Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2001 FCT 1426 (CanLII)

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Neutral Citation: 2001 FCT 1426

BETWEEN:

MIKISEW CREE FIRST NATION

Applicant

- and -

SHEILA COPPS, MINISTER OF CANADIAN HERITAGE, and

THE THEBACHA ROAD SOCIETY

Respondents

REASONS FOR ORDER

HANSEN J.

INTRODUCTION

[1] This is an application for judicial review of the decision to approve construction of a winter road through Wood Buffalo National Park ("WBNP") ("Park") for a purpose not related to park management.

[2] On May 25, 2001, Parks Canada announced its determination pursuant to the *Canadian Environmental Assessment Act*, 1992, c.37 that construction of the winter road in WBNP would not cause significant environmental impacts, provided certain mitigation measures were implemented. Accordingly, the road was approved.

[3] The Mikisew Cree First Nation ("Mikisew") and its members claim treaty rights to hunt, trap, fish and carry out their traditional mode of life in the area encompassed by WBNP. Members of the Band contend their treaty rights will be impacted by the construction of the road.

[4] Mikisew claims the Minister's decision to approve the road was made without adequate consultation with the Band or its members, notwithstanding the fact Mikisew had clearly indicated to representatives of the Minister that Mikisew's treaty rights would be affected. The Minister takes the position that Mikisew's treaty rights in WBNP have been extinguished, therefore, consultation is not required. Alternatively, the Minister's position is that any infringement of Mikisew's rights caused by the operation or construction of the winter road can withstand scrutiny under the test articulated in *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075.

Background

[5] The Mikisew Cree First Nation is an Indian Band as defined by the *Indian Act*, R.S.C. 1985, c. I-5, as amended, whose reserve lands are situated both near and within WBNP. Mikisew is a Treaty No. 8 First Nation; its ancestors, the Cree Indians of Fort Chipewyan, were signatories to Treaty No. 8 on June 21, 1899 at Fort Chipewyan.

[6] The respondent, the Thebacha Road Society ("Thebacha"), is the proponent of the road project. Thebacha is a non-profit organization registered in both the Northwest Territories ("NWT") and the Province of Alberta.

[7] WBNP is managed and protected under the *Canada National Parks Act*, 2000, c.32. It is located in northern Alberta and southern NWT. The Park has been designated a UNESCO world heritage site. The largest national park in Canada, WBNP covers 44,807 square kilometres of land that traverses the border between Alberta and the NWT. It contains the last remaining natural nesting area for the endangered whooping crane, the largest free-roaming, self-regulating bison herd in the world, unique gypsum-karst landforms and undisturbed natural boreal forests.

[8] First Nations people have inhabited WBNP for over 8,000 years. Today, subsistence hunting, trapping and fishing and commercial trapping still take place within the Park. The Park was established in 1922 to protect the last remaining herds of wood bison in northern Canada. Since 1949, resource harvesting within the Park has been governed by specific game regulations.

[9] In 1986, Mikisew (as represented by the Chief and Council of the Cree Band of Fort Chipewyan) and Canada (as represented by the Minister of Indian Affairs and Northern Development) entered into an agreement entitled the Treaty Land Entitlement Agreement ("TLEA"). In acknowledgement of the fact that the Crown had not fulfilled her obligations with regard to certain undertakings made in Treaty No.8, specifically the setting aside of sufficient reserve lands, the Crown undertakes to satisfy those obligations in this agreement. The Crown also agrees to provide cash compensation, some training and employment opportunities, and to share wildlife management responsibilities with the Band. As consideration, the Band undertakes to release the Crown from all obligations arising out of the specific section of Treaty No. 8 that deals with provision of reserve lands.

[10] On May 25, 2001, the respondent Minister of Canadian Heritage ("the Minister") made a decision authorizing Thebacha to construct a winter road through WBNP. The proposed winter road is 118 kilometres long and would connect two communities in WBNP: Peace Point and Garden River. Peace Point is a Mikisew reserve

and Garden River is a settlement of the Little Red River Cree First Nation. The proposed road follows an abandoned right-of-way that was cleared for a winter road in 1958, but was only operational until 1960. The proposed road would have a right-of-way width of 10 metres, a width sufficient for two vehicles to meet and pass. Vehicle use would be restricted to pick-up trucks, cars and vans and the posted speed limits would range from 10 to 40 kilometres per hour.

[11] Pursuant to s. 36(5) of the *Wood Buffalo National Park Game Regulations*, the establishment of the winter road would result in the creation of 200 metre wide road corridor in which the use of firearms would be prohibited. The total area of this corridor would be approximately 23 square kilometres.

[12] There are approximately 14 Mikisew trappers residing in trapping area 1209, the area the proposed road would traverse. In addition, other Mikisew trappers who do not live in trapping area 1209 may still trap in that area. Further, there could be as many as 100 or more Mikisew hunters who hunt in the vicinity of the proposed road, although the Minister argues that the number of trappers and hunters potentially affected is significantly less.

[13] In addition to the alleged interference with its trapping and hunting rights, Mikisew submits the road would result in fragmentation of habitat, loss of vegetation, erosion, increased poaching, increased wildlife mortality due to vehicle collisions, increased risk to sensitive and unique karst landforms and the introduction of foreign invasive plant species brought in on the wheels of vehicles and the buckets of graders and back-hoes.

[14] Construction of a road along the route in question was accepted in principle in the *WBNP Management Plan*, issued in 1984. The route has been referred to as the Peace River Road route because of its proximity to the Peace River. The road currently proposed originated at meetings in August 1999 at Fort Smith, NWT between the Minister and supporters of the Peace River Road. The supporters of the project, led by Richard Power, formed Thebacha. They subsequently submitted a proposal to Parks Canada for re-establishment of a winter road along the right of way of the Peace River Road route.

[15] Parks Canada developed *Terms of Reference* for the environmental assessment of the winter road project. The *Terms of Reference* were given to Mikisew on January 19, 2000 along with the timelines for the assessment. As well, Mikisew was advised there would be a public review following the initial assessment by an outside consultant.

[16] An *Environmental Assessment Report* was completed by an independent agency, Westworth Associates Environmental Ltd.("Westworth"), in April 2000. The report noted the winter road would likely result in some fragmentation of habitat. Copies of this report were sent to Mikisew Chief George Poitras in the summer of 2000, but the applicant did not respond to this report during the 64 day period of public consultation.

[17] Following deliberations by the Chief and Council, in a letter dated October 10, 2000 Mikisew informed Josie Weninger, the Park Superintendent, that it did not consent to the construction of the road. The proposed route for the road would travel through its Peace Point Reserve. Further, Mikisew raised concerns about unresolved issues surrounding its role in the management of the Park, the subject of ongoing litigation, and identified the serious concerns of Mikisew trappers and their commitment to conservation of their traditional lands.

[18] Mikisew sent a letter to the Minister of Canadian Heritage, Sheila Copps, on January 29, 2001, expressing Mikisew's concerns with the proposed road through the Peace Point Reserve and with Parks Canada's

failure to consult with Mikisew. As Mikisew had been informed that construction was to commence almost immediately, it invited Minister Copps, Minister of Indian Affairs Robert Nault, and Parks Canada CEO Tom Lee, to meet with Mikisew over the next week to discuss Mikisew's concerns, emphasizing the urgency of the situation.

[19] An alternative route, avoiding the Mikisew reserve, was chosen by Parks Canada and Thebacha. In March 2001, Parks Canada had Westworth complete a field inspection and biophysical resource assessment on the realignment. Mikisew was never consulted by Westworth in relation to these assessments.

[20] On May 25, 2001, a notice entitled "Parks Canada Determination Regarding the Thebacha Road Society Proposal to Reopen a Winter Snow Road in Wood Buffalo National Park" was posted to the WBNP website. The following appeared under the heading Finding and Determination:

Parks Canada and it's co-Responsible Authority HRDC have found the proposed reopening of the Garden River to Peace Point winter snow road is not in contradiction with Parks Canada plans and policy, (or other federal laws and regulations). It is determined that, taking into account the implementation of the Thebacha Road Society's mitigation measures, the project (construction, maintenance and operation of a winter snow road) is not likely to cause significant adverse environmental effects.

Subject to the implementation of the mitigating measures, including adaptive management and environmental management strategies, the winter snow road project is approved and can proceed.

The decision is attributed to the "Director General, Western and Northern Parks Canada Agency".

[21] A *Construction and Operating Services Agreement* was signed on July 3, 2001. It is anticipated by the respondent Thebacha that four permits will be issued under the *National Park Fire Protection Regulations* and the *National Park General Regulations*. These permits would give effect to the Agreement and provide mechanisms for the implementation of mitigation measures.

History of the Case

[22] On June 18, 2001, the Canadian Parks and Wilderness Society ("CPAWS") challenged the Minister's decision to approve the road by filing an application for judicial review in the Federal Court of Canada (File No. T-1066-01). The CPAWS application was based on administrative law grounds relating to the applicable framework of federal environmental legislation and regulations. The CPAWS application was heard by Gibson J. on September 27, 2001 in Vancouver. The application was dismissed by Order dated October 16, 2001.

[23] On June 25, 2001, Mikisew filed this application for judicial review. Mikisew's application relies on the same grounds contained in the CPAWS application but also relies on additional grounds specific to Mikisew. These include constitutional law principles relating to the Minister's fiduciary duty pursuant to s. 35(1) of the *Constitution Act, 1982*. In particular, Mikisew claims the Minister's decision was made without adequate consultation. Mikisew submits this breach of the Crown's fiduciary duty constitutes an unjustifiable infringement of Mikisew's constitutionally protected treaty rights.

[24] In early August 2001, Mikisew brought a motion for consolidation of these two judicial review applications pursuant to Rule 105(*a*) of the *Federal Court Rules, 1998*. The Minister subsequently brought a motion to have this judicial review application converted to an action. By Order dated August 13, 2001, I adjourned the motion for consolidation until the hearing of the Minister's motion for conversion.

[25] On August 27, 2001, when the motions were heard, the parties had reached an agreement. On consent, Dawson J. dismissed the motions for consolidation and conversion and ordered that the within matter would proceed on an expedited basis. Dawson J. also granted an interlocutory injunction preventing the commencement of construction on the road project until "this Court has finally adjudicated upon the within application for judicial review".

[26] Oral argument on this application was heard on October 26, 2001. Counsel for Mikisew presented evidence on the environmental law issues that was not before Gibson J. in the CPAWS application. This situation arose because counsel for the Minister elected not to file the affidavit of Josie Weninger, Park Superintendent, on the CPAWS application, but has filed it in this application.

Relief Sought

The applicant Mikisew seeks:

- an order reviewing and setting aside the decision of the Minister authorizing Thebacha Road Society to construct a winter snow road through WBNP;

- a declaration that the Minister has a fiduciary and constitutional duty to adequately consult with Mikisew Cree First Nation with regard to the construction of the road and the extent of that consultation to this date has been insufficient;

- an order of *mandamus* compelling the Minister to consult with Mikisew with respect to the scope, nature and extent of the impact the road may have on the exercise of Mikisew's treaty rights;

- an order prohibiting the Minister from making any further decisions with respect to the construction of the road until after the completion of the consultation process mandated by this Honourable Court;

- an order for costs; and

- such further and other relief as this Honourable Court deems just.

ISSUES

[27] The applicant framed the issues as follows:

1. Was the Minister's authorization of the proposed winter road through WBNP *ultra vires* the *Canada National Parks Act* and associated regulations ?

2. Did the information gaps in the environmental assessment prevent the Minister from making a proper determination under either the *Canada National Parks Act* or the *Canadian Environmental Assessment Act* regarding the approval of the road ?

3. Did the Minister breach principles of natural justice and administrative fairness in approving the road by:

1) failing to respect the applicant's right to be heard;

2) breaching the doctrine of legitimate expectations;

3) exhibiting bias, making her decision in bad faith or conducting herself in a manner that raises a reasonable apprehension of bias or pre-determination; or

4) failing to consider all relevant information in making her decision?

