REGINA v. IRVIN NORN

[Indexed as: **R. v. Norn**]

Alberta Provincial Court, Spence J., October 22, 1990

K.N. Lambrecht, for the Crown
L.T. Mandamin, for the accused

The accused, a Chipewyan Indian was charged with firing his rifle within a 100 metres of the centre line of a highway in contravention of s.36(5) of the *Wood* Buffalo *National Park Game Regulations,* and unlawfully hunting game without a permit in violation of s.18(a) of the regulations, thereby committing offences contrary to s.8(1) of the *National Parks Act,* R.S.C. 1985, c.N-14. The accused argued that the temporary winter roadway was not a highway within the meaning of the regulations. In the alternative, he argued that he had an existing treaty right to hunt from a roadway within the national park as protected by s.35(1) of the *Constitution Act, 1982.* Furthermore, he argued that the controlling "saving and accepting" clause in Treaty No. 8 was ambiguous and therefore submitted that extrinsic evidence in the form of the treaty commissioner's report and oral evidence of band elders should be allowed in order to discover the meaning attached to the provision by the Chipewyan people.

The Crown asserted that the right to hunt was extinguished by the Treaty No. 8 provision which effectively disallows hunting on lands taken up for other purposes and that the right to hunt is limited to food hunting only. The Crown also asserted that the manner of hunting was limited to traditional methods. In the alternative, even if hunting for purposes other than for food was protected in Treaty No. 8 the prohibition and requirement contained in the regulation did not unreasonably limit or cause undue hardship to the accused in the exercise of his right.

Held: Accused guilty.

1. The winter roadway is not a permanent road as it is only available for public use in the winter. The road is a main winter route connecting two communities, is within the Park, and is used by the public. It has a posted speed limit and other signs at certain locations and is maintained by the National Parks. It is in all respects, except one, consistent with the definition of highway in the regulation.

2. The Report of the Commissioners for Treaty No. 8, 22 September 1899, is not required to interpret the controlling provision of Treaty No. 8; however, it does provide an overall view of the historical context of the treaty. Extinguishment of rights by treaty require proof of clear intent. Evidence of a band elder corroborated by the commissioner's report indicates that the term "saving and excepting" was not thoroughly explained to the Chipewyan people. Because the provision was capable of more than one meaning, the Crown's interpretation that it extinguished the right to hunt in the National Park was rejected. A second term of the controlling provision "subject to regulation" was not ambiguous. The commissioner's report sufficiently explained that the right to hunt would be subject to regulation imposed in the interest of Indians and to preserve wildlife.

3. The Treaty No. 8 right to hunt in the National Park is not limited to food hunting. The limitation on the right to hunt must be found in the treaty, the Act or its regulations, or in the authorities that have interpreted the phrase "pursue their usual vocations of hunting ..." The regulation in question does not limit the holder of a permit to food hunting only and even if it did contain such a restriction, *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 requires a liberal interpretation be given to the phrase.

4. Similar reasoning applies to the issue of hunting in a non-traditional manner. The accused's discharge of his rifle from a highway was not envisioned at the time Treaty No. 8 was signed. However, the right and circumstances must be considered in a “contemporary manner”. Accordingly, the accused was exercising his right to hunt under the treaty.

5. The regulation concerning the prohibition of hunting without a permit meets the test outlined in *Sparrow* for determining the validity of regulating Indian rights: the regulation is reasonable as it is part of the game management for the park to ensure that there is game for future generations; the requirement of a permit does not present undue hardship to the accused nor does it adversely interfere with the exercising of his right to hunt. The accused

was entitled to possess the permit, he merely had to request a permit and one would be issued to him within a reasonable time and free of charge. At most, the permit process was inconvenient, and at the least, an insignificant restriction of his treaty right.

6. The regulation concerning the prohibition of hunting within 100 metres of the centre line of a highway also meets the *Sparrow* test. The accused's hunting right is limited but not unreasonably nor does it cause him any undue hardship. The regulation's objective is apparent - roadways are to be used by the public for travel, not for the purpose of hunting.

