FOREST MANAGEMENT IN ALBERTA AND RIGHTS TO HUNT, TRAP AND FISH UNDER TREATY 8

MONIQUE M. ROSS AND CHERYL Y. SHARVIT*

In this article, the authors discuss the principles of interpretation applicable to treaties and how these principles apply to Treaty 8. This analysis leads to the suggestion that Alberta's current regulatory scheme for allocating and managing timber harvesting rights over traditional lands of the Cree and Dene (signatories to Treaty 8) may breach the terms of the treaty. The authors further consider Treaty 8 and the Natural Resources Transfer Agreement (NRTA) in relation to constitutional principles — division of powers and s. 35(1) of the Constitution Act, 1982. *Finally, the authors demonstrate that the rights to hunt, trap and fish, guaranteed to the signatories of Treaty 8 and confirmed by the NRTA, exist today and are arguably being infringed unjustifiably by Alberta's forest management regime.*

Les auteures se penchent sur les principes d'interprétation applicables aux traités en général et au traité n° 8 en particulier. L'analyse les conduit à suggérer que le règlement actuel de l'Alberta sur le partage et la gestion des droits concernant la récolte du bois sur les territoires traditionnels des Dénés et des Cris (signataires du traité n° 8) pourrait manquer aux conditions dudit traité. Les auteures examinent aussi le traité n° 8 et la Convention sur le transfert des ressources naturelles par rapport aux principes constitutionnels — la répartition des pouvoirs et l'art. 35(1) de la Loi constitutionnelle de 1982. *Elles démontrent enfin que les droits de trappage, de chasse et de pêche garantis aux signataires du traité n° 8 et confirmés par la Convention susmentionnée, existent aujourd'hui et pourraient bien se trouver violés de façon injustifiée par le régime d'aménagement forestier de l'Alberta.*

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* Monique M. Ross, Research Associate, Canadian Institute of Resources Law; Cheryl Y. Sharvit, LL.M. student, University of Calgary. The authors thank Professor Nigel Bankes, Jeffrey Rath, Kenneth E. Staroszik, and Kerry Sloan for their helpful comments. Research for this article has been funded by the Sustainable Forest Management Network of Centres of Excellence.

I. INTRODUCTION

Of the numbered treaties blanketing the provinces of what is now Canada, Treaty 8 is the largest, encompassing a vast expanse of lands within the boreal forest, extending from the northwestern corner of Saskatchewan, through the northern half of Alberta, to the northeastern corner of British Columbia east of the Rocky Mountains. The southern boundary of Treaty 8 is the Athabasca River, and its northern limits reach as far as the south shore of Great Slave Lake in the Northwest Territories. The entire Peace-Athabasca River System, which flows into Great Slave Lake, is included within Treaty 8's boundaries.

The Dominion of Canada signed the treaty, motivated by a desire to open the land up for mining operations and railway construction, as well as by the need to address the conflicts occurring between the Aboriginal peoples of the area and white miners, Klondykers and trappers. The two major Aboriginal language groups who were parties to the treaty were the Cree, and Dene (Athapaskans), including Chipewyans, Beavers, Slaveys, Dogribs and Yellowknives.

Initial negotiations began in June of 1899 at Lesser Slave Lake, and Treaty 8 was signed that summer. The Treaty Commissioners, whose role was to negotiate and sign the treaty with the various Aboriginal peoples involved, were David Laird, J.H. Ross, and J.A.J. McKenna. Adhesions involving the Wood Cree, Beaver and Chipewyan peoples were signed between June and August of 1899 in Dunvegan, Peace River Landing, Vermillion, Fort Chipewyan, Smith's Landing, Fond du Lac, Fort McMurray and Wabasca. In the summer of 1900, adhesions were obtained by Commissioner J.A. Macrae with the Beavers of Fort St. John, the Crees of Sturgeon Lake, the Slavey Band of Upper Hay River (now the Dene Tha'), and the Dogribs, Yellowknives, Chipewyans and Slaveys of Fort Resolution.

In Alberta, the lands originally included within the boundaries of Treaty 8 are, for the most part, forested lands which have since been designated by the provincial government as Green Area lands and allocated to timber production and multiple use.[1]

[1] The only exception is an area near the Peace River comprised of patches of parkland, which has been settled and farmed and is designated as White Area. In addition, two national parks (Wood Buffalo and Jasper) under federal jurisdiction are encompassed within the boundaries of Treaty 8.

Since the development in the 1970s of technology to utilize aspen trees for the manufacture of pulp and paper, the pace of timber allocations in the boreal forest has increased dramatically. Whereas, prior to the 1980s, logging activities only affected a small portion of Northern Alberta, extensive areas of the boreal forest inhabited by the Cree and Dene are now overlaid with forest tenures, with the timber resource being utilized to supply five new pulp and paper mills built on the Peace-Athabasca River System between 1988 and 1993. These forestry allocations, as well as the extent and pace of timber logging by means of clearcutting, have raised concerns about the impact of industrial forestry operations on constitutionally protected treaty rights in the northern half of the province.

In this article, the argument is put forward that the current regulatory scheme by which the province allocates and manages timber harvesting rights over traditional lands of the Cree and Dene could be challenged as a breach of the terms of Treaty 8. The treaty grants its Aboriginal signatories and their descendants the right to gain their subsistence through hunting, trapping and fishing. Obviously, the exercise of these rights depends upon the existence and health of habitat and ecosystems, the survival of wildlife populations and access to wildlife. The terms of the treaty, including its oral terms, demonstrate that the parties did not agree to allow the government to promote the depletion or degradation of natural resources and ecosystems for the benefit of the dominant industrial society and to the detriment of Aboriginal peoples' rights, whose exercise depends on resource preservation and health. Accordingly, provincial allocation, use and management of forest resources which jeopardizes a right to gain a subsistence from hunting, trapping or fishing amounts to an infringement of this fundamental right. At a minimum, provincial forestry legislation which prevents or restricts the exercise of these treaty rights should be subjected to a justification test under s. 35(1) of the *Constitution Act, 1982*.[2] Treaty 8, coupled with s. 35(1), arguably imposes an obligation on the province to develop a forest management regime which does not unjustifiably infringe these rights.

The point of departure of this article is an analysis of the terms of Treaty 8 and the 1930 Natural Resources Transfer Agreement (NRTA), in light of the principles of interpretation defined by the Supreme Court of Canada. The nature and extent of the treaty rights, as well as regulatory and geographical limitations on those rights, and the effect of the NRTA on both the rights and the limitations, is considered. The question of the province's jurisdiction to legislate in a manner which interferes with the exercise of treaty rights is examined. Next follows an outline of the protection of treaty rights under s. 35(1) and the limitations imposed on infringements of those rights, including the justification analysis developed by the Supreme Court of Canada in the *R.* v. *Sparrow* case.[3] Finally, the above analysis is applied to the current forest legislation scheme in Alberta.

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[2] Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[3] [1990] 1 S.C.R. 1075 at 1107 [hereinafter *Sparrow*].

II. PRINCIPLES OF INTERPRETATION APPLICABLE TO TREATIES

A. GENERAL PRINCIPLES

It is well accepted by the courts that treaties and statutes relating to Aboriginal peoples "should be given a fair, large and liberal construction in favour of the Indians."[4] Ambiguities and doubtful expressions in the text of treaties must be resolved in favour of Aboriginal interests,[5] and "any limitations which restrict the rights of Indians under treaties must be narrowly construed."[6] As the honour of the Crown is at stake in its dealings with Aboriginal peoples, the Crown is assumed to intend to uphold its promises, and no appearance of "sharp dealing" will be sanctioned by the courts.[7] The treaties must therefore be interpreted in a manner consistent with the Crown's fiduciary duty.[8]

In addition to these general principles of interpretation, the Aboriginal understanding of the terms of a treaty, as well as the oral terms, should be examined to ascertain the intention of the treaty's signatories.

In *R.* v. *Horse*,[9] the Supreme Court of Canada refused to consider evidence concerning the Aboriginal understanding of Treaty No. 6 and its oral promises, concluding that the terms of the treaty were unambiguous. However, in refusing to consider extrinsic evidence, the Court relied on general rules of evidence and thus ignored the special nature of treaties entered into with Aboriginal peoples which distinguishes them from other contracts or treaties. Moreover, this case is an anomaly in Canada on the subject of treaty interpretation; the courts have instead accepted that "written terms alone often will not 'suffice to determine the legal nature of the document'".[10] In *R.* v. *Sioui*, the Supreme Court suggested that the analysis should never be confined to the written text of a treaty,[11] and in *Badger*, a Treaty 8 case, the Court considered extrinsic evidence without a discussion of whether the written text is ambiguous.[12]

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4 *Simon* v. *R.*, [1985] 2 S.C.R. 387 at 402 [hereinafter *Simon*]. See also *Nowegijick* v. *the Queen*, [1983] 1 S.C.R. 29 at 36 [hereinafter *Nowegijick*]; and *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1035 [hereinafter *Sioui*].

5 *Nowegijick*, *ibid.* See also *Jones* v. *Meehan*, 175 U.S. 1 (1899) [hereinafter *Jones*], where the court articulated the principle that in construing treaties, it is not the technical meaning of the words of the text, but the "sense in which they would naturally be understood by the Indians" that prevails; *Sioui*, *supra* note 4 at 1035; *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 86 at 98; and *Saanichton Marina Ltd.* v. *Claxton* (1989), 36 B.C.L.R. (2d) 79 at 88 (C.A.) [hereinafter *Saanichton*].

6 *R.* v. *Badger*, [1996] 1 S.C.R. 771 at 794 [hereinafter *Badger*].

7 *Ibid.*

8 On the fiduciary duty generally, see *Guérin* v. *R.*, [1984] 2 S.C.R. 335.

9 [1988] 1 S.C.R. 187 at 201 [hereinafter *Horse*].

10 P. Macklem, "The Impact of Treaty 9 on Natural Resource Development in Northern Ontario" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 97 at 99.

11 *Sioui*, *supra* note 4 at 1068.

12 *Badger*, *supra* note 6 at 771.

B. THE ABORIGINAL UNDERSTANDING

Canadian courts have adopted the rule enunciated by the U.S. Supreme Court in *Jones* v. *Meehan*,[13] that the Aboriginal understanding is to be preferred over the technical meaning of the words in a treaty.[14] The Supreme Court of Canada has reaffirmed this rule in *Badger*, its most recent judgment concerning Treaty 8:

> [I]t is well settled that the words in a treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted.[15]

In ascertaining the obligations arising from a treaty, then, the courts place particular emphasis on the Aboriginal understanding of its terms. The written text is thus only one element of the terms of a treaty. It records

> an agreement that had already been reached orally and ... [does] not always record the full extent of the oral agreement.... The treaties were drafted in English by representatives of the Canadian government....[16]

It is a fact of history that few Aboriginal signatories could read English and many did not understand English when the treaties were signed. The written text most likely reflects the government's desires more than the Aboriginal understanding of the terms which the parties had agreed to.

Courts must also take into account government's understanding of the treaty; the courts seek to discern a common intention of the parties which reconciles the Aboriginal and colonial interest.[17] Nevertheless, because the text likely represents the government's objectives, the emphasis in examining the historical context is on the Aboriginal understanding.

The intention of the parties is assessed through an examination of the text, the historical context and evidence of the intentions and understanding of the parties. Evidence of the Aboriginal understanding of the treaties is also collected from Aboriginal communities, their oral histories and collective memories.[18] Writers such

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13 *Jones*, *supra* note 5 at 1.

14 *Nowegijick*, *supra* note 4 at 36; *Sparrow*, *supra* note 3 at 1107.

15 *Badger*, *supra* note 6 at 799.

16 *Ibid.* at 798-99. In the case of Treaty 8, the evidence suggests that the treaty was pre-written and not amended to reflect the oral agreement between the parties. R. Fumoleau, *As Long as This Land Shall Last* (Toronto: McLelland and Stewart, 1973) at 74. Hugh Brody also notes that the term "to take treaty" itself implies that the Aboriginal signatories were "accepting a predetermined formula" rather than negotiating the terms of the treaties, as the Aboriginal peoples thought they were (H. Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas & McIntyre, 1981) at 69).

17 *Sioui*, *supra* note 4 at 1069.

18 See, for example, *Badger*, *supra* note 6 at 803.

as Fumoleau and Daniel have interviewed elders who either witnessed the Treaty 8 negotiations or have been told of the details of the negotiations by their parents and grandparents who participated in them.[19] These sources will be relied upon in the discussion of the Aboriginal understanding of Treaty 8.

C. THE ORAL TERMS OF TREATIES

Terms agreed to orally by the parties and promises made during the negotiation of treaties are evidence of a treaty's true terms. Evidence of oral terms and promises is gathered primarily from Commissioners' Reports[20] and witnesses' accounts. The courts place particular emphasis on verbal promises made on behalf of the federal government:

> The Indian people made their agreements orally and recorded their history orally ... the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation.[21]

What the above principles amount to is that a treaty must be liberally interpreted in its historical context and in accordance with the Aboriginal understanding of its terms. Any "evidence by conduct or otherwise as to how the parties understood the treaty"[22] or of promises made on behalf of the federal government is considered along with the written text. These principles will now be applied to Treaty 8 in order to determine: i) the nature of the hunting, trapping and fishing rights granted by the treaty; ii) the regulatory limitation; and iii) the geographical limitation placed on these rights.

III. THE WRITTEN TEXT OF TREATY 8

According to the written version of Treaty 8,[23] its Aboriginal signatories "cede, release, surrender and yield up to the Government of the Dominion of Canada ... all their rights, titles, and privileges whatsoever, to the lands included" within the treaty, and to all other lands in Canada. The treaty reserves to its Aboriginal signatories, and their descendants, rights 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 ... 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.

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19 Fumoleau, *supra* note 16; R. Daniel, "The Spirit and Terms of Treaty Eight" in R. Price, ed., *The Spirit of the Alberta Indian Treaties* (Toronto: Institute for Research on Public Policy, 1979) 47 at 73.

20 Commissioners' Reports were official reports based on the Commissioners' perception of events leading up to the signing of the treaties.

21 *Badger*, *supra* note 6 at 800.

22 *Saanichton*, *supra* note 5 at 85.

23 *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, etc.* (Ottawa: Queen's Printer, 1966) [hereinafter *Treaty No. 8*].