4. In approving the road, did the Minister fail to conduct herself in accordance with her fiduciary and constitutional duties to Mikisew in breach of subsection 35(1) of the *Constitution Act, 1982* ?

[28] In light of the decision of Gibson J. on the CPAWS application, the applicant focussed the bulk of its arguments on the fourth issue. Therefore, I will begin my analysis with the discussion of the aboriginal and constitutional law issues.

ANALYSIS

In approving the road, did the Minister fail to conduct herself in accordance with her fiduciary and constitutional duties to Mikisew in breach of subsection 35(1) of the *Constitution Act, 1982* ?

[29] Subsection 35(1) of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, reads as follows:

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	35.(1) Les droits existants - ancestraux ou issus de traités - des peuples autochtones du Canada sont reconnus et confirmés.

[30] The Supreme Court of Canada, in *Sparrow, supra*, at 1111-1119, sets out the now well-established test the Crown must meet when taking actions under their jurisdiction that impact on treaty or aboriginal rights. The following three questions form the framework for the analysis:

1) Is there an existing aboriginal or treaty right?

2) Has there been a *prima facie* infringement of the right?

3) Can the infringement be justified?

a) Is there a "compelling and substantial" objective?

b) Were the Crown's actions consistent with its fiduciary duty toward aboriginal people?

1. Is there an existing treaty right?

[31] The *Sparrow* analysis begins with the question of whether the First Nation can prove the existence of a treaty right.

[32] Chief George Poitras attests Mikisew have historic and constitutionally protected rights to hunt, trap, and fish and to use the land to pursue a traditional lifestyle. Furthermore, these rights extend to the land encompassed by WBNP. Mikisew submits its right to hunt, fish and trap is historically based in Treaty No.8. It states:

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.

The principles of treaty interpretation

[33] In *R. v. Badger,* 1996 CanLII 236 (S.C.C.), [1996] 2 C.N.L.R. 77 at paragraph 41, Cory J., writing for the majority, set out the principles to be applied in treaty interpretation:

... First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. ... Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. ... Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. ... Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. [Citations omitted.]

[34] The Minister relies on *R. v. Marshall* 1999 CanLII 665 (S.C.C.), [1999] 3 S.C.R. 456 at page 467 where Binnie J., for the majority stated:

The starting point for the analysis of the alleged treaty right must be an examination of the specific words used in any written memorandum of its terms...

And further, the Minister refers to page 474:

"Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty ... the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement ... and the interpretation of treaty terms once found to exist (*Badger*). The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown...

[Citations omitted]

[35] The Minister's position is that the Court should not favour one or the other party's interpretation of the treaty, but rather attempt to ascertain the common intention or mutual understanding of the parties at the time the treaty was made.

[36] The intentions of the parties in entering into the treaty can be adduced from a consideration of extrinsic evidence. The Minister points out that recent decisions of the Supreme Court of Canada in *R. v. Sundown*, 1999 CanLII 673 (S.C.C.), [1999] 1 S.C.R. 393, and *Badger, supra,* have held that extrinsic evidence of the historical and cultural context of a treaty may be received. Specifically, the Minister asks the Court to have reference to the historical record, the objectives of the government and the First Nations, and the political and economic context to determine the terms of Treaty No. 8. I agree that extrinsic evidence, to the extent that it can provide information about how the parties understood the terms of the agreement, can be valuable in giving content to the treaty.

The Crown's Intention

[37] According to the Minister, the Crown's intention in entering into the numbered treaties on the prairies is clear. In the Minister's view, this intention has been acknowledged by the Courts and is found in the Orders in Council establishing the Treaty Commissions, the report of the Treaty Commissioners and the treaty itself. The Minister points to the Supreme Court of Canada in *Badger, supra,* at paragraph 39, where the Court stated:

Treaty No. 8 is one of eleven numbered treaties concluded between the federal government and various Indian bands between 1871 and 1923. Their objective was to facilitate the settlement of the West. Treaty No. 8 made on June 21, 1899, involved the surrender of vast tracts of land in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and part of the Northwest Territories. In exchange for the land, the Crown made a number of commitments ...

[38] The Minister submits the very purpose of the numbered treaties was to obtain ownership to the lands for the purpose of their "taking up". This is confirmed, in the Minister's view, by the Supreme Court of Canada's comments with respect to Treaty No.6 in *R v. Horse,* 1988 CanLII 91 (S.C.C.), [1988] 1 S.C.R. 187 at 198:

The ultimate objective of this treaty was for the Government to obtain ownership of the lands it covered and to open the surrendered lands to settlement...

[39] While I agree that the Court in *Horse, supra*, found that the intention of the Crown was to obtain ownership of the lands, the Court did not go so far as to say that the purpose of entering into the treaty was for the "taking up" of lands. The Minister's interpretation, in my view, cannot be reconciled with the text of the treaty. The treaty sets out that the First Nations will be able to pursue their traditional ways of life "throughout the tract surrendered", subject to regulations, and **except** in "such tracts as may be required or taken up **from time to time** for settlement, mining, lumbering, trading or other purposes". The treaty makes it clear that the "taking up" of land will be the exception, not the rule. The "taking up" of land will happen gradually, perhaps temporarily, and deliberately. It clearly was not intended to occur automatically on all the land surrendered. The First Nations ceded **title** to the entire tract of land, but they surrendered **use** only in specific tracts as required by the Crown for other purposes.

The First Nations' Intention

[40] Mikisew submits it is evident from the historical accounts of the treaty negotiations that the First Nations signatories were greatly concerned about the restriction of their hunting and trapping activities. The applicant relies on the *Report of the Treaty Commissioners*, submitted to the Crown in 1899:

There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of

the hunting and fishing privileges.

We pointed out that...the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them.

...

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

[affidavit of Chief George Poitras, Exhibit "A", applicant's emphasis].

[41] The affidavit of Bishop Gabriel Breynat, sworn November 26, 1937, may also be relevant to understanding the agreement reached in Treaty No.8. The affidavit discloses numerous oral promises made to Mikisew's ancestors by the Crown, and indicates that the Crown told Mikisew's ancestors that those promises would be honoured even though they did not make it into the text of the treaty. Among the oral promises alleged to have been made by the Crown is the promise that Mikisew's traditional means of living would not be interfered with, and the "guarantee" that Mikisew would not be prevented from hunting and fishing as their ancestors had done.

[42] The Minister's submission is that very little weight should be given to the affidavit of Bishop Gabriel Breynat on account of evidentiary and substantive difficulties.

[43] The Minister submits the evidentiary difficulties associated with the affidavit are as follows:

i) The affidavit is not filed in any particular action;

ii) The applicant has not adduced any evidence about the purpose or purposes for which this affidavit was created.

[44] The Minister's substantive difficulties associated with the affidavit are as follows:

i) Bishop Gabriel Breynat purports to have been an interpreter for Treaty No. 8 but, his name is not listed as such within the text of the treaty;

ii) The affidavit was sworn 38 years after the signing of Treaty No. 8 at a point when Bishop Gabriel Breynat was 70 years old;

iii) The Treaty Commissioners were English speaking but the first language of Bishop Gabriel Breynat was French; and

iv) Bishop Gabriel Breynat is now deceased thus preventing any opportunity to test his evidence.

[45] The Minister submits that use of the Breynat affidavit in the interpretation of Treaty No. 8 would have

the Court violate several principles of treaty interpretation. In the Minister's view, reading an absolute guarantee of the right to hunt and trap into the treaty would be effectively adding to its terms, would exceed what is possible on the language, and would not reflect Canada's intentions in relation to the treaty making process.

[46] The Minister's argument based on the fact that Bishop Breynat's first language was French is without merit. Bishop Breynat is noted as an interpreter for Treaty No.11, clearly indicating his fluency in English (the language spoken by the Treaty Commissioners) and the relevant First Nations languages. The fact that French is the Bishop's first language does not support the conclusion that Bishop Breynat may have been mistaken in his interpretation of the events surrounding the signing of Treaty No. 8.

[47] In *Halfway River First Nation v. British Columbia (Ministry of Forests),* [1999] B.C.J. No. 1880 the Breynat affidavit was found to be inadmissable because it was not properly proven. The applicant in that case failed to prove that the affidavit was produced from secure custody. However, the Court did note that there was no indication of suspicious circumstances in the swearing of the affidavit and proceeded to find a Treaty No. 8 right to hunt and trap notwithstanding the finding that the Breynat affidavit was inadmissible.

[48] In this case, the Breynat affidavit has been produced from secure custody and its authenticity has been verified. In my view, however, the oral promises spoken to in Bishop Breynat's affidavit simply corroborate other evidence, such as the *Report of the Treaty Commissioners*, that is not objected to by the Crown. Therefore, it is not necessary to resort to the evidence found in the Bishop's affidavit in order to determine that the intention of the First Nation, in entering into the treaty, was to maintain their traditional mode of living, including hunting, trapping and fishing, throughout their traditional lands.

[49] The text of Treaty No. 8 is a record of the oral exchange of solemn promises between the Crown and the First Nations. As such, and because it is written in English, the text is necessarily a reflection of the Crown's perspective of the agreement that was struck. Even so, the text explicitly grants the First Nations the right to continue hunting and trapping as they had always done, throughout the tract surrendered, subject to conservation and limited geographic restrictions.

[50] Oral promises made at the time the treaty was concluded give rise to rights under the treaty. The Courts must hold these promises in high regard if the honour of the Crown is to be upheld. Given the strenuous judicial calls for generous interpretations, and for ambiguities to be resolved in favour of the First Nations, it is my opinion that there is ample evidence, even without according any weight to the Breynat affidavit, on which to base the finding that a constitutionally protected treaty right to hunt and trap in WBNP arose out of the signing of Treaty No. 8. Next, I must consider whether that right has been extinguished.

Extinguishment

[51] In this section, I will consider whether the treaty right to hunt and trap in WBNP has been extinguished; either by statute, through the "taking up" of lands, through "visible incompatible use" or by regulation.

[52] Treaty rights are protected from extinguishment by the principle that the Crown must produce evidence of a "clear and plain intention" to extinguish the treaty right at issue. Cory J. in the majority judgment of the Supreme Court of Canada in *Badger, supra,* at paragraph 41, explains:

... the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.

Extinguishment by statute

[53] The Minister maintains the creation of WBNP by Order in Council in April 1922 (P.C. No. 2498), had the effect of "overriding any treaty rights to the Park lands which may have been previously enjoyed" by Mikisew. Additionally, the Minister claims that a series of statutory instruments enacted for conservation purposes demonstrate a "clear and plain" intention to "suspend the treaty right to hunt and trap" within the boundaries of WBNP.

[54] The *Regulations Respecting Game in Dominion Parks*, Order in Council, December 1, 1919 (P.C. No. 2415) prohibited all hunting and trapping within the Park. However, a subsequent Order in Council dated April 30, 1926 enacted a permit scheme allowing persons who had hunted and trapped in WBNP prior to its establishment to continue their vocations.

[55] The applicant submitted a 1923 Public Notice of the Department of the Interior, produced from the secure custody of the National Archives of Canada, as evidence of the continued exercise of the treaty right, despite the establishment of the National Park. It states:

It is unlawful for any person other than *bona fide* natives, being Treaty Indians, to hunt or trap wild animals or birds within the boundaries of the Wood Buffalo Park. Any person violating this regulation will be prosecuted.

Treaty Indians must, however, conform to Park regulations with respect to closed seasons.

O.S. Finnie, Director

[56] This evidence simply confirms a fact that has been all but conceded by the Minister. Since WBNP was designated as a national park in 1922, hunting and trapping in the Park by First Nations has continued.

[57] I do not find a clear and plain intention to extinguish Mikisew's right to trap and hunt in the Park in either the establishment of WBNP or in the temporary regulation of that right for conservation purposes.

Have the lands been "taken up"?

