

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

WESTERN CANADA WILDERNESS COMMITTEE,

Applicant,

- and -

THE GOVERNMENT OF MANITOBA,

Respondent.

RESPONDING BRIEF OF THE RESPONDENT
GOVERNMENT OF MANITOBA

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PART II – LIST OF DOCUMENTS REFERRED TO

1. Affidavit of Barry Bentham, affirmed October 3, 2011
2. Affidavit of Jeff Delaney, affirmed October 3, 2011
3. Affidavit of John Dojack, affirmed September 30, 2011

PART III – ISSUE

1. Does the authorization by Provincial authorities for the construction of the Dickstone South Road constitute a commercial timber cutting right authorizing “logging” in a provincial park, contrary to subsection 15.1(1) of *The Forest Act*?
2. If the authorization of the construction of the Dickstone South Road constitutes a commercial timber cutting right authorizing “logging” in a provincial park, contrary to subsection 15.1(1) of *The Forest Act*, what form of relief should be granted by the Court?

PART IV – ARGUMENT

I. Introduction

1. Tolko Industries Ltd. ("Tolko") has been authorized to construct an all-season road through Grass River Provincial Park. Western Canada Wilderness Committee, (the "Applicant") has applied to the Court for an interpretation of the term "logging" as found in *The Forest Act* and *The Provincial Park Act*.

no logging

2. The Respondent, the Government of Manitoba, ("Manitoba") submits that the instruments issued to Tolko authorizing the construction of an all-season road do not constitute "a commercial timber cutting right authorizing logging in a provincial park" in accordance with s. 15.1 of *The Forest Act* and therefore the application should be dismissed.

II. Factual Background

3. On May 4, 1989, Her Majesty the Queen in Right of the Province of Manitoba, as represented by the Minister of Natural Resources, entered into a Forest Management Licence Agreement ("FML Agreement") with Repap Manitoba Inc. by which a Forest Management Licence Area was allocated to Repap to ensure a long-term fibre supply for the continued operation and expansion of an existing mill and facilities located at The Pas, Manitoba. Tolko is the successor to Repap, and assumed the rights and obligations of Repap under the FML Agreement.

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4. Areas of productive Manitoba Crown forest land are divided into Forest Management Units (or "FMUs"). Forest Management Licence Areas consist of multiple Forest Management Units. The area of Grass River Provincial Park comprises Forest Management Unit 60. FMU 60 was included in the Forest

Management Licence Area under the FML Agreement in which Tolko was granted commercial timber cutting rights.

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5. In 2009, amendments were made to *The Forest Act* and *The Provincial Parks Act*, as reflected in section 15.1 of *The Forest Act* and section 7 of *The Provincial Parks Act*. In response to the new legislation, the area in Forest Management Unit 60 was withdrawn from the Forest Management Licence Area under the FML Agreement between Manitoba and Tolko and other commercial timber cutting rights held by quota holders in the FMU were terminated.

***The Forest Act*, C.C.S.M. c. F150 (Tab 1)**

***The Provincial Parks Act*, C.C.S.M. c. P20 (Tab 2)**

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6. Tolko has applied for the Provincial authorizations necessary to construct an all-season road in Grass River Provincial Park from Provincial Trunk Highway 39 to the Chisel Lake railbed in Townships 65 and 66, Range 22 WPM (the "Dickstone South Road"). The following instruments (collectively, the "Instruments") have been granted to Tolko to authorize the construction of the Dickstone South Road:
 - a. a Crown Land Permit, issued by Sandy Thomson, Head of the Park Districts Programs, on January 29, 2011, under the authority of *The Provincial Parks Act*;
 - b. an Environment Act Licence, issued by Tracy Braun, Director under *The Environment Act*, on August 12, 2009, under the authority of *The Environment Act*;
 - c. a Work Permit, issued by Bryan Stefaniuk, Regional Services Superintendent for Manitoba Conservation, on March 7, 2011, under the authority, and in accordance with, *The Crown Lands Act*;

