HER MAJESTY THE QUEEN (Appellant) v. LARRY LITTLEWOLF (Accused); HER MAJESTY THE QUEEN (Appellant) v. GILBERT POTTS AND WILLIAM POTTS (Accused)

[Indexed as: **R. v. Littlewolf; R. v. Potts**]

Alberta Court of Queen's Bench, Bielby J., June 30, 1992

R.F. Taylor and M.A. Unsworth, for the appellant
A.D. Pringle, for the accused Gilbert Potts and William Potts
L. (Tony) Mandamin, for the accused Littlewolf

The accused Treaty 6 Indians were acquitted at two separate trials on various charges and convicted on other charges under the Alberta *Wildlife Act,* S.A. 1984, c.W-9.1 as a result of an undercover operation by a wildlife officer. The officer had attempted to locate evidence of Indians hunting game for resale purposes. The Crown appealed certain of the acquittals and G.P. and W.P. also appealed their convictions *(R. v. Potts,* [1992] 1 C.N.L.R. 142 (Prov. Ct.) and *R. v. Littlewolf* (Prov. Ct.), reported *supra*, at p.83).

Held: Crown appeals from acquittals allowed; convictions entered. Cross-appeals from convictions dismissed.

1. Treaty 6 ensured the Indian signatories the right to hunt on unoccupied private land for personal use and the right to hunt commercially.

2. Para. 12 of the *Constitution Act, 1930* limited hunting for personal consumption by Treaty 6 Indians. It removed the pre-existing treaty right to hunt on unoccupied privately-held land. Treaty 6 Indians are required to comply with the provisions of the *Wildlife Act* when hunting on privately-owned land without the owner's permission.

3. Para. 12 of the *Constitution Act, 1930,* removed the right of Treaty 6 Indians to hunt for commercial purposes. Thus the right did not survive to be protected by s.35(1) of the *Constitution Act, 1982.* The fiduciary duty to deal with Indian reserve land for the benefit of Indians cannot be extended to protect Treaty 6 commercial hunting rights. The provisions of the *Wildlife Act* operate to prohibit Treaty 6 Indians from hunting game for commercial purposes.

* * * * * *

BIELBY J.:

Summary of Results

The provisions of the *Wildlife Act,* S.A. 1984, c.W-9.1, as amended ("the *Wildlife Act")* operate to prohibit Indians subject to Treaty 6 (the "Treaty 6 Indians") from hunting game for commercial purposes. While Treaty 6 gave rights to the Indians to hunt for this purpose, the *Constitution Act, 1930,* para. 12 ("the 1930 *Constitution Act")* removed that right. It thus did not survive to be protected by s.35(1) of the *Constitution Act, 1982* (the "1982 *Constitution Act*").

Similarly, the 1930 *Constitution Act* continues to operate to limit hunting for personal consumption ("hunting domestically") by Treaty 6 Indians. It removes the pre-existing treaty right to hunt on privately-owned land. Treaty 6 Indians, like all other citizens, are required to comply with the provisions of the *Wildlife Act* when hunting on privately owned land without the owner's permission.

Therefore, these within Crown appeals from acquittals arising from such activities are allowed. Cross-appeals from certain convictions by Gilbert Potts and William Potts are dismissed.

The Facts

The accused were all charged as a result of an undercover operation conducted over a significant period of time by an undercover wildlife officer. That officer attempted to locate evidence of Indians hunting game for resale purposes in Alberta after officials received complaints.

Indians unquestionably have the right to hunt game for food for themselves any time of the year, unlike other citizens, as a result of signed treaties and constitutional protection discussed below. However, until the time these charges were laid, that right was not considered to extend to hunting game for resale or barter to other people ("hunting commercially"). Also, even in hunting domestically, Indians were considered to be bound by the general prohibitions as to the method of hunting on privately-owned land as set out in the *Wildlife Act*.

