Indexed as:

R. v. Badger

Wayne Clarence Badger, appellant;
v.
Her Majesty The Queen, respondent.
And between
Leroy Steven Kiyawasew, appellant;
v.
Her Majesty The Queen, respondent.
And between
Ernest Clarence Ominayak, appellant;
v.
Her Majesty The Queen, respondent, and
The Attorney General of Canada, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Federation of Saskatchewan Indian Nations, the Lesser Slave Lake Indian Regional Council, the Treaty 7 Tribal Council, the Confederacy of Treaty Six First Nations, the Assembly of First Nations and the Assembly of Manitoba Chiefs, interveners.

[1996] 1 S.C.R. 771

[1996] S.C.J. No. 39

File No.: 23603.

Supreme Court of Canada

1995: May 1, 2 / 1996: April 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Indians -- Treaty rights -- Hunting on privately owned land in tract ceded by treaty -- Violations of Wildlife Act -- Whether status Indians have right to hunt for food on privately owned land lying within tract ceded by treaty -- Whether hunting rights extinguished or modified by Natural Resources Transfer Agreement -- Whether licensing and game limitations apply to status Indians -- Constitution Act, 1982, s. 35(1) -- Treaty No. 8 (1899) -- Natural Resources

Transfer Agreement (Constitution Act, 1930, Schedule 2), para. 12 -- Alta. Reg. 50/87, ss. 2(2), 25 -- Alta. Reg. 95/87, s. 7.

The appellants were status Indians (under Treaty No. 8) who had been hunting for food on privately owned lands falling within the tracts surrendered by the Treaty. Each was charged with an offence under the Wildlife Act (the Act). Their trials and appeals proceeded together. The appellant Badger, who was hunting on scrub land near a run-down but occupied house, was charged with shooting a moose outside the permitted hunting season contrary to s. 27(1) of the Act. The appellant Kiyawasew, who had been hunting on a posted, snow-covered field that had been harvested that fall, and the appellant Ominayak, who had been hunting on uncleared muskeg, both had shot moose and were charged, under s. 26(1) of the Act, with hunting without a licence. All were all convicted in the Provincial Court. They unsuccessfully appealed their summary convictions, first to the Court of Queen's Bench and then to the Court of Appeal, challenging the constitutionality of the Act in so far as it might affect them as Crees with status under Treaty No. 8. The constitutional question raised: (1) whether status Indians under Treaty No. 8 have the right to hunt for food on privately owned land which lies within the territory surrendered under that Treaty; (2) whether not the hunting rights set out in Treaty No. 8 have been extinguished or modified by para. 12 of the Natural Resources Transfer Agreement, 1930 (NRTA); and, (3) the extent, if any, ss. 26(1) (requiring a hunting licence) and 27(1) (establishing hunting seasons) of the Act applied to the appellants.

Held: The appeals of Wayne Clarence Badger and Leroy Steven Kiyawasew should be dismissed. The appeal of Ernest Clarence Ominayak should be allowed and a new trial directed so that the issue of the justification of the infringement created by s. 26(1) of the Wildlife Act and any regulations passed pursuant to that section may be addressed.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: Treaty No. 8 guaranteed the Indians the "right to pursue their usual vocations of hunting, trapping and fishing" subject to two limitations, a geographic limitation and the right of government to make regulations for conservation purposes.

Certain principles apply in interpreting a treaty. First, a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. Second, the honour of the Crown is always at stake; the Crown must be assumed to intend to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. Third, any ambiguities or doubtful expressions must be resolved in favour of the Indians and any limitations restricting the rights of Indians under treaties must be narrowly construed. Finally, the onus of establishing strict proof of extinguishment of a treaty or aboriginal right lies upon the Crown.

The NRTA did not extinguish and replace the Treaty No. 8 right to hunt for food. Paragraph 12 of the NRTA clearly intended to extinguish the treaty protection of the right to hunt commercially but the right to hunt for food continued to be protected and, indeed, was expanded. Treaty rights, absent direct conflict with the NRTA, were not modified. The Treaty right to hunt for food accordingly continues in force and effect.

Three preliminary observations were made regarding the NRTA. First, the "right of access" in the NRTA does not refer to a general right of access but, rather, is limited to a right of access for the purposes of hunting. Second, the extent of the treaty right to hunt on privately owned land may well differ from one treaty to another, given differences in wording. Finally, the applicable interpretative principles must be applied. The words must be interpreted as they would naturally have been understood by the Indians at the time of signing.

The geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible land use. This approach is consistent with the oral promises made to the Indians at the time the Treaty was signed, with the oral history of the Treaty No. 8 Indians, with earlier case law and with the provisions of the Act itself. It is neither unduly vague nor unworkable. Land use must be considered on a case-by-case basis, however, because the approach focuses upon the use being made of the land.

The appeals of Messrs. Badger and Kiyawasew must be dismissed. The land was being visibly used. Since they did not

have a right of access to these particular tracts of land, their treaty right to hunt for food did not extend there. The limitations on hunting set out in the Act accordingly did not infringe upon their existing right and were properly applied. The geographical limitations upon the Treaty right to hunt for food did not affect Mr. Ominayak who was hunting on land not being put to any visible use.

The Indians would have understood that, by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation given the existence of conservation laws existing prior to signing the Treaty. The provincial government's regulatory authority under the Treaty and the NRTA (which transferred regulatory authority for conservation purposes to the provincial authorities) did not extend beyond the realm of conservation. The constitutional provisions of s. 12 of NRTA authorizing provincial regulations made it unnecessary to consider s. 88 of the Indian Act which provided that provincial laws of general application applied to Indians provided that those laws were not in conflict with aboriginal or treaty rights.

The public safety regulations, which formed the first step of a two-step licensing scheme, did not infringe any aboriginal or treaty rights. These regulations required all hunters to take gun safety courses and pass hunting competency tests and accordingly protected all hunters, including Indians. Reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food.

The second step of the licensing scheme, the conservation component, constituted a prima facie infringement. Under the Treaty, no limitation as to method, timing and extent of Indian hunting can be imposed. The present licensing scheme, however, imposes conditions on the face of the licence as to hunting method, the kind and numbers of game, the season and the permissible hunting area. These limitations are in direct conflict with the treaty right. Moreover, no provisions currently exist for "hunting for food" licences.

Any infringement of the rights guaranteed under the Treaty or the NRTA must be justified using the Sparrow test. This analysis provides a reasonable, flexible and current method of assessing the justifiability of conservation regulations and enactments. It must first be asked if there was a valid legislative objective, and if so, the analysis proceeds to a consideration of the special trust relationship and the responsibility of the government vis-à-vis the aboriginal people. Further questions might deal with whether the infringement was as little as was necessary to effect the objective, whether compensation was fair, and whether the aboriginal group was consulted with respect to the conservation measures.

The government led no evidence with respect to justification. The Court could not find justification in the absence of such evidence.

Per Lamer C.J. and Sopinka J.: The treaty rights were restated, merged and consolidated in the NRTA and so their preservation was assured by being placed in a constitutional instrument. The sole source for a claim involving the right to hunt for food is, therefore, the NRTA. The Treaty may be relied on for the purpose of assisting in the interpretation of the NRTA but it has no other legal significance.

Two key interpretative principles apply to treaties. First, any ambiguity in the treaty will be resolved in favour of the Indians. Second, treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward aboriginal peoples. These interpretative principles apply equally to the rights protected by the NRTA.

The rights of Indians pursuant to either the Treaty or the NRTA would, at the time either was agreed to, be understood to be subject to governmental regulation for conservation purposes. The rights protected by the NRTA are not constitutional rights of an absolute nature precluding any governmental regulation.

Section 35(1) of the Constitution Act, 1982 should not be the standard against which governmental regulation permitted by the NRTA, and the extent of the protection of the appellants' rights in the face of such regulation, should be assessed. Section 35(1) cannot provide constitutional protection to rights already constitutionally protected; nor does it apply to

another constitutional provision.

In the absence of a mechanism in the NRTA, the Court must develop a test through which the province's right to legislate with respect to conservation can be balanced against the Indians' right to hunt for food. The Sparrow test, developed in the context of s. 35(1), protects aboriginal rights while also permitting governments to legislate for legitimate purposes where the legislation is a justifiable infringement on those protected rights. This test applies equally well to the regulatory authority granted to the provinces under para. 12 of the NRTA. In applying the Sparrow criteria here, it is important to bear in mind that what is being justified is the exercise of a power granted to the provinces which is made subject to the right to hunt for food.

Cases Cited

By Cory J.