- d. a Timber Sale Agreement has been entered between Tolko and the Government of Manitoba, dated March 7, 2011, under the authority of *The Forest Act* (the "Timber Sale Agreement");
- e. an Operating Permit, issued by Brad Epp, Timber Sales Manager and designate for the Director of Forestry, on March 4, 2011, under the authority of, and in accordance with, *The Forest Act*; and
- f. a Work Permit, issued by Bryan Stefaniuk, Regional Services Superintendent for Manitoba Conservation, on August 4, 2011;
- g. a Work Permit, issued by Bryan Stefaniuk, Regional Services Superintendent for Manitoba Conservation, on September 1, 2011.

Affidavit of Barry Bentham, affirmed October 3, 2011, Exhibits "B" through "H"

Affidavit of John Dojack, affirmed September 30, 2011, Exhibit "D"

III. Argument

- 7. The issue relates principally to the meaning of s. 15.1(1) of *The Forest Act*:

No commercial timber cutting rights in parks

15.1(1) No commercial timber cutting right may be issued that authorizes logging on land in a provincial park.

***The Forest Act*, C.C.S.M. c. F150 (Tab 1)**

- 8. The authority granted to Tolko is for the construction of an all-season road, and not for the purpose of commercial timber harvest. None of the Instruments issued to Tolko authorize the cutting of trees for the purpose of commercial timber harvest.
- 9. Rather, any tree felling that is necessarily incidental to the construction of the Dickstone South Road has been properly authorized by the above Instruments, and is in compliance with all applicable legislation. The disposal of any timber

obtained through the construction of the Dickstone South Road will be restricted by measures that will ensure all harvested timber is disposed of in a manner that maximizes utilization and minimizes waste.

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10. To that end, Tolko has been approved to use any small volume of timber obtained through the construction of the Dickstone South Road as corduroy to reinforce the roadbed. Tolko will be required to use any salvaged merchantable timber remaining after the construction of the Dickstone South Road in their operations. Any harvested timber will be used by Tolko as corduroy within the Dickstone South Road, which will strengthen and reinforce the road.

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The Modern Approach to Statutory Interpretation

11. The Supreme Court of Canada has held that the modern approach to statutory interpretation is the preferred approach to interpreting legislation. Iacobucci J., writing for the majority of the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27, adopted the formulation described by Elmer Driedger in *The Construction of Statutes* (Toronto: Butterworths, 1974):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

***Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27 at paragraph 21**

12. In the Respondent's submission, the grant of the Instruments for the construction of the Dickstone South Road must satisfy the following three criteria in order to fall under the prohibition found in section 15.1(1) of *The Forest Act*:

- a. the right issued must constitute a timber cutting right;
 - b. the right issued must be commercial in nature; and
 - c. the right issued must constitute "logging".
13. Further, any analysis of section 15.1(1) of *The Forest Act* must be done within the statutory scheme and objects of *The Forest Act*. The prohibition of logging as set out at section 7(6) of *The Provincial Parks Act* clearly provides that the prohibition is framed within *The Forest Act*.

Prohibition on logging

7(6) Logging in provincial parks is prohibited in accordance with section 15.1 of *The Forest Act*.

The Provincial Parks Act, C.C.S.M. c. P20 (Tab 2)

14. In order to be consistent with the modern approach to statutory interpretation, the interpretation of the prohibition of logging should not be based on the context of *The Provincial Parks Act*, but rather, with consideration to the scheme and object of *The Forest Act*.

