Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2004 FCA 66, [2004] 3 FCR 436

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A-35-02

2004 FCA 66

Sheila Copps, Minister of Canadian Heritage (*Appellant*)

v.

Mikisew Cree First Nation and **The Thebacha Road Society** (*Respondents*)

and

Attorney General of Alberta (*Intervener*)

Indexed as: Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (F.C.A.)

Federal Court of Appeal, Rothstein, Sexton and Sharlow JJ.A.--Edmonton, September 29, 2003; Ottawa, February 13, 2004.

Constitutional Law -- Aboriginal and Treaty Rights -- Minister approving construction of winter road through National Park -- Mikisew Cree First Nation, descendants of Treaty 8 signatories, objecting for fear of habitat fragmentation, death of wildlife they trap, hunt -- Purpose of Treaty 8 -- Treaty provided tracts could be "taken up" for certain purposes -- Wood Buffalo National Park, established in 1922, occupies 5% of Treaty 8 area -- Nature, purpose of winter road explained -- Wood Buffalo National Park Game Regulations prohibiting firearms use within 200-metre-wide road corridor -- Parks Canada apologized for lack of consultation regarding project -- F.C.T.D. Judge holding Treaty 8 rights infringed for inadequate consultation -- Majority of F.C.A. allowing Heritage Minister's appeal -- Creation of Park not a "taking up" -- Treaty right to hunt not abrogated by statute -- In dissent, Sharlow J.A. failed to determine whether road approval was "taking up" -- Decision did not have to be justified under test in R. v. Sparrow since road approval a "taking up" -- That issue not relied on by Minister in F.C.A. but raised by intervener, Attorney General of Alberta -- Appropriate intervener assist Court by useful submissions different from those of parties -- Use of land as winter access road, prohibiting firearm use was "visible, incompatible land use" with hunting -- Express limitations in Treaty 8 not exhaustive -- Purposes mentioned imply access, transportation -- Road construction implied -- "Taking up" of land for purpose implied by Treaty 8 not prima facie constitutional infringement -- What s. 35 protects is right to hunt on land not required for settlement, other purposes -- Court bound by analysis of Cory J. in R. v. Badger.

Native Peoples -- Lands -- Heritage Minister approving construction of winter road through Wood Buffalo National Park under authority of Canada National Parks Act, s. 8 -- Mikisew Cree, descendants of Treaty 8

signatories, opposed for fear road having negative impact on hunting, trapping -- Park entirely within Treaty 8 area, occupying 5% thereof -- No hunting allowed in 200-metre-wide road corridor -- Minister proceeding without Indians' consent -- Parks Canada apologized for want of consultation -- Creation of Park not a "taking up" under Treaty 8 -- But road approval was a "taking up" -- As held by S.C.C. in R. v. Badger, use of land as road, firearm use prohibition "visible, incompatible land use" with hunting -- Purposes expressly mentioned in Treaty 8 imply access, transportation and therefore road construction -- Land may be "taken up" under Treaty 8 for road -- Constitution Act, 1982, s. 35 (Aboriginal and treaty rights) protecting only right to hunt on land not required for settlement, other purposes.

Environment -- Government approving construction of winter road in Wood Buffalo National Park over Indians' objections -- Cree trappers fearing road could fragment habitat, cause death of wildlife due to collision with motor vehicles -- Independent environmental assessment concluding some habitat fragmentation likely -- Proposed road realigned after biophysical resource assessment, field inspection -- Government satisfied proponent's mitigation measures adequate to prevent adverse environmental effects -- Per Sharlow J.A. (dissenting): while mitigation measures may prove adequate, Court should not speculate on adequacy as process fundamentally flawed.

This was an appeal from a Trial Division judgment, setting aside the Minister's decision to approve construction of a winter road through Wood Buffalo National Park. Statutory authority for the decision was provided by section 8 of the *Canada National Parks Act*.

Respondent, Mikisew Cree First Nation, is an Indian Band and its members are descendants of the Cree Indians of Fort Chipewyan who signed Treaty 8 in 1899. That Treaty indicated Her Majesty's desire to open an Indian territory for settlement, immigration, trade, travel, mining and lumbering and was intended to ensure peace and good will between Her Indian and other subjects. It was also intended to assure the Indians "of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence". While yielding all title to the lands, the Indians would be allowed to pursue their usual vocations of hunting, trapping and fishing, subject to any regulations which might, from time to time, be made by the Government 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 tract covered by Treaty 8 is an immense area in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchwan and the southern portion of the Northwest Territories. Wood Buffalo National Park was established in 1922. It is partly in Alberta and partly in the Northwest Territories and is entirely within the Treaty 8 area, occupying about 5% of that area. The Peace Point Reserve for the respondent First Nation is located within the Park.

The respondent, the Thebacha Road Society, a non-profit organization, the members of which include the town of Fort Smith, the Fort Smith Métis Council, Salt River First Nation and Little Red River Cree First is a proponent of a winter road through the Park each year, constructed of snow, compacted and watered to create an ice base. While the road would disappear each spring, the right of way for a winter road would endure so long as it is kept clear of trees and bushes. The proposed road would be 118 kilometres in length, joining a Little Red River Cree settlement within the Park with Alberta's highway system. For the most part, it would follow the route of an abandoned former winter road which has not been in use since 1960. Under *Wood Buffalo National Park Game Regulations*, subsection 36(5), establishment of this road would create a 200-metre-wide corridor wherein firearms use would be prohibited. Mikisew Cree trappers fear that the road might fragment habitat, allow for increased poaching and bring about the death of wildlife due to collisions with motor vehicles. An environmental assessment report, prepared by an independent agency according to Parks Canada terms of reference, confirmed that the road would likely result in some habitat fragmentation.

The Mikisew Cree First Nation eventually advised that it would not consent to construction of this road through its Peace Point Reserve, identifying not only the trappers' concerns but also unresolved issues as to its role in Park Management--the subject of litigation. At a meeting with the Thebacha Road Society representatives, the Chief expressed the Band's frustration by the manner in which Parks Canada had been handling the process. It was at this meeting that the First Nation learned that road construction was imminent.

Following a field inspection and biophysical resource assessment, the route of the proposed road was realigned so

as to avoid the Peace Point Reserve but the First Nation was neither advised of nor consulted with regarding the realignment. Parks Canada apologized to the First Nation peoples "for the way in which the consultation process unfolded" but announced on its website that the project would proceed as it was satisified that the Thebacha Road Society's mitigation measures were adequate to prevent adverse environmental effects. The Crown entered into an agreement with the Society for the construction and operation of the road. A judicial review application challenging the Minister's decision was brought by the Canadian Parks and Wilderness Society but the Trial Division's denial of that application was affirmed by the Federal Court of Appeal.

The First Nation also filed for judicial review, raising grounds additional to those in the other proceeding and was successful in the Trial Division, the Judge concluding that Treaty 8 Rights had been infringed due to inadequate consultation.

Held (Sharlow J.A. dissenting), the appeal should be allowed.

Per Rothstein J.A. (Sexton J.A. concurring): As found by Sharlow J.A. the creation of Wood Buffalo National Park did not constitute a "taking up" within the meaning of Treaty 8 and the Indians' treaty right to hunt has not been abrogated by statute. She did not, however, determine whether approval of the winter road was a "taking up". But she found that even if it was, such a "taking up" could amount to a *prima facie* infringement of Treaty 8 hunting rights and would have to be justified according to the test in *R. v. Sparrow*. That opinion could not be concurred with. There was no necessity to apply the *Sparrow* analysis since the road approval did constitute a "taking up".

Upon this appeal, the issue whether the approval amounted to a "taking up" was raised by the intervener, Attorney General of Alberta. The Minister did not rely on this issue. But the Attorney General's position did not go against this Court's conclusion in *Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs)*, that "an intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the production of fresh evidence". Alberta's position was that the road approval did not infringe treaty rights since taking up land for use as a road was a geographical limitation of the treaty right to hunt and trap as was provided for in the treaty. That submission fell squarely within the scope of Alberta's permitted intervention. The question of whether the road approval constituted a treaty infringement was still a live issue. It had been raised by the Minister in the Trial Division. Accordingly Alberta was entitled to make submissions on appeal, bearing in mind that the purpose of an intervention is to present to the Court submissions which are useful and different from the perspective of a non-party. Nor was the Minister's position inconsistent with that of Alberta.

Applying what was said by Cory J. in *R. v. Badger*, putting land to use as a winter access road and prohibiting firearm use within 200 metres thereof is "visible, incompatible land use" with hunting on the land. While road construction is not one of the express geographic limitations mentioned in Treaty 8, the express limitations are not exhaustive. The purposes expressly mentioned necessarily imply access and transportation. This in turn implies road construction. A road therefore is another purpose for which land may be "taken up" under Treaty 8. The approval of the road therefore constituted a "taking up" within the meaning of Treaty 8.

The next question was whether the taking up of land could constitute a *prima facie* constitutional infringement. In considering Treaty 8 in context, Cory J. concluded that the Indians "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". Unless the Crown has taken up land in bad faith or taken so much that no meaningful right to hunt remains, taking up land for a purpose expressly or necessarily implied in the treaty does not infringe a treaty right. It is the right to hunt on land not required for settlement or other purposes that was given constitutional protection by *Constitution Act, 1982*, section 35. This Court was bound by the analysis of Cory J. in *Badger*, which was directly applicable to the facts herein.

Per Sharlow J.A. (dissenting): Alberta first raised a procedural point, arguing that, pursuant to *Federal Court Act*, section 57, it should have been given notice of a constitutional question in the Federal Court Trial Division. Such notice was not required. Whether a section 57 notice is required depends upon the nature of the remedy sought in the particular case. There is no necessity for such notice where the remedy sought is other than a judgment that a statute or regulation is invalid, inapplicable or inoperable on constitutional grounds. The Mikisew Cree Nation merely argued that their treaty rights had been infringed by the manner in which the Minister exercised her

discretion. That argument did not call for a decision as to the constitutional validity, applicability or operability of legislation. No section 57 notice was required.

The Minister's argument, that the land now comprising Wood Buffalo National Park was "taken up" by the Crown when it was established, thereby placing it outside the geographical limitations of Treaty 8, was not accepted. As was held by the Judge below, use of the land as a Park was not visible and incompatible with Treaty 8 hunting rights. The leading authority on "taking up" is the opinion of Cory J. in *R. v. Badger* and it was considered at length.

The Minister suggested that section 2 of the *Regulations Respecting Game in Dominion Parks*, enacted in 1919, and which prohibited the harassment, pursuit and killing of any game within a Dominion Park, applied immediately to Wood Buffalo National Park and was necessarily inconsistent with the continuance of the treaty right to hunt. Regulation 2 notwithstanding, there was no evidence that a total prohibition on hunting was ever enforced in Wood Buffalo National Park against Aboriginal people entitled to the benefit of Treaty 8. The Minister conceded that those with Aboriginal treaty rights who had habitually hunted and trapped in the area of the Park were allowed to continue to do so. The 1984 Wood Buffalo National Park Management Plan acknowledged that the original intent--that the Park be free of hunting and trapping--was never achieved, treaty status Indians having been permitted to continue hunting and trapping, subject to closed seasons and regulations. Having permitted hunting in the Park throughout its history, the Minister could not now contend that use as a park was visibly incompatible with the continued existence of Treaty 8 hunting rights.

The Minister's next argument was that the Park is "occupied Crown land" to which Treaty 8 Indians have no right of access for hunting or trapping. This argument was based on *Natural Resources Transfer Agreement*, paragraph 12 which provides that provincial laws respecting game apply to Indians but the Province assures their right of hunting, trapping and fishing at all seasons on unoccupied Crown lands. Since this argument was not raised in the Trial Division, it was rejected with little discussion.