7. Since the regulations met the *Sparrow* test the Crown was not required to justify the regulations. The Crown proved all the elements of the offences including, the accused hunting without a permit within the park and within 100 metres of the centre line of the highway. Even though all the elements of the offences were present the accused had a treaty right to hunt within the park and, on the date in question, he was properly exercising that right except for the compliance with the regulations.

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SPENCE J.:

Background:

The accused was charged with three offences under s.8(1) of the *National Parks Act*, R.S.C. 1985, c.N.14 and regulations. Two counts were amended and one was withdrawn. The offences, as amended, read as follows:

> Irvin Norn, of Fort Chipewyan, Alberta, on or about the 28th day of January, A.D. 1990, within the Wood Buffalo National park, at a point of the winter road between Hay Camp and Moose Island, in the Province of Alberta, did unlawfully discharge a firearm within one hundred metres of the centre line of a highway, contrary to Section 36(5) of the Wood Buffalo National Park Game Regulations, and did thereby commit an offence contrary to Section 8(1) of the national Parks Act; and
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> on or about the 28th day of January, A.D. 1990, within Wood Buffalo National Park, at a point of the winter road between Hay Camp and Moose Island, in the Province of Alberta, did unlawfully hunt game, to wit: Moose, without being the holder of a general hunting permit, contrary to Section 18(a) of the Wood Buffalo National Park Game Regulations and did thereby commit an offence contrary to Section 8(1) of the National Parks Act.

The trial was held in Fort Chipewyan, Alberta. It commenced on the 22nd day of October, 1990 and concluded two days later, after which I reserved my decision to this date.

Facts

The accused is a Chipewyan native and is a member of the Yellow Knife B Band. At the time of the alleged offences he resided in the northern community of Fort Chipewyan, Alberta and was employed as the Manager of the Athabasca Chipewyan Band.

On January 28, 1990, while travelling with his common law partner by motor vehicle on the winter road from Fort Chipewyan, Alberta to Fort Smith N.W.T., he spotted two moose at a location within the Wood Buffalo National Park. He stopped the vehicle, retrieved his 30-30 calibre rifle, loaded it and, while allegedly standing within 100 metres of the centre line, discharged the rifle once or twice at one of the animals.

As the accused was discharging the firearm, a vehicle, being operated by the Assistant Chief Park Warden and containing passengers, including another Park Warden, was approaching from the opposite direction. The officers observed the actions of the accused and stopped their vehicle for further investigation. The accused did not possess a hunting permit.

Issues

1) has the Crown proven the elements of the offences described in the amended information.

2) if so, has the accused discharged his onus according to the recent Supreme Court case of *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [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, 111 N.R. 241 to establish:

a) that he has an existing treaty right to hunt:
1) on a highway, and
2) within the Wood Buffalo National Park.

b) if he has an existing treaty right to hunt, was he exercising that right on the date in question?
c) if he was, do the regulations which prohibit him from hunting within 100 meters of the center line of the highway and without a permit unreasonably interfere with the exercise of that right?

3) if the accused has discharged his onus according to *R. v. Sparrow,* supra, has the Crown justified the regulations as:

a) having a valid legislative objective, and
b) being consistent with the responsibility of the Crown when dealing with native people?

Argument

The accused's defense not only goes to the charge in Count 1 but he also submits that the Act and its regulations violate his treaty right to hunt in the National Park.

The accused argues that the Crown has failed to prove all of the elements of Count 1 that are necessary to make out the charge. In particular, the Crown has failed to prove, beyond a reasonable doubt, that the winter road is a highway within the meaning of the regulations.

The accused further suggests that if the Crown has proven all of the elements of the offences he has, nevertheless, complied with *R. v. Sparrow, supra,* and has established that he has an existing treaty right to hunt from a roadway within the Wood Buffalo National Park and was exercising that right on the date in question. Further, that the regulations unreasonably interfere with the exercise of that right.

