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The Trapping Rights of Aboriginal Peoples in Northern Alberta

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Executive Summary

This paper investigates the legal nature of the trapping rights of treaty beneficiaries in Alberta. The focus of the analysis is on Treaty 8, which was signed in 1899. The fundamental questions this report seeks to answer are the following: what remains of the right to trap recognized by Treaty 8? how has the right evolved over time? how is it viewed by Aboriginal peoples, by government? and how is it affected by resource development?

The report is in six sections. Section 1 is a brief introduction to the study. Section 2 provides some historical background on the evolution of trapping from the fur trade to the present day, the circumstances surrounding the negotiation of Treaty 8, the entering into of the Natural Resources Transfer Agreement (NRTA) and the increasing regulation and erosion of trapping rights over time.

Section 3 reviews different interpretations of the right to trap by the courts, Aboriginal peoples, government and various experts, focusing first on the treaty right, then on the modifications affected by the NRTA. This review illustrates the sharp differences that exist between those various parties, in particular with respect to the impact of the NRTA on the original treaty right to trap.

Section 4 examines how the right to trap is regulated under provincial wildlife legislation, and compares the limited nature of the right to trap conferred under the registered trapline system with the perception of that right still held by Aboriginal peoples.

Section 5 turns to the limitation of the right to trap resulting from land and resource development. It reviews briefly the entitlements of registered trappers to notification and compensation under oil and gas and forestry legislation, and questions the government of Alberta's lack of acknowledgement and protection of the treaty rights to trap in resource legislation.

Section 6 suggests a more generous interpretation and a redefinition of the treaty right to trap as a right to sustain a moderate livelihood, based on historical evidence and recent Supreme Court decisions. Finally, Section 7 outlines the need for negotiations involving both levels of government and First Nations communities and organizations, in order to address the issue of the interpretation and modern implementation of the rights recognized by the treaties.

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> The special rights of the Indians to hunt, trap and fish have been a continuing source of misunderstanding and conflict in the region now comprising the prairie provinces at least since the time the treaties were signed.[1]
>
> The sources of the under-development, poverty, disease and dependence within our First Nations can be found in the disregard and violation of our treaties and of Canada's own constitution. Likewise, the seeds of the solutions to the fundamental problems and contradictions can be found in the honouring and faithful implementation of these sacred treaty rights and obligations.
>
> …
>
> The consistent message emerging from the testimony of treaty nations is that the treaties are sacred and spiritual covenants that cannot be repudiated, any more than the cultures and identities of treaty nations can be repudiated.[2]

1.0. Introduction

Between 1871 and 1909, the Government of the Dominion of Canada concluded ten treaties in the region extending between the Great Lakes to the east and the Rocky Mountains to the west. An additional treaty, Treaty 11, was signed in 1921 in an area encompassed within the present-day Northwest Territories. Those treaties are known as the numbered treaties. The three Alberta numbered treaties include Treaty 6 (1876 and 1899), which stretches across the central part of Alberta and Saskatchewan, Treaty 7 (1877), which covers the southern part of Alberta, and Treaty 8 (1899 and 1900), which encompasses most of northern Alberta, northeastern British Columbia, the northwestern corner of Saskatchewan and a portion of the Northwest Territories south of Great Slave Lake (see attached map).[3] Alberta's numbered treaties are similar in many respects. In particular, they all contain the identical "land surrender clause", in return for various promises made by the Crown with respect to the setting aside of reserve lands, the payment of annuities, education, the provision of ammunition, tools, implements, etc.[4]

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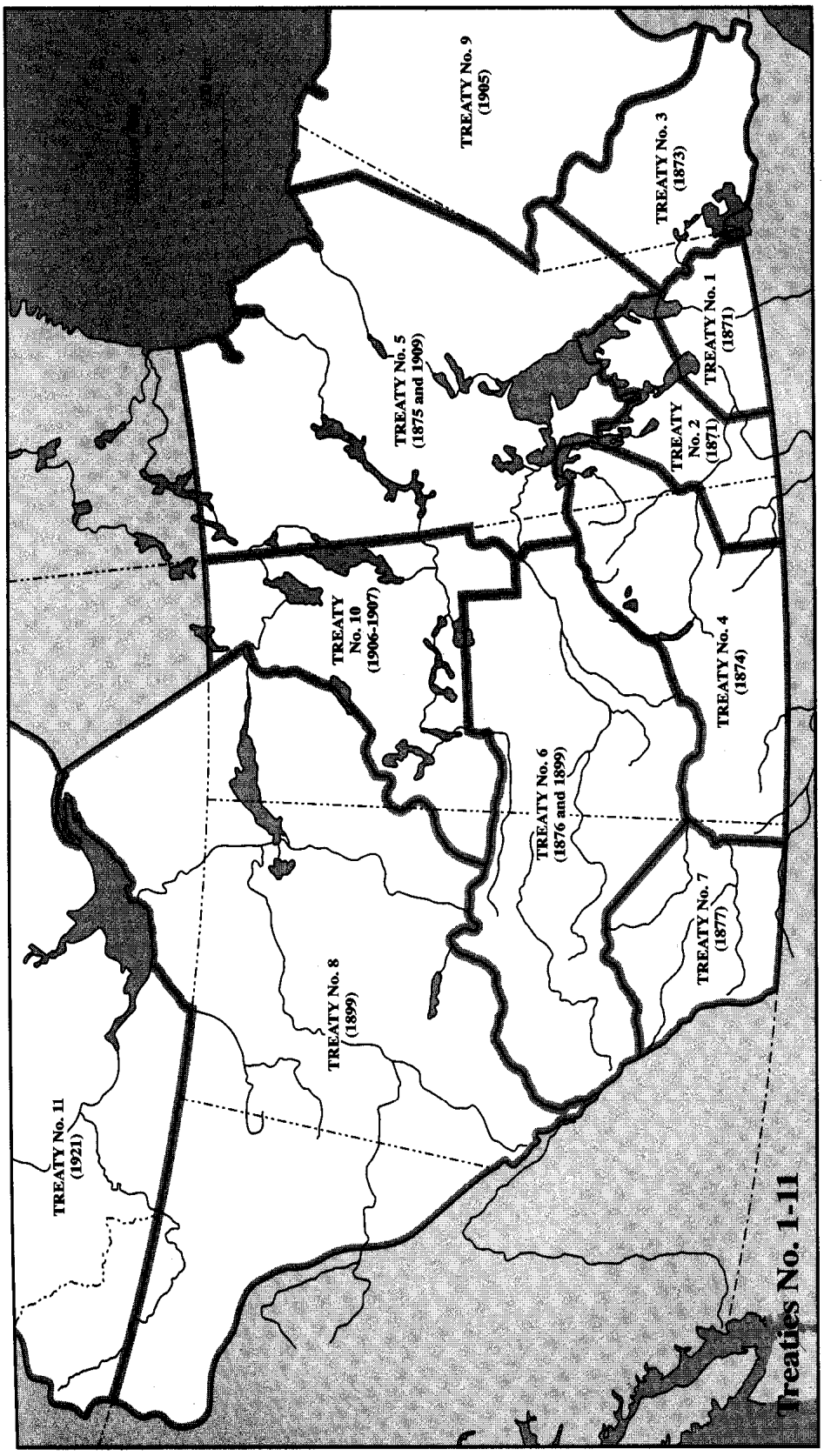
[1]Kent McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatchewan: University of Saskatchewan Native Law Centre, 1983) at 1.

[2]Royal Commission on Aboriginal Peoples, "Volume 2(1): Restructuring the Relationship" in *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) [hereinafter "RCAP Report] at 50 and 53.

[3]Map of Treaties No. 1-11. Source: Richard T. Price, ed., *The Spirit of the Alberta Indian Treaties*, 3rd ed. (Edmonton: The University of Alberta Press, 1999).

[4]The "land surrender" clause reads as follows: […] the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits […] *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, etc*. (Ottawa: Queen's Printer, 1966).



SOURCES: Based on D.G. Kerr, *Historical Atlas of Canada*, Third Revised Edition (Don Mills: Nelson, 1975), p. 57; O.P. Dickason, *Canada's First Nations* (Toronto: McClelland and Stewart, 1992), p. 274; Charles Mair, *Through the Mackenzie Basin* (Toronto: W. Briggs, 1908), op. p. 14; and Alberta Aboriginal Affairs, Map of "Indian Reserves, 1996."

A critical clause in the treaties was the written promise made to the Indian signatories that they would retain their rights to harvest wildlife on their traditional lands. The treaties vary somewhat in the wording of that clause. Treaty 6 protects the Indians' right "to pursue their avocations of hunting and fishing throughout the tract surrendered", while Treaty 7 only refers to their "vocations of hunting" and Treaty 8 provides broader protection to the Indians' "vocations of hunting, trapping and fishing", a recognition of the fact that the Aboriginal peoples living in what were then the Northwest Territories of Canada wished to maintain their traditional economic activities and were much less likely to settle on reserves than those living in the prairies.[5]

Subsequent interpretation of the treaties by governments and by the courts resulted in the steady regulation and limitation of the exercise of the wildlife harvesting rights recognized by the treaties. As noted by the Royal Commission on Aboriginal Peoples (RCAP):

> Aboriginal people that signed treaties in the nineteenth and twentieth centuries may have believed that their rights with respect to harvesting – their customary laws and practices – were to be protected. What they did not know, nor could they have anticipated, was that the treaty commissioners had brought with them a whole complex of societal attitudes toward fish and wildlife and how those resources were to be managed.[6]

The struggle over wildlife rights between Aboriginal peoples and both levels of government has lasted for over a century and is still ongoing. To illustrate that point, Brian Calliou cites the number of cases arising from the enforcement of hunting and fishing regulations against Aboriginal peoples.[7] First Nations firmly believe that they have special rights to wildlife based on their historical and constitutional relationship with the Canadian government. They view the treaties they entered into as sacred and solemn agreements which were to protect their rights to a traditional livelihood.

This paper examines the legal nature of the trapping rights of treaty beneficiaries in Alberta and what survives of these rights a century later. The focus of the analysis is on Treaty 8, the only one of the Alberta treaties that specifically mentions trapping along with hunting and fishing in the so-called "hunting clause" of the numbered treaties. Further, the analysis is restricted to the "treaty" rights of Aboriginal peoples in northern

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[5]Richard Daniel, "The Spirit and Terms of Treaty 8" in Price, *supra* note 3 at 80; see also Robert Metcs & Christopher G. Devlin, "Land Entitlement under Treaty 8" (April 2004) 41:4 Alta. L. Rev. at 972-978.

[6]RCAP Report, *supra* note 2 at 497.

[7]Brian Louis Calliou, *Losing the Game: Wildlife Conservation and the Regulation of First Nations Hunting in Alberta, 1880-1930* (LL.M., University of Alberta, 2000), chapter 1. The Canadian Native Law Reporter (C.N.L.R.) reports 80 hunting cases and 73 fishing cases between 1990 and 1999, 11 of which were heard by the Supreme Court of Canada. The author further notes that many cases in the lower courts are not reported.

Alberta. It does not address the situation of those First Nations who did not sign or adhere to Treaty 8 nor the situation of the Métis.[8] Treaty rights are those that are contained in an agreement between the Crown and Aboriginal peoples. In that respect, they differ from Aboriginal rights which are inherent and exist regardless of formal Crown recognition. A treaty may recognize and guarantee pre-existing Aboriginal rights, such as hunting and fishing rights. As stated by Brian Slattery, "treaty rights throw a protective mantle over aboriginal rights, providing an extra layer of security".[9]

The fundamental questions this paper seeks to address are the following: is the right to trap recognized by Treaty 8 still intact? has it been modified and to what extent? how does the trapping right issued by the provincial government differ from the treaty right to trap? is the provincial regulation of trapping rights applicable to treaty beneficiaries? how are the trapping rights affected by resource development? can the gap between the views of Aboriginal peoples and those of the provincial government about trapping rights be bridged? in which ways can government respect the treaty promises and accommodate Aboriginal trapping rights while allowing resource development?

The paper is in six parts. To set the context for the legal discussion of the trapping right, Section 2 provides some historical background on the evolution of Aboriginal trapping from the fur trade until the present day, and the circumstances surrounding the negotiation of Treaty 8 and the entering into of the Natural Resources Transfer Agreement (NRTA). Section 3 reviews the different interpretations by the courts, Aboriginal peoples, government and various experts of the treaty right as affected by the NRTA. Sections 4 and 5 focus on the limitations on the treaty right to trap resulting from provincial wildlife legislation as well as from resource development. Section 4 examines direct limitations on the exercise of the right under the provincial *Wildlife Act*, specifically the registered trapline system, and analyzes the nature of the trapping right conferred under that system as well as the Aboriginal concept of the trapline. Section 5 addresses the indirect limitation of the right resulting from land and resource development. Section 6 suggests a more generous interpretation and redefinition of the treaty right to trap, based on Supreme Court decisions and historical evidence. The concluding Section 7 outlines the need for both levels of government to enter into negotiations with political organizations and First Nations communities to reach an agreement on the interpretation of the terms of Treaty 8 and the NRTA, and the

[8]A number of Aboriginal peoples within Treaty 8 never signed the treaty and some are not affiliated with a Band. Further, the bands who have signed treaty land entitlement (TLE) claims since 1960 (e.g., Horse Lake, Mikisew Cree, Loon River, Woodland Cree) have not, with the exception of Horse Lake, adhered to Treaty 8. There are currently three groups of Aboriginal trappers: 1) Treaty 8 beneficiaries; 2) TLE beneficiaries (after 1960) who have not signed Treaty 8; 3) Aboriginal trappers who are not Treaty 8 beneficiaries and have not settled their claim, and therefore never relinquished their Aboriginal rights/title (e.g., the Lubicons).

[9]Brian Slattery, "Making sense of aboriginal and treaty rights" (July 2000) 79:2 Can. Bar Rev. 196 at 210.

protection and accommodation of Aboriginal trapping rights in the provincial legislative scheme pertaining to wildlife conservation and resource development.

2.0. Some Historical Background

2.1. Importance of Wildlife for First Nations and Relationship Between Man and Animal

Wildlife has always been of primary importance to First Nations people, as a source of food, to provide clothing, shelter and fulfill many other needs, as well as for its cultural and spiritual significance. Prior to the arrival of the Europeans, the Indian peoples inhabiting the prairie region of what is now Canada depended entirely on game, fish and wild plants for their livelihood. Hunting, fishing and gathering were an integral part of their daily lives, and affected every aspect of their culture, including their religion.[10]

Various authors have described the spiritual relationship existing between the hunter and the animals hunted. For instance, Martin Calvin discusses the beliefs that animals and humans were once very much alike, and Aboriginal peoples still feel a spiritual kinship. He describes the interaction between subarctic Indians and the wildlife upon which they depend as one of sympathy and mutual obligation. The animal is not killed unless the hunter obtains its consent in the spiritual world, and the animal is willing to surrender itself to the hunter. The relationship between a hunter and the animals gives meaning to the hunter's life, and a sense of identity.[11] Shelley Turner describes the mutual obligation existing between man and Nature as follows: "life forms such as animals, fish, birds and plants were to yield themselves up to the Indian for his needs", and for his part "the Indian knew that he must never abuse Nature's bounty by taking more than he needed for the present".[12] This relationship was predicated on mutual esteem and necessitated strict adherence to hunting and fishing taboos and rituals.

Harold McGee cites an observation about the Dené people which, in his opinion, holds true for the Subarctic and probably for much of North America: "if one were to select the single most consistent feature of aboriginal northern Athapascan magico-religious belief systems, it would be the significant reciprocal relationship that existed

[10]McNeil, *supra* note 1 at 1.

[11]Martin Calvin, "Subarctic Indians and Wildlife" in C. Vecsey & R.W. Venables, eds., *American Indian Environments: Ecological Issues in Native American History* (Syracuse, N.Y.: Syracuse University Press, 1980) at 38-45.

[12]Shelley D. Turner, "The Native American's right to hunt and fish: an overview of the Aboriginal spiritual and mystical belief system, the effect of European contact and the continuing fight to observe a way of life" (1989) 19 N.M.L. Rev. 377.

between humans and animals on which they depended for their livelihood".[13] He also notes that the peoples of the southern Yukon believed that "no animal should be hunted exclusively for its pelt: if use was not made of the meat, then all would suffer".[14] With respect to the beaver, the most significant species in the fur trade, he suggests that the flesh, fat and teeth of the beaver were as important to Aboriginal peoples as was the pelt.[15]

European contact leading to the spread of infections and diseases, as well as the fur trade and the influence of the missionaries profoundly affected this Indian-land relationship.[16]

2.2. Involvement of Indians in the Fur Trade

Excellent historical accounts of the evolution of the fur trade in North America, and of the critical role played by First Nations in that trade, are provided by Arthur Ray.[17] From the early beginnings of the trade in the 16th century, Indians were involved as producers, traders, or middlemen and were key to its development. In the boreal forest, the fur trade began in the late 17th and early 18th century and continued to be a major industry throughout the 19th century. The first fur trade post in what is now northern Alberta was established in Fort Chipewyan in 1778.[18] The superior quality of the beaver pelts that were found in the Athabasca country explains why the two competing trading companies, the North West Company and the Hudson's Bay Company, fought to control the trade in the region until their merger in 1821. The Hudson's Bay Company archives for the decade of the 1890s demonstrate the paramount importance of the Treaty 8 area as a fur-producing region in Canada.[19] As in the 18th century, the two most important species

[13]Harold McGee, "The use of furbearers by Native North Americans after 1500" in Milan Novak, *et al.*, eds., *Wild Furbearer Management and Conservation in North America* (Toronto: Ontario Ministry of Natural Resources, 1987) at 16.

[14]*Ibid.*

[15]*Ibid.* at 17.

[16]Turner, *supra* note 12.

[17]See Arthur J. Ray, *Indians in the Fur Trade* (Toronto: University of Toronto Press, 1974); *The Canadian Fur Trade in the Industrial Age* (Toronto: University of Toronto Press, 1990); "The Fur Trade in North America: an Overview from a Historical Geographical Perspective" in Novak, *et al.*, *supra* note 13 at 21; "Commentary on the Economic History of the Treaty 8 Area" (1995) 10:2 Native Studies Review pp. 160-195.

[18]Footprints on the Land: Tracing the Path of the Athabasca Chipewyan First Nation (Fort Chipewyan: Athabasca Chipewyan First Nation, 2003) at 40.

[19]Ray, "Commentary on the Economic History of the Treaty 8 Area", *supra* note 17 at 175: "… at the turn of the century the Treaty 8 area was the most important fur-producing region for the Hudson's Bay Company, accounting for 12 percent of the total value of its Canadian collection."

were marten and beaver, although the former declined over the period while the latter increased.

Over time the fur trade transformed local Indian economies. The trading of furs slowly increased in importance relative to the provision trade (i.e., securing provisions of fresh and dried meats to the traders) during the 19th century. And as the traditional hunting and trapping technologies were replaced by imported technologies from Euro-Canadians, commercial hunting and trapping became a necessity for Aboriginal peoples:

> Thus, the Indians depended on their commercial hunting for their survival in that it provided them the means to acquire the tools that had become essential. For this reason, distinguishing between "subsistence" and "commercial" hunting is not very useful. Without arms, ammunition, net lines, fish hooks, etc., the Indians would not have been able to provide for their own needs by the end of the 19th century.[20]

At the time of treaty making, therefore, the "usual vocation" of the Indians involved both commercial and subsistence hunting and trapping, which "provided the Indians with their primary livelihood down to at least the onset of depression."[21] As noted by Richard Daniel, despite the Indians' increasing dependence on trade goods and the services of the trading companies, "for most of them, continued reliance on traditional pursuits was a necessary supplement to the fur trade economy."[22]

Important changes took place in the 1890s as a result of the appearance of non-Aboriginal trappers, who began to enter previously inaccessible regions to exploit the rich fur resources. These are described further in Section 2.6. However, at the time of treaty negotiations, Aboriginal peoples were deeply engaged in hunting and trapping.

2.3. Negotiating the Treaties: Importance of the Provisions for the Continuation of Wildlife Harvesting Rights

Treaties with the Indian tribes were concluded by the Dominion of Canada to facilitate settlement and resource exploitation across Canada as the need arose.[23] In the case of Treaty 8, reports of the existence of great mineral wealth in the Peace, Athabasca and MacKenzie regions and the Klondike gold rush were determining factors in the Dominion's decision to enter into a treaty with the Indians of the Northwest Territories. Conflicts between the Indians and the gold seekers and white trappers had occurred in

[20] *Ibid.* at 179.

[21] Ray, "Commentary on the Economic History of the Treaty 8 Area", *supra* note 17 at 180.

[22] Daniel, *supra* note 5 at 52.

[23] John Taylor, "Two Views on the Meaning of Treaties Six and Seven" in Price, *supra* note 3 at 12.

1897 and 1898, and a settlement with the Indians was seen as advisable before the influx of large numbers of miners and settlers led to more problems.[24]

Treaty 8 negotiations were conducted quickly and adhesions obtained from various bands in June and July 1899, with new adhesions secured the following summer of 1900. As noted by the Treaty Commissioners in their official report to the Minister of the Interior in September 1899, the greatest fear expressed by the Indians was that by taking treaty, they may lose their hunting, fishing and trapping rights and be confined to reserves. It was only after receiving solemn assurances, from the Treaty Commissioners and missionaries helping in the negotiations, that they would be free to pursue their way of life, that the Indians agreed to sign the treaty.