Timber-Cutting Rights

15. Timber cutting rights are defined within s. 1(1) of *The Forest Act*:

"timber cutting right" means a forest management licence, timber sale agreement, timber permit or other authority under which a person is granted a right to cut and remove Crown timber;

The Forest Act, C.C.S.M. c. F150 (Tab 1)

16. The only instrument in this case that authorizes a timber cutting right under *The Forest Act* is the Timber Sale Agreement referred to in paragraph 6d of this Brief. The Timber Sale Agreement is an instrument under *The Forest Act* issued to provide the conditions for any tree felling that might be necessary in the construction of the Dickstone South Road.

Affidavit of Barry Bentham, affirmed October 3, 2011, Exhibit "E"

17. Tolko will take steps to ensure that any timber that is harvested over the course of the construction of the Dickstone South Road will be salvaged and used in a manner that maximizes utilization and minimizes waste. Such steps will include the use of salvaged timber as corduroy to reinforce and strengthen the roadbed, as well as use any excess timber in Tolko's operations.

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Commercial Timber Cutting Right

18. All words of section 15.1(1) of *The Forest Act* must be given meaning. The interpretation of section 15.1(1) is aided by section 15.1(4), which provides a non-exhaustive list of exclusions to the term "commercial timber cutting right". This non-exhaustive list provides exceptions that are consistent with the purposes of *The Forest Act*, and are indicative of the fact that legislature did not intend a broad prohibition of tree felling within provincial parks, but rather intended to preserve the ability to authorize timber cutting and removal to achieve certain forest management objectives. Section 15.1(4) reads as follows:

Definition: "commercial timber cutting right"

15.1(4) In this section, "commercial timber cutting right" does not include a timber cutting right that authorizes the holder — on the request and at the direction of government officials — to cut and remove the minimum amount of timber required to achieve any of the following purposes on land in a provincial park, if permitted under *The Provincial Parks Act*:

- (a) forest fire threat reduction;
- (b) forest pest and disease control;
- (c) forest rehabilitation and ecosystem preservation;
- (d) forest research;
- (e) the development of park infrastructure.

The Forest Act, C.C.S.M. c. F150 (Tab 1)

19. The right to cut and remove timber under section 15.1 of *The Forest Act* is modified by the term “commercial”. *The Canadian Oxford Dictionary* defines “commercial” as follows:

“commercial”: *adj.* 1 of, engaged in, or concerned with, commerce.

***The Canadian Oxford Dictionary*, (1st ed.)(Don Mills, ON: Oxford University Press, 1998)(Tab 5)**

The Dictionary of Canadian Law (4th ed.) defines commercial as:

COMMERCIAL. *adj.* 1. Connected with trade and commerce in general. 2. Of real property, principally used for the sale of goods or services.

***The Dictionary of Canadian Law* (4th ed.)(Toronto, ON: Thomson Reuters, 2011)(Tab 6)**

The American Heritage Dictionary of the English Language defines “commercial” as follows:

ADJECTIVE:

1.
 - a. Of or relating to commerce: *a commercial loan; a commercial attaché.*
 - b. Engaged in commerce: *a commercial trucker.*
 - c. Involved in work that is intended for the mass market: *a commercial artist.*
2. Of, relating to, or being goods, often unrefined, produced and distributed in large quantities for use by industry.
3. Having profit as a chief aim: *a commercial book, not a scholarly tome.*
4. Sponsored by an advertiser or supported by advertising: *commercial television.*

The American Heritage Dictionary of the English Language, 4th ed.,
online: Dictionary: Online,
<<http://education.yahoo.com/reference/dictionary/entry/commercial>>
(Tab 7)

The *Merriam-Webster Dictionary* defines "commercial" as follows:

- 1 a (1) : occupied with or engaged in commerce or work intended for commerce <a *commercial* artist>
 (2) : of or relating to commerce <*commercial* regulations>
 (3) : characteristic of commerce <*commercial* weights>
 (4) : suitable, adequate, or prepared for commerce <found oil in *commercial* quantities>
 b (1) : being of an average or inferior quality <*commercial* oxalic acid> <show-quality versus *commercial* cattle>
 (2) : producing artistic work of low standards for quick market success
- 2 a: viewed with regard to profit <a *commercial* success>
 b: designed for a large market
- 3: emphasizing skills and subjects useful in business <a *commercial* school>
- 4: supported by advertisers <*commercial* TV>