Applied: R. v. Sparrow, [1990] 1 S.C.R. 1075; considered: R. v. Horse, [1988] 1 S.C.R. 187; Myran v. The Queen, [1976] 2 S.C.R. 137; R. v. Mousseau, [1980] 2 S.C.R. 89; R. v. Bartleman (1984), 55 B.C.L.R. 78; referred to: R. v. Horseman, [1990] 1 S.C.R. 901; R. v. Cardinal (1977), 36 C.C.C. (2d) 369; R. v. Ominayak (1990), 108 A.R. 239; R. v. Sioui, [1990] 1 S.C.R. 1025; Simon v. The Queen, [1985] 2 S.C.R. 387; R. v. Taylor (1981), 34 O.R. (2d) 360; Nowegijick v. The Queen, [1983] 1 S.C.R. 29; Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85; Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313; Frank v. The Queen, [1978] 1 S.C.R. 95; R. v. Wesley, [1932] 2 W.W.R. 337; Prince v. The Queen, [1964] S.C.R. 81; Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695; R. v. Sutherland, [1980] 2 S.C.R. 451; R. v. Smith, [1935] 2 W.W.R. 433; R. v. Mirasty, [1942] 1 W.W.R. 343; R. v. Strongquill, [1953] 8 W.W.R. (N.S.) 247; Moosehunter v. The Queen, [1981] 1 S.C.R. 282; Kruger v. The Queen, [1978] 1 S.C.R. 104; R. v. Sikyea, [1964] 2 C.C.C. 325, aff'd [1964] S.C.R. 642; Guerin v. The Queen, [1984] 2 S.C.R. 335; R. v. Eninew (1984), 12 C.C.C. (3d) 365; R. v. Agawa (1988), 65 O.R. (2d) 505; R. v. Napoleon, [1986] 1 C.N.L.R. 86; R. v. Fox, [1994] 3 C.N.L.R. 132.

By Sopinka J.

Applied: R. v. Sparrow, [1990] 1 S.C.R. 1075; followed: Frank v. The Queen, [1978] 1 S.C.R. 95; referred to: R. v. Sutherland, [1980] 2 S.C.R. 451; Moosehunter v. The Queen, [1981] 1 S.C.R. 282; R. v. Horseman, [1990] 1 S.C.R. 901; Reference Re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148.

Statutes and Regulations Cited

Alta. Reg. 50/87, ss. 2(2), 25.
Alta. Reg. 95/87, s. 7.
Canadian Charter of Rights and Freedoms, s. 15.
Constitution Act, 1867, s. 93.
Constitution Act, 1930, s. 1.
Constitution Act, 1982, s. 35(1).
Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2), para. 12.
Treaty No. 8, made June 21, 1899 and Adhesions, Reports, etc. Reprinted from the 1899 edition by Roger Duhamel, Queen's Printer and Controller of Stationery, 1966.
Wildlife Act, S.A. 1984, c. W-9.1, ss. 15(1)(c), 26(1), 27(1).

Authors Cited

Daniel, Richard. "The Spirit and Terms of Treaty Eight". In Richard Price, ed., The Spirit of the Alberta Indian Treaties. Montreal: Institute for Research on Public Policy, 1979.
Friesen, Jean. Grant me Wherewith to Make my Living. Winnipeg: T.A.R.R. Centre, 1985.
Fumoleau, René. As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939. Toronto:

McClelland and Stewart, 1973.
Hogg, Peter W. Constitutional Law of Canada, 3rd ed. Toronto: Carswell, 1992.
Manitoba. Public Inquiry into the Administration of Justice and Aboriginal People. Report of the Aboriginal Justice Inquiry of Manitoba. Winnipeg: The Public Inquiry, 1991.
Morris, Alexander. The Treaties of Canada with the Indians of Manitoba and the North-West Territories. Toronto: Belfords, Clarke, 1880.

APPEALS from a judgment of the Alberta Court of Appeal (1993), 8 Alta. L.R. (3d) 354, 135 A.R. 286, 33 W.A.C. 286, [1993] 5 W.W.R. 7, [1993] 3 C.N.L.R. 143, affirming a judgment of the Court of Queen's Bench affirming the appellants' convictions for offences under the Wildlife Act. Appeals of Wayne Clarence Badger and Leroy Steven Kiyawasew dismissed; appeal of Ernest Clarence Ominayak allowed and a new trial directed.

Leonard Mandamin and Alan D. Hunter, Q.C., for the appellants.
Robert J. Normey and Margaret Unsworth, for the respondent.
I. G. Whitehall, Q.C., and R. Stevenson, for the intervener the Attorney General of Canada.
Kenneth J. Tyler, for the intervener the Attorney General of Manitoba.
P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.
Mary Ellen Turpel, Donald E. Worme and Gerry Morin, for the intervener the Federation of Saskatchewan Indian Nations.
Priscilla Kennedy, for the intervener the Lesser Slave Lake Indian Regional Council.
Gerard M. Meagher, Q.C., and Eugene J. Creighton, for the intervener the Treaty 7 Tribal Council.
Edward H. Molstad, Q.C., James A. O'Reilly and Wilton Littlechild, for the intervener the Confederacy of Treaty Six First Nations.
Peter K. Doody and John E. S. Briggs, for the intervener the Assembly of First Nations.
Jack R. London, Q.C., and Martin S. Minuk, for the intervener the Assembly of Manitoba Chiefs.

Appeals of Wayne Clarence Badger and Leroy Steven Kiyawasew dismissed; appeal of Ernest Clarence Ominayak allowed and a new trial directed.
Solicitors for the appellants: Mandamin & Associates, Calgary.
Solicitor for the respondent: The Attorney General for Alberta, Edmonton.
Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.
Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.
Solicitor for the intervener the Attorney General for Saskatchewan: The Attorney General for Saskatchewan, Regina.
Solicitors for the intervener the Federation of Saskatchewan Indian Nations: Wardell, Worme, Piché & Missens, Saskatoon.
Solicitors for the intervener the Lesser Slave Lake Indian Regional Council: Parlee, McLaws, Edmonton.
Solicitors for the intervener the Treaty 7 Tribal Council: Walsh, Wilkins, Calgary.
Solicitors for the intervener the Confederacy of Treaty Six First Nations: Molstad, Gilbert, Edmonton.
Solicitors for the intervener the Assembly of First Nations: Scott & Aylen, Ottawa.
Solicitors for the intervener the Assembly of Manitoba Chiefs: Buchwald, Asper, Gallagher, Henteleff, Winnipeg.

The reasons of Lamer C.J. and Sopinka J. were delivered by

1 **SOPINKA J.**:-- I have had the benefit of reading the reasons for judgment prepared in this appeal by my colleague, Justice Cory, and I am in agreement with his disposition of the appeal and with his reasons with the exception of his exposition of the relationship between Treaty No. 8, the Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2) (NRTA), and s. 35 of the Constitution Act, 1982.

2 In my view, the rights of Indians to hunt for food provided in Treaty No. 8 were merged in the NRTA which is the sole source of those rights. While I agree that the impugned provision of the Wildlife Act, S.A. 1984, c. W-9.1, infringes the constitutional right of Indians to hunt for food, I disagree that this constitutional right is one covered by s. 35(1) of the Constitution Act, 1982. I agree, however, that the constitutional right to hunt for food must be balanced against the right of the province to pass laws for the purpose of conservation and that this balancing may be carried out on the basis of the principles set out in R. v. Sparrow, [1990] 1 S.C.R. 1075.

3 There is no disagreement that the NRTA:

(a) duplicated the right of Indians to hunt for food which was contained in Treaty No. 8;
(b) widely extended the geographical area to include the whole of the province rather than being limited to the tract of land surrendered;
(c) shifted responsibility for passing game laws from the federal government to the provinces;
(d) eliminated the right to hunt for commercial purposes;
(e) is a constitutional document and the Treaty is not, although the Treaty receives constitutional protection by virtue of s. 35(1) of the Constitution Act, 1982.

4 In these circumstances, I am of the view that it was clearly the intention of the framers to merge the rights in the Treaty in the NRTA. To characterize the NRTA as modifying the Treaty is to treat it as an amending document to the Treaty. This clearly was not the intent of the NRTA. In enlarging the area in which hunting for food was permitted to extend to the whole of the province, it could not be suggested that the NRTA extended the Treaty to all of the province. Rather, the right to hunt for food was extended by the NRTA to the whole of the province, including the area covered by the Treaty. An Indian hunting on land outside the Treaty lands could not claim to be covered by the Treaty. If the NRTA merely modified the Treaty, an Indian hunting on Treaty lands could claim the right under the Treaty while an Indian hunting in other parts of the province could claim only under the NRTA. This would invite bifurcation of the rights of Indians hunting for food in the province.

5 Similarly, the provisions which transferred to the province the power to pass gaming laws for the purpose of conservation could not have been intended simply to amend the Treaty. As an amendment to the Treaty, this provision would have no constitutional force and could not alter the constitutionally entrenched division of powers. It might be suggested that the NRTA both amended the Treaty and, as an independent constitutional document, amended the Constitution.

If this were the intent, it is difficult to understand why all the terms of the Treaty relating to the right to hunt for food were replicated in NRTA. It must have been the intention to merge these rights in the NRTA so that they could be balanced with the power of the provinces to legislate for conservation purposes. In order to achieve a reasonable balance between them, it was important that they both appear in one document having constitutional status.

6 I can suggest no reason why the framers of the NRTA would have wanted to maintain any aspects of the Treaty except as an interpretative tool. They surely did not do so in order to allow these rights to be recognized under s. 35(1) of the Constitution Act, 1982 which appears to be the sole present justification for preserving the Treaty. However, even that justification loses any force when considered in light of the fact that the NRTA is itself a constitutional document and recognition under s. 35(1) is unnecessary for the protection of these important Indian rights.

