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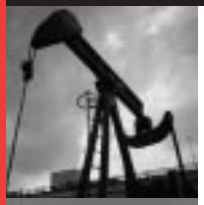


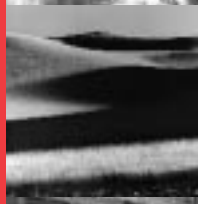


TREATY NO. 8 AND THE TRAPPING RIGHTS OF ABORIGINAL PEOPLES: EMPTY PROMISES?

Article by Monique M. Passelac-Ross◆

Introduction

Between 1871 and 1909, the Government of the Dominion of Canada concluded ten treaties with various Aboriginal groups in the region extending between the Great Lakes to the east and the Rocky Mountains to the west. An additional treaty, Treaty 11, was signed in 1921 covering a large area of the present-day Northwest Territories. Those treaties are known as the numbered treaties. The three Alberta numbered treaties include Treaty 6 (1876 and 1899), which stretches across the central part of Alberta and Saskatchewan, Treaty 7 (1877), which covers the southern part of Alberta, and Treaty 8 (1899 and 1900), which encompasses most of northern Alberta, northeastern British Columbia, the northwestern corner of Saskatchewan and a portion of the Northwest Territories south of Great Slave Lake.

Alberta's numbered treaties are similar in many respects. In particular, they all contain the identical "land surrender clause", in return for various promises made by the Crown to set aside reserve lands, to pay annuities, to provide education, ammunition, farm equipment and relief in times of famine or pestilence. The "land surrender" clause of Treaty 8 reads:

> "[…] the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits […]" [1]

A critical clause in the treaties was the written promise made to the Indian signatories that they would retain their rights to hunt, trap and fish on their traditional lands. The treaties vary somewhat in the wording of that clause. In Treaty 8, it is worded as follows:

> "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."

Subsequent interpretation of the treaties by governments resulted in the steady regulation and limitation of the exercise of the hunting, trapping and fishing rights (wildlife harvesting rights) recognized by the treaties. The struggle over wildlife rights between Aboriginal peoples and both levels of government has lasted for over a century and is still ongoing. First Nations firmly believe that they have special rights to wildlife based on their historical and constitutional relationship with the Canadian government. They view the treaties they entered into as sacred and solemn agreements which were to protect their rights to a way of life. Governments on the other hand view the lands "surrendered" by treaty as Crown lands which can be used and allocated as they see fit, irrespective of any right to hunt, trap and fish claimed by Aboriginal groups. Further, they tend to interpret the wording of the clause protecting the wildlife harvesting rights of Aboriginal peoples as enabling the government to regulate hunting, trapping or fishing activities and to "take up" lands for development as required.

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RÉSUMÉ

Cet article examine les droits de chasser, de piéger et de pêcher garantis par le Traité No. 8, conclu entre le gouvernement fédéral et diverses bandes indiennes en 1899. Ces droits ont été modifiés par la *Convention sur le transfert des ressources naturelles de 1930*. L'article analyse les évènements historiques qui ont contribué à limiter les droits de chasse, de piégeage et de pêche assurés par le traité, et les diverses interprétations de ces droits par la Cour Suprême et par certains historiens. L'auteur suggère que le conflit entre le gouvernement et les autochtones eu égard à ces droits ne peut être résolu que par une interprétation qui réconcilie les différentes perspectives et respecte les promesses faites aux signataires du traité par la Couronne.

Over a century has passed since Treaty 8 was signed. What is left of the hunting, trapping and fishing rights promised by treaty? How have they evolved over time? How are they interpreted by the courts and by government? How important are they still to Aboriginal peoples in 2005? And how can the different views of these rights held by government and Aboriginal peoples be reconciled?

