Bert Horseman Appellant v. **Her Majesty The Queen** Respondent and **The Attorney General of Manitoba and the Attorney General for Saskatchewan** Interveners

indexed as: r. v. horseman

File No.: 20582.

1989: November 27; 1990: May 3.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Indians -- Hunting rights -- Treaty Indian killing bear in self-defence and later selling hide -- Alberta Wildlife Act prohibiting trafficking in wildlife without a licence -- Whether prohibition applies to Treaty 8 Indians -- Whether Treaty 8 hunting rights limited by 1930 Natural Resources Transfer Agreement -- Wildlife Act, R.S.A. 1980, c. W-9, ss. 18, 42 -- Treaty No. 8 -- Natural Resources Transfer Agreement, 1930, para. 12.

Appellant, a Treaty 8 Indian, killed a grizzly bear in self-defence while hunting moose for food. He did not have at the time a licence under the Alberta Wildlife Act to hunt grizzly bears or sell their hides. A year later, in need of money to support his family, he purchased a grizzly bear hunting licence and sold the grizzly hide. This was an isolated act and not part of any planned commercial activity. Appellant was charged with unlawfully trafficking in wildlife, contrary to s. 42 of the Wildlife Act. At trial, he argued that the Act did not apply to him and that he was within his Treaty 8 rights when he sold the bear hide. This treaty secured the Indians' right "to pursue their usual vocations of hunting, trapping and fishing . . . subject to such regulations as [might] from time to time be made by the Government of the country". The trial judge found that the appellant's Treaty 8 hunting rights included the right to barter and acquitted him. The summary conviction appeal court set aside the acquittal and convicted the appellant. The court held that the Alberta Natural Resources Transfer Agreement of 1930 had limited the Treaty 8 hunting rights to a right to hunt only for food. The Court of Appeal upheld the decision.

Held (Dickson C.J. and Wilson and L'Heureux-Dubé JJ. dissenting): The appeal should be dismissed.

Per Lamer, La Forest, Gonthier and Cory JJ.: Section 42 of the Alberta Wildlife Act is a provincial law of general application which is applicable to Indians pursuant to s. 88 of the Indian Act so long as it does not conflict with a treaty right. The hunting rights reserved to the Indians in 1899 by Treaty No. 8 included hunting for commercial purposes, but these rights were subject to governmental regulation and have been limited to the right to hunt for food only -- that is to say, for sustenance for the individual Indian or the Indian's family -- by para. 12 of the Transfer Agreement. In exchange for the reduction in the right to hunt for purposes of commerce, the Crown widened the hunting territory and the means by which the Indians could hunt for food. The federal government's power to make such a modification unilaterally is unquestioned. Here, the appellant's sale of the bear hide was part of a "multi-stage process" which might include purchasing food for nourishment. The sale of the bear hide constituted a

hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as limited by the Transfer Agreement of 1930. The application of s. 42 of the Wildlife Act to the appellant was therefore not precluded by s. 88 of the Indian Act. The fact that a grizzly bear was killed by the appellant in self-defence or the fact that he obtained a grizzly bear hunting permit after he was in the possession of a bear hide is irrelevant to a consideration of whether there has been a breach of s. 42. The grizzly bear is in a precarious position, and trafficking in bear hides, other than pursuant to the provisions of the Wildlife Act, threatens its very existence. Section 42 is valid legislation enacted by the government with jurisdiction in the field. It reflects a bona fide concern for the preservation of a species.

Per Dickson C.J. and Wilson and L'Heureux-Dubé JJ. (dissenting): Indian treaties should be given a fair, large and liberal construction in favour of the Indians. They are sui generis, being the product of negotiation between very different cultures. Courts must therefore look at the broader historical context to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time. In 1899, the Indians were concerned that the most important aspect of their way of life, their ability to hunt and fish, not be interfered with. The language of Treaty No. 8 embodied a solemn engagement to Indians that their means of livelihood would be respected, and this promise was the sine qua non for obtaining their agreement to enter into the treaty. In guaranteeing the Indians the right to pursue their usual vocations of hunting, trapping and fishing "subject to such regulations as may from time to time be made by the Government of the country", the Canadian government committed itself to regulate hunting in a manner that would respect the Indians' lifestyle and the way in which they had traditionally pursued their livelihood.

Paragraph 12 of the Transfer Agreement was intended to respect the guarantees enshrined in Treaty No. 8, and the modifications to the areas within which Treaty 8 Indians would thereafter be able to engage in their traditional way of life should not be viewed as an attempt to abrogate or limit the Indians' rights to hunt and fish. Given the government's solemn commitment to Treaty 8 Indians, the term hunting "for food" in para. 12 should be construed as encompassing hunting for support and subsistence, which includes hunting in order to exchange the product of the hunt for other items, as opposed to purely commercial or sport hunting. Paragraph 12 must also be construed as conferring on the province of Alberta the power to regulate sport hunting and hunting for purely commercial purposes rather than as enabling it to place serious and invidious restrictions on traditional Indian hunting practices.

The killing of the bear in this case was not an act of "hunting"; it was an act of self-defence. Moreover, the sale of the hide was an isolated transaction for the purpose of support and subsistence. The appellant's conduct, therefore, is not caught by s. 42 of the Alberta Wildlife Act, which is applicable to Treaty 8 Indians only to the extent that they are engaged in commercial or sport hunting.

Cases Cited

By Cory J.

Applied: Frank v. The Queen, [1978] 1 S.C.R. 95; R. v. Sutherland, [1980] 2 S.C.R. 451; Moosehunter v. The Queen, [1981] 1 S.C.R. 282; **referred to**: Simon v. The Queen, [1985] 2

S.C.R. 387; Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313; Nowegijick v. The Queen, [1983] 1 S.C.R. 29; Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695; R. v. Strongquill (1953), 8 W.W.R. (N.S.) 247; Myran v. The Queen, [1976] 2 S.C.R. 137.

By Wilson J. (dissenting)

Nowegijick v. The Queen, [1983] 1 S.C.R. 29; Simon v. The Queen, [1985] 2 S.C.R. 387; R. v. White and Bob (1964), 50 D.L.R. (2d) 613, aff'd [1965] S.C.R. vi; R. v. Smith, [1935] 3 D.L.R. 703; R. v. Strongquill (1953), 8 W.W.R. (N.S.) 247; Frank v. The Queen, [1978] 1 S.C.R. 95; Prince and Myron v. The Queen, [1964] S.C.R. 81; R. v. Wesley, [1932] 2 W.W.R. 337; Sikyea v. The Queen, [1964] S.C.R. 642; R. v. George, [1966] S.C.R. 267; Moosehunter v. The Queen, [1981] 1 S.C.R. 282; R. v. Sutherland, [1980] 2 S.C.R. 451.

Statutes and Regulations Cited

An Act further to amend "The Indian Act" chapter forty-three of the Revised Statutes, S.C. 1890, c. 29, s. 10.

Constitution Act, 1867.

Constitution Act, 1930, 20 & 21 Geo. 5, c. 26 (U.K.) [reprinted in R.S.C. 1970, App. II, No. 25], s. 1.

Indian Act, R.S.C. 1927, c. 98, s. 69.

Indian Act, R.S.C. 1970, c. I-6, s. 88.