[58] The plain language of Treaty No. 8 reveals only two limitations on the right to hunt and trap. Cory J. in *Badger, supra*, describes the limitations on the rights as follows at paragraph 40:

Treaty No. 8, then, guaranteed that the Indians "shall have the right to pursue their usual vocations of hunting, trapping and fishing". The Treaty, however, imposed two limitations on the right to hunt. First, there was a geographic limitation. The right to hunt could be exercised "throughout the tract surrendered ... saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". Second, the right could be limited by government regulations passed for conservation purposes.

[59] Cory J. in *Badger, supra,* at paragraph 41, held that "any limitations that restrict the rights of Indians under treaties must be narrowly construed". Therefore, the provisions of Treaty No. 8 purporting to allow the "taking up" of lands (for various purposes) must be interpreted in a manner that honours the oral agreement. Since the "taking up" of lands by the Crown would effect an extinguishment of the treaty right in the area taken up, the

"taking up" of lands may also only be effected by strict proof of a "clear and plain intention".

[60] The respondent Minister submits the Courts in *R. v. Rider* (1968), 70 D.L.R. (2d) 77 (Alberta Magistrates Court) and *R.* v. *Norn,* reflex, [1991] 3 C.N.L.R. 135 (Alberta Provincial Court) at page 141, determined that national parks constitute lands "taken up for other purposes" within the meaning of Treaty No. 8. Therefore, the Minister's position is that since the land has already been "taken up", Mikisew can no longer claim treaty rights on that land. However, the Court in *Norn,* found that although the land was "taken up" for other purposes, the treaty right to hunt and trap was not extinguished. The Minister also acknowledges that the decision in *Norn* is somewhat of an anomaly, given the substantial authority to the contrary. Further, the Minister submits that the comments on treaty rights may be considered *obiter dicta*, given that the Court found justifiable infringement in any event.

[61] The Supreme Court of Canada decision in *Badger* makes my consideration of these two cases unnecessary. In *Badger,* the Court held that whether the land has been "taken up" is a question of fact to be determined on a case-by-case basis. It turns on a determination of whether the lands in question have been put to a visible use that is incompatible with the exercise of the specific treaty rights claimed.

[62] This test was articulated at paragraph 54 of the *Badger, supra,* decision:

An interpretation of the treaty properly founded upon the Indians' understanding of its terms leads to the conclusion that the geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible land use. This approach is consistent with the oral promises made to the Indians at the time the treaty was signed, with the oral history of the Treaty No. 8 Indians, with earlier case law and with the provisions of the *Alberta Wildlife Act* itself.

[63] The Court emphasized that the oral promises made by the Crown during treaty negotiations supported the "visible and incompatible land use" interpretation of the term. The Court concluded at paragraph 58:

Accordingly, the oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis.

[64] The applicant submits that the threshold for establishing a visible and incompatible land use is high. The applicant points to *Halfway River, supra,* where a majority of the British Columbia Court of Appeal held that the granting of a logging permit over the traditional hunting territory of the Halfway River First Nation did not constitute a "taking up" of land under Treaty No. 8. The Court found that even though the activity in question constituted a "shared use" of the land, nevertheless, it was an infringement of the treaty right to hunt. Huddart J.A., in a concurring opinion, stated at paragraphs 172, 173 and 176:

I agree with Mr. Justice Finch that the District Manager's decision must be reviewed "in the context of the competing rights created by Treaty 8". On the facts as the District Manager found them, however, this is not a case of "visible incompatible uses" such as would give rise to the "geographical limitation" on the right to hunt as Cory J. discussed in *Badger, supra*.

I do not think that the District Manager for a moment thought that he was "taking up" or "requiring" any part of the Halfway traditional hunting grounds so as to exclude Halfway's right to hunt or extinguish the hunting right over a particular area, whatever the Crown may now assert in support of his decision to issue a cutting permit. At most the Crown can be seen as allowing the temporary use of some land for a specific purpose, compatible with

the continued long-term use of the land for Halfway's traditional hunting activities. The Crown was asserting a shared use, not a taking up of land for an incompatible use ...

...

Nevertheless, a shared use decision may be scrutinized to ensure compliance with the various obligations on the District Manger, including his obligation to "act constitutionally", as I recall Crown counsel putting it in oral argument. Counsel agreed Sparrow provided the guidelines for that scrutinization on judicial review if a treaty right was engaged ...

Does use as a national park constitute a "visible and incompatible" use?

[65] To re-iterate, the test asks whether the use of the land as a national park is a visible use that is incompatible with the exercise of the right to trap and hunt by the First Nation.

[66] The Minister submits that national parks were established to protect the ecological integrity of a particular representative example of the Canadian landscape as well as to protect and preserve flora and fauna within that area. WBNP, in addition, has its own particular purpose. As set out within its enabling Order in Council, the stated purpose of the Park was to act as a preserve for the last remaining free roaming herd of wood bison. The Minister submits that its modern purpose has become the protection of the habitat of endangered migratory whooping cranes (whose nesting sites, the Minister adds, are remote from the road in issue), and the protection of a large boreal environment in pristine condition.

[67] The Minister concludes that treaty rights to hunt and trap within the borders of WBNP are incompatible with the purpose of the Park. The Minister feels that preservation of the Park's ecology and wildlife would be compromised if all Treaty No. 8 Indians were able to hunt and trap in the Park.

[68] The applicant relies on the holdings of the Supreme Court of Canada in *Badger, supra,* and *R. v. Sundown*, 1999 CanLII 673 (S.C.C.), [1999] 1 S.C.R. 393 for the proposition that the exercise of First Nations treaty rights is not incompatible with the creation of the Park. In these cases, not only was there no clear and plain intention to extinguish the treaty right found, but the establishment of a park did not constitute a "taking up" of land for an incompatible purpose.

[69] The Court in *Sundown, supra,* at page 414, established that "the creation of a park is not necessarily incompatible with the exercise of hunting rights unless, perhaps, the park operates as a wildlife sanctuary that prohibits all hunting". In upholding the hunting rights of First Nations in Meadow Lake Provincial Park, the Court unanimously concluded:

... For example, if the park were turned into a game preserve and all hunting was prohibited, the treaty right to hunt might be entirely incompatible with the Crown's use of the land. See in this respect *R. v. Smith*, reflex, [1935] 2 W.W.R. 433 (Sask. C.A.). This position accords well with *Myran v. The Queen*, 1975 CanLII 157 (S.C.C.), [1976] 2 S.C.R. 137, which held that there was no inconsistency in principle between a treaty right to hunt and the statutory requirement that the right be exercised in a manner that ensured the safety of the hunter and of others.

[70] The applicant submits that the purpose of WBNP cannot be incompatible with hunting. The applicant points to the *Wood Buffalo National Park Game Regulations*, SOR/78-830 which allows both natives and non-natives to hunt in the Park during open season as long as they have a permit. The applicant argues that there are no

provisions in the Regulations that prohibit hunting by First Nations, and suggests that the Crown has recognized the treaty right to hunt in the Park since the Park's inception. The trial judge in *Norn, supra,* at page 139, considered the history of the Park and provided the background as follows:

It is important to consider this case in its historical context. Treaty No. 8 was executed by the parties in 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 previously 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 Wood Buffalo National Park by permit of those treaty Indians, who, previous to the establishment of the Park, had hunted in the 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 [applicant's emphasis]

[71] In cross-examination, Josie Weninger, Park Superintendent, admitted that hunting and trapping in WBNP is not inconsistent with Parks Canada's regulatory regime (Cross-examination of Josie Weninger, October 1, 2001, page 1, lines 13 to 24). The applicant argues that this clearly points to the conclusion that the Crown has neither expressed a clear and plain intent to extinguish the right to hunt in the Park, nor has it "taken up" the land for a use incompatible with the right to hunt. In fact, the applicant submits that the situation would be more accurately described, as in *Halfway River,* as a "shared use" of the land.

[72] Finally, the applicant submits that the 1986 Treaty Land Entitlement Agreement ("TLEA") provides further evidence of Mikisew's existing treaty rights in WBNP. The applicant claims that the TLEA has great significance. First, it is a recognition by Canada that Mikisew has rights under Treaty No. 8, including rights within WBNP; and second, it recognizes that the exercise of Mikisew's treaty rights in WBNP is not an "incompatible use". While the "harvesting rights" guaranteed in Schedule 6 of the TLEA apply to the "traditional lands" of Mikisew and not the land to be traversed by the road in issue, they nevertheless are still within Park boundaries and, therefore, point to the conclusion that hunting and trapping by Mikisew is not incompatible with the use of the land as a national park.

[73] In my view, the lands of WBNP have not been "taken up" in a manner that is incompatible with a regulated right to hunt and trap by Mikisew. The Minister is defending a decision to build a road through this Park. Part of the Minister's strategy, as will be seen in the next section, includes pointing to the relatively few number of Mikisew hunters who will be affected by the road. At the same time, the Minister wishes to argue on this point that a treaty right to hunt and trap in the Park (exercised by the "few" Mikisew hunters) would be incompatible with the "modern purpose" of the Park which is to protect the habitat of endangered migratory whooping cranes and the protection of a large boreal environment in pristine condition.

[74] The Minister's appeals to 'ecological integrity' in this context are without merit. That is not to say hunting and trapping could never be found to be incompatible with the use of land as a national park. WBNP is a unique park; it is a vast and isolated wilderness. The exercise of hunting and trapping rights by Mikisew has coexisted with the use of the land as a national park since its inception. The following appears on the WBNP website maintained by Parks Canada:

Subsistence hunting, fishing and trapping still occur in Wood Buffalo National Park, as they have for centuries, and commercial trapping continues as a legacy of the fur trade. Traditional use of certain park resources by local Aboriginal groups is considered an important part of the park's cultural history. (http://parkscanada.pch.gc.ca/)

[75] As noted earlier, in *Badger, supra,* the Court held that whether the land has been "taken up" by the Crown is a question of fact to be determined on a case-by-case basis. On the facts before me, I am satisfied that the exercise of a right to trap and hunt is not incompatible with the use of land as a national park, particularly with respect to a park that is as large and as remote as WBNP.

Does regulation of the treaty right result in partial extinguishment?

[76] The Minister notes that s.35(1) of the *Constitution Act* states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". The Minister submits that in relation to the meaning of the term "existing" the Supreme Court of Canada has stated in *Sparrow, supra*, at page 1091:

The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*. A number of courts have taken the position that "existing" means "being in actuality in 1982". [Citations omitted]

[77] I agree that the issue is whether prior to 1982 treaty Indians had a right to enter WBNP for the purposes of hunting and trapping or whether that particular right had been extinguished. It is the Minister's position that prior to 1982 there is little doubt that federal law could extinguish and/or alter treaty rights. As the Supreme Court of Canada noted in *Marshall, supra,* at page 496:

Until enactment of the *Constitution Act, 1982*, the treaty rights of aboriginal peoples could be overridden by competent legislation as easily as could the rights and liberties of other inhabitants. The hedge offered no special protection, as the aboriginal people learned in earlier hunting cases such as *Sikyea v. The Queen*, 1964 CanLII 62 (S.C.C.), [1964] S.C.R. 642 and *R. v. George*, 1966 CanLII 2 (S.C.C.), [1966] S.C.R. 267...

[78] The Minister submits the issue of a "regulated" treaty right must be addressed. According to the Minister, the Supreme Court of Canada in both *Sparrow, supra*, and *R. v. Gladstone*, 1996 CanLII 160 (S.C.C.), [1996] 2 S.C.R. 723 concluded that regulation of First Nations' fishing did not amount to extinguishment because, although the activity was regulated, it was, nonetheless permitted. In the Minister's view, the important distinction is between that which was regulated but nonetheless permitted versus that which was not permitted.

[79] The Minister urges that the limited privilege to hunt and trap within the Park be appropriately characterized. In her view, the current hunting and trapping privileges enjoyed by some members of Mikisew is not a regulated Treaty No. 8 right. Instead, there is a strict prohibition on hunting and trapping in relation to which there is a limited exception which allows only a small definable group the privilege.