The written text thus indicates that the rights granted to Aboriginal signatories to hunt, trap and fish are limited in two ways, namely geographical and regulatory. These rights may be exercised on the land surrendered except for tracts "required or taken up" for the purposes listed, including "lumbering"; further, they are subject to federal regulation. In order to ascertain the true nature and extent of the rights and the limitations on those rights embodied in Treaty 8, the above-mentioned principles of treaty interpretation must be applied to the written text.

IV. APPLICATION OF THE PRINCIPLES OF TREATY INTERPRETATION TO TREATY 8

The written text of Treaty 8 does not accurately reflect the Aboriginal understanding of its terms. As noted by Fumoleau:

> Many words of the treaty text, their meaning and their consequences, were beyond the comprehension of the northern Indian. Even if the terms had been correctly translated and presented by the interpreters, the Indian was not prepared, culturally, economically or politically, to understand the complex economics and politics underlying the Government's solicitation of his signature.[24]

The evidence of the Slavey Indians who were present during negotiations provides further support for this conclusion:

> ... when the treaty was first signed, it was never explained to the people, they thought they would just give them the money and they would be satisfied.... Treaty rights were not much explained to the people....
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> ... We didn't know the Whiteman's papers and they used long words we couldn't understand...
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> ... They talked nice to us in them days but nobody understood their language ... to be honest, we have no idea what was written on the paper, since we do not speak English nor write it....[25]

When a generous and liberal interpretation is given to Treaty 8, and when the Aboriginal understanding and oral terms are taken into consideration, it becomes clear that the right to pursue usual vocations of hunting, trapping and fishing was in effect a guarantee that the treaty's Aboriginal signatories would be able to continue to earn a livelihood from these activities. Further, the government's ability to take up land, and thus exclude the effective exercise of treaty rights to hunt, trap and fish on such lands, was limited, and likely did not include all the purposes for which trees are harvested today. For example, clearcutting was not anticipated in 1899, nor was the scale of the logging operations which are carried out in the boreal forest.

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[24] Fumoleau, *supra* note 16 at 19. In some instances the treaty was not interpreted properly. For example, during negotiations with the Dene Tha', Louis Cardinal was the interpreter and supposedly explained Treaty 8 to the Dene Tha', yet he only spoke Cree. The Dene Tha' First Nation, *Dene Tha' Traditional Land Use and Occupancy Study* (Calgary: Arctic Institute of North America, 1997) at 4.

[25] Fumoleau, *ibid.* at 95-96.

A. A PEACE TREATY

Evidence gathered by writers such as Fumoleau relating to Treaty 8 negotiations suggests that it was understood to be primarily a peace treaty.[26] The recollection of Aboriginal people is that the Commissioners came in order to make peace: for example, Susie (Joseph) Abel, of the Dogrib Nation, remembered the following:

> The Agent said, "We are not looking for trouble. It will not change your life. We are just making peace between Whites and Indians.... And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone. I have come here to issue this money, that is all."[27]

It thus appears that the Aboriginal signatories signed Treaty 8 in an effort to achieve peace with the white settlers, trappers and gold-seekers who were increasingly invading their territories, harming their game and taking resources from the land. The treaty was intended, according to the understanding of both parties, to ensure a continuance of their way of life in the face of this invasion.

B. THE RIGHTS TO HUNT, TRAP AND FISH

Application of the various rules of interpretation confirms that treaty rights to hunt, trap and fish were intended to protect the Aboriginal way of life. As argued by Macklem in the context of Treaty 9, hunting, trapping and fishing rights

> represent an attempt to protect Aboriginal economic, social, and commercial practices from ... non-Aboriginal economic development. As such, they ought to be viewed as not only conferring the right to engage in the activity listed by the terms of the treaty but also including the right to expect that such activity will continue to be successful, measured by reference to the fruits of past practice.[28]

The essence of the Aboriginal understanding of Treaty 8 and in particular of "the right to pursue their usual vocations of hunting, trapping and fishing" is that it guaranteed they could continue to sustain themselves via these activities. René Fumoleau finds the Northwest Mounted Police patrol reports of 1897-1899 relevant for the purpose of identifying the motives of the Aboriginal signatories for entering into Treaty 8:

> They describe the Indian's way of life, *his complaints as increasing numbers of traders, trappers, and prospectors invade his ancestral hunting grounds*, and his reactions when confronted for the first time with the enforcement of Canadian laws.[29]

The Aboriginal signatories were concerned with protecting their ancestral hunting grounds, including the forests and game,[30] particularly from non-Aboriginal gold

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26 *Ibid.* at 74.
27 *Ibid.* at 90.
28 Macklem, *supra* note 10 at 117.
29 Fumoleau, *supra* note 16 at 51 [emphasis added].
30 *Ibid.* at 65.

seekers and white trappers who had invaded Aboriginal lands and were disrespectful of the Aboriginal way of life. These white men killed horses belonging to Aboriginal peoples and used poisoned bait, causing the Aboriginal peoples to fear the game resources would be depleted.[31]

There is also evidence that at the time of Treaty 8 negotiations, many Aboriginal peoples were in a state of "misery and starvation."[32] The understanding of some of the people at Fort Chipewyan was that their ancestors signed the treaty upon being told that "the Queen will never let your children die from hunger."[33] Intrusion by outsiders into their land was seen as inevitable, and they sought to secure some assurance that their way of life would be protected and that their people would not starve.[34]

The recollection of Antoine Beaulieu, a Chipewyan who witnessed the negotiations at Fort Smith, was as follows: "What I understood then was that they won't stop us from killing anything...."[35] Similarly, the recollection of the Aboriginal peoples who met with the Treaty Party at Fort Resolution was that Louison, who spoke on their behalf, "said that if nothing would change and the Indians would live as they had in the past, he'd agree to take the Treaty money...."[36]

Richard Daniel also concludes that the Aboriginal understanding of the terms of Treaty 8 was that their traditional livelihood was guaranteed, and that some even understood the treaty as leaving them with ownership of the wildlife.[37] He quotes Frank Cardinal, for example, who gained his understanding of Treaty 8 from his father and grandfather who attended the Lesser Slave Lake negotiations:

> The way I see things ... White man will govern his domestic animals.... These are the white man's responsibilities, but the wild animal belongs to the Indian."[38]

In *Re Paulette*'s application, the Northwest Territories Supreme Court heard oral evidence from chiefs as well as from others who remembered the Treaty 8 negotiations.[39] One witness testified that it was the Aboriginal understanding that their hunting and fishing would continue "as long as the sun shall rise and the rivers shall flow...."[40] The Aboriginal understanding was that their way of life was to continue indefinitely.

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31 Daniel, *supra* note 19 at 64; Fumoleau, *supra* note 16 at 65.

32 Fumoleau, *ibid.* at 54.

33 *Ibid.* at 55. See also Daniel, *supra* note 19 at 55, where he notes that the Hudson's Bay Company's power was declining and the Queen taking over. As the HBC had helped the Aboriginal people, "The treaty may have been seen as an opportunity to ensure that the government's generosity would be at least equivalent to that of the Company and the missions."

34 See Fumoleau, *supra* note 16 at 19, 80.

35 *Ibid.* at 82.

36 *Ibid.* at 93.

37 *Daniel*, *supra* note 19 at 82-83.

38 *Ibid.* at 83.

39 [1973] 6 W.W.R. 97 at 118 (N.W.T.S.C.) [hereinafter *Paulette*].

40 *Ibid.* at 121.

While the courts emphasize the Aboriginal understanding of the terms of a treaty, the government's understanding is also relevant. In *Paulette*, Morrow J. concluded as follows with respect to the understanding of the government representatives:

> Throughout the hearings before me there was a common thread in the testimony — that the Indians were repeatedly assured they were not to be deprived of their hunting, fishing and trapping rights. To me, hearing the witnesses at first hand as I did, many of whom were there at the signing, some of them having been directly involved in the treaty-making, *it is almost unbelievable that the Government party could have ever returned from their efforts with any impression but that they had given an assurance in perpetuity to the Indians in the Territories that their traditional use of the lands was not affected.*[41]

Further support for the proposition that what was being guaranteed was a way of life comes from evidence of the oral promises made during negotiation of the treaty. Felix Gibot, a Cree who witnessed the negotiations at Fort Chipewyan, recalled a Commissioner promising that Aboriginal people "can fish in this lake as long as they are alive, and they will make a living out of it."[42] Similarly, Daniel quotes Isador Willier, who stated that Aboriginal signatories were promised that they would always make their living from hunting and fishing, and that no one would ever stop them from obtaining the animals they required for these purposes.[43]

Fumoleau refers to an affidavit of James K. Cornwall[44] which records his recollection of the negotiations at Lesser Slave Lake. He recalled that the Commissioners made the following promises to the Aboriginal people, after informing them that they "had no authority to write it into the Treaty":

> a - Nothing would be allowed to interfere with their way of making a living, as they were accustomed to and as their forefathers had done.
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> ...
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> c - They were guaranteed protection in their way of living as hunters and trappers, from white competition; they would not be prevented from hunting and fishing as they had always done, so as to enable them to earn their living and maintain their existence.[45]

Fumoleau concludes that the Aboriginal peoples only agreed to sign the treaty when promised by the Commissioners that they would be able to hunt, trap and fish for a living and that the exercise of these rights would be "protected against the abuses of white hunters and trappers."[46] The conclusion that Aboriginal signatories were ensured

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41 *Ibid.* at 141 [emphasis added].

42 "Interview with Felix Gibot" in R. Price, ed., *supra* note 19, 155 at 159.

43 Daniel, *supra* note 19 at 93.

44 James K. Cornwall, known as Peace River Jim, was involved in all aspects of transportation in northern Alberta and the Peace River region, building steamships, pioneering new routes and promoting railway companies.

45 Fumoleau, *supra* note 16 at 75.

46 *Ibid.* at 65.

that they could continue to earn their livelihood from hunting, trapping and fishing is confirmed by the Commissioners' Report:

> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges.... We pointed out that ... the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them.[47]

Wilson J., dissenting in *R.* v. *Horseman*, another Treaty 8 case, found that the only conclusion which could be supported by the evidence was that there was an oral agreement in the negotiation of Treaty 8 that the way of life of the Aboriginal signatories would be protected:

> 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 Indian's 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.[48]

She concluded that "Treaty No. 8 embodied a solemn engagement to Indians in the Treaty 8 area that their livelihood would be respected."[49] The totality of the evidence thus suggests that the essence of the rights to hunt, trap and fish is protection of Aboriginal ways of life in perpetuity. This must be kept foremost in mind when interpreting the clauses of the treaty which deal with the limitations on the rights.

C. LIMITATIONS ON THE RIGHTS

As noted above, the rights to hunt, trap and fish in Treaty 8 are made subject to two kinds of limitations, namely regulatory and geographical. First, the rights are "subject to such regulations as may from time to time be made by the Government of the Country." Second, they may be exercised on the land surrendered in the treaty, "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

1. REGULATORY LIMITATION

The following two issues are relevant. First, who is entitled to restrict the treaty rights through regulation? Second, what type of regulation is permitted to restrict the scope of the treaty rights?

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47 *Treaty No. 8*, *supra* note 23 at 5.

48 [1990] 1 S.C.R. 901 at 911 [hereinafter *Horseman*].

49 *Ibid.* at 912.

The text of Treaty 8 states that the rights are subject to regulations made by the "Government of the Country." The identical phrase in Treaty 9 was interpreted in *R.* v. *Batisse* to refer exclusively to the federal government,[50] and the same interpretation was adopted in *R.* v. *Napoleon* and *Horseman* which dealt with Treaty 8.[51] Such an interpretation is not only apparent from the plain meaning of these words, but is also logical in the historical context, since the province of Alberta was not yet in existence when the treaty was negotiated and signed. There is no indication in the historical evidence of any discussion of provincial powers or the relationship between provincial governments and Aboriginal peoples. The question of the provinces' constitutional jurisdiction to affect the exercise of treaty rights is the topic of section VI below.

With respect to the kind of government regulation contemplated by the treaty, the report of the Commissioners is clear that regulation which prevents the continuance of the Aboriginal way of life is not permissible. Rather, treaty rights can only be regulated in a manner which enhances or protects their exercise. The Treaty Commissioners reported that only regulation aimed at resource conservation was to be permitted in the treaty:

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that *only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made*, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.
>
> We assured them that the treaty would not lead to any forced interference with their mode of life....[52]

The treaty thus allows the federal government to pass hunting and fishing laws if such laws are in the interest of the Aboriginal parties *and* necessary for the protection of fish and game. Indeed, such regulations were already in existence in 1899, and thus the majority in *Badger* found that "the Indians would have understood that, by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation."[53]

Similarly, in her dissenting opinion in *Horseman,* Wilson J. stated the following:

> [I]t 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

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50 (1978), 84 D.L.R. (3d) 377 at 383 (Ont. D.C.) [hereinafter *Batisse*].

51 *R.* v. *Napoleon*, [1982] 3 C.N.L.R. 116 at 120 (B.C. Prov. Ct.) [hereinafter *Napoleon*]; *Horseman, supra* note 48 at 935-36.

52 *Treaty No. 8, supra* note 23 at 6 [emphasis added].

53 *Supra* note 6 at 810.

> 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.[54]

The majority judgment in *Horseman,* delivered by Cory J., agreed with Wilson J. on this point, concluding that the rights to hunt, trap and fish were 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."[55] In *R.* v. *Sikyea*, the Northwest Territories Court of Appeal found that this passage from the Commissioners' Report indicated government could only make regulations affecting treaty rights if such regulations were to assure a supply of game to satisfy Aboriginal needs.[56]

The regulatory limitation on the rights reserved to the Aboriginal signatories of Treaty 8 was thus restricted to direct regulation of those rights for conservation purposes, in order to ensure the continued ability of Aboriginal people to exercise their rights. The question which is left unanswered by the text and not expressly addressed in the historical evidence is whether the government could regulate non-Aboriginal use of resources on the ceded territory in a manner which would interfere with the exercise of Treaty 8 rights.

In *Badger,* the Supreme Court found it significant that game laws were already in force in 1899;[57] by contrast, forest legislation permitting large-scale forestry, and use of forest resources to supply pulp and paper mills, was not in existence when the treaty was negotiated, nor could such practices have been contemplated by the parties, especially the Aboriginal signatories. Clearcutting was not introduced on a large scale until the 1970s. Had it been contemplated that forestry laws might interfere with the exercise of hunting, trapping and fishing rights, however, the conditions applicable to hunting, trapping and fishing laws would arguably have applied. Regulation of forest activities must seek to ensure the continued ability of Aboriginal peoples to exercise their rights which rely upon forest resources.