Natural Resources Transfer Agreement [confirmed by the Constitution Act, 1930], para. 12.

Treaty No. 8 (1899).

Unorganized Territories' Game Preservation Act, 1894, S.C. 1894, c. 31, ss. 2, 4 to 8, 26.

Wildlife Act, R.S.A. 1980, c. W-9, ss. 1(s), 18, 42.

Authors Cited

Daniel, Richard. "The Spirit and Terms of Treaty Eight." In The Spirit of the Alberta Indian Treaties. Edited by Richard Price. Montréal: Institute for Research on Public Policy, 1979.

Fumoleau, René. As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939. Toronto: McClelland and Stewart, 1973.

Hickey, Lynn, Richard L. Lightning and Gordon Lee, "T.A.R.R. Interview with Elders Program". In The Spirit of the Alberta Indian Treaties. Edited by Richard Price. Montréal: Institute for Research on Public Policy, 1979.

La Forest, G. V. Natural Resources and Public Property under the Canadian Constitution. Toronto: University of Toronto Press, 1969.

Laird, David, J. Ross and J. McKenna. "Report of Commissioners for Treaty No. 8." In Treaty

No. 8 Made June 21, 1899 and Adhesions, Reports, etc. Ottawa: Reprinted by Queen's Printer, 1966.

O'Chiese, Peter, et al. "Interviews with Elders." In The Spirit of the Alberta Indian Treaties. Edited by Richard Price. Montréal: Institute for Research on Public Policy, 1979.

Ray, Arthur J. Commentary on Economic History of Treaty 8 Area (Department of History, University of British Columbia, 1985) [unpublished].

APPEAL from a judgment of the Alberta Court of Appeal (1987), 53 Alta. L.R. (2d) 146, 78 A.R. 351, [1987] 5 W.W.R. 454, [1987] 4 C.N.L.R. 99, dismissing the appellant's appeal from a judgment of Stratton J. (1986), 69 A.R. 13, [1986] 2 C.N.L.R. 94, allowing the Crown's appeal from the appellant's acquittal by Wong Prov. Ct. J., [1986] 1 C.N.L.R. 79, on a charge of trafficking in wildlife. Appeal dismissed, Dickson C.J. and Wilson and L'Heureux-Dubé JJ. dissenting.

Kenneth E. Staroszik, for the appellant.

Richard F. Taylor and Margaret Unsworth, for the respondent.

Donna J. Miller and Gordon E. Hannon, for the intervener the Attorney General of Manitoba.

Graeme G. Mitchell, for the intervener the Attorney General for Saskatchewan.

The reasons of Dickson C.J. and Wilson and L'Heureux-Dubé JJ. were delivered by

Wilson J. (dissenting) -- I have had the advantage of reading the reasons of my colleague Justice Cory and must respectfully disagree with his conclusion that the appellant's conduct is caught by s. 42 of the Wildlife Act, R.S.A. 1980, c. W-9.

While my colleague has reviewed the facts of this appeal and the decisions of the lower courts, I believe it is important to emphasize that all parties were agreed and the trial judge so found that Mr. Horseman was legitimately engaged in hunting moose for his own use in the Treaty 8 area when he killed the bear in self-defence. Mr. Horseman did not kill the bear with a view to selling its hide although he was eventually driven to do so a year later in order to feed himself and his family. The sale of the bear hide was an isolated act and not part of any planned commercial activity. None of this is in dispute.

The narrow question before us in this appeal then is whether the isolated sale for food of a bear hide obtained by the appellant fortuitously as the result of an act of self-defence is something that the government of Alberta is entitled to penalize under the Wildlife Act. In my view, the answer to this question requires a careful examination of the terms of Treaty No. 8 and the wording of para. 12 of the Natural Resources Transfer Agreement, 1930 (Alberta) (the "Transfer Agreement").

Interpreting Indian Treaties

This Court has already established a number of important guidelines for the interpretation of

Indian treaties. In Nowegijick v. The Queen, [1983] 1 S.C.R. 29, Dickson J. (as he then was) stated at p. 36:

> . . . 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.]

In Simon v. The Queen, [1985] 2 S.C.R. 387, at p. 402, Dickson C.J. pointed to his observation in Nowegijick and reiterated that "Indian treaties should be given a fair, large and liberal construction in favour of the Indians".

The interpretive principles developed in Nowegijick and Simon recognize that Indian treaties are sui generis (per Dickson C.J. at p. 404 of Simon, supra). These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.

But the interpretive principles set out in Nowegijick and Simon were developed not only to deal with the unique nature of Indian treaties but also to address a problem identified by Norris J.A. in R. v. White and Bob (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at p. 649 (aff'd [1965] S.C.R. vi):

> In view of the argument before us, it is necessary to point out that on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status.
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> In other words, to put it simply, Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with to-day's formal requirements. Nor should they be undermined by the application of the interpretive rules we apply today to contracts entered into by parties of equal bargaining power.

In my view, the interpretive principles set out in Nowegijick and Simon are fundamentally sound and have considerable significance for this appeal. Any assessment of the impact of the Transfer Agreement on the rights that Treaty 8 Indians were assured in the treaty would continue to be protected cannot ignore the fact that Treaty No. 8 embodied a "solemn engagement". Accordingly, when interpreting the Transfer Agreement between the federal and provincial governments we must keep in mind the solemn commitment made to the Treaty 8 Indians by the federal government in 1899. We should not readily assume that the federal government intended to renege on the commitment it had made. Rather we should give it an interpretation, if this is possible on the language, which will implement and be fully consistent with that commitment. It

is appropriate, therefore, to begin the analysis of the issues in this appeal with a review of the nature of the "solemn engagement" embodied in Treaty No. 8.

Treaty No. 8 and Indian Hunting Rights

In his Commentary on Economic History of Treaty 8 Area (unpublished; June 13, 1985, at p. 8), Professor Ray warns of the dangers involved in trying to understand the hunting practices of Indians in the Treaty 8 area by drawing neat distinctions between hunting for domestic use and hunting for commercial purposes. He notes that Indians in the Treaty 8 area had developed a way of life that centred on wildlife resources. They hunted beaver, moose, caribou and wood buffalo with a view to consuming some portions of their catch and exchanging other portions. "For these reasons, differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact" (p. 9).

Others have confirmed Professor Ray's understanding of the world in which Treaty 8 Indians lived prior to 1899: see, for example, Richard Daniel's observations in "The Spirit and Terms of Treaty Eight", in The Spirit of the Alberta Indian Treaties (Richard Price, ed., Institute for Research on Public Policy, 1979), at pp. 47 to 100. In my view, it is important to bear in mind this picture of the Treaty 8 Indians' way of life prior to 1899 when considering the context in which they consented to Treaty No. 8.

In one of the most detailed studies of the history of the negotiations leading up to Treaty No. 8, As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939 (1973), R. Fumoleau explains why the Canadian government sought an agreement with the Treaty 8 Indians. The Klondyke gold rush gave rise to serious problems throughout 1897 and 1898, with miners travelling through territory occupied by the Indians and paying little respect to their traditional way of life. Inevitably conflict broke out as the Indians retaliated. The government of Canada quickly realized that it was necessary to reach an understanding with the Indians about future relations. Commissioners Laird, Ross and McKenna were therefore sent out to negotiate a treaty with the Indians.

