File No. 35379

SUPREME COURT OF CANADA

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

BETWEEN:

ANDREW KEEWATIN JR.

and

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

APPELLANTS
(Plaintiffs)

- and -

MINISTER OF NATURAL RESOURCES

and

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

RESPONDENTS
(Defendants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Third Party)

- and -

GOLDCORP INC.

RESPONDENT
(Intervener)

(Style of Cause continues inside cover pages)

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AND BETWEEN:

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(Interveners)

- and -

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and

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FORT MCKAY FIRST NATION

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FACTUM OF THE INTERVENER
FORT MCKAY FIRST NATION

PART I – OVERVIEW AND STATEMENT OF FACTS

1. Fort McKay First Nation [Fort McKay] intervenes in this appeal to defend constitutional protections applicable to its Treaty 8 rights, as modified by the *Natural Resources Transfer Agreement* [*NRTA*] (Book of Authorities of the Intervener Fort McKay First nation, hereinafter BAIFM, **Tab 31**) with Alberta (schedule 2 to the *Constitution Act, 1930*, BAIFM, **Tab 29**). Treaty 8 rights, as modified (BAIFM, **Tab 33**), enjoy constitutional protection through the whole of the *Constitution Act, 1930*, the *Constitution Act, 1982* (BAIFM, **Tab 30**), and the Honour of the Crown. The factual context of the present appeal does not involve consideration of the *Natural Resources Transfer Agreements* [*NRTAs*] under the *Constitution Act, 1930,*[1] yet the parties and the Courts below make comments on matters of law applicable to Numbered Treaties which have significance far beyond the Treaty 3 areas of Ontario. McKay therefore makes submissions respecting the significance of Treaty 8 and the *NRTAs* to the legal issues before the Court.

PART II – STATEMENT OF ISSUES

2. Fort McKay does not take a position on the primary issue before this Court, described by the Ontario Court of Appeal as whether Ontario has the right to "take up" lands and thereby limit harvesting rights without first obtaining Canada's approval in the Treaty 3 lands.

3. Fort McKay takes a position on two points: first, via Treaty 8 negotiation and the *NRTA* (BAIFM, **Tabs 33 and 31**), solemn assurances of continuity have been repeatedly given to Treaty Indians; second, there are legal consequence of such assurances for the exercise of provincial powers over land and resources, the taking up of land, and the duty to consult.

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[1] Reasons for Decision of the Ontario Court of Appeal, paragraph 233: "We do not propose to comment on the NRTA since it is unnecessary for the resolution of these appeals."

PART III – STATEMENT OF ARGUMENT

4. The historical developments giving rise to constitutional protections for Treaty 8 are summarized in earlier jurisprudence of this Court, cited herein, in Kent McNeil's article *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada,* and in the late Gerard V. La Forest's book *Natural Resources and Public Property under the Canadian Constitution*.[2] In summary, by the *Rupert's Land and North-Western Territory Order*,[3] Canada's acquisition of Rupert's Land involved both (i) the assurance that "upon 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"[4] and also (ii) the obligation that "[a]ny claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them."[5]

5. Canada and First Nations then negotiated the Numbered Treaties. This Court already recognizes that, since the lands comprising Treaty 8 were largely unsuitable for agriculture, "[t]he Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, 'the same means of earning a livelihood would continue after the treaty as existed before it'."[6] At the time of the Treaty and subsequent Adhesions, and until 1930, the Treaty 8 assurances included continuity of the ability to hunt, fish and trap for commercial purposes.[7] With respect to mining in the Treaty 8 area, in particular, this Court also recognizes that "[a]lthough it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights."[8] These collateral promises are integral to Treaty 8 interpretation, because the written version of the exchange of promises documented in Treaty 8 does not constitute an accurate

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2 Kent McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada,* (University of Saskatchewan Native Law Centre, 1983) pages 2 – 10, BAIFM, **Tab 27**; and Gerard V. La Forest, *Natural Resources and Public Property under the Canadian Constitution*, (Toronto: University of Toronto Press, 1969*)*, at pages 27, 29, and 34 – 36, BAIFM, **Tab 25**.

3 *Rupert's Land and North-Western Territory Order* (23 June 1870) BAIFM, **Tab 32**.

4 *Ibid*.

5 *Ibid*.

