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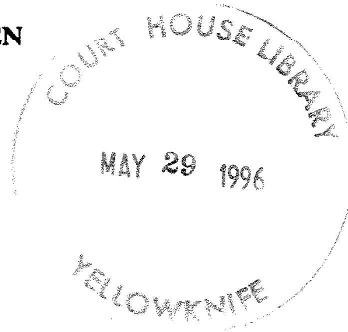
IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

BENOIT NOEL



REASONS FOR JUDGMENT OF
THE HONOURABLE CHIEF JUDGE R.W. HALIFAX
FILED: AUGUST 25, 1995

APPEARANCES:

MR. J. DONIHEE,
MR. J. MCCONNELL and
MS. J. MERCREDI: Counsel for the Crown
MR. G. PHILLIPS: Counsel for the Defendant

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

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- and -

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REASONS FOR JUDGMENT

The Accused is charged with two summary conviction offences arising out of one incident as follows:

> On or about 94.11.11 at or near Yellowknife, in the Northwest Territories, Benoit Noel of Dettah did unlawfully commit the following offence contrary to section 2 of the Regulations made under the **Area Management Act**, discharge firearm on Ingraham Trail Development Areas Firearms Regulations
>
> and further
>
> On or about 94.11.11 at or near Yellowknife, in the Northwest Territories, Benoit Noel of Dettah did unlawfully commit the following offence contrary to section 37 of the **Wildlife Act**, hunting without regard for safety.

An Agreed Statement of Facts dated May 15, 1995 was filed in this matter on behalf of the Accused and the Government of the Northwest Territories which has carriage of this prosecution. This agreement is as follows:

1. **THAT** Noel Benoit (the "Accused" below) is an "aboriginal person" within the meaning of section 35 of the **Constitution Act**, 1982.

2. **THAT** the Accused was exercising his Treaty No. 8 right to hunt which applies in the general area of the Ingraham Trail (Highway No. 4 or "the Highway" below) where the offences are alleged to have taken place. The Government of the Northwest

Territories makes this admission solely for the purposes of this litigation. This is not to be construed as any general admission as to the rights of the Accused. Notwithstanding the generality of the foregoing, the Government of the Northwest Territories does not admit that the Treaty No. 8 right to hunt applies within 1.5 kilometres of the centreline of Highway No. 4.

3. **THAT** the Accused is a member of the Yellowknives Dene Band. The Yellowknives Dene Band are adherents to Treaty No. 8, said adhesion No. 4 having been made July 25, 1900 at Fort Resolution, Northwest Territories, between Her Majesty's Government of the Dominion of Canada and the Chiefs of the Yellowknives Indians. Members of said Band are covered by the terms of Treaty No. 8.

4. **THAT** the Accused's Treaty number is 7630027101.

5. **THAT** the Accused was hunting for food and that he discharged a firearm to kill a caribou within the corridor specified as Area B in the Ingraham Trail Development Areas Firearms Regulations.

The trial of these two charges were joined as such arose out of the same incident. Further, the trial was divided into two parts by agreement. Part One being evidence relating to the actual offence, and Part two being further evidence relating to the constitutional challenge.

PART ONE - THE OFFENCES:

The evidence disclosed that the Accused and Mr. Beaulieau went hunting caribou along the Ingraham Trail during the day of November 11, 1994. The Accused shot a caribou for food at approximately kilometre 61 along the Ingraham Trail. It is clear from both the evidence of the Crown and Defence that the Accused discharged a .3030 rifle well within 1.5 kilometres of the Ingraham Trail at the time he shot the caribou. The kill site was approximately 150 feet on the north side of the roadway, and the Accused discharged his rifle at a point approximately 300 feet to the north side of the road and away from the road. After the caribou was hit with the first shot, it moved to the area of the kill site where it went down. This all occurred within 1.5 kilometres of the Ingraham Trail.

Pursuant to the **Area Development Act** RSNWT 1988 Ch. A-8 section 6 the Commissioner, upon the recommendation of the Minister, made the Ingraham Trail Development Areas Firearm Regulations, which created two development areas know as Ingraham Trail Development Area A and Ingraham Trail Development Area B. These regulations were declared in force on or about October 26th, 1993 in the following form:

AREA DEVELOPMENT ACT

INGRAHAM TRAIL DEVELOPMENT AREAS FIREARM REGULATIONS

The Commissioner, on the recommendation of the Minister, under section 6 of the **Area Development Act** and every enabling power, makes the **Ingraham Trail Development Areas Firearm Regulations**.