Mr. Daniel's study of these negotiations reveals that the Indians were especially concerned that the most important aspect of their way of life, their ability to hunt and fish, not be interfered with. He points out that the Commissioners repeatedly sought to assure the Indians that they would continue to be free to pursue these activities as they always had. In the course of treaty negotiations at Lesser Slave Lake in June 1899 (negotiations that set the pattern for subsequent agreements with other Indian groups near Fort St. John, Fort Chipewyan, Fond du Lac, Fort Resolution and Wabasca), Commissioner Laird told the assembled Indians that "Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are." (See: Daniel, op. cit., at p. 76). Similarly, Mr. Fumoleau has observed that "[o]nly when the Treaty Commissioners promised them that they would be free to hunt and trap and fish for a living, and that their rights would be protected against the abuses of white hunters and trappers, did the Indians at each trading post of the Treaty 8 area consent to sign the treaty" (Fumoleau, op. cit., at p. 65).

The official report of the Commissioners who negotiated Treaty No. 8 (presented to the

Minister of the Interior on September 22, 1899) confirms both that hunting and fishing rights were of particular concern to the Indians and that the Commissioners were at pains to make clear that the government of Canada did not wish to interfere with their traditional way of life. The Commissioners reported (at p. 6):

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

Interviews with Indian elders of the Lesser Slave Lake area confirm the archival evidence with respect to the critical role played by the promise with respect to hunting and fishing rights. James Cornwall, who was present at the treaty negotiations at Lesser Slave Lake, signed an affidavit in 1937 (see Fumoleau, op. cit., at pp. 74-75) in which he stated:

Much stress was laid on one point by the Indians, as follows: They would not sign under any circumstances, unless their right to hunt, trap and fish was guaranteed and it must be understood that these rights they would never surrender.

More recent interviews with William Okeymaw of the Sucker Creek Reserve and Felix Gobot of Fort Chipewyan confirm that the treaty was to "be in effect as long as the sun shines and the rivers flow" (see: p. 151 of Peter O'Chiese et al., "Interviews with Elders", in The Spirit of the Alberta Indian Treaties, op. cit., at pp. 113-60). Lynn Hickey, Richard L. Lightning and Gordon Lee, who have conducted numerous interviews with elders in the Treaty 8 area, summarize the result of their findings as follows, in "T.A.R.R. Interview with Elders Program", in The Spirit of the Alberta Indian Treaties, pp. 103-12 (at p. 106):

It is agreed that the treaty involved surrendering land, though a few people express this as an agreement to share land or surrender the surface only. Land is the only thing that was given up, however. The main discussion of the treaty by most elders concerns hunting, fishing, and trapping and how rights to pursue their traditional livelihood were not given up and were even strongly guaranteed in the treaty to last forever. Giving up the land would not interfere with the Indian's pursuit of his livelihood, and the Indians only signed the treaty on this condition. [Emphasis added.]

While one must obviously be sensitive to the fact that contemporary oral evidence of the meaning of provisions of Treaty No. 8 will not necessarily capture the understanding of the treaty that the Indians had in 1899, in my view such evidence is relevant where it confirms the archival evidence with respect to the meaning of the treaty. Indeed, it seems to me to be of particular significance that the Treaty 8 Commissioners, historians who have studied Treaty No. 8, and Treaty 8 Indians of several different generations unanimously affirm that the government of Canada's promise that hunting, fishing and trapping rights would be protected forever was the sine qua non for obtaining the Indians' agreement to enter into Treaty No. 8. Hunting, fishing and

trapping lay at the centre of their way of life. Provided that the source of their livelihood was protected, the Indians were prepared to allow the government of Canada to "have title" to the land in the Treaty 8 area.

In my view, it is in light of this historical context, one which did not, from the Indians' perspective, allow for simple distinctions between hunting for domestic use and hunting for commercial purposes and which involved a solemn engagement that Indians would continue to have unlimited access to wildlife, that one must understand the provision in Treaty No. 8 that reads:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added.]

If we are to remain faithful to the interpretive principles set out in Nowegijick and Simon, then we must not only be careful to understand that the language of Treaty No. 8 embodied a solemn engagement to Indians in the Treaty 8 area that their livelihood would be respected, but we must also recognize that in referring to potential "regulations" with respect to hunting, trapping and fishing the government of Canada was promising that such regulations would always be designed so as to ensure that the Indians' way of life would continue to be respected. To read Treaty No. 8 as an agreement that was to enable the government of Canada to regulate hunting, fishing and trapping in any manner that it saw fit, regardless of the impact of the regulations on the "usual vocations" of Treaty 8 Indians, is not credible in light of oral and archival evidence that includes a Commissioners' report stating that a solemn assurance was made that only such laws "as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made".

In other words, while the treaty was obviously intended to enable the government of Canada to pass regulations with respect to hunting, fishing and trapping, it becomes clear when one places the treaty in its historical context that the government of Canada committed itself to regulate hunting in a manner that would respect the lifestyle of the Indians and the way in which they had traditionally pursued their livelihood. Because any regulations concerning hunting and fishing were to be "in the interest" of the Indians, and because the Indians were promised that they would be as free to hunt, fish and trap "after the treaty as they would be if they never entered into it", such regulations had to be designed to preserve an environment in which the Indians could continue to hunt, fish and trap as they had always done.

Natural Resources Transfer Agreement

When the province of Alberta was created in 1905 its government did not receive the power to control natural resources in the province. Control over natural resources in Alberta remained in the hands of the federal government until 1930 when Canada and Alberta entered into the Transfer Agreement which placed Alberta on the same footing as the other provinces. Mindful of the government of Canada's responsibilities under a series of numbered treaties with Indians, the parties to the Transfer Agreement inserted a paragraph dealing with the Indians' treaty rights to

hunt, fish and trap. Paragraph 12 of the Transfer Agreement stated:

12In 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. [Emphasis added.]

In Natural Resources and Public Property under the Canadian Constitution (1969), at p. 180, G. V. La Forest (now a member of this Court) makes the following observation about para. 12 of the Transfer Agreement:

The effect of the provision is to give the Indians a constitutional right as against the provinces to hunt and fish on unoccupied Crown lands; it cannot be unilaterally altered by the provinces. It appears to have been inserted to protect similar rights accorded by the various treaties under which the Indians surrendered the territory now comprising the Prairie provinces, and it has been held to be quite proper to look at these treaties for assistance in determining the meaning of the provision. [Emphasis added.]

The proposition that para. 12 of the Transfer Agreement was formulated with a view to protecting Treaty 8 rights and that it is therefore quite proper to look at Treaty No. 8 in order to understand the meaning of para. 12 of the Transfer Agreement has been emphasized on a number of occasions. For example, in R. v. Smith, [1935] 3 D.L.R. 703, at pp. 705-6, Turgeon J.A. (Mackenzie J.A. concurring) stated:

As I have said, it is proper to consult this treaty in order to glean from it whatever may throw some light on the meaning to be given to the words in question. I would even say that we should endeavour, within the bounds of propriety, to give such meaning to these words as would establish the intention of the Crown and the Legislature to maintain the rights accorded to the Indians by the treaty. [Emphasis added.]