Further, just as it would be unreasonable to furnish the means of hunting and fishing if laws were enacted to render earning a livelihood from such activities impossible through their direct regulation, it would likewise be unreasonable for the government to pass laws allowing forest resources to be used in such a way as to prevent or seriously restrict the exercise of treaty rights. The Aboriginal signatories were promised that they would be as free to hunt and fish as they were before entering into the treaty. It makes little sense to argue that while they were to be free from laws which

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54 *Supra* note 48 at 913.

55 *Ibid.* at 935.

56 (1964), 46 W.W.R. 65 at 68, aff'd (1964), 49 W.W.R. 306 (S.C.C.) [hereinafter *Sikyea*].

57 *Badger, supra* note 6 at 810. See also *R.* v. *Norn*, [1991] 3 C.N.L.R. 135 (Alta. Prov. Ct.) in which Spence J. stated that it was "important to consider [that in 1899] National Parks were in existence and hunting within the Parks was governed by regulations."

unnecessarily restricted the exercise of their rights by limiting Aboriginal use of wildlife resources, they would not be protected from legislation allowing the exploitation of forest resources in a manner which interferes with their ability to earn a livelihood from hunting, trapping and fishing. If the government could not directly interfere with these activities neither could it permit third parties to do so.

Treaty 8 does, however, contemplate the taking up of land for lumbering, amongst other purposes. To what extent are the rights to hunt, trap and fish subject to the taking up by the government of lands for purposes including lumbering, and what is meant by "required or taken up for lumbering"?

2. GEOGRAPHICAL LIMITATION

When placed in its historical context, the geographical limitation on Treaty 8 rights permitting the government to take up land for lumbering does not allow for such limitations as created by much of the forestry developments and practices currently undertaken in Alberta. According to the written text of the treaty, "lands taken up or required for lumbering" become lands on which the Aboriginal signatories no longer have rights to hunt, trap and fish. A generous and liberal interpretation in favour of the Aboriginal parties requires interpreting this limitation narrowly and precludes the suggestion that the Aboriginal signatories agreed that their rights could be unexercisable in the future as a result of extensive tracts being taken up for the harvesting of forest resources. The historical evidence referred to above indicates that Aboriginal signatories agreed to the treaty in order to protect their rights and way of life from non-Aboriginal use of the land.

In *Simon*, the Supreme Court held that the right in the Treaty of 1752 to "have free liberty of hunting and fishing as usual" ensured the Aboriginal signatories to that treaty that it would be "*an effective source of protection of hunting rights.*"[58] The same conclusion should apply to Treaty 8. Accordingly, it cannot be said that the parties agreed to permit the government to take up land for lumbering to the extent that the Aboriginal parties can no longer sustain themselves on their traditional territories. Extensive exploitation of natural resources, such as clearcutting of large tracts of forests, could not have been contemplated by either party and certainly would not have been contemplated as having priority over treaty rights to hunt, trap and fish. The treaty provision allowing government to take up land for lumbering "from time to time"[59] must be interpreted in this historical context. As found by the Supreme Court in *Badger*, in light of the historical evidence,

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[58] *Supra* note 4 at 402 [emphasis added].

[59] This is not uncontroverted. An interview with William Okeymaw, who was twelve years old during the negotiations, is found in "Interview with William Ikeyman" in R. Price, ed., *supra* note 19, 150. At 151 he is quoted as stating: "The timber was not sold, yet I see twenty trucks a day hauling logs from many different places. During the time of the negotiations, nothing was asked about timber; so why is it they are taking the timber?"

> No doubt the Indians believed that most of the Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping.[60]

Similarly, in *Halfway River First Nation* v. *B.C. (Min. of Forests)*, Dorgan J. concluded that the historical context surrounding the negotiation of the treaty, in particular statements made in the Report of the Commissioners, indicated that "the scope of the geographical limits on Treaty 8 rights ought to be restricted."[61]

This view is confirmed by historical evidence that the government did not contemplate that extensive white settlement would occur in the Treaty 8 area.[62] Unlike the Prairie treaties, Treaty 8 did not require that reserves be set up, though the Aboriginal peoples could choose reserves. "The reserve idea is inconsistent with the life of a hunter, and is only applicable to an agricultural country."[63] Indeed, the Aboriginal parties would not have signed the treaty had they been forced to settle on reserves.[64] The negotiations took place on the understanding that the Aboriginal signatories would continue their hunting lifestyles.

The government could not have understood or represented that its right to require or take up lands for purposes such as lumbering was limitless, as it did not contemplate that it would become necessary to take up or require extensive tracts of land. Commissioner McKenna confirmed this when he advised that less compensation was required for Treaty 8 lands than for previous treaty lands because "there is no urgent public need of its acquirement."[65] Richard Daniel concludes on this point as follows:

> Whether it took the form of ownership of wildlife or protection from white competition, these assurances constituted a recognition that hunting, fishing and trapping as a way of life would remain an option for treaty Indians. If the treaty commissioners had looked upon these rights as mere temporary privileges pending widespread settlement or mining, they failed to make this clear in the negotiations.[66]

The Supreme Court in *Badger* found that the Aboriginal signatories were told that the promises made to them would be similar to those made to Aboriginal parties to other treaties.[67] Evidence of the promises made surrounding the signing of earlier treaties is thus relevant. The Court noted that in the context of Treaty No. 1, the following promise was made: "There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done...."[68] The Court further noted that "it is clear that for the Indians the guarantee that hunting,

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60 *Supra* note 6 at 803.

61 [1997] 4 C.N.L.R. 45 (B.C.S.C.) at para. 101 [hereinafter *Halfway*]. This case is also referred to as *Metecheah*.

62 Daniel, *supra* note 19 at 68.

63 *Ibid.* at 69, quoting a letter from Commissioner McKenna to superintendent general in 1899.

64 "Commissioners' Report," *Treaty No. 8*, *supra* note 23 at 6-7.

65 Daniel, *supra* note 19 at 69.

66 *Ibid* at 94.

67 *Badger*, *supra* note 6 at 802.

68 *Ibid.*

fishing and trapping rights would continue was the essential element which led to their signing of the treaties."[69]

It may be concluded, therefore, that the government's ability to take up land is limited in that it cannot do so where such taking up prevents or seriously impedes the Aboriginal way of life. Aboriginal peoples were promised that they would always be able to hunt, fish and trap and that there would always be land and resources capable of supporting these activities. That choice should remain open to them. They neither agreed nor contemplated that there would come a day when their right was substantially restricted because of occupation and unlimited industrial exploitation of resources. The affidavit of James Cornwall, who attended the Lesser Slave Lake negotiations, states that Aboriginal representatives stressed they would not sign unless it was understood that they would **never** surrender their rights to hunt, trap and fish.[70]

It is relevant as well to consider what was meant in Treaty 8 by "lumbering." There is no case law interpreting the meaning of this term in Treaty 8 or in the other treaties. Neither the Commissioners' Report nor the accounts of the oral promises and negotiations discuss the meaning of the term. It is worth noting, however, that in 1899, trees were not harvested for such purposes as pulp and paper production. Nor was clearcutting practised. The historical context suggests that both the government and Aboriginal peoples understood that forested land might be cleared to make agricultural use of the land, for mining, or for purposes related to settlement of the land, and that timber might be used for purposes such as building, heating and railroad construction. No one could have contemplated the extensive harvesting which occurs today for the supply of pulp and paper mills.

That land could be taken up for "other purposes" also cannot be interpreted as limitless, nor can it be interpreted as contemplating the clearcutting of land in order to supply the pulp and paper industry. It must be remembered that limits placed on treaty rights are restrictively construed; "other purposes" should only include such activities as could have been contemplated by the parties and understood and agreed to by the Aboriginal signatories at the time. In *Badger*, the Supreme Court found that the oral history of the Aboriginal parties to Treaty 8 indicates that they "understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas...."[71] In order to come within "other purposes," the land use must have been within reason of the parties in 1899.[72]

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69 *Ibid.* at 792.

70 Fumoleau, *supra* note 16 at 74-75.

71 *Badger*, *supra* note 6 at 803.

72 *R. v. Smith*, [1935] 2 W.W.R. 433 at 437 (Sask. C.A.) per Turgeon, J.A. for the majority [hereinafter *Smith*]. See also *R.* v. *Norn*, *supra* note 57 where Spence Prov. Ct. J. found that in light of the principles of interpretation and a consideration of the historical evidence, "There is no evidence to support the position of the Crown that the hunting, fishing and trapping rights of the Indians would be extinguished on lands taken up within the ceded tract for 'other purposes.'"

In light of the Crown's fiduciary obligations, the provisions of Treaty 8 which impose limits on the rights to hunt, trap and fish must be interpreted restrictively. As Macklem states in the context of Treaty 9,

> The grant of authority to 'take up' lands, either for listed or unlisted purposes, is subject to the Crown's overarching fiduciary obligation to exercise its discretion in accordance with the interests of Aboriginal peoples. Such an obligation entails that its discretion not be used to interfere with hunting, trapping and fishing rights.... Any ensuing restrictions of the geographic area where Aboriginal people are entitled to hunt, trap and fish must avoid interfering with the exercise of such rights or, in the alternative, must give top priority to the Aboriginal interests at stake.[73]

The authority given the government to take up lands is limited by its fiduciary obligations. It may be argued that the government is in breach of its fiduciary obligations when it takes up land for lumbering such that rights to hunt, trap and fish are rendered unexercisable or meaningless. To discharge its fiduciary obligation, the Crown must ensure that allocations of lands to third parties for timber harvesting and the harvesting practices used seek to permit the continued ability of Aboriginal people to gain subsistence from the land.

This interpretation is supported by decisions involving charges laid against Aboriginal hunters. Such cases are concerned primarily with whether the land in question was "required" or "taken up," and the courts have construed these terms restrictively, concluding that they refer to land which has been put to an active, visible and incompatible land use[74] which would reasonably have been contemplated by the parties in 1899. Where this test is not met, treaty rights persist. Thus, in light of the principles of interpretation and the evidence presented on Treaty 8, the majority in *Badger* found that:

> In 1899 the Treaty No. 8 Indians would have understood that land had been "required or taken up" when it was being put to a use which was incompatible with the exercise of the right to hunt.... They understood land to be required or taken up for settlement when buildings or fences were erected, land was put into crops, or farm or domestic animals were present.... These physical signs shaped the Indian's understanding of settlement because they were the manifestations of exclusionary land use which the Indians had witnessed as new settlers moved into the West....[75]

In the context of this discussion, visible physical manifestation of an exclusionary or incompatible land use would include physical evidence of logging operations, or posted signs or fences. Where these are not present, Treaty 8 signatories would have the right to hunt on land which is the subject of a forest tenure. While vast tracts of land are allocated to forest interests, companies only actively harvest or "occupy" parts of the land allocated at any one time; the government cannot permit their occupation of those parts, nor the cumulative effects of occupation, to interfere with existing treaty rights on the rest of the land.

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73 *Supra* note 10 at 130.

74 *Badger*, *supra* note 6 at 800, 803-804.

75 *Ibid.* at 799.

In order to assess whether Aboriginal and other land uses are compatible, one needs to examine the purpose for which land is occupied. These issues were addressed in *Sioui*, a case involving the use of a provincial park by the Huron for religious rites and customs. The Supreme Court, after looking at extrinsic evidence, determined that the treaty provision according the Huron "free exercise of their Religion, their Customs and Liberty of Trading with the English" meant that the Huron were "permitted to continue to carry on their customs on the lands frequented to the extent that those customs did not interfere with enjoyment of the lands by their occupier."[76] A treaty right restriction would only be allowed where "the occupancy to which the park is subject is incompatible with the exercise of the activities [of the Aboriginal people in question]".[77]

The question of compatibility is not simply one of purpose. A purpose may be compatible, but the method of achieving it may not be. Both the method and the purpose of occupation must be consistent with the exercise of treaty rights. In *Sioui,* the Court held "it is up to the Crown to prove that its occupancy of the territory cannot be accommodated to reasonable exercise of the Hurons' rights."[78] The court held that, "[f]or the exercise of rites and customs to be incompatible with the occupancy of the park by the Crown, it must not only be contrary to the purpose underlying that occupancy, it must prevent the realization of that purpose."[79] Further, if Aboriginal and government rights *can* be exercised simultaneously on Crown land, they must be, and the onus is on the Crown to prove they cannot be accommodated. This reasoning suggests that, if possible, the province must adopt forestry practices which enable the government to achieve the purpose of the occupation, namely the harvesting of trees, while at the same time accommodating the exercise of treaty rights. There is no fundamental incompatibility between logging and hunting, fishing and trapping: it is the method chosen, not the purpose of the occupation itself, which may be incompatible. This type of argument parallels the s. 35(1) justification analysis, to be discussed later.

An assessment of the impact of the Natural Resources Transfer Agreement (NRTA) on Treaty 8 rights and limitations is essential for a complete understanding of those rights, and what would constitute their infringement.

V. THE IMPACT OF THE NATURAL RESOURCES TRANSFER AGREEMENT

Prior to 1929, the provinces of Manitoba, Saskatchewan and Alberta did not have jurisdiction over or ownership of natural resources. In 1929 and 1930, the Canadian and provincial governments entered into agreements which transferred control and ownership of natural resources and Crown lands to the provinces. These agreements (NRTAs) are incorporated into the Constitution under s.1 of the *Constitution Act, 1930.* The Canadian government had to fulfil its obligations under the treaties it had entered into with the provinces' Aboriginal peoples by ensuring that these obligations would be

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[76] *Sioui, supra* note 4 at 1071-72.
[77] *Ibid.*
[78] *Ibid.* at 1072.
[79] *Ibid.* at 1073.

carried out by each province. Accordingly, paragraph 12 of the Alberta NRTA was included to protect treaty rights to hunt, trap and fish for food:[80]

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[81]

The provision was likely included in order to protect treaty rights to hunt, trap and fish for food by ensuring that the province secure a continuing supply of game and fish for the support and subsistence of Aboriginal peoples in Alberta.[82] This was the view of Kerans J.A. in *Badger*:

> It amounted to a transfer, or perhaps a delegation, of a legislative function from Canada to the provinces. In my view, it meant ... that, henceforth, the provinces could regulate Indian as well as other hunting, notwithstanding that Canada had, until then, exclusive legislative jurisdiction over Indians.[83]

Kerans J.A. added that "Canada saw that it had a duty to secure supply. Paragraph 12 transferred this obligation to the provinces in question. It is now the constitutional duty of these provinces to perform whatever obligations Canada had."[84] This view is supported by court decisions which have held that treaties can be used to determine the meaning of this NRTA provision, and that the provision embodies the federal Crown's desire to maintain the rights accorded to the Indians by the treaty.[85] Finally, it is supported by paragraph 2 of the NRTA which provides that the province is bound to "carry out in accordance with terms thereof ... every ... arrangement whereby any person has become entitled to any interest [in Crown lands] as against the Crown."[86] Canada could not delegate to the provinces greater powers than it had. The NRTA ensured that limitations on Canada's powers resulting from its treaty obligations were transferred along with those powers to the provinces. In *Badger*, the Court thus held that "the NRTA has not deprived Treaty No. 8 of legal significance"[87] and that where there is no direct conflict between the NRTA and treaty rights, the treaty rights have

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80 It should be noted that the treaty right was not limited to hunting, trapping and fishing for food, but rather included the harvesting of these resources for commercial purposes as well.

