Tab 1.

2004 CarswellOnt 936, 184 O.A.C. 84, [2004] 2 C.N.L.R. 355, 43 B.L.R. (3d) 244, 129 A.C.W.S. (3d) 2

2004 CarswellOnt 936, 184 O.A.C. 84, [2004] 2 C.N.L.R. 355, 43 B.L.R. (3d) 244, 129 A.C.W.S. (3d) 2

Wasauksing First Nation v. Wasausink Lands Inc.

Council of the Wasauksing First Nation a.k.a. Council of Ojibways of Parry Island Band, and John Beaucage and Terry Pegahmagabow, on their own behalf and on behalf of the registered members of the Wasauksing First Nation a.k.a. Ojibways of Parry Island Band, Applicants (Appellants) and Wasausink Lands Inc., Joyce Tabobondung, Wilfred King, Dora Tabobondung, Leslie Tabobondung, and Florence Tabobondung, Respondents (Respondents)

Ontario Court of Appeal

Laskin, Cronk, Armstrong JJ.A.

Heard: April 2-3, 2003
Judgment: March 4, 2004
Docket: CA C37772

Proceedings: affirming *Wasauksing First Nation v. Wasausink Lands Inc.* (2002), 2002 CarswellOnt 107, [2002] 3 C.N.L.R. 287 (Ont. S.C.J.)

Counsel: Yehuda Levinson, Eugene Meehan, David Stone for Applicants / Appellants

Charles Campbell, Renée Lang for Respondents / Respondents

Subject: Corporate and Commercial; Public; Contracts; Constitutional

Business associations --- Creation and organization of business associations — Corporations — Incorporation — Miscellaneous issues

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were

accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Aboriginal law --- Bands and band government — Band councils — Powers and jurisdiction — General principles

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by virtue of operating agreement — In 1997, WFN elected new chief and band council ("applicants") who objected to management of W Inc. by previous chief and band council — Applicant and individual members of WFN applied for declaration that all members of WFN were members of W Inc. — Application was dismissed — Applicants appealed — Appeal dismissed — Open to trial judge to find that there was no general understanding or belief amongst all, or even majority, of members of WFN that all members of WFN were "members" of W Inc., in corporate law terms, simply by virtue of fact that they were members of WFN — Trial judge did not err by applying "black letter" corporate law principles to assessment of issues concerning membership and board of directors of W Inc. — Applicants failed to establish requirements for rectification of W Inc.'s records under s. 309(1) of Corporations Act — Section 309(1) was not intended as tool to resolve complex corporate disputes by facilitating, through exercise of judicial discretion, fundamental changes that intruded on established internal corporate affairs — Applicants failed to establish that management of W Inc. was based on aboriginal rights and practices.

Business associations --- Specific corporate organization matters — Directors and officers — Miscellaneous issues

Wasauksing First Nation ("WFN") was native community on island in Lake Huron — Back in 1960s, to gain revenues for its members, WFN decided to lease part of its land as cottage lots — Because Indian Act prohibited Indian bands from alienating land except to Crown, in 1971 W Inc. was incorporated to lease lots and collect and manage rents — Between 1971 and 1993, chief and council in office from time to time acted as de facto directors of W Inc. and were accepted as such by members of WFN and by federal government and all concerned parties dealing with W Inc. — In 1994 and 1995, chief and council at time reorganized W Inc., formally separating its governance from that of WFN by

requirements of the Act concerning the regulation of a corporation's structure or affairs.

91 Finally, we do not accept the appellants' argument that an expansive interpretation of s. 309(1) of the Act is required in this case because its invocation is sought in an aboriginal context.

92 The appellants rely on *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.), a case which concerned the issue of whether income earned by a registered Indian living on a reserve was exempt from taxation under the *Income Tax Act*, 1970-71-72 (Can.), c. 63 by virtue of s. 87 of the *Indian Act*, R.S.C. 1970, c. I-6. In considering this issue, the Supreme Court of Canada stated at 36:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. *It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians*...In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that *Indian treaties "must...be construed*, not according to the technical meaning of [their] words...but *in the sense in which they would naturally be understood by the Indians*
>
> [emphasis added].

As appears from this passage, the principle of statutory construction referenced by the Supreme Court applies to "treaties and statutes relating to Indians". See also, in the tax exemption rights context, *Mitchell v. Sandy Bay Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.) at paras. 13-15 and, in the context of band taxation tribunal by-laws, *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.), at 67.

93 None of the *Nowegijick*, *Mitchell* or *Matsqui Indian Band* cases suggests that this interpretive principle applies to the construction of statutory provisions of general application, like s. 309(1) of the Act.

94 As well, we do not understand the interpretive principle formulated in *Nowegijick* to mandate the expansive interpretation of laws of general application where such a reading is not otherwise warranted. Were it otherwise, as the trial judge observed, laws of general application concerning corporations could be interpreted so as to create one form of statutory regime for aboriginals and another form of statutory regime, concerned with the same subject matter, for non-aboriginals. *Nowegijick*, *Mitchell* and *Matsqui Indian Band* do not dictate or support such an outcome. To the contrary, as observed by the Supreme Court in *Nowegijick* at p. 36: "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens."

95 The appellants also argue that an expansive interpretation of a statutory provision is warranted in the aboriginal context if it is demonstrated that an established aboriginal practice conflicts with the applicable statutory provision. Support for this proposition may be found in *K's Adoption Petition, Re* (1961), 32 D.L.R. (2d) 686 (N.W.T. Terr. Ct.) and *Casimel v. Insurance Corp. of British Columbia* (1993), 82 B.C.L.R. (2d) 387 (B.C. C.A.). See also, in the context of membership in an unincorporated association, *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 (S.C.C.).

Tab 2.

In the Court of Appeal of Alberta

Citation: 581834 Alberta Ltd. v. Alberta (Gaming and Liquor Commission), 2007 ABCA 332

Date: 20071106
Docket: 0603-0138-AC
Registry: Edmonton

Between:

581834 Alberta Ltd.

Appellant (Plaintiff)

- and -

Alberta Gaming and Liquor Commission

Respondent (Defendant)

Corrected judgment: A corrigendum was issued on July 3, 2008; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Keith Ritter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice J.H. Langston
Dated the 16th day of January, 2006
Filed on the 8th day of May, 2006
(2006 ABQB 47; Docket: 0103-05725)

Memorandum of Judgment

The Court:

Introduction

[1] This appeal involves the interpretation of a covenant for quiet enjoyment in a lease. The covenant protected the subtenant from interference by the sublandlord or any other person claiming "by, through or under" the sublandlord. At issue is whether the protection extends to the foreclosure of a mortgage granted by the head landlord. The trial judge found that it did not. We agree.

Facts

[2] In 1980 the respondent constructed a liquor store on land that was part of the Londonderry Mall in Edmonton. The land was owned by Lehndorff Property Management Ltd. ("Lehndorff"). Gentra Canada Investments Inc. ("Gentra") held a mortgage on the land.

[3] In 1990 after an upgrade to the mall, the respondent moved locations and entered into a new lease with Lehndorff ("the headlease"). The lease was for a term of 40 years. In 1993 the respondent sold its retail liquor business to the appellant. As part of the sale, the appellant and the respondent entered into a sublease. The sublease was for a term of 37 years. It contained the following covenant for quiet enjoyment:

> If and so long as the Subtenant [the appellant] performs each and every obligation of the Subtenant herein, the Subtenant shall quietly enjoy the Premises without hindrance or molestation by the Sublandlord [the respondent] or any other person claiming by, through or under the Sublandlord, subject to the terms and conditions of this Sublease.

[4] The headlease required Lehnndorff to use reasonable efforts to have its mortgagees execute a non-disturbance agreement, if so requested by the respondent. No request was made and no agreement was executed. Lehndorrf defaulted on the mortgage and in December, 1995 Gentra obtained an order for foreclosure. The effect of the order for foreclosure was to extinguish the interests of Lehndorrf, the respondent and the appellant. The appellant made an arrangement with Gentra to remain in possession; however, in April, 1996 Gentra was granted possession of the premises. In order to remain in the premises the appellant negotiated a lease with Gentra at a greatly increased rate. The appellant carried on business from the premises until the end of 2000. In 2001 it commenced this action claiming damages from the respondent for breach of the covenant of quiet enjoyment.

Trial Decision

[5] The trial judge held that the covenant was not absolute. The covenant did not protect the appellant from all interference, but only from hindrance or molestation by the respondent or any other person claiming by, through or under the respondent. He held that the interference suffered by the appellant was caused by Lehndorff's default on the mortgage and Gentra's subsequent foreclosure. As Lehndorff and Gentra were superior in title to the respondent, they did not claim "by, through or under" the respondent.

[6] In reaching his conclusion the trial judge rejected the appellant's arguments based upon s.48(1) of the *Law of Property Act,* R.S.A. 2000, c. L-7. The trial judge interpreted the section as protecting the foreclosing mortgagee from the rights of persons claiming through the owner, mortgagor or encumbrancer. This did not mean that the foreclosing mortgagee acts "through" any of these entities, as the appellant had argued. Rather, the mortgagee exercised its own independent right.

Grounds of Appeal

[7] The appellant submits that the trial judge misinterpreted the covenant and misapprehended the law with respect to covenants for quiet enjoyment.

Standard of Review

[8] The standard of review on both the interpretation of the covenant and the question of law is correctness.

Interpretation of the Covenant

[9] "The covenant for quiet enjoyment is an assurance against the consequences of a defective title including any disturbance founded thereon, and against any substantial interference by the covenantor or those claiming under him, with the enjoyment of the premises for all usual purposes": *Williams & Rhodes Canadian Law of Landlord and Tenant*, looseleaf, 6th ed.(Toronto: Carswell, 1988) at para. 9:1. Accordingly, the covenant protects against two things: interference with the title and physical interference with the use of the property. This case concerns interference with the title.

[10] Covenants may be absolute or qualified. The appellant seeks an interpretation which would make this an absolute covenant, protecting a tenant from all interference, even from those superior in title.

Tab 3.

In the Provincial Court of Alberta

Citation: R. v. Anderson, 2009 ABPC 249

Date: 20090827
Docket: 090043092P1
Registry: Edmonton

Between:

Her Majesty The Queen

- and -

Diana Louise Anderson

Reasons for Judgment of The Honourable Judge L.J. Wenden

[1] The accused is charged with two counts; one, an allegation of criminal harassment contrary to Section 264 of the *Criminal Code*, and the other, an allegation of interference with property contrary to Section 430 (1) (d) of the *Criminal Code*. The complainant for both allegations is Mary Doyle and the dates of December 1, 2007 to November 30, 2008 are the same for both alleged offences.

[2] The complainant, Mary Doyle and the accused, Diana Anderson, live next to each other. The complainant has lived in her residence at [...] Avenue for 15 years. The accused has lived in her residence for four years. The complainant said that problems between the two started virtually upon the accused moving in, and that they have worsened over the last three years.

[3] This accords with Anderson's view, as she swore a private information alleging that she was the victim of criminal harassment by Mary Doyle between the dates of January 1, 2004 to August 9, 2008, which information was stayed by the Crown. There was also a second information against Doyle that was stayed by the Crown. She also called the EPS to complain about alleged harassment by the complainant Ms. Doyle. This was investigated in late 2008 by

Constable Jennet of the EPS. The Constable did not swear an information against the complainant Doyle. Instead, she caused an information to be sworn against the accused Anderson.

[4] Constable Jennet received a substantial amount of information from Doyle who alleged multiple incidents of harassment by Anderson over the years during which the two were living next to each other. In an effort to be responsible, the Constable narrowed down the time complained of to one year, and the incidents in that year. In my view, it is important to keep this in mind for two reasons. Firstly, it validates Doyle's contention that the trouble has been ongoing since Anderson moved into the neighbouring house. Secondly, recognizing the fact that Doyle complained of multiple incidents occurring over the years puts the relationship between the two in a proper context.

[5] Conversely, to limit the period in question to one year, that year being December 1, 2007 to November 30, 2008, gives the impression that Doyle's complaints are more recent and less numerous when compared to Anderson's complaints. It also suggests that Doyle's complaints are in retaliation to those of Anderson. This is not the case.

[6] Doyle herself testified about events transpiring outside the time period of December 1, 2007 to November 30, 2008, and was cross-examined on them. The events of 2006 and 2007 provide narrative to the events of 2008.

2006:

[7] The complainant said that she had decided to erect a fence. The decision was made because Anderson had put up a small fence that prevented Doyle from using her own gate. Doyle was backing out of her garage, and realizing that she had forgotten something, stopped her car and got out. She was near the front of the garage when she realized that the accused was behind her, next to her car door. Anderson wanted to know why the fence was being put up, as it prevented her from leaning her ladder against Doyle's house when checking her eaves. Doyle suggested that this be discussed at a later time as she was late taking her children to school and herself to work. The accused persisted and held up Doyle for five or ten minutes. Doyle said that the accused would not move, making it difficult for her to get into her car. As Anderson was leaving Doyle's garage, she told the complainant that she was a horrible mother, an awful neighbor and ought to move. She said that she found the event to be upsetting to her. It was her son's birthday and the accused's actions caused a damper on the day. According to the complainant, the fence is a recurring problem for the accused, as the accused cannot now lean her ladder against Doyle's house.

[8] Another issue dealt with a sidewalk between the houses that was common to both properties. Ms. Doyle was in the habit of shoveling the snow off the walk and had done so the entire time that she lived at her house. The accused yelled at her telling her that her job was inadequate and not to shovel the common sidewalk any more alleging that it was her property.

2007:

[9] The issues in 2007 revolve around the shoveling of the City sidewalk and the complainant's radio. The accused did not want the complainant shoveling that portion of the city sidewalk that went past her house. In the accused's view, the shoveling was totally inadequate. The incident with the radio happened when the accused entered the complainant's property with the stated intention of turning off the complainant's radio. She was told by the compliant to leave the property.

2008:

[10] The complainant testified that after she put up her fence, the accused erected a number of tarpaulins and a lattice next to the Doyle's fence, and that they extended considerably higher than the six foot fence erected by the Doyles. The tarpaulins went up September- October 2008.

[11] The Crown tendered as Exhibit 1 four sheets of photographs that had been taken by the complaint. One of the sheets was a series of photographs of the complainant's back yard that show the tarpaulins erected by the accused from different angles. There are two pictures, one located in the center, bounded on the top by "Neighbor's fence, (Piano Teacher)" and the brief explanation at the bottom, and to the immediate left of that picture there is another one that shows the three tarpaulins and the piece of wood supporting the fence.

[12] At the center of the photographs, just to the right of a blue ball, there is either a 2x4 or a 4x4 leaning against the fence at a 45 degree angle. Ms. Doyle explained the purpose of the piece of wood.

> "Q How tall is that fence?
> A Six feet.
>
> Q Six feet.
> A Yes. And now with this lattice on there and here tarps, I have to put a lean-to against my fence because the first time that she put it up and we got a big wind storm … she had unhooked it from the tree …
>
> …
>
> Q It acts … like a kite
> A A kite yeah. So it started shaking the fence and I thought for sure that it was all going to come down, so I had to put this up which also distracts from --
>
> Q So that's that 2x4 you've got leaning
> …
> Q At a 45 degree angle to try and hold your fence … –
> …

Q from falling down –
A Yeah

Q - - when the wind blows.
A Yes
...
A And it disrupts you know my children from playing ...

(Transcript page 16, lines 14-41; page 17, line 1) (Emphasis added).

[13] As indicated in the foregoing, the fence was erected by the Doyles. The complainant said that she complained to the City Bylaw office about the tarpaulins but was told that nothing could be done. As at the date of the trial (July 24, 2009), the tarpaulinswere still in the position that is shown in the photograph. The complainant described the tarpaulins like "a big wind thing" (Transcript page 12, lines 32 – 41, page 13 lines 3-4).

[14] There are two other incidents that took place in 2008 that require some background explanation. The accused caused two informations to be laid against the complainant alleging criminal harassment. Both of the charges were stayed by the Crown.

[15] The complainant testified that on the occasion when the first information was stayed the accused left a bag hanging on her fence. The bag is the subject of the other three photographs that comprise Exhibit 1. The following note was attached to the outside of the bag: "Mary Here are some "Goodies" (good stories) that you and your family may enjoy. Diana". The words "you" and "your" were heavily underlined.

[16] The complainant said that she did not feel comfortable taking whatever was in the bag nor did she want the contents. The bag and its contents were returned to the accused with a note which said that it was being returned on the advice of her lawyer and that she did not want the contents.

[17] There was a second similar incident on November 11, 2008 when the second set of charges against Doyle were stayed. A bag was attached to a hanger that was hanging over her fence. In addition to the bag, there was a note that contained some misinformation about the complainant as it dealt with her age, birth date, etc. The accused also complained about the complainant's children. Lastly in the note she complained that video cameras that the complainant had set up in her yard were pointing onto the accused's property.

[18] The complainant denied this and said that they were trained on her entire back yard gate and sidewalk. She said that the video cameras were installed so that if the accused yelled at her, she would have evidence of this event. She re-affirmed the fact that the cameras were trained on her back gate, sidewalk and her entire back yard. It was never her intention that the cameras point into the yard of the accused. The complainant testified that she wants nothing to do with the accused.

[19] The complainant said that the accused continuously tries to talk to her, something that the complainant does not want to do. She says that the accused has reacted by continuous stares or attempts to talk to the children. The complainant said, "She'll be watching us continually"; (Transcript page 4, lines 6-13).

[20] In addition to the above, the complainant testified that the accused has:

- Sworn at her on what seems to be a regular basis;
- Complained about wind chimes that she had to Bylaw officials. The officials required her to remove the chimes, though there were similar ones in the neighbourhood;
- Approached the complainant's children, who are very young at nine and four, and has questioned them and solicited information from them;
- Complained to the SPCA that she has mistreated the dog;
- Complained that the Doyle's garden extends into the lane;
- Caused her the unnecessary expense of having to hire a lawyer.

[21] Crown counsel in his submissions to the Court said that he was uncertain if Section 264(1) of the *Criminal Code* was appropriate in the circumstances. After reviewing the evidence as it relates to section 264(1) of the *Code* it is my view that it falls short of making out the charge. Therefore, the count under that section is dismissed.

[22] Given the facts as I have found them, it is necessary to consider the jurisprudence on Section 430 of the *Criminal Code*, in addition to the applicable provincial legislation dealing with trespass, as well as jurisprudence that deals with trespass.

Section 430 of the Criminal Code:

[23] The relevant portions of Section 430 (1) are:

> "Every one commits mischief who wilfully
> ....
> (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property."

[24] Much of the jurisprudence has revolved around the meaning to be given to the word "enjoyment" in the phrase "enjoyment ... of property." Several Courts of Appeal, courts sitting as summary conviction appeal courts, as well as trial courts at various levels, have considered the meaning to be given to the word "enjoyment", as found in section 430 (d) of the *Criminal Code*. There are two different schools of thought; one that holds that the word "enjoyment" is to be narrowly construed, and relates to conduct in relation to property or rights in property; the other school holds that the word "enjoyment" ought to be given a more expanded meaning.

Trial Decisions:

[25] The issue in *R. v. Phoenix* (1991), 64 C.C.C. (3d) 252 (B.C. Prov. Ct.) was a loud noise complaint. The police had to attend two times and tell the accused to lower the noise level. The accused did not comply. The noise abated at about 5:00 am. The complainant, who lived a short distance away, complained that he was unable to get any rest. After finding on the facts that the actions of the accused were willful, the judge went on to consider the word "enjoyment". At pp.255-6, he said:

> *There is, however, a different sense in which 'enjoyment' is used in reference to property ...*
>
> *In this case the meaning to be assigned to 'enjoyment' is 'possession'. To hold otherwise would have the effect of creating an offence, punishable by indictment, whenever the tort of nuisance is committed, and sometimes even when the conduct falls short of a tort. For example, a person burning leaves in a backyard bonfire, interferes with the comfort and convenience, and therefore the 'pleasure' of her neighbour in enjoying the occupation of his land. Likewise, a person making construction noises in the erection of a new building. So would a person who plants a tree that eventually blocks the view of his neighbour.*
>
> *If Parliament had intended that all such conduct would constitute an offence, punishable on indictment, it would have said so explicitly. If Parliament had intended 'enjoyment' to mean pleasure, comfort or convenience, rather than possession, then is it not strange that it would have regarded 'use' and 'operation' as incidents of ownership or occupation of land or personal property worthy of protection, but 'possession'?*
>
> *I conclude that obstruction, interruption or interference with the enjoyment of property only occurs within the meaning of Section 430(1)(c) of the Criminal Code when it is aimed at the act of or entitlement to possession of that property.*

[26] As a result the accused was acquitted.