Merriam-Webster, online: Dictionary and Thesaurus - Merriam-Webster
Online, <<http://www.merriam-webster.com/dictionary/commercial>> (Tab 8)

The *MacMillan Dictionary* defines "commercial" as:

1. [Usually before noun] relating to business
 <a *commercial transaction*>
 <*This property is suitable for domestic or commercial use*>
 a. [Only before noun] producing goods or services to sell
 <*commercial whaling*>
 b. [Only before noun] produced in order to be sold

<One of their first commercial products was an electronic typewriter>

2. [Usually before noun] relating to making a profit

<The film's commercial success made her a star>

<The decision was made on a purely commercial basis>

- a. Paying more attention to making profits than to quality

<Their music has become so commercial>

3. Making money by broadcasting advertisements rather instead of being given money by the government

<Commercial radio stations>

MacMillan Dictionary, online: Macmillan Dictionary and Thesaurus, <<http://www.macmillandictionary.com/dictionary/british/commercial>> (Tab 9)

20. Lambert J.A., speaking for the British Columbia Court of Appeal in *William Weselowski and Associates Ltd. v. Currie*, [2001] B.C.J. No. 2337, considered the usage of the term "commercial" in the context of zoning and land use by-laws. At paragraph 19:

19 We were referred to some authorities from dictionaries, which were prepared on short notice during the adjournment, in relation to "commerce" and there is a thread that runs through the dictionary definitions and the legal authorities indicating that the "commerce" is like trading, like buying and selling and exchanging, and in many usages is confined to the context of being for the purpose of profit.

***William Weselowski and Associates Ltd. v. Currie*, [2001] B.C.J. No. 2337 (Tab 10)**

21. The purpose of the legislation is therefore to preclude the grant of timber cutting rights for the removal of Crown timber as a commercial product.
22. In the present case, the timber cutting right granted to Tolko is not for the purpose of authorizing the removal of trees as a commercial product for the

principle purposes of trade and profit. Rather, the granted timber cutting right is for the primary purpose of constructing infrastructure on Crown lands.

Logging

23. The interpretation of "logging" in section 15.1 of *The Forest Act* must be done in accordance with the modern approach to statutory interpretation.

24. *The Canadian Oxford Dictionary* defines "logging" as follows:

"logging": the work of cutting and preparing forest timber.

***The Canadian Oxford Dictionary*, 1st ed. (Don Mills, ON: Oxford University Press, 1998)(Tab 5)**

25. *The Dictionary of Forestry* defines "logging" as:

The felling, skidding, on-site processing, and loading of trees or logs onto trucks – synonym "harvesting".

***The Dictionary of Forestry*, online: SAFnet Dictionary
<<http://dictionaryofforestry.org/dict/term/logging>> (Tab 11)**

26. The *Merriam-Webster Dictionary* defines "logging" as:

1. a) to cut (trees) for lumber;
- b) to clear (land) of trees in lumbering – often used with *off*.

***Merriam-Webster*, online: Dictionary and Thesaurus - Merriam-Webster Online, <<http://www.merriam-webster.com/dictionary/logging>> (Tab 8)**

27. The *MacMillan Dictionary* defines "logging" as:

Logging: the work of cutting down trees for wood.

MacMillan Dictionary, online: Macmillan Dictionary and Thesaurus, <<http://www.macmillandictionary.com/dictionary/british/logging>> (Tab 9)

28. *The American Heritage Dictionary of the English Language, 4th ed.* defines logging as:

Logging: the process, work, or business of cutting down trees and transporting logs to a mill.