Similarly, in R. v. Strongquill (1953), 8 W.W.R. (N.S.) 247 (Sask. C.A.) (a case relied upon by this Court in Frank v. The Queen, [1978] 1 S.C.R. 95, at p. 100) McNiven J.A. stated at p. 269:

I have already said that whatever rights with respect to hunting were granted to the Indians by the said treaty were merged in par. 12 of the Natural Resources Agreement, supra. I have only referred to the treaty for such assistance as its terms may give in interpreting the language used in par. 12 for we must attribute to parliament an intention to fulfil its terms. It is also a cardinal rule of interpretation that words used in a statute are to be given their common ordinary and generally accepted meaning. Statutes are to be given a liberal construction so that effect may be given to each Act and every part thereof according to its spirit, true intent and meaning". [Emphasis added.]

The view expressed in Smith and in Strongquill to the effect that one should assume that Parliament intended to live up to its obligations under treaties with the Indians was subsequently approved by this Court in Prince and Myron v. The Queen, [1964] S.C.R. 81. Hall J. (for the

Court) adopted the following passage from R. v. Wesley, [1932] 2 W.W.R. 337, in which McGillivray J.A. had commented at p. 344:

I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to sec. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial. [Emphasis added.]

More recently, in Frank v. The Queen, supra, this Court reiterated that para. 12 was in part designed to ensure that the rights embodied in Treaty No. 8 were respected. Dickson J. stated at p. 100:

It would appear that the overall purpose of para. 12 of the Natural Resources Transfer Agreement was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food. See R. v. Wesley; R. v. Smith; R. v. Strongquill. [Emphasis added.]

In my view, the decisions in Smith and Wesley, cases that were decided shortly after the Transfer Agreement came into force, as well as later decisions in cases like Strongquill and Frank, make clear that, to the extent that it is possible, one should view para. 12 of the Transfer Agreement as an attempt to respect the solemn engagement embodied in Treaty No. 8, not as an attempt to abrogate or derogate from that treaty. While it is clear that para. 12 of the Transfer Agreement adjusted the areas within which Treaty 8 Indians would thereafter be able to engage in their traditional way of life, given the oral and archival evidence with respect to the negotiation of Treaty No. 8 and the pivotal nature of the guarantee concerning hunting, fishing and trapping, one should be extremely hesitant about accepting the proposition that para. 12 of the Transfer Agreement was also designed to place serious and invidious restrictions on the range of hunting, fishing and trapping related activities that Treaty 8 Indians could continue to engage in. In so saying I am fully aware that this Court has stated on previous occasions that it is not in a position to question an unambiguous decision on the part of the federal government to modify its treaty obligations: Sikyea v. The Queen, [1964] S.C.R. 642, R. v. George, [1966] S.C.R. 267, and Moosehunter v. The Queen, [1981] 1 S.C.R. 282, at p. 293. We must, however, be satisfied that the federal government did make an "unambiguous decision" to renege on its Treaty 8 obligations when it signed the 1930 Transfer Agreement.

The respondent in this appeal has not pointed to any historical evidence in support of its claim that para. 12 of the Transfer Agreement was intended to limit the Indians' traditional right to hunt and fish (which included a right of exchange) to one confined to hunting and fishing for personal consumption only. Absent such evidence, and in view of the implications of bad faith on the part of the federal government which would arise from it, I am not prepared to accept that this was the legislature's intent. Indeed, it seems to me that in R. v. Sutherland, [1980] 2 S.C.R. 451, which dealt with an analogous provision in the Transfer Agreement with Manitoba, Dickson J. was concerned to make clear that the restrictive approach favoured by the respondent is entirely inappropriate. He stated at p. 461:

Paragraph 13 of the Memorandum of Agreement, it is true, makes provincial game laws applicable to the Indians within the boundaries of the Province, but with the large and important proviso that assures them, inter alia, the "right" to hunt game at all seasons of the year for food on lands to which the Indians may have a right of access. This proviso should be given a broad and liberal construction. History supports such an interpretation as do the plain words of the proviso. The right assured is, in my view, the right to hunt game (any and all game), for food, at all seasons of the year (not just "open seasons") on lands to which they have a right of access (for hunting, trapping and fishing). [Emphasis added.]

Nevertheless, the respondent argues that the use of the words "for food" in para. 12 of the Transfer Agreement have this effect. They demonstrate, he submits, an intention on the part of the legislature to place substantial limits on the range of hunting related activities that Treaty 8 Indians can pursue free from provincial regulation. The respondent submits that Treaty 8 Indians can only derive protection from para. 12 if the purpose for which they are hunting is to feed themselves or their families and that because Mr. Horseman did not kill the bear with this purpose in mind his act falls outside the ambit of para. 12.

While the respondent suggests that this Court's jurisprudence on para. 12 and analogous provisions in other Transfer Agreements supports its restrictive reading of the proviso, I am of the view that this Court's previous decisions with respect to the language of para. 12 (and its equivalent in other Transfer Agreements) do not require the Court to construe the term "for food" in such a narrow and restricted manner. Given that Treaty No. 8 embodied a solemn engagement on the part of the government of Canada to respect a way of life that was built around hunting, fishing and trapping, given that our courts have on a number of occasions emphasized that we should seek to give meaning to the language used in para. 12 by looking to Treaty No. 8, and given that this Court's decision in Sutherland urged that para. 12 be given a "broad and liberal" construction, it seems to me that we should be very reluctant to accept any reading of the term "for food" that would constitute a profound inroad into the ability of Treaty 8 Indians to engage in the traditional way of life which they believed had been secured to them by the treaty.

I note that in Frank v. The Queen, supra, a case that involved a treaty Indian who had killed a moose, Dickson J. suggested (supra, at pp. 100-101) that, whereas under Treaty 6 hunting rights had been at large, under para. 12 they were now limited to hunting "for food" and that, as a result of para. 12, rights to hunt and fish otherwise than "for food" were subject to provincial game laws. But Dickson J. was quick to stress that in the case before him "these differences are unimportant because the appellant was hunting for food and upon land touched by both Treaty and Agreement" (p. 100). In other words, while the presence of the term "for food" clearly meant that after 1930 the province of Alberta had the power to regulate hunting that was not "for food", Dickson J. saw no need in that case to explore in detail the nature of the distinction between hunting "for food" and hunting for other purposes.

In Moosehunter v. The Queen, supra, a case that involved a treaty Indian who had killed deer in Manitoba, Dickson J. did have occasion to consider the nature of the dividing line created by the term "for food" in somewhat more detail. He observed at p. 285:

The reason or purpose underlying paragraph 12 was to secure to the Indians a supply of game and fish for their support and subsistence and clearly to permit hunting, trapping and fishing for food at all seasons of the year on all unoccupied Crown lands and lands to which the Indians had

access. The Agreement had the effect of merging and consolidating the treaty rights of the Indians in the area and restricting the power of the provinces to regulate the Indians' right to hunt for food. The right of Indians to hunt for sport or commercially could be regulated by provincial game laws but the right to hunt for food could not. [Emphasis added.]