> 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.[25]

Bishop Breynat, who acted as an interpreter for the Treaty Commissioners at Fond du Lac and was influential in convincing the reluctant leaders of the Chipewyan to accept the treaty, asserts that the Indians would never have consented to sign the treaty "if they had not received the solemn guarantee, given in the name of the Crown, not to be molested in their habits of life as woodsmen, living through hunting and fishing, and that they would be protected against competition by the Whites and their methods of exterminating fish and game".[26]

How did these solemn promises made by the Treaty Commissioners find expression in the written text of the treaty? The relevant clause in Treaty 8 is worded as follows:

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[24]René Fumoleau, *As long as this land shall last: a history of Treaty 8 and Treaty 11, 1870-1939* (Calgary: University of Calgary Press, 2004) (originally published by McClelland & Stewart, 1975) at 36-41; Daniel, *supra* note 5 at 58-66.

[25]David Laird, J. Ross & J. McKenna, "Report of Commissioners for Treaty No. 8" in *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc*. (Ottawa: Queen's Printer, 1966).

[26]Fumoleau, *supra* note 24, Appendix XI, "Canada's Blackest Blot", by Bishop Breynat, at 504-505. Father Lacombe, another Roman Catholic missionary who accompanied the Treaty 8 Commission and was influential in convincing the Indians to take treaty, is quoted as saying: "Your forest and river life will not be changed by the treaty, and you will have your annuities, as well, year by year, as long as the sun shines and the earth remains. Therefore I finish my speaking by saying, Accept": Daniel, *supra* note 5 at 79.

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the 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.

It appears that during the treaty negotiations, there was little discussion of the Crown's authority to regulate hunting, trapping and fishing activities. The *Unorganized Territories Game Preservation Act* of 1894 had been enacted by the Dominion of Canada a few years before Treaty 8 was signed, but its purpose was to protect game from over-exploitation by fur traders. As to the promises of protection against competition by white trappers, which were of great importance to the Indians signatories, they proved to be hollow. Government made some effort to restrict the granting of permits for hunting to newcomers to protect the Indians from white competition. But these were insufficient and as discussed further in Section 2.6, the wildlife harvesting rights promised during the treaty negotiations were steadily eroded during the twentieth century.

2.4. Game Regulation for Conservation: Protecting the Sportsmen Interests

Starting in the mid-19th century, government began to feel the need to regulate fisheries and wildlife. The Report of the RCAP attributes the development of government regulations of hunting and fishing and their application to Aboriginal peoples to two principal causes: 1) increasing regulation of inland fisheries on the east coast in the public interest; and 2) the rise of the scientific conservation movement, which was influenced by the disappearance of the buffalo on the prairies. The conservation movement, which gathered momentum toward the late-19th century, was triggered by sport hunters' concern over the preservation of fish and game. As stated by the RCAP, "the assault on North American wildlife in the late nineteenth century is a fact", but "there were differing views about the primary causes of species depletion".[27] Some attributed it to unrestricted hunting and the destructive practices of Aboriginal peoples, while others felt that environmental damage and pressure from non-Aboriginal hunters and fishermen were responsible for the decline. In Arthur Ray's opinion, the use of poisoned baits by white trappers in the 1890s and its impact on the fur-bearing animal population raised concerns about conservation and served as a catalyst for the enactment of conservation legislation by government. Ray notes that "one of the reasons that the *Northwest Game Act* of 1894 had been enacted was to preserve the resource base of the Native economies outside of organized territories".[28]

[27]RCAP Report, *supra* note 2 at 500.

[28]Ray, "Commentary on the Economic History of the Treaty 8 Area", *supra* note 17 at 173.

In his analysis of the history of regulation of First Nations hunters in Alberta from the late 19th to the early twentieth century, Brian Calliou highlights the importance of hunting for both Aboriginal peoples and sport hunters, resulting in conflict over scarce wildlife resources.[29] He suggests that sportsmen values won out over the values placed on wildlife by First Nations, and that laws and policies with respect to hunting came to reflect the sportsmen values and increasingly restricted the exercise of First Nations treaty rights and their traditional livelihoods. John Donihee also notes that the wildlife management paradigm that developed in the provinces and territories "evolved from English roots, which focused on game management and favoured sportsmen's interests."[30]

After the creation of the provinces of Alberta and Saskatchewan in 1905, Parliament enacted a new *Game Act* that recognized the jurisdiction of the two new provinces to legislate wildlife.[31] The Alberta government passed its own *Game Act* in 1907.[32] Initially, the passage of game laws did not significantly affect the treaty rights of Aboriginal peoples as game protection acts were applied "rather loosely" to First Nation hunters in Northern Alberta.[33] Increasingly however, legislation became more restrictive with complete bans on the hunting or trapping of certain species, limited hunting seasons and requirements for licences imposed on Aboriginal hunters.[34]

Despite the uncertainty and conflicting views held by government officials concerning the issue of jurisdiction over Indian hunting and trapping, provincial and territorial governments' efforts to apply game laws to Aboriginal peoples were largely successful and not opposed by the Dominion government. Brian Calliou relates how the Dominion government was persuaded to amend the *Indian Act* through the pressure of provincial and territorial governments and the sportsmen's lobby.[35] In 1890, an amendment to the Act had allowed the Superintendent General of Indian Affairs to declare that game laws in force in Manitoba and the Northwest Territories could apply to Indians.[36] In 1906, this authority was extended to the newly created provinces of

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[29]Calliou, *supra* note 7.

[30]John Donihee, *Returning Wildlife Management to Local Control in the Northwest Territories* (LL.M., University of Calgary, December 2002) at 15.

[31]*An Act for the Preservation of Game in the Northwest Territories*, S.C. 1906, c. 151.

[32]*An Act for the Protection of Game ("The Game Act")*, S.A. 1907, c. 14.

[33]Calliou, *supra* note 7 at 19. Nevertheless, in 1911 the closure of beaver hunting for two years led to numerous complaints by the beneficiaries of Treaty 8: see Fumoleau, *supra* note 26 at 150.

[34]Richard T. Price & Shirleen Smith, "Treaty 8 and Traditional Livelihoods: Historical and Contemporary Perspectives" (1993-1994) 9:1 Native Studies Review at 63-64.

[35]Calliou, *supra* note 7 at 94 and 118-147.

[36]*Indian Act*, S.C. 1890, c. 29, s. 10.

Saskatchewan and Alberta. The Department of Indian Affairs justified the application of game laws to Aboriginal peoples by arguing that measures protective of game and fish were in their own interest.[37] Nevertheless, as discussed further in Section 3.3.2, the Department was clearly concerned with protecting the subsistence rights of both treaty and non-treaty Indians.

Kent McNeil has analyzed the various court decisions that have dealt with the issue of federal/provincial jurisdiction over Indian hunting, trapping and fishing in the prairie provinces prior to 1930, and concluded that federal jurisdiction was deemed to be exclusive on reserves, and concurrent with provincial jurisdiction over game generally off reserves.[38] The1930 *Natural Resources Transfer Agreement* confirmed the delegation of federal powers to regulate Indian hunting, trapping and fishing to the province of Alberta.

2.5. The Transfer of Lands and Resources by the Dominion of Canada to the Province of Alberta: Natural Resources Transfer Agreement of 1930 and the "Indian Hunting Right" Clause

In 1930, the Dominion of Canada entered into a bilateral agreement with the province of Alberta which deeply affected the treaty relationship existing between the Crown and the Aboriginal peoples.[39] The *Natural Resources Transfer Agreement* (NRTA) transferred control and ownership of Crown lands and natural resources to the province of Alberta. This unilateral transfer took place without the involvement and the consent of the Indian signatories of the three numbered treaties in the province.

Two provisions of the NRTA qualify provincial rights of ownership and impose limitations on provincial legislative power respecting provincial property. Paragraph 1 effects the transfer of the interest of the Crown in lands, mines and minerals generally to the province, "subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same". The wording of this provision is almost identical to that of section 109 of the *Constitution Act, 1867*. Do land-based treaty rights such as hunting and trapping rights constitute "interests other than that of the Crown" in the lands transferred? In his discussion of the *St. Catherine's Milling Co.'s* case, in which the

[37]Calliou, *supra* note 7 at 95, 124.

[38]McNeil, *supra* note 1 at 17. In his view, "it was probably within the constitutional power of the provinces to restrict these rights, at least off reserves": at 21. See also Nigel Bankes' discussion of provincial regulation of aboriginal hunting, trapping and fishing rights in Peter J. Usher & N.D. Bankes, *Property, The basis of Inuit hunting rights – A new approach* (Ottawa: Inuit Committee on National Issues, 1986) at 53-57.

[39]The Alberta *Natural Resources Transfer Agreement* is a Schedule to the *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 25. The agreement was enacted provincially by *The Alberta Natural Resources Act*, S.A. 1930, c. 21.

nature of Indian title was discussed in the context of lands surrendered to the government of Canada under Treaty No. 3, Nigel Bankes states that "Lord Watson clearly contemplated that these remaining interests [the privilege of hunting and fishing mentioned in the treaty] amounted to an encumbrance on title: and presumably these interests continued to be an 'interest other than that of the province', within the meaning of section 109."[40] Constitutional expert Gerard La Forest's view is that "it can certainly be argued that the right to hunt and fish is an unsurrendered portion of an usufructuary right of the Indians in lands reserved for them, and consequently that it is a trust or an interest other than that of the provinces in such lands."[41] Paragraph 2 of the NRTA states that the province is bound to "carry out in accordance with terms thereof … every other arrangement whereby any person has become entitled to any interest [in Crown lands] as against the Crown …." Can the Indian treaties be defined as "arrangements" within the meaning of the agreement? The meaning of "arrangement" in the NRTAs has been discussed in a few cases, notably a 1935 decision of the Privy Council concerning the obligation to refund timber dues paid to the Dominion of Canada by homesteaders. Significantly, the Privy Council stated: "The word arrangement is as Parke, B. said in *Manning v. Eastern Counties R. Co.*, (1843), 12 M. & W. 237, at p. 253, a 'very wide and indefinite one'."[42] It is quite conceivable that an Indian treaty such as Treaty 8 could be deemed to be an arrangement between the Dominion of Canada and the Indian signatories, creating obligations in respect of Crown lands which have to be carried out by the province after the transfer.

Paragraph 12 of the NRTA, the so-called "Indian hunting right clause", deals specifically with the hunting, trapping and fishing rights of Aboriginal Peoples and 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 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.

On its face, this clause appears to guarantee the protection of the Indians' right to hunt, trap and fish, and of the very resource (game and fish) upon which they rely for their livelihood. However, as discussed in Section 3, subsequent interpretations of this clause

[40]Usher & Bankes, *supra* note 38 at 53.

[41]Gerard La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 119. While this statement is made in connection with lands reserved to the Indians under the 1763 proclamation, La Forest notes that the Prairie provinces have been held to be subject to Indians rights similar to those provided for under the proclamation 9at 129).

[42]*Reference concerning refunds of dues paid to the Dominion of Canada in respect of timber permits in the Western provinces; A.-G. Man. et al. v. A.-G. Canada*, [1935] 2 D.L.R. 1 at 11.

by the courts and by government have resulted in serious limitations of the original treaty right to trap.

2.6. The Increasing Erosion of Wildlife Harvesting Rights: Impacts on Aboriginal Peoples

A progressive erosion of Aboriginal and treaty rights to hunt, trap and fish occurred from the early part of the twentieth century until the constitutional entrenchment of treaty rights in 1982. The imposition on Aboriginal peoples of a wildlife management paradigm focusing on game management gradually displaced the Aboriginal community-based wildlife management paradigm.[43] Communal systems of establishing trapping areas and the cooperative rules that Aboriginal trappers had developed were also eroded as a result of the influx of white trappers who ignored these rules.[44] The construction of railways in northern Alberta in the 1910s, and the widespread use of bush planes in the early 1930s, accelerated this invasion. The white trappers introduced the use of poisoned baits and over-exploited the resource, with devastating effects on fur-bearing animal populations and on Aboriginal economies.[45] René Fumoleau describes how the problems arising from unaccustomed game laws and from the competition of white trappers were the subject of annual complaints at treaty time.

> At the signing of Treaty 8, Indians had established protective game laws to safeguard the wildlife of the country from overtrapping. This had been promised to them by the Commissioners. These measures were not enforced, however, allowing white trappers and free traders to plunder the territory's game and fur resources. The game restrictions which necessarily followed were imposed on white and native trappers alike, causing consternation and much hardship for many Indians.[46]

The invasion of white trappers was concomitant with the growing dependency of native trappers on commercial trapping in the 1920s and 1930s, and their loss of control over fur resources as a result of federal and provincial conservation programs. The combined effect of competition by white trappers, depletion of fur and game animal populations and the growing dependence of Aboriginal peoples on commercial trapping and on imported goods led to severe economic hardships for the Aboriginal population.[47] During the

[43]Donihee, *supra* note 30, Chapter 2, at 38.

[44]*Footprints on the Land*, *supra* note 18 at 63 and 68.

[45]Fumoleau, *supra* note 24, Appendix XI, "Canada's Blackest Blot", by Bishop Breynat, at 495: "In fairness, some of these whites made excellent citizens. But too many of them were unscrupulous men whose one idea was to make money. How they made it went unconsidered. They brought whiskey and taught the Indians how to brew. Some of them turned trapping "wholesalers". They spread poisoned bait to kill the furbearing animals. They trapped the country "clean" of game."

[46]*Ibid.* at 150.

[47]Ray, *The Canadian Fur Trade*, *supra* note 17 at 199-200.

1920s and 1930s, incomes earned by Aboriginal trappers fell short of their requirements, and they had to rely increasingly on economic assistance.[48] Arthur Ray attributes the poor performance of Aboriginal trappers in the 1920s, at a time when fur prices were high, to their displacement from their lands by growing numbers of whites, sometimes by physical force.[49] René Fumoleau summarizes the situation of Aboriginal trappers in the period between 1922 and 1939 as follows:

> Treaty promises made by the Federal Government were ignored by both the territorial administration and by the provincial government of Saskatchewan and Alberta. Especially serious was the breach of promises to guarantee the Indian his freedom to trap and hunt, and to provide protection from the encroachment of white trappers. These promises were broken, forgotten, and finally disavowed. The game laws were often in direct violation of Indian rights, and caused hardships unequalled in Indian history. The Indians depended on trapping for 95 per cent of their income and on hunting and fishing for their food. When these activities were threatened and restricted, it meant economic disaster for native people.[50]

The RCAP report notes that "the imperatives of provincial and territorial regulation ran head-on into the assumption by Aboriginal peoples that the treaties protected their rights to trap".[51] This occurred across Canada. Despite asserting their treaty rights to trap, Aboriginal trappers were arrested, jailed or fined and their furs confiscated under provincial regulations. The RCAP report relates the efforts of the Hudson's Bay Company to protect the treaty rights of Aboriginal trappers before the courts, and the fruitless attempts of the Department of Indian Affairs to secure the cooperation of provincial and territorial officials in protecting Aboriginal trapping from competition by white trappers.[52] Starting in 1923, the Department of Indian Affairs sought over a number of years to establish exclusive game and trapping preserves for Indian people. But negotiations failed because provincial governments insisted on restricting Indian hunting and trapping to these preserves.[53] The frustration of Aboriginal peoples over the application of game laws was such that several bands boycotted the Treaty days of 1920

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[48]Ray, *The Canadian Fur Trade*, *supra* note 17 at 202-208: Figure 49 illustrates the changing hunting/trapping income of Aboriginal Peoples in northern Alberta, Saskatchewan and Manitoba and the drastic declines in earnings starting in the early to mid-twenties, with setbacks of 70 to 80 percent.

[49]*Ibid.* at 202-205.

[50]Fumoleau, *supra* note 24 at xxvii.

[51]RCAP Report, *supra* note 2 at 507.

[52]RCAP Report, *ibid.* at 507-513; see also Fumoleau, *supra* note 24 at 317-318.

[53]Robert Irwin, "'A Clear Intention to Effect Such a Modification': The NRTA and Treaty Hunting and Fishing Rights" (2000) 13:2 Native Studies Review at 62. See also Lorraine D. Hoffman-Mercredi & Phillip R. Coutu, *Inkonze, the Stones of Traditional Knowledge: a History of Northeastern Alberta* (Edmonton: Thunderwoman Ethnographics, 1999) at 257, mentioning Chief Jonas Laviolette's requests for the establishment of Indian hunting and trapping preserves in the Fort Chipewyan area in 1922; Price & Smith, *supra* note 34 at 66-67.

in Fort Resolution to protest the regulations.[54] In the end, the requests of Treaty 8 signatories that government honour the promises made during treaty negotiations, notably that the Indians be protected from the exploitive practices of white trappers that decimated fur resources, were ignored.[55]

Not only were the trapping rights increasingly subject to regulation, but as provincial governments assumed the right to establish and regulate traplines, Aboriginal trappers started losing their trapping territories to non-aboriginal trappers.[56] The lack of productivity of the traplines operated by Aboriginal peoples was one of the reasons invoked for awarding traplines to white trappers. In Alberta, a system of trapping licences applicable to all trappers, including Aboriginal peoples, was instituted in 1937 and replaced with a system of registration of traplines and trapping areas in 1941-1942.[57]

The RCAP concludes its review of the steady restriction by government of the hunting and fishing rights of Aboriginal peoples as follows:

> A century of effective prohibition of activities that treaty beneficiaries believed had been guaranteed to them by treaty has had a major impact on government and on society generally. Part of the corporate memory of provincial resource management agencies is that Aboriginal and treaty rights do not exist.[58]

2.7. Continued Importance of Trapping in Northern Communities Today

Despite the limitations on their rights, trapping remains an important activity for Aboriginal peoples in the boreal forest, the region of the traditional fur trade. A report published in the late 1980s, summarizing the major findings of contemporary social research on trapping and trappers, noted:

> Participation in trapping is highest in Northern Canada, particularly among aboriginal peoples. The majority of Northern Canadians likely depend directly or indirectly to some degree on

[54]Fumoleau, *supra* note 24 at 153-159.

[55]*Footprints on the Land*, *supra* note 18 at 63 and 68, quoting passages from a letter sent by Chief Jonas Laviolette to Alberta's Minister of Agriculture in 1938, pleading government to "come to our rescue" and protect them from white trappers' activities which threatened their livelihood.

[56]RCAP Report, *supra* note 2 at 512-513.

[57]*Footprints on the Land*, *supra* note 18 at 67.

[58]RCAP Report, *supra* note 2 at 507.

> subsistence activities, including trapping. Indeed, some native peoples still subsist year-round on the land.[59]

One author reports that in 1991, it was estimated that 20% of Aboriginal adults in Canada were involved in subsistence related activities, including hunting, fishing, trapping, gathering and other activities which provide income in kind, as a means to support themselves and their families.[60] The author notes that the commercial aspect of trapping is inseparable from the subsistence aspect, and that "in addition to the fur income and the replacement and nutritional values of wild meat, economic benefits to Aboriginal peoples accrue from a number of secondary activities such as clothing and craft production". He adds:

> Trapping by Aboriginal peoples, however, involves much more than simply trying to earn some cash to support other subsistence activities; it represents a unique, social, spiritual and cultural relationship with the land and its resources.[61]

Others report that in northern Alberta, "hunting and trapping continue to be an important economic activity for many Native people" and trapping "still provides a substantial supplementary income to many and is an activity compatible with (and often associated with) subsistence food production."[62] A 1997 study of traditional land uses of the Dene Tha' Nation in northwest Alberta reports that there are seventy active trappers in the communities and that trapping is still a preferred way of life for many people.[63] For most Aboriginal trappers, trapping incomes are just one facet of a mixed economy in the North. The mere fact that these incomes are small does not support the argument that trapping is no longer important:

> However, such a conclusion does not consider the value of meat from furbearers as food, the personal use of furs for clothing or handicrafts, or the low cost of living associated with the lifestyles of many trappers. Moreover, it disregards the fact that some aboriginals prefer subsistence lifestyles to the regimentation of wage employment or the emptiness of social assistance, a preference that has immeasurable cultural and social significance.[64]

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[59]Arlen W. Todd & Edward K. Boggess, "Characteristics, Activities, Lifestyles and Attitudes of Trappers in North America" in Novak, *et al.*, *supra* note 13 at 68. The authors note that there are also non-Aboriginal trappers who rely completely on trapping for income.

[60]Richard Maracle, Impacts of the European Union (EU) Regulation 3254/91 on the Aboriginal Peoples of Canada (paper sponsored by Old Masset Village Council of Haida Gwaii, 1995).

[61]*Ibid.*

[62]Michael Asch & Shirleen Smith, "Some Facts and Myths About the Future of the Hunting and Trapping Economy in Alberta's North" in Patricia McCormack & R. Geoffrey Ironside, eds., *The Uncovered Past: Roots of Northern Alberta Societies* (Edmonton: Canadian Circumpolar Institute, University of Alberta, 1993) at 153.

[63]The Dene Tha' Nation, Dene Tha' Traditional Land Use and Occupancy Study (1997) at 64 and 19.