The American Heritage Dictionary of the English Language, 4th ed., online: Dictionary.com, <<http://dictionary.reference.com/browse/logging>> (Tab 7)

29. In Manitoba's submission, the term "logging" should be understood as meaning the cutting, moving, and on-site processing of trees as part of the forest industry. The combination of the words "logging" and "commercial" makes this point clear.
30. The grant of the Instruments that authorize the construction of the Dickstone South Road does not constitute the issuance of a commercial timber cutting right that authorizes "logging", as it is used within *The Forest Act*.
31. The transportation of logs, nor the construction of a road that will principally be used by a logging company is not to be considered "logging" for the purposes of section 15.1 of *The Forest Act*.

Case Law

32. In *Earthroots Coalition v. Ontario (Minister of Natural Resources)*, [2003] O.J. 3341 [*Earthroots*], the Ontario Superior Court of Justice considered an application similar to the instant case. In that case, the Minister of Natural Resources proposed to authorize improvements to a logging road within a conservation reserve. The applicant sought to prevent the authorization of those

improvements on the basis of a regulation that prohibited "commercial forest harvest" within conservation reserves.

Earthroots Coalition v. Ontario (Minister of Natural Resources),
[2003] O.J. 3341 (Tab 12)

33. The Court concluded that the applicant's interpretation of the regulation would unnecessarily prohibit the transportation of timber, and such a prohibition could adversely affect forest management licences in the area. This contextual factor must be considered when giving effect to the legislation:

The Bob Lake Reserve is within the Temagami Management Unit (the "TMU"), established under the *Crown Forest Sustainability Act*. There is a forest management plan in place governing the TMU. The Minister has granted licenses to harvest forestry within the TMU pursuant to section 27 of that Act and the inability to use the Eye Lake Road could adversely affect some of those licenses.

...

It is in the context of the foregoing framework and policy rubric that the Minister's discretionary decision and the requirements of section 1 and 2 of the Conservation Reserve Regulation must be reviewed. When the purposive words "protecting natural heritage areas and natural features on public land" and "preserving traditional public land uses" of section 1, and the limiting words "commercial forest harvest" and "other industrial uses" of section 2 are examined in this light, it is reasonable, in my view, to interpret the Conservation Reserve Regulation as not prohibiting the clearing, construction or improvement, nor the use of existing routes to and from commercial forest areas for the purposes of hauling timber from those areas. Indeed, if the strict and literal interpretation advanced by the Applicant were accepted it might well have the effect of partially defeating the objectives of the forest management plan and related policies put in

place in relation to the Minister's responsibilities over the same Crown forests under the *Crown Forest Sustainability Act*.

***Earthroots Coalition v. Ontario (Minister of Natural Resources)*, [2003] O.J. 3341 at paragraphs 25 and 27 (Tab 12)(Emphasis added)**

34. The Respondent submits that section 15.1 of *The Forest Act* should be read in the entire context of *The Forest Act* and *The Provincial Parks Act*. *The Forest Act* provides a legislative scheme to manage Crown forests and timber cutting rights in the province, and the ability to authorize the construction, operation and maintenance of forest infrastructure is crucial to the Respondent's ability to achieve its objectives. When section 15.1 of *The Forest Act* is considered in its ordinary sense in the context of the schemes and objects of *The Forest Act*, the reasonable conclusion is that legislature did not intend to prohibit the construction of infrastructure within Provincial Parks.

Response to Applicant's Brief

***Newfoundland and Labrador Wildlife Federation v. Newfoundland (Minister of Environment and Labour)*, [2001] N.J. 125 (Applicant's Brief at Tab 10)**

35. The Applicant's Brief relied on *Newfoundland and Labrador Wildlife Federation v. Newfoundland (Minister of Environment and Labour)*, (2001) 201 Nfld & PEIR 284 [*Newfoundland Wildlife Federation*] as authority that "logging" includes the construction and use of logging roads. The Respondent submits that the statutory language at issue in *Newfoundland Wildlife Federation* is broader than the statutory language in the present case, and thus, is not applicable. Specifically, sections 4(4) and 4(5) of the *Provincial Parks Act* (Newfoundland) provides as follows:

4(4) The Lieutenant-Governor in Council may make a park available for public use for those purposes and activities that are established for that park under section 5.

