assist this Court with regard to the culture, ways, intention and understanding of these particular Ojibway than was Lovisek. Some of his conclusions were **not** specifically based on his knowledge of these Ojibway or on their specific circumstances in 1873. For example, his evidence on "negative consciousness of condition" was not sufficiently based

on perceptions of these particular Ojibway. I have found that these particular Ojibway were quite different from the other Aboriginal signatories of the other numbered treaties.

[645] I do not accept the submission of counsel for Ontario that Chartrand's opinions are more balanced than Lovisek's.

[646] Overall he impressed me as less objective than Lovisek. At times, he appeared to be straining to support Ontario's position in this litigation. I shall provide a few examples giving rise to this impression. I could have given more.

[647] On May 23, 2006, in ordering Ontario to pay the costs of this trial of two issues on a partial indemnity basis, in advance, Spies J. referred to the evidence of Chartrand, at paragraphs 172-175 as follows:

> [172] Counsel for the MNR argues however, that the uncontradicted evidence of Dr. Chartrand contradicts the plaintiffs' position. He submits that the Ojibway who negotiated Treaty 3 did not have any detailed knowledge of a Canadian Constitutional distinction between federal and provincial authorities, and any such distinction was not, to them, a meaningful aspect of the treaty. The defendants rely on his evidence from his affidavit and his statement:
>
> > that "[i]t is implausible that the Ojibway who negotiated Treaty 3 held any detailed knowledge of a Canadian Constitutional distinction between Dominion and Provincial authorities, or that any such distinction was to them a meaningful aspect of the Treaty". In their eyes, and in the eyes of the Commissioners, the Treaty was with the Queen.
>
> [173] Dr. Chartrand was examined and in re-examination stated in part, as follows:
>
> > 1202. Q. … Does it remain your view
> > that in the conception of the aboriginals negotiating for and ultimately signing Treaty 3 they were dealing with the Crown -- …
> > …the Queen as a person and has what's gone on or has anything you've seen in the last day altered that view?
> > A. No. And I would base that answer on the preponderance of references to the Queen and to the treaty being made between the Queen and the Ojibway that are found in records detailing verbatim or near-verbatim statements by the participants as well as in, for example, the [1869] list of demands.
> > ...
> > THE DEPONENT: …
> > I do not dispute any contention, in fact, there is very good evidence in the documentary record to the effect that the Ojibway understood that they were dealing with individuals who belonged to a central government that was established at a place called Ottawa.
> > On the other hand, again, the totality of explanations given to the Ojibway indicate that that government had at its ultimate head and source of authority the Queen.
>
> [174] This evidence clearly qualifies the evidence in Dr. Chartrand's affidavit. Obviously if Ontario was not privy to the negotiations, nor referred to in the negotiations, it is too simplistic to say

> that the Ojibway who negotiated Treaty 3 did not have any detailed knowledge of a Canadian Constitutional distinction between Dominion and Provincial authorities. As Dr. Chartrand acknowledges however, that does not mean that the Ojibway did not appreciate the distinction between the Queen and that there was a central government referred to in the treaty as the Dominion of Canada.
>
> [175] In my view, considering the totality of the evidence of Dr. Chartrand, there is certainly support for the plaintiffs' position that the phrase "Dominion Government" at the time was the federal government and that that is how the parties to the Treaty understood it.
>
> [Emphasis added.]

[648] After that decision was released, and before this trial commenced, Chartrand issued a number of "corrections," including one retracting that answer and asserting that the Ojibway did not understand there was a central government referred to in the Treaty as the Dominion of Canada. Chartrand asserted he should not have referred to the federal government as a central government because the Ojibway were not aware that there was more than one level of Queen's government operating in Canada. Although they knew they were dealing with a government in Canada, there is no clear indication they knew they were dealing with a federal government "in the Euro-Canadian sense of the federal government." When he had earlier prepared his report (Ex. 60), Chartrand had not been so sure. It contains the following:

> … As no documents for the 1868-1872 period presenting verbatim quotes of Ojibway terms of address, attribute any significant number or consistent and clear references by Ojibway leaders to the 'Government of the Dominion of Canada', the nature and extent of Ojibway understanding of the 'government' with whom they were dealing, is obscured in the available documentary records. It remains unclear if the Ojibway understood the 'Dominion government' as a national-level government distinct from other governments in Canada.

[649] He maintained during cross-examination that the Ojibway were unaware of the existence of other levels of government in Canada, on the basis that he didn't see that knowledge reflected in the documents. While Chartrand said at trial that the Ojibway had a concept of a generic Queen's government operating within Canada distinct from the American government, they did not understand that there were multiple Queen's governments in Canada or that the Dominion Government was a central national level government. He later said that they had an "underlying cognition that they were dealing with sovereigns through various representatives in Canada" (Chartrand, January 21 and 25, 2010.)

[650] During his cross examination, Chartrand resisted a suggestion that in 1870 Simpson was correct in concluding the Red River Indians/Métis had been tampering with the Treaty 3 Ojibway. He refused to acknowledge that the Treaty 3 Ojibway's refusal to cooperate with Wolesley's troops in the summer of 1870 was as the result of speaking with the Red River Indians. While he said he was "not in a position to prove there had been no communication between Red River and Treaty 3," he also said he did not dispute the Ojibway "had received information from somebody." He insisted that there was "no evidence" to support the conclusion that the Red River Indians were "tampering with the Treaty 3 Ojibway." (January 21, 2010 at p.31.)

[651] That evidence seemed odd. I wondered what was behind it. When he later gave evidence about the lack of Ojibway knowledge about other levels of government in Canada, and explained that the Ojibway were unaware that there was more than one level of Queen's government in

Canada, I questioned whether his reluctance to acknowledge communications between the Treaty 3 Ojibway and the Ojibway in Manitoba from whom the Treaty 3 Ojibway might have gleaned the existence of another level of government in Canada was the basis for his otherwise unexplained sensitivity.

[652] In a different context, Chartrand gave evidence about another possible source of Ojibway knowledge of another level of government in Canada, albeit in trying to explain why it was not necessary for Morris to be more fulsome in his explanations during the negotiations as to what the Ojibway were being asked to give up.

[653] Chartrand posited that it was not necessary because McKay may have earlier provided the needed explanations.

[654] Morris had sent McKay, a member of the Manitoba Legislature, to the Treaty 3 area to promote the Treaty three times in the period immediately leading up to the 1873 negotiations. He was present throughout the 1873 negotiations, attended at least part of the Council meeting held overnight on October 2, 1873 and at Morris' request was at the Council meeting that preceded the recommencement of the negotiations on the morning of October 3. Chartrand explained that McKay, a Red River Metis, by reason of his background and Euro-Canadian education was able to act as a cultural intermediary and may have explained concepts, options, practical consequences, benefits and detriments of a Treaty to the Ojibway. It was McKay whom Morris tasked to explain the Treaty "in Indian" just before it was signed.

[655] Chartrand agreed that McKay would have been able to explain the differences between Canada and the provinces and their respective jurisdictions. He would have understood the concept of a province. He had experience with government structures. He was aware of the events that had transpired at the Red River leading ultimately to the formation of the Province of Manitoba.

[656] McKay had been present at the 1871 negotiations of Treaties 1 and 2 where Ex. 31, containing the note that "provinces cannot change the Treaty" was apparently prepared and perhaps discussed.

[657] Therefore there was some evidence that McKay could have explained to the Ojibway that there was more than one level of Queen's government in Canada and the implications arising therefrom.

[658] After Morris's statement on October 1 that the Ojibway would be able to hunt and fish on the lands being ceded until the lands were wanted, Chartrand said the Ojibway didn't question Morris on October 2 or during the remainder of the 1873 negotiations about "taking up" of land. In the absence of questions, Morris had had no reason to further explain the provision. Chartrand suggested it was not necessary for the Commissioners to explain the taking up clause during the negotiations because the Ojibway already understood that lands could be "taken up."

[659] Chartrand took the position that the only reference during the negotiations to the "taking up" clause was on October 1.

[660] I have already referred to Nolin's note written on October 3 in response to a Chief's demand that they must have the privilege of travelling through the country. Chartrand ignored the Nolin note in interpreting the Harvesting Clause (January 21, 2010 at p. 40) and assumed that the Ojibway accepted Morris' proposal made on October 1 limiting their Harvesting Rights until the lands were wanted. He refused to acknowledge that Nolin's note made on October 3 recorded an October 3 discussion about Harvesting Rights. (January 26, 2010 at pp.7-10.) Chartrand interpreted the Chief's demand literally, i.e., he took the English translation at its face even though McKay and Nolin both seem to have understood the Chief's demand to relate to being able to continue harvesting on the seasonal round. He opined that the Chief's demand that "the Indians must have the privilege of travelling through the country" was literally related to travelling and did not, as Lovisek suggested, relate to a right to harvest, to continue the Ojibway traditional way of life/traditional harvesting. (January 26, 2010 at pp. 7-10.) He conceded that travelling was understood to involve harvesting but refused to acknowledge that Nolin's note on October 3 related to a discussion about Harvesting Rights that took place on October 3, 1873 (January 26, 2010 at pp. 7-10.) He opined that the most plausible explanation for Nolin's entry on October 3 was Nolin's sudden recollection of Morris' October 1 statement that they could hunt and fish on ceded lands until the lands were wanted. He said referring back to the October 1 statement was preferable because it required him to "make fewer assumptions" (January 25, 2010 at p. 138) than the alternative explanation. He said a reference to hunting and wild rice harvesting that omitted fishing was "ethno-historically problematic" although he wasn't troubled that Nolin had referenced wild rice harvesting and Morris had not mentioned it on October 1. He also referred to the fact that it was inconsistent with Morris' statement on October 1, without sufficiently considering that Morris may have changed his position after October 1 (January 25, 2010 at pp. 141-2.)

[661] I found Chartrand's hypothesis that Nolin's note on October 3 was not a note of what was said on October 3 but was Nolin's sudden attempt (coincidentally at exactly the time when the discussion about travelling about the country was occurring) to recall what Morris had said two days earlier, to be implausible [but helpful if accepted in supporting Ontario's position that the Nolin note did not record a promise of perpetual Harvesting Rights made on October 3 that superseded Morris' earlier, more limited promise on October 1, 1873.]

[662] Chartrand, having earlier conceded that Morris was aware of the content of Nolin's note, later waffled on the point.

[663] Initially, Chartrand seems to have accepted as a given that Ontario's ownership of lands would give it exclusive rights. There are numerous passages in his main report to that effect. Chartrand opined in chief that when the 1874 Provisional Agreement was signed, Canada and Ontario understood that the determination of Ontario's boundaries would resolve which level of government would have jurisdiction to "take up" the Treaty 3 lands under the Treaty; "resolving the location of the boundary would simultaneously determine who had jurisdiction over what lands." He appears not to have considered the effect of valid intersecting of jurisdictions. He seemed to assume that this case was all about ownership rights. Like Ontario, he assumed that "taking up" was an ownership right, or was related strictly to use by the owner, not authorization by Canada of uses incompatible with Harvesting Rights.

[664] In cross examination, he conceded that as an ethno-historian he was not giving legal opinions and that at root, questions of jurisdiction are "purely legal" matters about which he has no expertise. He also said that he recognized that Canada continued to have jurisdiction over Indians in Ontario even after Canada lost the Boundary Dispute, but he did not appear to relate that concession to the meaning of the "taking up" provision or the reference to the Dominion in the Harvesting Clause (Chartrand, January 22, 2010 at p. 18)

[665] In my view, Chartrand's lack of Constitutional and legal expertise explains why he initially did not question, for example, that after the 1874 Provisional Agreement was signed, all (exclusive) jurisdiction would be either in Ontario or Canada, depending on the result of the Boundary Dispute.

[666] Chartrand repeatedly took the position that if something was not mentioned in the documents, it did not happen (January 21, 2010 at p. 23.)

[667] Earlier in his evidence during his examination in chief, Chartrand had not hesitated to interpret Euro-Canadian legal documents or to ascribe thoughts to Morris. However, he refrained repeatedly from so doing during cross-examination. One example occurred during his cross-examination on January 22, 2010 at pp. 10-11

> Q. So I'm going to suggest that actually makes our difficulty when we get to Treaty 3 a bit more intense, because here it suggests that there was actually a choice made to insert a specific reference to the Dominion Government, correct?
> A. We're now getting into the mind of Alexander Morris.
> Q. Well, with the greatest of respect --
> A. So it's --
> Q. -- if ever your opinion has involved trying to interpret what was in the minds of the commissioners and the government -- I mean on this particular point what you give an opinion about is what was the intention of the commissioners and the government. That's a question of mental state. So we're into mental states, right?
> A. To have some idea as to whether there was a choice, I would be on more solid footing to put forth an opinion on the matter if we had a document that we can clearly attribute as being a precursor draft of the Treaty 3 document in which -- in which we see this decision being -- that specific decision being made. …

[668] In my findings of fact with respect to the identity of the Treaty parties, I have concluded that Chartrand failed to give significant weight to the prior dealings of the Ojibway with representatives of Canada, including Dawson and Pither. He said on January 21, 2010 at pp. 122-3, "Knowing that the Route went through their territory under the direction of the Government of Canada is one thing but there is simply no evidence that the question was… a matter of concern to the Ojibway."

[669] Since he had not seen any references to the Boundary Dispute in the Treaty documents, Chartrand concluded "the two phenomena evolved like ships passing in the night" (January 21, 2010 at p. 131.) Again, he had simply assumed after Ontario won the Boundary Dispute it would have "exclusive jurisdiction," without considering that Canada might have intersecting jurisdiction under s. 91(24) and that Morris might have considered a loss of the Boundary Dispute in mentioning Canada in the Harvesting Clause.

[670] In contending that Morris did not consider the Boundary Dispute in drafting the Harvesting Clause, Chartrand said Morris did not mention the Boundary Dispute in his 1880 book, even though the Board of Arbitrators had in 1878 already decided in Ontario's favour (i.e., had held that Canada did not own the Disputed Territory.) Chartrand concluded that Morris' failure to mention the Boundary Dispute in his book meant that Morris was still of the view in 1880 that the Disputed Territory would be found to be in Canada. His evidence contains the following:

> January 21 at p. 132:
> Q. … you're saying this was written with knowledge of the outcome of the … arbitration decision, correct?
> A. With knowledge of the arbitration decision.
> Q. So by the time that … Morris writes this book, he's fully aware now that there's a good likelihood that the lands are going to be in Ontario, the southern lands?
> A. Actually, I would say the opposite. I would say that Morris continued to consider that the lands were contained within the Northwest Territories in law.
>
> January 21 at p. 134
> Q. … Morris, in writing his book in full awareness of the arbitration decision [made in 1878] takes no occasion to say, oh, well, if it should turn out that this land is in Ontario, we didn't really mean this Dominion Government business in the taking up clause, does he?
> A. No, he doesn't.
> Q. He has the opportunity to make it clear then and there that there's something in the treaty that's not quite right, and he doesn't do it, does he?
> A. He doesn't make any allusion to the boundary dispute.
>
> January 22 at p. 5
> …a totality of body of available documents regarding the making of the treaty that do not allude to the boundary dispute, that do not refer commissioners to it as a factor to be integrated into the making of the treaty. And the reverse, the mirror image of this is also true.
> …
> The development of the dispute between 1871 up to and including 1878 does not factor in the treaty or the making of the treaty. And it's clear that in terms of what is being primarily addressed, being the boundary question, it's clear that the parties are at that time subsuming the question of jurisdiction within the question.
> [Emphasis added.]

[671] When confronted with an inconsistency between Morris' awareness of the Boundary Dispute and his assertion that Morris assumed that the Treaty 3 lands would always be in the Northwest Territories and thus Canada would always be the owner of the Disputed Territory, Chartrand said he was "not certain that Ontario's entire body of research was known to all parties" and later said he simply "cannot posit whether the federal government understood the exact geographical extent of Ontario's claim." (January 22, 2010 at pp. 6 and 7.)

[672] Even though Chartrand agreed a plausible explanation for the mention of the Dominion in the Harvesting Clause was Canada's role in respect of treaties and its ongoing s. 91(24) responsibility under treaties to deal with grievances, he opined that Canada's s. 91(24) role and responsibility were "subsumed" by the fact that the Commissioners understood that the lands were in the Northwest Territories and by their knowledge of Canadian responsibility for Indians.

He conceded it was beyond his expertise to say whether both were in the minds of the Commissioners (January 22, 2010 at pp 74-77.)

[673] Chartrand cautioned that certain of the references in the documents, which might otherwise lead this Court to the conclusion that the Ojibway understood that they were dealing with the Dominion Government, should be downplayed. For example, in referring to Dawson's letter to Langevin dated December 19, 1870 (Ex. 1, Vol. 4, tab 103), mentioning that the Chiefs had expressed themselves to be quite open to treat with the Dominion Government, he volunteered that Dawson's statement might not have reflected an Ojibway awareness that they would be treating with Canada but rather Dawson's assumption on the point. (January 15, 2010 at p. 27.)

[674] Chartrand resisted the suggestion that Ontario had shirked its responsibilities in the past. For example, until he was taken to the pleadings in the *Annuities Case* [Ex. 4, p. 18], Chartrand could not recall that Ontario had taken the position in that litigation that it was not a party to Treaty 3 (January 22, 2010 at p. 123.)

[675] It was not until he was being cross-examined on April 22, 2010 at p. 17 on his two reply reports prepared in response to Lovisek's reports, that he clarified that he considered them to be less authoritative than his main report. Until then, he had not acknowledged that their preparation had involved less review and analysis than had his primary report.

[676] At this trial Chartrand admitted during cross-examination on January 26, 2010 that he had reviewed a copy of the Plaintiffs' argument filed in the costs motion in 2006, and had written a commentary to assist counsel for Ontario.

[677] While any of these examples on its own might not have guided me to a conclusion that Chartrand's evidence was less balanced than Lovisek's, I am of the view that taken together with other examples contained here and elsewhere in these Reasons, they do support that conclusion.

[678] While this is a minor consideration, it is nevertheless worth noting that unlike Lovisek, who has been retained by governments and First Nations, Chartrand has only been retained by governments (Ex. 59.)

[679] Generally speaking, I prefer the evidence of Lovisek to that of Chartrand.

Von Gernet

[680] In my view, much of Von Gernet's general evidence is not particularly helpful to this Court in deciding the issues here, as it was not related specifically to the circumstances of the Treaty 3 Ojibway in 1873. For example, his evidence that reserves were intended to facilitate a shift from hunting and gathering mode to an agricultural mode was inapplicable here. If it were intended to suggest that the Commissioners expected these Ojibway to forsake hunting and rely on agriculture after the Treaty was signed, I reject it.

[681] Von Gernet said he had "never been troubled" by Morris' failure to explain that the Government was seeking a surrender or cession of lands. In cross-examination on December 10, 2009 he said at pp. 100-101:

> I've seen the exact same argument and the -- your expression of puzzlement in many other cases. And I agree, it's a good point, there's no question that you're perfectly entitled to express that puzzlement that this is not the subject of discussion in any of these treaties. But my response has always been the same, and that is, if something is axiomatic, then there is no real need to discuss it. It's only negotiables that are not axiomatic.

[682] He "did not find it surprising" that Morris did not expressly discuss a sale of lands or a giving up of resources at any time during the 1873 negotiations. The Commissioners did not need to mention the implications of surrender during the negotiations because the Ojibway already understood, based on experience of other Aboriginal people elsewhere, that surrender/the cession of lands/opening up to settlement, etc. was the *raison d'être* of treaties. It is "inconceivable" that the Ojibway did not understand they were giving up their lands in some fashion or another.

[683] His evidence about the *raison d'être* of treaty-making was based on generalised circumstances I have found were largely absent in the Treaty 3 area. While "surrender of land" may have been the *raison d'être* for government negotiators in areas where the land was needed primarily for development, I have found on the circumstances here that it was not the Commissioners' primary motivation. Certainly it was not a motivation for the Ojibway.

[684] I do not accept his evidence in chief that the Treaty 3 Ojibway understood, by reason of information transmitted via the "moccasin telegraph," that Treaty 3 would involve giving up resources on their lands.

[685] Von Gernet attached significant weight to the Upper Canada treaties in offering his opinion that the Ojibway already understood the implications of the Treaty, despite the fact that the circumstances surrounding Treaty 3 and early Upper Canada treaties were very dissimilar and despite the fact that the linkage between the cession of land and the cession of Harvesting Rights had diminished by the time Treaty 3 was signed. In cross-examination, Von Gernet acknowledged the differences between the circumstances in Upper Canada and in the Treaty 3 area. The former generally involved smaller parcels of land. Treaties in Upper Canada generally were negotiated in anticipation of imminent settlement. The Aboriginal parties understood the land was about to be occupied and developed. The early Upper Canadian treaties did not include right to harvest clauses. In the case of Treaty 3, I have found that apart from the Dawson Route area, significant development and agricultural settlement were NOT anticipated.

[686] Between the signing of the early Upper Canadian treaties and Treaty 3, the Robinson Treaties and Old Crossing Treaties had intervened. At both negotiations, governments made representations to the Aboriginal parties that may well have affected the understanding of the Treaty 3 Ojibway with respect to Harvesting Rights. During the Robinson negotiations, Commissioner Robinson represented that the Indians could retain their hunting rights and were giving up nothing but a "nominal" title; during the Old Crossing negotiations, Commissioner Ramsey represented that the Chippewa were essentially giving up nothing, as they were, in

effect, trading a horse for the use of a horse. I have found the Robinson and Old Crossing representations and circumstances may have informed the Treaty 3 Ojibway understanding of the general implications of treaty-making.

[687] Von Gernet seemed palpably reluctant to express any opinion that might be at odds with Ontario's overall position in this litigation. For example, he disagreed, "as a general statement," that local governments were peopled by men whose interests, especially concerning lands, were usually in conflict with those of the First Nations. He would only agree on December 2, 2009 at p. 21 that the statement "does hold some truth, but not as a generalization."

[688] He "somewhat" disagreed with Lovisek's statement that the Ojibway were a hunting and trapping people, saying it was "unfair to characterize them as being primarily hunter gatherers or even to emphasize that part of their subsistence." (Von Gernet, December 2, 2009 at p. 30.)

[689] Von Gernet opined that the Ojibway believed they were dealing not with Canada but with the Queen. While he virtually conceded that the Ojibway understood that both the Dominion of Canada and the Province of Ontario existed in Canada, he opined that that understanding was not relevant or important to them. He maintained they were not concerned about "jurisdictional issues," despite their insistence on probing the extent of the authority of the Treaty Commissioners on October 2, 1873. For reasons outlined elsewhere, I have not accepted that the Ojibway were unconcerned about jurisdictional issues.

[690] With respect to the Ojibway understanding of selling lands and willingness to do so, Von Gernet relied on a statement he attributed to Chief Blackstone in a letter in English dated August 30, 1872 written on Blackstone's behalf by Antoine Tremblay containing the following:

> [w]e have been willing and still are to treat upon fair, reasonable terms and dispose of our interest or rights to lands between the height of land and Manitoba …'[i]nstead of three ($3) dollars per head,' we wish and require that we should be paid twenty ($20) per head yearly forever … If the Government consent to our … request we will surrender everything and give up all rights to the lands except that we shall have to have a Reserve for ourselves, which we will select …

[691] Blackstone could not speak English. Dawson challenged portions of that letter because he felt that they were defamatory. He believed that Tremblay, a tavern owner, had a motive to defame him because of his known opposition to taverns. Dawson asked an officer of the Public Works Department to meet with Blackstone to probe whether he had actually made the comments about Dawson contained in the letter. Blackstone said that various passages about Dawson in the letter did not accurately represent his views. Nevertheless, despite that history, Von Gernet relied heavily on other portions of the same letter, suggesting to this Court that Blackstone's disavowal of some parts of the letter actually bolstered the credibility of the parts of the letter he had not specifically disavowed. I note that Blackstone had only been asked about the truthfulness of the portions of the letter relating to Dawson.

[692] I found Von Gernet's assertion that he considered the unredacted portions of Blackstone's letter to be even more credible than they would have been if the redacted portions had not been challenged, unconvincing to say the least. The whole letter is patently suspect in my view. The truth of the redacted portions had been specifically questioned because they related specifically

to Dawson. The truth of the portions unrelated to Dawson had not been specifically questioned. Their truthfulness had not been confirmed by Blackstone.

[693] I have already referred to Von Gernet's comments that representations to the effect they would be able to continue traditional harvesting, made by government officials in the course of attempts to convince the Robinson and Old Crossing Indians to enter into treaties, were not relevant because the Ojibway would not have believed them.

[694] At least in Canada, the Honour of the Crown requires government representatives to be truthful when they make representations to the First Nations. Courts are to assume that governments intend to keep their promises. Aboriginal parties are entitled to rely on promises made.

[695] Von Gernet conceded in cross-examination that Morris was aware of the Boundary Dispute in 1873. However, he opined that Morris' awareness of the Boundary Dispute did not enter into the treaty-making process/was "not a live issue" for Morris during the Treaty negotiations. While I accept that he reviewed Morris' writings and speeches and found no reference to the Boundary Dispute, I question how his ethno-historical expertise qualified him to give such an opinion. [Chartrand did concede that Morris' reactions to the existence of the Boundary Dispute involved legal and Constitutional considerations about which he had no particular expertise.] I found Von Gernet's evidence regarding Morris' consideration of the Boundary Dispute to be of little assistance given his lack of legal and Constitutional expertise.

[696] Similarly, Von Gernet's expertise on Canada West's jurisdiction over Indians after 1860, based as it was on a simple review of a number of historical documents, was less extensive, informed and nuanced than Milloy's.

[697] His opinion with respect to the Old Crossing Treaty, based as it was on a simple review of a few documents and not undertaken as part of a comprehensive comparative contextual analysis, was less helpful to me than Lovisek's on that Treaty.

[698] I found unpersuasive Von Gernet's conclusion that the Ojibway had knowledge of the scope of the Treaty 3 land cession, based as it was on the fact that the Shorthand Reporter had a metes and bounds description before the Treaty was signed. Whether or not the *Manitoban* was "the organ" of the Manitoba government (and by extension subject to direction from Morris, as submitted by the Plaintiffs), Morris and the Shorthand Reporter travelled to the North West Angle from Winnipeg together, and waited for several days before the negotiations began. I am of the view that the Reporter's access to the metes and bounds description used by the Commissioners in the Treaty does not prove that the Ojibway had similar access, or would have understood a metes and bounds description even if they had.

[699] In short, Von Gernet had/has no particular expertise on the Treaty 3 Ojibway or their circumstances in 1873. While I accept that he is a qualified expert in other aspects of anthropology, for the reasons given above, I do not accept the submission of counsel for Ontario that his opinion is "more balanced" than Lovisek's.

[700] Generally speaking, where the evidence of Von Gernet differed from Lovisek's evidence, I have preferred Lovisek's. I have also tended to prefer Chartrand's evidence to Von Gernet's.

The Historical & Political Witnesses

Milloy

[701] In my view, Milloy is/was a very knowledgeable and reliable historical witness on matters within his area of expertise. He holds a doctorate from the University of Oxford specifically with respect to the development of British Imperial Policy for Canadian Indians between the 1750s and 1860s, including the policy of conciliation and civilization after 1830. I generally accept his evidence, including on the development of Indian policy, the reasons for the federal government's assumption of s. 91(24) jurisdiction over Indians and Indian lands and relevant to Morris' mention of "taking up by the Dominion of Canada" in the Treaty 3 Harvesting Clause.

[702] However, I found his evidence on the Boundary Dispute to be of little assistance, as he had not studied it in detail and, like Von Gernet and Chartrand, was without legal expertise.

[703] I have preferred Milloy's evidence to Von Gernet's with respect to the placement of s. 91(24), the transfer of jurisdiction over Indians to Ontario culminating in 1860 and Ontario's jurisdiction over Indians from 1860 onwards. On Euro-Canadian historical matters, I have concluded that Milloy has greater depth and historical expertise than Von Gernet, whose primary expertise is with respect to First Nations.

[704] Similarly, I have accepted Milloy's evidence on Canada's priorities in 1873, including his evidence that Canada considered it more important to assimilate the West than to assimilate the Treaty 3 Ojibway.

[705] Counsel for Ontario also made much of Milloy's answers in cross-examination about Canada's/Department of Indian Affairs' lack of involvement in administering off-reserve lands in the Disputed Territory after 1894 and in Keewatin after 1912.

[706] In posing questions about federal involvement in Ontario's authorization of land uses, counsel for Ontario focused on exercises of Ontario's ownership jurisdiction and not on exercises of Canada's s. 91(24) jurisdiction to protect Harvesting Rights. The questions ignored the reality of intersecting jurisdictions. I found those questions and Milloy's attempts to answer them unhelpful.

[707] Counsel for Ontario also made much of answers given by Milloy that he was not aware whether Canada had been involved when Ontario had patented and licensed land in Ontario. Under ss. 92 and 109, apart from the Treaty, Ontario had the right to grant patents and issue licenses. I would not have expected Canada to be involved in the licensing and patenting process under s. 109 UNLESS s. 91(24) interests were involved, i.e., when there was a conflict or perceived conflict between Ontario's proprietary interests and Canada's s. 91(24) interests. In any event, by 1894 Canada had legislated away its own right/obligation to authorize or refuse to

authorize land uses incompatible with Harvesting Rights in the Disputed Territory. I found Milloy's answers in response to those questions to be unhelpful and outside of his expertise.

Saywell

[708] Dr. John Saywell, an historian, gave evidence on the context of federal-provincial relations post-Confederation. He received a PhD from Harvard in 1956. He was most qualified in Modern Canadian and Political Constitutional History as it related to federalism and federal-provincial relations, including in the period between 1867 and 1912. The focus of his studies has been on the Euro-Canadian political classes. To him, judicial Reasons for Judgment and other documentation filed in respect of litigation were historical documents that shed light on historical issues.

[709] I found him to be a knowledgeable witness with respect to the thinking of Euro-Canadian politicians 1867-1912.

Vipond

[710] Dr. Robert Vipond, a political scientist and full professor of Political Science at the University of Toronto, with a PhD from Harvard in 1983, is a Constitutionalist. He has a particular interest in Constitutional development, specializing in Canadian federalism and the development of the Canadian Constitution 1864-1900.

[711] He has studied ideas, particularly of the English Canadian political elite, "the leading white guys as they created a nation." (February 23, 2010 at p. 14.)

[712] He has looked at documents, including pamphlets, debates, legal cases to study how people thought about issues at different times: "documents illuminate a particular way of thinking." (February 22, 2010 at p. 130.)

[713] His dissertation, "Federalism and the Problem of Sovereignty: Constitutional Politics and the Rise of the Provincial Rights Movement in Canada," and his particular expertise were therefore of relevance to Euro-Canadian thinking from the time of Confederation to 1912.

[714] I found Vipond to be a knowledgeable and credible witness. His evidence overall was of some assistance to this Court, especially with respect to the mindset/understanding of Morris in 1873; of the legislators in 1891 and 1912; the provincial autonomists on exercises by Canada of its s. 91(24) jurisdiction.

[715] However, he has no expertise to assist this Court in determining the Aboriginal perspective. (February 23, 2010 at p. 13.)

[716] He did not feel qualified to comment on qualifications to Ontario's proprietary rights in s. 109 on account of Indian rights (February 23, 2010 at p. 44) or restrictions on Ontario's rights in the face of Indian interests (February 23, 2010 at p. 118.)

10. FINDINGS OF FACT, PART 1

Findings re Interests of Canada

[717] The Higher Courts have repeatedly cautioned that regardless of the similarity in wording among treaties, it is necessary to carefully examine the specific facts in each case in coming to factual conclusions about the meaning to be given to any specific treaty.

[718] With respect to Treaty 3, the understanding of the Commissioners and their objectives must be determined having regard to the specific evidence in this case.

[719] On the specific facts here, I have found that the Treaty Commissioners were anxious to enter into a treaty to ensure that national priorities could be met.

[720] I find Canada perceived it needed a treaty to ensure safe passage of settlers and railway workers through and in the Treaty 3 territory and so it could honour its commitments to British Columbia and Great Britain.

[721] Canada appreciated that protecting the Ojibway was important to protecting Canada's strategic interests. It took Indians and Indian rights very seriously. In 1873, the Commissioners viewed fulfillment of the Treaty terms as important. To keep its promises and to protect its national interests, Canada needed to be able to ensure that its vital s. 91(24) interests were secure.

[722] I accept the evidence of Milloy that in 1873, "conciliation" was thought to be crucial to nation-building and to assimilating the West so national priorities could be met.

[723] I accept Saywell's evidence that in the 1870s, the North American Indians were still seen as being capable of opposing European advance in the territory. There was a widely held view among the political classes that good and peaceful relationships with the Indians in the Northwest must be established. If they were not, the Indians could be a constant source of trouble and expense. This is evident from the report on the 1872 treaty negotiations and Dawson's correspondence, among other evidence.

[724] I find that the Commissioners and Canada recognized that it was in Canada's strategic interest to promote peace and friendship with these Ojibway, to prevent unhappy Ojibway from attacking travelers on the Dawson Route and to allow surveyors and builders of the CPR to meet their December 31, 1876 deadline for completion of the Treaty 3 portion. I find that Canada wanted to avoid the significant costs of stationing troops in the area.

[725] I note in his Official Report of October 14, 1873, Morris included the following:

> It is fortunate too that the arrangement has been effected as the Indians along the lakes and rivers were dissatisfied at the use of the waters, which they considered theirs, without compensation, so much indeed, that I believe if the treaty had not been made, the Government would have been compelled to place a force on the line next year.

[726] Given the need for security of the CPR and Dawson Route, I find the Commissioners emphasized peace and friendship during the negotiations. Morris and Dawson repeatedly referred to future friendship:

> September 30, 1873: Morris: "The reason I am here today is the Queen's Government wish to have a treaty with you and take you by the hand and never let your hand go." (Dawson's Notes, Ex. 1, Vol. 6, Tab 268);
>
> October 1, 1873: Dawson: "[Dawson] had long looked forward to this meeting ... so as to fix permanently the friendly relations between the Indians and the white man." (Morris, Ex. 9, p. 55;
>
> October 1, 1873: Morris: "I want to settle all matters both of the past and the present, so that the white man and the red man will always be friends." (Morris, Ex. 9, p. 58);
>
> October 3, 1873: Morris : " ... that we wish to do the utmost in our power to make you contented, so that the white and red man will always be friends." (Morris, Ex. 9, p. 67);
>
> October 3, 1873: Morris: "I accept your hand and with it the lands, and will keep all my promises, in the firm belief that the treaty now to be signed will bind the red man and the white together as friends forever." (Morris, Ex. 9, p. 68)

[727] The Chiefs in turn also emphasized the importance of the relationship being created:

> October 3, 1873: Mawedopenais: "Depending upon the words that you have told us, and stretched out your hands in a friendly way, I depend upon that." (Morris, Ex. 9, p. 68);
>
> October 3, 1873: Mawedopenais: " ... you have promised the good things; you have given us your best compliments and wishes not only for once but forever; let there now for ever be peace and friendship between us." (Morris, Ex. 9, p.73; Dawson Notes, Ex. 1, Vol 6, tab 268, p. 6 of 7);
>
> October 3, 1873: Mawedopenais: "You understand me now, that I have taken your hand firmly and in friendship." (Morris, Ex. 9, p. 73; Dawson Notes, Ex. 1, Vol 6, tab 268, p 6 of 7.)

[728] I find the Commissioners promised and the Ojibway relied upon the promise of future friendship between the Ojibway and their Treaty partner.

[729] Chartrand's cross-examination on January 22, 2010 contains the following at p. 78:

> Q. …And I just want to direct you to Mr. Dawson's speech, and the second sentence of that:
> "He had long looked forward to this meeting, when all matters relating to the past, the present, and the future, could be disposed of so as to fix permanently the friendly relations between the Indians and the white men."
> I mean, isn't that an indication that they're framing this around the -- <u>they're framing these negotiations around the special relationship between -- and to avoid arguments with you for now, the Crown and Indians?</u>
> <u>A. Yes, certainly.</u>

[730] The Commissioners were aware of Canada's s. 91(24) responsibilities and Chartrand's January 22, 2010 cross-examination contains the following at pp. 79-80:

> Q. …He's relating this directly to, you know, <u>the devising of a scheme whereby both white men and Indians would be benefited.</u>
> A. Right.
> Q. That's <u>really at the core of the historic treaty-making function</u>, isn't that fair?
> A. <u>Yes, it is.</u>

> Q. And that sort of understanding post-1867 that this is the federal government's responsibility, right?
> A. Yes, that's correct.
> Q. Part of their responsibility for Indians?
> A. Yes, that's correct.
> Q. And if we go over to page 58, to the opening of the offer. This is Morris' offer. It's framed in the words:
> "'I want to settle all matters both of the past and present, so that the white and red man will always be friends.'"
> Again, he's framing the offer squarely within that historic treaty-making role, correct?
> A. The treaty-making role, yes, certainly.
> Q. Which by this time Morris clearly understood was vested in the federal government?
> A. Well, since 1867.
> Q. So what he's alluding to here is the responsibility of the federal government to Indians, right?
> A. Correct.

[731] I have earlier quoted portions from Morris' essays, speeches and book where he mentioned Canada's responsibility to the Indians.

[732] On January 22, Chartrand agreed and I find that the Commissioners understood that at the time they negotiated the Treaty, the Dominion Government had a responsibility to Indians under s. 91(24), which would continue under the Treaty, even within Ontario if Canada lost the Boundary Dispute.

[733] I accept Milloy's evidence that while Canada's policy as of 1873 was generally to assimilate Indians, general policy considerations here gave way to other priorities. I accept that Canada's biggest post-Confederation challenge was assimilating its huge new Empire to the West and that its goal of assimilating Indians was manifestly less important. Given the precarious security in the West involving First Nations threats, Canada, like the Imperial Government had done much earlier, recognized the wisdom of continuing the policies and strategies that had been behind the Proclamation of 1763. Those responsible for Canadian Indian Affairs returned to the policy of "conciliation" and the making of promises of protection necessary to achieve conciliation.

[734] While I do not doubt that Morris was aware of the federal policy of assimilating Indians, I accept Milloy's evidence that implementation of Indian policy prior to 1873 had not been uniform. In this case, the Commissioners and the members of the Canadian Privy Council who provided their authority and approved the Treaty terms were weighing various national priorities. In the circumstances here, assimilation of the West required peace and friendship with the Treaty 3 Ojibway.

[735] I accept Milloy's evidence that, historically, the Department of Indian Affairs was directed from the top and Indians were insulated from local settlers and governments whom the Imperial government had perceived could not be trusted to deal fairly with Indians. Part of the rationale for the placement of s. 91(24) with the federal government was protection of the minority Indian interest. I accept Milloy's evidence that Treaty Commissioners intended to interpose Canada between the Indians and settlers.

[736] I accept Milloy's evidence, relating to the provenance of s. 91(24) and the history of Imperial Indian policy as applied in Canada, and the evidence of Vipond and Saywell that the Treaty Commissioners were aware they were working within a tradition of protection and "guardianship" of Indians.

[737] It is clear from *Nova Brittania* and given his education and background, that Morris was aware of the model of Imperial administration and of Canada's Constitutional role, powers and obligations.

[738] Morris' first-hand experience and knowledge of the historical, political, legal and Constitutional background canvassed in these Reasons, including the thinking behind the placement of s. 91(24) under federal jurisdiction, the specific limitation in s. 109, the interaction between federal and provincial powers, the promises made to British Columbia and Great Britain, the history of Imperial policy and dealings with the Indians, and the implications of the ongoing Boundary Dispute are relevant to gleaning his understanding and intent in drafting the Treaty and in determining the promises made in 1873.

[739] As a "trained Constitutional lawyer" and a keen student of Imperial and Canadian history, Morris was clearly aware that Canada's s. 91(24) jurisdiction covered Canada's ability to make treaties and extinguish rights recognized under treaties. (Morris and the other Commissioners were taking their direction principally from the federal Department of Indian Affairs.) I find he was aware of the historic Imperial method of dealing with North American Indians; he was aware of the Imperial model dating back at least to the Proclamation of 1763 and its goal of protecting the Indians against interference from local settlers by reserving to them the use of their hunting grounds and administering Indian affairs centrally.

[740] Morris was aware that Canada had undertaken the protection of the Indian inhabitants of the HBC Territories as a condition of their transfer to Canada.

[741] Chartrand agreed in cross-examination on January 22, 2010 at pp. 83-85 that Morris believed that the federal government had inherited the operational aspects of obligation and duty previously exercised by the Imperial government:

> Q. … Morris knows that in the contemporary 1873 context, it is, in fact, the federal government that's the inheritor of the operational aspects of that package of Crown obligation and duty?
> A. He knows, assumes, believes, whatever. You know, again –
> Q. That's the framework he's working in?
> A. … yeah, it's the basic understanding that he has.

[742] In 1873, I find Canada recognized its obligation to protect the Indians, its wards, a vulnerable minority - against exploitation by the majority.

[743] I find that Morris appreciated that one of the reasons the Fathers of Confederation placed Indians and Lands reserved for the Indians under federal jurisdiction was to protect Indians, a vulnerable minority/the pupils or wards of the Dominion, from exploitation by the majority. He appreciated that to protect Canada's strategic interests, it was necessary to protect the Indians from local governments that might engage in activities that could antagonize the Indians.

[744] I accept Milloy's evidence (October 19, 2009 at p. 47) that after the 1760s, the Imperial authorities took responsibility for protecting Indians, a vulnerable minority, against exploitation by colonial/provincial authorities, and that after 1867, the federal government took over the Imperial responsibility vis-à-vis the Indians. I find that Morris, a keen student of Imperial history, was aware that such an approach would foster Canadian strategic interests, just as it had previously similarly fostered Imperial strategic interests in undeveloped territories.

[745] Milloy's evidence is consistent with the opinion expressed by Professor Hogg in *Constitutional Law of Canada, supra*, at 756, previously quoted at paragraph 141 above.

[746] I reject the submission of Ontario that Morris and the other Commissioners were oblivious to protecting the Indians. Even before Confederation, Morris understood the obligations to be assumed under s. 91(24). In his 1858 lecture generally about the annexation of the West, published in *Nova Brittania* (Ex. 130), one of the first matters he mentioned was the interests of the Indians, "a proper sense of the responsibilities to be assumed in regard to the well-being of the native and other inhabitants."

[747] All three Treaty Commissioners understood the importance of traditional harvesting to the Ojibway and therefore the importance of promising continuing Harvesting Rights to induce the Ojibway to enter into the Treaty.

[748] They knew it would not be easy to achieve an agreement. Key Ojibway Chiefs were "careless" about a treaty, divided among themselves and quite capable of walking away from the negotiating tent as they had done in 1871 and 1872.

[749] In 1873, I find that the Treaty Commissioners were concerned about Ojibway indifference to a treaty. I note that in 1873, before the negotiations began, the Indians objected to the location and kept the Commissioners waiting for several days before they were willing to start negotiating.

[750] With respect to the submission of counsel for Ontario that Dominion Indian policy did not seek to promote hunting and fishing, while I have accepted that Canada's overall policy at the time was to encourage the Indians to adopt agricultural pursuits, I find that the Commissioners understood that most of the Treaty 3 lands were not suited to agriculture. Morris made it clear to the Treaty 3 Ojibway that he expected their gardening to supplement, not replace, their traditional harvesting. On October 3, 1873 he said, "I think I should … give you the means to grow some food, so that if it is a bad year for fishing and hunting, you may have something for your children."

[751] I recognize that when he wrote Ex. 9, Morris mentioned not only that Treaty 3 "tranquilized the large Indian population," was "of great importance to Canada as it included the Dawson Route and the Canadian Pacific Railway," but also it included "a large extent of fertile lands." I find he must have been referring to the only fertile lands known at the time to exist in the area, the lands along the Rainy River, adjacent to the Dawson Route.

[752] I have considered that the Treaty does contain boilerplate language referring to opening of the lands for settlement and other purposes. While generally speaking, I accept that the opening up of Western lands for settlement and development was a primary motivator of the numbered treaties, on the specific evidence, I find it was not the primary motivator here.

[753] This conclusion is consistent with that of the JCPC in the *Annuities Case* in 1910. Lord Loreburn held that in making the treaty, the Dominion Government/Canada had acted, not for the benefit of the lands, but for distinct and important interests of its own.

[754] I have found that apart from the Rainy River area, the prospects for agricultural settlement in the Treaty 3 area were perceived as being dismal.

[755] I find that in 1873, Morris and the other Commissioners knew that there was considerable scepticism about the value of the Treaty 3 lands for agricultural and development purposes. Apart from the Rainy River area, the Treaty 3 area was viewed generally as unpromising for agricultural development.

[756] By the end of his cross-examination, Chartrand had essentially agreed with Lovisek that widespread agricultural uses were not expected in the Treaty 3 area away from the Rainy River. I find that the Commissioners did not think that the Treaty 3 area was conducive to agriculture apart from the Rainy River area.

[757] I find on the evidence that while the Commissioners expected some settlement in the Treaty 3 area, primarily in the area of the Dawson Route along the Rainy River, they did not consider settlement or indeed future development of the area to be as important as other national priorities, including providing settlers safe transport to the West and facilitating the building of the CPR between Fort Garry and Fort William without undue security costs or delay by the deadline of December 31, 1876.

[758] The Commissioners viewed prospects for lumbering in "the land between" guardedly. The pine was thought to be small. Timber could not be floated towards settled Canada given the direction of the flow of Treaty 3 rivers. While some mining was expected, it was not anticipated it would interfere with traditional resource harvesting.

[759] At the same time, from Canada's perspective, the continuation of the hunting, trapping and fishing rights was important to ensuring that the Ojibway did not become dependent upon relief or welfare delivered by the Department of Indian Affairs.

[760] In short, Canada and the Commissioners were primarily interested in securing the route through the Treaty 3 territory and less concerned with the prospects of the territory itself. Given the urgency of securing the Dawson Route and the completion of the CPR within the Treaty 3 area by December 31, 1876, they needed to get the Treaty done.

Findings re Interests of Ojibway

[761] I accept Chartrand's evidence that in determining understanding and intention in treaty cases, it is necessary to focus on the specific circumstances of each treaty:

> December 15, 2009
> Q. Is it your view that when one has considered the understanding of the parties with respect to one treaty on a given occasion, is that something that would be useful to an ethno-historian when he turns to look at another treaty?
> A. …The making of treaty agreements … are discrete events. And so it's important, if one is to seek to document the understandings of the parties to a particular treaty, to conduct in-depth research on the making and negotiation of that particular treaty.
>
> January 25, 2010
> Q. Right. And in fairness… I think you've been quite clear about this … in your view, you do, if you want to come to a deep understanding of a particular treaty circumstances, have to have regard to what happened in those treaty negotiations in the circumstances of those people?
> A. Absolutely.
> …
> A. Certainly in terms of trying to understand what were the concerns of the Treaty 3 Ojibway, it's imperative to look at their own circumstances

[762] It is stating the obvious to say that different circumstances may lead treaty signatories to have different understandings. Depending on their bargaining power, Aboriginal parties may make different demands and Treaty Commissioners may make different promises. Even when treaty language is boilerplate, the actual treaty terms may be found to differ from the formal written treaty terms. Identical formal treaty terms may be interpreted differently from treaty to treaty, depending on the contextual evidence and findings about actual mutual intention and understanding.

[763] Instead of taking a more general approach to Ojibway intent and understanding, as Von Gernet urged this Court to do, I have considered the specific evidence of these Ojibway, including the bargaining environment, the specific demands made by the Ojibway, and the specific promises made by the Commissioners in relation to Treaty 3. I do not accept Von Gernet's assertion about the application of a "general understanding of the time" to the understanding of Treaty 3 Ojibway. The circumstances of earlier treaties in Southern Ontario from which that understanding was said to be derived differed greatly from the circumstances of the Treaty 3 Ojibway in 1873. The Ojibway did not understand that a treaty would result in the loss of their Harvesting Rights. They had information from their relatives leading to a different conclusion.

[764] In short, I find, based on the evidence of all of Von Gernet, Chartrand and Lovisek, that the Treaty 3 Ojibway were aware of the treaty experiences of their kin to the south, west and east.

[765] As of 1873, I find that the Ojibway were aware of the representations that had been made to their kin to the south during the negotiation of the Old Crossing Treaty – that the consequence of signing that Treaty would be like giving up a horse, then getting back the use of that horse.

[766] On the evidence before me I find that as of 1873, the Treaty 3 Ojibway were also aware of the promises made to their kin to the east during the Robinson Treaty negotiations in effect that their Harvesting Rights would be virtually unaffected. By 1873 that perception had been borne out, as little development had occurred in the Robinson Treaty region. I find that in 1873, the Treaty 3 Ojibway perceived that their kin to the east who had signed the Robinson Treaties had received what they had been promised: they had been able to receive annuities without significant negative effect on their Harvesting Rights.

[767] I reject Von Gernet's evidence that the Robinson signatories would not have believed the harvesting promises made to them in 1850. I do not accept his assertion that the Treaty 3 Ojibway would have understood the negative implications of cessions of lands in respect of resources to be the same as those in the earlier Upper Canada Treaties.

[768] I reject the evidence of Chartrand in chief and of Von Gernet that in 1873 the Ojibway had a negative consciousness of their condition.

[769] I reject the evidence of Von Gernet and Chartrand to the effect that the Ojibway understood they needed to enter into a treaty in 1873.

[770] I find the Rainy River Chiefs were "careless about entering into a treaty," meaning they were in no rush to make a deal. They did not believe they <u>needed</u> to enter into a treaty, or that they should accept the best deal they could negotiate whatever it might be. They were under no immediate threat. The resources that provided their sustenance were not diminishing. Away from the Dawson Route, they were not facing large influxes of Euro-Canadian intruders. Settlers were passing <u>through</u> their territory, not settling on it. They were quite capable of all together saying No to any treaty proposal.

[771] Unlike their kin to the West who had much more fertile and valuable land (who had entered into Treaties 1 and 2 in 1871), they had twice refused to enter into a treaty in 1871 and 1872. They perceived they were negotiating from a position of strength. They would not be hustled. As Lovisek said on October 22, 2009 at p. 26, they were taking a wait and see approach. They would take their time.

[772] The Treaty 3 Ojibway loved their lives and their country (Lovisek, November 16, 2009 at p. 39.) They relished their way of life, including their seasonal round of trapping, hunting, fishing and harvesting over the breadth of their territories. They valued their customs and were not prepared to give them up. They had shown resolve in protecting their land and their culture, politely but firmly rejecting Christianity. They liked being Indians. They were "proud," "spirited," "saucy," "obstinate," "independent." Euro-Canadians had marvelled that they had shown no sense of inferiority and were "incapable of showing gratitude."

[773] I accept the evidence of Lovisek and parts of the evidence of Chartrand that they were prepared to embrace a Euro-Canadian presence **<u>only</u>** if it would be compatible with their cherished way of life, and would not cause serious interference with their hunting, fishing and trapping - central aspects of their distinctive culture central to their identity.

[774] In 1873 the Commissioners understood that the Treaty 3 Ojibway were demanding more for their "barren and sterile lands," their "swamp and muskeg," than the signatories of Treaties 1 and 2 had agreed to receive in 1871 for their "magnificent" prairie lands. (See Archibald letter to Secretary of State dated July 22, 1871.)

[775] I find that the Ojibway eventually were prepared to enter into the Treaty in 1873 only because they believed that they were entering into a relationship with Canada that would provide benefits. The Euro-Canadian Commissioners were promising that the Treaty would provide economic opportunities and at the same time they could continue their traditional way of making a living without significant interference.

Re The 1869 Demands

[776] The primary contested issue with respect to the 1869 Demands was whether they related to a right-of-way agreement or an agreement for the cession of the whole Treaty 3 area.

[777] Lovisek opined that the 1869 Demands related not to a treaty of cession, but to a right of way/passage through the Treaty 3 lands and the building of some works along the Route. She noted that in 1869 when the demands were formulated, the only matter under discussion was a right of way agreement.

[778] Counsel for Ontario submitted that the 1869 Demands must have related to a cession of lands, as they included a provision for the setting aside of reserves.

[779] I have concluded, based in part on the evidence of Lovisek on the point, which I accept, that the 1869 Demands were made in respect of a proposal for a right-of-way. In 1869, the Chiefs in the vicinity of the Dawson Route were the only participants in the discussions leading to the formulation of the 1869 Demands. In 1869, the **only** matter under discussion was a right of way. The Rainy River Chiefs requested reserves because they wanted to ensure that their sturgeon fishing areas and gardens in the vicinity of the Dawson Route would be preserved for their own exclusive use.

[780] In 1873, all Chiefs from the whole Treaty 3 area, not just the Chiefs from the vicinity of the Dawson Route, were present at and participated in the Treaty negotiations.

[781] I have found that by 1873, the Chiefs understood they were being asked to share the use of all the Treaty 3 lands. Given my finding that in 1873 the Chiefs understood the territory affected by the Treaty was the territory of all the Chiefs in attendance, my findings with respect to the 1869 Demands are of secondary importance. I have found that all the Chiefs understood and intended to give up exclusive use and share the use of the whole Treaty area, on certain conditions, which by October 3 they understood the Commissioners had agreed to meet.

[782] In my view, the 1869 Demands are significant in two important respects. Firstly, they showed the Ojibway understood the value of their lands. Secondly, although originally formulated in anticipation of a right-of-way agreement, by using them in the 1873 negotiations, the Ojibway were indicating they did not think that the consequences of giving up exclusive

control over the whole territory/sharing the use of the whole territory (plus making some other concessions in the vicinity of the Dawson Route and CPR) would be much different from a right of way in respect of the Dawson Route.

[783] My conclusion is consistent with Lovisek's suggestion that the Ojibway understood and agreed that there could be negative impacts along the rights of way. They anticipated that away from them, sharing their lands would not involve significant interference with their Harvesting Rights.

[784] I find that by 1870, Pither had an awareness of the scale of the Ojibway demands. Archibald wrote to the Secretary of State on April 7, 1871 (Ex. 4, pp 158 and 159): "Mr. Pither seems to think they would give up their rights to the whole country for much the same price they would ask for the right-of-way."

[785] I find that Pither's statement reflects that the Ojibway **had** communicated the 1869 Demands to him. That is why he said he thought the Ojibway would not demand much more for a full cession.

[786] Counsel for the Plaintiffs may be correct in submitting that although Canada had earlier received the 1869 Demands, it had not taken them seriously but had viewed them as outrageous. On October 2, 1873, when they were presented [or re-presented], the 1869 Demands were viewed by many observers as ridiculous. The *Manitoba Free Press* described their reception: "Most persons smiled as the Governor read it out, for which levity a severe rebuke was administered by the Indian who presented the paper."

[787] The Shorthand Reporter's account of the 1873 negotiations also contained an elliptical reference to their reception. A Chief said, "[w]e would not want that anyone should smile at our affairs."

[788] I have found, based in part on Morris' comment in his October 14, 1873 report that the Chiefs' counter-demand made on October 2, 1873 (the 1869 Demands) were the **demands they have urged since 1869.** On Lovisek's evidence, on Simpson's reference to those Demands in his letter to Howe dated August 19, 1870 (April 7, 1871; Ex. 1, Vol. 5, Tab 120 and Ex. 45, p. 299), the 1869 Demands were likely not new to the Canadian government in 1873.

Findings re The Harvesting Clause

The Ojibway Understanding of the Harvesting Clause at the Time the Treaty was Signed

[789] To the Ojibway, availability of resources to sustain the collective was paramount. That was their primary concern.