[64]Todd & Boggess, *supra* note 59 at 68.

The authors note that "trapping and associated hunting activity put a large amount of food on the table" and cite some studies that quantify the dietary role played by fur bearers themselves in country (subsistence) foods. In their view, while commercial trapping appears to be on the decline in the North, subsistence trapping and hunting remain important to the economy. For most trappers, "trapping provides a source of cash to fund subsistence activities that put wild meat and other country foods on the table".[65]

With this historical and cultural context as a backdrop, we can now turn to an exploration of how the trapping rights of Aboriginal peoples have been interpreted.

3.0. Different Interpretations of the Treaty Right to Trap as Affected by the NRTA

How are the trapping rights of Aboriginal Peoples acknowledged in the historical treaties, and in particular Treaty 8, defined and recognized in modern terms? How have these rights been affected by the 1930 NRTA? The following statement offers a stark assessment of the current situation:

> It continues to be our belief that Indian people and governments have conflicting perceptions of these Indian treaties; not only are these perceptions at the root of many contemporary Indian-government problems and misunderstandings, but their basis resides in the Indian treaty negotiations of the last century. In fact, government and Indian leaders tend to operate within two different systems of knowledge and perceptions of reality regarding basic "treaty rights" issues.[66]

The Supreme Court has underlined the need to reconcile the various interpretations of the treaties and to choose the one that best reflects the common intention and the interests of both parties at the time the treaty was signed.[67] This section examines how the Treaty 8 rights to hunt and trap have been interpreted by the courts, by Aboriginal peoples, by government, and by various experts. In each case, the discussion focuses first on the treaty right, then on the modifications to the right effected by the NRTA. It considers the nature or contents of the right, as well as the limitations on the right as set out in the relevant treaty and NRTA provisions.

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[65] *Ibid.* at 74.

[66] Price, *supra* note 5, Introduction, at xii.

[67] *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1069; *R. v. Marshall*, [1999] 3 S.C.R. 456 at 474.

3.1. Judicial Interpretation

At the outset, it is important to note that few judicial decisions have dealt specifically with trapping rights, and that none of the cases has ever gone to the Supreme Court of Canada yet. The following analysis of judicial decisions relies heavily on hunting and fishing cases. Peter Hutchins has remarked that "the relative scarcity of case law on the specific question of trapping, however, does not mean that rights are assured or that problems do not arise. It may imply, rather, a greater acceptance of legal constraints by aboriginal trappers, perhaps as a result of underestimating the extent of legal protection available."[68]

3.1.1. The Rules of Interpretation of Treaties

The rules of interpretation of treaties developed by Canadian courts are briefly summarized to provide a context for the discussion of the hunting and trapping clause of Treaty 8. Treaties are an exchange of solemn promises between the Crown and Aboriginal peoples and are regarded as sacred agreements.[69] Treaties should be given a fair, large and liberal interpretation, an interpretation that maintains the honour and the integrity of the Crown.[70] Any ambiguities or doubtful expressions in the written terms of a treaty must be interpreted in favour of the Indians; a corollary to this principle is that limitations that restrict the rights of the Indians "must be narrowly construed".[71] Treaties were concluded verbally and written up afterwards, and "did not always record the full extent of the agreement".[72] Consequently, the oral promises made at the time a treaty was concluded form part of the treaty.[73] The words in a treaty must not be interpreted in their strict technical sense, but rather in the sense that Aboriginal peoples would have understood them.[74] The Aboriginal understanding of the treaties is derived from such

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[68]Peter Hutchins, "The law applying to the trapping of furbearers by Aboriginal peoples in Canada: a case of double jeopardy" in Novak, *et al.*, *supra* note 13 at 31.

[69]*Sioui*, *supra* note 67 at 1063; *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 410; *R. v. Badger*, [1996] 1 S.C.R.771 at 793.

[70]*Badger*, *supra* note 69 at 794; *Sioui*, *supra* note 67 at 1035-1036; *Marshall*, *supra* note 67 at 496-497.

[71]*Badger*, *supra* note 69 at 794; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36; *Simon*, *supra* note 69 at 402.

[72]*Badger*, *supra* note 69 at 799.

[73]*Ibid.* at 799-800. In *Marshall*, Justice Binnie stated that "where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms": *supra* note 67 at 472.

[74]*Nowegijick*, *supra* note 71 at 36; *Sioui*, *supra* note 67 at 1035-36 and 1044; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1107; *Badger*, *supra* note 69 at 799.

sources as the oral histories and collective memories of Aboriginal communities.[75] A consideration of the historical and cultural background (extrinsic evidence) helps the courts determine which interpretation reflects the parties' common intention.[76] Extrinsic evidence may be used even absent any ambiguity on the face of the treaty; in fact, "it may suggest latent ambiguities or alternative interpretations not detected at first reading".[77] Treaty rights are not frozen in time and must not be interpreted in a static way as they were at the date of signature of the treaty: they must be updated to provide for their modern exercise.[78] This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context. Finally, "the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown" and requires strict proof of the clear intention of government to extinguish the right.[79] The Supreme Court has held that these rules of treaty interpretation apply equally to the rights protected by the NRTA.[80]

The courts emphasize the *sui generis* and collective nature of treaty rights. In *Sparrow*, the Supreme Court stated: "Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin* […] referred to as the 'sui generis" nature of aboriginal rights."[81] In the *Sundown* case, Justice Cory reaffirmed that treaty rights "are the right of aboriginal people in common with other aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories" and stated that "any interest in a hunting cabin is a collective right that is derived from the treaty" and that it "belongs to the Band as a whole and not to Mr. Sundown or any individual member of the Joseph Bighead First Nation".[82]

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[75]*Badger*, *supra* note 69 at 803.

[76]*Marshall*, *supra* note 67 at 514-515.

[77]*Ibid*. para. 11 and Madam Justice McLachlin's dissenting opinion at para. 83.

[78]*Simon*, *supra* note 69 at 402-403; *R. v. Sundown*, [1999] 1 S.C.R. 393 at 411; *Marshall*, *supra* note 67 at 499.

[79]*Badger*, *supra* note 69 at 794; *Simon*, *supra* note 69 at 406; *Sioui*, *supra* note 67 at 1061.

[80]*Badger*, *supra* note 69 at 775, 781-782.

[81]*Sparrow*, *supra* note 74 at 111-1112.

[82]*Sundown*, *supra* note 78 at 412.

3.1.2. The Right to Hunt and Trap under Treaty 8

3.1.2.1. Contents/Nature of the Right

What did the right to hunt and trap under Treaty 8 encompass? In the *Frank* case, the Supreme Court analyzed the differences between the hunting rights guaranteed under Treaty 6 and the rights protected under paragraph 12 of the Alberta NRTA. The court found that one of the essential differences was that "under the former the hunting rights were at large, while under the latter the right is limited to hunting for food".[83] This suggests that the treaty rights encompassed hunting for both domestic and commercial purposes.[84] This interpretation was confirmed by Justice Cory in the *Horseman* decision, when he stated that an examination of the historical background of Treaty 8 "leads inevitably to the conclusion that the hunting rights reserved by the Treaty included hunting for commercial purposes".[85]

Indeed, the Supreme Court has noted that the promise made by the Treaty Commissioners that hunting, fishing and trapping rights would be protected forever, in other words that their source of livelihood would be maintained, was the *sine qua non* condition for obtaining the Indians' agreement to enter into the treaty.[86]

The right to hunt also includes the right to conduct activities which are "reasonably incidental to the act of hunting itself", such as travelling with a rifle and ammunition on the way to exercise the right to hunt (*Simon*), or constructing a cabin for shelter and as a place to smoke fish and meat and to skin pelts (*Sundown*).[87] Justice Cory noted in *Sundown* that a reasonably incidental activity is not only one which is essential, or integral, to the right, but one that is meaningfully related or linked to its exercise. A right of access to the area where the treaty right is exercised is also an incidental right (*Saanichton Marina*).[88]

3.1.2.2. Limitations on the Right

The rights recognized under Treaty 8 as officially recorded in the treaty text were not unfettered; they were subject to two types of limitations. First, the rights were subject to regulations made by the "Government of the country" (the regulatory limitation). Second,

[83] *Frank v. The Queen*, [1978] 1 S.C.R. 95 at 100-101.

[84] McNeil, *supra* note 1 at 8.

[85] *R. v. Horseman*, [1990] 1 S.C.R. 901 at 929, para. 47.

[86] *Ibid*. at 911.

[87] *Simon*, *supra* note 69 at 403; *Sundown*, *supra* note 78 at 410-41.

[88] *Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79.

the Aboriginal signatories were entitled to hunt, fish and trap throughout the Treaty 8 area except on lands that "may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (the geographical limitation). This is known as the "lands taken up" provision.

With respect to the *regulatory limitation*, "Government of the country" was interpreted in the *Batisse* case as referring exclusively to the federal government.[89] That interpretation was adopted by the Supreme Court in the *Horseman* case, noting that in 1899, the federal government had jurisdiction over the Treaty 8 territory and was the only contemplated "government of the country".[90] As to the type of regulation envisioned, the Supreme Court has stated that the only acceptable regulation of the right contemplated by government at the time of treaty was for the purpose of conserving the game and fish on which the Indians depended for their sustenance and livelihood. This is based on the promises made by the Treaty Commissioners that only regulations that were aimed at conserving wildlife for the benefit of the Indians would be enacted. As noted by Justice Cory in *Horseman*:

> The Commissioners specifically observed that the right of the Indians to hunt, trap and fish as they had always done would continue with the proviso that these rights would have to be exercised *subject to such laws as were necessary to protect the fish and fur bearing animals on which the Indians depended for their sustenance and livelihood*..[91]

The *geographical limitation* was considered in a number of cases, when the courts were asked to decide whether a treaty right to hunt could be exercised on lands "taken up" or "occupied" by the Crown. The outcome of the cases was determined not by the simple fact that the lands were "taken up" or "occupied" by the Crown, but by an assessment of the compatibility between the exercise of the hunting right and the purpose of the Crown occupation. For example, hunting was found to be incompatible with a land use such as a game preserve (*R. v. Smith*), or a road (*R. v. Mousseau*), but compatible with a wildlife management area (*R. v. Sutherland*, *Moosehunter v. The Queen*), a provincial forest reserve and fur conservation area (*R. v. Strongquill*) or a provincial park (*Sioui*, *Sundown*).[92]

The Supreme Court has elaborated on the test of incompatibility in *Sioui*. In that case, the land in question was a provincial park located in the province of Quebec, and as

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[89]*R. v. Batisse* (1978), 84 D.L.R. (3rd) 377 (Ont. D.C.); *R. v. Napoleon*, [1982] 3 C.N.L.R. 116 (B.C. Prov. Ct.).

[90]*Horseman*, *supra* note 85 at 935.

[91]*Ibid.* at 935.

[92]*R. v. Smith*, [1935] 2 W.W.R. 433; *R. v. Mousseau*, [1980] 2 S.C.R. 89; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282; *R. v. Strongquill* (1953), 8 W.W.R. (N.S.) 247; *Sioui*, *supra* note 67; *Sundown*, *supra* note 78.

such it was "occupied" by the Crown. The Hurons had received assurances under a 1760 treaty that they could practice ancestral customs and religious rites on the territory encompassing the park, and had proceeded to cut trees, camp and make fires in the park without permission. Justice Lamer found that the most reasonable way to reconcile the competing interests of the provincial government and those of the Hurons was to protect the exercise of the rights of the Hurons on the territory in question, as long as this was not incompatible with provincial occupancy of the park:

> As occupancy has been established, the question is whether the type of occupancy to which the park is subject is incompatible with the exercise of the activities with which the respondents were charged […] For the exercise of rites and customs to be incompatible with the occupancy of the park by the Crown, it must not only be contrary to the purpose underlying that occupancy, it must prevent the realization of that purpose.[93]

Justice Lamer added that "it is up to the Crown to prove that its occupancy of the territory cannot be accommodated to reasonable exercise of the Huron's rights".[94] The *Sundown* case was decided on a similar analysis of the compatibility between the hunting right of Mr. Sundown, including his right to build a shelter to facilitate the hunt, and the Crown's use of the land as a provincial park.[95]

In *Horseman* and *Badge*r, the Supreme Court discussed the geographical ambit of the treaty right to hunt under Treaty 8 and earlier judicial interpretations of the concept of occupancy. First, the court observed that what was contemplated at the time of the treaty was a limited interference with hunting and fishing practices. In *Horseman*, Justice Cory stated that "the Indians ceded title to the Treaty 8 lands on the condition that they could reserve exclusively to themselves 'their usual vocations of hunting, trapping and fishing throughout the tract surrendered'".[96] This view was reiterated in *Badger*.[97] Justice Cory further noted that because the Treaty 8 lands were not well suited to agriculture, "the government expected little settlement in the area" and the staking of claims by white prospectors "was not expected to have an impact on the Indian's hunting rights".[98] The Commissioners reassured the various Indian Bands that they would remain as free to hunt and fish as they were at the time of treaty making, leading the Indian signatories to believe "that most of the Treaty No. 8 land would remain unoccupied and would be

[93]*Sioui*, *supra* note 67 at 1072-1073.

[94]*Ibid*. at 1072.

[95]*Sundown*, *supra* note 78.

[96]*Horseman*, *supra* note 85 at 928.

[97]*Badger*, *supra* note 69 at 814: "[…] the maintenance of as much of their hunting rights as possible was of paramount concern to the Indians who signed Treaty 8".

[98]*Ibid*. at 801.

available to them for hunting, fishing and trapping."[99] This led Justice Cory to make the following finding with respect to the geographical limitation of the hunting rights:

> 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.[100]

The way in which the Indians would have understood physical manifestations of occupation is described as follows:

> 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…These physical signs shaped the Indian's understanding of settlement because they were the manifestations of exclusionary land use which the Indians had witnessed as new settlers moved into the West.[101]

The visible, incompatible use test applies to privately owned lands, since "Treaty No. 8 Indians would not have understood the concept of private and exclusive property ownership separate from actual land use".[102] The Supreme Court has emphasized that whether or not land has been "taken up" or "occupied" is a question of fact that will be resolved on a case-by-case basis.[103]

In the *Catarat* case, the Court of Appeal of Saskatchewan found that the "visibly in use" test applied in *Badger* with respect to private lands should not be rigidly applied in the case of Crown lands, for to do so "would undercut previous decisions which have held that game preserves, forest reserves, highway corridors, wildlife management areas and provincial parks are "occupied" Crown lands to which Indian hunters do not have an automatic right of access."[104] The court found that the focus should be on "whether they are actually put to an active use which is incompatible with hunting".[105]

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[99] *Ibid*. at 803.

[100] *Ibid*. at 800.

[101] *Ibid*. at 799.

[102] *Ibid.*

[103] *Ibid*. at 800, 804.

[104] *R. v. Catarat,* [2001] 2 C.N.L.R. 158 (Sask. C.A.) at para 74.

[105] *Ibid*. at para 77.

3.1.2.3. Justification of the Limitations

While the rights promised by treaty may be limited or infringed by government, the courts require that any restriction imposed on these rights be justified. This results from the constitutional protection provided to treaty rights by subsection 35(1) of the *Constitution Act, 1982*, which "recognizes and affirms" existing treaty rights. The justification analysis developed by the Supreme Court in the *Sparrow* case in 1990 has been applied consistently by the judiciary in situations where aboriginal and treaty rights are infringed by government. The honour of the Crown and its fiduciary relationship vis-à-vis Aboriginals are the guiding principles in the analysis.

In *Badger*, the Supreme Court extended the justificatory standard developed for Aboriginal rights in *Sparrow* to treaty rights, stating that "it is equally, if not more important to justify *prima facie* infringements of treaty rights".[106] Because the rights granted by treaties "form an integral part of the consideration for the surrender of their land", any *prima facie* infringement of these rights must be justified. Even though the regulation of the hunting right is specifically contemplated in Treaty 8, the Court concluded that a statute or regulation that constitutes a *prima facie* infringement of the rights assured by Treaty 8 or the NRTA must be justified.[107] Justice Cory's findings in *Badge*r applied to the "regulatory limitation" of the right resulting from the licensing provisions of the *Wildlife Act*, not to the "geographical limitation" that may result from a "taking up" or occupation of lands by the government. But presumably and logically, infringements of a treaty right resulting from the "taking up" of the land, even though contemplated in the treaty, are subject to the same justificatory test as those resulting from regulating the right.

Some recent judicial decisions have considered the restrictions that may apply to the government's exercise of its power to "take up" or "occupy" land. In the *Halfway River* case, Justice Finch of the British Columbia Court of Appeal was of the view that:

> The Indian's right to hunt … and the Crown's right to regulate, and to require or take up lands, cannot be given meaning without reference to one another. They are competing or conflicting rights as has been recently affirmed in *R. v. Sundown* … The Indians' right to hunt is subject to the "geographical limitation", and the Crown's right to take up land cannot be read as absolute or unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless …. I am therefore of the view that it is unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a limitation on the Indian's right to

[106] *Badger*, *supra* note 69 at 814.

[107] *Ibid*. at 820-821; *Marshall, supra* note 67 at 500; *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533 at 551, 555.

> hunt. In either case, however, the Crown's right qualifies the Indians' rights and cannot therefore be exercised without affecting those rights.[108]

The implication of this statement is that the government must justify decisions or actions that amount to a "taking up of land" which interferes with the exercise of treaty rights, and in particular must consult adequately with the Aboriginal peoples whose rights may be affected by its actions or decisions. A similar view of the Crown's obligation to consult with treaty beneficiaries when taking up land, even for a use of land contemplated in the treaty, is endorsed by the Federal Court in the *Liidlii Kue First Nation* case.[109] However, in its recent decision in the *Mikisew Cree* case, the Federal Court of Appeal, adopting an argument put forward by the government of Alberta, found that government could take up land without infringing on the treaty rights, when such taking up was expressly or implicitly contemplated in the treaty. The case concerns the construction of a winter road through Wood Buffalo National Park. The road was approved by the Minister of Canadian Heritage, despite the objections of the Mikisew Cree who were concerned with potential negative impacts of the road on their trapping, hunting and fishing rights. Justice Rothstein stated:

> With the exception of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt….Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of section 35.[110]

Since there is no infringement of the treaty right in Justice Rothstein's opinion, no justification of the infringement is required, and there is no obligation on the part of the government to consult with potentially affected Aboriginal peoples before taking up the land. That decision has been appealed and was heard by the Supreme Court on March 14, 2005.[111]

What constitutes a *prima facie* infringement of a treaty right? The burden of establishing a *prima facie* infringement is not heavy. In *Gladstone*, the Supreme Court

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[108]*Halfway River First Nation v. British Columbia (Ministry of Forests*) (1999), 4 C.N.L.R. 1 (B.C.C.A.) at 40. Justice Huddart took a different view of the matter and stated that there was no "taking up" of lands in that case, only a sharing of the land. The Crown was simply allowing a temporary use of an area for a specific purpose which was not incompatible with the long-term use of the area by Halfway for hunting. Nevertheless, the Crown's obligation to consult the Halfway on the scope of its right was also engaged in a "shared use" decision and it had not been met in that case. Justice Huddart agreed with Justice Finch's conclusions that the District Manager decision had to be set aside.

[109]*Liidlii Kue v. Canada*, [2000] C.N.L.R. 123 (F.C.T.D.).

[110]*Canada (Minister of Canadian Heritage*) *v. Mikisew Cree First Nation*, [2004] F.C.J. No. 277 at paras. 18 and 21. Justice Sharlow wrote a lengthy dissent endorsing the position of Justice Finch in the *Halfway River* case.

[111]Leave to appeal granted July 22, 2004.

held that any "meaningful diminution" of rights constitutes an infringement.[112] In *Badger*, Justice Cory held that any limitation on the method, timing and extent of a treaty hunting right amounts to an infringement.[113] In *Halfway River*, Justice Dorgan found that "any interference with the right to hunt" constituted a *prima facie* infringement of the treaty right, and Justice Finch of the Court of Appeal agreed with this finding.[114]

If a *prima facie* infringement is established, the Crown must justify that infringement. The *Sparrow* justification analysis is in two steps:

> First, is there a valid legislative objective.[…] The objective of the department in setting out the particular regulations would be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial …
>
> if a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here…the guiding principle …is [that] 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 can be justified.[115]

In *Sparrow*, the court cited the legislative objective of game conservation as "surely uncontroversial", a statement that has not been questioned in later cases. However, as noted by Justice Cory in *Badger*, the standard of scrutiny of a legislation enforced pursuant to a valid conservation or management objective requires that "the legislation in question advances important general public objectives in such as manner that it ought to prevail". The objective of conservation "does not automatically lead to the conclusion that s. 26(1) [of the Wildlife Act] 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."[116] Justice Cory developed this line of reasoning further in the *Sundown* case:

> It would not be sufficient for the Crown to simply assert that the regulations are "necessary" for conservation. Evidence on this issue would have to be adduced. The Crown would also have to demonstrate that the legislation does not unduly impair treaty rights. The solemn promises of the treaty must be fairly interpreted and the honour of the Crown upheld. Treaty rights must not be

[112] *R.* v. *Gladstone*, [1996] 2 S.C.R. 723 at 757.

[113] *Badger*, *supra* note 69 at 818.