6 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, at paragraph 30, per Binnie J. for the Court, BAIFM, **Tab 12**.

7 *R. v. Badger*, [1996] 1 S.C.R. 771 at paragraphs 46 -47, 56, 72 and 83, BAIFM, **Tab 14**; *R. v. Horseman*, [1990] 1 S.C.R. 901 at 928 line a to 929 line j per Cory J. for the majority, BAIFM, **Tab 18**.

8 *R. v. Badger*, *ibid*, at paragraph 55, per Cory J. for the majority, BAIFM, **Tab 14**.

record of all the rights of the Aboriginal party and all the duties of the Crown that were created in that exchange.[9]

6. Canada retained administration and control of Crown lands when the provinces of Manitoba, Saskatchewan and Alberta were created; and it assumed this responsibility in the Railway Belt and Peace River Block of British Columbia.[10] In 1930, through the Schedules in the *Constitution Act, 1930*, these Provinces assumed administration and control over these Crown lands. By section 1 of the *Constitution Act, 1930*, however, provincial jurisdiction over lands and resources was expressly made subject to existing trusts or other interests, and was further limited by the *NRTA* provisions applicable to each Province.

7. With respect to Trusts or other interests, the Courts below agree that Ontario's rights in public lands under s. 109 of the *Constitution Act, 1867*, are subject to the harvesting rights under Treaty 3.[11] Ontario concedes this, stating that its property in lands, mines, minerals and resources pursuant to the *Constitution Act, 1867*, is subject to "treaty harvesting rights" because such rights are within the proviso respecting the ownership of public lands.[12] It necessarily follows that its s. 91 rights are subject to these same Treaty rights. This proviso in the *Constitution Act, 1867*, is underlined in the chart in Part VII. Identical wording appears in clause 1 of each of the provincial Schedules to the *Constitution Act, 1930*, also underlined in Part VII. The intent of the *Constitution Act, 1930*, was to put the provinces in the same position as Ontario (and the other original Provinces of Confederation). The rights of Ontario as regards Crown lands and resources were subject to Treaty rights. When administration and control of Crown lands and resources was transferred to the provinces of Alberta through the *Constitution Act, 1930*, Alberta also took that interest subject to Treaty rights as amended by the *NRTAs*.

8. The intent of the *NRTAs* was to secure substantive Indian harvesting rights, also described by this Court as a substantive livelihood right.[13] For Treaty 8, this involves a continuing ability to hunt, fish and trap for subsistence and cultural purposes, and to be able to pass that Aboriginal tradition onto

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9 *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 at paragraph 116, BAIFM, **Tab 3**.

10 *British Columbia (Attorney General) v. Canada (Attorney General)*; *An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41, page 58 line a to page 60 line h, BAIFM, **Tab 5**.

11 *Keewatin v. Ontario (Minister of Natural Resources)*, 2011 ONSC 4801, paragraph 1375, BAIFM, **Tab 10**; Reasons for Decision of the Ontario Court of Appeal, paragraphs 65, 106, 117, 140, 210, BAIFM, **Tab 10**.

12 Factum of the Respondent, Minister of Natural Resources, at paragraph 79.

13 *Mikisew Cree, supra*, at paragraphs 26, 30 and 48, BAIFM, **Tab 12**; *Moosehunter v. The Queen,* [1981] 1 S.C.R. 282 at page 293, BAIFM, **Tab 13**.

future generations.[14] This is a fundamental element of the constitutional assurances given to First Nations so as to obtain their consent or adhesion to Treaty 8, and also a fundamental element of the constitutional assurances given to First Nations in 1930. The division of powers was amended by the *Constitution Act, 1930*, to ensure that this substantive livelihood right would be respected by the Provinces, and by Canada. Alberta is obligated to carry out this arrangement by clause 2 of the *NRTA* and/or the Honour of the Crown.

9. With respect to specific provisions of the *NRTAs*, paragraph 9 of the *NRTA* with Alberta provides that the rights to fishery were to belong and be administered by the Province "[e]xcept as herein otherwise provided." Since the transfer of public lands generally was subject to Treaty rights, the provincial rights in relation to fishery are also subject to Treaty 8 rights to fish. Paragraph 12 of the *NRTA* with Alberta has two assurances. It provides that provincial laws respecting game were to be applicable to Indians "in order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence."[15] This is a substantive right to the continuance of the supply of game. Alberta also "assures" to the Indians the right to hunt for food on "all unoccupied Crown lands and on any other lands to which the Indians have a right of access." This includes Indian reserve lands.[16] This is a substantive right to hunt for food. The right to a supply of game and fish for support and subsistence, and the right to hunt for food, are *both* substantive rights under Treaty 8 as modified by the *NRTAs*.