7 From the foregoing, I conclude that it was the intention of the framers of para. 12 of the NRTA to effectuate a merger and consolidation of the Treaty rights. This was the view of Dickson J. (as he then was), speaking for the Court,

in Frank v. The Queen, [1978] 1 S.C.R. 95, at p. 100:

> It would appear that the overall purpose of para. 12 of the Natural Resources Transfer Agreement was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but 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.

As pointed out, these rights were restated in the NRTA and their preservation was assured by being placed in a constitutional instrument.

8 If this was the intention, and I conclude that it was, then the proper characterization of the relationship between the NRTA and the Treaty rights is that the sole source for a claim involving the right to hunt for food is the NRTA. The Treaty rights have been subsumed in a document of a higher order. The Treaty may be relied on for the purpose of assisting in the interpretation of the NRTA, but it has no other legal significance.

9 The fact that the source of the appellants' rights to hunt and fish for sustenance is found within the provisions of the NRTA does not alter the analysis that has previously been employed in the interpretation of treaty rights. The key interpretative principles which apply to treaties are first, that any ambiguity in the treaty will be resolved in favour of the Indians and, second, that treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward aboriginal peoples. These principles apply equally to the rights protected by the NRTA; the principles arise out of the nature of the relationship between the Crown and aboriginal peoples with the result that, whatever the document in which that relationship has been articulated, the principles should apply to the interpretation of that document. I find support for this reasoning in the prior decisions of this Court concerning the interpretation of the NRTA. In R. v. Sutherland, [1980] 2 S.C.R. 451, for example, this Court specifically stated, at p. 461, that the NRTA should be given a "broad and liberal construction", and, at p. 464, that any ambiguity should be "interpreted so as to resolve any doubts in favour of the Indians". Moreover, this position is compatible with the concept that the NRTA constitutes a merger and consolidation of treaty rights, and with the view that it was through the enactment of the NRTA that the "federal government attempted to fulfil their treaty obligations" (see Moosehunter v. The Queen, [1981] 1 S.C.R. 282, at p. 293).

Validity of the provisions of the Wildlife Act

10 In light of my conclusion that the right of Indian persons to hunt for food is constitutional in nature, the issue remaining for determination is whether the provisions of the Wildlife Act under which the appellants were convicted are constitutionally permissible. On the bare wording of para. 12 of the NRTA, it appears as though such an issue could never arise. The NRTA grants legislative power over "gaming" subject to the Indians' right to hunt for food, apparently suggesting that the province has no jurisdiction to legislate in relation to those rights. This interpretation arises out of the mandatory language used in para. 12, wherein the legislative power is granted to the province, but qualified by the statement that the power exists "provided, however, that the said Indians shall have the right. . . ."

11 The reasoning in R. v. Horseman, [1990] 1 S.C.R. 901, informs us that such a formalistic interpretation of the language of the NRTA is incorrect. At the time the treaties that preceded the NRTA were signed, there was already in place legislation enacted for conservation purposes which affected the Indians' rights. Indeed, there existed total bans on the hunting of certain species. As a result, at the time the treaties were signed and, even more so, at the time that the NRTA was agreed to by the provinces and the federal government, it would have been clearly understood that the rights of Indians pursuant to either document would be subject to governmental regulation for conservation purposes. The rights protected by the NRTA thus cannot be viewed as being constitutional rights of an absolute nature for which governmental regulation is prohibited.

12 How, then, is the governmental regulation permitted by the NRTA, and the extent of the protection of the appellants' rights in the face of such regulation, to be assessed? Cory J. has taken the position that the standard against

which the validity of the Wildlife Act is to be assessed is s. 35(1) of the Constitution Act, 1982, and the test set out in Sparrow, supra. I am unable to agree with my colleague on this point. Section 35(1) was intended to provide constitutional protection for aboriginal rights and treaty rights that did not enjoy such protection. It cannot have been intended to be redundant and provide constitutional protection for rights that already enjoyed constitutional protection. Moreover, para. 12 of the NRTA is a constitutional provision and, as such, s. 35(1) has no direct application to it. Infringements of constitutional rights cannot be remedied by the application of a different constitutional provision. As Estey J. stated in Reference Re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, at p. 1207, the Canadian Charter of Rights and Freedoms "cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act, 1867". That case concerned the application of s. 15 of the Charter to s. 93 of the Constitution Act, 1867. Although the case is not directly on point with the issues arising in this appeal, in my view, Estey J.'s comment provides support for the position that constitutional provisions enacted later in time are not to be read as impliedly amending the earlier enacted provisions. (See Peter W. Hogg, Constitutional Law of Canada (3rd ed. 1992), at p. 1183.) Nor are later provisions of the constitution applicable in terms of the interpretation of earlier provisions. On that reasoning, s. 35(1) is inapplicable to the provision of the NRTA that protects the right of aboriginal persons to hunt for food.

13 That is not to say, however, that the principles underlying the interpretation of s. 35(1) have no relevance to the determination of whether a particular legislative enactment has an acceptable purpose and whether it constitutes an acceptable limitation on the rights granted by the NRTA. There is no method provided in the NRTA whereby government measures that may impinge upon the rights the same document grants to Indians can be scrutinized. It is clear, however, that the NRTA does require a balancing of rights. The right of the province to legislate with respect to conservation must be balanced against the right granted to the Indians to hunt for food. Thus, it falls to the Court to develop a test through which this task can be accomplished. In Sparrow, this Court developed principles for balancing the constitutionally protected right to fish for food against the federal government's power to pass laws for conservation. Although the Sparrow test was developed in the context of s. 35(1), the basic thrust of the test, to protect aboriginal rights but also to permit governments to legislate for legitimate purposes where the legislation is a justifiable infringement on those protected rights, applies equally well to the regulatory authority granted to the provinces under para. 12 of the NRTA as to federal power to legislate in respect of Indians.

14 In this way, the Sparrow test is applied to the NRTA by analogy, with the result that the Court will have a means by which to ensure that the rights in the NRTA are protected, but that provincial governments are also provided with some flexibility in terms of their ability to affect those rights for the purpose of legislating in relation to conservation. As Cory J. points out, the criteria set out in Sparrow do not purport to be exhaustive and are to be applied flexibly. In applying them in this context, it is important to bear in mind that what is being justified is the exercise of a power granted to the provinces, which power is made subject to the right to hunt for food. Both are contained in a constitutional document. The application of the Sparrow criteria should be consonant with the intention of the framers as to the reconciliation of these competing provisions.

15 I agree with Cory J. that, in the absence of evidence with respect to justification, there must be a new trial and I would dispose of the appeal as suggested by him.

16 The constitutional question and answers are as follows:

> If Treaty 8 confirmed to the Indians of the Treaty 8 Territory the right to hunt throughout the tract surrendered, does the right continue to exist or was it extinguished and replaced by para. 12 of the Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, 20-21 George V, c. 26 (U.K.)), and if the right continues to exist, could that right be exercised on the lands in question and, if so, was the right impermissibly infringed upon by s. 26(1) or s. 27(1) of the Wildlife Act, S.A. 1984, c. W-9.1, given Treaty 8 and s. 35(1) of the Constitution Act, 1982?

17 The right to hunt for food referred to in Treaty No. 8 was merged in the NRTA which is the sole source of the

right.

18 Sections 26(1) and 27(1) of the Wildlife Act did not infringe the constitutional rights of Mr. Badger or Mr. Kiyawasew to hunt for food.

19 Mr. Ominayak was exercising his constitutional right to hunt for food. Section 26(1) of the Wildlife Act is a prima facie infringement of his right to hunt for food under NRTA and is invalid unless justified.

The judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. was delivered by

20 CORY J.:-- Three questions must be answered on this appeal. First, do Indians who have status under Treaty No. 8 have the right to hunt for food on privately owned land which lies within the territory surrendered under that Treaty?

Secondly, have the hunting rights set out in Treaty No. 8 been extinguished or modified as a result of the provisions of para. 12 of the Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2)? Thirdly, to what extent, if any, do s. 26(1) and s. 27(1) of the Wildlife Act, S.A. 1984, c. W-9.1, apply to the appellants?

Factual Background

21 Each of the three appellants was charged with an offence under the Wildlife Act. Their trials and appeals have proceeded together.

22 The facts are straightforward and undisputed. The appellant Wayne Clarence Badger was charged with shooting a moose outside the permitted hunting season contrary to s. 27(1) of the Wildlife Act. The appellants Leroy Steven Kiyawasew and Ernest Clarence Ominayak, who had also shot moose, were charged, under s. 26(1) of the same statute, with hunting without a licence. All three appellants, Cree Indians with status under Treaty No. 8, were hunting for food upon lands falling within the tracts surrendered to Canada by the Treaty.

23 The lands in question were all privately owned. Mr. Badger shot a moose on brush land with willow regrowth and scrub. There were no fences or signs posted on the land, but a farm house was located a quarter mile from the place where the moose was shot. Mr. Kiyawasew was hunting on a snow-covered field. There was no fence, but Mr. Kiyawasew testified that he had passed old run-down barns shortly before he stopped to shoot the moose. He had seen signs which were posted on the land but he was unable to read them from the road. Mr. Ominayak was hunting on uncleared muskeg. There were no fences, signs or buildings in the vicinity.