[114] *Halfway River*, *supra* note 108 at 41.

[115] *Sparrow*, *supra* note 74 at 1113-1114.

[116] *Badger*, *supra* note 69 at 811.

> lightly infringed. Clear evidence of justification would be required before that infringement could be accepted.[117]

Therefore, justification of the infringement of a treaty right requires that the means used to achieve the legislative objective are consistent with the honour of the Crown and its fiduciary obligations to First Nations. Several questions need to be asked. These include: has the treaty right been given adequate priority in relation to other rights? has there been as little infringement of the right as possible? is adequate compensation available in a situation of expropriation? and has the Aboriginal group affected been adequately consulted with respect to the measures being taken? As stated by Chief Justice McLachlin in the recent *Haida* decision: "It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate."[118]

3.1.3. The Right to Hunt and Trap as Affected by the NRTA

On several occasions, the Supreme Court of Canada has considered the impact of the 1930 NRTAs on the treaty rights to hunt and fish recognized under various numbered treaties.[119] Two of these decisions, *Horseman* and *Badger*, deal specifically with the effect of paragraph 12 of the Alberta NRTA on the Treaty 8 hunting right. The *Horseman* case involved a Treaty 8 Indian who killed a bear in self-defence while hunting moose for food, and later bought a hunting licence in order to sell the bear hide. Mr. Horseman was charged with unlawfully trafficking in wildlife contrary to section 42 of the provincial *Wildlife Act*. In his defence, he argued that he was within his Treaty 8 rights when he sold the bear hide. The question before the court was whether the provision of the *Wildlife Act* was applicable to the appellant. In *Badger*, three status Indians had been hunting for food on privately owned lands within the Treaty 8 area. They were charged with an offence under the *Wildlife Act* and convicted. In their defence, they challenged the constitutionality of the *Wildlife Act* in so far as it might affect them as Crees with status under Treaty 8. The court had to decide first, whether the Treaty 8 right to hunt continued to exist, or whether it had been extinguished and replaced by paragraph 12 of the NRTA, and second, if the treaty right continued to exist, whether it could be exercised on privately owned lands and the extent to which it could be regulated by the province.

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[117] *Sundown*, *supra* note 78 at 417.

[118] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73 at para. 20.

[119] E.g., *Frank v. The Queen*, [1978] 1 S.C.R. 95; *Sutherland*, *supra* note 92; *Moosehunter*, *supra* note 92; *Badger*, *supra* note 69; *Horseman*, *supra* note 85..

3.1.3.1. Contents/Nature of the Right

In both cases, the Supreme Court held that the NRTA effected a unilateral change to Treaty 8 by extinguishing the right to hunt commercially. The power of the federal government to unilaterally modify the treaty was unquestioned, although the majority in *Badger* observed that "it is unlikely that it would proceed in that manner today".[120] The Court applied the principles of interpretation of treaties, notably that a treaty right will only be extinguished if there is a clear and plain intention on the part of the government to extinguish the right, to the NRTA and concluded:

> 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.[121]

What is the meaning of the term "for food" in the NRTA? In *Horseman*, Justice Cory writing for the majority defined the right to hunt for food as "for sustenance for the individual Indian or the Indian's family".[122] It did not include the right to sell the hide of an animal whose flesh has been consumed. That sale constituted "a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce."[123]

In her lengthy dissent written on behalf of Chief Justice Dickson and Madam Justice L'Heureux-Dubé, Madam Justice Wilson offered a different interpretation of the term "for food". Based on expert testimony provided by Professor Arthur Ray and other sources, as well as on her reading of previous court decisions, she found that paragraph 12 of the NRTA should not be interpreted as an attempt to renege on the treaty promises. In her view, it was unrealistic to separate commercial from subsistence activities. The term "for food" encompassed not only direct consumption of the flesh of the animal, but also the right to sell the fur in exchange for other items:

> […] if we are to give para. 12 the "broad and liberal" construction called for in *Sutherland*, a construction that reflects the principle enunciated in *Nowegijick* and *Simon* that statutes relating to Indians must be given a "fair, large and liberal construction", then we should be prepared to accept that the range of activity encompassed by the term "for food" extends to hunting for "support and subsistence", i.e., hunting not only for personal consumption but also hunting in order to exchange the product of the hunt for other items as was their wont, as opposed to purely commercial or sport fishing.[124]

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[120] *Badger*, *supra* note 69 at 815.

[121] *Ibid.* at 811.

[122] *Horseman*, *supra* note 85 at 936.

[123] *Ibid.*

[124] *Ibid.* at 919. This was also the view of Madam Justice Wong of the Alberta Provincial Court, who issued the initial decision in the *Horseman* case: "…I find that s. 12 of the *Alberta Natural Resources Act*

Justice Wilson's reading of the term "for food" as encompassing consumption of the meat of the animal as well as its sale or exchange in order to buy other items necessary for sustenance is discussed further in Section 6 of this paper.

The Supreme Court further held that as a result of the NRTA, the geographical area in which the right to hunt can be exercised has been expanded to include the entire province, whereas it was previously limited to the Treaty 8 area.[125] This is part of the *quid pro quo* which, in Justice Cory's view in *Horseman*, counterbalances the reduction by the Crown of the treaty right to hunt for commercial purposes.

Did the NRTA effect a "merger" of the treaty rights into NRTA rights? In *Horseman*, based on its previous decisions, the majority of the Supreme Court held that the purpose of paragraph 12 of the NRTA was to effect a merger and consolidation of the treaty right to hunt and fish. In *Badger* however, the majority of the court abandoned the merger and consolidation theory and found that the treaty right to hunt for food was left intact and was protected as an existing treaty right by section 35 of the Constitution. Justice Cory stated:

> 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.[126]

3.1.3.2. Limitations on the Right

Aside from modifying the treaty right to hunt and trap "at large" into a right to hunt and trap "for food", to what extent did the NRTA change the regulatory and geographical limitations on the treaty right? In *Badger*, Justice Cory stated that "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 be properly imposed by the government".[127]

With respect to the *regulatory limitation* on the right, the NRTA confirms the authority of the province to regulate the exercise of treaty rights. Justice Cory found in *Badger* that "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".[128] Provincial

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intended the Indians of Treaty No. 8 be assured of their right to "pursue their usual vocations of hunting, trapping and fishing with the object only of placing the hunted, trapped or fished creature in the mouths of the Indians."(*Horseman*, [1986] 1 C.N.L.R. 79 at 84-85).

[125] *Frank*, *supra* note 119 at 100; *Horseman*, *supra* note 85 at 933; *Badger*, *supra* note 69 at 795-796.

[126] *Badger*, *supra* note 69 at 794.

[127] *Ibid.* at 797.

[128] *Ibid.* at 820.

game laws are applicable to Aboriginal peoples, but only to the extent that they are aimed at conserving the supply of game. In addition, reasonable regulations aimed at ensuring public safety may be permissible.[129] The provincial government has the same duty as the federal government to not infringe unjustifiably the hunting right modified by the NRTA, and "limitations on treaty rights, like breaches of Aboriginal rights, should be justified".[130] In *Badger*, the court scrutinized the licensing scheme under Alberta's *Wildlife Act*, including both the safety and the conservation component of the scheme, to determine whether or not it infringed the hunting rights of the accused. While the safety component of the regulations did not constitute an infringement, the conservation component did:

> 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.[131]

Justice Cory determined that the legislative scheme "denies to holders of treaty rights as modified by the NRTA the very means of exercising those rights."[132] In the absence of justification led by the provincial government, and in view of the importance of the conservation issue, the court ordered a new trial so that the question of conservation may be addressed.

As to the *geographical limitation*, Justice Cory stated that it had not been modified by the NRTA.[133] The right to hunt and trap can only be exercised on "unoccupied Crown lands" and "any other lands to which the said Indians may have a right of access". With respect to Crown lands, the courts use the terms "occupied" and "taken up" interchangeably. As to lands to which Indians have a "right of access", they may include both Crown and private lands, and this clause has been interpreted to mean any land to which the public has access for the purpose of hunting, fishing and trapping. With respect to Crown lands, where the public is granted limited access for hunting, Aboriginal peoples have an unlimited right of access.[134] On privately owned lands, as stated by Justice Cory in *Badger*, the extent of access to exercise a right to hunt may differ from one treaty to another depending on the exact wording of the treaty affected by the NRTA.[135] In the case of Treaty 8, if the privately owned land is not "required or taken

[129] *Ibid*. at 818.

[130] *Ibid*. at 813.

[131] *Ibid.*

[132] *Ibid.* at 820.

[133] *Ibid*. at 807.

[134] *Ibid*. at 804.

[135] *Ibid*. at 798.

up", it will be land to which the Indians have a right of access to hunt for food.[136] This determination will be done on a case-by-case basis. As discussed earlier, when privately owned land is not put to a "visible, incompatible use", then a right of access in order to hunt for food will be found.

3.2. Aboriginal Interpretation

3.2.1. The Treaties

An appreciation of the Aboriginal understanding of Alberta's numbered treaties can be gained from research undertaken in the early 1970s under the auspices of the Indian Association of Alberta (IAA). The purpose of this research project was to study oral traditions and written records of the Alberta treaties in order to answer the following question: what is the meaning of the Alberta Indian treaties? The results of that research were published in 1979 in a volume entitled *The Spirit of the Alberta Indian Treaties*, which was cited favourably by the Supreme Court in both the *Horseman* and *Badger* decisions.[137]

In that volume, J.E. Foster defines the relationship between Aboriginal groups and the Crown as a compact and suggests that:

> […] during the first century and a half of the fur trade, the essence of an understanding, a compact, emerged between Indian and white traders; that the compact was further clarified and delineated during the succeeding half-century when the Hudson's Bay Company enjoyed monopolistic control; and that the desire to continue significant aspects of this compactual relationship constituted an important part of the "mental set" with which the Indian leaders approached the treaty negotiations in the 1870s.[138]

Far from being solely an economic exchange, trade was a means to establish alliances, and thus to enhance security. The relationship was characterized by an interdependence based on equality and reciprocity rather than domination. The concept and practice of reciprocity were of fundamental importance in the Aboriginal political and legal system. As stated by J.E. Foster: "Reciprocity, mutual obligation, governed interpersonal and kinship relations but is also basic to the Indian approach to the fur trade and, I suggest, to treaty-making".[139] The fur trade ceremonies revalidated this alliance between Indians and the white peoples. Jean Friesen also suggests that the guiding force in Indian politics was the search for security, and that "the goal of the numbered treaties

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[136]*Ibid*. at 808.

[137]Price, *supra* note 3.

[138]J.E. Foster, "Indian-White Relations in the Prairie West during the Fur Trade Period – A Compact?" in Price, *supra* note 3 at 183-184.

[139]*Ibid.* at 205.

was economic security, just as it had been in treaties between Indians".[140] In turn, Richard Daniel suggests that "the treaty was not so much a precise legal definition of Indian rights under Canadian law as a compact or set of fundamental principles that would form the basis for all future relations between the Indian people and the government", and further, that it was an agreement on how the natural resources would be shared and "on the extent to which the Indian people would receive benefits of the non-native society with whom they were to share the land".[141]

The compact extends into the future. For the Aboriginal signatories, the treaties were not once and for all transactions, but "represented the beginning of a continuing relation of mutual obligation".[142] The betrayal of this compact in the years following the signing of the treaties explains the "Indian's litany of lament, revolving around such apparently disparate issues as hunting, trapping and fishing rights, land claims, health services, control of education, and economic development".[143] This view of treaties as a source of long-term relations and obligations between the Crown and the Aboriginal signatories is endorsed by the Supreme Court and was most recently reaffirmed in the *Haida* decision, where Chief Justice McLachlin stated that the Crown must act with honour and integrity in making and *applying* treaties.[144]

Did the Aboriginal signatories of the treaties understand the land surrender clause of the treaties to mean that they were actually giving up or selling the land? It is worth noting at the outset that the bands involved in treaty-making spoke different languages, and that the negotiations were often conducted with the assistance of Metis interpreters whose knowledge of these languages was sometimes poor and whose familiarity with the English language was uneven. A review of oral testimony in the Treaty 6 area leads John Taylor to conclude that "the understanding which runs through all of the testimony is that the Indians gave up limited rights in the land, namely the surface rights".[145] This is confirmed by Sharon Venne who states, based on interviews with Cree elders from the Treaty 6 area, that "The Chiefs and Elders could not have sold the lands to the settlers as they could only share the lands according to the Cree, Saulteau, Assiniboine and Dene

[140]Jean Friesen, "Magnificent Gifts: The Treaties of Canada with the Indians of the Northwest 1869-1876" in Price, *supra* note 3 at 207.

[141]Daniel, *supra* note 5 at 99.

[142]Friesen, *supra* note 140 at 210.

[143]Foster, *supra* note 138 at 183.

[144]*Haida*, *supra* note 118 at para. 19.

[145]John Leonard Taylor, "Two Views on the Meaning of Treaties Six and Seven" in Price, *supra* note 3 at 42.

laws".[146] In the context of Treaty 8, Richard Daniel notes that the elders have divergent views about the exact meaning of the surrender clause and quotes expert opinion on the difficulty of communicating the concept of land surrender to Aboriginal peoples.[147] All authors agree that the Treaty Commissioners did not fully address the issue of land surrender nor explain the implications of the surrender clause. René Fumoleau sums up his review of archival sources pertaining to the signing of Treaty 8 as follows: "It would seem that few people were concerned with the land ownership question, the real reason for the coming of these visitors."[148]

With respect to resources such as game and fish, the prevailing Indian understanding is that they were never given to the Europeans. Interviews of Aboriginal elders in Alberta demonstrate that "there was universal agreement amongst the interviewees that the animals, birds and fish were not surrendered".[149] Across Canada, treaties were signed on the basis of promises of continued use of resource rights, in addition to promises of kinship, annuity, economic assistance, education and clothing.

In the context of Treaty 8, Indian leaders only agreed to sign the treaty upon being reassured by the Treaty Commissioners that there would be no restrictions on their right to hunt, trap and fish and that they would be allowed to continue their "livelihood". For Richard Daniel, this suggests "that the Indians understood that they would be able to pursue these activities on a commercial basis, as they had before the treaty.'[150] The following statement by Professor Ray, quoted by Justice Cory in the *Horseman* case, confirms that the Aboriginal parties understood from the Treaty Commissioners that their traditional economy and way of life would be maintained:

> The commissioners responded by stressing that the government did not want Indians to abandon their traditional economic activities and become wards of the state. Indeed, one of the reasons that the Northwest Game Act of 1864 had been enacted was to preserve the resource base of the native economies outside of organized territories. The government feared that the collapse of these economies would throw a great burden onto the state such as had occurred when the bison economy of the prairies failed.[151]

As to whether the treaty signatories understood or were explained the regulatory limitation on the hunting, fishing and trapping right, this is also unclear. The view of

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[146]Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Ash, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) at 192-193.

[147]Daniel, *supra* note 5 at 97-98.

[148]Fumoleau, *supra* note 24 at 79.

[149]Taylor, s*upra* note 145 at 43.

[150]Daniel, *supra* note 5 at 93.

[151]*Horseman*, *supra* note 85 at 928.

elders in the Fort Chipewyan area is that they were promised that their rights to hunt, fish and trap would not be restricted, and a statement made in 1939 by Pierre Mercredi, one of the treaty interpreters, supports that view:

> I interpreted the words of Queen Victoria to Alexandre Laviolette, Chief of the Chipewyans and his band…I know, because I read the Treaty to them, that there was no clause in it which said that they might have to obey regulations about hunting. They left us no copy of the Treaty we signed, saying that they would have it printed and send a copy to us. When the copy came back, that second clause (that they shall promise to obey whatever hunting regulations the Dominion Government shall set) was in it. It was not there before. I never read it to the Chipewyans or explained it to them. I have no doubt that the new regulation breaks that old treaty. It makes me feel bad altogether because it makes lies of the words I spoke then for Queen Victoria.[152]

To this day, the collective memory of the elders is that the Indians' right to pursue their traditional livelihood was never given up and was even strongly guaranteed to last forever. All accounts of the understanding of Treaty 8 by Aboriginal peoples conclude that it was a "peace and friendship treaty which acknowledged a sharing of lands and resources in return for a government-funded, church-implemented social "safety net". How lands and resources would be shared was never clearly enunciated."[153]

3.2.2. The NRTA

The transfer by the Dominion of Canada of lands and natural resources to the province of Alberta pursuant to the 1930 NRTA occurred without the consent of the signatories of the treaties. For this reason, as noted by Sharon Venne, the Elders of Treaty 6 question the NRTA and the power of the province to make rules and regulations in contravention of the treaty.[154]

3.3. Government Interpretation

3.3.1. The Treaties

The Dominion of Canada's views of the treaties it was entering into with First Nations, gleaned from historical documents, are well documented. As stated by John Leonard Taylor: "The government view of a treaty was that of an instrument of land surrender with provisions for a *quid pro quo* in terms of annuities, reserves of land, and other

[152]Fumoleau, *supra* note 24 at 79-80.

[153]Mercredi & Coutu, *supra* note 53 at 262.

[154]Venne, *supra* note 146 at 196.

traditional items."[155] René Fumoleau's account of the negotiation of Treaties 8 and 11 and the events following the signing of these treaties corroborates this statement.[156]

In its 1996 final report, the Royal Commission on Aboriginal Peoples noted the following view of both levels of government vis-à-vis the treaty rights of the Dene Tha', one of the First Nations whose ancestors signed Treaty 8: "Canada and Alberta take the position that any rights Dene Tha' may have had to lands outside their reserves were extinguished absolutely – according to the text of the document - by Treaty 8."[157] One is left to ponder how the Crown could have come to so completely overlook the hunting, trapping and fishing clause of the treaty, and the promises of the Treaty Commissioners, which led the Indians to believe that their traditional economy and way of life would be protected throughout most of the Treaty 8 area and which, in the words of the Supreme Court of Canada, was "of paramount concern" to the Indians and an "essential element of this solemn agreement".[158] The way in which the NRTA is interpreted lends further support to the views of government.

3.3.2. Impact of the NRTA

The archival records pertaining to the negotiations that led to the transfer of natural resources from the Dominion of Canada to the provinces of Manitoba, Saskatchewan and Alberta in 1930, and the exchange of correspondence between Dominion and provincial officials both before and after the agreement was finalized, provide valuable insights into the views of government officials as to which Indian interests needed to be protected and how to best achieve this protection in the agreements.[159]

In the late 1920s, officials from the Departments of Indian Affairs and Justice were clearly concerned with protecting the Indians' treaty livelihood rights, especially those of the northern Indians who depended on hunting, trapping and fishing for their subsistence, in light of the failure of provincial governments to protect Indians from white trappers and their reckless destruction of game.[160] They sought to guarantee the Indians'

[155]Taylor, *supra* note 145 at 40.

[156]Fumoleau, *supra* note 24: "By Treaties 8 and 11, the Canadian Government intended to extinguish the Indian title to the immense Athabasca-Mackenzie District", Introduction at xxvi.

[157]RCAP Report, *supra* note 2 at 433.

[158]See *Badger*, *supra* note 69 at 814-815.

[159]See Frank J. Tough, "Introduction to Documents: Indian Hunting Rights, Natural Resources Transfer Agreements and Legal Opinions from the Department of Justice" (1995) 10:2 Native Studies Review at 121; "The Forgotten Constitution: *The Natural Resources Transfer Agreements* and Indian Livelihood Rights, ca. 1925-1933" (April 2004) 41:4 Alta. Law Rev. at 999; Irwin, *supra* note 53.

[160]Tough, *supra* note 159 at 1020 and 1030-31; Irwin, *supra* note 53 at 68.

continued right to hunt and fish on unoccupied Crown lands according to the treaty, subject to regulation. A detailed examination of the changes in the wording of paragraph 12 between the original 1926 version and the final 1929 version confirms that the addition of specific terms was designed to strengthen the protection of Indian hunting rights. Thus, the specification that provincial game laws were to secure the continuance of the supply of game and fish for the support and subsistence of Indians, the inclusion of the terms "at all seasons of the year" to prevent the restriction of Indian hunting through closed seasons, the expansion of the range of hunting from unoccupied Crown lands to "any lands to which the said Indians may have a right of access", and the express addition in the final version of "trapping" along with hunting and fishing, at the request of the Hudson's Bay Company's counsel David Laird.[161]

Legal opinions from Dominion officials subsequent to the signing of the NRTA offer further interpretations of the Indian hunting right clause. In 1931 and 1933, the province of Alberta requested clarification of certain terms, notably "game", "unoccupied Crown lands" and "Indians of the Province" from Indian Affairs officials. Alberta was of the view that the term "game" should be defined with reference to the *Alberta Game Act*, and that the term "unoccupied Crown lands" should be construed as Crown lands for which no homestead entry or lease had been given, but should not include game preserves or sanctuaries. Alberta was afraid that unless it could restrict the type of game and the areas where they may be killed by Indians, certain species of wildlife would be endangered. Legal opinions from W. Stuart Edwards, Deputy Minister of Justice, dated 1931 and 1933, contradict the provincial interpretation of the terms "game" and "Indians of the Province" and confirm the interpretation of "unoccupied Crown lands". Mr. Edwards underlines that the intent of paragraph 12 was "to secure to the Indians a definite right or privilege and to except the Indians from the application of the Provincial Game Laws in respect of the exercise of that right".[162] He reaffirms the exclusive jurisdiction of the Dominion Parliament to regulate and restrict the exercise of the right. The word "game" should be understood in its ordinary sense "without reference to any limitations upon the meaning of the term "game" which may exist under the Provincial Game Laws from time to time in force". The term "unoccupied Crown lands" means: 1) lands the title to, or right to use and enjoyment of, which has not been disposed of; and 2) lands which have not been appropriated or set aside for a specific public purpose and actually used and enjoyed for such purpose. As to the term "Indians", which the province interpreted as meaning Indians as defined in the *Indian Act*, and therefore treaty Indians, Mr. Edwards is of the contrary opinion that it should be interpreted as including treaty as well as non-treaty Indians.[163]

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[161]Tough, *supra* note 159 at 1036-1037.