[80] In my opinion, the case law does not support the Minister's distinction between a right that is "regulated" and one that is "not permitted". In *Gladstone, supra,* the aboriginal right to sell herring was not extinguished by extensive regulation that included, at various times, a complete prohibition on the trade.

[81] In *Sparrow, supra,* at page 1092, the Court specifically rejected the view that regulation results in a partial extinguishment. The Court held that the right, provided it had not been extinguished by a clear and plain intention prior to 1982, could be considered to exist in its unregulated form. The word "existing" simply means to

exclude those rights validly extinguished prior to the *Constitution Act, 1982*.

Conclusion

[82] The Crown's ability to declare that lands have been "taken up" for other purposes prior to the constitutionalization of treaty rights in 1982 is limited by the principles of treaty interpretation. Going back to *Badger, supra*, at paragraph 41, the Court held that "... any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed..." Therefore, the conclusion that a geographic limitation on the exercise of treaty rights (the "taking up" of land by the Crown) has been achieved, must not be arrived at lightly.

[83] I agree with the applicant's submissions that the treaty rights that existed in 1899 received constitutional protection in 1982 as "existing treaty rights", subject only to the Crown's right to take up land and a consideration of any evidence of a clear and plain intent to extinguish the rights prior to 1982. The Crown has failed to discharge the onus to provide evidence of a "clear and plain intention" to extinguish the treaty rights. Accordingly, this constitutional protection requires any infringement of these rights to be justified in accordance with the *Sparrow* test.

[84] As an aside, the respondent also advanced the following proposition in these proceedings: the road approval itself amounts to a "taking up" of land by the Crown. Here, the Minister argues that the First Nations people appreciated there would be encroachment on the lands, therefore, this "taking up" of the road corridor by the Crown would not require justification according to the *Sparrow* analysis. The applicant responds that the "taking up" of lands is not expressly authorized by the treaty - the treaty simply limits the exercise of treaty rights on the land that is taken up. Therefore, in the applicant's view, the taking up of lands is an exercise of Crown authority, subject to the Constitution, and must be justified according to the test in *Sparrow*.

[85] The approach of the Crown forwarded here would render the 1982 constitutionalization of the treaty rights meaningless. It is clear that post-1982, the Crown can not unilaterally defeat treaty rights. This position taken by the Minister cannot be reconciled with the honour and integrity of the Crown as a fiduciary. Finch J. concluded in *Halfway River, supra,* at paragraph 136 that it is "... unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a limitation or restriction on the Indians' right to hunt... ".

[86] Whether the road approval is characterized as a "taking up" of land or as the imposition of a "shared use", if it is found to constitute a *prima facie* infringement on the treaty rights of Mikisew, it will have to be justified according to the *Sparrow* analysis.

2. Has there been a *prima facie* infringement of the treaty right?

[87] The applicant submits there is a low threshold for establishing a *prima facie* infringement under the *Sparrow* test. The applicant relies on the following statement by the Supreme Court of Canada in *Gladstone, supra*, at page 810:

Although I agree with the analysis of the Chief Justice on this issue, I want to emphasize that the burden to demonstrate that legislation infringes upon an existing aboriginal right, which is borne by the claimant, is fairly low ... Therefore, the aboriginal right claimant does not even have to prove on the balance of probability that the impugned legislation constitutes an infringement, and surely not that it "clearly impinges" upon the right, as the Chief Justice seems to suggest. The only thing that the claimant must show is that, on its face, the legislation

comes into conflict with a recognized aboriginal right, either because of its object or its effects...

[88] Mikisew submits the construction of the road constitutes a *prima facie* impact on the exercise of their treaty rights. The applicant notes that all of Mikisew's reserve lands are situated close to WBNP and their Peace Point reserve is located wholly within the Park. Peace Point serves as the east terminus of the proposed road.

[89] The applicant submits the evidence of the proposed road's impact on Mikisew's rights is overwhelming. When Parks Canada's witness, Josie Weninger, was asked during cross-examination about the potential impact of the road on moose, the following exchange took place:

Q: And specifically we don't know what impact the road is going to have on moose, as an example, correct?

A: I would say that's correct. Without going down on the ground though, it's difficult to see what impact there would be on moose.

Q: So then, as an example, given that you don't know what the impact of the road is going to be on moose, how is it that you're able to determine how somebody should be able to be compensated, as an example, for the loss of moose arising from the construction of this road?

A: We do have information on impact of road on moose. We know, for example, that you're not likely to find a lot of hunting of moose on the road because the moose will avoid it.

Q: So then on the basis of that answer, at least in the area of at least with regard to moose specifically then, it's been your experience in other areas of the Park that roads do in fact harass moose out of the areas where roads are constructed, correct?

A: I would say they avoid them. I'm not sure I would say it harasses them out because we do have other incidents, as you're probably aware of, some hunting on roadway.

Q: But roads, in effect, change the pattern of moose and other wildlife within the Park and that's been what Parks Canada observed in the past with regards to other roads, correct?

A: It is documented that roads do impact. I would be foolish if I said they didn't.

[Cross-examination of Josie Weninger, October l, 2001, page 13, line 10 to page 14, line 11, Application Record at 265-266]

[90] In response to this evidence of infringement, the Crown submits "the system of hunting permits within the Park does not restrict a hunter to any particular territory". Therefore, in the Minister's view, a hunter with a valid permit is free to hunt anywhere within the boundaries of the Park. In the event the road causes a change in the movement patterns of moose, the Minister argues that such a change could be easily accommodated by the similar movement of a hunter.

[91] The impact the road would have on the environment in the Park is set out in the affidavit of former park warden, Jacques Saquet. Projected impacts include: fragmentation of wildlife habitat and disruption of migration patterns, loss of vegetation, erosion of sandy soils, increased poaching because of facilitated access, increased wildlife mortality due to vehicle collisions, increased risk to sensitive and unique karst landforms, and

the introduction of foreign invasive plant species.

[92] The applicant argues that any impact on the environment would have a corresponding impact on Mikisew's rights to hunt and trap in the Park due to Mikisew's reliance on the stability of the wildlife and furbearer populations. For example, the fisher is an economically important species for trappers in WBNP (Draft Environmental Assessment Report, section 5.4.3.3). The fisher is a vulnerable species that thrives in undisturbed wilderness; it makes up a significantly higher proportion of the furbearer catch inside the Park than it does outside (Draft Environmental Assessment Report, Table 16). The Environmental Assessment was unable to predict the impact of the road on the fisher populations or the populations of other important furbearers such as muskrat, marten, wolverine and lynx. However, it did note that increases in trapping pressure, as would be expected with increased access, have been found in the past to cause significant decreases in marten populations and a local extinction of fishers (Draft Environmental Assessment Report 6.4.7.3.).

[93] In terms of wildlife, the analysis in the Environmental Assessment Report discloses a significant potential impact on traditional hunting activities as well. Moose is the focus of much of the subsistence hunting in the Park by the traditional users (Draft Environmental Assessment Report 5.4.3.6). The road will increase access into previously isolated regions, which is likely to result in increased mortality of moose due to more intensive hunting, poaching and predation. As a result of an increase in wolf occurrence along the right-of-way, moose, drawn to roadways for preferred foraging opportunities, may fall prey to wolves more often.

[94] The applicant also notes it is important to recognize that the impact of the road on hunting will be increased by the prohibition on the use of firearms within 100 metres of either side of the centre line of the road, as required by section 36(5) of the *Wood Buffalo National Park Game Regulations*. As a result of these Regulations, hunting will be prohibited over approximately 23 square kilometres of land.

[95] Based on the foregoing, Mikisew submits it has clearly established a *prima facie* impact on its treaty rights triggering the Crown's obligation to justify that impact in accordance with the requirements set out in the *Sparrow* test.

[96] The Minister acknowledges that one of the risks associated with the proposed winter road is the potential increase in unauthorized hunting. The Minister notes, however, that poaching is only anticipated during those winter months when the road will be open and accessible. Mikisew's reply is that once the right-of-way is cleared, access to all terrain vehicles will be facilitated throughout the year. This point is well taken.

[97] Finally, while the Minister agrees with the applicant's submission that the road will cause a prohibition of hunting over an area of approximately 23 square kilometres, the Crown urges that it must be considered in the context of a Park which encompasses 44,807 square kilometres.

[98] In my opinion, the applicant has demonstrated the following impacts on its right to trap and hunt in WBNP:

i) **a geographical limitation**

Within the road corridor, Mikisew hunters will be prohibited by regulation from exercising their right to hunt. The ability to carry on traditional hunting activities in proximity to the reserve lands is important to the exercise of the hunting right. Further, trapping will also be disrupted. Many of the Mikisew traplines are located close to the

existing right-of-way, presumably for ease of access. In fact, the proposed route passes through Mikisew's designated registered trapping area and passes within one kilometre of a Mikisew trapping cabin. To the extent that traplines will have to be re-located, Mikisew's right to trap is clearly impacted.

ii) **potential adverse economic consequences**

First, the Draft Environmental Assessment Report states the road could potentially result in a diminuation in quantity of "catch"for Mikisew; fewer furbearers will be caught in their traps. Second, the same report identifies a potential change in the composition of the "catch"; the more lucrative or rare species of furbearers may decline in population.

iii) **potential cultural consequences**

Subsistence hunting and trapping by traditional users of the Park's resources has been in decline for many years. Opening up this remote wilderness to vehicle traffic could potentially exacerbate the challenges facing First Nations struggling to maintain their culture. For example, if the moose population is adversely affected by increased poaching or predation pressures caused by the road, Mikisew will be forced to change their hunting strategies. This may simply be one more incentive to abandon a traditional lifestyle and turn to other modes of living. Further, Mikisew argues that keeping the land around the reserve in its natural condition and maintaining their hunting and trapping traditions is important to their ability to pass their skills on to the next generation of Mikisew.

The test for *prima facie* infringement

[99] The Minister proposes that even if the Court concludes there may be some evidence of an infringement, to be consistent with the *Sparrow* principles outlined above, the evidence must be scrutinized by a further three part test: (i) is the limitation reasonable; (ii) does it impose undue hardship; and (iii) does it deny the right holders the preferred means of exercising their rights?

[100] The relevant passage from *Sparrow, supra,* at page 1112 reads:

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation...

[101] The applicant's position is that the three considerations or questions listed in *Sparrow* do not constitute a three-part test. In fact, strictly speaking none of them would have to be met in order to find a *prima facie* infringement. The applicant cites from *Sparrow, supra,* at page 1111 as follows:

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)...

[102] From this, the applicant maintains it is clear that the Supreme Court of Canada did not intend to establish a three-part test nor did they intend to require that all three elements named by the respondent be met. The applicant argues that if the proposed road has the effect of interfering with their treaty rights to trap and hunt, then a *prima facie* infringement is established and the inquiry goes no further. The applicant states that its interpretation

gains support from the following sentence in *Sparrow, supra,* at page 1112 which follows the discussion of the three questions to be considered:

... In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food...

[103] The applicant interprets this comment as an indication that the Court in *Sparrow* did not intend to impose a three-part test, but a list of considerations. In the applicant's view, the Court in *Sparrow* acknowledged that, in the end, the question is simply "is there an adverse impact?"

[104] The Supreme Court of Canada in *Gladstone, supra,* at page 57 indicated that there is not a stringent three-part test to be passed. Lamer C.J. writing for the majority, explained that the questions of reasonableness, undue hardship and preferred means are merely factors to be taken into account. Infringement, in his analysis, is best viewed as any real interference with or diminuation of the right. The applicant points to the decision in *R. v. Breaker*, reflex, [2001] 3 C.N.L.R. 213 (Alta P.C.), where Cioni J. held that the act of establishing a road corridor was, in itself, a *prima facie* interference with the right to hunt within that area. McLachlin J. (as she then was) clarified the test in *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507 at pages 656-657. McLachlin J. was in dissent but her views on this point were not contested:

The test for *prima facie* infringement prescribed by *Sparrow* is "whether the legislation in question has the effect of interfering with an existing aboriginal right" (p. 1111). If it has this effect, the *prima facie* infringement is made out. Having set out this test, Dickson C.J. and La Forest J. supplement it by stating that the court should consider whether the limit is unreasonable, whether it imposes undue hardship, and whether it denies to the holders of the right their "preferred means of exercising that right" (p. 1112). These questions appear more relevant to the stage two justification analysis than to determining the *prima facie* right; as the Chief Justice notes in *Gladstone* (at para. 43), they seem to contradict the primary assertion that a measure which has the effect of interfering with the aboriginal right constitutes a *prima facie* violation. In any event, I agree with the Chief Justice that a negative answer to the supplementary questions does not negate a *prima facie* infringement.