This article focuses on the trapping rights promised under Treaty 8 and their evolution over time in northern Alberta. It summarizes some of the findings of an in-depth study published by the Canadian Institute of Resources Law.[2] It presents relevant historical facts, reviews significant developments affecting the treaty relationship (notably the 1930 Natural Resources Transfer Agreement between Canada and Alberta), examines how the courts have interpreted the Indians' rights to hunt, trap and fish under both the treaty and the NRTA, presents other interpretations of these rights, and concludes by outlining the need for reconciliation between these interpretations.[3]

The 1899 Treaty

At the time of treaty-making, in the late 1800s, the Aboriginal inhabitants of what were then the Northwest Territories had been involved in the fur trade for over a century. The first fur trade post in what is now northern Alberta was established in Fort Chipewyan in 1778. The beaver pelts that were found in the Athabasca country were of superior quality. Historians have documented that at the turn of the century, the Treaty 8 area was the most important fur-producing region for the Hudson's Bay Company, accounting for 12 percent of the total value of its Canadian collection. From the early beginnings, the Indians played a key role in the development of the fur trade. Over time, the Indians came to depend on their commercial trapping for their livelihood, as the sale of furs provided the means to acquire the tools that had become essential to them.[4]

This explains why, during treaty negotiations, the Indians were reluctant to sign the treaty for fear that they may lose their hunting, trapping and fishing rights. As reported by government envoys (the Treaty Commissioners): "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".[5] It is only after receiving such solemn guarantees that the Indians agreed to sign Treaty 8.

Another development was occurring at the time of treaty-making. White trappers had started to enter previously inaccessible regions to exploit the rich fur resources. The white trappers introduced the use of poisoned baits and over-exploited the resource, with devastating effects on fur-bearing animal populations and on Aboriginal economies. Clashes between Aboriginal and non-Aboriginal trappers occurred. By entering into a treaty, the Indians believed that the government would protect them from the encroachment of white trappers.

Increasing concerns about the depletion of wildlife and the perceived need for wildlife conservation led to government regulation. The *Northwest Game Act* was enacted by the Dominion of Canada in 1894, in part to preserve the resource base of the Native economies. After the creation of the provinces of Alberta and Saskatchewan in 1905, Parliament enacted a new *Game Act* that recognized the jurisdiction of the two new provinces to legislate wildlife.[6] The Alberta government passed its own *Game Act* in 1907.[7] Initially, the passage of game laws did not significantly affect the treaty rights of the Indians, as government did not strictly apply game protection legislation to Aboriginal hunters in Northern Alberta. Nevertheless, in 1911 the closure of beaver hunting for two years led to numerous complaints by the beneficiaries of Treaty 8. Increasingly, legislation became more restrictive with complete bans on the hunting or trapping of certain species, limited hunting seasons and requirements for licences imposed on Aboriginal hunters.

Despite asserting their treaty rights to trap, Aboriginal trappers were arrested, jailed or fined and their furs confiscated under provincial regulations. The Hudson's Bay Company's efforts to protect the treaty rights of Aboriginal trappers before the courts, and the Department of Indian Affairs' attempts to secure the cooperation of provincial and territorial officials in protecting Aboriginal trapping from competition by white trappers, proved fruitless.[8] Starting in 1923, the Department of Indian Affairs sought over a number of years to establish exclusive game and trapping preserves for Indian people. But negotiations failed because provincial governments insisted on restricting Indian hunting and trapping to these preserves. The frustration of Aboriginal peoples over the application of game laws was such that several bands boycotted the Treaty days of 1920 in Fort Resolution to protest the regulations. The requests of Treaty 8 signatories that government honour the promises made during treaty negotiations, namely that the Indians would be free to hunt, trap and fish and that they would be protected from the exploitive practices of white trappers that decimated fur resources, were ignored.

The 1930 Natural Resources Transfer Agreement (NRTA)

Although the province of Alberta was created in 1905, it did not acquire ownership of its lands and resources until 1930, when the Dominion of Canada entered into a bilateral agreement with the province. The *Natural Resources Transfer Agreement* (NRTA) transferred control and ownership of Crown lands and natural resources to the province of Alberta.[9] This unilateral transfer took place without the involvement and the consent of the Indian signatories of the three numbered treaties in the province. But it deeply affected the treaty relationship existing between the Dominion of Canada and the Aboriginal peoples.