[27] *R. v. Vaillancourt* [1991] O.J. No. 2094, a decision of Merredew Prov. Div. J., (Ontario Court of Justice - Provincial Division), also dealt with a noise complaint.

[28] The facts in this case dealt with a series of noise complaints over several months. According to the facts, Vaillancourt was an inveterate party organizer and had hosted many late, noisy parties. He had been warned on several occasions about the noise emanating from his place, and had even made an effort to muffle the sound by installing plywood panels on his windows. This met with some success, but there was still very much noise caused by the coming and going of the invited guests. As well there were what was described as "gushes of music" whenever the door of the house was opened.

[29] At paragraphs 17-19 of the decision, Merredew J. observed that:

R. v. Phoenix 64 CCC 3d 252 is the only recent authority I have been able to find which assists in construing the provisions of CCC 430(1)(d); that is, mischief, when the criminal act is said to be the interference with the lawful enjoyment of property. With re-spect, I agree with Judge de Villier's assessment of the facts and that the accused's ac-tions in the Phoenix case were wilful. With respect however, I have difficulty with the proposition in these circumstances that the meaning attributed to "quietness" in real property law, that is the right to possess land without challenge to title, is the meaning to be as-signed to that word, as opposed to the plain meaning of the word, on the principle that the meaning most favourable to an accused must be chosen where penal consequences may ensue.

With respect, there is no doubt that there is a special meaning attributed to "enjoyment", particularly as in "quiet enjoyment" in real property law, but I can find no foundation for importing that special "term of art" meaning into a discussion of the meaning of the word as used in Section 430 of the Criminal Code, in the phrase "interferes with the lawful use, enjoyment or operation of property ..." where that phrase is one of several definitions of the crime of mischief. None of the other definitions refer to questions of title. They refer to physical attacks on property or interference in its use or enjoyment; jusdem generis a reference to questions to title would seem to be out of place. In this connection, it is of interest to note that the Code provides specific offences for several crimes relating to title to property. For example, Criminal Code Sections 386 and 387, both of which are species of fraud, and although not a direct criminalisation of the civil breach of right of quiet enjoyment, provided in covenants in deeds and leases and the like, these sections do criminalise certain frauds which have the effect of attacking good title to lands.

The Phoenix decision negates the proposition that this subsection was intended to have the effect of "creating an offence punishable by indictment even where the tort of nuisance is committed." In my opinion, that is exactly what Parliament intended, provided it is only a crime if the impugned actions are committed "wilfully"; it is that quality of state of mind which raises that which might otherwise be actionable only as a tort or mischief into a crime.

In the absence of other helpful criminal law jurisprudence, it may be of value to review some civil cases to find jurisprudence as to the common use of the words

....

A few recent Ontario cases give the flavour of this jurisprudence.

In Banfair et al. v. Formula Fun Centre 51 OR 2d 361, Mr. Justice O'Leary held that "noise from the track...;" that is one of those tracks where people buzz about on little

cars, go-carts; "Noise from the track constituted an unreasonable interference with the plaintiff's enjoyment of their property." An example of, in a civil matter, the use of the word "enjoyment of property".

In Mandeza v. Palazzi 1976 12 OR 2d 270, an action having to do in part with damages from the spreading roots of a tree, the court said, "...nor do I think the interference with the enjoyment of the plaintiff's land is substantial. The latter is usually concerned with smoke, or dust, or noise or smell." This is referring to the enjoyment of property.

In Walker v. Pioneer Construction 1975 8 OR 2d 35 and in Barrette v. Franki 1955 OR 413, the courts refer to pile driver noise and an asphalt plant as nuisances where noise interferes with the enjoyment or use of property.

In Royal Anne Hotel v. Ashcroft 1979 95 DLR 3rd 756, in the Supreme Court of Canada, Mr. Justice McIntyre held that the essence of the law of nuisance is interference with enjoyment of land, and refers to it as when smoke, fumes and noise invade the right of enjoyment of land.

Thus, both in commonplace meaning and in jurisprudence there is ample support for the proposition that "enjoyment" in relation to mischief to property may properly be con-strued to refer to freedom from noise and other things which may reduce the quality of life therein or thereon. If such interference is merely a nuisance, it is actionable in civil law; if it is wilful and unreasonable it may be the subject of a criminal charge under the Criminal Code s. 430.

[30] In his view, there was ample evidence to infer that the actions of Vaillancourt were willful, and on the evidence, they interfered with the enjoyment of the property of the complainants.

Summary Conviction Appeals:

[31] *R. v. T.W.* [1993] B.C.J. No. 2031, 21 W.C.B. (2d) 194 was an appeal from an acquittal on a charge under s. 430 (1) (c). Cowan J. noted that the issue before the court was the proper interpretation to be given to the phrase "enjoyment of property". After a consideration of *R. v. Phoenix* Cowan J. said:

10 Simply stated the issue is whether the trial judge erred in law in interpreting the meaning of the words "enjoyment of property" in s. 430(1)(c) of the Criminal Code.

...

12 If recourse is had to that dictionary source in regard to the term enjoyment (which also is not defined in the Criminal Code) the following definitions are set out:

Enjoyment

(1) The action or state of enjoying anything. Also the possession and use of something which affords pleasure or advantage

(2) Gratification, pleasure

13 Enjoyment then can connote "use" or it can connote "pleasure". The trial judge following the Phoenix case held that in the terms of the section it referred to use. Significantly, however, the section refers to both the "use" of property and the "enjoyment" of property. Since the word "use" is in the section then it would in my opinion be reasonable to conclude that by also including the word "enjoyment" in the section that it was intended that the word be construed in the sense of gratification or pleasure.

14 In my view it can be said that by using the term enjoyment in the section Parliament intended to make it an offence to wilfully disturb a person's pleasurable enjoyment of property, such as, in this case, by noise sufficiently excessive so as to prevent the enjoyment of sleep. The loss of sleep is not a trivial matter as was found by Greene M.R. in the case of Andreae v. Selfridge & Co. Ltd. (1937), 3 A.E.R. 255 where he stated:

> *To say that the loss of one or two nights rest is one of those trivial matters in respect of which the law will take no notice appears to me to be quite a misconception...*

15 In the result the appeal is allowed. The judgment in the court below dealt with the matter primarily on the issue of the proper interpretation of the term enjoyment. The issue of the respondent's wilfulness in acting as he did was not specifically addressed. The admitted facts are such in my opinion that there is no doubt that the respondent's conduct was wilful.

16 Accordingly I consider that the appropriate order to be made on this appeal is that the acquittal be set aside, a conviction entered and that the case be remitted to Youth Court for the purpose of sentencing.

[32] In *R. v .K.P. (supra)*, Kurisko J., sitting on an appeal from a conviction in Youth Court followed the decision in *Phoenix* and overturned a conviction on the grounds that the trial judge failed to consider that decision in arriving at the conviction. In my view, in light of the Ontario Court of Appeal's decision in *Maddeaux* (discussed in the following section of these reasons), to the extent that reliance is placed upon *Phoenix* in arriving at the decision, *R.v K.P* has been overruled.

Courts of Appeal:

[33] *R. c. Drapeau* 1995 CarswellQue 2 (WLeC), (1995), 96 C.C.C. (3d) 554 ("*Drapeau*")is a decision of the Quebec Court of Appeal. The two justices who issued judgments on the meaning to be given to the word "enjoyment" (Fish and Chamberland JJA) were divided on that meaning. The reasons of the three Justices include the following:

> *Beauregard J.A. (translation): - The difficulty in this case is not in the interpretation of the words "use", "enjoyment", and "operation" found in s. 430(1)(d) of the Criminal Code.*
> ...
>
> *The solution to the difficulty raised by the present case lies rather in the answer to the following question. When the appellant interfered with the Bélangers while they were on their land, did he merely want to interfere with them, without regard to the fact that they were on their own land (and in that case, the appellant would not be guilty), or did he want to interfere with their enjoyment of their land, or, at the very least, did he know that he was interfering with their enjoyment of it (in which case, he would be guilty)?*
>
> *After due consideration, I am unable to overcome the doubt which I have in this regard, which doubt is resolved in favor of the appellant.*

Fish J.A. referred to the jurisprudence on this point, as well as dictionary definitions of the word "enjoyment. At page 560 he said:

> *In considering the meaning of "enjoyment" as that word is used in s. 430(1)(d) of the Criminal Code, we must not overlook that s. 430(1)(d) creates an offence in relation to "the . . . use, enjoyment or operation of property".*
>
> *It does not contemplate "enjoyment" as an abstract concept divorced from its statutory context. Rather, it employs for a legal purpose a known term that enjoys a relatively fixed legal meaning mentioned in all of the dictionaries, specialized and general, that I have cited above.*
>
> *In each instance, the ordinary legal meaning of "enjoyment" is restricted to the entitlement or exercise of a right.*
> ...
>
> *With the greatest respect, however, I do not believe that Parliament intended the word "enjoyment" in s. 430(1)(d) to bear all of the definitions given by general dictionaries such as Robert and Random House. It is not so much a matter, in my view, of giving the word its "ordinary meaning" or "sens commun"; rather, we are*

required to determine the meaning of the word in the particular context of s. 430 of the Criminal Code.

[34] And at p. 561:

Criminal mischief in relation to private property is under our present Code of broader compass, but that does not mean its essence has changed. In my view it remains an offence in relation to property or rights in property. This is reflected in its placement in the Criminal Code: s. 430(1)(d) appears in Part XI, entitled "Wilful and Forbidden Acts in respect of Certain Property".

The words in s. 430(1) (d), "willfully . . . obstructs, interrupts or interferes . . . with the lawful use, enjoyment or operation of property", must be interpreted, I repeat, in a manner that does not do violence to the history of the crime they describe or to the context in which that crime appears in the Code.

Seen in this light, I do not believe that "enjoyment: in s. 430(1) (d) refers to a purely subjective state, such as the nature or intensity of the pleasure derived from a property by its owner, possessor or occupant. Nor do I believe that a person who diminishes that pleasure, even knowingly, is liable for that reason alone to conviction for criminal mischief.

[35] And at p.562:

To conclude otherwise, in my respectful view, is to make of a crime in relation to property an offence against feelings and tastes.

With respect for the views expressed by my colleague Chamberland, I would not interpret the law so broadly as to permit that result, and then impose on policemen and prosecutors the thankless task of enforcing it.

[36] Chamberland J.A. (dissenting) opined, at page 565:

The appellant submits that the trial judge erred in giving too broad and liberal interpretation to the word "enjoyment" by wrongly applying civil law notions to criminal and penal law. The appellant argues that it would have been more appropriate to adopt the interpretation given to it by Villiers Prov. Ct. J. In Phoenix, supra, and restricting the meaning to be given to the word to problems concerning the very possession of the property. The appellant argues that the accused is entitled to the narrow construction of the legal text, in short, to the interpretation most favorable to him.

...

In my view, the appellant is wrong.

...

[37] And at pages 566-8:

> *Section 430(1) (d) of the Criminal Code provides that, "Every one commits mischief who wilfully . . . obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property". Within the meaning of s. 428, the words "property" means both real or personal (immovable or moveable) corporeal property. The word "enjoyment" is, however, not defined in the Criminal Code.*
>
> *Dictionaries give three meaning for this word (Le Nouveau Petit Robert, 1993):*
>
> *1. Pleasure experienced to the fullest degree.*
> *2. The action of using or applying a thing, of gaining from it, the satisfaction that it is able to provide.*
> *3. The fact of having or being entitles to a right.*
>
> *The Canadian jurisprudence is divided (in his opinion, my colleague Fish J.A. mentions these decisions, identifying them with one or other of the positions on the matter; I will not do the same exercise here), on the meaning to be given to the word "enjoyment" in the context of s. 430 of the Criminal Code. Certain decisions restrict the meaning of the word to the sole fact or tight of possessing the property others give it a more extensive of possessing the property; others give it a more extensive meaning, including therein the action of obtaining from the property which a person possesses the satisfaction that this property is capable of providing.*
>
> *With respect for the contrary opinion, I cannot convince myself that one must restrict the meaning of the word "enjoyment" to the sole fact or right of possessing the property, the meaning often given to this word in real estate (immovable) matters. (For example, art. 1854 of the Civil Code of Quebec, S.Q. 1991, c. 64, requires that the lessor provide his lessee with the "peacable enjoyment" of the property leased, and art. 1858 of the Civil Code of Quebec, which warrants the lessee against legal challenges affecting his enjoyment of the leased property.). In Phoenix, supra, based on real property law (droit immobilier), Villiers Prov. Ct. J. found that "the meaning to be assigned to 'enjoyment' is 'possession' "(at p. 255), and that the obstruction, interruption or interference with a person in the enjoyment of property could only happen "when it is aimed at the act of our entitlement to possession of that property" (at p. 256).*

[38] Referring to some observations made by Villiers J that suggested that an extended meaning to the word "enjoyment" would criminalize otherwise legal behaviour, Cumberland J.A. states:

> *I do not share the view of Villiers Prov. Ct. J., nor his fears.*

Parliament intended to criminally sanction the actions of every person who wilfully prevents a person, for example a neighbor, from enjoying his property, for example, the immovable that he purchased and, in my view, it clearly expressed itself in s. 430(1)(d) of the Criminal Code. I do not believe that the enumeration of situations, which are often borderline cases, where a charge of mischief could be brought, would justify us obscuring the ordinary meaning of words, and in particular, of the word "enjoyment".

If Parliament had intended that the word "enjoyment" mean "possession", it would have used te word "possession". Section 430(1)(d) is drafted in such a way to cover property in its dynamic aspect (employment, enjoyment or the exploitation of property), rather that its static aspect (ownership, rental or possession). The use of the word "enjoyment" comes completely within this logic.

In my view, the word "enjoyment" here has a much more inclusive meaning that just the fact of being the holder of a right to possess the property; it includes the action of obtaining from property, which a person lawfully holds, the satisfaction that this property can provide to that person. In short, the person who driven by guilty intent, wilfully interferes with his neighbour in the enjoyment of his property, exposes himself to having to answer to a charge of mischief brought under s. 430(1)(d) of the Criminal Code. The offence obviously requires that the Crown call evidence of the wilful actions of the accused and his guilty mind (mens rea).

[39] *R. v. Maddeaux* [1997] O.J. No. 1184 (Ont. C.A.) (QL) dealt with a set of facts where the appellant and the complainant lived in the same apartment building. The appellant's suite was immediately below that of the complainant. She complained about the noise he was making. He was charged under section 430(1) (c) of the *Criminal Code*. The Crown's evidence consisted of the written complaint of the complainant and the evidence of the building superintendent who testified to hearing the noise, and to turning the matter over to the police.

[40] The trial judge dismissed the charges on the basis that he was bound by the decision of *R. v. K.P.*, [1993] O.J. No. 822, (08/03/93) where the court had followed the reasoning in *R. v. Phoenix* (1991), 64 C.C.C. (3d) 252 (BCPC). Austin J. A. delivered the judgment for the court in *Maddeaux*. He considered the decisions in *K.P.* and *Phoenix.* He noted that the judge in *K.P.* omitted any reference to *R. v. Vaillancourt,* [1991] O.J. No. 2094 and the fact Merredew J. specifically rejected the reasoning in *Phoenix.*

[41] He considered the debate over the meaning of the word "enjoyment" contained in *Drapeau*, and at para 11 he cited the following passage from Chamberland JA's dissent:

Parliament intended to criminally sanction the actions of every person who wilfully prevents a person, for example, a neighbour, from enjoying his property, for example, the immovable that he purchased and, in my view, it clearly expressed itself in s. 430(1)(d) of the Criminal Code. I do not believe that the enumeration of

situations, which are often borderline cases, where a charge of mischief could be brought, would justify us obscuring the ordinary meaning of words, and in particular, of the word "enjoyment."

If Parliament had intended that the word "enjoyment" mean "possession," it would have used the word "possession." Section 430(1)(d) is drafted in such a way as to cover prop-erty in its dynamic aspect (employment, enjoyment or the exploitation of property), rather than its static aspect (ownership, rental or possession). The use of the word "enjoyment" comes completely within this logic.

In my view, the word "enjoyment" here has a much more inclusive meaning than just the fact of being the holder of a right to possess the property; it includes the action of obtaining from property, which a person lawfully holds, the satisfaction that this property can provide to that person. In short, the person who, driven by guilty intent, wilfully interferes with his neighbour in the enjoyment of his property, exposes himself to having to answer to a charge of mischief brought under s. 430(1) (d) of the Criminal Code. The of-fence obviously requires that the Crown call evidence of the wilful actions of the accused and of his guilty mind (mens rea).

[42] And continuing, he said:

With respect, I prefer the opinion of Chamberland J.A.

> *11 The term "quiet enjoyment" is found in the covenant for quiet enjoyment normally given by the vendor to the purchaser on the sale of real property. Such a covenant is a promise not to detract from, nor interfere with the purchaser's title to, or possession of the property. Black's Law Dictionary, Sixth Edition, 1990, p. 1428, defines "quiet enjoyment" as:*
>
> > *... a covenant, usually inserted in leases and conveyances on the part of the grantor, promising that the tenant or grantee shall enjoy the possession and use of the premises in peace and without disturbance.*
> >
> > *Such a covenant normally has nothing whatever to do with sound, noise, peace or quiet. In addi-tion, it is enforceable only against the grantor or lessor.*
>
> *12 The charge in the instant case is that Mr. Maddeaux wilfully interfered with the lawful use or operation of property. In my view, the words "use, enjoyment or operation" in s. 430 (1)(c) are to be read ejusdem generis. "Use" of this property would include being present in the apartment for the purposes of cooking, eating,*

> *cleaning, resting, sleeping, listening to the radio and watch-ing television. The word "enjoyment" might include any or all of those uses. "Operation" would not normally be employed in connection with a residential property, such as an apartment, but would be used in connection with a commercial, institutional or industrial enterprise as, for in-stance, a music shop, a grocery store, a library, or a mill.*

[43] In *R. v. Nicol*, 2002 CarswellMan 474 (WLeC), the Manitoba Court of Appeal considered the same issue, that is the meaning to be given to the word "enjoyment". The accused lived in Brandon, Manitoba. She caused problems for her neighbours. She was charged *inter alia* with two charges of mischief under s. 430(1)(d) of the *Criminal Code.* After a trial, the accused was convicted of two counts of mischief. Her summary conviction appeal was dismissed.

[44] Leave to appeal was granted on the issue of whether the trial judge erred in law in holding that the accused's conduct, as found by him, constituted offences under s. 430(1)(d) of the *Criminal Code*. The decision of the Court was given by Huband J. and included the following reasons:

> *5 There is some case law which indicates that the "enjoyment" of property is to be considered objectively, as an entitlement to exercise property rights. There are other cases which interpret "enjoyment" from a subjective standpoint, as taking pleasure from the use of the property. The trial judge applied the subjective standard.*

[45] And:

> *7 The learned trial judge was alive to the conflicting authorities, which he reviewed with some care in his reasons for decision.*
>
> *There are a number of trial decisions to which reference might be made, but for our purposes, it is sufficient to confine consideration of the case law to two decisions of provincial courts of appeal.*

[46] Huband J. considered the decisions of Fish and Chamberland JJA in *Drapeau* prior to considering the decision in *Maddeaux*:

> *15 In the case of R. v. Maddeaux (1997), 115 C.C.C. (3d) 122 (Ont. C.A.), the Ontario Court of Appeal considered an appeal where the charge was under s. 430(1)(c) rather than s. 430(1)(d). But the same debate occurred with respect to the interpretation of the word "enjoyment," and the court was faced with the choice of either adopting the position of Fish J.A. or Chamberland J.A. In a unanimous decision delivered by Austin J.A., the court adopted Chamberland J.A.'s position, but with additional reasons.*

16 The charge against the accused Maddeaux arose because he had caused excessive noise, which was a major nuisance to the occupant of a neighbouring apartment. In upholding the con-viction, Austin J.A. wrote (at p. 127):

> *The charge in the instant case is that Mr. Maddeaux wilfully interfered with the lawful use or operation of property. In my view, the words "use, enjoyment or operation" in s. 430(1)(c) are to be read ejusdem generis. "Use" of this property would include being pre-sent in the apartment for the purposes of cooking, eating, cleaning, resting, sleeping, listening to the radio and watching television. The word "enjoyment" might include any or all of those uses. "Operation" would not normally be employed in connection with a residential property, such as an apartment, but would be used in connection with a commercial, institutional or industrial enterprise as, for instance, a music shop, a grocery store, a library, or a mill.*

Austin J.A. then concluded in these terms (at p. 128):

> *In my respectful view, there can be no reasonable doubt as to the meaning of "enjoy-ment" in s. 430(1)(c) of the Code and, accordingly, resort to the strict construction rule is neither necessary nor appropriate.*

17 Among the other cases which have considered the matter is R. v. Hnatiuk , [2000] A.J. No. 545, 2000 ABQB 314 (Alta. Q.B.), decided by Veit J. of the Court of Queen's Bench of Alberta. I mention this case because, unlike the present case and even the two that have been noted, R. c. Drapeau and R. v. Maddeaux, the conduct of the accused (a husband and wife) towards their neighbours was horrendous. Everything one could imagine was done to make the complainant's life unbearable in terms of living next door to the accused. I cannot help but believe that it was this sort of conduct -- having nothing to do with a proprietary right -- that Parliament intended to criminalize under s. 430(1)(d). While the conduct of others who are charged under this section may be less offensive than that of the Hnatiuks, the difference is to be reflected in the sentence. Where the nuisance is marginal, the sentence will be adjusted accordingly.