The Crown argues to the contrary. However, if the accused has complied with *Sparrow,* the Crown submits that the regulations are justified under the circumstances as they have a valid legislative objective and they are consistent with the responsibility of the Crown when dealing with native people.

Decision

Issue 1

The only issue in dispute relates to count 1. That issue is whether or not the Crown has proved that the highway, as described in the amended information, is a highway within the meaning of the section?

As far as the other elements of the count and the elements of count 2, I find that the Crown has proven them to the standard required by law.

The highway in question is the winter road between Fort Chipewyan, Alberta and Fort Smith, N.W.T.

The Wood Buffalo National Park Game Regulations, proclaimed 2 November 1978 (P.C.), 1977-3324/SOR 78-830 defines "highway" at s.2(1) as follows:

"highway" means a highway in the Park and includes a common or public highway, street, road, avenue, parkway, driveway, or bridge intended for use by the general public for the passage of motor vehicles; (route)

Black's Law Dictionary, 5th ed. (St. Paul: West Publishing Company, 1979) defines "highway" as follows:

> Highway. A free and public roadway, or street; one which every person has the right to use. In popular usage, refers to main public road connecting towns or cities. In broader sense, refers to any main route on land, water, or in the air. Its prime essentials are the right of common enjoyment on the one hand and the duty of public maintenance on the other. *Robinson v. Faulkner,* 163 Conn. 365, 306 A.2d 857, 861.

The only argument differentiating this roadway from a highway is the fact that it is not a permanent road as it is only available for public use in the winter. The road is a main winter route connecting the two communities, it is a roadway within the park, it is open in the winter and used by the public's motor vehicles, it has signs at certain locations, it has a posted speed limit, and it is maintained by the National Park, albeit, by contract with the government of the N.W.T. In all respects, except one, it is consistent with a highway. Counsel argues that if the legislators intended that this winter road be a highway they would have included it in the definition section but the section is inclusive and not exhaustive in its language.

I find, for these reasons, that the winter road located within the Wood Buffalo National Park is a highway within the meaning of the regulations.

Issue 2(a)

The accused must establish that he has a treaty right to hunt from a highway with the federal park.

He is a Chipewyan Indian originally from the Fort Resolution Band but at the time of the incident he had transferred to the Yellow Knife B Band. Both bands, however, were signatories to the treaty.

It is important to consider this case in its historical context. Treaty No. 8 was executed by the parties in the year of 1899. National parks were in existence and hunting within the parks was governed by regulations. At the time that Wood Buffalo National Park was created in 1922 the regulations prohibited hunting in all Dominion parks. The Wood Buffalo National Park was created to preserve and safeguard the Wood-bison, also known as Wood-buffalo, within their original habitat. The government was concerned that if such a reserve was not set aside the only remaining herd of buffalo in their native and wild state would become extinct. Pursuant to the provisions of s.18 of *The Dominion Forest Reserves and Parks Act,* and by Order in Council, dated the 18th day of December, 1922, part of the Treaty 8 land was designated as the National Park. The previous amended regulations, dated the 1st day of December 1919, were further amended by Order in Council, dated the 30th day of April 1926, to allow hunting within the Wood Buffalo National Park by permit of those treaty Indians, who, previous to the establishment of the Park, had hunted in that area. Since 1926 the regulations have been amended and varied from time to time but a permit is still required for hunting within the Park.

The accused invokes s.35(1) of the *Constitution Act, 1982* which provides:

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

The purpose of Treaty No. 8 is described in the preamble, which states:

> AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto to Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from her Majesty's bounty and benevolence.

In return for the surrender of this large tract of land the Indians were granted the right to continue their "usual vocations" of hunting, fishing and trapping. Further, they were promised reserve lands and other personal property depending on whether they would continue their existing ways or take up the life of a settler or farmer. The foregoing obligations of the Crown are clearly explained in the pertinent provision:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.
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> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves . . .

The treaty continues, at some length, describing the property, both real and personal, to be given the bands and certain individuals depending on future life styles.