The wildlife officer introduced himself to Indians on different reserves in Alberta, became known to some of them, hunted with some of them and purchased game from them. The accused Mr. Littlewolf was charged with thirteen violations of the *Wildlife Act* arising from his unwitting involvement with the wildlife officer. He was acquitted of twelve of them. The accused Gilbert Potts and William Potts were similarly charged with a variety of offences. Gilbert Potts was acquitted on nine of them. William Potts was acquitted on six of them. Each accused was convicted on one or more other charges that do not form the subject matter of this appeal.

The Crown appeals each acquittal. They arise from two separate judgments given in two separate trials by two different Provincial Court Judges. The Potts brothers also appeal from their convictions. During oral argument on the appeal, the Crown abandoned its appeal from the acquittal of Mr. Littlewolf on counts four and eleven, leaving appeals in place from the ten remaining acquittals.

The Trial Decisions

Provincial Court Judge Ayotte heard the trial involving both the Potts (see *R. v. Potts*, [1992] 1 C.N.L.R. 142). He dismissed charges after finding that the sections of the *Wildlife Act* under which the Potts were charged were inoperative regarding Indians. He found that their Aboriginal right to commercial hunting, guaranteed by Treaty 6, remained unaffected by the provisions of the 1930 *Constitution Act.* He also held that the Indian right to hunt for commercial purposes may have been validly limited by the provisions of the *Wildlife Act* before 1982 but, as a result of s.35(1) of the 1982 *Constitution Act,* provincial legislation no longer operates to defeat that right. The *Wildlife Act* purports to do so and thus was found inoperative against both Potts. However, he convicted the Potts brothers of certain charges on the basis that the hunting there involved a plan to sell to the undercover officer, knowing he planned to resell to a third party. This was in clear violation of the *Wildlife Act* that unquestionably applied to the wildlife officer as a non-Indian. Aiding the commission of such an offence took the Potts outside the good faith requirement Judge Ayotte found to exist as a component of the exercise of treaty hunting rights. It removed their exemption from the application of the *Wildlife Act* as a result.

Provincial Court Judge Fraser applied Judge Ayotte's reasoning regarding commercial hunting in the *Littlewolf* trial [reported *supra*, at p. 83]. He similarly acquitted that accused of three counts relating to the trafficking of game. Mr. Littlewolf was also acquitted of various counts relating to hunting domestically but after dark, during closed season and with a light on the basis that this type of hunting was permissible to a Treaty 6 Indian on unoccupied land. The learned Provincial Court Judge found that the land in question was unoccupied although privately-owned, and that the Treaty 6 Indians' right to hunt domestically extended to that land.

The Legal History of the Treaty 6 Indians' Right to Hunt

The accused are all Indians entitled to the benefits of Treaty 6 by virtue of their membership in Indian bands that were parties to this treaty. This treaty is completely described by Dickson J. in *R. v. Frank,* [1978] 1 S.C.R. 95, [1977] 4 W.W.R. 294, 75 D.L.R. (3d) 481, 4 A.R. 271, 34 C.C.C. (2d) 209 at 210:

> The appellant was hunting on Treaty No. 6 lands. This treaty was concluded in 1876 between the Queen and the Plain and Wood Cree Tribes of Indians and other Tribes inhabiting the area therein described. That area embraced 121,000 square miles extending from near what is now the Manitoba-Saskatchewan border on the east to the Rocky Mountains on the west. The tract covers roughly the central one-third of the present Provinces of Alberta and Saskatchewan. In consideration of the surrender to the Government of Canada of their rights, titles and privileges to the included lands the Indians inhabiting those lands were given a number of undertakings, including the following:

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

This treaty guarantees the Indian signatories the right to continue pursuing their avocation of hunting. This right has been held to include the hunting of wildlife for sale or barter to others, i.e. hunting commercially, by Cory J. of the Supreme Court of Canada in *R. v. Horseman* [1990] 1 S.C.R. 901, [1990] 3 C.N.L.R. 95 at 100, [1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193, 108 A.R. 1, 55 C.C.C. (3d) 353 at 373 (S.C.C.) (the *"Horseman"* case). The Crown does not dispute that Treaty 6 ensured the continued right to hunt commercially to Treaty 6 Indians.