1. The Ingraham Trail development areas are delimited in accordance with the descriptions in the Schedule and shall be known by the names respectively assigned to them.

2. No person shall discharge or cause to be discharged a firearm within Ingraham Trail Development Area A or Ingraham Trail Development Area B.

3. These regulations apply according to their terms before they are published in the **Northwest Territories Gazette**.

SCHEDULE

(Section 1)

INGRAHAM TRAIL DEVELOPMENT AREA A

(a) All that portion of the Northwest Territories lying within the boundaries described as follows:

(b) Commencing at the point of intersection of the centreline of the travelled portion of Ingraham Trail Highway No. 4 with the eastern boundary of the City of Yellowknife;

(c) thence due north following the City of Yellowknife boundary to its intersection with a line parallel to and 1.5 km from the centreline of the travelled portion of the Ingraham Trail Highway No. 4;

(d) thence easterly following a line parallel to and 1.5 km from the centreline of the travelled portion of Ingraham Trail Highway No. 4 to its intersection with 113° 43'W;

(e) thence due south in a straight line along 113° 43'W passing through the centreline of the travelled portion of Ingraham Trail Highway No. 4 to its intersection with a line parallel to and 1.5 km from the centreline of the travelled portion of the Ingraham Trail Highway No. 4;

(f) thence westerly following a line parallel to and 1.5 km from the centreline of the travelled portion of Ingraham Trail Highway No. 4 to its intersection with the eastern boundary of the City of Yellowknife:

(g) thence north along the City of Yellowknife boundary to the point of commencement;

(h) all being described with reference to the appropriate map issued from the Canada Map Office, Department of Energy, Mines and Resources on a scale of 1:250,000 (1 inch = 4 miles).

INGRAHAM TAIL DEVELOPMENT AREA B

(a) All that portion of the Northwest Territories lying within the boundaries described as follows:

(b) Commencing at the point of intersection of the centreline of the travelled portion of Ingraham Trail Highway No. 4 with 113° 34'W;

(c) thence due north following 113° 34'W to its intersection with a line parallel to and 1.5 km from the centreline of the travelled portion of the Ingraham Trail Highway No. 4;

(d) thence easterly and northeasterly following a line parallel to and 1.5 from the centreline of the travelled portion of the Ingraham trail Highway No. 4 to a point west of the most northerly end point of the travelled portion of the Ingraham Trail Highway No. 4;

(e) thence following an arc that has as its centre a point 1.5 km north of the most northerly end point of the centreline of the travelled portion of Ingraham Trail Highway No. 4 and continuing to a point east of the travelled portion of the Ingraham Trail Highway No. 4;

> (f) thence southwesterly and westerly following a line parallel to and 1.5 km from the centreline of the travelled portion of Ingraham Trail Highway No. 4 to its intersection with 113° 34'W;
>
> (g) thence north along 113° 134'W to the point of commencement;
>
> (h) all being described with reference to the appropriate map issued from the Canada Map Office, Department of energy, Mines and Resources on a scale of 1:250,000 (1 inch = 4 miles).

There is no doubt upon the evidence presented that the Accused discharged a firearm within the area designated as Ingraham Trial Development Area B. Assuming the Ingraham Trail Development Areas Firearm Regulations have been properly legislated and are enforceable against the Accused, I am more than satisfied that the Accused breached the said Regulation as alleged.

With regard to the charge under section 37 of the **Wildlife Act,** there is no evidence of unsafe hunting. Other than the accused's hunting partner, there were no other persons in the area. There were cabin lots about two kilometres away but behind a ridge from where the shooting occurred. The accused shot in a direction away from the road with the ridge as a backstop some distance beyond the caribou which was shot. Only one shot was fired which hit the caribou and resulted in the kill. Under these circumstances, the prosecution had not shown that the hunting involved was without regard for safety. As the onus on the prosecution has not been met, I find the accused not guilty of the charge under the **Wildlife Act**.

PART TWO - THE CONSTITUTIONAL CHALLENGE:

No issue has been taken or notice given that the **Area Development Act** is ultra vires The Commissioner in Council in light of the **Northwest Territories Act** and the **Territorial Lands Act**. Ultra vires in the sense that this statute is beyond the legislative competence, as it proposed to deal with lands over which the Commissioner in Council has no legislative authority as such lands, or parts thereof, remain under the control of Her Majesty the Queen in Right of Canada. As this issue was not properly raised, it is assumed that the Commissioner in Council

has the legislative authority to enact the **Area Development Act** and make regulations thereunder.