18 I agree with the decision of the Ontario Court of Appeal in the R. v. Maddeaux case and the reasoning which led to that decision.

19 On the question before us, my answer is that the trial judge did not err in law in holding that the accused's conduct, as found by him, constituted offences under s. 430(1)(d) of the Criminal Code.

Trial decisions proceeding Maddeaux:

[47] *R. v. Hnatiuk*, 2000 CarswellAlta 1642 is a trial decision of Veit QBJ. There was a long and acrimonious relationship between the accused and the complainants that resulted in the accused being charged with mischief.

[48] Dealing with the interpretation of the word "enjoyment" her ladyship stated:

> *45 For the purposes of this case, I accept the position of the Ontario Court of Appeal concerning the interpretation of the concept of enjoyment of property in preference to that of the Quebec Court of Appeal. In other words, I accept that the word "enjoyment" has a more inclusive meaning than "possession" and includes the action of obtaining from property the satisfaction that the property can provide: Maddeaux .*
>
> *46 One difficulty with the decision to adopt a broad interpretation of the word "enjoyment" is that the words of section 430 of the Criminal Code, are, therefore, extremely broad: it is a crime to wilfully obstruct, interrupt or interfere with the lawful use, enjoyment or operation of property. Wilfully means knowingly, or deliberately, in the sense adodpted (sic)by the B.C.C.A. in Tan ; obstruct means to stand in the way of; interrupt means to break the continuity of; and, although interfere has a quite technical meaning of interposing or interspersing, by extension it means "to get in each other's way". The Haavaldsens knew that their use of their legal fire pit got in the way of the Hnatiuks enjoyment of their property; yet the Haavaldsens continued to use their fire pit. Could they be convicted of the criminal offence of interfering with the enjoyment by the Hnatiuks of their home, which they lawfully own and in relation to which they have a lawful right to use their backyard? Of course not. Common sense tells us that the doing of something which is not illegal is not transformed into a crime by the fact that it annoys a neighbour. However, the doing of something which is wrongful -- for example causing a loud disturbance in the middle of the night which contravenes a municipal by-law may also constitute a crime if it disturbs, or interferes with, a neighbour's sleep. A purposive interpretation of the words of s. 430 leads us to the conclusion that, although the words themselves are broad, they mean that a person who en-gages in wrongful behaviour which interferes with the lawful enjoyment of property is guilty of a crime. In this case, the fact that the Hnatiuks had put up this chain link fence, which was not pretty, and draped it with a tarp, which was not property, and that Ms. Hnatiuk wrote rude words on the tarp, which were not pretty, but all of which were lawful, cannot constitute a crime, even though the fence, the tarp, and the words on the tarp reduced or interfered with the enjoyment by the Haavaldsens of their property. The evidence establishes that there were three wilful wrongful conducts, all of which were trespass, in which Ms. Hnatiuk engaged; she deliberately doused the fire on two occasions -- that was a trespass on the Haavaldsens property even if it was not an assault of the Haavaldsens and their guests -- and she deliberately trespassed on*

their property to hit their fence with a basketball. And on each of those occasions, it is clear that the wrongful conduct interfered with, or got in the way of, the enjoyment by the Haavaldsens of their property.

47 Therefore, I convict Ms. Hnatiuk of the charge of mischief in relation to the three specific instances of trespass...

[49] In *R. v. Link* 2004 CarswellAlta 1641, Fradsham PCJ dealt with a situation where the complainants were awakened from there sleep at approximately 3:30 a.m. by the sound of voices coming from the accused's yard, followed a little later by music and loud noises, again coming from the yard of the accused. The noise continued until around 5:00 a.m. The complainants then called the police. This was no other evidence of an on-going noise problem.

[50] After a thorough review of the existing law, Fradsham PCJ said:

37 So, what is the current state of the law? In my view, and with great respect to those who hold a contrary opinion, the weight of authority is in favour of the position taken by the Ontario Court of Appeal in R. v. Maddeaux, supra. I respectfully agree that the term "enjoyment of property" as it appears in section 430(1) of the Criminal Code ought not to differ in meaning depending upon whether the property involved is real or personal. The term "property" is defined in section 2 of the Code as including both real and personal property. There is nothing in the section which would suggest that Parliament meant the word "enjoyment" to vary in meaning within the same section depending upon the type of property involved.

38 Having said that, I am also of the view that in order for otherwise non-criminal conduct to constitute the crime of mischief because it interferes with the enjoyment of property, that conduct must be, in and of itself, "wrongful" as described by Veit, J. in R. v. Hnatiuk, supra. This is in addition to it being wilful. Wilfulness may be inferred from the facts of the case.

39 In the case at Bar, the conduct complained of was loud voices and music. That is what awoke the Tingleys. [FN9] It must be noted that this was an isolated incident. It is not a case of the conduct continuing after previous warnings had been given that it must stop. No such warnings were given in this case. The evidence does not disclose an ongoing pattern of instances of noise coming from the accused's property sufficient to interfere with the Tingleys' enjoyment of their residence. [FN10] The evidence is that this was a singular event. In my view, the evidence falls very much short of proving beyond a reasonable doubt that the acts of the accused were wilful as that term is used in section 430(1) of the Code. [FN11]

40 Further, there is no evidence before me that the conduct (voices and music) which awoke the Tingleys (which is the conduct which interfered with the Tingley's enjoyment of their property) was wrongful. There is no indication that it constituted

> *a violation of any municipal by-law, or constituted a civil wrong, or otherwise offended some provision of the law. It may have been many things, but it was not wrongful.*

[51] At para 35 of his decision, Fradsham PCJ said: "It would appear from Her Ladyship's reasons that to be "wrongful", an act must contravene a municipal by-law, or constitute a civil wrong (tort). [FN7]" The footnote reads "It would seem logical that breaches of provincial legislation or regulations, or breaches of contractual obligations might also suffice to make an act 'wrongful' for the purposes of Veit, J.'s analysis."

[52] Like my brother Fradsham, I accept the state of the law to be that as is set out in *Maddeaux,* and that "enjoyment" in the phrase "enjoyment of property" is to be given wide meaning, beyond that suggested in the *Phoenix* decision. With respect, however, I do not accept his observation that "to be 'wrongful', an act must contravene a municipal by-law, ..." Veit QBJ clearly uses the breach of a municipal by law as an example of wrongful behaviour.

[53] The term "wrongful behaviour" finds its definition in the effect that it has on someone else. That is evident from the phrase in *Hnatiuk* "... a person ... engage(ing) in wrongful behaviour which interferes with the lawful enjoyment of property is guilty of a crime." It is therefore contextual.

[54] Consider the fire pit example that her Ladyship used. Her view is that as the fire pit was legal, its use even though it annoyed the Hnatiuks, was a legal act and could not be characterized as a crime.

[55] However, if the evidence showed that the only times that fires were lit:

(1) was when the wind was blowing in the direction of the neighbour's house;
(2) the neighbours were in the back yard alone, or with guests;
(3) the material being burned produced a black noxious smoke;

the act in that case would be "wrongful", as the obvious reason would be to interfere with the "enjoyment" of the property.

[56] Significantly, in his decision at para 39, Fradsham PCJ seems to opt for the contextual approach when he emphasizes that in *Link* ,the noise making was an isolated incident, and there was neither a pattern of warnings being given to cease and desist, nor was there a pattern of continuous noise making. Implicitly, had these factors existed, the result could have been different.

TRESPASS:

[57] The evidence revealed acts of trespass to the Doyle property. Thus an examination of the *Petty Trespass Act* Chapter P 11 and decisions relating to what constitutes trespass are in order.

[58] The relevant sections of the *Petty Trespass Act* are:

> 2(1) Every person who
>
> (a) without the permission of the owner or occupier of land enters on land when entry is prohibited under section 2.1,
>
> ...
>
> (2) A person who is guilty of an offence under subsection (1), whether or not any damage is caused by the contravention, is liable
>
> (a) for a first offence, to a fine not exceeding $2000, and
>
> (b) for a 2nd or subsequent offence in relation to the same land, to a fine not exceeding $5000.
>
> Notice
>
> 2.1(1) Entry on land may be prohibited by notice to that effect, and entry is prohibited without any notice on land
>
> (a) that is a lawn, garden or land that is under cultivation,
>
> (b) that is surrounded by a fence, a natural boundary or a combination of a fence and a natural boundary, or
>
> (c) ...
>
> (emphasis added)

Cases Defining Trespass:

[59] In *Friesen v. Forest Protection Limited* [1978] N.B.J. No. 30, Dickson, QBJ described trespass thusly:

> *"33 Trespass may be described as a wrongful act done in disturbance of the possession or property of another or against the person of another, against his will (38 Halsbury (3rd Ed.), at p. 734). And again, every unlawful action by one person on land in possession of another is a trespass for which an action lies although no actual damage is done (ibid, p. 739). And that a person does not know an act to be wrongful makes him no less a trespasser. To throw a foreign substance on the property of another, and particularly in doing so to disturb his enjoyment of his property, is an unlawful act. The spray deposited here must be considered such a foreign substance, and its deposit unquestionably amounted to a disturbance, however slight it may have been, of the owners' enjoyment of their property. I*

therefore must conclude that the defendant, in depositing the spray did in fact commit what would, in the absence of statutory authority, be considered a trespass. This of course does not involve any question of whether or not the spray may have been toxic or non-toxic, because even to have thrown water, or garbage, or snow, or earth tippings, or any other substance on the property would equally have amounted to an act of trespass. Inasmuch as the trespass here resulted in some injury, however slight, to the plaintiffs, their entitlement to damages in respect of that injury flows directly from the trespass to the property, and it becomes unnecessary to decide whether, as alleged, the deposit of the spray on the adult plaintiffs, and the probable exposure of the infant plaintiff to some minute portion of drifted spray, amounted also to a trespass to their persons. I may, though, say in this regard that it probably did, notwithstanding that the defendant had no intention to injure or harm anyone, for the defendant could reasonably have foreseen the likelihood of persons on the ground, even if only in isolated instances, being within the area of the spray.

[60] In *Kerr et al. v. Revelstoke Building Materials Ltd.* [1976] A.J. No. 637, 71 D.L.R. (3d) 134 (SCTD), the reasons include the following:

Shannon, J.

11 I am satisfied on the evidence that they have established a cause of action founded in trespass. The evidence establishes that their premises were invaded from time to time by smoke, sawdust, fly ash and objectionable sounds. The physical invasion of their premises by sawdust and fly ash was so severe on occasion that it interfered with their use and enjoyment of their property. Actual samples of fly ash were collected and placed in vials by the plaintiff, James Runciman Kerr, and were entered in evidence as exhibits.

"Every invasion of property, be it ever so minute, is a trespass": Entick v. Carrington (1765), 19 St. Tr. 1030 at p. 1066; Salmond on the Law of Torts, 15th ed. (1969), at p. 49; Boyle v. Rogers, [1921] 2 W.W.R. 704, 31 Man. R. 263; affirmed [1922] 1 W.W.R. 206, 31 Man. R.421(Man.C.A.).

"It is a trespass to place any chattel upon the plaintiff's land, or to cause any physical object or noxious substance to cross the boundary of the plaintiff's land...": Salmond on the Law of Torts, 15th ed. (1969), at p. 53.

[61] In *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* [1996] O.J. No. 1760, Farley J opined:

12 Trespass - this has been described as the physical invasion of a substance upon a property without the consent of the landowner. In Kerr et al. v. Revelstoke Building Mate-rials Ltd. (1976), 71 D.L.R. (3d) 134 (Alta. S.C.), Shannon J. at pp. 136-7 stated:

> *Every invasion of property, be it ever so minute, is a trespass": Entick v. Carrington (1765), 19 St. Tr. 1030 at p. 1066; Salmond on the Law of Torts, 15th ed. (1969), at p. 49; Boyle v. Rogers, [1921] 2 W.W.R. 704, 31 Man. R. 263; affirmed [1922] 1 W.W.R. 206, 31 Man. R., 421 (Man. C.A.)*
>
> > *"It is a trespass to place any chattel upon the plaintiff's land or to cause any physical object or noxious substance to cross the boundary of the plaintiff's land...": Salmond on the Law of Torts, 15th ed. (1969) at p. 53.*
>
> *The trespassing substance need not be established as toxic or inherently dangerous: see Freisen et al. v. Forest Protection Limited (1978), 22 N.B.R (2d) 146 (N.B.S.C.) where Dickson J. at p. 162 stated:*
>
> > *This of course does not involve any question of whether or not the spray may have been toxic or non-toxic, because even to have thrown water, or garbage, or snow, or earth tippings or any other substance on the property would equally have amounted to an act of trespass.*

[62] In addition to these cases there are those mentioned by Merredew J in *Vaillancourt* and cited above. They demonstrate that even the most seemingly innocuous acts qualify as "interference with the enjoyment of property" e.g. noise from the track (*Banfair v. Formula Fun Centre*); spreading roots of a tree deemed not substantial (*Mandeza v. Pallazzi*); pile driver noises and an asphalt plant (*Walker v. Pioneer Construction*); smoke fumes and noise (*Royal Anne Hotel*).

[63] See also *R. v. S.E.* 1993 Carswell NWT 11, Northwest Territories Court of Appeal, (Lieberman, Hetherington and Stratton JJ.A), at paras 12-14, where Hetherington J. A. for the Court held that a violation of privacy qualified as an interference under section 430 (1) (d) of the *Criminal Code*.

CREDIBILITY:

[64] The complainant was the sole witness who testified concerning the events that she alleges constituted mischief. I found her to be quite open and honest in her answers. I did not get the sense that she was vindictive, or trying to embellish her testimony.

[65] At one point in her testimony she said: "I'm just trying to think. It's hard to remember stuff. There's been so much, and I can't."(Transcript page 7, lines 24-25). I take that to mean that there was such a history between the complainant and the accused with so much detail that she could not remember all of it. Two of the incidents to which she testified, that is, the tarpaulins

above her fence and the gift bag hung on her fence gate, are substantiated by photographs that were tendered as exhibits. I accept her evidence.

Application of the Law to the Facts:

[66] The evidence establishes that there were three instances of trespass to the Doyle property, all of which took place between December 1, 2007 to November 30, 2008. I am satisfied beyond any reasonable doubt that all of the actions of the accused were wilful.

[67] The accused trespassed on the property by unhooking the rope that tied the tarpaulins to a tree. This was a wrongful act. Unhooking the rope allowed the tarpaulins to act as a wind catcher, or as the complainant put it "a kite" resulting in the wooden beams that held up the tarpaulins striking the complainant's fence and causing it to become loose. She testified that she had to put up a beam to steady the fence and that it disrupted her children at their play. The tarpaulins were still up on the date of the trial – July 24th, 2009. She was not cross-examined on any aspect of the tarpaulins. In my view, the entire structure acted like a battering ram.

[68] The two items that were left for the complainant, each one the evening of the day when charges against Ms Doyle were stayed, constitute trespass. One of these items was photographed and is an exhibit in the trial. The photograph clearly shows that the bag is on the inside of the Doyle fence. There is a note attached to the outside of the bag addressed to the complainant and signed by the accused. The complainant said that she did want items in the bag and that bag and contents were given over to the police. There was a second bag left for the complainant, hanging over her fence, about November 11th. This bag held a note that contained substantial misinformation about the complainant and complaints about her children.

[69] Both trespasses are wrongful acts as described by Veit QBJ in the *Hnatiuk* decision. Nor are the two incidents so trivial that the *de minimus* principle can be pleaded given the history between the two individuals involved in this case. Placing the items where they were placed was intended to annoy, upset and frustrate the complainant. Additionally, the complainant said that she did not feel comfortable about accepting the items and did not want them. Both of these items constituted an interference with the enjoyment of Ms. Doyle's property.

[70] I find the accused guilty.

Dated at the City of Edmonton, Alberta this 27th day of August, 2009.

Judge L.J. Wenden
A Judge of the Provincial Court of Alberta

Appearances:

John Hnidan
for the Crown

Dale Knisely
for the Accused

Tab 4.

CANADA

CONSOLIDATION

CODIFICATION

Alberta Natural Resources Act

Loi des ressources naturelles de l'Alberta

S.C. 1930, c. 3

S.C. 1930, ch. 3

Current to December 15, 2014

À jour au 15 décembre 2014

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

An Act respecting the transfer of the Natural Resources of Alberta

[*Assented to 30th May 1930*]

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title

1. This Act may be cited as *The Alberta Natural Resources Act*.

Agreement confirmed / Proviso

2. The agreement set out in the schedule hereto is hereby approved, subject to the proviso that, in addition to the rights accruing hereunder to the province of Alberta, the said province shall be entitled to such further rights, if any, with respect to the subject matter of the said agreement as are required to be vested in the said province in order that it may enjoy rights equal to those which may be conferred upon or reserved to the province of Saskatchewan under any agreement upon a like subject matter hereafter approved and confirmed in the same manner as the said agreement.

Loi concernant le transfert des ressources naturelles de l'Alberta

[*Sanctionnée le 30 mai 1930*]

Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète :

Titre abrégé

1. La présente loi peut être citée sous le titre : *Loi des ressources naturelles de l'Alberta.*

Convention ratifiée

2. La convention énoncée à l'Annexe de la présente loi est par les présentes approuvée, sous la réserve que, outre les droits attribués ci-après à la province de l'Alberta, ladite province doit jouir de tous autres droits, s'il en est, concernant le sujet de ladite convention, dont il pourra être nécessaire d'investir ladite province afin qu'elle puisse jouir de droits égaux à ceux qui peuvent être conférés ou réservés à la province de la Saskatchewan en vertu de toute convention sur un sujet semblable dorénavant approuvée et ratifiée de la même manière que pour ladite convention.

ject to the exercise by the Parliament of Canada of its legislative jurisdiction over sea-coast and inland fisheries.

INDIAN RESERVES

10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

11. The provisions of paragraphs one to six inclusive and of paragraph eight of the agreement made between the Government of the Dominion of Canada and the Government of the Province of Ontario on the 24th day of March, 1924, which said agreement was confirmed by statute of Canada, fourteen and fifteen George the Fifth chapter forty-eight, shall (except so far as they relate to the *Bed of Navigable Waters Act*) apply to the lands included in such Indian reserves as may hereafter be set aside under the last preceding clause as if the said agreement had been made between the parties hereto, and the provisions of the said paragraphs shall likewise apply to the lands included in the reserves heretofore selected and surveyed, except that neither the said lands nor the proceeds of the disposition thereof shall in any circumstances become administrable by or be paid to the Province.

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.

SOLDIER SETTLEMENT LANDS

13. All interests in Crown lands in the Province upon the security of which any advance has been made under the provisions of the *Soldier Settlement Act*, being chapter 188 of the Revised Statutes of Canada, 1927, and amending Acts, shall continue to be vested in and administered by the Government of Canada for the purposes of Canada.

NATIONAL PARKS

14. The parks mentioned in the schedule hereto shall continue as national parks and the lands included therein, as the same are described in the orders in council in the said schedule referred to (except such of the said lands as may be hereafter excluded therefrom), together with the mines and minerals (precious and base) in each of the said parks and the royalties incident thereto, shall continue to be vested in and administered by the Government of Canada as national parks, but in the event of the Parliament of Canada at any time

subordonnément à l'exercice par le Parlement du Canada de sa juridiction législative sur les pêcheries du littoral et de l'intérieur.