[105] It is clear the onus of proving a *prima facie* infringement lies with the applicant. In *Sparrow*, the Court asks whether there would be an adverse impact on the exercise of the right. The Court then asks whether the restriction "unnecessarily" infringes the exercise of the right. I agree that this part of the analysis seems to blur with the justification branch of the *Sparrow* test. The Minister is correct that the Court in *Sparrow* mentioned the three considerations as part of the analysis under the determination of a *prima facie* infringement, however, the case law since *Sparrow* has not focussed on those factors. In my opinion, the applicant's position reflects recent judicial interpretation (See for example *Gladstone, supra,* at page 757 and *R* v. *Coté*, 1996 CanLII 170 (S.C.C.), [1996] 3 S.C.R. 139 at page 186).

[106] Accordingly, it is not necessary to consider the three questions explored by the Minister since I am satisfied the applicant has made out an adverse impact on the exercise of its treaty rights. It is not appropriate, at this stage, to consider whether the rights have been **unnecessarily** impacted. This issue is more properly addressed within the justification analysis. In conclusion, I find the applicant has met the *prima facie* infringement branch of the *Sparrow* test.

3. Can the infringement be justified?

[107] Once a *prima facie* impact has been established, the onus shifts to the Crown to demonstrate that the impact is justifiable. As noted in *Sparrow, supra*, at page 1121:

... If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation is justifiable. To that end, the Crown would have to show that there is no underlying unconstitutional objective such as shifting more of the resource to a user group that ranks below the Musqueam. Further, it would have to show that the regulation sought to be imposed is required to accomplish the needed limitation...

[108] Justification requires the Crown to meet a two-stage test. The infringement must be related to a compelling and substantial government objective and it must be consistent with the Crown's role as a fiduciary.

a. Is there a compelling and substantial objective?

[109] The Supreme Court of Canada in *Sparrow, supra,* at page 1113, held that the first consideration under the justification analysis is whether or not there is a valid legislative objective at issue:

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. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s.35 (1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s.35(l) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

[110] Mikisew submits that when, as in this case, it is the decision of a government official as opposed to the enactment of legislation that is at issue, the pertinent question to ask is whether there is a valid and substantial objective supporting the decision. Here, the applicant argues, the question is: "Was there a compelling and substantial objective behind the approval of the construction of the road to the detriment of Mikisew's treaty rights, or can the objective be met elsewhere?"

[111] The applicant argues the evidence makes it obvious that the objective behind authorizing the construction of the road was mere convenience, to facilitate travel between the communities in and around the Park. The applicant submits the objective was not related to safety, emergency, economic or other important public purposes. Indeed, the applicant argues that by Parks Canada's own acknowledgment the road was not considered to be for park purposes. Such an objective is not, in Mikisew's submission, sufficiently compelling and substantial to justify the infringement of constitutionally protected treaty rights.

[112] The Minister relies on the document produced by Parks Canada in announcing their decision to support their assertion of a valid legislative objective:

... Neither the former, nor the revised *National Parks Act*, provide any specific guidance for winter snow roads as part of a regional transportation and community access system. Also, Parks Canada does not have a general nor a specific policy applicable to the reopening of a former winter snow road in Wood Buffalo National Park. This is not an unusual situation as national policy guidelines and regulatory statutes seldom are formed to deal with circumstances unique to a specific location. Winter snow roads are a long-standing and wide-spread method of access in large areas of northern Canada, including in the vicinity of Wood Buffalo National Park. Parks Canada has a recognized responsibility to consider traditional and historic patterns of travel, regional transportation and social construct in relation to its national parks, particularly in remote and sparsely populated territory. Consequently it is concluded that although the proposed winter snow road is not needed for operational Parks purposes, it is acceptable to consider reopening this winter snow road for the social and transportation needs of local residents, subject to acceptable potential adverse environmental effects.

[affidavit of Josie Weninger, Exhibit "E" at page 3, Minister's emphasis)]

[113] The Minister also relies on the evidence of Richard Power, Project Coordinator for Thebacha. In his view, WBNP creates a geographic barrier that isolates the surrounding communities. The Minister submits there is little opportunity for local residents to visit with friends and family in the winter months due to the lack of access through the Park. The Minister argues it was with the objective of connecting these isolated First Nations that it approved the construction of the winter road.

[114] Further, the Minister submits the winter road is important for the individuals who reside in Fort Smith, including members of Salt River First Nation, Smith's Landing First Nation, Little Red River Cree First Nation and the Fort Smith Metis Council. It will allow them to access important services and maintain social and family networks.

[115] I accept the Minister's assertion that the winter road proposal was adopted, not for mere convenience purposes, but to fulfill the legislative objective of meeting regional transportation needs. However, I am persuaded by the applicant's argument that this purpose is not sufficiently "compelling and substantial" to justify the infringement of constitutionally protected treaty rights. For example, the objective is not aimed at safe-guarding s. 35(1) rights by conserving or managing a natural resource as noted in *Sparrow* to be a valid legislative objective. It is not aimed at preventing harm to the local population or to aboriginal peoples themselves. McLachlin J. in *Van der Peet* calls these "compelling objectives, relating to the fundamental conditions of the responsible exercise of the right".

[116] McLachlin J. in her dissenting judgment in *Van der Peet*, expresses strong disagreement with the holding of the Chief Justice in *Gladstone, supra,* on the issue of the justification test. In a principled analysis, she notes that the Chief Justice interpreted the first requirement of the *Sparrow* test for justification, a compelling and substantial objective, as one that could be met by any goal intending to further the good of the community as a whole, taking into account aboriginal and non-aboriginal interests. The objectives of actions that infringe constitutionally protected rights, in her view, must be ones that preserve the "civilised exercise of the right". Allowable limitations would not negate the right, but limit its exercise. She continues at page 661:

... The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.

[117] In *Delgamuukw v. British Columbia,* 1997 CanLII 302 (S.C.C.), [1998] 1 C.N.L.R. 14, a year later, however, the majority at paragraph 161 commented that:

... legitimate government objectives also include "the pursuit of economic and regional fairness" and "the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups" (para 75). By contrast, measures enacted for relatively unimportant reasons, such as sport fishing without a significant economic component (*Adams, supra*) would fail this aspect of the test of justification.

[118] In my view, the majority judgments in *Gladstone* and *Delgamuukw* have had the effect of weakening the justification test as set out in *Sparrow*. The Court in *Sparrow* held that general public interest objectives would be insufficient to meet the test but did not articulate which government objectives would prove to be compelling and substantial. Subsequent judicial interpretation, as described above, has allowed public interest objectives to creep into the analysis.

[119] The Supreme Court of Canada in *R. v. Adams*, 1996 CanLII 169 (S.C.C.), [1996] 4 C.N.L.R. 1 at pages 22-23 commented on the issue of defining compelling and substantial objectives:

As with limitations of the rights enshrined in the *Charter*, limits on the Aboriginal rights protected by s. 35(1) must be informed by the same purposes which underlie the decision to entrench those rights in the Constitution to be justifiable: *Gladstone, supra*, at para. 71. Those purposes are the recognition of the prior occupation of North America by Aboriginal peoples, and the reconciliation of prior occupation by aboriginal peoples with the assertion of Crown sovereignty: *Van der Peet*, at para. 39, *Gladstone*, at para. 72. Measures which are aimed at conservation clearly accord with both these purposes, and can therefore serve to limit aboriginal rights, as occurred in *Sparrow*.

I have some difficulty in accepting, in the circumstances of this case, that the enhancement of sports fishing *per se* is a compelling and substantial objective for the purposes of s. 35(1). While sports fishing is an important economic activity in some parts of the country, in this instance, there is no evidence that the sports fishing that this scheme sought to promote had a meaningful economic dimension to it. On its own, without this sort of evidence, the enhancement of sports fishing accords with neither of the purposes underlying the protection of Aboriginal rights, and cannot justify the infringement of those rights. It is not aimed at the recognition of distinct Aboriginal cultures. Nor is it aimed at the reconciliation of Aboriginal societies with the rest of Canadian society, since sports fishing, without evidence of a meaningful economic dimension, is not "of such overwhelming importance to Canadian society as a whole" (*Gladstone*, at para. 74) to warrant the limitation of aboriginal rights.

[Emphasis added]

[120] While in *Adams* the Court found that the promotion of sport fishing, on the facts of the case, did not constitute a compelling and substantial objective, they did leave the door open for an economic rationale for justification. Further, Lamer C.J. returned to the notion of "reconciliation", a theme running through the cases from *Gladstone* to*Delgamuukw*. In Lamer C.J.'s view, attention must be drawn to the fact that "... Aboriginal societies exist within, and are a part of, a broader social, political and economic community..." (*Gladstone* at page 97). This concept of reconciliation was elevated in these cases to one of the central purposes of s. 35(1). However, the Supreme Court of Canada's recent decision in *Marshall, supra*, may signal an end to the "reconciliation" approach.

[121] Writing for the majority in *Marshall*, Binnie J.'s approach to s. 35(1) focusses on upholding the honour of the Crown. The decision makes no mention of "reconciliation" as a purpose underlying s. 35(1). The focus is not on accommodating economic and non-native interests with aboriginal rights, but on the obligations and responsibility of the Crown toward First Nations.

[122] Having regard to Binnie J.'s approach in *Marshall* and considering the direction in *Adams* to judge an objective by asking whether it is "informed by the same purposes" as the provision which provides constitutional protection for the rights, I find that an enhanced regional transportation network for the communities surrounding the Park is not a compelling and substantial objective. Allowing the social and economic interests of other communities to justify diminishing Mikisew's right to trap and hunt cannot be said to be in recognition of the prior occupation of this land by Mikisew.

[123] However, in the event that I am wrong and the objective of meeting regional transportation needs does constitute a compelling and substantial objective, I will proceed with the *Sparrow* analysis to determine whether this legislative objective can be justified in its infringement of a treaty right.

b. Were the Crown's actions consistent with its fiduciary duty toward aboriginal people?

[124] Once a valid objective is found, an infringement can only be justified if it is consistent with the fiduciary relationship existing between the Crown and the First Nation. The Court in *Sparrow* explained the second part of the test as follows:

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin, supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

(*Sparrow, supra*, at page 1114)

[125] The applicant submits the Minister's authorization of the road was not carried out in a manner that demonstrated any regard for Mikisew's treaty rights. Accordingly, it constitutes a breach of the fiduciary duty owing to a First Nation by the Crown.

[126] The Court in *Sparrow* set out further questions to be addressed in assessing whether or not the Crown's actions were consistent with its fiduciary duty owing to First Nations. Depending on the circumstances of the inquiry, these questions include: whether the treaty right has been given adequate priority in relation to other rights; whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the First Nation in question has been consulted.

[127] How each of these considerations fits into the scheme of the *Sparrow* analysis is somewhat unsettled. Lamer C.J. in *Delgamuukw, supra,* remarked as follows at page 76:

The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples. What has become clear is that the requirements of the fiduciary duty are a function of the "legal and factual context" of each appeal (*Gladstone, supra*, at para. 56). *Sparrow* and *Gladstone*, for example, interpreted and applied the fiduciary duty in terms of the idea of priority. The theory underlying that principle is that the fiduciary relationship between the Crown and Aboriginal peoples demands that Aboriginal interests be placed first. However, the fiduciary duty does not demand that Aboriginal rights always be given priority. As was said in *Sparrow, supra*, at pp. 1114-15 [S.C.R.; page 184 C.N.L.R.]:

The nature of the constitutional protection afforded by s. 35(1) *in this context* demands that there be a link between the question of justification and the allocation of priorities in the fishery. [Emphasis added.]