Nor had Treaty 8 hunting rights within the Park been abolished by statute. Having already found that there was nothing about establishment of the Park that was incompatible with the exercise of Treaty 8 hunting rights, it could not be accepted, in the words of Mahoney J. in *Baker Lake (Hamlet) v. Minister of Indians Affairs and Northern Development*, that the "necessary effect" of the legislation creating Wood Buffalo National Park on governing its administration was to extinguish the hunting rights in Treaty 8, or that the legislation was inconsistent with the continuation of those rights. The Trial Division Judge correctly concluded that the hunting rights guaranteed in Treaty 8 subsisted in the Park, subject to applicable regulations.

Alberta's argument, that a "taking up" of land is contemplated by Treaty 8 and cannot be even a *prima facie* infringement within the *Sparrow* analysis so that no justification is required and the Minister had no duty to consult with the First Nation prior to approving construction of the road, was not sound. But even if it did have merit, it should not determine the outcome of this appeal. The argument, based on a literal approach, was that because Treaty 8 conferred the right to "take up", the Crown had no duty to consult, negotiate or even give advance notice to the First Nation. A similar argument was rejected in *Halfway River First Nation v. British Columbia (Ministry of Forests)*. The Minister has always been aware of the "taking up" argument now propounded by Alberta--in the Court below counsel for the Minister mentioned it "as an aside"--and it would be wrong for this Court to affirm the Minister's decision on a ground upon which she chose not to rely.

As to whether the Judge below erred in finding a *prima facie* infringement, in view of the opinion of Lamer C.J. in *R. v. Gladstone, Sparrow* could not be taken as authority for the proposition that a finding of *prima facie* infringement is wrong in law unless it is preceded by an express consideration of each of the three *Sparrow* questions. In the context herein, the question was whether the decision to construct the winter road would result in a meaningful limitation of the First Nation's rights to hunt and trap within the boundaries of Wood Buffalo National Park. The Judge was aware of the relevant facts: size of the Park and of the road and corridor within which firearms would be prohibited, probable impact on wildlife, location of road in relation to the First Nation's reserve, traplines and hunting grounds and the role of these activities in the life of the Mikisew Cree. The Judge did not err in any of her findings of fact from which she concluded that construction of the road would have an adverse effect on hunting and trapping sufficient to meet the *prima facie* infringement test. There was no valid reason for interfering with that conclusion even though the Judge did not address the *Sparrow* questions expressly.

While the Park is large and the corridor is small by comparison, the fact was that the Indians' preferred method of hunting and trapping, was integrally linked to the very place where the road is to be built.

The next question was whether the Treaty 8 infringement was justifiable. The first branch of the justification analysis involves the objective of the legislation or government action resulting in the *prima facie* infringement. As explained in *Sparrow*, an objective of preserving subsection 35(1) rights by natural resource management would be valid as would the prevention of the exercise of these rights in a way that would harm the general population or the native peoples themselves. Thus, it may be necessary to balance Aboriginal rights with those of others. Still, in *Sparrow*, a cautious approach was taken to that possibility, and the suggestion that the "public interest" could justify breach of an Aboriginal right was rejected. "Public interest" was seen as being so vague as to furnish no meaningful guidance for justifying a limitation of constitutional rights. Enhancement of the social and economic interests of people residing at Fort Smith and at other places near the Park was insufficiently compelling to override the First Nation's constitutionally protected right to hunt in the Park. In justifying a *prima facie* infringement, an objective could not be pressing and substantial unless it relates in some way to the long-term enhancement or preservation of the Aboriginal right infringed or is overwhelmingly in the interests of the entire population. The winter road failed to meet either test.

As to the second branch of the justification test, the Crown's obligation as fiduciary, its discharge required, at the least, meaningful consultation prior to making a decision that would infringe an Aboriginal right. The consultation has to be "in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples who lands are at issue". The Judge's conclusion, that the Crown had failed to demonstrate that a meaningful First Nations consultation had taken place, was agreed with. This was inconsistent with the honour of the Crown as fiduciary.

While it was true that the First Nation failed to avail itself of the opportunity of commenting on the road project in the environmental assessment context and also that, as suggested by counsel for the Minister, multi-purpose consultations are a possibility, there must be evidence that treaty rights were on the table, understood and addressed. The Minister failed even to respond to the First Nation's attempts to place its treaty rights on the table. The conduct of responsible Crown officials herein indicated a complete disregard for the concerns of the Mikisew Cree First Nation regarding the breach of their Treaty 8 rights.

Finally, while it was true that attempts at mitigation which may prove sufficient are to be taken, the Court should not speculate upon the adequacy of the mitigation measures when the process was fundamentally flawed.

statutes and regulations judicially

considered

Canada National Parks Act, S.C. 2000, c. 32, s. 8.

Constitution Act, 1930, 20 & 21 Geo. V, c. 26 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 16) [R.S.C., 1985, Appendix II, No. 26], s. 1.

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 35.

Dominion Forest Reserves and Parks Act (The), S.C. 1911, c. 10, ss. 2, 18 (as am. by S.C. 1913, c. 18, s. 5).

Federal Court Act, R.S.C., 1985, c. F-7 , s. 57 (as am. by S.C. 1990, c. 8, s. 19).

Federal Court Rules, 1998, SOR/98-106, r. 110.

Indian Act, R.S.C., 1985, c. I-5 , s. 2(1) "band".

Natural Resources Transfer Agreement (Alberta) [confirmed by the *Constitution Act, 1930*, 20 & 21 Geo. V, c. 26 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 16) [R.S.C., 1985, Appendix II, No. 26], s. 2], para. 12, 14.

Order in Council P.C. 1922-2498.

Regulations Respecting Game in the Dominion Parks, P.C. 1919-2415.

Treaty No. 6 (1876).

Treaty No. 8 (1899).

Wildlife Act, S.A. 1984, c. W-9.1.

Wood Buffalo National Park Game Regulations, SOR/78-830 , s. 36(5).

cases judicially considered

followed:

R. v. Badger, 1996 CanLII 236 (S.C.C.), [1996] 1 S.C.R. 771; (1996), 133 D.L.R. (4th) 324; [1996] 4 W.W.R. 457; 181 A.R. 321; 37 Alta. L.R. (3d) 153; 105 C.C.C. (3d) 289; [1996] 2 C.N.L.R. 77; 195 N.R. 1; 116 W.A.C. 321.

applied:

R. v. Morgentaler, 1993 CanLII 158 (S.C.C.), [1993] 1 S.C.R. 462; *R. v. Mousseau*, 1980 CanLII 194 (S.C.C.), [1980] 2 S.C.R. 89; (1980), 111 D.L.R. (3d) 443; [1980] 4 W.W.R. 24; 3 Man. R. (2d) 338; 52 C.C.C. (2d) 140; [1980] 3 C.N.L.R. 63; 31 N.R. 620; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (S.C.C.), [1989] 1 S.C.R. 1038; (1989), 59 D.L.R. (4th) 416; 26 C.C.E.L. 85; 89 CLLC 14,031; 40 C.R.R. 100; 93 N.R. 183.

distinguished:

R. v. Sparrow, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075; (1990), 70 D.L.R. (4th) 385; [1990] 4 W.W.R. 410; 46 B.C.L.R. (2d) 1; 56 C.C.C. (3d) 263; [1990] 3 C.N.L.R. 160; 111 N.R. 241; *Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1996), 199 N.R. 1 (F.C.A.); *McIntosh v. Canada (Secretary of State)* (1994), 168 N.R. 75 (F.C.A.); *Broddy v. Alberta (Director of Vital Statistics)* reflex, (1982), 41 A.R. 255; 142 D.L.R. (3d) 151; [1983] 1 W.W.R. 481; 23 Alta. L.R. (2d) 77; 31 R.F.L. (2d) 225 (C.A.); *Morine v. L & J Parker Equipment Inc.* 2001 NSCA 53 (CanLII), (2001), 193 N.S.R. (2d) 51; 30 Admin. L.R. (3d) 113; 8 C.C.E.L. (3d) 211 (C.A.); *Gitxsan Treaty Society v. Hospital Employees' Union*, 1999 CanLII 7628 (F.C.A.), [2000] 1 F.C. 135; (1999), 177 D.L.R. (4th) 687; 249 N.R. 37 (C.A.).

considered:

Halfway River First Nation v. British Columbia (Ministry of Forests) 1999 BCCA 470 (CanLII), (1999), 178 D.L.R. (4th) 666; [1999] 9 W.W.R. 645; 64 B.C.L.R. (3d) 206; 129 B.C.A.C. 32; [1999] 4 C.N.L.R. 1 (C.A.); *R. v. Sundown*, 1999 CanLII 673 (S.C.C.), [1993] 1 S.C.R. 393; (1999), 170 D.L.R. (4th) 385; [1999] 6 W.W.R. 278; 177 Sask. R. 1; 132 C.C.C. (3d) 353; [1999] 2 C.N.L.R. 289; 236 N.R. 251; *R. v. Catarat*, 2001 SKCA 50 (CanLII), [2001] 6 W.W.R. 681; (2001), 207 Sask. R. 57; [2001] 2 C.N.L.R. 158 (C.A.); *R. v. Smith*, reflex, [1935] 2 W.W.R. 433 (Sask. C.A.); *R. v. Marshall*, 1999 CanLII 665 (S.C.C.), [1999] 3 S.C.R. 456; (1999), 178 N.S.R. (2d) 201; 177 D.L.R. (4th) 513; 138 C.C.C. (3d) 97; [1999] 4 C.N.L.R. 161; 246 N.R. 83; *R. v. Gladstone*, 1996 CanLII 160 (S.C.C.), [1996] 2 S.C.R. 723; (1996), 137 D.L.R. (4th) 648; [1996] 9 W.W.R. 149; 79 B.C.A.C. 161; 23 B.C.L.R. (3d) 155; 109 C.C.C. (3d) 193; [1996] 4 C.N.L.R. 65; 50 C.R. (4th) 111; 200 N.R. 189; 129 W.A.C. 161; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010; (1997), 153 D.L.R. (4th) 193; 99 B.C.A.C. 161; 220 N.R. 161; 162 W.A.C. 161; *R. v. Adams*, 1996 CanLII 169 (S.C.C.), [1996] 3 S.C.R. 101; (1996), 138 D.L.R. (4th) 657; 110 C.C.C. (3d) 97; [1996] 4 C.N.L.R. 1; 202 N.R. 89.

referred to:

Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage) (2001), 40 C.E.L.R. (N.S.) 273; 212 F.T.R. 1 (F.C.T.D.); affd 2003 FCA 197 (CanLII), [2003] 4 F.C. 672; (2003), 1 Admin. L.R. (4th) 103; 1 C.E.L.R. (3d) 20 (C.A.); *Canada (Minister of Canadian Heritage) v. Mikisew Cree First Nation* (2002), 293 N.R. 182 (F.C.A.); *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, reflex, [1980] 1 F.C. 518; (1979), 107 D.L.R. (3d) 513; [1980] 5 W.W.R. 193; [1979] 3 C.N.L.R. 17 (T.D.); *Saanichton Marina Ltd. v. Tsawout Indian Band* reflex, (1989), 57 D.L.R. (4th) 161; [1989] 5 W.W.R. 82; 36 B.C.L.R. (2d) 79; [1989] 3 C.N.L.R. 46 (C.A.); *R. v. Sioui*, 1990 CanLII 103 (S.C.C.), [1990] 1 S.C.R. 1025; (1990), 30 Q.A.C. 287;

70 D.L.R. (4th) 427; 56 C.C.C. (3d) 225; [1990] 3 C.N.L.R. 127; 109 N.R. 22; *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507; (1996), 137 D.L.R. (4th) 289; [1996] 9 W.W.R. 1; 23 B.C.L.R. (3d) 1; 80 B.C.A.C. 81; 109 C.C.C. (3d) 1; [1996] 4 C.N.L.R. 177; 50 C.R. (4th) 1; 200 N.R. 1; 130 W.A.C. 81; *Guerin et al. v. The Queen et al.*, 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335; (1984), 13 D.L.R. (4th) 321; [1984] 6 W.W.R. 481; 59 B.C.L.R. 301; [1985] 1 C.N.L.R. 120; 20 E.T.R. 6; 55 N.R. 161; 36 R.P.R. 1; *Regina v. Taylor and Williams* reflex, (1981), 34 O.R. (2d) 360; 62 C.C.C. (2d) 227; [1981] 3 C.N.L.R. 114 (C.A.).