[790] I accept that during the Treaty negotiations, the Commissioners said nothing to explain that Euro-Canadian concepts of land ownership were dramatically different from Ojibway concepts of territoriality.

[791] The major difference in Lovisek's and Chartrand's evidence on the Ojibway understanding and intention with respect to post-Treaty use of lands if they did agree to enter into a treaty was as follows: Lovisek opined on October 23, 2009 that away from the Dawson Route and CPR right of way, the Ojibway did not agree to any significant interference with their Harvesting Rights or to any decrease in the geographical area where they would be able to hunt. Chartrand said (December 15, 2009) that they understood that taking up of lands by Euro-Canadians would require them to make geographic accommodations, i.e., not to pursue traditional harvesting activities on those lands once they were occupied.

[792] While Chartrand opined (January 14, 2010 at p. 87) that the Ojibway understood that Euro-Canadian activity could cause geographic limits on their hunting areas, he conceded there is no specific evidence from the negotiations that they had any precise understanding of the extent of such limits. He said on January 25, 2010 at p. 102:

> A. …My understanding of what the Ojibway understood under the treaty was that there would be a process of accommodation for a Euro-Canadian presence in the treaty territory, accommodation involving necessarily shifts in certain areas in some instances where harvesting perhaps were conducted…

[793] I accept Lovisek's evidence, largely supported by Chartrand's by the end of his cross-examination, that all parties expected that in the Treaty 3 environment, the anticipated uses of the Ojibway and of the Euro-Canadians would largely be compatible post-Treaty.

[794] I accept Lovisek's evidence on October 23, 2009 that the Ojibway expected resource use and sharing of benefits therefrom was to be reciprocal, at pp. 133-135 as follows:

> Q. Lending and borrowing of resources, that's something you refer to in a number of places in your report. What do you mean by that?
> A. That's essentially an Ojibway concept, Chief Sa-katche-way refers to it specifically. I described it as sharing. This is a characteristic of Ojibway culture which I earlier also described it in its more technical format as reciprocal altruism, and what it means essentially is that the Ojibway were willing to share their resources and certainly parts of their territory, as long as they also had reciprocal access to the benefits of whatever was being introduced by outsiders.
> Q. Outside of the corridor, the railway corridor and the Dawson Route corridor, what kind of sharing did they have in mind, in your view?
> A. Well, we have historical records which describe some of that understanding. The Ojibway used to fish for subsistence fishing as well some trade purposes in the lakes and the rivers, especially Lake of the Woods. They had no objection to Euro-Canadians fishing in the same waters, but they did object when commercial fishing was introduced and was affecting their own subsistence and commercial fishing. So this is an aspect of what sharing would be.

[795] I accept Lovisek's emphasis on the Ojibway expectation that if they agreed to give up exclusive use, they would be able to benefit from sharing in Euro-Canadian activities and that the extent of those benefits would affect their degree of tolerance/perception of Euro-Canadian interference, i.e., whether they perceived the activities to constitute significant interference with their harvesting.

[796] Although he did not say directly that the Ojibway expected "to share" use of land and resources after the Treaty, Chartrand gave answers in cross-examination in effect endorsing Lovisek's view. Chartrand said in cross-examination that the Ojibway did not consider

themselves to have exclusive proprietary rights to game and fish in a Western sense. (January 9, 2010 at p. 58.) I have already outlined the basis and extent of the sharing anticipated by the Ojibway and Chartrand's opinion that there was room to share with Euro-Canadians, given that the Ojibway harvested only to meet their needs and not to the maximum extent of the resources.

[797] Chartrand agreed on January 25, 2010 the Ojibway were not buying into/accepting a future involving progressive extinguishment of their harvesting rights. He gave the following evidence at pp. 12-13:

> A…. the Ojibway have absolutely no intention of abandoning their culture wholesale. If they want social and cultural change to happen, to the extent that they want that, they're expecting to be in control of that process.
> **Q. But they're not buying into a process of progressive, if you wish, extinguishment by slices at the behest of the government of their way of life?**
> **A. No.**
> [Emphasis added.]

[798] Chartrand agreed with Lovisek that the Ojibway perceived that they would be able to derive benefits from Euro-Canadian activities.

[799] Chartrand's cross-examination on January 26, 2010 contains the following at pp. 77-79:

> Q. … But even in terms of the discussions about cattle and waters, I mean, it's framed not in terms of we're giving you the waters, we're giving you the lands or anything like that, it's framed in terms of borrowing and lending, isn't it?
> A. Yes. Which is where I see the allegory coming in.
> Q. Well, that's not suggesting a giving up of their waters, for example, is it?
> A. The chief is alluding in allegory to a certain exchange of access to resources, without, I think -- I think it's a basic mistake to take the terminology of borrowing cattle or lending as being literal terms. The Ojibway understand that this potential treaty is going to be a permanent agreement that will last.
> Q. Right. But in terms of the subject matter of the agreement, the resources, they're not using language that, for example, says we give you our waters, we give you our land, and in exchange, you give us cattle and money?
> A. The chief doesn't say that here. He's alluding to a post -- a potential post-treaty future in which both the Ojibway and Euro-Canadians will benefit.
> Q. Right. And talks about, quite literally, albeit using allegorical terms, a cross-cultural exchange of knowledge through the lending of children?
> A. Yes, and again I believe that that is very much an allegorical reference.
> [Emphasis added.]

[800] By the end of the evidence, there was consensus between Lovisek and Chartrand on this issue.

[801] I find, based on the evidence of Lovisek (October 23, 2009 at p. 140) and Chartrand (January 21, 2010 at pp 119-120), the Ojibway knew and agreed they were giving up **exclusive** use of their lands and would be sharing the resources on them with the Euro-Canadians after the Treaty was signed. They expected Euro-Canadian and Ojibway uses to be compatible.

[802] Away from the Dawson Route and CPR areas, I accept Lovisek's evidence and I find the Ojibway did not accept that they would be required to curtail or change their traditional subsistence harvesting and trading activities. They did not understand that there would be

significant limitations on their Harvesting Rights. I do not infer that they understood that as lands away from the Dawson Route and CPR were developed as mutually anticipated, there would be increasing and cumulative negative impacts on their way of life, which in the words of counsel for the Plaintiffs, would result in "extinguishment by slices."

[803] The Ojibway understood that they were agreeing to allow some Euro-Canadian occupancy (Lovisek, October 23, 2009 at p. 88) and they would be sharing the use of the lands with and benefitting from the use of the lands by the Euro-Canadians (Lovisek, November 18, 2009 at p. 144.) They expected, for example, to share in the benefits of anticipated timber operations, including receiving wages for labour. (Lovisek, October 23, 2009, p. 140.)

[804] Lovisek gave evidence the Ojibway understood they were being promised the use of lands they were accustomed to using. I accept her evidence that the Ojibway understood not simply that they could forever hunt "somewhere" in the Treaty 3 territory; the promise was with respect to lands about which they had some knowledge, "not just so long as there's somewhere they can go in Treaty 3" (Lovisek, November 23, 2009 at pp. 90-91.)

[805] I note that even Von Gernet, who had opined that it was "incomprehensible" that the Ojibway did not understand they were giving up their lands, conceded that both parties recognized that the Ojibway would, at the very least, be able to hunt and fish, harvest wild rice or otherwise engage in the usual activities on most of the lands being ceded, but with the caveat that at least some of those lands would be subject to immediate "taking up" for settlement or other purposes.

[806] Although Von Gernet did not identify which lands he had in mind, I find that both he and Chartrand were contemplating possible agricultural settlement of lands in the Rainy River area, the only lands in the Treaty 3 area known at the time to have agricultural potential. Von Gernet conceded the Ojibway understood there would be lots of land on which they could engage in their usual activities and that their reserves would include and protect their sturgeon fishing and gardening locations primarily located in the Rainy River area. He postulated that their reserves would also serve as refuges "where they could engage in a new mode of subsistence in the event that their foraging lifestyle became unfeasible." With respect to the anticipated agricultural potential of the balance of the Treaty 3 lands, Von Gernet said that while the Ojibway hoped their traditional lifestyle would continue in perpetuity, "any prudent Ojibway leader" would have understood that things would not stay the same forever. In other words, he was suggesting in effect that they **should** have understood, based on their knowledge of the *raison d'être* of treaties in general, that after the Treaty was signed, their Harvesting Rights could be progressively extinguished (Von Gernet, December 11, 2009.)

[807] I reject that evidence of Von Gernet's because of the specific evidence relating to Ojibway knowledge here.

Finding re Understanding of Canada re Likely Compatibility of Traditional Harvesting and Anticipated Euro-Canadian Land Uses

[808] Chartrand said in cross-examination on January 25, 2010 at pp 106-7, "Morris was alluding to a situation after the treaty in which lands outside reserves would not be immediately taken up, at least in his mind, to -- on a scale that would significantly impact the Ojibway way of life."

[809] I find that after the Treaty was completed, both Canada and the Ojibway expected traditional harvesting activities to continue on Treaty 3 lands away from the Dawson Route and CPR. Chartrand gave evidence similar to Lovisek's that they understood that farming and agricultural settlement would happen along the Rainy River Valley. Their fishing and gardening locations would be protected, i.e., preserved for their exclusive use, in the vicinity of the Dawson Route. Ojibway hunting usually took place in the interior and away from the Dawson Route.

[810] I find the Commissioners anticipated compatibility of Euro-Canadian uses with Ojibway Harvesting away from the Dawson Route.

Finding re Were the Harvesting Promises Broadened on October 3, 1873/Did the Ojibway Accept Morris' October 1, 1873 Proposal? Had the Commissioners Amended it by October 3, 1873?

[811] I have outlined Chartrand's evidence of January 21, 2010 at pp. 86-88 in which, in interpreting the Harvesting promise, he focused "on the direct explanation given by Morris on October 1." He maintained traditional harvesting was not discussed on October 3. The Ojibway did not seek clarification about Morris' October 1 proposal. "If the Ojibway presented no concerns or questions regarding the principle of taking up … Morris would have had no compelling reason to explain the provision in further detail."

[812] I have outlined Lovisek's opinion that the Ojibway did not accept Morris' October 1 proposal about hunting and fishing until the lands were wanted, and that there was a further discussion of Harvesting Rights on October 3 when a Chief demanded "the privilege of traveling through the country" and Nolin recorded that "the Indians will be free as by the past for their hunting and wild rice harvest."

[813] I accept Dr. Nichols' interpretation of the meaning of "hunting and wild rice harvest" to mean "to make a living from resources," to which Lovisek referred, as set out in paragraph 528 above.

[814] I have earlier referred to the Chief's demand on October 3, 1873, heard by McKay in Ojibwe but translated into English as "we must have the privilege of travelling about the country." I have found that McKay understood that demand to relate to their ability after the Treaty to be able to make a living as in the past on all of the Treaty 3 lands. I find McKay said to the Ojibway in Ojibwe, "the Indians will be free as by the past for their wild rice harvest and hunting," that Nolin recorded McKay's words verbatim in his October 3 note and then McKay turned to the Commissioners and said in English, "Of course I told them so."

[815] I have found the Ojibway were seeking formal confirmation in the presence of the Commissioners that the Commissioners were acceding to their demand that their traditional harvesting would continue as in the past.

[816] Chartrand said (January 20, 2010 at p. 24) McKay was at the negotiations to act as a cultural intermediary on behalf of the Government, presumably to provide information to the Ojibway. McKay's role was as a facilitator. He continues at pp. 25-26: "[McKay] was there to explain, explain concepts, possibly explain practical consequences of provisions of the treaty, possibly explain what he understood as being Indian policy. … we know that McKay discussed the question of travel over lands."

[817] I have concluded that after the October 2 negotiations about which the Shorthand Reporter had reported in the *Manitoban* ("It was extremely doubtful whether an agreement could be come to or not"), the Commissioners had a further conference and decided to sweeten their offer. McKay was sent to attend the Ojibway Council and participated in discussions. When the Council resumed on October 3, the Ojibway came to the Council and made a demand in the presence of the Commissioners that they must be able to continue their harvesting. McKay affirmed in the presence of the Commissioners that the Indians will be "free as by the past" for their "hunting and wild rice harvest."

[818] I have concluded that McKay, a member of Morris' entourage, would not have made the promise in the Commissioners' presence on October 3 unless they had expressly authorized him to do so.

[819] I conclude, based on the sequence of questions and answers mentioned earlier, that on October 3, Nolin was not simply remembering Morris' October 1 statement [as posited by Chartrand] but was recording a discussion about continuing Harvesting Rights that occurred during the final negotiations on October 3.

[820] I accept Lovisek's evidence that the Ojibway Chief's statement translated into English as "we must be free to travel through the country," related to a demand to be able to continue to make a living from their traditional harvesting. I find based on Dawson's notes that the reference to "where vacant" was not included in the Chief's demand. There had been no reference to "vacant" lands at any earlier point in the negotiations.

[821] I have rejected Chartrand's evidence that there was only one mention of Harvesting during the negotiations: on October 1, when Morris proposed that the Ojibway would be able to hunt and fish on their lands until the lands were wanted. However, that was also the only mention of a limitation on Harvesting Rights.

[822] I have rejected Chartrand's assumption that Nolin was recording on October 3 what Morris had said on October 1. I have found that the Commissioners knew the Ojibway perceived they were being promised perpetual Harvesting Rights as in the past throughout their territory, and that this was a major consideration for entering into the Treaty.

[823] In rejecting Chartrand's evidence that on October 3, Nolin was referring to Morris' statement on October 1 that until the lands were wanted, the Ojibway could hunt and fish on them, I have relied on the following:

1. The sequence of all the contemporaneous notes suggests that on October 3, a Chief said "we must have the privilege of traveling about the country." I have found there was a discussion about it at that time.

2. I accept that there is a translation issue with respect to travelling about the country. I accept Lovisek's evidence that the Chief's statement related to pursuing their traditional harvesting/way of life. I note that Chartrand agreed that travelling included harvesting.

3. I find McKay understood the demand made in Ojibwe to relate to traditional harvesting. He said to the Ojibway, "The Indians will be free as by the past for your hunting and wild rice harvest."

4. Nolin recorded the exchange. "The Indians will be free as by the past for their hunting and wild rice harvest." McKay then said in English to the Commissioners, "Of course I told them so."

5. Chartrand agreed in cross-examination that **if** "Indians will be free as by the past for their hunting and wild rice harvest" was what McKay said in Ojibwe to the Ojibway before he turned to the Commissioners and said, "Of course I told them so," in English, **then** McKay made no reference to any limitation of their Harvesting Rights (January 25, 2010 at pp. 110-141.)

6. Dawson made it clear in his post-Treaty correspondence that the Commissioners induced the Indians to enter into the Treaty by telling them that they would "forever" have their fishing [i.e., Harvesting] rights. Dawson's recollection is consistent with the way Nolin recorded the exchange. Although many of Dawson's comments were directed to fishing rights (given the focus of the concern at the time), he did refer to hunting and fishing, for instance, in his April 25, 1895 letter to Reed. I accept Lovisek's evidence (October 22, 2009 at p. 117) that Dawson would not have drawn any distinction between fishing and Harvesting Rights. The Harvesting Clause related to both. As I have already found, "hunting and wild rice harvest" referred to making a living from all forms of harvesting. In his subsequent correspondence, Dawson made no reference to the Harvesting Rights being limited by "taking up" of lands, indicating that the focus of the Commissioners' discussion in 1873 was about Harvesting Rights and not about ownership rights or under what circumstances Harvesting Rights could be limited or by whom.

7. Morris had a copy of the Nolin Notes. He edited and attached them to his Official Report of the Treaty without comment, suggesting he did not disagree with their content.

8. This interpretation is consistent with the Commissioners' October 3 offer of perpetual provision of ammunition and twine for hunting and fishing purposes.

[824] Chartrand assumed that Morris had not changed his position between October 1 and October 3. Because of that assumption, he also assumed that McKay would not say, "Of course I told them so" in relation to a question relating to continuing Harvesting Rights. (He did say McKay was confirming something he had already discussed with them, although he disagreed as to what that was.)

[825] I have considered the submission of counsel for Ontario based on Chartrand's evidence that McKay could not have believed the Ojibway would be free to pursue their harvesting without limitation after the Treaty was signed because he had heard Morris' more limited promise on October 1. A member of Morris's entourage, Mckay would not have failed to convey the limitation Morris had expressed on October 1. It would have been "very strange" if McKay had disregarded Morris' October 1 statement and said, "Of course I told them so."

[826] I accept that it is unlikely that McKay would have flouted Morris' instructions in his presence. It is more likely that McKay was doing what Morris had instructed him to do. I find McKay's statement on October 3, "Of course I told them so," is indicative that by October 3, Morris and the other Commissioners had decided to broaden their previous more limited proposal to accede to the Ojibway demand for continuing Harvesting Rights as in the past, as Dawson said, to "induce" the Ojibway to enter into the Treaty.

[827] The point "that they would have forever have the fisheries…was strongly insisted upon and it had great weight with the Indians who for some years previously had persistently refused to enter into any treaty" (Dawson's letter, May 28, 1888, Ex. 1, tab 552.)

[828] I find the Commissioners knew the Rainy River Ojibway Chiefs were indifferent about entering into the Treaty and it was unlikely they would have accepted Morris' October 1 terms even if the Treaty 3 Ojibway away from the Route had agreed to do so. The Rainy River Chiefs understood they were key players in the negotiations because they controlled the Dawson Route and it was their agreement that was needed.

[829] At the Council preceding resumption of the formal negotiations, the Chiefs in the presence of McKay and Nolin had "a most exhaustive discussion." I find they resolved to "accept the Governor's terms **with some modifications**." They resolved to make it clear they were demanding continuing Harvesting Rights. On October 3, in the presence of the Commissioners, the Chiefs sought and received confirmation that their Harvesting Rights would continue as in the past.

[830] I find that by the time the Treaty was signed on October 3, 1873, McKay and the Commissioners understood the Ojibway were insisting on a promise of perpetual Harvesting Rights and understood that that is what they had been given.

[831] After considering all the matters mentioned elsewhere in these Reasons, I find, as Dawson said, the representation was made that the Ojibway would "forever" have their traditional Harvesting Rights as in the past.

[832] In all the circumstances here, given the obstinate insistent nature of the Ojibway and their focus on resource harvesting, I find the Commissioners saw the extraordinary promise as necessary to achieve their pressing goal of completing the Treaty. They understood Canada needed to secure the Dawson Route and to get the CPR built through the Treaty 3 territory by December 31, 1876. They saw the promise as being feasible, given their perceptions about the nature of the Treaty 3 territory and the compatibility foreseen between the Euro-Canadian uses they anticipated and Harvesting Rights. Promises to protect hunting rights away from the area of the Dawson Route were seen as being feasible because Canada and the Ojibway knew that hunting did not generally occur close to the water. Sturgeon fishing and gardening areas could be protected. They did not anticipate Euro-Canadian mining or logging activities that would significantly affect Ojibway traditional harvesting. In short, because the Commissioners foresaw compatibility between Euro-Canadian and Ojibway uses of land, they believed they could make the promises on which the Ojibway were insisting and at the same time achieve Canada's pressing national objectives.

[833] I accept the evidence of Lovisek (November 23, 2009 at p. 82) that the October 1 proposal was not incorporated into the Treaty. The Ojibway did not agree to losing their hunting rights whenever land was wanted. Apart from certain lands in the Rainy River Valley area where they did not traditionally hunt, I find they did not accept that they would be required to curtail their traditional subsistence harvesting and trading activities in their territory. I have not inferred that they understood and accepted that as lands away from the right-of-way were brought into use by Euro-Canadians, there would be increasing and cumulative negative impacts on their harvesting (January 21, 2010 at pp 119-120.) Had they perceived that a treaty would bring serious detriments to or seriously interfere with their way of life, **they would have refused to sign.**

[834] I find that on October 3, the Commissioners understood that the Ojibway, as a precondition of signing the Treaty were demanding post-Treaty Harvesting Rights as in the past away from the Dawson Route and the CPR right-of-way [i.e., harvesting without significant interference.] When McKay said, "Of course I told them so," the Commissioners were aware that the Ojibway understood the Commissioners were accepting their condition. When Nolin wrote "the Indians will be free as by the past for your hunting and wild rice harvest," he was translating what McKay said to them in Ojibwe and was accurately recording the substance of the discussion taking place about Harvesting Rights on October 3 with the knowledge and on the instructions of the Commissioners.

[835] I find that after the discussion recorded in the Nolin Note on October 3, the Ojibway understood that the Commissioners were promising them that they would be able to continue to make a living from harvesting as before (Lovisek, November 18, 2009 at p. 136) The Commissioners understood that that is what they were promising.

[836] I find that the Commissioners distinctly held out to the Ojibway that they would have their ordinary avocations of hunting and fishing throughout the tract as in the past. I have based that conclusion in part on the evidence of Lovisek, portions of Chartrand's evidence, McKay's statement to the Commissioners that "of course I told them so," Nolin's note and Dawson's post-Treaty recollections.

Why Did Morris Mention the Dominion in the Harvesting Clause?

[837] I accept Saywell's evidence (April 6, 2009 at pp 60-67, 78) that in his role as Dominion-appointed Treaty Commissioner, and as a lawyer and ex-judge, Morris would have been expected to draft a significant legal document like Treaty 3 in a clear, precise manner and to use legal terms that would achieve Canada's desired ends within the bounds of Canada's jurisdiction.

[838] I find that Morris, "a trained Constitutional lawyer," whom all parties agreed was aware of the Boundary Dispute, specifically considered its likely potential negative effects on the Ojibway were Canada to lose and Ontario held to be the owner of the Disputed Territory. In mentioning Canada, Morris was not focusing on ownership rights. Morris clearly understood that Canada could lose the Boundary Dispute, in which event it would no longer own the Disputed Territory.

[839] I find Morris wanted to protect Canada's wards, the Indians. He deliberately mentioned the Dominion in the Harvesting Clause and to use the words "taking up by Canada" in part so that if Canada lost the Boundary Dispute, it would be able, using its s. 91(24) jurisdiction and the Treaty, to restrict Ontario's interference with Ojibway Harvesting Rights, if it were necessary.

[840] If he had not taken steps to protect the Ojibway, he and the other Commissioners perceived that Canada's strategic interests could have been severely compromised, given the perception of all the Commissioners that unhappy Treaty 3 Ojibway could interfere with the building of the CPR and the safety of the Dawson Route.

[841] I have earlier reviewed the evidence relating to the timing of the appointment of the Commissioners in relation to the various Orders in Council and the differing instructions for treaties in the Northwest Territories and for Treaty 3.

[842] I reject Chartrand's evidence (January 22, 2010 at p. 30) based on his reliance on the June 16, 1873 Order in Council that the Commissioners were simply assuming that Canada would always be the beneficial owner of the Treaty 3 lands because they would always be in the Northwest Territories under the administration of Canada. It appears that the June 16, 1873 Order in Council on which Chartrand relied may not in fact have been operative to appoint the 1873 Commissioners specifically to negotiate Treaty 3. Different directions existed with respect to treaties in the Northwest Territories and Treaty 3. In any event, I find Morris would not have relied on an Order in Council to inform himself about the ownership of the lands. He was aware of the potential implications of the Boundary Dispute with respect to ownership.

[843] More importantly, apart from any Order in Council, I have found that Morris clearly understood that Canada's s. 91(24) obligations and its strategic interest in meeting those

obligations were not limited to the Northwest Territories. Canada's responsibilities to Indians extended to all of Canada, including lands located within s. 109 provinces.

[844] By mentioning the reservation of Harvesting Rights to the Indians, he was making it clear that Ontario's proprietary rights under s. 109 would be subject to Indian Harvesting Rights reserved to the Ojibway under the Treaty, an interest other than an interest of the province in the same under s. 109.

[845] I have found Morris and the other Commissioners were not indifferent about which level of government would be able to affect/limit Treaty Rights post-Treaty. Had they been, and had it been their intention to allow any government or whichever government owned the land to limit the rights of the Ojibway, it would have been easy for Morris to achieve that end by using words that made that intention clear. He could have used proprietary language such as was contained in the precedent provided, the Robinson Treaties.

[846] He could have made it clear in the Treaty that an owner could authorize uses inconsistent with Harvesting Rights. Had he done so, after Ontario was held to be the owner, Canada would not have been able to do anything to protect harvesting on those lands once the use was authorized. He chose instead to word the Harvesting Clause in a way that would protect Indian interests (and indirectly Canadian strategic interests) regardless of whether Canada won or lost the Boundary Dispute. By referring to the Dominion in the Harvesting Clause in the Treaty, Morris made it clear that if Ontario purported to "take up"/authorize land uses that would significantly interfere with Harvesting Rights, an authorization from Canada would be needed under the Treaty.

[847] In part because none of Von Gernet, Milloy or Chartrand is an expert qualified to comment on the legal and Constitutional considerations motivating Morris as he drafted the Treaty, I reject their evidence that Morris' knowledge of the existence of the Boundary Dispute was irrelevant to his choice of words – his mention of Canada in the Harvesting Clause.

[848] I have found that knowing of the existence of the Boundary Dispute and the possibility that Canada would be found not to be the owner of lands in the Disputed Territory, Morris had good legal, Constitutional, political and strategic reasons for specifically mentioning Canada in the Harvesting Clause.

[849] Morris anticipated, for reasons detailed elsewhere, that if Canada won the Boundary Dispute, it would have the ability to manage threats posed to Harvesting Rights by attempts to develop lands in a manner that would be incompatible with Harvesting Rights. If Canada lost the Boundary Dispute, he understood that while the federal government would not be able to patent Ontario's land or authorize forestry operations or forestry uses on provincial Crown lands, his mention in the Harvesting Clause of authorization of taking up by the Dominion meant that land uses threatening interference with Treaty Harvesting Rights would require two authorizations: firstly from Ontario under s. 109 giving the requisite proprietary rights to make use of the lands and secondly from Canada under the Treaty and s. 91(24), authorizing such interference.

[850] I find Morris did intend that Canada, in the event it lost the Boundary Dispute, would be able to exercise its ongoing jurisdiction over Indians and Treaty Harvesting Rights even within Ontario. Morris understood there would be intersecting jurisdictions. He knew if Ontario owned the land, two levels of government would be involved **if** Ontario were purporting to significantly interfere with Treaty Harvesting Rights. In protecting those Rights, he understood he was exercising Canada's valid s. 91(24) jurisdiction. Canada's ability to affect provincial proprietary rights when exercising a valid federal jurisdiction was accepted in 1873 by all the political players, even the provincial autonomists. Chancellor Boyd's reasoning in *Seybold* illustrates that involvement of more than one government in authorizing land use is not a new concept.

[851] I have found that Morris expressly reserved Harvesting Rights to the Ojibway under the Treaty, an interest he understood to be a pre-existing interest under s. 109.

[852] I find that, given his knowledge of the Constitution, Morris was intending to specify that if Canada lost the Boundary Dispute, Ontario's s. 109 interest would be burdened by and subject to the pre-existing Harvesting Rights reserved to the Treaty 3 Ojibway guaranteed under the Treaty. In reserving Treaty Harvesting Rights to the Ojibway, Morris understood that Courts would interpret the Harvesting Clause to mean that Ontario was taking its s. 109 rights subject to Treaty Harvesting Rights.

[853] Morris' and Canada's understanding and intent regarding his use of Constitutional and legal concepts is covered in more detail in the section of these Reasons headed "Answer to Question One – Is the Harvesting Clause as Written Constitutional?"

Did the Ojibway Understand and Accept that Canada Could Interfere with Their Treaty Harvesting Rights?

[854] The issue here is whether McKay, when he explained the Treaty in Ojibwe, as reported by Morris in his October 14, 1873 report, mentioned or the Ojibway understood from other information provided, that the Dominion Government could limit Harvesting Rights.

[855] I have referred earlier to McKay's background and experience and important "cultural intermediary" role, both before and during the 1873 negotiations.

[856] In his October 14 report Morris wrote, "After a reading of the Treaty, and an explanation of it in Indian by the Hon. James McKay, it was signed."

[857] The evidence is unclear as to how McKay read and explained the Treaty in Ojibwe just before it was signed. No notes prepared by McKay or anyone else are extant to shed light on whether he read the Treaty in English or how he explained it in Ojibwe. It is impossible to know with certainty whether he attempted to translate verbatim the words of the formal Treaty.

[858] Counsel for Ontario submitted that it would have been impossible for McKay to accurately interpret the Treaty word-for-word. He submitted that McKay did not translate or explain the harvesting promise in its entirety. His explanation of the harvesting promise was likely similar to Morris' statement on October 1. If McKay did refer to the harvesting promise, he

likely referred simply to "the government," which the Ojibway would not have understood to be a federal government distinct from a provincial government. When he was explaining the Harvesting Clause he did not specifically refer to the Dominion Government.

[859] For reasons already detailed, I reject the submission that on October 3, in explaining Treaty Harvesting Rights, McKay referred to Morris' statement on October 1.

[860] I reject Chartrand's evidence that McKay likely referred to Morris' October 1 statement, as I have held that by October 3, it had been superseded.

[861] There is largely agreement among the experts that McKay must not have specifically mentioned regulation of Ojibway harvesting by the Dominion Government or anyone else.

[862] Chartrand's report, Ex. 60, contains the following:

> At p. 123:
> None of the extant Treaty 3 negotiation records document the Treaty Commissioners giving verbal explanations to the effect that hunting and fishing rights were to become subject to possible government regulation. The subject of regulation of Aboriginal harvesting activity, by the Government of the Dominion of Canada or by any other government, does not appear to have been discussed prior to the signing of Treaty 3.
>
> At pp. 124-125:
> 'Nolin's Notes' and the "Paypom Treaty" record the harvesting rights promise as: "The Indians will be free as by the past for their hunting and rice harvest." The wording in these latter records suggest that either the oral promise or oral understanding of harvesting rights actually precluded regulation of these activities, by government or by any other body external to Ojibway society.
>
> In a negotiation context where the Ojibway understood that some of the lands outside reserves would become taken by Euro-Canadians (thereby likely affecting locations where traditional harvesting activities could be conducted), the idea that harvesting practices in themselves might become subject to regulation, or partial control by outside parties or institutions, would have proved a delicate and controversial matter. Mention of regulation of harvesting during the negotiations would have generated questions and expressions of concern by Ojibway leaders and spokespersons, and required further discussion and explanation by the Treaty Commissioners. None of the Treaty 3 negotiation records allude to any such discussions.
>
> Since the subject of regulation does not appear to have been introduced during negotiations, its sudden mention by James McKay in his reading of the treaty should have generated questions. However, as the only documentary source on the treaty negotiations referring to McKay's interpretations, Alexander Morris' October 14, 1873 treaty report does not detail any reference to Ojibway leaders or spokespersons asking further clarification, or raising concerns regarding the Ojibway language reading of the Treaty. The report suggests that McKay's explanations were not given in response to questions or objections. As no other documentary source even alludes to this event, McKay's reading and explanation appears to have been accepted as straightforward by the Ojibway.
> …
> The apparent lack of reaction to the inclusion of the regulation of harvesting activity, and to the omission of several matters agreed upon orally, is even more puzzling …the Ojibway understood the importance of written documents to Euro-Canadian officials. … a number of the issues agreed upon orally had been discussed earlier on October 3rd, 1873, merely hours prior to the reading of the treaty

text. The points could not have been forgotten in this short time, especially in light of the presence of an Ojibway oral narrative recorder.

Since James McKay's Ojibway language address was not recorded (in writing) and no oral tradition narrative of the address appears to have survived, the extent to which he presented a complete and accurate account of the contents of the Treaty 3 text remains an unresolved historical issue. The historical questions and problems identified by scholars relating to the lack of Ojibway reaction to the differences the Treaty 3 text content relative to their understanding of the oral treaty agreement appears unresolvable. These questions and problems are sufficiently marked, to put into question the extent to which the written text of Treaty 3 can be used as a basis on which to describe or reconstruct an accurate and complete understanding of the Treaty 3 agreement by the Ojibway signatories.

Simply put, there are strong historical and ethnohistorical grounds on which to posit that the English language contents and provisions of the text of Treaty 3, do not necessarily reflect the exact nature and full scope of the Ojibway understanding of the oral treaty agreement reached with Alexander Morris. As a source of historical information on how the Ojibway conceived their treaty agreement with the Crown, the text of Treaty 3 must be used with caution.
[Emphasis added; references omitted.

[863] Lovisek's report (Ex. 28) contains the following:

At pp. 182-3:
Both the Treaty Commissioners and the Saulteaux understood and agreed that hunting and fishing rights were reserved over their territory. There are no references in the records which were written in colloquial speech by Dawson or Nolin, or in the Shorthand Reporter's account which describe the application of regulations to hunting and fishing or which limited hunting and fishing rights…

The Saulteaux at the time of Treaty 3 had no experience with Euro-Canadians who claimed authority to regulate their hunting and fishing. Since the Ojibwe language has a word for regulation, inâkonigewin, had the word been used by Lieutenant-Governor Morris or the interpreters and understood by the Saulteaux, it would likely have been reported in the various Treaty documents. The Ojibwe language also has a word for 'taking up' in the sense of: "I take it from him" which translates to *nin mamawa*.

The historical records indicate that the taking-up clause was not considered by Morris to be of sufficient importance to warrant discussion either with Ottawa, or the Saulteaux. …
…
…[T]here is no evidence from the historical record that Lieutenant-Governor Morris had the articles of the Morris Document translated literally and read to the Saulteaux by McKay or explained. It is probable that McKay in reading the final terms of the treaty before it was prepared 'in an hour', relied upon the shorter and easier to translate agreement, such as the Nolin Notes.

At pp. 186-187:
There is no evidence in the historical records of the Treaty 3 negotiations that the full context of the "taking-up" clause as drafted in the Morris Document was discussed, explained, consented to by the Saulteaux or recorded in the Dawson Notes, Nolin Notes, Paypom Treaty, or the Shorthand Reporter's account. That the Saulteaux were not informed and did not consent to the "taking-up" clause is reflected in the Shorthand Reporter's Account, the Nolin Notes, the Paypom Treaty, Dawson Notes, and subsequent information provided by Simon J. Dawson in 1888 and 1895 (as noted above).

The treaty of record comprises the Nolin Notes, Paypom Treaty, Dawson Notes, the Shorthand Reporter's Account and the Morris Document, and not the Morris Document alone. When these documents are considered in conjunction with the statements made by Morris in the subsequent

> numbered treaties and by the interpretations of other Commissioners who negotiated the numbered treaties, it is apparent that the "taking-up" clause was not explained in the form it appears in the Morris template treaty. There is also no evidence in the treaty records that the Saulteaux would have consented to any regulation of their hunting and fishing treaty rights, had the issue of regulation been introduced during negotiations. The "taking-up" clause was not mutually agreed upon by parties to Treaty 3.
> [Emphasis added, footnotes omitted.]

[864] I find that McKay did not translate the Treaty word by word into Ojibwe. Because he did not refer specifically to limiting of Harvesting Rights by regulation by Canada, he therefore did not refer to limitation of Harvesting Rights by "taking up" by Canada either.

[865] From Nolin's Note, Lovisek's and Chartrand's evidence already quoted and Dawson's post-Treaty recollections, I find that Morris did not advise the Ojibway on October 3, and they did not understand, that Canada could authorize land uses inconsistent with Harvesting Rights and pass legislation to extinguish or limit Harvesting Rights. They certainly did not consider any other government could have such power. They expected Canada to protect their Harvesting Rights away from the Dawson Route or CPR right of way, not limit, extinguish or ignore them.

[866] The Plaintiffs recognize that although the Ojibway were not advised about Canada's powers, the Commissioners knew it would be Constitutionally open to the federal government to pass legislation limiting or extinguishing the Treaty rights, after consideration of the conflicts between Euro-Canadian uses and hunting and fishing. Alternatively, it could refuse to allow or authorize such development. The Plaintiffs are not taking the position that the lack of disclosure that Canada could limit their Harvesting Rights is a basis for altogether voiding the Treaty. They accept that today, their rights can be limited by Canada provided it can meet the *Sparrow* test. However, they emphasize the unfairness that would occur if Ontario were allowed to limit their Harvesting Rights under the Treaty given the lack of explanation or Ojibway understanding that even Canada could do so.

Findings Re The Parties' Understanding with respect to the Identity of the Treaty Parties

The Ojibway's Understanding on the Identity of the Treaty Parties

[867] In their written closing argument, counsel for Ontario submitted at para. 272: "that the Ojibway understood that the Commissioners were representatives of the Queen, and that the Treaty they agreed to was ultimately between them and the Queen, recognizing that the Queen operated through government officials;" at para. 274: "the Ojibway understood going into the negotiations that a government of the Queen existed in Canada;" at para. 275: "they would not have had any appreciation in 1873 that there were multiple Queen's governments in Canada. They had a concept of a generic Queen's government operating within Canada, and that it was distinct from the American government;" at para 279: "Morris was not attempting to persuade the Ojibway that their Treaty was with a government rather than with the Queen;" at para 377(c): "they understood that the government they were dealing with was the Queen's government."

[868] I have accepted Lovisek's evidence and found that by October 2, the Ojibway understood and accepted that the treaty-making authority of the Commissioners was coming from the Government at Ottawa. The Treaty would be implemented and enforced by the government that had sent Pither, Provencher, Dawson and Morris. They understood that Pither, Indian Agent, and Provencher, an employee of Indian Affairs, would be particularly responsible for their welfare in part by implementing the Treaty

[869] The Ojibway understood that their Treaty partner, presented as a single defined unitary entity would address their needs and enforce the Treaty promises. Morris had taken pains to explain his relationship with the Council at Ottawa, the Government of Canada. The Ojibway, who clearly were determined to ascertain the power of the entity with which they were dealing, had satisfied themselves that the Queen's government at Ottawa was behind the negotiations and would take responsibility for honouring the Treaty promises. Morris represented that if anything were wanting, those who did not do their duty in a proper manner would be dealt with. He promised that the ear of the Queen's government would always be open and that it would address their needs and complaints.

[870] Given the clear evidence that Canada intended that Canada would be the Queen's government that would be their Treaty partner, counsel for Ontario was never really in a position to submit that Canada and the Ojibway's **mutual** intention in 1873 was that the Treaty parties would be the Queen and the Ojibway, at least in the sense that the Ojibway would be able to rely on the Queen or Her Majesty the Queen in Right of the British Government to fulfill the Treaty terms. Yet that is what counsel for Ontario submitted the Ojibway understood. He submitted in effect that because the Ojibway were ultimately relying on the Queen, they did not care how the Queen's government was constituted. They did not care whether the Government of Canada was a unitary government or whether the Queen's government consisted of multiple governments. It did not matter to them. Even though Canada viewed itself as the Treaty party, because Canada was/is part of an indivisible Crown, Canada's intention was/is irrelevant. Because the Ojibway were ignorant of the constituents of the Queen's government in 1873, it does not and would not violate the spirit of the Treaty or the Honour of the Crown to allow Ontario to limit Treaty Harvesting Rights.

[871] Ontario's submission is essentially that because the Ojibway were relying on the Queen and understood that a generic Queen's government, by occupying lands, could deprive them of their Harvesting Rights, it would not be contrary to the spirit of the agreement to allow another government that is part of the Queen's government to extinguish their Harvesting Rights. The fact that they did not know about the existence of Ontario and believed the Queen's government at Ottawa was a unitary government is irrelevant because the Ojibway were indifferent as to the make-up of the Queen's government. In effect, the Queen's governments of Ontario and Canada were interchangeable to the Ojibway.

[872] In my view, that submission overlooks the fact that the Ojibway wanted to form an alliance, a relationship, with a power that could make and implement and would enforce the Treaty. The Ojibway understood the Council at Ottawa was that power. The Ojibway agreed to deal with the Council at Ottawa and were relying only on the Council at Ottawa.

[873] I find the Commissioners were able to make the Ojibway understand that they did not have all the Queen's power. They were representing the Government, the Council at Ottawa. The Ojibway had been dealing with Dawson as a representative of the Government of Canada on a regular basis since 1868. Dawson had met with their Grand Council repeatedly. Chartrand conceded in cross-examination (January 21, 2010, pp. 77-78) that it was very possible that during one of the early Council meetings, Dawson had explained the nature of his authority to oversee the Route and may very well have made a reference to the Government of the Dominion of Canada. The Ojibway understood that Canada was building the Dawson Route and that Dawson was an employee of Canada. They had been dealing with Pither as a representative of the federal Department of Indian Affairs since 1870. They had seen Canadian troops crossing their lands on their way to quell the insurrection at the Red River. There were ways in which the sense of the Government at Ottawa could be conveyed. They knew that Pither and Provencher were employees of Canada. They knew that Canada was building the CPR. They appreciated that the security of the Dawson Route and the building of the CPR and its security were the most pressing reasons for the Treaty from the perspective of the Commissioners.

[874] In short, they knew the Commissioners were from Canada. They were dealing with Canada. Canada was promising to implement and enforce the Treaty. They were content with that.

[875] From a review of the various contemporaneous records of the negotiations, it is clear that Morris did frequently refer to the Queen at the start of the 1873 negotiations. He knew the Ojibway perceived Her Majesty favourably because they believed that Indians in British territories had been well treated relative to their counterparts in the United States. At the beginning of the negotiations, Morris was clearly hoping to benefit from that positive perception. Chartrand opined that, initially, Morris was trying to achieve his negotiation goal by alluding to Ojibway historic understanding that the Queen was noble, generous, kind and protective (January 22, 2010 at p. 84.)

[876] However, I find, just as the *Manitoba Free Press* correspondent noted in his report that during the negotiations on October 2, 1873, Morris made a deliberate decision to make it clear what he obviously knew, that they were dealing with and he was deriving his authority from the Canadian government.

[877] I find that on October 2, 1873, Morris decided to abandon his earlier approach and opted to clarify what he had earlier said.

[878] Because Morris changed tack, Chartrand's reference to the "preponderance" of references to the Queen does not hold water. It is necessary to look at what was said during the critical phase of the negotiations on October 2 and 3.

[879] On October 3, he repeatedly mentioned and explained not only that the Council at Ottawa would be implementing the Treaty but also that the ear of the Queen's government would always be open. The Treaty promises would be enforced.

[880] Chartrand gave evidence (January 15, 2010) that when Morris said the ear of the Queen's Government would always be open to the Ojibway, he was directing them to bring their complaints to the Queen's Government that he represented and promising that that Queen's Government would address their concerns.

[881] I find the Ojibway knew they would be turning to the Government of Canada (even if they did not understand the precise nature of a federal constitutional monarchy), they perceived it as their ally. They looked to it and understood they would deal with it, through Indian Agents, as they had already dealt with Pither before the Treaty was made.

[882] I note that Chartrand's evidence January 19, 2010 contains the following:

> At p. 118:
> A. …I do believe that the Ojibway at this time believed … that these individuals and Alexander Morris in particular were persons who could …effectuate the implementation of provisions, or who could ensure that treaty promises were kept.

After the Treaty was signed, the Ojibway did not call on the Queen but on Morris and the Government at Ottawa:

> At p. 127:
> A. I do not have any documentary evidence indicating that they wrote petitions or complaints or had them written directly to the Queen.
>
> At p. 130:
> Q. Okay. Do we -- I take it, though, we never see the Ojibway complain to the English government?
> A. Not directly, no.

[883] Immediately after the Treaty was made, the Ojibway asked for the appointment of more Indian Agents on the ground to ensure that the provisions promised and other undertakings of Canada would be fulfilled.

[884] Generally speaking, I find the Ojibway wanted, intended and relied on dealing in the future with the entity they perceived to be their Treaty partner, the Queen's Government represented by the Treaty Commissioners, the Government at Ottawa. I find the Ojibway did understand they were dealing with the Government that they knew was directing the Treaty negotiations and promising to address their concerns "so long as the sun shone and the waters flowed."

[885] I accept Lovisek's evidence that on October 3, 1873, the Ojibway knew they were not literally dealing with or relying on the Queen. I specifically reject Von Gernet's and Chartrand's evidence that they thought they were.

[886] Based on the evidence of Lovisek, I find that the Ojibway Chiefs understood that while the Queen's Government/Council at Ottawa acted in the name of the Queen, they were not the Queen, and after the Treaty they would not literally be dealing with the woman in England who was Queen, nor would they be dealing with any government across the Great Salt Lake.

[887] By drawing on the Ojibway experience and understanding of their own meetings in Council and comparing their Council to a Council governing the Dominion, Morris was able to successfully explain that his relationship was with the Government at Ottawa and not literally with the Queen. Lovisek said on November 23, 2009 that Ojibway references to the Queen were sometimes symbolic and sometimes not. She commented that on October 2, after Morris (1) rejected the 1869 demands; (2) was questioned about the extent of his power; (3) said that he represented the Queen's Government; (4) reminded the Ojibway that there was another "great Council that governed a Great Dominion" that held its Councils the same as they held theirs – Morris had been able to successfully explain the concept of the Dominion Government in a manner that the Ojibway understood. He was explaining that he was receiving his authority from a Great Council in Ottawa that governs a Great Dominion. Morris' explanation could be translated into Ojibwe. [The Government of Canada/the Queen's Government/the Government at Ottawa could be translated as the Council at Ottawa.]

[888] I find the Ojibway understood the only government with which they were dealing and with which they would deal after the Treaty was signed was the Queen's government at Ottawa, the only government that Morris mentioned. They understood that Morris, Provencher and Dawson were representing that government and that the promises were being made on behalf of it. They were not ultimately relying on the Queen for the fulfillment of the Treaty promises.

[889] I have found the Ojibway did not question the Commissioners or seek clarification about the source of their authority on October 3 because they already understood from Morris' explanation given on October 2 that they were there on behalf of the Council at Ottawa that governed a Great Dominion, and they were content with that.

[890] They understood from what Morris told them that the government with which they were dealing and would be dealing was a unitary government. They did not understand, because they were not advised, that any other government could potentially affect their Treaty rights. They did not agree to have their Harvesting Rights adversely affected by any other government.

[891] I find the Ojibway were looking to form an alliance with the Queen's Government at Ottawa, and were looking to it to implement and enforce the Treaty.

[892] I find the Ojibway relied on Morris' specific representations that the Ear of the Queen's Government would always be open to hear their complaints and that their complaints would be heard. Whenever they perceived assaults on their Treaty Rights, they understood they would complain to their Treaty partner, the Queen's Government at Ottawa. They expected it to keep its promise that the undertakings made by the Commissioners on the Government's behalf would be fulfilled. I have found the Commissioners highlighted the role of the Dominion Government in implementing Treaty terms and represented that the Ear of the Queen's Government would be open to ensure that the Treaty promises were enforced.

[893] The Ojibway did not understand the concept of indivisibility of the Crown on which Ontario relies (i.e., that when exercising its exclusive s. 92 powers, Ontario is notionally accountable directly to the Queen and is not subordinate to the federal government.)

[894] Ontario could not contend that the Ojibway understood that they would look not only to Canada to fulfill its obligations but also to Ontario to honour whatever obligations Ontario owed to the Ojibway under the Treaty vis-à-vis Harvesting Rights.

[895] The Ojibway did not intend to deal with various emanations of the Crown. Chartrand and counsel for Ontario emphasized that the Ojibway were not aware of multiple governments in Canada. Counsel for Ontario placed great reliance on the assertions of Von Gernet and Chartrand that the Ojibway did not understand or care what level of the Queen's government they were dealing with.

[896] I have accepted Lovisek's evidence, supported by Chartrand's evidence before he made his "corrections," and I find that the Ojibway were aware that they were dealing with the Queen's Government at Ottawa, presented to the Ojibway as a unitary government.

[897] I accept Chartrand's evidence given before he made his "corrections" that the Ojibway understood they were dealing with individuals who belonged to a central government at a place called Ottawa.

[898] Even if they did not understand all the niceties of Canadian Constitutional jurisdiction, I am of the view that any lack of knowledge or confusion in this regard should not be used to the disadvantage of the Ojibway.

[899] Bearing in mind the principles of treaty interpretation set out later in these Reasons, I do not accept Ontario's submission that if the Ojibway did not appreciate that the Government at Ottawa had Constitutional authority and responsibility for Indians and treaties, that should ground an interpretation of the Treaty that would allow Ontario to limit Ojibway Harvesting Rights in a manner I have found would be contrary to the specific intention of the Commissioners and Canada, who clearly intended reference to the Dominion to refer to Canada and only Canada, and in a manner that would deprive the Ojibway of Treaty Rights both they and Canada understood they were being promised and upon which the Ojibway were insisting as condition of entering into the Treaty.

[900] Ontario's submission about Ojibway reliance on the Queen is clearly an attempt to use the technical Euro-Canadian legal concept of indivisibility of the Crown to limit Treaty Harvesting Rights in a way that was not contemplated by Canada or the Ojibway in 1873. I will return later to the "honour" Ontario is demonstrating in making such a submission.

[901] Even if I had concluded that the Ojibway were mistakenly placing some reliance on the Queen to ensure that the promises of her Government at Ottawa were kept, that would not have changed my overall conclusion.

[902] Again, bearing in mind the applicable principles of treaty interpretation, I would have declined to use such a technical concept to defeat Treaty Rights, contrary to the mutual intention of Canada and the Ojibway and contrary to the plain meaning of the Harvesting Clause itself, which did not specify that the Queen could extinguish the Treaty Harvesting Rights but that they could be limited or extinguished only by "taking up" or authorization of "taking up" **by Canada**.

[903] In any event, I have accepted the submission of counsel for the Plaintiffs and the evidence of Lovisek that the Ojibway cared about and relied upon the power of the Council at Ottawa to implement and enforce the Treaty provisions and were not literally relying on the power of the Queen.

[904] I find the Ojibway were aware of other governments in Canada but they understood they were and would be dealing only with the Government at Ottawa.

[905] Von Gernet's cross-examination on December 3, 2009 contains the following at p. 89:

> Q. But the establishment of a new government and a new province in the Red River was a major part of the sequence of events that's happening between 1870 and 1873, is that fair?
> A. Yes.
> Q. And I suggest to you that the Saulteaux, in some way, were aware that there was another governmental power or force growing up at the Red River; is that fair?
> A. Yes.
> [Emphasis added.]

[906] Unlike Von Gernet who conceded the Ojibway were aware of another government, for instance at Red River, Chartrand at trial maintained they did not understand there were distinct Euro-Canadian governmental bodies operative in Canada.

[907] I have considered the submission of counsel for Ontario on the issue of Ojibway understanding regarding the identity of the Treaty party, that as a layperson, I cannot interpret the evidence as well as properly qualified ethno-historians. I note that the ethno-historians did not agree on the Ojibway's ultimate reliance on the Queen. Where they conflict, I accept the evidence of Lovisek that the Ojibway were relying on Canada and only Canada. I reject the evidence of Von Gernet and Chartrand with respect to the Ojibway's reliance on the Queen.

Canada's Understanding on Identity of the Treaty Parties

[908] While the Commissioners understood in a broad sense that Her Majesty the Queen was being named in the Treaty, it was clear to them that "Indians and Land Reserved for the Indians" were exclusively a Canadian federal responsibility. Canada was not looking to Government of the United Kingdom, the Queen or the Government of Ontario to fulfill the Treaty promises they were making on behalf of Canada. They intended the reference to the Dominion in the Harvesting Clause to be to Canada.

[909] The clause Morris inserted in the Treaty relating to limitation of Treaty Harvesting Rights did not refer to the Queen or to a generic government, but to the Dominion, i.e., the Government of Canada. The process he set out to be followed in limiting Treaty Harvesting Rights plainly and clearly required authorization from the Canadian government.

[910] The Canadian government approved the terms of the Treaty itself by Order in Council.

[911] In short, I have found it was not irrelevant to Canada whether Canada or Ontario would have the right to limit or remove Treaty Harvesting Rights. On the contrary, I find that it was important to the Commissioners and to Canada that Canada have this power.

Summary of Findings of Fact Part 1

[912] I have rejected the evidence to the effect that the Ojibway understood they needed to enter into a treaty in 1873 due to a negative consciousness of their condition. The Ojibway were not "desperate." They were in no rush to enter into any treaty. The key Treaty 3 Rainy River Chiefs (i.e., the ones who controlled the Dawson Route) were "careless" about a treaty.

[913] The Ojibway understood they were agreeing to share the use of their whole territory and resources with Euro-Canadians, so long as the sharing would not significantly interfere with their own Harvesting Rights. They did not agree to give up their means of making a living, i.e., their own use of resources or their continuing rights to subsistence harvesting on that land. The Commissioners recognized that that was their condition for entering into the Treaty, and they expressly promised the Ojibway could keep those rights to induce them to do so.

[914] Away from the rights of way, the Commissioners promised and the Ojibway understood that their harvesting would not be significantly interfered with. The Plaintiffs did not understand or agree that development and occupation of lands off the rights-of-way would result in a lessening of the area where they could hunt.

[915] The Commissioners authorized McKay to convey their positive promises that their Harvesting Rights would continue as in the past "as long as the sun shone and the waters flowed." On October 3, the Commissioners expressly promised that if the Ojibway had a problem with non-fulfilment or Treaty enforcement, the Ear of the Queen's Government, i.e., the Government at Ottawa, would always be open and that their Treaty partner, Canada, would ensure that the promises made by the Commissioners would be actively enforced.

[916] Given their negative assessment of the overall potential of the Treaty 3 lands, the Commissioners made unusual promises they might not have been prepared to make in a more promising environment. The Commissioners believed it was both feasible and in the national interest to make the promises to the Ojibway that they did.

[917] The Ojibway practiced sustenance harvesting directed to satisfying needs, not to maximizing their harvest. The Commissioners/Canada and the Ojibway expected that the continuation of traditional harvesting practices would leave room for Euro-Canadians to share in the use of the resources without significantly affecting Ojibway subsistence harvesting (Chartrand, January 18-19, 2010.) In other words, the Ojibway and the Commissioners expected Euro-Canadian land uses and Ojibway traditional harvesting would be compatible.

[918] After reviewing, comparing and analyzing all the evidence, while I have found that the Ojibway knew they were compromising their right to exclusively occupy all their lands, they did not understand and did not agree to an increasing erosion of their Harvesting Rights as Euro-Canadian development was authorized, let alone compromise their Harvesting Rights by agreeing to process-free development and extinguishment of their Harvesting Rights by whomever the owner of the lands turned out to be.

[919] Morris deliberately made the reference to the Dominion in the Harvesting Clause and during the negotiations, not because he expected that the Dominion would always be the owner of the lands, but because he knew there was a good possibility that the Dominion would not always be the owner. The Dominion was the Treaty partner of the Ojibway, and he expected and promised that the Dominion would implement and enforce the Treaty promises pursuant to its s. 91(24) jurisdiction. He held out the Dominion as their friend and ally. His promises were consistent with his understanding of the historic protective role of the Imperial Government and Canada after 1867 in standing between the settlers and the Indians and also the prospective "wardship" role he expected Canada to take after the Treaty was signed. He wanted to ensure that Canada could keep its promises even if Ontario were found to own the land.

[920] While the Commissioners understood and agreed that the Harvesting Rights promise would require some management by the federal government, in light of the anticipated compatibility of Euro-Canadian and Ojibway uses, they did not expect that such management would be unduly onerous or would require intervention except in the rare event of conflict between Euro-Canadian uses and Ojibway Harvesting Rights.

[921] If Canada won the Boundary Dispute, the Commissioners expected multi-departmental cooperation to manage the situation and to fulfill the Treaty promises, because it was recognized that security of travelers to the West, the CPR and the Dawson Route depended on the cooperation of the Treaty 3 Ojibway.

[922] If Canada lost the Boundary Dispute, the Treaty made it clear that Canada expected to exercise its s. 91(24) jurisdiction, if necessary, to protect Treaty Harvesting Rights. Morris understood Treaty Harvesting Rights reserved under the Treaty were an interest other than the interest of the province in the lands.

