R. v. Maurice

Canadian Native Law Reporter

Saskatchewan Provincial Court

Nightingale J.

October 5, 2001

[2002] 2 C.N.L.R. 244

Her Majesty the Queen on the Informations of Ken Dillabaugh, a Resource Officer and a Peace Officer v. Walter James Gardiner and Mervin M. Maurice

Case Summary

The accused were charged with the unlawful use of a searchlight for the purpose of hunting wildlife, contrary to s-s. 11.1(3) of The Wildlife Regulations, 1981, made pursuant to The Wildlife Act, 1998, S.S. 1998, c. W-13.12. The accused were driving home following an unsuccessful moose hunting expedition when they saw a whitetail deer in the ditch. Using the beam of the headlights the accused M got out and killed the deer. The deer was killed on a public dirt road which was Crown land. The accused were subsequently stopped by the RCMP in a routine highway check and they were later charged.

The accused submitted that they are Métis persons and that as Métis they are also "Indians" within the meaning of the term in the Constitution Act, 1867. The accused submitted that the Natural Resources Transfer Agreement (NRTA) protects Métis as well as Indians so that they were in the same position as treaty Indians, who are specifically exempted by the terms of the Regulation from its operation when they hunt on reserve lands. They submitted that para. 12 of the NRTA guarantees them, as Indians, an Aboriginal right to hunt as they wish on unoccupied Crown lands to which they have a right of access, a guarantee which cannot be ousted by the Regulation. The accused further submitted that the decisions in R. v. Prince and Myron, R. v. Myran and Meeches, R. v. Tobacco and R. v. Mooswa stand for the proposition that Indians under the protection of the NRTA are free to hunt at night with artificial lights so long as it is safe to do so.

Moreover the accused asserted that the Regulation did not apply to them because by proclaiming the Regulation the Province exceeded its legislative jurisdiction. The accused submitted that the Regulation touches a core of Indianness and that only Parliament may legislate concerning this core subject matter. The accused submitted that as Métis they possess an Aboriginal right to hunt, that the Regulation infringed this right and that the infringement was not justified under the analysis outlined by the Supreme Court of Canada in R. v. Sparrow, *[1990] 3 C.N.L.R. 160*.

The Crown did not concede that the accused are Métis persons. The Crown argued that the Métis were not included in the term "Indians" for the purposes of the NRTA. The Crown

submitted that the Métis are subject to the Regulation because the Regulation is a law of general application that neither exceeds provincial jurisdiction nor touches upon a core of Indianness. Even if the core of Indianness is touched, the Regulation can be upheld if it can withstand the Sparrow analysis. The Crown submitted that, while acknowledging that the Métis of Sapwagamik may have a collective right to hunt, the accused no longer enjoyed that right because they had distanced themselves from the community and no longer live a traditional Métis life. The Crown submitted that if the accused had an Aboriginal right to hunt, the Regulation did not infringe that right, and if it did, any infringement was justified under the Sparrow analysis.

Held: Accused guilty as charged.

1. The accused are Métis, as they assert.
2. The hunting traditions, customs and practices of the people of Sapwagamik include hunting after dark by moonlight, but it is not a part of the community's traditions to use artificial light to hunt. Indeed, the practice has been expressly spurned as dangerous.
3. Assuming without deciding that Métis are included as Indians in the NRTA and the Constitution Act, the Regulation nevertheless applies to them. The accused did not have the benefit of the reserve lands exemption contained in the Regulation because they were not hunting on reserve lands. Paragraph 12 of the NRTA gave the accused no protection from the operation of the Regulation. Their rights were circumscribed by the need for safety. The case law cited does not broadly approve all night hunting with the use of artificial lights. Rather, the weight of authority supports the conclusion that dangerous hunting practices will not be protected by an assertion of Aboriginal rights. Aboriginal rights must be exercised subject to legislation that addresses legitimate safety concerns.
4. The Regulation is a law of general application within provincial jurisdiction. The doctrine of interjurisdictional immunity was not triggered by the Regulation. The Regulation prohibiting night hunting does not touch the core of Indianness. It does not completely extinguish an Aboriginal right to hunt for food, but rather limits that right in the interests of safety.
5. The Regulation did not prima facie infringe the accuseds' Aboriginal rights as guaranteed pursuant to s.35(1) of the Constitution Act, 1982. The limitation is reasonable because the practice of night hunting is highly dangerous. The Regulation does not cause undue hardship because using artificial lights to hunt at night has never been even a marginal aspect of the hunting practices of the people of Sapwagamik, and for the same reason the Regulation does not deny to the holders of the right their preferred means of exercising that right.
6. Even if the Regulation prima facie infringed the accuseds' Aboriginal rights, any infringement has been justified by the Crown. The legislative objective for the Regulation is safety, a compelling and substantial concern. The infringement honours the fiduciary relationship between the Crown and Aboriginal peoples by neither singling out the Métis,

nor allowing others to stand in priority to the Métis. The hunting rights of Métis in Northern Saskatchewan have not been infringed in any meaningful way by the restriction on hunting at night with artificial light. The Métis were consulted regarding the Regulation.

P.M. McAdam, for the Crown. C. Chartier, for the accused.

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NIGHTINGALE P.C.J.

I. Preamble

1 The Accused in this case have been charged with hunting at night by means of a spotlight. It is clearly the hope of the parties that a number of issues about the nature and extent of the Aboriginal rights of the Métis of Northwest Saskatchewan will be settled here. In the event, this judgment will be much narrower in scope. I have concluded that however one approaches or characterizes the hunting rights of the Métis, those rights are circumscribed by the safety needs of hunters and of the public. Hunting at night with artificial lights is so fundamentally dangerous that no one ought to do it, and the legislated prohibition against the practice is able to withstand all of the arguments raised against it in this case. Accordingly, for the reasons which follow, I have concluded that both Accused are guilty of the offence charged.

II. Background and Facts

2 On the afternoon of Wednesday, October 6th, 1999, Walter Gardiner, Richard Maurice and Mervin Maurice left their homes in Meadow Lake, Saskatchewan and went hunting moose together near Keeley Lake, some distance to the north. They hunted through the afternoon and evening, but they were unsuccessful and eventually gave up. Around two o'clock in the morning of the 7th of October, Walter Gardiner was driving the group home along a public dirt road which runs between Provincial Highway Numbers 4 and 903, when the headlights illuminated a whitetail deer along the ditch. The men decided to take it, so Mervin Maurice got out of the vehicle and killed the deer, using the headlights' beam. The group loaded the carcass into the box of the pickup truck and headed home. As they neared Meadow Lake around quarter to five that morning, they were stopped in a routine highway check by a member of the R.C.M.P. and were eventually charged with the unlawful use of a searchlight for the purpose of hunting wildlife, contrary to Section 11.1(3) of The Wildlife Regulations, 1981, as amended. While in his written statement to the police Walter Gardiner indicated that the spot where the deer was killed was on the Reserve lands of the Canoe Lake First Nation, such was not the case; the deer was killed on Crown land.

3 It was agreed between the parties that if I find that the Accused are Métis, they are also "Indians" within the meaning of that term in The Constitution Act, 1867, though each party takes a very different view of whether the Accused should be seen as "Indians" at any time later than

1867. Therefore, considering the agreement between counsel, I am proceeding on the basis that if they are Métis, the Accused are "Indians" in both law and fact for the purposes of the division of governmental powers and responsibilities established in Section 91(24) of The Constitution Act, 1867.

4 Messrs. Gardiner and Maurice have asserted that they are Métis persons. The Crown does not concede the point, notwithstanding its position that the Métis of Northwest Saskatchewan are "Indians" for the purposes of Section 91(24) of The Constitution Act, 1867. The extensive historical evidence tendered by the Accused satisfies me that they are Métis, being direct descendants of people who took scrip in 1906 from the Scrip Commissioner James McKenna at Ile-à-la Crosse. The evidence further satisfies me that Messrs. Gardiner and Maurice and their families maintain a substantial connection to the tiny Métis settlement of Sapwagamik at the Northwest reach of Canoe Lake, from whence they came. For several years both men have lived with their families in the Town of Meadow Lake, so that their children could obtain an education, there being no school at Sapwagamik and each family preferring to live as a unit rather than sending their children to a residential school or to stay with relatives in another community. Neither Accused has regular employment, although both take work when they can find it. Summers and Christmas vacations are spent at Sapwagamik, where the two families reconnect with parents and grandparents and engage more fully in a Métis traditional life of hunting, fishing and trapping. Indeed, a decade ago Mervin Maurice built his family a new cabin at the settlement to replace one of his father's which was falling into ruin.