24 The appellants were all convicted in the Provincial Court of Alberta. They appealed their summary convictions to the Court of Queen's Bench, challenging the constitutionality of the Wildlife Act in so far as it might affect them as Crees with status under Treaty No. 8. The Court of Queen's Bench affirmed the convictions. The appellants' appeals to the Alberta Court of Appeal were also dismissed.

Judgments Below

Alberta Court of Queen's Bench

25 Foster J., in brief reasons, held that R. v. Horseman, [1990] 1 S.C.R. 901, decided that Treaty No. 8 had been modified by the Natural Resources Transfer Agreement, 1930 (hereinafter "NRTA"). Accordingly, an individual who comes within the ambit of Treaty No. 8 may hunt in order to obtain food on unoccupied Crown lands or on other lands to which he or she may have a right of access. This is the existing hunting right which is protected by s. 35(1) of the Constitution Act, 1982. Foster J. also relied upon R. v. Cardinal (1977), 36 C.C.C. (2d) 369 (Alta. C.A.), and R. v. Ominayak (1990), 108 A.R. 239 (Alta. C.A.), to hold that an individual does not, without more, have a right of access to private lands. As a result, hunting on those lands was not protected under s. 35(1). Accordingly, she dismissed the appeals.

Court of Appeal (1993), 135 A.R. 286

26 Although all three judges of the Court of Appeal agreed that the appellants' appeals should be dismissed, they travelled by different routes to reach that conclusion.

Per Kerans J.A.

27 Kerans J.A. concluded that it was not necessary to decide either if the hunting in question was protected under Treaty No. 8 or if Alberta could make laws that derogated from treaty rights. Rather, he held that pursuant to Horseman, supra, any treaty right to hunt other than on Crown lands had been extinguished by the NRTA. The "merger and consolidation" theory applied in Horseman was effectively a theory of "extinguishment and replacement". Because the Treaty No. 8 hunting right had been extinguished by the NRTA, reference could not be made to the Treaty to determine the scope of the "right of access" to hunt on the "other lands" referred to in the NRTA. As a result of this finding, he dismissed the appeals.

Per Lieberman J.A.

28 Lieberman J.A. held that Horseman, supra, defeated the appellants' position in this case. He determined, at p. 357, that the "entrenchment of treaty rights in s. 35(1) of the [Constitution Act], 1982 has no application to the hunting rights conferred by Treaty No. 8" which he found had been extinguished by the NRTA. Thus, he concluded that the terms of the Wildlife Act prevailed and the appeals must be dismissed.

Per Conrad J.A.

29 Conrad J.A. held that since Horseman, supra, dealt with the right to hunt commercially on Crown lands, it was not binding on the issue as to whether a treaty right to hunt on private lands had been extinguished. Conrad J.A. observed that the question of whether Treaty No. 8 gave the appellants the right to hunt on privately owned lands required that consideration be given to the meaning of "unoccupied" Crown lands in the NRTA and of "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" in Treaty No. 8. Conrad J.A. concluded that Crown lands would not be "unoccupied" merely because they were not put to some visible use. She found that the words "required or taken up" for "other purposes" were critical. She held that if the Crown's interest was alienated or transferred to a private owner, the Crown had "required or taken up" the land under the Treaty and the land was no longer "unoccupied" under the NRTA. She concluded that even if "occupied" as defined in R. v. Horse, [1988] 1 S.C.R. 187, refers only to private lands visibly in use, she would extend the ratio of Horse, supra, and find that there is no treaty right to hunt on private land, regardless of whether or not it is in visible use. Therefore, she concluded that Treaty No. 8 did not reserve to the appellants the right to hunt on the privately owned lands in question and that the Wildlife Act did not infringe the right protected under s. 35(1).

30 In the event that she was wrong on that issue, Conrad J.A. went on to hold that if the Treaty did give the appellants the right to hunt on private lands, those rights had not been extinguished by the NRTA. The NRTA did not contain a clear intention to extinguish all treaty hunting rights, but only to extinguish commercial hunting rights on Crown lands. However, the hunting rights granted by the Treaty were not unlimited. They were subject to regulation and it would be necessary to determine if the regulations enacted in the Alberta Wildlife Act were a justifiable infringement on s. 35(1). Ultimately, she found that it was unnecessary to undertake an analysis of the justification in light of the fact that she had concluded that the treaty did not confer a right to hunt on private lands. She dismissed the appeals.

Relevant Treaty and Statutory Provisions

31 The relevant part of Treaty No. 8, made 21 June 1899, provides:

> And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered

> as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

32 The Constitution Act, 1930, s. 1 provides:

> 1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the Constitution Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

33 The Natural Resources Transfer Agreement, 1930 is the Schedule referred to in s. 1. Paragraph 12 of the NRTA provides:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

34 Section 35(1) of the Constitution Act, 1982 provides:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

35 Sections 26(1) and 27(1) of the Wildlife Act provide:

> 26(1) A person shall not hunt wildlife unless he holds a licence authorizing him, or is authorized by or under a licence, to hunt wildlife of that kind.
>
> 27(1) A person shall not hunt wildlife outside an open season or if there is no open season for that wildlife.

Constitutional Question

36 The constitutional question stated by this Court on May 2, 1994 is as follows:

> If Treaty 8 confirmed to the Indians of the Treaty 8 Territory the right to hunt throughout the tract surrendered, does the right continue to exist or was it extinguished and replaced by para. 12 of the Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, 20-21 George V, c. 26 (U.K.)), and if the right continues to exist, could that right be exercised on the lands in question and, if so, was the right impermissibly infringed upon by s. 26(1) or s. 27(1) of the Wildlife Act, S.A. 1984, c. W-9.1, given Treaty 8 and s. 35(1) of the Constitution Act, 1982?

Analysis

37 On this appeal, the extent of the existing right to hunt for food possessed by Indians who are members of bands which were parties to Treaty No. 8 must be determined. The analysis should proceed through three stages. First, it is necessary to decide what effect para. 12 of the NRTA had upon the rights enunciated in Treaty No. 8. After resolving which instrument sets out the right to hunt for food, it is necessary to examine the limitations which are inherent in that

right. It must be remembered that, even by the terms of Treaty No. 8, the Indians' right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation. Second, consideration must then be given to the question of whether the existing right to hunt for food can be exercised on privately owned land. Third, it is necessary to determine whether the impugned sections of the provincial Wildlife Act come within the specific types of regulation which have, since 1899, limited and defined the scope of the right to hunt for food. If they do, those sections do not infringe upon an existing treaty right and will be constitutional. If not, the sections may constitute an infringement of the Treaty rights guaranteed by Treaty No. 8, as modified by the NRTA. In this case the impugned provisions should be considered in accordance with the principles set out in R. v. Sparrow, [1990] 1 S.C.R. 1075, to determine whether they constitute a prima facie infringement of the Treaty rights as modified, and if so, whether the infringement can be justified.

38 It is now appropriate to consider the source of the existing right to hunt for food.

The Existing Right to Hunt for Food

The Hunting Right Provided by Treaty No. 8

39 Treaty No. 8 is one of eleven numbered treaties concluded between the federal government and various Indian bands between 1871 and 1923. Their objective was to facilitate the settlement of the West. Treaty No. 8, made on June 21, 1899, involved the surrender of vast tracts of land in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and part of the Northwest Territories. In exchange for the land, the Crown made a number of commitments, for example, to provide the bands with reserves, education, annuities, farm equipment, ammunition, and relief in times of famine or pestilence. However, it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap. The Commissioners wrote:

> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. . . .
>
> We pointed out . . . that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. . . .
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it. [Emphasis added.]

40 Treaty No. 8, then, guaranteed that the Indians "shall have the right to pursue their usual vocations of hunting, trapping and fishing". The Treaty, however, imposed two limitations on the right to hunt. First, there was a geographic limitation. The right to hunt could be exercised "throughout the tract surrendered . . . saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".

Second, the right could be limited by government regulations passed for conservation purposes.

Impact of Paragraph 12 of the NRTA

Principles of Interpretation

41 At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See R. v. Sioui, [1990] 1 S.C.R. 1025, at p. 1063; Simon v. The Queen, [1985] 2 S.C.R. 387, at p. 401. Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. See Sparrow, supra, at pp. 1107-8 and 1114; R. v. Taylor (1981), 34 O.R. (2d) 360 (Ont. C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See Nowegijick v. The Queen, [1983] 1 S.C.R. 29, at p. 36; Simon, supra, at p. 402; Sioui, supra, at p. 1035; and Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, at pp. 142-43. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. See Simon, supra, at p. 406; Sioui, supra, at p. 1061; Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313, at p. 404.

42 These principles of interpretation must now be applied to this case.

Interpreting the NRTA

43 The issue at this stage is whether the NRTA extinguished and replaced the Treaty No. 8 right to hunt for food. It is my conclusion that it did not.

44 For ease of reference, para. 12 of the NRTA provides:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

45 It has been held that the NRTA had the clear intention of both limiting and expanding the treaty right to hunt. In Frank v. The Queen, [1978] 1 S.C.R. 95, consideration was given to the differences between Treaty No. 6 (which, for this purpose, has a hunting rights clause similar to that in Treaty No. 8) and para. 12 of the NRTA. Dickson J., as he then was, held at p. 100:

> The essential differences, for present purposes, between the Treaty and the Agreement are (i) under the former the hunting rights were at large while under the latter the right is limited to hunting for food and (ii) under the former the rights were limited to about one-third of the Province of Alberta, while under the latter they extend to the entire province.