Paragraph 12 of the NRTA protects specifically the hunting, trapping and fishing rights of the Indians:

> "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."

On its face, this clause appears to guarantee the protection of the Indians' right to hunt, trap and fish and of the game and fish upon which they rely for their livelihood. However, the clause did nothing to prevent the erosion of the hunting and trapping rights of Aboriginal peoples. Not only did the provincial government continue to enact game regulations restricting the trapping rights, but it also instituted a system of trapping licences, later replaced by traplines and trapping areas, which further eroded these rights. Traplines were lost to Indians and awarded to non-Aboriginal trappers who operated the lines more "productively" than Aboriginal trappers. And trapping came to be seen as a purely "commercial" activity, subject to provincial regulation.

Ultimately, as the Royal Commission on Aboriginal Peoples stated in 1996:

> "A century of effective prohibition of activities that treaty beneficiaries believed had been guaranteed to them by treaty has had a major impact on government and on society generally. Part of the corporate memory of provincial resource management agencies is that Aboriginal and treaty rights do not exist."[10]

Court Interpretation of the Treaty and the NRTA

As noted above, subsequent to the signing of Treaty 8 and the NRTA, the Indians were and, to this day, continue to be charged criminally for exercising what they believe are their constitutional rights to hunt and fish, unrestricted by provincial regulation. This scenario is played out across Canada.[11] How have the courts interpreted the wildlife rights recognized to the Indians by the treaty and the NRTA?

On several occasions, the Supreme Court has been asked to interpret the hunting clause of the numbered treaties, as well as the impact of the NRTA on the hunting rights of the Indians.[12] The Court has emphasized that the hunting clause must not be interpreted in a strict technical sense, but in the sense that the Indians would have understood at the time of signing. This understanding was shaped in part by the oral promises made by the Treaty Commissioners to the Indians.

Two Supreme Court decisions are particularly relevant to this discussion of Treaty 8 and the Alberta NRTA. The first is *R. v. Horseman* ("*Horseman*")[13] and the second is *R. v. Badger* ("*Badger*").[14] Both decisions were issued after the entrenchment of Aboriginal and treaty rights in subsection 35(1) of the *Constitution Act, 1982*.

The Treaty

The case law regarding the rights to hunt, trap and fish recognized by treaty has established some very clear findings. However, the case law is still evolving with respect to some of the wording of the hunting clause, in particular the extent of the government's power to restrict the Indians' right by "taking up" lands for development purposes.

To begin with, the Court has recognized that the treaty rights to hunt, trap and fish encompassed hunting for both domestic and commercial purposes. In the *Horseman* decision, after reviewing expert testimony and the historical background of Treaty 8, Justice Cory stated that "the original Treaty right clearly included hunting for purposes of commerce".[15] What was promised was the maintenance of the Indians' livelihood, of a way of life based on subsistence and commercial hunting and trapping as these activities were practised in 1899. The Court has acknowledged that the promise made to the Indians by the Treaty Commissioners that their hunting, trapping and fishing rights would be protected forever was "the essential element which led to their signing the treaty".[16]

Further, the Court has established that the rights recognized under Treaty 8 were not unlimited. They were subject to two types of limitations. First, the rights were subject to regulations made by the "Government of the country" (the regulatory limitation). Second, the rights could be exercised throughout the Treaty 8 area except on lands that "may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (the geographical limitation). This second limitation is known as the "lands taken up" provision.

Regulatory Limitation

With respect to the regulatory limitation, it is clear that the power to regulate was granted exclusively to the federal government, which in 1899 had jurisdiction over the Treaty 8 territory and was the only contemplated "government of the country". As to the type of regulation envisioned, the Court has stated that the only acceptable regulation of the right contemplated by government at the time of treaty was for the purpose of conserving the game and fish on which the Indians depended for their sustenance and livelihood. This is based on the promises made by the Treaty Commissioners that only regulations that were aimed at conserving wildlife for the benefit of the Indians would be enacted.