5 The evidence has also established that Sapwagamik, sometimes also known as "Local 176" of the Métis Nation of Saskatchewan, has existed for a number of years, although the date of its founding was never stated. The parties have approached the case on the footing that the settlement qualifies as a collective which had and still has Aboriginal hunting rights, although they do not agree as to who may exercise those rights. Counsel have agreed that since this Métis community is physically and culturally proximate to another Métis community at Turnor Lake, I may apply the factual findings made by my brother Judge in R. v. Morin & Daigneault, *[1996] 3 C.N.L.R. 157* (Sask. Prov. Ct.) and find here an Aboriginal right to hunt. Even without such an agreement by counsel I would have no hesitation in finding that Sapwagamik is a Métis community of long standing, with a significant tradition, practice and custom of hunting in the surrounding countryside for food. The nature of the Aboriginal right to hunt, particularly as it relates to the matter of hunting at night, will be explored further in the pages that follow, as will the question of whether the Accused may exercise a communal right to hunt.

III. The Regulation and the Offence Charged

6 The relevant Regulation (hereinafter referred to as the Regulation), which I reproduce in its entirety, provides:

> Hunting Safety
>
> 11.1(1) Nothing in this section is to be construed as applying to hunting on a Reserve.

(2) For the purpose of ensuring the safety of hunters and the public, a searchlight shall not be used for the purposes of hunting wildlife.

(3) No person shall fail to comply with subsection (3).

(4) Notwithstanding subsections (2) and (3), a person may use a searchlight for the purposes of normal trapping operations.

(5) No person shall, during the period from one-half hour after sunset to one-half hour before sunrise, discharge, for the purposes of hunting, a firearm from any:

(a) provincial highway or highway;

(b) road, primary grid road or grid road;

(c) road allowance, right of way or ditch.

7 Section 2(JJ.2) of the same Regulations defines "searchlight" as follows:

2(JJ.2) "searchlight" means a spotlight, flashlight, jacklight, nightlight, headlight or any other light that casts a beam of light, and includes night vision scopes and goggles.

8 The Regulation was proclaimed in February, 1998, following the decision of the Saskatchewan Court of Queen's Bench in R. v. Grumbo, *[1996] 3 C.N.L.R. 122*, which acknowledged the existence of Aboriginal hunting and fishing rights of Métis people in Saskatchewan. More will be said later in these reasons about the background to the Regulation.

IV. Hunting Safety and the Hunting Traditions of the Community

9 Since the issue of hunting safety so informs this decision, I will now discuss in detail the considerable evidence on the point. I begin with the testimony of Richard Wyatt, called by the Crown in reply to the Defence case.

10 Mr. Wyatt, the Executive Director of the Saskatchewan Association for Firearm Education (hereinafter referred to as SAFE), testified as an expert on hunter safety. SAFE is an agency in Saskatchewan which delivers the Canadian Firearms Safety Course and the Saskatchewan Hunter Education Program to hunters and would-be hunters. It is part of Mr. Wyatt's job to identify hunting safety concerns and ensure that safety concerns are being properly addressed in SAFE's programmes and courses. As well as heading the organization, Mr. Wyatt personally prepares materials for and teaches hunter education courses, and has trained nearly one thousand hunters. He sits on the Development Committee of the Canadian Firearms Centre, as well as on the International Hunter Education Association, an organization which co-ordinates hunter safety courses across the Continent. The copyrighted teaching materials he has helped create have been acquired by thirty-eight states in the United States of America for use in their hunter training courses.

11 Mr. Wyatt testified that one of the eight principles of firearm safety is that a hunter be certain of the target and beyond. He explained that night hunting with an artificial light is not taught during routine hunter training, since the practice is illegal for licenced hunters. If a trainee were

to ask during training about using artificial lights to hunt at night, Mr. Wyatt testified that he would explain that the practice is universally seen as dangerous because:

a) while the target may be very well identified in the light beam, the beam also creates shadows and dark spots behind the target, because the beam is so close to horizontal;

b) the human eye adjusts to different levels of light and, having first adjusted to the dark, the pupils will constrict when the light is switched on, thus reducing the ability to see and, in particular, to perceive depth of field;

c) the brighter the spotlight, the blacker the scene behind the range of the beam.

12 From his extensive professional contacts across North America, Mr. Wyatt has become aware that no jurisdiction in Canada or the United States permits night hunting by artificial light. Mr. Wyatt explained that the kind of high-powered rifle used in Saskatchewan to kill big game will fire a bullet with a lethal range of three or four miles, and that, even if the bullet hits the prey, it will pass through the body and remain lethal unless it hits a heavy bone in the animal. Even though the most powerful spotlights available today cast a beam of up to half a mile, they still leave a long distance of invisibility behind the illuminated target. With no idea what is behind the target, the hunter knows nothing about the terrain, the possible presence of other people or the danger of ricochet within the zone of fire. As he put it succinctly at page 751 of the trial transcript:

> ... and with the use of the artificial light you just simply cannot be sure of what is beyond the target.

13 In Mr. Wyatt's view there is no such thing as an isolated area where it is safe to hunt with lights at night, because it is in just such isolated places that hunters go looking for moose and deer to shoot. Even if the hunter is familiar with the terrain the danger remains, in Mr. Wyatt's opinion, since the hunter cannot know whether other hunters are there. There is, in short, no situation in which hunting at night with an artificial light would not be inherently dangerous.

14 Mr. Wyatt also has access to hunting accident statistics, and observed that in 1960, when record-keeping began, there were one hundred and six hunting accidents and fourteen fatalities, whereas now there are no fatalities and few injuries, a development he ascribes to hunter education, including teaching about the dangers of hunting at night with artificial lights.

15 In addition to all the foregoing, Mr. Wyatt told a harrowing tale of his own experience in the Porcupine Plain district of Saskatchewan, when he was compelled to move his own hunting camp after a hunter using a spotlight shot at a moose a hundred yards away from him, and the bullet whizzed through Mr. Wyatt's campsite.

16 In contrast, hunting under bright moonlight can be safe in some circumstances in Mr. Wyatt's view, such as when the moon is high overhead and there is a solid backdrop behind the target which will stop the bullet.

17 Concerns about the dangers of hunting at night by artificial light are not limited to the opinions of experts such as Mr. Wyatt. Kenneth Ness, as the Regional Compliance Specialist for the West Boreal Region of Saskatchewan Environment and Resource Management (hereinafter referred to as SERM), has received complaints and anonymous telephone tips from area residents concerned about their safety as a result of people hunting at night with lights. In 1997 and 1998 his office at Meadow Lake received approximately a hundred and fifty "Turn-In-Poacher" telephone calls about people hunting at night with lights. Even after February, 1998, when the present Regulation was proclaimed, the office still received some one hundred and twenty-nine such calls. Mr. Ness described a high level of anger and anxiety among landowners about the issue. In his experience, it is a common practice among those who hunt at night by artificial light to do what Messrs. Gardiner and Maurice did in this case, namely to use vehicle lights as a spotlight along rural roadways.

18 The Regulation exempts Indians hunting on their Reserve lands from its application, but Mr. Ness noted that the majority of Indian Bands in the Province have responded to the exemption by passing Band bylaws which prohibit the practice as dangerous and unethical.

19 Joseph Muldoon, presently the Director of the Environmental Protection Branch of SERM, testified about the consultations about the Regulation which occurred in late 1997 and early 1998, when he was Senior Manager of Public Involvement in the Aboriginal Affairs Unit of SERM, between SERM and the Saskatchewan Métis community at large. While I will describe his evidence in more detail later in these reasons, it is apposite to note at this point that, throughout the series of meetings which were held across the Province, Mr. Muldoon gained a strong impression that Métis people very much favoured a ban on using artificial lights to hunt at night for reasons of safety, although they wanted the prohibition contained in their own Métis Wildlife and Conservation Act to govern, rather than a law of general application such as the Regulation.

20 I received considerable further direct testimony about the perspective of Métis people of Northwest Saskatchewan about night hunting. It seems that from both political and traditional viewpoints, the Northwest Saskatchewan Métis community has shunned the use of artificial lights to hunt at night.