RÉSERVES INDIENNES

10. Toutes les terres faisant partie des réserves indiennes situées dans la province, y compris celles qui ont été choisies et dont on a mesuré la superficie, mais qui n'ont pas encore fait l'objet d'une ratification, ainsi que celles qui en ont été l'objet, continuent d'appartenir à la Couronne et d'être administrées par le gouvernement du Canada pour les fins du Canada, et, à la demande du surintendant général des Affaires indiennes, la province réservera, au besoin, à même les terres de la Couronne inoccupées et par les présentes transférées à son administration, les autres étendues que ledit surintendant général peut, d'accord avec le ministre approprié de la province, choisir comme étant nécessaires pour permettre au Canada de remplir ses obligations en vertu des traités avec les Indiens de la province, et ces étendues seront dans la suite administrées par le Canada de la même manière à tous égards que si elles n'étaient jamais passées à la province en vertu des dispositions des présentes.

11. Les dispositions des paragraphes un à six inclusivement et du paragraphe huit de la convention conclue entre le gouvernement du Dominion du Canada et le gouvernement de la province d'Ontario le vingt-quatrième jour de mars 1924, laquelle dite convention a été ratifiée par statut du Canada quatorze et quinze George V, chapitre quarante-huit, s'appliqueront (sauf en tant qu'elles ont trait à la *Loi du lit des cours d'eau navigables*) aux terres comprises dans les réserves indiennes qui peuvent dans la suite être mises à part en vertu de la clause précédente, tout comme si ladite convention avait été conclue entre les parties à cette dernière, et les dispositions desdits paragraphes s'appliqueront également aux terres comprises dans les réserves jusqu'ici choisies et arpentées, sauf que ni lesdites terres ni le produit de leur aliénation ne pourront, en aucune circonstance, être administrés par la province ou à elle payés.

12. Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.

TERRES D'ÉTABLISSEMENT DE SOLDATS

13. Tous les intérêts dans les terres de la Couronne de la province sur la garantie desquelles une avance a été consentie en vertu des dispositions de la *Loi d'établissement de soldats*, chapitre 188 des Statuts revisés du Canada, 1927, et des lois modificatrices, continueront d'appartenir au gouvernement du Canada pour les fins du Canada et d'être administrés par lui.

PARCS NATIONAUX

14. Les parcs mentionnés à l'annexe des présentes demeureront parcs nationaux, et les terres y comprises, ainsi qu'elles sont décrites dans les arrêtés en conseil énoncés dans ladite annexe (sauf celles desdites terres qui peuvent ensuite en être exclues), ainsi que les mines et minéraux (précieux et vils) qui se trouvent dans chacun desdits parcs, de même que les redevances y afférentes, continueront d'appartenir au gouvernement du Canada et d'être administrées par lui à titre de parcs nationaux; mais, advenant le cas où le Parlement

Tab 5.

Wayne Clarence Badger *Appellant*

v.

Her Majesty The Queen *Respondent*

and between

Leroy Steven Kiyawasew *Appellant*

v.

Her Majesty The Queen *Respondent*

and between

Ernest Clarence Ominayak *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Federation of Saskatchewan Indian Nations, the Lesser Slave Lake Indian Regional Council, the Treaty 7 Tribal Council, the Confederacy of Treaty Six First Nations, the Assembly of First Nations and the Assembly of Manitoba Chiefs *Interveners*

INDEXED AS: R. *v.* BADGER

File No.: 23603.

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

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Indians — Treaty rights — Hunting on privately owned land in tract ceded by treaty — Violations of Wildlife Act — Whether status Indians have right to hunt

Wayne Clarence Badger *Appelant*

c.

Sa Majesté la Reine *Intimée*

et entre

Leroy Steven Kiyawasew *Appelant*

c.

Sa Majesté la Reine *Intimée*

et entre

Ernest Clarence Ominayak *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Le procureur général du Canada, le procureur général du Manitoba, le procureur général de la Saskatchewan, la Federation of Saskatchewan Indian Nations, le Lesser Slave Lake Indian Regional Council, le Treaty 7 Tribal Council, la Confederacy of Treaty Six First Nations, l'Assemblée des Premières Nations et l'Assembly of Manitoba Chiefs *Intervenants*

RÉPERTORIÉ: R. *c.* BADGER

N° du greffe: 23603.

1995: 1er et 2 mai; 1996: 3 avril.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Indiens — Droits issus de traités — Chasse sur des terres privées situées dans le territoire cédé aux termes d'un traité — Violations de la Wildlife Act — Les

Wayne Clarence Badger *Appellant*

v.

Her Majesty The Queen *Respondent*

and between

Leroy Steven Kiyawasew *Appellant*

v.

Her Majesty The Queen *Respondent*

and between

Ernest Clarence Ominayak *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Federation of Saskatchewan Indian Nations, the Lesser Slave Lake Indian Regional Council, the Treaty 7 Tribal Council, the Confederacy of Treaty Six First Nations, the Assembly of First Nations and the Assembly of Manitoba Chiefs *Interveners*

INDEXED AS: R. *v.* BADGER

File No.: 23603.

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

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Indians — Treaty rights — Hunting on privately owned land in tract ceded by treaty — Violations of Wildlife Act — Whether status Indians have right to hunt

Wayne Clarence Badger *Appelant*

c.

Sa Majesté la Reine *Intimée*

et entre

Leroy Steven Kiyawasew *Appelant*

c.

Sa Majesté la Reine *Intimée*

et entre

Ernest Clarence Ominayak *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Le procureur général du Canada, le procureur général du Manitoba, le procureur général de la Saskatchewan, la Federation of Saskatchewan Indian Nations, le Lesser Slave Lake Indian Regional Council, le Treaty 7 Tribal Council, la Confederacy of Treaty Six First Nations, l'Assemblée des Premières Nations et l'Assembly of Manitoba Chiefs *Intervenants*

RÉPERTORIÉ: R. *c.* BADGER

N° du greffe: 23603.

1995: 1er et 2 mai; 1996: 3 avril.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Indiens — Droits issus de traités — Chasse sur des terres privées situées dans le territoire cédé aux termes d'un traité — Violations de la Wildlife Act — Les

for food on privately owned land lying within tract ceded by treaty — Whether hunting rights extinguished or modified by Natural Resources Transfer Agreement — Whether licensing and game limitations apply to status Indians — Constitution Act, 1982, s. 35(1) — Treaty No. 8 (1899) — Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2), para. 12 — Alta. Reg. 50/87, ss. 2(2), 25 — Alta. Reg. 95/87, s. 7.

The appellants were status Indians (under Treaty No. 8) who had been hunting for food on privately owned lands falling within the tracts surrendered by the Treaty. Each was charged with an offence under the *Wildlife Act* (the Act). Their trials and appeals proceeded together. The appellant Badger, who was hunting on scrub land near a run-down but occupied house, was charged with shooting a moose outside the permitted hunting season contrary to s. 27(1) of the Act. The appellant Kiyawasew, who had been hunting on a posted, snow-covered field that had been harvested that fall, and the appellant Ominayak, who had been hunting on uncleared muskeg, both had shot moose and were charged, under s. 26(1) of the Act, with hunting without a licence. All were all convicted in the Provincial Court. They unsuccessfully appealed their summary convictions, first to the Court of Queen's Bench and then to the Court of Appeal, challenging the constitutionality of the Act in so far as it might affect them as Crees with status under Treaty No. 8. The constitutional question raised: (1) whether status Indians under Treaty No. 8 have the right to hunt for food on privately owned land which lies within the territory surrendered under that Treaty; (2) whether the hunting rights set out in Treaty No. 8 have been extinguished or modified by para. 12 of the *Natural Resources Transfer Agreement, 1930* (*NRTA*); and, (3) the extent, if any, ss. 26(1) (requiring a hunting licence) and 27(1) (establishing hunting seasons) of the Act applied to the appellants.

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

Indiens inscrits ont-ils le droit de chasser pour se nourrir sur des terres privées situées dans le territoire cédé aux termes d'un traité? — Les droits de chasse ont-ils été éteints ou modifiés par la Convention sur le transfert des ressources naturelles? — Le régime de délivrance des permis et les restrictions applicables à la chasse au gibier s'appliquent-ils aux Indiens inscrits? — Loi constitutionnelle de 1982, art. 35(1) — Traité nº 8 (1899) — Convention sur le transfert des ressources naturelles de 1930 (Loi constitutionnelle de 1930, annexe 2), par. 12 — Règlement de l'Alberta 50/87, art. 2(2), 25 — Règlement de l'Alberta 95/87, art. 7.

Les appelants sont des Indiens inscrits (aux termes du Traité nº 8) qui chassaient pour se nourrir sur des terres privées situées dans le territoire cédé aux termes du Traité. Chacun des appelants a été accusé d'une infraction à la *Wildlife Act* (la Loi). Ils ont été jugés ensemble, tant en première instance qu'en appel. L'appelant Badger, qui chassait dans des taillis près d'une maison délabrée mais occupée, a été accusé d'avoir, contrairement au par. 27(1) de la Loi, abattu un orignal en dehors de la saison de chasse. L'appelant Kiyawasew, qui chassait dans un champ couvert de neige où se trouvaient des écriteaux et où on avait fait la récolte à l'automne, ainsi que l'appelant Ominayak, qui chassait dans une savane non déboisée, ont eux aussi abattu des orignaux, et ils ont été accusés, en vertu du par. 26(1) de la Loi, d'avoir chassé sans permis. Ils ont tous été déclarés coupables en Cour provinciale. Ils ont sans succès interjeté appel de leur déclaration de culpabilité par procédure sommaire, d'abord à la Cour du Banc de la Reine puis à la Cour d'appel, contestant la constitutionnalité de la Loi dans la mesure où elle pourrait porter atteinte à leurs droits en tant que Cris visés par le Traité nº 8. La question constitutionnelle comporte trois volets: (1) Les Indiens inscrits aux termes du Traité nº 8 ont-ils le droit de chasser pour se nourrir sur des terres privées situées dans le territoire cédé aux termes de ce traité? (2) Les droits de chasse énoncés dans le Traité nº 8 ont-ils été éteints ou modifiés par les dispositions du par. 12 de la *Convention sur le transfert des ressources naturelles de 1930* (la *Convention*)? (3) Dans quelle mesure, le cas échéant, les par. 26(1) (obligation de détenir un permis de chasse) et 27(1) (établissement des saisons de chasse) de la Loi s'appliquaient-ils aux appelants?

Arrêt: Les pourvois de Wayne Clarence Badger et de Leroy Steven Kiyawasew sont rejetés. Le pourvoi d'Ernest Clarence Ominayak est accueilli et un nouveau procès est ordonné afin que soit examinée la question de la justification de l'atteinte créée par le par. 26(1) de la *Wildlife Act* et les règlements pris en application de cette disposition.

evidenced a clear intention to extinguish the treaty protection of the right to hunt commercially. However, it was emphasized that the right to hunt for food continued to be protected and had in fact been expanded by the *NRTA*. At page 933, this appears:

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

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

47 Pursuant to s. 1 of the *Constitution Act, 1930*, there can be no doubt that para. 12 of the *NRTA* is binding law. It is the legal instrument which currently sets out and governs the Indian right to hunt. However, the existence of the *NRTA* has not deprived Treaty No. 8 of legal significance. Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfil its promises. Treaty rights can

de la *Convention* démontrait l'existence d'une intention claire d'éteindre la protection par le traité du droit de faire la chasse commerciale. Toutefois, il y a été précisé que le droit de chasser pour se nourrir continuait d'être protégé et qu'il avait, de fait, été élargi par la *Convention*. À la p. 933, on peut lire ceci:

> Quoique la Convention ait bel et bien supprimé le droit de faire de la chasse commerciale, le droit de chasser pour se nourrir a été sensiblement élargi. Les territoires sur lesquels pouvaient chasser les Indiens ont été considérablement agrandis. En outre, les moyens employés par eux aux fins de la chasse pour se nourrir ont été soustraits à la compétence des gouvernements provinciaux. Il est, par exemple, permis aux Indiens de chasser le chevreuil en se servant d'un faisceau lumineux et de chiens, méthodes qui sont ou peuvent être défendues aux autres. Les Indiens ne sont pas non plus soumis aux restrictions saisonnières que se voient imposer tous les autres chasseurs. C'est-à-dire qu'ils peuvent chasser le canard et l'oie au printemps comme à l'automne, tout comme ils peuvent chasser le chevreuil à longueur d'année. Les Indiens ne sont assujettis à aucune restriction quant au type de gibier qu'ils peuvent tuer. Cela veut dire que si d'autres personnes peuvent avoir à respecter des restrictions en ce qui concerne l'espèce ou le sexe du gibier qu'elles peuvent tuer, les Indiens eux peuvent, pour se nourrir, tuer le mâle et la femelle du chevreuil, faisans et faisanes, canards et canes. [Je souligne.]

Voir également les arrêts *Cardinal c. Procureur général de l'Alberta*, [1974] R.C.S. 695, à la p. 722, et *Myran c. La Reine*, [1976] 2 R.C.S. 137, à la p. 141. Je tiens à ajouter que le récent arrêt *Horseman*, précité, doit être considéré comme ayant tranché les questions qui y étaient soulevées. Les décisions de notre Cour confirment que, dans la mesure où cette intention y est clairement exprimée, le par. 12 de la *Convention* modifie le droit de chasser pour se nourrir prévu par le Traité nº 8.

À la lumière de l'article premier de la *Loi constitutionnelle de 1930*, il ne saurait faire de doute que le par. 12 de la *Convention* est une règle de droit ayant force obligatoire. Cette disposition est le texte juridique qui, actuellement, énonce et régit le droit de chasse des Indiens. Toutefois, l'existence de la *Convention* n'a pas enlevé au Traité nº 8 toute son importance juridique. Les traités sont des promesses sacrées, et l'honneur de la

only be amended where it is clear that effect was intended. It is helpful to recall that Dickson J. in *Frank*, *supra*, observed at p. 100 that, while the *NRTA* had partially amended the scope of the Treaty hunting right, "of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food" (emphasis added). I believe that these words support my conclusion that the Treaty No. 8 right to hunt has only been altered or modified by the *NRTA* to the extent that the *NRTA* evinces a clear intention to effect such a modification. This position has been repeatedly confirmed in the decisions referred to earlier. Unless there is a direct conflict between the *NRTA* and a treaty, the *NRTA* will not have modified the treaty rights. Therefore, the *NRTA* language which outlines the right to hunt for food must be read in light of the fact that this aspect of the treaty right continues in force and effect.

Couronne commande que la Cour présume que cette dernière entendait respecter ses promesses. Des droits issus de traités ne peuvent être modifiés que lorsque c'est clairement cet effet qui était visé. Il est utile de rappeler que, à la p. 100 de l'arrêt *Frank*, précité, le juge Dickson a souligné que même si la *Convention* avait partiellement modifié la portée du droit de chasse prévu au Traité ce texte a «également [. . .] réaffirm[é] et [. . .] garanti[. . .] aux Indiens visés par les traités le droit de chasser et de pêcher pour leur subsistance» (je souligne). À mon avis, ces propos appuient ma conclusion que le droit de chasser prévu au Traité nº 8 a été modifié par la *Convention*, mais uniquement dans la mesure où l'intention d'apporter cette modification ressort clairement de ce texte. Le bien-fondé de cette thèse a été confirmé à maintes reprises dans les décisions mentionnées précédemment. La *Convention* n'a eu pour effet de modifier des droits issus de traités que dans les cas où il y avait conflit direct entre elle et le traité en cause. Par conséquent, le texte de la *Convention* qui énonce le droit de chasser pour se nourrir doit être interprété à la lumière du fait que cet aspect du droit de chasser issu du traité continue d'être en vigueur et de produire ses effets.

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

48 À l'instar du Traité nº 8, la *Convention* circonscrit le droit de chasser pour se nourrir, et ce tant en ce qui concerne le territoire sur lequel ce droit peut être exercé qu'en ce qui concerne la réglementation dont le gouvernement peut à bon droit imposer le respect dans l'exercice du droit en question. Examinons d'abord la question des limites territoriales.

Geographical Limitations on the Right to Hunt for Food

Limitation territoriale du droit de chasser pour se nourrir

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

49 Aux termes de la *Convention*, les Indiens peuvent exercer le droit de chasser pour se nourrir «sur toutes les terres inoccupées de la Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès». Dans les présents pourvois, la chasse a été pratiquée sur des terres qui, bien que visées par la cession de 1899, étaient devenues des terres privées. Par consé-

Tab 6.

2007 CarswellAlta 850, 2007 ABCA 206, [2007] A.W.L.D. 3264, [2007] A.W.L.D. 3317, [2007] A.W.L.D. 3265, [2007] A.W.L.D. 3318, [2007] A.W.L.D. 3263, [2007] A.W.L.D. 3267, [2007] A.W.L.D. 3266, [2007] A.W.L.D. 3316, [2007] 10 W.W.R. 1, 77 Alta. L.R. (4th) 203, 222 C.C.C. (3d) 129, [2007] 4 C.N.L.R. 281

2007 CarswellAlta 850, 2007 ABCA 206, [2007] A.W.L.D. 3264, [2007] A.W.L.D. 3317, [2007] A.W.L.D. 3265, [2007] A.W.L.D. 3318, [2007] A.W.L.D. 3263, [2007] A.W.L.D. 3267, [2007] A.W.L.D. 3266, [2007] A.W.L.D. 3316, [2007] 10 W.W.R. 1, 77 Alta. L.R. (4th) 203, 222 C.C.C. (3d) 129, [2007] 4 C.N.L.R. 281

R. v. Lefthand

Her Majesty the Queen (Appellant) and Ezra Elliott Lefthand (Respondent)

Her Majesty the Queen (Respondent) and Edward Joseph Eagle Child (Appellant)

Alberta Court of Appeal

C. Conrad, J. Watson, F. Slatter JJ.A.

Heard: January 16, 17, 2007
Judgment: June 26, 2007
Docket: Calgary Appeal 0501-0334-A, 0501-0125-A

Proceedings: affirming *R. v. Eagle Child* (2005), 2005 ABQB 275, 383 A.R. 169, 2005 CarswellAlta 539 (Alta. Q.B.); affirming *R. v. Eagle Child* (2004), [2004] A.J. No. 726, 366 A.R. 277, 2004 CarswellAlta 842, 2004 ABPC 111 (Alta. Prov. Ct.); and reversing *R. v. Lefthand* (2005), 55 Alta. L.R. (4th) 139, 2005 ABQB 748, 2005 CarswellAlta 1512, 388 A.R. 231, [2006] 2 C.N.L.R. 209 (Alta. Q.B.); reversing *R. v. Lefthand* (2004), 353 A.R. 52, [2004] 2 C.N.L.R. 170, 2004 CarswellAlta 153, 2004 ABPC 38, [2004] A.J. No. 169 (Alta. Prov. Ct.)

Counsel: M.D. Gates, Q.C. for Department of Justice

A.D. Hunter, Q.C., A.P. Johnston for Respondent, Ezra Elliott Lefthand

K.R. McLeod for Appellant, Edward Joseph Eagle Child

Subject: Public; Natural Resources; Constitutional

2007 CarswellAlta 850, 2007 ABCA 206, [2007] A.W.L.D. 3264, [2007] A.W.L.D. 3317, [2007] A.W.L.D. 3265, [2007] A.W.L.D. 3318, [2007] A.W.L.D. 3263, [2007] A.W.L.D. 3267, [2007] A.W.L.D. 3266, [2007] A.W.L.D. 3316, [2007] 10 W.W.R. 1, 77 Alta. L.R. (4th) 203, 222 C.C.C. (3d) 129, [2007] 4 C.N.L.R. 281

Aboriginal law --- Aboriginal rights to natural resources — Fishing offences — Fishing out of season

Accused E, Treaty No. 7 Indian, fished for food using bait in form of worms at time when area where accused was fishing was closed to fishing with bait pursuant to Fisheries Act and Alberta Fishery Regulations, 1998 — Trial judge found no prima facie infringement of aboriginal fishing rights and convicted E of fishing in closed area — Appeal by E was dismissed — Summary conviction appeal judge found that there were numerous other nearby bodies of water open for fishing and that E had not demonstrated prima facie infringement of his fishing rights — E appealed — Appeal dismissed — E had right to fish for food pursuant to terms of Treaty No. 7 — Scope of aboriginal fishing rights can be limited by regulation to conserve game — Regulation is bona fide scheme of management and conservation of fish stocks and does not overtly discriminate against aboriginal fishery — Closed season was to prevent extirpation of breeding stock of rainbow trout in river — Regulation does not breach any specific covenant of treaty and is objectively reasonable — E failed to show any breach of aboriginal right that would raise defence, because aboriginal treaty rights are expressly made subject to regulations of this type.