Does this right continue today? The Crown submits that it does not, having been removed by the 1930 *Constitution Act,* which was a constitutional document and thus more than mere legislation. Had it survived this constitutional amendment, the mere fact that it was regulated by the *Wildlife Act* prior to the passage of the 1982 *Constitution Act* does not mean the right was lost. Constitutional change cannot be effected by the enactment of legislation. If that right survived 1930 it survived to 1982 and became protected by s.35(1) of the *Constitution Act* enacted that year.

Whether the right to hunt commercially thus survives today depends upon the interpretation of the 1930 *Constitution Act.*

That enactment provides:

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

If this is interpreted to mean that some remnant of the right to hunt commercially survived 1930, it would have survived up to the current time to become protected by the 1982 *Constitution Act* s.35(1).

<u>The Effect of Section 35(1) of the 1982 Constitution Act</u>

Section 35(1) of the 1982 *Constitution Act* reads:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

These accused have argued that this section, not argued in the *Horseman* case, affects the determination of constitutional protection for treaty rights. That is true, but before s.35(1) comes into play, an Aboriginal right must be found to exist. The court sets out this analytical scheme in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160 at 182-83, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263 at 289-90 (the "*Sparrow* case"):

> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s.35(1) ... The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake.
> . . .
>
> If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right.

If the first question is answered by the conclusion that the legislation in question does not have the effect of interfering with an existing Aboriginal right to hunt commercially, it is not necessary to consider whether the *Wildlife Act* is a legitimate regulation of that right. In other words, if no treaty right to hunt commercially exists now, no obligation arises on the Crown to justify any limitations created on it by the *Wildlife Act*.

Even where legislation does interfere with treaty rights, the Supreme Court of Canada has made it clear that s.35(1) does not absolutely preclude such laws. Where such interference is found to occur, the second step of the process arises: the Crown will be called upon to justify the interfering legislation.

This means that once a law is shown to affect an Aboriginal or treaty right, the Crown must justify it. It must first show that the law is aimed at a valid legislative objective and then that it honours the Crown's trust obligation to Aboriginal people.

The Current Extent of the Treaty 6 Indians' Right to Hunt

Following the procedure set out in the *Sparrow* case, I must first examine the facts to decide whether there was, at the time of trial, an existing treaty or Aboriginal right of the type the *Wildlife Act* is said to infringe.

To begin this analytical journey, I must determine whether Treaty 6 Indians have an existing right to hunt commercially, or to hunt on private land for personal use. Such rights were granted to them under Treaty 6. Have they been removed by any constitutional amendment since?

The only possible source of relevant constitutional change is the 1930 *Constitution Act.* Is it to be interpreted to remove totally a Treaty 6 Indian's right to hunt commercially, and to hunt on private land for domestic consumption?

The Crown argues that this constitutionally assured right to hunt is limited to the right of an Indian to hunt for himself and his family. The treaty right to hunt domestically was undeniably enshrined in the 1930 *Constitution Act,* as held in *R. v. Arcand*, [1989] 2 C.N.L.R. 110, [1989] 3 W.W.R. 635, 65 Alta. L.R. (2d) 326 (Alta. Q.B.).

Defense, however, argues that the 1930 *Constitution Act* also enshrined the Treaty 6 Indians' right to hunt commercially and to hunt on unoccupied privately-owned land. While this Act is not express on this point, defense argues that it is ambiguous and should be construed in favor of the Indian to include the right to hunt for food to be sold commercially as well as consumed personally, and the right to hunt on unoccupied privately-owned land.

Similarly, Treaty 6 states that Indians may exercise their right to hunt for food "throughout the tract surrendered ... saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes." Defense argues that this has not been limited by the 1930 *Constitution Act* and today provides Indians with the right to hunt on privately-owned lands while no buildings are located thereon, or human activity is not ongoing on those lands.