[923] In short, the Commissioners perceived that whether it won or lost the Boundary Dispute, by making the promise on which the Ojibway were insisting – reserving the Harvesting Rights to the Indians in the Harvesting Clause and mentioning "taking up" by the Dominion – Canada could protect its wards and at the same time could meet its pressing national objectives.

[924] For all the reasons detailed within these Reasons, I have found that in the Treaty 3 area, the Commissioners promised more than a continuation of the right to hunt anywhere within their traditional territories. Away from the vicinity of the Dawson Route and the CPR, they intended that Ojibway Harvesting Rights would not be significantly interfered with without the authorization of Canada. They would continue throughout the Treaty 3 lands "as long as the sun shone and the waters flowed."

11. POST-TREATY EVENTS

[925] In presenting the evidence in this section, rather than separating each issue into its own sub-section, I opted to use mostly chronological order because many issues and events were inter-related even though at first glance they might have seemed unrelated. For instance, in the first five years following the signing of Treaty 3, efforts were made to allocate reserves.

However, the best of federal intentions were derailed by the Boundary Dispute. When there was discussion of an important issue or event, I highlighted the issue or event by inserting headings.

[926] After the surrender the Ojibway never limited Euro-Canadian occupation in the balance of their territory (Lovisek, October 23, 2009 at p. 137.) They shared resources with the Euro-Canadians throughout the Treaty 3 territory.

Attempting Reserve Allocation Amidst Political Upheaval

[927] **1873.** On October 11, 1873, the federal government instructed Dawson to start consulting with the Treaty 3 bands about reserve selection.

[928] Morris intended that Canada would keep its Treaty promises. In his Official Report dated October 14, 1873, he stated, "I would further suggest that no patent should be issued or license granted or mineral or timber lands, or other lands, until the question of the reserves has first been adjusted."

[929] In fact, the location of the Treaty 3 reserves was not to be confirmed for another 42 years. The reasons for the delay and the negative effects on the Ojibway are covered later in these Reasons.

[930] Treaty 3 was approved by federal Order in Council on October 31, 1873.

[931] On November 4, 1873 the Governor General wrote Morris a letter (Ex. 1, vol. 7, tab 294) that said in part, "[T]he results will I believe … furnish …additional evidence that the method adopted by the Government in dealing with the Indians is such as to secure their protection." [Emphasis added.]

[932] On November 5, 1873, following the Pacific Scandal, the Conservative government of Morris' mentor, Macdonald, was forced to resign.

The Liberals are Elected

[933] **1874.** In January 1874, a Liberal government headed by Alexander Mackenzie was elected. It included a number of Reformers who were strong provincial autonomists.

[934] Chartrand's report, Ex. 60, contains the following at p. 316:

> On January 8th, 1874, the Lieutenant-Governor of Ontario reported on the state of the boundary dispute in a Speech from the Throne, indicating that informal steps had been taken towards establishing a "provisional" boundary as Ontario and the Dominion Governments continued respective efforts at historical and legal research and analysis…

[935] In early 1874, Morris, Provencher and Dawson all repeatedly urged that reserve selection be completed as soon as possible.

[936] On March 2, 1874 Dawson wrote a letter (Ex. 4, p. 251) to the Minister of the Interior containing the following:

> Rainy River is the only place where extensive reserves of the first class, that is farming lands, could interfere with the progress of settlement; and I would propose limiting [the reserves] on that river to an aggregate area of 6 square miles.
>
> ... [T]he islands of the Lake of the Woods are at present the chief farming stations of the Indians … On conferring with the Indians I have no doubt but that matters relating to the reserves can be easily arranged. They will of course seek to get as much as they can on Rainy River but there, it has already been explained to them that they are to be confined, as regards reserves of the first class, to the localities they hitherto occupied as camping grounds, fishing stations and gardens.

[937] In his report, Ex. 60, Chartrand confirmed that Dawson anticipated compatibility between Euro-Canadian and Ojibway uses, except perhaps in the Rainy River area:

> At p. 217:
> Dawson's letter [of March 2, 1874] reveals that he expected little to no conflict with respect to the selection and use of lands by Aboriginal signatories, the Dominion and non-Aboriginal settlers and developers. As he indicated, at the time the only area where potential conflict might develop was in the vicinity of Rainy River, where Aboriginal signatories had developed their own agricultural practices and where lands held the most promising potential for non-Aboriginal settlement and farming. …
>
> In other Treaty 3 localities … Dawson expected few conflicts …
> …
> At p. 316:
> In March 1874, the Legislative Assembly of Ontario passed a resolution formally proposing to have the boundary question settled either by a board of arbitration or by the JCPC, and adopting a temporary or "provisional" boundary in the interim, to be located by negotiation with the Dominion Government.
>
> At p. 115:
> On March 19, 1874 twenty Ojibway Chiefs had a petition written on their behalf, pressing demands directly to Alexander Morris that their reserves be surveyed and determined as soon as possible.

[938] Lovisek's report contains the following at pp. 145-6:

> Within six months of the signing of Treaty 3, on March 19, 1874 twenty chiefs from the Lake of the Woods presented a letter in French to Lieutenant Governor Morris which contained various complaints about the non fulfillment of Treaty 3. Although many of the complaints involved the lack of receipt of farming implements and reserves, the chiefs made several statements which reveal their understanding of the Treaty. For example, the Chiefs stated that the desire for the Treaty was to: "ally ourselves with the Whites by a Treaty, we calculated on being maintained by them, at least to the extent were promised..."

[939] In a letter dated May 31, 1874 (Ex. 4, p. 260), a number of Chiefs expressed concerns that the reserves were not being set up quickly enough. They wanted to ensure that their gardens would be protected, as promised, and that localities where they fished for sturgeon would be incorporated into reserves for their exclusive use.

[940] In June 1874, the governments of Ontario and Canada, now both Liberal, agreed on a temporary Canada/Ontario boundary and on the appointment of a Board of Arbitration to adjudicate the Boundary Dispute. Canada was to make grants of land to the west and north of the provisional boundary line, Ontario to the east and south. The two governments agreed that once

the boundary line was determined, they would ratify patents made in the meantime and provide an accounting of the proceeds.

[941] Chartrand in his report, Ex. 60, addressing the jurisdiction issue, mentioned the following:

> At p. 316:
> The two governments also agreed that the arbitration award would be considered "final and conclusive." [References omitted.]
>
> At p. 366:
> Beginning in the summer of 1874 under the Provisional Boundary Agreement Ontario assumed jurisdiction over patents to mining locations in a defined eastern portion of the Treaty 3 territory.
> …
> Available documents pertaining to the negotiations of Treaty 3 present no direct evidence indicating whether the Ojibway participants to the negotiations were aware that the lands being treated for formed part of a territory being disputed by two distinct levels of government. These documents present no direct evidence indicating whether the boundary dispute, if known to the Ojibway, held any particular significance to them.
>
> At pp. 207-8:
> On June 24th, as formal Dominion-Ontario negotiations were nearly completed in regards to assigning a temporary boundary enabling administration of Treaty 3 lands, a report was prepared by the Minister of the Interior recommending the appointment of Simon Dawson and Robert Pither as Commissioners to undertake reserve selection negotiations with Treaty signatories …The Minister explained that Dawson had already been selected by Alexander Morris to act in this capacity, and to that effect, had held preliminary discussions with the boundary waters Ojibway resulting in the production of map of the area showing the general locations of two classes of reserves promised under Treaty 3 (farming reserves and wild lands reserves). The report presented the following recommendations respecting reserve locations:
>
> > The Reserves for farming purposes should be confined generally to localities heretofore cultivated by the Indians and occupied by them as camping and fishing grounds; such, according to Mr. Dawson was the understanding at the time of the making of the Treaty; and these Reserves should be so placed as not unnecessarily interfere with the progress of settlement.
>
> [References omitted.]

[942] Chartrand's report, Ex. 60, contains the following:

> At p. 210
> Simon Dawson and Robert Pither were formally notified by the Department of the Interior of their appointments as Commissioners to negotiate the selection of Reserves with Treaty 3 bands on July 14th, 1874…
>
> At pp. 211-212:
> Dawson and Pither held separate conferences with signatory bands of Rainy River and the Lake of the Woods in the first half of October, 1874. By October 8th, as the conferences with Rainy River bands were essentially concluded, Pither wrote Dawson to confirm arrangements regarding the preparation of a report to the Department of the Interior …
>
> On October 9th, Dawson transmitted a telegram to E.A. Meredith (Deputy Minister of the Interior) reporting the successful conclusion of the Rainy River conference. A similar notice pertaining to the conference with Lake of the Woods … bands was transmitted October 15th.

> Dawson provided a preliminary report on the Reserve selections to E.A. Meredith (Deputy Minister of the Interior) on December 31, 1874. This report described reserves laid out along Rainy River and Rainy Lake area and was accompanied by a map showing their approximate locations. Dawson emphasized that the reserves along Rainy River needed to be surveyed and confirmed as soon as possible. Owing to their proximity to the immigrant travel route and to the fact that they contained valuable land, the Rainy River Reserves were susceptible to encroachments from squatters. [References omitted.]

[943] Meanwhile, Canada was building on the foundation of the Indian agency system in the Treaty 3 area that had been started with the appointment of Pither in early 1870. It appointed other Indian Agents to serve on the ground in the Treaty 3 area.

[944] **1875.** In a letter dated January 19, 1875, Fournier, the federal Minister of Justice, and Bernard, the Deputy Minister of Justice recommended (Ex. 131, pp. 1024-1028) that the federal government disallow B.C. Crown land legislation because it failed to protect Indian interests. (Vipond, February 26, 2010 at pp. 69-80.)

[945] Blake, another provincial rights advocate, also recommended disallowance the following year. He endorsed Fournier and Bernard's view that the federal government could intervene in the management of provincial Crown lands where the federal government had a duty to act to protect the rights of the Indians under s. 91(24).

[946] Vipond gave evidence on February 26, 2010 to the effect that despite the fact their political stripes differed from those of the federal Conservatives, Fournier, Bernard and Blake all understood that the federal government had both jurisdiction and responsibility to protect First Nations' interests, even in respect of lands that were situated in a province with s. 109 powers. Fournier was quoted as follows:

> [T]he undersigned feels that he cannot do otherwise than advise that the Act in question is objectionable, as tending to deal with lands which are assumed to be the absolute property of the province, an assumption which completely ignores, as applicable to the Indians of British Columbia, the honour and good faith with which the Crown has, in all other cases, since its sovereignty of the territories in North America, dealt with their various Indian tribes.
> [Emphasis added.]

[947] Vipond agreed (February 26, 2010) this passage was a "ringing endorsement" of the federal responsibility to look out for the interests of the Indians, and that Fournier, Bernard and Blake believed that British Columbia's s. 109 ownership of its lands was subject to the rights of the Indians.

[948] In February 1875, the federal government acted to implement and enforce Treaty 3 rights after it was reported that Euro-Canadian settlers at Fort Frances had been cutting wood on reserves. A department of the federal government in concert with the Indian Department invoked federal jurisdiction under the *Dominion Lands Act* and appointed Pither as a Dominion Land agent at Fort Frances with power to prevent settlers from cutting timber on Indian lands. On June 21, 1875, the federal government empowered Pither to punish the trespassers [Ex. 60, Chartrand report at p. 218.]

[949] Lovisek's report (Ex. 28) contains the following at pp 147-149 recording Morris' comments about a conversation with the Chiefs with respect to a Petition dated June 21, 1875 [Ex. 1, Vol. 8, tab 359, p. 8.]:

> One of the chiefs asked for a copy of the Treaty, "saying they want to know what is written…"
>
> > 1st The first chief Canda-comigo-wi-ninie … said I had promised that no drink should be in their country … I told him a law had been made against it, and I would report his wishes and ask that the law be enforced.
> > …
> > 3rd. He complained that the promises of the Treaty were not being kept. …
> > …
> > The chief said, … It is all rock at White Fish Lake… I want to give up part of that and get more on the Lake of the Woods.
> >
> > 9th. ... The second chief … said… We … want an agent for ourselves at the Lake of the Woods…
> >
> > …He asked for a copy of the Treaty…
> > …
>
> The Saulteaux understood that their treaty relationship was personal and with the Commissioners with whom they had personally dealt with at Northwest Angle, particularly Morris. This is why when the Saulteaux had a complaint about the treaty they travelled long distances to meet personally with Morris and later his successor, Cauchon. This demonstrates that the Saulteaux understood that the treaty agreement was personal and limited to certain parties. The Saulteaux were not indifferent to the parties they had entered into for such an important agreement. The agreement created a relationship which the Saulteaux would have understood through such mechanisms as alliance, kinship and reciprocity. These mechanisms involved mutual obligation, interpersonal relations and kinship. Both the Saulteaux and Treaty Commissioners now shared a mutual relationship in the form of a symbolic kinship to the Queen, which enabled what Historian Jean Friesen has described as reciprocal obligations.
>
> Morris forwarded the Chiefs' complaints of June 21, 1875 to the Minister of the Interior on July 3, 1875. Chief Sakatcheway (also known as Perrot) asked for "cattle, tools, implements, uniforms and flags." Morris relayed this information to Provencher, who said he had sent them to Indian Agent Pither. Morris wrote:
>
> > …
> > It is essential that the stipulations of the Treaty be exactly observed and the carrying out of the same should occupy the whole time of the agent charged therewith…
>
> [Emphasis added; footnotes omitted.]

[950] In August 1875, the federal government appointed Surveyor General Dennis ("Dennis") to complete negotiations for the selection of reserves for the Rainy River and Lake of the Woods bands. (Chartrand report, Ex. 60, p. 214; Lovisek report, Ex. 28 at p. 149.) Lovisek's report, Ex. 28, contains the following at pp. 149-150:

> The Surveyor General of the Dominion of Canada J. Dennis arrived in Fort Frances on September 10, 1875 to address a number of treaty related issues which had arisen since 1873. As part of his meetings with the [Ojibway], on October 1, 1875, Dennis entered into a detailed agreement with the Rainy River Chiefs on the extent and location of their eight reserves. This agreement is often referred to as the Rainy River Reserve Agreement. … The October 1, 1875 Rainy River Reserve Agreement was signed by several [Ojibway] signatories, some of whom had endorsed the Morris Document. But the signatories to the Rainy River Reserve Agreement signed with the marks of their totems. ...

[951] Lovisek emphasized the importance of a handwritten note on the agreement in her evidence on October 22, 2009 at p. 94 (adopting Ex. 1, vol. 8, tab 367) as follows:

> It is understood that the fishing at the rapids opposite this Reserve is to be open to the Indians generally.
> …
> The fishing opposite this Reserve for the Indians generally.
> It is understood that the fishing in the Rainy River opposite this Reserve is for the Indians generally.
>
> It is understood that the government will have the right to construct canal locks or other public works to pass the Long Sault rapids - should they so desire in such case the Indians to be duly notified and if the fisheries should be destroyed thereby, the Indians to be fairly dealt with in consequence.
> [Emphasis added.]

[952] In his report, Ex. 60, Chartrand mentioned the Rainy River Reserve Agreement at pp. 222-223:

> … The agreement confirmed the establishment of different reserve lands and contained provisions regulating the geographic location of Aboriginal fishing activity outside reserves. The agreement was signed on October 1st, 1875, between J.S. Dennis (Surveyor General at the Department of the Interior) and seven Rainy River area Chiefs and leading Band Representatives.
>
> …The Rainy River area had historically been subject to relatively dense Ojibway occupation, as it featured regionally important sturgeon fisheries and rich soil permitting the development of a traditional Ojibway agricultural economic base (cf. section 6.1). No fewer than seven Bands were established along Rainy River following Treaty 3. …
>
> Specific fishing areas outside reserves were … designated as "open to the Indians generally" … The agreement stipulated in such an eventuality [construction of public works] the Indians would "be duly notified and if the Fisheries should be destroyed thereby the Indians to be fairly dealt with in consequence."
> [Emphasis added. Footnotes and references omitted.]

[953] Lovisek gave evidence that Dennis' promises in the Rainy River Reserve Agreement are consistent with an intention by the federal government to set aside sturgeon fisheries in the Rainy River area for exclusive Indian use. She commented that the federal government not only recognized Treaty 3 Ojibway rights to fish within their reserves, but also agreed to protect sturgeon fishing only by the Indians in areas opposite several of the reserves. The government also promised that if public works adversely affected Indian fisheries, it would compensate the Ojibway. Even in the area of the Dawson Route, where the Ojibway had understood and accepted there could be negative impacts on their fishing by reason of Euro-Canadian uses, the federal government undertook to compensate the Ojibway for such negative impacts.

[954] All the expert witnesses agreed that post-Treaty, if the Ojibway had concerns about non-fulfilment of Treaty terms, Canada expected them to direct their complaints to Ottawa through the Indian Agents. Chartrand said on January 19, 2010 that Canada insisted they use the agency system as a "one-stop shopping place" for resolution of their complaints, whether the issue to be resolved had arisen on or off-reserve:

> Q: … what we see consistently is these complaints are directed to the federal government… the federal government also actively started to say to the Indians, deal with the agent, don't start writing

> us letters in Ottawa, don't come travelling to Ottawa, you know, don't go outside the framework we've created?
> A: It wasn't started. It was a -- very much a continuation of policy …in force …prior to the treaty agreement when, I believe in 1872, Chief Blackstone attempted to travel to Ottawa, and in the end, Wemyss Simpson ended up taking certain steps to ensure that he never left Prince Arthur's Landing. … [I]f you're asking me … were there directives transmitted down the chain of communication to the Ojibway emphasizing that there was a proper chain of communication to be followed, the answer is an unqualified yes.
> Q: Right. And that included with respect to matters related to hunting and fishing rights off-reserve?
> A: I would tend to think, and I don't claim to have conducted exhaustive research on every issue that the Ojibway were ever faced with, but I would tend to think that chain of communication would have been insisted on in regards to any matter of life on reserves or life of the Ojibway.
> Q: And sorry, it's the on-reserve part that I want to deal with. It's not just on-reserve, it's also with respect to treaty rights issues, hunting rights issues, fishing rights issues?
> A: Yes, that's correct."
> [Emphasis added.]

[955] Chartrand observed (January 21, 2010 at p. 65) that the Ojibway consistently framed their complaints in terms of the relationship. They expected their Treaty partner to address their complaints and have due regard for their welfare.

[956] Dennis reported to Ottawa that the Chiefs had generally taken exception "to the manner in which they had been treated, so contrary to what they had been led to expect." In a letter dated October 1, 1875, he quoted Chief Powawassan and two other chiefs verbatim as follows:

> We wish to thank the Minister for sending you to see us, not alone because of the result of settling our reserves but because representing the Minister, you have been able to give us the assurance that everything will be done for us that …we are entitled to under the Treaty. We hope … nothing was said … displeasing to the Government."

[957] Lovisek gave evidence on November 18, 2009 at p 71 that at an Indian Council on October 3, 1875, Dennis said, "This is the proper way for the Indians to do if they have any complaint, and you may depend upon it that when you bring forward complaints in this way, if they prove to be well-grounded, the Government will listen to your wants and will remedy all reasonable grievances. You have proffered your complaints in a most courteous way and I shall inform the Minister accordingly."

[958] In his Annual Report to Indian Affairs dated October 30, 1875 (Ex. 4, p. 282-283), Provencher, the Indian Commissioner, noted that the previous year, Treaty 3 Indians had received revenue from hunting and fishing exceeding $25,000. They had reserved to themselves the right of selecting their Reserves and were making many demands. He proposed that the Government educate them on the true meaning of the Treaty. [Emphasis added.]

[959] **1876.** In March 1876 in a speech to the Commons, Sir John A. Macdonald, then the Leader of the Opposition, on the introduction of the *Indian Act*, said: "The Bill is a very important one. It affects the interest of the Indians who are especially under the guardianship of the Crown and of Parliament." [Emphasis added.]

[960] After Ontario pressed its claim in the Boundary Dispute to lands as far west as the forks of the Saskatchewan River, Prime Minister Mackenzie wrote a letter to Premier Mowat in

September 1876: "I think it is likely that we can agree to the western boundary, but it is utterly useless to talk of compensation for something upon a suppositious claim west of that. That cannot under any circumstances be even spoken by us."

[961] **1877.** Lovisek's report (Ex. 28) contains the following at pp. 152-3:

> Indian Agent Amos Wright informed E. A. Meredith Deputy Minister of the Department of the Interior, on November 17, 1877, that he had met with Chief Blackstone who said that they were entitled to cattle as promised by the Government at the time of the treaty. Blackstone also stated that:
>
> > they were promised the privilege to travel free, on the Government steam boats, and teams on the Dawson route, and that he, and, also his people, should be furnished with clothing, annually.
>
> Indian Agent Wright dismissed Chief Blackstone's claims:
>
> > These claims seemed to me so absurd that I did not think it advisable to trouble the Department with the matter however, I stated to them distinctly, that the Government in dealing with the Indians, would, confine themselves strictly to the terms of the Treaty.
>
> ... Since Wright was not present at the Treaty 3 negotiations, his dismissal of Chief Blackstone's grievances were without foundation.

[962] On December 29, 1877, a Rainy River Chief addressed a petition (Ex. 1, Vol. 8, tab 400) to Morris' successor, the Honourable Mr. Cauchon, asking him to use his influence with the Government at Ottawa.

[963] Lovisek's report (Ex. 28) contains the following at pp. 153-154:

> The Saulteaux continued to understand that it was the Dominion Government or the "Government at Ottawa" with whom they had entered into a reciprocal relationship and with whom they should register their complaints about the treaty. On December 29, 1877, Chief Kishekoka of Rainy River, under instruction by the chiefs of Rainy River and Northwest Angle wrote to Joseph Edouard Cauchon about: "some grievances that we have and hope that you will use your influence for us with the Government at Ottawa."

[964] **1878**. On January 3, 1878, Pither wrote to Meredith, Deputy Minister, informing him of the difficulties the Ojibway would experience were they required to stay on their reserves in order to receive annuity payments. Lovisek quoted a portion of that letter in her report (Ex. 28) at pp. 153-154:

> I have always impressed on the Indians that any provision made to them by persons authorized by the Government would be kept and have told them to keep faithfully all promises made on their part of the Treaty- and up to this time I have had no fault to find with the Indians under my charge.
> [Emphasis added; footnotes omitted.]

Events, 1878 - 1887

The Boundary Dispute

[965] Vipond gave evidence that for Premier Mowat and for Ontario, the outcome of the Boundary Dispute was far from a trivial matter. Ontario had significant political and economic incentives to seek to have its boundary determined to be as far west as possible. Any lands it could establish to be within its boundaries would provide it with revenue. In an era before

income taxes, the sale and licensing of Crown lands was the engine and fuel of provincial ambition. Mowat's strategy, dubbed "Empire Ontario," was to maximize Ontario's area and exploit the resources in the less populated areas of the province for the benefit of the metropolis, Toronto.

[966] Vipond's report, Ex. 123, contains the following:

> At pp. 13-14
> The basic principle of forest management in Ontario, both pre- and post-Confederation, was that forests were for rent but not for sale. For various reasons, this basic policy… for Ontario… produced "an extraordinary financial bonanza throughout the last two decades of the nineteenth century." As Nelles notes, "(w)henever the provincial treasurer required additional revenue to meet his obligations…, the Commissioner of Crown Lands merely auctioned off another batch of timber limits." … Timber rights…were so lucrative … that, according to Nelles' calculation, between 1867 and 1899 timber fees accounted for approximately 30% of the *total* revenue of the government of Ontario. …
>
> With so much at stake, Ontario guarded its right to manage its forests vigilantly – even when this provoked controversy with the federal government. …
>
> At pp. 16-17
> **Political:** …The exploitation of natural resources generated revenue that could be used to develop the sort of infrastructure – roads, schools, cheap power – that would generate more revenue. This was the essence of Ontario's strategy to build a modern industrial state. Yet as revenue needs grew, so grew the need to enlarge the hinterland from which resources could be extracted. Thus, for Oliver Mowat, who served as premier from 1871-1896, extending Ontario's boundaries beyond the limits established in 1867 was absolutely essential to the future health and prosperity of Ontario. …
> …
> Extending Ontario's boundary was not simply about economic development, however. There were at least two political motivations as well. First, by controlling more resources over a broader territory, Mowat's Liberals believed they would build enduring political support for their party and government. … Control over land and natural resources simply increased the opportunities for dispensing patronage enormously.
>
> At p. 18:
> These imperatives, at once economic and political, help to explain why the dispute over the placement of Ontario's western and northern boundaries became one of the signature struggles between Mowat's Ontario and Macdonald's Ottawa. …
> [Footnotes & references omitted.

[967] After three days of hearings in August 1878, the Boundary Commission decided that the west/east boundary between Ontario and Canada was about at the westerly limit of the Treaty 3 lands. The Disputed Territory, roughly 2/3 of the Treaty 3 lands, was held to be in Ontario. It was a big victory for Ontario. There was a huge rally in Niagara Falls and parades were held to celebrate in Toronto, London and Bothwell.

The Conservatives are Elected

[968] Before either Ontario or Canada could act on the decision of the Boundary Commission, Macdonald's federal Conservatives won a federal election and took office again on October 17, 1878.

[969] Chartrand's report, Ex. 60, contains the following at p. 330: "Upon returning to power, John A. Macdonald led the new Dominion Government's resolve to refuse to ratify the boundary award." [References omitted.]

[970] **1879.** In March 1879, after its repeated requests that Canada pass legislation to implement the Boundary Award had gone unanswered, Ontario passed *An Act respecting the Administration of Justice in the Northerly and Westerly parts of Ontario* and appointed two stipendiary magistrates to superintend its new territory: E.B. Borron in the northern portion (the District of Nipissing), and W.D. Lyon in the western section (the District of Thunder Bay.) (Chartrand's report, Ex. 60 at p. 332.)

[971] The Dominion Government continued to ignore Ontario's actions (Chartrand's report, Ex. 60 at p. 332.)

[972] **1880.** In a letter dated January 20, 1880, the federal Minister of Justice wrote, "[A]s the Parliament of Canada has not yet legislated upon the subject, the question of the boundaries remains, as a matter of law, unsettled."

[973] Saywell's report, Ex. 137-2, contains the following at p. 14:

> When the matter arose in the Commons, Macdonald charged that … the arbitrators had determined not the "true" but the "best line they could under the circumstances." He would not accept a decision by a "bad tribunal," only one member of which was an expert "in the construction of Statutes," to "give away territory equal to any great European kingdom" in "utter disregard of the interests of the Dominion."

[974] Chartrand's report, Ex. 60, contains the following at p. 218: "Between 1875 and 1880 most Treaty 3 reserves, including some located in the more remote parts of the Treaty territory, were selected although several reserves remained to be surveyed." [References omitted.]

[975] Chartrand wrote in Ex. 60 at pp. 332-333:

> By early 1880, John A. Macdonald was also … beginning to articulate an alternative challenge to Ontario's ability to administer lands and resources contained within the territory awarded by the Board of Arbitration. In February 1880, the House of Commons returned to debating the merits or validity of the 1878 decision. On February 16th, a Member of Parliament inquired whether the government intended in the current session to "propose a measure ratifying the award on the subject of the boundary between Canada and Ontario." John A. Macdonald provided the response for the government, bluntly stating "It is not the intention of the Government to propose any such measure."
>
> The House of Commons returned to the boundary issue on February 18th, in a debate … pertaining to a bill … requesting the House of Commons to affirm the 1878 arbitration award. A motion was immediately introduced by Simon J. Dawson (then M.P. for Algoma) to have a parliamentary committee appointed to review the evidence presented in 1878 to the Board of Arbitration and re-examine the basis and validity of its decision. This was followed by several speeches in which various members of the House debated key aspects of Dominion and Ontario arguments in the boundary case. At the end of the debate, John A. Macdonald explained his support for reviewing the basis of the award:
>
> …
>
> > The utter disregard of the interests of the Dominion which are involved in this matter is one that calls for the most serious consideration of this House, as well as for the most serious

> consideration of the people in this country. The Province of Ontario after all, perhaps, will not get as much as it expected, because a great portion of the Indian title to the land is not extinguished; while, in regard to those portions that are extinguished, if the award was consistent, they have the right of sovereignty, and the title belongs either to the Indians or to the assignee of the Indians, which is the Dominion Government.
>
> [References omitted.]

[976] **1881.** By 1881, the CPR had been completed north of the Lake of the Woods.

[977] In the Disputed Territory, pending a legal determination of Ontario's boundaries, there was chaos on the ground. As early as February 1881, an Ontario magistrate had written: "There is no civil court to collect debts, no land agent to locate settlers, no registry office to record deeds, no timber agent to protect the forest." (Saywell report, Ex. 137-2, pp. 20-21.)

[978] Meanwhile, Canada passed legislation extending the boundary of Manitoba eastward. Saywell's report, Ex. 137-2, contains the following:

> At p. 17
> [O]n 7 March 1881 … the Manitoba boundary bill was introduced … Sir Alex Campbell stated that the new boundary proposed on the east "will extend to the west limit of Ontario, wherever that may be…" and a map indicated "what the boundary line between Ontario and Manitoba will be, as the present Government of the Dominion believe the law establishes it." …
> …
> At pp. 18-19:
> During the heated debate in the Commons on 18 March 1881, Macdonald declared that … as "trustees for the Dominion" he believed the only way to settle the case was an appeal to the Judicial Committee.

[979] **1882.** During the federal election campaign of 1882, Macdonald, speaking of the Boundary Dispute, was quoted as follows:

> The land belonged, so far back as the grant of Charles II could give it, to the Hudson's Bay Company, but it was subject to the Indian title. They and their ancestors had owned the lands for centuries until the Dominion Government purchased them. These lands were purchased, not by the province of Ontario – it did not pay a farthing - but by the Dominion … Even if all the territory Mr. Mowat asks for were awarded to Ontario, there is not one stick of timber, one acre of land, or one lump of lead, iron or gold that does not belong to the Dominion…

[980] The *Globe* characterized Macdonald's statement as a "flimsy piece of sophistry." Mowat decided to test it in court, declaring "There can be no war without two parties." He said that while he was just as attached to Confederation as anyone, "if [Ontario] could only maintain Confederation by giving up half of [its] Province, then Confederation must go." (Saywell report, Ex. 137-2, pp 19-22, 33.)

[981] **1883**. In 1883, at Rat Portage (now Kenora), there were two municipal governments, two legislatures; two sets of courts, two liquor laws, and three police forces. Saywell's report (Ex. 137-2) contains a newspaper report from one day in July 1883, at pp. 20-21:

> Dominion Commissioner McCabe with two policemen, Ontario Magistrate Burdon with twenty-five policemen, and Stipendiary Magistrate Brereton with fifteen policemen acting on behalf of Manitoba, have been arresting each other all day; and the people have been siding, some with one party and some with another, to the imminent danger of the peace and of loss of life.

[982] **1884**. On August 11, 1884, the JCPC affirmed the 1878 Award of the Boundary Commission.

[983] Saywell's report (Ex. 137-2) contains the following at p. 28: "[T]he Judicial Committee decided that the western and northern boundaries were as the 1878 Award had determined. But absent Dominion legislation the Award was not binding. [Emphasis added.]

[984] Just as he had claimed in the Commons in February 1880 and during the 1882 federal election campaign, Macdonald continued to claim ownership of the Disputed Territory, even after the 1884 JCPC affirmation of the 1878 Boundary Commission, on the basis that the 1873 Ojibway surrender had passed title to the federal government. Canada continued to purport to exercise jurisdiction, in part, by issuing timber licenses to the St. Catherine's Milling Company (a company with close connections to the Conservative party.) Chartrand's report, Ex. 60, contains the following at p. 341:

> However, the final proviso by the JCPC regarding the need for Imperial legislation, left an opening by which John A. Macdonald could pursue an alternate strategy to attempt to retain control over natural resources in the former 'disputed territory'. As Armstrong put it:
>
> > This decision, however, was not binding until ratified by legislation, and Macdonald steadfastly refused to act ... In the end, Mowat was forced to launch a suit against the St. Catherine's Milling Company which was cutting timber in the disputed area under a federal licence.
>
> [References omitted.]

[985] Lovisek's report (Ex. 28) at p. 169:

> On September 30, 1884, Deputy Superintendent General of Indian Affairs, Lawrence VanKoughnet informed Sir John A. MacDonald by memorandum based on information received from the Indian Agent, McPherson, about game laws being applied to the Indians in Lake of the Woods (Keewatin) and Manitoba. VanKoughnet described the Indians in the District of Keewatin as:
>
> > dependent altogether upon the chase for their living. If they are restricted from supplying the wants of themselves and their families with game during the close seasons they will have to be fed by the Department, and this system has never been introduced within the precincts of the Province of Manitoba as formerly constituted, nor the District of Keewatin. The Indians at present are fed by the forests and rivers and that which they raise in their gardens and farms.
>
> [Footnotes omitted.]

[986] **1885**. In 1885, Ontario commenced litigation against the St. Catherine's Milling Company seeking an injunction and damages for illegally cutting timber on lands owned by Ontario.

[987] Saywell's report, Ex. 137-2 contains the following at p. 34:

> Early in 1885, Mowat charged that the Company had cut timber illegally on Ontario lands and sued for an injunction and damages. The company had close connections with the Conservative party, and Mowat must have realized that Macdonald would either be a party to the suit or use the company as the Dominion's proxy.

[988] The experts disagreed on the use to be properly made of Ojibway complaints made years after the Treaty was signed.

[989] Lovisek wrote in Ex. 28

> At p. 96:
> This memory record does not appear to have been transcribed to paper. The treaty terms memorized by the anonymous Indian Reporter were likely transmitted orally to other Saulteaux and may have been recorded indirectly in the form of written complaints, some of which survive in the historical record.
>
> At p. 145:
> The historical record contains a number of recorded grievances or complaints from the [Ojibway] about the non fulfillment of the terms of Treaty 3. These complaints routinely refer to restrictions on hunting and fishing, especially after the establishment of commercial fisheries in Lake of the Woods c. 1880s and after Ontario imposed game and fish regulations. From this corpus of historical records it is possible to access if partially, the understanding of the [Ojibway], and sometimes of both parties, particularly with respect to the taking-up clause.
>
> At pp 163-164:
> Although the Treaty 3 Indian Reporter's memory may be lost to history, the substance of what the Saulteaux remembered and understood remained alive and was recorded in their complaints.
> [Emphasis added; footnotes omitted.]

[990] Chartrand gave evidence on January 19, 2010 at p. 115 that as time passed, and the Ojibway were subjected to outside influences, their recollections became less and less reliable. He used the term "feedback" to describe that phenomenon.

[991] There was disagreement among the experts as to the effect of feedback in Ojibway communications recorded in English after 1873. As the Ojibway could not speak English, their communications were subject to filtering and editing by the scribe, often the Indian Agent. Therefore, all such communications have to be viewed with caution.

[992] Further, as time passed and the Ojibway learned to read and write, their own recollections could have been affected by failing memories and information gained from learning to read and write, e.g., information gained from reading the Treaty.

[993] In the mid-1880s, a clause forbidding ceremonials was inserted into the *Indian Act.* Potlatch laws, introduced in 1885, were used to suppress traditional ceremonial practices central to maintaining oral tradition. They seem to have restricted the Midewiwin as well, preventing the Ojibway from gathering in the usual areas. Federal legislation forbidding the Ojibway to practice their traditional ceremonies or even to speak their own language disrupted the chain of oral history handed down from generation to generation.

[994] Von Gernet gave evidence about attempts made to stifle "Indianness," which in turn would have had the effect of hampering the passing on of oral tradition. Von Gernet's evidence on December 9, 2009 contains the following:

> Q. And particularly given the Potlatch Laws, which notionally on their face didn't apply to them, but were de facto applied to them, they weren't carried on as openly either?

> A. Yeah, I think there was a general government tendency to frown upon any activities that were considered to be pagan, because they were an impediment to the civilization program they were pushing.
> Q. Right. Those activities tended to keep the Indian Indian rather than getting out of the way of them becoming white, so to speak?
> A. Yes.
> Q. And so again, those occasions would provide less of an opportunity for the passing on of oral traditions; is that fair?
> A. I think for the most part, you're correct in suggesting, if I hear you correctly, that the imposition either through coercion or subtle manipulation by -- on the part of the government of a certain civilization program, I think, contributed to an overall reduction in the ability for Aboriginal peoples to transmit their traditional knowledge from generation to generation.

[995] Lovisek gave evidence on October 20, 2009 about the effect of the diminishment of the sturgeon fishery caused by commercial fishing in the Lake of the Woods and Rainy River areas and the introduction of the potlatch laws, at p. 71

> Q. Now, what ultimately happened to the Midewiwin society and to the Grand Council?
> A. … [S]everal things happened. In… the mid-1880s … a clause was inserted into the Indian Act which forbade ceremonials, especially ceremonials that involved dancing or giving away things. And although it was directed initially at the potlatch and the sun dance, it seemed to have captured the Midewiwin as well since the Indian agents were enforcing that in the Treaty 3 area. …this… restricted the Ojibway from gathering in the usual areas that they would for the Midewiwin.
>
> The second thing that happened was that their sturgeon fisheries were subject to depletion as a result of the introduction of commercial fishing in the 1880s, particularly by American commercial fisheries. And this affected the Lake of the Woods runs and those that ran into the Rainy River.
>
> So this reduced the necessity on the part of many to come to the Rainy River to engage in ceremonies which they could no longer engage in and also to participate to the same extent in the sturgeon fishing.

[996] Whether or not it is of marginal relevance to understanding and intent in 1873, evidence of developments in the late nineteenth and the twentieth century is relevant to other issues here, including the continuing importance of Harvesting Rights to the Ojibway and the content of the obligations inherent in the Honour of the Crown.

[997] **1888**. As noted earlier, Dawson, by this time a federal MP for Algoma, pointed out in a speech in the House of Commons in May 1888 that "it was stipulated that the Indians shall have the right of fishing all over the territory as they formerly had … that they were to be at liberty to hunt and fish in every direction." Prime Minister Macdonald promised to have his "Minister of Fisheries" look after this matter.

[998] In his post-Treaty recollections of discussions concerning the Harvesting Clause, Dawson made no mention of any limitations on Harvesting, either by regulation or "taking up" by Canada. Although Dawson was specifically referring to fishing, allusions to harvesting included hunting, fishing, trapping and wild rice harvesting.

The *St. Catherine's Milling* Case

[999] The *St. Catherine's Milling* case was heard between the spring of 1885 and late 1888 by eleven judges in three Canadian courts and the JCPC in England.

[1000] Chartrand set out some background in his report (Ex. 60) at p. 345:

> *St. Catherine's Milling* was a direct outcome of the Ontario-Dominion boundary dispute, as subsequently transformed into a jurisdictional dispute. The Ontario boundary location question had evolved between 1869 and 1884, and had been settled by the JCPC, without reference to the matter of Indian title or to Treaty 3:
>
> > The Boundary Dispute was not begun as an assault on Aboriginal rights; rather, these rights were dragged into the protracted fray …
>
> [References omitted.]

[1001] Saywell gave evidence (April 6, 2009 at p. 100) that even as the *St. Catherine's* case was being heard, the judges involved recognized that the language of Treaty 3, i.e. reference to "taking up" by Canada, could raise further issues were Ontario to be held to be the owner of the land.

[1002] The JCPC's decision in *St. Catharine's Milling*, affirming Ontario's beneficial ownership of the Disputed Territory, was released on December 12, 1888.

Negative Fallout Affecting the Treaty 3 Ojibway after the Release of the *St. Catherine's Milling* Decision / Negative Repercussions of the Boundary Dispute on Treaty 3 Ojibway

[1003] **1889.** On January 17, 1889, a few weeks after the *St. Catharine's Milling* decision was released, Ontario Premier Mowat wrote to Dewdney, the federal Minister of the Interior responsible for Indian Affairs (Ex. 1, Vol. 12, tab 565), proposing that in the Disputed Territory, the Harvesting Clause in Treaty 3 be interpreted in the manner Ontario is now urging upon this Court:

> By the North West Angle Treaty No. 3 (3rd October '73) it was provided that the Indians would have the right of hunting and fishing throughout the surrendered territory subject to regulations by the Dominion Government 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.
> [Emphasis added.]

[1004] I note that Mowat, in mentioning the wording of the Harvesting Clause in the Treaty, omitted to include the key words in respect of "taking up," namely "by the Dominion Government."

[1005] The experts disagreed as to Mowat's understanding of Ontario's legal position re "taking up" under the Treaty, although they agreed that Ontario and Canada agreed to negotiate re treaty allocation and "taking up" by Ontario.

[1006] Ontario as owner challenged Canada's jurisdiction to establish reserves on Ontario's lands without its consent.

[1007] Morris died in October 1889.

[1008] On November 1, 1889, Tilton, Deputy Minister of Fisheries at the federal Department of Fisheries and the Deputy Supt. General Indian Affairs at the federal Department of Indian Affairs arranged for Indian officers at Rat Portage to be appointed as special fishery overseers, clothed with magisterial powers under the *Fisheries Act* to enforce the Fisheries Law and Regulations and to prevent fishing occurring, to the detriment of the Indians at Lake of the Woods on the Rainy River and at Lac Seul.

[1009] **1890**. By the 1890s, most of the Chiefs who had signed Treaty 3 in 1873 had died.

[1010] Lovisek's report (Ex. 28) contains the following at pp. 154-155:

> …Indian Agent E. McColl had received so many complaints or petitions from Chief Mawedopenais that McColl was relieved to report his and the death of other treaty chiefs in the 1890s.
>
> …The Indian Agent at Rat Portage [Kenora] Agency reported complaints by the Lake of the Woods chiefs in 1890:
>
> > …
> > In July last I attended the annuity payments to the Indians of the Lake of the Woods, at Assabaskashing. Their spokesman, Chief Conducumewininie, came forward and, after the usual handshaking, addressed me as follows: "When the treaty was made with us at the North-West Angle we saw the lips of the Government moving, but now they are closed in silence, and we do not know what is done in the councils of our mother, the Queen. We see some one fishing out in the lake. Who is he and where does the evil spirit come from? Is he a big-knife (an American) from the United States? We wish our children and children's children to live, but he is destroying their food, and they will die of hunger. When we gave up our lands to the Queen we did not surrender our fish to her, as the Great Spirit made them for our special use.

[1011] Lovisek said that the Ojibway 1890 references to "the lips of the government moving" and to "the Councils of our Mother the Queen" were references to the Dominion government. "When we gave up our lands to the Queen," they were referring metaphorically to her.

[1012] Saywell's report (Ex. 137-2) contains the following:

> At p. 36:
> … the intensely personal Macdonald-Mowat feud which had been waged for a quarter of a century was over. Not only had Mowat won every battle with the federal government, but by 1890 Macdonald was old and tired, obsessed with the politically divisive nation –threatening controversies around the *Jesuit Estates Act*, the Manitoba School question, and finally the reciprocity-loyalty cry election of March 1891. The old disputes with Ontario were left in the capable hands of John Thompson, one-time premier of Nova Scotia… In 1885 he had become minister of justice and by 1890 was clearly the heir-designate. Although it is dangerous to speculate, Thompson seems to have felt that with the battle over the field should be cleared of all debris.
> …
> At pp. 38-40:
> … it was not until 28 November 1890 that Thompson met with Mowat and other Ontario ministers … it seemed that Mowat was still wary of the federal government. Of the 24 matters which were

> discussed … those concerning Indian Reserves and treaties were cast in the language and form of a draft agreement:
>
> 3. Future Treaties with Indians for surrendering their rights to require the concurrence of the Province in which the lands lie by a Joint Commission. Mr. Mowat proposes that an Order in Council to that effect be passed by the Dominion and confirmed by [an] Act of Parliament….
>
> (1) The Ontario Government shall be a party to the selection of Reserves hereafter.
>
> (2) The Reserves are to be confirmed and established **according as the Treaty stipulates**.
>
> (3) A Joint Commission for the two Governments (Canada and Ontario) to be appointed to settle and determine any questions outstanding as to the Reserves, according to the rule stated in paragraph (2)
>
> …

Chartrand prefaced Item 4 with the comment, "The participants also agreed that responsibility for fishery regulations in the Treaty 3 territory (excluding waters forming parts of Indian Reserves) would be transferred from the Dominion to the Ontario government:"

> 4. An Order in Council to be passed by the Dominion Government providing that the Regulations as to fishing in the territory covered by the Morris Treaty as thereby provided, other than on the Reserves for Indians, shall be made by the Government of Ontario as respects the lands of the Province, without prejudice to the jurisdiction of the Dominion Parliament with respect to Fisheries under the *B.N.A act*.
>
> 5. The Fisheries Question/ A case to be settled for the Courts, Mr. Mowat is to have [a] draft made to be submitted for consideration. This requires [the] concurrence of Quebec.

[1013] The *St. Catherine's* decision had either highlighted or created a problem. Although Canada had exclusive jurisdiction to negotiate treaties, including making promises to create reserves, unless reserves were excepted at the time of the surrender in the metes and bounds description of the lands being ceded, the province that owned the land could object to the creation of reserves by the federal government on the basis that those reserves were being created on provincially owned land.

[1014] Although at the time the Treaty was signed, the Ojibway had chosen the lands they wanted for reserves, these were not excepted from the lands included in the metes and bounds description in the Treaty. [Reserves chosen in advance had been excepted from the lands included in the Robinson Treaties.] After *St. Catherine's Milling* was decided, Ontario took the position that it had absolute ownership of all the Treaty 3 lands, i.e., they had not consented to the use of its lands for the creation of the reserves. Ontario took the position that the federal reserve allocation that had already occurred years earlier was invalid, since Ontario had not expressly consented to it.

[1015] As mentioned earlier, reserves including gardens and sturgeon fisheries had been a key consideration in the making of Treaty 3. During the 1873 negotiations, Canada had specifically promised to protect existing Ojibway gardening and sturgeon fish areas along the Dawson Route by including them in reserves to be set aside for their own exclusive use. Canada had effectively

kept that promise in allocating the reserves that it had and in making the Rainy River Reserve Agreement.

[1016] Now, more than 15 years after the promises had been made, Ontario was calling into question those reserve allocations. The Ojibway were not advised, consulted or asked to make representations during the ensuing negotiations between Canada and Ontario, just as they had not been consulted or represented during the *St. Catherine's Milling* litigation.

[1017] After *St. Catherine's Milling*, Ontario put Ojibway Harvesting Rights in jeopardy, taking the position that as owner of lands in Ontario, it could extinguish their Treaty Harvesting Rights on lands simply by authorizing their use.

[1018] Chartrand's report, Ex. 60, contains the following at pp. 357-359:

> …On December 17, 1890, Lawrence VanKoughnet (Deputy Superintendent General) presented his assessment of the principles established at the November 28th conference to his superior, Edgar Dewdney (Superintendent General). Respecting the Treaty 3 issues quoted above, VanKoughnet indicated he essentially approved the principles agreed to, as follows:
>
> > … The proposition contained in (3) for the appointment of a joint commission to settle any questions as to the establishment of the Reserves according to the rules laid down in paragraph (2) appears unobjectionable, provided that, as stated in clause (3), the Reserves as at present selected and surveyed be not interfered with, except some good reason presents itself for intervention.
>
> … However, VanKoughnet proposed that Lake of the Woods fisheries be reserved for the exclusive use of Treaty 3 Indians, on the grounds that these fisheries were vital to the basic subsistence of signatory bands and that severe interference by non-Aboriginal fishermen could endanger the well-being of Aboriginal communities:
>
> > With regard to the subject of clause (4), namely that the fishery regulations be made by the Ontario government as respects all the territory belonging to that Government in Treaty 3 outside of Indian reserves, the undersigned considers that it would be well if such power were vested in the Local Government, on the understanding, however, that as regards the fisheries of the Lake of the Woods, they should be reserved for the common use of the Indians of Treaty 3, as from this Lake they have always been in the habit of deriving their principal sustenance, and, should they be excluded therefrom, or should other fishermen be allowed to establish fisheries thereon, it would in either case prove most disastrous to the Indians.
>
> [Emphasis added; references omitted.]

[1019] That proposal was later replaced with one that exclusive fishing rights to waters between headlands adjacent to reserves be secured to the Indians. A provision to that effect was included in the 1891 Legislation but ultimately was not insisted upon by Canada. [The provision was removed in 1915.] (Chartrand's report, Ex. 60, at p. 358.)

[1020] In his Report, Ex. 60, Chartrand quoted at p. 224 from David T. McNab, *The Administration of Treaty 3: The Location of the Boundaries of Treaty 3 Indian Reserves in Ontario, 1873-1915,* as follows:

> The idea of headland to headland water boundaries for Treaty 3 Indian reserves in Ontario first appeared in the legislation of 1891 and then again in the 1894 agreement in the context of this

> fisheries question, presumably as a panacea to retain some of the fishery in Lake of the Woods and some areas for the growing and harvesting of wild rice as food sources for the Ojibwa. By extending the existing shoreline boundaries to a line, drawn from headland to headland, the Indian reserves would be greatly increased in size and the Indian bands would have exclusive control of the fishery and wild rice in that area.

[1021] Counsel for the Plaintiffs quoted the November 18, 1890 report (Ex. 1, Vol. 12, tab 588) of E. McColl, Superintendent of Inspecting Indian Agencies, reflecting that thus far, attempts to "civilize" the Ojibway were proving fruitless:

> Only two of the thirteen life chiefs appointed in this agency at treaty time in 1873 are now living. The death of Blackstone, Mawintopenesse –[Mawedopenais]… and other prominent chiefs has effectually broken the by chain of traditional pagan observances, which exerted such a baneful influence over their deluded followers in preventing them from adopting the enlightened habits of civilization.

[1022] In cross-examination on January 19, 2010, Chartrand commented on that passage as follows at pp. 33-37:

> Q. … the author …is expressing the hope that finally by getting these old pagan chiefs out of the way, progress towards enlightened western behaviour will be soon to be seen. Is that fair?
> A. Yes, certainly a very ethnocentric statement, very much in line with what at the time was the general long-term goal of the Department of Indian Affairs, essentially pressing Aboriginal peoples towards cultural assimilation. And certainly the passing away of what appear to be a generation of key traditional religious leaders was seen as an opportune moment in implementing and in furthering cultural assimilation.

[1023] Canada and Ontario agreed that confirmation of the Treaty 3 reserves was to be the subject of further negotiations at a federal/provincial conference to be held in November 1890.

[1024] Chartrand in his report, Ex. 60, wrote at pp. 356-357:

> The Treaty 3 related matters discussed and provisionally agreed to by the Dominion and Ontario representatives at the November 28th conference, were reviewed by federal and Ontario officials in December 1890 and January 1891. Following an endorsement of a tentative Dominion-Ontario agreement establishing procedures for settling outstanding Treaty 3 issues, the respective governments enacted parallel legislation in the spring of 1891 confirming the need to negotiate a binding agreement.

[1025] **1891**. There were further drafts of the Agreement. On April 13, 1891 Thompson sent comments to Mowat on a draft of "the proposed agreement" including the following:

> … (4), "<u>There should also</u>, I think, <u>be a stipulation by the provincial Government to confirm and secure to the Indians</u>, by all means in its power, all and any rights and privileges intended to be ceded to them by the Treaty and as to which confirmation by the Ontario Government or Legislature may be necessary or desirable, and <u>especially the rights and privileges in respect to hunting and fishing in the surrendered territory.</u>" [Emphasis added.]

[1026] Saywell's report (Ex 137-2) contained the following at pp. 38-40: "It would seem evident…that Mowat was not sympathetic to Thomson's concerns and rejected his proposed revisions. <u>The bill that went to the Assembly a week later</u> – on 21 April and was assented to on 4 May 1891 – <u>reflected neither</u>." [Emphasis added.]

[1027] In the negotiations with Ontario after *St. Catherine's Milling* was decided, Canada did not consult the Treaty 3 Ojibway.

[1028] The *Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario, Respecting Indian Lands*, to which I refer as the "1891 Legislation," was assented to on May 4, 1891.

[1029] The 1891 Legislation [Ex. 1, Vol. 13, tab 600 at pp. 174-175] not only gave Ontario the right to confirm reserves within the Disputed Territory and to be a party to any future treaties respecting lands in Ontario, but also contained the following Schedule relevant to the issues in this litigation:

SCHEDULE

Agreement made on behalf of the Government of Canada on the one part and on behalf of the Government of Ontario on the other part.

Whereas by Articles of Treaty made on the third of October, one thousand eight hundred and seventy-three, between Her Most Gracious Majesty the Queen, by Her commissioners the Honourable Alexander Morris, Lieutenant Governor of Manitoba and the North-West Territories, Joseph Albert Norbert Provencher and Simon James Dawson, on the one part, and the Saulteaux tribe of the Ojibbeway Indians, inhabitants of the country within the limits thereinafter defined and described, by their chiefs, chosen and named as thereinafter mentioned, of the other part, which said treaty is usually known as the North-West Angle Treaty, No. 3, the Saulteaux tribe of the Ojibbeway Indians and all other the Indians inhabiting the country therein defined and described surrendered to Her Majesty all their rights, titles and privileges whatsoever to the lands therein defined and described on certain terms and considerations therein mentioned:

And whereas by the said treaty, out of the lands so surrendered, reserves were to be selected and laid aside for the benefit of the said Indians: and the said Indians were amongst other things hereinafter provided to have the right to pursue their avocations of hunting and fishing throughout the tract surrendered, subject to such regulations as might, from time to time, be made by the Government of the Dominion of Canada, and saving and excepting such tracts as might, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by the said Government of the Dominion of Canada or by any of the subjects thereof duly authorized therefor by the said Government.

And whereas the true boundaries of Ontario have since been ascertained and declared to include part of the territory surrendered by the said treaty and other territory north of the height of land with respect to which the Indians are understood to make a claim as being occupants thereof, according to their mode of occupying, and as not having yet surrendered their claim thereto or interest therein.

And whereas before the true boundaries had been declared as aforesaid the Government of Canada had selected and set aside certain reserves for the Indians in intended pursuance of the said treaty, and the said Government of Ontario was no party to the selection, and has not yet concurred therein.

And whereas it is deemed desirable for the Dominion of Canada and the Province of Ontario to come to a friendly and just understanding in respect of the said matters, it is therefore agreed as follows:

1. With respect to the tracts to be, from time to time, taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract have been decided to belong to the Province of Ontario, or to Her Majesty in right of the said Province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, 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 said Government of Ontario; and that the concurrence of the Province of Ontario is required in the selection of the said reserves [Emphasis added.]

2. That to avoid dissatisfaction or discontent among the Indians, full enquiry will be made by the Government of Ontario as to the reserves heretofore laid out in the territory, with a view of

> acquiescing in the location and extent thereof unless some good reason presents itself for a different course.
>
> 3. That in case the Government of Ontario after such enquiry is dissatisfied with the reserves or any of them already selected, or in case other reserves in the said territory are to be selected, a joint commission or joint commissions shall be appointed by the Governments of Canada and Ontario to settle and determine any question or all questions relating to such reserves or proposed reserves.
>
> 4. That in case of all Indian reserves so to be confirmed or hereafter selected, the waters within the lands laid out or to be laid out as Indian reserves in the said territory, including the land covered with water lying between the projecting headlands of any lake or sheets of water, not wholly surrounded by an Indian reserve or reserves, shall be deemed to form part of such reserve, including islands wholly within such headlands, and shall not be subject to the public common right of fishery by others than Indians of the band to which the reserve belongs.
>
> 5. That this agreement is made without prejudice to the jurisdiction of the Parliament of Canada, with respect to inland fisheries under the British North America Act, one thousand eight hundred and sixty-seven, in case the same shall be decided to apply to the said fisheries herein mentioned.
>
> 6. That any future treaties with the Indians in respect of territory in Ontario to which they have not hitherto surrendered their claim aforesaid, shall be deemed to require the concurrence of the Government of Ontario.
>
> [Emphasis added.]