Geographical Limitation

The extent of the geographical limitation contemplated by the treaty is more difficult to establish, and the jurisprudence on this point is still evolving. The courts have considered several questions: first, how much "taking up" of lands was anticipated at the time of treaty making? second, when are lands considered "taken up" and does that mean that they are unavailable for hunting, trapping and fishing? third, is the "taking up" of lands by government a limitation on the hunting right of the Indians, or is it an independent right?

As to the first question, it is clear for the Supreme Court that what was contemplated at the time of the treaty was a limited interference with the hunting and fishing practices of the Indians. Justice Cory remarked in the *Badger* case that the Indians believed that most of the Treaty 8 land would remain unoccupied and would be available for hunting, fishing and trapping. The government did not expect that the area would be extensively settled at the time.

The answer to the second question is derived from this first finding. The Indians understood that land was taken up when it was put to a visible use that was incompatible with hunting. The concept of "visible, incompatible land use" has become the test used by the courts to determine whether lands are "taken up".[17] If there are physical signs of occupation, such as buildings, fences, crops, or farm animals on the land, the land is visibly occupied or taken up. However, occupancy of the land for a particular purpose does not necessarily mean that the land cannot be used for hunting. It is only if the uses are incompatible that the land will be deemed to be unavailable to Aboriginal hunting. For example, hunting will not be allowed in a game preserve, because it is incompatible with the fundamental purpose of establishing the preserve. On the other hand, Indians may hunt on lands taken up as forests, or in wildlife management areas, because hunting for food is not incompatible with those particular land uses.

The answer to the third question is still unsettled. To date, the Supreme Court has dealt with the "taking up" of lands by government as part of the geographical limitation on the hunting, trapping and fishing rights. Recent judicial decisions have considered the restrictions that may apply to the government's exercise of its power to "take up" or "occupy" land. In the *Halfway River* case, Justice Finch of the British Columbia Court of Appeal stated that "the Indians' right to hunt is subject to the "geographical limitation", and the Crown's right to take up land cannot be read as absolute or unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless".[18] In other words, the Crown's right to take up land is not a separate or independent right, rather it is a limitation on the Indian's right to hunt.

However, in the *Mikisew Cree* case, the Federal Court of

Appeal, adopting a legal argument put forward by the Alberta government, came to a different conclusion:

> "With the exception of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express [*sic*] or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt.… Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of section 35."[19]

An appeal from this decision has been heard by the Supreme Court, and a decision is expected to be issued in the fall of 2005.

The question of whether the right to "take up" lands is an independent right held by government or a limitation on the Indians' right is critical. In the landmark *Sparrow* case, the Supreme Court has established that governments must justify limitations or infringements of aboriginal rights according to a test developed by the court.[20] The justification test also applies to infringements of treaty rights. Thus, if the taking up of lands is a limitation on the right to hunt, it must be justified by government.

The NRTA

How have the courts interpreted the impact of the NRTA on the treaty rights to hunt, trap and fish? In the *Horseman* and *Badger* cases, the Supreme Court held that the NRTA effected a unilateral change to Treaty 8 by extinguishing the right to hunt commercially and by preserving only the right to hunt for food. This is based on a literal interpretation of the words "for food" in paragraph 12 of the NRTA. In *Badger*, the court remarked that the federal government was empowered to enact the NRTA unilaterally, although it was unlikely that it would proceed in that manner today. In the Court's view, this reduction of the treaty right to hunt was counterbalanced by an expansion of the right. The geographical area in which the Indians could hunt for food was expanded to include the entire province, and the methods of hunting were placed beyond the reach of the provincial government.

According to the majority of the Court, hunting for food means hunting for direct consumption of the flesh of the animal. In *Horseman*, Justice Cory writing for the majority defined the right to hunt "for food" as "for sustenance for the individual Indian or the Indian's family". It did not include the right to sell the hide of an animal whose flesh has been consumed. That sale constituted "a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce." [21]

How did the NRTA affect the regulatory and the geographical limitations on the treaty right? The Supreme Court has provided clear answers to this question.