APPEAL from the Trial Division judgment (2001 FCT 1426 (CanLII), [2002] 1 C.N.L.R. 169; (2001), 214 F.T.R. 48), setting aside the Minister's decision approving construction of a winter road through Wood Buffalo National Park. Appeal allowed, Sharlow J.A. dissenting.

appearances:

Paul A. Shenher and *Teresa A. Crotty-Wong* for appellant.

Jeffrey R. W. Rath and *Allisum Taylor Rana* for respondent Mikisew Cree First Nation.

Elizabeth A. Johnson for respondent The Thebacha Road Society.

Robert J. Normey and *Angela J. Brown* for intervener.

solicitors of record:

Deputy Attorney General of Canada for appellant.

Rath & Company, Priddis, Alberta, for respondent Mikisew Cree First Nation.

Ackroyd, Piasta, Roth & Day LLP, Edmonton, for respondent The Thebacha Road Society.

Alberta Department of Justice, Constitutional and Aboriginal Law Branch for intervener.

The following are the reasons for judgment rendered in English by

[1]Rothstein J.A.: Sharlow J.A. has conducted a thorough review of the facts and history of this case which I need not repeat. I agree with her findings that the creation of Wood Buffalo National Park did not constitute a "taking up" within the meaning of Treaty 8 [1899] and that the Mikisew's treaty right to hunt has not been abolished by statute. However, Sharlow J.A. did not determine whether the approval of a winter road between Peace Point and Garden River in the southwestern portion of the Park was a "taking up." She found that even if it was, such a "taking up" could still be a *prima facie* infringement of the Treaty 8 hunting rights that would have to be justified according to the test set out in *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075. I am unable to agree.

[2]For the reasons that follow, I think that the approval of the road did constitute a "taking up" within the meaning of Treaty 8, properly interpreted according to the canons of Aboriginal treaty interpretation. As such, the Mikisew Cree First Nation have no continued right to hunt on land taken up for the road and there is no violation by the Minister of section 35 of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. There is therefore no need to apply the *Sparrow* analysis. Although, as a matter of good practice, the Minister might have consulted more extensively with the Mikisew before approving the road, she was not constitutionally obliged to do so.

ALBERTA'S STANDING TO RAISE THE "TAKING UP" ARGUMENT

[3]On appeal, the issue of whether the approval of the road was a "taking up" was raised by the intervener the Attorney General of Alberta. At the hearing of the appeal, counsel for the Minister at first indicated that the Minister had abandoned this issue but later clarified that the Minister was simply not relying on it. Sharlow J.A. is of the opinion that it would be wrong for this Court to affirm the Minister's decision on a ground upon which the Minister herself chooses not to rely.

[4]It is true that "an intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence" (*Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1996), 199 N.R. 1 (F.C.A.), at paragraph 2). However, that is not what Alberta is attempting to do.

[5]Alberta was granted leave to intervene on, among other things, "the issues raised in grounds 2 and 3 of the Notice of Appeal." Ground 2 reads as follows:

In the alternative, if there are treaty rights to hunt and trap within Wood Buffalo National Park, the judge made an error of law in finding that the Minister's decision to approve the winter road within Wood Buffalo National Park constituted an infringement of treaty rights.

I agree with Sharlow J.A. that there are still treaty rights to hunt and trap within Wood Buffalo National Park. Alberta's position is that the approval of the road was not an infringement of those treaty rights because taking up land for use as a road is a geographical limitation of the treaty right to hunt and trap provided for in the treaty itself. The submission that Alberta is making is one that falls squarely within the scope of the permitted intervention.

[6]Even though the Minister's counsel chose not to rely on this argument at the hearing of the appeal, the question of whether the approval of the road constituted an infringement of the Mikisew's treaty right to hunt was still a live issue. This argument was raised by the Minister in the Trial Division [2001 FCT 1426 (CanLII), [2002] 1 C.N.L.R. 169] (as it then was) but dismissed on the grounds that even if the road approval was a taking up, it would still need to be justified according to the *Sparrow, supra*, analysis (paragraphs 84-86). Accordingly, Alberta was entitled to make submissions on appeal. After all, "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party" (*R. v. Morgentaler*, 1993 CanLII 158 (S.C.C.), [1993] 1 S.C.R. 462, at page 463).

[7]While the Minister does not rely on the argument raised by Alberta, she has not contradicted or otherwise disavowed Alberta's position. Nor has she made admissions or taken a position inconsistent with Alberta's arguments. For these reasons, I am of the view that the issues raised by the Attorney General of Alberta may be considered in assessing the constitutionality of the Minister's decision to approve the road.

WAS THE APPROVAL OF THE ROAD A "TAKING UP"?

[8]Alberta says that the approval of the road cannot be a constitutional infringement because the land for the road has been "taken up" in accordance with a geographic limitation that is expressly stated in the Treaty.

[9]The relevant portion of Treaty 8 reads as follows:

And Her Majesty the Queen hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

The Supreme Court analyzed the extent of this treaty right to hunt in *R. v. Badger*, 1996 CanLII 236 (S.C.C.), [1996] 1 S.C.R. 771. As Cory J. pointed out, "by the terms of Treaty No. 8, the Indians' right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation" (paragraph 37).

[10]It is true that, on the facts of *Badger*, the treaty right to hunt was subject to paragraph 12 of the Natural Resources Transfer Agreement (NRTA) as given effect by the *Constitution Act, 1930* [20 & 21 Geo. V, c. 26 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 16) [R.S.C., 1985, Appendix II, No. 26], s. 2]. Here, the NRTA does not apply because Wood Buffalo National Park remained vested in the Government of Canada under paragraph 14 of the NRTA. However, Cory J. held that "the geographical limitation on the right to hunt for food provided by Treaty No. 8 has not been modified by para. 12 of the NRTA" (paragraph 66). His analysis is therefore equally applicable to the unmodified Treaty 8 right to hunt.

[11]Cory J. examined the oral history of the signatories in order to determine how the parties would have understood the geographical limitation on the right to hunt. He concluded that "[a]n 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" (paragraph 54).

[12]Putting land to use as a winter access road, on or within 200 metres of which the use of firearms is prohibited, is clearly visibly incompatible with hunting on the land.

[13]Although constructing roads is not one of the express geographic limitations referred to in Treaty 8, the express limitations are not exhaustive. Treaty 8 specified that lands may be taken up "for settlement, mining, lumbering, trading or other purposes." Roads are not expressly mentioned as one of these contemplated uses, but settlement, mining, lumbering, and trading all necessarily imply access and transportation. In turn, access and transportation necessarily imply the construction of roads. A road therefore is another purpose for which land may be "taken up" under Treaty 8. In *Badger*, Cory J. cited *R. v. Mousseau*, 1980 CanLII 194 (S.C.C.), [1980] 2 S.C.R. 89, as an example of Crown land being taken up for a public road (paragraph 59). The approval of the road therefore did constitute a "taking up" within the meaning of Treaty 8.

CAN TAKING UP LAND BE A *PRIMA FACIE* CONSTITUTIONAL INFRINGEMENT?

[14]Section 35 of the *Constitution Act, 1982* constitutionalized "the existing aboriginal and treaty rights of the aboriginal peoples of Canada" (emphasis added). In order to determine whether there has been a *prima facie* infringement of a constitutionally-protected treaty right, it is therefore necessary to determine the scope of the treaty right that existed in 1982.

[15]Sharlow J.A. says that Treaty 8 should not be interpreted as if it were just an ordinary contract. I agree. Aboriginal treaties should be liberally construed and any uncertainties, ambiguities, or doubtful expressions should be resolved in favour of the Indians. The words of the treaty must not be interpreted in their strict technical sense but rather must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing (*Badger, supra*, at paragraph 52).

[16]However, in *Badger*, Cory J., after considering the context in which Treaty 8 was signed and the oral history of its signatories, held that (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.

[17]As Cory J. held, a proper interpretation of Treaty 8 indicates that the parties never intended the treaty right to hunt to be an unlimited right; rather, the Indians were willing to accept settlement and other uses of the land that would restrict their right to hunt so long as sufficient unoccupied land would remain to allow them to maintain their traditional way of life.

[18]With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt. Neither of these exceptions apply here. This is not a case where the Minister has acted in bad faith; nor, as the land required for the road corridor comprises approximately 23 square kilometres out of the 44,807 square kilometres of Wood Buffalo National Park or the approximately 840,000 square kilometres encompassed by Treaty 8, is this a case where no meaningful right to hunt remains.

[19]The treaty right to hunt has always been limited by the fact that hunting is not permitted on land that has been taken up. It is the right to hunt on land which is not required for settlement, mining, lumbering, trading or other purposes which obtained constitutional protection when section 35 came into force.

[20]In *Badger, supra*, Cory J. recognized the limited nature of the treaty right to hunt. He found that Mr. Badger and Mr. Kiyawasew were hunting on land that was visibly being used. As their treaty right to hunt did not extend

to hunting on such land, the hunting limitations set out in the provincial *Wildlife Act* [S.A. 1984, c. W-9.1] did not infringe their existing right and were properly applied to them (paragraph 67). Accordingly, Cory J. did not find a *prima facie* infringement of section 35 and did not apply the *Sparrow, supra*, test to those defendants.

[21]Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of section 35. This is to be contrasted with the case where the limitations provided by the treaty do not apply but the government nevertheless seeks to limit the treaty right. In such a case, the *Sparrow* test must be satisfied in order for the infringement to be constitutionally permissible.

[22]Sharlow J.A. relies on the reasons of Finch J.A. in *Halfway River First Nation v. British Columbia (Ministry of Forests)* 1999 BCCA 470 (CanLII), (1999), 178 D.L.R. (4th) 666 (B.C.C.A.) as support for the proposition that a "taking up" could itself be a *prima facie* infringement of the Mikisew's treaty rights. However, I find that I am bound by the analysis of Cory J. in *Badger, supra*, which is directly applicable to the facts of this case.

[23]As the approval of the road constituted a taking up within the meaning of Treaty 8, the Mikisew's treaty right to hunt on the road corridor is suspended for as long as it is being used for a purpose visibly incompatible with hunting. There therefore has been no infringement of Treaty 8, as constitutionalized by section 35, that requires the application of the *Sparrow* test.

[24]Although the Minister was not obligated to consult with the Mikisew before approving the road project, it may well have been good practice for her to have consulted more extensively than she did. However, the advisability and extent of such consultation was within the Minister's discretion. There is no basis for this Court interfering with that exercise of discretion.

CONCLUSION

[25]A number of environmental and administrative law issues were raised in the Mikisew's original application for judicial review. The Trial Division Judge did not consider it necessary to deal with these issues given her finding on the constitutional issue. The Mikisew did not address these issues in their factum or in oral argument. Nor have they requested that the matter be sent back to the Federal Court for a determination of those issues.

[26]The appeal should be allowed, the decision of the Trial Division set aside, and the decision of the Minister of Canadian Heritage restored.

Sexton J.A.: I agree.