Other contexts permit, and may even require, that the fiduciary duty be articulated in other ways (at p. 1119 [S.C.R.; p. 187 C.N.L.R.]):

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of

the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

Sparrow did not explain when the different articulations of the fiduciary duty should be used. Below, I suggest that the choice between them will in large part be a function of the nature of the Aboriginal right at issue.

[128] Having regard to the factual context of the case before me, the analysis in this section will focus on the adequacy of the Minister's consultation with Mikisew. It is also necessary to touch on the issues of priority, minimal infringement and compensation. In exploring each of these issues, the central focus of the analysis is whether the actions of the Crown are consistent with its role as a fiduciary.

(i) Has the aboriginal group in question been meaningfully consulted by the Crown?

[129] The applicant submits that in authorizing the construction of the road without adequate consultation with Mikisew as required by s. 35(1) of the *Constitution Act, 1982*, the Minister has failed to meet the duties imposed on her. Accordingly, her decision is not justified.

[130] First Nations consultation has been a necessary ingredient in the justification analysis since *Sparrow*. Both parties rely on the statements of Lamer C.J. in *Delgamuukw, supra,* at page 79 for articulation of the duty to consult:

There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal title is justified, in the same way that the Crown's failure to consult an Aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some case may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.

[Emphasis added]

[131] Mikisew points to the B.C. Court of Appeal decision in *Halfway River, supra*, at page 44, where the Crown's fiduciary obligation to consult with First Nations prior to making decisions that impact treaty rights was also at issue. The Court affirmed the obligation to consult, and elaborated on its content as follows:

... The fact that adequate notice of an intended decision may have been given, does not mean that the requirement for adequate consultation has also been met. The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.(Citations omitted)

[Emphasis added]

[132] The applicant further submits the Crown's fiduciary obligation to consult with First Nations was affirmed in the case of *R. v. Noel*, [1999] 4 C.N.L.R. 78 in which the Court considered the Territorial government's establishment of a hunting corridor. The applicant submits that the Court held that, even under time constraints, the Territorial government was not entitled to overlook the rights of First Nations. The Court concluded, at page 95, that the government had to take First Nations' constitutional rights seriously and conduct proper consultation:

... Consultation must require the government to carry out meaningful and reasonable discussions with the representatives of Aboriginal people involved. The fact that the time frame for action was short does not justify the government to push forward with the proposed regulation without proper consultation.

[133] In the case of *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, 1998 CanLII 9086 (F.C.), [1998] 4 C.N.L.R. 68, the Federal Court of Canada Trial Division held that the Governments of Canada, Newfoundland and Labrador, could not proceed with the establishment of a national park in territory which is subject to a comprehensive land claim until "adequate, meaningful consultations" with the Inuit had been carried out. The applicant notes that even though the Court found the establishment of the national park would only minimally impact the Inuit's rights and use of the land, it nevertheless held that the Crown had a duty to carry out meaningful consultation with the Inuit. Richard A.C.J. (as he then was) stated as follows at pages 98-99:

The fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the Aboriginal group has been consulted is relevant to determining whether the infringement of Aboriginal rights is justified.

The nature and scope of the duty will vary with the circumstances. Even where the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose rights and lands are at issue.

Any negotiations should also include other Aboriginal nations which have a stake in the territory claimed. The Crown is under a moral, if not a legal, duty to enter into and conduct these negotiations in good faith.

[134] Mikisew argues that "unilateral actions" that infringe upon treaty rights reflect adversely on the honour of the Crown. In the applicant's view, the Crown cannot be seen to have acted honourably as a fiduciary toward its beneficiaries in the exercise of its discretionary powers because it did not consult with Mikisew prior to making a decision which constituted a *prima facie* impact on their treaty rights.

[135] Mikisew submits the Minister failed to fulfill the Crown's fiduciary obligation to consult with them in good faith and with the intention of substantially addressing their concerns. They argue any consultation that took place falls far short of the nature and level required by the Constitution.

[136] The Minister relies on the decision of *Liidlii Kue First Nation* v. *The Attorney General of Canada*, [2000] F.C.J. No. 1176 (Q.L.). Here, Reed J. considered the content of the duty to consult and commented at paragraph 62: "Another factor relevant to the nature and scope of the required consultation will be the nature of the prospective infringement".

[137] The Minister also refers to *Halfway River, supra,* where Finch J. offered a survey of the existing case law at paragraph 160:

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are

provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. (Citations omitted)

There is a reciprocal duty on Aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions. (Citations omitted).

[138] Therefore, the Minister's position is that since the content of the duty to consult is largely based on the extent of the infringement of the right, and the infringement in this case can be characterized as minimal, then the duty to consult in this case is a low one.

Evidence of Consultation

[139] The applicant submits the failure of the Minister to consult Mikisew in the decision-making process speaks for itself. The communications between Parks Canada, Thebacha and Mikisew concerning the road initiative are set out below. Since the issue of adequate consultation is critical to this application, I have drawn at length from the evidence presented regarding consultation:

Chronology of Communications

Summer 1999	Mikisew was approached by Thebacha and was informed of their desire to construct a winter road from Peace Point to Garden River. The proposed road would cross a 0.8 km long section of Mikisew's Peace Point Reserve at the east end to connect with the existing park loop road. Thebacha asked Mikisew to support the road. Mikisew advised that it would have to explore the proposal in detail and consider whether the road would be in their membership's best interests.
January 19, 2000	Parks Canada e-mailed Chief Poitras and provided him with a copy of the Terms of Reference for the environmental assessment. Chief Poitras was also advised at this time of the timelines relating to the assessment and the subsequent public review period.
July 20, 2000	A meeting was held between Josie Weninger and Chief Poitras at which Parks Canada provided the Chief with more information regarding the status of the proposed road project.
July 25, 2000	An Open House was held by Parks Canada at Fort Chipewyan. Two Mikisew trappers attended.
August 2000	Chief Poitras was provided with copies of the Environmental Assessment Report.
August 3, 2000	A meeting was held between Josie Weninger and Chief Poitras at which Parks Canada gave Chief Poitras an update on the status of the road proposal.

August 16, 2000 — A letter was sent to Richard Power of Thebacha by Lawrence Vermillion, a Mikisew trapper, with a copy to Josie Weninger. The letter outlined the concerns of seven Mikisew trappers who trap in the area of the proposed road. Among the concerns raised were impacts on the furbearers, increased vandalism and poaching, and possible compensation.

October 10, 2000 — Mikisew informed Josie Weninger by letter that it did not consent to the construction of the road through its Peace Point Reserve for a number of reasons. In particular, Mikisew raised concerns about unresolved issues surrounding its role in the management of the Park, which was the subject of litigation, and identified the concerns of Mikisew trappers and their commitment to conservation of park lands.

January 19, 2001 — Chief George Poitras was making a trip to Fort Smith and planned a meeting with Josie Weninger. Ms. Weninger took ill and Chief and Council met with Senior Policy Advisor Don Aubrey instead. They discussed a number of issues at the meeting, but most significantly Mikisew learned that Parks Canada and Thebacha had been engaged in ongoing discussions concerning the road initiative, and that the road was very near approval. Chief Poitras asked Don Aubrey to have Ms. Weninger call him immediately upon her return to work to discuss the decision-making process and specifically, to discuss Mikisew's exclusion from it.

January 25, 2001 — Chief Poitras spoke with Richard Power. Mr. Power denied having knowledge of Mikisew's concerns with the road, as set out in the letter of October 10, 2000, and asked that Mikisew forward him a copy. Mr. Power advised the Chief that Parks Canada had led Thebacha to believe that Mikisew had no objection to the road going through the reserve, and that he had just been informed for the first time by Tom Lee, CEO of Parks Canada, that Mikisew did not support the road. He also advised the Chief that Lee told him Thebacha had to work things out with Mikisew before Parks Canada would approve the road.

January 29, 2001 — Mikisew Chief and Council met with Thebacha representatives. Thebacha sought Mikisew's support, but Chief and Council explained they were extremely frustrated by the manner in which Parks Canada had been handling the process. Chief and Council circulated a letter they had just sent to Sheila Copps, Minister of Canadian Heritage, and told the Thebacha representatives they would have to wait to hear from the Minister with regard to their concerns before they could give Thebacha an answer. Thebacha also committed to lobby their MLA and MP to impress on the Minister the urgency of meeting with Mikisew on the road initiative.

January 29, 2001 — Mikisew sent the letter to Minister Copps expressing their concerns with the proposed road through the Peace Point Reserve and with Parks Canada's failure to consult with Mikisew. As Mikisew had been informed that construction was to commence almost immediately, it invited Minister Copps, Minister of Indian Affairs Robert Nault and CEO Tom Lee of Parks Canada to meet with Mikisew over the next week to discuss Mikisew's concerns, emphasizing the urgency of the situation.

February 2, 2001 — Chief Poitras spoke to Josie Weninger. She advised him that Thebacha was working on a proposal for an alternative route. The parties defer as to the content of the discussion. The Minister submits that traplines were discussed. Mikisew submits that Chief Poitras asked to be involved in any deliberations on an alternative route, but Ms. Weninger was very vague with regard to what the route was and where the process was going from there.

February 5, 2001 Chief Poitras contacted Richard Power and informed him that Mikisew was still waiting to hear from the Minister, and its position on the road had not changed. Chief Poitras confirmed the conversation in a letter dated February 5, 2001.

February 5, 2001 Chief Poitras also spoke with Josie Weninger and again asked her about the alternative route. She advised him that they were still looking at two possible routes and also notified him about her research into *ex gratia* payments to individual trappers.

February 5, 2001 Chief Poitras met with the Peace Point trappers. They advised him that they had also expressed their concerns to Josie Weninger. They had told her that they were greatly concerned about the impact the road would have on their traplines, and that offering compensation did not solve the issue because once the nature of the land was changed, the damage could not be undone.

February 9, 2001 Mikisew received a standard-form response letter from the Minister's office stating that its correspondence "will be given every consideration".

March 2001 Parks Canada and Westworth Associates Environmental Ltd. completed the field inspection and biophysical resource assessment on the realignment. Mikisew was never informed that the route for the realignment had been chosen or consulted by Westworth in relation to these assessments.

March/April 2001 Chief Poitras spoke on the telephone several times with Josie Weninger and Gaby Fortin, Director General West of Parks Canada, attempting to arrange a meeting with Parks Canada to address Mikisew's concerns. It was extremely difficult to get a meeting arranged, for both parties, and a number of phone calls went back and forth.

April 27, 2001 Chief Poitras finally met with Gaby Fortin from Parks Canada in Calgary. At that meeting the Chief learned the route of the realignment, discovering that the realignment would track the Peace Point Reserve by extending 10 metres from the Reserve boundary for 2.5 kilometres before joining the Park Loop Road north of the Reserve. The Chief asked that someone meet with Mikisew's Council to make a full presentation on the realignment, and was informed that it could not be done until after the formal announcement of the approval. The Chief strongly disagreed and was promised that a presentation would take place in Mikisew's Council Chambers on May 2, 2001. Chief Poitras attested that Parks Canada made it very clear him that the decision had already been made to approve the realignment.

April 30, 2001 In response, Gaby Fortin of Parks Canada sent Mikisew a letter apologizing for excluding Mikisew from the consultation process. The letter stated in part: "I apologize to you and your people for the way in which the consultation process unfolded concerning the proposed winter road and any resulting negative public perception of the MCFN. It was never Parks Canada's intention to exclude you from the process nor to place the MCFN in a negative light in the community."