(5) Notwithstanding subsection (4), a park may not be utilized in any manner for

- (a) mineral exploration;
- (b) mining;
- (c) logging;
- (d) hydro electric development; or
- (e) private cottages.

Provincial Parks Act, R.S.N.L. 1990, c.P-32, (Tab 3)

36. The phrase "a park may not be utilized in any manner for ..." is markedly broader than the language within the Manitoba legislation. This phrase provides a complete prohibition against any use of a provincial park for any of the listed activities. In contrast, and as found in *Earthroots*, the Manitoba legislation intends for the prohibition to be considered in the context of commercial timber cutting rights and the broader forest management scheme of *The Forest Act*.
37. The Respondent submits that the Ontario Superior Court of Justice's analysis in *Earthroots* is the appropriate framework to apply in the present case. It is submitted that the legislative scheme considered in *Earthroots* is more closely analogous to the Manitoba scheme.

Application of the Excise Tax Act

38. The Respondent submits that the *Excise Tax Act* (Canada) has no bearing on the present case, and no weight should be attributed to the definition of "logging" contained within that Act.
39. The *Excise Tax Act* is federal taxation legislation that cannot be relied upon to interpret provincial forest management legislation because the two statutes are entirely distinct and for purposes entirely unrelated to each other. Further, the

doctrine of *in pari materia* provides that one statute is not to be considered as an aid in interpreting a separate and unrelated statute.

40. A similar issue concerning legislative interpretation was considered in *Springfield (Rural Municipality) v. Provincial Municipal Assessor (Manitoba)*, 76 Man. R. (2d) 72. In that case, the applicant sought to rely on *The Mining Tax Act* (Manitoba) and *The Mines Act* (Manitoba) to define the term “minerals” as used in *The Municipal Assessment Act*. Huband J.A., writing for the Court of Appeal, stated:

In my opinion, neither the definition in *The Mines Act* nor in *The Mining Tax Act* can have any impact on the way that the word “minerals” is to be defined under *The Municipal Assessment Act*. Those definitions were specifically crafted to fit particular requirements of the enactment in question. In neither case was it intended that the definition should have any application beyond the terms of the statute in question.

***Springfield (Rural Municipality) v. Provincial Municipal Assessor (Manitoba)*, 76 Man. R. (2d) 72 at paragraph 29 (Tab 2 of Applicant’s brief)**

41. In this case, section 69 of the *Excise Tax Act* is entirely inappropriate for defining “logging” for the purposes of Provincial forest management legislation. Section 69 only speaks to fuel tax rebates as they relate to fuel sold by vendors to individuals engaged in “logging”. Subsection 69(2) is cited as an example of the use of “logging” within the context of the *Excise Tax Act*:

Definitions

69. (1) In this section,

...

“logging” means the felling, limbing, bucking and marking of trees, construction of logging roads, off-highway transportation of logs to a mill-pond or mill yard, log salvaging and reforestation, but does not include any production activity on logs after transportation to a mill-pond or mill yard;

Fuel tax rebate to vendor

(2) Where gasoline or diesel fuel has been sold by a licensed manufacturer or licensed wholesaler to

...

(e) a qualified person for use in logging, or

...

for the sole use of the purchaser and not for resale and the taxes imposed by Parts III and VI are payable in respect of the sale, the manufacturer or wholesaler may, in such circumstances and on such terms and conditions as the Minister may prescribe, deduct, within two years after the sale, a fuel tax rebate in an amount calculated in accordance with subsections (8) and (8.01) from the amount of any payment of any tax, penalty, interest or other sum that the manufacturer or wholesaler is liable or is about to become liable to make under those Parts or under this Part in respect of taxes under those Parts.