Defense states that the definition of the area covered by that right either expressly includes unoccupied privately-owned land, or is ambiguous. If ambiguous, it should be interpreted to include unoccupied privately-owned land. That enactment states that the Indians have the right to hunt for food "... on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." Defense argues that Indians have the right of access to unoccupied privately-owned land, because that right was given to them in Treaty 6 and the words of the 1930 *Constitution Act* are wide enough to continue it, i.e. "any other lands to which the said Indians may have a right of access" includes all lands except those "required or taken up for settlement, mining, lumbering or other purposes ... ", which includes unoccupied privately-owned land.

If this argument was accepted, Mr. Littlewolf could not be convicted of the charges relating to his method of hunting domestically, because he was hunting for his own food, using techniques legitimate to him in hunting domestically; the offence only arises because of the location where the hunt occurred. If he has an unimpeded treaty right to hunt on unoccupied privately-owned land, he cannot be convicted. The hunt occurred in an unfenced, cultivated farmer's field.

The Crown, on the other hand, argues that the right to hunt on unoccupied privately-owned land was removed by the 1930 *Constitution Act.* Alternatively, it argues that the land in question was sufficiently "occupied" to bring it within the exception to the right to hunt, i.e. that there need not be human habitation or daily activity to make the land occupied, that the simple fact of private ownership makes it occupied and therefore off limits to the food hunt.

Ambiguities in statutes affecting Indians must be resolved in favour of the Indians, see *R. v. Sutherland,* [1980] 2 S.C.R. 451, [1980] 3 C.N.L.R. 71 at 80, [1980] 5 W.W.R. 456, 113 D.L.R. (3d) 374 at 385, 7 Man. R. (2d) 359, 35 N.R. 361, *Nowegijick v.* R., [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89 at 94, 144 D.L.R. (3d) 193 at 198, [1983] C.T.C. 20, 83 D.T.C. 5042, 46 N.R. 41. I accept that the 1930 *Constitution Act* is ambiguous as it relates to commercial hunting. Evidence before the learned Trial Judge showed that the Treaty 6 right to hunt commercially included the right to trade with other Indians and non-Indians, to acquire food and other goods by way of trading game prior to 1930. The wording of the 1930 *Constitution Act* is not so clear as to persuade me that it limits that right to one of hunting for personal consumption, in light of the fact that hunting "for food" traditionally included the right to acquire food by way of commercial trade.

However, I cannot see any ambiguity as it relates to whether the 1930 *Constitution Act* confirmed any right to hunt on privately-owned land. If the constitution-makers had intended to allow Indians the continued right to hunt on unoccupied privately-owned land, they surely would have drafted the 1930 *Constitution Act* to refer to "all unoccupied land", rather than simply to "unoccupied Crown land". Instead, by using the word "unoccupied" to refer only to Crown land, there could not have been an intent to extend the right.

It is a principle of statutory construction that "... the same words would have the same meaning, and, conversely, different words should have different meanings" as discussed by E.A. Driedger in his text *Construction of Statutes,* at 92. This means that when a word is used in one phrase in a statute but not in another, some difference in meaning between the two phrases must have been intended. No suggestion has been made that this principle should not be applied to the construction of a constitutional enactment, as well as ordinary statutes.

Therefore, the reference in the 1930 to "... any other lands to which the said Indians may have a right of access" must refer to land they own, or that is located on a reserve or on which they have permission to hunt. This is the only interpretation left open for these words that gives a consistent meaning to the use of the modifier "unoccupied" before the words "Crown lands".

This conclusion follows the decision of the Supreme Court of Canada in *R. v. Horse,* [1988] 1 S.C.R. 187, [1988] 2 C.N.L.R. 112, [1988] 2 W.W.R. 289, 47 D.L.R. (4th) 526, 39 C.C.C. (3d) 97, 65 Sask. R. 176, 82 N.R. 206. That Court expressly considered and rejected the argument made by defense here that some ambiguity existed in Treaty 6 that allowed Treaty 6 Indians to hunt on privately-owned land. Estey J. states at 209 [S.C.R.; p. 132 C.N.L.R.]:

> In summary then the terms of the treaty are clear and unambiguous: the right to hunt preserved in Treaty No. 6 did not extend to land occupied by private owners.