21 During his testimony, Philip Chartier, Regional Director of Buffalo Narrows and LaLoche in the Métis Nation of Saskatchewan, discussed at length the drafting and adoption of the Métis Wildlife and Conservation Act in 1994 by the Métis Nation. A copy of the Act was exhibited at the trial. Section 13 provides:

> 13. No person shall hunt or fish with the aid of an artificial light.

Mr. Chartier testified that this enactment is intended to reflect and affirm traditional Métis hunting practices.

22 Edward Gardiner, an Elder of Sapwagamik, testified extensively about his community and its

traditions. He confirmed that the Métis Wildlife and Conservation Act is meant to embody Métis traditional hunting practices, which sometimes entail hunting at night by moonlight but never by artificial light. In his view, most Elders would feel that to use an artificial light would be wrong. He said, at p. 186 of the trial transcript:

> Q: If Wally [Gardiner] or Mervin [Maurice] asked you if they could go hunting what would you tell them?
>
> A: [Translation] Well, if they were to come and ask me I would guide them and tell them that they should never use a light to hunt with or any -- not to shoot anything late at night because of the unknown.

23 Ambrose Maurice and Florence Maurice, the parents of Mervin Maurice and also Elders, both testified that most Elders would disapprove of hunting at night with artificial light except in the limited context of trapping.

24 I have mentioned several instances in the evidence where the hunting traditions of the Métis of Northwest Saskatchewan were discussed. From these and other, similar pieces of testimony among the other Métis witnesses, I find that the hunting traditions, customs and practices of the people of Sapwagamik include hunting after dark by moonlight. I also find that the use of artificial light to hunt is no part of the community's traditions, and that the practice has always been expressly and specifically spurned as dangerous. This tradition has found its way into the Métis Wildlife and Conservation Act of 1994, which the Métis hope will govern their hunting rights.

V. The Positions of the Parties as to Jurisdictional and Aboriginal Rights Issues

25 The Accused advanced a number of reasons why, in their view, the Regulation does not apply to them, and why they possess the right to hunt at night with lights. For ease of reference I will set these submissions out in the order that the Accused raised them and will state the Crown's response immediately following each.

A. The Natural Resources Transfer Agreement, 1930

26 The Accused submit that both federal and provincial governments considered the Métis to be "Indians" in 1867 when the Canadian Confederation was formed, and that this governmental opinion remained consistent up to and including 1930. Thus, when the Natural Resources Transfer Agreement of that year (hereinafter referred to as the NRTA) was negotiated and given the force of law by The Constitution Act, 1930, both governments meant to extend to the Métis the protection from the effect of Provincial laws extended to "Indians" in the Agreement. The Accused filed volumes of historical government documents in which they say there is a continuity of language in both government correspondence and legislation which makes plain that when officials and legislators used the term "Indian," they meant to include the Métis. They submit that it can therefore be similarly assumed that the negotiators and drafters of the NRTA and The Constitution Act, 1930 also meant to include the Métis as "Indians" when using that

term. This being the case, the Accused argue that they are in the same position as Treaty Indians, who are specifically exempted by the terms of the Regulation from its operation when they hunt on Reserve lands. In any event, and quite apart from the exemption contained in the Regulation, according to the Accused, Paragraph 12 of the NRTA guarantees them, as "Indians," an Aboriginal right to hunt as they wish on unoccupied Crown lands to which they have a right of access, a guarantee with [sic] cannot be ousted by the Regulation.

27 More specifically, the Accused urge that several decisions of the Supreme Court of Canada and the Court of Appeal of Saskatchewan, which bind me, have held that "Indians" under the protection of the NRTA are free to hunt at night with artificial lights so long as it is safe to do so. Counsel referred me to R. v. Prince and Myron, *[1964] S.C.R. 81*, *[1964] 3 C.C.C. 1*, *46 W.W.R. 121*, *41 C.R. 403*; R. v. Myran and Meeches, *[1976] 1 W.W.R. 196*, *23 C.C.C. (2d) 73* (S.C.C.); R. v. Tobacco, *[1980] 3 C.N.L.R. 81* (Sask. C.A.); and R. v. Mooswa, [1980] 3 C.N.L.R. 112 (Sask. C.A.).

28 The Crown disagrees, submits that there is no such continuity of language in the exhibited documents, but that rather the documents disclose a strong lack of consistency about the constitutional and legal standing of the Métis. The Crown therefore urges that I find that the Métis were not included in the term "Indians" for the purposes of the NRTA and that I find them to not have its protections. This was the conclusion recently reached by the Court of Appeal of Manitoba in R. v. Blais, *[2001] MBCA 55* [*[2001] 3 C.N.L.R. 187*] concerning the interpretation of the Manitoba NRTA.

B. Division of Constitutional Powers -- "Interjurisdictional Immunity"

29 If the foregoing submission fails, and I find that the Métis are not "Indians" for the purposes of the NRTA, then the Accused, referring to the fact that the Crown has conceded that they are "Indians" within the meaning of Section 91(24) of The Constitution Act, 1867, assert that the Regulation cannot apply to them because by proclaiming the Regulation the Province has exceeded its legislative jurisdiction. Although the Regulation may apply to all Saskatchewan hunters, when it is applied to the Métis as "Indians," it "touches a core of Indianness" in relation to which only Parliament has the jurisdiction to legislate and, in the absence of an Act of Parliament which incorporates the Regulation into federal law, it must be held not to apply to the Métis. In this connection I am referred to: Delgamuukw v. British Columbia, *[1997] 3 S.C.R. 1010* [*153 D.L.R. (4th) 193*, *[1998] 1 C.N.L.R. 14*, *220 N.R. 161*], R. v. Alphonse, *[1993] 4 C.N.L.R. 19*, and R. v. Dick, *[1985] 2 S.C.R. 309* [*23 D.L.R. (4th) 33*, *[1986] 1 W.W.R. 1*, *69 B.C.L.R. 184*, *[1985] 4 C.N.L.R. 55*, *22 C.C.C. (3d) 129*, *62 N.R. 1*].

30 The Crown responds by submitting first that the Regulation, as a law of general application, does not "touch a core of Indianness" and that the Accused, as Métis, ought to be as subject to it as is anyone else, just as Métis must pay taxes and must obey motor traffic rules. In the alternative, argues the Crown, even if the core of Indianness is touched, the Supreme Court of Canada [in] its decision in Delgamuukw, supra, and in other decisions has held that even if an enactment does touch upon Indianness, the enactment may nonetheless be upheld if it can withstand the justificatory analysis established in R. v. Sparrow, *[1990] 1 S.C.R. 1075* [*70 D.L.R.*

(4th) 385, *[1990] 4 W.W.R. 410*, *46 B.C.L.R. (2d) 1*, *[1990] 3 C.N.L.R. 160*, *56 C.C.C. (3d) 263*, *111 N.R. 241*]. The Crown also submits that the Court of Appeal for Saskatchewan definitively settled the point in R. v. Grumbo, *[1998] 3 C.N.L.R. 172* when it held that Saskatchewan's Wildlife Act is a law of general application, which did not tread into federal jurisdiction nor touch upon the core of Indianness.

C. The Charter s. 35(1) Aboriginal Right to Hunt -- Infringement Without Justification

31 As a further alternative the Accused submit that, as Métis, they possess an Aboriginal right to hunt, which the Regulation infringes and which the Crown has failed to justify under the tests prescribed in Sparrow, supra, and in R. v. Badger, *[1996] 1 S.C.R. 771*, *[1996] 2 C.N.L.R. 77*, *[1996] 4 W.W.R. 457*, *105 C.C.C. (3d) 289*. As a result, the Regulation should be found not to apply to them, and they should be acquitted.

32 The Crown concedes that the Métis of Sapwagamik may have a collective Aboriginal right to hunt, but says that the Accused are no longer holders of that collective right since they have moved away from the community, both geographically and by their lifestyle. As the evidence discloses, after the decision of the Court of Queen's Bench was rendered in Grumbo, supra, SERM introduced and now enforces a series of criteria to determine whether someone claiming to be Métis actually qualifies as a holder of the collective right. The Crown submits that Messrs. Gardiner and Maurice do not fit the criteria because they no longer live at Sapwagamik for much of the year and no longer live the traditional life. The Crown takes the alternative view that, even if the Accused had an Aboriginal right to hunt, the Regulation does not amount to a prima facie infringement of such right under the Sparrow test and that, even if it did, any infringement has been justified on the same Sparrow analysis.