Excise Tax Act, (Applicants Brief at Tab 8)

42. Given that this term is used only in the limited context of determining eligibility for fuel taxation rebates, it is entirely inappropriate to rely on section 69 as useful in interpreting "logging".
43. In addition to not relating to the same subject area, it is further submitted that the definition found in the Federal *Excise Tax Act* cannot be relied upon to interpret provincial legislation. The doctrine of *in pari materia* states that statutes should only be used to interpret similar legislation where the legislation has been enacted by the same legislative body.
44. Pierre-André Côté, author of *The Interpretation of Legislation in Canada*, 3d (Scarborough, ON: Thomson Canada, 2000) states that "[there] is no presumption of coherence between federal and provincial legislation; at the very least it cannot be applied with the same weight nor for the same reasons. Because their common origin makes study of related statutes enlightening, related legislation from the same legislature should be consulted first." Côté quotes Middleton J. in *R. v. Axler*, (1917) 40 O.R. 304 (S.C.) at 307 as a source for this authority:

The Acts of one Legislature may be read together, but not the Acts of separate legislative bodies.

***The Interpretation of Legislation in Canada*, 3d (Scarborough, ON: Thomson Canada, 2000) at page 344 (Tab 13)**

45. In the present case, even if the *Excise Tax Act* was concerned with the same subject area, which it clearly does not, the doctrine of *in pari materia* suggests that it would inappropriate to rely on federal legislation to interpret provincial statutes.

Nature of Declaration and Relief Sought

46. In the event that the Court determines that the authorization by Provincial authorities for the construction of the Dickstone South Road constitutes a commercial timber cutting right authorizing "logging" in a provincial park, contrary to subsection 15.1(1) of *The Forest Act*, and relief ought to be granted to the Applicant, it is submitted that the relief should be restricted to the facts and circumstances presently before the Court.
47. An exercise of the Court's declaratory powers cannot be based solely on a hypothetical legal question. Rather, any such relief must be determined as against factual foundation.
48. The Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821 has commented on the circumstances in which a prayer for declaratory relief should be granted by the Court.

The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or whether the dispute has yet to arise and may not arise. As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and

"hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as future rights.

***Canada v. Solosky*, [1980] 1 S.C.R. 821 (Tab 14)(Emphasis added)**

49. In the present case, the only rights at stake are those concerning the Dickstone South Road. The issues concerning the Dickstone South Road represent a specific and discrete factual situation to which a set of laws applies.
50. In contrast, the relief sought by the Applicant would ask for judicial determination on permits and licences that have not yet been issued. Further, is there no evidence to suggest that there is any intention on the part of the authorizing bodies to issue any further permits or licences that would conflict with section 15.1 of *The Forest Act*.
51. It is submitted that any interpretation of legislation by the Court can only be determined as against actual set of facts, rather than unsubstantiated and hypothetical circumstances. In this instance, the Court can only consider of whether the issuance of authorizations for the construction of the Dickstone South Road constitutes the issuance of a commercial timber cutting right that authorizes logging.
52. Any relief granted that is beyond the facts of the current dispute, and that goes to addressing hypothetical and unknown circumstances would have the effect of encouraging parties to seek judicial comment on legislation whenever they disagreed with a particular interpretation of legislation, notwithstanding that there is no factual basis for such an application. It is submitted that such relief is beyond the role of the Courts declaratory powers, and should be appropriately limited to the facts before the Court.


Conclusion

53. Based on the forgoing, the Respondent respectfully requests that this Honourable Court make a determination that the construction of the Dickstone South Road has properly been authorized by the Respondent, and dismiss this application with costs in favour of the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 3rd, 2011

Civil Legal Services
Manitoba Justice
Counsel for the Respondent

For: 
Per: Gordon E. Hannon,
General Counsel