[1030] I note that the wording of the 1891 Legislation did not track Mowat's wording suggested in his January 17, 1889 letter to Dewdney ("shall not and do not apply to lands which are or which shall be the subject of grants, licenses, sales or leases.") It referred to lands "taken up" by Ontario.

[1031] Edward Blake, during his preparations for *Seybold* in 1902, was quoted as saying "the Province secured so much, and conceded so little, under [the 1891 Legislation.]" (Saywell report, p. 42.)

[1032] Sir John A. Macdonald died in June 1891.

[1033] **1892**. In 1892, the Indian Department was reorganized. By then, the CPR had been completed. The Dawson Route was no longer being used. The importance of First Nations issues in general and Treaty 3 issues in particular had dwindled.

[1034] In 1892, Ontario began passing fisheries legislation affecting the Disputed Territory. Although s. 12 of the provincial *Act for the Protection of Game and Fur-bearing Animals* stipulated that provincial game laws were not to apply to Indians killing game for their immediate use and were not to be "construed to affect any rights specially reserved to or conferred upon Indians by any treaty or regulation in that behalf made by the government of the Dominion of Canada, with reference to hunting on their reserve or hunting grounds or in any territory specially set apart for the purpose, Ontario's game laws were not interpreted to exempt off-reserve Indian hunting and fishing in Ontario. In other words, off-reserve Treaty Harvesting Rights were not recognized by Ontario.

[1035] To foster the Euro-Canadian commercial fishery, Ontario refused to license Aboriginal fisheries. (Chartrand, January 19, 2010 at p. 82.)

[1036] A letter dated July 18, 1892 (Ex. 1, Vol. 13, tab 608) addressed to the Superintendent of Indian Affairs, referred to a petition from the Chiefs of the Assabaskashing Agency. In Ex. 28, Lovisek referred to the following portion of that petition and opined it expressed their understanding of the identity of the parties to Treaty 3 and the promises made, at p. 155 as follows:

> …Now when the treaty was made, there were solemn promises that this allowance would last as long as an Indian live- At that time, the Governor was at the Angle and pointing towards the East, taking the name of the Queen to witness, he said that all the promises would be kept.
>
> Taking hold of a pan he said that we would eat of the same pan as brothers- How is it now that the Department is going back on these promises and upset down the pan?
>
> What is it that has turned up that things are to be changed?
>
> Now we want the pan to be turned up again and be brothers and receive what we were promised.
>
> Having kept faith with the Department it is only but fair that we should expect that they would keep it towards us. We have kept our part of the Treaty, is it not hard that the government should keep theirs?
> [Emphasis added; footnotes omitted.]

The 1894 Agreement: Ratification of the 1891 Legislation

[1037] Chartrand's report, Ex. 60, contains the following at p. 361:

> The draft text of the agreement included with the reciprocal legislation was accepted, without revisions, as the final text of the agreement, signed on April 16, 1894, by Thomas Mayne Daly (Superintendent General of Indian Affairs) and John Morisson Gibson (Ontario Secretary and Registrar…)

[1038] Pursuant to the 1891 Legislation, the 1894 Agreement, upon execution, had (and has) the force of federal legislation.

[1039] I shall deal with the legal and Constitutional issues arising out of *St. Catherine's Milling* later in these Reasons in the sections on Answers to Question One and Two.

[1040] Suffice it to say here that in the negotiations that ensued after *St. Catherine's Milling* was decided, Canada agreed that Ontario would be allowed to extinguish Harvesting Rights by "taking up" lands in the Disputed Territory.

[1041] The experts disagreed as to whether the legal effect of the federal 1891 Legislation was to confirm that Ontario already could "take up" lands within the Disputed Territory under the Treaty, or whether the 1891 Legislation amended the Treaty to allow that to happen.

[1042] Counsel for Ontario submitted that the 1891 Legislation recognized Ontario's "pre-existing" right to "take up" lands under the Treaty.

[1043] Counsel for the Plaintiffs submitted that Canada negotiated away Harvesting Rights to which the Ojibway were previously entitled under the Treaty and passed the 1891 Legislation taking them away without any notice to the Treaty 3 Ojibway.

[1044] Vipond gave evidence that the 1891 Legislation was intended to solve the jurisdictional problems in the Disputed Territory that had arisen out of *St. Catherine's Milling* and Ontario's insistence that Canada did not have the power to allocate the Treaty 3 reserves within the Disputed Territory without its cooperation and consent.

[1045] Counsel for the Plaintiffs submitted that the 1891 Legislation was a settlement by Ontario and Canada in relation to the Disputed Territory only, negotiated at a time when Ontario had a clear upper hand and legal advantage arising out of the decision in *St. Catherine's Milling*. Canada apparently gave up Ojibway hunting and fishing rights on lands "taken up by Ontario" so Ontario would agree to confirm the reserves that Canada had promised to the Treaty 3 Ojibway and already purported to allocate.

[1046] Whether Canada had a duty to protect Treaty 3 Harvesting Rights more aggressively than it did during the 1890-1894 negotiations is not to be decided here.

[1047] **1895.** Lovisek's report (Ex. 28) at p. 165-6 reads as follows:

> On April 26, 1895, Dawson again wrote to the Deputy Minister of Indian Affairs, Hayter Reed about the subject of hunting and fishing rights in Treaty 3:
>
> > [I]t was distinctly held out to them [the Indians] by the Commissioners acting for the Government [Treaty 3] that they would have the right to pursue their ordinary avocations of hunting and fishing throughout the tract they were about to surrender and stipulation embodying this understanding appears in the Treaty (No. 3). …
>
> Dawson expressed what he thought the Saulteaux had understood:
>
> > I was one of the commissioners appointed by the Government to negotiate a Treaty with the Saulteaux of the Ojibbeway Indians and as such was associated with Mr. W.M. Simpson in 1872, and subsequently acted in the same capacity with Lieut: Governor Morris and Mr. Provencher in 1873. … In those days it was never contemplated that there would be such a run on their fisheries by the white man as has since occurred. Otherwise, the clause in favour of the Indians would have been made stronger. However, in view of the stipulation it could never in reason or justice have been supposed that the Government, through the commission, had intended to deprive the Indians of their chief means of subsistence, and it would be difficult to find any justification for the manner in which the Indians , more especially those of Rainy River and the Lake of the Woods, have been treated in regard to their fisheries …

[1048] Dawson again was reiterating that the Commissioners had expected compatibility between Ojibway harvesting and Euro-Canadian uses, and that they had not expected that the Ojibway would be subjected to resource depletion as a result of Euro-Canadian uses. He expressed the view that for Canada to allow it would be unjustifiable.

The *Annuities Case* (heard 1903-1910)

[1049] Lord Watson commented in *St. Catherine's Milling*: "Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown and the Dominion of all obligations involving the payment of money."

[1050] In 1903, Canada sued Ontario for such indemnity.

[1051] The reasons of Burbidge J., the trial judge, were delivered March 18, 1907 and included the following:

> The question of obtaining the surrender of the Indians title in the lands described in the North West Angle Treaty No. 3, was in 1870, when Rupert's Land and the North-Western Territory were admitted to the Union, a very urgent and pressing one, not because lands were at that time required or deemed to be desirable or available for settlement, but because it was necessary for the good government of the country to open up and maintain through such lands a line or way of communication between the eastern and settled portions of Canada and the great and fertile western territory that was added to the Dominion.

[1052] In 1910, the JCPC agreed that Canada's principal purpose in obtaining Treaty 3 was not a surrender of the lands. Even though they were part of the same Crown, the interests of Canada and Ontario were different. Lord Loreburn on behalf of the JCPC wrote:

> To begin with, this case ought to be regarded as if what was done by the Crown in 1873 had been done by the Dominion Government, as in substance it was in fact done…. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.
> …
> …The Dominion Government were indeed, on behalf of the Crown, guardians of the Indian interest and empowered to take a surrender of it and to give equivalents in return…
> [Emphasis added.]

Relations Between Ojibway and Euro-Canadians 1909-1912

[1053] Lovisek's report (Ex. 28) contains the following at pp. 155-156:

> In 1909, the Chiefs and Councillors of the Rainy River, Rainy Lake and Seine River Bands understood that the treaty protected their hunting and fishing, but that they were experiencing active opposition to their attempts to make a living from hunting and fishing. On April 9, 1909 the Chiefs and Councillors prepared a petition to Frank Oliver, Minister of the Interior and Superintendent General of Indian Affairs, the Chiefs and Councillors:
>
> > We wish to lay before you our business and troubles ... We are not seeking anything new but only want our dues between us our fathers and this Government at North West Angle in the year 1873 ...
> >
> > We also wish to Fish for ourselves all the year and no reserve seasons for us. It's our daily food.

> We don't want to be stopped and Game Inspectors cutting our lines and taking our nets. It is in our Treaty Papers. You are not right to take our privilages [sic] away. We do not molest your interests. We only want to live.
>
> Again we have allowed you to build Dams and Power works unmolested ...
>
> Now for Hunting
>
> We have no hunting grounds. Our privilages [sic] were never taken from us by Treaty Agreement. We may not kill moose without someone interfering and being stopped. We want to know the reason why? The White Man's laws are all right for them - we live and let live in our hunting they do not, just shoot to destroy. The time has now come to have an understanding. Are we to be treated as white men? Are your words or the word of the Great White Queen our Mother to be as smoke? We trust you will still remember the Queen's man's word is his bond.

On September 29, 1909, the Chief of the Couchiching Reserve complained directly to Frank Oliver, Superintendent General of Indian Affairs about the Treaty:

> By the treaty made in 1873 with our most gracious Queen, Her Majesty agreed with us that we should have right to pursue our avocations of fishing throughout the tract surrendered, but in our day, this right amounts to nothing, because the Rainy Lake in front of our reservations is nearly depopulated. We positively know that nearly every day, more than two or three [car]loads of fish coming from the Rainy Lake have been shipped by American companies out from Ranier to Chicago and New York. Americans are fishing all the time in Canadian waters. Is there no remedy to this fraud? If not, where will we get our fish in a very near future?

[Emphasis added; footnotes omitted.]

The Background to the Annexation of Keewatin to Ontario in 1912

[1054] Only the southern 2/3 of the Treaty 3 lands were in the Disputed Territory. Before 1912, Keewatin, where the traditional harvesting lands at issue in this litigation are located, was not part of the Disputed Territory but was under the beneficial ownership and administration of Canada. Before 1912, the federal government had exclusive jurisdiction over Treaty Rights under s. 91(24) as well as jurisdiction to authorize all land uses within Keewatin.

[1055] In 1912, Keewatin was annexed to Ontario using the process mandated by the *Constitution Act, 1871*. Section 3 provided as follows:

> The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, **upon such terms and conditions as may be agreed upon to by the said Legislature**, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.
> [Emphasis added.]

[1056] The parties disagreed as to whether the 1891 Legislation applied to Keewatin after its annexation to Ontario in 1912.

[1057] Counsel for Ontario submitted that at the moment of annexation, the 1891 Legislation started to apply in Keewatin, permitting Ontario, after first obtaining authorization from Canada,

to limit or extinguish Harvesting Rights under s.1, which provided that the rights of hunting and fishing by the Indians did not continue in respect of lands taken up by Ontario.

[1058] Counsel for the Plaintiffs submitted that the Defendants have not demonstrated and there is no good reason to conclude that in 1912 the Dominion had a clear and plain intent to extinguish previously unaffected Treaty Harvesting rights in Keewatin. The 1891 Legislation did not apply in Keewatin. There is no good reason to imply that Parliament intended to extinguish any aspect of Treaty Rights conferred under Treaty 3. Rather, there is good reason to conclude, based on the evidence and the wording of the 1912 Legislation, that Canada intended to preserve Treaty Rights.

[1059] The 1912 annexation of Keewatin resulted after Manitoba proposed to extend its boundaries, and Ontario then sought to do likewise and to secure a port on Hudson's Bay. (Saywell, April 7, 2009; Ex. 1, Vol. 7, tabs 108 and 111.)

[1060] Vipond's report (Ex. 123) describes the circumstances at pp. 19-21:

> In contrast to the twenty-year, all-out struggle over Ontario's western boundary, the re-definition and extensionof Ontario's northern boundary in 1912 seems like a sort of geographic codicil, much less contentious in nature and much swifter in resolution. Actually, the northern extension was a classic case of "federalism dominoes." When the Laurier government created the provinces of Alberta and Saskatchewan, it chose to make the 60th parallel the northern boundary. …The government of Manitoba… lost no time in asserting its claim to a northern extension of Manitoba that would match the northern exposure of Alberta and Saskatchewan. Manitoba was especially keen to have access to Hudson's Bay… Not to be outdone, Ontario then petitioned the federal government to have its northern boundaries extended to include the Keewatin Lands… Under the circumstances, Laurier could hardly extend Manitoba's boundary without doing the same for Ontario … Thus, in 1908, the federal government announced that it would introduce boundary legislation … to Parliament, but negotiations … became so rancorous that the deal fell apart. With the election of the Borden government in 1911, both the personal and partisan complexion of the federal government changed, and in February 1912 the federal government introduced legislation into Parliament extending the northern boundaries of Manitoba, Ontario …

[1061] Saywell's report (Ex 137-2) sets out the agreement between Ontario and Canada reached in February 1912, at pp. 55-56:

> Ontario would not get its port, but would get access to one or more ports on the Bay. Ontario received a strip of land five miles wide from the boundary of … Manitoba to the Nelson River… The province would also receive a further strip along the Nelson to its mouth and such foreshore as might be necessary for port facilities. Moreover, if the terminus of the proposed Hudson Bay Railway was at Port Churchill, and if Ontario wished to use it as its terminal as well they would be given a right of way.

[1062] On February 5, 1912, just before agreement was reached, Prime Minister Borden requested his Deputy Minister of Justice Newcombe to answer questions about possible implications of the annexation of Keewatin to Ontario (Ex. 127.) Newcombe responded to Borden's questions on February 12, 1912 (Ex. 128.) Vipond was referred in evidence to Newcombe's opinion and then cross-examined on February 25, 2010 on it, as follows:

> At p. 124:
> Q. [reading from Newcombe's opinion]

> I think, nevertheless, that the words will bear a construction broad enough to justify a stipulation for the protection of minorities …

At p. 126:
Q. But what I'm going to suggest to you … there is a history of the division of powers between the federal government and the provincial government as being informed, at least in part, by an interest in protecting local minorities?
A. Yes.

At pp 127-128:
Q. …we can use these two documents [Exhibits 127 and 128] to get a sense of what was concerning Borden …about the ability to impose conditions on the extension of a provincial boundary …and … by looking at Newcombe's response, we can also get a sense of what Borden and Newcombe would have understood … about that power…?
A. Yes.
Q. And to the extent that this is immediately proximate to a statute imposing terms and conditions on an extension of a boundary, it does give us a sense of what kinds of purposes and intentions Borden, Newcombe and the others in government may have intended?
A. I think that's fair.

At p. 129:
Q. … Newcombe is suggesting that, in fact, the federal government can hold back part of its powers when it's making a transfer … to a provincial government -- by means of the imposition of terms and conditions?
A. Yes.

At pp. 130-131:
Q. Now going on to the second question:

> "Has Parliament in any such Act enlarging the boundaries of a Province…[the power] to modify the division of powers?"
> "In my opinion Parliament cannot on such an occasion divest itself of any of its distinctive powers, or assume any of those of the legislature, although reasonable limitations may, as terms or conditions of union, be imposed upon the execution of provincial powers, and possibly special powers may be reserved to the Dominion."

That's Newcombe's answer to the division of powers question, correct?
A. Yes.
Q. And this is consistent … with the view that even after the extension lands are added, those things that are in federal jurisdiction generally -- let's take fisheries, for example -- remain in federal jurisdiction, correct?
A. Yes. …
Q. …Indian Affairs was a federal jurisdiction before the extension and is a federal jurisdiction after the extension? …
A. Fair enough.

[1063] Saywell's report, Ex. 137-2 contains the following at p. 56: "During seven years of prime ministerial discussions and diplomacy there had been no discussion, or even mention, of the Indians in Keewatin." He gave evidence on April 7, 2009 that in his research of the historical documents generated early in the consideration process of the 1912 annexation, he found no mention of Treaty 3, at pp. 185-188:

> Q. [Y]ou don't find anywhere in the debates in Parliament … Laurier or Borden expressing the view that the Treaty 3 rights were going to be changed in any way?

A. I don't recall.
Q. And you don't recall any mention of them saying that the Treaty 3 rights were going to be extinguished, for example?
A. No.
Q. Or that the powers of the federal government around Treaty 3 were going to be changed?
A. Well, since Treaty 3 hadn't been mentioned there couldn't be any mention of that, could there?
Q. And the same in the cabinet documents that we see, there is no discussion of extinguishing Treaty 3 rights, correct?
A. No.

[1064] Saywell's report, Ex. 137-2 contains the following at p. 57:

> However, the Indians had been on the mind of officials in the Department of Indians Affairs. After the passage of Laurier's Resolution in 1908 the official concern worked its way up through the bureaucracy to a Report to a Committee of the Privy Council from the Superintendent General of Indian Affairs approved on 17 January 1910:
>
> > In a memorandum dated 6th December, 1909, from the Superintendent General of Indian Affairs, stating that the proposed extension of the boundaries of the Provinces of Manitoba, Ontario and Quebec…renders it expedient that full and careful attention should be given to the Indian claims on the territory proposed to be annexed to the Provinces and that representations should be made to the Governments of the said Provinces to ensure their favourable consideration.
>
> [Emphasis added.]

[1065] Vipond said the first mention he found of Indians in the record was in a report to the Privy Council (tab 751) dated January 17, 1910. During his evidence on February 25, 2010, Vipond said that as of January 17, 1910, Ontario's focus was on the question of unceded lands. There was no mention of Treaty 3.

[1066] Vipond was then referred to a September 20, 1911 memorandum from the Deputy Minister to the Minister of Lands re Indian Affairs containing the following: "As directed by you, I have made a careful search for all papers, regulations and documents relating to the management of Indian affairs, and I have brought together a large collection which I think will cover all that is of importance in connection with Indian affairs." It mentioned Treaty 3 as follows: "[T]here are a great many reserves covered by Treaty No. 3, which have never been definitively approved or accepted by the Ontario Government. It would be well if this question could be taken up and settled as soon as possible." In the same memo, the Deputy Minister raised the following issue:

> There is the interesting question of the language of the treaties with respect to hunting and fishing on wild lands. Are these treaty obligations void when the land comes under the Province, or has the Indian any rights or privileges under the various treaties which places him in a different position from the white man with respect to the killing of fish and game.

[1067] Vipond opined on February 25, 2010 that the Deputy Minister was raising a concern about ensuring that the Treaty Rights would continue if the Treaty 3 land came under provincial administration.

[1068] After the agreement was reached in February 1912, the newly elected government of Borden prepared legislation to move the extension forward.

[1069] Saywell's report, Ex. 137-2, contains the following at p. 56: "The existence of Section 2(a) came as a surprise to Whitney when he first saw the bill."

[1070] On March 5, 1912, Whitney wrote (Ex. 1, vol. 1, tab 780) to Cochrane, leader of the Ontario Federal Conservative caucus in Ottawa, seeking information about references in the proposed bill to Indians, and asking Cochrane to explain any obligations Canada was asking Ontario to assume. (Saywell, April 7, 2009.)

[1071] Cochrane responded on March 8, 1912 to Whitney as follows (Ex. 1, tab 782): "My understanding is that when Ontario wishes to take possession of the land they must settle with the Indians in the same manner as I understand was done when the last treaty was made, and which Honorable Colonel Matheson handled."

[1072] It appears from that letter that Cochrane alerted Whitney only to the issues relating to unceded title and Treaty 9. He did not mention Treaty 3 rights. (Saywell, April 7, 2009.)

[1073] Counsel for Canada submitted that Ontario would not have agreed to annexation knowing that it could not "take up" lands in Keewatin without the authorization of Canada. (See the section of these Reasons on Canada's Devolution Argument.)

[1074] In Ex. 123, Vipond said that he was asked "On the basis of your knowledge of Canadian political thought after Confederation, would Ontario have accepted the transfer of the Keewatin Lands in 1912 if Ontario had thought that Ontario could not 'take up' or authorize the 'taking up' of tracts of land in the Keewatin Lands following the transfer of those lands to Ontario?" His answer was "No." It is clear from the historical record that Ontario would never have accepted constraints on its ability to "take up" tracts of land in Keewatin because the ownership, control and disposition of land was utterly central to the province's post-Confederation development strategy."

[1075] Vipond gave evidence in chief that had there been qualifications or conditions in 1912 that required or allowed the ongoing supervision of the federal government over such actions, it "would have been a big deal." Ontario would not have accepted any supervision. However, he agreed in cross-examination that so long as Canada was acting under a valid federal jurisdiction, even the provincial autonomists would not have viewed Canada's actions as unacceptable supervision. His expertise did not permit him to comment on whether Ontario's title was burdened by or qualified on account of Indian rights (February 23, 2010 at pages 44, 51 and 127.)

[1076] Obligations assumed by Ontario with respect to the Treaty 3 lands in Keewatin differed significantly from those eventually assumed by it in respect of Treaty 9 upon annexation. As mentioned earlier, in 1910 the JCPC had in the *Annuities Case* denied Canada's claim for indemnity for payment of Treaty 3 annuities.

[1077] Vipond opined on February 25, 2010 that Ontario benefited from the annexation. It agreed to accept the transfer of the Keewatin Lands subject to conditions that Canada imposed, including conditions relating to Indian rights. Ontario accepted the lands subject to the condition

that it would have to negotiate a treaty with the Indians in the unceded territories, which had to be approved by the Federal Governor-General in Council. Ontario understood and agreed it could not patent or license unsurrendered lands in the territory annexed in 1912 until those lands had been surrendered. Had the Government of Canada refused to give its approval, then Ontario would not have been able to sell or lease the land. Ontario agreed to pay the costs of future treaty-making.

[1078] The first and only document Saywell found that did refer to Treaty 3 was a memorandum to Pedley, Deputy Superintendent General of Indian Affairs dated March 11, 1912 (Ex. 1, tab 783), mentioning Canada's requirement that Ontario confirm Treaty 9 reserves and pay Treaty 9 annuities. (Saywell, April 7, 2009.)

[1079] Vipond referred to the same memo and opined that by March 11, 1912, the Department of Indian Affairs was aware of the fact that some of the land to be annexed to Ontario was Treaty 3 land. (February 25, 2010 at p. 96.)

[1080] The *Ontario Boundary Extension Act, 1912* included what counsel for the Plaintiffs submitted were the following terms and conditions imposed by Canada:

> 2(a) That the province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and had obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders;
>
> (b) That no such surrender shall be made or obtained except with the approval of the Governor in Council; and
>
> (c) That the trusteeship of the Indians and the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament.

[1081] Vipond opined that nothing in paragraphs 2(b) or 2(c) of the 1912 Legislation limited Indian title.

[1082] Saywell gave evidence on April 7, 2009 from a historical perspective that the framers of the *Boundary Extension Act, 1912* did not intend to amend/abrogate Treaty 3 rights. Its words reflect Canada's recognition that it was a trustee of the Indians and that it had a continuing responsibility to them:

> Q. …I'm showing you … the three clauses that you've cited (a), (b) and (c) appear at the end of 2, correct? … Now, I want to understand what you're saying in terms of your opinion of what section (a) means. There is no doubt that there the reference to surrenders of rights and the costs of such surrenders is a reference to the unceded lands; is that correct?
> A. I understand, yes.
> Q. So, the Province of Ontario recognizing the rights of the Indians, do you say that that doesn't include the Treaty 3 rights or does it include any rights of the Indians in your understanding?
> A. My understanding is that it makes no specific reference to the rights in the Treaty 3 area that will be added to Ontario… There is neither a reference including or excluding.
> Q. And in paragraph (c) there is this phrase "the trusteeship of the Indians in the territory shall remain in the Government of Canada subject to control of parliament." I take it that that's an

> assertion of the continued responsibility of parliament for the Indians as a subject matter under s. 91(24); is that fair?
> A. Yes.
> …
> Q. … But as a general rule, when we are looking at (c) … Ontario took the view that Canada was responsible for the Indians and their affairs; isn't that correct?
> A. Yes.
> Q. And that reference to the trusteeship of the Indians I take it is meant to be a general assertion or reference to Canada's responsibility for the welfare and guardianship of the Indians if you wish?
> MR. STEPHENSON: And just if I could, I presume that question is intended from a historical perspective. You're not asking him to interpret the statute *per se*.
> BY MR. JANES:
> Q. I'm not asking him to give a legal opinion on this. This word "trusteeship" of the Indians doesn't appear in the Constitution and I am trying to figure out what kind of meaning it might have had.
> A. The word "trustee" and "trust" is certainly mentioned emphatically and explicitly in the post-Confederation establishment of the department responsible for it, that is, the department of the Secretary of State. Langevin mentions that, and McDougall also mentions who speaks on the seventh resolution of the address to Her Majesty, December 1867, of the particular under 91(24) responsibility of the central government. So that there is a -- there was a constant reference to this idea and this word trusteeship, wards, and so on.
> Q. So, this fits into the continuum of words that you see in relation to the relationship to the federal government of the Indians where you'll see the relationship described, for example, as the Indians are the wards of the federal government; is that fair?
> A. In political debate, yes.
> [Emphasis added.]

[1083] The 1912 Legislation itself made no specific reference to Treaty 3 rights.

[1084] My legal conclusions regarding the effect of the 1912 annexation of Keewatin on Treaty 3 Harvesting Rights are set out in the section of these Reasons entitled "Answer To Question One."

Confirmation of Reserves and Other Developments- 1915

[1085] The worst long-term negative effects of the Boundary Dispute and the *St. Catherine's Milling* decision on the Treaty 3 Ojibway were not felt by the Treaty 3 Ojibway until 1915.

[1086] As noted earlier, in the years immediately following 1873, there was evidence that Canada took active steps to implement and enforce the Treaty.

[1087] Soon after the Treaty was signed, Pither was appointed under the *Dominion Lands Act* to enforce timber regulations and prevent abuses by Euro-Canadians. He was later also given magisterial power under the *Fisheries Act* to enforce Ojibway fishing rights. The federal Fisheries Department instituted a policy with Indian Affairs whereby Indian Agents at Rat Portage (Kenora) would be special fisheries overseers. Senior Ministers in the federal government urged the United States to control American fishing on the Lake of the Woods. A message signed by the Minister of the Interior and Minister of Fisheries was forwarded, urging the Americans to restrain their appetite for Lake of the Woods fish "in order to conserve the fisheries as a means of livelihood to the Indians."

[1088] On the ground in the Treaty 3 area, Dawson and Dennis, the federal Surveyor General, worked to address the problems that had arisen in the reserve creation process. Dennis negotiated the Rainy River Agreement mentioned earlier, creating reserves and recognizing and protecting Ojibway fisheries.

[1089] The federal government proposed to reserve the right to fish commercially in the Lake of the Woods **only to the Indians**, and banned use of pound nets by white fishermen. (Muirhead, "The Ontario Boundary Dispute and Treaty 3 1873-1915," p. 11.)

[1090] These actions were all indicative of a federal willingness to go beyond the Indian Department and enforce Treaty Harvesting Rights on a multi-departmental basis, in some instances even in preference to Euro-Canadian harvesting rights.

[1091] In the few years following Confederation and after 1873, the federal government also used its powers to advocate on behalf of the Indians with respect not only to on-reserve but also off-reserve matters.

[1092] When sturgeon stocks were being depleted, Dawson and Prime Minister Macdonald spoke out in Parliament about protecting fisheries for the Ojibway. Macdonald promised to have his Minister of Fisheries look after this matter "within [Canada's] Constitutional powers."

[1093] Canada's post-Treaty activities protecting Harvesting Rights between 1873 and about 1892 involved federal departments other than the Department of Indian Affairs, including the Department of Fisheries and the Dominion Lands Department. Prime Minister Macdonald himself was vocal in protecting the Indians.

[1094] Canada's conduct in the years that immediately followed the Treaty was consistent with an understanding that it owed the Ojibway a duty to implement and enforce the Harvesting promises made to induce them to enter into the Treaty.

[1095] When the Ojibway complained about problems in Treaty implementation and enforcement, initially the federal government did act. Dennis promised that well-grounded complaints would be remedied. Dominion employees Pither, Dawson and Dennis attempted to address their complaints. Canada set up reserves as promised, including the gardens and sturgeon fishing areas for their exclusive use. It paid annuities. Twine, ammunition and agricultural implements were supplied.

[1096] In the years preceding *St. Catherine's Milling*, most of the Treaty 3 area was administered by Canada under the 1874 Provisional Agreement. The federal government coordinated land granting and Indian policy through the Board of Commissioners charged with managing Indian Affairs. That Board included both the Commissioner of Indian Affairs (at first Provencher) and the federal Commissioner of Lands.

[1097] Lovisek's evidence and Chartrand's cross-examination on Muirhead's article, "The Ontario Boundary Dispute and Treaty 3: 1873-1915" (contained in the secondary source collection of documents) cast light on the federal government's early but apparently short-lived

willingness to stand up for Treaty 3 Rights and on its waning attendance to them as time passed. What had been federal priorities/"burning issues" in 1873 were becoming less pressing after the CPR had been built and the Dawson Route had fallen into disuse.

[1098] Muirhead's article contains the following:

> At p. 12
> Clearly the federal government recognized its treaty obligations in the early 1890s. … Even more surprising was Ottawa's willingness to appoint special fisheries officers to enforce its regulations in favour of the Indians and against white fishermen. Unfortunately for the Natives, this federal determination to observe its responsibilities under Treaty 3 was short-lived.
> …
> By 1892 a number of factors served to cause a change in government policy. The death of Prime Minister Macdonald removed a defender of Treaty 3 prerogatives from the federal scene…
>
> That year Concession 5 of the Lake of the Woods was opened to gill and pound nets.
>
> At p. 15:
> Perhaps it was more than symbolic that the Deputy Superintendent of Indian Affairs for 18 years was forced out of office … in 1892. Further, the Department underwent a debilitating reorganization.

[1099] Chartrand was cross-examined on January 25, 2010 on the Muirhead article:

> Q. … Professor Muirhead … goes on to discuss how the Department of Indian Affairs became marginalized, once, I suggest to you, effectively the Indians' right issues could no longer be used to advance other federal agendas.
> A. Yes, that's correct. He makes the point.
> Q. …I'm going to suggest to you that's a point that does have support in the overall factual matrix; isn't that fair?
> A. Yes, I agree that there's some support for the position. ...
> Q. ...Professor Muirhead's conclusion, in the paper that you've cited from, that ultimately the "Indian rights as negotiated under treaty were ignored as governments pushed ahead with …other agendas?"
> …
> A. Oh, yes, he actually uses the term [ignored.] I consider it a bit strong, because we do have some evidence that the federal government made attempts to protect treaty rights and look after the welfare, the well-being, of Aboriginal peoples. But -- so I think where I would diverge from Professor Muirhead is simply in terms of the strength of the language that he uses.… In my opinion, I'd say that the interests were simply not recognized and pressed, pressed forth, very strongly, but to say that they were simply omitted altogether is a bit strong, because we do see efforts being made.
>
> At pp 13-14:
> Q. And then Professor Muirhead's opinion, starting at the bottom of … page 12…:
>
> > Unfortunately for the Natives, however, this federal determination to observe its responsibilities under Treaty 3 was short-lived. Instead, the government became more concerned over the rising costs of Indian administration.
>
> Now, that's an observation by Professor Muirhead.
> A. Yes.
> Q. And won't you agree with me that there's some basis in what we see of governments' conduct post-Treaty to support this?
> A. Yes.

[1100] I have found that in 1873, Morris intended and I have referred to his correspondence underlining how important it was for Canada to keep its promises.

[1101] Even after Canada was the loser in *St. Catherine's Milling*, when it negotiated with Ontario about confirming the location of the Treaty 3 reserves, it extracted at least two significant concessions from Ontario contained in the 1891 Legislation, which if they had been honoured in the long term, would have protected Treaty Rights:

> 1.…to avoid dissatisfaction or discontent among the Indians… full enquiry will be made by Ontario as to the reserves heretofore laid out in the territory with a view of acquiescing in the location and extent thereof unless some good reason presents itself for a different course; and
>
> 2. …in the case of all reserves so to be confirmed, the waters within the lands…laid out…as Indian reserves, including land covered with water lying between…headlands, …shall be deemed to form part of such reserve…and shall not be subject to the public common right of fishery by others than Indians of the band to which the reserve belongs.
> [Emphasis added.]

[1102] Unfortunately, by 1915, as Lovisek said on October 23, 2009 at p. 28, even those two concessions were no longer being enforced. Ontario unequivocally refused to confirm 7 of 8 reserves on the Rainy River containing prime agricultural land and insisted the Ojibway be removed from them. It refused to implement several of the promises the federal Commissioners had made to the Treaty 3 Ojibway to induce them to enter into the Treaty, including the promise that their gardens in the Rainy River area would be included in the reserves set aside for their exclusive use. Ontario took the position that fertile lands the federal government had already allocated to the Ojibway in the Rainy River area should be made available to Euro-Canadian settlers. It asserted that the reserves that had been allocated to the Ojibway were standing in the way of development and progress. By 1915, the Ojibway had lost 89% of their agriculture base.

[1103] Lovisek summarized the negative consequences of the Boundary Dispute on the Treaty 3 Ojibway in her report (Ex. 28) at p. 21 as follows:

> …Throughout the protracted legal proceedings they [Ojibway/Salteaux] were never advised, consulted, or represented
>
> [A]fterwards, Ontario refused to confirm the reserves … Some Saulteaux located at Sturgeon Lake (now Quetico Park) were forced at gun point to leave their reserve in the middle of winter.
> [Emphasis added. Footnotes omitted.]

[1104] Muirhead wrote:

> At p. 19:
> Toronto was concerned that Indian reserves not interfere "with the proper settlement of the territory by a white population, especially on the Rainy River …"
>
> At p. 21:
> In 1915 *Act to Confirm the Title of Government of Canada to certain lands and Indian Lands*. Indians had lost reserves at the mouth of Rainy River, the Wild Lands Reserve, Reserves 14 and 37, and the Hungry Hall Reserve where the Rainy River flowed into Lake of the Woods. The province… demanded the lands be sold and surveyed for resale to settlers. They were on record as encouraging the sale of all reserves along the River.

[1105] The 1915 *Act to Confirm the Title of Government of Canada to certain lands and Indian Lands* does not make clear on its face what really happened. It makes it appear that Ontario did confirm the Rainy River reserves. It reads in part as follows:

> …and whereas in pursuance of the terms of an agreement dated 16th April, 1894, between the Government of Canada and the Government of Ontario, the Government of Ontario has made full enquiry as to the said reserves so laid out, and it has been decided to acquiesce in the location and extent thereof with the exception of that known as Indian Reserve 24C, in the Quetico Forest Reserve, and subject to the modification and additional stipulation of said agreement hereinafter set forth, and whereas the Government of Canada has deposited in the Department of Lands, Forests and Mines of Ontario plans of said reserves…

[1106] Section 1 provides as follows:

> Therefore His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:
>
> 1. The said reserves as shown on said plans, with the exception of Indian Reserve 24C, in the Quetico Forest Reserve, are hereby transferred to the Government of Canada, whose title thereto is hereby confirmed, and subject to all trusts, conditions and qualifications now existing respecting lands held in trust by the Government of Canada for Indians, and subject to the provisions of the following sections.

[1107] Chartrand seems to have initially taken the wording of the 1915 Act at face value. His report (Ex. 60) contains the following at p. 219:

> …With one exception, Ontario and the Dominion finally concurred in the selection of Treaty 3 reserves in negotiations held between 1913 and 1915, allowing for their confirmation by Order-in-Council. …
> …
> In 1915, Ontario passed an *Act to Confirm the Title of the Government of Canada to Certain Lands and Indians Lands*. Specific to Treaty 3 reserves:
>
> > Thus the government of Ontario confirmed that the boundaries of Treaty 3 Indian reserves would be as they had been selected by the Indians and surveyed by the federal government.
>
> [Emphasis added; references omitted.]

[1108] However, in cross-examination Chartrand conceded that Ontario **had** insisted on the cancellation of all but one of the reserves containing good agricultural land, and the Ojibway population in the area had been moved to a reserve at Manitou Rapids (January 22, 2010 at p. 113.)

[1109] Chartrand's cross-examination on January 22, 2010 contains the following at pp 116:

> Q. But the point is that the government of Ontario becomes quite unhappy and resistant to the reserves as created by the Government of Canada -- Government of Canada?
> A. Well, in certain -- the certain locality of Rainy River, that becomes an issue. …

[1110] On January 25, 2010, Chartrand agreed, "the question of the surrender of the Rainy Lake reserves was a matter that Ontario had put forth as one of the conditions for confirming the reserves."

[1111] Ex. 1, Vol. 17, tab 799 contains a Memorandum written by Aubrey White, Ontario Deputy Minister of Lands, Forests and Mines, dated December 15, 1914 to his superior, the Ontario Minister of Lands, Forests and Mines, summarizing what had happened, as follows:

> At the time the treaty was made… the [Dominion] Government authorized the laying out of certain reserves for the Indians, and those reserves were selected by them … and the Indians confidently expected they would get these reserves.
>
> When the boundaries of Ontario were legally established by the judgment of the Imperial Privy Council, Ontario's title … was undoubted. As Ontario had not been consulted in connection with … the selection of the reserves, the Government declined to recognize what had been done …the matter… became dormant, with occasional wakeful periods of negotiation. In … 1894… an agreement was signed.
>
> … nothing definite was done until last year [1914] in the month of December. Treaty 3 was taken up with the Minister of Interior and Dept. of Indian Affairs and a conclusion was arrived at as to what should be done by both Governments.
>
> It was agreed by the representative of the Dept. of Indian Affairs that surrenders should be taken from the Indians of all the [8] reserves on the Rainy River except one at Manitou Rapids… This agreement also covered what is known as the Wild Lands Reserve.
>
> It was further agreed that what is known as Reserve 24C situated on what is now called the Quetico Provincial Park, would be abandoned as a reserve by the Dept. of Indian Affairs.
> [Emphasis added.]

[1112] In short, by 1915, Ontario had refused to confirm 7 of the 8 reserves containing good agricultural land on the Rainy River. The protection for exclusive fisheries between headlands that had been contained in the 1891 Legislation was gone. (Chartrand, January 25, 2010 at p. 7.)

[1113] On April 8, 1915, *By an Act to confirm the Title of the Government of Canada to certain lands and Indian lands* was assented to. Section 2 of the 1915 legislation included the following:

> …the land covered with water lying between the projecting headlands of any lake or sheets of water not wholly surrounded by an Indian reserve or reserves…islands not wholly within such headlands shall not be deemed to form part of such reserve but shall continue to be the property of the Province.
> [Emphasis added.]

[1114] Whether Canada had/has a duty to protect Treaty 3 Harvesting Rights more aggressively than it did in 1915 is not to be decided here.

The Evidence of Williams and Epp re Land Use in Ontario 1873-1930

[1115] Counsel for Ontario called Dr. Williams ("Williams") and Prof. Ernest Epp ("Epp") to give evidence about land use authorizations by Ontario after 1890 to support its submission that the dearth of Ojibway complaints about them was indicative that the Ojibway understood in 1873 that "taking up" by Ontario was permissible under the Treaty.

[1116] Epp, qualified as an historian on Northern Ontario, gave evidence on Euro-Canadian land uses in the Treaty 3 territory authorized by Ontario between 1873 and 1930; Williams, qualified as an expert in forestry with experience in the history of forestry in Ontario, gave evidence about forestry in the Treaty 3 area between 1873 and 1930.

[1117] The premise apparently underlying their evidence was that whenever land or resources were being used, knowing that Ontario was providing the authorizations, the Ojibway should

have objected. That they did not, proves they must have agreed in 1873 to "taking up" by a generic Queen's government, including Ontario. Ontario seems to have assumed that any development should have triggered Ojibway complaints. In the absence of recorded complaints about "taking up" by Ontario, this Court should conclude that the Ojibway understood and agreed in 1873 that their Harvesting Rights could be extinguished as lands were developed.

[1118] I have found that in 1873 the Ojibway agreed to share the use of the land and resources. I have accepted Lovisek's evidence that she would not have expected them to complain unless that sharing significantly interfered with their harvesting activities.

[1119] Counsel for the Plaintiffs emphasized that they do not question Ontario's jurisdiction to authorize land uses within Ontario. They do challenge its right to authorize land uses of such intensity, extent or duration that they have a significant adverse impact on their Harvesting Rights. They do challenge Ontario's right to "take up" lands so as to limit their rights to hunt and fish as provided for in Treaty 3.

[1120] In giving evidence about Euro-Canadian development post-Treaty in the Treaty 3 area, neither Epp nor Williams commented on the effect or impact of that development on Ojibway traditional harvesting. They were not asked and did not undertake any analysis of impact on Harvesting Rights.

[1121] Epp conceded that Ontario had not asked him to identify the location of traditional hunting and trapping areas, wildlife or animal populations. He could not say whether any of the Euro-Canadian land uses about which he gave evidence had significantly interfered with Ojibway traditional harvesting. Had he been asked to do so, he said he might have sought the assistance of an ethno-historian or an anthropologist. He would have had discussions with the Ojibway. (Epp, January 27, 2010 at pp. 73-75.) He could not assist this Court on the issue of Ojibway knowledge about the extent of the Euro-Canadian land uses or the level of government that had authorized them (Epp, January 29, 2010.)

[1122] [Von Gernet and Chartrand both gave evidence that to assess impacts on Treaty Harvesting Rights would be a complex and difficult exercise. To properly gauge impact, a detailed analysis would be necessary, involving an assessment of multiple factors, including the location of Ojibway harvesting activities and the type of Euro-Canadian land uses; the extent of Euro-Canadian resource exploitation; the difficulty of accommodating the Euro-Canadian activities; the availability to the Ojibway of alternative resources; the benefits the Ojibway were deriving from Euro-Canadian land uses, the cumulative effects on Ojibway harvesting of other Euro-Canadian land uses (because an isolated Euro-Canadian activity that might not have been objectionable when the land was largely untouched, might have become objectionable by 2010, given intervening diminishment of other resources and territorial encroachment.) (Von Gernet, December 4, 2009; Chartrand, January 18, 2010.)]

[1123] In their evidence, neither Epp nor Williams distinguished clearly between development in Keewatin and in the Disputed Territory.

Evidence re Development in Keewatin

[1124] In Keewatin there was very limited, if any, Euro-Canadian land use until at least 50 years after 1873, when prospecting for gold began in the Red Lake District during the 1920s.

Evidence re Development in the Disputed Territory

[1125] The Historical Atlas of Canada indicates that in all of the Treaty 3 area, agricultural, forestry and mining development as of 1891 did not meet the statistical threshold necessary to warrant depiction on the map. (Ex. 87, Altas of Canada, Plate 5: 1891; see Epp, February 17, 2010 at pp. 5-7.)

[1126] Epp gave evidence that agricultural settlement in the Disputed Territory was mostly in townships close to Rainy Lake and the Rainy River. (Epp, January 29, 2010 at p. 145.)

[1127] **Transportation.** To facilitate passage through the Treaty 3 territory prior to the turn of the century, Canada built the Dawson Route. (Epp, January 29, 2010 at pp. 121-2 and 126-7.)

[1128] Chartrand said that by 1879, immigrant travel over the Dawson Route was in serious decline.

[1129] The first CPR train traversed the Treaty 3 territory between Fort Garry and Fort William in 1883, ten years after the Treaty was signed. The CPR was the only line of communication through the territory until 27 years post-Treaty.

[1130] Roads were trails or primitive cuts through the forest, primarily for winter use.

[1131] Up to 1930, most of the roads built were in the Rainy River Valley. None were north of the English River or even much to the north of the CPR line. The Ojibway and Euro-Canadians alike travelled by canoe during the summer. (Epp, February 16, 2010.)

[1132] **Mining Development.** Prospecting interest and activity that had begun in earnest in the Disputed Territory around 1890 had dried up by about 1906. Some mining locations were staked but were not worked. Some were worked intermittently, for a few months at a time. (Epp, February 17, 2010.)

[1133] **Lumbering.** Before 1875, there was no commercial timber harvesting anywhere in the Treaty 3 territory. Issuance of timber licenses was delayed by the Boundary Dispute. (Williams, February 19, 2010 at pp. 74 -75.)

[1134] Ontario's first sale of timber berths occurred in the Rainy River district in 1890. (Epp, February 16, 2010 at pp. 164-165.)

[1135] Both Epp and Williams agreed that while information on surveys, sales and licenses by Ontario of timber berths is available, whether and how much timber was harvested is unknown.

There is little or no reliable data. (Williams, February 18 and 19, 2010 See also Ex. 1, Vol. 13, tab 628 at pp. 5-6 of 57; Ex. 1, Vol. 14, tab 632 at pp. 5 of 60.)

[1136] Williams said on February 19, 2010 that during the study period, pine harvesting in the Disputed Territory involved the manual felling of trees during a few months of the year. The lumbermen left standing other species of trees. It could take decades to complete harvesting on a timber berth.

[1137] Counsel for the Plaintiffs submitted that the statistics cited by Williams for the Western Timber District, an area extending from Toronto to the Manitoba border, did not provide a reliable basis upon which this Court could infer the extent of timbering in the Treaty 3 area. Unlike other parts of the Western Timber District, where rivers flowed towards settled Canada, Treaty 3 area rivers flowed north and west, forcing lumber operators to rely primarily on prairie markets. (Exhibits 112 and 113; Williams, February 18, 2010 at p. 126, Ex. 116; Williams, February 19, 2010 at pp. 24 and 43-45.)

[1138] Findings of Fact Part II contain my conclusions on the Epp and Williams evidence.

1920s-1950s: Developments in the Disputed Territory and the Keewatin Lands

[1139] Lovisek's report (Ex. 28) contains the following at pp. 156-157:

> On March 26, 1924 a letter addressed to James Robinson, Solicitor of Kenora dated January 3, 1924 from Chief David Land of White Dog Reserve was published in the *Kenora Miner and News*. Robinson stated that the letter was one of several that he received from various chiefs about their grievances. The letter from Chief Land stated:
>
> > We, the Indians of this band of Islington are asking the Government about the agreement that was made when first the white man asked the Indians [about] this land.
> >
> > When the treaty first was given to the Indians there was lots of supplies, farm tools etc. They are getting shorter every year. There is only little supplies now, some twine [ ] shot and gun powder, no farm tools.
> >
> > When the government sends the supplies to us we don't get them the Agent delivers them to the HB. Co. [Hudson's Bay Company]. The white man told the Indians the reserves to be their own land. Ther is another thing about the moose, deer and caribou and fur animals. The white man told the Indians I don't buy these from you and now the Department is going to look at me like a white man. That is the Department is going to stop me killing any of those.
> >
> > We are asking the government to be the same agreement now as when the first treaty was made. That is all.
>
> [Emphasis added; footnotes omitted.]

[1140] Chartrand gave evidence on January 19, 2010 about 1927-1951, a "repressive period," containing the following:

> Q. … isn't it fair to say that we don't see a common practice of the Indians commencing court cases at that period to vindicate their rights?
> A. Well, at that time period, this was what, in my opinion, is the most repressive period in post-1876 Indian Act Aboriginal history. In fact, two years earlier, in 1927, through -- at the initiative of

> Duncan Campbell Scott, an Act had been passed, it was a federal Act, that went so far as to prevent Aboriginal peoples in Canada from raising funds to press for political -- political grievances, to press for rights, without the fundraising being expressly approved by the Superintendent General -- actually, it was the Minister of Indian Affairs, which was the common -- the common time.
> … that, to me, is likely the most repressive, 1927 to, in law, 1951…
> …
> Q. And so what we see here at this period of time is that in fact the government, the federal government, as part of this policy, was really trying to say… we are the ones who will decide what cases or interests or positions should be advanced on the part of the Indians, and in particular, to sort out what are the frivolous, vexatious types of claims that are being advanced and essentially we'll deal with the serious issues.
> A. I believe a long time ago, in a pretrial cross-examination, I think it was 2009, I alluded very generically to a hypothetical situation where a policy of protection can become oppressive. I think this is what we're -- this is what we're dealing with here by this time period.
> Q. But I think internally the government dressed it up as, we're just protecting the Indians from these dastardly lawyers who are going to advance all sorts of frivolous and vexatious claims, isn't that it?
> A. In some cases that was actually expressly written out.
> At p. 101
> Q. And the central concern may just be this idea that legal counsel would put overinflated ideas about the scope of the rights and strength of the rights into the Indians' heads, making the Indians take on unreasonable or irrational positions, that's the way the government thinks?
> A. All of that, including possible problems of corruption or bad behaviour, uncontrolled behaviour, may very well have been underlying various -- various instances. Underlying it all is the concept that the Euro-Canadian concept that Aboriginal peoples had -- essentially were minors under the law --
> At p. 103:
> Q. This actually becomes -- this policy is really the ultimate culmination of the idea that the proper channels for the Indians is to take their complaints to the federal government and then the federal government, as their guardian, essentially, will deal with it as appropriate?
> A. That's certainly how the federal government perceived the process to work…
> Chartrand, January 19, 2010

[1141] Jim Netamequon of the Assabaska Band wrote to the Department of Indian Affairs in his second language, English, on October 10, 1927:

> … During the first treaty was made the way I thing it took [ink blotch] me you Sold some thing that I should be owned for ever that is what I am writing to you again the white man Sweep off Every thing on which I should owned and I am kind of afraid if I dont see what I can make my livings and my wishes what have been Sold I wish you could let me have something so I can feeled we were told when first treaty made time we Shake hands we Said that we never have any change and if it happens to be change we will talk over again Settled that up over again [Emphasis added.]

[1142] On September 17, 1929, J. H. Bury, Supervisor of Indian Timberlands in the Department of Indian Affairs, wrote a memorandum (Ex. 1, Vol. 18, tab 845) to the Deputy Minister of Indian Affairs, blaming Ontario for the conditions facing the Lake of the Woods Indians:

> I desire to draw your attention to the deplorable state of affairs that is existing at present among the Indians of the Lake of the Woods area (Treaty No.3) due entirely to the action of the Province of Ontario in curtailing their hunting and fishing rights.
>
> I have seen many Indians practically starving on the shore, whilst they watched white men fishing commercially in the bays, adjacent to their reserves, the Indians themselves being refused fishing licenses by Ontario, although quite willing to pay the license fee and purchase their nets and equipment.

> Many instances of absolute persecution of Indians on the part of officious game wardens have been reported, the most glaring being the recent instance of Game Warden Hemphill descending on the Islington band and confiscating all the deer meat that the Indians had taken for food, and also the deer skins which they required for moccasins.
>
> The Lake of the Woods Indians are physically suffering from the wrongful treatment meted out to them by the Province, but are patiently awaiting the time when their wrongs will be re-dressed and their rights vindicated….

Bury cited the clear wording of the Harvesting Clause, capitalizing Her Said Government of the Dominion of Canada, and recommending that Canada intervene to protect the Treaty rights of the Ojibway, as the words of the Treaty anticipated. His September 17, 1929 memo continued:

> If this clause means what it says, and the language is un-equivocal, then the hunting and fishing privileges of the Indians are under the control of the Dominion Government solely, and any regulation that the Province of Ontario may see fit to make, is ultra vires, unless assented to in the first place by the Dominion…
> …
> The Department being the custodian of the rights of the Indians, naturally, I presume, takes the position, that the control of Indian hunting and fishing rests solely with the Dominion Government and should in my humble opinion press a test case, as far as the Privy Council of Great Britain, so as to determine how far Ontario has the power to abrogate solemn treaties….
> …
> I submit that we should insist upon: –
>
> The right of the Indians to take game and fish for food, only, at any time.
>
> The prior right of the Indians to commercial fishing in their own waters or waters adjacent to their reserves.
>
> The creation of trapping ground areas for the exclusive use of the Indians.
>
> Conclusion
> The Indians of Treaty No. 3 area (Lake of the Woods) are possibly facing today the worst conditions of living that they have ever experienced. Prevented from hunting for food, restricted from commercial fishing, failing to secure a blue –berry crop, they will assuredly need all the help and assistance that its possible to give them to tide over the winters; but if besides financial help, they also receive the assurance from the Department that their grievances will be remedied so far as it is humanly possible to do so, then they will turn to the future with renewed hope and a conviction that treaties are inviolable documents, not susceptible to alteration or abrogation by parties who were not contributory signatories.

[1143] On June 11, 1938, Captain Frank Edwards, the Indian Agent in the area, made notes during a meeting with an organized group of Treaty 3 Ojibway known as "The Organization of Amalgamated Indians" about their Treaty Harvesting Rights. Capt. Edwards then wrote (Ex. 1, Vol. 18, tab 852) to Indian Affairs to report as follows:

> They know the Dominion Government took over Canada. Now the Ontario Government has taken over, but it was the Dominion Government they made the Treaty with. … the Indians should have the fishing in the lake and also the game. They understood that was their own.

After asking through an interpreter whether they understood they could fish and sell fish, their paraphrased answer was as follows:

> It seems they understood that they could do anything with the fish, or trap and shoot. That right belonged to them. They are trying to find out and know why the Ontario Government can come along and prevent them from doing these things.
> [Emphasis added.]

[1144] Ex. 1, Vol. 18, tab 853 contains a letter from the Ojibway who lived on the Couchiching Reserve dated September 24, 1938, to the Federal Minister, the Honourable T. Crearar, Department of Mines and Resources (the Ministry under which the Department of Indian Affairs fell at that time), which included the following:

> …Whereas the fundamentals of the stipulations agreed upon to the said transactions were not faithfully carried out as it was promised by the Dominion Government.
>
> We, therefore, commit ourselves humbly in approaching our authorities at Ottawa of such representations as may be honestly considered by them in accordance to the obligations set forth for the benefit of the Indians and their children and those that will be thereafter.
> [Emphasis added.]

[1145] A. Spencer, the Indian Agent at the Fort Frances agency, wrote a letter dated September 27, 1938 (Ex. 1, Vol. 18, tab 854) to the Secretary of Indian Affairs containing the following:

> I have the honour to report that the Chiefs and Headmen of the North West Angle Treaty No. 3 have been holding a Joint Meeting… for the last 4 days…and they think the Department is not living up to their promises, in a number of things, but more in respect of trapping and hunting.
>
> They have appointed a small delegation to go to Ottawa, to interview the Department, in respect to their Treaty, the greatest discussion was in regard to Fishing and Hunting, because the game Wardens were seizing their Nets and Boats or taking them up in court and being Fines for Fishing [sic].
>
> The Indians cannot make a living unless they are permitted to sell a few fish, as fishing and trapping is the only way they have of makeing a living. But the Game and Fishery Dept. at Toronto would only give to each fisherman One Licence instead of from Two-to-Four, probably some of the Indians would get a licence to catch and sell a few fish, because at this time nearly all the lake is taken up with white fishermen and the Indians have no place to go.
>
> If the Indians are not allowed to catch a few fish to sell, it will be as I was told by few of my Indians, they said that if they could not sell a few fish to provide for their families, that they would have to go to Jail, because they could not see their families starve, and I think they are telling the truth in that respect.
>
> If a delegation goes to Ottawa, I would recommend that an Official from the Department accompany them there to Toronto to interview the Game and Fisheries Department. …
> [Emphasis added.]