VI. Discussion and analysis

33 Having outlined the arguments, I will discuss each of them, in the order they appear above.

A. The Natural Resources Transfer Agreement, 1930

34 In light of the conclusion I have reached about the dangers inherent in hunting at night by means of an artificial light, I do not find it necessary to resolve the question as to whether it was the intention of the parties to the NRTA to include the Métis within the meaning of the term "Indians." Assuming, without deciding, that such was the intention, and that Paragraph 12 of the NRTA applies to the Accused, in my opinion, in the circumstances of this case, that provision gives them no protection from the operation of the Regulation.

35 Paragraph 12 of the NRTA provides:

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

> within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

36 The hope of the Métis for Government recognition that they possess Aboriginal title to lands in Saskatchewan notwithstanding, it is clear that in this Province, and indeed across the country, there is no political or legal recognition of the concept of Métis title to land. Nor is there a recognition of a concept of "Reserves" for Métis people. Indeed, the legal device of scrip was designed to eliminate later Métis claims to the land. Thus while the Accused may have hunted on lands within the traditional hunting territory of Sapwagamik, they were not hunting on a "Reserve" nor on lands to which the Province agrees they hold title. Therefore, even as "Indians" under the NRTA they do not have the benefit of the "Reserve" lands exemption contained in the Regulation.

37 I am assuming, because the contrary was not argued, that the roadway upon which the hunting occurred was unoccupied Crown land to which the Accused had a right of access within the meaning of Paragraph 12 of the NRTA because if it were otherwise even if they are "Indians" for the purposes of the NRTA, paragraph 12 of the NRTA would not shield them because they would not be hunting in a location covered by Paragraph 12.

38 Even assuming that the Regulation's own "Reserve lands" exemption does apply, or that the Accused have a right as "Indians" to hunt on unoccupied Crown lands to which they had a right of access, I conclude that they would still have to comply with the Regulation. The Accused suggest that the Supreme Court of Canada and the Court of Appeal of Saskatchewan, in a series of decisions which bind me, have approved all night hunting practices by Indians, including hunting with the use of artificial lights, which are not dangerous to human life. In my opinion, a detailed look at the cases reveals that hunting at night with artificial lights does not carry such a judicial imprimatur.

39 In Myran and Meeches, supra, the Supreme Court of Canada considered the case of two Treaty Indians who used a spotlight to hunt with a rifle with a lethal range of two miles near an occupied farmhouse. The accused defended themselves at trial by asserting that the Manitoba NRTA, with an identical provision to Paragraph 12 in Saskatchewan's NRTA, rendered them immune from Manitoba's prohibition from the use of artificial lights. In upholding convictions, Dickson J. observed, at p. 197 of the S.C.R. report of his opinion:

> There can be no doubt that the Accused were hunting without due regard for the safety of others in the vicinity.

His Lordship then quoted Freedman J.A. from R. v. Prince and Myron, in the Manitoba Court of Appeal, and found that Indians have no right to adopt a hunting method or manner which is contrary to the Manitoba Wildlife Act, since the NRTA specifically provides that Game Acts shall apply in some respects.

40 The Accused have referred me to two Saskatchewan authorities concerning night hunting

with artificial lights. In R. v. Tobacco et al., *[1980] 3 C.N.L.R. 81* the Court of Appeal of Saskatchewan addressed only the issue of whether the Accused had a right of access to the lands upon which they hunted. While the charge was with hunting with an artificial light, the Court did not address the safety issue, but decided simply that the hunters possessed a right of access which exempted them from the operation of the Game Act (the precursor to The Wildlife Act). A similar analysis and result followed several weeks later with the Court's decision in R. v. Mooswa, [1980] 3 C.N.L.R. 112 (Sask. C.A.).

41 The Court of Appeal of Saskatchewan has also examined the issue of hunter safety in the general context of Aboriginal rights. In R. v. Bigstone, *[1981] 3 C.N.L.R. 103* a Treaty Indian was charged with carrying a loaded firearm in a vehicle after being observed squatting in the box of a pickup truck with a .22 calibre rifle, contrary to The Wildlife Act. He claimed the right to do so, but the statute was found to apply to him because it was directed towards safety, with the Court following the reasoning in Myran and Meeches, supra. In R. v. Kytwayhat, *[1984] 4 C.N.L.R. 107*, Cameron J.A. disposed of a similar case in a like manner, following Myran and Meeches and Bigstone.

42 In R. v. Simon, *[1985] 2 S.C.R. 387*, *[1986] 1 C.N.L.R. 153*, *(1985), 23 C.C.C. (3d) 238* the Supreme Court of Canada examined the case of a Mi'kmaq hunter charged with illegal possession of a rifle and ammunition during a closed season. In upholding an acquittal, Dickson C.J.C. wrote, at p. 251-2 of the C.C.C. report [p. 168 C.N.L.R.] of his opinion:

> In this case, the appellant was not charged with hunting in a manner contrary to public safety in violation of the Lands and Forests Act but with illegal possession of a rifle and ammunition upon a road passing through a forest, wood or resort of moose or deer contrary to s.150(1) of the same Act ... In my opinion, it is implicit in the right granted under art. 4 of the Treaty of 1752 that the appellant has the right to possess a gun and ammunition in a safe manner in order to be able to exercise the right to hunt. [Emphasis added]

I infer from this passage of his judgment that the Chief Justice was suggesting that a quite different result would have obtained had the charge been one involving a risk to public safety.

43 Two more recent decisions from other Canadian jurisdictions also bear consideration. While neither is binding upon me, both are directly on point.

44 The Supreme Court of Nova Scotia in R. v. Bernard, *[2001] NSSC 19* [*[2001] 2 C.N.L.R. 141*] considered a claim by a Mi'kmaq Indian that his Treaty right to hunt included the ability to use an artificial light to hunt at night. MacDonald J. found that the section of the Nova Scotia Wildlife Act which prohibited the use of spotlights was not directed towards safety issues, but rather towards issues of sporting fairness and hunter ethics. He wrote, at paragraph 17 of his Judgment:

> This appeal is not about an aboriginal's claim to hunt in an unsafe manner. Judge Ross was absolutely correct in his conclusion that aboriginal hunting rights must yield to legitimate safety concerns.

Thus, while MacDonald J. found that the prohibition did not apply to the Accused, he did so because he found that the prohibition had nothing to do with safety and that other sections in the Act sufficiently addressed the safety issue.

45 In contrast, the Regulation under consideration here is unquestionably aimed at ensuring the safety of hunters; it says so in precise, clear words. The rules of statutory interpretation provide that the heading of the section, "Hunter Safety" does not form part of the Regulation itself. However, even without those words of preamble, it could not be plainer that the provision addresses safety alone.

46 A decision of the Court of Appeal of British Columbia, R. v. Seward, *[1999] 3 C.N.L.R. 299*, also addressed the issue of night hunting by use of artificial light. Mr. Seward and two others, all status Indians, took a deer in a clear-cut near a power-line road at two in the morning, using a hand-held powerful spotlight. They claimed the constitutional right to hunt as they had, and insisted that the practice was part of the Band's hunting tradition. Evidence was presented at trial that in the past, members of the Band used "flares" set in hearths in canoes, and later used pit miners' lamps and occasionally carbide lamps on their foreheads for hunting. The Accused testified that they had taken all precautions to ensure that no other humans nor animals were in their line of fire. Ryan J.A. on behalf of a unanimous Court, disagreed that the Aboriginal rights of the Accused included the right to hunt at night by means of artificial light. Applying the analysis found in Sparrow, supra, and Van der Peet, *[1996] 2 S.C.R. 507* [*137 D.L.R. (4th) 289*, *[1996] 9 W.W.R. 1*, *23 B.C.L.R. (3d) 1*, *[1996] 4 C.N.L.R. 177*, *109 C.C.C. (3d) 1*, *50 C.R. (4th) 1*, *200 N.R. 1*] to the case, Her Ladyship considered first the nature of the right to hunt, carefully not bringing artificial limitations to the question. Using Lamer, C.J.C.'s guidance from Van der Peet, supra, she examined the practices, traditions and customs of the Band prior to contact with Europeans to determine what were the crucial elements of their distinctive society, and what was integral to their distinctive culture. She then asked whether the practice under consideration was a part of what truly made the society what it was. She held that the hunting tradition should be described as hunting deer for food and ceremonial purposes, and that spotlighting was only one of many methods that could be used to hunt and it was not a crucial element of the Band's distinctive culture. Following the analysis used by the Supreme Court of Canada in R. v. Gladstone, *[1996] 2 S.C.R 723*, *[1996] 9 W.W.R. 149*, *[1996] 4 C.N.L.R. 65*, *109 C.C.C. (3d) 193*, 50 C.R. (4th), Ryan J.A. next considered whether there had been a prima facie infringement of the Band's Aboriginal right to hunt. She found that a prima facie infringement required a "meaningful diminution" of the right, gauged by the criteria set out in Sparrow, supra, and that, within those criteria, the question of whether the limitation imposed by the statute interferes with a preferred means of exercising the right is to be determined by reference to community standards. She found that the evidence before her did not show that hunting at night with an artificial light had ever been a preferred means of hunting for the Band, that the restriction imposed by the British Columbia Wildlife Act did not cause undue hardship and that the restriction represented a reasonable limitation on the Aboriginal right because it was aimed at safety. As a result, Ryan J.A. found no prima facie infringement of the Band's Aboriginal rights. I will return to this decision later in these reasons when I consider the issue as to whether the Accuseds' s. 35(1) rights are infringed by the Regulation.