81 Paragraph 12 of the Saskatchewan Agreement, and paragraph 13 of the Manitoba Agreement, are identical. All three agreements can be found as schedules to the *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26.

82 G.V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 180; *Cardinal* v. *Attorney General of Alberta*, [1974] S.C.R. 695 at 707 [hereinafter *Cardinal*].

83 *R.* v. *Badger* (1993), 8 Alta. L. R. (3d) 354 at 362-63 (C.A.).

84 *Ibid.* at 363.

85 *R.* v. *Smith*, *supra* note 72 at 435-36; *R.* v. *Strongquill*, [1953] 8 W.W.R. 247 (Sask. C.A.) [hereinafter *Strongquill*]; *Prince and Myron* v. *Canada (A.G.)*, [1964] S.C.R. 81 [hereinafter *Prince and Myron*]; *Frank* v. *Canada (A.G.)*, [1978] 1 S.C.R. 95 at 100; *Sikyea*, *supra* note 56 at 70.

86 *Constitution Act, 1930*, Schedule 2.

87 *Badger*, *supra* note 6 at 796.

not been modified.[88] The NRTA only replaced treaty rights where it clearly intended to do so. The federal government is assumed to intend to fulfil its promises and act in accordance with its fiduciary obligations.

With the signing of the NRTA, Crown lands in Alberta, formerly federal lands, became provincial Crown lands, and the province was required to honour the treaty rights granted.[89] Thus, where land is not required or taken up — in other words, where it is "unoccupied" — the province guarantees to Aboriginal peoples rights to hunt, trap and fish.

The analysis now turns to a consideration of what changes, if any, the NRTA had on the nature of the right and the regulatory and geographical limitations embodied in Treaty 8. As with treaties, the courts have held that paragraph 12 of the NRTA must be given a broad and liberal construction, with any ambiguities resolved in favour of Aboriginal peoples.[90] This means that the effect of the NRTA on treaty rights should be limited. From the perspective of Aboriginal peoples, Treaty 8 is a solemn engagement and it, not the NRTA, is the source of their rights, as the NRTA was enacted without Aboriginal involvement or consent.

A. THE RIGHTS TO HUNT, TRAP AND FISH

In *Horseman* and *Badger,* the Supreme Court held that the NRTA extinguished the Treaty 8 right to hunt commercially, because paragraph 12 only required the province to guarantee Aboriginal people rights to hunt, trap and fish for food.[91] This, the Court held, constituted a direct conflict between the NRTA and the commercial right under the treaty. The Court reasoned that, because the NRTA is a constitutional document, its failure to protect commercial rights showed a clear and plain intent to extinguish them. The commercial aspect of the right to live off of hunting, trapping and fishing has therefore been extinguished. Rights under Treaty 8 to hunt, trap and fish for food, however, were not extinguished or replaced by the NRTA, and therefore continue to have effect.[92]

B. THE REGULATORY LIMITATION

The NRTA confirms the authority of the province to regulate the exercise of Treaty 8 rights through laws pertaining to conservation. The regulatory limitation in the treaty was thus included in the NRTA, and the regulatory authority extended to the provincial

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88 *Ibid.* at 797.

89 The federal and provincial Crowns should be regarded as being one and indivisible. See *R.* v. *Secretary of State*, [1981] 4 C.N.L.R. 86 (Eng. C.A.).

90 *Horse*, *supra* note 9 at 192; *R.* v. *Sutherland*, [1980] 2 S.C.R. 451 at 461, 464-65 [hereinafter *Sutherland*].

91 *Badger*, *supra* note 6 at 779. *Horseman*, *supra* note 48. It is beyond the scope of this article to discuss the merits of this decision. See Wilson J., dissenting in *Horseman*, *supra* note 48 at 913-22; C. Bell, "*R.* v. *Badger*: One Step Forward or Two Steps Back?" (1997) 8 Constitutional Forum 21.

92 *Badger*, *ibid.* at 794, 797.

government.[93] The majority in *Badger* concluded that provincial game laws aimed at conserving game are applicable to Aboriginal peoples: "However, the provincial government's regulatory authority under the Treaty and the NRTA did not extend beyond the realm of conservation."[94] Dissenting in *Horseman*, Wilson J. concluded that paragraph 12 should be seen to embody the promises made by the Treaty 8 Commissioners. Thus, while the provision gives the province jurisdiction to enact laws respecting game and to enforce those laws upon Aboriginal peoples, the provision is restricted to regulation for conservation purposes in order to secure a supply of game for Aboriginal peoples. Along with the transfer of authority, it confirms the province's shared responsibilities with the federal government under the treaty.[95] This conclusion is supported by the majority in *Horseman*:

> 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.[96]

In *Badger*, the majority of the Supreme Court found:

> In light of the existence of these conservation laws prior to signing the Treaty, the Indians would have understood that, by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation. This concept was explicitly incorporated into the *NRTA* in a modified form providing for Provincial regulatory authority in the field of conservation.[97]

Cory J. held that the NRTA rendered provincial game laws applicable to Aboriginal peoples, "so long as they were aimed at conserving the supply of game."[98]

In *Moosehunter* v. *The Queen*, the Supreme Court went so far as to hold that the province could only regulate the rights of Aboriginal peoples to hunt for sport or commercially, and could not regulate the right to hunt for food, even for conservation purposes.[99] The same conclusion was reached regarding the Manitoba agreement in *Strongquill*, where Gordon J.A. stated that "the Indians should be preserved before the moose."[100] However, as discussed earlier, under the terms of Treaty 8, the rights are subject to regulation for conservation purposes.

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93 *Ibid.* at 810.

94 *Ibid.*

95 *Ibid.*; *Horseman*, *supra* note 48 at 920 per Wilson J., dissenting.

96 *Horseman*, *ibid.* at 935-36.

97 *Badger*, *supra* note 6 at 810.

98 *Ibid.*

99 [1981] 1 S.C.R. 282 at 285 [hereinafter *Moosehunter*] which considers the identical provision of the Saskatchewan NRTA.

100 *Strongquill*, *supra* note 85 at 260; quoted in *Sutherland*, *supra* note 90 at 463; see also *Cardinal*, *supra* note 82 at 707; *R.* v. *Wesley*, [1932] 2 W.W.R. 337 at 344 (Alta. S.C.A.D.) per McGillivray J. for the majority. Adopted in *Prince and Myron*, *supra* note 85 at 84.

C. THE GEOGRAPHICAL LIMITATION

The courts have held that under the NRTA, the territory on which Treaty 8 rights to hunt, trap and fish may be exercised has been expanded.[101] Whereas, under the treaty, the rights could be exercised on surrendered lands not required or taken up, under the NRTA they may be exercised 1) on all "unoccupied" Crown lands, and 2) on other lands to which Aboriginal peoples have a right of access for purposes of hunting, trapping and fishing in Alberta.

The geographical restrictions on the right to hunt for food under Treaty No. 8, however, have not been modified.[102] The right of the province to occupy lands for lumbering or other purposes under the NRTA is restricted in the same manner as the federal government's authority under the treaty to require or take up lands for lumbering. Lands which are "unoccupied" are lands not required or taken up,[103] and the courts use the terms "occupied" and "taken up" interchangeably.[104] The NRTA simply permits the province to carry out this same "taking up" of the land. The extent and purposes of that taking up remain the same. This view is reinforced by s. 35(1) of the *Constitution Act, 1982* which guarantees "existing", meaning unextinguished, treaty rights. Since the NRTA did not extinguish the treaty rights to hunt, trap and fish for food, these rights as guaranteed in the treaty are now recognized and affirmed under s. 35.

Under the NRTA, hunting, trapping and fishing rights also exist on lands to which Aboriginal peoples have "access." This has been interpreted as meaning any land to which the public has access for the purpose of hunting, fishing or trapping. Because the NRTA did not replace the rights in the treaty to hunt for food, Aboriginal peoples have a right of access to land, including privately owned land, in order to hunt for food if such land is not "required or taken up" within the meaning of Treaty 8.[105] In *Badger,* the Supreme Court held this to mean that "where limited hunting by non-Indians is permitted on Crown land taken up as a wildlife management area or a fur conservation area ... Indians continue to have an unlimited right of access for the purposes of hunting for food...."[106] Where the public is granted limited access for hunting, trapping and fishing — for example, under the terms of a Forest Management Agreement (FMA) — Aboriginal peoples have an unlimited right under the NRTA to hunt, trap and fish for food. Further, the courts have held that where the public right to hunt is limited to

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101 *Badger, supra* note 6 at 779.

102 *Ibid.* at 807.

103 See K. McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatchewan: Native Law Centre, 1983) at 22.

104 See, for example, *Badger, supra* note 6 at 799-800; *Smith, supra* note 72 at 438, where Turgeon J.A., referring to Treaty 6 and the Saskatchewan NRTA, stated that "tracts set aside for mining, lumbering, settlement or other purposes (and upon which the right to hunt was withheld from the Indians) might have been said to be 'occupied.'"

105 *Badger, supra* note 6 at 798.

106 *Ibid.* at 804.

enumerated species, Aboriginal peoples exercising their right to hunt under the NRTA have unlimited rights to hunt for food.[107]

Similarly, Aboriginal peoples can hunt on days when the public is prohibited from hunting, because Aboriginal peoples may hunt, trap and fish "at all seasons of the year."[108] The only limitation is that the indigenous person must be hunting for food.[109]

VI. DIVISION OF POWERS

It has been shown that the restrictions which could be placed on the hunting, trapping and fishing rights embodied in Treaty 8 are limited by the terms of the treaty and that the same limits apply to the provincial government under the NRTA. What must also be considered are general questions of provincial jurisdiction to affect the exercise of treaty rights, since paragraph 12 of the NRTA does not stipulate that the province may enact forest management laws, as opposed to game conservation laws, in a manner which interferes with the exercise of hunting, trapping and fishing rights. Jurisdiction with respect to Aboriginal people and Aboriginal rights is determined by reference to ss. 91 and 92 of the *Constitution Act, 1867* and s. 88 of the *Indian Act*.

Sections 91 and 92 of the *Constitution Act, 1867*[110] set out subject matters over which the federal and provincial governments, respectively, have exclusive legislative powers. Section 91(24) places "Indians and lands reserved for Indians" within the exclusive jurisdiction of the federal government. Under s. 92(5), the provinces have jurisdiction to legislate respecting the management and sale of provincial Crown lands and the timber and wood on those lands, and under s. 92(13) they are granted jurisdiction over property and civil rights in the province.

The provinces may not legislate directly with respect to Aboriginal peoples or their lands. Direct regulation of treaty rights is within exclusive federal jurisdiction.[111] However, provincial legislation which in pith and substance is in relation to a matter falling under s. 92 will be *intra vires* in its application to Aboriginal people and lands reserved for them,[112] unless it singles out Aboriginal people,[113] or purports to regulate them "*qua* Indians."[114] This means that provincial legislation cannot impair their "status and capacity as Indians,"[115] or their "Indianness."[116] Because treaty rights

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107 *Sutherland, supra* note 90 at 459.

108 *Moosehunter, supra* note 99 at 292; *Sutherland, supra* note 90 at 461.

109 *Sutherland, ibid.* at 462-63.

110 1867 (U.K.), 30 & 31 Vict., c. 3.

111 *Badger, supra* note 6; *R.* v. *White and Bob* (1964), 50 D.L.R. (2d) 613 at 618 (B.C.C.A.), aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.) [hereinafter *White and Bob*].

112 See P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1996) at 546-47.

113 *Sutherland, supra* note 90 at 455; *Moosehunter, supra* note 99 at 293; *Dick* v. *The Queen*, [1985] 2 S.C.R. 309 at 322 [hereinafter *Dick*]; *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 at para. 179 [hereinafter *Delgamuukw*].

114 *Four B Manufacturing Ltd.* v. *United Garment Workers of America*, [1980] 1 S.C.R. 1031 at 1048-49 [hereinafter *Four B Manufacturing*].

115 *Ibid.* at 1047; *Natural Parents* v. *Superintendent of Child Welfare*, [1976] 2 S.C.R. 751.

to hunt, trap and fish are at the core of "Indianness," the provinces lack legislative jurisdiction to infringe upon them: "s. 91(24) protects a "core" of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity."[117] That core includes all rights protected under s. 35(1), and it is protected even from laws of general application.[118]

Secondly, s. 88 of the *Indian Act*[119] may allow provincial laws of general application to impair the exercise of Aboriginal rights. However, the same does not hold for treaty rights:

> *Subject to the terms of any treaty* and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

This section specifically subjects provincial laws to the terms of any treaty; treaty rights prevail unless the legislation serves a conservation purpose as permitted under the NRTA.[120] In *Badger*, a case dealing with provincial game conservation laws, the Supreme Court held that s. 88 was not applicable because the NRTA, a constitutional document, allowed the treaty rights to be affected by provincial conservation regulation.