May 2, 2001 A meeting was held between Josie Weninger, Gaby Fortin, Mikisew Chief and Council. They discussed Mikisew's January 2001 letter to Minister Copps setting out Mikisew's concerns, and Chief

	and Council emphasized Mikisew's dissatisfaction with being excluded from the road proposal process.
May 17, 2001	Mikisew sent Minister Copps another letter informing her of its concerns with the realignment. Mikisew expressed their disappointment and concern over Parks Canada's failure to consult, particularly in light of the fact that Parks Canada was aware, at least as of October 2000, that Mikisew had substantial concerns with regard to the proposed road.
May 25, 2001	A News Release was posted to the Parks Canada website announcing the approval of the winter road.
May 25, 2001	The CEO of Parks Canada, Tom Lee, issued a message to all staff announcing the approval of the road and indicating that Parks Canada would not consider an all-weather road proposal.
May 25, 2001	Gaby Fortin called Chief Poitras to inform him of the decision.
May 25, 2001	Tom Lee sent a letter to Chief Poitras as a formal response to the May 17, 2001 letter to Minister Copps. The letter indicated that Parks Canada recognized that the consultation process had not been adequately conducted, but pointed out that there had been meetings and discussions between Mikisew and Parks Canada.

[140] I will explore several issues raised by this evidence in the course of characterizing the extent of consultation that occurred in this case.

Public consultation versus "First Nations" consultation

[141] Many of the communications relied on by the Minister to demonstrate their consultation efforts are instances of Mikisew being provided with standard information on the proposed road, prior to Mikisew formally notifying Parks Canada of their specific concerns with the road. This communication was of the same form and substance as the communication being distributed to all interested stakeholders. In my view, taken alone, it does not constitute First Nations consultation as required by s. 35(1) of the *Constitution Act, 1982*.

[142] For example, the Minister stresses that Parks Canada provided Mikisew with the *Terms of Reference* for the environmental assessment on January 19, 2000. Also, Mikisew was advised of the open house sessions which took place over the summer of 2000. The Minister argues that the first formal response from Mikisew did not come until October 10, 2000, some two months after the public comment period had lapsed.

[143] Mikisew maintains that the reason for the delay in submitting its position to Parks Canada was to allow the First Nation to go through a diligence process of identifying concerns and issues. Chief Poitras also explained that the Mikisew did not formally participate in the open houses, because, as he stated, "... an open house is not a forum for us to be consulted adequately" (cross-examination, on affidavit of Chief Poitras, page 14, lines 22-23). Mikisew asserts that the infringement of their constitutionally protected treaty rights is a matter that cannot be adequately addressed at public forums meant to engage all stakeholders.

[144] The Minister maintains that Mikisew did not communicate its concerns about the forum for consultation to Parks Canada. Therefore, the Minister argues that Mikisew cannot be heard to complain about the process of consultation in the face of its failure to participate in the open house process, its failure to advise Parks Canada about their concerns with the open house process, and its refusal to cooperate in the process because of on-going litigation. In essence, the Minister's submissions express the sentiment that it was up to Mikisew to avail itself of the consultation process and if they failed to do so, except on their own terms, then the Minister is relieved of her duty to consult.

The failure of Parks Canada to respond to the October 10, 2000 letter

[145] The applicant submits that Ms. Weninger's account of Parks Canada communications with Mikisew glosses over the fact that almost four months passed between Mikisew's October 10, 2000 notification of their concerns and the actual meeting taking place where the matter was discussed with Mikisew. In the interim, the applicant complains that Parks Canada continued to work towards the approval of the road, essentially ignoring Mikisew's concerns. Specifically, Mikisew never received a response to its October 10, 200 letter and was shocked to learn almost four months later that the project had been proceeding as planned and was nearing approval. In cross-examination, Ms. Weninger confirms this version of events and states that Parks Canada's failure to respond to the letter was "not good communication"(cross-examination on affidavit of Josie Weninger, page 19 at line 15).

[146] The applicant also maintains that Parks Canada had received information about the concerns of Mikisew trappers in the August 16, 2000 letter from Lawrence Vermillion. This letter detailed the specific issues with the proposed road that were most pertinent to the trappers. While the October 10, 2000 letter from Mikisew did not provide extensive details regarding the specific concerns of the trappers, it must be viewed in light of the fact that Mikisew's communication was based on its understanding that Parks Canada was already aware of the reasons for the trappers' objection to the road.

[147] The applicant submits the most telling evidence of Parks Canada's poor handling of the consultation process is the correspondence of April 30, 2001 to Mikisew from Gaby Fortin and of May 25, 2001 to Mikisew from Tom Lee. In the applicant's view, both Crown officials clearly admitted the Crown's failure to properly consult with Mikisew. The letters note that it was "never Parks Canada's intent to exclude you from the process", and "Parks Canada recognizes that the consultation process did not unfold in the early stages in the way it was intended to" (affidavit of Chief George Poitras, Exhibits "N" and "P").

[148] The Minister disputes that the April 30, 2001 letter from Gaby Fortin represents an acknowledgment by Parks Canada of the Crown's failure to consult. The Minister notes that when Chief Poitras was communicating Mikisew's surprise and concern over being notified at the "eleventh hour" that the road was near approval, he told Mr. Fortin that Mikisew was being "perceived as a bad guy" for stalling the approval process. The Minister submits that the letter should be construed as an apology for the way the consultation unfolded, in that it resulted in a negative public perception of the Mikisew, but not as an apology for the failure to consult.

[149] The applicant disputes Tom Lee's statement in his May 25, 2001 letter, that the recent meeting occurred "at the request of Parks Canada to ensure the views of the Mikisew Cree First Nation were heard prior to any decision being made". The applicant submits this statement is simply incorrect. The applicant's position is that the meeting held on May 2, 2001 came about only due to the persistent demands of Mikisew. Further, the applicant submits that Mikisew was clearly informed at that meeting that the decision to approve the road had already been

made.

[150] The applicant submits that the discussions and meetings referred to by Mr. Lee do not constitute adequate consultation. The applicant admits that the discussions with Ms. Weninger may have involved discussions about the proposed road, but argues that she was always vague on the realignment. Furthermore, the applicant submits that when Mikisew eventually did meet with Parks Canada, the decision to approve the realignment had already been made.

Defining the duty of "First Nations consultation"

[151] The cases raised by the parties reveal a tension in the law. The Court in *Nunavik Inuit, supra,* held that even where the standard for consultation is minimal, the consultation must be conducted in good faith, and with the intention of substantially addressing the concerns of the First Nation. The Court characterizes the duty as a "moral, if not a legal duty". On the other hand, the Minister points to *Halfway River, supra*, which emphasizes the reciprocal duty on the First Nation to participate, and to not frustrate the consultation process.

[152] At the core of this dispute are conflicting perceptions of the status of the applicant. Mikisew, asserting treaty rights, argues that "First Nations consultation" must be separate and distinct from the processes offered to other stakeholders. This is the justification offered for their lack of participation in open houses and public comment periods. The Minister and Thebacha, on the other hand, take the position that Mikisew is but one of many stakeholders in this community.

[153] The applicant has asserted interference with a constitutionally protected right. At the very least, Mikisew is entitled to a distinct process if not a more extensive one. This finding would justify Mikisew's failure to adhere to the Minister's timelines for public participation. Mikisew, in my opinion, has not frustrated a "First Nations consultation" process at all. Instead, they have refused to accede to the Minister's expectation that a public consultation process is sufficient to discharge her constitutional duty towards them.

[154] The jurisprudence makes it clear that the consultation must be undertaken with the genuine intention of substantially addressing First Nation concerns. In the present case, at the very least, this would have entailed a response to Mikisew's October 10, 2000 letter, and a meeting with them to ensure that their concerns were addressed early in the planning stages of the project. At the meetings that were finally held between Parks Canada and Mikisew, a decision had essentially been made, therefore, the meeting could not have been conducted with the genuine intention of allowing Mikisew's concerns to be integrated with the proposal.

[155] It should be noted that the argument made by the Minister, to the effect that the Mikisew were afforded the same procedural rights as all other stakeholders, effectively impugns the Minister's decision under the "adequate priority" branch of the justification analysis. If Mikisew can be attacked for not having participated in a public forum process in order to secure their rights, it is clear that the Minister did not accord those rights priority over those of other users, as would be expected given their constitutional status under s. 35(1). This will be explored in more detail in the next section.

[156] Thebacha noted in argument that interviews were conducted with some of Mikisew's members during the environmental assessment process. It should be stressed that any consultation undertaken by Thebacha does not relieve the Minister of her duties under s. 35(1). The Crown, as a fiduciary, owes Mikisew a duty to consult. This duty cannot be delegated to interested third parties.

[157] In conclusion, it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a First Nation prior to making a decision that infringes on constitutionally protected treaty rights. In the justification stage of the *Sparrow* analysis, the onus of proof is on the Crown. The Mikisew do not bear the burden of proving that the Crown did not adequately consult with them. It is for the Crown to demonstrate that they did provide a meaningful First Nations consultation. The Minister has not met this burden.

(ii) Has the treaty right been given adequate priority in relation to other rights?

[158] The Court in *Sparrow, supra,* at pages 1115-1116, assigned first priority to conservation purposes, second priority to treaty and aboriginal rights, third priority to economic interests and fourth priority to recreational interests. Mikisew submits this framework applies to the claims of any user groups with competing claims.

[159] The applicant relies on *Breaker, supra*, in which the Alberta Provincial Court applied the *Sparrow* test to the Crown's establishment of a road corridor wildlife sanctuary. The Court ruled that the road corridor was established in violation of s. 35(1) of the *Constitution Act, 1982*. With respect to First Nations priority, Cioni J. noted as follows at page 279:

As well, Governmental policies that encourage or create competition for the numbers of animals in the Highwood, such as sport hunting and cattle grazing *without consideration to First Nations priority and allocation*, and a balancing thereof with societal common law rights, as referred to in *Gladstone* are, in my view, constitutionally impermissible.

[160] The applicant submits the Minister, by approving the construction of the road, has assigned the interests of one user group, the residents of local communities, priority over the interests of another user group, Mikisew hunters and trappers with constitutionally protected rights. The applicant objects to the fact that convenience of travel and other societal factors have been given priority over the exercise of constitutionally protected treaty rights. In the applicant's view, this is an exact reversal of the assignment of priority mandated by *Sparrow*.

[161] Characterizing this case as one that pits the interests of a First Nation against those of local residents may be an over-simplification. To be sure, there are First Nations' interests represented both among the supporters and the opponents of this project. However, the applicant does raise an important distinction. The road approval has placed the economic and social interests of one group (admittedly including those of several First Nations) against the constitutionally protected right to trap and hunt and to pursue a traditional lifestyle of the Mikisew. As a fiduciary, the Crown can not be permitted to allow the interests of third parties, or its own interests, to obscure its obligations to First Nations.

[162] The Supreme Court of Canada in *Adams, supra,* held that the Quebec fishery regulations failed to meet the *Sparrow* test for justification. The Court found that the promotion of sport fishing was the major goal of the regulations. However, the Court remarked that even if a valid legislative objective had been shown, the scheme could not stand because it failed to provide the requisite priority to the aboriginal right as laid down by *Sparrow*. In *Gladstone, supra,* it was noted that, at least in a commercial sphere, the priority of constitutionally protected rights is satisfied if the government has taken those rights into account and has allocated the resource in a manner that demonstrates respect for that priority. At the end of the day, this Court must be satisfied that the Minister has taken into account the existence and importance of Mikisew's treaty rights.

[163] Again, this question points to the nature of the consultation that was undertaken. In my opinion, the

analysis of priority accords better with cases involving questions of resource allocation, such as fishery or forestry claims. Therefore, given the direction in *Delgamuukw, supra*, to focus on the "articulation of the fiduciary duty" that is most appropriate to deal with the specific issues raised by the facts, in my opinion, the finding of inadequate consultation is sufficient to impugn the Minister's decision and it is not necessary for me to make a determination of whether Mikisew's rights have been afforded the requisite priority in the Minister's decision.

(ii) Has there been as little infringement as possible of the treaty right?