Legislative power in relation to Indians and lands reserved for the Indians is vested in the federal parliament pursuant to section 91(24) of the **Constitution Act**, 1867, 30 & 31 Victoria C.3 (U.K.). Parliament has exercised its legislative authority under section 91(24) by the enactment of the **Indian Act** RSC 1985 Chapter I - 5 and other related statutes to deal particularly with "Indians" as defined in the **Indian Act**. As aboriginal people reside within provinces/territories and move freely about these jurisdictions, provincial/territorial laws of general application apply to "Indians" as set out in Section 88 of the **Indian Act**:

> Section 88
>
> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with the Act or any order, rule, regulation or bylaw made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

(For a discussion of the background and development of this area, see **Aboriginal Peoples and the Law**, Revised First Edition by Morse, B.W., Carlton University Press, Ottawa, Canada, 1991 at pages 431 to 466. See also **Guerin** v. **The Queen** (1984) 2 S.C.R. 335 and **R.** v. **Taylor and Williams** (1981) 34 O.R. (2d) 360 (Ont. C.A.), **R.** v. **Soui** [1990] 1 S.C.R. 1025 and **R.** v. **Alphonse** [1993] 5 W.W.R. 401 (B.C.C.A.)

With the coming into force of the **Constitution Act**, 1982 and particularly section 35(1) on April 17th, 1982, Section 35 (1) provides "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

The application and meaning of section 35(1) of the **Constitution Act**, 1982 was considered by the Supreme Court of Canada in the watershed case of **R.** v. **Sparrow** (1990) 1 S.C.R. 1075. The facts as set out by the court are fairly straight forward and are set out here.

> The appellant, a member of the Musqueam Indian Band, was charged under s.61(1) of the **Fisheries Act** of the offence of fishing with a drift net longer than that permitted by the terms of the Band's Indian food fishing licence. The fishing which gave rise to the charge took place on May 25, 1984 in Canoe Passage which is part of the area subject to the Band's licence. The licence, which had been issued for a one-year period beginning March 31, 1984, set out a number of restrictions including one that drift nets were to be limited to 25 fathoms in length. He has throughout admitted the facts alleged to constitute the offence, but has defended the charge on the bases that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence is inconsistent with s. 35(1) of the **Constitution Act**, 1982 and therefore invalid.

At this point, and prior to a review of **R**. v. **Sparrow** (supra), it is appropriate to set out the background and circumstances of the present case. As set out earlier, the members of the Yellowknives Dene Band became adherent to Treaty No. 8 as a result of Adhesion No. 4 on July 25, 1900. The members of the band continued to hunt, fish and gather in their traditional area around Yellowknife, NT. These traditional areas are partly depicted in Appendix "A" to this judgment, which is a map of the area with community trails outlines and the Ingraham Trail no shooting zones outlined in red. As Yellowknife developed as a community and the Ingraham Trail was constructed, recreational use of the areas and lakes along the Ingraham Trail increased. A number of leases for recreational purposes were provided by the federal government, and in fact some titled land was acquired by individuals in the area. As recreational use increased, the members of the Yellowknives Dene Band reduced their use of the area as game was being forced out by habitation. Traditional traplines were abandoned in some cases, due to damage caused to traps and traplines by recreational users of the area. Hunting for caribou, moose and other animals continued, as well as spring hunting for muskrats, within the development area and what has now become the no shooting zones. As use of the area increased, concerns arose regarding big game hunting, especially when the caribou migration went through the area. In 1987 a large number of caribou migrated through this area and there resulted a number of complaints regarding unsafe hunting practices, breaches of game laws, lack of enforcement and liquor involvement. These issues were brought before the Denedah Conservation Board and the Department of Renewable Resources agreed to develop a proposal. In July 1988 a proposal to create a no shooting zone was developed and the Denedah

Conservation Board then advertised the proposal to get feedback from the community. In September 1988 a meeting was held in Lac La Martre which was attended by Chief Sangris of the Yellowknives Dene Band and Chief Rabesca from Fort Rae. The proposal was discussed and agreement was reached to establish a zone prohibiting the shooting of big game from November 1st to April 30th within 1.5 km of the Ingraham Trail. Both of the Chiefs present agreed to this proposal.