[1146] On October 3, 1938, the Organized Indians of the Northwest Angle wrote a letter enclosing the following resolution:

> Moved by the organized Indians do hereby resolve to urgently request the Government to allow exemption for hunting and fishing, without being arrested and fined. And that the Indian agents shall be given instructions strictly to protect the Indians so that no Indian should be prosecuted by the Game Wardens.

> According to the old documents and treaties, they could not stop us from hunting trapping and fishing. It is in no way to interfere with these documents. There is no such thing as a law governing the treaties. THE TREATY SPEAKS FOR ITSELF.
>
> If the Indians are not allowed to hunt, they will starve.
>
> By the organized Indians of the Northwest Angle Treaty No. 3.
> [Emphasis added.]

[1147] Ontario continued to deny the Treaty 3 Ojibway the right to hunt and fish off-reserve under the Treaty. Lovisek's report (Ex. 28) refers at p. 161 to a memorandum written by an Indian Agent to Indian Affairs on December 5, 1938 noting that Ontario had passed regulations taking away all the rights and privileges the Indians thought they had under the Treaty:

> Indians cannot now kill food or game for food except on their reserves and have to do so for food, therefor being criminals…
>
> I dont know what can be done now, but it certainly seems to me we should take some action, as every Indian has to break the regulations to enable him to get food to exist.
>
> Fishing and hunting is the most pressing of our problems, and something should be done immediately. The Chief and one of the Councillors from Islington Band were in to see me yesterday and said the Indians would be starving by Christmas as there was very little fur, and whitemen trapping in their territory, and legally they could not get fish or meat for food for themselves or their families ... Previously I used to tell them to …put up fish and meat, now if I tell them to do this I am conniving in the breaking of the regulations, and presumably might be held liable myself.
> [Emphasis added.]

[1148] Ontario's response to Canada's and the Ojibway's assertion that the Ojibway had Harvesting Rights off-reserve under the Treaty was described in 1939 by Indian Agent Edwards in a letter dated April 15, 1939 [Ex. 1, Vol. 18, tab 858] to M. Christianson, General Superintendent of Agencies:

> I dislike keeping bringing up before the Department the question of trapping, hunting and fishing problems of my Indians, but Ottawa apparently has no idea how serious the matter is…
>
> They cannot kill a deer on the reserve for food and take a piece of the meat with them off reserve when traveling without being liable for prosecution. And they can be fined for this. They cannot fish for food, with twine given them by us under Treaty stipulations, without being liable, and have been fined and their boats and nets seized and not been given back without payment for the return of them.
>
> .. Mr. Taylor, Deputy Minister of Game and Fisheries, when talking to me last summer, said it was nothing to do with him when asked how the Indians were going to make a living, that was "our Department's baby", not his. The Indians were not going to live on the Province's moose, deer, fish etc., and some other way of their making a living should be devised by us.
>
> The Indians and all of us are very much discouraged. They say the treaty was signed for as long as the rivers flow etc. and we are breaking the treaty.
> [Emphasis added.]

[1149] It appears from Taylor's response, quoted above, that as of 1939, Ontario was pointedly refusing to recognize any responsibility to respect or honour the Treaty promises.

[1150] After a delegation of Ojibway travelled to Ottawa to make their complaints on May 22, 1939, the Director of the Department of Indian Affairs, Dr. H. W. McGill ("McGill"), prepared a memorandum (Ex. 1, Vol. 18, tab 859) for the Deputy Minister outlining the "distressing situation" and noting that Ontario had changed the definitions in its regulations "apparently for the express purpose of barring Indian Treaty rights ..." I note that McGill referred to the failure of the Dominion to honour its moral obligations under the Treaty. (Lovisek report, Ex. 28, at p. 161.)

[1151] On June 18, 1941, the Chief and Committee of the Union Council of Treaty 3, including Chief Ed L. Hyacinthe of the Grassy Narrows Band, appealed to the Department of Indian Affairs, as follows:

> We the undersigned Treaty Indians held a Council meeting bearing date June 18th 1941 appeal to the Department of Indian Affairs for protection and ask that justice be done. This is in accordance with rights granted to us through the Act of Her Most Gracious Queen Victoria by the Treaty Number 3 of North West Angle bearing date of October 3rd 1873.
> …
> What us Indians lived as for a living, the white man is taking these away from us now. For instance, fishing, trapping and game. …This is the resolution passed by all members of Treaty No. 3, North West Angle Treaty.
>
> We have given many complaints to the Indian Agent [and he has sent] our complaints to Ottawa and we never get an answer. We now think that we will go and see you personally and tell of our complaints which will be in the Fall.
> [Emphasis added.]
> (Lovisek report, Ex. 28, at p. 162)

[1152] Chief John Ross and Councillors of Lac Seul Band sent a letter dated September 16, 1946 (Ex. 1, Vol. 18, tab 860) to Norman Liquors, a liaison between the Indians and the Special Joint Committee of the Senate and House of Commons, characterizing their understanding of the Treaty promise as "first explained" to them "to hunt and fish in the territory ceded by us as a right without hindrance."

> Since we made the treaty with the Government of Canada, we believe we should not be forced to have any dealings with the Province of Ontario.
> The Lac Seul band is in Treaty No. 3 which was made in 1873 and also known as the Northwest Angle Treaty. We are satisfied with our conception of the original agreement and want it to continue; the terms to be carried out as promised and as it was first explained to our representatives who signed the treaty for the Indians. …
>
> Our understanding of the original Treaty was that we could hunt and fish without hindrance in the territory ceded by us. The Indians who signed the Treaty could not possibly anticipate any future Government regulations which would change this, as Game and Fish laws were unknown to our forefathers. It seems reasonable to suppose that the white man who arranged the treaty must have known something about Game and Fishery regulations even in those days of long ago. We believe if this had been fully explained to the Indians the Treaty either would not have been signed or would have contained a positive statement giving the Indians full right to hunt and fish without restrictions. Since we made the Treaty with the Government of Canada we believe we should not be forced to have any dealings with the Province of Ontario.
> [Emphasis added.]
> (Lovisek report, Ex. 28, at p 163)

The Present Day

[1153] Into the 20th century, the Indian Agents reported every year that the principal activities of the Ojibway at Grassy Narrows were hunting, fishing, berry picking and the harvesting of wild rice.

The Evidence of William Fobister

[1154] William Fobister ("Fobister"), a member of the Grassy Narrows First Nation, gave evidence on November 24 and 25, 2009, primarily relevant to the continuing importance of traditional harvesting in Ojibway culture and the effects of lumbering on the Grassy Narrows people. He told about his life as a child and in recent years. He emphasized that traditional harvesting continues to be a crucial component of Grassy Narrows culture and identity.

[1155] The Grassy Narrows people could not survive just on the produce of their gardens. They also need meat, game and fish obtained by hunting and fishing.

[1156] Fobister described the seasonal patterns followed by all members of his family before he was sent off to residential school when he was 7 years old. I have summarized his evidence in detail because he made a poignant statement about his love for a lifestyle that many Canadians would assume to be undesirable and unwanted.

[1157] Fobister was born on February 18, 1946 in a cabin located on his father's trapline on Crown land, a several-day canoe trip from the Grassy Narrows Reserve. I inferred from his evidence that the family went to the same cabin and his father winter-trapped on the same trapline every year.

[1158] **Seasonal Round.** From May to June, the family would be at the Reserve, where they planted potatoes, corn, cabbage and onions in their gardens. In July, they would paddle and portage a freighter canoe to a location about 30 kilometres from the Reserve. They would spend two to three weeks there, living in tents and harvesting blueberries that they canned or dried over the open fire for winter use or for sale to others.

[1159] After the blueberry harvest, his family would return to the Reserve for a week or so to check on their gardens. Then they would journey 10-15 kilometres in another direction to harvest and preserve wild rice, living in tents or cabins. A great deal of work was involved. One family member would sit in front of a canoe and paddle. Another would sit at the back and hit the rice into the canoe with a stick. While the rice dried, they would dig holes. Then they would place the dried rice in them and dance on the rice to remove the husks. They would sell some of the wild rice and keep some for winter use.

[1160] After that harvest, they would return to the Reserve to harvest their gardens. His parents, who did not have a root cellar, would bury the produce, surrounded with dry grass, in a hole in a sandy area of the bush to preserve it until the winter.

[1161] In mid-September, after they had gathered and stored wood for the older family members who wintered at the Reserve, the family travelled two-three days by freighter canoe to their winter trap line. Along the way, they would hunt and trap. After reaching their trap line, they would ensure their cabin was well maintained, and gather and store wood for the winter. His older brothers helped their father hunt, setting traps and snares to catch beaver, otter, mink and other animals.

[1162] When he was very young, Fobister would remain in the cabin with his mother and learn from her how to preserve animal pelts. He would help her bring in wood and haul water. She made moccasins, gloves, jackets and pants from the pelts. His father sold fur and pelts to the HBC.

[1163] They lived on their trap line throughout the winter and into the spring, eating deer, moose, beaver, lake trout, walleye, northerns and sucker meat, supplemented with wild rice, dried blueberries and produce preserved from their gardens. A dog team was used to haul wood and meat and to travel to buy food at the closest store, about 15-20 kilometres away.

[1164] In April after the wolf and fox moulted, the family would move to another location to trap muskrat, otter and beaver. They would then return to the Reserve and prepare the garden for another year.

[1165] **Treaty Days.** About the end of May or early June, "Treaty Days" were held. A Euro-Canadian group that included medical practitioners [doctor, dentist, X-ray technician], missionaries, representatives of Lands and Forests [now the MNR] and the RCMP together with the Indian Agent would visit the Grassy Narrows Reserve. Their journey involved taking the CNR to the Jones station and then travelling 40 km north by canoe for two to three days to reach the Reserve.

[1166] The women would dress up in their best clothes. When seeing the doctor/dentist, etc., band members who spoke English would help those who did not.

[1167] Fobister described on November 24, 2009 the main event, the distribution by the Indian Agent of the Treaty annuities of $5 per person, as follows:

> A. …The Indian agent will be sitting in the table, my dad used to string us in a line… and he was given the $5. Right next to the Indian agent, my dad would have his treaty money, his $5, and right next to MNR, he would pass this five bucks to get his trapper's licence, and there goes his treaty money.

His parents used the $5 received for each child to buy clothes or whatever was needed.

[1168] Fobister said he understood they were receiving the annuity payments for sharing their land.

[1169] The Ojibwe words for Indian Agent are shoniya okimah or Anishnabe okimah, meaning the Indians' boss. The word for the MNR representative was Kakaanawaytunk, meaning a steward, "a person who takes care of things for you." Fobister understood the MNR was helping the Indian Agent take care of the land, watch for forest fires and put them out. When he was

growing up, Fobister believed that the Indian Agent held a higher position than the MNR representative. He understood that complaints should be made to the Indian Agent, who would look after the Ojibway for as long as they lived.

[1170] On the Grassy Narrows Reserve there was no school. In 1953 when Fobister was seven, he was sent to residential school, which he attended September to June each year until 1958. Students were punished for speaking Ojibwe. They were not allowed to mention their own culture or to practice it. They were taught "mainly about the Roman Catholic religion," nothing about Treaty 3 or Government.

[1171] After he left school at 12 or 13, Fobister helped his father trapping, working with the HBC, hauling wood, cutting grass, hunting [moose, deer, ducks, partridge, rabbit] and fishing. He learned to handle firearms, knives and axes, and to cut up animals and fish.

[1172] When he was older, he worked at Grassy Lodge, a local tourist camp. First he was a camp boy, later a fishing guide. Other Grassy Narrows people worked as guides at other nearby tourist camps.

[1173] The Grassy Narrows people fished for their own consumption and for sale to others until 1970, when mercury poisoning was discovered in the Wabigoon and English River system and adjacent lakes. Fish were declared unsafe to eat. Fishing ended. The tourist industry, formerly the main employer in the area, collapsed. Welfare was introduced for the first time.

[1174] During the early 1970s, Fobister was his community's first welfare administrator. As time passed, he assumed other positions with the band, including resources coordinator [rebuilding and repairing trapping cabins on Crown land], band councillor and then Chief of the Grassy Narrows band from 1992-2002. At the time of trial, he was still a band councillor.

[1175] Fobister said there were no nearby roads when he was young. There was no logging in the area of the trap line where he was born. Even today, the vast majority of the trap lines of the Grassy Narrows people are located on Crown lands. Euro-Canadian forestry operations are also largely conducted on Crown land.

[1176] Selective logging in the vicinity of the Grassy Narrows Reserve and of Fobister's father's trap line did not begin until the mid to late 1960s. Initially, swede saws or axes were used. Loggers harvested only selected types of wood. Other trees were left standing.

[1177] Fobister said that the impact of that type of selective logging on hunting and trapping was more acceptable to his people. They did not object to the logging because they were working together with the Euro-Canadians and could still hunt and trap without much disturbance. They benefited from participating in the selective logging process, from being paid to plant saplings after it ended, and from the road access it brought. After the loggers finished harvesting and moved on, the Ojibway were still able to hunt because many trees were left standing and there were places where the animals could still hide in safety.

[1178] In recent years, clear-cutting activities of "quite large" areas of their traditional hunting territories have, in Fobister's view, adversely affected their hunting and trapping. The Ojibway have complained that their Treaty Rights have been and are being violated. Modern day clear-cutting has had greater impacts than earlier logging. It is done 24 hours a day, 7 days per week by heavy machinery (not by men with saws and axes.) Everything is cut. The land is levelled. No trees are left standing. In areas that have been clear-cut, no animals remain because their warrens have been bulldozed. Fobister said, "Our way of life, how we hunted and fished, now it's being slowly depleted."

[1179] Today, Grassy Narrows hunters have to travel farther to hunt than they did in the '50s, '60s and '70s. They receive fewer benefits from Euro-Canadian logging activities. Now, tree planting is now done by machinery. The Grassy Narrows people are left with almost nothing to depend on.

[1180] Fobister has always hunted and trapped and continues to go into the bush to hunt and trap. "It's still my way of life." Although welfare has "crippled" people within his community, many of the "new generation" want to hunt. He expressed the view on November 25, 2009 that it is "so important" for the future generation to maintain traditional practices and "to be able to fix…what's been happening to us lately."

Royal Commission on Aboriginal Peoples

[1181] The Royal Commission on Aboriginal Peoples ("RCAP"), a Canadian Royal Commission established in 1991 to consider Aboriginal issues, culminated in a final report of 4000 pages published in 1996.

[1182] I did not review RCAP until after I had analyzed the evidence and reached my factual conclusions. My findings herein are not based on RCAP. They are all based on the evidence presented in the case before me. RCAP, of course, did not deal specifically with Treaty 3 but was more general. Nevertheless, as I was completing writing the Reasons, I concluded the following excerpt from RCAP is worthy of mention here:

> The Crown asked First Nations to share their lands with settlers, and First Nations did so on the condition that they would retain adequate land and resources to ensure the well-being of their nations. The Indian parties understood they would continue to maintain their traditional governments, their laws and their customs and to co-operate as necessary with the Crown. There was substantive agreement that the treaties established an economic partnership from which both parties would benefit. Compensation was offered in exchange for the agreement of First Nations to share. The principle of fair exchange and mutual benefit was an integral part of treaty making. First Nations were promised compensation in the form of annual payments or annuities, social and economic benefits, and the continued use of their lands and resources.
>
> …First Nations were assured orally that their way of life would not change unless they wished it to. They understood that their governing structures and authorities would continue undisturbed by the treaty relationship. They also assumed, and were assured, that the Crown would respect and honour the treaty agreements in perpetuity and that they would not suffer — but only benefit — from making treaties with the Crown. …
>
> …

> Written texts also placed limits on the agreements and promises being made, unbeknownst to the Indian parties. For example, written texts limiting hunting and fishing to Crown lands stand in contradiction to the oral promise not to interfere, in any way, with their use of wildlife and fisheries resources. These inherent conflicts and contradictions do not appear to have been explained to the Indian parties.
>
> One of the fundamental flaws in the treaty-making process was that only the Crown's version of treaty negotiations and agreements was recorded in accounts of negotiations and in the written texts. Little or no attention was paid to how First Nations understood the treaties or consideration given to the fact that they might have had a completely different understanding of what had transpired.
>
> Another fundamental problem was the Crown's failure to establish the necessary laws to uphold the treaties it signed. Unlike the modern treaties of today, which have provisions for implementation, implementation of the historical treaties was virtually overlooked. Once treaties were negotiated, the texts were tabled in Ottawa and the commissioners who had negotiated them moved on to other activities. …
>
> Nor did the government's corporate memory with respect to the historical treaties survive within the Indian affairs administration. Accordingly, after treaties were made, unless they were described and explained explicitly and disseminated widely in government departments, the promises and understandings reached with First Nations would have been lost as officials changed jobs or moved on. This helps to explain the gradual distancing of officials from the treaties that they, as government officials, were charged with implementing.
>
> … the Crown did not involve First Nations in decisions about how proceeds from their lands would be used. The eclipse of treaties and the absenting of Indian people from decision making was pervasive, reinforced by *Indian Act* provisions that restricted Indian people to reserves and forbade them to pursue legitimate complaints about the non-fulfillment of treaties.
> …
> … respect for the treaties and the obligation to fulfil them have not been priorities for governments in Canada or, indeed, for Canadians generally.
> *Looking Forward, Looking Back*, Part One, Section 6, Sub-Sections 5 and 6, Royal Commission on Aboriginal Peoples

12. FINDINGS OF FACT, PART II

Findings re Identity of The Treaty Parties

Re Canada's and the Ojibway's Understanding of the Identity of Their Treaty Partner and their Duties to Each Other

[1183] I have found that in 1873, the Ojibway understood the Commissioners had been appointed by the Government at Ottawa and were representing it. They understood the Treaty was with the Queen's Government in Ottawa and it was the only Queen's Government they would be dealing with. They understood they were not dealing literally with the Queen.

[1184] In the years immediately following 1873, the behaviour of both the federal government and the Ojibway reflected a mutual understanding that they were to deal only with each other.

[1185] I find, based on the *viva voce* evidence and the post-Treaty documents, that after the Treaty was signed, the Ojibway dealt first with Morris, then with the Department of Indian Affairs, the branch of the Canadian government responsible for Indians.

[1186] After the Treaty was signed, consistent with this understanding, the federal government built on the formal structure of the Indian Agents it had already started in the Treaty 3 area. It encouraged the Ojibway to use this structure as the means to have their concerns, needs and grievances, including complaints about Treaty implementation and enforcement, on- and off-reserve, addressed.

[1187] The Ojibway understood their relationship with Canada, their Treaty partner, was important.

[1188] The focus of the Treaty negotiations was the establishment of a relationship between the Ojibway and their new Treaty partner, the government at Ottawa.

[1189] I accept Chartrand's evidence that the Ojibway framed their complaints in terms of their relationship with each other. I find, based on the evidence of both Lovisek and Chartrand, that post-Treaty, the Ojibway understood that **all** their complaints should be addressed to the federal government via their Indian Agents. The Plaintiffs looked to the federal government and expected it to address their complaints. When matters were not to their liking, the Ojibway sent their letters and petitions through the federal Indian Agents to Ottawa. The Government of Canada understood that the Ojibway were looking to it. It intended to make good on its promises to the Ojibway.

[1190] It is clear that the Ojibway saw a link to the federal government. When Morris retired they petitioned (Ex. 1, Vol. 8, tab 400) his successor, Cauchon, asking him to intercede for them with the Government at Ottawa.

[1191] While there are relatively few references to the Queen in the post-Treaty documents, there are some, especially to Our Mother the Queen. Lovisek said that after the Treaty was signed [and the formal relationship was established] the Ojibway perceived that they now had kinship links to the Canadian Government/shared a mutual relationship in the form of a symbolic kinship with the Great Mother, the Queen. They expected mutual give and take and that their Treaty partner would have due regard for their welfare.

[1192] A good example of a post-Treaty mention of the Queen relied upon by Ontario is the statement attributed to Chief Conducumewininie as quoted by the Indian Agent McColl in his report (Ex. 1, Vol. 12, Tab 588, pp. 199-201) dated November 18, 1890:

> When the treaty was made with us at the North-West Angle we saw the lips of the **Government** moving but now they are closed in silence, and we do not know what is done in **the Councils of our mother the Queen**. We see some one fishing out in the lake. Who is he and where does the evil spirit come from? Is he a big-knife [an American] from the United States? We wish our children and our children's children to live, but he is destroying their food and they will die of hunger. **When we gave up our lands to the Queen we did not surrender our fish to her, as the Great Spirit made them for our special use.** [Emphasis added.]

[1193] Although the Ojibway did refer to the Queen, it was in the context of referring to "the Councils of our Mother the Queen" and after reference to the "lips of the government moving." It is clear from the context that Chief Conducumewininie understood he was dealing with the Council of the Queen, the Government at Ottawa, not the Queen literally.

[1194] In other correspondence, reference was made only to the government. An example is a letter dated October 1, 1875, in which Dennis quoted Chief Powawassan and two other chiefs verbatim as follows:

> We wish to thank the Minister for sending you to see us, not alone because of the result of settling our reserves but because representing the Minister, you have been able to give us the assurance that everything will be done for us that …we are entitled to under the Treaty. We hope… nothing was said … displeasing to the Government."
> [Emphasis added.]

The use of words such as "Minister" suggests they knew they were looking to the Government that included the Minister of Indian Affairs for fulfilment of the Treaty promises.

[1195] While there are references in some of the other documents to the Queen and to Our Mother the Queen, there is no evidence that the Ojibway ever directed any of their complaints to the Queen or sought to literally communicate with her. There is no evidence that any of the Ojibway Chiefs sought to travel to London to meet with the Queen or the Queen's government in London. Interaction was between the Ojibway and the Government at Ottawa.

[1196] Chartrand agreed on January 19, 2010 at p. 127 that he did not have any documentary evidence indicating that the Ojibway wrote petitions or addressed complaints directly to the Queen or (at page 130) to the English government.

[1197] In the years immediately after the Treaty was concluded, the federal government was the only government to which the Ojibway looked for fulfilment of the promises. They always addressed their complaints to officials in Ottawa or representatives of the Government at Ottawa.

[1198] The Ojibway took their own Treaty promises to the Government of Canada seriously. They did what they had promised to do. After they signed the Treaty, they did not harass travellers on the Dawson Route or interfere with the construction of the CPR. In 1874, Chief 'Kou-crouche' (Cou-Crouche or Crooked Neck) met with Morris:

> …to acquaint him of their [Ojibway] desire to make peace with the Sioux. The Chief said the words he had heard at the Angle were good, he had promised to live at peace with all men, and he now wished to make friends with the Sioux. The distrust between the two tribes had been great, owing to past events. At the Angle, but for the presence of the troops, the Chippewas would have fled, it having been circulated among them, that the Sioux were coming to attack them. Permission was given to the Chief to pay his visit to the Sioux, and messengers were sent to them, in advance, to explain the object of his visit…
> [Footnotes omitted.]
> (Lovisek's report, Ex. 28, at p. 146.)

[1199] On the basis of all the post-Treaty documents and evidence, I have concluded that both Canada and the Ojibway understood they were looking to each other and only each other to fulfill the Treaty promises.

Re Ontario's Understanding of the Identity of the Treaty Parties in the Late 19th and Early 20th Centuries as Evidenced by its Post-Treaty Conduct

[1200] I accept the submission of counsel for the Plaintiffs that the circumstances surrounding the *Annuities Case* and the submissions made by counsel for Ontario during argument are relevant to Ontario's understanding of the identity of the Treaty parties in 1873.

[1201] At the time the *Annuities Case* was argued, Ontario submitted that Treaty 3 was a contractual arrangement between Canada and the Ojibway, made without privity with or mandate from Ontario. In effect, Ontario was submitting that the governmental Treaty partner was Canada, not the Queen.

[1202] Unlike Ontario's position before me that the principal purpose of Treaty 3 was to obtain a surrender of the lands and that Canada had no ongoing role to protect Harvesting Rights under s. 91(24) after the Treaty was signed, I note that in the *Annuities Case*, Ontario submitted that Canada made the Treaty for its own purposes and its own account [e.g., to secure the Dawson Route, to further its objectives of opening the West for settlement, to satisfy the promises made to British Columbia in the terms of Union to build the CPR, to look out for the interests of the Ojibway under the *Rupert's Land and Northwest Territories Order* and more generally acting in its s. 91(24) capacity as the guardian of Indians.]

[1203] Unlike here where Ontario denied Canada's s. 91(24) role in the Disputed Territory after 1888, submitting that after *St. Catherine's Milling* was decided, Canada had no ongoing s. 91(24) role, in the *Annuities Case* Ontario's "Statement in Answer" to Canada's claim referred to Canada's protective s. 91(24) role vis-à-vis the Indians in the Disputed Territory as follows:

> The Indians were, as they still are, the wards or pupils of the Crown represented by the Dominion, and some of the principal matters covered by the said Treaty relate solely or mainly to such wardship or pupilage, and many of the obligations undertaken by the Dominion in and by the said Treaty relate to that subject, and not to the subject of the cession of the territory.

[1204] For many years after 1873 and after the *Annuities Case*, Ontario continued to position itself as a stranger to the Treaty. It consistently took the position that neither the federal government nor the Ojibway could look to it for satisfaction of any Crown obligations under it. Ontario refused to respect the Treaty promises. Its continuing conduct is clear evidence that until fairly recently, Ontario understood that the references to "the Government of the Dominion of Canada" in the Harvesting Clause were references to Canada (not to the Queen) and that Canada (not the Queen) was the Treaty partner of the Ojibway.

[1205] In 1915, for example, in refusing to confirm 7 of 8 of the Ojibway reserves that had contained good agricultural land in the Rainy River area, Ontario disregarded specific promises Canada had made to the Ojibway during the negotiations that their gardens would be specifically reserved to them for their exclusive use. After they lost their best agricultural land and were forced as a result to depend more heavily on traditional harvesting than they would otherwise have had to do, Ontario refused to allow them to hunt off reserve for subsistence (as I have found, clearly contrary to the promises made in the Treaty.)

[1206] In 1939, the Ontario Deputy Minister of Game and Fisheries, when discussing federal complaints that Ontario was violating the Treaty, was reported to have retorted that how the Indians were going to make a living was "our Department's baby," not his. The Indians were not going to live off the province's deer, fish, etc., and Canada should devise some other way of making a living for them.

[1207] Into the 1950s, Ontario denied any responsibility to respect Ojibway Harvesting Rights. Chartrand described Ontario's restriction of Ojibway fishing rights in favour of Euro-Canadian commercial fishermen and its attempts to keep the Ojibway away from areas used by Euro-Canadian sports fishermen, and its raids of reserves to seize deer killed off-reserve.

[1208] It appears from all of the evidence that Ontario's present position that it is obliged as a Crown entity to respect Treaty Rights has not been long held, but is newfound.

Findings re the Meaning of the Harvesting Clause

Re Post-Treaty Conduct Shedding Light on Mutual Understanding of the Meaning of the Harvesting Clause

[1209] Both Lovisek and Chartrand agreed that Canada responded to complaints about breaches of Treaty Harvesting Rights that arose both on- and off-reserve.

[1210] I accept the evidence, including that of Chartrand quoted earlier, that officials in the Department of Indian Affairs [the federal government] did not view their mandate/role as being limited to on-reserve issues. They recognized their jurisdiction and duties to Indians under s. 91(24) among other things by advocating for the protection of their Treaty 3 Harvesting Rights.

[1211] Counsel for Ontario contended that after the Treaty was signed, federal Indian Affairs took no role in the patenting of off-reserve lands in Ontario after 1889 and in Keewatin after 1912. He submitted during argument that after the Treaty was signed, Canada had no ongoing s. 91(24) jurisdiction in the Disputed Territory.

[1212] Chartrand conceded in cross-examination that when Canada received complaints about hunting and fishing matters, hunting regulations, fishing regulations, overfishing, it did not say, "Not our problem, complain to Toronto."

[1213] Chartrand conceded on January 25, 2010 at p. 14 that Canada had a s. 91(24) mandate within Ontario, even after Canada lost the Boundary Dispute.

[1214] I reject Ontario's submission that the post-Treaty conduct of the Department of Indian Affairs is inconsistent with a perception that it had no mandate off-reserve.

[1215] I find that Canada did intend to protect Treaty Harvesting Rights off-reserve. While it did not expect to routinely involve itself in authorizations for the use of land, it did have the power, under the Treaty and s. 91(24) to involve itself in authorizing or refusing to authorize uses incompatible with Treaty Rights.

[1216] In the immediate post-Treaty years, it took active steps to protect Harvesting Rights. Canada gave Pither power under the *Dominion Lands Act* and the *Fisheries Act* to enforce timber regulations and fishing rights respectively.

[1217] Canada made representations to the United States, asking it to curb commercial fishing adversely affecting Ojibway fisheries on the Lake of the Woods. The federal government proposed to ban all but Indian fishing in the Lake of the Woods. It took steps to protect Ojibway fishing and then proposed instituting the headlands principle. Other federal initiatives to protect Harvesting Rights were initiated on a multi-departmental basis.

[1218] Canada's conduct immediately after the Treaty was signed indicated that it understood that it owed the Ojibway a duty to enforce the Harvesting promise.

[1219] I find that in the years immediately after 1873, Canada intended to protect the Ojibway and their Harvesting Rights and acted to do so.

[1220] When post-Treaty commercial fishing was depleting the fish stocks available to the Ojibway, Dawson wrote that it was never intended that activity by Euro-Canadians in the Treaty 3 territory would be of such extent that it would interfere with activities "so as to prevent or inhibit the Indians from participating in that activity." That statement confirms that in 1873, the Treaty Commissioners did not expect Euro-Canadian harvesting activities to have serious impacts on Ojibway subsistence harvesting. (Lovisek, October 22, 2009 at p. 114; November 18, 2009 at p. 112.)

[1221] Between 1889 and 1891, although Canada's resolve to implement and enforce Treaty promises was waning, it nevertheless extracted an agreement in principle from Ontario that Ontario would confirm the Treaty 3 reserves already allotted to the Ojibway, absent strong reasons to do otherwise and that the Ojibway would have exclusive fishing rights in waters between the headlands.

[1222] A provision was included in the 1891 Legislation providing for Aboriginal fishing between headlands.

[1223] The conduct of the parties recognized the relationship between the Ojibway and the Canadian Government. I have found that the Ojibway took their promises seriously and kept them. I find that the Canadian Government initially did the same.

[1224] However, as time passed, and especially after Macdonald died and *St. Catherine's Milling* was lost, Canada's firm resolve was increasingly diluted. By 1915, unfortunately for the Ojibway, Canada's interest in protective activities had waned considerably. By 1915, it had acceded to Ontario's refusal to confirm 7 of the 8 Rainy River reserves that contained the best agricultural land and its refusal to restrict fishing in waters between headlands to the Ojibway exclusively.

[1225] Post-Treaty, the mutual intention/expectation that the Ojibway would be able to harvest resources as in the past was generally borne out. The Indian Agent reports filed in evidence

illustrate that year after year, the principal occupations of the Treaty 3 Ojibway continued to be hunting, trapping, fishing, wild rice harvesting and berry picking; occasionally supplemented by other activities.

[1226] When the Ojibway made repeated complaints about interference with **off-reserve** Harvesting Rights, they clearly considered that it was incumbent on the federal government to address their concerns.

[1227] Evidence of Ojibway discontent and complaints about unfair regulation by Ontario of their harvesting activities is not evidence of incompatibility between Ojibway harvesting activities and anticipated Euro-Canadian land uses in my view. Rather, it is evidence of disregard and disrespect for the Ojibway harvesters and for their Treaty Rights and of the reality that Ontario did not consider itself obliged to respect Treaty Rights under the Honour of the Crown.

[1228] Being able to pursue traditional Harvesting Rights as in the past continues to be of great importance to the Plaintiffs. It is central to their identity and culture to this day.

[1229] Even in the post-1915 period, the Department of Indian Affairs took a continued interest in the off-reserve harvesting activities of the Ojibway because if the hunt had failed, the federal government would have had to support the Treaty 3 Ojibway.

[1230] Other evidence of post-Treaty developments presented in this Court reflected a continuing expectation that the Harvesting Rights granted under the Treaty and post-Treaty Euro-Canadian development activities would be compatible.

Re Compatibility of Ojibway / Euro-Canadian Land Usage After 1873

[1231] Post-Treaty communications and activities reflect that in 1873, away from the Dawson Route and CPR right-of-way, the Commissioners had been correct in anticipating compatibility between traditional harvesting and Euro-Canadian activities in the Treaty 3 area.

[1232] I have already quoted the portion of Chartrand's report (Ex. 60) that contains the following at p. 217:

> Dawson's letter [of March 2, 1874] reveals that he expected little to no conflict with respect to the selection and use of lands by Aboriginal signatories, the Dominion and non-Aboriginal settlers and developers. As he indicated, at the time the only area where potential conflict might develop was in the vicinity of Rainy River, where Aboriginal signatories had developed their own agricultural practices and where lands held the most promising potential for non-Aboriginal settlement and farming. …
>
> In other Treaty 3 localities, such as Lake of the Woods, Dawson expected few conflicts …

[1233] In the case of the Grassy Narrows Ojibway, the life of Fobister is illustrative of the continuing reality that they were still pursuing the seasonal round without significant Euro-Canadian interference, at least into the 1960s and that Euro-Canadian uses and traditional harvesting were compatible.

[1234] Until recently, the Ojibway did not object to the federal government and the federal government took no role with respect to forestry activities involving selective cutting that offered them benefits and did not drive away the animals. Fobister said it was not until the introduction of wide-scale industrial clear-cutting [perceived by the Ojibway as being outside the range of compatible activities] that they complained to the federal government, expected it to "take up" their cause and when it did not, eventually decided to take action on their own behalf.

Re Ontario's Evidence of Euro-Canadian Development in Ontario 1873-1930

[1235] Prior to 1894 in the Disputed Territory or prior to 1912 in the Keewatin Lands, there was, in my view, insufficient evidence upon which this Court could have properly concluded that the Ojibway were aware that Ontario was authorizing land uses that significantly interfered/were incompatible with Treaty Harvesting Rights so as to engage the federal interest under s. 91(24) and the Treaty or that the Ojibway viewed any particular uses as significant interferences with their Treaty Harvesting Rights sufficient to engage Canada's s. 91(24) jurisdiction or requiring Canada's authorization under the Treaty.

[1236] In my view, Ontario failed to recognize that there could be compatibility between Aboriginal and Euro-Canadian land uses and if there were, there would be no reason for the Ojibway to object. Ontario ignored that the parties mutually understood and anticipated that the Ojibway and Euro-Canadians would be sharing the use of the resources.

[1237] The evidence of Williams and Epp dealt with land uses *per se*, not land uses that significantly interfered with Treaty Harvesting Rights. It did not address any of: (1) the threshold for federal engagement; (2) what I have found to be a mutual expectation of compatibility between Ojibway and Euro-Canadian uses; or (3) the room for sharing resources.

[1238] The Epp and Williams evidence is not probative of Ontario's assertion that the Ojibway must have understood and accepted that Ontario could authorize land uses that would significantly and increasingly interfere with their Treaty Harvesting Rights.

[1239] Within the Disputed Territory, I note that neither Epp nor Williams could say whether the Ojibway knew it was Ontario [not the Dominion] that was authorizing land uses after 1890.

[1240] Chartrand's report, Ex. 60, contains the following:

> At pp. 366-367:
> Available documents do not permit a precise determination of the time and circumstances under which different Aboriginal signatories to Treaty 3 developed an understanding that non-Reserve lands surrendered by the Treaty came under provincial jurisdiction. However, available documents show that such an awareness had developed among a number of Treaty bands towards the mid - late 1890s.
>
> At p. 368:
> One set of circumstances in which Treaty 3 Ojibway may have gained knowledge of Ontario's jurisdiction over non-Indian Reserve lands and natural resources, involves their growing employment in lumber and mining industries beginning in the 1890s. By this time, in the aftermath of the *St. Catherine's Milling* decision, these industries (outside Reserves) operated exclusively under Ontario

> Government licenses and / or patents. As documented in section 5.7, Treaty band member employment in lumber and mining operations became sufficiently significant economically in this period in the southern portion of the Treaty 3 territory to become consistently noted in annual reports of the Department of Indian Affairs. These records show that significant employment in lumber and mining had extended to the northern (English River) portion of Treaty 3 by the first decade of the 20th century.
>
> At p. 372:
> …Band members on reserves would have been typically informed of provincial decisions affected on-Reserve matters indirectly, through communication to and from Indian Agents who in turn, sought and obtained required information from superiors in the Department of the Indian Affairs. Thus, in such instances, Aboriginal knowledge of Ontario's jurisdiction would have been 'filtered' through the Department of Indian Affairs.
> [Emphasis added; references omitted.]

[1241] The Plaintiffs submitted that in any event, evidence respecting lack of complaints about "taking up" by Ontario in the Disputed Territory after 1894 was not directly relevant, because the 1891 Legislation allowed Ontario to "take up" lands. By 1894 within the Disputed Territory, Canada had negotiated away the Harvesting Rights of the Treaty 3 Ojibway on lands "taken up" by Ontario.

[1242] I have held elsewhere in these Reasons that the 1891 Legislation that came into effect in 1894 took away Harvesting Rights from the Ojibway on lands taken up that they otherwise would have had under the Treaty. I have held the 1891 Legislation amended the Treaty by allowing Ontario to "take up" lands in a manner visibly incompatible with Treaty Harvesting Rights. As a result, the federal interest could not have engaged after 1894 to protect Harvesting Rights on those lands. Even if there had been otherwise satisfactory evidence of knowledge and lack of complaints, in my view it would not have been possible to make much of Ojibway lack of complaints about land use authorizations *per se* after 1894 within the Disputed Territory.

[1243] I reject the submission of counsel for Ontario that since the Ojibway were unaware of the 1891 Legislation, they should have complained about loss of Harvesting Rights by reason of "taking up" in the Disputed Territory. I think it unlikely that had Canada received complaints about matters it had expressly sanctioned under the 1891 Legislation, it would have nevertheless taken pains to record them. Canada would surely not have acted to address complaints about activities it had expressly authorized by legislation.

[1244] Similarly, it seems unlikely that federal Indian Agents would have gone to any lengths to explain to the Ojibway the adverse effects that the federal legislation would have in extinguishing Harvesting Rights on lands in the Disputed Territory "taken up" by Ontario. Chartrand agreed that Aboriginal knowledge was "filtered" through the Department of Indian Affairs.

[1245] In my view, Chartrand's evidence that there was some knowledge by the late 1890s that the Ojibway knew the lands had come under provincial jurisdiction is unpersuasive. For instance, the fact that Ojibway were employed by companies that had received their patents or licenses from Ontario does not prove they were aware of that fact.

[1246] I reject Ontario's submission that evidence regarding the lack of complaints regarding development within the Disputed Territory is useful in shedding light on their understanding of the Treaty in 1873.

[1247] In short, I conclude that the lack of Ojibway complaints in the Disputed Territory after 1891 is not probative of any of the contentions Ontario is urging upon this Court.

13. ANSWER TO QUESTION ONE

> Question One
> Does Her Majesty the Queen in Right of Ontario have the authority within that part of the lands subject to Treaty 3 that were added to Ontario in 1912, to exercise the right to "take up" tracts of land for forestry, within the meaning of Treaty 3, so as to limit the rights of the Plaintiffs to hunt or fish as provided for in Treaty 3?
> Emphasis added.]

[1248] I have answered Question One in seven steps:

Step 1: The Principles of Treaty Interpretation

Step 2: Application of the Principles of Treaty Interpretation to the Harvesting Clause

(a) Wording of the Harvesting Clause
  (i) The Importance of the Written Word to the Ojibway and Canada
  (ii) The Literal Meaning of the Harvesting Clause

(b) What were the mutual intentions of the parties as to the meaning of the Harvesting Clause as of 1873 that best reconcile the interests of the parties at the time the Treaty was signed?

Step 3: Is an interpretation based on my finding of mutual intention Constitutional?

Step 4: Bearing in mind the answers to Steps (1) (2) and (3) above, as of 1873, what is the answer to Question One?

Step 5: The Effect of the 1891/1894 Legislation/Agreement

(a) Did the 1891/1894 Reciprocal Legislation/Agreement declare Ontario's existing rights or did it give Ontario additional rights that it did not have under the Treaty?

(b) Did it apply to Keewatin after 1912 [and confer the same rights on Ontario in respect of Keewatin as it had with respect to the Disputed Territory before 1912]?

Step 6: The Devolution Argument.

Step 7: In light of all of the above, what is the answer to Question One?

Step 1: The Law: Principles of Treaty Interpretation

[1249] Treaties define Aboriginal rights guaranteed by s. 35 of the *Constitution Act*. Section 35 represents a "solemn commitment to recognizing and affirming Aboriginal rights." (*Sparrow* at page 1108.)

[1250] "Limiting reconciliation risks unfortunate consequences and is not honourable" (*Haida Nation* at para 33.)

[1251] "Difficulties associated with … definition of claims are to be addressed by assigning appropriate content to the duty, not by denying the existence of the duty." (*Haida Nation* at para. 37.)

[1252] Treaties "may appear to be no more than contracts. Yet they are far more. They are a solemn exchange of promises made by the Crown and various First Nations. They often formed the basis for peace and the expansion of European settlement" (*Sundown* at para 24.)

[1253] The Crown was and is required to uphold the highest standards of conduct in the negotiation, interpretation and implementation of ancient treaties. They should not be interpreted as if they were commercial contracts negotiated at arm's length by parties with equal bargaining power. (*Marshall* at para 45.)

[1254] In *Secession of Quebec*, the Supreme Court of Canada, for the Court wrote:

> Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing Aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of Aboriginal peoples. The "promise" of s. 35, as it was termed in *Sparrow* at p. 1083, recognized not only the ancient occupation of land by Aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value. [Emphasis added.]

[1255] It is always assumed the Crown intends to fulfill its promises. Writing for the Court in *Haida Nation*, McLachlin C.J.C. wrote at paragraphs 19 and 20:

> [19] … In making and applying treaties, the Crown must act with honour and integrity.
>
> [20] …It is always assumed that the Crown intends to fulfill its promises" (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.

[1256] In *Marshall*, the Supreme Court of Canada held that the holder of rights to participate in a particular activity may enjoy special treaty protection against interference with its exercise, even where the activity may also be enjoyed by others… (Paragraphs 45 and 47.)

[1257] "The very nature of … treaties … commands a generous interpretation and uncertainties, ambiguities or doubts should be resolved in favour of the natives." (*Van der Peet* at para. 143.)

[1258] In *Nowegijick*, Dickson J. (as he then was) wrote:

> At p. 36:
> .... It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and that doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption
> …
> At p. 202:
> We must… in these cases, have regard to substance and the plain and ordinary meaning used rather than to forensic dialectics.

[1259] Technical legal concepts should not be used by governments to defeat provisions inserted to protect the Indians.

[1260] In *Mitchell*, La Forest J. held at p. 131 that, from 1763, "the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians…" Exemption from taxation guards against the possibility that one branch of government through imposition of taxes could erode the full measure of benefits given by the branch of government entrusted with supervision of Indian affairs. La Forest J. held at p. 135 that:

> . . . when the Crown acquits treaty and ancillary obligations . . . it cannot be accepted that Indians ever supposed that their treaty right to these entitlements could ever be compromised on the strength of subtle legal arguments . . . <u>It would be highly incongruous if the Crown, given the tenor of its treaty commitments, were permitted, through the imposition of taxes, to diminish in significant measure the ostensible value of the benefits conferred</u>.
> [Emphasis added.]

[1261] In *Mitchell*, Dickson C.J.C., concurring with LaForest J., wrote at p. 98

> …Aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions. In some cases, … the interpreter will only be able to perceive that there is an ambiguity by first invoking the [Aboriginal understandings of words.]

[1262] In *Morris*, Deschamps and Abella JJ. wrote at para. 24: "The oral promises made when the treaty was agreed to are as much a part of the treaty as the written words."

[1263] LaForest J. wrote in *Mitchell* at p. 130: "The sections of the *Indian Act* relating to the inalienability of Indian lands seek to give effect to this protection <u>by interposing the Crown between the Indians and the market forces</u> which, if left unchecked, <u>had the potential to erode Indian ownership of these reserve lands</u>." [Emphasis added.]

[1264] In *Mitchell v. MNR*, the Supreme Court of Canada said at paragraph 9: "[A]n obligation [arose] to treat Aboriginal peoples fairly and honourably and to protect them from exploitation."

[1265] LaForest J. wrote in *Mitchell* at p. 136:

> …an interpretation of s. 90(1)(*b*), which sees its purpose as limited to preventing non-natives from hampering Indians from benefitting in full from the personal property promised Indians in treaties and ancillary agreements, is perfectly consistent with the tenor of the obligations that the Crown has always assumed *vis-à-vis* the protection of native property.

> …
> I do not take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.

[1266] Binnie J said in *Marshall* at paragraph 52:

> I do not think an interpretation of events that turns a positive …trade demand into a negative …covenant is consistent with the honour and integrity of the Crown… the trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown [Emphasis added.]

[1267] The fundamental objective of modern day treaty interpretation is reconciliation of Aboriginal and non-Aboriginal peoples and their respective claims, interests and ambitions.

[1268] In *Morris*, Deschamps and Abella JJ. wrote for the majority at para. 361:

> The goal of Treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the Treaty was signed. This means that the promises in the Treaty must be placed in their historical, political, and cultural contexts to clarify the common intention of the parties and the interests they intended to reconcile at the time.

Step 2: The Application of the Principles of Treaty Interpretation

2 (a) The Wording of the Harvesting Clause

2(a)(i) The Importance of the Written Word To the Ojibway and Canada

[1269] Counsel for the Plaintiffs submitted that the Defendants are asking this Court to disregard the express reference to the Dominion in the Harvesting Clause. In all the circumstances here, it would be unjust to ignore words deliberately inserted by the Commissioners to protect their rights, which plainly require that a certain process be followed before their Harvesting Rights could be limited or extinguished. The wording of the Clause makes it clear that only the Government of the Dominion of Canada can "take up" or authorize "taking up" under the Treaty and thereby limit their Treaty Harvesting Rights.

[1270] Even though they could not read or write, the Ojibway understood that having oral promises committed to writing was important because it made the promises easier to enforce.

[1271] I have accepted Lovisek's evidence that they placed great importance on the written word. The manner in which they signed the written Treaty indicated the significance they attached to it. After the Treaty was signed, the Chiefs asked for a copy of the Treaty written on parchment, so "it could not be rubbed off." Morris later reported to Ottawa that they had again asked for a copy of the Treaty.

[1272] I have also accepted Von Gernet's evidence that from the perspective of the Privy Council that ratified the Treaty in late October 1873, the formal written text of the Treaty, including the explicit reference to the Dominion Government, was the Treaty.

[1273] Like the Treaty Commissioners, members of the Privy Council would have understood the reference to the "Government of the Dominion of Canada" in the Harvesting Clause to be to the federal government. (*Dominion Day* was the name of the holiday commemorating the formation of Canada as a dominion on July 1, 1867. The holiday was not renamed "Canada Day" until October 27, 1982; at the time of the Treaty and for many years afterward, the term "Dominion" was widely known to refer to the whole of Canada.)

[1274] Counsel for Ontario submitted, in effect, that since Morris did not explain about the different emanations of the Queen's Government in Canada and since the Ojibway could not read the reference to the Government of Canada in the Treaty Harvesting Clause, and McKay probably did not specifically refer to Canada in explaining the Treaty, it would not violate the Honour of the Crown to ignore its plain wording. Focusing on ownership rather than Harvesting Rights, they submitted at para. 420 of their written closing submissions that "the language used to describe internal divisions of the Crown in the Treaty language was not material to the Treaty bargain."

[1275] Counsel for Ontario submitted that the principle that doubtful or ambiguous expressions should be taken to have the meaning most favourable to the Indians, **does not** suggest that unambiguous treaties should be interpreted so as to create benefits to the Indians that were not intended. The principle that "any limitations which restrict the rights of Indians under treaties must be narrowly construed" is subordinate to the principle that "the overarching goal of treaty interpretation, discerning the common intention of the parties to the treaty when assessed in a purposive and contextual manner." Earlier emphasis on the written treaty as a complete record of the treaty negotiations and the treaty itself (see for example *Horse*) has been supplanted by emphasis on ensuring that the Honour of the Crown is fulfilled. He quoted *Badger* at paragraph 14 as follows:

> As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. [Emphasis in original.]

[1276] I note that the next two sentences of *Badger* read as follows:

> Rather, they must be interpreted in the sense that they would have actually been understood by the Indians at the time of the signing. This applies, as well, to those words in a Treaty which would impose a limitation on the right which has been granted.

[1277] Here, counsel for Ontario submitted that the principle that treaties should be interpreted flexibly should be applied to Ontario's benefit.

[1278] Counsel for Ontario submitted the Plaintiffs' "narrow literal interpretive approach" "cannot stand," as it is "divorced from the intentions of the parties and Constitutional reality." Their written argument contained the following:

> 363. While the starting point to determine the common intention and mutual understanding of the parties is the text of the treaty, consideration must also be given to extrinsic evidence of the historical and cultural context of the treaty, even in the absence of any ambiguity in the treaty text.
> …
> 365. [I]n the Aboriginal context, courts must "go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings" between Aboriginal peoples and the Crown. This principle applies even where a technical construction is advanced by an Aboriginal party.

[1279] Counsel for the Plaintiffs denies the wording of the Harvesting Clause is "divorced from the intentions of the parties and Constitutional reality." Focusing on the subject matter of the Harvesting Clause, Harvesting Rights (not property rights), he submitted that the Clause accords with both. In 1873, Canada was the entity with control over Harvesting Rights and the only entity that could limit or extinguish them.

[1280] The Clause as written contemplates on its face that subjects of the Dominion may be authorized by Canada to "take up" lands under the Treaty/to use lands in a manner visibly incompatible with Harvesting Rights. 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.

[1281] Counsel for the Plaintiffs submitted the Ojibway are not asking this Court [as the First Nations did in *Marshall* or in *Sioui*] to imply terms in the Treaty. They are content with the language contained in the formal Treaty. Where, as here, the Treaty Commissioners clearly, deliberately and unambiguously expressed the mutual intentions of the parties and made it clear that only Canada could limit the Ojibway right to hunt over the ceded territory, the Court should enforce the Treaty wording.

2(a)(ii) The Literal Meaning of the Words

[1282] The words of the Harvesting Clause in the formal Treaty are as follows:

> Harvesting Clause
> … the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the tracts surrendered as hereinbefore described … saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering, or other purposes by her said Government of the Dominion of Canada, or any of the subjects thereof duly authorized therefore by the said Government.

[1283] The primary thrust of Ontario's argument is that the words in the Harvesting Clause, literally interpreted, make no sense. Only owners can "take up" lands.

[1284] Counsel for the Plaintiffs submitted the words do make sense. "Taking up" means what the Supreme Court of Canada has said it means: using or authorizing uses of lands in a manner incompatible/inconsistent with Harvesting Rights.

Conclusion Re 2(a)(i) and 2(a)(ii)

[1285] The process clause defines the circumstances under which the Harvesting Right can be limited. Given the adverse effects that the application of the limitation could have on the protection the Courts will extend and the level of scrutiny to be applied to governmental actions that impinge upon Treaty Rights, to "read-out" this process clause would be unwarranted.

[1286] In my view, the plain and literal wording of the Treaty is that the Ojibway will have unlimited Harvesting Rights throughout the tract surrendered, i.e., over all the ceded territory, off-reserve as well as on-reserve, unless the process specified in the Treaty is followed. The Ojibway are entitled to exercise their Harvesting Rights unless Canada has authorized their limitation or extinguishment.

[1287] A literal reading of the Treaty supports the Plaintiffs' position without any reference to any contextual evidence. While Ontario can authorize the use of lands under s. 109, its rights are limited by Treaty Harvesting Rights. Where another reading would be to the disadvantage of the Ojibway, that reading should be rejected.

2(b) What were the Mutual Intentions of the Parties as to the Meaning of the Harvesting Clause as of 1873 that best reconcile the interests of the parties at the time the Treaty was signed?

[1288] Rather than simply relying on the plain and literal interpretation of the Harvesting Clause, having regard to all of the evidence and other principles of treaty interpretation set out herein, I have gone further and chosen among the various possible interpretations of common intention the one that best reconciles the interests of the parties at the time the Treaty was signed.

[1289] I have focused on the evidence about this particular Treaty. Chartrand gave evidence that the specific facts here must be carefully examined. The Supreme Court of Canada has repeatedly held that treaty rights should be determined having due regard to the particular terms, context and history of the treaty in question (e.g., *Badger* at 343-344.) In considering the intentions of the parties, a trial Court is not to leap from one treaty to another but to base its findings on the specific facts related to the particular treaty under consideration.

[1290] In *Sundown*, Cory J wrote:

> 25. Treaty rights, like Aboriginal rights, are specific and may be exercised exclusively by the First Nation that signed the treaty. The interpretation of each treaty must take into account the First Nation signatory and the circumstances that surrounded the signing of the treaty.
> …
> Thus, in addition to applying the guiding principles of treaty interpretation, it is necessary to take into account the circumstances surrounding the signing of the treaty and the First Nations who later adhered to it. For example, consideration should be given to the evidence as to where the hunting and fishing were done and how the members of the First Nation carried out these activities.

[1291] I have considered that I must not only look at the unique specific circumstances, but I must also consider the Aboriginal perspective.

[1292] I have already given reasons for finding that the Ojibway understood they were dealing with the Queen's Government of Canada, and were relying only on the Government of Canada to implement and enforce the Treaty.

[1293] While they understood they were giving up exclusive use of all the Treaty 3 lands, they did not agree to unlimited uses by the Euro-Canadians in a manner that would significantly interfere with their Harvesting Rights. They agreed to share use on the express promise that their Harvesting Rights would continue as in the past. I reject the submission of Ontario that the Ojibway understood that unlimited development was "the tangible and anticipated manifestation" of the Treaty agreement.

[1294] I have considered the submission of Ontario, citing *Ireland* at p. 589, that the rights of Canada and the Ojibway must be balanced and thereby reconciled. In essence, a "taking up" by Ontario limitation on Harvesting Rights should be implied. I have rejected the submission of counsel for Ontario that the "taking up" limitation operates as confirmation of a geographic limitation that follows automatically from the cession of lands under the Treaty and the reconciliation of that central provision with the promise of ongoing Harvesting Rights.

[1295] In all the circumstances I have detailed, a "taking up" limitation by Ontario cannot be implied with respect to this Treaty. It is not necessary to do so to reconcile Euro-Canadian land uses and Harvesting Rights. Here, everyone understood they would be compatible. In fact, to do so, given the specific promises I have found were made to the Ojibway and having regard to the other circumstances as I have found them, would be contrary to what the Ojibway could reasonably expect and contrary to what the principle of the Honour of the Crown requires of our governments.

[1296] The Commissioners did not anticipate or require the Ojibway to agree to increasing reduction of their harvesting areas (away from the Dawson Route and CPR right of way), let alone such reduction without federal authorization.

[1297] I have already referred to the Commissioners' extraordinary promises that I have found were made. After the end of the unpromising negotiations on October 2, the Shorthand Reporter noted in the *Manitoban* that it was "extremely doubtful whether an agreement could be come to or not."