And at p. 101, he stated:

> The Appellate Division . . . held that para. 12 of the Natural Resources Transfer Agreements of Alberta and Saskatchewan did two things: (i) it enlarged the areas in which Alberta and Saskatchewan Indians could respectively hunt and fish for food; (ii) it limited their rights to hunt and fish otherwise than for food by making those rights subject to provincial game

> laws. I would agree that such is the effect of para. 12.

To the same effect, see R. v. Wesley, [1932] 2 W.W.R. 337 (Alta. S.C. App. Div.), at p. 344, as adopted in Prince v. The Queen, [1964] S.C.R. 81, at p. 84.

46 This Court most recently considered the effect the NRTA had upon treaty rights in Horseman, supra. There, it was held that para. 12 of the NRTA evidenced a clear intention to extinguish the treaty protection of the right to hunt commercially. However, it was emphasized that the right to hunt for food continued to be protected and had in fact been expanded by the NRTA. At page 933, this appears:

> Although the Agreement did take away the right to hunt commercially, the nature of the right to hunt for food was substantially enlarged. The geographical areas in which the Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. For example, they may hunt deer with night lights and with dogs, methods which are or may be prohibited for others. Nor are the Indians subject to seasonal limitations as are all other hunters. That is to say, they can hunt ducks and geese in the spring as well as the fall, just as they may hunt deer at any time of the year. Indians are not limited with regard to the type of game they may kill. That is to say, while others may be restricted as to the species or sex of the game they may kill, the Indians may kill for food both does and bucks; cock pheasants and hen pheasants; drakes and hen ducks. [Emphasis added.]

See also Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695, at p. 722; and Myran v. The Queen, [1976] 2 S.C.R. 137, at p. 141. I might add that Horseman, supra, is a recent decision which should be accepted as resolving the issues which it considered. The decisions of this Court confirm that para. 12 of the NRTA did, to the extent that its intent is clear, modify and alter the right to hunt for food provided in Treaty No. 8.

47 Pursuant to s. 1 of the Constitution Act, 1930, there can be no doubt that para. 12 of the NRTA is binding law. It is the legal instrument which currently sets out and governs the Indian right to hunt. However, the existence of the NRTA has not deprived Treaty No. 8 of legal significance. Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfil its promises. Treaty rights can only be amended where it is clear that effect was intended. It is helpful to recall that Dickson J. in Frank, supra, observed at p. 100 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). I believe that these words support my conclusion that the Treaty No. 8 right to hunt has only been altered or modified by the NRTA to the extent that the NRTA evinces a clear intention to effect such a modification. This position has been repeatedly confirmed in the decisions referred to earlier. Unless there is a direct conflict between the NRTA and a treaty, the NRTA will not have modified the treaty rights. Therefore, the NRTA language which outlines the right to hunt for food must be read in light of the fact that this aspect of the treaty right continues in force and effect.

48 Like Treaty No. 8, the NRTA circumscribes the right to hunt for food with respect to both the geographical area within which this right may be exercised as well as the regulations which may properly be imposed by the government. The geographical limitations must now be considered.

Geographical Limitations on the Right to Hunt for Food

49 Under the NRTA, Indians may exercise a right to hunt for food "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access". In the present appeals, the hunting occurred on lands which had been included in the 1899 surrender but were now privately owned. Therefore, it must be determined whether these privately owned lands were "other lands" to which the Indians had a "right of access" under the Treaty.

50 At this stage, three preliminary points should be made. First, the "right of access" in the NRTA does not refer to a

general right of access but, rather, it is limited to a right of access for the purposes of hunting: R. v. Mousseau, [1980] 2 S.C.R. 89, at p. 97; R. v. Sutherland, [1980] 2 S.C.R. 451, at p. 459. For example, everyone can travel on public highways, but this general right of access cannot be read as conferring upon Indians a right to hunt on public highways.

51 Second, because the various treaties affected by the NRTA contain different wording, the extent of the treaty right to hunt on privately owned land may well differ from one treaty to another. While some treaties contain express provisions with respect to hunting on private land, others, such as Treaty No. 8, do not. Under Treaty No. 8, the right to hunt for food could be exercised "throughout the tract surrendered" to the Crown "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." Accordingly, if the privately owned land is not "required or taken up" in the manner described in Treaty No. 8, it will be land to which the Indians had a right of access to hunt for food.

52 Third, the applicable interpretative principles must be borne in mind. Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories (1880), at pp. 338-42; Sioui, supra, at p. 1068; Report of the Aboriginal Justice Inquiry of Manitoba (1991); Jean Friesen, Grant me Wherewith to Make my Living (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. 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. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted.

See Nowegijick, supra, at p. 36; Sioui, supra, at pp. 1035-36 and 1044; Sparrow, supra, at p. 1107; and Mitchell, supra, where La Forest J. noted the significant difference that exists between the interpretation of treaties and statutes which pertain to Indians.

53 The evidence led at trial indicated that in 1899 the Treaty No. 8 Indians would have understood that land had been "required or taken up" when it was being put to a use which was incompatible with the exercise of the right to hunt.

Historian John Foster gave expert evidence in this case. His testimony indicated that, in 1899, Treaty No. 8 Indians would not have understood the concept of private and exclusive property ownership separate from actual land use. They understood land to be required or taken up for settlement when buildings or fences were erected, land was put into crops, or farm or domestic animals were present. Enduring church missions would also be understood to constitute settlement. These physical signs shaped the Indians' understanding of settlement because they were the manifestations of exclusionary land use which the Indians had witnessed as new settlers moved into the West. The Indians' experience with the Hudson's Bay Company was also relevant. Although that company had title to vast tracts of land, the Indians were not excluded from and in fact continued hunting on these lands. In the course of their trading, the Hudson's Bay Company and the Northwest Company had set up numerous posts that were subsequently abandoned. The presence of abandoned buildings, then, would not necessarily signify to the Indians that land was taken up in a way which precluded hunting on them. Yet, it is dangerous to pursue this line of thinking too far. The abandonment of land may be temporary. Owners may return to reoccupy the land, to undertake maintenance, to inspect it or simply to enjoy it. How "unoccupied" the land was at the relevant time will have to be explored on a case-by-case basis.

54 An interpretation of the Treaty properly founded upon the Indians' understanding of its terms leads to the conclusion that the geographical limitation on the existing hunting right should be based upon a concept of visible,

incompatible land use. This approach is consistent with the oral promises made to the Indians at the time the Treaty was signed, with the oral history of the Treaty No. 8 Indians, with earlier case law and with the provisions of the Alberta Wildlife Act itself.

55 The Indian people made their agreements orally and recorded their history orally. Thus, the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation. Treaty No. 8 was initially concluded with the Indians at Lesser Slave Lake. The Commissioners then travelled to many other bands in the region and sought their adhesion to the Treaty. Oral promises were made with the Lesser Slave Lake band and with the other Treaty signatories and these promises have been recorded in the Treaty Commissioners' Reports and in contemporary affidavits and diaries of interpreters and other government officials who participated in the negotiations. See in particular: Richard Daniel, "The Spirit and Terms of Treaty Eight", in Richard Price, ed., The Spirit of the Alberta Indian Treaties (1979), at pp. 47-100; and René Fumoleau, O.M.I., As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939 (1973), at pp. 73-100. The Indians' primary fear was that the treaty would curtail their ability to pursue their livelihood as hunters, trappers and fishers. Commissioner David Laird, as cited in Daniel, "The Spirit and Terms of Treaty Eight", at p. 76, told the Lesser Slave Lake Indians in 1899:

> Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are.
>
> In return for this the Government expects that the Indians will not interfere with or molest any miner, traveller or settler. [Emphasis added.]

Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap". The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although 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. For example, one commissioner, cited in René Fumoleau, O.M.I., As Long as this Land Shall Last, at p. 90, stated:

> We are just making peace between Whites and Indians -- for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.

56 Commissioner Laird told the Indians that the promises made to them were to be similar to those made with other Indians who had agreed to a treaty. Accordingly, it is significant that the earlier promises also contemplated a limited interference with Indians' hunting and fishing practices. See, for example, Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories, supra. In negotiating Treaty No. 1, the Lieutenant Governor of Manitoba, A. G. Archibald, made the following statement to the Indians, at p. 29:

> 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 is 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 lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is 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 reserve where you will find a place ready for you to live on and cultivate. [Emphasis added.]

With respect to Treaty No. 4, Lt. Gov. Morris made the following statement to the Indians, at p. 96:

> We have come through the country for many days and we have seen hills and but little wood and in many places little water, and it may be a long time before there are many white men settled upon this land, and you will have the right of hunting and fishing just as you have now until the land is actually taken up. [Emphasis added.]

With respect to Treaty No. 6, Lt. Gov. Morris stated at p. 218:

> You want to be at liberty to hunt as before. I told you we did not want to take that means of living from you, you have it the same as before, only this, if a man, whether Indian or Half-breed, had a good field of grain, you would not destroy it with your hunt. [Emphasis added.]