The protection accorded to treaty rights by s. 88 has been extended beyond situations in which a province seeks to apply a law of general application directly to Aboriginal peoples, to situations in which the law of general application applies to third parties but has the effect of interfering with treaty rights. Thus, in *Saanichton*, the British Columbia Court of Appeal found that construction of a marina would impair a treaty right to carry on a fishery as formerly, because the marina would limit access to the fishery and destroy habitat.[121] The Court concluded,

> There is no question that if the licence of occupation derogates from the treaty right of the Indians, it is of no force and effect. The province cannot act to contravene the treaty rights of Indians, nor can it authorize others to do so.[122]

Provincial forest legislation which is in pith and substance in relation to forestry would, *prima facie,* be constitutional. This legislation can therefore incidentally affect Aboriginal peoples and lands. Even if classified as a law of general application, however, forest legislation cannot contradict the terms of a treaty. A forest statute such

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116 *Natural Parents* v. *Superintendent of Child Welfare, ibid.* at 760-61; *Dick, supra* note 113 at 315-17, 326.

117 *Delgamuukw, supra* note 113 at paras. 177, 181. See also *Simon, supra* note 4 at 411.

118 *Delgamuukw, ibid.*

119 *Indian Act*, R.S.C. 1985, c. I-5 [emphasis added].

120 *Badger, supra* note 6 at 809; *Horseman, supra* note 48 at 936; *White and Bob, supra* note 111; *Simon, supra* note 4; *Saanichton, supra* note 5; *Sioui, supra* note 4.

121 *Saanichton, ibid.* at 92.

122 *Ibid.* at 92, per Hinkson J.A.

as Alberta's *Forests Act* contradicts the terms of Treaty 8 to the extent that it allows dispositions to third parties which impair the exercise of the rights to hunt, trap and fish. It will be recalled that the scope of these rights includes the promise that Aboriginal peoples could continue to live off these pursuits forever. This analysis calls into question the province's jurisdiction to apply the act in a manner which interferes with the exercise of the Treaty 8 rights of Aboriginal peoples to hunt, trap and fish.

Section 35(1) of the *Constitution Act, 1982* and the justification analysis must still be addressed for two reasons.[123] First, the Supreme Court has indicated that a justification analysis similar to that developed for s. 35(1) of the Constitution might apply where s. 88 renders a provincial law inapplicable because it interferes with treaty rights:

> [O]n the face of s. 88, treaty rights appear to enjoy a broader protection from contrary provincial law under the *Indian Act* than under the *Constitution Act, 1982*. Once it has been demonstrated that a provincial law infringes "the terms of [a] treaty," the treaty would arguably prevail under s. 88 even in the presence of a well-grounded justification.... But the precise boundaries of the protection of s. 88 remains a topic for future consideration. I know of no case which has authoritatively discounted the potential existence of an *implicit* justification stage under s. 88.[124]

Although *obiter*, this quote raises the possiblity that future decisions may apply a justification analysis to the division of powers, such that treaty rights will only be shielded from provincial laws if the province cannot justify its interference with those rights.

Second, even if our conclusions above are wrong, and notwithstanding s. 91(24) of the Constitution and s. 88 of the *Indian Act*, a provincial government has jurisdiction to legislate with respect to forest resources in a manner which incidentally affects treaty rights, it may not do so in a manner which unjustifiably infringes those rights.

The remainder of this article will discuss s. 35(1) of the *Constitution Act, 1982*, and then address specific issues of forest management in Alberta. It will be argued that even if the province can legislate with respect to forestry in a manner which affects Treaty 8 rights to hunt, trap and fish, the current forestry regime in Alberta may be unable to pass the test for justifiable infringement of treaty rights under s. 35(1).

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123 In *R.* v. *Côté*, [1996] 3 S.C.R. 139 at 164 [hereinafter *Côté*], Lamer C.J. for the majority states the following:

> In this instance, the appellants challenge a *provincial* regulation which allegedly restricts their aboriginal or treaty rights to fish.... As such, even if the *Regulation respecting controlled zones* is not found to infringe their constitutional rights unjustifiably under the *Sparrow* test for s. 35(1), if the right to fish is characterized as a treaty right, it may still be open to the appellants to challenge the provincial regulation under the federal statutory protection extended to aboriginal treaties under s. 88 of the *Indian Act* [emphasis in original].

See also *Côté* at 191 and *Horseman*, *supra* note 48 at 936.

124 *Ibid.* at 191-92.

VII. SECTION 35(1) OF THE *CONSTITUTION ACT, 1982* AND TREATY RIGHTS

Section 35(1) of the *Constitution Act, 1982* "recognizes and affirms" treaty rights. Prior to 1982, treaty rights were limited by federal legislation; the latter prevailed where inconsistent with the terms of a treaty. Section 35(1), however, protects treaty rights and accordingly limits governmental powers to the extent that they unjustifiably interfere with the exercise of treaty rights. Section 52 of the *Constitution Act* renders any law inconsistent with s. 35(1) to be of no force or effect to the extent of that inconsistency. Any tenures or licences, for example, issued in contravention of s. 35(1) pursuant to such legislation would likewise be rendered of no force or effect.

According to *Badger*, the infringement and justification analysis as set out in *Sparrow* applies to treaty rights as well as to Aboriginal rights, and to provincial as well as federal legislation.[125] In *Badger*, the Supreme Court held that provincial game laws were applicable to Aboriginal peoples as long as they were aimed at conservation, but that such regulation is not automatically permissible. Rather, the manner in which conservation laws are administered must not conflict unjustifiably with treaty rights.[126]

The nature and scope of the rights to hunt, trap and fish embodied in Treaty 8 have already been discussed. The next stage is to consider whether these rights have been extinguished: only "existing" treaty rights are protected under s. 35(1).[127] Any such extinguishment must be proven by the Crown, which must show that there was a clear and plain legislative intent to do so. Only the federal legislature could have extinguished such rights, as it would be *ultra vires* the province to do so.[128]

As already noted, the Supreme Court held in *Horseman* and reaffirmed in *Badger* that only the commercial right to hunt has been extinguished by the Alberta NRTA, while the right to hunt for food continues in force and effect. The following discussion will therefore focus on the matters of infringement and justification.

A. ESTABLISHING A *PRIMA FACIE* INFRINGEMENT

Forest management in the province as a whole, as well as specific forestry allocation decisions, must be examined in order to determine whether there is a *prima facie* infringement. The cumulative effect of the regulatory regime must be examined in order to determine if, on its face, the scheme infringes upon the exercise of treaty rights.[129]

The onus of establishing *prima facie* infringement of a treaty right lies with the party challenging the legislation. In *Sparrow*, the Supreme Court held that "the regulation would be found to be a *prima facie* interference if it were found to be an adverse

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125 *Badger*, *supra* note 6 at 811-12, 820; see also *Coté*, *supra* note 123 at 164.

126 *Badger*, *ibid.* at 811, 820.

127 *Sparrow*, *supra* note 3 at 1091.

128 *Delgamuukw*, *supra* note 113 at para. 173.

129 *R.* v. *Gladstone*, [1996] 2 S.C.R. 723 at 761 [hereinafter *Gladstone*].

restriction on the Musqueam exercise of their right to fish for food."[130] As stated by the British Columbia Court of Appeal, "The onus on the applicant is not heavy."[131] Any "meaningful diminution" of rights constitutes an infringement.[132] In *Halfway*, Dorgan J. found a *prima facie* infringement where common sense suggested an interference with the rights.[133] She rejected the forest company's argument that "the mere setting aside or 'taking up' of lands for logging cannot be considered a *prima facie* infringement of these rights,"[134] and held that the Report of the Commissioners suggests that "any interference with the right to hunt, fish or trap constitutes a *prima facie* infringement of Treaty 8 rights."[135] In *Badger*, the majority found that any limitation on the "method, timing and extent" of treaty hunting rights would amount to an infringement.[136]

In *Sparrow*, the Court offered some factors which indicate that an infringement has occurred:

> First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?.... If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.[137]

In *Gladstone*, however, the Court clarified that those factors do not form a test that has to be met by Aboriginal claimants; if any of these factors are shown, a *prima facie* infringement is found.[138]

A *prima facie* interference will also be found where legislation confers an unstructured discretion on a Minister and the exercise of that discretion risks interfering with Aboriginal rights. In *Côté* and *R.* v. *Adams*, the Supreme Court held that the honouring of Aboriginal and treaty rights cannot be left to a discretionary act:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament [or a province] may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide

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130 *Sparrow*, *supra* note 3 at 112.
131 *R.* v. *Sampson* (1995), 16 B.C.L.R. (3d) 226 at 240 (C.A.) [hereinafter *Sampson*].
132 *Gladstone*, *supra* note 129 at 757.
133 *Halfway*, *supra* note 61 at para. 103.
134 *Ibid.* at para. 99.
135 *Ibid.* at para. 101.
136 *Badger*, *supra* note 6 at 818.
137 *Sparrow*, *supra* note 3 at 1112-13.
138 *Gladstone*, *supra* note 129 at 757.

> representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.[139]

A *prima facie* infringement thus results where the "exercise of [an] aboriginal [or treaty] right ... is exercisable only at the discretion of the Minister."[140]

B. JUSTIFICATION

1. OBJECTIVE

Where a *prima facie* infringement has been found, the government may seek to justify it. In considering the Crown's plea of justification, it must be recalled that the Crown is to be held to "a high standard of honourable dealing with respect to the aboriginal peoples of Canada."[141] The first step in the justification analysis is to show whether, in infringing the treaty right, the government was pursuing a valid legislative objective. In order to justify the infringement of a treaty right, the objective must be "compelling and substantial."[142]

In *Gladstone* the Court elaborated on the criteria to be met in establishing a valid objective:

> [T]he objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or ... at the reconciliation of aboriginal prior occupation with the assertion of sovereignty of the Crown.[143]

The Supreme Court has held that conservation is a valid legislative objective, in part because it is aimed at preserving s. 35(1) rights.[144] Other legitimate government objectives include: "the pursuit of economic and regional fairness" and the "recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups."[145] In the context of Aboriginal title, compelling and substantial objectives include "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims."[146] However, as Lamer C.J. indicated that these would be valid legislative objectives in the context of title, they may not be in the context of other rights. In the context of Treaty 8, the only valid legislative objective established in *Badger* is conservation. Whether or not other legislative objectives may

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139 *R.* v. *Adams*, [1996] 3 S.C.R. 101 at 132 [hereinafter *Adams*]; *Coté*, *supra* note 123 at para. 76.

140 *Adams*, *ibid.* at 131.

141 *Sparrow*, *supra* note 3 at 1109.

142 *Ibid.* at 1113; *Delgamuukw*, *supra* note 113 at para. 161.

143 *Supra* note 129 at 774.

144 *Sparrow*, *supra* note 3 at 1113.

145 *Delgamuukw*, *supra* note 113 at para. 161.

146 *Ibid.* at para. 165.

limit treaty rights remains uncertian; whatever these objectives may be, the means used to achieve them must meet the test developed by the Court.[147]

2. MEANS OF ACHIEVING THE OBJECTIVE: THE CROWN'S FIDUCIARY DUTY

Once the government has established a valid legislative objective, the next step is to analyze the means used to achieve the desired objective in order to determine whether such means recognize and affirm the Aboriginal or treaty rights. As the Supreme Court stated in *Sparrow*, the means used must uphold the honour of the Crown and be in keeping with the Crown's fiduciary duty:

> The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.[148]

In the context of subsistence harvesting rights, the honour of the Crown will only be upheld where the right in question has been given priority. In *Sparrow*, the priority of an Aboriginal right to fish for food was defined to mean that after conservation needs have been met in that fishery, the Aboriginal right to fish for food has to be satisfied first. This means that

> If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right.[149]

In the context of a commercial right, or any right lacking internal limits, the Court has found that while the Aboriginal rights holders may still have priority, this cannot mean an exclusive Aboriginal harvest right such as that considered in *Sparrow*. Lamer J. stated in *Gladstone*:

> [T]he doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.[150]

In some cases the fiduciary duty will not require the kind of priority discussed in *Sparrow*, but rather will require that there be as little infringement as possible, that fair compensation be made available for expropriations, or that affected Aboriginal groups

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147 *Ibid.* at para. 166.

148 *Sparrow*, *supra* note 3 at 1110.

149 *Ibid.* at 1116.

150 *Supra* note 129 at 767.

be consulted; which articulation is applicable will depend upon the nature of the right at issue.[151] In other cases, particularly in the context of Aboriginal title, the fiduciary duty requires Aboriginal involvement in decision making.[152]

Sparrow suggested that the Crown must show that the means it has chosen impair the right as minimally as possible.[153] However, Cory J. in *R.* v. *Nikal* weakened the test by imposing the concept of reasonableness on it. What must be shown now is that "the infringement is one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible."[154] In order for the government to demonstrate that it has sought to impair the rights as minimally as possible, and has acted in accordance with its responsibilities as fiduciary, it is essential for the government to consult with Aboriginal peoples where it is possible that their rights may be affected by government action. As stated by Dorgan J. in *Halfway,* "[h]ow can one reach any reasonable conclusion as to the impact on Halfway's rights without obtaining information from Halfway on their uses of the area in question?"[155] The Crown cannot argue that it has allowed Aboriginal peoples to continue to exercise their treaty rights, and has given those rights priority, where it has not consulted with them.

Since *Sparrow*, the courts have consistently required consultation whenever s. 35(1) rights have been impaired. In *Sparrow,* the Supreme Court required consultation with the Aboriginal peoples regarding conservation measures and management of the fishery.[156] The British Columbia courts have relied on *Sparrow* to require consultation in the development of resource management plans as well as conservation measures.[157] In *Jack*, the British Columbia Court of Appeal held that enforcement of a closure of the salmon fishery at the mouth of a river without consultation with the affected Aboriginal rights holders was a breach of the Crown's fiduciary duty. Consultation is essential in order to identify what rights exist, and also how those rights are affected by resource use.

The onus is on the government to initiate consultation with Aboriginal peoples.[158] What constitutes adequate consultation depends on the context,[159] including the seriousness of the infringement,[160] and is determined by asking whether it is in keeping with the Crown's fiduciary duty.[161] At a minimum, this means that the Crown

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151 *Delgamuukw, supra* note 113 at para. 162.

152 *Ibid.* at para. 168.

153 *Sparrow, supra* note 3 at 1119.

154 [1996] 1 S.C.R. 1013 at 1064-65 [hereinafter *Nikal*].

155 *Halfway, supra* note 61 at para. 58.

156 *Sparrow, supra* note 3 at 1119.