* * *

The following are the reasons for judgment rendered in English by

[27]Sharlow J.A. (dissenting): The Minister is appealing a judgment of the Federal Court Trial Division setting aside the decision of the Minister of Canadian Heritage to approve the construction of a winter road through Wood Buffalo National Park: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2001 FCT 1426 (CanLII), [2002] 1 C.N.L.R. 169 (F.C.T.D.). The statutory authority for the Minister's decision is section 8 of the *Canada National Parks Act*, S.C. 2000, c. 32.

[28]A number of issues are raised in this appeal. My discussion is organized under the following headings:

A. Facts

B. Standard of review

C. Was notice required under section 57 of the *Federal Court Act*?

D. Do Treaty 8 hunting rights subsist in Wood Buffalo National Park?

(1) Has the land comprising Wood Buffalo National Park been "taken up" by the Crown?

(2) Is the land comprising Wood Buffalo National Park "occupied Crown land"?

(3) Have hunting rights been abolished by statute within Wood Buffalo National Park?

(4) Conclusion

E. *Prima facie* infringement

(1) The establishment of the road as a "taking up"

(2) Was the winter road approval a *prima facie* infringement?

F. Justification

(1) First branch: the objective of the decision

(2) Second branch: the Crown's obligation as fiduciary

G. Conclusion

A. Facts

[29]Mikisew Cree First Nation is an Indian Band as defined by the *Indian Act*, R.S.C., 1985, c. I-5 [subsection 2(1)]. George Poitras is the Chief of Mikisew Cree First Nation.

[30]The members of Mikisew Cree First Nation are descendants of the Cree Indians of Fort Chipewyan who signed Treaty 8 on June 21, 1899 at Fort Chipewyan. Accordingly, they are entitled to the benefits of Treaty 8.

[31]The relevant portions of Treaty 8 read as follows:

Whereas the Indians inhabiting the territory hereinafter defined have . . . been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

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

. . .

And whereas, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective Bands at the dates mentioned hereunder, the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits . . . .

. . .

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. [My emphasis.]

[32]The "tract of country bounded and described" in Treaty 8 is the area in which the Aboriginal signatories were guaranteed the right to hunt, trap and fish, subject to the other terms of the Treaty. That area encompasses 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories.

[33]Wood Buffalo National Park was created in 1922 and expanded in 1926. The area that is now Wood Buffalo National Park is partly in Alberta and partly in the Northwest Territories. It is administered from Fort Smith, Northwest Territories, located near the northeastern boundary of the Park.

[34]Wood Buffalo National Park is located entirely within the area of Treaty 8, occupying approximately 5% of that area. Thus, all of the land now comprising Wood Buffalo National Park is land on which the Aboriginal signatories to Treaty 8 had the right to hunt, trap and fish before the Park was established.

[35]An agreement dated December 23, 1986 resulted in the establishment of a number of reserves for Mikisew Cree First Nation, including a reserve at Peace Point, which is located within the boundaries of Wood Buffalo National Park on the all-weather road that runs into the Park from Fort Smith. The area of the Peace Point Reserve has been formally removed from the Park, although the Park surrounds it.

[36]The 1986 agreement provided for the continuation of hunting rights within the Park, subject to regulation and to the advice and recommendations of a Wildlife Advisory Board consisting of four members of Mikisew Cree First Nation, three persons appointed by the Crown and, as a non-voting member, the Superintendent of the Park.

[37]The proponent of the winter road through Wood Buffalo National Park is the respondent The Thebacha Road Society, a non-profit organization registered in both the Northwest Territories and Alberta. Its members include the town of Fort Smith (located in the Northwest Territories on the northeastern boundary of Wood Buffalo National Park), the Fort Smith Métis Council, Salt River First Nation, and Little Red River Cree First Nation.

[38]A winter road is essentially an ice road, constructed annually in early winter when there is sufficient snow to be compacted and watered to create an ice base. The road disappears in the spring when the snow and ice melt. The right of way for a winter road is permanent, as long as it is kept clear of trees and bushes.

[39]The record contains ample evidence that the construction of the winter road is supported by individuals living in and near Wood Buffalo National Park, including residents of Fort Smith and individuals from the First Nations who are members of the Thebacha Road Society. The anticipated benefits of the winter road to its proponents are obvious and well documented.

[40]The proposed winter road would be 118 kilometres long, joining Peace Point and Garden River, a settlement of the Little Red River Cree First Nation that is located within Wood Buffalo National Park, near the southwestern boundary, and would thus connect with the Alberta highway system. Most of the route of the proposed winter road would follow an abandoned right of way that was cleared for a winter road in 1958, but was only operational until 1960. It would be wide enough to allow two vehicles to meet and pass. The road allowance would be 10 metres wide. Vehicle use would be limited to pick-up trucks, cars and vans. The posted speed limits would range from 10 to 40 kilometres per hour.

[41]Pursuant to subsection 36(5) of the *Wood Buffalo National Park Game Regulations*, SOR/78-830, the establishment of the winter road would result in the creation of a 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 (approximately .05% of the total area of Wood Buffalo National Park).

[42]There are approximately 14 trappers who are members of Mikisew Cree First Nation and who reside in the trapping area to be traversed by the proposed road. There are other members of Mikisew Cree First Nation who may trap in that area although they do not live there. There may be as many as 100 such individuals who hunt in the vicinity of the proposed winter road. Mikisew Cree First Nation is concerned that 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.

[43]Construction of a road along the route in question was accepted in principle in 1984. In the summer of 1999, a meeting was held at Fort Smith between government officials and supporters of the road. The supporters later formed the Thebacha Road Society and submitted a proposal to Parks Canada for the re-establishment of a winter road along the route of the 1958 winter road. The proposed road would cross a 0.8 km long section of the Peace Point Reserve at the east end to connect with the existing all weather road from Fort Smith. Parks Canada developed terms of reference for the environmental assessment of the winter road project.

[44]Mikisew Cree First Nation was informed by the Thebacha Road Society of their desire to construct a winter road from Peace Point to Garden River. The Thebacha Road Society asked Mikisew Cree First Nation to support the road. Mikisew Cree First Nation advised that it would have to explore the proposal in detail and consider whether the road would be in their best interests.

[45]On January 19, 2000, Parks Canada provided Mikisew Cree First Nation with a copy of the terms of reference for the environmental assessment and advised on the timelines for responses and the subsequent public review period. The environmental assessment report was completed by an independent agency, Westworth Associates Environmental Ltd., in April of 2000. The report noted that the winter road would likely result in some fragmentation of habitat. Chief Poitras was provided with copies of the environmental assessment report in August of 2000. Mikisew Cree First Nation did not respond to the report during the 64-day period of public consultation.

[46]On July 20, 2000, Park Superintendent Josie Weninger met with Chief Poitras and provided him with more information regarding the status of the proposed road project. On July 25, 2000, an open house was held by Parks Canada at Fort Chipewyan. It was attended by two trappers who are members of Mikisew Cree First Nation.

[47]On August 3, 2000, Park Superintendent Weninger met with Chief Poitras and gave him an update on the status of the road proposal. By letter dated August 16, 2000, Lawrence Vermillion, a Mikisew Cree First Nation trapper, sent a letter to Richard Power of the Thebacha Road Society, with a copy to Park Superintendent Weninger, outlining the concerns of seven Mikisew Cree First Nation 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.

[48]On October 10, 2000, Mikisew Cree First Nation informed Park Superintendent 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 Cree First Nation 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 Cree First Nation trappers and their commitment to conservation of park lands.

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

[50]On January 25, 2001, Chief Poitras spoke with Richard Power of the Thebacha Road Society. Mr. Power denied having knowledge of Mikisew Cree First Nation's concerns with the road, as set out in the letter of October 10, 2000, and asked that Mikisew Cree First Nation forward him a copy. Mr. Power advised the Chief that Parks Canada had led the Thebacha Road Society to believe that Mikisew Cree First Nation had no objection to the road going through the reserve, and that he had just been informed for the first time by Tom Lee, the Chief Executive Officer of Parks Canada, that Mikisew Cree First Nation did not support the road.

[51]On January 29, 2001, Chief Poitras and the Council of Mikisew Cree First Nation met with the Thebacha Road Society representatives. The Thebacha Road Society sought the support of Mikisew Cree First Nation, but the Chief and Council explained they were extremely frustrated by the manner in which Parks Canada had been handling the process. The Chief and Council circulated a letter they had just sent to the Minister, and told the representatives of the Thebacha Road Society that they would have to wait to hear from the Minister with regard

to their concerns before they could give the Thebacha Road Society an answer. The Thebacha Road Society also committed to lobby their MLA and MP to impress on the Minister the urgency of meeting with Mikisew Cree First Nation on the road initiative.

[52]It was apparently at that meeting that Mikisew Cree First Nation learned that the commencement of construction was imminent. On the same day, Mikisew Cree First Nation sent a letter to the Minister expressing their concerns with the proposed road, and with Parks Canada's failure to consult with Mikisew Cree First Nation. They proposed a meeting the following week with the Minister, Mr. Lee and the then Minister of Indian Affairs, emphasizing the urgency of the situation.

[53]On February 2, 2001, Chief Poitras spoke to Park Superintendent Weninger. She advised him that the Thebacha Road Society was working on a proposal for an alternative route. There is conflicting evidence as to the content of the discussion. The Minister submits that traplines were discussed. Mikisew Cree First Nation 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.

[54]On February 5, 2001, Chief Poitras contacted Mr. Power of the Thebacha Road Society, and informed him that Mikisew Cree First Nation 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. On the same day, Chief Poitras also spoke with Park Superintendent 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. When Chief Poitras met with the Peace Point trappers, they advised him that they had also expressed their concerns to Park Superintendent 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.

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

[56]In March of 2001, Parks Canada and Westworth Associates Environmental Ltd. completed the field inspection and biophysical resource assessment on a realignment of the winter road that would avoid the Peace Point Reserve. The new proposal was that the road would track the Peace Point Reserve by extending 10 metres from the Reserve boundary for 2.5 kilometres before joining the all-weather road from Fort Smith. Mikisew Cree First Nation was never informed that the route for the realignment had been chosen, and was not consulted on the realignment, or the related environmental assessments.

[57]In March and April of 2001, Chief Poitras spoke on the telephone several times with Park Superintendent Weninger and Gaby Fortin, Director General West of Parks Canada, attempting to arrange a meeting with Parks Canada to address Mikisew Cree First Nation's concerns. It was extremely difficult to get a meeting arranged, for both parties, and a number of phone calls went back and forth. On April 27, 2001, Chief Poitras finally met with Gaby Fortin in Calgary. At that meeting the Chief learned the route of the realignment. He asked that someone meet with Mikisew Cree First Nation'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 Cree First Nation's Council Chambers on May 2, 2001. Chief Poitras attested that Parks Canada made it very clear to him that the decision had already been made to approve the realignment.

[58]In response, Gaby Fortin sent Mikisew Cree First Nation a letter dated April 30, 2001 apologizing for excluding Mikisew Cree First Nation 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."

[59]On May 2, 2001, a meeting was held between Park Superintendent Weninger, Gaby Fortin, and the Chief and Council of Mikisew Cree First Nation. They discussed Mikisew Cree First Nation's January 2001 letter to the Minister. The Chief and Council emphasized Mikisew Cree First Nation's dissatisfaction with being excluded from

the road proposal process.

[60]On May 17, 2001, Mikisew Cree First Nation sent the Minister another letter informing her of its concerns with the realignment. Mikisew Cree First Nation 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 Cree First Nation had substantial concerns with regard to the proposed road.

[61]On May 25, 2001, Mr. 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. Gaby Fortin called Chief Poitras to inform him of the decision. Mr. Lee also sent a letter to Chief Poitras as a formal response to the May 17, 2001 letter to the Minister. 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 Cree First Nation and Parks Canada.