Natural resources --- Fish and wildlife — Offences — Operating in prohibited territory — Fishing — Closed area

Accused E, Treaty No. 7 Indian, fished for food using bait in form of worms at time when area where accused was fishing was closed to fishing with bait pursuant to Fisheries Act and Alberta Fishery Regulations, 1998 — Trial judge found no prima facie infringement of aboriginal fishing rights and convicted E of fishing in closed area — Appeal by E was dismissed — Summary conviction appeal judge found that there were numerous other nearby bodies of water open for fishing and that E had not demonstrated prima facie infringement of his fishing rights — E appealed — Appeal dismissed — E had right to fish for food pursuant to terms of Treaty No. 7 — Scope of aboriginal fishing rights can be limited by regulation to conserve game — Regulation is bona fide scheme of management and conservation of fish stocks and does not overtly discriminate against aboriginal fishery — Closed season was to prevent extirpation of breeding stock of rainbow trout in river — Regulation does not breach any specific covenant of treaty and is objectively reasonable — E failed to show any breach of aboriginal right that would raise defence, because aboriginal treaty rights are expressly made subject to regulations of this type.

Aboriginal law --- Aboriginal rights to natural resources — Fishing offences — Miscellaneous offences

Fishing contrary to bait ban — Accused L, Treaty No. 7 Indian, fished for food using bait in form of worms at time when area where accused was fishing was closed to fishing with bait pursuant to Fisheries Act and Alberta Fishery Regulations, 1998 — Trial judge found no prima facie infringement of aboriginal fishing rights and convicted L of fishing with live bait in area where bait ban was in place — Appeal by L was allowed and conviction was quashed — Summary conviction appeal judge found that regulations were inconsistent with treaty rights of aboriginal people under Treaty No. 7 — Crown appealed — Appeal allowed — L had right to fish for food pursuant to terms of Treaty No. 7 — Scope of aboriginal fishing rights can be limited by regulation to conserve game — Regulation is bona fide scheme of management and conservation of fish stocks and does not overtly discriminate against aboriginal fishery — Bait ban was to protect vulnerable populations that could not support harvest because they were at threshold levels — Regulation does not breach any specific covenant of treaty and is objectively reasonable — L failed to show any breach of aboriginal right that would raise defence, because aboriginal treaty rights are expressly made subject to regulations of this type.

2007 CarswellAlta 850, 2007 ABCA 206, [2007] A.W.L.D. 3264, [2007] A.W.L.D. 3317, [2007] A.W.L.D. 3265, [2007] A.W.L.D. 3318, [2007] A.W.L.D. 3263, [2007] A.W.L.D. 3267, [2007] A.W.L.D. 3266, [2007] A.W.L.D. 3316, [2007] 10 W.W.R. 1, 77 Alta. L.R. (4th) 203, 222 C.C.C. (3d) 129, [2007] 4 C.N.L.R. 281
regulations contemplated by the treaty.

100 With respect to the first factor, it has not been shown that the regulations in these appeals are other than a *bona fide* scheme of management and conservation of the fish stocks.

101 Secondly, there are no express promises in the Treaty that are broken. As discussed previously, the express covenants in the Transfer Agreement do not apply here, as these are Federal regulations. The Treaty does allow hunting "throughout the Tract", but that phrase should not be read literally (*supra*, para. 62). It is merely there to confirm that the rights are coextensive with the Tract. The rights granted are collective, and were granted at large to the numerous Blackfoot, Blood, Piegan, Sarcee and Stony bands in the area, without intending to suggest that every band could hunt or fish everywhere. Covenants of this type should not be read as guaranteeing a right to fish in every stream at any time, regardless of the effect that will have on conservation measures. The treaty protects an *activity*; no site specific rights are granted. Further, the reference to the "Tract" is clearly subject to two limits: government regulations and the taking up of land for settlement. There is no reason to assume the areas of the Tract open to fishing cannot be regulated. The right to regulate for conservation reasons allows some closing of waters to fishing so long as a reasonable opportunity to hunt or fish for food is preserved in the vicinity. In these appeals the uncontradicted Crown evidence was that there were other waters in the immediate vicinity that were open for fishing (in the case of Eagle Child), and other waters where bait fishing was permitted (in the case of Lefthand). On the evidence the regulations do not offend the covenant for hunting and fishing "throughout the Tract", as there was fishing available in the immediate vicinity for that purpose.

Priority to the Aboriginal Fishery

102 With respect to the third factor, there is no overt discrimination against the aboriginal fishers. Lefthand argues that a priority has been given to non-aboriginal fishers, because they are allowed to inflict a small mortality rate on the stocks through catch and release fishing (*supra*, para. 9). There are several answers to this argument.

103 By way of background, several of the early cases held that priority must be given to aboriginal hunters when there is a shortage of game to meet all demands: *Jack* at pg. 313 and *Sparrow* at pp. 1115-6. There is no obvious source of the declared priority to game that aboriginal hunters are said to have. It is not mentioned in any Treaty, nor in the Transfer Agreements. The right to continue their "vocation of hunting" would have been a vocation in competition with the European settlers. Historically, the Crown had no authority to grant an exclusive fishery, and had a policy of not doing so: *Nikal* at paras. 31-32. Even the promises made by the Treaty 8 Commissioners (*supra*, para. 98) "that they would be as free to hunt and fish after the treaty as they would be if they never entered into it" would only have implied a right to hunt in competition with the settlers. Even if Ominayak (one of the hunters in *Badger*) had a right to hunt moose on privately owned but unoccupied land, it cannot have been intended that he would have a priority to the game there over the private owner. While the Transfer Agreements and treaties gave aboriginal hunters certain privileges, a priority to game stocks is not obviously one of them.

104 Further, conservation measures are not subordinate to aboriginal rights. In *Sparrow* at pg. 1115 the Court held that the constitution merely sets a priority for access to fish and game, adopting "an order of priorities" set out in *Jack*, "of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports

Tab 7.

1995 CarswellSask 60
Saskatchewan Court of Appeal

James Smith Indian Band v. Saskatchewan (Master of Titles)

1995 CarswellSask 60, [1995] 3 C.N.L.R. 100, [1995] 6 W.W.R. 158, 123 D.L.R. (4th) 280, 131 Sask. R. 60, 54 A.C.W.S. (3d) 1024, 95 W.A.C. 60

TERRY SANDERSON, COLIN ALVIN MOOSTOOS, HERB SANDERSON, and PETER SANDERSON, all of JAMES SMITH INDIAN RESERVE in Province of Saskatchewan, being Chief and Headmen of JAMES SMITH INDIAN BAND, for and on behalf of themselves and all other members of JAMES SMITH INDIAN BAND v. MASTER OF TITLES

Wakeling, Sherstobitoff and Lane JJ.A.

Heard: October 5, 1994
Judgment: April 12, 1995
Docket: Doc. 1665

Counsel: *D.B. Heffernan*, for appellants.
P.M. McAdam, for respondent.

Subject: Public; Property

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Native Law --- Reserves and real property — Rights and title

Real property — Registration of interests in land — Caveats — Caveatable interests — No broad principle existing that interest in land deriving from aboriginal title being uncaveatable — Court deciding on case by case basis — Caveat based on Indian hunting and fishing rights arising from profit à prendre based on custom and usage, Treaty 6 or Natural Resources Transfer Agreement not disclosing interest in land in this case — Registrar correct in rejecting caveat.

Native law — Aboriginal rights — Hunting, trapping and fishing — No broad principle existing that interest in land deriving from aboriginal title being uncaveatable — Court deciding on case by case basis — Caveat based on Indian hunting and fishing rights arising from profit à prendre based on custom and usage, Treaty 6 or Natural Resources Transfer Agreement not disclosing interest in land in this case — Registrar correct in rejecting caveat.

Native law — Aboriginal rights — Land — No broad principle existing that interest in land deriving from aboriginal title being uncaveatable — Court deciding on case by case basis — Caveat based on Indian hunting and fishing rights arising from profit à prendre based on custom and usage, Treaty 6 or Natural Resources Transfer Agreement not disclosing interest in land in this case — Registrar correct in rejecting caveat.

The members of an Indian band submitted caveats to the Land Titles Office for registration They claimed an inalienable interest in certain lands by way of an equitable interest and a profit à prendre arising from custom and usage; Treaty 6; and the *Natural Resources Transfer Agreement*. The registrar refused to register the caveats and the Master of Titles agreed with the registrar. The band members petitioned under s. 194 of the *Land Titles Act* setting out the grounds of their dissatisfaction. A chambers judge rejected the caveats on the basis that they did not claim an interest in land. The band members appealed.

Held:

Appeal dismissed.

Per Sherstobitoff J.A. (concurring in result) (Lane J.A. concurring)

There is no broad principle that any claim to an interest in land which derives from aboriginal title is incapable of being an interest in land registrable under the *Land Titles Act*. Some such interests may be compatible with a land registration system and may thus be registrable under the Act. Claims for registration based on interests derived from aboriginal title should be decided on a case by case basis. Here, the chambers judge was correct in holding that the Master in Titles was entitled to refuse to register the caveat because it did not, on its face, disclose a registrable interest in land.

Per Wakeling J.A.

Where a land claim relates to aboriginal rights, the Act has no application and a caveat alleging such an interest is not appropriately filed. Further, there is no acceptable rationale for subjecting some aboriginal land claims to the Act, and not others. Here the nature of the claim being caveated was aboriginal in nature. The band members contended for a right which was paramount to any of the rights and obligations which the Act seeks to protect. They could not then use the Act to protect an interest which they said was not placed at risk by the Act.

> The position of the band was that, at the effective date of the Transfer Agreement conveying administration of the lands from the federal to the provincial government, an Indian reserve existed on the lands in question, or that the federal government held the lands in trust for the band, and thus, under the terms of the agreement, the lands did not pass to the province but remained with the federal government. Furthermore, if the lands were an Indian reserve, they could not be alienated by anyone except the band itself to the Crown in the right of Canada, and then only under strict conditions: ss. 37 to 41 of the Indian Act, R.S.C. 1985, c. I-5. It followed that the province had no authority to issue, under the Land Titles Act, the various titles to the land in question, and that none of the provisions of that Act, including the provisions of s. 213 as to indefeasibility of a title issued under the Act, applies to the lands ...
>
> It is at this point that the band's position that it is entitled to maintain the caveats against the lands breaks down. The right to file the caveats arises from s. 150 of the Land Titles Act. Since the band's position is that the Act does not apply to the lands in question, the band cannot at the same time rely upon the Act for the authority to file the caveats. This conclusion is consistent with the band's position that its interest and the federal government's interest in the lands were unaffected by any dealings with the lands under the authority of the Land Titles Act subsequent to the effective date of the Transfer Agreement — that is, all dealings which resulted in the issue of titles to the private owners of land. If the band's position, after trial, proves to be correct, it has no need of the caveats to protect its interest in the lands because, similarly, any future dealings with the land cannot affect its claim. For these reasons, the caveats cannot be maintained.

24 While there was comment in the judgment as to the application of Torrens system legislation to Crown land held for Indians, it was not part of the decision, and did not purport to lay down any general principle.

25 In this case, the Band does not dispute the application of *The Land Titles Act* to the land in question, nor does it dispute the validity of the titles to the land issued under the Act. That being so, the judgment in *Lac La Ronge* has no application to this case.

26 I would dismiss the appeal on the basis that the Master of Titles was entitled to refuse to register the caveat because it did not on its face disclose a registerable interest in land, and I adopt the reasons given by the chambers judge, Gunn J., reported at (1994), 115 Sask. R. 25 [[1994] 1 W.W.R. 546], for that conclusion except to the extent that it may conflict with this judgment.

Appeal dismissed.

1993 CarswellSask 374
Saskatchewan Court of Queen's Bench

James Smith Indian Band v. **Saskatchewan** (Master of Titles)

1993 CarswellSask 374, [1994] 1 W.W.R. 546, [1994] 2 C.N.L.R. 72, 107 D.L.R. (4th) 9, 115 Sask. R. 25, 43 A.C.W.S. (3d) 476

Re an application pursuant to SECTION 194 OF THE LAND TITLES ACT, R.S.S. 1978, c. L-5

TERRY SANDERSON, COLIN ALVIN MOOSTOOS, HERB SANDERSON and PETER SANDERSON, all of the JAMES SMITH INDIAN RESERVE in the Province of **Saskatchewan**, being the Chief and Headmen of the **JAMES SMITH INDIAN BAND**, for and on behalf of themselves and all other members of the **JAMES SMITH INDIAN BAND** v. MASTER OF TITLES

Gunn J.

Judgment: October 5, 1993
Docket: Doc. Regina 591/93

Counsel: *D.B. Heffernan*, for applicants.
P.M. McAdam, for respondent.

Subject: Public; Property

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Native Law --- Reserves and real property — Rights and title

Native Law --- Reserves and real property — Rights and title — Registration of caveat

Real Property --- Registration of land — Land titles — Caveats — Registration

Real property — Registration of interests in land — Registry officials — Rights and powers — Registrar having right to reject document which does not, on its face, disclose interest in land.

Real property — Registration of interests in land — Caveats — Caveatable interests — Caveat based on Indian hunting and fishing rights not disclosing prima facie interest in land — Registrar correct in rejecting caveat.

Native law — Aboriginal rights — Hunting, trapping and fishing — Common law concepts of property not applying to aboriginal treaty rights — Hunting and fishing rights being merged in para. 12 of Natural Resources Transfer Agreement — Applicability of provincial laws to such rights to be determined by reference to para. 12 and not to treaties.

Real property — Profits à prendre — Creation — Profit à prendre not arising by custom and usage at common law — Section 72 of Land Titles Act prohibiting acquisition of profit à prendre by prescription — Caveat based on Indian hunting and fishing rights not disclosing prima facie interest in land.

Native law — Treaties — Application — Common law concepts of property not applying to aboriginal treaty rights — Hunting and fishing rights being merged in para. 12 of Natural Resources Transfer Agreement — Applicability of provincial laws to such rights to be determined by reference to para. 12 and not to treaties.

The members of the Indian Band were successors of the band members who signed Treaty 6 with Canada in 1876. The treaty provided that the members should have the right to hunt and fish throughout the land surrendered, except such land as Canada might authorize to be used for settlement, mining, lumbering or other purposes. The band members submitted a caveat to the Land Titles Office for registration, claiming an interest in land owned by the province. They claimed an inalienable interest by way of an equitable interest and a profit à prendre arising from custom and usage; Treaty 6; and the Natural Resources Transfer Agreement ("N.R.A."). The registrar refused to register the caveat and the Master of Titles agreed with the registrar. The band members applied by way of petition under s. 194 of the *Land Titles Act* setting out the grounds of their dissatisfaction.

Held:

Application dismissed.

The registrar has a duty to examine each instrument to determine if the right asserted, prima facie, may be an interest in land. While he may in this examination apply the existing jurisprudence, he may not examine evidence to support the claim, but merely the document itself. Accordingly he may reject a document which he believes does not on its face disclose an interest in land under s. 150 of the Act.

At common law no profit à prendre arises by custom and usage. Furthermore, s. 72 of the Act expressly provides that no

profit à prendre may be acquired by any person by prescription. The rights set out in the treaties are unique. Traditional common law concepts of property should not be applied to these rights. The N.R.A. transferred Crown lands to the province. Hunting and fishing rights set out in the treaties have been merged in para. 12 of the N.R.A. All questions concerning the application of provincial laws to Indian hunting in the province should be determined exclusively by reference to para. 12 and not the original treaties. Even if established, aboriginal title is generally inalienable, except to the Crown. Aboriginal title has no place in a Torrens system whose primary object is establishing and certifying the ownership of indefeasible titles and simplifying their transfer. The caveat claimed an interest on behalf of all band members. If the interest arose under Treaty 6, all members of other Treaty 6 bands had a similar right. If it arose under para. 12 of the N.R.A., all Indians within the province at a particular time, irrespective of their normal residence, had a similar right. If their rights constituted a profit à prendre, there could be innumerable caveats filed against each parcel and effective surrender of these rights would be practically impossible to achieve. For all of the above reasons, the caveat did not disclose a prima facie interest in land whether one considered custom and usage, Treaty 6, and the N.R.A. individually or collectively.

Table of Authorities

Cases considered:

Canada (Attorney General) v. Ontario (Attorney General), [1897] A.C. 199 — *considered*

Delgamuukw v. British Columbia, (sub nom. *Uukw v. British Columbia)* [1987] 6 W.W.R. 240, 16 B.C.L.R. (2d) 145, 37 D.L.R. (4th) 408, [1988] 1 C.N.L.R. 173 (C.A.) [leave to appeal to S.C.C. refused [1987] 6 W.W.R. 240n, 12 B.C.L.R. (2d) xxxvi, 80 N.R. 315] — *considered*

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, (sub nom. *Guerin v. Canada)* 55 N.R. 161, 13 D.L.R. (4th) 321 — *referred to*

Heller v. British Columbia (Registrar, Vancouver Land Registration District) (1960), 33 W.W.R. 385, 26 D.L.R. (2d) 154 (B.C.C.A.) [affirmed [1963] S.C.R. 229, 41 W.W.R. 641, 38 D.L.R. (2d) 1] — *considered*

Holland Canada Mortgage Co.'s Case, Re, [1918] 3 W.W.R. 345 (**Sask.** Master of Titles) — *applied*

Pawis v. R., (sub nom. *McGregor v. R.)* [1980] 2 F.C. 18, 102 D.L.R. (3d) 602, [1979] 2 C.N.L.R. 52 (T.D.) — *considered*

R. v. Horseman, [1990] 1 S.C.R. 901, [1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193, 55 C.C.C. (3d) 353, 108 N.R. 1, 108 A.R. 1, [1990] 3 C.N.L.R. 95 — *applied*

R. v. McIntyre, [1992] 4 W.W.R. 765, [1992] 3 C.N.L.R. 113, 100 **Sask.** R. 255, leave to appeal to S.C.C. refused (1992), [1993] 1 W.W.R. lix, 146 N.R. 400 — *considered*

R. v. McKinney, [1979] 2 W.W.R. 545, 46 C.C.C. (2d) 566, 988 D.L.R. (3d) 369, 2 Man. R. (2d) 403, 31 N.R. 567, [1979] 2 C.N.L.R. 87 (C.A.) [reversed in part [1980] 1 S.C.R. 401, [1981] 1 W.W.R. 448, 31 N.R. 564, 2 Man. R. (2d) 400, 50 C.C.C. (2d) 576, [1984] 2 C.N.L.R. 113] — *distinguished*

R. v. Sparrow, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 3 C.N.L.R. 160 — *referred to*

13 In *Re Holland Canada Mortgage Co.'s Case*, [1918] 3 W.W.R. 345, Milligan M.T. considered the duties of a registrar in considering whether to register a caveat. He said at p. 345:

> While it is true, therefore, that a registrar is justified in refusing to file a caveat, which on its face shows that the caveator can have no interest in the land, I think his duty goes no further than this and, if the claim of the caveator to an interest in land is *prima facie* good, the caveat should be registered. In other words, the registrar is not called upon to determine the claim but merely to determine whether under the facts stated in the caveat there is possibly an interest in the land accruing to the caveator.

14 I am satisfied the registrar has a duty to examine each instrument to determine if the right asserted, prima facie, may be an interest in land. He is entitled in this examination to apply the existing jurisprudence. He is not entitled to go behind the document presented to examine the evidence to support the claim, but simply shall examine the document presented to him. Accordingly the registrar is entitled to refuse to register a document which in his view does not on its face, prima facie, disclose an interest in land.

Re: (2) Is the interest claimed in the caveat, prima facie an interest in land?

15 The applicants claim an inalienable interest by way of an equitable interest and a profit à prendre arising from three sources: (1) custom and usage, (2) Treaty No. 6 and (3) The Natural Resources Transfer Agreement. They submit these three sources must be considered collectively, not individually to determine whether, prima facie, this could create an interest in land which would support the registration of a caveat.

16 The Master of Titles admits at common law, a grant of hunting or fishing rights could constitute a profit à prendre and that a profit à prendre is an interest in land which would support the registration of a caveat. However, he submits not every grant of permission to hunt on one's land creates a profit à prendre. In order to grant such rights, an express grant or clear legislation is required. (See *Siewert v. Seward*, [1975] 3 W.W.R. 584 (Alta. C.A.).) The Master of Titles further submits and the applicant agrees that at common law, no profit à prendre could arise by custom and usage. Furthermore s. 72 of the Act expressly provides that no profit à prendre may be acquired by any person by prescription.