[162]Tough, *supra* note 159: Document Two: Legal Opinion by W. Stuart Edwards, at 159.

[163]*Ibid.* Tough's discussion focuses in large part on the interpretation to be given to the term "Indians of the Province" in the NRTA. He concludes that, contrary to judicial interpretations to date, the term was

The Alberta government's view of the NRTA is that it extinguished the commercial aspect of the right to trap, an interpretation confirmed by the Supreme Court in *Horseman* and *Badger*. Viewing trapping as a purely commercial activity, the province subjects trapping by Aboriginal peoples to the same regulatory regime that applies to all trappers, without any concern for the Aboriginality of the trapping activity. With respect to the "lands taken up" provision of the treaty as modified by the NRTA, the current provincial interpretation can be summarized as follows: the treaties contemplate that land may be taken up for settlement or other purposes, therefore the taking up of lands by the province for *bona fide* purposes is an independent right rather than a limitation or restriction on the Indian's right to hunt or trap. It cannot be held to be a *prima facie* infringement of the treaty right and therefore does not need to be justified. As a result, the government is under no obligation to consult Aboriginal peoples when "taking up" lands for purposes contemplated in the treaties. As noted earlier in this paper, this argument was advanced by the Alberta government in *Mikisew Cree*, a Federal Court case where the meaning of the lands taken up provision of Treaty 8 was discussed. Even though the federal Minister did not rely on this argument at the hearing of the appeal, Alberta's argument was adopted by Justice Rothstein of the Federal Court of Appeal to conclude that the approval of a winter road was a taking up of land within the meaning of Treaty 8 and did not constitute an infringement of the hunting right of the Mikisew Cree.[164]

Alberta has advanced the same argument in other aboriginal and treaty rights cases where it has been granted intervener status. Thus, in a Factum submitted to the Supreme Court in the *Haida* case, Alberta argues that "a taking up or occupying of lands means that there is no infringement of a right and there is no need to justify under the Sparrow test which includes a consultation component".[165] In *R. v. Cardinal*, the provincial government presented evidence to suggest that there were no limitations placed upon government to take up lands for settlement and other purposes and further, that the duty to consult was fulfilled by negotiation of the treaty itself, the subsequent survey of reserves and the fulfillment of the treaty land entitlements in the treaty.[166]

On the specific issue of the Crown's duty to consult with Aboriginal peoples, Alberta maintains that this is not a freestanding obligation of the Crown, but that it is intrinsically linked to, and dependent upon, section 35 of the Constitution. In a Factum submitted to the Supreme Court in the *Taku River* case, which was heard together with the *Haida* case,

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all-inclusive, and not restricted to treaty Indians. The implication of this interpretation for treaty Indians is that if the NRTA was meant to apply to all Indians, not only to treaty Indians, then the rights of the treaty Indians would not have been affected by the NRTA. Treaty Indians would have the benefits of both the treaties they had signed and the NRTA.

[164]*Mikisew Cree*, *supra* note 110.

[165]*Haida, supra* note 118. Factum of the Intervener The Attorney General of Alberta, December 18, 2003, at para. 51.

[166]*R. v. Cardinal*, [2003] A.J. No. 908 (Alta. Prov. Ct., May 23, 2003) unreported.

Alberta states that it "does not endorse a duty to consult (whether *ex ante*, as maintained by Canada; or as part of a duty of fair dealing, as maintained by the Appellant) prior to the proof of Aboriginal title or rights."[167] According to Alberta, the obligation to consult is only triggered by proof of a violation of section 35 rights.

The Supreme Court decisions in the *Haida* and *Taku River* cases refute this position. The Court found that the duty to consult is grounded in the honour of Crown:

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown.[…] It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> […] In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown …"[168]

Chief Justice McLachlin stated that the duty to consult and accommodate was "part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution", and that previous decisions in cases like *Sparrow* "negate the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification".[169]

3.4. The Views of Experts

3.4.1. The Treaty Right

The views of various historians with respect to the circumstances surrounding the negotiation of the treaties, the intentions of the parties and the written and oral promises made to the Indians at treaty making have already been discussed in Section 2 of this paper and do not need to be reiterated here. With respect to the hunting, trapping and fishing clause of Treaty 8, the following two points are emphasized as critical to a proper understanding of the treaty. First, the assurances received by the Indians that they would be as free to hunt and fish after the treaty as they were before (i.e., to pursue their way of life) persuaded them to sign a treaty that they were reluctant to sign. Treaty 8 would never have been signed had the signatories understood that land was going to be gradually "taken up" by government and that their way of life would be increasingly eroded. Second, commercial hunting and trapping were part of the Indians' way of life at

[167] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.C. 74. Factum of the Intervener The Attorney General of Alberta, September 2003, at para. 8.

[168] *Haida*, *supra* note 118 at paras. 16 and 17.

[169] *Ibid.* at paras. 32 and 34.

the time of treaty-making, therefore the treaty right to trap included both a "domestic use" and a "commercial" component. Arthur Ray's expert opinion, as quoted in *Horseman*, emphasizes this second point:

> [C]ommercial provision hunting was an important aspect of the commercial hunting economy of the region from the onset of the fur trade in the late 18th century. However, no data exists that makes it possible to determine what proportion of the native hunt was intended to obtain provisions for domestic use as opposed to exchange.
>
> Furthermore, in terms of economic history, I am not sure any attempts to make such distinctions would be very meaningful in that Indians often killed animals such as beaver, primarily to obtain pelts for trade. However, the Indians consumed beaver meat and in many areas it was an important component of the diet. […] differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact.[170]

As noted earlier, these expert opinions on the nature of the agreement concluded and of the hunting right recognized by treaty have been fully endorsed by the Supreme Court in *Horseman* and *Badger*.

On the issue of the regulatory limitation on the treaty rights, Robert Irwin states that both the Indians and government "understood that regulation meant conservation of the resource for the continued use by Indian peoples" and that it was intended to ensure their continued viability.[171] Legal experts underline the restrictions that apply to the powers of government to limit the hunting, trapping and fishing rights, both by direct regulation of the right and by occupying or "taking up" the lands originally allocated to Indian hunting. Patrick Macklem analyzes the identical hunting right clause in Treaty 9 and finds that "an open-ended interpretation of either of the two qualifications on hunting, trapping and fishing rights would confer an unbridled authority upon government actors to extinguish precisely that which Aboriginal signatories thought they were protecting".[172] Much of the discussion among legal experts focuses on the jurisdictional issues: are provincial governments entitled to regulate Indian hunting? and are provincial governments authorized to "take up" lands or to authorize resource development that interferes with the treaty right? These issues are addressed in the next subsection.

3.4.2. Impact of the NRTA

In an article published in an issue of Native Studies Review in 1995, Arthur Ray questions whether the drafters of the NRTA intended to curtail commercial treaty

[170]Quoted in *Horseman*, *supra* note 85 at 928-929.

[171]Irwin, *supra* note 53 at 55.

[172]Patrick Macklem, "Impact of Treaty 9 on Natural Resources Development" in Michael Ash, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) 97 at 127.

rights.[173] He suggests that historical research on the transfer agreements is needed. The same issue of Native Studies Review includes an article by Frank Tough, who discusses the results of his research of archival records pertaining to the interpretation of the Indian hunting rights clause of the NRTA.[174] A more recent article by Frank Tough provides a detailed reconstruction of the successive drafts of paragraph 12 of the NRTA from 1926 to 1929.[175] Robert Irwin offers further historical information on the negotiations leading to the drafting of paragraph 12 and sheds light on the intent and purpose of the framers of that clause.[176]

Frank Tough explains that the term "trapping" was not included in the 1926 version of paragraph 12 but was added in the final 1929 draft. He suggests that it would have been contradictory to include trapping in that clause if the intention had been to cut down a commercial right:

> That this change occurred at the behest of the Hudson's Bay Company indicates that some provision for commercial activity was added to the paragraph after the stipulation "for food" had been made to the 1929 draft. Understandably, if there had been a clear and plain intent to eliminate all traces of a commercial right, then the word trapping would not have been added to the text of para. 12 at the behest of the HBC. The inclusion of trapping added a commercial dimension to para. 12.[177]
>
> […] In 1929, and for some two centuries prior, the term "trapping" connoted an involvement in the production of furs for exchange. Trapping "for food" would have been within the scope of the traditional economy. The conscious inclusion of trapping with the intention to cut down a commercial treaty right would be contradictory.[178]

He notes that the need for cash was likely greater in 1929 than it was in 1899, a fact that is corroborated by Arthur Ray.[179] Further, policy makers were aware that the traditional economy required cash. In his view, legal interpretations of the NRTA and the respective provincial agreements have been short-sighted and incomplete. He suggests that "there is no historical evidence that a derogation of treaty livelihood rights was intended or occurred and, in fact, the actual needs for those living the Indian mode of life became a priority in December 1929".[180]

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[173]Ray, "Commentary on the Economic History of the Treaty 8 Area", *supra* note 17 at 172.

[174]Tough, "Introduction to Documents", *supra* note 159.

[175]Tough, "The Forgotten Constitution", *supra* note 159.

[176]Irwin, *supra* note 53.

[177]"The Forgotten Constitution", *supra* note 159 at 1037.

[178]"Introduction to Documents", *supra* note 159 at 139.

[179]See *supra* notes 23 and 24 and accompanying text.

[180]"The Forgotten Constitution", *supra* note 150 at 1044.

Robert Irwin's historical analysis of the negotiation and subsequent interpretation of the NRTA's hunting clause by Dominion officials corroborates this view.[181] The Dominion negotiators did not intend to extinguish treaty rights through the passage of paragraph 12 of the NRTA, nor did they believe they had replaced any treaty rights.

> […] the historical evidence clearly indicates that the Dominion intended to transfer the regulatory authority over treaty hunting and trapping rights and the licensing of treaty fishing rights to the provincial governments.
>
> The historical evidence also makes it clear, however, that the Dominion did not seek to limit or extinguish any element of the treaty Indian hunting and fishing rights with the passage of the NRTA.[182]

Peter Hutchins reflects on the tendency of government and the courts to presume that trapping is a uniquely commercial activity, a perception that developed in the early part of the century, and states that this interpretation "disregards the social, religious, and economic context in which trapping by aboriginal peoples takes place".

> Although aboriginal trappers trap with a view to selling fur, and indeed have organized themselves into associations for the purposes of marketing fur, trapping remains but one element of bush activity. Animals are hunted and trapped for food as well as pelts. When, therefore, does the activity become "commercial"?[183]

He adds that although aboriginal trapping "has a "commercial" component, it should not automatically be presumed to be an inherently commercial activity: its role in a multidimensional bush economy must not be ignored".[184]

In her analysis of the *Badger* decision, Catherine Bell argues that the segmented approach to the definition of treaty rights adopted by the majority is to be rejected, because "the divisible concept of the right to hunt does not reflect the understanding of Indian signatories to the treaties and is superimposed on the interpretation and delineation of the promises exchanged".[185] The rejection of the majority's approach to the definition of treaty rights by dissenting members of the Court suggests at the very least that the scope of the right is ambiguous, and such ambiguity should be resolved in favour of the Indian signatories. In her view, it is plausible "to interpret paragraph 12 of the NRTA as limiting the exercise of a broader treaty right rather than extinguishing aspects of a

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[181]Irwin, *supra* note 53.

[182]*Ibid*. at 81-82.

[183]Peter Hutchins, "The Law Applying to the Trapping of Furbearers by Aboriginal Peoples in Canada: A Case of Double Jeopardy" in Novak, *et al.*, *supra* note 13 at 32.

[184]*Ibid.*

[185]Catherine Bell, "*R. v. Badger*: One Step Forward and Two Steps Back?" (1997) 8:2 Constitutional Forum at 23.

right."[186] Further, she questions the lack of attention paid by the Court to the concept of fiduciary obligation and suggests that "treaty promises give rise to a stricter duty of adherence by the Crown because of a dual fiduciary obligation: the general obligation of the Crown to act in the interests of Aboriginal peoples over whom they exercise significant control and the specific obligation of the Crown to fulfill express promises in the treaty."[187] Because the treaties become the sole source of what were formally Aboriginal rights, a stricter standard of care should apply to the assessment of how honourable government conduct is. The justificatory analysis applied to the infringement of treaty rights should be more exacting than that applied to aboriginal rights.

This view is shared by other legal scholars. Peter Hogg comments on the Supreme Court's application of the *Sparrow* doctrine in *R. v. Côté* as follows:

> We are left with the unsatisfactory position that treaty rights have to yield to any law that can satisfy the *Sparrow* standard of justification. […] In my view, the standard of justification for a law impairing a treaty right should be very high indeed.[188]

Leonard Rotman holds similar views on the appropriateness of applying the *Sparrow* justificatory test to treaty rights.[189] He underlines the differences between Aboriginal and treaty rights, the most significant being their origins. Treaty rights do not have an independent existence like Aboriginal rights; they are the product of negotiations between the parties. If they are subject to alteration at the whim of the Crown, it would belittle their importance and the solemn nature of the treaties. Allowing the *Sparrow* test to be applied to treaty rights "blurs the distinction between Aboriginal and treaty rights and provides the latter with no greater protection than the former. This is particularly true where pre-existing Aboriginal rights, such as hunting, fishing or trapping rights, were expressly included in the terms of treaties".[190]

> The solemn nature of treaties as representative of the agreements made between the Crown and Aboriginal peoples and their existence as negotiated compacts suggest that any attempt to abrogate the rights contained within them ought to be subject to a more onerous test than that applied to Aboriginal rights.[191]

He suggests that the approach adopted by the Supreme Court in the *Sioui* case is preferable in that it represents an attempt at conciliation that is based upon the intention

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[186]*Ibid.* at 24.

[187]*Ibid.* at 25.

[188]Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2001 edition) at 618.

[189]Leonard Rotman, "Defining Parameters: Aboriginal rights, Treaty Rights, and the Sparrow Justificatory Test" (1997) 36:1 Alta L. Rev. 149.

[190]*Ibid.* at 166.

[191]*Ibid.* at 168.

of the parties at the time a treaty is signed. "Rather than looking at whether legislative infringements of rights are justifiable under the *Sparrow* test, the *Sioui* model adopts as its starting point the desire to find appropriate methods of maintaining the exercise of rights protected under the treaties in a manner that attempts to reconcile treaty intentions with contemporary realities".[192]

With respect to the regulatory and geographical limitations of the hunting, trapping and fishing rights, various authors focus on the restrictions that apply to provincial powers to infringe the treaty rights and in particular, on the fiduciary obligations of the provincial Crown.[193] The provincial government, in light of the obligation it assumed pursuant to paragraph 12 of the NRTA to ensure a supply of game for the Indians' support and subsistence, is restricted first, in the manner in which it can regulate the right and second, in the extent to which and the manner in which it can occupy land and allocate resources. Nigel Bankes and Shim Imai suggest that the geographical proviso, rather than imposing limits on the Indian's hunting rights, limits the rights of the Crown to "occupy" lands and is a source of obligations for the Crown.[194] The province has an overriding obligation, both fiduciary and constitutional, to support the way of life of the Indians and to fulfill the Crown's solemn engagement or "pivotal" guarantee concerning hunting, trapping and fishing.

Some legal writers focus on the division of powers and argue that, by virtue of subsection 91(24) of the *Constitution Act, 1867*, provincial governments may not be authorized to either "take up" lands or enact legislation with respect to natural resource development that relates to the land-based rights of Aboriginal peoples, matters that are within the core of federal jurisdiction. Shin Imai argues that even though no court has adjudicated directly on this point, the core federal authority over "Indians, and Lands reserved for Indians" encompasses the "taking up" of treaty lands. The NRTA transferred to the Prairie provinces the authority to regulate for conservation purposes, but did not transfer general authority over "Indians and Lands reserved for the Indians" to the province. The authority to take up lands remains with the federal government.[195] Nigel Bankes focuses on the "lands reserved" head of subsection 91(24) and suggests that the

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[192]*Ibid.* at 171.

[193]E.g. Macklem, *supra* note 172; Bell, *supra* note 185; Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727, and "Making Sense of Aboriginal and Treaty Rights", *supr*a note 9; Peter Hutchins, David Shulze & Carol Hilling, "When Do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59 Sask. L. Rev. 97; Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Saskatoon: Purich Publishing Ltd., 2001) c. 3.

[194]Nigel Bankes, "The Lands Taken Up Provision of the Prairie Treaties", paper presented at the *Access Management: Policy to Practice, A Conference Presented by the Alberta Society of Professional Biologists*, March 18-19, 2003, Calgary, Alberta; Shin Imai, "Treaty Lands and Crown Obligations: The "Tracts Taken Up" Provision" (2001) 27 Queen's L.J. at 1.

[195]Imai, *ibid.* at 37.

division of powers analysis developed by the Supreme Court in the *Delgamuukw* case supports the conclusion that land-based rights such as hunting rights are encompassed within the term "lands reserved", that they are part of the core of Indianness and that the doctrine of interjurisdictional immunity places those rights off-limits to provincial legislatures. Not only are provincial laws that purport to extinguish those rights invalid, but in addition, provincial laws of general application such as laws in relation to oil and gas, mining or forestry (resource laws) that relate (other than in an incidental way) to those land-based rights should be held inapplicable.[196] The division of powers analysis in that article is in the context of Aboriginal title lands, not in the context of treaty lands. However, similar arguments may well be made in the case of land-based rights such as hunting and fishing which were specifically protected by treaty, if one takes the view that the lands over which these rights could be exercised could only be "taken up" by the federal government for specific and limited purposes and that the Indians were promised that there would remain plenty of lands available to them to maintain their way of life.[197]

4.0. The Regulatory Limitation of the Trapping Right

As noted earlier, the Alberta government views the trapping right as a purely commercial right and regulates it accordingly. This section examines the way in which the provincial government regulates the activity of trapping and applies the regulatory scheme to Aboriginal trappers. Further, based on judicial decisions and expert opinion, it considers the nature of the trapper's interest in general, and how the Aboriginal peoples view their traplines.

4.1. Regulation of Trapping under Alberta's *Wildlife Act* and *Wildlife Regulation*

Trapping is regulated under the general hunting provisions of the provincial *Wildlife Act* and *Wildlife Regulation.*[198] As stated earlier, Alberta started regulating game in 1906.[199] Trapline registration was implemented in 1937. Initially, trappers only required a trapping license which allowed the trapping of animals throughout the province. A system of registered traplines was implemented in 1941-42 as a measure of conservation. Subsection 64(1) of the 1942 *Game Act* enabled the government to make regulations for

[196]Nigel Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32:2 U.B.C. L. Rev. at 317.

[197]See Shin Imai's discussion of the *St. Catherines Milling* case, *supra* note 194 at 40-41.

[198]R.S.A. 2000, c. W-10; A.R. 143/97.

[199]*The Game Act*, S.A. 1906-1915, c. 14.

the issuing of licences for trapping "granting to the licensee the sole privilege of trapping over a specified area".[200]

The current *Wildlife Act* continues the system of trapline registration instituted in 1941. Subsection 1(1) of the Act provides the following definitions:

> (o) "hunt" means in particular: …(iii) capture or willfully injure or kill;
>
> (hh) "trap" (i) used as a noun, means a device, other than a weapon, designed and commonly used to capture, injure or kill animals of any kind, and (ii) used as a verb, means capture, injure or kill animals of any kind, or attempt to do so, by means of the use of a trap;
>
> (j) "fur-bearing animal" means an animal of a kind prescribed as such pursuant to section 4(1)(c) of the *Wildlife Regulation.* [Schedule 4 - Part 3 of the regulation lists fur-bearing animals in the province.]

Part 2 of the Act, entitled "Relationship of the Crown to Wildlife", contains provisions dealing with the issue of ownership of wildlife. Subsection 7(1) vests the property in all live wildlife in Alberta in the Crown. Pursuant to section 9, the Minister may transfer the Crown's property in wildlife in writing on terms and conditions considered appropriate by the Minister. Section 10 provides that, in the event of a dispute as to whether wildlife belongs to the Crown, the Minister's decision is final.

The Act contains general prohibitions about hunting: subsection 24(1) prohibits hunting without a licence, and section 25 prohibits hunting outside an open season or at all if there is no open season, unless specifically authorized.[201] The Minister can issue a licence or permit to an applicant and determine the number of licences to be issued and the manner in which they are allocated. A licence is issued for a five year term, provided the licence is renewed yearly.[202] The application for renewal must include a report on the number and species of furbearers taken by all trappers. A licence is not transferable except to the extent prescribed. Under section 19 of the Act, the Minister has wide discretionary powers to cancel or suspend a licence or a person's right to claim or hold a licence "if the Minister considers that it is in the public interest".