[1298] The Commissioners needed the Rainy River Chiefs to make the Treaty. The Dawson Route was along the Rainy River. The Rainy River Chiefs were "careless" about entering into a treaty. While Morris might have been able to get the Chiefs from the north and east to sign without such a promise, that result would not have achieved Canada's needed end.

[1299] On October 3, 1873, in the presence of the Commissioners, when the Chief demanded in Ojibwe words that McKay understood to mean they must be able to be make a living ("hunting and wild rice harvest")/to have their Harvesting Rights, McKay advised the Ojibway in the Commissioners' presence that they would be able to hunt and pursue their wild rice harvest as in

the past. Nolin recorded McKay's representation in his notes. McKay then turned to the Commissioners and said, "Of course I told them so."

[1300] Dawson recalled that in 1873 the Commissioners had promised they would forever have the use of their fisheries to induce the Ojibway to enter into the Treaty. He noted it had great weight with the Ojibway, who had been refusing to enter into the Treaty.

[1301] I have found that the Commissioners believed that given the particular circumstances of Treaty 3, including the obstinate nature of the Ojibway, the barren and sterile characteristics of most of its land, its poor prospects for agricultural uses, the urgency of completing the Treaty including a pressing need for security so the December 31, 1876 deadline for completing the CPR through the Treaty 3 territory could be met, it was not only reasonable but also necessary to make the promise of the continuing Harvesting Rights as in the past.

[1302] The Chiefs were demanding continuing Harvesting Rights as in the past. If the promise had not been made, the Rainy River Ojibway would have refused to enter into the Treaty.

[1303] I have already detailed the reasons for concluding that Canada did **not** intend that if Ontario were held to be the owner of Treaty 3 lands, it would have an open-ended power to remove Ojibway Treaty Harvesting Rights from tracts of land "taken up" in their traditional territory, no matter how significant the impact.

[1304] I have rejected the submission of Ontario that:

> 421 … no one – neither the Aboriginal parties to Treaty 3, nor the Treaty Commissioners (nor Canada or Ontario) – thought or intended that two levels of government might be required to take action in order to authorize the taking up of land for settlement, mining or lumbering within the territorial boundaries of the North-West Territories, or Ontario, much less that one level of government might act as a gatekeeper over another. [It] was not part of [the] mutual understanding.

and the submission that involvement of more than one government would have been unheard of, "inconceivable," in 1873.

[1305] I have found Morris did intend a two-step process to be followed in the Disputed Territory in the event that Canada lost the Boundary Dispute whenever Ontario purported to significantly interfere with Treaty Harvesting Rights. Even in 1873, there was nothing novel or unforeseen about the possibility of intersecting jurisdictions, especially given Morris' knowledge of the existence of the Boundary Dispute and the possibility that Ontario could be held to be beneficial owner of Treaty 3 lands. The wording chosen clearly anticipated the possibility of involvement of more than one government. While two governments exercise legitimate legislative jurisdiction, it is eminently foreseeable that two governments may be simultaneously involved in authorizing land use. Morris clearly understood that in 1873 when he referred to Canada in the Harvesting Clause. That it was foreseeable that more than one government could have a role in authorizing uses of land is illustrated by Chancellor Boyd's analysis in *Seybold*. His reasons illustrate that he did not understand "taking up" to be an incident of ownership. He recognized that where intersecting jurisdictions were in play, more than one government could be involved in authorizing land uses. Boyd had also been the trial judge in *St. Catherine's Milling*

and was well aware when he decided *Seybold* that Ontario was the beneficial owner of the land. His reasoning illustrates that on the face of intersecting jurisdictions, involvement of more than one level of government in authorizing uses of lands was not "inconceivable" in his time.

[1306] Monitoring and enforcement of Treaty Rights were seen as necessary to protect Canada's wards, the Ojibway and to protect Canada's own strategic interests, as unhappy Ojibway could have interfered with the building of the CPR and/or travellers over the Dawson Route.

[1307] I have found Morris understood that a loss of the Boundary Dispute would place the Ojibway in greater jeopardy, create a greater need for Canada to exercise its legitimate s. 91(24) jurisdiction and interpose itself between them and Ontario the local government (just as the Imperial Government had done earlier in order to protect the Indians in the strategic interests of the central government) than if Canada won the Boundary Dispute.

[1308] Morris understood that if the Treaty had allowed any owner to unilaterally authorize uses interfering with Harvesting Rights without Canada's further authorization/involvement, the legal result would be at least threefold: (1) the Ojibway would not be allowed to harvest on those lands [the geographical area of the lands available for harvesting would be increasingly diminished, contrary to the promise made as part of Canada's counter-offer on October 3]; (2) if the Ojibway did not have Treaty Harvesting Rights on those lands, the Courts could not require Ontario to justify its actions in "taking up" those lands even if they significantly infringed Treaty 3 Harvesting Rights; (3) Canada would be powerless to protect Ojibway Harvesting Rights in respect of those lands [with a concomitant powerlessness to protect Canada's other related strategic interests.] That would run contrary to the mutual intention of the parties at the time the Treaty was made, fly in the face of the express promises solemnly made by Canada to the Ojibway during the negotiations, violate the Honour of the Crown and have the potential to threaten security in the West.

[1309] I have held the Plaintiffs' "narrow, literal, interpretive approach" is **not** divorced from the intentions of the parties. There is no "mismatch" between the wording of the Treaty and the mutual intention of the parties. Canada, the only government that can authorize uses that significantly interfere with Treaty Harvesting Rights, intended to protect the Ojibway by making it necessary for Canada to authorize any use of land that significantly interfered with Ojibway Harvesting Rights under the Treaty.

[1310] After having considered all the evidence and the various interpretations of common intention, the one that best reconciles the interests of both parties at the time the Treaty was signed, the chosen interpretation is that Canada promised continuous Harvesting Rights without significant interference away from the Dawson Route and CPR right-of-way and the Ojibway relied upon Canada and only Canada to implement and enforce those Rights. Canada intended that in the event it lost the Boundary Dispute, Ontario would not be able to "take up" lands/authorize any land uses that would significantly interfere with Harvesting Rights unless Canada also authorized such "taking up."

[1311] In this litigation, it is not necessary for me to decide the specifics of what process Canada would have been required to follow under the Treaty in the event its own authorizations threatened to interfere with Treaty Harvesting Rights. [We do know that before October 1873, Canada had set up a process of consultation among federal departments to coordinate exercise of federal land granting power and s. 91(24) powers and responsibilities and that in the years immediately following 1873, it had taken steps to actively protect Harvesting Rights.]

[1312] I have found that Morris did understand that Canada's s. 91(24) jurisdiction could limit provincial power over property. While he did not intend that Canada would appropriate provincial assets, he did intend to ensure that Harvesting Rights could and would be protected. He did intend that if Canada lost the Boundary Dispute and Ontario was proposing to take action that would significantly interfere with Harvesting Rights, both provincial and federal authorizations would be required. He understood that the use of land within Ontario could have two aspects, a proprietary aspect governed by the province, and an aspect governed by Canada under its s. 91(24) jurisdiction.

[1313] Given my finding that the Ojibway understood and agreed that they were dealing with Canada and only Canada, and that Canada intended to keep its promises, it is not necessary to determine what the legal effect of a differing Ojibway misunderstanding would have been. I do note that the Treaty did not specify that the Queen could limit Treaty Harvesting Rights but that the Dominion of Canada could. I have found the Commissioners intended that the burden of Treaty Harvesting Rights on s. 109 rights could **only** be removed by Canada, the guardian of Indians under s. 91(24). I find that the Treaty required that if Canada lost the Boundary Dispute, the authorization process by Canada must be followed in respect of each and every proposed use with the potential to significantly interfere with Harvesting Rights.

[1314] I find that Morris, an advocate of strong central powers, would not have wanted to confer powers on Ontario to the detriment of the Ojibway contrary to Treaty promises made by Canada. He would not have wanted to confer on Ontario a power to limit or extinguish the Harvesting Rights the Commissioners were solemnly promising with the effect of exposing those Rights to significantly more erosion than either they or the Ojibway intended.

Step 3: Was the Harvesting Clause as written Constitutional?

[1315] Ontario based its argument on its exclusive proprietary jurisdiction over lands in Ontario. It characterized this as a case where the Plaintiffs are attacking Ontario's rights to exercise the prerogatives and incidents of land ownership. In his submissions on the Constitutionality of the Harvesting Clause, as throughout this case, counsel for Ontario exhorted this Court to focus only on its proprietary rights and to recognize their importance to Ontario. It demonstrated a palpable reluctance to have this Court consider the importance to the Ojibway of their Treaty Harvesting Rights.

[1316] Ontario submitted Treaty 3 must be interpreted/approached in a manner consistent with the evolving interpretation of the Constitutional framework of Canada, so that Ontario is able to "take up"/develop lands and extinguish treaty rights wherever Ontario authorizes settlement,

mining or lumbering. To reach a contrary interpretation would be inconsistent with Ontario's proprietary jurisdiction under s. 109 and overturn a cardinal feature of provincial fiscal resources. This would be a dramatic change to the balance of Canadian federalism as it applies in the Keewatin Lands and has been so applied for over a century, and would represent a marked and unwarranted incursion into provincial proprietary and legislative jurisdiction.

[1317] Counsel for Ontario submitted that even if the Treaty Commissioners intended to give Canada a role in "taking up" lands in order to protect the Ojibway, mention of Canada in the "taking up" clause was unconstitutional.

[1318] Not surprisingly, I have held that when Morris drafted the Harvesting Clause, he was focusing on Harvesting Rights, not property rights.

[1319] I have found Morris, the Commissioners and Privy Council all intended and understood "taking up by the Dominion of Canada" did not relate to ownership rights but to Canada's s. 91(24) power to protect, or alternatively restrict, otherwise unrestricted Harvesting Rights.

[1320] In my view, in considering the Constitutionality of the Harvesting Clause as written, it would be incorrect for this Court to consider only Ontario's proprietary rights. In my view, the task of this Court in considering the Constitutional issue here is to determine, as Vipond said, how provincial proprietary rights and powers interact or mesh with federal Constitutional rights and powers over Indians. Although he held that Ontario owned the Disputed Territory, including the timber on it, Lord Watson in *St Catherine's Milling* nevertheless recognized the reality of intersecting jurisdictions, just as Morris had done in 1873, and the Courts have done ever since. The intersecting authorities are, on the provincial side, administrative control over provincial lands and resources, and on the federal side, Indians and lands reserved for Indians.

Does Canada have a Constitutional Role under s. 91(24) in protecting Harvesting Rights in Ontario?

[1321] There are two Constitutional protections for Indians built into the structure of the *Constitution Act*, 1867 – the assignment of jurisdiction over Indians and Indian Affairs to the federal government in s. 91(24) and the qualification of provincial ownership rights in s. 109.

[1322] This Court must decide whether Morris was properly acting within Canada's s. 91(24) jurisdiction when he deliberately opted to specifically mention "taking up by Canada" in the Harvesting Clause, as I have found to protect Treaty 3 Harvesting Rights.

[1323] Counsel for Ontario submitted that *St. Catherine's Milling* is determinative. Morris' reference to Canada in the Harvesting Clause is unconstitutional. The JCPC in that case made it clear that since Ontario had beneficial ownership of the Disputed Territory, it had exclusive jurisdiction over it. The JCPC recognized Ontario's exclusive authority to administer and dispose of Crown lands within the province; since 1888, all patents, licences and other authorizations over Crown lands within the province have been issued by Ontario, "without federal supervision." *St. Catherine's Milling* and *Smith* confirmed that (outside of treaty reserves) the federal government's s. 91(24) jurisdiction over lands subject to Indian title was removed once

the lands were surrendered. To require Ontario to obtain federal authorization would be at odds with the recognition of exclusive provincial authority over ceded lands expressed in *St. Catherine's Milling*. See *Sundown* at paras. 34-35; *Saanichton Marina* at 171; *Smith* at 252; *St. Catherine's Milling* at 59.

[1324] Counsel for Canada submitted that *Smith* stands for the proposition that post-surrender, the provincial title is "relieved of the burden of the Indian rights under s. 91(24)." He relied on the following passage in *Smith* in support of the proposition that after the 1873 surrender, Canada had no continuing s. 91(24) jurisdiction off-reserve. At p. 564:

> The effect of a complete release, therefore, would be the withdrawal of these lands from Indian use within the contemplation of s. 91(24) of the *Constitution Act*. As found in *St. Catherine's*, the title of the Province would be unencumbered by any operation of s. 91(24).

[1325] Counsel for the Plaintiffs distinguished *Smith* on its facts. In that case there was a complete surrender of land with no reservation of Harvesting Rights.

[1326] Counsel for the Plaintiffs submitted that Ontario and Canada have misapprehended the modern law of the division of powers by failing to account for the fact that provincial ownership rights and jurisdiction in respect of public lands are qualified by federal jurisdiction over Indians and Treaty Rights and by the Harvesting Clause in the Treaty reserving Harvesting Rights to the Ojibway. *St. Catherine's Milling* and *Smith* do not stand for the proposition that Canada had no ongoing s. 91(24) jurisdiction after the Treaty was made. In *St. Catherine's Milling*, the position of the parties was that the land was free and clear of any interest except the Treaty Harvesting Right. Lord Watson specifically reserved judgment regarding how the federal government's s. 91(24) jurisdiction with respect to Harvesting Rights would mesh with Ontario's powers under s. 109.

[1327] Counsel for the Plaintiffs submitted that counsel for Ontario overlooked Lord Watson's statement in *St. Catherine's* that the JCPC was not determining how the hunting rights were to be limited or to what extent. It clearly declined to address or resolve that issue. Lord Watson continued:

> The fact, that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario.
>
> …
>
> There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit.

[1328] In the first sentence, Lord Watson recognized that even though the federal government had no proprietary interest in the timber, Canada, not Ontario, still had exclusive power to regulate the hunting right. There is an ongoing federal jurisdiction with respect to hunting and fishing. Implicit in those words was a recognition by the JCPC that the Treaty Harvesting Rights existed and that Ontario's s. 109 rights were subject to those Treaty Rights.

[1329] Counsel for the Plaintiffs submitted that the arguments of both governments that the JCPC in *St. Catherine's Milling* effectively decided this case, by determining that Ontario has title to the lands and that therefore there can be no federal role in determining where, when, how or to what extent Ontario may exercise its proprietary rights, is hard to reconcile with Lord Watson's statement to the effect that the JCPC was not determining how hunting rights were to be limited.

[1330] Counsel for the Plaintiffs also referred to Saywell's evidence that in *St. Catherine's Milling,* Lord Watson was indicating that the JCPC was **not** deciding where, when, how and by whom lands could be taken up.

[1331] He referred as well to Vipond's evidence that Lord Watson was referring to the important question, involving how the federal government's s. 91(24) obligation to protect hunting and fishing rights would mesh with the province's s. 109 proprietary rights and also that the JCPC did not decide that Ontario, the owner of the lands in the Disputed Territory, was free and clear of the burden of the Ojibway hunting and fishing mentioned in the Treaty.

[1332] Vipond's cross-examination on February 26, 2010 contained the following at pp 102-103:

> Q. So it's your view -- and not speaking as a lawyer but a political scientist, that Lord Watson is conveying the message that the question of how the federal government's jurisdiction with respect to the hunting rights would interact with the province's power to take up lands is a matter that was not settled by the St. Catherines Milling case?
> A. That's how I interpret it, yes.
> Q. And in terms of understanding the actions of political actors following the St. Catherines Milling decision, that's a significant passage, isn't it?
> A. Yes.
> [Emphasis added.]

[1333] Vipond agreed on February 26, 2010 at p. 104 that the issue decided in *St. Catherine's Milling* was who had the right to issue timber licenses on lands in Ontario. He agreed that the answer to that question depended on who was the owner of the land. Lord Watson held that Ontario was the owner and the federal government had no right to issue licenses or appropriate Ontario's beneficial interest in timber in Ontario. At the same time, he opined that Ontario's proprietary interests and the federal government's exclusive power to regulate the Indians' privilege of hunting and fishing had to be understood in relation to each other. How the two interests mesh with each other is a matter for Constitutional interpretation and legal doctrine.

[1334] The Plaintiffs here are not claiming that Canada has proprietary rights over lands in Ontario. They are claiming that Canada has legislative rights under s. 91(24) to protect Indians as required, including protecting their Treaty Rights.

[1335] I have already held that when Morris drafted the Treaty, he understood that the federal government would not be able to appropriate the proprietary rights of Ontario were Canada to lose the Boundary Dispute. At the same time, he understood Canada would be able to deal with matters properly within its s. 91(24) jurisdiction, including Treaty Rights. Acting as a Dominion official, he recognized the importance of specifying which level of government was responsible for what. Recognizing Canada's obligation to protect Treaty Rights, he mentioned Canada in the

Harvesting Clause to make it clear that Canada would be able to protect them in the event it lost the Boundary Dispute and a conflict developed between Ontario and Canada over development initiatives that could adversely affect Harvesting Rights.

[1336] Morris specified a process in the Harvesting Clause that must be followed in the event an entity other than Canada was purporting to interfere with the Treaty Harvesting Rights the Commissioners had promised.

(1) Conclusion re Section 91(24) Jurisdiction / Powers

[1337] Morris' reference to Canada in the Harvesting Clause was a proper exercise of Canada's s. 91(24) jurisdiction.

[1338] Only the federal government can make treaties. (See *Delgamuukw* at para. 175.)

[1339] Although in 1873 he may have believed that federal powers were greater than they later were held to be, Morris was correct that Canada could adversely affect proprietary rights by a valid exercise of its s. 91(24) jurisdiction over Indians.

[1340] Treaty Harvesting Rights were properly the subject of federal jurisdiction. A valid exercise of s. 91(24) power could affect uses of land within Ontario. So long as the federal role was truly constrained to its federal jurisdiction, exercise of that jurisdiction would be warranted.

[1341] More than one government could affect uses of lands within a province. Even when the federal government does not have proprietary interests in relation to the federal head of power under which it is acting, it can deal with federal matters such as fisheries or Indians [including treaty rights.]

[1342] In the *Fisheries Case*, a case involving s. 91 jurisdiction over fisheries, Lord Herschell wrote at pp. 712-713:

> Their Lordships are of the opinion that the 91st section of the *British North America Act* did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading "Seacoasts and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came in force. At the same time it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of the legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is

> elected. If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that, in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by s. 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the *British North America Act*, been left to the provinces and not vested in it.
> [Emphasis added.]

[1343] Duff J. for the majority in the *Water Powers* reference case highlighted the difference between unwarranted federal interference with a provincial jurisdiction and a legitimate federal constraint on provincial action. He explained at page 219 the way to reconcile the two jurisdictions:

> We must, as best we can, reconcile the control by the provinces of their own assets as assets, with the exercise by the Dominion of its exclusive powers for the purposes which those powers were intended to subserve. This can only be accomplished by recognizing that the proprietary rights of the provinces may be prejudicially affected, even to the point of rendering them economically valueless, through the exercise by the Dominion of its exclusive and plenary powers of legislation under the enumerated heads of section 91. On the other hand, in giving effect to the provisions of the *British North America Act*, we must rigorously adhere to the radical distinction between these two classes of enactment: legislation in execution of the Dominion's legislative powers under section 91, which may, in greater or less degree, according to the circumstances and the nature of the power, affect the proprietary rights of the provinces, and even exclude them from any effective control of their property; and, in contradistinction, legislation conceived with the purpose of intervening in the control and disposition of provincial assets, in a manner, which, under the enactments of that Act touching the distribution of assets, revenues and liabilities, is exclusively competent to the provinces. [Emphasis added.]

[1344] In *Seybold*, the JCPC affirmed that Canada does have jurisdiction to affect provincial proprietary rights by reason of its s. 91(24) jurisdiction with respect to Indians in the same way that it can affect provincial proprietary rights by reason of its s. 91 jurisdiction over fisheries:

> Their Lordships repeat for the purposes of the present argument what was said by Lord Herschell in delivering the judgment of this Board in the *Fisheries Case*, as as to the broad distinction between proprietary rights and legislative jurisdiction.

[1345] In *Sparrow* the Supreme Court reaffirmed that Canada does have legislative power to affect provincial proprietary rights. Dickson C.J.C. and LaForest J. held [for the Court] at pp. 1097-1098:

> The distinction to be drawn was carefully explained, in the context of federalism, in the first [*Fisheries Case*]. There, the Privy Council had to deal with the interrelationship between, on the one hand, provincial property, which by s. 109 of the *Constitution Act, 1867* is vested in the provinces (and so falls to be regulated *qua* property exclusively by the provinces) and, on the other hand, the federal power to legislate respecting the fisheries thereon under s. 91(12) of that Act.

The Supreme Court of Canada then quoted from *BNA Act, 1867* the portion shown underlined in the quote at paragraph 1342 above.

[1346] In the case of the Treaty Harvesting Rights, the Plaintiffs are not submitting that the federal government can authorize a forestry operation without the province first granting the proprietary rights necessary to carry out the operation. No forestry operation can be carried out without a provincial authorization to do so. At the same time, if the forestry operation will foreseeably and significantly interfere with Treaty Harvesting Rights, a federal authorization to

interfere adversely with those Harvesting Rights must be obtained from the federal government under s. 91(24) and under the provisions of the Treaty.

[1347] I do not accept the submission of Ontario made in argument that in exercising its proprietary rights, it has powers akin to those of a fee simple owner, unconstrained by the division of powers. [Please see also the section of these Reasons headed "Answer to Question Two - Is Division of Powers Analysis Appropriate Here? Is Ontario Unconstrained by the Division of Powers? Are Treaty Rights Protected only by s. 35 and the Honour of the Crown?"] Counsel for Ontario cited Hogg, *Constitutional Law of Canada, supra*, at para 29.3, as follows:

> 29.3 … The federal and provincial governments have full executive powers over their respective public properties. It is neither necessary nor accurate to invoke the royal prerogative to explain the Crown's power over its property. As a legal person, the Crown in right of Canada or the Crown in right of a province has the power to do anything that other legal persons (individuals or corporations) can do. Thus, unless there are legislative or constitutional restrictions [footnote 11] applicable to a piece of public property, it may be sold, mortgaged, leased, licensed or managed at the pleasure of the responsible government, and without the necessity of legislation. [Emphasis added.]

[1348] I note that footnote 11 to that paragraph reads as follows:

> An example of constitutional restriction would be lands reserved for the Indians, which although owned by the province, are subject to federal legislative power under s. 91(24).
> [Emphasis added.]

[1349] I also note that paragraph 29.4 of the same book, in a section on Legislative power and Proprietary Interests, contains the following:

> Some of the implications of the distinction between legislative power and proprietary interests are less obvious. The exercise of legislative power over, say, fisheries, may severely limit the owner's enjoyment of the property…such a law is valid notwithstanding its incidental effects on proprietary rights… the provincial power over property is limited by the existence of federal powers.
> [Emphasis added.]

[1350] I also note that Canada in exercising its s. 91 jurisdiction, frequently requires further authorizations for land uses, even within provinces with s. 109 powers, when they interfere or threaten to interfere with a federal jurisdiction. For example, Canada requires such federal authorizations under the *Fisheries Act.* Canada's jurisdiction to interfere with land use within a province derives from its fisheries jurisdiction under s. 91. Section 35(1) of the *Fisheries Act* provides:

> 35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

Section 35(2) of the *Fisheries Act* (like the provision in the Harvesting Clause allowing Canada to "take up" lands i.e., to allow use visibly incompatible with Harvesting Rights) allows Canada [Minister] to authorize such harmful disruption or destruction, which is otherwise not allowed absent a federal authorization:

> 35.(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

Before a user can dig trenches or undertake ordinary activities, even on her own land, which would adversely affect fish habitat, even if she is within a s. 109 province and has obtained a fee simple patent from the province, she must also obtain an authorization from Canada under the federal *Fisheries Act*.

[1351] A province may own the bed of a river but may not be able to dam the river if by so doing it will harmfully alter fish habitat unless it has first obtained a permit from the federal government allowing it to do so pursuant to s. 35 of the *Fisheries Act*. Another example illustrating that the right of a government or a subject to use land or a resource may depend on more than fee simple ownership is a fee simple owner of land in a municipality who cannot erect a particular type of building without complying with municipal zoning by-laws.

[1352] I do not accept Ontario's and Canada's submission that post-Treaty, Canada had no continuing s. 91(24) jurisdiction over "taking up" lands in Ontario, if in making that submission they were suggesting that Canada had no ongoing s. 91(24) legislative jurisdiction over Treaty Harvesting Rights off-reserve in Ontario.

[1353] In my view, in *St. Catherine's Milling*, Lord Watson for the JCPC did recognize that even though the federal government had no proprietary interest in the timber within the Disputed Territory, Canada, not Ontario, had power to regulate the hunting right and that Canada had ongoing jurisdiction over hunting and fishing:

> The fact, that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario ...
> [Emphasis added.]

[1354] In my view, *Smith* has no application here for the reasons cited by counsel for the Plaintiffs mentioned earlier. Canada's reliance on *Smith* demonstrates the pitfalls of considering the effect of a surrender without having regard to the specific circumstances.

[1355] A valid exercise of federal jurisdiction under s. 91(24) (enforcing Treaty Rights) is not federal supervision. The exercise of provincial powers can be constrained by a legitimate exercise of federal jurisdiction. When the federal government is exercising its legitimate powers over Indians and lands reserved for the Indians, it is not acting in a supervisory role but acting pursuant to its own valid Constitutional powers. In exercising its own valid s. 91(24) jurisdiction, Canada cannot be said to be improperly "supervising" or meddling with provincial proprietary jurisdiction.

(2) Conclusions re Section 109

[1356] Section 109 of the *Constitution Act, 1867* protects the interests of the Indians because Ontario's rights thereunder are expressly qualified by interests other than interests of the province in the same, including Treaty Harvesting Rights.

[1357] *St. Catherine's Milling* and *Seybold*, both Treaty 3 cases, make it clear (just as I have found Morris anticipated and understood when he drafted the Treaty) that the Treaty Harvesting

Rights reserved to the Indians in Treaty 3 impose a limitation on Ontario's s. 109 jurisdiction, as an interest under s. 109 "other than an interest of the province in the same."

[1358] In *St. Catherine's Milling*, the JCPC mentioned that Ontario's s. 109 rights are subject to the qualified privilege of hunting and fishing mentioned in the Treaty. It did not decide that Ontario could "take up" lands in Ontario without regard to Treaty Harvesting Rights.

[1359] In *Seybold*, the JCPC also held that the extinguishment was not complete, at para. 3:

> The lands in question are comprised in the territory within the province of Ontario, which was surrendered by the Indians by the treaty of October 3, 1873, known as the North-West Angle Treaty. It was decided by this Board in the *St. Catherines Milling* case, that prior to that surrender the province of Ontario had a proprietary interest in the land, under the provisions of s. 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land **subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty**."
> [Emphasis added.]

[1360] In a portion of his decision where he spoke for the whole Court in *Delgamuukw* Chief Justice Lamer wrote at para. 175:

> 175 The province responds by pointing to the fact that underlying title to lands held pursuant to Aboriginal title vested with the provincial Crown pursuant to s. 109 of the *Constitution Act, 1867*. In its submission, this right of ownership carried with it the right to grant fee simples which, by implication, extinguish Aboriginal title, and so by negative implication excludes Aboriginal title from the scope of s. 91(24). The difficulty with the province's submission is that it fails to take account of the language of s. 109, which states in part that:
>
> > 109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces . . . subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.
>
> Although that provision vests underlying title in provincial Crowns, it qualifies provincial ownership by making it subject to the "any Interest other than that of the Province in the same". In *St. Catherine's Milling*, the Privy Council held that Aboriginal title was such an interest, and rejected the argument that provincial ownership operated as a limit on federal jurisdiction. The net effect of that decision, therefore, was to separate the ownership of lands held pursuant to Aboriginal title from jurisdiction over those lands. Thus, although on surrender of Aboriginal title the province would take absolute title, jurisdiction to accept surrenders lies with the federal government. The same can be said of extinguishment -- although on extinguishment of Aboriginal title, the province would take complete title to the land, the jurisdiction to extinguish lies with the federal government.
> [Emphasis added.]

[1361] A provincial government attempted to revive the argument that ownership gave it exclusive rights to lands that could not be limited by protection of Aboriginal rights in *Haida Nation*. The Supreme Court of Canada affirmed that Crown ownership of lands under s. 109 was qualified by pre-existing Aboriginal rights at paras. 58-59:

> 58 The Province's argument rests on s. 109 of the *Constitution Act, 1867*, which provides that "[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces." The Province argues that this gives it exclusive right to the

> land at issue. This right, it argues, cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*. To do so, it argues, would "undermine the balance of federalism"
>
> 59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). 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. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed…. There is therefore no foundation to the Province's argument on this point.

[1362] In his written argument, counsel for Ontario appeared to be agreeing that before the surrender, under s. 109, provincial rights were subject to the burden of the Indian usufructuary right and that upon the extinguishment of that title by surrender, the province was subject to the qualified privilege of hunting and fishing reserved to the Indians in the Treaty. However, it attempted to distinguish *Delgamuukw* and *Haida Nation* at paragraph 102 of its written closing argument on the basis that "…qualified harvesting rights are a very different type of legal interest than Aboriginal title."

[1363] *Black's Law Dictionary*, 8th ed., confirms that "usufructuary" is a property interest, defining it as "one having the right to usufruct; specif., a person who has the right to the benefits of another's property; a life-renter." "Usufruct" is defined as "A right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property right may naturally diminish over time." [Emphasis added.]

[1364] In considering the distinction between proprietary and non-proprietary rights, urged upon me by counsel for Ontario, I have considered the following:

[1365] In *Sparrow*, Chief Justice Dickson and LaForest J wrote at pp. 1111-1112:

> Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful to avoid the application of traditional common law concepts of property as they develop their understanding of the "*sui generis*" nature of Aboriginal rights.
> [Emphasis added.]

[1366] In *Sundown* at para. 35:

> Aboriginal and treaty rights cannot be defined in a manner which would accord with common law concepts of title to land or the right to use another's land. Rather, they are the right of Aboriginal people in common with other Aboriginal people to participate in certain practices traditionally engaged in by particular Aboriginal nations in particular territories.
> [Emphasis added.]

[1367] The Supreme Court of Canada has, in a number of cases, held that s. 91(24) covers two distinct heads of powers, "Indians" and "Lands reserved for the Indians." This distinction is significant in understanding how there can be a continuing federal interest in Keewatin Lands that are not "Lands reserved for the Indians." Aboriginal and Treaty Rights other than Aboriginal title can fall under the subject matter of "Indians" and not "Lands reserved for the Indians." Chief Justice Lamer summarized this principle as follows in *Delgamuukw* at paragraph 138:

> The picture which emerges from *Adams* is that Aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one

> end, there are those Aboriginal rights which are practices, customs and traditions that are integral to the distinctive Aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land" (at para.26). **Nevertheless, those activities receive constitutional protection**. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an Aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. I put the point this way in *Adams* **…**
>
> At the other end of the spectrum, there is Aboriginal title itself. As *Adams* makes clear, Aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive Aboriginal cultures. Site-specific rights can be made out even if title cannot.
> [Emphasis added.]

and at paragraph 176:

> 176 I conclude with two remarks. First, even if the point were not settled, I would have come to the same conclusion. The judges in the court below noted that separating federal jurisdiction over Indians from jurisdiction over their lands would have a most unfortunate result -- the government vested with primary constitutional responsibility for securing the welfare of Canada's Aboriginal peoples would find itself unable to safeguard one of the most central of native interests — their interest in their lands. Second, although the submissions of the parties and my analysis have focussed on the question of jurisdiction over Aboriginal title, in my opinion, the same reasoning applies to jurisdiction over any Aboriginal right which relates to land. As I explained earlier, *Adams* clearly establishes that Aboriginal rights may be tied to land but nevertheless fall short of title. Those relationships with the land, however, may be equally fundamental to Aboriginal peoples and, for the same reason that jurisdiction over Aboriginal title must vest with the federal government, so too must the power to legislate in relation to other Aboriginal rights in relation to land.
> [Emphasis added.]

[1368] The Ojibway concept of their ability to harvest and use the natural resources of the land is consistent with the Chief Justice's statement in *Delgamuukw* that Aboriginal peoples can have Harvesting Rights integral to their distinctive culture that are rights that fall within the jurisdiction of the federal government under s. 91(24). Here, Ojibway hunters, based on the evidence of Lovisek and Fobister, exercised exclusive control over their lands before the Treaty was signed and, at the very least, site specific activities after. Morever, their Harvesting Rights on their lands as in the past were reserved to them under the Treaty.

[1369] The Treaty Harvesting Rights here, like Aboriginal title, are based on an established pre-existing use of land recognized by the Treaty Commissioners. In S*eybold*, the JCPC held Treaty 3 Harvesting Rights were "reserved to the Indians in the Treaty."

[1370] Dean La Forest noted in his book *Natural Resources and Public Property under the Canadian Constitution* at p. 120: "... it does, of course, matter to [the Indians] where they hunt and fish; the privilege is thus attached to land and would appear to constitute a trust or interest other than that of the province in the same." [Emphasis added.] At p. 179 of his book, he wrote: "Reasons have already been advanced in support of the view that the right to hunt and fish is an interest preserved by s. 109."

[1371] In my view Dean LaForest's book does not support the proposition urged upon this Court that Ontario is entitled to exclusive use without regard to the Treaty Harvesting Rights. He wrote at p. 84:

> A more difficult question arises in relation to the privilege reserved … to hunt and fish on surrendered lands. Some statements of the Privy Council [*St. Catherine's, Seybold*] appear to indicate that this privilege may be a trust or interest in the land but Greene J. of the Ontario High Court later held the contrary in. *Commanda* at p. 178.
> [Emphasis added.]

[1372] He disagreed with the reasoning in *Commanda*.

[1373] While the Supreme Court of Canada has since discarded the concept of usufructuary rights, LaForest's reasoning at pp. 118-119 that hunting rights be interpreted as a reservation of part of the usufructuary rights nevertheless remains apposite:

> Some treaty provisions, however, might well be interpreted as a reservation of a part of the usufructuary right, rather than as a mere promise not attached to the land. Thus in the treaty examined in the *St. Catherine's* case, there is the following provision: "…the Indians are to have right to pursue their avocations of hunting and fishing throughout the surrendered territory, with the exception of those portions of it which may from time to time be required or taken up for settlement" … such a provision, if it is binding on the province, may curtail the freedom of action of the provincial legislature in connection, for example, with its game and fishing regulations. In the *St. Catherine's* case, the only references to this clause indicate that the Dominion has legislative power to regulate the Indians' privilege and that questions might arise respecting the right to determine to what extent, and at what periods, the territory over which the Indians exercise these rights is to be taken up for settlement. These statements appear to recognize the hunting and fishing rights as against the province and this seems to be the view taken of the case in *Ontario Mining Co. v. Seybold*, where it is said:
>
> > It was decided by this Board in the *St. Catherine's Milling Co.'s Case* that prior to that surrender the province of Ontario had a proprietary interest in the land, under the provisions of s. 109 of the *BNA Act, 1867*, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty.
>
> From this it can certainly be argued that the right to hunt and fish is an unsurrendered portion of the usufructuary right of the Indians in lands reserved for them, and consequently that it is a trust or an interest other than that of the provinces in the such lands. It would follow that, subject to the exceptions in the treaty, the right would come within the exclusive jurisdiction of the federal authorities as relating to Indians and lands reserved for Indians. But this was not the view taken in *R. v. Commanda*.
> [Underlining emphasis added]

[1374] I reject the submission of counsel for Ontario that the qualified Harvesting Rights to which the JCPC referred in *St. Catherine's Milling* and *Seybold* were not interests other than that of the province in the same under s. 109.

Conclusion re Constitutionality of the Harvesting Clause as Written

[1375] In summary, the mention of the Dominion of Canada in the Harvesting Clause and the reservation to Canada of the power to authorize interference with otherwise unlimited Harvesting

Rights under the Treaty, is Constitutional. Ontario's s. 109 rights are subject to the Harvesting Rights under the Treaty, an interest other than of the province in the lands and also to Canada's s. 91(24) jurisdiction.

[1376] It is necessary to consider s. 91 and s. 109 in relation to each other. An activity can have a proprietary aspect governed by a province and a federal aspect governed by the federal government.

[1377] I accept that under s. 91 Canada can exercise its legislative jurisdiction in relation to Indians and Indian lands including protecting Treaty Rights. Under the Treaty, only Canada can authorize "taking up" of lands for uses that will significantly interfere with Treaty Harvesting Rights.

[1378] I am of the view that the "taking up" clause was not an improper attempt to interfere with proprietary rights, but a valid exercise of a legitimate federal head of power.

[1379] In specifically referring to Canada in the Harvesting Clause, the Treaty Commissioners had no intention of interfering with Ontario's s. 109 proprietary powers/the granting of Crown instruments **except** to the extent it was necessary to use its s. 91(24) powers to protect the Harvesting Rights promised to the Ojibway under the Treaty. To the extent that the exercise of its federal jurisdiction over Indians and Treaty Rights would affect Ontario's proprietary rights under s. 109, that was Constitutionally allowable. Treaty Rights are squarely within the jurisdiction of the federal government under s. 91(24).

[1380] While I have found that Morris had no intention of attempting to appropriate Ontario's s. 109 rights, I have also found he had no intention of expanding Ontario's rights by conferring rights to Ontario under the Treaty it did not already have under s. 109, thereby undermining Ojibway Harvesting Rights. Believing that Canada must keep its promises to the Indians, he drafted the Harvesting Clause with a view to protecting the Indians and in turn ensuring that Canada would have the power to keep its promises and its security interests would not be undermined.

[1381] The Canadian Constitutional framework does not require this Court to ignore treaty wording intended by Canada to protect treaty rights pursuant to s. 91(24). It does not require the Court to interpret words protective of treaty rights in a manner designed to defeat treaty rights.

[1382] Canada can deal with matters within its s. 91(24) jurisdiction, including treaty rights, both as a matter of Constitutional law and based on the wording of the treaty.

Step 4: In light of Steps 1, 2 and 3 above, What is the Answer to Question One as of 1873?

[1383] The answer to Question One as of 1873 was No.

Step 5: The Effect of the 1891/1894 Legislation/Agreement

5(a) Did the 1891/1894 Legislation/Agreement ("the 1894 Agreement") Declare Ontario's Existing Rights Or Give Ontario Additional Rights?

[1384] As mentioned earlier, within weeks of the release of *St. Catherine's Milling*, on January 17, 1889, Mowat wrote to Dewdney, the federal Minister of the Interior, pressing Ontario's proprietary rights within the Disputed Territory, and suggesting that they were not subject to Harvesting Rights under the Treaty. I have found on a plain reading of that letter that Mowat, having read the words in the Harvesting Clause, was uncertain that it would allow Ontario to develop lands "free of the Indian right of hunting and fishing." He understood that the Treaty appeared to provide that Canada's authorization would be required under the Treaty, if Ontario were purporting to interfere with Harvesting Rights under the Treaty. He wrote: "But whether that would be a legal consequence without an Order in Council or statutory enactment might be the subject of more or less litigation and friction."

[1385] I have already held that read literally, the Harvesting Clause did not allow "taking up" by Ontario and that the mutual intention of the parties was not to allow "taking up" by Ontario. I have therefore concluded the Answer to Question One in 1873 was No.

[1386] Even though Mowat probably had no knowledge of the facts I have reviewed about mutual intention of the Treaty parties or the details of the 1873 negotiations, Mowat was also a trained Constitutional lawyer and in his dual role of Premier and Attorney General had repeatedly argued for Ontario in the JCPC. He clearly understood from the plain wording of both the Treaty and s. 109 that a Court could determine that Ontario's s. 109 proprietary rights were subject to Treaty Harvesting Rights and that the wording of the Clause was Constitutional having regard to Canada's s. 91(24) powers and the specific wording of s. 109.

[1387] Vipond agreed that Mowat in his January 17, 1889 letter to Dewdney was writing about the question that Lord Watson had left unanswered in *St. Catherine's Milling*, namely, when Ontario makes grants of land, does the user or owner take them "free from the Indian right of hunting and fishing?" Vipond's cross-examination on February 26, 2010 contains the following:

> At pp. 111-112
> Q. … I'm going to suggest to you that what Mowat is writing about here is essentially the question that Lord Watson says is left unanswered. That is, what happens to the Indian rights when Ontario makes grants of land, the question being are those rights -- and if you look at Mowat's letter, I want you to see the words "free from the Indian right of hunting and fishing."
> A. Yes…
> …
> At pp. 113-114:
> Q. And he's saying that there might be legal problems with that if there isn't either an Order-in-Council or legislation from the federal government ensuring that that is what actually happens, correct?
> A. Yes. …
> [Emphasis added.]

[1388] Saywell agreed that in the January 17, 1889 letter, Mowat was recognizing that the wording of the Harvesting Clause gave rise to a legal question. Did Ontario have a right to authorize land use free and clear of the Indian Treaty right of hunting and fishing?

[1389] In his January 17, 1889 letter Mowat did mention "taking up." He did not refer to "taking up by Canada." However, the reference to Canada in the Harvesting Clause would not have escaped his notice. He would have understood that a Court could determine that before Ontario could authorize uses of land that purported to interfere with Treaty Harvesting Rights, Ontario would need the authorization of Canada.

[1390] Vipond agreed in cross examination that Mowat understood that as owner, Ontario could authorize use of lands under s. 109 apart from the Treaty. That right did not emanate from the Treaty. However, he also understood that a court could rule that Ontario's rights were subject to Ojibway Harvesting Rights under the Treaty. In addition, Mowat was aware that in *St. Catherine's Milling*, the JCPC had noted that Ontario's rights were subject to the qualified privilege of hunting and fishing.

[1391] Mowat wanted Ontario to have unfettered rights to authorize land uses within the Disputed Territory.

[1392] With his January 17, 1889 letter to Dewdney, Mowat enclosed a proposed Order in Council to be passed by Canada, which read as follows:

> It is hereby declared… that all the territory surrendered by the said treaty is now required for settlement, or mining, or lumbering purposes… any right of the Indians under the said treaty to pursue the avocations of hunting and fishing aforesaid shall not and do not apply to lands which are or which shall be the subject of such **grants, licenses, sales or leases as aforesaid.**
> [Emphasis added.]
> (Saywell report, Ex. 137-2, pp 37-38)

[1393] Had Canada agreed to Mowat's draft, the Ojibway would have lost their hunting rights in all of the Disputed Territory, not just on lands "taken up" by Ontario. [As eventually passed, the 1891 Legislation did **not** incorporate Mowat's suggested wording but instead used the "taking up" wording Morris had used in the Treaty in 1873, but without the qualifier "by the Dominion."]

[1394] Negotiations between Canada and Ontario ensued. The Ojibway were not included, and were apparently unaware of them.

[1395] Ontario, having just won in *St. Catherine's Milling* in the JCPC, apparently perceived that it had the upper hand. It was threatening not to confirm the reserves that Canada had set up years earlier in fulfillment of the Treaty promise. [Unlike in the Robinson Treaties where the metes and bounds description excepted the lands that had already been identified by the Vidal Commission as reserves, Treaty 3 included all the lands but with a promise to create reserves. This gave Ontario the argument that the reserves had been created out of lands that had already passed into its ownership. Ontario was insisting that the reserves could not have been allocated to the Ojibway by Canada without its consent.]

[1396] Canada needed to be able to deliver on its promises to create reserves.

[1397] The 1891 Legislation (Ex. 1, Vol. 13, tab 605 at pp. 174-175) includes the following:

> And whereas by the said treaty, out of the lands so surrendered, reserves were to be selected and laid aside for the benefit of the said Indians: and the said Indians were amongst other things hereinafter provided to have the right to pursue their avocations of hunting the fishing throughout the tract surrendered, subject to such regulations as might from time to time be made by the Government of the Dominion of Canada, and saving and excepting such tracts as might from time to time be required or taken up for settlement, mining, lumbering or other purposes by the said Government of the Dominion of Canada or by any of the subjects thereof duly authorized therefor by the said Government.
>
> And Whereas the true boundaries of Ontario have since been ascertained and declared to include part of the territory surrendered by the said Treaty and other territories north of the height of land with respect to which the Indians are understood to make a claim as being occupants thereof, according to their mode of occupying, and as not having yet surrendered their claim thereto or interest therein.
>
> And Whereas before the true boundaries had been declared as aforesaid the Government of Canada had set aside certain Reserves for the Indians in intended pursuance of the said treaty, and the said government of Ontario was no party to the selection, and has not yet concurred therein.
>
> And Whereas it is deemed desirable for the Dominion of Canada and the Province of Ontario to come to a friendly and just understanding in respect of the said matters, and the Governor General of Canada in Council and the Lieutenant Governor General of Canada in Council have given authority for the execution on their behalf respectively pursuant of the said Statutes of an Agreement in terms of these presents.
>
> Now Hereby It is Agreed between the two Governments as follows; -
>
> 1. With respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract have been decided to belong to the Province of Ontario, or to *Her Majesty in right of the said Province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, 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 said Government of Ontario; and that the concurrence of the Province of Ontario is required in the selection of the said reserves* [Emphasis added.]
> [Emphasis added.]

Conclusions Re The Effect Of The 1891 Legislation

[1398] I have already held that Ontario as of 1873 did not have the right to "take up" lands in the Disputed Territory.

[1399] I find that Mowat understood that Ontario needed federal legislation that would have the legal effect of amending the Treaty to give it the right to "take up" lands in Ontario free and clear of Treaty Harvesting Rights without Canada's authorization.

[1400] The fact that Mowat ensured not only that the two governments negotiated an agreement, but also that Canada passed legislation to enable Ontario to "take up" lands, speaks volumes about Mowat's understanding.

[1401] Ontario and Canada did not consider it sufficient to rely on a simple agreement. Canada passed legislation to allow Ontario to "take up" lands within Ontario without the authorization of Canada. Had Ontario been entitled to grant lands free of Harvesting Rights on the basis of the Treaty words alone, such legislation would have been unnecessary.

[1402] I find that to the detriment of the Ojibway, Ontario sought and obtained rights from Canada it did not already have under s. 109 or under Treaty 3. It successfully "bargained" with Canada to be able to "take up" land free of Indian hunting and fishing rights under the Treaty, by threatening to refuse to confirm the Treaty 3 reserves if Canada refused to pass legislation allowing that to happen.

[1403] I find that the 1891 Legislation had the effect of amending Treaty 3, not simply confirming Ontario's rights before it was passed.

[1404] But for the 1891 Legislation, Ontario would not have had the power to "take up" lands in the Disputed Territory in a manner visibly incompatible with Treaty Harvesting Rights without first receiving the authorization of Canada. The 1891 Legislation amended Treaty 3 by taking away Harvesting Rights the Treaty 3 Ojibway would otherwise have had.

[1405] Despite Canada's concession in relinquishing Harvesting Rights on lands taken up by Ontario in the Disputed Territory, by 1915 Ontario still had not confirmed the Reserves or recognized the headlands principle.

[1406] Whether Canada's action in acceding to Ontario's demands was justifiable is not to be decided here.

5(b) Did the 1891/1894 Legislation/Agreement Apply to Keewatin After 1912?

[1407] It is undisputed that prior to the annexation of Keewatin to Ontario in 1912, the 1894 Agreement did **not** apply in Keewatin. Prior to 1912, Ontario had neither legislative powers nor proprietary interest in Keewatin because it was outside of its boundaries.

[1408] As noted earlier, the 1891 Legislation provided as follows:

> With respect to the tracts to be, from time to time, taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract have been decided to belong to the Province of Ontario, or to Her Majesty in right of the said Province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement.
> [Emphasis added.]

[1409] Counsel for Ontario submitted:

> 468…the language employed in section 1 of the 1894 Agreement does not delineate any particular geographic ambit to which it applies. Instead, it refers to "Crown lands in the surrendered tract" – which reads as though all of the Treaty 3 lands fall within Ontario…

> 469 There was no need to specify an explicit territorial ambit of section 1, because Ontario's ability to take up and authorize the taking up of land was (and is) limited to lands within its boundaries. Put differently, the territorial ambit of section 1 is defined by the territorial ambit of Ontario's constitutional powers, including its legislative and proprietary powers over lands.
>
> 470 When the Keewatin Lands were added to Ontario in 1912, Ontario's constitutional powers became applicable to these lands. Section 1 of the 1894 Agreement became applicable to the Keewatin Lands at that time.
>
> 471 … the same mischief addressed by the 1894 Agreement would apply – in exactly the same way – to any Treaty 3 Lands subsequently added to the Province.
> [Emphasis added.]

[1410] In the alternative, counsel for Ontario submitted that if this Court does not conclude that the 1891 Legislation applies to Keewatin, based on a "purposive" reading, any resulting legislative lacuna should be remedied by this Court on the basis that Parliament and the Ontario Legislature clearly would have intended to remedy "the same mischief in the same way" had they turned their minds to the issue. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: Butterworths, 2008) wrote the following at p. 183:

> Legislative silence with respect to a matter does not necessarily amount to a gap in the legislative scheme. A gap is a "true" gap only if the legislature's intention with respect to the matter cannot be established by necessary implication. An intention is necessarily implied if (1) it can be established using ordinary interpretation techniques and (2) the implication is essential to make sense of the legislation or to implement its scheme.

[1411] Counsel for Ontario relied upon a statement of Borden made in Parliament to the effect that after annexation, Ontario's powers would be the same as within its original boundaries. The Borden exchange was quoted by Saywell in his report (Ex. 137-2) at page 59:

> Do we understand that the title to the lands east of the boundary between Manitoba and Ontario is to go to the Ontario government or is it reserved to the Dominion?" asked E.M. Macdonald, a Liberal from Pictou. Borden answered a slightly different question:
>
> > In extending the boundaries of the province of Manitoba the Crown reserves, as was done in the case of Alberta and Saskatchewan, the title to the public domain which has not passed to private hands. Therefore the Crown, holding title to the public domain in the district indicated in the order in council, proposes to make a grant of a strip five miles in width from the eastern boundary of the province of Manitoba to the mouth of the Nelson river. The point at which that strip is to begin has not been precisely defined.
>
> But, continued Macdonald, "I was asking in regard to the title of lands in what would be New Ontario; does the federal government exercise the title or is it given to the province?" To which Borden answered, "It passes as the other lands within the province of Ontario. It is to be administered by the Crown on the advice of the government of Ontario." German, a Welland Liberal pointedly asked, "Who will have jurisdiction over these five miles?" Borden replied that "It will be subject to the legislative jurisdiction of the province of Manitoba just as any other portion of land within the boundaries of that province." But German was not to be deflected: "Then will the hon. gentleman tell me who owns the land? Is it owned by Manitoba or Ontario or the Dominion government?" The answer, said Borden, was "It has never been owned by Manitoba, it is at present owned by the federal government and as soon as this grant is passed it will be owned by the Ontario government."

[1412] Counsel for the Plaintiffs submitted that the 1891 Legislation does **not** apply to the Keewatin Lands. Its territorial ambit is expressly limited to the Disputed Territory, the lands that

the JCPC in *St Catherine's Milling* declared to be beneficially owned by Ontario. The subject matter of the negotiations leading up to the 1891 Legislation was only the Disputed Territory. He relied in part on a letter (Ex. 1, Vol. 12, tab 585) to the Privy Council enclosing relevant documents in which the Superintendent General of Indian Affairs referred to the negotiations to "be opened between the Dominion Government and the Government of Ontario with respect to the rights of Indians in Reserves in that portion of territory covered by Treaty No. 3 which has been declared by the judgment of the Privy Council of Great Britain to be the property of the provincial government." (Vipond, March 1, 2010 at pp. 11-13.)

[1413] He submitted that the 1891 Legislation was confined to the "said matters" described in the preamble following from the resolution of the Boundary Dispute, applying only to the Disputed Territory.

Conclusions re Applicability of the 1891 Legislation to Keewatin after 1912

[1414] I do not accept the submission of Ontario based on Borden's statement in Parliament quoted earlier. While I agree that in 1912, Canada and Ontario accepted that Ontario would have s. 109 powers over lands being annexed to Ontario, Borden's answer was directed to "title." The Plaintiffs do not dispute that title in the annexed lands passed to Ontario. While it was understood that Ontario would have the usual s. 109 powers in Keewatin, I do not accept that Canada exhibited a clear intent to have the 1891 Legislation (that had taken away Treaty Rights in respect of the Disputed Territory) apply in Keewatin (that was not in the Disputed Territory at the time the legislation was passed.)

[1415] I have accepted Saywell's and Vipond's evidence (Vipond, February 24, 2010 at p. 52) that the 1891 Legislation was designed to specifically deal with lands dealt with by *St. Catherine's Milling*.

[1416] I have found that the 1891 Legislation resulted from negotiations between Ontario and Canada in respect of "the said matters." It was intended to address the issues in the Disputed Territory arising out of *St. Catherine's Milling*. It was implicit that Canada and Ontario intended to limit its territorial ambit to the Disputed Territory. At the time of the 1891 Legislation, there were no questions to be resolved concerning Indian Lands in Keewatin.

[1417] As *Arrow River* makes clear, provincial enactments, if restricted to the area to which enactments are said to apply, are limited to that area.

[1418] I have found that but for the 1891 Legislation, Ontario would not have had the right to "take up" lands in the Disputed Territory without authorization from Canada. It must be borne in mind that Ontario is seeking an interpretation of a statute having the effect of limiting Treaty Rights.

[1419] I have rejected the submission of counsel for Ontario that the "same circumstances addressed by the 1894 Agreement existed when the Keewatin Lands were annexed in 1912." When the Agreement to annex Keewatin was reached, there were no circumstances similar to those existing in 1891/1894 to motivate Canada to compromise the Harvesting Rights of the

Treaty 3 Ojibway in Keewatin. There was a much different dynamic in the negotiations between Canada and Ontario leading up to the 1912 Legislation than there had been in the period immediately after Canada had lost the *St. Catherine's Milling case*. In the former, Ontario had the upper hand. Canada wanted to get the reserves confirmed. In 1912, Ontario had no right to annex the Keewatin Lands. Ontario was the supplicant, seeking to extend its territory and to secure access to a port on Hudson's Bay.

[1420] The 1891 Legislation was clearly intended to respond to *St. Catherine's Milling*, which did not affect Keewatin, while the 1912 Legislation was motivated by reasons totally unrelated to Canada's obligations to the Ojibway or Ontario's s. 109 rights.

[1421] The extension lands were lands to which Ontario had no claim. Ex. 1, Vol. 16, tabs 737 and 742 are letters, the first dated March 16, 1909 to Sir Wilfrid Laurier from Whitney, the Premier of Ontario, and the second from Whitney to Laurier dated November 11, 1909, which contain the following:

> Tab 737:
> We are quite aware of the appositeness of the old and more or less trite saying that 'One should not look a gift horse in the mouth.' But, subject to that, and desiring to speak with the utmost good feeling and temper, my Colleagues and I desire to bring to your notice our very great disappointment that your Government has not allotted to us at least the territory east of the Nelson River.

and

> Tab 742:
> We quite appreciate that the Province has no legal right or claim in the matter whatever, and therefore, strictly and technically speaking, we cannot complain of or object to what might under other circumstances be termed an injustice.

[1422] I find that in 1912, Ontario recognized it should not look a gift horse in the mouth. In 1912, it was in no position to bargain for rights additional to s.109 re "taking up." Ontario took its rights in Keewatin as they were, without negotiating for additional rights in respect of "taking up" as it had done in the Disputed Territory.

[1423] I have not accepted Chartrand's evidence that the One Man Lake Reserve in Keewatin was established under the process created in the 1891 Legislation, but have accepted the evidence of Vipond that Chartrand was mistaken and that the One Man Lake Reserve was established under a different *ad hoc* process that did not reflect the process outlined in the 1891 Legislation.