[62]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 website of Wood Buffalo National Park. The following appeared under the heading "Finding and Determination":

Parks Canada and it's [*sic*] 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.

[63]The Crown has entered into an agreement with the Thebacha Road Society providing for the construction and operation of the winter road. At the time of the hearing of this matter in the Federal Court, it was anticipated that permits would be issued to give effect to the agreement and provide mechanisms for the implementation of mitigation measures.

[64]On June 18, 2001, Canadian Parks and Wilderness Society filed an application for judicial review to challenge the Minister's decision to approve the construction of the winter road. The application was based on administrative law grounds relating to the applicable framework of federal environmental legislation and regulations. The application was dismissed on October 16, 2001: *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)* (2001), 40 C.E.L.R. (N.S.) 273 (F.C.T.D.); affirmed 2003 FCA 197 (CanLII), [2003] 4 F.C. 672 (C.A.).

[65]On June 25, 2001, Mikisew Cree First Nation filed the application for judicial review that resulted in the decision now under appeal. That application raised the same issues as the previous application of Canadian Parks and Wilderness Society, which have now been decided in favour of the Minister. It also relied on additional grounds specific to Mikisew Cree First Nation. Those are the issues that were determined by the Judge in favour of Mikisew Cree First Nation, giving rise to this appeal by the Minister.

[66]The basis of the judgment is that the rights of the people of Mikisew Cree First Nation under Treaty 8 were infringed because the Minister's decision was not preceded by adequate consultation. The Minister appeals that judgment, and seeks restoration of the Minister's decision.

B. Standard of review

[67]The Judge did not specifically address the question of standard of review. However, it is clear that with respect to the issues raised before her, the Judge applied a standard of correctness. In my view, she was correct to do so.

[68]The Minister's decision was challenged on the basis that it was made without recognizing or taking into account certain Aboriginal rights, and resulted in an unjustified breach of those rights. That was a challenge based

on one or more errors of law. As the Minister has no special expertise on such questions, and there is no preclusive clause in the legislation pursuant to which her decision was made, there was no basis upon which the Judge could or should have applied any standard of review except correctness.

[69]This Court must apply the correctness standard to the decision of the Judge, to the extent it consists of questions of law. Her findings of fact must be reviewed on the standard of palpable and overriding error. Any findings of mixed fact and law must be reviewed on the standard of palpable and overriding error, except to the extent they are based on an error of law.

C. Was notice required under section 57 of the *Federal Court Act*?

[70]I will deal first with a procedural point. The Attorney General of Alberta was not given notice of the proceedings in the Federal Court and was not a party to those proceedings, but has been permitted to intervene in the appeal on the basis of rule 110 of the *Federal Court Rules, 1998*, SOR/98-106: see *Canada (Minister of Canadian Heritage) v. Mikisew Cree First Nation* (2002), 293 N.R. 182 (F.C.A.). Rule 110 provides, among other things, that the Attorney General of a province may apply for leave to intervene in any proceeding in this Court if a "question of general importance" is raised.

[71]Alberta argues that notice of a constitutional question should have been given in the Federal Court pursuant to section 57 [as am. by S.C. 1990, c. 8, s. 19] of the *Federal Court Act*, R.S.C., 1985, c. F-7, as amended, and that the matter should be returned to the Federal Court for a trial of the constitutional issues. Alberta has also submitted, in the alternative, a number of arguments in support of the position of the Minister that the appeal should be allowed.

[72]After oral submissions on this point by counsel for Alberta, and without calling upon counsel for Mikisew Cree First Nation to respond, the panel indicated that it was not persuaded that a section 57 notice was required. The reasons for that decision are stated below.

[73]Section 57 of the *Federal Court Act* reads as follows:

57. (1) Where the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of any province, or of regulations thereunder, is in question before the Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be adjudged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

(2) Except where otherwise ordered by the Court or the federal board, commission or other tribunal, the notice referred to in subsection (1) shall be served at least ten days before the day on which the constitutional question described in that subsection is to be argued.

(3) The Attorney General of Canada and the attorney general of each province are entitled to notice of any appeal or application for judicial review made in respect of the constitutional question described in subsection (1).

(4) The Attorney General of Canada and the attorney general of each province are entitled to adduce evidence and make submissions to the Court or federal board, commission or other tribunal in respect of the constitutional question described in subsection (1).

(5) Where the Attorney General of Canada or the attorney general of a province makes submissions under subsection (4), that attorney general shall be deemed to be a party to the proceedings for the purposes of any appeal in respect of the constitutional question described in subsection (1).

[74]The issue raised by Mikisew Cree First Nation in its application for judicial review required the Federal Court to determine whether certain treaty rights were infringed when the Minister decided to permit the construction of the winter road through Wood Buffalo National Park. This was a constitutional question because of subsection 35(1) of the *Constitution Act, 1982*, which reads as follows:

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

affirmed.

[75]Notice of a constitutional question under section 57 of the *Federal Court Act* is not required in every case where a constitutional issue is raised, or in every case where a party asserts a constitutional right. It is the nature of the remedy sought in a particular case that will determine whether a section 57 notice is required.

[76]The objective of section 57 is to preclude a court from making a judgment that a statute or regulation is invalid, inapplicable or inoperable on constitutional grounds, unless the constitutional question underlying the judgment is the subject of prior notice to Canada and the provinces. A notice of constitutional question under section 57 is simply a means of ensuring that appropriate notice is given. It is axiomatic that there is no need for a section 57 notice in a case where the judicial remedy is something other than a judgment that a statute or regulation is invalid, inapplicable or inoperable on constitutional grounds. Of course, other remedies are possible. This is explained in the judgment of Justice Lamer, as he then was, in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (S.C.C.), [1989] 1 S.C.R. 1038. Although he was in dissent, all of the judges agreed with his analysis on this point.

[77]*Slaight Communications* establishes that, generally speaking, a discretionary decision may be subject to two forms of constitutional challenge. One is a challenge to the legislation itself. Such a challenge is based on the premise that the legislation, properly interpreted, expressly or by necessary implication confers on the decision-maker the authority to make a decision that infringes a constitutional right. In a challenge of that kind, the argument must be that the legislation is unconstitutional, and the remedy will be aimed at the legislation.

[78]The other form of constitutional challenge to a discretionary decision is based on an argument that the legislation does not authorize the decision-maker to make a decision that infringes a constitutional right. In a challenge of that kind, the remedy is not aimed at the legislation at all, but only at the decision.

[79]In my view, the constitutional challenge in this case is limited to the decision. It is common ground that the Minister has the discretionary authority to decide whether to approve the construction of the winter road through Wood Buffalo National Park, and that her decision is subject to challenge on constitutional grounds. However, Mikisew Cree First Nation does not argue that the governing legislation expressly or by necessary implication authorizes the Minister to make a decision that infringes a constitutional right. Nor does Mikisew Cree First Nation argue that the legislation must be read down to conform to a constitutional principle, or to avoid the inevitable infringement of a constitutional right. The argument is that the manner in which the Minister exercised her discretion infringed the treaty rights of Mikisew Cree First Nation. That argument does not call for a decision as to the constitutional validity, applicability or operability of legislation. It follows that no notice of constitutional question was required under section 57 of the *Federal Court Act*.

[80]Alberta refers to a number of cases in which notice under section 57 of the *Federal Court Act*, or the equivalent notice required by another statute, was given. Those cases are not helpful because they disclose no debate on the scope of section 57. No doubt there are many cases where a party gives notice of a constitutional question out of an abundance of caution, or perhaps even as the result of a mistaken view of the legislation requiring the notice.

[81]Alberta also cites a number of cases in which an issue arose because no notice was given under section 57 or its equivalent: *McIntosh v. Canada (Secretary of State)* (1994), 168 N.R. 75 (F.C.A.); *Broddy v. Alberta (Director of Vital Statistics)* (1982), 41 A.R. 255 (C.A.); *Morine v. L & J Parker Equipment Inc.* 2001 NSCA 53 (CanLII), (2001), 193 N.S.R. (2d) 51 (C.A.); *Gitxsan Treaty Society v. Hospital Employees' Union*, 1999 CanLII 7628 (F.C.A.), [2000] 1 F.C. 135 (C.A.). I do not propose to deal with these cases in detail. It is enough to say that they all involve challenges to legislation on constitutional grounds. None of them supports the conclusion that notice is required under section 57 of the *Federal Court Act* in this case.

D. Do Treaty 8 hunting rights subsist in Wood Buffalo National Park?

[82]The Minister argues that the land now comprising the Wood Buffalo National Park was "taken up" by the Crown when the Park was established, thus placing it outside the geographical limitations of Treaty 8. In the alternative, the Minister argues that the land is "occupied Crown land" to which there is no general right of access to hunt and trap. As a second alternative, the Minister argues that any treaty right to hunt and trap in the area of

the Park has been extinguished by the statute and regulations governing the Park.

(1) Has the land comprising Wood Buffalo National Park been "taken up" by the Crown?

[83]The Judge rejected the argument that the area of Wood Buffalo National Park was "taken up" when the Park was established, because the use of the land as a Park is not a use that is visible and incompatible with continued existence of the hunting rights guaranteed by Treaty 8. I agree with her conclusion, for the reasons she gave.

[84]The leading authority on the question of "taking up" is the judgment of Justice Cory in *R. v. Badger*, 1996 CanLII 236 (S.C.C.), [1996] 1 S.C.R. 771. In that case, three Cree Indians who were entitled to the benefits of Treaty 8 shot moose for food on private land in Alberta. They were appealing their conviction of offences under the *Wildlife Act*, S.A. 1984, c. W-9.1. In one case, the charge was shooting a moose out of season. In the other two cases, the charge was shooting a moose without a hunting licence.

[85]It is important to note that *Badger* involved facts that are not present in this case. The individuals in *Badger* were asserting a treaty right to hunt on private land, not in Wood Buffalo National Park or other federal Crown land. Hunting on private land in Alberta was regulated by provincial law, which brought into play paragraph 12 of the Natural Resources Transfer Agreement (Alberta) (confirmed by the *Constitution Act, 1930*), which reads as follows:

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

[86]The Natural Resources Transfer Agreement is part of the Constitution of Canada by virtue of section 1 of the *Constitution Act, 1930* [20 & 21 Geo.V, c. 26 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 16) [R.S.C., 1985, Appendix II, No. 26]]. However, it plays no part in this case because Alberta laws regarding the hunting of game do not apply in Wood Buffalo National Park.

[87]Justice Cory's statement of the issues in *Badger, supra*, is critical to an understanding of his conclusions. It reads as follows (paragraph 37):

On this appeal, the extent of the existing right to hunt for food possessed by Indians who are members of bands which were parties to Treaty No. 8 must be determined. The analysis should proceed through three stages. First, it is necessary to decide what effect para. 12 of the [Natural Resources Transfer Agreement] had upon the rights enunciated in Treaty No. 8. After resolving which instrument sets out the right to hunt for food, it is necessary to examine the limitations which are inherent in that right. It must be remembered that, even by the terms of Treaty No. 8, the Indians' right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation. Second, consideration must then be given to the question of whether the existing right to hunt for food can be exercised on privately owned land. Third, it is necessary to determine whether the impugned sections of the provincial *Wildlife Act* come within the specific types of regulation which have, since 1899, limited and defined the scope of the right to hunt for food. If they do, those sections do not infringe upon an existing treaty right and will be constitutional. If not, the sections may constitute an infringement of the Treaty rights guaranteed by Treaty No. 8, as modified by the [Natural Resources Transfer Agreement]. In this case the impugned provisions should be considered in accordance with the principles set out in *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075, to determine whether they constitute a *prima facie* infringement of the Treaty rights as modified, and if so, whether the infringement can be justified.