The right, the Crown argues, to hunt, trap and fish is extinguished on any portion of the tract that is used or taken up for settlement, mining, lumbering, trading or other purposes.

The law is sufficiently clear that a National Park is land taken up for "other purposes." For these rights to be extinguished, however, there must be strict proof of the fact of extinguishment, *Simon v. The Queen,* [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 or as in *R. v. Sparrow*, *supra* at p. 280 [p. 174 C.N.L.R.]:

> the onus of proving that the Sovereign intended to extinguish the Indians title lies on the respondent and that intention must be clear and plain

The accused argues that his right to hunt in the Park was not extinguished for he and his people never understood or agreed that the "saving and excepting" clause of the treaty terminated this right. His interpretation of the treaty, in particular the clause in question, differs from that of the Crown.

In support of this argument the accused seeks to introduce the Report of Commissioners for Treaty No. 8, dated 22nd September, 1899. He argues that the clause is ambiguous and this document supports not only his evidence but also that of the 81 year old elder, Adelaine Mandeville who stated, in effect, that her mother told her that they would always be allowed to hunt and trap.

This case, in many respects, has similar issues as the Supreme Court case of *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. In that case Estey J. wrestled with the issue of whether or not the meaning of a certain provision in the treaty was ambiguous. The appellants argued that the Indians were entitled by the treaty to hunt on land taken up for settlement as their right to hunt was not extinguished but rather they had a joint use of the land with the settler. The appellants, to support this argument, wanted the court to consider the transcript of the negotiations surrounding Treaty No. 6. These negotiations were described in a text written by the Hon. Alexander Morris, P.C. who acted as a Queen's representative in the formation of many of the Indian treaties in western Canada.

Estey J. extensively examined the law relative to the interpretation of contractual documents, including Indian treaties. This recital of the law is, in part, set out at p. 201 and 202 [pp. 124-25 C.N.L.R.]:

> I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement.
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> The parol evidence rule has its analogy in the approaches to the construction of Indian treaties. This Court in *Simon v. The Queen,* [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390, 23 C.C.C. (3d) 238, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366 was concerned with the proper interpretation of an Indian treaty by the courts. Dickson C.J. stated at p. 404 [p. 169 C.N.L.R.]: "An Indian treaty is unique; it is an agreement sui generis

> which is neither created nor terminated according to the rules of international law". An early judgment in *Nowegijick v. The Queen* [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89, 144 D.L.R. (3d) 193, [1983] L.T.C. 20, 83 D.T.C. 5041, 46 N.R. 41, referred more broadly to the rules of interpretation properly applicable in a court of law to an Indian treaty. Dickson J. (as he then was) there stated, at p. 36 [p. 94 C.N.L.R.]: "... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."

He concludes that there is no ambiguity but admits the text for the reasons explained on p. 203 [p.126 C.N.L.R.]:

> In my opinion there is no ambiguity which would bring in extraneous interpretative materials. Nevertheless I am prepared to consider the Morris text, proffered by the appellants, as a useful guide to the interpretation of Treaty No. 6. At the very least, the text as a whole enables one to view the treaty at issue here in its overall historical context.

The accused submits that the controlling provision of Treaty No. 8 is ambiguous as his and Ms. Mandeville's evidence suggests that the clause is subject to more than one interpretation. In my view it is not. But for this evidence the "saving and excepting" clause is clear. At the most it becomes an extrinsic ambiguity but if I follow the logic enunciated by Estey J. in *R. v. Horse, supra,* I may use the Commissioner's Report as a useful guide to the interpretation of Treaty No. 8 and, at the very least, to view the treaty in its overall historical context.

The text, Estey J. decides, does not support the appellant's argument. He quotes extensively from the text and finds that hunting rights were not intended or understood to extend to land occupied by settlers.