47 In R. v. Augustine, *[2001] N.B.J. No. 9*, (leave to appeal denied *[2001] N.B.J. No. 190*, *2001 NBCA 57*), Riordon J. of the Court of Queen's Bench of New Brunswick considered an appeal from the conviction of three Treaty Indians charged under that Province's Fish and Wildlife Act with hunting at night with the assistance of a light. The three Accused had hunted moose with a high-powered rifle and a high intensity spotlight on clear-cut, unoccupied Crown land on the first day of hunting season, amid the campsites of a significant number of other hunters. As the Conservation Officers investigated, one of the Accused aimed the spotlight for a few seconds at the patrol vehicle before continuing a scan of the clear-cut. Riordon J. upheld the convictions of the Accused, observing at p. 5 of his judgment:

> Hunting for large game with a high-powered rifle at night with the aid of a light with limited ability to see is in my opinion dangerous and hazardous. It is not possible to see very much if anything beyond or on the other side of the light beam. With such limited visibility the risk of death or serious injury is obvious.

and at p. 6 he added:

> When a treaty right such as hunting is exercised it must be conducted with regard to the safety of others, R. v. Paul, *[1993] N.B.J. No. 607*; R. v. Simon, *[1985] 2 S.C.R. 387*. Although the appellants have a treaty right to hunt that does not mean they have a right to hunt dangerously or without regard to the safety of others. Such rights must be exercised in a safe and reasonable manner.

48 From all of the foregoing I conclude that hunting practices which are dangerous will not be protected by an assertion of Aboriginal rights. Riordon J. put the reasons for such a conclusion succinctly in the passages quoted directly above. The weight of authority, both in the Supreme Court of Canada and in other superior courts around the Country, is that Aboriginal rights must be exercised subject to legislation which addresses legitimate safety concerns. The provisions of Paragraph 12 of the NRTA do not change that ordering of priorities.

49 Therefore if the Accused are "Indians" under the NRTA, and their rights fall to be considered in like fashion to those "Indians" who took treaty in 1906, the Accused would still have to comply with the Regulation, because they were not hunting on a Reserve and because the cases cited above have held that no one is allowed to engage in dangerous hunting practices, even people with NRTA rights who hunt on unoccupied Crown land to which they have a right of access.

B. Division of Constitutional Powers -- "Interjurisdictional Immunity"

50 Having decided that the Accused, even assuming that they have the protection of Paragraph 12 of the NRTA, would still have to comply with the Regulation, I turn to the next submission by the Accused, that the Regulation cannot apply to them since it encroaches on Parliament's legislative jurisdiction because it affects the Accuseds' status as Section 91(24) Indians. I do so in the event that I have erred in my analysis regarding the NRTA, and also that it is appropriate

to conclude that it was not the intention of the parties to the NRTA to include the Métis as Indians for the purposes of the Agreement.

51 Professor Peter Hogg described the doctrine of interjurisdictional immunity in his book, Constitutional Law of Canada, (Toronto, Carswell, 1997) at pp. 27-9:

> These decisions establish that the provincial Legislatures have the power to make their laws applicable to Indians and on Indian reserves, so long as the law is in relation to a matter coming within a provincial head of power. The situation of Indians and Indian reserves is thus no different from that of aliens, banks, federally-incorporated companies and interprovincial undertakings. These too, are subjects of federal legislative power, but they still have to pay provincial taxes, and obey provincial traffic laws, health and safety requirements, social and economic regulations and the myriad of other provincial laws which apply to them in common with other similarly-situated residents of the province.

and further at pp. 27-10 and 27-11:

> The second exception to the general rule that provincial laws apply to Indians and lands reserved for the Indians is "Indianness." A provincial law that affects "an integral part of primary federal jurisdiction over Indians and lands reserved for the Indians" will be inapplicable to Indians and lands reserved for the Indians, even though the law is one of general application that is otherwise within provincial competence. This vague exception, which has been framed as precluding laws that impair the "status or capacity" of Indians, or that affect "Indianness", has its analogy in the immunity from provincial laws that affect a vital part of undertakings within federal jurisdiction.

As to the impact of this upon Métis people, Professor Hogg wrote, in the same work at pp. 665-66:

> But there are also many persons of Indian blood and culture who are outside the statutory definition. These "non-status Indians" are also undoubtedly "Indians" within the meaning of s. 91(24), although they are not governed by the Indian Act. The Métis people ... were ... excluded from the charter group from whom Indian status devolved. However, they are probably "Indians" within the meaning of s. 91(24).

52 A number of Canadian judicial decisions have also sought to define the doctrine: see R. v. Kruger, *[1978] 1 S.C.R. 104*, *[1977] 4 W.W.R. 300*, *34 C.C.C. (2d) 377*; R. v. Dick, *[1985] 2 S.C.R. 309*, *[1985] 4 C.N.L.R. 55*, [1986] 1 W.W.R.; R. v. Coté, *[1996] 3 S.C.R. 139*, *[1996] 4 C.N.L.R. 26*, *110 C.C.C. (3d) 122*; R. v. Delgamuukw, supra, R. v. Alphonse, *[1993] 4 C.N.L.R. 19* (B.C.C.A.); Cardinal v. Attorney General of Alberta, *[1974] S.C.R. 695*; and R. v. Grumbo, *[1998] 3 C.N.L.R. 172* (Sask. C.A.). In Delgamuukw, Lamer C.J.C. put the doctrine thus, at paragraphs 179 to 182:

> The vesting of exclusive jurisdiction with the federal government over Indians and Indian lands under s. 91(24), operates to preclude provincial laws in relation to those matters. Thus, provincial laws which single out Indians for special treatment are ultra vires,

because they are in relation to Indians and therefore invade federal jurisdiction ... However, it is a well-established principle that (Four B Manufacturing Ltd., supra, at p. 1048 [S.C.R.; p. 25 C.N.L.R.]:

> The conferring upon Parliament of exclusive legislative competence to make laws relating to certain classes of persons does not mean that the totality of those persons' rights and duties comes under primary federal competence to the exclusion of provincial laws of general application.

In other words, notwithstanding s. 91(24), provincial laws of general application apply proprio vigore to Indians and Indian lands. Thus, this Court has held that provincial labour relations legislation (Four B) and motor vehicle laws (R. v. Francis), which purport to apply to all persons in the province, also apply to Indians living on reserves.

What must be answered, however, is whether the same principle allows provincial laws of general application to extinguish Aboriginal rights. I have come to the conclusion that a provincial law of general application could not have this effect, for two reasons. First, a law of general application cannot, by definition, meet the standard which has been set out by this Court for the extinguishment of Aboriginal rights without being ultra vires the province. That standard was laid down in Sparrow, supra, at p. 1099 [S.C.R.; p. 174 C.N.L.R.], as one of "clear and plain" intent. In that decision, the Court drew a distinction between laws which extinguished Aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been "necessarily inconsistent" with the continued exercise of Aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown "use language which refers expressly to its extinguishment of aboriginal rights (Gladstone, supra, at p. 34), the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish Aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, proprio vigore, extinguish Aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.