57 The oral history of the Treaty No. 8 Indians reveals a similar understanding of the treaty promises. Dan McLean, an elder from the Sturgeon Lake Indian Reserve, gave evidence in this trial. He indicated that the understanding of the treaty promise was that Indians were allowed to hunt anytime for food to feed their families. They could hunt on unoccupied Crown land and on abandoned land. If there was no fence on the land, they could hunt, but if there was a fence, they could not hunt there. This testimony is consistent with the oral histories presented by other Treaty No. 8 elders whose stories have been recorded by historians. The Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings. No doubt the Indians believed that most of the Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping. See The Spirit of the Alberta Indian Treaties, supra, at pp. 92-100.

58 Accordingly, the oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis.

59 Most of the cases which have considered the geographical limitations on the right to hunt have been concerned with situations where the hunting took place on Crown land. In those cases, it was held that Crown lands were only "occupied" or "taken up" when they were actually put to an active use which was incompatible with hunting. For example, R. v. Smith, [1935] 2 W.W.R. 433 (Sask. C.A.), considered whether Indians had a right to hunt for food on a game preserve located on Crown land. There, in my view, it was correctly observed at p. 436 that "it is proper to consult th[e] treaty in order to glean from it whatever may throw some light on the meaning to be given to the words" in the NRTA. It was sensibly held at p. 437 that the Indians did not have a right of access to hunt on the game preserve because to do so would be incompatible with the fundamental purpose of establishing a preserve: "a game preserve would be one in name only if the Indians, or any other class of people, were entitled to shoot in it". See also R. v. Mirasty, [1942] 1 W.W.R. 343 (Police Ct.), in which Crown land was taken up for a forest and game preserve; and Mousseau, supra, in which Crown land was taken up for a public road. However, the courts have recognized an existing treaty right to hunt on Crown land taken up as a forest because hunting for food is not incompatible with that particular land use: R. v. Strongquill, [1953] 8 W.W.R. (N.S.) 247 (Sask. C.A.). Finally, where limited hunting by non-Indians is permitted on Crown land taken up as a wildlife management area or a fur conservation area, the courts have held that Indians continue to have an unlimited right of access for the purposes of hunting for food: Strongquill, supra, at pp. 267 and 271; Sutherland, supra, at pp. 460 and 464-65; and Moosehunter v. The Queen, [1981] 1 S.C.R. 282, at p. 292.

60 A second but shorter line of cases has considered whether Indians have a treaty right of access to hunt on privately owned lands. While various factual situations have been considered, the courts have not settled the question as to whether the Treaty No. 8 right to hunt for food extends to privately owned land which is not put to visible use. This Court has considered hunting on private land in two cases.

61 In Myran, supra, the accused were charged with hunting without due regard for the safety of others. In obiter, it was stated that the accused persons did not have a right of access to the lands on which they had hunted. In an earlier case, the Manitoba Court of Appeal had held that, unless privately owned lands were posted with signs explicitly prohibiting hunting, both Indians and non-Indians could hunt there. Myran, supra, overturned that line of reasoning, holding that, in and of itself, the absence of signs did not establish a right of access for hunting purposes. That position was adopted in Horse, supra, at p. 195. However, Myran, supra, did not explore in any detail the extent of the right of access. Accordingly, the full scope of the treaty right to hunt on private land remains to be considered. In addition, because the right of access is a question of fact, the particular facts arising in Myran, supra, are significant.

In that case, the accused persons were hunting for food in an alfalfa field belonging to a farmer who had been awakened by the sound of the accused's rifle shots and by the accused's hunting light flashing through his bedroom window. The rifles had a range of nearly two miles and there were farm houses, highways, pastures, a town and a breeding station within their range. On those facts, there is no doubt that the land was put to an active and visible use which was incompatible with hunting.

62 In Horse, supra, the accused persons were hunting on privately owned land without the owner's permission. This Court stated repeatedly that Treaty No. 6 did not afford the accused a right of access to hunt on "occupied private lands" (see pp. 198, 204 and 209-10). In Horse, supra, the private lands were not posted, but they were sown to hay and grain and, thus, were visibly and actively used for farming. In light of these facts, there was no need to consider what was encompassed by the term "occupied private land". The use of the land was so readily apparent that it clearly fell within the category of occupied land. Similarly, in Mousseau, supra, at p. 97, this Court indicated that Indians had a right to hunt on: (a) all unoccupied Crown lands; (b) any occupied Crown land to which they had a right of access by statute, common law or otherwise; and (c) "any occupied private lands to which the Indians have a right of access by custom, usage, or consent of the owner or occupier, for the purpose of hunting, trapping, or fishing". However, that case involved hunting on a public highway which was clearly occupied Crown land. Although Mousseau, supra, summarized this Court's position on that point, the question of hunting on unoccupied private land was neither then, nor previously, before the Court. As a result, in both Horse, supra, and Mousseau, supra, the question of whether the Treaty protected a right of access to unoccupied private lands -- private lands which had not been taken up for settlement or other purposes -- was left unresolved.

63 One case which has specifically considered the treaty right to hunt on unoccupied private land is R. v. Bartleman (1984), 55 B.C.L.R. 78 (B.C.C.A.). There, the accused was charged with using ammunition which was prohibited under the provincial Wildlife Act. He had been hunting on uncultivated bush land. No livestock or buildings were present, no fence surrounded the land, and no signs had been posted. He claimed that, on the basis of his Treaty hunting right, the provincial legislation did not apply to him. His hunting rights were set out in the 1852 North Saanich Indian Treaty (quoted in Bartleman, at p. 87) which provided that the Indians "are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly". The B.C. Court of Appeal held that it was necessary to interpret the right on the basis of what the Indians would have understood in 1852 by the words of the Treaty. It held that the Treaty right to hunt could be exercised where to do so would not interfere with the actual use being made of the privately owned land. At page 97 this was written:

> . . . the hunting must take place on land that is unoccupied in the sense that the particular form of hunting that is being undertaken does not interfere with the actual use and enjoyment of the land by the owner or occupier.

64 The Court of Appeal found that hunting was not incompatible with the minimal level of use to which the land was being put.

65 The "visible, incompatible use" approach, which focuses upon the use being made of the land, is appropriate and correct. Although it requires that the particular land use be considered in each case, this standard is neither unduly vague nor unworkable.

66 In summary, then, the geographical limitation on the right to hunt for food is derived from the terms of the particular treaty if they have not been modified or altered by the provisions of para. 12 of the NRTA. In this case, the geographical limitation on the right to hunt for food provided by Treaty No. 8 has not been modified by para. 12 of the NRTA.

Where lands are privately owned, it must be determined on a case-by-case basis whether they are "other lands" to which Indians had a "right of access" under the Treaty. If the lands are occupied, that is, put to visible use which is incompatible with hunting, Indians will not have a right of access. Conversely, if privately owned land is unoccupied and not put to visible use, Indians, pursuant to Treaty No. 8, will have a right of access in order to hunt for food. The facts presented in each of these appeals must now be considered.

67 The first is Mr. Badger. He was hunting on land covered with second growth willow and scrub. Although there were no fences or signs posted on the land, a farm house was located only one quarter of a mile from the place the moose was killed. The residence did not appear to have been abandoned. Second, Mr. Kiyawasew was hunting on a snow-covered field. Although there was no fence, there were run-down barns nearby and signs were posted on the land. Most importantly, the evidence indicated that in the fall, a crop had been harvested from the field. In the situations presented in both cases, it seems clear that the land was visibly being used. Since the appellants did not have a right of access to these particular tracts of land, their treaty right to hunt for food did not extend to hunting there. As a result, the limitations on hunting set out in the Wildlife Act did not infringe upon their existing right and were properly applied to these two appellants. The appeals of Mr. Badger and Mr. Kiyawasew must, therefore, be dismissed.

68 However, Mr. Ominayak's appeal presents a different situation. He was hunting on uncleared muskeg. No fences or signs were present. Nor were there any buildings located near the site of the kill. Although it was privately owned, it is apparent that this land was not being put to any visible use which would be incompatible with the Indian right to hunt for food. Accordingly, the geographical limitations upon the Treaty right to hunt for food did not preclude Mr. Ominayak from hunting upon this parcel of land. This, however, does not dispose of his appeal. It remains to be seen whether the existing right to hunt was in any other manner circumscribed by a form of government regulation which is permitted under the Treaty.

Permissible Regulatory Limitations on the Right to Hunt for Food

69 Pursuant to the provisions of s. 88 of the Indian Act, provincial laws of general application will apply to Indians. This is so except where they conflict with aboriginal or treaty rights, in which case the latter must prevail: Kruger v. The Queen, [1978] 1 S.C.R. 104, at pp. 114-15; Simon, supra, at pp. 411-14; Sparrow, supra, at p. 1109. In any event, the regulation of Indian hunting rights would ordinarily come within the jurisdiction of the Federal government and not the Province. However, the issue does not arise in this case since we are dealing with the right to hunt provided by Treaty No. 8 as modified by the NRTA. Both the Treaty and the NRTA specifically provided that the right would be subject to regulation pertaining to conservation.