[88]Justice Cory described the hunting rights guaranteed by Treaty 8 as follows (at paragraphs 39-40):

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, for example, to provide the bands with reserves, education, annuities, farm equipment, ammunition, and relief in times of famine or pestilence. However, it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap. The Commissioners wrote:

> 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. (Emphasis added.)

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.

(It is noted that the record in this case includes a copy of the Commissioners' Report quoted by Justice Cory in *Badger*.)

[89]Justice Cory concluded that the Natural Resources Transfer Agreement did not extinguish the right in Treaty 8 to hunt for food. Thus, for Aboriginal people entitled to the benefit of Treaty 8, the only geographic limitation on the right to hunt for food within the area of Treaty 8 is land "taken up" within the meaning of those words in Treaty 8, even if the land is privately owned. Justice Cory did not consider whether, after the enactment of subsection 35(1) of the *Constitution Act, 1982*, the "taking up" land for farms could be a *prima facie* infringement of Treaty 8. That issue did not arise in *Badger*. It does arise in this case, however, and is discussed later in these reasons.

[90]The test to be applied in determining whether land is "taken up" is explained in paragraph 54 of Justice Cory's reasons:

> 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. [My emphasis.]

[91]Justice Cory expanded on this at paragraphs 58- 59:

> 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.
>
> Most of the cases which have considered the geographical limitations on the right to hunt have been concerned

with situations where the hunting took place on Crown land. In those cases, it was held that Crown lands were only "occupied" or "taken up" when they were actually put to an active use which was incompatible with hunting. For example, *R. v. Smith*, reflex, [1935] 2 W.W.R. 433 (Sask. C.A.), considered whether Indians had a right to hunt for food on a game preserve located on Crown land. There, in my view, it was correctly observed at p. 436 that "it is proper to consult th(e) treaty in order to glean from it whatever may throw some light on the meaning to be given to the words" in the [Natural Resources Transfer Agreement]. It was sensibly held at p. 437 that the Indians did not have a right of access to hunt on the game preserve because to do so would be incompatible with the fundamental purpose of establishing a preserve: "a game preserve would be one in name only if the Indians, or any other class of people, were entitled to shoot in it". See also *R. v. Mirasty*, reflex, [1942] 1 W.W.R. 343 (Police Ct.), in which Crown land was taken up for a forest and game preserve; and [*R. v. Mousseau*, 1980 CanLII 194 (S.C.C.), [1980] 2 S.C.R. 89], in which Crown land was taken up for a public road. However, the courts have recognized an existing treaty right to hunt on Crown land taken up as a forest because hunting for food is not incompatible with that particular land use: *R. v. Strongquill*, [1953] 8 W.W.R. (N.S.) 247 (Sask. C.A.). Finally, where limited hunting by non-Indians is permitted on Crown land taken up as a wildlife management area or a fur conservation area, the courts have held that Indians continue to have an unlimited right of access for the purposes of hunting for food: *Strongquill, supra*, at pp. 267 and 271; [*R. v. Sutherland*, 1980 CanLII 18 (S.C.C.), [1980] 2 S.C.R. 451], at pp. 460 and 464-65; and *Moosehunter v. The Queen*, 1981 CanLII 13 (S.C.C.), [1981] 1 S.C.R. 282, at p. 292. [My emphasis.]

[92]Two of the three convictions were upheld on the basis that the land where they were hunting was being visibly used for a purpose that was incompatible with hunting. In one case, the hunting occurred on the land covered with second growth willow and scrub, only one quarter of a mile from a farm house. In the other case, the hunting occurred on what was clearly a farmer's field.

[93]The third person was hunting in an area of uncleared muskeg, with no fences, signs or buildings anywhere near the site of the kill. The land where he was hunting did not meet the "visible, incompatible use test". In his case, it was necessary to go further and consider the constitutional validity of the provisions of the Alberta *Wildlife Act* under which he had been charged. For that purpose, Justice Cory applied the analysis in *Sparrow, supra*. Although *Sparrow* dealt with the infringement of non-treaty Aboriginal rights, Justice Cory found it to be equally applicable to the infringement of Aboriginal treaty rights. He held that the impugned provision of the *Wildlife Act* conflicted with the hunting rights in Treaty 8, as modified by the Natural Resources Transfer Agreement, so that there was a *prima facie* infringement. It was thus necessary to consider whether the infringement was justified. The matter was returned for retrial on that question.

[94]Returning to the present case, the question is this: Do the laws governing Wood Buffalo National Park result in a use of the land that is visibly incompatible with the exercise of the hunting rights guaranteed by Treaty 8? The Judge said no, and I agree.

[95]The Minister argues against that conclusion on the basis of the combined operation of sections 2 and 18 [as am. by S.C. 1913, c. 18, s. 5] of *The Dominion Forest Reserves and Parks Act*, S.C. 1911, c. 10; section 2 of the *Regulations Respecting Game in the Dominion Parks* (P.C. 1919-2415), Order in Council (P.C. 1922-2498), which created Wood Buffalo National Park, and Order in Council (April 30, 1926), which expanded its boundaries.

[96]The relevant parts of sections 2 and 18 of *The Dominion Forest Reserves and Parks Act*, which came into force in 1911, read as follows:

2. All Dominion lands within the respective boundaries of the reserves mentioned in the schedule to this Act are hereby withdrawn from sale, settlement and occupancy under *The Dominion Lands Act* or any other Act, or any regulations made under any Act with respect to mines or mining or timber or timber licenses or leases or any other matter whatsoever; and after the passing of this Act no Dominion lands within the boundaries of the said reserves shall be sold, leased or otherwise disposed or, or be located or settled upon, and no person shall use or occupy any part of such lands, except under the authority of this Act or of regulations made thereunder.

. . .

18. The Governor in Council may, by proclamation, designate such reserves or areas within forest reserves or such other areas as he sees fit, the title to which is vested in the crown in the right of Canada, to be and to be known as Dominion Parks, and, they shall be maintained and made use of as public parks and pleasure grounds for the benefit, advantage and enjoyment of the people of Canada, and the provision of this Act governing forest reserves, excepting section 4, shall also apply to the Dominion Parks. [My emphasis.]

[97]In 1919, the Governor in Council enacted the *Regulations Respecting Game in the Dominion Parks*. Regulation 2 reads as follows:

Except as hereinafter provided, no person shall at any time chase, harass or pursue, hunt, shoot at, trap, take, wound, kill, capture or destroy any game within a Dominion Park.

[98]On December 18, 1922, Wood Buffalo National Park was created by Order in Council P.C. 1922- 2498 as a park under *The Dominion Forest Reserves and Parks Act*. The record does not indicate that the area of the Park had first been designated a forest reserve, as the Act appears to contemplate, but I assume nothing turns on that. The Order in Council indicates that the purpose of creating the Park was to safeguard the "Wood-bison, or so-called Wood-buffalo". It is not disputed that the Park was validly created.

[99]It is the position of the Minister that the general prohibition on hunting, as set out in Regulation 2, applied immediately to Wood Buffalo National Park, and as such a prohibition is necessarily inconsistent with the continued existence of a treaty right to hunt, the treaty right ceased to exist within the Park when it was created.

[100]A somewhat similar proposition was addressed in *R. v. Sundown*, 1999 CanLII 673 (S.C.C.), [1999] 1 S.C.R. 393. The issue in that case was whether Mr. Sundown, an Indian who was subject to Treaty No. 6 [1876], was in breach of a provincial park regulation when he constructed a log cabin within a Saskatchewan provincial park for use as shelter when he was hunting and fishing within the park. The regulation prohibited the construction or occupation of a temporary or permanent dwelling on park land without permission. Mr. Sundown was acquitted because the construction of the cabin was reasonably incidental to his Aboriginal hunting right as it had traditionally been exercised, and was not incompatible with the use of the land as a provincial park. The reasoning of Justice Cory on the question of incompatible use is instructive for this case (paragraph 41):

Thus, if the exercise of the respondent's hunting right were wholly incompatible with the Crown's use of the land, hunting would be disallowed and any rights in the hunting cabin would be extinguished. 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 as 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.

[101]Despite Regulation 2, there is no evidence that a total prohibition on hunting was ever recognized or enforced in Wood Buffalo National Park against Aboriginal people who were entitled to the benefit of Treaty 8. There is, however, evidence to the contrary. Indeed, the Minister concedes that those with Aboriginal treaty rights who had habitually hunted and trapped in the area of the Park were allowed to continue to do so, subject only to regulation.

[102]This is confirmed by a notice dated August 1, 1923, published over the name "O.S. Finnie, Director" by the government authority then charged with administering Wood Buffalo National Park. The notice reads as follows (Appeal Book, Volume 5, at page 2638):

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.

[103]Mr. Finnie later wrote, in a letter dated December 24, 1925, that he had never conceded that Treaty Indians had the right under Treaty 8 to hunt within Wood Buffalo National Park (Appeal Book, Volume 6, at page 2779). Other notes and correspondence from Mr. Finnie are similar (Appeal Book, Volume 6, at pages 2766-2767). Those writings, taken at face value, may represent Mr. Finnie's interpretation of Treaty 8, but they are not capable

of establishing that the legislation and regulations governing Wood Buffalo National Park were incompatible with the continued existence of Aboriginal hunting rights in the Park.

[104]More recent government publications relating to Wood Buffalo National Park confirm that there has been no interruption in Aboriginal hunting in the area of the Park. The 1984 Wood Buffalo National Park Management Plan (Appeal Book, Volume 2, at pages 890-1018) states as follows at page 904:

The original intent had been to have the park free of hunting and trapping. However, this never occurred and natives of treaty status were permitted to continue hunting and trapping, subject to certain closed seasons and regulations. [My emphasis.]

[105]The following statement is taken from the Wood Buffalo National Park website as it appears in the record (Appeal Book, Volume 5, at page 2639):

Archeological evidence shows that Aboriginal people have inhabited the Wood Buffalo region for more than 8000 years, long before fur traders arrived in the early 1700s. The Europeans called the people they met in this region Beaver, Slavey and Chipewyan. The Beaver and Slavey left the area as the fur trade moved west. Today, the communities around the park are mostly made up of Cree, Chipewyan, Metis and non-aboriginal people.

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 an important part of the park's cultural history. [My emphasis.]

[106]The fact is that Aboriginal people and others are permitted to hunt within Wood Buffalo National Park, subject to regulations. It is argued for the Minister that permission for hunting within Wood Buffalo National Park is not explained by the continued existence of hunting rights in Treaty 8, but is merely an instance in which the Crown is exercising its right to regulate activities within the Park. There is some evidence that contradicts this theory. Indeed, a note from Mr. Finnie suggests (but does not prove) a different reason why no steps were taken to prohibit hunting by Treaty Indians within the Park. The note is dated December 21, 1925 and reads in part as follows (Appeal Book, Volume 6, at page 2777):

At present those Treaty Indians who are natives of the Wood Buffalo Park District, or those who formerly hunted or trapped in that area, before it was constituted a park, are permitted to carry on their hunting and trapping operations as formerly. If we had not allowed the Treaty Indians to hunt and trap in the Park there would have developed such opposition to the creation of the Park that we would not have been able to secure it at all. This opposition would have developed from the Indian Department and from Bishop Breynat.

[107]The meaning of this note is unclear. The record contains no material from the "Indian Department" to indicate what position they might have taken with respect to hunting rights within Wood Buffalo National Park. Bishop Breynat was a missionary who worked in northern Canada for many years. There is some evidence that he may have witnessed the signing of Treaty 8 (Appeal Book, Volume 6, at page 2784).

[108]In any event, I am not persuaded that it is necessary to determine what motivated the Crown, in 1922 or in later years, to permit the continuation of hunting within Wood Buffalo National Park. The important question is whether, having done so, the Minister can now contend that the use of the area of Wood Buffalo National Park as a park is visibly incompatible with the continued existence of hunting rights under Treaty 8. The record establishes no incompatibility at all, visible or otherwise. It follows that the Judge was correct to conclude that the area of Wood Buffalo National Park has not been removed from the area of Treaty 8 by having been "taken up".