Treaty No. 8 is accompanied by an Order in Council Setting Up Commission For Treaty 8 and a Report of Commissioners for Treaty No. 8, dated the 22nd September, 1899. The Order in Council is interesting but not particularly helpful. The Report of Commissioners does shed light on the issue. It contains background information on the time, place, and purpose of the treaty. On the first page of the Report, which is page 5 of the exhibit, it explains that the Indians feared that the treaty would inevitably cause the curtailment of the hunting and fishing privileges.

On page 6 of the Report the Commissioners state:

> 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 furbearing 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.

It is clear that the Indians recognized that their right to hunt, trap and fish could be restricted by reasonable regulations to protect the fish and animals but there is nothing to indicate that the Indians appreciated or understood the consequences if the government triggered the "saving and excepting" clause. The Report is consistent with the evidence of the accused and Ms. Mandeville. The interpretation of the treaty must be considered in the light of the judicious rule of Dickson J. in the *Nowegijick v. The Queen, supra.* He stated at p. 36 [p. 94 C.N.L.R.]:

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

It is apparent, from the evidence, that the Indians were justified to believe that they would be able to hunt on the surrendered lands subject, only, to regulations. 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" except for the uncertainty implicit in the "saving and excepting" clause.

Estey J. found in *R. v. Horse, supra,* that the historical text supported his position that the clause was not ambiguous for it was satisfactorily explained to the Indians at the time the treaty was being negotiated.

At p. 208 [p. 131 C.N.L.R.], Estey J. states:

> Nowhere in Morris' dispatch or in the records of negotiations are the statements made by the Indians expressly requesting the right to hunt on occupied lands. The statement made by Lieutenant Governor Morris at p. 218 cited above does not, in my opinion, establish this right. In the context of the terms of the treaty, *which were explained to the Indians carefully and assented to by them,* it is clear that the right to hunt was not extended to land that became occupied by settlers. The statement, even when taken alone, can be read in a manner consistent with the written provision and it does not contradict the written expression of the preservation of hunting rights in the manner outlined therein. When the negotiations and the terms of Treaty No. 6 are read in light of the entire historical context of the other treaties this view is inescapable. (Emphasis added)

Following this rational I find the relevant term in the treaty to be capable of more than one meaning, therefore, the right to hunt reserved to the accused by Treaty No. 8 does extend to the Park. I acknowledge, that the government probably did not intend this result considering the other treaties reviewed in *R. v. Horse, supra* but when Treaty No. 8 is read in the light of the Commissioner's report the conclusion is unavoidable for this clause was not explained to or assented to be the Indians. The evidence of the accused and Ms. Mandeville is not only acceptable but understandable when reviewing the circumstances.

There were other arguments raised within this issue by both counsel. I reject them and my reasons are as hereinafter explained.

The accused vigorously argued that the "subject to regulations" term of the treaty was ambiguous. I find that it is not on the same basis that I found that the "saving and excepting" clause was ambiguous. The Report of the Commissioners sufficiently explains that regulations may be imposed in the interest of the Indians and to preserve the wildlife. At p. 6 of the report the words of the Commissioners are unequivocal:

> 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 Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be free to hunt and fish after the treaty as they would be if they never entered into it.

The Crown submits that if the court finds the Park is not lands taken up for "other purposes" the highway should be classified as such land. I accept this assertion but I adopt my findings on the Park lands to the lands taken up for the highway for the same reasons.

Issue 2(b)

The Crown asserts that if the accused has an existing treaty right to hunt that right is limited to hunting for food. The treaty grants to the Indians the right to "pursue their usual vocations of hunting. . ."