70 Treaty No. 8 provided that the right to hunt would be "subject to such regulations as may from time to time be made by the Government of the country". In the West, a wide range of legislation aimed at conserving game had been enacted by the government beginning as early as the 1880s. Acts and regulations pertaining to conservation measures continued to be passed throughout the entire period during which the numbered treaties were concluded. In Horseman, supra, the aim and intent of the regulations was recognized. At page 935, I noted:

> Before the turn of the century the federal game laws of the Unorganized Territories provided for a total ban on hunting certain species (bison and musk oxen) in order to preserve both the species and the supply of game for Indians in the future. See The Unorganized Territories' Game Preservation Act, 1894, S.C. 1894, c. 31, ss. 2, 4 to 8 and 26. Even then the advances in firearms and the more efficient techniques of hunting and trapping, coupled with the habitat loss and the over-exploitation of game, (undoubtedly by Europeans more than by Indians),

> had made it essential to impose conservation measures to preserve species and to provide for hunting for future generations. Moreover, beginning in 1890, provision was made in the federal Indian Act for the Superintendent General to make the game laws of Manitoba and the Unorganized Territories applicable to Indians. See An Act further to amend "The Indian Act" chapter forty-three of the Revised Statutes, S.C. 1890, c. 29, s. 10. A similar provision was in force in 1930. See Indian Act, R.S.C. 1927, c. 98, s. 69.

In light of the existence of these conservation laws prior to signing the Treaty, the Indians would have understood that, by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation. This concept was explicitly incorporated into the NRTA in a modified form providing for Provincial regulatory authority in the field of conservation. Paragraph 12 of the NRTA begins by stating its purpose:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians. . . . [Emphasis added.]

It follows that by the terms of both the Treaty and the NRTA, provincial game laws would be applicable to Indians so long as they were aimed at conserving the supply of game. However, the provincial government's regulatory authority under the Treaty and the NRTA did not extend beyond the realm of conservation. It is the constitutional provisions of para. 12 of the NRTA authorizing provincial regulations which make it unnecessary to consider s. 88 of the Indian Act and the general application of provincial regulations to Indians.

71 The licensing provisions contained in the Wildlife Act are in part, but not wholly, directed towards questions of conservation. At first blush, then, they may seem to form part of the permissible government regulation which can establish the boundaries of the existing right to hunt for food. However, the partial concern with conservation does not automatically lead to the conclusion that s. 26(1) is permissible regulation. It must still be determined whether the manner in which the licensing scheme is administered conflicts with the hunting right provided under Treaty No. 8 as modified by the NRTA.

72 This analysis should take into account the wording of the treaty and the NRTA. I believe this to be appropriate since the object will be to determine first whether there has been a prima facie infringement of the Treaty No. 8 right to hunt as modified by the NRTA and secondly if there is such an infringement whether it can be justified. In essence, we are dealing with a modified treaty right. This, I believe, follows from the principle referred to earlier that treaty rights should only be considered to be modified if a clear intention to do so has been manifested, in this case, by the NRTA. Further, the solemn promises made in the treaty should be altered or modified as little as possible. The NRTA clearly intended to modify the right to hunt. It did so by eliminating the right to hunt commercially and by preserving and extending the right to hunt for food. The Treaty right thus modified pertains to the right to hunt for food which prior to the Treaty was an aboriginal right.

73 For reasons that I will amplify later, it seems logical and appropriate to apply the recently formulated Sparrow test in these circumstances. I would add that it can properly be inferred that the concept of reasonableness forms an integral part of the Sparrow test. It follows that this concept should be taken into account in the consideration of the justification of an infringement. As a general rule the criteria set out in Sparrow, supra, should be applied. However, the reasons in Sparrow, supra, make it clear that the suggested criteria are neither exclusive nor exhaustive. It follows that additional criteria may be helpful and applicable in the particular situation presented.

Conflict Between the Wildlife Act and Rights Under Treaty No. 8

74 It has been recognized that aboriginal and treaty rights are not absolute. The reasons in Sparrow, supra, made it clear that aboriginal rights may be overridden if the government is able to justify the infringement.

75 In Sparrow, supra, certain criteria were set out pertaining to justification at pp. 1111 and following. While that

case dealt with the infringement of aboriginal rights, I am of the view that these criteria should, in most cases, apply equally to the infringement of treaty rights.

76 There is no doubt that aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the native peoples. To paraphrase the words of Judson J. in Calder, supra, at p. 328, they embody the right of native people to continue living as their forefathers lived. Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.

77 This said, there are also significant aspects of similarity between aboriginal and treaty rights. Although treaty rights are the result of mutual agreement, they, like aboriginal rights, may be unilaterally abridged. See Horseman, supra, at p. 936; R. v. Sikyea, [1964] 2 C.C.C. 325 (N.W.T.C.A.), at p. 330, aff'd [1964] S.C.R. 642; and Moosehunter, supra, at p. 293. It follows that limitations on treaty rights, like breaches of aboriginal rights, should be justified.

78 In addition, both aboriginal and treaty rights possess in common a unique, sui generis nature. See Guerin v. The Queen, [1984] 2 S.C.R. 335, at p. 382; Simon, supra, at p. 404. In each case, the honour of the Crown is engaged through its relationship with the native people. As Dickson C.J. and La Forest J. stated at p. 1110 in Sparrow, supra:

> By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. [Emphasis added.]

79 The wording of s. 35(1) of the Constitution Act, 1982 supports a common approach to infringements of aboriginal and treaty rights. It provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". In Sparrow, supra, Dickson C.J. and La Forest J. appeared to acknowledge the need for justification in the treaty context. They said this at pp. 1118-19 in relation to R. v. Eninew (1984), 12 C.C.C. (3d) 365 (Sask. C.A.), a case which considered the effect of the Migratory Birds Convention Act on rights guaranteed under Treaty No. 10:

> As we have pointed out, management and conservation of resources is indeed an important and valid legislative objective. Yet, the fact that the objective is of a "reasonable" nature cannot suffice as constitutional recognition and affirmation of aboriginal rights. Rather, the regulations enforced pursuant to a conservation or management objective may be scrutinized according to the justificatory standard outlined above. [Emphasis added.]

80 This standard of scrutiny requires that the Crown demonstrate that the legislation in question advances important general public objectives in such a manner that it ought to prevail. In R. v. Agawa (1988), 65 O.R. (2d) 505 (C.A.), at p. 524, Blair J.A. recognized the need for a balanced approach to limitations on treaty rights, stating:

> . . . Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the Canadian Charter of Rights and Freedoms which provides that limitation of Charter rights must be justified as reasonable in a free and democratic

society.

81 Dickson C.J. and La Forest J. arrived at a similar conclusion in Sparrow, supra, at pp. 1108-9.

82 In summary, it is clear that a statute or regulation which constitutes a prima facie infringement of aboriginal rights must be justified. In my view, it is equally if not more important to justify prima facie infringements of treaty rights. The rights granted to Indians by treaties usually form an integral part of the consideration for the surrender of their lands. For example, it is clear that the maintenance of as much of their hunting rights as possible was of paramount concern to the Indians who signed Treaty No. 8. This was, in effect, an aboriginal right recognized in a somewhat limited form by the treaty and later modified by the NRTA. To the Indians, it was an essential element of this solemn agreement.

83 It will be remembered that the NRTA modified the Treaty right to hunt. It did so by eliminating the right to hunt commercially but enlarged the geographical areas in which the Indian people might hunt in all seasons. The area was to include all unoccupied Crown land in the province together with any other lands to which the Indians may have a right of access. Lastly, the province was authorized to make laws for conservation. Specifically:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

84 The NRTA only modifies the Treaty No. 8 right. Treaty No. 8 represents a solemn promise of the Crown. For the reasons set out earlier, it can only be modified or altered to the extent that the NRTA clearly intended to modify or alter those rights. The Federal government, as it was empowered to do, unilaterally enacted the NRTA. It is unlikely that it would proceed in that manner today. The manner in which the NRTA was unilaterally enacted strengthens the conclusion that the right to hunt which it provides should be construed in light of the provisions of Treaty No. 8.

85 It follows that any prima facie infringement of the rights guaranteed under Treaty No. 8 or the NRTA must be justified. How should the infringement of a treaty right be justified? Obviously, the challenged limitation must be considered within the context of the treaty itself. Yet, the recognized principles to be considered and applied in justification should generally be those set out in Sparrow, supra. There may well be other factors that should influence the result. The Sparrow decision itself recognized that it was not setting a complete catalogue of factors. Nevertheless, these factors may serve as a rough guide when considering the infringement of treaty rights.

Prima Facie Infringement of the Treaty Right to hunt as modified by the NRTA

86 The licensing provisions of the Wildlife Act address two objectives: public safety and conservation. These objectives, in and of themselves, are not unconstitutional. However, it is evident from the wording of the Act and its regulations that the manner in which the licensing scheme is set up results in a prima facie infringement of the Treaty No.8 right to hunt as modified by the NRTA. The statutory scheme establishes a two-step licensing process. The public safety component is the first one that is engaged.