10. This Court states that the Indians were again re-assured of their continuing right to hunt and fish for food when the Treaty rights were "merged and consolidated" by the *NRTAs*. Dickson J., in *Frank,* stated that while the *NRTA* had partially amended the scope of the Treaty hunting right, "of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food" (emphasis added).[17]

11. There is no question that the *NRTA* limits provincial competence in respect of Indian livelihood rights under Treaty 8. Peter Hogg's text, *Constitutional Law of Canada*, identifies the *NRTA* as one of the "exceptions to the general rule that provincial laws apply to Indians and lands reserved for

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14 *R. v. Côté* [1996] 3 S.C.R. 139 at paragraph 56, BAIFM, **Tab 16**.

15 *R. v Horseman*, [1990] 1 S.C.R. 901, at page 915 line i to page 916 line c, BAIFM, **Tab 18**.

16 *R. v. Sutherland*, [1980] 2 S.C.R. 451 at 459; and see also 462 to 463, BAIFM, **Tab 20**.

17 *R. v. Badger*, *supra*, at paragraph 47, BAIFM, **Tab 14**, citing with approval *Frank v. The Queen*, [1978] 1 S.C.R. 95 at 100, per Dickson J. for the Court, BAIFM, **Tab 6**.

Indians."[18] He describes the *NRTA* as "[a] further limitation on provincial competence to make laws applicable to Indians"[19] and confirms that, subject to games laws intended to protect the supply of game, "provincial laws cannot affect treaty rights."[20] Hogg also states that the *NRTA* is "a right of the Indians to take game and fish for food" and that "provincial laws cannot deprive Indians of this right."[21] The submission of the Respondent Goldcorp, which is that provincial laws may burden Indian harvesting rights because such laws apply to First Nations "*ex proprio vigore* or by incorporation under s. 88 of the *Indian Act*"[22] is mistaken in the context of Treaty 8. Paragraph 12 of the *NRTA* does not confer capacity upon the Province of Alberta to impose broad provincial regulation of Treaty harvesting for purposes unrelated to conservation of game necessary for the continued enjoyment of Indian livelihood rights.[23]

12. Supreme Court of Canada jurisprudence confirms these propositions. In *Horseman,* Wilson J. (in the minority, but with the majority on this point) considers the effect of the *NRTA* upon Treaty 8 and states that the *NRTA* modified the Treaty 8 rights through a *quid pro quo*. The ability to pursue a commercial livelihood from hunting, fishing and trapping was unilaterally extinguished, but this involved a limitation on provincial powers: "[b]oth the area of hunting and the way in which the hunting could be conducted was removed from the jurisdiction of provincial governments."[24] This Court confirms in *Badger* that this fundamental change to the nature of the Treaty right, in exchange for a limitation in provincial power, was unilaterally imposed by the Federal Crown, and that "[i]t is unlikely that it would proceed in that manner today."[25] It follows necessarily that the law of inter-jurisdictional immunity is embedded in the *NRTA,* such that its abolition would constitute a constitutional amendment without consultation with Fort McKay or other First Nations.

13. In *Gladstone* the Court states that paragraph 12 of the *NRTA* "provides for a permanent settlement of the legal rights of the aboriginal groups to whom it applies."[26] *Blais* (which involved hunting, and not trapping or fishing) describes the purpose of the *NRTA* as being "to ensure respect for

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18 Peter Hogg, *Constitutional Law of Canada*, 5th ed., Supplemented, vol. 1 (Toronto: Carswell, 2007), at paragraph 28.2 on page 28-11, BAIFM, **Tab 24**.

19 *Ibid.,* at paragraph 28.4 on page 28-19, BAIFM, **Tab 24**.

20 *Ibid.,* at paragraph 28.2(c) on page 28-12, BAIFM, **Tab 24**.

21 *Ibid*., at paragraph 28.2(e) on page 28-15, BAIFM, **Tab 24**.