Hunting is regulated on public as well as on privately owned lands, defined under subsection 1(1)(z) of the Act as including lands held under a certificate of title as well as lands "held under leases or other dispositions from the Crown that are prescribed to be privately owned land". Section 38 of the Act prohibits hunting on "occupied land" without the consent of the owner or occupant, and defines "occupied land" as follows:

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[200]*The Game Act*, R.S.A. 1942, c. 70.

[201]Subsection 24(1), formerly s. 26(1), was found by the S.C.C. in the *Badger* case to conflict with the hunting right set out in Treaty No. 8 as modified by the NRTA: *supra* note 69 at 820.

[202]Pursuant to s. 17 of the Act, a licence expires on March 31 following the date of its issue.

> a) privately owned land under cultivation or enclosed by a fence of any kind and not exceeding one section in area on which the owner or occupant actually resides; and
>
> b) any other privately owned land that is within one mile of the section referred to in clause (a) and that is owned or leased by the same owner or occupant.

More specific rules with respect to licensing are set out in the *Wildlife Regulation*, which creates six categories of trapping licences: 1) a registered fur management licence; 2) a registered fur management area partner licence; 3) a resident fur management licence; 4) an Indian fur management licence; 5) a Metis fur management licence; and 6) a subsistence licence (not for trapping).

On public lands, trapping is organized by Registered Fur Management Areas (RFMAs). Under section 69 of the previous *Wildlife Act*, trappers obtained a Certificate of Registration for a trapping area, which entitled them to trap furbearers within the specified area.[203] The current Act no longer refers to trapping areas, only to the issuance of licences. Reference to the establishment of registered fur management areas is found in the Regulation:

> s. 21 (1) The Minister may, for the purpose of licensing, establish or continue a system for the registration of fur management areas, and a registered fur management area is an area established or continued under that system.

Each RFMA is allocated to a Senior Licence Holder under a Registered Fur Management Licence, which describes the boundary of the RFMA. Section 33 of the Regulation details the eligibility, and section 34 the entitlements of licensees. The only criteria for obtaining a licence are residency in Alberta and proof of qualification to trap.[204] A Registered Fur Management Licence authorizes its holder to hunt fur-bearing animals and, north of the Red Deer River, to hunt up to 6 black bears (s. 34(1)). Pursuant to subsection 21(2) of the Regulation, the Minister may cancel a licence if, in his opinion, the RFMA to which that licence relates is not being harvested to his satisfaction. When an RFMA becomes vacant, the policy of Fish and Wildlife Division is to list the vacant RFMA in the area where it is located, allowing qualified adult residents to apply.

A Senior Licence Holder can enter into partnership agreements with other trappers, who are then authorized to trap on the RFMA. Until recently, partners on RFMAs did not require a licence: the Senior Licence Holder could sign on a partner by completing a Fur Management Area Partnership Agreement, which was approved by a Fish and Wildlife officer. As of the year 2004, Junior Partners on a RFMA must also purchase a licence. The basic fee for a Senior Licence is $40 (plus additional fee for added township) and $20.00 for a Partner Licence. The spouse or a resident child (under 18 years of age) of a

[203]R.S.A. 1980, c. W-9.

[204]A first-time trapper is required to pass a test or complete a Trapper Education course.

licence holder are allowed to hunt and trap within the RFMA without a licence. Each senior licence holder must submit an annual Report of Fur Bearing Animals Taken that includes the fur harvests of a spouse and a resident child, as well as partner licence holders.

A different system applies on private lands or lands that are held to be such and that are not part of a RFMA. Pursuant to subsection 36(1), trapping is authorized under a Resident Fur Management Licence. The Regulation specifies the criteria for eligibility and the entitlements of resident trappers.[205] The basic fee for the licence is $20. Resident trappers are not authorized to trap fisher, otter, lynx and wolverine nor marten on Fur Management Zone 3.[206] However, beaver may be trapped without a licence on privately owned lands, although a licence is required to sell the pelts. Similar to registered trappers, resident trappers must now report their fur catches each trapping season.

On Indian Reserves, Aboriginal peoples must obtain an Indian Fur Management Licence from the Band Administration Office.[207] No fee is charged for that licence. On Metis Settlements, members can obtain a Metis Fur Management Licence from the Metis Settlement Office. No fee is charged for the licence.

Finally, pursuant to section 39 of the Regulation, a Subsistence Hunting Licence can be obtained for the subsistence hunting area defined in subsection 39(2). It enables its holder to hunt one animal (moose, mule deer and white-tailed deer) between January 1 and April 30 in the area specified in the licence (s. 40), but only to feed his family members (s. 111). The licence is issued if the Minister is satisfied that the person is "in dire need of sustenance" for any of his family member. Family members are defined widely under subsection 3(t) of the Regulation as including also "relations created by the sharing of one but not both parents or through step or foster relationships".

The Regulation sets quotas for four species of furbearers (fisher, lynx, otter, wolverine). The quotas are set by Fur Management Zones and Wildlife Management Units (WMUs), and linked to the size of the trapping area.[208] The regulation also establishes fur seasons for each species of furbearers by Fur Management Zone. Mandatory registration of the above-mentioned four species, once captured and killed, is in effect. The Regulation also contains mandatory requirements for first-time trappers, establishes various sanctuaries as well as habitat conservation areas and wildlife control

[205]Alberta residents who are at least 14 years of age can apply for a licence, provided they have passed a test and completed a Trapper Education course.

[206]Alberta Sustainable Resource Development, Fish and Wildlife, *2003 Alberta Guide to Trapping Regulations*, at 5.

[207]*Ibid*. at 5. For eligibility and entitlements, see ss. 37 and 38 of the Regulation.

[208]There are eight Fur Management Zones in the province.

areas. Finally, it regulates the use of trapping devices and the methods of trapping, the sale of pelts and parts, and the exportation of furbearing animals.

The construction of a trapper's cabin is not regulated and is allowed as a matter of policy. Pursuant to section 124 of the *Disposition and Fees Regulation*, the holder of a registered fur management licence does not require a disposition under the *Public Lands Act* to build a cabin, provided that the cabin is located within the RFMA and is occupied for less than 180 days per year, and only for the purpose of trapping.[209] In 1994, due to increasing demands for the construction of cabins for recreational uses, the Alberta Trappers' Association developed a trappers cabin policy which was endorsed by the provincial government as provincial policy.[210] Trappers are now required to make a formal application to the local Land and Forest Service office for the construction or expansion of a cabin, and trappers are encouraged to obtain a Miscellaneous Permit for the new cabin. The policy specifies the dimensions of the main cabin and site and allows up to three cabins per RFMA. A government authorization is required for additional cabins.

4.2. Application of the Regulatory Regime to Aboriginal Peoples

When Alberta first instituted a system of trapline licensing in 1937, Aboriginal trappers could obtain their trapping licences for free. The government started charging fees in 1944 and the Department of Indian Affairs paid the fees of Treaty Indians until 1968. When it ceased this practice, Treaty Indians lost many of their traplines.[211]

There are currently 1,677 RFMAs in Alberta, varying in size from 36 square miles to 720 square miles. In 2003, there were approximately 2300 licensed trappers in Alberta, including 1600 registered trappers, and 650 resident trappers.[212] The government does not keep track of the number of RFMAs and licences held by Aboriginal peoples, nor does it have information on the number of Indian and Metis fur management licences. In 1980, it was estimated that just under 50% of all trappers in Alberta were Treaty Indians, and well over 50% were Aboriginal peoples, including non-status Indians and Metis.[213] It appears

[209] *Dispositions and Fees Regulation*, A.R. 54/2000, s. 124.

[210] Alberta Environmental Protection, Natural Resources, *Trapper Cabins: A Policy for Use* (1994).

[211] Gerry Sutton, *Trappers' Rights* (Edmonton: Jasper Printing, 1980) at 15: the author reports that between 1968 and 1973, approximately 170 trapping areas ceased to be held by Treaty Indians. In 1973, there were 431 Indian trapping areas and 654 Indian trappers in Alberta.

[212] Alberta Sustainable Resource Development, *Trapping in Alberta*: <www3.gov.ab.ca/srd/fw/trapping/index.html>.

[213] *Ibid* at 14.

that certain First Nations are now attempting to regain registered trapping licences that had been lost to non-Aboriginal trappers.

The belief that the NRTA extinguished any commercial trapping right held under treaty, and the commonly accepted view in government that trapping is a purely commercial activity, have resulted in the blanket application of trapping regulations to Aboriginal trappers. The *Wildlife Act* and *Wildlife Regulation* make no mention of any treaty rights and make no allowance for Aboriginal trappers. Aboriginal trappers are subject to the same licensing requirements and restrictions as all other trappers. They must pay fees to obtain licences, are subject to closed seasons and quotas, are restricted in the means used for trapping, and must report their fur harvest yearly in order to obtain a renewal of their licence. The only allowance for "subsistence" hunting does not relate to the trapping of fur bearers. Further, Aboriginal trappers are restricted with respect to the areas where they can trap in the same manner as non-Aboriginal trappers. The definition of "occupied land" in section 38 of the Act contradicts the finding in *Badger* that private land is only "occupied", and therefore not available for hunting by Aboriginal hunters, if there is a visible sign of occupation.

Nevertheless, to a certain extent Aboriginal trappers appear to be treated somewhat differently than non-Aboriginal trappers. In 1980, Sutton reported that there were pockets of northern Alberta which were in effect "group areas" and that historically, certain traplines were designated as "treaty lines" and restricted to Treaty Indians of a certain band.[214] Although there is no official policy in that respect, current practice appears to be that RFMAs held by Aboriginal trappers are maintained within the First Nation community of which these trappers are members, to the extent it is possible. When a licence becomes available, Fish and Wildlife officers will advise a band and the leadership will offer the licence to its members. Similarly, the transfer of a licence from an Aboriginal trapper to a non-Aboriginal trapper usually involves the approval of the band.[215]

4.3. The Nature of the Trapping Right under the Legislative Scheme

What is the nature of the interest held pursuant to a registered fur management licence? There is a dearth of material on the subject. The few publications on trappers' rights note the paucity of legal precedents in Canada in this area and the fact that those rights are

[214]Sutton, *supra* note 211 at 14.

[215]Personal communication with Pat Dunford, Head, Legislative and Advisory Services Enforcement – Field Services Branch, Fish and Wildlife Division, Alberta Sustainable Resource Development, September 2004.

poorly defined and understood.[216] In 1980, Sutton stated that Alberta government officials view the trapping licence as a mere licence, rather than an interest in land.[217] This perception remains unchanged in 2004: trappers are viewed as having a licence or privilege to harvest fur and are not expected to be on their RFMA for more than half the year. Similarly, Van Drimmelin observed that in British Columbia, the various ministries "perceive trappers as having a weak interest in land and therefore rarely accommodate trappers' concerns".[218]

Van Drimmelin describes a licence as "a right or privilege to use the grantor's land in a specified manner", "a personal right between the licensor and licensee" that does not create an interest in land.[219] It is revocable by the grantor and the revocation does not create a right to compensation. However, a licence can be coupled with an interest in land. Is the trapping licence a mere annual privilege or licence, or is it also an interest in land?

As noted, the *Wildlife Act* retains ownership rights in all live wildlife to the Crown. The trapper only acquires a right to an animal once it is killed and in his possession. The right granted by the licence is only a right to capture wildlife by the use of traps, snares or hunting, not an interest in the wildlife itself. The legislation is silent on the issue of interests in land. However, several elements of the licence, as well as government practices with respect to the renewal of licences, the transfer and devolution of RFMAs and licences, and compensation for losses and damages suffered by trappers, suggest that it is more than a mere licence.

First, the licence is associated with a defined territory, the RFMA. Even though the establishment of a RFMA is not legislated in Alberta, its boundaries are described in the registered fur management licence.[220] Policy documents describe the RFMA as "a parcel of public land allocated to a registered trapper" and state that the registered trapline system "provides trappers with exclusive trapping privileges within the boundaries of their area, allowing them to manage the fur resources within the RFMA".[221] These boundaries are depicted on maps kept by the Fish and Wildlife Division of the Department of Sustainable Resource Development. They are rarely changed, and only for

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[216]See e.g. Sutton, *supra* note 211; Benjamin Van Drimmelin, "The Missing Lynx: Trapping, Logging and Compensation" (1991) 25 U.B.C. L. Rev. 335; Hutchins, *supra* note 183.

[217]Sutton, *supra* note 211 at 10.

[218]Van Drimmelin, s*upr*a note 216 at 335.

[219]*Ibid.* at 343.

[220]Alberta Sustainable Resource Development, Fish and Wildlife Division, *Registered Fur Management Licence* : the licence identifies the Registered Fur Management Area No. and states that the boundary description is attached.

[221]Trapper Cabins: A Policy for Use, supra note 210.

specific purposes (e.g., to combine a small RFMA area with a larger one).[222] It appears that the licence, coupled with a well-defined RFMA, implies some security of tenure that extends beyond the annual term of a trapping licence.

Second, a trapper is issued a renewal of his licence, not a new licence, and some trapping areas have been held by the same families for generations. It appears that the right to a yearly renewal is automatic upon submission of the required fee and annual report of furbearers taken. Subsection 21(2) of the *Wildlife Regulation* enables the Minister to cancel a licence if the RFMA is not being harvested, but in practice the fur records are not closely scrutinized. Sutton suggests that the Minister could not refuse to renew a licence in order to open the trapping area to a competing use.[223]

Third, government policy with respect to the transfer of licences suggests that "traplines are treated as property rather than as an annual privilege."[224] Even though the final authority to issue a licence remains with government, a practice of "selling" traplines has developed.[225] The view of government officials is that only the sale of improvements gives rise to compensation. However, the sale price is often considerably higher than the improvements or assets, such as a cabin, which are being sold by the trapper, indicating that the licence is closer to an interest in land than a mere licence. The transfer of the licence is usually approved by government, as long as the "buyer" is qualified to trap. In the case of the death of a trapper, the licence will be normally issued to the spouse or children, or to junior trappers working on the RFMA.

Fourth, compensation is paid when the trapper's interest is damaged or in effect expropriated as a result of industrial activity on Crown lands. A compensation program has been in place in Alberta since 1980. It includes compensation for damage to or destruction of assets, temporary disruptions to trapping operations or long-term loss of opportunity to trap caused by industrial disturbances. This program is described further in Section 5 of this paper.

On the basis of the above factors, both Sutton and Van Drimmelin argue that the trapper's interest is akin to a *profit à prendre*, defined as "the right to enter onto the land of another, to take some profit from the soil which is capable of ownership, for the use of

[222]Personal communication, Pat Dunford, Head, Legislative and Advisory Services Enforcement – Field Services Branch, Fish and Wildlife Division, Alberta Sustainable Resource Development, December 2004.

[223]Sutton, *supra* note 211 at 19-20, citing a principle enunciated in *Delmonico v. Director of Wildlife* (1969), 67 W.W.R. 340 at 343.

[224]Van Drimmelin, *supra* note 216 at 345.

[225]The sale of traplines is routinely advertised in the magazine of the Alberta Trappers Association, *Alberta Trapper*.

the owner of the right."[226] Game has long been recognized as a profit of the soil. A *profit à prendre* is a proprietary interest in the land itself and cannot be easily revoked by the land owner. The existence of such an interest places some constraints on land use by the Crown as landowner. The Crown cannot extinguish the right without compensation, and the holder of the *profit à prendre* has legal remedies when a subsequent grant by the Crown is in derogation of his interest.[227] The rare court decisions on this matter appear to confirm this interpretation of the trapper's interest as a *profit à prendre*.[228]

As a result of a long association and familiarity with their trapline, most trappers develop a close relationship with the land and a sense of proprietorship. This feeling of ownership also stems from the development of infrastructure such as cabins, bridges and miles of trails that are cut and maintained by the trappers. Further, trappers develop a deep appreciation for the furbearers and view themselves as stewards of their RFMA in particular, and of the land in general.

4.4. The Nature of the Trapping Right as Perceived by Aboriginal Trappers

Trapline registration was a concept foreign to Aboriginal trappers. As noted by Hugh Brody, the system was introduced throughout the country largely in response to conflicts between indigenous and white trappers, in an attempt to both protect limited wildlife resources from over-harvesting and "to bring what were considered the Indians' unusual economic practices into line with ideas of ownership and exclusivity in the interests of rational production of a market economy".[229] Many Aboriginal peoples registered their traplines in the hope of acquiring a certain protection for their traditional trapping grounds. Peter Hutchins explains the profound misunderstanding that developed between Aboriginal trappers and government from then on:

> Through misrepresentation and misunderstanding, treaty Indians actually came to believe that registered traplines recognized and protected treaty rights, whereas government officials often operated under the assumption that registration provided no substantive protection against competing land uses.[230]

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[226]Van Drimmelin, *supra* note 216 at 346.

[227]Sutton, *supra* note 211 at 20-25; Van Drimmelin, *supra* note 216 at 346-347. See also Bankes, *supra* note 38 at 60-67.

[228]*Bolton et al. v. Forest Pest Management Institute* (1985), 66 B.C.L.R. 126 (C.A.); Chris Vickers and Canadian Forest Products Ltd., Prov. Ct of Alberta, Docket No. 85007523, March 17 1986.

[229]Hugh Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas & McIntyre, 1981) at 88.

[230]Hutchins, *supra* note 183 at 35.

To this day, the trapline remains "an important expression of Indian land and resource use" and is perceived by Aboriginal trappers as the "last frontier" against loss of land.[231] As stated by Hugh Brody, who studied Treaty 8 First Nations in northeast British Columbia:

> Even if a family is not using it, their trapline's existence through fallow years is a source of real security: it is important simply because it is there. Registered traplines are far more than areas in which an Indian can make money from furs; they are a stake in the land and its future. Moreover, the traplines taken together constitute a land base away from the reserve and, for nearly all reserves, traplines represent a large proportion of a hunting territory. […]Trapping is only a specific use of that land. For some individuals the fight in defence of a trapline is a fight for the possibility of making money from furs. For everyone, active trapper or not, it has become a struggle for the right to be an Indian. By twists of history and confusion over realities, the trapline has come to mean to the Indians something tantamount to the terms of the Treaty. Although they continue to insist upon and to exercise their right to hunt on Crown land wherever they can, it is registered traplines that they hold to be especially and irreversibly theirs. For a long time, the government has led them to believe this. The Indians are perplexed and angry now that, once again, the truth appears to be changing.
>
> The registered traplines represent land that remains to Indian people; the land to which, in spite of previous and great losses, they feel they have clear title. Here, in a circle drawn on a map in some white game official's office, and in circles that are drawn on maps in the people's own minds, there still is room for the Beaver, Cree, or Slavey way of life. For them it is the bitterest of ironies, therefore, to be told that in Canadian law, registered traplines grant no hunting rights and protection against other activities that would destroy the wildlife on them. Only if the term "trapline" is fortified by the meanings that the Indians give the word can the importance of their traplines be grasped. The Indians' dismay and fury when new intrusions threaten their traplines are a measure of the importance they attach to them.[232]

The above analysis lays out clearly the difficult situation in which Aboriginal trappers find themselves. On the one hand, the provincially regulated trapline (RFMA) is the only territory acknowledged by government in which they retain exclusive trapping rights and some degree of control over wildlife. On the other hand, the trapping licence is subject to regulatory restrictions and is a weak right that does not provide protection against encroaching resource development. As noted by Hutchins, "the very existence of traplines has been used to deny the survival of aboriginal rights or titles", and the fact that the trapline is an individualized form of tenure contradicts the collective nature of the treaty right to trap.[233] "Trapline registration systems may constitute for the aboriginal trapper a denial of an independent right to trap based on aboriginal rights or traditional

[231] *Ibid.*

[232] Brody, *supra* note 229 at 98-99.

[233] Hutchins, *supra* note 183 at 34.

use" (or on treaty), but they have become the only protection available to Aboriginal trappers.[234]

A few Aboriginal trappers have attempted to argue that they still hold unrestricted treaty rights to trap. In a 1984 case heard in a provincial court in Alberta, an Aboriginal trapper claimed an unrestricted right to trap under Treaty 8 as a defence against a charge under section 19 of the *Wildlife Act*.[235] That claim was dismissed by the court, which held that the unrestricted right to take or kill animals was for food only. In that case, the principal or primary purpose of the hunt was commercial, and the accused was not protected by the treaty. In the *Chechoo* case in Ontario, a treaty beneficiary claimed a right to trap without a licence under Treaty 9.[236] The court held that the province could not by legislation diminish, abridge or interfere with the rights to hunt and fish reserved unto the Indians under Treaty 9; the federal government had the sole power to abridge treaty rights under the terms of section 88 of the *Indian Act*. As the court remarked, the irony in this case is that Mr. Chechoo's claim was made against another treaty beneficiary, himself a licensed trapper who invoked the protection of the provincial *Game and Fish Act* against Mr. Chechoo. The case illustrates the dual nature of the trapping right from an Aboriginal perspective: it is both a right protected by treaty and a right benefiting from provincial protection under wildlife legislation.