87 Under s. 15(1)(c) of the Wildlife Act, the Lieutenant Governor in Council may pass regulations which "specify training and testing qualifications required for the obtaining and holding of a licence or permit". The regulations passed pursuant to this section are found in Alta. Reg. 50/87, s. 2(2) which reads as follows:

(2) Subject to the General Wildlife (Ministerial) Regulation, a person is not eligible to obtain or hold a recreational licence unless

(a) prior to the date of his application for a recreational licence, he has

(i) achieved a mark, as determined by the Minister, on an examination approved by the Minister,
(ii) held a licence authorizing recreational hunting in Alberta or elsewhere, or
(iii) passed a test approved by the Minister respecting hunting competency,

and

(b) if his right to hold a recreational licence has been suspended in accordance with the Act or its predecessor, he has passed the examination referred to in clause (a)(i) subsequent to the beginning of his period of suspension.

88 Standing on its own, the requirement that all hunters take gun safety courses and pass hunting competency tests makes eminently good sense. This protects the safety of everyone who hunts, including Indians. It has been held on a number of occasions that aboriginal or treaty rights must be exercised with due concern for public safety. Myran, supra, dealt with two Indians charged with hunting without due regard for the safety of others, contrary to the provisions of the Manitoba Wildlife Act. The accused argued that they were immune from the Act on the basis of their right to hunt for food guaranteed under the Manitoba Natural Resources Act (parallel to the NRTA). Dickson J. (as he then was) for the Court found at pp. 141-42 that:

> I think it is clear from Prince and Myron that an Indian of the Province is free to hunt or trap game in such numbers, at such times of the year, by such means or methods and with such contrivances, as he may wish, provided he is doing so in order to obtain food for his own use and on unoccupied Crown lands or other lands to which he may have a right of access. But that is not to say that he has the right to hunt dangerously and without regard for the safety of other persons in the vicinity. [Emphasis added.]

He went on at p. 142 to state that:

> In my opinion there is no irreconcilable conflict or inconsistency in principle between the right to hunt for food assured under para. 13 of the Memorandum of Agreement approved under The Manitoba Natural Resources Act and the requirement of s. 10(1) of The Wildlife Act that such right be exercised in a manner so as not to endanger the lives of others. The first is concerned with conservation of game to secure a continuing supply of food for the Indians of the Province and protect the right of the Indians to hunt for food at all seasons of the year; the second is concerned with risk of death or serious injury omnipresent when hunters fail to have due regard for the presence of others in the vicinity. [Emphasis added.]

89 That decision was subsequently affirmed by this Court in Sutherland, supra, and Moosehunter, supra. See to the same effect R. v. Napoleon, [1986] 1 C.N.L.R. 86 (B.C.C.A.) and R. v. Fox, [1994] 3 C.N.L.R. 132 (Ont. C.A.). Accordingly, it can be seen that reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food. Similarly these regulations do not infringe the hunting rights guaranteed by Treaty No. 8 as

modified by the NRTA.

90 While the general safety component of the licensing provisions may not constitute a prima facie infringement, the conservation component appears to present just such an infringement. Provincial regulations for conservation purposes are authorized pursuant to the provisions of the NRTA. However, the routine imposition upon Indians of the specific limitations that appear on the face of the hunting licence may not be permissible if they erode an important aspect of the Indian hunting rights. This Court has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty. I would add that a Treaty as amended by the NRTA should be considered in the same manner. Horseman, supra, clearly indicated that such restrictions conflicted with the treaty right. Moreover, in Simon, supra, this appears at p. 413:

> The section clearly places seasonal limitations and licensing requirements, for the purposes of wildlife conservation, on the right to possess a rifle and ammunition for the purposes of hunting. The restrictions imposed in this case conflict, therefore, with the appellant's right to possess a firearm and ammunition in order to exercise his free liberty to hunt over the lands covered by the Treaty. As noted, it is clear that under s. 88 of the Indian Act provincial legislation cannot restrict native treaty rights. If conflict arises, the terms of the treaty prevail.

91 The Simon case dealt with Provincial regulations which the government attempted to justify under s. 88 of the Indian Act. By contrast, in this case, para. 12 of the NRTA specifically provides that the provincial government may make regulations for conservation purposes, which affect the Treaty rights to hunt. Accordingly, Provincial regulations pertaining to conservation will be valid so long as they are not clearly unreasonable in their application to aboriginal people.

92 Under the present licensing scheme, an Indian who has successfully passed the approved gun safety and hunting competency courses would not be able to exercise the right to hunt without being in breach of the conservation restrictions imposed with respect to the hunting method, the kind and numbers of game, the season and the permissible hunting area, all of which appear on the face of the licence. Moreover, while the Minister may determine how many licences will be made available and what class of licence these will be, no provisions currently exist for "hunting for food" licences.

93 At present, only sport and commercial hunting are licensed. It is true that the regulations do provide for a subsistence hunting licence. See Alta. Reg. 50/87, s. 25; Alta. Reg. 95/87, s. 7. However, its provisions are so minimal and so restricted that it could never be considered a licence to hunt for food as that term is used in Treaty No. 8 and as it is understood by the Indians. Accordingly, there is no provision for a licence which does not contain the facial restrictions set out earlier. Finally, there is no provision which would guarantee to Indians preferential access to the limited number of licences, nor is there a provision that would exempt them from the licence fee. As a result, Indians, like all other Albertans, would have to apply for a hunting licence from the same limited pool of licences. Further, if they were fortunate enough to be issued a licence, they would have to pay a licensing fee, effectively paying for the privilege of exercising a treaty right. This is clearly in conflict with both the Treaty and NRTA provisions.

94 The present licensing system denies to holders of treaty rights as modified by the NRTA the very means of exercising those rights. Limitations of this nature are in direct conflict with the treaty right. Therefore, it must be concluded that s. 26(1) of the Wildlife Act conflicts with the hunting right set out in Treaty No. 8 as modified by the NRTA.

95 Accordingly, it is my conclusion that the appellant, Mr. Ominayak, has established the existence of a prima facie breach of his treaty right. It now falls to the government to justify that infringement.

Justification

96 In my view justification of provincial regulations enacted pursuant to the NRTA should meet the same test for

justification of treaty rights that was set out in Sparrow. The reason for this is obvious. The effect of para. 12 of the NRTA is to place the Provincial government in exactly the same position which the Federal Crown formerly occupied. Thus the Provincial government has the same duty not to infringe unjustifiably the hunting right provided by Treaty No. 8 as modified by the NRTA. Paragraph 12 of the NRTA provides that the province may make laws for a conservation purpose, subject to the Indian right to hunt and fish for food. Accordingly, there is a need for a means to assess which conservation laws will if they infringe that right, nevertheless be justifiable. The Sparrow analysis provides a reasonable, flexible and current method of assessing conservation regulations and enactments.

97 In Sparrow, at p. 1113, it was held that in considering whether an infringement of aboriginal or treaty rights could be justified, the following questions should be addressed sequentially:

> First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. [Emphasis added.]

At page 1114, the next step was set out in this way:

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from Taylor and Williams and Guerin, supra. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified. [Emphasis added.]

Finally, at p. 1119, it was noted that further questions might also arise depending on the circumstances of the inquiry:

> These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.
>
> We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians. [Emphasis added.]

98 In the present case, the government has not led any evidence with respect to justification. In the absence of such evidence, it is not open to this Court to supply its own justification. Section 26(1) of the Wildlife Act constitutes a prima facie infringement of the appellant Mr. Ominayak's treaty right to hunt. Yet, the issue of conservation is of such importance that a new trial must be ordered so that the question of justification may be addressed.

Conclusion

99 The constitutional question posed before this Court was:

> If Treaty 8 confirmed to the Indians of the Treaty 8 Territory the right to hunt throughout the tract surrendered, does the right continue to exist or was it extinguished and replaced by para. 12 of the

> Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, 20-21 George V, c. 26 (U.K.)), and if the right continues to exist, could that right be exercised on the lands in question and, if so, was the right impermissibly infringed upon by s. 26(1) or s. 27(1) of the Wildlife Act, S.A. 1984, c. W-9.1, given Treaty 8 and s. 35(1) of the Constitution Act, 1982?

100 It is evident from these reasons that the constitutional question should be answered as follows. The hunting rights confirmed by Treaty No. 8 were modified by para. 12 of the NRTA to the extent indicated in these reasons.

Paragraph 12 of the NRTA provided for a continuing right to hunt for food on unoccupied land.

101 Mr. Badger and Mr. Kiyawasew were hunting on occupied land to which they had no right of access under Treaty No. 8 or the NRTA. Accordingly, ss. 26(1) and 27(1) of the Wildlife Act do not infringe their constitutional right to hunt for food.

102 However, Mr. Ominayak was exercising his constitutional right on land which was unoccupied for the purposes of this case. Section 26(1) of the Wildlife Act constitutes a prima facie infringement of his Treaty right to hunt for food. As a result of their conclusions, the issue of justification was not considered by the courts below. Therefore, in his case, a new trial must be ordered so that the issue of justification may be addressed.

Disposition

103 The appeals of Mr. Badger and Mr. Kiyawasew are dismissed.

104 The appeal of Mr. Ominayak is allowed and a new trial directed so that the issue of the justification of the infringement created by s. 26(1) of the Wildlife Act and any regulations passed pursuant to that section may be addressed.