22 Factum of the Respondent Goldcorp Inc., paragraphs 81 and 82.

23 *Horseman*, *supra*, at page 912 line f to page 913 line d per Wilson J; and 928 line a to 929 line j per Cory J. for the majority, BAIFM, **Tab 18**.

24 *Ibid*., at page 933 line i, per Cory J. for the majority, BAIFM, **Tab 18**.

25 *R. v. Badger*, *supra*, at paragraph 84, BAIFM, **Tab 14**.

26 *R. v. Gladstone,* [1996] 2 S.C.R. 723, at paragraph 38, BAIFM, **Tab 17**.

the Crown's obligations to 'Indians' with respect to hunting rights."[27] With respect to the substantive right to a supply of game and fish, the Court in *Sutherland* adopts the reasons of McGillivray J.A. in *R. v. Wesley* for the proposition that the intention of paragraph 12 of the *NRTA* "is to assure to the Indians a supply of game in the future for their support and subsistence … subject to the express and dominant proviso that care for the future is not to deprive them of the right to satisfy their present need for food by hunting…".[28]

14. Treaty 8 rights include hunting, fishing and trapping, and are far more than privileges of hunting, fishing or trapping somewhere. Treaty 8 negotiations and the *NRTA* both involve solemn assurances of continuity of practices, traditions and customs integral to First Nation societies. In this respect, location *is* important to First Nations -- particularly in areas in which the traditions were undertaken by ancestors, and on or near Indian reserves. This Court recognizes this reality in *Mikisew Cree*, where Binnie J. for the Court writes that "for aboriginal people, as for non-aboriginal people, location is important."[29]

15. The Indian livelihood right has not received sufficient legal recognition. McNeil states that *NRTA* assurances "have been used as an aid in interpreting the game laws paragraph, but they have not been given legal significance in themselves."[30] Treaty 8 embodies a solemn engagement to Indians that their livelihood would be respected,[31] and the *NRTA* restates this obligation.[32] Fort McKay submits that, in the tradition of the common law anticipated by this Court's judgment in *Haida*,[33] it is now time that the solemn constitutional assurances respecting continuity be given greater legal significance of themselves.

16. The need for greater recognition arises from the acute sensitivity associated with provincial powers in respect of land and resources. Constitutionally protected Treaty 8 rights are, today,

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27 *R. v. Blais*, 2013 SCC 44, [2003] 2 S.C.R. 236 at paragraph 32, BAIFM, **Tab 15**.

28 *R. v. Sutherland*, *supra*, at page 462, BAIFM, **Tab 20**, citing *Rex v. Wesley*, (1932), 58 C.C.C. 269, [1932] A.J. No. 5 at paragraphs 31 to 33, BAIFM, **Tab 21**.

29 *Mikisew Cree*, *supra,* at paragraph 47, BAIFM, **Tab 12**. See also: La Forest, *Natural Resources and Public Property under the Canadian Constitution*, *supra*, at page 120: "It does, of course, matter to them where they hunt and fish….", BAIFM, **Tab 25**.

30 Kent McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada, supra*, page 23, BAIFM, **Tab 27**.

31 *Horseman*, *supra*, page 912 line f, BAIFM, **Tab 18**.

32 *R. v. Badger*, *supra*, at paragraph 47, BAIFM, **Tab 14**, citing with approval *Frank v. The Queen*, [1978] 1 S.C.R. 95 at 100, per Dickson J. for the Court, BAIFM, **Tab 6**.

33 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paragraph 11, BAIFM, **Tab 9**.

both substantive and procedural in nature.[34] This should require a nuanced, contextual approach to the interplay between Treaty 8 rights and the exercise of provincial powers, whether legislative, regulatory or proprietary. The law requires that provincial powers to govern must be exercised in a way which respects Treaty rights and the constitutional assurances which have been given. The 'taking up' clause in Treaty 8 must be read in the context of its underlying purposes, as intended by both the Crown and the First Nation peoples.[35] This includes solemn assurances by the Crown respecting continuity, *despite* the change which Treaty 8 presaged, operating with respect to both the supply of game and fish for support and subsistence, and the right to hunt for food. These assurances are solemn constitutional obligations to First Nation peoples intended to reconcile their Aboriginal interests with sovereignty, and as such engage the honour of the Crown. The Crown is required to act with diligence in pursuit of the fulfillment of these assurances.[36]