With respect to the regulatory limitation, the significant change resulting from the NRTA is that the power to regulate the right was transferred from the federal to the provincial government. In *Badger*, the Court stated that "the effect of para. 12 of the NRTA is to place the Provincial government in exactly the same position which the Federal Crown formerly occupied."[22] However, the type of regulation contemplated did not change. Provincial game laws were applicable to Aboriginal peoples, but only to the extent that they were aimed at conserving the supply of game. In addition, reasonable regulations aimed at ensuring public safety are permissible.

As to the geographical limitation, Justice Cory stated in *Badger* that "the geographical limitation on the right to hunt for food provided by Treaty No. 8 has not been modified by paragraph 12 of the NRTA."[23] The visible, incompatible use test remains appropriate to determine if lands are "taken up" or "occupied". In *Badger*, the test was applied to privately owned lands to determine whether the lands in question were lands to which Indians had a right of access in order to hunt.

The Supreme Court has underlined that the provincial government has the same duty as the federal government to not infringe unjustifiably the hunting right modified by the NRTA, and that "limitations on treaty rights, like breaches of Aboriginal rights, should be justified".[24] It is noteworthy that the court does not distinguish between regulatory and geographical limitations in that respect. As discussed above, the "taking up" or occupation of lands by government has always been considered by the Supreme Court as part of the geographical limitation of the right, not as an independent right that could escape justification.

Other Interpretations of the Impact of the NRTA on the Treaty Rights to Hunt, Trap and Fish

The Supreme Court's literal interpretation of the right to hunt "for food" in paragraph 12 of the NRTA as being limited to actual consumption of the flesh of the animal hunted is problematic. In a lengthy dissent in the *Horseman* case, Justice Wilson strongly disagreed with that interpretation and offered a different reading of the NRTA clause. Historians also question whether the drafters of the hunting clause of the NRTA intended to extinguish the commercial rights of the Indians. They suggest that the intention of the federal government in 1929, when the

NRTA was being negotiated, was to fulfill its treaty obligations and to protect the interests of the Indians.[25] The hunting right clause was inserted in the NRTA in order to secure to the Indians a right to trap for "support and subsistence", rather than for strict consumption of the flesh of the animal. Their arguments are outlined below.

In *Horseman*, Justice Wilson first discusses the central importance of the government of Canada's promise to the Indians of Treaty 8 that their livelihood would be respected and that their hunting, trapping and fishing rights would be protected forever. She interprets the jurisprudence on paragraph 12 of the NRTA as supporting her finding that "one should view para. 12 of the Transfer Agreement as an attempt to respect the solemn engagement embodied in Treaty No. 8, not as an attempt to abrogate or derogate from that treaty."[26] Given the "pivotal nature" of the guarantee concerning hunting, fishing and trapping, it is essential for the Court to be satisfied that the federal government made an "unambiguous decision" to renege on its treaty obligations before concluding that it did. The historical evidence presented does not support the conclusion that "para. 12 of the NRTA was intended to limit the Indians' traditional right to hunt and fish (which included a right of exchange) to one confined to hunting and fishing for personal consumption only".[27] In her opinion, paragraph 12 of the NRTA confers on the province the power to regulate hunting for sport or for purely commercial purposes, not the power to restrict the Indians' right to hunt for support and subsistence in the broader sense.

This interpretation of the right to trap is buttressed by historical research on the drafting of the hunting right clause of the NRTA, and by evidence of the federal government's intentions in the late 1920s. Frank Tough provides a detailed reconstruction of the successive drafts of paragraph 12 of the NRTA from 1926 to 1929. He explains that the term "trapping" was not included in the 1926 version of paragraph 12 but was added in the final 1929 draft at the request of the Hudson's Bay Company. In his opinion, it would have been contradictory to include trapping in that clause if the intention had been to extinguish a commercial right. Given the nature of the traditional economy at the time the NRTA was negotiated, this argument is persuasive. Archival records show that in the late 1920s, officials from the Departments of Indian Affairs and Justice were clearly concerned with protecting the Indians' treaty livelihood rights, especially those of the northern Indians who depended on hunting, trapping and fishing for their subsistence. They were well aware that the traditional economy required cash. They sought to guarantee the Indians' continued right to hunt and fish on unoccupied Crown lands according to the treaty, subject to regulation.