Justice Estey's decision removes in every respect the defense argument sought to be made here. The issue is settled.

Because of this conclusion, it is unnecessary for me to consider the argument of whether the farmer's fields in which Mr. Littlewolf was found hunting fall within the definition of "unoccupied land".

Similarly, to interpret the 1930 *Constitution Act* as removing both the treaty right of hunting commercially and the right to hunt on unoccupied privately-owned land is to interpret it as extinguishing treaty rights. The onus of proving either express or implicit extinguishment of such a right lies upon the Crown. See the *Horseman* case at p. 376 [C.C.C.; p. 103-4 C.N.L.R.], *Simon v. R.,* [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153 at 170, 24 D.L.R. (4th) 390 at 405, 23 C.C.C. (3d) 238, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366. The Crown has not met this onus regarding the commercial hunt.

Therefore, aside from any other considerations, defense argues that the accuseds' right to hunt commercially was not removed or extinguished by the 1930 *Constitution Act* and continue today. It cannot be removed by the *Wildlife Act,* it therefore must be inoperative to the extent it purports to do so.

Had I found an ambiguity in the 1930 *Constitution Act* as to the area in which Indians could hunt, these arguments would also apply to Mr. Littlewolf and the offences relating to the method of hunting domestically with which he was charged. However, as no such ambiguity has been found, the *Wildlife Act* continues to apply to him. He must, therefore, be convicted of those offences as no defense is apparent aside from this unsuccessful challenge to the constitutionality of the *Wildlife Act.*

The Horseman Case

The accused make a cohesive and appealing argument regarding commercial hunting. Without more, it could well be successful. However, the Supreme Court of Canada has considered the limits on the Indian's right to hunt in the *Horseman* case in 1990, expressly rejecting the concept that it included commercial hunting.

That case, on appeal from the Alberta Court of Appeal, dealt with an Indian person who had sold a bear hide without a proper permit, using the proceeds to buy food for his family. The Court, in a 4-3 split determined that the *Wildlife Act,* as it prohibited such sales, was operative against Native persons, as it was against other persons. This finding was based on an interpretation of the 1930 *Constitution Act* in which the Indians' unregulated right to hunt for food was found to include only a right to hunt for food for personal consumption. In this decision Cory J. for the majority states at p. 373 [C.C.C.; p. 100 C.N.L.R.]:

> An examination of the historical background leading to the negotiations for Treaty 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the treaty included hunting for commercial purposes ...

He goes on to discuss the effect of the 1930 *Constitution Act* on these rights at p. 377 [C.C.C.; p. 104 C.N.L.R.]:

> ... Although the agreement did *take away* the right to hunt commercially, the nature of the right to hunt for food was substantially enlarged. The geographical areas in which the Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. (emphasis added)

He goes on to state at p. 379 [C.C.C.; p. 106 C.N.L.R.]:

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

He goes on to state at p. 380 [C.C.C.; p. 106 C.N.L.R.]:

> It has been seen that the Treaty No. 8 hunting rights have been limited by the provisions of the 1930 Transfer Agreement to the right to hunt for food, that is to say, for the sustenance for the individual Indian or the Indian's family ... The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8 as amended by the 1930 Transfer Agreement ... (emphasis added)

The relevant provisions of Treaty 8 are identical to those of Treaty 6. Therefore, Cory J. appears to have expressly found that the Indian people's right to hunt commercially was removed by the 1930 *Constitution Act,* referred to by him as the Transfer Agreement. If so, there is therefore no existing treaty right to be protected by s.35(1) of the 1982 *Constitution Act.* The provisions of the *Wildlife Act* cannot therefore be said to conflict with such an existing protected treaty right.

Attempts to Distinguish the *Horseman* Case

Provincial Court Judge Ayotte distinguished Cory J.'s comments in this way. He found that the *Horseman* decision in effect holds that the 1930 *Constitution Act* did not extinguish the right to hunt commercially but rather only made it subject to provincial regulation. He does this notwithstanding the above quotations from Cory J.'s judgment to the effect that the 1930 *Constitution Act* did "take away" the right and that the treaty hunting rights "have been limited ... to the right to hunt for food, that is to say, for sustenance for the individual Indian or the Indian's family."