In my view, the distinction that Dickson J. drew in Moosehunter between hunting for "support and subsistence", and hunting for "sport or commercially" is far more consistent with the spirit of Treaty No. 8 and with the proposition that one should not assume that the legislature intended to abrogate or derogate from Treaty 8 hunting rights than the respondent's submission that in using the term "for food" the legislature intended to restrict Treaty 8 hunting rights to hunting for direct consumption of the product of the hunt. And if we are to give para. 12 the "broad and liberal" construction called for in Sutherland, a construction that reflects the principle enunciated in Nowegijick and Simon that statutes relating to Indians must be given a "fair, large and liberal construction", then we should be prepared to accept that the range of activity encompassed by the term "for food" extends to hunting for "support and subsistence", i.e. hunting not only for direct consumption but also hunting in order to exchange the product of the hunt for other items as was their wont, as opposed to purely commercial or sport hunting.

And, indeed, when one thinks of it this makes excellent sense. The whole emphasis of Treaty No. 8 was on the preservation of the Indian's traditional way of life. But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern civilization over the next one hundred years. Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food". It will, of course, be a question of fact in each case whether a sale is made for purposes of sustenance or for purely commercial profit.

If we are to be sensitive to Professor Ray's observation that the distinction between hunting for commerce and domestic hunting is not one that can readily be imposed on the Indian hunting practices protected by Treaty No. 8, and if we are to approach para. 12 as a proviso that was intended to respect the guarantees enshrined in Treaty No. 8 (which I think we must do if at all possible), then para. 12 must be construed as a provision conferring on the province of Alberta the power to regulate sport hunting and hunting for purely commercial purposes rather than as a provision that was to enable the province to place serious and invidious restrictions on the Indians' right to hunt for "support and subsistence" in the broader sense.

When the phrase "for food" is read in this way para. 12 of the Transfer Agreement remains faithful to the Treaty 8 Commissioners' solemn engagement that the government of Canada would only enact "such laws as to hunting as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals" and that Treaty 8 Indians "would be free to hunt and fish after the treaty as they would be if they never entered into it". While Treaty 8 Indians and the government of Canada may not have foreseen in 1899 that limits would one day have to be placed on the extent to which people could engage in commercial and sport hunting, such restrictions are obviously necessary today in order to preserve particular species.

Provided such restrictions on commercial and sport hunting are imposed in order to preserve species that might otherwise be endangered, the government would appear to be acting in the interests of the Indians in maintaining the well-being of the environment that is the pre-condition to their ability to pursue their traditional way of life. Such restrictions are entirely consistent with the spirit and language of Treaty No. 8. What is not consistent with the spirit and language of Treaty No. 8 is to restrict the ability of the Indians to hunt for "support and subsistence" unless this restriction also is required for the preservation of species threatened with extinction.

In summary, it seems to me that the term hunting "for food" was designed to draw a distinction between traditional hunting practices that the Indians were to be free to pursue and sport hunting or hunting for purely commercial purposes. And if we are to avoid paying mere lip-service to the interpretive principles set out in Nowegijick and Simon, principles that require us to resolve ambiguities with respect to the language of statutes like the Transfer Agreement in favour of the Indians, then any uncertainties regarding the nature of the boundary between purely commercial or sport hunting and the Indians' traditional hunting practices must be resolved by favouring an interpretation of para. 12 of the Transfer Agreement that gives the province of Alberta the power to regulate commercial and sport hunting but that leaves traditional Indian hunting practices untouched.

My colleague, Cory J., takes a different view. He concludes that para. 12 of the Transfer Agreement was designed to "cut down the scope of Indian hunting rights" and that there was a "quid pro quo" granted to the Indians by the Crown for the reduction in hunting rights. Describing this "quid pro quo", Cory J. suggests that the "area of hunting and the way in which the hunting could be conducted was extended and removed from the jurisdiction of provincial governments". But in my view the historical evidence suggests both that the Indians had been guaranteed the right to hunt for their support and subsistence in the manner that they wished some four decades before the Transfer Agreement was ratified and that it is doubtful whether the provinces were ever in a legitimate constitutional position to regulate that form of hunting prior to the Transfer Agreement. As a result, I have difficulty in accepting my colleague's conclusion that the Transfer Agreement involved some sort of expansion of these hunting rights. Moreover, it seems to me somewhat disingenuous to attempt to justify any unilateral "cutting down of hunting rights" by the use of terminology connoting a reciprocal process in which contracting parties engage in a mutual exchange of promises. Be that as it may, I see no evidence at all that the federal government intended to renege in any way from the solemn engagement embodied in Treaty No. 8.

The Case at Bar

The learned trial judge found as a fact that the appellant killed the bear in self-defence and not with a view to selling, exchanging or bartering its hide. It is difficult therefore to describe Mr. Horseman's act as hunting for commerce or sport. Indeed, it is difficult to describe Mr. Horseman's act as "hunting" at all. It would be passing strange if the government of Canada in enacting the Transfer Agreement of 1930 intended to put Treaty 8 Indians in the absurd position of being penalized for defending themselves against attack by wild animals. Nor, with respect, can I accept my colleague's suggestion that Parliament believed that if Treaty 8 Indians were exempted from provincial regulations if they killed an animal in self-defence, they would try to circumvent such regulations by making duplicitous claims to this effect.

Section 42 of the Wildlife Act states that "no person shall traffic in any wildlife except as is expressly permitted by this Act or by the regulations". I have already suggested that while the federal government may have the power to regulate trafficking in wildlife provided that such regulation is in the interest of the Indians, the provincial government has no power to regulate Indian practices that fall within the Indians' traditional way of life and that are linked to their support and subsistence. In so far as Treaty 8 Indians are concerned, the government of Alberta is limited to regulation of purely commercial and sport hunting.

The trial judge stated:

Keeping in mind the necessity of making factual findings in every case that comes before the court, I find that Mr. Horseman sold the grizzly bear hide in a manner, and for a purpose consistent with the tradition of his ancestors, that is "for the purposes of subsistence and exchange". I find that Mr. Horseman did not engage in a commercial transaction, that is one having profit as a primary aim.

She concluded therefore that Mr. Horseman's act fell outside the range of activities which the province of Alberta could regulate by means of the Wildlife Act. This result accords with common sense. While the province may be able to limit the Indians' right to traffic in hides where such trafficking forms part of a commercial venture or is the result of sport hunting, it does not, in my view, have the power to regulate an isolated sale that is the result of an act of self-defence. All the more so when the hide was sold by Mr. Horseman, as the trial judge found on the facts, not for commercial profit but to buy food for his family.

I would allow the appeal, set aside the order of the Court of Appeal, and restore the acquittal. I would answer the constitutional question as follows:

Question:

Between February 1, 1984 and May 30, 1984, was s. 42 of the Wildlife Act, R.S.A. 1980, c. W-9, constitutionally applicable to Treaty 8 Indians in virtue of the hunting rights granted to them under the said Treaty? In particular, were the hunting rights granted by Treaty No. 8 of 1899 extinguished, reduced or modified by para. 12 of the Alberta Natural Resources Transfer Agreement, as confirmed by the Constitution Act, 1930?

Answer:

Section 42 of the Wildlife Act was applicable to Treaty 8 Indians only to the extent that they were engaged in commercial or sport hunting. The Treaty 8 hunting rights were neither extinguished nor reduced by para. 12 of the Alberta Natural Resources Transfer Agreement. The territorial limits within which they could be exercised were, however, modified by para. 12.