Second, as I mentioned earlier, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on "Indianness" or the "core of Indianness" ... The core of Indianness at the heart of s. 91(24) has been defined in both negative and positive terms. Negatively, it has been held to not include labour relations (Four B) and the driving of motor vehicles (Francis). The only positive formulation of Indianness was offered in Dick. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply proprio vigore to the members of an Indian band to hunt and because those activities were "at the centre of what they do and who they are" (supra, at p. 320 [S.C.R.; p. 65 C.N.L.R.]). But in Van der Peet, I described and defined the Aboriginal rights that are recognized and affirmed by s. 35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive Aboriginal culture of the group claiming the right. It follows that Aboriginal rights are part of the core of Indianness at the heart of s. 91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application.

53 Lamer C.J.C. went on to describe the manner by which such provincial laws of general application which would otherwise offend against the doctrine of interjurisdictional immunity could be incorporated referentially into federal law by s. 88 of the Indian Act. The Métis being expressly excluded from the definition of "Indian" in that Act, there can be no such referential incorporation of the Regulation in relation to them, should the doctrine be found to apply.

54 Does the doctrine of interjurisdictional immunity arise in this case? Is the Regulation a law of general application? The Crown submits that I am bound by the opinion of the Court of Appeal of Saskatchewan in this regard, as expressed by Sherstobitoff J.A. for the majority in R. v. Grumbo, supra, where he wrote at p. 185:

> The division of powers argument was treated by both parties as a secondary argument. Mr. Grumbo argues that, the Crown having stipulated that Metis [sic] are Indians within the meaning of s. 91(24) of the Constitution Act, 1867, then the provisions of the Wildlife Act cannot apply to them as it would be legislation relating to Indians qua Indians. The weight of authority clearly says that provincial legislation relating to game is provincial law of general application affecting Indians not qua Indians but as inhabitants of the province, and is applicable to them, subject of course to s. 12 of the Natural Resources Transfer Agreement ... The principle is not affected by the judgment of the Supreme Court in R. v. Dick ... where the court was prepared to assume, for the purpose of the judgment, that the legislation in issue affected the Indianness of the accused, because it was specifically said that the court was not deciding the issue. Mr. Grumbo cannot succeed on this ground.

55 One of the cases to which Sherstobitoff J.A. referred was the decision of the Supreme Court of Canada in Kruger and Manuel v. The Queen *(1977), 34 C.C.C. (2d) 377*, which established two indicia by which to determine whether a law is one of general application: first, does its operation extend uniformly throughout the territory, and second, presuming that it does so extend, what are the intents and effects of the legislation? Does the legislation exist in relation to one class of citizens in object or purpose? The fact that a law may have a graver consequence to one person than another does not necessarily disqualify it as a law of general application. Dickson J. wrote of this, at p. 381:

> There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in its effect paralyzes the status and capacities of a federal company.

Dickson J. went on to find that the British Columbia Wildlife Act was a law of general application, and that it applied to the Indian Accused. As to the need for referential incorporation of a provincial law into federal law he found that he did not need to decide the question, holding, at p. 386:

> If s. 88 [of the Indian Act] does not referentially incorporate the Wildlife Act, the only question at issue is whether the Act is a law of general application. Since that proposition

> has not been here negatived, the enactment would apply to Indians ex proprio vigore. It is, therefore, immaterial to the present appeals whether s.88 takes effect by way of referential incorporation or not. In either case, these appeals must fail.

56 However, Kruger was decided prior to the enactment of s. 35(1) of the Canadian Charter of Rights and Freedoms which informed Lamer C.J.C.'s opinion in Delgamuukw, supra, as quoted above. Grumbo was decided in June of 1997 and Delgamuukw was not released until December of that year. Thus, Lamer C.J.C.'s observation in Delgamuukw that even a provincial law of general application might not apply to Indians because of the doctrine of interjurisdictional immunity, could not have been known to the Saskatchewan Court of Appeal when that Court decided Grumbo. I must therefore consider how the Regulation affects the "core of Indianness" referred to by Lamer C.J.C. in Delgamuukw.

57 I begin by noting that while Lamer C.J.C. used expressions such as "touch" and "affect" to describe how a provincial law of general application might have an impact upon the core of Indianness, when he considered what sort of law might not survive the doctrine of interjurisdictional immunity, he referred to such a law "extinguishing" the core. It is the purported extinguishment of an Aboriginal right which he saw as placing a provincial law of general application as beyond the legislative competence of a provincial government vis-à-vis Indians. The Chief Justice reached no conclusion as to whether provincial game laws could have this effect. In referring to the Supreme Court of Canada's decisions in Dick and in Van der Peet, Lamer C.J.C. wrote that Aboriginal rights activities which are "at the centre of what they do and who they are" and that "are integral to the distinctive Aboriginal culture of the group claiming the right" may not be extinguished by provincial laws of general application.

58 Two aspects of these comments by the Chief Justice invite closer examination for the purposes of this case. Firstly, his remarks suggest that it does not offend interjurisdictional immunity for a province to enact legislation which, while being a law of general application, nonetheless touches or even limits an Aboriginal right, so long as the effect of the enactment is not to extinguish the right. This comports with his comments earlier in the Judgment, at paragraph 160, where he observed:

> The Aboriginal rights recognized and affirmed by s. 35(1), including Aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., Sparrow) and provincial (e.g., Coté) governments. However, s. 35(1) requires that those infringements satisfy the test of justification.

He then went on to describe the test, as articulated in Gladstone, supra, whereby an infringement might prove justified. In Coté itself, Lamer C.J.C. wrote, at paragraph 74 of his Judgment:

> ... The majority of recent cases which have subsequently invoked the Sparrow framework have similarly done so against the backdrop of a federal statute or regulation. See, e.g., Gladstone. But it is quite clear that the Sparrow test applies where a provincial law is alleged to have infringed an Aboriginal or treaty right in a manner which cannot be justified: Badger, supra, at para. 85 (application of Sparrow test to provincial statute

which violated a treaty right). The text and purpose of s. 35(1) do not distinguish between federal and provincial laws which restrict Aboriginal or treaty rights, and they should both be subject to the same standard of constitutional scrutiny.

59 These passages confirm the principle that unless a provincial law of general application completely extinguishes an Aboriginal right, it is to be examined according to the Sparrow, Badger and Gladstone tests and not according to the doctrine of interjurisdictional immunity.

60 Secondly, Lamer C.J.C.'s remarks suggest that in determining whether the impugned enactment purports to extinguish an Aboriginal right, it is important to define the right and to decide whether that claimed right is "at the centre of what they do and who they are", bearing in mind that Aboriginal rights are highly site-specific. I have already determined that the right under consideration here is the right to hunt for food. While the Regulation prohibits a method or means of exercising the right, its effect does not approach extinguishment of the right itself. Indeed, respected Elders of the community have told me that the practice of night hunting by means of artificial light is and has always been rejected as dangerous.

61 In my view, applying the authorities cited above to the facts of this case, the application of the Regulation to the Accused, assuming that they possess an Aboriginal right to hunt for food, as the parties agreed, does not extinguish that right but only curtails a method of exercising it which is, in any event, universally disapproved by the holders of the right. Another consequence of the finding that night hunting with artificial lights is not a tradition of the Métis of Northwest Saskatchewan is the corollary that a Regulation prohibiting such hunting does not touch their core of Indianness. The question of whether the Regulation infringes the Aboriginal right of the Métis will be discussed below, but I find that the Regulation is a law of general application and that the doctrine of interjurisdictional immunity is not triggered by it. The Accuseds' submission cannot prevail.

C. The Charter s. 35 Right to Hunt -- Infringement Without Justification

62 Earlier in these reasons I determined, as agreed by the parties, that the Métis of Northwest Saskatchewan, including the members of the settlement at Sapwagamik, possess an Aboriginal right to hunt for food. The Accused claim membership in that settlement and thus an entitlement to participate in the collective Aboriginal right to hunt, but the Crown disagrees, both as to whether the Accused are still members of the community and as to whether they are entitled to exercise the community's collective hunting rights. After Morin and Daigneault, supra, was decided in the Court of Queen's Bench of Saskatchewan, SERM developed a set of four criteria which Conservation Officers in the field were to use to decide whether a Métis claimant of Aboriginal hunting or fishing rights "qualifies" as a holder of the right. These criteria are:

1. an ability to demonstrate Métis ancestry;
2. proof of permanent residency in northern Saskatchewan, which is defined as north of the Northern Administration District (AND) line;

3. an ability to demonstrate that the claimant's family has longstanding connections to the particular northern community in which the claimant resides; and
4. an ability to demonstrate that the claimant is living off the land or living a traditional lifestyle.