He does this by stating that Cory J. did not expressly say that the right to hunt commercially was extinguished.

With respect, I must disagree. Cory J. does expressly state commercial hunting rights have been removed, that the current right is limited to the right to hunt for sustenance for the individual Indian or the Indian's family. The clear meaning of his words can bear no other interpretation.

The learned Provincial Court Judge then goes on to say that Cory J.'s judgment should be taken to stand for something other than the deletion of commercial hunting rights, notwithstanding his express words. He says that Cory J. must be taken to have said that the 1930 *Constitution Act* allowed commercial hunting rights to be regulated by the province but not completely removed. This must be so because this is the result of liberally construing Treaty 6. Absent an express prohibition on commercial hunting, the 1930 *Constitution Act* must be interpreted to mean it continues, albeit in regulated form.

With all respect, in this analysis the learned Provincial Court Judge is substituting his opinion for that of the Supreme Court of Canada. I find nothing in Cory J.'s judgment that would support this interpretation.

In a variation on this theme, defense argues that while Cory J. may have expressly found commercial hunting no longer existed as a treaty right after 1930*,* this finding was obiter. I am arguably not therefore bound by it and may consider the issue anew.

Pursuant to this analysis, Cory J. was dealing with a situation where an Indian was not outright prohibited from hunting game but rather was subject only to regulations requiring him to get a permit to take and sell a bear pelt. Cory J. was correct regarding his conclusion on these facts, it is argued, because the 1930 *Constitution Act* expressly permitted regulation, so long as the regulated activity was not outright prohibited. Paragraph 12 states: "... the laws respecting game in force in the Province from time to time shall apply to the Indians ... provided ... that the said Indians shall have the right ... of hunting ... for food."

Therefore, Cory J. needed only to review Mr. Horseman's situation as one where he violated a provincial game regulation. On this examination the regulation is seen to be valid as it falls short of prohibition. Cory J. is stated to have gone farther than he needed to go on the facts before him; his decision should therefore be interpreted in the context of those facts as dealing only with the regulation, not the prohibition or the extinction of a treaty right. If this is done, the field is left open for this Court to apply defense interpretation and uphold the acquittal.

Some support for the defense position that the question remains open is found in the unanimous judgment of the Court delivered some three weeks after the *Horseman* decision in *Sparrow*. There the Court was invited and declined to consider whether an Aboriginal right to commercially fish still existed, stating at p. 282 [C.C.C.; p. 176 C.N.L.R.]:

> In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's food fishing license. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes.

In this decision the Court could have stated that the right to take game commercially did not exist if that was its view. Its decision to not determine that issue shows that it remains open. Although the *Sparrow* case involved Indians whose rights were not affected by the *Constitution Act, 1982,* this reluctance to declare whether fishing rights extended to commercial fishing shows the possibility that the Supreme Court of Canada might someday find that they do. It should be noted that Cory J. did not form a part of the panel on this case.

On the other hand, care must be exercised in applying authorities dealing with British Columbia Indians, such as *Sparrow.* They are not governed by treaties such as Treaty 6, nor by the 1930 *Constitution Act.* Therefore, their Aboriginal rights to hunt and fish are not thereby modified or abated. They may well have additional or separate rights to those enjoyed by Prairie Indians, because of their different historical interaction with the immigrant peoples.

Also, Wilson J. in the dissenting decision in the *Horseman* case at p. 368 [C.C.C.; p. 118 C.N.L.R.] does consider the argument that the 1930 *Constitution Act* allows the province to regulate but not prohibit commercial hunting by Indians. She accepts the arguments, but clearly the majority did not. This belies the suggestion that the Supreme Court was not presented with this argument and therefore should not be considered to have ruled on it in the *Horseman* case.

Simply put, the defense interpretation of Treaty 6 and the 1930 *Constitution Act* was not accepted in the *Horseman* case by the Supreme Court of Canada.