157 *Sampson, supra* note 131 at 250-52; *R.* v. *Jack* (1995), 16 B.C.L.R. (3d) 201 at 221-23 (C.A.) [hereinafter *Jack*]; *R.* v. *Little* (1995), 16 B.C.L.R. (3d) 253 at 279 (C.A.) [hereinafter *Little*]; *Klahoose First Nation* v. *British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3d) 59 at 62-63.

158 *Nikal, supra* note 154 at 1065; *Sampson, supra* note 131 at 252; and *Jack, supra* note 157 at 222.

159 *Sampson, ibid.* at 251.

160 *Delgamuukw, supra* note 113 at para. 168.

161 *Jack, supra* note 157 at 222.

must fully inform Aboriginal peoples, whose rights may potentially be affected, of the relevant resource use decisions and the possible effects of the legislation on them and on other users.[162] Consultation must always be "in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue."[163]

The British Columbia Court of Appeal has required disclosure of the manner in which fishery allocation decisions are arrived at, and the reasons for any interference with Aboriginal rights.[164] Moreover, the government, before making a decision which might interfere with Aboriginal or treaty rights, must ensure that it is fully informed of the Aboriginal peoples' resource use practices and their views on conservation measures which affect their use of resources.[165]

The consent of Aboriginal peoples, depending on the circumstances, may be necessary.[166] It is always desirable to have the consent of Aboriginal peoples, and in some instances a vote may be necessary.[167] In *R.* v. *Noël*, the Northwest Territories Territorial Court held that alternative measures proposed by Aboriginal peoples must be seriously considered.[168]

The concept of reasonableness is invoked when consultation efforts are being considered. Thus, in *Nikal*, the Court stated that the government must make "every reasonable effort ... to inform and to consult."[169] Accordingly, where the Aboriginal peoples affected refuse to meet with government officials or to take part in a consultation process and the government has made all reasonable effort, a Court is not likely to find an unjustifiable infringement based on lack of consultation.[170]

The cases thus far address direct regulation of the exercise of an Aboriginal fishing right and competing (Aboriginal and non-Aboriginal) users of the same resource. In regard to competing uses, Macklem argues, "In the context of an infringement of a treaty right to hunt, fish, or trap, it means that activities protected by treaty must be given priority over competing non-Aboriginal land use."[171] Similarly, in *Westbank First Nation* v. *B.C.*, Curtis J. held that "[t]he Crown, as owner of the land, has an obligation to allow and provide for existing aboriginal rights when permitting other uses."[172]

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162 *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 at 485 (B.C.S.C.); *Jack*, *supra* note 157 at 222; *Sampson*, *supra* note 131 at 252.

163 *Delgamuukw*, *ibid.* at para. 168.

164 *Sampson*, *supra* note 131 at 252; *Little*, *supra* note 157 at 279.

165 *Jack*, *supra* note 157 at 222.

166 *Delgamuukw*, *supra* note 162 at 488.

167 *Jack*, *supra* note 157 at 223; *Delgamuukw*, *supra* note 113 at 423; *Sampson*, *supra* note 131 at 252.

168 [1995] 4 C.N.L.R. 78 at 95 (N.W.T. Terr. Ct.).

169 *Nikal*, *supra* note 154 at 1065.

170 See *Ryan* v. *Shultz* (25 January 1994), Smithers 7855 (B.C.S.C.).

171 *Supra* note 10 at 132-33.

172 *Westbank First Nation* v. *B.C.*, [1997] 2 C.N.L.R. 221 at 225 (B.C.S.C.) [hereinafter *Westbank*].

VIII. APPLICATION TO FOREST MANAGEMENT IN ALBERTA

Treaty 8 guarantees the Aboriginal peoples the right to live off the land and that sufficient land and resources will always be available to support hunting, trapping and fishing activities. This is repeated in paragraph 12 of the NRTA.

The right to earn a livelihood from these activities requires access to and preservation of wildlife resources. Though the government is permitted to take up land for lumbering, it was never contemplated that the majority of traditional lands would be taken up or occupied for resource extraction, nor was it envisioned that habitat would be damaged or altered to the extent that treaty rights could no longer be exercised or would be severely restricted. The terms of Treaty 8 are breached by the provincial government when it takes up lands for timber growing and harvesting in a manner which results in the prevention or restriction of the exercise of treaty rights. Legislation which has the potential to infringe those rights must be justified under the *Sparrow* test. If unjustifiable, tenures granted under the provisions which fail the justification test will be of no force or effect, as will be the legislation, to the extent of its inconsistency with s. 35(1).

Treaty rights exist on lands which are currently subject to timber allocations by the provincial Crown. The remainder of this article argues that the forest management regime governing such allocations is arguably an unjustifiable infringement of Treaty 8 rights. As established by the courts, forest management "as a whole" may be examined in order to determine whether a legislative scheme interferes with treaty rights. The following analysis focuses on the current legislative scheme rather than on specific timber allocations to forest companies. First, it is contended that the legislative framework of forest allocation and management in Alberta, on its face, infringes Treaty 8 hunting, trapping and fishing rights. It is then submitted that this infringement may not be justifiable in accordance with the test established by the Supreme Court in *Sparrow*.

A. *PRIMA FACIE* INFRINGEMENT

In Alberta, forest lands are administered by the Minister of Environmental Protection (formerly the Minister of Lands and Forests) under the *Forests Act* and associated regulations.[173] It is suggested that the current legislative and policy framework for forest management in Alberta interferes with treaty rights for the following reasons: 1) the legislation does not provide guidance to the Minister in his/her discretionary allocation and management of timber rights to third parties, leaving treaty rights to be honoured at the discretion of the Minister; and 2) the extent and manner of occupation of forest lands for timber growing and harvesting is potentially detrimental to the continued exercise of hunting, trapping and fishing rights.

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[173] R.S.A. 1980, c. F-16; the most important regulation is the *Timber Management Regulations*, Alta. Reg. 60/73 as amended.

1. UNSTRUCTURED MINISTERIAL DISCRETION IN THE ALLOCATION AND MANAGEMENT OF TIMBER RIGHTS

According to the Supreme Court decisions in *Côté* and *Adams*, a *prima facie* infringement results when an unstructured discretionary regime risks infringing treaty rights in a substantial number of applications. The discretionary nature of the forestry regime is discussed in this section, while the risk of infringement of treaty rights is shown in the following section dealing with the extent and manner of occupation of forest lands.

The *Forests Act* and associated regulations should be designed to structure the Minister's discretion to grant and manage timber rights so as to ensure that treaty rights are respected. However, the Act does not impose on the Minister an obligation to affirm and protect those rights. Even though the granting of timber rights has the potential to significantly affect treaty rights, ministerial discretion in forest use and allocation is almost completely unfettered; no specific criteria have been set to guide the Minister in his/her resource management decisions and ensure that treaty rights are upheld. The Minister does not have sufficient directives to fulfil his/her fiduciary duties.

The *Forests Act* merely specifies that the Minister may divide forest land into forest management units, determine an annual allowable cut (AAC) for each of these units, and dispose of Crown timber pursuant to one of the following forest tenures: a Forest Management Agreement (FMA), a timber quota, or a timber permit.[174] The right to harvest timber on any provincial forest land for which a cut level has been calculated may be granted to a third party by ministerial decision without legislative guidance. Nor do sections of the Act applicable to the allocation of each of the three forest tenures provide directives: with respect to timber quotas, s. 17 of the Act simply states that the Minister may divide the AAC and allocate coniferous or deciduous timber quotas specifying a volume of cut or an area of cut, as well as prescribe terms or conditions for the allocation. In regard to the allocation of FMAs, the Act sets out that:

> 16(1) The Minister, with the approval of the Lieutenant Governor in Council, may enter into a forest management agreement with any person to enable that person to enter on forest land for the purpose of establishing, growing and harvesting timber in a manner designed to provide a perpetual sustained yield.

In *Reese* v. *Alberta*,[175] a judicial review case dealing with the allocation of an FMA pursuant to the above section, McDonald J. interpreted the meaning of section 16(1) and analyzed the extent of the Minister's discretion in entering into an FMA. The Court found that the Minister can only exercise his discretion to enter into an FMA "if the agreement has as its purpose the purpose which is stated in s. 16(1),"[176] which he determined to be that the forest management agreement "be 'designed' to 'provide a

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[174] *Forests Act*, *ibid.* ss. 14, 15.

[175] (1992), 7 C.E.L.R. 89 (N.S.Q.B.).

[176] *Ibid.* at 114.

perpetual sustained yield.'"[177] In his opinion, the provision of a perpetual sustained yield of *timber* is the only relevant consideration imposed by the *Forests Act* on the Minister in the granting of timber rights by way of an FMA. Other considerations which could influence ministerial decisions, such as environmental quality and multiple use, were not regarded as prerequisites in meeting the objective of a sustained yield of timber. Thus, MacDonald J. noted the following concerning the preamble to the Daishowa FMA, in which the Minister's desire to ensure a perpetual supply of benefits and products while maintaining a forest environment of high quality is stated:

> While that may well be a correct observation about the intention of the parties to the FMA when they entered into the agreement, it tells us nothing about whether such an obligation is required by s. 16(1) of the *Forests Act*.

With respect to the multiple use policy pursued by the provincial government on Crown forests, the Court stated:

> The reason for which I do not dwell at length upon the existence of concern and action on the part of the government for uses of the forest other than timber harvesting is that, in my view, the promotion or protection of such uses, however laudable, *is irrelevant to whether the Daishowa agreement "is designed to provide a perpetual sustained yield."*[178]

By the same token, the affirmation and protection of treaty rights could be viewed as an extraneous consideration in the Minister's decision to allocate an FMA, since neither the Act, the regulations nor the tenure agreement acknowledge the existence of such rights. The Minister could be guided in his allocation decision by a concern to protect treaty rights, but he is, nevertheless, not statutorily obliged to do so. The same wide latitude characterizes ministerial decisions in regard to the granting of non-timber rights to third parties pursuant to the terms of the FMA agreement.

Similarly, the Minister's discretion in the exercise of his various powers over the life of the FMA is not restricted by any special requirements to "recognize and affirm" treaty rights. All of the major forest operations to be carried out by a forest company are set out in a series of forest management plans which are prepared by the FMA holder in accordance with provincial requirements and submitted to the Minister for his approval. Such requirements are stipulated by regulation and "ground rules" and they include, for instance, the completion of forest inventories providing the database upon which a forest company's calculations as to volumes and areas to be cut are based. These inventories are primarily of timber resources and, over the past few years, have tended to also include wildlife resources. However, the forest company is not specifically required to collect information as to areas which are of critical importance to First Nations for hunting, trapping or fishing activities nor as to wildlife populations which support these activities. Sacred sites are not required to be identified either. At the time of the allocation of timber rights, the extent of forest use by Aboriginal peoples is largely unknown to both the provincial government and forest companies

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[177] *Ibid.* at 122.

[178] *Ibid.* at 145 [emphasis added].

and, in the absence of that knowledge, accommodation of both timber and treaty rights is impossible. In short, the legislative framework of forest management does not direct the Minister to consider Aboriginal land use and treaty rights in the performance of his duties as forest land manager.

2. THE EXTENT AND MANNER OF "TAKING UP" OR "OCCUPATION" OF TRADITIONAL LANDS

a. The Extent of Occupation

There appears to be no limit in Alberta to the steady "taking up" or "occupation" of traditional lands for forestry developments; this has, in effect, created a situation which was never envisioned by the signatories of Treaty 8. As noted, the Aboriginal signatories of Treaty 8 would have understood that limited taking up of lands for purposes of lumbering could take place, but they never would have agreed to the extensive taking up and clear-cutting of lands to supply world-scale pulp and paper manufacturing plants. At the present time, in the boreal forest, the allocation of vast expanses of forest lands by means of FMAs to multinational corporations is primarily designed to supply large pulp and paper mills, which consume tremendous quantities of timber for export. For instance, the Alberta-Pacific pulp mill produces fifteen hundred tonnes of pulp per day and has been described as the largest single-line kraft pulp mill in the world. The FMA area allocated to this forest company encompasses over 60,000 km^2 and covers close to 9 percent of Alberta's land surface.

FMAs are area-based tenures; that is to say, they allocate timber rights to forest companies over a pre-determined area of land defined in the agreement. Even though only a portion of the allocated area may be "timber productive" and may therefore be logged during the twenty year term of the agreement, the FMA holder occupies, and is entitled to conduct forestry operations over, the entire allocated area. The FMA conveys to its holder the right to enter upon and occupy the land for the purposes of establishing, growing and harvesting timber in a manner designed to provide a perpetual sustained yield.[179] This includes, subject to government approval, the right to select areas to be logged, the sequence of logging operations, and the location of the roads to be built to access these areas. Pursuant to a standard FMA clause, FMA holders are deemed to be "occupants" of the public lands comprising the forest management area.[180]

Indian reserves, being vested in the federal Crown, are specifically excluded from the allocated land base. Other areas "excepted" out of the FMA include, notably, areas subject to timber dispositions, lands subject to specific dispositions such as grazing leases, the beds and shores of bodies of water, and lands designated as Provincial Parks or Forest Recreation Areas.[181] By contrast, the entire traditional territory utilized by

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[179] See, for example, "Daishowa Canada Co. Ltd. Forest Management Agreement," O.C. 424/89, s. 7(1).

[180] *Ibid.* s. 7(2).

[181] *Ibid.* s. 4.

Treaty 8 First Nations for their hunting, trapping and fishing activities, and in particular for their traplines, is included in the FMA area and thus, in principle, is available for timber harvesting.

Most of the productive forest lands in the boreal forest in Alberta are currently allocated to forest companies or individuals by way of FMAs and timber quotas. As a direct result, the descendants of Aboriginal communities which were signatories of Treaty 8 are now surrounded by forest developments, with their traditional land base entirely or partly overlaid with forest tenures. For instance, as of December 1996, the majority of the Dene Tha' traditional lands in the northwestern corner of Alberta are encompassed within the area allocated to Daishowa-Marubini International Ltd. and its subsidiary, High Level Forest Products Ltd., under two large FMAs and various timber quotas covering approximately 60,000 km^2.

b. Manner of Occupation of Forest Lands for Timber Uses

The extent of forest operations on Treaty 8 land far exceeds that contemplated by its terms. The manner in which forest lands are taken up and occupied for timber uses further threatens the exercise of treaty rights. The rights included in Treaty 8, it will be recalled, amount to a right to continue to gain sustenance from their traditional lands in perpetuity. Aboriginal signatories to Treaty 8 would have understood that certain government regulations would limit their rights, but only for conservation purposes. However, forestry regulations applying to the growing and harvesting of trees as well as incidental forest operations do not seek to conserve wildlife.