(2) Is the land comprising Wood Buffalo National Park "occupied Crown land"?

[109]The Minister's second argument is that the area of the Park is occupied Crown land or is land to which the Indians of Treaty 8 do not have a right of access for the purpose of hunting or trapping. This argument is based on paragraph 12 of the Natural Resources Transfer Agreement, reproduced here for ease of reference:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time

shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access. [My emphasis.]

[110]This argument was not raised in the Federal Court Trial Division, and as a result there was no evidence led to address the issues raised by this argument and it was not addressed by the Judge. Counsel for Mikisew Cree First Nation argued, and counsel for the Minister conceded in oral argument, that the area of Wood Buffalo National Park is not subject to provincial laws regulating hunting and trapping.

[111]Given the state of the record, I propose to reject this argument without extensive discussion. It is sufficient to say that the Minister has relied on only two cases. One of the cases is *R. v. Catarat*, 2001 SKCA 50 (CanLII), [2001] 6 W.W.R. 681 (Sask. C.A.), in which provincial Crown land in northern Saskatchewan that had been leased to the federal government for use as a military weapons range was "occupied Crown land" for the purposes of the Natural Resources Transfer Agreement because it was in active use for a purpose incompatible with hunting. The other case is *R. v. Smith*, reflex, [1935] 2 W.W.R. 433 (Sask C.A.), which considered the status of an area designated in a provincial statute as a game preserve in which all hunting was prohibited. The basis of the decision was that laws governing the game preserve were clearly inconsistent with the continuation of Aboriginal hunting rights (see the comments of Justice Cory on this case at paragraph 59 of *Badger, supra*). According to the record in this case, the hunting regulations for Wood Buffalo National Park have proved to be compatible with the continuation of Aboriginal hunting rights under Treaty 8 within the Park. On that basis, both *Catarat* and *Smith* are distinguishable on their facts.

(3) Have hunting rights been abolished by statute within Wood Buffalo National Park?

[112]The Crown's other alternative argument is that hunting rights under Treaty 8 were abolished by statute. The Judge rejected that argument, and I agree with her. Before subsection 35(1) of the *Constitution Act, 1982*, came into force, an Aboriginal right could be extinguished by competent legislation as easily as a common law right. The test for extinguishment was explained as follows in *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075, at pages 1098-1099:

In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in [*Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.)], at p. 568:

> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.

See also *Attorney-General for Ontario v. Bear Island Foundation* [reflex, (1984), 49 O.R. (2d) 353 (H.C.)] at pp. 439-40. That in Judson J.'s view was what had occurred in [*Calder v. Attorney General of British Columbia*, 1973 CanLII 4 (S.C.C.), [1973] S.C.R. 313], where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be `clear and plain'". (Emphasis added.) The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

[113]Although *Sparrow* dealt with the extinguishment of Aboriginal rights that are not protected by a treaty, the same principles apply to the pre-1982 extinguishment of Aboriginal treaty rights. This was recognized by Justice Binnie when he said this at paragraphs 47-48 of *R. v. Marshall*, 1999 CanLII 665 (S.C.C.), [1999] 3 S.C.R. 456:

On June 25, 1761, following the signing of the Treaties of 1760-61 by the last group of Mi'kmaq villages, a ceremony was held at the farm of Lieutenant Governor Jonathan Belcher, the first Chief Justice of Nova Scotia, who was acting in the place of Governor Charles Lawrence, who had recently been drowned on his way to Boston. In reference to the treaties, including the trade clause, Lieutenant Governor Belcher proclaimed:

> The Laws will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience.

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. On April 17, 1982, however, this particular type of "hedge" was converted by s. 35(1) into sterner stuff that could only be broken down when justified according to the test laid down in *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075, at pp. 1112 *et seq.*, as adapted to apply to treaties in *Badger*, *supra*, per Cory J., at paras. 75 et seq. See also *R. v. Bombay*, reflex, [1993] 1 C.N.L.R. 92 (Ont. C.A.). The fact the content of Mi'kmaq rights under the treaty to hunt and fish and trade was no greater than those enjoyed by other inhabitants does not, unless those rights were extinguished prior to April 17, 1982, detract from the higher protection they presently offer to the Mi'kmaq people.

[114]I have already rejected two of the Minister's arguments on the basis that there is nothing about the establishment of Wood Buffalo National Park that is incompatible with the exercise of the hunting rights guaranteed by Treaty 8. Given that, it is impossible to accept, in the words of Justice Mahoney in *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development* [[1980] 1 F.C. 518 (T.D.)], that the "necessary effect" of the legislation creating Wood Buffalo National Park or governing its administration was to extinguish the hunting rights in Treaty 8, or that the legislation was not consistent with the continuation of those rights.

(4) Conclusion

[115]For these reasons, the Judge was correct to conclude that the hunting rights guaranteed in Treaty 8 subsist in the land comprising Wood Buffalo National Park, subject to the applicable regulations.

E. *Prima facie* infringement

[116]The Judge held that the approval of the winter road constituted a *prima facie* infringement of the hunting rights guaranteed by Treaty 8 which, according to *Sparrow, supra*, cannot be permitted to stand unless justified. Two legal issues have been raised in this context. The first issue, which has been raised only by Alberta, is whether the establishment of the winter road is a "taking up" of land that is contemplated by the terms of Treaty 8. The second issue, which is relevant only if this Court does not find that the establishment of the road is contemplated by the terms of Treaty 8, is whether the Judge was correct to find a *prima facie* infringement.

(1) The establishment of the road as a "taking up"

[117]Alberta argues that, for the purposes of Treaty 8, the establishment of the winter road is a "taking up" by the Crown of the 200-metre-wide corridor within which the road will pass, which automatically excludes that area from the area in which Treaty 8 hunting rights can be exercised (see the discussion relating to geographical limits of Treaty 8, under the heading "(1) Has the land comprising Wood Buffalo National Park been `taken up' by the Crown?").

[118]The relevant portion of Treaty 8 is reproduced for ease of reference:

> 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. [My emphasis.]

[119]Alberta's argument is that a "taking up" of land is contemplated by Treaty 8 and therefore cannot be held to be even a *prima facie* infringement within the *Sparrow, supra*, analysis. If that is the case, no justification is required, and the Minister had no duty to consult with Mikisew Cree First Nation before approving the construction of the winter road. In my view, this argument is not sound, but even if it has merit, it should not

determine the outcome of this appeal.

[120]As I understand Alberta's argument, it is based on the premise that Treaty 8 should be interpreted according to the principles applicable to contracts. One of those principles is that if the terms of a contract give one party a unilateral right to take a certain action, the contract is not breached if that action is taken. The quoted part of Treaty 8, read literally, gives the Crown the unilateral right to remove land permanently from the area within which the Treaty 8 hunting and trapping rights may be exercised in order to use the land for "settlement, mining, lumbering, trading or other purposes." Alberta argues, based on that literal approach, that because the right to "take up" land is granted by Treaty 8 itself, it is unfettered by an obligation on the part of the Crown to consult, to negotiate, or even to give advance notice to Mikisew Cree First Nation.

[121]A similar argument was rejected by Justice Finch in *Halfway River First Nation v. British Columbia (Ministry of Forests)* 1999 BCCA 470 (CanLII), (1999), 178 D.L.R. (4th) 666 (B.C.C.A.). The issue in that case was the constitutional validity of a timber-cutting permit granted by a district manager pursuant to a provincial statute. The Halfway River First Nation challenged the validity of the permit on a number of grounds, one of which was that the area of the permit was an area in which they had hunting rights pursuant to Treaty 8. Their challenge succeeded in the British Columbia Supreme Court. An appeal to the British Columbia Court of Appeal was dismissed, with one judge dissenting. Justice Finch (as he then was) and Justice Huddart agreed that the appeal should be dismissed, but for different reasons. Because they characterize the problem differently, only Justice Finch considered it necessary to deal with the "taking up" argument.

[122]Justice Finch characterized the issue as a problem of the interpretation of Treaty 8. He extracted from *Saanichton Marina Ltd. v. Tsawout Indian Band* reflex, (1989), 57 D.L.R. (4th) 161 (B.C.C.A.); *Badger, supra*; and *R. v. Sioui*, 1990 CanLII 103 (S.C.C.), [1990] 1 S.C.R. 1025, the principles applicable to the interpretation of Aboriginal treaties. I paraphrase as follows his summary of those principles:

(1) A treaty should be given a fair, large and liberal construction in favour of the Aboriginal signatories.

(2) A treaty must be construed not according to the technical meaning of its words, but in the sense that they would naturally be understood by the Aboriginal signatories.

(3) As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned.

(4) Any ambiguities or doubtful expressions in the wording of a treaty must be resolved in favour of the Aboriginal signatories. Any limitation on the rights of the Aboriginal signatories under a treaty must be narrowly construed.

(5) Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content. Courts must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration.

[123]In his discussion of the "taking up" issue as it was presented in that case, Justice Finch noted that as section 35 of the *Constitution Act, 1982* elevated treaty rights to constitutional rights, it could be argued that the right of the Crown to "take up" land covered by Treaty 8 is a Crown right that itself might have achieved constitutional status. Assuming, without deciding, that the Crown's right to "take up" has constitutional status, that right cannot be stronger than any other constitutional power of the Crown, including the constitutional power that the Crown sought to exercise in *Sparrow, supra*. As Justice Finch said, at paragraph 129 of *Halfway River*, *supra*:

In my view the fact that the Crown asserts its rights under Treaty 8 can place it in no better position vis-a-vis a competing or conflicting Aboriginal treaty right than the position the Crown enjoys in exercising the powers granted in either s. 91 or 92 of the *Constitution Act, 1867*.

[124]Justice Finch concluded that the granting of a licence to cut timber in an area in which hunting rights are guaranteed by Treaty 8 is a *prima facie* infringement of the hunting right, and that the Crown had an obligation to consult. In other words, he applied the *Sparrow* analysis despite the fact that Treaty 8 appears to permit the Crown to act unilaterally to reduce the geographic area of the hunting rights by "taking up" land for one of the specified purposes.

[125]In my view, the analysis of Justice Finch is correct. It follows that even if the establishment of the winter road is a "taking up" of the 200-metre-wide road corridor, the "taking up" could be a *prima facie* infringement of the Treaty 8 hunting rights that must be justified according to the test in *Sparrow*.

[126]Even if I am wrong to accept the analysis of Justice Finch on this point, and the *Sparrow* analysis has no application upon a "taking up" of land within the areas covered by Treaty 8, I would nevertheless decline to determine this appeal on the ground that the approval of the winter road was a "taking up". It appears from paragraph 84 of the reasons for judgment that in the Court below, the "taking up" argument was mentioned by counsel for the Minister "as an aside". At the hearing of this appeal, counsel for the Minister indicated that this argument had been abandoned, but the Minister's other counsel later clarified that the Minister was simply not relying on it.

[127]The Minister has always been aware of the "taking up" argument now propounded by Alberta. I do not say that Alberta was not entitled to make that argument in this Court. The Minister could have done so as well. However, for reasons that the Minister has not disclosed and need not disclose, she has chosen not to defend her decision on that ground. In my view, it would be wrong in these circumstances for this Court to affirm the Minister's decision on a ground upon which the Minister herself chooses not to rely.

(2) Was the winter road approval a *prima facie* infringement?

[128]I will now consider the argument of the Minister that the Judge erred in finding a *prima facie* infringement. The factual basis for that finding is stated at paragraph 98 of the reasons:

In my opinion, the applicant has demonstrated the following impacts on its right to trap and hunt in [Wood Buffalo National Park]:

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 [*sic*] 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.