17 The applicants point to certain passages from Treaty No. 6:

> Her Majesty further agrees with her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by her Government of her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government of the Dominion of Canada, or by any of the subjects thereof, duly authorized therefor, by the said Government.

and argue Treaty No. 6 granted their ancestors a legally enforceable right to enter onto land owned by the Crown to remove fish and animals. They therefore submit that what was granted was an interest in land, more specifically a profit à prendre and that by virtue of the *Natural Resources Transfer Agreement* (**Saskatchewan** Natural Resources, 20-21 Geo. V, c. 41) ("N.R.A.") this would bind the Province.

18 Section 2 of the N.R.A. provides as follows:

> 2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines, or minerals and any other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease, or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other that Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

19 The applicants refer to *Anger and Honsberger, Law of Real Property* (2nd ed.), A.H. Oosterhoff and W.B. Rayner (ed.), vol. 2 (Aurora: Canada Law Book, 1985), p. 973 and the following definition:

> A profit à prendre is a right to take something off the land of another person:
>
> A profit includes the power and privilege to acquire,
>
> (a) through severance, ownership of some part of the physical substance included in the possession of the land that is subject to the profit, or
>
> (b) by reduction to possession, ownership of some substance which, were it not for the existence of the profit, could be appropriated only by the possessor of the land that is subject to the profit.

20 The applicants also rely on *R. v. McKinney*, [1979] 2 W.W.R. 545 (Man. C.A.). However, in my view, O'Sullivan J.A. writing for the Court simply points out a number of issues which may arise and the case does not assist the applicants.

21 When the Province of **Saskatchewan** was established in 1905, the federal government retained ownership of all Crown lands, mines, minerals and other natural resources within its boundaries. These were ultimately transferred to the Province in 1930 by the Transfer Agreement which was ratified by the Parliament of the United Kingdom and became part of the Constitution of Canada. In order for the applicant to successfully rely on s. 2 of the N.R.A. they must first establish that they have an interest in Crown lands based upon their Treaty rights to hunt and fish.

22 The Master of Titles argues that hunting and fishing rights were to exist vis-à-vis particular lands only so long as the lands were not required for "settlement, mining, lumbering or other purposes". Once the lands were so required, the Treaty hunting and fishing rights were to come to an end. He submits this is the only reasonable construction to place on the Treaties, as any other interpretation would defeat the very purpose which the Crown had for entering into the Treaty, namely, to free the land from the burden of the Indian's interest. It would have been impossible to settle the land in an orderly fashion had the Crown been required to re-negotiate with the Indians for the surrender of their profit à prendre to hunt and fish upon the lands surrendered by the Treaty before making any use of those lands.

23 The Supreme Court has considered the nature of the rights granted to Indians by Treaty on a number of occasions. It has concluded that the rights set out in the Treaties are sui generis. It has warned against applying traditional common-law concepts of property to these rights. (See *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1112 [[1990] 4 W.W.R. 410]; and *Guerin v. R.*, [1984] 2 S.C.R. 335 at p. 382 [[1984] 6 W.W.R. 481].)

24 The question of whether the right to hunt and fish set out in Treaty No. 6 constitutes a profit à prendre was specifically considered by Walker J. in *R. v. Sundown* (1988), 64 **Sask**. R. 56 (Q.B.). *Sundown*, supra, was an appeal from conviction by a treaty Indian who had been charged with selling or offering fish for sale contrary to the ***Saskatchewan*** *Fishery Regulations*. The appellant argued that the combination of Treaty No. 6 and the N.R.A. amounted to a profit à prendre based on the treaty right of fishing. Walker J. did not accept this argument and concluded that this was not a profit à prendre.

25 In *Pawis v. R.*, [1979] 2 C.N.L.R. 52, Marceau J. of the Federal Court Trial Division considered this same issue. Four Treaty Indians had been charged with offences contrary to the *Ontario Fishery Regulations*. They were all subject to the Robinson-Huron Treaty. They claimed as a defence a breach of trust by the federal Crown vis-à-vis the hunting and fishing privileges guaranteed to them by the Treaty. Marceau J. did not accept this argument and said at p. 64 of his judgment:

> How can the privilege to hunt and to fish be the "property of a trust". There is no subject-matter here capable of being "held" or "administered" by a trustee for the benefit of a beneficiary. Unless the lands said to be ceded were to be considered as being the trust property? That suggestion, however, cannot hold since there never has been any doubt that the title to the lands was already vested in the Crown before 1850, and the Treaty cannot be construed as purporting to recognize in favour of the Indians a right different in nature than that of a licencee.

In coming to this decision Marceau J. relied on *Canada (Attorney General) v. Ontario (Attorney General)*, [1897] A.C. 199, a case in which the Judicial Committee of the Privy Council, in deciding questions that turned upon the construction of the very treaty which he had to consider arrived at the following conclusion quoted at p. 64 of his decision:

> Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities.

26 The Master of Titles says the right to hunt and fish are revocable by the Crown, that the rights exist "saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by her said Government ..."

27 Paragraph 12 of the N.R.A. reads as follows:

> 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.

28 In *R. v. Horseman*, [1990] 1 S.C.R. 901 [[1990] 4 W.W.R. 97], the Supreme Court held that the hunting and fishing rights set out in the Treaties had been "merged and consolidated" into para. 12 and that all questions concerning the application of provincial laws to Indian hunting in the province were to be determined exclusively by reference to para. 12 and not by reference to the original Treaties. This decision was recently confirmed by the **Saskatchewan** Court of Appeal in *R. v. McIntyre*, [1992] 3 C.N.L.R. 113 [[1992] 4 W.W.R. 765] (**Sask**. C.A.), application for leave to appeal to the Supreme

Court dismissed December 10, 1992.

29 The Master of Titles argues that the rights conferred upon Indians by para. 12 are similar in scope to the rights conferred by Treaty and that in neither case is a profit à prendre established. At common law a profit à prendre is an interest in land which may be freely assigned or transferred. Furthermore the Act specifically provides that a caveator may transfer his caveat to another person (s. 157.1(1)). But Indian hunting rights cannot be transferred.

30 The caveat submitted by the applicants claims an interest in land on behalf of all members of the **James Smith Indian Band**. However, if James Smith Band members have a right to hunt and fish upon the lands in question pursuant to Treaty No. 6, all other Indians who are members of Bands that are also parties to Treaty No. 6 have a similar right. If the right to hunt, fish and trap upon the lands in question is derived from para. 12 of the N.R.A., all Indians who at any particular moment happen to be within the boundaries of the Province, irrespective of their normal residence, have a similar right. If their rights constitute a profit à prendre there could be innumerable caveats filed against each of these parcels of land and effective surrender of these rights would be practically impossible to achieve.

31 In my view the caveat presented does not disclose an interest in land capable of protection by caveat whether one considers custom and usage, Treaty No. 6, and the N.R.A. individually or collectively. In argument both the applicants and the Master of Titles described and discussed the positions being advanced in terms of whether the rights being claimed were more "akin" to a licence or to a profit à prendre with some acknowledgment that neither category was a true fit in the circumstances. Macdonald J.A. in *Delgamuukw v. British Columbia*, (sub nom. *Uukw v. British Columbia*), [1988] 1 C.N.L.R. 173 [[1987] 6 W.W.R. 240] (B.C.C.A.), dealt with an action against Her Majesty the Queen in right of the province of British Columbia, asserting aboriginal rights over extensive lands and claiming declarations and orders in recognitions and enforcement of those rights. The court had to consider their right to have certificates of lis pendens registered against unalienated Crown lands. The Crown's argument was that if the interest in land claimed by the respondents is not registrable under the *Land Title Act*, then they are not entitled to register a certificate of lis pendens in respect of that interest. The respondents in answer said they claimed an interest in land and a registrable interest need not be shown for registration of a certificate of lis pendens.

32 The Court in deciding that the lis pendens could not be registered made reference to a decision of Bird J.A. in *Heller v. British Columbia (Registrar, Vancouver Land Registration District)* (1960), 26 D.L.R. (2d) 154 at 159 [33 W.W.R. 385] (B.C.C.A.):

> As to question (1), the Torrens System of land registration has been recognized by Legislatures and Courts throughout the Commonwealth, since the first legislation on the subject was enacted in Australia in 1858, as a system of which the primary object was to establish and certify to the ownership of absolute and indefeasible titles to land under Government authority as well as to guarantee the titles, and to simplify transfers thereof ...
>
> > The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest.

Macdonald J.A. ultimately held that even if established, aboriginal title is generally inalienable, except to the Crown. Aboriginal title can have no place in a Torrens system which has the primary object of establishing and certifying the

ownership of indefeasible titles and simplifying transfers thereof.

33 Although this case is not directly referable to the case before me, there are similarities in the attempt being made to equate sui generis rights to a provincial Torrens system.

34 For all of the reasons discussed above, I hold the interest claimed in the caveat is not, prima facie, an interest in land and the application is dismissed with costs to the respondent.

Application dismissed.

Tab 8.

Mikisew Cree First Nation *Appellant*

v.

Sheila Copps, Minister of Canadian Heritage, and Thebacha Road Society *Respondents*

and

Attorney General for Saskatchewan, Attorney General of Alberta, Big Island Lake Cree Nation, Lesser Slave Lake Indian Regional Council, Treaty 8 First Nations of Alberta, Treaty 8 Tribal Association, Blueberry River First Nations and Assembly of First Nations *Interveners*

Première nation crie Mikisew *Appelante*

c.

Sheila Copps, ministre du Patrimoine canadien, et Thebacha Road Society *Intimées*

et

Procureur général de la Saskatchewan, procureur général de l'Alberta, Nation crie de Big Island Lake, Lesser Slave Lake Indian Regional Council, Premières nations de l'Alberta signataires du Traité nº 8, Treaty 8 Tribal Association, Premières nations de Blueberry River et Assemblée des Premières Nations *Intervenants*

INDEXED AS: MIKISEW CREE FIRST NATION *v.* CANADA (MINISTER OF CANADIAN HERITAGE)

Neutral citation: 2005 SCC 69.

File No.: 30246.

2005: March 14; 2005: November 24.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

RÉPERTORIÉ : PREMIÈRE NATION CRIE MIKISEW *c.* CANADA (MINISTRE DU PATRIMOINE CANADIEN)

Référence neutre : 2005 CSC 69.

Nº du greffe : 30246.

2005 : 14 mars; 2005 : 24 novembre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Indians — Treaty rights — Crown's duty to consult — Crown exercising its treaty right and "taking up" surrendered lands to build winter road to meet regional transportation needs — Proposed road reducing territory over which Mikisew Cree First Nation would be entitled to exercise its treaty rights to hunt, fish and trap — Whether Crown had duty to consult Mikisew — If so, whether Crown discharged its duty — Treaty No. 8.

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples.

Appeal — Role of intervener — New argument.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Indiens — Droits issus de traités — Obligation de consultation de la Couronne — Exercice par la Couronne du droit issu du traité et « prise » de terres cédées afin de construire une route d'hiver pour répondre aux besoins régionaux en matière de transport — Route proposée réduisant le territoire sur lequel la Première nation crie Mikisew aurait le droit d'exercer ses droits de chasse, de pêche et de piégeage issus du traité — La Couronne avait-elle l'obligation de consulter les Mikisew? — Dans l'affirmative, la Couronne s'est-elle acquittée de cette obligation? — Traité nº 8.

Couronne — Honneur de la Couronne — Obligation de consulter et d'accommoder les peuples autochtones.

Appel — Rôle de l'intervenant — Nouvel argument.

Under Treaty 8, made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories, an area whose size dwarfs France, exceeds Manitoba, Saskatchewan and Alberta and approaches the size of British Columbia. In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the rights to hunt, trap and fish throughout the land surrendered to the Crown except "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".

Aux termes du Traité n^{o} 8 signé en 1899, les premières nations qui vivaient dans la région ont cédé à la Couronne 840 000 kilomètres carrés de terres situées dans ce qui est maintenant le nord de l'Alberta, le nord-est de la Colombie-Britannique, le nord-ouest de la Saskatchewan et la partie sud des Territoires du Nord-Ouest, une superficie de très loin supérieure à celle de la France, qui excède celle du Manitoba, de la Saskatchewan ou de l'Alberta et qui équivaut presque à celle de la Colombie-Britannique. En contrepartie de cette cession, on a promis aux premières nations des réserves et certains autres avantages, les plus importants pour eux étant les droits de chasse, de pêche et de piégeage sur tout le territoire cédé à la Couronne à l'exception de « tels terrains qui de temps à autre pourront être requis ou pris pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets ».

The Mikisew Reserve is located within Treaty 8 in what is now Wood Buffalo National Park. In 2000, the federal government approved a winter road, which was to run through the Mikisew's reserve, without consulting them. After the Mikisew protested, the road alignment was modified (but without consultation) to track around the boundary of the reserve. The total area of the road corridor is approximately 23 square kilometres. The Mikisew's objection to the road goes beyond the direct impact of closure to hunting and trapping of the area covered by the winter road and included the injurious affection it would have on their traditional lifestyle which was central to their culture. The Federal Court, Trial Division set aside the Minister's approval based on breach of the Crown's fiduciary duty to consult with the Mikisew adequately and granted an interlocutory injuction against constructing the winter road. The court held that the standard public notices and open houses which were given were not sufficient and that the Mikisew were entitled to a distinct consultation process. The Federal Court of Appeal set aside the decision and found, on the basis of an argument put forward by an intervener, that the winter road was properly seen as a "taking up" of surrendered land pursuant to the treaty rather than an infringement of it. This judgment was delivered before the release of this Court's decisions in *Haida Nation* and *Taku River Tlingit First Nation*.

La réserve des Mikisew se trouve sur le territoire visé par le Traité n^{o} 8 dans ce qui est maintenant le parc national Wood Buffalo. En 2000, le gouvernement fédéral a approuvé la construction d'une route d'hiver, qui devait traverser la réserve des Mikisew, sans consulter ceux-ci. À la suite des protestations des Mikisew, le tracé de la route a été modifié (mais sans consultation) de manière à ce qu'il longe la limite de la réserve. La superficie totale du corridor de la route est d'environ 23 kilomètres carrés. L'objection des Mikisew à la construction de la route va au-delà de l'effet direct qu'aurait l'interdiction de chasser et de piéger dans le secteur visé par la route d'hiver et porte sur le préjudice causé au mode de vie traditionnel qui est essentiel à leur culture. La Section de première instance de la Cour fédérale a annulé l'approbation de la ministre en se fondant sur la violation de l'obligation de fiduciaire de la Couronne de consulter adéquatement les Mikisew et a accordé une injonction interlocutoire interdisant la construction de la route d'hiver. La cour a conclu que les avis publics types et la tenue de séances portes ouvertes n'étaient pas suffisants et que les Mikisew avaient droit à un processus de consultation distinct. La Cour d'appel fédérale a annulé cette décision et a conclu, en s'appuyant sur un argument présenté par un intervenant, que la route d'hiver constituait plus justement une « prise » de terres cédées effectuée conformément au traité plutôt qu'une violation de celui-ci. Cette décision a été rendue avant que notre Cour se prononce dans les affaires *Nation Haïda* et *Première nation Tlingit de Taku River*.

Held: The appeal should be allowed. The duty of consultation, which flows from the honour of the Crown, was breached.

Arrêt : Le pourvoi est accueilli. L'obligation de consultation qui découle du principe de l'honneur de la Couronne n'a pas été respectée.

The government's approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First Nations, undermined it. [4]

When the Crown exercises its Treaty 8 right to "take up" land, its duty to act honourably dictates the content of the process. The question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of the aboriginal peoples to hunt, fish and trap so as to trigger the duty to consult. Accordingly, where the court is dealing with a proposed "taking up", it is not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a First Nation treaty right. The Court must first consider the process and whether it is compatible with the honour of the Crown. [33-34] [59]

The Crown, while it has a treaty right to "take up" surrendered lands, is nevertheless under the obligation to inform itself on the impact its project will have on the exercise by the Mikisew of their treaty hunting, fishing and trapping rights and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew in good faith and with the intention of substantially addressing their concerns. The duty to consult is triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the content of the Crown's duty. Under Treaty 8, the First Nation treaty rights to hunt, fish and trap are therefore limited not only by geographical limits and specific forms of government regulation, but also by the Crown's right to take up lands under the treaty, subject to its duty to consult and, if appropriate, to accommodate the concerns of the First Nation affected. [55-56]

Here, the duty to consult is triggered. The impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question. Contrary to the Crown's argument, the duty to consult was not discharged in 1899 by the pre-treaty negotiations. [54-55]

However, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the

La démarche adoptée par le gouvernement a nui au processus de réconciliation entre la Couronne et les premières nations signataires du Traité n^{o} 8 plutôt que de le faire progresser. [4]

Lorsque la Couronne exerce son droit issu du Traité n^{o} 8 de « prendre » des terres, son obligation d'agir honorablement dicte le contenu du processus. La question dans chaque cas consiste à déterminer la mesure dans laquelle les dispositions envisagées par la Couronne auraient un effet préjudiciable sur les droits de chasse, de pêche et de piégeage des Autochtones de manière à rendre applicable l'obligation de consulter. Par conséquent, dans les cas où la Cour est en présence d'une « prise » projetée, il n'est pas indiqué de passer directement à une analyse de la justification fondée sur l'arrêt *Sparrow* même si on a conclu que la mesure envisagée, si elle était mise en œuvre, porterait atteinte à un droit issu du traité de la première nation. La Cour doit d'abord examiner le processus et se demander s'il est compatible avec l'honneur de la Couronne. [33-34] [59]

Même si le traité lui accorde un droit de « prendre » des terres cédées, la Couronne a néanmoins l'obligation de s'informer de l'effet qu'aura son projet sur l'exercice, par les Mikisew, de leurs droits de chasse, de pêche et de piégeage et de leur communiquer ses constatations. La Couronne doit alors s'efforcer de traiter avec les Mikisew de bonne foi et dans l'intention de tenir compte réellement de leurs préoccupations. L'obligation de consultation est vite déclenchée, mais l'effet préjudiciable et l'étendue du contenu de l'obligation de la Couronne sont des questions de degré. En vertu du Traité n^{o} 8, les droits de chasse, de pêche et de piégeage issus du traité de la première nation sont par conséquent restreints non seulement par des limites géographiques et des mesures spécifiques de réglementation gouvernementale, mais aussi le droit pour la Couronne de prendre des terres aux termes du traité, sous réserve de son obligation de tenir des consultations et, s'il y a lieu, de trouver des accommodements aux intérêts de la première nation. [55-56]

En l'espèce, l'obligation de consultation est déclenchée. Les effets de la route proposée étaient clairs, démontrés et manifestement préjudiciables à l'exercice ininterrompu des droits de chasse et de piégeage des Mikisew sur les terres en question. Contrairement à ce qu'elle prétend, la Couronne ne s'est pas acquittée de l'obligation de consultation en 1899 lors des négociations qui ont précédé le traité. [54-55]

Cependant, étant donné que la Couronne se propose de construire une route d'hiver relativement peu importante sur des terres cédées où les droits issus du

"taking up" limitation, the content of the Crown's duty of consultation in this case lies at the lower end of the spectrum. The Crown is required to provide notice to the Mikisew and to engage directly with them. This engagement should include the provision of information about the project, addressing what the Crown knew to be the Mikisew's interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown must also solicit and listen carefully to the Mikisew's concerns, and attempt to minimize adverse impacts on its treaty rights. [64]

The Crown did not discharge its obligations when it unilaterally declared the road re-alignment would be shifted from the reserve itself to a track along its boundary. It failed to demonstrate an intention of substantially addressing aboriginal concerns through a meaningful process of consultation. [64-67]

The Attorney General of Alberta did not overstep the proper role of an intervener when he raised before the Federal Court of Appeal a fresh argument on the central issue of whether the Minister's approval of the winter road infringed Treaty 8. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the court provided that in doing so its legal argument does not require additional facts not proven in evidence at trial, or raise an argument that is otherwise unfair to one of the parties. [40]

Cases Cited

Considered: *R. v. Badger*, [1996] 1 S.C.R. 771; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; **distinguished:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43; *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. v. Morgentaler*, [1993] 1 S.C.R. 462; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19; *Province of Ontario v. Dominion of*

traité des Mikisew sont expressément assujettis à la restriction de la « prise », le contenu de l'obligation de consultation de la Couronne se situe plutôt au bas du continuum. La Couronne doit aviser les Mikisew et nouer un dialogue directement avec eux. Ce dialogue devrait comporter la communication de renseignements au sujet du projet traitant des intérêts des Mikisew connus de la Couronne et de l'effet préjudiciable que le projet risquait d'avoir, selon elle, sur ces intérêts. La Couronne doit aussi demander aux Mikisew d'exprimer leurs préoccupations et les écouter attentivement, et s'efforcer de réduire au minimum les effets préjudiciables du projet sur les droits issus du traité des Mikisew. [64]

La Couronne n'a pas respecté ses obligations lorsqu'elle a déclaré unilatéralement que le tracé de la route serait déplacé de la réserve elle-même à une bande de terre à la limite de celle-ci. Elle n'a pas réussi à démontrer qu'elle avait l'intention de tenir compte réellement des préoccupations des Autochtones dans le cadre d'un véritable processus de consultation. [64-67]

Le procureur général de l'Alberta n'a pas outrepassé le rôle d'un intervenant lorsqu'il a soulevé devant la Cour d'appel fédérale un nouvel argument pertinent à la question qui était au cœur du litige, à savoir si l'approbation de la route d'hiver par la ministre violait le Traité nº 8. Un intervenant peut toujours présenter un argument juridique à l'appui de ce qu'il prétend être la bonne conclusion juridique à l'égard d'une question dont la cour est régulièrement saisie pourvu que son argument juridique ne fasse pas appel à des faits additionnels qui n'ont pas été prouvés au procès, ou qu'il ne soulève pas un argument qui est par ailleurs injuste pour l'une des parties. [40]

Jurisprudence

Arrêts examinés : *R. c. Badger*, [1996] 1 R.C.S. 771; *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, 2004 CSC 73; *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, [2004] 3 R.C.S. 550, 2004 CSC 74; **distinction d'avec l'arrêt :** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; **arrêts mentionnés :** *R. c. Sioui*, [1990] 1 R.C.S. 1025; *R. c. Marshall*, [1999] 3 R.C.S. 456; *R. c. Marshall*, [2005] 2 R.C.S. 220, 2005 CSC 43; *Halfway River First Nation c. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. c. Morgentaler*, [1993] 1 R.C.S. 462; *Lamb c. Kincaid* (1907), 38 R.C.S. 516; *Athey c. Leonati*, [1996] 3 R.C.S. 458; *Performance Industries Ltd. c. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 R.C.S. 678, 2002 CSC 19; *Province of*

Canada (1895), 25 S.C.R. 434; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Smith*, [1935] 2 W.W.R. 433.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.
Natural Resources Transfer Agreement, 1930 (Alberta) (Schedule of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26), para. 10.
Wood Buffalo National Park Game Regulations, SOR/78-830, s. 36(5).