Both counsel referred the court to *Rex v. Wesley (1932),* 14 W.W.R. 337 but that case involves s. 12 of the agreement described in *The Alberta Natural Resources Act,* S.A. 1930, c.21 which does grant to the Indians the right to hunt etc. for food on all unoccupied Crown lands and on any other lands to which the Indians may have a right of access. The agreement does shield the Indian's hunting rights from provincial legislation but not from federal. Both counsel provided cases to that effect and the Crown was very insistent that the court not apply this agreement to federal lands. Martland J. in *Elk v. The Queen,* [1980] 2 S.C.R. 166 at p. 168 [1981] 2 C.N.L.R. 56 at 57, [1980] 4 W.W.R. 671, 114 D.L.R. (3d) 137, 52 C.C.C. (2d) 382, 5 Man.R. 400, 33 N.R. 516 applies the judgment of *Daniels v. White and The Queen,* [1968] S.C.R. 517, 64 W.W.R. 385, 4 C.R.N.S. 176, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1, when he states:

> In the present case we are dealing with a Federal enactment, namely the *Fisheries Act.* Applying the decision of the majority in the *Daniels* case we must hold that the accused was bound by the provisions of that Act. The proviso in clause 13 of the 1929 agreement, affirmed by the 1930 tripartite legislation, did not exempt him from compliance with the *Fisheries Act* and the Regulations thereunder.

The Park is within the jurisdiction of the federal government. It is not subject to the agreement. If the right to hunt is limited to food that limitation must be found in the treaty, the Act or its

regulations or in authorities that have interpreted the phase, "pursue their usual vocations of hunting etc" to mean that the Indians can hunt in the park but for food only.

R. v. Rider (1968), 70 D.L.R. (2d) 77, 66 W.W.R. 100, [1969] 1 C.C.C. 193 involves a treaty Indian who hunts game for food within the boundaries of a National Park of Canada but does not consider the issue. The case implies that if hunting was allowed it must be for food even though the relevant term of the treaty is similar in wording to Treaty No. 8.

In *Sparrow* the regulations, under the *Fisheries Act,* provide for issuing licences to Indians or a band "for the sole purpose of obtaining food for that Indian and his family and for the band." As in *Sparrow* the regulations in this case also provide for a licensing system by permit. These regulations, however, do not restrict the holder of the permit to hunting exclusively for food.

Even though the license in the *Sparrow* case was restricted to food the court gave its meaning a liberal interpretation. The court said at p. 282 [p. 176 C.N.L.R.]:

> However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can, however, regulate the exercise of that right, but such regulation must be in keeping with s.35(1).

The present facts disclose an accused hunting in an untraditional manner. He was out for a Sunday drive and came upon two moose. He exited his vehicle and shot at them. The treaty does not envision such a set of circumstances but this right must be considered in a “contemporary manner.” Accordingly, I find that the accused was exercising his right to hunt under the treaty.

Issue 2 (c)

Sparrow requires the court to determine whether the regulations interfere with the hunting right to such a degree as to constitute a prima facie infringement of s.35(1). To resolve this issue the Court in *Sparrow* outlined the test at p. 290 [p. 182 C.N.L.R.]:

> First, is the limitation unreasonable? Secondly, does the regulation impose undue hardship? Thirdly, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.

The *Wood Buffalo Park Game Regulations* as amended were revoked and new regulations for the Park were made by Order in Council P.C. 1978-3324 on November 2, 1978. The sections in issue are located under the headings of, Prohibitions and Certificates and Firearms.

The prohibition concerning the permit is set out in s. 18(a) as follows:

> 18. No person shall
> (a) hunt game unless he is the holder of a general hunting permit,

Section 36(5) is the other regulation in contention, it states:

> No person shall discharge a firearm or cause a shot, bullet or other missile to pass along, across or within one hundred metres of the centre line of any highway.

The treaty right to hunt has not been extinguished but it is limited. This issue was addressed in *R. v. Agawa,* [1988] 3 C.N.L.R. 73 at 89, 65 O.R. (2d) 505, 53 D.L.R. (4th) 101, 43 C.C.C. (3d) 266 at 285 where Blair J.A. states:

> In this case, it seems to me that it is impossible to say that this right does not exist. It has not been extinguished. At most, it has been restricted by the requirement that Indians be licensed before exercising it. What is at stake is not the existence of the Indians' treaty right to fish but whether that right can properly be restricted by the licensing requirement.
>
> In addressing this question it must be borne in mind that not all Indian treaty rights are absolute and immutable. While Indian property rights derived from treaties may remain virtually unqualified, hunting and fishing rights cannot be divorced from the realities of life in present-day Canada. Much has changed since the treaty was executed in 1850. At the time,

> fish and game may have been regarded as limitless resources. They are no longer. Conservation and management of fish and game resources are required if they are to be protected from extinction and preserved for the benefit of Indians as well as other Canadians.