The practice of industrial forestry by way of clearcutting, coupled with the pressure to cut large volumes of wood to supply recently-built, world-size pulp and paper mills, presents a serious threat of impairment or destruction of wildlife habitat and the resources therein. The type of large-scale industrial forestry currently practised in the boreal forest is incompatible with the continued exercise of hunting, trapping and fishing rights.

In and of itself, the allocation of lands to individuals or forest companies and their use for timber production and extraction does not necessarily interfere with the exercise of treaty rights. As established in the analysis of the terms "taken up" and "occupied," the courts are reluctant to infer from occupation of the land that treaty rights can no longer be exercised. As noted, only a small proportion of the allocated area is actively used for forestry purposes at any one time, and it is presumed that hunting, trapping and fishing may still be conducted on the balance of the lands.

The implicit assumption in the multiple use approach pursued by the provincial government is that forestry activities are not incompatible with other uses of the forest. However, compatibility of timber growing and harvesting with hunting, fishing and trapping cannot be presumed. Inasmuch as forests provide habitat for wildlife, the removal of forest cover has a direct impact on wildlife populations, and therefore on hunting and trapping activities which depend on their continued existence. The severity of the impact depends on the type of forestry practised.

The practice of industrial forestry, based on the sustained-yield philosophy, aims at ensuring a long-term continuous supply of timber to the forest industry. It involves cutting blocks of forests in a sequential way as well as conducting a variety of forest operations necessary to ensure forest regrowth and forest protection (*e.g.* replanting or seeding, silvicultural treatments such as thinning, weeding, application of herbicides and insecticides), in accordance with long-term forest management plans. The most common method of logging is clearcutting, with the size and layout of cutblocks varying. Access to the cutblocks to cut and remove the trees and to carry out various forest management activities necessitates the construction of a network of forest roads, some of them across streams and wetlands.

Even though in any given year only a small percentage of the FMA area is logged, as noted by Curtis J. in the *Westbank* case, the overall impact of logging on the forest environment is much wider:

> It is important to distinguish however between area that is unlogged and area that is unaffected by logging — if, for example, 50% of the total area were clear cut in a checkerboard pattern of 20 hectare blocks, while 50% would remain uncut, arguably 100% would be affected by logging.[182]

The impacts of forestry operations on ecosystem integrity in general, and on wildlife habitat and populations in particular, vary greatly over time and space and as a result of harvesting methods used. New forest habitat created by harvesting may benefit certain species while at the same time be detrimental to others. For instance, clearcutting is known to provide new forage for deer, but negatively impacts woodland caribou and bear, which require large tracts of contiguous areas of forest.

Roads, by increasing access to remote areas and creating edge habitat, often have negative impacts on wildlife; poor road construction across streams and near watercourses frequently damages fish habitat, and roads provide greater access to sport hunters, which further depletes the wildlife. In *R.* v. *Crowe*, a Saskatchewan Provincial Court case in which the establishment by the provincial government of Road Corridor Game Preserves was challenged by an Aboriginal party, the following evidence was provided by a government expert witness in regard to the impacts of roads on moose populations:

> Mr. Kowal testified that Road Corridor Game Preserves were initiated in response to dwindling moose populations in the north. He indicated that the increase in forestry activity was primarily responsible for this phenomenon.... Moreover, the forestry companies constructed a large number of roads into the areas of their operations which provided easy access for hunters. Mr. Kowal testified that in his opinion it was primarily the proliferation of roads in the north that was responsible for the declining moose population.[183]

While the impact of logging is in some respects temporary, since forests do regenerate, its duration is significant in the boreal forest where regeneration is slow. The length of

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[182] *Westbank*, *supra* note 172 at 224, para. 10; see also *Halfway*, *supra* note 61 at paras. 106-107.

[183] [1997] S.J. No. 188 at para. 3 (QL).

time required for aspen-dominated boreal forests to reach maturity is fifty to seventy years and it takes approximately 120 years for these forests to reach old-growth stage. Further, regrowth of the forest does not necessarily lead to restoration of the ecosystem upon which the exercise of Aboriginal rights depends and regeneration practices often alter significantly the composition of the natural forest.

The overall impact of logging on forest ecosystems and wildlife populations has long been an issue of public concern. In 1979, the Environment Council of Alberta held extensive public hearings on the environmental effects of forestry operations in the province and brought these public concerns forward to the provincial government, along with a set of recommendations designed to address the issues. With respect to trapping, the Council reported as follows:

> Trappers are concerned about the present clear-cut method of harvesting timber. Where mature timber is clear-cut in large blocks the forage for squirrels, in the form of seed cones, is gone and the squirrel leaves the area. Martens and fishers also leave the area, since they rely on squirrels for the bulk of their food supply. The noise from harvesting machinery also has a detrimental effect on fur harvest, since it causes many fur bearers to change their feeding and travel patterns.[184]

A decade later, another government-appointed expert panel reported persistent concerns about the impact of forestry operations on trapping and urged government to finalize and implement a fur management policy:

> Many concerns were raised that the livelihood of trappers would be placed in jeopardy by forest development, through depletion of furbearer populations and by vandalism to trappers' cabins and equipment. There is also concern that trappers would have little or no say in FMA decisions that affect the furbearer resource, and that little or no compensation would be forthcoming for damages to property or to the fur resource.[185]

With the increasing recognition of forests as natural ecosystems and a better understanding of the interconnectedness of all parts of those ecosystems, the overall effects of timber harvesting on plants and animals are more widely acknowledged. Attempts are made to avoid or mitigate negative impacts.[186] Nevertheless, a 1995 scientific study warns against the deleterious impacts of current forest practices as follows:

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[184] Alberta, Environment Council of Alberta, *The Environmental Effects of Forestry Operations in Alberta, Report and Recommendations* (Edmonton: The Council, February 1979) at 23.

[185] Alberta Energy/Forestry, Lands and Wildlife, *Forest Management in Alberta — Report of the Expert Review Panel* (Edmonton: University of Alberta, May 1990) at 62.

[186] See for instance Alberta Forestry, Lands and Wildlife, *Daishowa Canada Co. Ltd. Timber Harvest Planning and Operating Ground Rules* (Edmonton: Alberta Forestry, Lands and Wildlife, Forest Service, 14 March 1990). Pursuant to s. 3.1.10 entitled Wildlife Habitat Planning, a Forestry/Wildlife Integration Technical Committee is to be established "to facilitate the integration of wildlife and fisheries concerns into the Forest Management Plan and the 6-Year Development Plan and to identify wildlife zones." Similar provisions are now included in the ground rules governing forest operations throughout the province.

> The current and dominant form of forest management in Alberta's mixedwood forests includes unstructured clearcut logging, a narrow range of rotation ages leading to a constant-age class merchantable forest, silvicultural enhancement for conifer regeneration, and the administrative separation of the hardwood and softwood landbase.... Changes to the forest landscape caused by current forestry practices include the loss of structural complexity (green trees, snags, DWM) in young forests, loss of older forest stages, and the likely spatial separation of aspen and conifers. The transformation of the boreal forest landscape, in turn, is likely to alter the composition and abundances of biota and the nature of ecological processes. Current forest management practices, therefore, are inadequate to ensure the ecological integrity of Alberta's boreal mixedwood forests.[187]

The authors of the study recommend that the provincial government and the forest industry "recognize that many of the ecological effects of commercial forestry, including those guided by forest ecosystem management, are presently unknown, and therefore establish aspen mixedwood forest reserves of appropriate scale as ecological bench marks against which other forest land-uses can be evaluated."[188]

A debate among experts is ongoing as to the way in which various forest practices, notably clearcutting, affect wildlife habitat and populations; even though the extent to which negative impacts are counterbalanced by positive impacts remains uncertain, there is general agreement on the fact that logging does change wildlife habitat, and that of various types of logging, clearcutting has the most dramatic effects. Given the lack of reliable data on wildlife populations and the impacts of harvesting on these populations over time, it is not possible to assert with any degree of confidence that clearcutting in general is a safe and ecologically sound practice in the boreal forest, or that it has no detrimental effect on the exercise of treaty rights to hunt, trap and fish. In the *Westbank* case, which dealt with the impacts of logging on an aboriginal right to trap marten, Curtis J. remarked:

> On the materials before me, and indeed on the state of scientific knowledge to date, there is considerable uncertainty concerning the point at which logging will harm marten habitat, and how specific patterns of logging will affect the species. Logging has changed considerably in recent years, and studies based on old practices may not be helpful for assessing newer ones. It is clear however that the proposed logging will begin to transform a relatively large area of mature forest on the trap line from one which shows little sign of logging into one liberally scattered with clear cut patches, albeit much more widely spaced and smaller than the previous areas logged.[189]

From the point of view of the Aboriginal peoples inhabiting the boreal forest and desirous to exercise their constitutionally protected treaty rights, the debate about the impacts of logging on wildlife habitat and populations has an air of unreality. Aboriginal communities are directly and immediately affected in their subsistence activities by the impacts of forestry activities carried out on their traditional lands.

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187 J.B. Stelfox, ed., *Relationship between stand age, stand structure, and biodiversity in aspen mixedwood forests in Alberta* (Vegreville, Alta.: Alberta Environmental Centre; Edmonton, Alta.: Canadian Forest Service, 1995) at vii, viii.

188 *Ibid.*

189 *Supra* note 172 at paras. 27-28.

Many First Nations have begun to collect the requisite information in order to demonstrate the extent of logging impacts on wildlife populations.[190] Alphonse Scha-Sees, one of the Dene Tha' elders interviewed during the recent completion of a traditional land use and occupancy study, stated:

> Today, there is a lot of logging going on, even on our lands and reserves. When we complain about it, they tell us that they have a right to do so, and they shut off there. Last year, I went to my cabin with a skidoo. I went to see if there were any animals, but there are hardly any because there has been logging on my trapline and the animals don't have any forest left. There were 70 lakes on my trapline, when we used to trap for muskrat and beaver, but now there are no lakes. Now all the water is gone due to the logging. You people have to do something about that logging on our lands for future generations to come.[191]

Another elder, Jean Pastian, added:

> If you take the large spruce away, the squirrels have no place to live. Then the martens disappear. Then the fox. Then the lynx. Then the moose have no cover for the winter. We have to stop this.[192]

Aboriginal peoples draw little comfort from knowing that the mature forest which provides habitat for wildlife they rely upon for hunting, trapping and fishing will grow back in another seventy years, or that species other than the ones they have traditionally relied upon for their subsistence may replace the species which have been lost or displaced. As noted by Dorgan J. in the *Halfway* case:

> ...members of Halfway depend on hunting to feed their families and the proximity of the Tusdzuh area to the reserve allows Halfway members easy access to quality hunting areas where they can harvest game to feed their families.
>
> ...the petitioners state that encroachments have already forced Halfway to go further and further to find quality hunting. The reasonable inference to be drawn from this letter is that logging in CP212 will be another "further encroachment" which will cause the petitioner's hardship.
>
> The MOF and Canfor argue that Halfway has the rest of the Tusdzuh area in which to enjoy the preferred means of exercising its rights. This again ignores the holistic perspective of Halfway. Their preferred means are to exercise their rights to hunt, trap and fish in an unspoiled wilderness in close proximity to their reserve lands. In that sense, the approval of CP212 denies Halfway the preferred means of exercising its rights.[193]

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190 A wealth of information on the impacts of both logging and oil and gas developments in the boreal forest is being collected as a result of the undertaking of traditional land use and occupancy studies amongst Treaty 8 First Nations in Alberta. See for instance Fort McKay First Nations, *There Is Still Survival Out There* (Calgary: Arctic Institute of North America, 1994).

191 The Dene Tha' First Nation, *Dene Tha' Traditional Land Use and Occupancy Study, supra* note 24 at 15.

192 *Ibid.* at 64.

193 *Halfway, supra* note 61 at paras. 111, 113, 114.

The above analysis demonstrates the failure to provide clear legislative guidelines to the Minister in the exercise of his/her discretion in allocating and managing forest lands. This failure has resulted in the unlimited "taking up" of vast areas of traditional lands for the practice of industrial forestry. This, in turn, jeopardizes the pursuit of hunting, fishing and trapping activities, and clearly indicates that provincial forest legislation, on its face, infringes treaty rights and amounts to a breach of the terms of Treaty 8. The argument put forward in the next section is that this *prima facie* infringement may not be justifiable by the provincial government.

B. JUSTIFICATION

The courts have established that provincial legislation affecting the exercise of treaty rights must be justified in accordance with the *Sparrow* test.

The first step in the justification analysis involves an assessment as to whether or not the government is pursuing a valid legislative objective. The validity of the provincial legislature's objective in enacting the *Forests Act* is not examined in this article: it is understood that the legislative objective is economic development and securing a future supply of timber for this purpose, and that this is likely a legitimate objective.[194] Instead, the discussion focuses on the means used to achieve that legislative objective.

The Supreme Court has unequivocally stated that the means by which a valid legislative objective is to be attained must uphold the honour of the Crown and be in keeping with the Crown's fiduciary duty to the Aboriginal peoples. This requires the accordance of priority to treaty rights in both the process and the substance of decisions which potentially restrict those rights. The following two aspects of the Court's investigation into the Crown's conduct are considered: 1) whether there has been minimal infringement of treaty rights, and 2) whether the provincial Crown, before taking any action which might impact on treaty rights, has consulted with potentially affected First Nations.

1. MINIMAL INFRINGEMENT

The desired result must be achieved with as little infringement as possible on treaty rights. To be justifiable, any interference with treaty rights must be necessary in order to achieve the valid legislative objective. The provincial government, both in the process by which it allocates and manages other uses of the forest, and in the substance of its decisions, must give priority to treaty rights. The legislative scheme currently governing forest management in Alberta flagrantly contradicts these principles by granting priority to the rights of forest tenure holders over those of Aboriginal people without acknowledging or seeking to accommodate existing treaty rights with newly allocated timber rights.

The following standard FMA clause illustrates the approach taken by government with respect to third party access to allocated forest areas:

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[194] See the discussion in VII. B. above with respect to legislative objectives.