Treaties and Proclamations

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1.
Treaty No. 8 (1899).

Authors Cited

Mair, Charles. *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*. Toronto: William Briggs, 1908.
Report of Commissioners for Treaty No. 8, in *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.*, reprinted from 1899 edition. Ottawa: Queen's Printer, 1966.

APPEAL from a judgment of the Federal Court of Appeal (Rothstein, Sexton and Sharlow JJ.A.), [2004] 3 F.C.R. 436, 236 D.L.R. (4th) 648, 317 N.R. 258, [2004] 2 C.N.L.R. 74, [2004] F.C.J. No. 277 (QL), 2004 FCA 66, reversing a judgment of Hansen J. (2001), 214 F.T.R. 48, [2002] 1 C.N.L.R. 169, [2001] F.C.J. No. 1877 (QL), 2001 FCT 1426. Appeal allowed.

Jeffrey R. W. Rath and *Allisun Taylor Rana*, for the appellant.

Cheryl J. Tobias and *Mark R. Kindrachuk*, *Q.C.*, for the respondent Sheila Copps, Minister of Canadian Heritage.

No one appeared for the respondent the Thebacha Road Society.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Robert J. Normey and *Angela J. Brown*, for the intervener the Attorney General of Alberta.

Ontario c. Dominion of Canada (1895), 25 R.C.S. 434; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *R. c. Smith*, [1935] 2 W.W.R. 433.

Lois et règlements cités

Convention sur le transfert des ressources naturelles de 1930 (Alberta) (annexe de la *Loi constitutionnelle de 1930*, L.R.C. 1985, app. II, nº 26), par. 10.
Loi constitutionnelle de 1982, art. 35.
Règlement sur le gibier du parc de Wood-Buffalo, DORS/78-830, art. 36(5).

Traités et proclamations

Proclamation royale (1763), L.R.C. 1985, app. II, nº 1.
Traité nº 8 (1899).

Doctrine citée

Mair, Charles. *Through the Mackenzie Basin : A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*. Toronto : William Briggs, 1908.
Rapport des commissaires sur le Traité nº 8, dans *Traité nº 8 conclu le 21 juin 1899 et adhésions, rapports et autres documents annexés*. Ottawa : Ministre des Approvisionnements et Services Canada, 1981.

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Rothstein, Sexton et Sharlow), [2004] 3 R.C.F. 436, 236 D.L.R. (4th) 648, 317 N.R. 258, [2004] 2 C.N.L.R. 74, [2004] A.C.F. nº 277 (QL), 2004 CAF 66, qui a infirmé un jugement de la juge Hansen (2001), 214 F.T.R. 48, [2002] 1 C.N.L.R. 169, [2001] A.C.F. nº 1877 (QL), 2001 CFPI 1426. Pourvoi accueilli.

Jeffrey R. W. Rath et *Allisun Taylor Rana*, pour l'appelante.

Cheryl J. Tobias et *Mark R. Kindrachuk*, *c.r.*, pour l'intimée Sheila Copps, ministre du Patrimoine canadien.

Personne n'a comparu pour l'intimée Thebacha Road Society.

P. Mitch McAdam, pour l'intervenant le procureur général de la Saskatchewan.

Robert J. Normey et *Angela J. Brown*, pour l'intervenant le procureur général de l'Alberta.

James D. Jodouin and *Gary L. Bainbridge*, for the intervener the Big Island Lake Cree Nation.

Allan Donovan and *Bram Rogachevsky*, for the intervener the Lesser Slave Lake Indian Regional Council.

Robert C. Freedman and *Dominique Nouvet*, for the intervener the Treaty 8 First Nations of Alberta.

E. Jack Woodward and *Jay Nelson*, for the intervener the Treaty 8 Tribal Association.

Thomas R. Berger, Q.C., and *Gary A. Nelson*, for the intervener the Blueberry River First Nations.

Jack R. London, Q.C., and *Bryan P. Schwartz*, for the intervener the Assembly of First Nations.

The judgment of the Court was delivered by

BINNIE J. — The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.

Treaty 8 is one of the most important of the post-Confederation treaties. Made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories. Some idea of the size of this surrender is given by the fact that it dwarfs France (543,998 square kilometres),

James D. Jodouin et *Gary L. Bainbridge*, pour l'intervenante la Nation crie de Big Island Lake.

Allan Donovan et *Bram Rogachevsky*, pour l'intervenant Lesser Slave Lake Indian Regional Council.

Robert C. Freedman et *Dominique Nouvet*, pour l'intervenante les Premières nations de l'Alberta signataires du Traité nº 8.

E. Jack Woodward et *Jay Nelson*, pour l'intervenante Treaty 8 Tribal Association.

Thomas R. Berger, c.r., et *Gary A. Nelson*, pour l'intervenante Premières nations de Blueberry River.

Jack R. London, c.r., et *Bryan P. Schwartz*, pour l'intervenante l'Assemblée des Premières Nations.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — L'objectif fondamental du droit moderne relatif aux droits ancestraux et issus de traités est la réconciliation entre les peuples autochtones et non autochtones et la conciliation de leurs revendications, intérêts et ambitions respectifs. La gestion de ces rapports s'exerce dans l'ombre d'une longue histoire parsemée de griefs et d'incompréhension. La multitude de griefs de moindre importance engendrés par l'indifférence de certains représentants du gouvernement à l'égard des préoccupations des peuples autochtones, et le manque de respect inhérent à cette indifférence, ont causé autant de tort au processus de réconciliation que certaines des controverses les plus importantes et les plus vives. Et c'est le cas en l'espèce. 1

Le Traité nº 8 est l'un des plus importants traités conclus après la Confédération. Les premières nations qui l'ont signé en 1899 ont cédé à la Couronne une superficie de 840 000 kilomètres carrés de terres situées dans ce qui est maintenant le nord de l'Alberta, le nord-est de la Colombie-Britannique, le nord-ouest de la Saskatchewan et la partie sud des Territoires du Nord-Ouest. Pour donner une idée de l'étendue du territoire cédé, sa superficie est 2

Nations peoples. Within that framework, as Cory J. pointed out in *Badger*,

> the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. [para. 52]

30 In the case of Treaty 8, it was contemplated by all parties that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not. Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, "the same means of earning a livelihood would continue after the treaty as existed before it".

31 I agree with Rothstein J.A. that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.

32 It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River*

que par les peuples des premières nations. Comme l'a fait remarquer le juge Cory dans l'arrêt *Badger*, dans ce contexte

> le texte d'un traité ne doit pas être interprété suivant son sens strictement formaliste, ni se voir appliquer les règles rigides d'interprétation modernes. Il faut plutôt lui donner le sens que lui auraient naturellement donné les Indiens à l'époque de sa signature. [par. 52]

Dans le cas du Traité n° 8, toutes les parties signataires envisageaient que « de temps à autre » des terres cédées seraient « prises » de l'ensemble des terres sur lesquelles les premières nations avaient des droits de chasse, de pêche et de piégeage issus du traité et seraient transférées à l'ensemble des terres sur lesquelles elles n'avaient pas un tel droit. Les terres visées par le Traité n° 8 se trouvent dans le nord du Canada et ne se prêtent pas, pour la plupart, à l'agriculture. Les commissaires qui ont négocié le Traité n° 8 pouvaient donc, comme je l'ai déjà mentionné, assurer aux premières nations qu'elles [TRADUCTION] « auraient après le traité les mêmes moyens qu'auparavant de gagner leur vie ».

Je suis d'accord avec le juge Rothstein pour dire que les « prises » effectuées subséquemment par la Couronne ne constituaient pas toutes une atteinte au Traité n° 8 devant être justifiée conformément au critère énoncé dans l'arrêt *Sparrow*. Dans cet arrêt, on s'en souviendra, la réglementation sur les pêches du gouvernement fédéral portait atteinte au droit de pêche autochtone et devait être strictement justifiée. La situation n'est pas la même en l'espèce où les droits autochtones ont été cédés et sont éteints, et où les droits issus du Traité n° 8 se limitent expressément aux terrains qui n'ont pas [TRADUCTION] « de temps à autre [. . .] [été] requis ou pris pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets » (je souligne). Le libellé du traité ne peut annoncer plus clairement des changements à venir. Néanmoins, la Couronne était et est encore censée gérer le changement de façon honorable.

Il s'ensuit que je ne peux souscrire à la démarche axée sur le critère énoncé dans *Sparrow* retenue en l'espèce par la juge de première instance, qui s'est

52 It is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price.

(2) Did the Extensive Consultations With First Nations Undertaken in 1899 at the Time Treaty 8 Was Negotiated Discharge the Crown's Duty of Consultation and Accommodation?

53 The Crown's second broad answer to the Mikisew claim is that whatever had to be done was done in 1899. The Minister contends:

> While the government should consider the impact on the treaty right, there is no duty to accommodate in this context. The treaty itself constitutes the accommodation of the aboriginal interest; taking up lands, as defined above, leaves intact the essential ability of the Indians to continue to hunt, fish and trap. As long as that promise is honoured, the treaty is not breached and no separate duty to accommodate arises. [Emphasis added.]

54 This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

55 The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal

Ce n'est pas comme si les premières nations signataires du Traité n° 8 n'avaient pas payé chèrement leur droit à un comportement honorable de la part de la Couronne; la cession des intérêts autochtones sur un territoire plus grand que la France constitue un prix d'achat très élevé.

(2) La tenue de vastes consultations auprès des premières nations au moment de la négociation du Traité n° 8 en 1899 a-t-elle libéré la Couronne de son obligation de consultation et d'accommodement?

La deuxième réponse générale de la Couronne à la revendication des Mikisew est que ce qui devait être fait a été fait en 1899. La ministre soutient ce qui suit :

> [TRADUCTION] Bien que le gouvernement doive tenir compte des incidences sur le droit issu du traité, il n'existe aucune obligation d'accommodement dans ce contexte. Le traité lui-même constitue l'accommodement aux intérêts autochtones; la prise de terres, telle qu'elle est définie ci-dessus, ne touche aucunement à la capacité fondamentale des Indiens de continuer à chasser, à pêcher et à piéger. Dans la mesure où cette promesse est honorée, le traité n'est pas violé, et aucune obligation d'accommodement distincte ne prend naissance. [Je souligne.]

Cet argument n'est pas fondé. La consultation qui exclurait dès le départ toute forme d'accommodement serait vide de sens. Le processus envisagé ne consiste pas simplement à donner aux Mikisew l'occasion de se défouler avant que la ministre fasse ce qu'elle avait l'intention de faire depuis le début. La conclusion de traités est une étape importante du long processus de réconciliation, mais ce n'est qu'une étape. Ce qui s'est passé à Fort Chipewyan en 1899 ne constituait pas un accomplissement parfait de l'obligation découlant de l'honneur de la Couronne, mais une réitération de celui-ci.

Le traité accorde à la Couronne un droit de « prendre » des terres cédées à des fins de transport régional, mais elle n'en est pas moins tenue de s'informer de l'effet qu'aura son projet sur l'exercice par les Mikisew de leurs droits de chasse et de piégeage, et de leur communiquer ses constatations. La Couronne doit alors s'efforcer de traiter

Tab 9.

(4) Subsection (2) applies with respect to any system established under subsection (3) as if a replacement resource development certificate had been physically issued.

AR 143/97 s20;105/2002

Registration of fur management areas, and licence cancellations

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.

(2) The Minister may cancel a registered fur management licence if, in his opinion, the registered fur management area to which that licence relates is not being harvested to the Minister's satisfaction.

Leg band system for falconry birds

22(1) The Minister shall approve a system of rings or devices, known as leg bands, that are to be placed on falconry birds held or to be held under falconry permits for the purposes of identifying the birds and their origins or modes of acquisition, and a Hess band is automatically approved for the purposes of this section.

(2) A leg band is to be either

(a) a seamless metal band, indicating that the falconry bird on which it is placed was born in captivity, or

(b) a Hess band.

AR 143/97 s22;105/2002

Fees

General requirement to pay fees

23 No licence or permit is to be issued, nor any other service under the Act or this Regulation to be provided, nor, if issued or provided, is it valid, unless the fee or assessment, if any, prescribed in Schedule 8 in relation to that issue or other service is first paid.

Fees for licences, permits, etc.

24(1) The fee, if any, payable in respect of the issue of a licence or permit or any other service listed in column 2 of Part 1, 2 or 3 of Schedule 8 is that set out in the corresponding item of column 3 of that Part of that Schedule.

(2) A person who collects an animal under the authority of a collection licence must pay the assessment set out in Part 4 of Schedule 8 unless the collected animal is to be held under the

(14) If, in any one fiscal year, applications for any combination of special licences are made by or on behalf of an individual who is ineligible to obtain or hold that combination of special licences, all applications for special licences in that combination made by or on behalf of that individual in that fiscal year are invalid.

(15) Each application for a special licence to be issued through a lottery made by or on behalf of a non-resident must be accompanied by at least one application for a special licence authorizing the hunting of the same kind of animal made by at least one resident who is eligible to obtain and hold both a special licence so authorizing and a hunter host licence, failing which the applications both of the non-resident and of any resident whose application accompanies the non-resident's application are invalid.

(16) To the extent that subsection (3) prohibits the obtaining or holding of any combination of 2 or more licences of any kind, a resident is not considered to be applying for any such licences by reason only of applying for participation in lotteries in respect of those licences or any of them, provided that at no time, whether as a result of a lottery or otherwise, does the resident become ineligible under subsection (3) with respect to any licence.

AR 143/97 s31;156/98;151/2001;134/2002;109/2003;177/2004; 159/2006;142/2007;71/2008;129/2009;85/2011;86/2012

Wildlife certificate and resource development certificate

32(1) Subject to subsection (1.1), any person may purchase

(a) a wildlife certificate, which, if a recreational licence is also issued, becomes a component part of that licence, and

(b) a resource development certificate, which, when attached to a wildlife certificate, becomes a component part of that wildlife certificate.

(1.1) If the prospective purchaser is a non-resident alien, the wildlife certificate referred to in subsection (1)(a) must be designated as a non-resident alien wildlife certificate.

(2) Notwithstanding subsection (1)(a), a wildlife certificate is never a component part of a licence for the purpose of construing section 26(1) of the Act.

AR 143/97 s32;151/2001;251/2001;105/2002;69/2010

Registered fur management licence - eligibility

33(0.1) In this section,

(a) "designation" means designation by a nominated official under this section as a senior holder;

(b) "nominated official" means an employee of the Crown who is nominated by the Minister for the purposes of the provision of this section that is in question;

(c) "recognition" means recognition as a senior holder by the Minister before, or by a nominated official after, the commencement of this clause.

(0.2) A designation or recognition may only be given to or held by a person who is or remains, as the case may be, otherwise eligible to obtain and hold a registered fur management licence - senior holder.

(0.3) A designation or recognition remains in effect only until

(a) it is revoked pursuant to this section,

(b) its holder relinquishes it in writing, or

(c) it is automatically revoked by this clause by reason of its holder's ceasing to be eligible to obtain or hold the registered fur management licence - senior holder for the registered fur management area in question.

(0.4) A nominated official may revoke a designation or recognition if he or she considers that

(a) its holder, without valid excuse, has not renewed that licence before September 30 following the expiry of the licence, or

(b) the registered fur management area has otherwise been abandoned.

(0.5) Registered fur management licences are subdivided into

(a) registered fur management licence - senior holder, and

(b) registered fur management licence - partner,

and a person is not eligible to apply for or to hold a registered fur management licence in either subdivision unless that person is a senior holder or a partner, as the case may be.

(1) A person is eligible to obtain a registered fur management licence in respect of a registered fur management area if and only if,

(a) either

(i) in the case of a registered fur management area that is wholly situated both north of the northern

boundary of Township 118 and east of Wood Buffalo National Park, the applicant is

(A) neither a non-resident, nor a non-resident alien nor a corporation other than a society, or

(B) a non-resident who resides in or within 30 miles of Fort Smith, Northwest Territories,

or

(ii) in the case of any other registered fur management area, the applicant is neither a non-resident, nor a non-resident alien nor a corporation other than a society,

(b) subsection (0.5) is met, and

(c) repealed AR 155/2008 s5,

(d) at any time before applying for the licence, the applicant

(i) achieved such mark in an examination approved by the Minister as was fixed by the Minister,

(ii) held a licence authorizing the trapping of fur-bearing animals in Alberta or elsewhere, or

(iii) successfully completed a course approved by the Minister respecting the trapping of fur-bearing animals.

(e) repealed AR 156/98 s4.

(2) A registered fur management licence - senior holder may be renewed only if the application for renewal

(a) is made after June 30 but before September 30 following the expiry of the licence, and

(b) is accompanied by a completed report to the Minister that shows, for the 12 months ending on June 30 in the year in which the application for renewal is made, the number and kinds of fur-bearing animals killed in the registered fur management area by

(i) all the holders of registered fur management licences in respect of the area, and

(ii) individuals referred to in the section 4(1)(e) to (i) exemptions who have authority to hunt in the area.

(2.1) An application for renewal of a registered fur management licence - partner must be accompanied by confirmation by a senior holder who is licensed or is contemporaneously applying for a senior holder licence confirming the extant valid status of the agreement referred to in section 3(ii.08).

(3) During the period of 5 years following the initial issue of a registered fur management licence - senior holder to an eligible person for the first time and provided that the holder

(a) has been in compliance with the Act and this Regulation,

(b) remains eligible to hold a registered fur management licence - senior holder, and

(c) applies for renewal of the licence each year,

the Minister shall not, after that initial issue, decline to grant that person's application for renewal of the licence.