17. Weakness in the consultation framework requires judicial action so as to ensure a proper appreciation of Treaty rights. The need for evolution in the law may be illustrated with respect to the imminent extirpation of woodland caribou from Alberta ranges, including the traditional lands of Fort McKay.[37] The significance of woodland caribou to Treaty 8 rights obtained judicial recognition in *R. v. Horseman*,[38] and pending extirpation of this species has never been justified.[39] This species would not be at risk of extirpation if Treaty 8 rights, as modified by the *NRTA,* were properly balanced with the exercise of provincial and federal powers through the duty to consult as presently applied. Weakness in the consultation framework, illustrated by the pending extirpation of a species imprinted on the Canadian quarter, flows from rigid application of the Court's statement at paragraph 53 of *Rio Tinto:* "[t]he subject of the consultation is the impact on the claimed rights of the *current* decision under consideration."[40] Rigid application of this comment means the duty to consult and accommodate is short-sighted, focussing on the trees affected by a government decision rather than on the forests in which Treaty 8 rights are exercised and in which game necessary for hunting exist. When

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34 *Mikisew Cree*, *supra,* at paragraph 57, BAIFM, **Tab 12**.

35 *Mikisew Cree, supra,* at paragraph 29, BAIFM, **Tab 12**.

36 *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paragraph 9, BAIFM, **Tab 11**.

37 *Adam v. Canada (Environment)*, 2011 FC 962 (CanLII) at paragraphs 14, 20, and 35 to 36, BAIFM, **Tab 2**. See also: *Western Canada Wilderness Committee v. Canada (Minister of Fisheries and Oceans)*, 2014 FC 148 (CanLII), at paragraphs 90 to 94, BAIFM, **Tab 23**.

38 *R. v Horseman*, *supra*, at p. 929 at lines b – c, per Cory J. for the majority, BAIFM, **Tab 18**.

39 *Supra,* fn 37, BAIFM, **Tabs 2 and 23**.

40 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at paragraph 53, BAIFM, **Tab 22**.

making this comment the Court was responding to a submission that the duty to consult required, in every case, an examination of *past* impacts arising from exploitation of the entire resource.[41] By rejecting this submission, the Court was saying that the duty to consult is *prospective* in nature i.e. its purpose is "to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them."[42] The ironic result of the Court's comment has been overstatement of the capacity of the taking up clause to erode assurances of continuity of use, and the supply of game, through the exercise of provincial powers. The Court did not intend that solemn constitutional assurances be eroded to infringement, and then compensated with damages.

18. The Court has never limited the duty to consult to government decisions, or conduct, which have an immediate impact on lands and resources.[43] The duty to consult was intended by this Court to be a contextual, generative process, extending to strategic decisions.[44] Academic commentary points out, correctly, that Aboriginal peoples in Alberta are repeatedly frustrated in their efforts to rely upon the duty to consult to *look forward* i.e. to place a current decision in the context of others in order to properly appreciate the impact on present and future continuity of right which has been assured to them.[45] Judicial commentary recognizes that a rigid insistence upon examination of adverse impacts at the project level does not accurately appreciate future impacts.[46] When this Court spoke of the adverse effects of the winter road in *Mikisew Cree* upon the exercise of Treaty 8 rights, it did so in broad terms of injurious affection of surrounding lands arising from fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality.[47] Nothing in this is rigidly focused upon the immediate footprint of the winter road itself.

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41 *Ibid.*, at paragraph 52, BAIFM, **Tab 22**.

42 *Ibid*., at paragraph 35, BAIFM, **Tab 22**.

43 *Rio Tinto, supra,* at paragraph 44, BAIFM, **Tab 22**. See also: David Laidlaw and Monique Passelac-Ross, *Alberta First Nations Consultation and Accommodation Handbook*, CIRL Occasional Paper #44 (Canadian Institute of Resources Law, University of Calgary, March 2014) at page 8, BAIFM, **Tab 26**.

44 *Rio Tinto, supra,* at paragraph 38, BAIFM, **Tab 22**.

45 David Laidlaw and Monique Passelac-Ross, *Alberta First Nations Consultation and Accommodation Handbook*, *ibid*., at pages 31 to 32, BAIFM, **Tab 26**.