> It is recognized by the Minister that the Company's use of the forest management area for growing and harvesting timber is to be the primary use thereof and that it is to be protected therein, but in keeping with the policy of providing for multiple uses of the same public land, the Minister reserves all land rights on the forest management area not specifically given hereby, including ...:
>
> (a) the right of others to travel, hunt, fish and otherwise use the said lands for recreational purposes....;
>
> (d) the right to authorize trapping and domestic stock grazing...[195]

This clause ensures general access of the public to the FMA area to travel, hunt and fish for recreational purposes. Therefore, Aboriginal people, like other members of the public, are entitled to continue using their traditional lands for hunting and fishing. However, with declining wildlife populations available, this is a hollow right. Only a priority to Aboriginal hunting would give effect to the treaty right. Further, the Minister reserves "the right to authorize trapping"; presumably trappers in possession of a trapper's licence are entitled to trap within the FMA area. Nevertheless, the use of forest lands for timber growing and harvesting is established as the "primary use" and is clearly intended to take precedence over non-timber uses in the event of conflict. Third party rights to the use of the forest are only authorized to the extent that they do not interfere with ongoing forest operations and the rights of FMA holders.[196]

The above-cited FMA clause granting priority to the rights of FMA holders infringes upon treaty rights in two basic ways: first, by failing to specifically include treaty rights to hunt, trap and fish among the list of rights reserved by the Crown; and second, by making hunting, trapping and fishing rights, which would include those granted by the treaty, secondary to the rights granted to FMA holders, even though treaty rights may be impinged upon by the activities of FMA holders.

Aboriginal peoples retain the freedom to exercise their treaty rights in those areas of the forest which are not being logged or which are not otherwise occupied by a forest company for incidental operations, such as the construction, operation, storage and maintenance yards, roads and camps. However, when a company identifies a need to log forest areas used by Aboriginal peoples for hunting or trapping and thus threatens the continued exercise of their treaty rights, the rights of the FMA holder are deemed to prevail over those of Aboriginal peoples.

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[195] "Daishowa Canada Co. Ltd. Forest Management Agreement," O.C. 424/89, s. 8(1).

[196] Of note is the fact that despite the wording of this FMA clause, the right to grow and harvest timber is not always accorded priority over other forest uses. Specifically, the right of oil and gas companies to conduct geological and geophysical exploration, which is included in the list of rights which may be authorized by the Minister, is unlikely to be denied once an exploration licence has been obtained from Alberta Energy (*Mines and Minerals Act*, R.S.A. 1980, c. M-15 and *Exploration Regulation*, Alta. Reg. 32/90). Further, in the event that exploratory activities lead to the discovery of oil and gas reserves, and mineral operations are approved by the Alberta Energy and Utilities Board, the right to develop such reserves is unquestioned and mineral producers are granted access to the FMA. Consent of the occupant (the FMA holder) is required; however, if access is denied, a right-of-entry order may be obtained from the Surface Rights Board (*Surface Rights Act*, S.A. 1983, c. S-27.1). In other words, select third party interests may take precedence over those granted to FMA holders.

At present, no delineation has been made between constitutionally protected treaty rights to trap and trapping rights acquired by any member of the public by means of a yearly trapping licence. As a result, this FMA clause amounts to a potential infringement of treaty rights, and the constitutionality of such a provision as it relates to treaty rights is highly debatable. Indeed, as noted earlier, application of the principles established by the Supreme Court in *Badger* and several other cases suggests that, since the public is granted a limited right of access to hunt, fish and trap within the FMA area, Aboriginal people have an unlimited right of access to the FMA area for the purpose of hunting, fishing and trapping for food. Treaty rights should be given priority over any competing logging rights allocated to forest companies, as well as over hunting, fishing and trapping rights allocated to the public.

The rights of Aboriginal users are not acknowledged in either the *Forests Act*, the regulations thereunder or the tenure agreements such as the FMAs. In addition, no attempt is made by the provincial government to mediate between treaty rights and the rights of other forest users, notably forest companies. Volumes of cut are calculated on the basis of accessibility and commercial value of tree species and the industrial needs of the mills.

In the recent past, some progress has been achieved in developing forest practices which mitigate potential negative impacts of logging on wildlife habitat and populations. However, in order to avoid or effectively mitigate the impact of forest operations on traditional land uses by First Nations, and thus accommodate treaty rights and industrial resource development, there needs to be recognition by both the provincial government and industry of the existence of those rights and a willingness to accommodate the Aboriginal interest in wildlife harvest. It is suggested that accommodation is possible with little effort.

Preliminary identification of traditional land uses and of the potential effects of forest developments on Aboriginal people is required before land is allocated and cut levels are calculated and approved. Maintenance of existing traplines to enable Aboriginal peoples to pursue their traditional activities may necessitate a reduction of the land area available to a forest company prior to calculation of the AAC levels; once AAC volumes have been set, it is difficult and costly for the provincial government to reduce those volumes by withdrawing land from the FMA area. The Aboriginal interest could also be accommodated by providing Aboriginal communities co-management authority over their traditional hunting/trapping territory, with the authority to preserve sensitive and highly productive areas for wildlife and passive uses. Accelerated habitat recovery programs could be implemented on clear cut land and entrusted to Aboriginal management. Effective accommodation of competing rights requires effective involvement of Aboriginal peoples in allocation and management decision-making processes.

2. CONSULTATION

The provincial government cannot demonstrate that it has fulfilled its duty to consult with Aboriginal peoples in order to minimize infringement of their treaty rights. As

noted earlier, the duty to consult arises in the context of the justification analysis. Legal writer Michael McDonald argues that provincial regulation should not have the effect of unilaterally impairing, infringing or extinguishing treaty or Aboriginal rights. "At the very least, the application of the justification principles set out in *Sparrow* and included in the *Badger* decision for treaty rights, should be incorporated into the procedure for lands being taken up for 'mining and lumbering'."[197] In point of fact, no legal or policy provisions exist concerning the need for government to inform and to consult with Treaty 8 communities, nor is there a procedure to be followed in the case of such consultation, either at the time forest tenures are allocated or at the time forest management plans are drafted and submitted to the Minister for approval.

A departmental policy outlining a public involvement program in forest management planning was adopted by the provincial government in 1990. Aboriginal peoples are omitted from the list of key participants in this planning process.[198] Pursuant to this policy document, Forestry Environmental Liaison Committees consisting of representatives of local public groups having an interest in forest management are to be established by the forest company "where sufficient interest exists locally." In the most recent set of FMAs, implementation of this public consultation policy has involved the addition of a clause requiring the forest company, prior to submitting its proposed forest management plan to the Minister, to conduct public presentations and reviews of the plan and to respond to public concerns raised with respect to the plan.[199]

Arguably, both the current public consultation policy and the FMA clause provide inadequate consultation of Treaty 8 First Nations by the provincial Crown, and are not in keeping with the Crown's fiduciary duty. First, the consultation process is designed to provide public input into management decisions after, instead of prior to, the allocation of FMAs or timber quotas. Assuming that an Aboriginal group might agree to participate in the public involvement process on the same basis as any other "stakeholder," this participation would not suffice to establish that the provincial Crown had adequately satisfied its fiduciary obligation. Aboriginal peoples, enjoying constitutionally protected treaty rights, cannot be treated on the same basis as any "stakeholder" or "interest group" when their rights are at risk of being infringed. The duty to consult is specifically imposed on the Crown; even though consultation between a forest company and potentially affected Aboriginal peoples is a positive step, such a process does not relieve the province of its broader fiduciary obligation. As noted by Dorgan J. in *Halfway*, a case examining whether the issuance of a cutting permit

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197 M. McDonald, "Aboriginal and Treaty Rights in the Natural Resource Sector: Consultation, Negotiation, and Justification Duties of the Crown Towards Aboriginal Groups" (Paper Presented at the Native Investment and Trade Association Conference on Aboriginal Law, 26-27 September 1996) at 11 [unpublished].

198 Alberta Forestry, Lands and Wildlife, *Planning Together for the Future, Public Involvement and Forest Management Planning* (Edmonton: 1990). Key participants are listed as including: the general public, special interest groups such as recreationists, ranchers, trappers, municipal authorities and environmental organizations, FMA holders, various departments within the provincial government, and petroleum, natural gas and mineral resource developers.

199 *E.g.* High Level Forest Products Ltd. Forest Management Agreement, O.C. 629/96, s. 10(1).

infringed upon Aboriginal and treaty rights, meetings between a forest company and a First Nation group which do not involve ministry officials "cannot be considered consultation for the purposes of determining whether Lawson met his fiduciary obligations."[200]

In the same decision, the duty to consult was described by the Court as follows:

> Based on the *Jack*, *Noel* and *Delgamuukw* cases, the Crown has an obligation to undertake reasonable consultation with a First Nation which may be affected by its decision. In order for the Crown to consult reasonably, it must fully inform itself of the practices and of the views of the Nation affected. In so doing, it must ensure that the group affected is provided with full information with respect to the proposed legislation or decision and its potential impact on aboriginal rights.[201]

Adequate consultation imposes a duty on the Crown to first, inform itself of traditional uses and the potential impacts of proposed decisions on such uses and second, fully inform potentially affected First Nations of the upcoming decisions. In the absence of sufficient knowledge as to the nature and extent of the use of forest land by Aboriginal peoples for hunting, trapping and fishing, the provincial government typically allocates timber rights and permits forest companies to plan their forestry operations. Consultation with First Nations is a prerequisite to obtaining such knowledge, to assessing the extent of treaty rights and to more adequately and fairly measuring and attempting to mitigate potential impacts of forest developments on these rights. The onus remains on the provincial government to initiate a consultation process which will enable both parties to gain a full understanding of each other's views and practices.

As early as 1990, recommendations to involve Aboriginal peoples at an early stage in the process of FMA negotiation and allocation were submitted to the provincial government by the Alberta-Pacific Environmental Assessment Review Board on the following terms:

> 9.4.4 It is recommended that the Indian Bands and Aboriginal people that would be affected by the FMA be involved in negotiation and discussion during the preparation of the FMA. Financial resources to enable effective participation should be made available to them and matters for their involvement should include:
>
> - possible effects of the FMA on treaty rights or land claims;...
> - impacts on wildlife and wildlife habitat, and on trapping, hunting and fishing, including consideration of compensation for affected trappers; ...
> - plans to minimize impacts on Aboriginal People and their lands as a result of logging roads and improved access; ...[202]

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200 *Halfway*, *supra* note 61 at para. 136.

201 *Ibid.* at para. 133.

202 The Alberta-Pacific Environmental Impact Assessment Review Board, *The Proposed Alberta-Pacific Pulp Mill: Report of the EIA Review Board* (Edmonton: Alberta Environment, 1990) at 90. This joint federal-provincial EIA panel was appointed to examine the environmental impacts of the proposed Alberta-Pacific pulp mill and provide recommendations to both the federal and the

Further, the Review Board recommended that specific contractual obligations be included in the FMA in order to protect treaty rights:

> The Board recommends that the concerns of the Aboriginal People regarding their Treaty Rights to hunt, trap and fish on lands be properly addressed by the governments. Alberta-Pacific *should be required* to have detailed and well designed harvesting plans which have been developed jointly with the government, the proponent and Aboriginal representatives. Comprehensive native trappers' compensation should be developed and negotiated between the three parties and *made part of the FMA*.[203]

These recommendations were ignored by the provincial government; the FMA was negotiated and signed between the province and the company without direct involvement by the affected First Nations and without adequate knowledge of the potential impacts of forest allocations on treaty rights and traditional uses. The agreement fails to impose any obligation on the company to involve Aboriginal representatives in the development of harvesting plans and makes no reference to a trappers' compensation program. Even though the company did eventually implement various measures in order to involve Aboriginal people in its operations, these commitments by the company cannot be viewed as satisfying the provincial government's fiduciary obligation towards Aboriginal peoples.[204]

In summary, infringement of treaty rights by the provincial Crown under the current legal and policy framework of forest management appears to be unjustifiable based on the following reasons: 1) there is no explicit attempt made by the provincial government, in its timber allocation and management decisions, to interfere to a minimal extent with treaty rights or to give priority to these rights, and 2) consultation with First Nations, to the extent that it does occur, is inadequate. As a result, the provincial government does not fulfil its fiduciary duty owed to Treaty 8 First Nations.

IX. CONCLUSION

The above analysis has sought to establish that the rights to hunt, trap and fish guaranteed to the signatories of Treaty 8 in 1899, and confirmed by the NRTA, exist to this day. Treaty rights are constitutionally protected under s. 35(1) of the *Constitution Act, 1982*. Any infringement of these rights must be justified in accordance with the *Sparrow* test.

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provincial governments as to the acceptability of the project. The Board recommended against the approval of the proposed mill until the completion of additional river studies.

203 *Ibid.* at 45 [emphasis added].

204 Alberta-Pacific established an Aboriginal Affairs Resource Team in order to implement its mission statement, which is to "commit to meaningful Aboriginal participation in all aspects of the Company." In addition, Aboriginal people were allowed to appoint representatives on the Forest Management Task Force comprised of various groups; the company also developed a Trapper Compensation Program; finally, the company provided funding towards the completion of a traditional land use and occupancy study inventorying Aboriginal land uses in the western part of the FMA.

The legislative scheme pursuant to which Crown forests are allocated and managed in Alberta amounts to a *prima facie* infringement of treaty rights. The provincial government can only honour treaty rights by acknowledging their existence. Ministerial discretion should be structured in such a way as to provide clear direction to the Minister responsible for forest allocation and management in his resource management decisions. Both the process of allocation and the actual allocation of the forest resource must reflect the prior interests of aboriginal people in the resource. Further, the provincial Crown should make every reasonable effort to make its use of forest resources compatible with the pursuit of traditional activities by Aboriginal peoples. Fulfilment by the provincial Crown of its fiduciary duty to the descendants of Treaty 8 signatories requires that accommodation be found between treaty rights and competing resource rights. The means by which such accommodation is reached must be developed jointly by First Nations and the provincial Crown. At a minimum, adequate consultation with affected Aboriginal groups must take place before further timber rights are allocated and management decisions made which may interfere with their rights.

The courts are only beginning to define in more precise terms the obligation to consult First Nations. The provincial government could take positive steps to develop clear policies and legislative rules which, in the words of the Royal Commission on Aboriginal Peoples, will contribute to "restore the treaty partnership" and "implement the historical treaties from the perspective of both justice and reconciliation."[205]

[205] Royal Commission on Aboriginal Peoples, "Volume 2: Restructuring the Relationship" in *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) at 42, 49.