(4) On the expiry of the 5-year period referred to in subsection (3) or of the latest period established under this subsection and provided that the holder

(a) has been in compliance with the Act and this Regulation,

(b) remains eligible to hold a registered fur management licence - senior holder,

(c) has applied for renewal of the licence each year, and

(d) applied before the expiry of that period,

the Minister may in writing extend that initial 5-year period and subsequently each such latest period for a further term not exceeding 5 years, in which case, provided that those conditions have been met, the Minister shall not decline to grant that person's application for renewal of the licence during that extended period.

(5) The registered fur management licence of a person

(a) who ceases to be a senior holder or a partner, as the case may be, or

(b) who ceases to hold the ongoing eligibility qualification referred to in subsection (1)(a),

is automatically cancelled on the occurrence of that event.

AR 143/97 s33;156/98;173/2003;158/2004;155/2008; 86/2012;65/2013

Validity of licence

18 A licence to hunt a kind of wildlife has effect subject to section 12(2) and is valid only

(a) to authorize hunting of wildlife of that kind and the killing or capturing of wildlife in the number endorsed on the licence or prescribed,

(b) during the open season for wildlife of that kind and during the currency of the licence,

(c) in an area where wildlife of that kind may be lawfully hunted,

(d) to authorize hunting by the licence holder or a person authorized by or under the licence to hunt, and

(e) if it is accompanied with the tag or tags forming part of the licence, where applicable.

1984 cW-9.1 s21

Cancellation and suspension

19(1) The Minister may, if the Minister considers that it is in the public interest to do so,

(a) cancel or suspend a licence or permit,

(b) suspend a person's right to obtain or hold a licence or permit,

(c) reinstate a cancelled licence or permit, or

(d) remove a suspension of or restore a suspended right to obtain or hold a licence or permit.

(1.1) If the Minister has entered into an agreement under section 10 of the *Government Organization Act* with the government of Canada or of a province or territory or of another country or component part of another country that deals with the suspension or cancellation of the recreational licences in Alberta and that other jurisdiction of persons who have been convicted of offences relating to hunting, other than by means of traps, or whose right to hunt, other than by means of traps, or to obtain or hold recreational licences, has been suspended or cancelled under the laws of each such jurisdiction, the Minister may

(a) cancel or suspend an Alberta recreational licence held by such a person,

(b) suspend such a person's right to obtain or hold such a recreational licence,

(c) reinstate a recreational licence that has been so cancelled, or

(d) remove such a suspension of or restore such a suspended right to obtain or hold a recreational licence.

(1.2) In construing subsection (1.1),

(a) the terms "hunt", "hunting", "recreational licences" and "traps" are to be construed, to the extent that they relate to the jurisdiction other than Alberta, generally as applying to the equivalent terminology in the equivalent laws of that jurisdiction and in accordance with the laws of that jurisdiction, and

(b) if there is no term equivalent to the term "recreational licence", the term is to be taken to refer to those licences or equivalent permissions that are as closely equivalent to recreational licences as the comparative contexts of the legislation of Alberta and the other jurisdiction allow.

(2) Subsection (1)(c) and (d) do not apply in respect of a cancellation or suspension under subsection (1.1) or section 101 or 102.

(2.1) Subsection (1)(d) does not apply in respect of a suspension under section 35(4)(b) of the *Fisheries (Alberta) Act*.

(3) Without limiting the applicability of any other provision of this Act against which an offence involving a licence or permit may be committed, a person who does anything

(a) under the purported authority of a licence or permit that is under suspension, or

(b) while the person's right to obtain or hold a licence or permit is under suspension that would be authorized by that licence or permit if held and if that right were not under suspension,

whether the suspension was imposed under this section, section 101 or 102 of this statute or section 35(4)(b) of the *Fisheries (Alberta) Act*, is guilty of an offence against this subsection if the holding of a valid licence or permit is necessary to make the act lawful.

(4) Where a suspension or cancellation of a licence or permit or a suspension of the right to obtain or hold a licence or permit is imposed under section 101 or 102 or this section, a notice to that effect is sufficiently served on a person if it is sent by registered mail to the last recorded address shown on the licence or permit, as

the case may be, most recently held by the person or, if the person had no licence or permit, to the person's last known address.

RSA 2000 cW-10 s19;2003 c49 s5

Refusal to issue licence re maintenance orders

19.1(1) In this section, "Director" means the Director of Maintenance Enforcement appointed under the *Maintenance Enforcement Act*.

(2) If the Director notifies the Minister pursuant to section 22.1(1) of the *Maintenance Enforcement Act*, the Minister shall, in respect of the debtor named in the notice, refuse to issue a recreational licence under this Act except as permitted by the Director under section 22.1(3) of the *Maintenance Enforcement Act* until the Director withdraws the notice or notifies the Minister that the maintenance order has been withdrawn.

2004 c18 s30

Non-transferability

20 A licence or permit is not transferable unless and except to the extent prescribed.

1984 cW-9.1 s23;1996 c33 s16

Use of and carrying another's licence

21(1) A person shall not

(a) allow the person's licence to be used or carried by another person,

(b) use the licence of another person, or

(c) knowingly carry the licence of another person.

(2) Subsection (1) does not apply where the person using or carrying the licence is authorized by or under the licence to hunt.

1984 cW-9.1 s24

Defacement, alteration and possession of certain documents

22 A person shall not

(a) deface or alter a licence, permit or other prescribed document, or

(b) have in the person's possession

(i) a document that purports to be but is in fact not a licence, permit or other prescribed document, or

(ii) a licence, permit or other prescribed document that has been defaced or altered.

1996 c33 s17

Tab 10.

(x) "range improvement" means a modification to the range or to any resource on the range for the purposes of the proper use and management of a grazing disposition, including specific management for the purposes of increasing or maintaining the carrying capacity of the grazing disposition;

(y) "range improvement agreement" means an agreement referred to in section 79(c) between the holder of a grazing disposition and the Minister for the purposes of conducting one or more range improvements under Division 2 of Part 3;

(z) "range management plan" means an instrument defining goals, specific objectives and specific outcomes to be achieved by a holder during a certain period for the proper use and management of the holder's grazing disposition;

(aa) "register" means to post an application, approval, authorization, disposition or any other instrument in a book or record of public lands administration maintained by or on behalf of the Department for that purpose;

(bb) "registered fur management licence" means a registered fur management licence issued under the *Wildlife Regulation* (AR 143/97);

(cc) "stop order" means an order under section 59.2 of the Act;

(dd) "subject land", in respect of a disposition, means public land that is the subject of the disposition or to which the disposition relates;

(ee) "timber disposition" means timber disposition as defined in the *Forests Act*;

(ff) "vacant disposition area" means public land

(i) on which no development is occurring or is likely to occur for 90 days,

(ii) that is under the administration of the Minister, and

(iii) that is the subject of

(A) an authorization, easement, miscellaneous permit, commercial trail riding permit, pipeline agreement or provincial grazing reserve

(B) a licence of occupation, unless the public land is a closed road within the meaning of section 54.01 of the Act,

(C) a timber disposition,

(D) a grazing allotment under the *Forest Reserves Act*, or

(E) a registered fur management licence;

(gg) "vacant public land" means a vacant disposition area or other land that is under the administration of the Minister and that is not the subject of a formal disposition.

(2) The following definitions apply for the purposes of section 114.1 of the Act:

(a) "amount of change in beneficial ownership" means, with respect to a corporate leaseholder or corporation referred to in clause (d), the greater of the following:

(i) the ratio of the number of shares that have had a change in beneficial ownership to the total number of issued and outstanding shares of the corporate leaseholder or corporation, calculated immediately prior to the change in the case of a transfer or redemption of shares, and immediately after the change in the case of an allotment of shares;

(ii) the ratio of the number of shares that have had a change in beneficial ownership and that provide the right to cast votes to elect directors of the corporate leaseholder or corporation to the total number of issued and outstanding shares with such voting rights of the corporate leaseholder or corporation, calculated immediately prior to the change in the case of a transfer or redemption of shares, and immediately after the change in the case of an allotment of shares;

(b) "animal unit" means a cow of average weight with calf at foot, and any variations in the proportions of an animal unit due to age, weight and type of livestock as determined by the Minister;

(c) "associated corporation" means

(i) any corporation that holds shares in a corporation that holds a grazing lease or grazing licence,

(ii) any corporation that holds shares in a corporation referred to in subclause (i), or

Division 1
Public Use of Vacant Public Land

General licence respecting recreational purposes

32(1) Subject to this Part, any person may enter on and occupy vacant public land for a recreational purpose.

(2) Subject to section 34, a person wishing to enter on and occupy vacant public land, other than a trail, for a recreational purpose must apply for and obtain an access permit before entering on the land if

(a) the person intends to undertake a use or activity on the vacant public land that could reasonably be expected to occur for a period longer than 14 days,

(b) a closure imposed by a competent authority under any law in force in Alberta is in effect for all or part of the vacant public land,

(c) the entry on and occupation of the vacant public land has been prohibited under Division 3 of this Part,

(d) the use or activity is likely to cause unreasonable loss or damage to the vacant public land, or

(e) the use or activity is likely to contravene a disturbance standard applicable to the vacant public land.

General licence respecting trails

33(1) Subject to this Part, any person may enter on and occupy a trail on vacant public land for a recreational or commercial purpose.

(2) Subject to section 34, a person wishing to enter on and occupy a trail on vacant public land must apply for and obtain an access permit before entering on the land if

(a) the person intends to undertake a use or activity on the vacant public land that could reasonably be expected to occur for a period longer than 14 days,

(b) a closure imposed by a competent authority under any law in force in Alberta is in effect for vacant public land comprising all or part of the trail or adjoining the trail,

(c) the entry on and occupation of the vacant public land has been prohibited under Division 3 of this Part,

Tab 11.

CANADA

CONSOLIDATION

CODIFICATION

Indian Act

Loi sur les Indiens

R.S.C., 1985, c. I-5

L.R.C. (1985), ch. I-5

Current to December 15, 2014

Last amended on April 1, 2013

À jour au 15 décembre 2014

Dernière modification le 1 avril 2013

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

RESERVES

Reserves to be held for use and benefit of Indians

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

Use of reserves for schools, etc.

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.

R.S., c. I-6, s. 18.

Children of band members

18.1 A member of a band who resides on the reserve of the band may reside there with his dependent children or any children of whom the member has custody.

R.S., 1985, c. 32 (1st Supp.), s. 8.

Surveys and subdivisions

19. The Minister may

(*a*) authorize surveys of reserves and the preparation of plans and reports with respect thereto;

(*b*) divide the whole or any portion of a reserve into lots or other subdivisions; and

(*c*) determine the location and direct the construction of roads in a reserve.

R.S., c. I-6, s. 19.

POSSESSION OF LANDS IN RESERVES

Possession of lands in a reserve

20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

RÉSERVES

Les réserves sont détenues à l'usage et au profit des Indiens

18. (1) Sous réserve des autres dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; sous réserve des autres dispositions de la présente loi et des stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

Emploi de réserves aux fins des écoles, etc.

(2) Le ministre peut autoriser l'utilisation de terres dans une réserve aux fins des écoles indiennes, de l'administration d'affaires indiennes, de cimetières indiens, de projets relatifs à la santé des Indiens, ou, avec le consentement du conseil de la bande, pour tout autre objet concernant le bien-être général de la bande, et il peut prendre toutes terres dans une réserve, nécessaires à ces fins, mais lorsque, immédiatement avant cette prise, un Indien particulier avait droit à la possession de ces terres, il doit être versé à cet Indien, pour un semblable usage, une indemnité d'un montant dont peuvent convenir l'Indien et le ministre, ou, à défaut d'accord, qui peut être fixé de la manière que détermine ce dernier.

S.R., ch. I-6, art. 18.

Enfants des membres d'une bande

18.1 Le membre d'une bande qui réside sur la réserve de cette dernière peut y résider avec ses enfants à charge ou tout enfant dont il a la garde.

L.R. (1985), ch. 32 (1er suppl.), art. 8.

Levés et subdivisions

19. Le ministre peut :

a) autoriser des levés de réserves et la préparation de plans et de rapports à cet égard;

b) séparer la totalité ou une partie d'une réserve en lots ou autres subdivisions;

c) décider de l'emplacement des routes dans une réserve et en prescrire la construction.

S.R., ch. I-6, art. 19.

POSSESSION DE TERRES DANS DES RÉSERVES

Possession de terres dans une réserve

20. (1) Un Indien n'est légalement en possession d'une terre dans une réserve que si, avec l'approbation du ministre, possession de la

Tab 12.

2005 FC 1622, 2005 CF 1622
Federal Court

Ermineskin Indian Band & Nation v. Canada

2005 CarswellNat 3959, 2005 CarswellNat 6710, 2005 FC 1622, 2005 CF 1622, [2005] F.C.J. No. 1991, [2006] 1 C.N.L.R. 100, 148 A.C.W.S. (3d) 1, 269 F.T.R. 1

Chief Victor Buffalo acting on his own behalf and on behalf of all the other members of the Samson Indian Nation and Band and The Samson Indian Band and Nation, Plaintiffs and Her Majesty The Queen in Right of Canada, The Minister of Indian Affairs and Northern Development and The Minister of Finance, Defendants and Chief Jerome Morin acting on his own behalf as well as on behalf of all the Members of Enoch's Band of Indians and The Residents thereof on and of Stony Plain Reserve No. 135, Intervenors and Emily Stoyka and Sara Schug, Intervenors

Teitelbaum J.

Heard: May 1 2000 - May 26, 2005
Judgment: November 30, 2005
Docket: T-2022-89

Counsel: Mr. james O'Reilly, Ms Hélèn Sioui Trudel, Mr. Edward H. Molstad, Q.C., Mr. Marco S. Poretti, Ms Priscilla Kennedy, Mr. Terry Davis, Mr. Nathan Whitling, Mr. David Sharko, Ms Rayana Allen, Mr. Peter W. Hutchins, Ms Cristina A. Scattolin, Mr. Robert Freedman, Ms Anjali Choksi, Mr. Owen Young, Mr. L. Douglas Rae, Mr. W. Tibor Osvath, Ms Carolyn M. Buffalo, for Plaintiffs
Mr. Alan D. Macleod, Mr. Clarke Hunter, Ms Mary Comeau, Ms Brenda Armitage, Ms Wendy McCallum, Mr. Tom Valetine, Mr. James Bazant, Mr. Ray Chartier, Mr. Robert Stack, for Defendants
Mr. Terry P. Glancy, Mr. Robert J. Normey, Mr. S.H. Stan Rutwind, for Interveners
Ms Beverley Bauer, Q.C., for Attorney General of Alberta

Subject: Public; Constitutional; Property; Estates and Trusts; Evidence; Torts

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Aboriginal law --- Constitutional issues — Reserves and real property — Land surrendered to Crown

On May 30, 1946, surrender of minerals was executed on behalf of plaintiff First Nation on lake reserve — By Order-in-Council dated June 28, 1946, Crown accepted surrender so that mineral interests and accompanying mining rights could be leased for benefit of plaintiff — In 1952, commercial quantities of oil and gas reserves were discovered underlying surface of lake reserve and production began — Crown prepared and executed leases with oil and gas companies with regard to exploration and extraction rights — Significant royalty moneys have been paid to Crown on behalf of plaintiff — Plaintiff brought action against Crown, claiming that it had aboriginal right to manage its resources and money generated by oil and gas fields — Plaintiff further contend that Crown was liable for its failure to actively manage funds in same manner as private law trustee — Action dismissed — Plaintiff failed to establish aboriginal or treaty right to own, manage, control and administer their own reserve lands, resources, and any money arising therefrom — Land surrender clause was explained to and understood by Cree signatories to Treaty No. 6 (1876) — No evidence of any trade by Cree in minerals, including salt, oil, and gas — Crown held Indian moneys, pursuant to s. 61(1) of Indian Act, for "use and benefit" of Indians or bands, giving rise to fiduciary obligation — Plaintiff's assertion that trust arose either from historical relationship between Crown and aboriginal people or Treaty No. 6 was rejected — Indian moneys that were subject-matter of present action came into being subsequent to execution of 1946 surrender of minerals document — Words contained in surrender were sufficient to create trust — Crown could not authorize outright transfer of plaintiff's funds, either to band council or to commercial trustee, for purpose of making investments — Conditions such as approval of band membership and investment plan of some sort would be necessary before Minister, as trustee, could make any determination as to whether such expenditure would be for band's benefit and best interests — In paying rate of interest to Indian moneys pursuant to s. 61(2) of Indian Act, Minister discharged his duty as trustee to invest trust corpus — In fixing rate of interest or investing, trustee's duty is not to maximize profits, but to invest prudently — Since Crown was trustee for Indian moneys and may rely on money management provisions of Indian Act to carry out its duties as trustee, there can be no unjust enrichment claim — Crown has paid proper amount of interest and plaintiff has therefore suffered no deprivation within confines of existing legislative regime.

Public law --- Crown — Crown property — Crown as trustee of property

On May 30, 1946, surrender of minerals was executed on behalf of plaintiff First Nation on lake reserve — By Order-in-Council dated June 28, 1946, Crown accepted surrender so that mineral interests and accompanying mining rights could be leased for benefit of plaintiff — In 1952, commercial quantities of oil and gas reserves were discovered underlying surface of lake reserve and production began — Crown prepared and executed leases with oil and gas companies with regard to exploration and extraction rights — Significant royalty moneys have been paid to Crown on behalf of plaintiff — Plaintiff brought action against Crown, claiming that it had aboriginal right to manage its resources and money generated by oil and gas fields — Plaintiff further contend that Crown was liable for its failure to actively manage funds in same manner as private law trustee — Action dismissed — Plaintiff failed to establish aboriginal or treaty right to own, manage, control and administer their own reserve lands, resources, and any money arising therefrom — Land surrender clause was explained to and understood by Cree signatories to Treaty No. 6 (1876) — No evidence of any trade by Cree in minerals, including salt, oil, and gas — Crown held Indian moneys, pursuant to s. 61(1) of Indian Act, for "use and benefit" of Indians or bands, giving rise to fiduciary obligation — Plaintiff's assertion that trust arose either from historical relationship between Crown and aboriginal people or Treaty No. 6 was rejected — Indian moneys that were subject-matter of present action came into being subsequent to execution of 1946 surrender of minerals document — Words contained in surrender were sufficient to create trust — Crown could not authorize outright transfer of plaintiff's funds, either to band council or to commercial trustee, for purpose of making investments — Conditions such as approval of band membership and investment plan of some sort would be necessary before Minister, as trustee, could make any determination as to whether such expenditure would be for band's benefit and best interests — In paying rate of interest to Indian moneys pursuant to s. 61(2) of Indian Act, Minister discharged his duty as trustee to invest trust corpus — In fixing rate of interest or investing, trustee's duty is not to maximize profits, but to invest

Confederation in 1867, the federal government of Canada assumed this special responsibility. In *Guerin* , at p. 383, Dickson J. held,

> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interest and to the great Dissatisfaction of the said Indians...." Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.

765 I cannot conclude that anything in either the written text of Treaty 6 or the surrounding negotiations and historical context shows that there was any kind of understanding that bands would administer and manage their reserve lands and resources. Quite the contrary, it is clear that this was to be a function and responsibility of the Crown, which dates back to the Royal Proclamation of 1763. Neither the written text of Treaty 6 nor the treaty negotiations supports the contention that the Cree retained unto themselves the right to sell, lease, or otherwise dispose of their interests in their reserves. In my opinion, the Cree leadership who signed Treaty 6 understood that by doing so, they would be putting themselves under the protection of the Crown in return for receiving certain specified benefits.

766 I conclude that Samson has not established an aboriginal or treaty right to own, manage, control and administer their own reserve lands, resources, and any money arising therefrom.

767 I propose now to deal with Samson's challenge to section 17 of the *Indian Act*. That section, which falls under the heading "New Bands," provides:

> 17. (1) Minister may constitute new bands - The Minister may, whenever he considers it desirable,
>
> (a) amalgamate bands that, by a vote or a majority of their electors, request to be amalgamated; and
>
> (b) constitute new bands and establish Band Lists with respect thereto from existing band Lists, or from the Indian Register, if requested to do so by persons proposing to form the new bands.
>
> (2) Division of reserves and funds - Where pursuant to subsection (1) a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Minister determines shall be held for the use and benefit of the new band.
>
> (3) No protest - No protest may be made under section 14.2 in respect of the deletion from or the addition to a Band List consequent on the exercise by the Minister of any of the Minister's powers under subsection (1).

768 In their Amended Statement of Claim (No. 4), as noted earlier, the plaintiffs allege, in part, the following:

> 70. Furthermore, it is expedient to declare section 17 of the *Indian Act* unconstitutional, illegal, null and void.