The judgment of Lamer, La Forest, Gonthier and Cory JJ. was delivered by

Cory J. -- At issue on this appeal is whether the provisions of s. 42 and s. 1(s) of the Wildlife Act, R.S.A. 1980, c. W-9, apply to the appellant, whose forebears were members of one of the Indian Bands party to Treaty No. 8 signed in 1899 which guaranteed substantive hunting rights to certain Indian people.

Factual Background

The facts are not in dispute and were agreed upon at trial. Mr. Bert Horseman is an Indian within the meaning of the Indian Act, R.S.C. 1970, c. I-6. He is a descendant of the Indian people who were parties to Treaty No. 8. He is a member of the Horse Lakes Indian Band No. 196 and resides on that Reserve which is some 40 miles northwest of Grande Prairie, Alberta.

In the spring of 1983 the appellant went moose hunting in the territory north of his Reserve in order to feed himself and his family. This he was entitled to do pursuant to the provisions of Treaty No. 8. He was successful in his hunt. He shot a moose, cut it and skinned it. The moose was too large for the appellant to bring back to the Reserve. He therefore hurried home to obtain the assistance of other Band members to haul it out of the bush. When they arrived at the carcass the appellant and his friends were unpleasantly surprised to find that a grizzly bear had appropriated the moose. The arrival of the appellant was even more unpleasant and upsetting for the bear, which by this time clearly believed it had acquired a valid possessory title to the moose. Faced with the conflicting claim, the bear charged the appellant. Bert Horseman displayed cool courage and skill under attack. He shot and killed the bear, skinned it and took the hide.

A scant few years ago the appellant no doubt would have been congratulated for his display of skill and courage and indeed his survival in dangerous and desperate circumstances. However, life in our time is not so simple and trouble of a different sort than charging grizzlies was looming on the horizon for the appellant. Horseman did not have a licence under the Wildlife Act to hunt grizzly bears or sell their hides. This omission ordinarily could be readily excused for neither the presence of the bear nor its attack could have been foreseen.

One year later, in the spring of 1984, the appellant found himself in the unfortunate position of being out of work and in need of money to support his family. In these straitened circumstances he decided to sell the grizzly hide. On or about April 19th he applied for and was issued a grizzly bear licence under s. 18 of the Wildlife Act. This licence entitled him to hunt and kill one bear and sell the hide to a licensed dealer as provided by the regulations passed pursuant to that Act. The appellant made use of this licence to sell the hide of his adversary of the year before to a licensed dealer for a price of $200. This isolated sale, which was clearly not part of any organized commercial transaction, took place between April 19th and May 22nd.

There can be no doubt of the financial needs of the appellant nor of his good faith. He certainly made efforts to stay within the spirit of the law. Nevertheless, an information was laid against him in July of 1984 charging him with trafficking in wildlife. The charge was set forth in these words:

[The appellant] between the 1st day of February A.D. 1984 and the 30th day of May A.D. 1984 at or near Beaverlodge within the Province of Alberta did UNLAWFULLY traffic in wildlife, to wit a Grizzly Bear Hide except as is expressly permitted by the Wildlife Act or by the regulations.

CONTRARY to the provisions of Section 42 of the Wildlife Act and amendments thereto.

The sole defence raised on behalf of Horseman was that the Wildlife Act did not apply to him and that he was within his Treaty 8 rights when he sold the bear hide. Nothing is to turn on the killing of the bear in self-defence. Nor is it argued that Horseman was induced into a mistake of

the law by the words of an official of the Government. Rather, it is the appellant's position that he can, at any time, on Crown lands or on lands to which Indians have access, kill a grizzly bear for food. Further, it is said that he can sell the hide of any grizzly bear he kills in order to buy food.

The Courts Below

Provincial Court

The Provincial Court judge found that the hunting rights described in Treaty No. 8 were not limited to simply taking game for subsistence but included rights of trading and bartering in game: [1986] C.N.L.R. 79. She concluded that although s. 42 of the Wildlife Act of Alberta was a law of general application the Treaty 8 rights included the right to barter. Thus the appellant had not exceeded his Treaty rights when he sold the bear hide.

The Court of Queen's Bench

The judge of the Court of Queen's Bench set aside the acquittal and convicted the appellant and imposed the minimum fine provided by the Act of $100: (1986), 69 A.R. 13, [1986] 2 C.N.L.R. 94. The judge was of the view that Treaty 8 rights had been specifically restricted as a result of the Natural Resources Transfer Agreement of 1930 which in his view limited the rights of the Indians to trapping, fishing and hunting only for food. In his opinion if the product of the hunt was involved in a multi-stage process whereby it was sold to obtain funds, even though those funds might be used for the purchase of food, then the activity had proceeded beyond hunting "for food" and had entered the domain of commerce. Further, he expressed the view that s. 42 of the Wildlife Act was of general application and that Horseman was bound by it.

The Court of Appeal

The Court of Appeal upheld the decision of the Court of Queen's Bench: (1987), 53 Alta. L.R. (2d) 146, 78 A.R. 351, [1987] 5 W.W.R. 454, [1987] 4 C.N.L.R. 99. It too was of the view that the effect of para. 12 of the Transfer Agreement was to restrict the Indian rights to hunting, trapping and fishing for food only. The Court of Appeal was also of the view that s. 42 of the Wildlife Act was of general application and that Horseman was bound by it.

Applicable Legislation

Treaty No. 8, 1899:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Constitution Act, 1930:

1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the Constitution Act, 1867, or any Act amending the

same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

Natural Resources Transfer Agreement, 1930 (Alberta):

12In 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.

Wildlife Act, R.S.A. 1980, c. W-9:

42 No person shall traffic in any wildlife except as is expressly permitted by this Act or by the regulations.

1 . . .

. . .

(s) "traffic" means any single act of selling, offering for sale, buying, bartering, soliciting or trading;

Treaty and Hunting Rights

An examination of the historical background leading to the negotiations for Treaty No. 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the Treaty included hunting for commercial purposes. The Indians wished to protect the hunting rights which they possessed before the Treaty came into effect and the Federal Government wished to protect the native economy which was based upon those hunting rights. It can be seen that the Indians ceded title to the Treaty 8 lands on the condition that they could reserve exclusively to themselves "their usual vocations of hunting, trapping and fishing throughout the tracts surrendered".

The economy of the Indian population at the time of the Treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life. In his Commentary on Economic History of Treaty 8 Area (unpublished; June 13, 1985), Professor Ray notes at p. 4:

The Indians indicated to the Treaty 8 commissioners that they wanted assurances that the government would look after their needs in times of hardships before they would sign the treaty. The Commissioners responded by stressing that the government did not want Indians to abandon their traditional economic activities and become wards of the state. Indeed, one of the reasons that the Northwest Game Act of 1894 had been enacted was to preserve the resource base of the native economies outside of organized territories. The government feared that the collapse of these economies would throw a great burden onto the state such as had occurred when the bison economy of the prairies failed.

Professor Ray, in conclusion on this point, states at pp. 8-9:

[C]ommercial provision hunting was an important aspect of the commercial hunting economy of the region from the onset of the fur trade in the late 18th century. However, no data exists that makes it possible to determine what proportion of the native hunt was intended to obtain provisions for domestic use as opposed to exchange.