46 *Gift Lake Metis Settlement v. Metis Settlement Appeal Tribunal (Land Access Panel)*, 2009 ABCA 143 at paragraphs 31 to 33, *per curiam*, BAIFM, **Tab 8**, citing with approval: *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461 (C.A.), 266 N.R. 169 at paragraph 46, BAIFM, **Tab 4**; and Bourassa J. in *R. v. Panarctic Oils Ltd.*, (1983), 43 A.R. 199 (NWT T.C.), [1983] N.W.T.R. 143, at paragraph 22, BAIFM, **Tab 19**.

47 *Mikisew Cree*, *supra*, at paragraphs 44 and 47, BAIFM, **Tab 12**.

19. If the Crown is "to take … [Treaty] …rights into account *before* making a decision that may have an adverse impact on them,"[48] then it must consider the impact of the contemporary decision on the future exercise of Treaty rights at the level of the whole of a First Nation's traditional territory. This prevents extinguishment of constitutionally protected First Nation rights by the cuts of hundreds or thousands of individual projects, each one found to be individually insignificant and therefore not requiring either accommodation or justification.[49] The Court's decision in *Mikisew Cree* does not establish "the Mikisew Test"[50] but, rather, acknowledges that "Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future."[51] This flows from the Court's recognition of the law of Aboriginal consultation as a framework of broad principle, capable of future development by the courts.[52] A broad vision in the duty to consult supports public policy objectives of sustainable development, defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs,[53] and the precautionary principle.[54] A broad vision will also recognize the necessity of effective cooperative federalism, since federal and provincial action will be required to protect the supply of fish and game. Provincial powers in relation to land and resources must be coordinated with federal powers in relation to inland fisheries, migratory birds, and species at risk, in this respect.

20. Lack of foresight in the duty to consult and accommodate undermines the assurances of continuity given to First Nations by the Numbered Treaties and the *NRTAs*. Because of the scale and extent of industrial development now occurring in the 21st century, more is immediately required in law to ensure respect for the assurances given, and obligations undertaken, as a condition of the acquisition of land in the Canadian west and derived from the equitable principles which have uniformly governed the relations between Aboriginal persons and the British Crown since 1763. Fort McKay therefore respectfully submits that the framework of the law of Aboriginal consultation be further developed to

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48 *Rio Tinto, supra,* at para. 35, BAIFM, **Tab 22**.

49 *Supra*, fn. 46 and 47, BAIFM, **Tabs 4, 8, 12 and 19**.

50 Factum of the Respondent Goldcorp Inc., at paragraph 117.

51 *Mikisew Cree*, *supra*, at paragraphs 27 and 63, BAIFM, **Tab 12**.

52 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paragraph 11, BAIFM, **Tab 9**.

53 World Commission on Environment and Development, "Brundtland Report," in *Report of the National Task Force on Environment and Economy* (1987), cited in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at page 37 lines b to i, BAIFM, **Tab 7**.

54 *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at paragraphs 3 and 31 - 32, BAIFM, **Tab 1**, citing the *Bergen Ministerial Declaration on Sustainable Development* (1990).

ensure respect for constitutional assurances of continuity *despite* change. The duty to consult and accommodate must encompass an obligation on the Crown, when taking up land under the Numbered Treaties, to consider and take action to ensure the supply of game necessary for hunting, fishing and trapping, and to ensure the continued enjoyment of the Treaty livelihood right assured to First Nations.

PART IV – SUBMISSIONS ON COSTS

21. These submissions have not imposed additional costs on any of the Appellants or Respondents, and Fort McKay submits that it should not pay costs associated with this intervention.

PART V – ORDER SOUGHT

22. That Fort McKay have permission to present brief oral argument at the hearing of the appeal; and that this Court recognize an obligation of the Crown, when taking up land under the Numbered Treaties, to demonstrate that it has considered and taken action to ensure the supply of game necessary for hunting, fishing and trapping, and to ensure the continued enjoyment of the Treaty livelihood right assured to First Nations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of April, 2014

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PART VI – ALPHABETICAL TABLE OF AUTHORITIES

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PART VII – STATUTORY PROVISIONS

Constitution Act, 1867

109. 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.

Constitution Act, 1930, Clause 1 of each Schedule, entitled *Transfer of Public Lands Generally*

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the Constitution Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall,
from and after the coming into force of this agreement, and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.