Aboriginal trappers still strongly hold to the view that their trapline is an "entitlement". This explains why the enforcement of provincial regulations by Fish and Wildlife Officers is often resisted by Aboriginal trappers. Sutton noted in 1980 that relations between Aboriginal peoples and Fish and Wildlife Officers are often tense, and Aboriginal trappers complain of harassment and hostility.[237] Ron Morin's recent research on Aboriginal hunting and fishing in Alberta shows that even when Indians attempt to exercise their right to harvest wildlife, they are charged with various offences under wildlife legislation.[238] In his view, the attitudes and enforcement methods of Fish and Wildlife Officers are biased and lack a true understanding of First Nations culture. This situation underlines the need to clarify the nature of the trapping right of Aboriginal peoples and to reconcile the views of government and Aboriginal trappers, an issue addressed in the last section of this paper.

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[234]*Ibid*. at 35.

[235]*R. v. Boucher*, Alta. Prov. Ct, September 7, 1984, Docket: Fort McMurray No. A1629751-R.

[236]*Chechoo v. R.*, [1981] 3 C.N.L.R. 45.

[237]Sutton, *supra* note 211 at 15.

[238]Ron Morin, *Hunting and Fishing Rights in Alberta* (Edmonton: Native Counselling Services of Alberta) <www.ncsa.ca/documents/hunting_and_fishing_rmorin.pdf>.

5.0. The Geographical Limitation of the Trapping Right: Resource Development and the "Taking Up" of Treaty Land

The extent of resource development, notably oil and gas, oil sands and forestry, on the northern half of the province encompassed within Treaty 8, and the ecological impacts of this development, have been well documented. However, as noted in an earlier publication, the impacts of resource development on the land-based rights and way of life guaranteed to the First Nations by the treaty have not been much researched.[239] It appears that in certain areas, Aboriginal trappers are not actively using their traplines, but the extent to which this declining trend is the result of increasing encroachments by industrial development on the traplines needs to be documented. The following sections provide an overview of the entitlements of registered trappers confronted with forestry and oil and gas developments on their RFMAs. The discussion focuses first on the notification requirements, and second on the compensation provisions which may apply in the event of losses or damages incurred by trappers as a result of industrial developments.

5.1. Are Trapping Rights Recognized in Resource Legislation?

A brief review of the legislative and regulatory framework for the development of forest and oil and gas resources reveals the lack of strong protection for the rights of registered trappers. Licensed trappers are entitled to be notified of upcoming developments, with a greater degree of consultation occurring in the case of oil and gas development, but they have very little control over resource development on their RFMAs.

5.1.1. Forest Legislation

With respect to forestry development, neither the *Forests Act* nor the *Timber Management Regulation* makes any mention of the licensed trapper's interest. Forest Management Agreements (FMAs) and timber quotas are allocated to forest companies without consultation with the registered trappers on whose RFMAs logging operations will take place. FMAs contain a standard clause reserving to the Crown the right to authorize trapping within the FMA area, provided that the FMA holder's right to grow and cut timber is not significantly impaired.[240] The requirement to notify trappers of upcoming logging operations is found in a policy document, the provincial Ground Rules,

[239]See Monique M. Ross, *Aboriginal Peoples and Resource Development in Northern Alberta*, CIRL Occasional Paper #12 (Calgary: Canadian Institute of Resources Law, 2003) at 1-2.

[240]See e.g. Forest Management Agreement (Province of Alberta and Spray Lake Sawmills (1980) Ltd.), O.C. 284/2001, s. 8(1)(d).

which provide direction to timber operators for planning and implementing their operations.[241]

The Ground Rules include provisions for the integration of timber harvesting with other resources, such as wildlife, and other forest users, such as trappers. Section 4.5, entitled Integration of Timber Harvesting with the Trapping Industry, requires timber operators to make "a reasonable effort" to refer their long-term General Development Plan and supply information to senior partners of a RFMA who may be affected by proposed harvest operations. The plan should be sent five years before the beginning of harvest operations. Further, at the trappers' request, the company must send its Annual Operating Plan (AOP) as soon as it is approved by government. The AOP must identify the location of trappers cabins, trails and traplines "if known". In addition, trappers must be advised at least 10 days prior to impending harvest activities, "preferably by personal contact".

These policy provisions do not impose strict obligations on forest companies to notify trappers. It appears that by contrast to large FMA holders, small timber operators only provide notification ten days prior to their cutting operations. Further, trappers are clearly expected to accommodate upcoming logging operations by removing their equipment, including traplines, or rescheduling their trapping activities to reduce conflict. There does not appear to be a similar expectation that timber operators will modify their operations to accommodate the concerns of trappers. This is mere notification, not a consultation process.

In addition, the ten days notification period (which used to be only five days until 2003) is insufficient. During the trapping season, trappers are often on a remote line and do not pick up their registered mail until after the fact. Further, even if contact is made prior to cutting operations, the conditions that trappers may have agreed to with a particular company are not necessarily carried out by the operators performing the work who may be unaware of agreements or conditions. Consultation is usually conducted during the ten-day period and the trappers will often have barely time to clear out of the way on industrial operators.[242]

Individual forest companies may go beyond these minimal provincial standards. For instance, Alberta-Pacific Forest Industries Inc. (Al-Pac) attempts to accommodate trapping activities within its FMA area by both minimizing the negative effects of timber harvesting on furbearers, and consulting and compensating trappers more extensively than the provincial scheme requires. The company's Detailed Forest Management Plan

[241]Alberta Environmental Protection, Lands and Forest Services, *Alberta Timber Harvest Planning and Operating Ground Rules*, 1994.

[242]Personal communication, Gordy Klassen, President of the Alberta Trappers' Association, February 2005.

(2000) acknowledges the importance of trapping within its FMA area, and sets up a Trapper Consultation Program and a Trapper Compensation Program.[243] The company has developed a Trapping Management Policy with the stated objective to "maintain an opportunity for Aboriginal people who have been affected by our woodlands activities to pursue a trapping livelihood in the Forest Management Area".[244] Under the consultation program, trappers are notified at three intervals. The first notification occurs one to three years ahead of logging operations, and the exchange of information enables the company to become aware of trappers' concerns and to make some adjustments to its logging plans, and the trappers to be informed of the company's upcoming activities and of its trapper's programs. The second notification occurs one trapping season ahead of scheduled logging, and the third at least ten days before entry in the area to be logged.

By contrast with the provincial standards described earlier, the intent appears to be to gather information from the trappers about their traplines and land uses and to incorporate their concerns into the company's logging plans. Further, notification is conducted by a team of trapper coordinators and involves actual meetings with the affected trappers. Even though this company program is an improvement over the provincial minimal requirements, it remains a voluntary initiative by an individual company and does not strengthen significantly the rights of Aboriginal trappers confronted with forest development.

5.1.2. Oil and Gas Legislation

With respect to energy development, as is the case with forestry, the legislative and regulatory framework pursuant to which energy resources are developed does not mention trappers' interests at any stage in the development process. It is only in policy documents, such as Guides or Information Letters, that trappers are identified as parties that may be affected by the various activities of energy companies. Thus, trappers are entitled to receive notification of upcoming seismic exploration activities on their RFMA. Seismic operators must contact the registered trappers in their program area at least 10 days prior to initiating the program of exploration.[245] The same notification requirement applies to the issuance of surface leases, such as mineral surface leases, licences of

[243]Alberta-Pacific's Detailed Forest Management Plan, January 1, 2000. Under 4.3.4 – *Furbearers*, the plan states that 392 traplines are located within the FMA, providing trappers with a supplementary income as well as a traditional lifestyle, and discusses the needs of the 15 species of furbearers found in the area (at 41). Section 5.5.7 – *Trappers*, describes both the trapper consultation program and the trapper compensation program. The trapper compensation program is discussed under Section 5.2 of this report.

[244]Alberta Pacific Forest Industries Inc., *Trapping Management Guide*, at 3.

[245]Alberta Sustainable Resource Development, Information Letter 2004-04, *Changes to Trapper Notification*, April 7, 2004.

occupation or pipeline lease agreements, by the Lands and Forest Service of Alberta Sustainable Resource Development.[246]

Trappers are also entitled to be notified by companies applying to the Alberta Energy and Utilities Board (EUB) for energy developments, pursuant to Guide 56.[247] The EUB has a well-developed public consultation program (now called participant involvement). Guide 56 states that "industry is required to develop an effective participant involvement program that includes parties whose rights may be directly and adversely affected by the nature and extent of the proposed application."[248] These include parties with a direct interest in land (such as landowners, residents, occupants) and parties who have a right to conduct activities on the land, such as Crown disposition holders.[249] Trappers are treated as Crown disposition holders, and as such are included in the consultation and notification process.[250] The guide outlines the minimum consultation and notification requirements and expectations that apply respectively for facility licences (e.g., processing plants, batteries), pipeline licences, and well licences.[251] These include the distribution of project-specific information, responding to questions and concerns, discussing options, alternatives and mitigating measures and seeking confirmation of non-objection through cooperative efforts. Guide 56 distinguishes two types of involvement: personal consultation, and notification. Requirements are more stringent in the case of personal consultation (e.g., face-to-face visits or telephone conversation rather than written correspondence for the initial communication). If the concerns or objections of the affected parties cannot be resolved, the applicant must file a non routine application and provide the EUB a written summary of those outstanding concerns/objections. The resolution of concerns/objections may occur through informal discussions or an Appropriate Dispute Resolution (ADR) process. Alternatively a public hearing with the EUB may be requested. Trappers can raise objections to energy applications by sending a letter of objection to the EUB, explaining how their rights may be directly and adversely affected by the proposed development.

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[246]Personal communication, Ralph Jamieson, Dispositions Services and Technical Services Branch, Public Lands and Forests Division, December 20, 2004. Trappers' notification is required as per Condition 116, which is used for all surface approvals.

[247]Alberta Energy and Utilities Board, Guide 56, Energy Development and Schedules, October 2003.

[248]*Ibid*. at 5.

[249]*Ibid*. at 6, under 2.2.1: Who to include.

[250]This is the case, even though trappers do not fit the definition of a "Crown disposition holder" provided in Appendix 3 of Guide 56, at 232: "A person or party that has been assigned use of public lands (e.g., lease, licence or permit) issued under the provisions of the *Public Lands Act"*. A registered trapper does not hold a licence under the *Public Lands Act*, and a trapper's cabin is exempted from the requirement to obtain a disposition under the *Dispositions and Fees Regulation*, as discussed in Section 4.2 of this report.

[251]Guide 56, Tables 5.1, 5.2, 6.1, 6.2 and 7.1.

5.2. Trappers Compensation for Losses Resulting from Industrial Activity

The Alberta Trappers Compensation Program was launched by the provincial government in 1980 and became effective in 1981. Its objective is to compensate trappers for trapping business losses related to industrial activity on Crown lands, and for cabins lost to naturally caused forest fires.[252] The program has currently no legislative or regulatory basis; it is a policy-based initiative.[253]

Since 1997, the program has been administered by the Alberta Trappers Association (ATA), with joint funding by industry and government. Stakeholders in the program include Alberta Sustainable Resource Development (ASRD), the Alberta Forest Products Association (AFPA), the ATA, the Canadian Association of Petroleum Producers (CAPP), the Small Explorers and Producers Association of Canada (SEPAC), the Canadian Energy Pipeline Association (CEPA) and ATCO Electric.[254] A Compensation Policy and Procedures, developed in 1998, provides a framework for compensation. A seven-member Trappers' Compensation Board, comprising a representative of Metis trappers and a representative of First Nations trappers, in addition to the industry representatives and ATA representative, manages the program.[255]

The program allows eligible trappers to receive compensation for their losses, either directly from a responsible company or from a Trappers' Compensation Fund. The five claims recognized under the program include: 1) direct damages to trapper assets; 2) theft, damages and other deliberate damages; 3) trapper cabins lost to forest fires; 4) temporary disruptions to trapping operations; and 5) long term loss of livelihood.[256] The third category of claims is funded by the trappers themselves, out of a portion of their trapping licences. The board reviews, adjusts and settles claims and helps resolve claim-related disputes between individual trappers and companies. Companies are responsible for payment of damage to or destruction of trapper assets, temporary disruptions and long-term loss of livelihood caused by industrial activity if a RFMA is being "liquidated"

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[252]Alberta Energy, Information Letter 81-1, Trappers Compensation Program, January 27, 1981.

[253]Note that the 1984 *Wildlife Act* included a provision establishing a Fish and Wildlife Trust Fund for the purpose of, *inter alia*, providing compensation for damage to traplines resulting from industrial activities: s. 6 of the *Wildlife Act*, R.S.A. 1984, c. W-9.1, provided: There is hereby established the Fish and Wildlife Trust Fund for the purposes of: … (b) providing compensation, in accordance to prescribed programs, for … (iii) damage to traplines resulting from industrial activities. This provision has been removed from the current *Wildlife Act*.

[254]Alberta Sustainable Resource Development, Fish and Wildlife, *2003 Alberta Guide to Trapping Regulations*, at 13: <www3.gov.ab.ca/srd/fw/trapping/index.html>.

[255]*Alberta Trappers' Compensation Program – Memorandum of Understanding (Policy and Procedures)*, September 1998: <www.albertatrappers.com/trustAdmin/mouBookletForm.doc>.

[256]*Ibid*. at 13-19.

and there is no opportunity for recovery of furbearer harvest.[257] Trappers must first directly negotiate with the company responsible. If negotiations fail, the claim is submitted through the local Fish and Wildlife Service office to the Trappers' Compensation Board. Claims for theft or vandalism or loss of cabins to forest fires are compensated with funds coming from the ATA Compensation Fund. The board's decisions are binding with respect to allocation of funds under its control, but the board has no authority to require payment of a claim it has approved when the compensation payment comes from a company.

The program suffers from insufficient funding and is in need of a major overhaul.[258] As stated by the Chair of the board: "The ATA and its members are very concerned that the existing compensation program is not totally meeting the trapper's needs. Industry also has serious concerns because of conflicts and the lack of clear responsibility of trapping area holders. I have recommended that a thorough review of the program be undertaken."[259] The compensation program is rarely used by Aboriginal trappers, who feel that it does not address their needs and that they are not adequately represented on the board.

The compensation program offered by Al-Pac provides an alternative to the provincial compensation program, especially for Aboriginal trappers.[260] It enables eligible trappers to participate in Al-Pac's monitoring program, which is designed to gather statistical data on furbearers prior to and following harvesting activities to monitor population changes over time, and to obtain employment or improvements as compensation-in- kind. Monetary compensation is awarded for the following claims: long term loss of livelihood, interference or inconvenience resulting from harvesting and hauling activities, damaged or lost trap sets if a trapper was not notified ten days prior to harvesting operations, and participation in the beaver nuisance program.[261]

Other forest companies and oil and gas companies have also developed their own compensation programs and negotiate directly with registered trappers who may be affected by their operations. Further research is needed on specific compensation policies and practices developed by private corporations.

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[257] *Ibid*. at 18.

[258] The annual contributions to the Fund by government and industry amount to $66,000: see <www.albertatrappers.com/trustAdmin/trustAdminCompensation.html>.

[259] *Ibid.* at Summary, and personal communication, Lew Ramstead, Chairman of the Alberta Trappers' Association Compensation Board, September 2004.

[260] See *supra* note 243 at 109-110.

[261] Trapping Management Guide, *supra* note 244 at 16-20.

5.3. Does the Alberta Government Acknowledge the Existence of Treaty Rights on Lands Taken up for Resource Development?

The above-mentioned notification and compensation provisions at a minimum acknowledge the existence of the registered trappers' interest. Because this interest is viewed by the province as a mere licence conferring a weak right, it does not benefit from strong protection from competing resource uses. Further, Aboriginal trappers cannot claim special protection as treaty beneficiaries since the provincial government does not recognize the existence of a treaty right to trap.

Policy documents emphasize that the lands comprising Treaty 8 are "public lands" and the province has full legislative powers to manage these lands and natural resources.[262] The idea that First Nations still hold and are entitled to exercise hunting, fishing and trapping rights under treaty on their "traditional lands" with limited interference from government is resisted by the Alberta government. There is lip recognition that the government will "acknowledge and respect the existing treaty and other constitutional rights of Aboriginal people in provincial legislation, policies, programs and services".[263] However, there seems to be no limits to the steady "taking up" of lands for resource development, without consideration for the existence and potential infringement of treaty rights. As discussed in a previous publication, the government has not yet undertaken a review of its resource legislation in order to assess its impact on the hunting, fishing and trapping rights of Aboriginal peoples, and resource development is continuously eroding these land-based rights.[264]

In a recently released Draft Consultation Policy on Land Management and Resource Development, Alberta acknowledges that some activities on Crown lands may affect existing treaty rights and other interests of First Nations, and states that it "will consult with First Nations when development of natural resources on provincial Crown land may infringe First Nations Rights and Traditional Uses".[265] Five Ministries are currently developing Consultation Guidelines that will help individual departments identify at which stages in regulatory processes consultation should occur. At the same time, Alberta strenuously argues in court proceedings that it does not have a duty to consult Aboriginal peoples when land is "taken up" for uses contemplated in the treaty, and further, that the obligation to consult First Nations is only triggered upon proof of the existence of an

[262]See for example Government of Alberta, *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework* (Edmonton: 2000) at 14 and 17.

[263]*Ibid.* at 17.

[264]See s*upra* note 239.

[265]Alberta Government, The Government of Alberta's Proposed First Nations Consultation Policy on Land Management and Resource Development, August 31, 2004.

Aboriginal or treaty right.[266] The implication appears to be that the government of Alberta does not recognize the existence of any treaty right until that right has been proven or established in court. As a result, there are currently no statutory requirements for Crown consultation with Aboriginal peoples potentially affected by resource development. The Consultation Policy and Guidelines, by creating consultation processes involving the government, not only resource developers, will go some way towards fulfilling government's obligation to consult First Nations. However, it appears that the provincial government will not amend statutory and regulatory provisions pertaining to resource development to account for the new consultation processes; the Consultation Policy states that "consultation will occur within applicable legislative and regulatory timelines".

When First Nation communities have questioned the potential impacts of resource development on their treaty and Aboriginal rights and have asked to be consulted about these developments, the approach taken by government officials or regulatory tribunals has been to deny the existence or validity of these rights, or alternatively to deny that they have the jurisdiction and expertise to decide whether the alleged rights are valid or may be infringed by proposed development. An example of this denial is provided by the failed attempt by the Whitefish Lake First Nation to appeal a decision by Alberta Environment Director to approve an expansion of a sour gas plant operated by Tri Link Resources Ltd., on the basis of the potential impact of the plant on its Aboriginal and treaty rights. In particular, the Band argued that the release of contaminants from the plant may affect its members' uses of the lands for hunting, trapping and fishing and that the Director had not adequately assessed these potential impacts. A related claim was that the Director had failed to consult with the First Nation prior to approving the expansion. The Environmental Appeal Board (EAB), which heard the appeal, stated as follows:

> […] thus, the Director would have to consider the potential impacts of his approval decision on those claims and accompanying uses, once they were brought to his attention in a Statement of Concern, *if the Alberta government recognized the validity of the First Nation's legal claims*". However, the Board is unaware of any law requiring or allowing the Director himself to decide for the Alberta government whether those claims are valid.
>
> […] the Board presumes that the Director did in fact inquire as to the Alberta's government position on the validity of the First Nation's claimed aboriginal rights and found that the government disputed their validity as a matter of geographic uncertainty".[267]

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[266]See Section 3.3.2 of this report. The recent Supreme Court decisions in the *Haida* and *Taku River* cases should put to rest the argument that rights must be "proven" before the government will agree to consult Aboriginal peoples on potential infringements of their treaty rights.

[267]*Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment, re: Tri Link Resources Ltd.*, (19 November 1999) 99-009 (Alberta E.A.B.) at paras. 29 and 30. In a further decision following a request for reconsideration by the Whitefish Lake First Nation, the Board stated: "unlike the situation in British Columbia, the existence and scope of these rights is not conceded. This is

Another example of the reluctance to address claims of infringement of treaty rights in the resource development process is the Alberta Energy and Utilities Board (EUB)'s position as outlined in several of its decisions. First Nations confronted with energy developments on their traditional lands have long argued that their treaty rights and traditional land uses, notably trapping, may be adversely affected by these developments. The EUB denies that it has the jurisdiction to address questions of Aboriginal or treaty rights, and relies on its general consultation requirements to respond to First Nations' requests for consultation.[268] Its stance concerning the lack of standing of First Nation communities that wish to object to proposed developments further illustrates that reluctance. In three recent decisions, one of which was appealed to the Alberta Court of Appeal, the EUB has informed First Nation communities that, in order to have standing to object to energy applications, they had to establish "a legally recognized interest with respect to the land in question or use of it, and that the decision of the Board may directly and adversely affect that interest".[269] The test for standing used by the EUB is spelled out in subsection 26(2) of the *Energy Resources Conservation Act (ERCA)*, which allows the Board to give certain rights to a person affected by an energy development.[270] In all three cases, the EUB concluded that the First Nations did not have standing because they either had failed to establish that they had a legally recognized interest, or they had not established the potential for direct and adverse impacts. The Court of Appeal agreed to hear the appeals, stating as follows:

> Natural resource development can impact or potentially impact on treaty rights. The law is unsettled and rapidly developing. It is not clear how the common law regime regarding infringement of treaty rights and justification for infringement, as set out in *R. v. Sparrow* […] interacts with the statutory roadmap that governs the Board's actions. There is no case law directly on point. It will benefit not only the parties to the present appeal, but also other First

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the Alberta government's position, apparently adopted by an official of the Crown more directly involved in such matters than the Director" (28 September 2000) at para. 47.