This conclusion was also reached by the Saskatchewan Court of Appeal in *R. v. McIntyre* [reported *infra* at p. 113] on an essentially identical case dealing with Treaty 10 Indians' rights.

Defense has suggested that the *Horseman* decision is an anomaly, considering the expanded view of Native rights expressed by the Supreme Court of Canada in *Sparrow* and in *R. v. Sioui*, [1990] 1 S.C.R. 1025, [1990] 3 C.N.L.R. 127, 70 D.L.R. (4th) 427, 56 C.C.C. (3d) 225. These are decisions that were delivered in the same month as *Horseman.* Even if this is so, *Horseman* stands as the law in Canada regarding Treaty 6 Indians.

Therefore, I cannot find that the accuseds' treaty rights to hunt commercially survived past 1930. They therefore do not exist today as a reason to avoid the operation of the *Wildlife Act.*

Defense finally argues that I may now come to a different result than Cory J. because the issue of s.35(1) of the 1982 *Constitution Act* was not raised in *Horseman* with the result the Crown did not have to lead evidence to show that the regulation of hunting by the *Wildlife Act* was justified, as would be required by s.35(1), based on the *Sparrow* decision. As s.35(1) has been argued here, the Crown would be required to justify the provincial legislation, which it has not attempted to do. Therefore, the legislation must stand suspended in operation against the accused regarding these charges.

However, clearly the Crown's duty to justify legislation arises only after a prima facie infringement of a treaty right has been found in it. That has not occurred here. Therefore, because defense cannot show that a treaty right to hunt commercially on unoccupied privately-owned land survived 1930, the provisions of s.35(1) of the 1982 *Constitution Act* do not assist them.

Moral Persuasion

Defense raised certain arguments that also appear to have been raised before the Saskatchewan Court of Queen's Bench in *R. v. McIntyre,* an unreported decision of Wright J. delivered December 2, 1991 [reported [1992] 1 C.N.L.R. 129]. He describes these arguments as follows [quoting *Horseman*, [1990] 3 C.N.L.R. 95 at 103-4 as quoted in *McIntyre* at p. 137]:

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

Like Wright J. I cannot accept that these contentions allow me to override the *Horseman* decision. While the Supreme Court of Canada in *Guerin v. R.,* [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120, [1984] 6 W.W.R. 481, 13 D.L.R. (4th) 321, 36 R.P.R. 1, 20 E.T.R. 6 agreed that the Crown has an

equitable obligation or fiduciary duty to deal with Indian reserve land for the benefit of Indians, that duty was not extended by Cory J. in the *Horseman* case to find the Treaty 6 commercial hunting rights continue.

These defense arguments are made without direct authority, on issues previously thought to not be justiciable and in amendment to current requirements for constitutional change. If they are to be accepted, it must be done other than by this Court.

Conclusions

In summary, therefore, I find the provisions of the *Wildlife Act* in force in regard to all accused. I convict them of the offences of which they were acquitted, other than those regarding which the Crown abandoned its appeals. The Potts' appeals from those counts on which they were convicted are dismissed.

If I am wrong in my conclusions that there has been no interference with commercial hunting rights, i.e. that the right to hunt for food in the 1930 *Constitution Act* includes the right to hunt for commercial purposes, I would find that the *Wildlife Act* that prohibits such activities is an unjustified prima facie interference with that right, and would uphold the Potts' acquittals and the three acquittals relating to Mr. Littlewolf's commercial hunting. I would not interfere with the learned Provincial Court Judge's convictions on those charges where he found the Potts were not exercising their right to hunt bona fide.

The obligation to pay the fines imposed by the learned Provincial Court Judge arising from his convictions of the Potts is stayed until the expiration of the period for the filing of an appeal from this decision or the conclusion of any appeal, whichever last occurs. Regarding the sentences to be imposed for those offences for which I have allowed the appeals, sentencing is remitted to the respective Provincial Court judges who heard the trials. It is to be spoken to after the expiration of the period for the filing of the appeal from this decision or the conclusion of any appeal, whichever last occurs. Crown counsel is to arrange for sentencing, upon proper notice to defense.