Even though the Supreme Court in *Sparrow* laid out the test to determine the validity of regulating Indian rights I suggest that the statement made by the Court at [p. 181 C.N.L.R.] supports Blair J.A. in *Agawa* when Dickson C.J.C. and La Forest J. state:

> Section 35(1) suggests that while regulations affecting aboriginal rights is not precluded, such regulations must be enacted according to a valid objective.

The accused did not have a general hunting permit when he was hunting within 100 metres of the centre line of the highway.

The evidence is clear that a permit is required and he was entitled to one. It was his at no charge. He believed, however, that he had the right to hunt without the permit.

At this stage *Sparrow* does not require that the regulations be justified but only that they be reasonable, not impose undue hardship and not interfere with the holders means of exercising that right. In applying this test, in the circumstances, the permit process, at the most, is inconvenient and, at the least, as insignificant restriction of his treaty right.

The objective of the regulation is reasonable. It is part of the game management for the Park. It assists the management team in their duties. That team consists of not only government officials but also of that group of natives who have this right. Information derived from the permit process assists in preparing statistical data which is required for short and long term planning for the preservation of the wild life to ensure that there is game for future generations. This regulation is a valid and necessary tool for such a purpose.

The permit does not present an undue hardship to the accused nor does it adversely interfere with the exercising of his right to hunt. He is one of a group of people entitled to possess the permit. It is not available to all citizens of the country as only those who qualify under the regulation may obtain it. He merely has to request and it would be issued to him, within a reasonable time and free of charge.

The regulation concerning the prohibition of hunting within 100 metres of the centre line of a highway is similar to many regulations enacted by the provinces of this country. Dickson J., in *R. v. Mousseau*, [1980] 2 S.C.R. 89, [1980] 3 C.N.L.R. 63, [1980] 4 W.W.R. 24, 111 D.L.R. (3d) 443, 52 C.C.C. (2d) 140, 3 Man. R. (2d) 338, 31 N.R. 620, agrees with Mr. Justice Monnin's view concerning the right of Indians to hunt on public roads as stated at p. 98 [p. 70 C.N.L.R.].

> A public road in Manitoba is occupied Crown land. Citizens, including Indians, have a right of access to public roads and road allowances but such right is limited to ingress and egress, to travel thereon, and to movement thereon but does not extend to hunting thereon. Therefore it is not land to which Indians have a right of access for the purpose of hunting.

Applying the test to this regulation the accused's hunting right is limited but not unreasonably nor does it cause him any undue hardship. Its objective is apparent; roadways or highways are to be used by the public for travel not for the purpose of hunting.

For these reasons I find that the regulations meet the *Sparrow* test.

The accused argued that the regulations, in particular s.12, is unreasonable as it may interfere unduly with the exercise of some Indians within the class who have the treaty right to hunt. This may be so for the regulation restricts the permit issuance by quota and lineage. The accused, however, qualified and the evidence was clear that he would have received it upon request. His treaty right to hunt was not unduly restricted by the regulation. Circumstances may arise where a native within or without the class is arbitrarily denied a permit but that case, if it ever arises, has to be determined on its merits.

Since I have found that the regulations meet the test in *Sparrow* the Crown is not required to justify the regulations.

In summary, the Crown has proven all the elements of the offences including, the accused hunting without a permit within the park and within 100 metres of the centre line of the highway. Even though all the elements of the offences are present the accused has a treaty right to hunt within the park and, on the date in question, he was properly exercising that right except for the compliance with the regulations.

I, therefore, find the accused guilty of the two counts set out in the amended information.