Furthermore, in terms of economic history, I am not sure any attempts to make such distinctions would be very meaningful in that Indians often killed animals, such as beaver, primarily to obtain pelts for trade. However, the Indians consumed beaver meat and in many areas it was an important component of the diet. Conversely, moose, caribou and wood buffalo were killed in order to obtain meat for consumption and for trade. Similarly, the hides of these animals were used by Indians and they were traded. For these reasons, differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact.

The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government of Canada lends further support to this conclusion where they wrote (at p. 6):

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

I am in complete agreement with the finding of the trial judge that the original Treaty right clearly included hunting for purposes of commerce. The next question that must be resolved is whether or not that right was in any way limited or affected by the Transfer Agreement of 1930.

The Effect of the 1930 Transfer Agreement

At the outset two established principles must be borne in mind. First, the onus of proving either express or implicit extinguishment lies upon the Crown. See Simon v. The Queen, [1985] 2 S.C.R. 387; Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313. Secondly, any ambiguities in the wording of the Treaty or document must be resolved in favour of the Native people. This was expressed by Dickson J., as he then was, speaking for the Court in Nowegijick v. The Queen, [1983] 1 S.C.R. 29, at p. 36, in these words:

. . . treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

The appellant argues that the Transfer Agreement of 1930 was not signed by the Indians. Since they were not a party to it, they could not have agreed to any restriction of their hunting and fishing rights and that these rights could not have been lost as a result of the operation of what has been called the "merger and consolidation" theory.

The Crown on the other hand states that it is clear from the wording of para. 12 itself that the

hunting rights were limited by the Agreement. The wording again is as follows:

> 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. [Emphasis added.]

The Crown argues that the rights granted to the Indians by the Treaty of 1899 were "merged and consolidated" in the 1930 Transfer Agreement. The Crown further submits that the limiting meaning of these words has been noted and upheld by this Court in Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695; Frank v. The Queen, [1978] 1 S.C.R. 95; R. v. Sutherland, [1980] 2 S.C.R. 451, at p. 460, and Moosehunter v. The Queen, [1981] 1 S.C.R. 282.

The merger and consolidation theory was first put forward by McNiven J.A. in R. v. Strongquill (1953), 8 W.W.R. (N.S.) 247 (Sask. C.A.) He stated at pp. 267-68:

Pars. 10, 11 and 12 of the said agreement refer to Indians and with respect to the matters therein dealt with the rights heretofore enjoyed by the Indians whether by treaty or by statute were merged and consolidated. Vide Rex v. Smith, [1935] 2 WWR 433, 64 CCC 131, where Turgeon, J.A. says at p. 436:

"It follows therefore that whatever the situation may have been in earlier years the extent to which Indians are now exempted from the operation of the game laws of Saskatchewan is to be determined by an interpretation of par. 12, given force of law by this Imperial statute."

In Cardinal v. Attorney General of Alberta, supra, Martland J., for the majority, expressed the opinion that the 1930 Transfer Agreement operated so as to extend provincial jurisdiction in the form of game laws to Indian Reserves. At page 707 he wrote:

The opening words of the section define its purpose. It is to secure to the Indians of the Province a continuing supply of game and fish for their support and subsistence. It is to achieve that purpose that Indians within the boundaries of the Province are to conform to Provincial game laws, subject, always, to their right to hunt and fish for food.

In later decisions Dickson J., as he then was, adopted this approach. It was his view that the Transfer Agreement operated so as to cut down the scope of Indian hunting rights. In Frank v. The Queen, supra, at p. 100, he commented:

It would appear that the overall purpose of the para. 12 of the Natural Resources Transfer Agreement was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food.

Similarly in Moosehunter v. The Queen, supra, at p. 285, he wrote:

The Agreement had the effect of merging and consolidating the treaty rights of the Indians in

the area and restricting the power of the provinces to regulate the Indians' right to hunt for food. The right of Indians to hunt for sport or commercially could be regulated by provincial game laws but the right to hunt for food could not.

The appellant contends that these authorities should not be followed. The position is three-fold. Firstly, it is argued that when it is looked at in its historical context, the 1930 Transfer Agreement was meant to protect the rights of Indians and not to derogate from those rights. Secondly, and most importantly, it is contended that the traditional hunting rights granted to Indians by Treaty No. 8 could not be reduced or abridged in any way without some form of approval and consent given by the Indians, the parties most affected by the derogation, and without some form of compensation or quid pro quo for the reduction in the hunting rights. Thirdly, it is said that on policy grounds the Crown should not undertake to unilaterally change and derogate the Treaty rights granted earlier. To permit such a course of action could only lead to the dishonour of the Crown. It is argued that there rests upon the Crown an obligation to uphold the original Native interests protected by the Treaty. That is to say, the Crown should be looked upon as a trustee of the Native hunting rights.

These contentions cannot be accepted. The short answer to the appellant's position is that para. 12 of the 1930 Transfer Agreement was carefully considered and interpreted by Chief Justice Dickson in the three recent cases of Frank v. The Queen, supra; R. v. Sutherland, supra, and Moosehunter v. The Queen, supra. These cases dealt with the analogous problems arising from the Transfer Agreements with Manitoba and Saskatchewan which were worded in precisely the same way as the Transfer Agreement with Alberta under consideration in this case. These reasons constitute the carefully considered recent opinion of this Court. They are just as persuasive today as they were when they were released. Nothing in the appellant's submission would lead me to vary in any way the reasons so well and clearly expressed in those cases.

It is also clear that the Transfer Agreements were meant to modify the division of powers originally set out in the Constitution Act, 1867 (formerly the British North America Act, 1867). Section 1 of the Constitution Act, 1930 is unambiguous in this regard: "The agreements . . . shall have the force of law notwithstanding anything in the Constitution Act, 1867 . . ." .

In addition, there was in fact a quid pro quo granted by the Crown for the reduction in the hunting right. 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. It can be seen that the quid pro quo was substantial. Both the area of hunting and the way in which the hunting could be conducted was extended and removed from the jurisdiction of provincial governments.

The true effect of para. 12 of the Agreement was recognized by Laskin J., as he then was, in

Cardinal, supra, at p. 722, where he wrote:

[Section 12] is concerned rather with Indians as such, and with guaranteeing to them a continuing right to hunt, trap and fish for food regardless of provincial game laws which would otherwise confine Indians in parts of the Province that are under provincial administration. Although inelegantly expressed, s. 12 does not expand provincial legislative power but contracts it. Indians are to have the right to take game and fish for food from all unoccupied Crown lands (these would certainly not include Reserves) and from all other lands to which they may have a right of access. There is hence, by virtue of the sanction of the British North America Act, 1930, a limitation upon provincial authority regardless of whether or not Parliament legislates. [Emphasis added.]

This effect of para. 12 of the Agreement was also recognized by Dickson J., as he then was, in Myran v. The Queen, [1976] 2 S.C.R. 137, at p. 141:

I think it is clear from Prince and Myron that an Indian of the Province is free to hunt or trap game in such numbers, at such times of the year, by such means or methods and with such contrivances, as he may wish, provided he is doing so in order to obtain food for his own use and on unoccupied Crown lands or other lands to which he may have a right of access.

It is thus apparent that although the Transfer Agreement modified the Treaty rights as to hunting, there was a very real quid pro quo which extended the Native rights to hunt for food. In addition, although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native peoples affected, nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned and has not been challenged in this case.