[129]The Minister argues that the finding of *prima facie* infringement of a treaty right is incorrect in law because it was made without taking into account the factors required by *Sparrow*. The Minister also argues that some of the Judge's factual conclusions had no evidentiary foundation.

[130]I will deal first with the *Sparrow* test for *prima facie* infringement. In *Sparrow*, Chief Justice Dickson and Justice La Forest said (at page 1112) that the determination of whether a limitation to an Aboriginal right constitutes a *prima facie* infringement requires consideration of three questions: (1) whether the limitation is unreasonable, (2) whether the limitation imposes unreasonable hardship, and (3) whether the limitation precludes the exercise of the right by the preferred means.

[131]However, it has subsequently been recognized that those three questions are more relevant to the determination of justification than to the determination of *prima facie* infringement (see, for example, the dissenting reasons of Justice McLachlin, as she then was, in *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507, at paragraph 297). The current view is that the *Sparrow* questions are factors that are relevant to the determination of *prima facie* infringement, but they are not determinative. This is explained by Chief Justice Lamer, as he then was, in *R. v. Gladstone*, 1996 CanLII 160 (S.C.C.), [1996] 2 S.C.R. 723, at paragraph 43:

The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. [My emphasis.]

[132]It seems to me that, after *Gladstone*, *Sparrow* cannot be taken as authority for the proposition that a finding of *prima facie* infringement is wrong in law unless it is preceded by an express consideration of each of the three *Sparrow* questions. The point of the enquiry into the question of *prima facie* infringement, in the context of this case, is to determine whether the decision to construct the winter road would result in a meaningful limitation to the rights of Mikisew Cree First Nation to hunt and trap within the boundaries of Wood Buffalo National Park. That is how the Judge approached the issue, and in my view it is the correct approach.

[133]The findings of fact quoted above indicate that the Judge was aware of what were obviously relevant facts: the size of the Park, the size of the road and the corridor in which firearms would be prohibited, the probable impact of the road on wildlife, the location of the road in relation to the reserve lands of Mikisew Cree First Nation, and their traplines and hunting areas, and the role of hunting and trapping in the life of Mikisew Cree First Nation. The record discloses no palpable and overriding error in any of her findings of fact. She concluded from those facts that the construction of the road would have an adverse effect on hunting and trapping that is sufficient to meet the test of *prima facie* infringement. I see no valid basis for interfering with that conclusion, despite the fact that the Judge did not consider it useful to address the three *Sparrow* questions expressly.

[134]In any event, I am not persuaded that the Judge's conclusion on *prima facie* infringement would have been any different if she had specifically addressed the three *Sparrow* questions. The questions, phrased in the factual context of this case, would be: (1) whether the construction of the winter road unreasonably limits the exercise of hunting and trapping rights, (2) whether that limitation imposes unreasonable hardship, and (3) whether that limitation precludes the exercise of the right by the preferred means. I take from *Gladstone, supra*, that a negative answer to any of these questions would not preclude a finding of *prima facie* infringement. It would appear to follow that a positive answer to only one of the questions could be a sufficient basis for such a finding.

[135]I will consider only the third question. I refer to the Judge's findings of fact as to the proximity of the proposed winter road to the preferred hunting areas and traplines of Mikisew Cree First Nation, the probable disruption to the wildlife, and the restrictions on the use of firearms within the 200-metre road corridor. In my view, the inescapable conclusion is that, for any Mikisew Cree First Nation members who typically hunt or trap near the area of the road corridor, the construction of the winter road will restrict their preferred means of hunting and trapping. It is not particularly relevant to the third question that Wood Buffalo National Park is large and the

road corridor is small by comparison, because the preferred means of hunting and trapping is integrally linked to the very place where the proposed road will be constructed. It follows that the Judge made no error in concluding that the construction of the winter road would limit hunting and trapping to an extent that would constitute a *prima facie* infringement of the rights of Mikisew Cree First Nation in Treaty 8.

F. Justification

[136]The next step is to consider whether the infringement of Treaty 8 is justifiable. This is explained as follows in *Sparrow, supra*, at pages 1109-1110:

There is no explicit language in [subsection 35(2) of the *Constitution Act, 1982*] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in [*Nowegijick v. The Queen*, 1983 CanLII 18 (S.C.C.), [1983] 1 S.C.R. 29] and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen, supra*.

. . .

Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

(1) First branch: the objective of the decision

[137]There are two branches to the justification analysis. The first branch relates to the objective of the legislation or government action that causes or constitutes the *prima facie* infringement of the treaty right in question. The first branch is explained in *Sparrow* as follows (at page 1113):

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(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial. [My emphasis.]

[138]The closing words of the above quotation introduce the notion that it may be possible to balance Aboriginal rights with the rights or needs of other people. However, *Sparrow* takes a cautious approach to that possibility, expressly rejecting the argument that the "public interest" could justify a breach of an Aboriginal right. The following comments appear at page 1113:

We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

[139]To similar effect are these comments of then Chief Justice Lamer in *Gladstone, supra*, at paragraphs 71-75:

Although the aboriginal rights recognized by s. 35(1) are . . . fundamentally different from the rights in the *Charter*, the same basic principle--that the purposes underlying the rights must inform not only the definition of the rights but also the identification of those limits on the rights which are justifiable--applies equally to the justification analysis under s. 35(1). [Underlining added.]

. . .

Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those [aboriginal] rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation. [Underlining added.]

The recognition of conservation as a compelling and substantial goal demonstrates this point. Given the integral role the fishery has played in the distinctive cultures of many aboriginal peoples, conservation can be said to be something the pursuit of which can be linked to the recognition of the existence of such distinctive cultures. Moreover, because conservation is of such overwhelming importance to Canadian society as a whole, including aboriginal members of that society, it is a goal the pursuit of which is consistent with the reconciliation of aboriginal societies with the larger Canadian society of which they are a part. In this way, conservation can be said to be a compelling and substantial objective which, provided the rest of the *Sparrow* justification standard is met, will justify governmental infringement of aboriginal rights. [Underlining added.]

Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment. [Italic and underlining in original.]

[140]These comments were essentially repeated by then Chief Justice Lamer the following year in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010, at paragraph 161.

[141]*R. v. Adams*, 1996 CanLII 169 (S.C.C.), [1996] 3 S.C.R. 101, presents an example of a situation where the broader public interest did not justify a *prima facie* infringement of an Aboriginal right. The result of that case is summarized by then Chief Justice Lamer, at paragraph 58:

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.

[142]The Judge analyzed all of the jurisprudence referred to above, noting finally that Justice Binnie, in *R. v. Marshall, supra*, makes no mention of accommodating economic and non-native interests with Aboriginal rights. She reached the following conclusion (at paragraph 122 of her reasons):

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.

[143]Justice Binnie's decision in *Marshall* dealt with the problems of identifying an Aboriginal right through the interpretation of a treaty. He did not discuss justification. However, I agree with the Judge's conclusion that the objective of the winter road, which is to enhance the economic and social interests of all of the people who live in Fort Smith and other areas in and near Wood Buffalo National Park, is not sufficiently compelling and substantial to override the constitutionally protected right of Mikisew Cree First Nation to hunt in the Park.

[144]I accept that the proposed winter road is likely to be an advantage to its proponents, and others who live in the area. There may even be some advantages for Mikisew Cree First Nation. However, there is no winter road now, and there has been no such road for nearly 40 years. Mikisew Cree First Nation, whose members live, hunt and trap in the immediate vicinity of the proposed road, clearly believe that, for them, any possible advantages do not outweigh the disadvantages. In the context of a proposed justification for the *prima facie* infringement of an Aboriginal right, an objective cannot be pressing and substantial unless it relates in some way to the long-term enhancement or preservation of the Aboriginal right that is being infringed (such as the conservation of natural resources), or the objective is overwhelmingly in the interests of the population as a whole. Like the Judge, I cannot accept that the approval of the winter road meets either test.

[145]Having reached the conclusion that the Judge was correct in her conclusion on the first branch of the justification test, it is not necessary to go further and consider whether the Judge was also correct to find that the Minister also failed the second branch of the justification test, which is whether the infringement is consistent with the role of the Crown as having a positive obligation to honour all obligations undertaken in Aboriginal treaties. However, I will consider that aspect of her judgment.

(2) Second branch: the Crown's obligation as fiduciary

[146]The second branch of the justification test has its origins in the decision of the Supreme Court of Canada in *Guerin et al. v. The Queen et al.*, 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335 and *Regina v. Taylor and Williams* (1981), 34 O.R. (2d) 360 (C.A.). The connection is explained as follows by then Chief Justice Lamer in *Sparrow, supra*, at page 1108:

The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. . . . [T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

[147]The obligation of the Crown in this regard requires, at least, meaningful consultation before a decision is made that will infringe an Aboriginal right. Meaningful consultation is described as follows in *Delgamuukw*, *supra*, at paragraph 168:

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. [Underlining added.]

[148]The Judge, correctly, did not limit her analysis of the second branch of the justification test to the question of meaningful consultation. She also touched on the issues of priority, minimal infringement and compensation, keeping her focus throughout on the central question of whether or not the actions of the Minister were consistent with its fiduciary obligations (her approach is clearly described at paragraphs 124-128 of her reasons). However, the basic complaint of Mikisew Cree First Nation is centred on the failure to consult. The question of the adequacy of consultation warranted the detailed consideration it was given by the Judge.

[149]The Judge's conclusion on the question of consultation is stated as follows, at paragraph 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.

[150]I agree with this conclusion. The record discloses that Mikisew Cree First Nation had opportunities to comment on the proposed winter road, in the context of the environmental assessment, and did not do so. The record also discloses that when Mikisew Cree First Nation did attempt to engage the Minister in discussions, there was no response. I agree with counsel for the Minister that in some circumstances, meaningful consultation in relation to an infringement of a treaty right may occur in conjunction with consultations on other issues, such as environmental impact, and that the First Nation has an obligation to participate in any consultations actively and in good faith.

[151]However, even if multi-purpose consultations are possible in theory, there must be evidence that First Nation treaty rights are on the table, are understood, and are addressed. It is difficult to find that meaningful consultations have occurred if the Minister has failed to hear or respond to the attempts of the First Nation to put its treaty rights on the table.

[152]In this case, there is no evidence of any good faith effort on the part of the Minister to understand or address the concerns of Mikisew Cree First Nation about the possible effect of the road on the exercise of their Treaty 8 hunting and trapping rights. It is significant, in my view, that Mikisew Cree First Nation was not even told about the realignment of the road corridor to avoid the Peace Point Reserve until after it had been determined that the realignment was possible and reasonable, in terms of environmental impact, and after the road was approved. That invites the inference that the responsible Crown officials believed that as long as the winter road did not cross the Peace Point Reserve, any further objections of the Mikisew Cree First Nation could be disregarded. Far from meaningful consultation, that indicates a complete disregard for the concerns of Mikisew Cree First Nation about the breach of their Treaty 8 rights.

[153]As indicated above, the Judge touched on the other *Sparrow, supra*, factors, but in each case reached a conclusion that favoured the position of Mikisew Cree First Nation. Of particular interest is her discussion of the Minister's argument that reasonable steps were taken to mitigate the effect of the winter road on hunting and trapping near the road. Those steps might well be reasonable, and at the end of the day may prove to be sufficient. However, the Judge found, and it is not disputed, that Mikisew Cree First Nation was not consulted on these measures and, more importantly, that these measures related to a route for the proposed road that was kept secret from Mikisew Cree First Nation until after the critical decision had been made. It was not for the Judge, and it is not for this Court, to speculate about the adequacy of the mitigation steps devised as the result of a process that was fundamentally flawed.

G. Conclusion

[154]I would dismiss the appeal with costs.