[164] The applicant submits that minimizing impacts on treaty rights in fulfilment of the Crown's fiduciary obligation is required by the *Sparrow* test.

[165] The applicant submits that mitigation measures are to be designed in consultation with the First Nation whose rights are at issue. Mikisew points to *Breaker, supra,* at pages 280-281, in which the Crown was found to have implemented an unconstitutional road corridor wildlife sanctuary. The Court held that the Crown's failure to consider reasonable access to hunting for First Nations was fatal to their decision. According to the applicant, the Crown's decision was set aside because of its failure to consider all other alternatives that could effect the desired conservation goal, such as limiting other uses of the resource including sport hunting, outfitting and guiding, and cattle grazing.

[166] Mikisew submits that a lack of proper consultation prevented the Minister from appreciating the impact the road would have on their treaty rights. Mikisew's concerns extend beyond the direct effects of the road on wildlife, and relate to effects on the exercise of their rights throughout the Park. These effects would include the disruption of trap lines, denning sites and mineral licks; the facilitation of poaching from the road; an increase of vandalism to trap lines and cabin break-ins; and the general opening up of a secluded trapping area to outside interference.

[167] Mikisew submits the Minister did not have sufficient information before her to determine whether there was minimal impairment of the exercise of its treaty rights. The applicant points to the evidence of Parks Canada's own witness, Josie Weninger, who admitted on cross-examination that the information gaps concerning wildlife prevented Parks Canada from knowing if the road would impact Mikisew's rights as little as possible:

Q: So you can't say with any degree of certainty that this project impacts Mikisew trappers as little as possible, correct?

A: We heard from Mikisew that they couldn't even tell us that.

Q: So the answer?

A: The answer is we cannot say with any certainty that this project was designed to impact as little as possible on them, because as you noted earlier, there is an impact - sorry - a gap in terms of furbearers.

[Cross-examination of Josie Weninger, August 24, 2001, page 28, lines 16-25]

[168] The applicant argues that, not only was the Minister not fully informed of the potential impacts of the road, the Minister took no steps to mitigate any possible impacts on Mikisew's treaty rights. Again, the applicant submits this was clearly admitted in the cross-examination of Josie Weninger:

Q: Now in paragraph 23 when you refer to ex gratia payments, was there any other method of addressing

the concerns that the trappers addressed? Were there any mitigation measures discussed with the trappers with regard to their concerns regarding vandalism, poaching or encroachment or environmental impact?

A: I believe I said the last time we talked about this that there were not other measures examined, that we only looked at *ex gratia* payments.

[Cross-examination of Josie Weninger, October 1, 2001, page 10, line 27 to page 11, lines 1-80]

[169] The Minister submits that all possible steps were taken to ensure that the construction and operation of the winter snow road would have a minimal consequential effect. The Minister offers the following evidence:

(i) Mikisew was provided with the terms of reference for the environmental assessment;

(ii) An extensive environmental assessment was completed by Westworth;

(iii) A summer reconnaissance environmental assessment was completed by Westworth;

(iv) A series of open houses were held specifically designed to hear concerns and comments about the winter road proposal;

(v) Thebacha was required to undertake extensive mitigation steps to address information gaps and to reduce any potential negative impacts. These steps included notifying Mikisew trappers of the construction schedule so as to minimize interference with their trap lines, requiring that there be gaps in snow berms along trapper trails; and requiring the services of an archaeologist during construction of the road so as to identify any cultural resource sites.

(vi) Parks Canada met with two Mikisew trappers to address their specific concerns; and

(vii) Parks Canada agreed to realign the road so as to accommodate Mikisew's refusal to allow the road to continue on an existing right-of-way through its reserve.

[170] The applicant complains that the mitigation measures attached to the Minister's decision were not developed in consultation with Mikisew and were not designed to minimize impacts on Mikisew's rights. I agree. Even the realignment, apparently adopted in response to Mikisew's objections, was not developed in consultation with Mikisew. The evidence does not establish that any consideration was given to whether the new route would minimize impacts on Mikisew's treaty rights. The evidence of Chief George Poitras highlighted an air of secrecy surrounding the realignment, a process that should have included a transparent consideration of Mikisew's concerns.

[171] Parks Canada admitted it did not consult with Mikisew about the route for the realignment, nor did it consider the impacts of the realignment on Mikisew trappers' rights. The following is taken from the cross-examination of Josie Weninger:

Q: ...you talk about two possible alternative routes for the road to avoid the Peace Point Reserve. Was the Chief and Council ever asked what alternative route was their preference?

A: [Not] Unless Westworth Consultants did. We didn't ask them specifically, the formal body.

Q: So you just advised them that there were two possible alternatives?

A: Yes.

Q: And then without input from Mikisew you decided on the alternate route on your own, is that correct?

A: We did tell them that there would be an environmental assessment carried out on the realignment and we would be looking at which one had the least impact.

Q: On what?

A: On trees specifically.

Q: But not necessarily the least impact on the Mikisew, correct?

A: Yes, sorry.

[Cross-examination of Josie Weninger, August 24, 2001, page 31, lines 20-27; page 32, lines 1-11]

[172] The Minister, has not offered any explanation for its failure to involve Mikisew in the process to determine the route of the "realignment". This would have gone a long way toward resolving whether attention was given by Parks Canada to minimizing the infringement of Mikisew's rights. Minimization of the environmental effects, is related to, but not identical to the issue of minimization of the interference with Mikisew's treaty rights. It is the impact of the proposed road on furbearer populations that is most significant to Mikisew.

[173] In my view, only one of the seven measures listed by the respondent Minister speaks directly to the issue of minimizing the impact on Mikisew's treaty rights. The first four measures recount standard procedures mandated by the environmental assessment rules. They may be designed to minimize environmental impacts, but they cannot be said to be steps taken to minimize the effects of the proposed road on the constitutional rights of Mikisew. The sixth measure refers to the meeting where Ms. Weninger discussed the possibility of compensation with two trappers. The final measure refers to the decision to realign the road which, in my opinion, cannot be relied upon by the Minister as a step taken to minimize impact because it arises out of a complete lack of consideration of Mikisew's interests in the first instance.

[174] The mitigation steps listed in the fifth measure are relevant, however, they were not developed in consultation with Mikisew. This leads to the inference, in my view, that the measures were implemented to achieve the appearance of minimizing impact and not necessarily with the genuine intention of minimizing impact. The Minister's decision may have passed this stage of the analysis if Parks Canada had simply asked Mikisew how the effects of the road project on their rights could be minimized. Parks Canada could have responded to Mikisew's objection to the road passing through their reserve by asking: "What would be the most favourable route for the road from your perspective?". I do not accept the Minister's argument that the road comprises a minimal infringement on Mikisew's treaty rights simply because it replaced a more intrusive alignment. The original road flagrantly disregarded not only Mikisew's treaty rights but their rights over their reserve land. The language of *Sparrow* is "as little infringement as possible". While it may not be clear to what extent Parks Canada would have had to modify the proposal to accomodate Mikisew in its implementation, it is clear that Parks Canada would at least have to inquire, in good faith, as to steps that could be taken to reduce the impact of the project on the treaty rights. This inquiry was not undertaken.

(iv) Is fair compensation available?

[175] In *Sparrow, supra,* at page 1119, the Court framed this consideration under the second part of the justification analysis as follows: "... in a situation of expropriation, is fair compensation available?". How the law of compensation for expropriation should be adapted to deal with the infringement of constitutionally protected rights is a challenge that will undoubtedly engage this Court in the years to come. At the present time, I am not aware of any jurisprudence that applies an analysis of the adequacy of compensation offered for the infringement of a treaty right.

[176] The Minister submits that research conducted by Josie Weninger into the types of payment made in other circumstances where trappers were affected by a project demonstrates a show of good faith by Parks Canada. The Minister also points to discussions between Ms. Weninger and Mikisew trappers directly affected by the road regarding *ex gratia* payments of $5000 as evidence of a willingness to discuss the issue of compensation. As well, the Minister refers to the opinion of Ms. Weninger, found in her affidavit that any loss suffered by the trappers as a result of interference with traplines could be adequately compensated. Therefore, it is the Minister's position that if the construction and operation of the road were to have a negative impact on the trappers any loss could be quantified and compensated.

[177] Mikisew takes the position that an offer of fair compensation is an indicator of the Crown's intention to honour its fiduciary duty to First Nations. However, by the Crown's own admission, there was no offer of fair compensation in the present case. In support of this assertion, Mikisew relies on the following exchange from the cross-examination of Ms. Weninger:

Q: ...did you advise the trappers that by providing the (quote unquote) ex gratia payments that what was intended was a non-legally binding gift wherein Parks Canada wouldn't acknowledge that they had any liability to compensate whatsoever?

A: I do know that there was clarification in the meeting as to what ex gratia meant and I clarified that it was a gift.

Q: That it wasn't intended as compensation or some form of legal payment?

A: I believe I was very careful not to imply that it was compensation.

[cross-examination on affidavit of Josie Weninger, October 1, 2001, page 11, lines 22-27 and page 12, lines 1-6]

[178] Mikisew also notes the evidence of Lawrence Vermillion, a Mikisew trapper, who was present at the meeting where the *ex gratia* payments were discussed. He testified that the trappers with whom the discussions took place were not satisfied the *ex gratia* payments would address their concerns and were of the view that any offer of compensation must be made to all of the trappers in trapping area 1209. Furthermore, Mikisew notes that the discussions did not include any consideration of the impact of the road on Mikisew hunters.

[179] It must be kept in mind that a collective right to trap and hunt is at stake. In my opinion, in order to uphold the honour of the Crown in its dealings with a First Nation, the issue of compensation would have to be explored in good faith, and in a transparent manner that would permit an informed First Nation to consider the conditions under which they would voluntarily agree to the infringement of their treaty rights.

[180] Viewed in this light and on the facts before me, the analysis of compensation under this branch of the justification test points again to the question of consultation. The Minister could not have determined what an offer of fair compensation would be without undertaking an exploration of the issues and concerns and possible impacts on Mikisew associated with this project. I have already concluded that this consultation did not occur. Therefore, without deciding whether the steps the Minister took towards providing compensation to Mikisew trappers would reflect adversely on the honour of the Crown, I find that the analysis under this branch simply underscores the inadequacy of the consultation that took place in this case.

[181] The question of whether the Crown's actions were consistent with its fiduciary duty in this case hinges on consultation. In fact, it is premature to consider the issues of priority, minimal infringement and compensation, given that the consultation that would enable the Crown to satisfy those branches of the test was not undertaken.

CONCLUSION

[182] While the considerations that comprise the second step of the *Sparrow* justification analysis are flexible and should be adapted to allow the Court to focus on the most appropriate consideration in light of the facts before it, if the analysis reveals that the Crown's actions were not consistent with its fiduciary duty towards the First Nation, then the decision is not justified.

[183] In my opinion, a meaningful First Nations' consultation would have gone a long way toward satisfying the fiduciary duty of the Crown and may have saved the decision under the other branches of the justification analysis. In the end, the decision of Parks Canada to approve the winter snow road through WBNP is not a justified infringement of Mikisew's treaty rights because the Minister did not meet her duty to consult with Mikisew.

DISPOSITION

[184] In this case, I have found that Mikisew possess treaty rights to hunt and trap in WBNP. Further, pursuant to the *Sparrow* analysis, I have concluded that the Minister's decision to approve the road infringes on those rights and that the infringement is not justified.

[185] Since I have disposed of this matter on the constitutional grounds raised by the applicant, it is not necessary to consider the environmental and administrative law issues.

[186] For these reasons, the application for judicial review is allowed and the Minister's decision is set aside.

[187] I do not find it necessary to grant the additional relief sought by the applicant. I trust that any future consideration of the winter road project will be undertaken in accordance with these reasons.

[188] At the conclusion of the hearing, the parties requested an opportunity to provide written submission regarding costs. Accordingly, the issue of costs is reserved.

"Dolores M. Hansen"

J.F.C.C.

Ottawa, Ontario

December 20, 2001