Further, it must be remembered that Treaty No. 8 itself did not grant an unfettered right to hunt. That right was to be exercised "subject to such regulations as may from time to time be made by the Government of the country". This provision is clearly in line with the original position of the Commissioners who were bargaining with the Indians. The Commissioners specifically observed that the right of the Indians to hunt, trap and fish as they always had done would continue with the proviso that these rights would have to be exercised subject to such laws as were necessary to protect the fish and fur bearing animals on which the Indians depended for their sustenance and livelihood.

Before the turn of the century the federal game laws of the Unorganized Territories provided for a total ban on hunting certain species (bison and musk oxen) in order to preserve both the species and the supply of game for Indians in the future. See The Unorganized Territories' Game Preservation Act, 1894, S.C. 1894, c. 31, ss. 2, 4 to 8 and 26. Even then the advances in firearms and the more efficient techniques of hunting and trapping, coupled with the habitat loss and the over-exploitation of game, (undoubtedly by Europeans more than by Indians), had made it essential to impose conservation measures to preserve species and to provide for hunting for future generations. Moreover, beginning in 1890, provision was made in the federal Indian Act for the Superintendent General to make the game laws of Manitoba and the Unorganized Territories applicable to Indians. See An Act further to amend "The Indian Act" chapter forty-three of the Revised Statutes, S.C. 1890, c. 29, s. 10. A similar provision was in force in 1930. See Indian Act, R.S.C. 1927, c. 98, s. 69.

Obviously at the time the Treaty was made only the Federal Government had jurisdiction over the territory affected and it was the only contemplated "government of the country". The Transfer Agreement of 1930 changed the governmental authority which might regulate aspects of hunting in the interests of conservation. This change of governmental authority did not contradict the spirit of the original Agreement as evidenced by federal and provincial regulations in effect at the time. Even in 1899 conservation was a matter of concern for the governmental authority.

In summary, the hunting rights granted by the 1899 Treaty were not unlimited. Rather they were subject to governmental regulation. The 1930 Agreement widened the hunting territory and the means by which the Indians could hunt for food thus providing a real quid pro quo for the reduction in the right to hunt for purposes of commerce granted by the Treaty of 1899. The right of the Federal Government to act unilaterally in that manner is unquestioned. I therefore conclude that the 1930 Transfer Agreement did alter the nature of the hunting rights originally guaranteed by Treaty No. 8.

Section 42 of the Wildlife Act

At the outset it must be recognized that the Wildlife Act is a provincial law of general application affecting Indians not qua Indians but rather as inhabitants of the Province. It follows that the Act can be applicable to Indians pursuant to the provisions of s. 88 of the Indian Act so long as it does not conflict with a treaty right. It has been seen that the Treaty No. 8 hunting rights have been limited by the provisions of the 1930 Transfer Agreement to the right to hunt for food, that is to say, for sustenance for the individual Indian or the Indian's family. In the case at bar the sale of the bear hide was part of a "multi-stage process" whereby the product was sold to obtain funds for purposes which might include purchasing food for nourishment. The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as amended by the 1930 Transfer Agreement. Thus the application of s. 42 to Indians who are hunting for commercial purposes is not precluded by s. 88 of the Indian Act.

The fact that a grizzly bear was killed by the appellant in self-defence must engender admiration and sympathy, but it is unfortunately not relevant to a consideration of whether there has been a breach of s. 42 of the Wildlife Act. Obviously if it were permissible to traffic in hides of grizzly bears that were killed in self-defence, then the numbers of bears slain in self-defence could be expected to increase dramatically. Unfortunate as it may be in this case, the prohibition against trafficking in bear hides without a licence cannot admit of any exceptions.

Neither, regrettably, can it be relevant to the breach of the s. 42 that the appellant in fact obtained a grizzly bear hunting permit after he was in the possession of a bear hide. The granting of a permit does not bring a hunter any guarantee of success but only an opportunity to legitimately slay a bear. The evidence presented at trial indicated that the limitations placed upon obtaining a licence and the limited chance of success in a bear hunt resulted in the success rate of between 2 and 4 per cent of the licence holder. This must be an important factor in the management of the bear population. Wildlife administrators must be able to rely on the success ratio and proceed on the assumption that those applying for a permit have not already shot a bear. The success ratio will determine the number of licenses issued in any year. The whole

management scheme which is essential to the survival of the grizzly bear would be undermined if a licence were granted to an applicant who had already completed a successful hunt.

As well, s. 42 of the Wildlife Act is consistent with the very spirit of Treaty No. 8, which specified that the right to hunt would still be subject to government regulations. The evidence indicates that there remain only 575 grizzly bears on provincial lands. This population cannot sustain a mortality rate higher than 11 per cent per annum if it is even to maintain its present numbers. The statistics indicate that the population will decline if death resulting from natural causes, legal hunting and poaching (and indications are that levels of poaching match legal takings) reached a total of more than 60 bears in a year. The grizzly bear requires a large range and is particularly sensitive to encroachment on its habitat. This magnificent animal is in a truly precarious position. All Canadians and particularly Indians who have a rich and admirable history and tradition of respect for and harmony with all forms of life, will applaud and support regulations which encourage the bears' survival. Trafficking in bear hides, other than pursuant to the provisions of the Wildlife Act, threatens the very existence of the grizzly bear. The bear may snarl defiance and even occasionally launch a desperate attack upon man, but until such time as it masters the operation of firearms, it cannot triumph and must rely on man for protection and indeed for survival. That protection is provided by the Wildlife Act, but if it is to succeed it must be strictly enforced.

Section 42 of the Wildlife Act is valid legislation enacted by the government with jurisdiction in the field. It reflects a bona fide concern for the preservation of a species. It is a law of general application which does not infringe upon the Treaty 8 hunting rights of Indians as limited by the 1930 Transfer Agreement.

Disposition

In the result, I would dismiss the appeal. The constitutional question posed should be answered as follows:

Question:

Between February 1, 1984 and May 30, 1984, was s. 42 of the Wildlife Act, R.S.A. 1980, c. W-9, constitutionally applicable to Treaty 8 Indians in virtue of the hunting rights granted to them under the said Treaty? In particular, were the hunting rights granted by Treaty No. 8 of 1899 extinguished, reduced or modified by para. 12 of the Alberta Natural Resources Transfer Agreement, as confirmed by the Constitution Act, 1930?

Answer:

The answer to both queries framed in the Question should be in the affirmative.

The Wildlife Act applied to the appellant and Horseman is guilty of violating s. 42 of the Act. Nonetheless he did not seek out the bear and shot it only in self-defence. The trial judge found that he acted in good faith when he obtained the license to hunt bear. He was in financial difficulties when he sold the bear hide in an isolated transaction. He has provided the means whereby the application of the Wildlife Act to Indians was explored. If it were not for statutory requirement of a minimum fine, in the unique circumstances of the case, I would vary the sentence by waiving the payment of the minimum fine. Nevertheless, in light of the

circumstances of the case, and the time that has elapsed, I would order a stay of proceedings. There should be no order as to costs.

Appeal dismissed, Dickson C.J. and Wilson and L'Heureux-Dubé JJ. dissenting.

Solicitors for the appellant: Rogers & Company, Calgary.Solicitor for the respondent: The Attorney General for Alberta, Edmonton.Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.Solicitor for the intervener the Attorney General for Saskatchewan: The Department of Justice, Regina.