[1424] Having considered the evidence of Saywell and Vipond, I have concluded that there is no evidence, let alone plain and clear evidence, that Canada intended the 1891 Legislation or 1894 Agreement to apply to the Keewatin Lands at the time it was passed **or** in 1912.

[1425] In interpreting principles applicable to questions dealing with Indian interests, generally speaking, the interpretation that impairs the Indian interests as little as possible is to be preferred (*Osoyoos*).

[1426] Sullivan's "Construction of Statutes" (5th ed., *supra*) contains the following at p. 515: "The liberal interpretation principle applies…to any issues relative to the treaty as a source of rights."

[1427] Special considerations apply when interpreting statutes potentially affecting Aboriginal rights:

> It is presumed that a legislature does not intend to narrow, extinguish or otherwise interfere with Aboriginal rights. [Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002) at p. 412.]

[1428] LaForest J. wrote in *Mitchell* at p. 143: "If legislation bears on treaty promises, the Courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown."

[1429] The Supreme Court of Canada has made it clear that any intention to extinguish Aboriginal title must be "clear and plain" (*Sparrow*, *Bear Island*). Dickson C.J.C. and LaForest J. applied this to non-title Aboriginal rights in *Sparrow*. In addition, in interpreting all legislation relating to Aboriginals (such as that in 1894 and 1912), "doubtful expressions [should be] resolved in favour of the Indians," to adopt the words of Dickson J. (as he then was) at p. 36 of *Nowegijick*. The Honour of the Crown requires the Crown to fulfill its promises.

[1430] The 1891-1894 Legislation/Agreement did not expressly amend the Treaty provision re "taking up" except in respect of the Disputed Territory. In 1912, the 1891 Legislation was not amended to make it apply to an expanded area. The 1891-1894 Legislation/Agreement was not specifically mentioned in the 1912 Legislation. Neither the 1891 nor the 1912 Legislation mentions the Keewatin Lands. It is not necessary to infer their inclusion to give the legislation meaning.

[1431] I have accepted the evidence of Saywell and Vipond that before the 1912 Legislation was passed, after reviewing Hansard and all other relevant documents relating to the 1912 annexation, neither of them found any discussion about extinguishing or altering Treaty 3 rights or any evidence that Canada/Parliament considered or agreed to alter, extinguish or in any way amend the terms of Treaty 3. To the contrary, Canada appears to have been concerned to ensure that Indian rights in the territory would be respected and protected and that federal jurisdiction in respect of Indians and their Lands would continue. The 1912 Legislation made it clear that Canada expected to continue its trusteeship role in connection with Indians (a position that runs counter to viewing 1891 Legislation removing Treaty Rights formerly inapplicable to Keewatin, as applicable after 1912.) It inserted conditions in the legislation to that end.

[1432] I accept the submission of counsel for the Plaintiffs that the 1912 Legislation did not make it clear that in Keewatin, Ojibway Harvesting Rights throughout the tract were being abridged or extinguished with respect to tracts taken up by Ontario. There was no clear and plain intention by the federal government to remove or extinguish Harvesting Rights in Keewatin at the time it was annexed to Ontario in 1912.

Step 6: The Devolution Argument

[1433] Counsel for Canada (not Ontario) made much of the 1912 Legislation, submitting that it conferred rights and imposed obligations on Ontario and absolved Canada from any further s. 91(24) obligations in Keewatin relating to "taking up" of land in Keewatin. He submitted that all of Canada's obligations devolved to Ontario under the 1912 Legislation. In effect, counsel for Canada submitted that in 1912, Ontario agreed to accept all responsibilities for Indians in Keewatin and Canada agreed to relinquish all jurisdiction over Indians in Keewatin.

[1434] In both its oral and written submissions, counsel for Canada submitted that upon the transfer of the beneficial interest, by operation of law, Canada's rights and obligations, both Constitutionally and pursuant to Treaty, devolved to that local government, in this case, Ontario. (See *Secretary of State* at 132.) Under s. 2(a) of the *Boundary Extension Act,* Ontario was to act as Canada had "heretofore" in dealing with the "rights of the Indian inhabitants" of the District of Keewatin. "Rights" included Treaty Rights. Canada submitted that under s. 2(a), Ontario took the place of Canada in dealing with First Nations' rights. The content of those rights did not change. They submitted it is also a fundamental principle that a treaty promise given by the Crown in one of its aspects cannot be read so as to prevent the Crown "from transferring or altering sovereignty, or as binding the [Crown] to carry out obligations when it no longer has the power to do so." *Manuel* at 828. See also *Maritime Bank*. When the Keewatin lands became part of Ontario, s. 109 of the *Constitution Act, 1867* applied. Pursuant to legislative authority and by operation of law, immediately upon transfer Ontario gained title to the lands "unencumbered by any operation of s. 91(24)." *Smith* at pages 562, 564 and 569.

[1435] Where the Constitution mandates that something must or can be done only by Ontario, the Treaty must be adjusted by substituting "Ontario" for "Canada" to accord with the Constitutional imperative.

[1436] Counsel for Canada submitted that upon receipt of the benefits of the transferred lands, Ontario became "burdened with the obligation imposed by the Treaty" to honour the right of the Indians to hunt and fish over lands now within Ontario's exclusive jurisdiction. To so find would "permit the Treaty to survive." At the moment the Keewatin Lands became part of Ontario, s. 109 of the *Constitution Act, 1867* applied, confirming that Ontario gained title to the lands "unencumbered by any operation of s. 91(24)," but "burdened with the obligation imposed by the Treaty" to honour the right of the Indians to hunt and fish over lands now within Ontario's exclusive jurisdiction. *Smith* at pages 562, 564 and 569; *Seybold* at 81, cited with approval in *Smith* at 564-65.

[1437] Counsel for Canada relied on the following evidence of Fobister from November 25, 2009:

> Q. And so at the time when you were chief, when there was -- when you had concerns about logging, within the Treaty 3 area, would you speak to somebody from the provincial government about that concern?
> A. Initially, I did talk to someone within the provincial government. When they didn't listen, then I went to what the treaty had to offer us prior that Indian Affairs would take care of us. And I did go there. And he didn't -- and at that time, I don't know if I should mention the name, but anyway, Indian

> Affairs did not protect us, did not respond to us when the logging that we were dissatisfied with happened. They claimed that it was not their jurisdiction.
> …
> Q. So is it fair to say that if you had gone to the representative of the provincial government and they had satisfied your concerns, you wouldn't have had any reason to go to Indian Affairs about that issue?
> A. Yes.

[1438] Counsel for the Plaintiffs disagreed with Canada's submission that Canada's obligations devolved to Ontario in 1912. He submitted the transfer in 1912 was very different from a transfer that would have had that effect. Ontario was not gaining self-government in 1912. Canada was not relinquishing its sovereignty. The annexed lands were still part of Canada.

[1439] Counsel for the Plaintiffs submitted that the doctrine of devolution only applies when law-making powers and obligations are transferred from one government to another, not when assets are transferred within an existing federal framework. Devolution applies, for instance, when a colony has gained independence. In 1912, Ontario did not gain independence from Canada. There was no establishment of a new legislature, no new grant of a legislative power, or removal of the Keewatin Lands from Canada. When Canada transferred the Keewatin Lands to Ontario, it did so within Canada. The Constitutional division of powers and Canada's obligations to the Ojibway under them [s. 91(24)] were unaffected. The federal s. 91(24) jurisdiction over Indians, including Treaty Rights, did not change. Canada's obligations under the Treaty were unaffected.

[1440] Canada's argument has some practical difficulties that were immediately apparent. For example, Canada has continued to pay Treaty 3 annuities and to provide other services to the Ojibway in Keewatin since 1912.

[1441] Canada submitted that Ontario would not have accepted Keewatin knowing that Canada would "supervise" Ontario's exercise of its s. 109 jurisdiction. However, Vipond, the expert called by Canada to assert that Ontario would not have accepted "supervision," conceded in cross-examination that even strong provincial autonomists such as Mowat clearly understood and accepted that if Canada were exercising a legitimate s. 91 jurisdiction, that would not constitute unacceptable "supervision."

[1442] Ontario accepted responsibilities and obligations on the annexation more onerous than agreeing to s. 91(24) authorizations by Canada whenever Ontario was purporting to significantly interfere with Harvesting Rights. For example, Ontario agreed to pay Treaty 9 annuities.

[1443] I do not accept Canada's contention that Ontario would not have accepted annexation if it knew it would be required to obtain authorization from Canada for "taking up" of lands in Keewatin.

Conclusions on the Devolution Argument

[1444] In my view, the jurisdictional analysis to be applied here involves consideration of the division of powers. Saywell and Vipond conceded the 1912 Legislation expressly alludes to

continuation of the federal s. 91(24) trusteeship/protective jurisdiction role in the territory being annexed. It was well understood by 1912 that even though the federal government had no proprietary rights, it could exercise its s. 91(24) jurisdiction to protect Indians and by so doing, adversely affect a province's proprietary rights.

[1445] Keewatin was annexed to Ontario in 1912 using the process mandated by the *Constitution Act, 1871*. Section 3 provided as follows:

> The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed upon to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

[1446] In the lead-up to the passage of the 1912 Legislation, I find (based on Newcombe's opinion) that Canada believed it could not alter the division of powers. It believed it could impose conditions of transfer on Ontario, requiring it to expressly recognize and uphold Ojibway Treaty Rights, including Harvesting Rights. Ontario accepted the conditions imposed by Canada because it was in no position to demand otherwise. Canada had no legal obligation to transfer Keewatin to it. In 1912, Ontario stood to benefit from the annexation of Keewatin, as it would be able to derive revenues therefrom. Ontario wanted access to a port on Hudson's Bay.

[1447] It is not necessary to accept Canada's devolution argument to "permit the Treaty to survive." After 1912, Canada had, and in 2011 still has, the power to fulfill its Treaty obligations under s. 91(24) of the *Constitution Act, 1867*. Moreover, s. 2 of the 1912 Extension Legislation expressly and specifically provided that the trusteeship of Indians in the Territory would remain the responsibility of Canada. In the lead up to annexation, Canada appears to have taken positive steps to ensure that Indian rights in the territory would be respected and that federal jurisdiction in respect of Indians and lands reserved for the Indians would continue. It imposed conditions in the legislation on their face designed to **affirm** existing Treaty Rights, not modify them.

[1448] The wording, particularly of s. 2(c) of the Act, reinforces my conclusion that Parliament intended to affirm the continuity of federal jurisdiction over Indians and Indian lands, consistent with Newcombe's opinion. The phrase "the trusteeship of the Indians in the territory shall remain in the Government of Canada subject to control of Parliament" recognizes the continued responsibility of Parliament for the welfare and guardianship of the Indians under s. 91(24) (Vipond, February 25, 2010 at pp 116, 132-133; Saywell, April 7, 2010 at pp. 205-212.)

[1449] I accept Saywell's evidence that "trusteeship of the Indians" was intended to be a political shorthand for the general wardship/guardianship responsibility of the federal government to manage the affairs of the Indians. I find that the 1912 Legislation contemplated that Canada, not Ontario, would continue to fulfill the trusteeship role.

[1450] I have accepted the submission of counsel for the Plaintiffs and the evidence of Vipond and Saywell that in Keewatin, the principle that the federal government has a role to act as protector guardian of the Indians and their interests is reinforced by the Constitutional provisions

of the Rupert's Land and Northwest Territory Order and the provisions of the *Constitution Act, 1871*.

[1451] Canada's s. 91(24) jurisdiction over Indians including Treaty Rights did not devolve to Ontario in 1912 upon the transfer of the Keewatin lands to Ontario. None of the bases for devolution arose or existed in 1912. Fobister's attempt to get assistance from Ontario does not prove Canada's assertion. He also sought redress through Canada, as he clearly understood Indian Affairs to have a continuing responsibility.

Step 7: The Answer to Question One

[1452] In Keewatin, Ontario does not have the right to limit Treaty Rights by "taking up lands under the Treaty." It can issue land authorizations under s. 109 apart from the Treaty, but only in compliance with s. 109, i.e., only so long as the authorizations do not have the effect of substantially interfering with Treaty Harvesting Rights. To authorize uses that significantly interfere with Treaty Harvesting Rights under the Treaty, Ontario, or users of land already authorized by Ontario to use the land, must also obtain the authorization of Canada.

[1453] I do not accept Ontario's submission that a "No" answer to Question One represents "a massive incursion" on Ontario's proprietary rights and is contrary to the mutual intentions of the parties and the Constitutional reality. Rather, it is a "Yes" answer that would not accord with the mutual intention of the parties or with the Constitutional reality. Such an interpretation would not best reconcile the interests of the parties at the time the Treaty was made. Under s. 109, Ontario's rights are expressly subject to "any interest other than that of the province in the same," including Treaty Harvesting Rights. Had I ignored the clear reference in the Treaty to authorization of "taking up" by Canada, I am of the view that that would have been to allow an unwarranted incursion on Ojibway Harvesting Rights by Ontario.

[1454] The Commissioners deliberately provided in the Harvesting Clause that in the event Ontario won the Boundary Dispute or a new province with s. 109 powers were formed under s. 3 of the *1871 Constitution Act*, authorization of "taking up" by Canada would be needed in addition to Ontario's or that new province's authorization under s. 109. In that event, the Commissioners did contemplate and intend that a two-step authorization process would need to be followed.

[1455] Although Canada bargained away its control over Ojibway Harvesting Rights on lands "taken up" by Ontario in the Disputed Territory and passed legislation amending the Treaty in that respect, Treaty Harvesting Rights outside the Disputed Territory (e.g., in Keewatin) were not affected.

[1456] The circumstances surrounding the negotiation for the annexation of Keewatin differed considerably from those surrounding the negotiations of the 1891 Legislation. During the negotiations for the 1912 Legislation, there was no mention of altering Treaty 3 rights. Canada was aware that part of the Treaty 3 lands was being annexed to Ontario. No legislation was passed amending Treaty 3 Harvesting Rights in Keewatin; on the contrary, the 1912 Agreement

specifically mentioned the continuing trusteeship obligations of the federal government to the First Nations in the area.

[1457] There is no plain and clear proof that Canada intended to alter Treaty 3 Harvesting Rights in 1912.

[1458] In short, the Treaty promises made to the Ojibway in 1873 remain unaffected by the 1891 Legislation and/or by the 1912 Legislation annexing Keewatin to Ontario.

[1459] I have rejected Canada's devolution argument. The answer to Question One is No.

The *Mikisew* Factor

[1460] Counsel for Canada asserted at this trial with seeming confidence that we were in essence wasting our time because the issues needing to be decided here have already been conclusively determined in *Mikisew*.

[1461] Similarly, counsel for Ontario submitted that when Lord Watson mentioned "questions left behind" in *St. Catherine's Milling*, he was contemplating the same issues already addressed by the Supreme Court in *Mikisew*. Since the Supreme Court concluded in *Mikisew* that the party "taking up" lands must allow the Aboriginal rightsholders to retain a meaningful ability to exercise their off-reserve Harvesting Rights (determined on a community-by-community, not treaty-wide, basis), that standard must be applied here.

[1462] In essence, counsel for both governments submitted that the substantive promise in Treaty 3, as in *Mikisew*, was simply that sufficient lands would remain available post-Treaty to allow for the meaningful pursuit of the Treaty Harvesting Rights.

[1463] Counsel for both governments, assuming Canada owes no fiduciary duty to the Ojibway but only the same Honour of the Crown duties as it was held to owe to the Cree in *Mikisew*, and assuming the duty owed by Ontario and Canada is the same, submitted there would be no advantage to the Ojibway were Canada rather than Ontario to be doing the "taking up" of lands. They submitted that the Supreme Court of Canada in *Mikisew* has already settled that Canada does not owe the Ojibway a fiduciary duty. Since Canada owes no such duty, it does not matter that in other circumstances, Canada might be required to fulfill more onerous duties to Indians than Ontario.

[1464] Counsel for Canada submitted that with the exclusive property rights of the province firmly established in law, *Mikisew* and *Haida Nation* already provide the necessary roadmap for understanding the relationship between Ontario's exclusive right to "take up" Crown lands within its borders and the Plaintiffs' Treaty 3 rights to hunt, fish and gather over Crown lands not yet "taken up."

[1465] Counsel for Canada submitted that *Mikisew* stands for the following propositions at paras. 3, 24, 30, 33 and 51:

- The Crown's right to "take up" lands under the Treaty is an inherent limitation on treaty hunting, fishing and trapping rights.
- Wording such as is found in Treaty 3 contemplates that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations have Treaty Rights to hunt, fish and trap, and placed in the inventory of lands where they do not.
- Treaty Harvesting Rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."
- Such language cannot be clearer in foreshadowing change. Nevertheless, the Crown is expected to manage the change honourably.
- In this context, the Honour of the Crown gives rise to a "duty of consultation" in advance of any "taking up" of lands that may interfere with Treaty Rights. This "principle of consultation . . . goes to the heart of the relationship" between Aboriginal and non-Aboriginal peoples.

[1466] For both governments to have assumed that the *Mikisew* standard will be applied here, without rigorously comparing the wording of the clauses at issue, the details of the negotiations of this Treaty and the specific promises made to these Ojibway, was in my view virtually tantamount to begging the real question to be decided here – what is the correct legal interpretation of this particular Clause, having regard to all of the circumstances in this case?

[1467] Treaty Rights are substantive rights that are now Constitutionally protected. Courts must carefully determine their scope and context based upon a careful consideration of the specific circumstances in which the particular treaty was made. One size does not fit all. As one of the witnesses said, history can be messy.

[1468] To properly determine the legal standard to be applied, it was and is necessary to carefully examine the particular circumstances here in context and to consider the mindset, interests and unique perspectives of each Treaty partner. What promises were made, both in respect of the content of the Harvesting Rights and in respect of their continuing enforcement? What did these parties intend and understand at the time this Treaty was made? The legal obligations that are owed will depend on the specific wording and circumstances, the mutual understanding of these parties at the time this Treaty was made and the interpretation that best reconciles their interests.

[1469] Given the two specific questions posed in this case relating to Ontario's rights and obligations, counsel agreed that it is not necessary for this Court to specifically determine Canada's obligations to the Ojibway under the Harvesting Clause. However, Canada's and Ontario's assertion that Canada could not owe a fiduciary duty to the Ojibway here because none was found in *Mikisew*, and that Ontario's duties could not be held to be higher than Canada's, required me to consider these issues. The characterization of Canada's duty as fiduciary or otherwise and the definition and delineation of the extent of its obligations to the Plaintiffs in respect of these Treaty Rights are not directly before me here. I shall not comment further except to say only the obvious: that the existence of a fiduciary duty is dependent on a number of circumstances defining the nature of the relationship. Any future determination of Canada's

obligations, fiduciary or otherwise, to the Ojibway under the Treaty in connection with the Harvesting promise, will be determined having regard to the exact nature of the relationship created with the Ojibway in 1873 and may be affected in part by Canada's specific promises here, the nature and extent of Canada's discretion and the Ojibway vulnerability with respect to this Harvesting promise.

[1470] Suffice it to say that for the purpose of considering Ontario's argument, based as it was on the conclusion in *Mikisew* that Canada did not owe a fiduciary duty to the Cree in Treaty 8, I cannot conclude with certainty that Canada could not be found to owe a fiduciary duty to the Treaty 3 Ojibway in respect of the Harvesting Clause in all the circumstances here.

[1471] Given the specific promises found to have been made and the deliberate inclusion of a specifically worded process clause mentioning Canada, the legal characterization of the duty that a Court might find Canada to owe to them could be different from the duty it was found to owe under Treaty 8.

[1472] I shall outline some of the differences between the Treaty 8/*Mikisew* and the Treaty 3 facts as I have found them in order to highlight why the conclusions in *Mikisew* may not necessarily be held to apply here.

a) The clause under consideration in *Mikisew* was worded differently from the Harvesting Clause here. Treaty 8 contains no protective process clause.
b) In *Mikisew*, there was no need for the Court to consider whether the lands had been validly "taken up" (i.e., whether the specific process for "taking up" prescribed in the treaty had been followed, i.e., by a party other than Canada that needed to be authorized by Canada.)
c) The two treaties were negotiated under very different circumstances. Treaty 8 was not negotiated by Morris. The Treaty 8 Cree had very different perspectives and interests from the Treaty 3 Ojibway.
d) Binnie J. generalized in *Mikisew* at paragraph 24 that the post-Confederation numbered treaties were designed to open up the Canadian West to settlement and development. He noted that that stated purpose was reflected in the limitations on hunting, fishing and trapping rights contained in Treaty 8. He noted at paragraph 53 that the evidence led at the *Mikisew* trial supported a finding that in the year Treaty 8 was negotiated, 1899, the Cree understood that after the treaty was signed, when land was put to a use that was visibly incompatible with the exercise of their right to hunt, they would no longer be able to hunt on that land. In other words, there was a factual finding that the Aboriginal signatories of Treaty 8 understood, intended and accepted that the geographical limits of their hunting areas would shrink as lands were "taken up"/transferred from the inventory of lands over which they had treaty rights to hunt, fish and trap, to the inventory of lands where they did not have those rights. I have found that in Treaty 3, the Ojibway and the Commissioners had a much different intent and understanding. Canada's primary interest in negotiating Treaty 3 was not opening the Treaty 3

area to settlement and development. The Ojibway did not agree to a progressive limitation of the geographical area where they could hunt.

e) In *Mikisew* there was no factual finding that the Treaty 8 Aboriginal signatories had been induced to enter into the treaty by specific promises about the perpetual continuation of their subsistence Harvesting Rights as in the past over the whole territory. There was no finding that the Cree did not understand that Canada could unilaterally interfere with their rights.

f) On the facts as found in *Mikisew*, the Aboriginal signatories in effect agreed during the negotiations to what Plaintiffs' counsel in this case referred to as "extinguishment of their Harvesting Rights by slices." They were found to have understood and accepted that after they signed the treaty, they would be unilaterally deprived of their hunting rights as lands were developed. On the facts as found, Treaty 8 was held to have imposed a geographical limitation on the harvesting area, "consistent with the oral promises made at the time the treaty was signed, the oral history of the Treaty 8 Indians, earlier case law and the provisions of the *Alberta Wildlife Act*." Put differently, in *Mikisew* the Aboriginal signatories to Treaty 8 understood and accepted that after they signed it, there could be significant interferences with their harvesting rights and that their traditional harvesting rights would be increasingly displaced as "taking up" increased. There was a very different factual finding here.

g) Even in the absence of a protective process clause and in the face of an understanding and agreement that their traditional harvesting rights could be increasingly limited as development progressed, the Supreme Court of Canada held in *Mikisew* that it was necessary to ensure that the substantive promise that was made in Treaty 8 would be kept (i.e., that the Cree would have a continuing right to hunt on the lands ceded: so much land would not be taken up that there would be no meaningful right to hunt on the remaining land.) Given the findings made with respect to the mutual understanding of the parties and the absence of a process clause that must be followed, the Court held that so long as they still had a meaningful right to pursue their traditional harvesting, there would be no substantive breach of the treaty. Even in those very different circumstances, the Court held there was a duty to consult, possibly to accommodate and certainly to avoid breaching the substantive treaty term by ensuring that the Aboriginal signatories had a meaningful right to hunt within their traditional territories. In the case of Treaty 3, I have held the parties did <u>not</u> intend that Ojibway Harvesting Rights would receive substantive protection <u>only</u> when they were on the verge of becoming meaningless.

h) In the particular circumstances of Treaty 3, I have found that to get the Treaty done, the Commissioners **<u>did</u>** make promises to the Treaty 3 Ojibway that went beyond those found by the Court to have been made to the Cree signatories in *Mikisew*. The Commissioners did not require the Ojibway to agree, as a term of the Treaty, that their harvesting areas would decrease over time.

i) While the *Mikisew* Cree agreed to geographical displacement of hunting rights, the Treaty 3 Ojibway did not.

j) Binnie J. found at paragraph 25 of *Mikisew* that there was anticipation of an "uneasy tension between the First Nations' essential demand that they continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing numbers of non-Aboriginal people moving into the surrendered territory" in the Treaty 8 area. I have found that in the Treaty 3 area, there was no such "uneasy tension." The parties did not see from the beginning that their ongoing relationship would be difficult to manage. Apart from the right of way area they mutually anticipated little permanent settlement in the Treaty 3 area. Canada understood that if it won the Boundary Dispute, the relationship would be relatively easy to manage since cooperation among the federal departments involved was expected. If Ontario won the Boundary Dispute and a conflict in uses developed, Morris had provided that Canada would be able to manage the situation by refusing to authorize proposed uses that crossed the line.

[1473] In *Mikisew*, the Supreme Court of Canada highlighted the difference between substantive treaty rights that cannot be infringed except upon satisfying the *Sparrow* test, and procedural rights that apply under the Honour of the Crown, even before the point of substantive breach of the treaty has been reached. It made it clear that the Honour of the Crown requires consideration of the content of the substantive promise, in effect recognition of the overall promise, consultation and monitoring in anticipation of possible breach and, in some circumstances, accommodation to ensure that the line between possible and substantive breach will not be crossed. The Court held that once the geographic scope had been so narrowed that the hunting right was about to become meaningless, any further authorizations of land uses would need to meet the s. 35 *Sparrow* test. The *Sparrow* analysis would apply to the federal Crown as soon as the line of substantive infringement was crossed. In their submissions about *Mikisew*, counsel for the governments did not draw a clear distinction between the duties of governments where there has not yet been a substantive infringement and where a substantive breach has already occurred.

[1474] The Plaintiffs submitted that even the evidence of Chartrand in cross-examination supports a conclusion that it was not when the Harvesting Right was reduced to meaningless that the Treaty Harvesting Clause would be breached and *Sparrow* would apply, but when non-Aboriginal activities would start to intrude to a degree that they would give rise to serious concerns/when they could not accommodate the non Aboriginal activities.

[1475] Counsel for the Plaintiffs in argument referred to Chartrand's cross-examination on the point about meaninglessness versus serious effect:

> Q: And that line, I'm going to suggest to you, is not crossed at the point where there's no fishing of any sort whatsoever available, it's crossed well before then, isn't it? And if you want me to break this down --
> A: Yeah. I mean, certainly the warning and the concern appears long before then.
> …
> Q"And what I'm going to suggest to you is that the concern and complaint would have been triggered at a lower level than that. And this is an example where we see that, where we see sturgeon depletion, and not extinction at this point, but just depletion and the threat of future extinction, triggering a complaint.

> A: …The Ojibway would have voiced concerns when … they perceived a development that… if uncontrolled, would very significantly and harshly impede their ability to make a living.
> …
> Q: But once those activities, I suggest to you, started to unreasonably interfere with the Ojibway way of life, you could expect to hear complaints from the Ojibway about that?
> A: I would phrase that in the way that I've just explained, that if given, at a certain point in time, the Ojibway have a number of strategies that are at hand that, taken as a whole, allow to them make a living according to reaching a given level of subsistence. If the Ojibway had perceived, at that point in time, that Euro-Canadian activities [in] the land [and] the waters…
> …MR. JANES: (Continuing reading from Chartrand's report):
>> …were reaching a point where they … could not accommodate those activities by either further diversifications, if no alternatives were available, then they would have raised concerns.
>
> [Emphasis added.]

[1476] Counsel for Ontario submitted that Ontario can interfere with where the Ojibway hunted, how they hunted, and when they hunted, because they knew when they were signing this Treaty that that was what they were facing, and they accepted it. Their only expectation was that their right to hunt would not become meaningless.

[1477] For all the reasons already detailed, I have rejected that submission. The Commissioners promised the Ojibway that their Harvesting Rights would continue as in the past.

[1478] At this stage this Court is not determining whether Ontario has breached the Harvesting Rights Clause. That determination is to be made during the next stage of this litigation having regard to the circumstances here, not the very different circumstances pertaining in *Mikisew*.

14. ANSWER TO QUESTION TWO

[1479] Question Two is as follows:

> If the answer to question/issue 1 is "no," 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? [provided that the question of whether or not the particular statutes and statutory instruments at issue in this action in fact justifiably infringe the Treaty Rights shall not be determined and shall be reserved for the trial of the rest of this proceeding.]

[1480] Phrased differently, if the answer to Question One is No, can Ontario nevertheless authorize forestry operations that would infringe the Plaintiffs' Treaty Harvesting Rights so long as it can meet the *Sparrow* justification requirements?

[1481] In resolving Question Two, this Court is only to consider the legal question related to the division of powers, not to apply the justifiable infringement test to the facts. Spies J. directed as follows:

> This Court orders, for greater certainty that threshold issue 2 does not extend to the question of whether or not the particular provincial statutes and statutory instruments relevant to this action in fact justifiably infringe the treaty right of the plaintiffs so as to validly authorize the relevant forestry operations of the defendant Abitibi-Consolidated Inc.

[1482] The following factual findings are relevant to the resolution of Question Two:

a) I have accepted Chartrand's evidence on January 21, 2010 at pp. 55-6 that hunting was and is central to the Indianness of the Treaty 3 Ojibway. To simply focus on the physical aspects of the activity would be a mistake. To understand the significance of hunting to the Ojibway, a holistic approach must be taken.

b) I have also accepted Fobister's evidence summarized earlier in these Reasons about the importance of traditional harvesting to his people.

c) In my view, the evidence in this case amply supports the conclusion that the Treaty 3 Ojibway were and are vitally concerned about being able to continue and maintain the traditional harvesting activities I have found were promised to them during the Treaty 3 negotiations. Traditional harvesting was and is closely linked with their identity and fundamentally important to them culturally, economically and spiritually. Traditional harvesting was and is tied to their understanding and perception of themselves and their society. Indeed, before 1873 and ever since, the right to harvest has been central to the identity and economy of the Treaty 3 Ojibway.

Analysis

[1483] I have answered Question Two by dealing with the issues raised during argument in the following sequence:

1 Is a division of powers analysis appropriate here? Can Ontario act as any other fee simple landowner without regard to the division of powers?
2 If a division of powers analysis applies, is the matter (here traditional Harvesting Rights under the Treaty) at the core of the federal s. 91(24) power?
3 Will the proposed provincial action/legislation have an adverse impact on that core? Does inter-jurisdictional immunity apply to indirect interference?
4 Does s. 88 of the *Indian Act* apply?
5 What is the answer to Question Two?

Issues Raised in Argument

1. Is a Division of Powers analysis appropriate here?

[1484] Generally, counsel for Ontario submitted that the answer to Question Two is Yes, Ontario *can* justifiably infringe Treaty 3 Harvesting Rights. The issue is the scope of Ontario's Constitutional capacity, if it cannot "take up" lands under the Treaty but can authorize the use of lands under s. 109.

[1485] Counsel for Ontario submitted this Court should not be concerned about allowing Ontario to infringe Treaty 3 Harvesting Rights because Ontario recognizes it is bound to honour the Treaty under the Honour of the Crown and s. 35 of the *Constitution Act, 1982*.

[1486] Counsel for Ontario submitted that when the Constitution was repatriated in 1982, s. 35 gave both procedural and substantive Constitutional protection to the Plaintiffs' Treaty Harvesting Rights. It protected off-reserve Treaty Harvesting Rights from unjustifiable infringement by the Province by imposing duties on Ontario: (a) to consult and accommodate when authorizing land uses (*Mikisew* at para. 3; *Haida Nation* at para. 59) and; (b) to justify any infringements of Treaty 3 Harvesting Rights.

[1487] Section 35 ushered in a new era of reconciliation in Crown-Aboriginal relations. *Van der Peet* contains the following at para. 31

> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.

[1488] The Supreme Court of Canada in *Mikisew* has set out a test for justification of *prima facie* breaches of s. 35 rights "perfectly tailored to ensure appropriate protection of all interests." This Court should apply the *Mikisew* test. It should look to s. 35. These serve to properly restrain Ontario's activities in this context and require it to consult and accommodate the Ojibway when authorizing land uses or dispositions that would result in "taking up" of lands. Where necessary, they would require Ontario to justify any infringements of Treaty 3 Harvesting Rights that would result.

[1489] Ontario submitted that one of the central goals of the division of powers analysis is to preserve an appropriate balance between federal and provincial powers:

> *Canadian Western* at paras. 24 and 36
> As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers.
>
> *OPSEU* at 17
> The history of Canadian Constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers.

[1490] Balanced, cooperative federalism can, in the submission of Ontario, best be achieved if Ontario has a "meaningful capacity to exercise its s. 109 ownership." In the interest of balanced federalism, "Ontario must be given sufficient scope to 'fulfill its Constitutional obligations' in relation to lands, to involve itself in discussions with the Ojibway, to resolve conflicts between provincial proprietary rights and traditional Harvesting rights under the Treaty." Counsel for Ontario submitted in written argument:

> 22(b) Balanced, co-operative federalism supports provincial capacity to justify infringements of the plaintiffs' treaty harvesting rights. Further shielding behind the division of powers doctrine of inter-jurisdictional immunity would serve no meaningful or useful purpose.

[1491] Counsel for Ontario submitted that because Her Majesty the Queen in Right of Ontario holds the beneficial ownership in all non-reserve lands ceded under Treaty 3, Ontario can exercise its proprietary right to authorize uses and dispositions of lands within Ontario as it sees fit like any other fee simple owner, unconstrained by the division of legislative powers under the Constitution. …

> 22(c) ii. In authorizing forestry activities on Crown lands off-reserve, Ontario is exercising its proprietary powers under s. 109 of the *Constitution Act, 1867*. The exercise of proprietary power is not limited by inter-jurisdictional immunity, only by s. 35 of the *Constitution Act, 1982* (and, where applicable, the doctrine of federal paramountcy – which is not engaged here);

[1492] The doctrine of inter-jurisdictional immunity is "too blunt an instrument" to accommodate the conflicting interests of Ontario, Canada and the First Nations because it "hampers the legitimate interplay between federal and provincial powers, creates serious uncertainty as to the delineation of the core of a head of power, risks creating legal vacuums, and is generally superfluous." Its application should be restricted to narrow areas critical to giving effect to a limited number of federal heads of power.

[1493] That doctrine does not apply to Ontario in its exercise of its proprietary jurisdiction. Ontario *qua* landowner is free to act in a manner that would otherwise be *ultra vires*.

[1494] He cited cited Hogg, *Constitutional Law of Canada*, *supra*, at para. 29.2, as follows:

> 29.2 … the provincial Legislature may legislate terms as to the use or sale of provincial property which it could not legislate in other contexts, for example, a stipulation that timber be processed in Canada [footnote: *Smylie v. The Queen* (1900), 27 O.A.R. 172 (C.A.)], or that no Chinese or Japanese labour be employed in cutting timber [footnote: *Attorney-General for British Columbia and the Minister of Lands v. Brooks-Bidlake and Whitall, Ltd.* (1922), 63 S.C.R. 466]. This broad legislative power to dispose of a province's own property is consistent with the broad executive power enjoyed by the province as proprietor.

[1495] He also cited the portions of the same text that I have already quoted in the sections of these Reasons dealing with the credibility of the experts and with the Constitutionality of the Harvesting Clause.

[1496] Counsel for Ontario submitted that the doctrine of inter-jurisdictional immunity cannot apply where Ontario is not relying on its legislative authority under the Constitution, but exercising its proprietary rights like any other property owner. Its exercise of provincial proprietary jurisdiction is unrelated to the division of powers. Section 109 is regulated by the Honour of the Crown [duty to consult and accommodate] and s. 35 [any significant limitation on the right must be justified] and not by s. 91(24).

[1497] The fact that Ontario can also exercise its proprietary rights by way of legislation enacted under s. 92(5) does not mean that Ontario is limited by competing federal heads of legislative authority under the division of powers. Section 92(5) should not be viewed as an independent source of provincial jurisdiction.

[1498] Counsel for Ontario submitted that the doctrine of inter-jurisdictional immunity does not apply to the exercise of provincial proprietary jurisdiction because that doctrine exists in order to maintain an appropriate balance between valid exercises of federal and provincial legislative authority under ss. 91 and 92. Inter-jurisdictional immunity has nothing to do with the exercise of property rights.

[1499] In the section of these Reasons headed "Answer to Question One – Step 3," I have already mentioned the reference by counsel for Ontario to LaForest on *Natural Resources and Public Property under the Canadian Constitution. supra*, in which the author referred to the right of provinces to deal with their property pursuant to the executive powers at pp. 164 and 167 as follows:

> Provincial legislative power over its property carries with it the power of administration and control by the provincial executive. This means that a provincial government may, without legislation, exercise in respect of its property the same rights as a private owner, and consequently attach such restrictions as it deems fit when it makes grants by lease or licence. …

[1500] Counsel for Ontario referred to *St. Catherine's Milling* as an illustration of the "extremely narrow scope of federal power relative to provincial jurisdiction under s. 109."

[1501] He cited *Brooks-Bidlake* and *Smylie* as authority for the proposition that provincial proprietary power is **not** constrained by federal legislative power. Brooks-Bidlake at p. 457.

> Sect. 91 reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalized persons; but the Dominion is not empowered by that section to regulate the management of the public property of the Province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race. These functions are assigned by s. 92, head 5, and s. 109 of the Act to the Legislature of the Province; and there is nothing in s. 91 which conflicts with that view.
> [Emphasis added.]

[1502] Counsel for Ontario submitted the Plaintiffs are seeking to use the doctrine of inter-jurisdictional immunity to give the federal government a "supervisory" role over Ontario's exercise of proprietary and related legislative jurisdiction in the Keewatin Lands.

[1503] Counsel for the Plaintiffs submitted that the answer to Question Two is No. In effect, because Treaty Rights are also protected under the Honour of the Crown and s. 35, Ontario is asking this Court to ignore the protection afforded Treaty Rights under the division of powers.

[1504] Counsel for the Plaintiffs reiterated that while Ontario can act in its own proprietary interest under s. 109 without the federal s. 91(24) interest engaging, it can only continue to do so as long as by so acting it does not significantly interfere with federal interests at the core of s. 91(24), including Treaty Harvesting Rights. Ontario can patent land and issue licenses only up to the point of significant interference.

[1505] Section 35 has not overtaken and replaced the division of powers in the circumstances here. The Supreme Court of Canada in *Morris* has specifically rejected the submission now being made by Ontario, holding that the protection provided by s. 91(24)/the doctrine of inter-jurisdictional immunity was not withdrawn when s. 35 was passed. The Supreme Court has held

that the doctrine of inter-jurisdictional immunity continues to apply to protect treaty rights and to render inoperative an otherwise valid provincial law (the *Wildlife Act*) to the extent of the impairment. In that case, the Court did not hold that s. 92(13) was merely confirmatory of the province's jurisdiction to legislate in relation to its proprietary jurisdiction. Deschamps and Abella JJ. for the majority wrote at paras. 42-43:

> 42 In this case, there is no question that the relevant provisions of the *Wildlife Act* are valid provincial legislation under s. 92(13) of the *Constitution Act, 1867*, which refers to Property and Civil Rights in the Province. However, where a valid provincial law impairs "an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians" (*Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, at p. 1047), it will be inapplicable to the extent of the impairment. Thus, provincial laws of general application are precluded from impairing "Indianness". (See, for example, *Dick v. The Queen*, [1985] 2 S.C.R. 309, at p. 326.)
>
> 43 Treaty rights to hunt lie squarely within federal jurisdiction over "Indians, and Lands reserved for the Indians". As noted by Dickson C.J. in *Simon*, at p. 411:
>
> > It has been held to be 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.
>
> This Court has previously found that provincial laws of general application that interfere with treaty rights to hunt are inapplicable to particular Aboriginal peoples. (See, for example, *Simon*, at pp. 410-11; *Sundown*, at para. 47.) Where such laws are inapplicable because they impair "Indianness", however, they may nonetheless be found to be applicable by incorporation under s. 88 of the *Indian Act*.
> [Emphasis added.]

[1506] In *Morris*, McLachlin C.J.C. and Fish J., while disagreeing with the majority about whether hunting after dark is always unsafe and as such is treaty protected, agreed with the majority that the doctrine of inter-jurisdictional immunity applies to protect core federal legislative competence from inference by governments as follows:

> 90. Under the doctrine of inter-jurisdictional immunity, valid provincial legislation is constitutionally inapplicable to the extent that it intrudes or touches upon core federal legislative competence over a particular matter. Thus, exclusive federal jurisdiction under s. 91(24) protects "core Indianness" from provincial intrusion: *Delgamuukw*, at para. 177. Valid provincial legislation which does not touch on "core Indianness" applies *ex proprio vigore*. If a law does go to "core Indianness" the impugned provincial legislation will not apply unless it is incorporated into federal law by s. 88 of the *Indian Act*.
>
> 91. Indian treaty rights and Aboriginal rights have been held to fall within the protected core of federal jurisdiction: *Simon* at p. 411; *Delgamuukw*, at para. 178. It follows that provincial laws of general application do not apply *ex proprio vigore* to the hunting activities of Indians that are protected by a treaty.
> [Emphasis added.]

[1507] The law is settled that provincial laws of general application cannot impair treaty rights at the core of Canada's s. 91(24) jurisdiction.

[1508] While most of the relevant cases have involved provincial regulation of treaty rights, counsel for the Plaintiffs submitted that in *Saanichton Marina*, the British Columbia Court of Appeal enjoined the construction of a marina that was adversely affecting fish habitat and treaty

fishing by the Tsawout people under the Douglas Treaty. See also *White*; *Bartleman*; *Simon*; *Sundown*.

[1509] Counsel for the Plaintiffs distinguished the cases relied on by counsel for Ontario in their attempt to support their contention that Ontario can exercise its proprietary rights without regard to the division of powers. He submitted that *Smylie*, decided before *Canadian Western* and *Morris*, did not involve provincial rights that conflicted with a core federal jurisdiction. Inter-jurisdictional immunity does not apply to the federal trade and commerce power as it is not a person, place or thing. Indians are federal persons. Treaty Harvesting Rights are at the core of the federal s. 91(24) jurisdiction over Indians. In *Smylie*, provincial powers under s. 109 were not limited by an interest other than that of the province in the same. There was no such pre-existing interest. The licensee in *Smylie* had no prior right to sell timber across the border. Unlike in *Smylie*, Treaty Harvesting Rights here are protected as an interest other than that of the province in the same.

[1510] Counsel for the Plaintiffs submitted that the reasoning in *Brooks Bidlake* has been overtaken, as it was decided before *Canadian Western.* Were *Brooks Bidlake* to be decided today, an inter-jurisdictional immunity analysis would be required. On the facts in *Brooks Bidlake*, a Court using the *Canadian Western* analysis would probably conclude that the limitation involving Japanese and Chinese workers was <u>not</u> at the core of the federal citizenship jurisdiction/power under s. 91(25) (see page 457) and for that reason, the doctrine of inter-jurisdictional immunity would not apply. [Unlike the case at bar, where the limitation on Harvesting Rights involving Indians is at the core and inter-jurisdictional immunity would be found to apply.] Had the legislation in *Brooks Bidlake* contained a general prohibition directed at keeping Chinese persons out of the province, inter-jurisdictional immunity would apply. See *Union Colliery* at p. 587. At the same time, post-1982, the limitation in *Brooks Bidlake* involving Japanese and Chinese workers would be held to be unconstitutional.

[1511] In *Northwest Falling*, the Court allowed federal interference with provincial proprietary interests where provincial jurisdiction could have adverse effects on federal heads of power.

[1512] In a number of cases, the Supreme Court of Canada has held that s. 91(24) covers two distinct heads of powers: "Indians" and "Lands reserved for the Indians." While most important in the context of Aboriginal title cases, this distinction is significant here in understanding the continuing federal interest in lands in Keewatin that are not "Lands reserved for the Indians." Treaty Rights other than Aboriginal title fall under the subject matter of "Indians." Indians can have treaty rights tied to lands that may not amount to Aboriginal title/rights to the exclusive possession of the lands. [I have already cited the reasoning of Lamer C.J.C. on this point in *Delgamuukw* at paragraph 176.]

<u>(2) Are Traditional Harvesting Rights Under the Treaty at the Core of the Federal s. 91(24) Power?</u>

[1513] Counsel for Ontario submitted the doctrine of inter-jurisdictional immunity is restricted in its application to narrow residual areas that are critical to give effect to a limited number of

federal heads of power. Care must be taken to distinguish between the scope and the core of the s. 91(24) jurisdiction over Indians. With respect to scope, the federal government can legislate on any subject matter in relation to Indians (subject to the Constitutional justification protection granted by s. 35). Section 91(24) re: "Indians" covers subject matters relating to Aboriginal identity and activities, often characterized as "Indianness" (or regulating Indians *qua* Indians, or Indians in their Indianness.) The core of Indianness under s. 91(24) is narrower, related to central elements of Indian identity.

[1514] While counsel for Ontario conceded that the core of the Indians' branch of s. 91(24) protects some aspects of Treaty Rights, including Treaty Harvesting Rights, from provincial impairment, he submitted that not all aspects of Treaty Harvesting Rights necessarily come within the core. The majority in *Morris*, for example, left open the question of provincial Constitutional capacity to interfere with commercial Treaty Harvesting Rights. Questions of public safety and resource conservation also leave scope for provincial laws. Geographic restrictions on where Treaty Harvesting Rights can be exercised at any given point in time, resulting from the effect of provincial proprietary and related legislative jurisdiction, do not impair the core of s. 91(24). Even though Ontario cannot access the "taking up" clause in the Treaty, the substantive bargain of the Treaty was that lands could be developed and Treaty Rights could be geographically restricted.

[1515] Counsel for the Plaintiffs submitted that while jurisdictional overlap will generally not result in a provincial law being found to be ineffective, in certain circumstances, including when the doctrine of inter-jurisdictional immunity applies, it will. The Supreme Court of Canada has made it clear that with regard to "Indians and Lands reserved for the Indians," there is an unassailable core of federal jurisdiction immune from impairment by the operation of provincial laws, even if those laws are of general application.

[1516] Counsel for the Plaintiffs submitted that the substantive bargain was not as alleged by Ontario. In making the submission that the core was not affected and that the substantive bargain was that lands could be developed by the generic government, including Ontario, and that Treaty Rights could be geographically limited once that happened, Ontario is effectively urging this Court to ignore the mutual intention of the parties, the deliberate insertion of the process clause by the Commissioners to protect Treaty Rights and the plain and ordinary meaning of the Harvesting Clause.

(3) Does Inter-jurisdictional Immunity apply to Indirect Interferences?

[1517] While conceding that the regulation of Treaty Harvesting Rights is within the exclusive jurisdiction of the federal government (subject to very narrow exceptions for safety and conservation), counsel for Ontario submitted that in passing the *Crown Forests Sustainability Act*, Ontario was not directly regulating, nor proposing to directly regulate, Treaty Harvesting Rights.

[1518] Licensing of Crown lands for forestry purposes would only remotely and indirectly affect Treaty Harvesting Rights by limiting where those Rights can be exercised at a given point in

time. Because the impact of the provincial legislation here is indirect, it will not impair the core of the federal s. 91(24) power as it relates to Treaty Harvesting Rights, so long as the *Mikisew* test is met, i.e. a meaningful ability to exercise those rights remains. The effect is more remote than the indirect effect involved in *Irwin Toy*, where the provincial advertising restriction at issue was nevertheless found not to impair federal broadcasting undertakings. At p. 958:

> Do the provisions nevertheless have the effect of impairing the operation of a federal undertaking? The interveners adduced evidence showing the importance of advertising revenues in the operation of a television broadcast undertaking and that the prohibition of commercial advertising directed to persons under thirteen years of age affected the capacity to provide children's programs. This is not a sufficient basis on which to conclude that the effect of the provisions was to impair the operation of the undertaking, in the sense that the undertaking was "sterilized in all its functions and activities." [**test now changed]**The most that can be said, as in *Kellogg's* (at p. 225), is that the provisions "may, incidentally, affect the revenue of one or more television stations." Nor can it be said that the provisions have the potential to impair the operation of a broadcast undertaking.
> (See also *Canadian Western Bank* at para. 49.)

[1519] Counsel for Ontario acknowledged that this Court is bound by *Morris*, but submitted that that case is distinguishable. *Morris* did not raise the issue of provincial capacity to limit Treaty Harvesting Rights by authorizing the "taking up" of lands. It did not consider the extent to which such exercises of provincial jurisdiction would be consistent with the internal geographical limitations on the Harvesting Rights contained in those treaties.

[1520] Counsel for the Plaintiffs submitted that the Supreme Court rejected any distinction between direct and indirect effects/interference in *Canadian Western* at para. 49, holding that the same test applies to both. He disagreed with Ontario's submission that *Irwin Toy* supports the proposition that inter-jurisdictional immunity does not apply to indirect effects of provincial legislation/regulation, submitting that in *Irwin Toy*, the Court did not refuse to apply the doctrine of inter-jurisdictional immunity because the effect of the provincial legislation/regulation was indirect. Rather, it refused to apply the doctrine on the ground that there was not enough evidence to conclude that there had been an impairment.

[1521] Counsel for the Plaintiffs submitted that in making this argument, Ontario was in essence submitting that an indirect effect does not constitute an impairment/does not significantly interfere with Harvesting Rights. Spies J. has already held that impacts, including effects of the particular statutes and statutory instruments on the Treaty Rights of the Plaintiffs, are not to be determined during this stage of the litigation. The argument about indirect versus direct effects is thus not open to Ontario during this stage.

[1522] During the next stage of the trial, Ontario will be at liberty to submit that its activity does not constitute an impairment or significantly interfere with Harvesting Rights on the ground and that the effect of its activity is only indirect.

Conclusions

1. Is Division of Powers Analysis Appropriate Here? Is Ontario Unconstrained by the Division of Powers? Are Treaty Rights Protected only by s. 35 and the Honour of the Crown?

[1523] I have earlier given reasons for rejecting the submissions of Ontario that *St. Catherine's Milling* stands for the proposition that after a valid surrender, Canada has no further s. 91(24) jurisdiction and also for rejecting Canada's submission that *Smith* stands for the same proposition.

[1524] In *St. Catherine's Milling*, Canada asserted a proprietary interest in the land, based upon the theory that the Treaty 3 surrender had conveyed legal title from the Treaty 3 Ojibway to the federal government. The JCPC rejected Canada's arguments and held that Ontario, not Canada, had proprietary rights in lands in Ontario under s. 109. At issue were ownership rights, not Harvesting Rights.

[1525] In my view, a solid evidentiary basis exists in this case upon which I have concluded that Canada's founding fathers, centralists and provincial autonomists alike, and later Morris in 1873, understood Canada could act under s. 91(24) to protect the Harvesting Rights of its wards "the Indians," and that in so doing Canada could adversely affect provincial proprietary rights and that s. 109 rights could be limited by Treaty Harvesting Rights reserved to the Indians under the Treaty by Canada exercising its s. 91(24) powers.

[1526] I have already opined that the JCPC did not conclude in either *St. Catherine's Milling* or *Seybold* that the title was free and clear of any Indian interest, but that it was free and clear of any interest except the harvesting interest mentioned in the Treaty. Canada's s. 91(24) interest was continuing. I have noted that at the end of the judgment in *St. Catherine's Milling*, Lord Watson specifically reserved judgment with respect to "questions that may be behind the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes …" [Emphasis added.]

[1527] Counsel for Ontario submitted that when exercising its proprietary rights and not subject to the division of powers, Ontario has powers akin to those of a fee simple owner. He cited Hogg, *Constitutional Law of Canada*, *supra*, at para 29.3, as follows:

> 29.3 … The federal and provincial governments have full executive powers over their respective public properties. It is neither necessary nor accurate to invoke the royal prerogative to explain the Crown's power over its property. As a legal person, the Crown in right of Canada or the Crown in right of a province has the power to do anything that other legal persons (individuals or corporations) can do. Thus, unless there are legislative or constitutional restrictions [footnote 11] applicable to a piece of public property, it may be sold, mortgaged, leased, licensed or managed at the pleasure of the responsible government, and without the necessity of legislation.
> [Emphasis added.]

[1528] I have already noted the content of footnote 11, as follows:

> An example of constitutional restriction would be lands reserved for the Indians, which although owned by the province, are subject to federal legislative power under s. 91(24).

[1529] I have also noted that paragraph 29.4 of the same book on Legislative power and Proprietary Interests, contains the following:

> Some of the implications of the distinction between legislative power and proprietary interests are less obvious. The exercise of legislative power over, say, fisheries, may severely limit the owner's enjoyment of the property…such a law is valid notwithstanding its incidental effects on proprietary rights… the provincial power over property is limited by the existence of federal powers. [Emphasis added.]

[1530] I have rejected the submission of Ontario that Treaty Harvesting Rights cannot adversely affect provincial proprietary rights.

[1531] I am of the view that had *Brooks Bidlake* been decided today, the Court would likely have scrutinized the provision involving Japanese and Chinese workers, and used an inter-jurisdictional immunity analysis and would have found that the doctrine did not apply because it was not at the core of the citizenship power.

[1532] Were *Morgan* being decided today, the Court would likely use an inter-jurisdictional immunity analysis. It would consider whether the provincial law limiting ownership of certain types of property in P.E.I. goes to the core of the federal citizenship power.

[1533] In my view the *Smylie* case is not helpful to this Court in deciding the issues here. Because it involved the federal trade and commerce power and not a federal "person, place or thing" power, the doctrine of inter-jurisdictional immunity would not apply. Under s. 109, the licensee had no prior right to sell timber across the border, and therefore there was "no interest other than the interest of the province in the same," such as the Treaty Harvesting Rights here.

[1534] I note that LaForest wrote at p. 170: "In *Smylie*, *Brooks Bidlake* and *Fisheries*, we saw that provincial legislation respecting its property may incidentally affect matters falling within s. 91 of the *British North America Act.* But such legislation … cannot invade the federal sphere." [Emphasis added.]

[1535] I do not accept the submissions of counsel for Ontario that Ontario is free to exercise its proprietary rights like any other landowner.

[1536] At p. 179, LaForest wrote: "Reasons have already been advanced in support of the view that the right to hunt and fish is an interest preserved by s. 109."

[1537] I have not accepted Ontario's submission that Ontario is not subject to Treaty Rights under s. 109. Pre-existing rights protected under s. 109 have always included Treaty Harvesting Rights. Ontario is now ignoring that Harvesting Rights are an interest "other than that of the province in the same" pursuant to s. 109.

[1538] In *St. Catherine's Milling* at p. 52, the JCPC did not conclude that Ontario's s. 109 rights were free of Harvesting Rights.

[1539] In *Seybold*, Lord Davey for the JCPC affirmed that the surrender did not leave the federal government without any s. 91(24) jurisdiction, at p. 79:

> … prior to the surrender Ontario had a proprietary interest in the land, under the provisions of s. 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon extinguishment of that title by the surrender the province acquired the full beneficial interest in the land **subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty**.
> [Emphasis added.]

[1540] Ontario's argument virtually ignored *Morris* and the statements of the Supreme Court of Canada in *Sparrow*, *Delgamuukw* and *Haida Nation* among others concerning limitations on the scope of s. 109 powers, quoted earlier in these Reasons supporting the view that Ontario took its proprietary interest subject to Treaty Rights. Its proprietary rights are subject to pre-existing Harvesting Rights, an interest other than that of the province in the same.

[1541] I have already mentioned the reasons of Lamer C.J.C. in *Delgamuukw* at paragraph 175 and the reasoning of the Court in *Haida Nation* at paragraphs 58 and 59.