The historical evidence supports Justice Wilson's view that the purpose of paragraph 12 of the NRTA was simply to confer on the province the power to regulate sport and purely commercial hunting, not to extinguish any treaty rights of the Indians.

Is there Room for Reconciliation?

The Supreme Court has repeatedly underlined the need for reconciliation between the views of government and those of Aboriginal peoples on the interpretation of the treaty terms and their modern implementation, and the need to accommodate treaty rights.

In the *Marshall* case, Justice Binnie drew a distinction between a treaty right to trade for "necessaries" or sustenance, and a free standing commercial right to trade.[28] In his view, the concept of "necessaries" is equivalent to the concept of a "moderate livelihood", which "includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth".[29] This is reminiscent of Justice Wilson's distinction in *Horseman* between hunting for support and subsistence, and hunting for purely commercial profit. Justice Binnie's finding is based on his extensive analysis of the historical background of the Mi'kmaq treaties. He notes that in the 1760s, the British "did not want the Mi'kmaq to become an unnecessary drain on the public purse"; as a result, it was "necessary to protect the traditional Mi'kmaq economy, including hunting, fishing and gathering".[30] He further observes that "the same strategy of economic aboriginal self-sufficiency was pursued across the prairies in terms of hunting".[31]

Defining the right to trap "for food" as encompassing a right to sell or trade the product of the trap for support and subsistence, or to sustain a moderate livelihood, as opposed to a purely commercial right, is an interpretation of the NRTA that upholds the honour and integrity of the Crown. The Supreme Court has stated that the honour of the Crown is always at stake when the Crown enters into treaties with Aboriginal peoples and applies them. Chief Justice McLachlin reiterated that principle most recently in the *Haida* decision:

> "In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the interpretation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown' […].

> […] The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of 'sharp dealing'." [32]

Based on the historical evidence discussed above, this interpretation is also the one that best reflects the intention and the interests of the parties at the time the treaty and the NRTA were signed.

To this day, the original promise by the Crown to the Indians that their livelihood would be maintained remains an empty promise. A provincial Task Force appointed by the Alberta government reported in 1991 that "the whole area of Aboriginal rights respecting hunting, trapping and fishing remains of intense spiritual and cultural concern to Aboriginal peoples."[33] The resolution of the long-standing conflict between Aboriginal peoples and the government concerning the rights promised by Treaty 8 will require negotiation of an agreement on the honourable implementation of these promises.

◆ Ms. Passelac-Ross is a Research Associate at the Canadian Institute of Resources Law. The full paper, *The Trapping Rights of Aboriginal Peoples in Northern Alberta*, can be ordered from the Canadian Institute of Resources Law by phone (403) 220-3200, fax (403) 282-6182 or email cirl@ucalgary.ca. Research for this paper was funded by the Alberta Law Foundation.

Notes:

1. *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, etc.* (Ottawa: Queen's Printer, 1966).
2. Monique M. Passelac-Ross, *The Trapping Rights of Aboriginal Peoples in Northern Alberta*, Occasional Paper #15 (Calgary: Canadian Institute of Resources Law, 2005).
3. The term "Indians" is used in the treaties and by historians and expert scholars when analyzing the historical relationship between the Crown and First Nations. It is also used by the courts in their discussions of historical documents.
4. For detailed historical accounts of the evolution of the fur trade and the critical role played by First Nations in that trade, see Arthur J. Ray: *Indians in the Fur Trade* (Toronto: University of Toronto Press, 1974); *The Canadian Fur Trade in the Industrial Age* (Toronto: University of Toronto Press, 1990); "Commentary on the Economic History of the Treaty 8 Area" (1995) 10:2 Native Studies Review 160-195.
5. David Laird, J. Ross & J. McKenna, "Report of Commissioners for Treaty No. 8" in *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, etc.* (Ottawa: Queen's Printer, 1966).
6. *An Act for the Preservation of Game in the Northwest Territories*, S.C. 1906, c. 151.
7. *An Act for the Protection of Game ("The Game Act")*, S.A. 1907, c. 14.
8. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) vol. 2(1) at 507-513.
9. The Alberta *Natural Resources Transfer Agreement* is a Schedule to the *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 25. The agreement was enacted provincially by *The Alberta Natural Resources Act*, S.A. 1930, c. 21.
10. RCAP Report, *supra* note 8 at 507.
11. Brian Louis Calliou, *Losing the Game: Wildlife Conservation and the Regulation of First Nations Hunting in Alberta, 1880-1930* (LL.M., University of Alberta, 2000) c. 1 [unpublished]. The Canadian Native Law Reporter (C.N.L.R.) reports 80 hunting cases and 73 fishing cases between 1990 and 1999, 11 of which were heard by the Supreme Court of Canada. The author further notes that many cases in the lower courts are not reported.
12. Most of the cases relate to hunting or fishing rights, very few relate directly to trapping rights, and none of the trapping cases has ever gone to the Supreme Court of Canada.
13. *R. v. Horseman*, [1990] 1 S.C.R. 901.
14. *R v. Badger*, [1996] 1 S.C.R. 771.
15. *Horseman*, *supra* note 13 at 929.
16. *Badger*, *supra* note 14 at 792. See also *Horseman*, *ibid.* at 928: "the Indians ceded title to the Treaty 8 lands on the condition that they could reserve exclusively to themselves 'their usual vocations of hunting, trapping and fishing throughout the tract surrendered'."
17. *Badger*, *ibid.* at 797-809.
18. *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 4 C.N.L.R. 1 (B.C.C.A.) at 40.
19. *Canada (Minister of Canadian Heritage) v. Mikisew Cree First Nation*, [2004] F.C.J. No. 277 at paras. 18 and 21. Justice Sharlow wrote a lengthy dissent endorsing the position of Justice Finch in the *Halfway River* case.
20. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 113-1119.The first step in the justification analysis is for government to show that, in infringing the right, it is pursuing a valid legislative objective. The second step involves establishing that the means used to pursue that objective uphold the honour of the Crown and are in keeping with the unique relationship between the Crown and Aboriginal peoples. Depending upon the circumstances of the case, this may involve giving priority to the Aboriginal right, making sure that the right is infringed as little as possible, offering fair compensation for expropriation, and ensuring that affected Aboriginal peoples are consulted.
21. *Horseman*, *supra* note 13 at 936.
22. *Badger*, *supra* note 14 at 820.
23. *Ibid.* at 807.
24. *Ibid.* at 813.
25. See Frank J. Tough, "Introduction to Documents: Indian Hunting Rights, Natural Resources Transfer Agreements and Legal Opinions from the Department of Justice" (1995) 10:2 Native Studies Review at 121; "The Forgotten Constitution: *The Natural Resources Transfer Agreements* and Indian Livelihood Rights, ca. 1925-1933" (April 2004) 41:4 Alta. L. Rev. at 999; Robert Irwin, "'A Clear Intention to Effect Such a Modification': The NRTA and Treaty Hunting and Fishing Rights" (2000) 13:2 Native Studies Review at 62.
26. *Horseman*, *supra* note 12 at 915-916.
27. *Ibid.* at 916.
28. *R. v. Marshall*, [1999] 3 S.C.R. 456.
29. *Ibid.* at 502.
30. *Ibid.* at 482-483.
31. *Ibid.*
32. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73, para. 19.
33. Alberta, *Justice on Trial – Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Edmonton: Solicitor General, March 1991) vol. III.

NEW PUBLICATIONS

The Trapping Rights of Aboriginal Peoples in Northern Alberta

by Monique M. Passelac-Ross. 2005. 79 pp. Occasional Paper #15. $20.00

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The Institute was incorporated on the basis of a proposal prepared by a study team convened by the Faculty of Law at the University of Calgary. The Institute continues to work in close association with the Faculty of Law. It is managed by its own national Board of Directors and has a separate affiliation agreement with the University of Calgary.

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