[268]The EUB's position is discussed in: Monique M. Ross, "The Dene Tha' Consultation Pilot Project: An 'Appropriate Consultation Process' with First Nations?" (2001) 76 Resources 1; Nigel Bankes, "Regulatory Tribunals and Aboriginal Consultation" (2003) 82 Resources 1.

[269]*Whitefish Lake First Nation v. Alberta (Energy and Utilities Board*), [2004] A.J. No. 98, February 11, 2004, at para. 6. The cases involve, in addition to the Whitefish Lake First Nation, the Dene Tha' First Nation and the Frog Lake First Nation: *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, [2003] A.J. No. 1582, December 11, 2003; *Frog Lake First Nation v. Alberta (Energy and Utilities Board*), [2003] A.J. No. 1583, December 11, 2003. Leave to appeal the EUB decisions was granted by the Court of Appeal in the three cases. The appeals by the Frog Lake and the Whitefish Lake First Nations have been discontinued, and the appeal by the Dene Tha' was heard by the Court of Appeal on February 10-11, 2005.

[270]R.S.A. 2000, c. E-10. Subsection 26(2) states that "if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person", the Board shall provide that person an opportunity to be heard and make representations to the Board.

> Nations communities and those involved in the oil and gas industry to clarify the process to be used in order to identify and address treaty rights and constitutional issues.[271]

Ultimately, the only appeal heard by the Court of Appeal was that of the Dene Tha' First Nation.[272] The Court dismissed the appeal. The analysis focused on the interpretation of the standing provision found in section 26(2) of the ERCA, and the Court stated that "no one argued before us that that was not the test".[273] That provision has two branches, a legal test, and a factual one. In order to satisfy the legal test, one has to demonstrate some legally-recognized interest. The Court ruled as follows:

> Satisfaction of the first test, some legally-recognized interest, was pretty well conceded on this appeal. […] Obviously, a constitutional, a legal, or an equitable interest would suffice.
>
> Though some of the counsel at some stages seem to have thought that the Board had found no legally-recognized interest here, that is not how we read the two Board decisions.[…] Though there is some ambiguity in the January 16 decision, we see none at all in the April 15 decision. Still less do we read the Board as saying that it had no jurisdiction to ask such a question (about a legally-recognized interest)."[274]

The appeal was dismissed on the grounds that the determination of whether the Dene Tha' would be directly and adversely affected was a factual determination, and the Court did not have the jurisdiction to review the EUB's determination that the First Nation had not established that its rights would be directly affected by the proponents actions. The First Nation had not met the second branch of the test, the factual one.

The Court declined to address the issue of whether the Crown has a duty to consult those with aboriginal or treaty rights, holding that the issue was not really raised before the Board:

> We do not and cannot decide whether the Crown in Right of the province has or had a duty to consult here, or whether it in fact consulted sufficiently or at all, There is no leave to raise either such question on appeal, neither arises from these proceedings, the Board did not rule upon them, and it had no cause to, on this record.[275]

The Court did not "clarify the process to be used in order to identify and address treaty rights and constitutional issues" in the oil and gas development process, as First Nations communities had hoped it would.

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[271] *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, *ibid.*, para. 4.

[272] *Dene Tha' First Nation v. Alberta Energy and Utilities Board et al.*, 2005 A.B.C.A. 68 (February 16, 2005).

[273] *Ibid.* at para. 9.

[274] *Ibid.* at paras. 11 and 12.

[275] *Ibid.* at para. 33.

6.0. Redefining the Nature of the Aboriginal Trapping Right

As discussed in Section 3, there is general agreement among all concerned that the right to trap recognized by Treaty 8 included both a commercial and a domestic component. The right to trap thus defined was critical to the continuation of the Aboriginal way of life at the time of treaty-making, and the promise of its protection was pivotal to the signing of the treaty by the Aboriginal parties. That right was subject to regulation by the Dominion of Canada for conservation purposes only and could be restricted by limited "taking up" of lands by the Dominion.

However, views differ as to the impact of the NRTA on the treaty right to trap. The courts and governments interpret the NRTA as having extinguished the commercial component of the right. What is left of the treaty right is a right to trap "for food" interpreted literally, that is for direct consumption of the flesh of the animal. Further, in 1930, the province acquired the power to regulate the exercise of the treaty right and the right to "take up" or "occupy" lands. The courts emphasize that this grant of authority is subject to the same limitations as those applying to the federal government under the treaty, and that any infringement of the right must be justified under the *Sparrow* test. Similar to the federal Crown, the provincial Crown must act honourably in interpreting and applying the treaty. The provincial government views trapping as a strictly commercial activity, not protected by Treaty 8. Consequently, as illustrated in the last two sections, the government subjects Aboriginal trappers to the same regulatory regime as non-Aboriginal trappers, and it fails to acknowledge and protect their treaty rights to trap in the resource development process.

Aboriginal peoples and various experts disagree with the literal interpretation of the hunting right clause of the NRTA and the view that the NRTA restricted the rights to hunt, trap and fish protected by Treaty 8. They suggest that the intention of the federal government in 1929 was to fulfill its treaty obligations and protect the interests of the Indians, and that the hunting right clause was inserted in the NRTA in order to secure to the Indians a right to trap for "support and subsistence", rather than for strict consumption of the flesh of the animal. Justice Wilson's dissenting opinion in *Horseman*, and Justice Binnie's analysis of the concept of "sustenance" in *Marshall*, lend support to that broad and liberal interpretation of paragraph 12 of the NRTA.

In *Horseman*, Justice Wilson first discusses the central importance of the government of Canada's promise to the Indians of Treaty 8 that their livelihood would be respected and that their hunting, trapping and fishing rights would be protected forever. She interprets the jurisprudence on paragraph 12 of the NRTA as supporting her finding that "one should view para. 12 of the Transfer Agreement as an attempt to respect the solemn engagement embodied in Treaty No. 8, not as an attempt to abrogate or derogate

from that treaty."[276] Given the "pivotal nature" of the guarantee concerning hunting, fishing and trapping, Justice Wilson states that it is essential for the Court to be satisfied that the federal government made an "unambiguous decision" to renege on its treaty obligations before concluding that it did. In her view, the historical evidence presented does not support the conclusion that "para. 12 of the NRTA was intended to limit the Indians' traditional right to hunt and fish (which included a right of exchange) to one confined to hunting and fishing for personal consumption only".[277] She draws support from Justice Dickson's distinction in *Moosehunter* between hunting for "support and subsistence" and hunting for "sport or commercially" for her position:

> And if we are to give para. 12 the "broad and liberal" construction called for in *Sutherland*, a construction that reflects the principle enunciated in *Nowegijick* and *Simon* that statutes relating to Indians must be given a "fair, large and liberal construction", then we should be prepared to accept that the range of activity encompassed by the term "for food" extends to hunting for "support and subsistence", i.e. hunting not only for direct consumption but also hunting in order to exchange the product of the hunt for other items as was their wont, as opposed to purely commercial or sport hunting.
>
> […] this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food".[278]

In her opinion, paragraph 12 of the NRTA confers on the province the power to regulate hunting for sport or for purely commercial purposes, not the power to restrict the Indians' right to hunt for support and subsistence in the broader sense. Justice Wilson disagrees with Justice Cory's finding that a *quid pro quo* was granted by the Crown for the reduction in the hunting rights of the Indians, in that the geographical area of the hunt was expanded to the whole province, and the way in which hunting was conducted was removed from the jurisdiction of the province. She questions "whether the provinces were ever in a legitimate constitutional position to regulate that form of hunting prior to the Transfer Agreement."[279]

Justice Wilson's interpretation of the right to hunt "for food" as encompassing a right to sell or exchange the product of the hunt for support or sustenance is comparable to Justice Binnie's interpretation of the Mi'kmaq's right to trade for "sustenance" or "necessaries" in the *Marshall* decision.[280] The "trade clause" of the Mi'kmaq treaties of

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[276]*Horseman*, *supra* note 85 at 915-916.

[277]*Ibid.* at 916.

[278]*Ibid*. at 919.

[279]*Ibid*. at 921.

[280]Marshall, *supra* note 67.

1760-61, which was being considered in the *Marshall* case, is different from the hunting right clause of Treaty 8. Nevertheless, the findings of the court on the principles of treaty interpretation and their application to the case have relevance for the construction of the hunting rights of the numbered treaties. In *Marshall*, Justice Binnie construed the treaty right as a "right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test".[281] In his view, the concept of "necessaries" is equivalent to the concept of a "moderate livelihood", which "includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth".[282] Justice Binnie draws a distinction between the treaty right to trade for necessaries or sustenance, and a free standing commercial right to trade. This is reminiscent of Justice Wilson's distinction between hunting for support and subsistence as opposed to hunting for purely commercial profit. Justice Binnie's finding is based on his extensive analysis of the historical background of the Mi'kmaq treaties. He notes that in the 1760s, the British "did not want the Mi'kmaq to become an unnecessary drain on the public purse"; as a result, it was "necessary to protect the traditional Mi'kmaq economy, including hunting, fishing and gathering".[283] He further observes that "the same strategy of economic aboriginal self-sufficiency was pursued across the prairies in terms of hunting".[284]

Defining the right to trap "for food" as encompassing a right to sell or trade the product of the trap for "support and subsistence", or to sustain a moderate livelihood, as opposed to a purely commercial right, is an interpretation of the NRTA that upholds the honour and integrity of the Crown. The Supreme Court has repeatedly stated that the honour of the Crown is always at stake when the Crown enters into treaties with Aboriginal peoples and applies them.[285] This is due to the nature of the relationship between the Crown and Aboriginal peoples, a relationship that has been defined as fiduciary in nature in certain circumstances. Chief Justice McLachlin reiterated that principle most recently in *Haida*:

> In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the interpretation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown"[…].
>
> […] Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty […].

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[281] *Ibid*. at 500-501.

[282] *Ibid*. at 502.

[283] *Ibid*. at 482-483.

[284] *Ibid.*

[285] *Ibid*. at 496-499.

> […] The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing".[286]

Further, this interpretation of the right to trap is buttressed by historical research on the drafting of the hunting right clause of the NRTA, and by evidence that in 1929, the federal government was concerned with protecting the way of life of the northern Indians who depended on hunting, trapping and fishing for their subsistence.[287] Given the nature of the traditional economy at the time the NRTA was negotiated, Frank Tough's argument that it would have been contradictory to include trapping in paragraph 12 of the agreement, if the intention had been to completely eliminate the right to trade furs, is persuasive. The historical evidence supports the view that the purpose of paragraph 12 of the NRTA was simply to confer on the province the power to regulate sport and purely commercial hunting, not to extinguish any treaty rights of the Indians.

If the right to trap for food as defined above is an existing treaty right, it ensues that it can only be regulated by the province for conservation purposes, and that it cannot be limited by continuous taking up of lands for resource development. Further, any infringement of the right needs to be justified, as outlined in Section 3.1.2. of this paper. In *Horseman*, Justice Cory emphasized that the means employed by the Indians to hunt for food, the seasons during which they could hunt, and the species they could hunt were placed beyond the reach of the provincial government.[288] Applying these findings in *Badger*, Justice Cory concluded that the licensing scheme under the Alberta *Wildlife Act* was in direct conflict with the treaty right to hunt.[289] Similarly in *Marshall*, Justice Binnie found that the imposition of a closed season, the discretionary nature of the licensing system and the blanket prohibitions against fishing without a licence infringed the treaty right of the Mi'kmaq.[290] With respect to the geographical limitation, as noted earlier, both *Horseman* and *Badger* have established that the geographical area in which the treaty right could be exercised was enlarged as a result of the NRTA.

These findings explicitly restrict the power of the province to regulate the treaty right to trap, unless the regulation is justified on the basis of conservation or other compelling and substantial public objectives.[291] However, the simple assertion that regulations are necessary for conservation is not sufficient to justify infringement. The Crown still has to demonstrate that the regulations have carefully considered the treaty rights and that it has

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[286] *Haida*, *supra* note 118, para. 19.

[287] See Irwin, *supra* note 53; Tough, *supra* note 159; and Sections 3.3.2 and 3.4.2 of this report.

[288] *Horseman*, *supra* note 85 at 933.

[289] *Badger*, *supra* note 69 at 820.

[290] *Marshall*, *supra* note 67 at 505.

[291] *Marshall (No. 2)*, *supra* note 107 at 539, 552.

sought to accommodate these rights.[292] By these standards, the way in which trapping is currently regulated by the provincial government would undoubtedly be found to unjustifiably infringe a treaty right to trap. The regulatory regime gives provincial decision-makers an unstructured discretionary power. The province imposes blanket prohibitions on Aboriginal and non-Aboriginal trappers alike, and strictly regulates the seasons in which trapping is allowed, the species and numbers trapped, the methods of trapping and the areas in which trapping may occur. These legislative and regulatory provisions all infringe the treaty right to trap.

In the *Breaker* case, a case dealing with the hunting rights of a beneficiary of Treaty 7, Judge Cioni of the Provincial Court of Alberta concluded that the regulatory regime applicable to hunting in the Highwood Road Corridor Wildlife Sanctuary established under the Alberta *Wildlife Act* was a *prima facie* infringement of the treaty rights of the accused. After a thorough examination of the evidence and judicial precedents, notably the findings of the Supreme Court in *Badger*, Judge Cioni found that even though they were aimed at conservation, the hunting restrictions in the wildlife sanctuary were not justified. There was nothing in the wording of the Regulations to indicate any accommodation of the First Nations' priority rights to hunt:

> […] Conservation measures to preserve the supply of game are basic and critical and come first but only when the First Nation right is included and balanced and is a factor in the making of the final decision, consistent with the Crown's honour and duty. There is no indication, on the evidence, that that was done here.
>
> […] As well, governmental policies that encourage or create competition for the numbers of animals in the Highwood, such as sport hunting and cattle grazing <u>without consideration to First nations priority and allocation</u>, and a balancing thereof with societal common law rights, as referred to in Gladstone are, in my view, constitutionally impermissible.
>
> The test here is not solely the merit of a road corridor sanctuary, along Highways 40 and 541, but a full scrutiny of what accommodation has been made for Mr. Breaker's right to hunt for food in the Highwood and WMU 404. I find here there to be no such accommodation. The approaches taken do not add up to minimal infringement but, in my view, to maximum control of Native hunting, while leaving a narrow allowance of Native subsistence hunting, without due regard to practicality.[293]

The court found equally disturbing the fact that the First Nations were not consulted on the conservation scheme, but simply notified of the "*fait accompli*" once the Regulations were in place.[294]

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[292] *Sundown*, *supra* note 78 at 417.

[293] *R. v. Breaker*, [2000] A.J. No. 1317 at paras. 493, 501 and 502.

[294] *Ibid.* at paras. 507-508.

It should be noted that, as noted by Justice Binnie in *Marshall*, the right to trap "for food", that is for "support and subsistence", has a limited scope. A trapping right to trade for "necessaries" as opposed to economic gain "is a regulated right that can be contained by regulation within its proper limits".[295] Justice Binnie defines the type of permissible regulation of that right as follows:

> Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard.[296]

If the treaty right may be regulated by the Crown, it is equally important to note that Aboriginal peoples are entitled to be consulted about limitations on the exercise of their treaty rights. The next and final section of this paper examines the way in which the province may accommodate the Aboriginal right to trap for food as defined in this section.

7.0. Accommodating the Aboriginal Trapping Right

In 1991, the provincially appointed Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (the Cawsey Commission, by the name of its Chairman Justice Cawsey) published its final report.[297] As part of its mandate, the Task Force was asked to review the findings and recommendations of the Alberta Board of Review on Provincial Courts published in 1978 (the Kirby Report), and to determine the extent to which these findings were still applicable and whether the recommendations had been implemented. One of the recommendations of the Kirby Report dealt specifically with the enforcement of the *Wildlife Act* and related statutes on Native Peoples. It read as follows:

> Discussions between representatives of the Government of Alberta, the Indian Association of Alberta and the Metis Association of Alberta should be initiated by the Government at the earliest possible date for the following purposes:
>
> a. to discuss the problems arising out of the provisions of the Wildlife Act, related statutes and their enforcement;

[295] *Marshall*, *supra* note 67 at 501.

[296] *Ibid*. at 503.

[297] Alberta, Justice on Trial – Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (Edmonton: Solicitor General, March 1991).

> b. to bring about a more equitable interpretation of the rights of the Indians implicit in the Indian treaties with respect to hunting, fishing and trapping;
>
> c. to effect changes in the Wildlife Act and related statutes that will reflect that interpretation and accord recognition to the corresponding needs of the Metis.[298]

The Cawsey Task Force determined that this recommendation was still applicable, noting that there was considerable concern amongst Aboriginal peoples respecting the enforcement of provincial Wildlife and Fishing statutes and regulations and that this area of the law remained very contentious for them.[299] Another area of concern for Aboriginal peoples involved the "multi-leasing of Crown land and the subsequent impact on trapping rights." The Task Force stated that the jurisdictional and constitutional issues surrounding the federal government's delegation of authority to the province compounded the enforcement problems. The Task Force noted some effort on the part of the provincial government to develop programs to facilitate communications between the Department of Forestry, Lands and Wildlife and Aboriginal communities, but concluded:

> The whole area of Aboriginal rights respecting hunting, trapping and fishing remains of intense spiritual and cultural concern to Aboriginal people. While the development of programs allows the perspective of the Department of Forestry, Lands and Wildlife to be presented to Aboriginal people, there still remains a fundamental difference of opinion on issues of hunting, trapping and fishing with no active mechanism present to facilitate dialogue to address such issues.[300]

Negotiations are ongoing between Aboriginal political organizations (Treaty 8 First Nations) and the federal government on treaty implementation. Certain Treaty 8 First Nations have also submitted specific claims to the federal government. It would be advisable for the provincial government to heed the advice offered in the two above-mentioned reports and to also enter into negotiations with Aboriginal organizations and communities to address the issue of the interpretation of the Alberta treaties and the NRTA, notably the land-based treaty rights of Aboriginal peoples.

The Supreme Court has repeatedly underlined the need for reconciliation between the views of government and Aboriginal peoples on the interpretation of the treaty terms and their modern implementation, as well as the need to accommodate treaty rights. Most recently, in the *Marshall* case, the Supreme Court acknowledged that resource conservation and management raise complex issues that need to be resolved on a case by case basis. The process of accommodation of the treaty rights requires that Aboriginal peoples be involved in the decision-making process:

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[298] *Ibid*. Volume III – Working Papers and Bibliography, at 2-65.

[299] *Ibid*. at 3-23.

[300] *Ibid.* at 3-24.

> As this and other courts have pointed out on many occasions, the process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation.[301]

In 1993, in its appeal decision in the *Badger* case, Justice Kerans stated his dismay at the state of provincial game legislation in Alberta which allows for no Aboriginal participation in wildlife management.[302] More recently, in the *Breaker* case Judge Cioni expressed similar concerns about the provincial government's lack of consultation with First Nations in setting up wildlife conservation schemes:

> Consultation is equally important in the *Sparrow* resource context, as with allocation of the resources of the Highwood. Consultation with First Nations will engage the long history and tradition of the Native experience to enhance modern biological and scientific practices.
>
> […] Consultation and, further, co-operation in conservation schemes that will preserve the supply of game is essential for efficient action on common goals.[303]

The final recommendation of the RCAP with respect to fish and wildlife harvesting by Aboriginal peoples suggests a most appropriate and sound approach to the resolution of the long-standing conflict between treaty beneficiaries and both levels of government with respect to their hunting, trapping and fishing rights:

> 2.4.62 The principles enunciated in the *Sparrow* decision of the Supreme Court of Canada be implemented as follows:
>
> (a) provincial and territorial governments ensure that their regulatory and management regimes acknowledge the priority of Aboriginal subsistence harvesting;
>
> (b) for the purposes of the *Sparrow* priorities, the definition of 'conservation' not be established by government officials, but be negotiated with Aboriginal governments and incorporate respect for traditional ecological knowledge and Aboriginal principles of resource management; and
>
> (c) the subsistence needs of non-Aboriginal people living in remote regions of Canada (that is, long-standing residents of remote areas, not transients) be ranked next in the *Sparrow* order of priority after those of Aboriginal people and ahead of all commercial or recreational fish and wildlife harvesting.[304]

The implementation of such measures necessitates an interpretation of Treaty 8 and paragraph 12 of the NRTA that upholds the treaty promises, namely that the Aboriginal peoples' means of earning a livelihood would be protected, and that allows these promises to be fulfilled in a modern context.

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[301] *Marshall (No. 2)*, *supra* note 107 at 550.

[302] *R. v. Badger*, [1993] C.N.L.R. 143 (Alta. C.A.).

[303] *Breaker*, *supra* note 293 at paras. 509 and 510.

[304] RCAP Report, *supra* note 2 at 652.

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