[1542] I do not accept Ontario's submission that when exercising its proprietary rights, Ontario is not subject to the division of powers. In *Morris* the Supreme Court of Canada held that s. 109 rights are subject not only to s. 35 rights, but are also constrained by the exercise of federal power under s. 91. Treaty Rights are protected by s. 91(24) as well as by s. 35 and the Honour of the Crown. Section 35 supplements Treaty Rights already otherwise protected under s. 109. It does not adversely affect them. In *Morris*, the Supreme Court of Canada did not hold that s. 92(13) of the *Constitution Act* merely confirms the provinces' jurisdiction to legislate in relation to their proprietary jurisdiction.

[1543] I do not accept Ontario's submission that treaty protection should be limited to s. 35 and the Honour of the Crown. As Lamer C.J.C. in *Delgamuukw* held at paras. 176-178, "to separate jurisdiction over Indians from jurisdiction over their lands" and from the jurisdiction over "other Aboriginal rights in relation to land" would create an injustice.

[1544] The Supreme Court of Canada made it clear in *Delgamuukw* that s. 35 and the Honour of the Crown are not the only limitations on s. 109 proprietary rights. The doctrine of inter-jurisdictional immunity/division of powers can limit s. 109 powers as well.

[1545] I do not accept the submissions of Ontario that Ontario can use its proprietary jurisdiction to partially extinguish Treaty Rights. Only Canada could extinguish Treaty Rights before 1982 and only Canada could justifiably infringe Treaty Rights post-1982.

[1546] I note that in *Delgamuukw*, where an NDP government in British Columbia had withdrawn a general extinguishment argument but was continuing to advance a partial extinguishment argument similar to the one being made by Ontario here (i.e., that using its proprietary powers, British Columbia could make fee simple grants and thereby extinguish Aboriginal title piece by piece.) Lamer C.J.C., after rejecting that contention at paragraph 175, added at paragraph 176:

> 176 I conclude with two remarks. First, even if the point were not settled, I would have come to the same conclusion. The judges in the court below noted that separating federal jurisdiction over Indians from jurisdiction over their lands would have a most unfortunate result -- the government vested with primary constitutional responsibility for securing the welfare of Canada's Aboriginal peoples would find itself unable to safeguard one of the most central of native interests — their interest in their lands. Second, although the submissions of the parties and my analysis have focussed on the question of jurisdiction over Aboriginal title, in my opinion, the same reasoning applies to jurisdiction over any Aboriginal right which relates to land. As I explained earlier, *Adams* clearly establishes that Aboriginal rights may be tied to land but nevertheless fall short of title. Those relationships with the land, however, may be equally fundamental to Aboriginal peoples and, for the same reason that jurisdiction over Aboriginal title must vest with the federal government, so too must the power to legislate in relation to other Aboriginal rights in relation to land.
> [Emphasis added.]
> *Delgamuukw* at para. 176; *Adams* at para, 30; *Cote* at para. 39.

[1547] In short, Ontario is constrained by the division of powers. Ontario is not free to exercise its proprietary rights without regard to the division of powers. Canada, using its s. 91(24) jurisdiction, can make treaty promises that may affect Ontario's proprietary interests, including promising Treaty Harvesting Rights.

2. If Ontario is Constrained by the Division of Powers, Does Inter-Jurisdictional Immunity Apply?

[1548] *Delgamuukw* made it clear, among other things, that if not allowed to do so under the Treaty itself, Ontario cannot extinguish Treaty Rights at the core of federal jurisdiction. Lamer C.J.C. noted at paras. 177 that "s. 91(24) protects a 'core' of Indianness from provincial intrusion, through the doctrine of inter-jurisdictional immunity" and at para. 178 that "the core of Indianness encompasses the … practices, customs and traditions which [may or may not be] tied to land…Provincial governments are prevented from legislating in relation to both types of Aboriginal rights."

[1549] I accept the submission of counsel for the Plaintiffs that inter-jurisdictional immunity applies here.

[1550] While the Supreme Court of Canada has recently limited the applicability of the doctrine of inter-jurisdictional immunity in *Canadian Western* because of the fundamental federal responsibility for a thing or person (here Indians), the Court specifically reaffirmed that inter-jurisdictional immunity continues to apply, in the case of s. 91(24), to protect the core of Indianness. Binnie and LeBel JJ. wrote:

> 61 In some cases ... the Court has found a vital or essential federal interest to justify federal exclusivity because of the special position of Aboriginal peoples in Canadian society or, as Gonthier J. put it in the *National Battlefields Commission* case mentioned earlier, "the fundamental federal responsibility for a thing or person" (p. 853). Thus, in *Natural Parents*, Laskin C.J. held the provincial *Adoption Act* to be inapplicable to Indian children on a reserve because to compel the surrender of Indian children to non-Indian parents "would be to touch 'Indianness', to strike at a relationship integral to a matter outside of provincial competence" (pp. 760-61). Similarly, in *Derrickson*, the Court held that the provisions of the British Columbia *Family Relations Act* dealing with the division of family property were not applicable to lands reserved for Indians because "[t]he right to possession of lands on an Indian reserve is manifestly of the very essence of the federal

> exclusive legislative power under s. 91(24) of the *Constitution Act, 1867*" (p. 296). In *Paul v. Paul*, [1986] 1 S.C.R. 306, our Court held that provincial family law could not govern disposition of the matrimonial home on a reserve. In these cases, what was at issue was relationships within Indian families and reserve communities, matters that could be considered absolutely indispensable and essential to their cultural survival. [Emphasis added.]

[1551] I note that Mr. Penner, counsel for Canada, in argument on April 30, 2010 submitted that part of the protective component of s. 91(24) (as confirmed by *Canadian Western*) is inter-jurisdictional immunity and that during argument on May 3, 2010, counsel for Ontario conceded that generally speaking, Treaty Harvesting Rights **do** relate to Indianness and that Treaty hunting and fishing rights are at the core of the s. 91(24) jurisdiction.

[1552] On the facts here, I have concluded that Treaty Harvesting Rights are at the core of the federal s. 91(24) jurisdiction. For the purposes of this litigation, the Plaintiffs are not claiming that they have ongoing Aboriginal title. [However, it seems clear that before the Treaty, the Ojibway had Aboriginal title to all of the Treaty 3 lands. Before the Treaty was signed, the Treaty 3 Ojibway exercised exclusive control over the Treaty 3 territory and exercised their Harvesting Rights. As I found on the facts, as LaForest noted in his book and the JCPC noted in *St. Catherine's* and *Seybold*, Harvesting Rights were reserved to the Ojibway under the Treaty.]

[1553] Only the federal government, pursuant to its jurisdiction over Indians and consistent with the Chief Justice's description of Harvesting Rights in *Delgamuukw*, has power over Treaty Harvesting Rights. Treaty Harvesting Rights are Constitutionally protected. They burden the use of the land under s. 109. In this case, based on my conclusions about the importance of Harvesting Rights to the Treaty 3 Ojibway, I am strongly of the view that their traditional hunting rights are at the core of the federal s. 91(24) jurisdiction/central to the Indianness of the Treaty 3 Ojibway and worthy of federal protection under the doctrine of inter-jurisdictional immunity.

[1554] For all the reasons outlined elsewhere in these Reasons, I do not accept Ontario's submission that the "substantive bargain" allowed Ontario to remove Treaty Rights by "taking up" lands. I have found that the "substantive bargain" was that the lands could not be developed in a manner that would significantly interfere with Harvesting Rights. Ontario's rights to authorize uses of land were limited by the Treaty to authorizing uses of land that did not significantly interfere with Harvesting Rights. I have already held that only Canada could "take up" lands under the Treaty/extinguish Treaty Rights. Treaty Harvesting Rights were intended by Canada and the Ojibway to be enforceable substantive rights to be protected, not to be interfered with without the specific authorization of the Dominion of Canada. Although the Plaintiffs do not contest Canada's rights as defined by the Treaty, they do contest any right of Ontario under the Treaty to remove or ignore the burden of the Harvesting Rights and I have so held in answering Question One.

[1555] As Treaty-protected Harvesting Rights are at the core of the federal government's s. 91(24) jurisdiction, Ontario cannot interfere with them unless allowed to do so under s. 88 of the *Indian Act*.

3. Does Inter-Jurisdictional Immunity Apply?

[1556] While many of the decided cases on inter-jurisdictional immunity have involved provincial attempts to directly regulate Treaty Rights, I am of the view that the doctrine applies in any situation where there is *prima facie* infringement of a core federal interest, whether direct or indirect. In my view, even an indirect interference with Treaty Harvesting Rights could significantly adversely affect those rights/constitute an infringement of those rights.

[1557] Indirect interference could sufficiently adversely affect the core of the federal jurisdiction for inter-jurisdictional immunity to apply. See *Canadian Western*. However, whether the indirect effects/impacts of the provincial activities/legislation under consideration here are sufficiently significant to constitute infringement is an issue to be determined later in these proceedings.

4. Does s. 88 of the Indian Act Apply?

[1558] If a provincial law is found to impair "Indianness," it may nevertheless be held to apply if allowed to do so by s. 88 of the *Indian Act*, which reads as follows:

> **88.** Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.
> [Emphasis added.]

[1559] Assuming that Ontario's legislation or acts adversely interfered with Harvesting Rights so as to constitute a *prima facie* infringement of Treaty 3 Harvesting Rights, could it or they be saved by the operation of s. 88 of the *Indian Act*?

[1560] In *Morris,* Deschamps and Abella JJ. wrote at para. 45:

> [45] But as the opening words of this provision demonstrate, Parliament has expressly declined to use s. 88 to incorporate provincial laws where the effect would be to infringe treaty rights. And this Court held in *Côté* at para. 86, that one of the purposes of s. 88 is to accord "federal statutory protection to Aboriginal treaty rights". Thus, on its face, s. 88 cannot be used to incorporate into federal law provincial laws that conflict with the terms of any treaty.
> [Emphasis added.]

[1561] The dissenting minority took the same position on the effect of s. 88 as follows:

> 96 The Court clarified the effect of s. 88 of the *Indian Act* in *Dick v. The Queen*, [1985] 2 S.C.R. 309. The Court noted that for the purposes of s. 88 there are two categories of provincial laws: (1) laws which can be applied to Indians without touching their Indianness; and (2) laws which cannot apply to Indians without regulating them *qua* Indians (pp. 326-27). The first category of provincial laws applies to Indians without any constitutional difficulty. The second category cannot apply to Indians by reason of the doctrine of inter-jurisdictional immunity. It is to this second category of provincial legislation that s. 88 of the *Indian Act* is directed. Thus, s. 88 incorporates provincial laws of general application that are otherwise constitutionally inapplicable to Indians — laws that are precluded from applying to Indians by the doctrine of inter-jurisdictional immunity because they affect core Indianness, a matter under federal jurisdiction.

> 97 However, as may be readily observed from its text, s. 88 does not incorporate all provincial laws that are otherwise inapplicable by reason of the doctrine of inter-jurisdictional immunity. Section 88 operates, *inter alia*, "[s]ubject to the terms of any treaty". In other words, s. 88 cannot incorporate a provincial law that conflicts with a treaty right.
> [Emphasis added.]

[1562] Both the majority and the minority concluded that the trigger for application of the protective opening words of s. 88 of the *Indian Act* is *prima facie* infringement. Deschamps and Abella JJ. wrote for the majority in *Morris*:

> 54 The protection of treaty rights in s. 88 of the *Indian Act* applies where a conflict between a provincial law of general application and a treaty is such that it amounts to a *prima facie* infringement. Where a provincial law of general application is found to conflict with a treaty in a way that constitutes a *prima facie* infringement, the protection of treaty rights prevails and the provincial law cannot be incorporated under s. 88.
>
> 55 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*, as alluded to by Lamer C.J. in *Côté*, at para. 87. The purpose of the *Sparrow/Badger* analysis is to determine whether an infringement by a government acting within its constitutionally mandated powers can be justified. This justification analysis does not alter the division of powers, which is dealt with in s. 88. Therefore, while the *Sparrow/Badger* test for infringement may be useful, the framework set out in those cases for determining whether an infringement is justified does not offer any guidance for the question at issue here.

[1563] In these circumstances, the provincial law cannot displace Treaty Rights. Section 88 of the *Indian Act* can have no application.

5. The Answer to Question Two

[1564] In my view, the doctrine of inter-jurisdictional immunity clearly applies here. Treaty Harvesting Rights are at the core of the federal 91(24) jurisdiction. Provincial attempts to infringe Treaty Rights are ineffective due to a combination of Canada's s. 91(24) jurisdiction over Indians and the special protection afforded to Treaty rights under s. 88 of the *Indian Act*. Provinces cannot significantly infringe rights at the core of s. 91(24). Significant infringements of Treaty 3 Harvesting Rights by the province can have no force or effect.

[1565] Section 88 of the *Indian Act* and the doctrine of inter-jurisdictional immunity together operate to render ineffectual any provincial action that constitutes a *prima facie* infringement of a Treaty Harvesting Right. [*Morris* at para. 55.]

[1566] In 1873, Morris was obviously not aware of the doctrine of inter-jurisdictional immunity. However, its effect accomplishes exactly what I have found he and the other Treaty Commissioners intended to do in drafting the Harvesting Clause in the Treaty. Morris was able to protect Harvesting Rights against significant interference by Ontario even without legislation.

[1567] The answer to Question Two is No.

15. THE EFFECT OF THE ANSWERS TO QUESTIONS ONE AND TWO

[1568] Counsel for Ontario submitted in argument that to answer the questions as this Court has done would "be contrary to balanced, cooperative federalism," "be inconsistent with Ontario's proprietary jurisdiction under s. 109, "dramatically change the balance of Canadian federalism as it applies in the Keewatin Lands and has been so applied for over a century;" "represent a marked, massive and unwarranted incursion into provincial proprietary and legislative jurisdiction" and "exclude Ontario from the bargaining table." He urged this Court to give Ontario "sufficient scope to fulfil its Constitutional obligations, exercise its Constitutional rights, and be at the table in any discussion affecting its interests."

[1569] In my view, the answers to Questions One and Two will **not** result in Ontario being excluded from the bargaining table. They will result in Ontario being required to respect the Harvesting Rights Clause in the Treaty as found by this Court as mutually intended by the parties to the Treaty.

[1570] Citing *Mikisew,* Ontario agrees that under the Honour of the Crown, it is already required to consult with the Ojibway whenever it is contemplating forestry uses that may adversely affect Harvesting Rights. [I have earlier commented on the applicability of the *Mikisew* standard here.] Although I have held that Ontario cannot access the "taking up" clause under the Treaty, Ontario can exercise its Constitutional powers under s. 109 to authorize land uses that do not significantly interfere with Treaty Harvesting Rights. Its right to patent and license land up to the point of significant interference involves a concomitant duty to assess in advance the impacts on Treaty Harvesting Rights of any activities it is being asked to patent or license.

[1571] These Answers to Questions One and Two do not "deprive Ontario of important rights that were part of the Confederation bargain." Since Confederation, s. 109 rights have been subject to interests other than interests of the province in the same. They have been subject to interference by valid federal legislation. They do not put Ontario behind "the Constitutional baseline" but at it, just as the Treaty Commissioners intended. In answering Questions One and Two, this Court has not determined that the activities of Ontario that precipitated this litigation do or did amount to *prima facie* infringement of Treaty Harvesting Rights. It has answered the questions it was ordered to answer in order to focus the issues and the evidence to be called during the next stage of these proceedings.

[1572] Whether or not the activities Ontario was purporting to authorize would significantly interfere with the Treaty Harvesting Rights has not been directly addressed in the evidence before this Court to date. Evidence must be adduced going beyond the fact that there was Euro-Canadian activity in the Keewatin Lands, and addressing the impact of that activity on Treaty Harvesting Rights.

[1573] The next stage of this litigation will involve a complicated impact assessment. During cross-examination on January 18, 2010, Chartrand explained at pp. 56-69 the myriad

considerations that will need to be taken into account. These include but may not be limited to: the practical effect of the proposed land use on Harvesting Rights; the consultation, or lack thereof, between Ontario and the Ojibway; the ability of the Ojibway and Ontario to simultaneously use the land; the scope of the area affected; how the use would affect particular families; the length of time involved in Ontario's proposed use of the land; the scale of the work; whether accommodations and benefits to the Ojibway are built in; where within Keewatin, the use is taking place; the depletion caused to resources, in particular regions within Keewatin, and the area as a whole. I have repeatedly emphasized herein that the Ojibway understood in 1873 they would derive benefits from sharing their resources with the Euro-Canadians, including wages and other advantages that might alleviate or offset otherwise detrimental effects.

[1574] Throughout these Reasons, I have recognized the uniqueness of the circumstances under which Treaty 3 was negotiated. Just as the circumstances in Keewatin were extraordinary when the Treaty was made, they continue to differ greatly from those in other, more developed areas today. Keewatin remains largely virgin territory, most of which continues to be held as Crown lands.

[1575] The fact that Ontario has been exercising its s. 109 jurisdiction for many years in Keewatin without litigation in my view speaks volumes, not (as asserted by Ontario) about Ojibway agreement in 1873 to allow progressive extinguishment of their Harvesting Rights, but (as asserted by the Plaintiffs) about the unusual characteristics of the Treaty 3 area and the high level of compatibility between Harvesting Rights and Euro-Canadian land uses in Keewatin. From the largely undeveloped state of Keewatin today, it appears that adequate consultation and accommodation would go a long way towards ensuring continuing compatibility between Harvesting Rights and Euro-Canadian uses. Just as the circumstances of Treaty 3 were unusual in 1873 and provided a unique rationale for the extraordinary promises made, it appears that the circumstances in Keewatin today continue to provide a unique opportunity for cooperation and reconciliation.

[1576] Ontario by and large already has the ability to control the way in which future forestry development will occur and to pursue the objective of promoting compatibility and/or preventing or minimizing interference with Treaty 3 Harvesting Rights. In my view, pursuing that objective can only further reconciliation.

[1577] Counsel for Ontario agreed that it is already required to consult with the Treaty 3 Ojibway with respect to how and where cutting will be allowed. He advised that forestry licenses are hundreds of pages thick. They contain very detailed plans respecting how much and when cutting will be allowed, what trees will be left, what replanting must be done, etc. Ontario already does have the power to require its licensees to take steps to avoid or minimize interference with Harvesting Rights. It already has the power to scope its licensing instruments to ensure that Harvesting promises in the Treaty are honoured.

[1578] The April 26, 2010 transcript contains the following at p. 24:

> MR. STEPHENSON: My point is that there are tools available, you know, to the Ontario government in order to honour its treaty obligations and make sure that some recipient of an instrument with respect to Crown land [has] not an ability to validly and unduly entrench upon harvesting rights.

[1579] While Harvesting Rights on lands where uses inconsistent with their Harvesting Rights have been authorized have not been legally extinguished, the practical effect on the ground of the finding that the Ojibway and Canada did not agree that the geographic area where the Ojibway could hunt could be decreased as land use was authorized without the authorization of Canada may not be as significant as might appear at first blush. The Supreme Court of Canada has held that all treaties must be construed so as to include a prohibition against unsafe hunting. Fobister and counsel for the Plaintiffs both acknowledged that the Plaintiffs are committed to hunting safely.

[1580] These answers to Questions One and Two do not apply in the more developed portions of the Treaty 3 lands that constituted the Disputed Territory. They only apply to the Treaty 3 lands in Keewatin because Keewatin was and is unaffected by the 1891 Legislation.

[1581] Even today in Keewatin, it appears that the Plaintiffs' traditional harvesting activities are largely compatible with Euro-Canadian activities. They do not contend that *all* or even most Euro-Canadian land uses in Keewatin are or will be incompatible with Treaty 3 Harvesting Rights.

[1582] An infringement of Treaty Harvesting Rights will be found only if the activity is unreasonable or arbitrary and if it places a significant burden on their exercise or otherwise significantly interferes with them. Deschamps and Abella JJ. for the majority of the Court in *Morris* wrote at para 50:

> Insignificant interference with a treaty right will not engage the protection afforded by s. 88 of the *Indian Act*. This approach is supported both by *Côté* and by *Nikal*, where Cory J. rejected the idea that "anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement" (para. 91 (emphasis added [by Deschamps and Abella JJ.])). Therefore, 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 do not infringe the right.
> (See also *Côté* at paras. 77-80 and *Nikal*, at paras. 98-102.)

[1583] Were Ontario's laws, regulations or licenses held to place only a modest burden on the exercise of Treaty Harvesting Rights or were they held to interfere in an insignificant way with the exercise of those Rights, they would not be constrained by inter-jurisdictional immunity.

[1584] I have already noted that impact assessment must involve both positive and negative factors. Potentially negative aspects of particular Euro-Canadian land uses can be addressed by ensuring that the Ojibway will benefit from the economic activity being proposed.

[1585] Although I have held that Ontario cannot unilaterally legislate or act in a manner to significantly interfere with hunting and fishing rights in Keewatin without authorization from Canada, there is nothing preventing it from conferring and cooperating with the Treaty 3 Ojibway and with Canada.

[1586] Post-1982, it is clear that the First Nations should be involved in matters that vitally affect them. I fail to see how allowing them to seek benefits from activities that would otherwise significantly adversely affect their livelihood, would undermine or interfere with balanced, cooperative federalism.

[1587] In my view, requiring *prima face* infringement/significant adverse impact before the doctrine of inter-jurisdictional immunity and s. 88 apply, and tolerating insignificant interferences with Harvesting Rights, strikes a balance among Ontario's s. 109 proprietary interest, the Treaty Rights of the Plaintiffs and Canada's power to make and enforce Treaty Rights and to legislate *qua* Indians. It serves to reconcile provincial powers over Ontario assets *qua* assets with federal powers over Indians *qua* Indians.

[1588] Because it cannot access the Treaty or pass legislation to infringe Harvesting Rights, Ontario does not have the power to significantly adversely impact the Treaty Harvesting Rights if, after consulting, the effect of its actions would be to significantly adversely impact Harvesting Rights. Under the Treaty, before that could happen, Canada, the historical guardian of Indians and their lands under the Constitution, would have to authorize that adverse impact/Treaty infringement and satisfy the *Sparrow* test.

[1589] Ontario is therefore restricted either to acting within the confines of the Treaty by avoiding significantly affecting the right (possibly by agreeing to mitigation measures with the Ojibway) or turning to Canada to enable it to significantly affect the right without the consent of the Ojibway.

16. THE HONOUR OF THE CROWN

[1590] In 1982, a solemn commitment was made to recognize and affirm treaty rights (see *Sparrow* at pages 1108-1109.) Section 35 of the *Constitution Act 1982* Constitutionalized the protection of treaty rights. Treaties define Aboriginal rights guaranteed by s. 35. McLachlin C.J.C. said at paragraph 20 of *Haida Nation* that s. 35 represents a promise of rights recognition.

[1591] Since 1982, the Supreme Court of Canada has made it clearer and clearer that, in the process of reconciliation, Canadian governments must respect treaty rights, interpret ancient treaties liberally and in context, having regard to the manner in which they would have been understood by the Indians. Words imposing limitations on treaty rights should be narrowly construed. Governments must uphold the highest standards in treaty implementation, an important element of the "rededication" of the commitment to Canada's Aboriginal people.

[1592] In *Sparrow*, after governments submitted that an Aboriginal right to fish had been extinguished prior to 1982 as a result of progressive restriction and detailed regulation, Dickson C.J.C. and LaForest J. emphasized that s. 35(1) of the *Constitution Act, 1982* recognizes and affirms treaty rights and pointedly referred to Canada's past failures to uphold the Honour of the Crown at pp. 1103-1105; 1108:

> ... there can be no doubt that over the years the rights of the Indians were often honoured in the breach ... As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35

(B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."

For many years, the rights of the Indians to their Aboriginal lands -- certainly as legal rights -- were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, Aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "Aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community." … It took a number of judicial decisions and notably the *Calder* case in this Court (1973) to prompt a reassessment of the position being taken by government.

In the light of its reassessment of Indian claims following *Calder*, the federal government on August 8, 1973 issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians", which it regarded "as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country". ... [Underlining emphasis added by Dickson C.J.C. and LaForest J.]

It is obvious from its terms that the approach taken towards Aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position ... As recently as *Guerin* ... the federal government argued in this Court that any federal obligation was of a political character.

It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of Aboriginal rights. ... Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords Aboriginal peoples constitutional protection against provincial legislative power.

…The relationship between the Government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.

[1593] In *Haida Nation* McLachlin C.J.C. wrote:

19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity ...

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

> ...
> 25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered ... the honour of the Crown requires that rights be determined, recognized and respected.
> ...
> 27 The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests.
> ...
> 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. As stated in *Mitchell v. M.N.R.* at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat Aboriginal peoples fairly and honourably, and to protect them from exploitation" [Emphasis added by McLachlin C.J.C.].

[1594] On the same day as *Haida Nation* was released, McLachlin C.J.C.'s reasons in *Taku River* were also released. In that case, she characterized a province's submission that it only had a duty of fair dealing before the determination of litigation as an impoverished view of the Honour of the Crown and all that it implies.

[1595] Last autumn, the Supreme Court also released *Beckman*. Deschamps J. made the following observation about the relationship between treaties and the Honour of the Crown at para. 106:

> For the treaty to have legal value, its force must be such that neither of the parties can disregard it.

[1596] Since 1982, the Courts have consistently emphasized the legal and enforceable nature of treaty rights when interpreting the will of Parliament in enacting s. 35.

[1597] Since 1982, the Supreme Court of Canada has repeatedly referred to the Honour of the Crown in iterating and reiterating that treaties are solemn, sacred and legally enforceable covenants. It has emphasized that treaty promises were not made out of simple Crown benevolence, but as consideration for benefits it received. [See the survey of Professor Leonard Rotman in "Marshalling the Principles from the *Marshall* Morass" (2000) 23 Dalhousie L.J. 5 at 24-29.]

[1598] From the beginning of opening arguments until the end of the case, counsel for Ontario chanted the phrase 'Honour of the Crown' almost like a mantra, as if the reassuring cadence of its repetition would salve any concerns this Court might otherwise have about its failure to honour Treaty Rights in the past.

[1599] Counsel for the governments repeatedly assured this Court that they are aware of their duties to uphold the Honour of the Crown and that they can be expected to respect the Treaty promises. Post *Haida Nation* and *Mikisew*, Ontario acknowledges that they are legally obligated to respect Treaty Rights under the doctrine of the Honour of the Crown.

[1600] However, Ontario's present assurances came with a significant caveat. Ontario wants to honour the Treaty promise as Ontario narrowly interprets it.

[1601] While acknowledging that it must act honourably, in an attempt to support an interpretation having the effect of limiting Treaty Harvesting Rights, Ontario sought to benefit (to the disadvantage of the Ojibway) from reliance on the technical concept of indivisibility of the Crown.

[1602] I have earlier observed, based on its submissions in earlier litigation including but not limited to the *Annuities Case*, and statements made by representatives of Ontario quoted in the evidence, that Ontario's position in this litigation that it is bound to respect Treaty Rights is newfound, not long held. It does not reflect the stance taken by Ontario in the years more proximate to the time the Treaty was made, and for at least 100 years thereafter. It therefore cannot fairly be said to reflect Ontario's intention at the time the Treaty was made (not that Ontario claimed to be a party to the Treaty in 1873.) Parties are free to change their legal positions but the relevant time for the determination of intention here is 1873.

[1603] Ontario's approach to this litigation, while pleasantly civil, was strongly adversarial. Always focusing on its own proprietary rights, it downplayed the plain and clear reference in the Harvesting Clause to Canada. It characterized as a "mistake" what I have found to be Morris' deliberate attempt to protect the Harvesting Rights of the Ojibway (by referring to Canada so Canada could manage the situation/ensure its promises were kept, in the event Canada lost the Boundary Dispute.)

[1604] Here, Ontario was asking this Court to interpret the Harvesting Clause in a manner contrary to the plain meaning of the Treaty words, to benefit itself by expanding its s. 109 rights while restricting Ojibway rights validly conferred under s. 91(24).

[1605] Ontario alleged a "mutual" intention that its own experts, including Chartrand, virtually conceded on cross examination did not exist, by agreeing that the Commissioners, acting on behalf of Canada, intended the reference to Canada in the Harvesting Clause to be to Canada and only to Canada, i.e., not to the Queen or the Crown.

[1606] Ontario attempted to use traditional Euro-Canadian common law property principles to support the relief it was seeking, despite the evidence of Chartrand called by Ontario that Ojibway concepts were vastly different (e.g., they did not have a concept of buying and selling land.)

[1607] In this litigation, counsel for Ontario continued to rely on an argument that the policy of the Canadian government was to agriculturalize the Indians, yet its actions circa 1914-1915 largely deprived the Ojibway of the opportunity to benefit from agriculture and forced them to rely more on traditional harvesting.

[1608] On the one hand, Ontario insisted on being at the table so that it can fulfill its Constitutional obligations. On the other, by insisting it has exclusive rights over lands in Ontario, it sought to exclude Canada and by extension the Ojibway, from enjoying the same privilege. [Had Ontario been held to have the right to "take up" lands in Ontario under the Treaty, the Courts would have had no jurisdiction to protect Harvesting Rights in respect of those lands.]

[1609] Counsel for Ontario maintained that all "taking up" of land within Ontario is exclusively within Ontario's jurisdiction, whether or not "taking up" by Ontario would significantly interfere with Treaty Harvesting Rights. On its interpretation of the Treaty, Ontario would have unilateral control over lands "taken up" while the Ojibway would have no rights in connection with those lands.

[1610] I have already referred at length to Ontario's submissions on *Mikisew*, where the mutual intention of the parties at the time the treaty was made was held to be different from the mutual intention here. Ontario relied heavily on *Mikisew* in submitting that involving Canada in authorizing "taking up" would serve no useful purpose because Canada's and Ontario's duties to the Ojibway in respect of "taking up" are identical. Counsel for Ontario stated in argument on April 26, 2010 at p. 38: "That is it. And that's why we say that bringing Canada in as a third party at the table really doesn't add anything, because that's not part of their trusteeship obligation either historically or in law."

[1611] Ontario did not recognize any difference between a duty to honour Treaty Rights and a duty to protect Treaty Rights or any possibility that on the facts here, Canada's duties might be held to be more onerous than they were held to be in *Mikisew*.

[1612] I have already commented that Ontario's acceptance of the *Mikisew* standard, given the differences between the facts in *Mikisew* and the facts here, was questionable.

[1613] Binnie J. noted in *Mikisew* that there was, in the Minister's argument, a strong advocacy of unilateral Crown action that not only ignored the mutual promises of the treaty, both written and oral, but were also the "antithesis of reconciliation and mutual respect." I note that Ontario's primary argument here in connection with both Questions One and Two was similar.

[1614] Canada submitted in this Court that it has no continuing role in protecting Treaty Harvesting Rights in Keewatin. All its responsibility in that regard has devolved to Ontario.

[1615] In the past, as noted in *Sparrow*, governments have vigorously resisted the notion that they could owe legally enforceable duties under the Treaty. Counsel for the Plaintiffs contended that in substance they were still doing so here. As in *Marshall*, he suggested that the conduct of the Defendants here has put the Honour of the Crown to the test.

[1616] During argument, I tested the Plaintiffs' submission with all counsel.

[1617] I probed whether there might be a disconnect between the conduct required of the Crown under the Honour of the Crown, and the governments' approach to the issues here.

[1618] These inquiries were not directed at counsel personally, who behaved civilly, competently and professionally throughout. They arose out of a sincere effort on my part to try to reconcile the requirements of honourable Crown behaviour, as articulated by our Supreme Court, with the approaches to the issues being taken before this Court.

[1619] I recognized on the one hand that every litigant should be able to put its best foot forward. On the other hand, I questioned whether the conduct of the Crown parties was geared sufficiently to complying with recent case law emphasizing the need to affirm and recognize Treaty Rights, regard Treaty promises as "sacred covenants," give treaties a broad and liberal interpretation and bear in mind the perspective of the Aboriginal signatories.

[1620] 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.

[1621] My inquiries about Honour of the Crown duties canvassed with counsel during argument were not a factor in my fact-finding process. My factual determinations herein were made after reviewing, comparing and analyzing all of the evidence and without regard to considerations involving the Honour of the Crown.

[1622] Had I found the facts as the governments urged me to find them, they could have supported the interpretation of the Treaty that the governments were seeking.

[1623] The governments have been afforded the opportunity to present a version of the facts which, if accepted, could have supported the legal conclusions they were asking this Court to reach.

[1624] That being said, I have now rejected much of the evidence on mutual intention and understanding relied upon by the governments in support of their narrow interpretation of the Harvesting Clause.

[1625] On the facts as I have found them, I am of the view it would violate the Honour of the Crown were Ontario to now continue to ignore the process clause that I found was deliberately inserted by the Commissioners to protect Treaty Harvesting Rights. Having been unsuccessful, I am firmly of the view that they should now, to use the words of Binnie J. in *Mikisew* at paragraph 63, "get on with performance."

[1626] The Honour of the Crown requires not only a fulfillment of Constitutional responsibilities and Treaty obligations, but also genuine openness and commitment to achieving reconciliation.

17. THE NEXT STAGE OF THIS LITIGATION

[1627] During the next stage, counsel will call evidence with respect to whether the forestry activity Ontario is proposing to authorize is nevertheless allowable because it does not/will not significantly interfere with Treaty Harvesting Rights.

[1628] As already noted, the Plaintiffs and the Defendants take differing positions on the impact on harvesting of the forestry activities that Ontario is being asked to license. The Plaintiffs contend that they would significantly interfere with Harvesting Rights under the Treaty. Ontario submits they would not.

[1629] It will be necessary for the Court to make the complex type of impact assessment not undertaken during this stage of the trial. The Court will consider the types of factors acknowledged by Chartrand, Von Gernet and Lovisek to be appropriate in making such an assessment.

[1630] If the forestry activities under consideration will not significantly interfere with Ojibway Harvesting Rights, the federal s. 91(24) interest will not engage, and Ontario will be free to licence such activities without federal authorization.

[1631] If they will significantly interfere, Canada must be involved in authorizing the proposed activity. I emphasize that it will be necessary to assess not only the detriments but also the benefits that would accrue to the Ojibway as a result of any proposed forestry activity. The Ojibway agreed to share the use of the resources so long as they also shared the benefits arising out of those uses. Therefore, if proposed forestry activities would benefit the Ojibway, they would be less likely to be held in breach of the Treaty.

18. FINAL OBSERVATIONS

[1632] Because I recognize that this judgment is lengthy, while re-iterating that I have felt it necessary to detail my Reasons as I have, the following summarizes the heart of the matter:

General Concern About Framing of the Issues

[1633] Ontario has framed the issues here in terms of its own property rights. The Plaintiffs are not disputing that Ontario has title to lands in Ontario. However, Ontario's argument understates the importance of Harvesting Rights to the Ojibway and virtually ignores intersecting s. 91(24) and s. 109 jurisdictions. Harvesting Rights were crucial to the Ojibway in 1873 and continue to be in 2011.

Findings of Fact and Law re 1873-1912/Answers to Questions One and Two

[1634] Canada needed the Treaty more than the Ojibway did in 1873 in order to build the CPR railway and secure the Dawson Route. Both were vitally necessary to the overall development of

the West and Canada. Canada knew the Ojibway could walk away from the 1873 negotiations without reaching an agreement. Indeed, they had done so after the two previous attempts.

[1635] The Ojibway made it clear to the Commissioners that they must be able to hunt and fish "as long as the sun shone and the waters flowed." Canada knew this was a pivotal consideration for the Ojibway.

[1636] On October 2, the negotiations did not go well. Overnight on October 2, or early on October 3, the tide changed.

[1637] On the morning of October 3, the Chiefs returned to the negotiations. In the Commissioners' presence and with their knowledge, McKay assured them they would "be free as by the past for [their] hunting and wild rice harvest." I have found that this was the mutual intention of the parties. On October 3, Canada promised the Ojibway that after the Treaty was signed they would be able to make a living harvesting resources throughout the Treaty 3 area as in the past.

[1638] I have found as a fact that the Ojibway were unaware that Ontario could affect their Harvesting Rights. They were relying on Canada/the Queen's Government at Ottawa to implement and enforce the promises. The relationship with the Queen's Government at Ottawa was important to the Ojibway.

[1639] Canada enforced the Treaty Rights, as Morris promised, for several years while the CPR was being constructed.

[1640] In the eyes of Morris and Canada, it was pivotal that the Ojibway remain content while the railroad was being built and as settlers enroute to the West were crossing the Dawson Route. In order to fulfill Canada's s. 91(24) obligations, the Treaty Harvesting promises needed to be kept, even if Ontario were to win the Boundary Dispute. Familiar with ss. 91(24) and 109, Morris/ Canada ensured the promises could be kept by deliberately, and not mistakenly, referring to the Dominion in the Harvesting Clause. For all the reasons previously set out, I have no reservation in concluding Morris tailored the wording of the Treaty to ensure that the Government of Canada could stand between the local government and the Indians, where necessary, just as the Imperial Government had done earlier.

[1641] Being of the view that the provisions of the treaties must be carried out with the "utmost good faith," I have found that Morris would not have drafted Treaty terms that would deprive Canada of its power to ensure that that was done. In mentioning Canada, he was properly exercising his jurisdiction under s. 91(24).

[1642] Morris was familiar with the Canadian Constitution. He did what was constitutionally open to Canada – to protect Indian and indirectly national interests.

[1643] The 1891 Legislation was intended to apply only to the Disputed Territory, the portion of the Treaty 3 territory affected by *St. Catherine's Milling*. The 1891 Legislation was not intended to apply, and did not apply, to areas unaffected by *St. Catherine's Milling*, such as those at issue here. There is no "evidence of a clear and plain intention on the part of the government to **extinguish treaty** rights" (*Badger* at para. 41) either by the 1891 or the 1912 Legislation.

[1644] The 1912 events did not alter Treaty 3 Harvesting Rights in Keewatin.

Implications of This Decision

[1645] While Canada does not have title to land in Ontario, Canada has jurisdiction under s. 91(24) and the Treaty to limit Treaty Harvesting Rights. Ontario does not. This decision does not put Ontario behind the Constitutional baseline but at it – precisely as the Commissioners intended in 1873. Reference to Canada in the Harvesting Clause was not colourable but Constitutional.

[1646] The Honour of the Crown must be fulfilled on a continuing basis. The Commissioners promised to implement and enforce Treaty Rights. In light of the findings of fact and the other matters outlined in these Reasons, they should now "get on with performance" of their obligations.

19. DISPOSITION

[1647] The answer to Question One is No.

[1648] The answer to Question Two is No.

[1649] Counsel have asked to make submissions before any further order is made.

[1650] I am prepared to hear further submissions immediately on the content of the formal order to be issued herein.

[1651] Counsel should immediately make arrangements for a conference call to discuss any matters that need to be addressed in the immediate future.

_____

M.A. SANDERSON J.

Released: August 16, 2011

APPENDICES

Appendix A. Summary Describing Procedural Background and History of this Litigation

[1652] From Agreed Procedural and Forestry Narrative: In April of 2000, three Grassy Narrows members – Willie Keewatin, Andrew Keewatin Jr. and Joseph William Fobister – commenced an application for judicial review against the Minister and Abitibi (the "Application"), seeking relief including the following:

> [a] A declaration or declarations that each of the Applicants are beneficiaries under Treaty 3 and as such have rights to fish and hunt within the provincially defined Whiskey Jack Forest Management Unit;
>
> [b] A declaration that the Minister of Natural Resources (the "Minister") or his delegate had no authority to approve any Forest Licences, Forest Management Plans, work schedules or other approvals or authorizations for forest operations, within those lands subject to Treaty 3 that were added to the Province of Ontario by virtue of *The Ontario Boundaries Extension Act,* S.C. 1912, c. 40, (the "Keewatin Lands") so as to infringe, violate, impair, abrogate, or derogate from, the rights to hunt and fish guaranteed to the Applicants by Treaty 3;
>
> [c] A declaration that within the Keewatin Lands, the Government of the Province of Ontario, its Ministers or delegates, have no power or jurisdiction to "take up" lands for lumbering within the meaning of Treaty 3, since this power is exclusively reserved to the Government of the Dominion of Canada;
>
> [d] A declaration that within the Keewatin Lands, the Government of the Province of Ontario, its Ministers or delegates, have no power or jurisdiction to do or permit any activity that infringes, violates, impairs, abrogates or derogates from, the Applicants' rights to hunt and fish pursuant to Treaty 3;
>
> [e] A declaration that the activities carried out by Abitibi-Consolidated Inc. pursuant to Sustainable Forest Licence 5442253, the 1999-2019 Forest Management Plan for the Whiskey-Jack Forest Management Unit, and any work schedules or other approvals and authorizations issued by the Minister or his delegate to Abitibi-Consolidated Inc. for its forest operations within the Whiskey Jack Forest Management Unit, infringe, violate, impair, abrogate, or derogate from, the rights to hunt and fish guaranteed to the Applicants by Treaty 3;
>
> [f] A declaration that Sustainable Forest Licence 5442253, the 1999-2019 Forest Management Plan-for the Whiskey Jack Forest Management Unit and any work schedules or other approvals and authorizations of forest operations, insofar as they apply to the Keewatin Lands, are void and of no effect;

> [g] An order quashing the Minister or his delegate's decision to approve Sustainable Forest Licence 5442253, the 1999-2019 Forest Management Plan for the Whiskey Jack Forest Management Unit and any work schedules or other approvals and authorizations of forest operations related to that Plan, insofar as they apply to the Keewatin Lands;
>
> [h] An order prohibiting the Minister or his delegate from approving any forest licences, forest management plans, work schedules or other approvals and authorizations of forest operations related to the Whiskey Jack Forest Management Unit, insofar as they apply to the Keewatin Lands;
>
> [i] An order granting an interim stay of the operation of Sustainable Forest Licence 5442253, the 1999-2019 Forest Management Plan for the Whiskey Jack Forest Management Unit, and any work schedules or other approvals and authorizations of forest operations pursuant to that Plan insofar as they apply to the Keewatin Lands, or such other interim order as this Honourable Court considers proper, pending the final determination of this application.
>
> Emphasis added.

[1653] The Application was quashed by Then J. on application of both the Minister and Abitibi *(Keewatin v. Ontario (Minister of Natural Resources)* (2003), 66 O.R. (3rd) 370 (Div Ct)), with leave to bring an action raising the same issues. Then J. reasoned as follows:

> [35] However, the relief sought belies this submission. In paragraph (a), the applicants request a declaration that they are beneficiaries under Treaty 3 and have a right to hunt and fish in the provincially defined Whiskey Jack Forest Management Unit. This Court cannot grant the relief sought for two reasons. First, this declaration is not related to the exercise of a statutory power. Second, what the applicants are requesting in this paragraph is a finding of fact, and establishing this fact is the basis for the application. The finding of facts is a key aspect of this case, but is not something that the Divisional Court is designed to do on judicial review. The making of such a determination will require an extensive review of history, experts, and documents. Even if it is assumed that the applicants have these rights, there are other important factual determinations that are raised by these declarations that must be resolved before the declarations can be considered – for example, the question of whether or not these rights have been infringed by the moving parties.
>
> [45] Unlike *Masters, supra*, the motion record places sufficient material before this Court to determine that there are significant facts in dispute that require an extensive review of the evidence, including considerable expert evidence. The adjudication of the issues raised by this application requires consideration of a wide range of historical, anthropological, ecological, biological and economic evidence in addition to evidence concerning the course of dealings between the applicants, their First Nation, the Ontario Ministry of Natural Resources and Abitibi over a considerable period of time. The complexity and volume of this evidence is compounded by the challenges posed by the special evidentiary dimensions of Aboriginal and treaty rights cases. In these circumstances, it is imperative for the material facts to be found on the basis of direct exposure to evidence tendered at trial.
>
> [46] It is also likely that many material facts will be disputed. The applicants identify a number of grounds supporting their request for relief. The Minister disputes many of the factual assertions or assumptions on which the applicants' case appears to be premised – i.e. the fact that the logging activities are infringing the applicants' Treaty 3 rights. It is also possible that a number of factual

> issues will have to be examined in detail in order to decide issues relating to the justifiable infringement of the applicants' treaty rights. Where there is an evidentiary dispute with respect to facts that are material to the issues to be resolved and the inferences to be drawn from those facts, a summary application is not the appropriate vehicle for determining such issues: *Energy Probe*, *supra* at 470; *City of Burlington*, *supra* at 589; *Seaway Trust*, *supra* at 533; *Moyle v. Palmerston Police Services Board* reflex, (1995), 25 O.R. (3d) 127 at 131 (Div. Ct.); *R. v. Jetco Manufacturing Ltd.* reflex, (1987), 57 O.R. (2d) 776 at 781 (C.A.).
>
> [47] Much of the evidence necessary to address the issues raised by this application will be expert opinion evidence. This type of evidence requires particularly close judicial scrutiny, especially if there are conflicting expert opinions. The additional opportunity for assessing credibility afforded by *viva voce* evidence is particularly important in the Aboriginal and treaty rights context (*Delgamuukw v. British Columbia* 1993 CanLII 4516 (BC C.A.), (1993), 104 D.L.R. (4th) 470 at 560-561 (B.C.C.A.).
>
> [59] A great deal of evidence, including expert evidence will be called by the parties on a number of disputed facts and issues, and it is inappropriate to deal with these disputes of material fact by way of summary application: *Renegade*, *supra*. Some of the disputed issues include: (a) the proper interpretation of the applicable provisions of Treaty 3; (b) inferences to be drawn from the applicable legislative history; (c) the adverse effects, if any, of logging operations on wildlife resources; (d) the nature and extent of benefits generated by logging activities in the area in question for both the general public and First Nations members; and (e) the nature and extent of consultations and discussions between the applicants, their First Nations community, and the respondents concerning the conduct of the logging operations in question.

[1654] In January of 2005, the three Applicants commenced this action as Plaintiffs. Prior to the filing of Statements of Defence, they brought two motions before the Case Management Judge, Madam Justice Spies:

> [a] A motion for interim costs in any event of the cause; and
>
> [b] A motion for a representation order, providing authorization for the plaintiffs to bring this action on behalf of all Grassy Narrows members, pursuant to Rule 12.08 of the *Rules of Civil Procedure*.

[1655] On May 23, 2006, a Representation Order was made [on consent] following a Grassy Narrows Band Council resolution authorizing this action.

[1656] After defining the two threshold issues now before me by Order dated June 28, 2006, Spies J. granted the Plaintiffs' motion for interim costs, ordering interim costs payable in advance on a partial indemnity basis in any event of the cause for the purpose of determining the threshold issues. She stayed the balance of the litigation pending the determination of the threshold issues.

[1657] The parties then delivered pleadings in respect of the threshold issues to be tried.

[1658] After the Minister commenced third party proceedings against the Attorney-General of Canada ("Canada"), Canada defended both the third party claim and the main action (that is, the main action in respect of the trial of the threshold issues.)

[1659] In summer 2008, Abitibi (now Abitibi-Bowater Inc.) indicated to the Ministry its interest in having discussions regarding the transfer or surrender of its sustainable forest licence for the Whiskey Jack Forest. This was the primary tenure underlying the forestry authorizations that the Plaintiffs had challenged. Discussions with the Ministry about a formal surrender of the license were initiated in September 2008. In April of 2009, Abibiti entered into protection under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "CCAA.")

[1660] In June of 2009, Gascon J. of the Quebec Superior Court issued an order in the CCAA proceedings lifting any stay of proceedings as it applied to Abitibi's participation in this action and determining that the stay under the CCAA did not apply in this action as against Ontario and Canada.

[1661] As of September 29, 2009, the Minister accepted Abitibi's surrender of its sustainable forest licence for the Whiskey Jack Forest. Counsel for Abitibi withdrew from further participation in the trial on November 16th, 2009.

[1662] In 2009, the plaintiff Willie Keewatin passed away. The title of proceeding and the Representation Order were amended accordingly, on consent.

[1663] No new sustainable forest licence has been issued for the Whiskey Jack Forest. However:

> [a] Some timber harvesting has continued in the Whiskey Jack Forest since Abitibi surrendered its sustainable forest licence, on the basis of forest resource licences issued by the Ministry of Natural Resources for specific areas (outside of the area identified by Grassy Narrows as its traditional land use area);
>
> [b] Ontario has not taken any steps to remove the Whiskey Jack Forest, or the provincial Crown lands identified by Grassy Narrows as its traditional land use area (which are within the Whiskey Jack Forest), from the inventory of lands available for use or disposition on the basis of provincial authorizations, including authorizations that would permit forestry operations;
>
> [c] The Ministry of Natural Resources continues to explore issuing a new licence or licenses for the purpose of authorizing forestry activities in the Whiskey Jack Forest, and continues to engage in discussions with Grassy Narrows and others with respect to the Ministry's interest in issuing one or more forestry licences for areas within or overlapping the area identified by Grassy Narrows as its traditional land use area;
>
> [d] To date, Grassy Narrows has not agreed to the types of forestry operations proposed by the Ministry for that part of the Whiskey Jack Forest that Grassy Narrows identifies as its traditional land use area. As noted above, part of the area that Grassy Narrows identifies as its traditional land use area, lies within the Keewatin Lands.

Appendix B:
Agreement regarding Historical Documents

Court File No. 05-CV-281875 PD-A1

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

PLAINTIFFS

AND

MINISTER OF NATURAL RESOURCES and
ABITIBI-CONSOLIDATED INC.

DEFENDANTS

AND

THE ATTORNEY GENERAL OF CANADA

THIRD PARTY

AGREEMENT REGARDING PRIMARY DOCUMENTS

1. The primary historical documents introduced at trial (including but not limited to those duplicated in Exhibit 1, and the Alexander Morris book marked as Exhibit 9):

   a) Should be presumed to be authentic, subject to a contrary finding by the trial judge; and

   b) Can be used by the trial judge as evidence for the truth of their contents, recognizing that such evidence is rebuttable, and that the evidence offered by any document should be considered in light of evidence provided by the witnesses and by other documents.

2. This agreement does not apply to secondary documents, such as the texts and journal articles referred to by many of the experts. The usual evidentiary rules apply for such documents.

Appendix C: Table of Cases

Short Form	Citation
Adams	*R. v. Adams* (1996), 138 D.L.R. (4th) 657
Annuities Case	*Canada v. Ontario*, [1910] A.C. 637
Annuities Case (Supreme Court)	*Ontario v. Canada* (1909), 42 S.C.R. 1, aff'd [1910] A.C. 637 (P.C.)
Badger	*R. v. Badger*, [1996] 1 S.C.R. 771
Bartleman	*R. v. Bartleman* (1984), 55 B.C.L.R. 78 (C.A.)
Bear Island	*Ontario (Attorney-General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570
Beckman	*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103
BNA Act 1867	*Reference re: British North America Act, 1867*, s. 108 (Can.) [1898] A.C. 700. Also referred to herein as the *Fisheries Case*.
Brooks-Bidlake	*Brooks-Bidlake and Whittall Limited v. Attorney General for British Columbia*, [1923] A.C. 450 (P.C.)
Canadian Western	*Canadian Western Bank v. Alberta*, 2007 SCC 32, [2007] 2 S.C.R. 3 ("*Canadian Western*")
Commanda	*R. v. Commanda*, [1939] 3 D.L.R. 635 (Ont. H.C.)
Côté	*R. v. Côté*, [1996] 3 S.C.R. 139; (1996) 138 D.L.R. (4th) 386
Delgamuukw	*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010
Fisheries Case, The	*Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia*, [1898] A.C. 700 (P.C.)
George	*R. v. George*, [1966] S.C.R. 267
Guerin	*Guerin v. The Queen*, [1984] 2 S.C.R. 335 (*"Guerin*")
Haida Nation	*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511
Ireland	*R. v. Ireland* (1990), 1 O.R. (3d) 577 (Gen. Div.)
Irwin Toy	*Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927
Manuel	*Manuel and others v Attorney*, [1982] 3 All ER 786 at 799 (appr'd by the Court of Appeal on other grounds in *Manuel and others v Attorney General*, [1982] 3 All ER 822 A.C., leave to appeal to the House of Lords refused at 832)
Maritime Bank	*Liquidators of Maritime Bank of Canada v. Receiver General of New Brunswick*, [1892] A.C. 437 (P.C.)
Marshall	*R. v. Marshall*, [1999] 3 S.C.R. 456; (1999), 177 D.L.R. (4th) 513
Marshall-Bernard	*R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220
Mercer	*Attorney-General of Ontario v. Mercer* (1883), 8 A.C. 767 (P.C.)
Mikisew	*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388
Mitchell	*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; 71 D.L.R. (4th) 193
Mitchell v. M.N.R.	*Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911
Morgan	*Morgan v. Prince Edward Island (Attorney General)* (1975), [1976] 2

	S.C.R. 349
Morris	*R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915
Nikal	*R. v. Nikal*, [1996] 1 S.C.R. 1013
Northwest Falling	*Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292
Nowegijick	*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29
Ontario v. Canada (1895)	*Ontario v. Canada* (1895), 25 S.C.R. 434
OPSEU v. Ontario	*OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2
Osoyoos	*Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746
Rio Tinto Alcan	*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650
Sannichton Marina	*Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79
Secession of Quebec	*Reference re Secession of Quebec* (1998), 161 D.L.R. (4th) 385 at 421 [para 82] also [1998], 2 S.C.R. 217
Secretary of State	*R. v. Secretary of State for Foreign* and *Commonwealth Affairs***,** ex parte Indian Association of Alberta, [1982] 2 All E.R. 118 at 132
Seybold (Chancellor Boyd's decision)	*Ontario Mining Co. v. Seybold* (1899), 31 O.R. 386 (H.C.), aff'd (1900), 32 O.R. 301 (Div. Ct.), aff'd (1901), 32 S.C.R. 1, aff'd (1902), [1903] A.C. 73 (P.C.)
Seybold (J.C.P.C.)	*Ontario Mining Co. v. Seybold* (1902), [1903] A.C. 73 (P.C.)
Sikyea	*R. v. Sikyea* (1964), 43 D.L.R. (2d) 150 (N.W.T. C.A.), aff'd [1964] S.C.R. 642
Silver Brothers Ltd.	*Attorney General for Quebec v. Attorney General for Canada*, [1932] A.C. 514 (P.C.)
Simon	*Simon v. The Queen*, [1985] 2 S.C.R. 387
Smith	*Smith v. Canada*, [1983] 1 S.C.R. 554
Smylie	*Smylie v. The Queen* (1900), 27 O.A.R. 172 (C.A.)
Sparrow	*R. v. Sparrow*, [1990] 1 S.C.R. 1075
Spies J. Decision	*Keewatin v. Ontario (Minister of Natural Resources)* (2006), 32 C.P.C. (6th) 258 (Ont. S.C.J.)
St. Catherine's Milling	*St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.)
Sundown	*R. v. Sundown*, [1999] 1 S.C.R. 393
Taku River	*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550
Van der Peet	*R. v. Van der Peet*, [1996] 2 S.C.R. 507
Union Colliery	*Union Colliery Co. of British Columbia Ltd. v. Bryden*, [1899] A.C. 580 (P.C.)
Waters Powers Reference	*Reference re: Waters and Water-Powers*, [1929] S.C.R. 200
Wewaykum	*Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245

White	*R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, aff'd (1965) 52 D.L.R. (2d) 481 (S.C.C.)

CITATION: Keewatin v. Minister of Natural Resources 2011 ONSC 4801
Court File No. 05-CV-281875PD
Date: 20110816

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiffs

- and –

MINISTER OF NATURAL RESOURCES and ABITIBI-CONSOLIDATED INC.

Defendants

- and –

THE ATTORNEY GENERAL OF CANADA

Third Party

REASONS FOR JUDGMENT

M.A. SANDERSON J.

Released: August 16, 2011