63 Representatives of SERM who testified at the trial agreed that the application of these criteria to all Saskatchewan people who claim to be Métis would result in only approximately 5% of them meeting the criteria and being able to exercise the Aboriginal right to hunt. The Accused would be among the 95% who may not exercise the right because they no longer live at Sapwagamik for most of the year and because they are no longer living a traditional lifestyle.

64 As part of my decision in this case I have been invited by both parties to rule on the SERM criteria; to endorse them, modify them or determine them to be inappropriate. It is not necessary for me to do so. Assuming, without deciding, either that the Accused have met all four SERM criteria and have an Aboriginal right to hunt, or that the criteria ought not to apply and that by some other yardstick the Accused personally are holders of an Aboriginal right to hunt, I find that the right has not been infringed by the Regulation and that even if it were, the infringement would be justified.

65 I touched on this question of infringement and justification earlier, when I discussed in a preliminary way the conclusions that Ryan J.A. reached in Seward, supra. I return to it now with a closer focus.

66 In Sparrow, supra, the Supreme Court of Canada established four stages of analysis in deciding whether a Treaty right has been unjustifiably infringed:

1. Has the claimant demonstrated that he or she was acting pursuant to an Aboriginal right?
2. Has the right been extinguished prior to the enactment of s. 35(1) of The Constitution Act, 1982?
3. Has the right been infringed? and
4. Has the infringement been justified?

67 With respect to the first two stages of analysis, counsel have agreed that the Métis of Northwest Saskatchewan, including those of Sapwagamik, hold an existing and historical Aboriginal right to hunt moose and deer for food which had not been extinguished prior to 1982, and I find it unnecessary to resolve the question as to whether the two Accused may exercise the right as members of the collective but will assume that they may.

68 The Supreme Court of Canada in Badger, supra, indicated that the Sparrow analysis outlined above applies not only to Treaty rights claims, but also to broader claims of Aboriginal rights. In Gladstone, supra and in Van der Peet, supra, the Court further refined the analysis. In Van der Peet the Court stressed that in determining whether an Aboriginal right has been infringed, one first conducts a careful examination as to the precise nature of the asserted claim

of right, taking into account the nature of the activity itself and whether it is an element of a practice, custom or tradition integral to the particular Aboriginal group claiming the right. As Lamer C.J.C. put it in Gladstone, at paragraph 23:

> . . . There is no point in the appellants' being shown to have an Aboriginal right unless that Aboriginal right includes the actual activity they were engaged in; this stage of the Van der Peet analysis ensures that the Court's inquiry is tailored to the actual activity of the appellants.

69 The examination is a highly focussed inquiry; in Gladstone, for instance, Lamer C.J.C. said that the question to be answered was: "whether the exchange of herring spawn on kelp for money or other goods, and/or the sale or trade of herring spawn on kelp in the commercial marketplace, were, prior to contact, defining features of the distinctive culture of the Heiltsuk." (Paragraph 25).

70 Applying this methodology to the case at bar, it may readily be seen from the evidence that hunting at night with an artificial light is not presently and has never been a feature of the Aboriginal right of the Métis of Northwest Saskatchewan to hunt for food. That being the case, the Accused cannot satisfy the first stage of the Sparrow test, because they have not shown that they were acting pursuant to an Aboriginal right. However, in the event that I am in error in reaching this conclusion, and that the Aboriginal right claimed should be viewed more broadly as simply the right to hunt animals for food, I will continue the analysis through the third and fourth steps of the Sparrow test: has there been a prima facie infringement of an Aboriginal right and, if so, is it justified under s. 35(1)?

1. Prima facie Infringement

71 In Sparrow, the Supreme Court of Canada established three factors to examine in deciding whether an Aboriginal right has prima facie been infringed. At p. 182 of the C.N.L.R. report of the decision, the Court wrote:

> To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of section 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation cause undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.

72 In Gladstone, Lamer C.J.C. held that these three criteria were not meant to be an exhaustive list of what defines a prima facie infringement, but that any meaningful diminution of an Aboriginal right would suffice. He wrote, at paragraph 43:

> The Sparrow test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a prima facie interference with their rights in order to demonstrate that

> those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purposes of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in Sparrow do not define the concept of prima facie infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a prima facie infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a prima facie infringement.

73 In the present case I can find no such meaningful diminution. Examining the three Sparrow factors, I turn first to the question of whether the limitation on the right which the Regulation imposes is reasonable. My answer must be yes. I have found that the practice of night hunting by means of an artificial light is highly dangerous, and so a law which prohibits is more than reasonable, it is essential. The limitation is also slight, in the sense that it, even if one were to assume that Northwest Saskatchewan Métis have sometimes traditionally hunted in this way, no longer being able to do so would not meaningfully diminish their right to hunt.

74 For the same reason I find that the limitation in the Regulation does not impose an undue hardship. I reach the same conclusion when I ask whether the limitation denies to the Métis of Northwest Saskatchewan their preferred means of exercising the right to hunt for food. The evidence I have extensively reviewed earlier in these reasons makes clear that using artificial lights to hunt at night has never been so much as even a marginal aspect of the hunting practices of the people of Sapwagamik, must [sic] less say a preferred means of, hunting.

75 Turning to the broader question as outlined in Gladstone, I can find nothing in the Regulation and in the limitation it imposes on the Accused which even approaches a meaningful diminution of their assumed Aboriginal hunting right, and thus to a prima facie infringement of that right. Accordingly the Regulation applies to them.

76 As well in this regard, I draw from the decision of the Supreme Court of Canada in R. v. Badger, *[1996] 1 S.C.R. 771* [*133 D.L.R. (4th) 324*, *[1996] 4 W.W.R. 457*, *181 A.R. 321*, *37 Alta. L.R. (3d) 153*, *[1996] 2 C.N.L.R. 77*, *105 C.C.C. (3d) 289*, *195 N.R. 1*], where Cory J. wrote of Aboriginal rights and safety and he observed, at p. 817-818 [S.C.R.; pp. 109 C.N.L.R.]:

> That decision [Myran] was subsequently affirmed by this Court in Sutherland, supra and Moosehunter, supra. See to the same effect R. v. Napoleon, [1996] 1 C.N.L.R. 86 (B.C.C.A.) and R. v. Fox, *[1994] 3 C.N.L.R. 132* (Ont. C.A.). Accordingly, it can be seen that reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food. Similarly these regulations do not infringe the hunting rights guaranteed by Treaty No. 8 as modified by the NRTA. [Emphasis added]

77 Again, in the event that I have erred in reaching the foregoing conclusion, I will continue the

Sparrow analysis through the fourth stage, examining whether, if there had been a prima facie infringement shown, it has nonetheless been justified by the Crown.

2. Justification

78 In Sparrow, supra, Lamer C.J.C., wrote, at pp. 183-84 of the C.N.L.R. report of his opinion:

> If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes a legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. 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, we refer back to the guiding interpretive principle derived from Taylor and Williams and Guerin, supra. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
>
> ... Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.
>
> ... We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

79 The onus of demonstrating that a prima facie infringement of an Aboriginal right is justified rests on the Crown, on a balance of probabilities.

a. Is There a Valid Legislative Objective?

80 There can be little question but that the objective of the Regulation is safety; it says so in so many words. As the evidence has made plain, it was enacted in February of 1998 in response to the decision of the Court of Queen's Bench of Saskatchewan in Grumbo, supra, a decision which, it was felt, rendered night hunting with lights permissible. Both the words of the heading

of s. 11 of the Regulations and the words of s. 11 itself clearly show that the objective of the Regulation is entirely concerned with safety. The reasons for the concern are set out in the testimony of Crown witness Richard Wyatt, and in the testimony of several of the Métis Elders who said that hunting with the aid of a light has always been viewed as a dangerous practice. Indeed, the Métis Wildlife and Conservation Act confirms that view, banning as it does the practice of hunting with artificial lights.

81 The Accused argue that the Regulation is not a law of general application, but rather is aimed specifically at Aboriginal Peoples who would exercise their s. 35(1) rights, and loses its validity on that account. In my view, this is not the case. The Regulation applies with equal force to everyone in Saskatchewan except Treaty Indians hunting on Indian Reserves, and that exemption is based upon the treaty terms. The fact that most First Nations in Saskatchewan have passed Band bylaws which prohibit hunting with artificial lights reinforces the universally held view that the practice is dangerous. I find that the objective of the legislation -- safety -- is a compelling and substantial one, and meets the test articulated in Sparrow.

b. Does the Infringement Honour the Fiduciary Relationship Between the Crown and Aboriginal Peoples?

82 As a law of general application, the Regulation does not single out the Métis. Neither does it purport to allocate a natural resource to some other harvester in priority to the Métis. The Regulation seeks to protect all users of the forest. Its only effect is to keep all hunters safe in the field, something which surely thereby honours the trust relationship referred to in Sparrow.

c. Has There Been As Little Infringement As Possible?

83 Having found that night hunting by artificial light is not now and never has been a feature of Métis hunting practices in Northwest Saskatchewan, it follows that their hunting right is not infringed in any meaningful way by the restriction imposed by the Regulation.

d. Were the Métis Consulted Regarding the Regulation?

84 In late 1997 and early 1998, SERM undertook a Province-wide consultation with Aboriginal Peoples about what to do concerning the practice of hunting with artificial lights. The impetus for the consultation, and the need to deal with the particular hunting practice, was the belief that the decision in Grumbo, supra had approved jacklighting. The consultative process was described by Crown witness Joseph Muldoon, now Director of the Environmental Protection Branch of SERM, but in 1997-8 the Senior Manager of the Public Involvement and Aboriginal Affairs unit.

85 As I have mentioned earlier in these reasons, by late 1997 SERM was experiencing significant political and public pressure to resolve the issue of night hunting, with rural landowners in particular expressing concern. Although SERM felt pressure to deal quickly with the safety issue, and specifically to have a regulation in place by February, 1998, an advance consultative plan was formed and carried out. Meetings with Métis Peoples across

Saskatchewan were organized against a background of what Mr. Muldoon described to me as partnership agreements which had existed since 1985, under which SERM and Métis people were able to have a dialogue about issues of mutual concern. Mr. Muldoon said of the need for and purpose of such meetings:

> Our advice to the rest of the department and our lead in that particular process was that consultations were an absolute requirement with both First Nation and Métis people for a number of reasons, one being that we wanted to get the input from both Métis and First Nation people with respect to what their needs were and how we could put a regulation in place that would, if it infringed, that would be a minimal infringement. We were certainly cognizant of Sparrow and wanted to ensure that we conducted all the consultations that were necessary. We also felt that if we did not have support from both the First Nation and Métis people that the enforcement of that regulation would be extremely difficult so the other major reason for the consultation was to ensure that we had the support from both Métis and First Nation people. The third component was to ensure that whatever regulation that was built that it would take into account the results from that consultation. [Trial transcript, pp. 687-8]

86 Preliminary meetings were held between SERM and executives of the Métis Nation of Saskatchewan (hereinafter referred to as MNS) to decide the locations for more local meetings, and SERM sought MNS assistance in advertising the meetings. SERM made funding available to MNS to advertise and convene the meetings. Once the dates and locations of the meetings were established, advertisements were placed in Saskatchewan's regular newspapers. Letters were written to the communities themselves, advising the people about the meetings and advising that the topic of the meeting was concern over night hunting and safety. One such a meeting was held at Beauval, Saskatchewan on the 6th of January, 1998, after only a few weeks' notice. Because of the short time frame, local radio advertising was intensively used to make people aware of the meeting. Between 130 and 150 people from Jans Bay, Cole Bay, Canoe Lake and Beauval attended the meeting, including some who travelled there by bus. Several options were discussed, including a Province wide ban on the use of lights to hunt, a Province wide ban on discharging a firearm at night and a limited right to hunt in the Provincial Forest away from roads and buildings. The meeting lasted several hours. Métis in attendance were distrustful of SERM, and emphasized that the Métis approach to hunting issues was already set out in the Métis Wildlife and Conservation Act, which they preferred as the means of governing the situation. Mr. Muldoon said of the tenor of the meeting:

> ... One of the other -- or a couple of other pieces that came from the consultation that I think were significant was a number of elders standing and obviously the whole culture of -- the importance of elders and so on came out very clear. All of the people that -- that I recall at those meetings talked about we have respect for fish and wildlife. We want to look after it. We have very strong ties to the land and that -- that was a very important piece of the discussions and they indicated clearly we hunt at night by natural light and we don't want to lose that right but that we do not agree, it's ethically wrong and it's unfair to the animal to hunt with the use of artificial lights at night and that was a consistent message. [Trial transcript, p. 707]

87 At some, if not all the meetings between SERM and Métis communities across Saskatchewan, a resolution was passed at the urging of the Métis leadership, which declared that the meeting did not constitute meaningful consultation.

88 Mr. Muldoon testified that several aspects of the Regulation came about as a direct result of the consultations, such as the right to use a light to hunt at night for the purposes of trapping, and the clause which clearly bans night hunting by artificial light but permits night hunting by moonlight.

89 Since the January 1998 meeting, several other meetings were held, albeit after the proclamation of the Regulation. SERM has also continued to provide funding on an ongoing basis so that a representative from MNS can work with SERM in resource management.

90 Notwithstanding the views expressed in the "non-consultation" resolutions passed at the meetings, I am satisfied that the consultation which SERM undertook with the Métis of Northwest Saskatchewan was real and substantial, that the SERM representatives listened to what the Métis said and indeed incorporated some of the Métis perspectives into the Regulation. In particular, the Regulation incorporates s.13 of the Métis Wildlife and Conservation Act, something which the Métis sought during the meetings. In R. v. Nikal, *[1996] 1 S.C.R. 1013* [*133 D.L.R. (4th) 658*, *[1996] 5 W.W.R. 305*, *19 B.C.L.R. (3d) 201*, *[1996] 3 C.N.L.R. 178*, *105 C.C.C. (3d) 481*] (S.C.C.) Cory J. wrote, at p. 1064 [S.C.R.; pp. 211-12 C.N.L.R.]:

> It can, I think, properly be inferred that the concept of reasonableness forms an integral part of the Sparrow test for justification. For example, in these last questions reasonableness will be a necessary aspect of the inquiry as to justification ... For example, the need for the dissemination of information and a request for consultations cannot simply be denied. So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement. This is no more than recognizing that regulations pertaining to conservation may have to be enacted expeditiously if a crisis is to be avoided. On occasion, strict and expeditious conservation measures will have to be taken if potentially catastrophic situations are to be avoided. The nature of the situation will have to be taken into account in assessing the conservation measures taken. The greater the urgency and the graver the situation the more reasonable strict measures may appear.

91 The foregoing comments apply with even greater force, it seems to me, where the legislative objective is safety rather than conservation. I agree that there was a need to move quickly to put the Regulation in place, and in my view the consultations which SERM held with Aboriginal Peoples meet the Sparrow test as further articulated in Nikal, supra.

92 Counsel did not suggest that there are other questions to be asked in the Sparrow analysis, and I cannot see others. This is not a case, for instance, where anything has been expropriated, triggering an inquiry as to whether proper or adequate compensation has been made or is available. This being the case, the Crown has satisfied me that any infringement of Aboriginal

rights has been justified.

VII. Summary

93 I have concluded that the Accused are Métis, as they assert. Assuming, without deciding, that it was intended that Métis be included as "Indians" in the 1930 Natural Resources Transfer Agreement and The Constitution Act, 1930, and that therefore the Accused have the rights set out in the Agreement, the Regulation nevertheless applies to them. They were not hunting on an Indian Reserve, and, because they were hunting on unoccupied Crown lands to which, as "Indians" they had a right of access, their rights must be circumscribed by the need for safety.

94 In the event that I have erred in reaching the foregoing conclusion, and assuming that it was not the intention of the parties to include the Métis in the protections of the NRTA, I have found that the doctrine of interjurisdictional immunity is not triggered by the Regulation as it applies to the Accused, because it does not extinguish the "core of Indianness" which they possess.

95 I have also found that the Regulation does not prima facie infringe the Accuseds' Aboriginal rights as guaranteed them pursuant to Section 35(1) of The Constitution Act, 1982, and that even if it did, any infringement has been justified by the Crown. Accordingly and for these reasons I find the Accused guilty.

96 DATED at the Town of Meadow Lake this 5th day of October, 2001.

Accused guilty.

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