On December 19th, 1988 Regulation R-085-88 under the **Wildlife Act** was established as follows:

WILDLIFE ACT
R-085-88
19/12/88
Commissioner
Yellowknife

The Commissioner of the Northwest Territories, under sections 20 and 91 of the **Wildlife Act**, and every enabling power, orders as follows:

1. The **Special Management Area Regulations**, established by instrument R-079-82, as amended by instruments numbered R-099-82, R-014-83 and R-007-84, are amended by these regulations.

2. The enacting clause is repealed and the following substituted:

"The Commissioner of the Northwest Territories, under sections 20 and 91 of the **Wildlife Act**, and every enabling power, orders that the **Special Management Area Regulations** are made and established."

3. The following is added after section 3:

"4. No person shall discharge a firearm for the purposes of hunting big game within special management area F/1-B during the period commencing November 1 in one year and ending April 30 in the following year."

4. The schedule is amended by adding the following after the description of Special Management Area F/1-A:

"SPECIAL MANAGEMENT AREA F/1-B

All that portion of the Northwest territories lying within the following boundaries:

on the west by the easterly boundary of the City of Yellowknife

on the north and south by lines parallel to and perpendicularly distant 1.5 km on either side of the centreline of the travelled portion of the Ingraham Trail (Highway No. 4); and

on the east by an arc that has its centre at the most easterly endpoint of the centreline of the travelled portion of the Ingraham Trail and a radius of 1.5 km and that joins the north and south boundaries.

The area includes the most easterly endpoint of the centreline of the travelled portion of the Ingraham Trail.

The boundaries are described with reference to the 1:50,000 scale National Topographic Series maps 85 I/5, 85 I/6, 85 I/11, 85 I/12, 85 J/8 and 85 J/9 produced by the Surveys and Mapping Branch, Department of Energy, Mines and Resources, Ottawa."

The reasoning behind the development of the proposal was to prohibit shooting for big game for the six month period which basically was the usual time frame that caribou may be expected to migrate through the area. Things seemed to go along fairly well until the Fall of 1992 when the caribou migration arrived in the area in late October and all kinds of shooting took place within the "no shooting" zone as the regulation did not kick in until November 1st, 1992. A number of complaints arose as to unsafe hunting practices, lack of enforcement and the slaughter of caribou. There were gut piles all along the road and on adjacent lakes, cabins and other property were damaged by rifle fire and cabin users were put in fear for their safety.

As a result a review of the situation was carried out by the Department of Renewable Resources, and the Department of Municipal and Community Affairs. It was concluded by the Government of the Northwest Territories that the situation could not be properly controlled

under the provisions of the **Wildlife Act** and that the **Area Development Act** should be used to create "no shooting" zones. A memo dated August 12, 1992 from the Deputy Minister of Municipal and Community Affairs was forwarded to the persons and organizations set out in the distribution list as follows:

> Proposed Development Area Regulations Along the Ingraham Trail
>
> The Department of Municipal and Community Affairs, in conjunction with the Department of Renewable Resources, is proposing the establishment of Development Area Safety Regulations along the Ingraham Trail. The purpose of the regulations would be to ensure public safety through the prohibition of discharging a firearm along inhabited areas of the Trail. The **Area Development Act** provides the legislative basis for restricting the discharge of a firearm in inhabited areas.
>
> Please find attached a map showing two proposed development safety areas along the Trial. The areas incorporate 1.5 km on each side of the Ingraham Trail.
>
> If you have any questions or require any further information please contact David Boote, Senior Planner, Municipal and Community Affairs at 920-8038.
>
> DISTRIBUTION LIST
>
> President
> Metis Local # 66
>
> President
> Metis Local # 55
>
> Chief
> Yellowknives Dene Band
>
> Chief
> Ndilo Dene Band
>
> President
> Cassidy Point/Prosperous Lake Association
>
> Manager
> Lands Division
> DIAND

Manager
Planning and Lands
City of Yellowknife

Yellowknife
Hunters and Trappers Association

The map attached sets out the proposed "no shooting" zones as shown in red on Appendix "A" hereto. No written or oral responses were received and time was of the essence since concern of an early caribou migration in October, 1993 existed.

On October 5th, 1993 a meeting was convened to discuss the proposed Regulation. Chief Sangris of the Yellowknives Dene Band and Robert Turner, President of the Yellowknife Hunter and Trappers Association were present as well as other interested parties and representatives of the Government of the Northwest Territories. Chief Sangris expressed very serious concerns over the proposal and the interference with aboriginal hunting rights in the area. Issues of proper enforcement of the existing regulation under the **Wildlife Act** were discussed as well as issues of education of hunters. Another alternative raised was the creation of the corridor, but exclude the Dene from the operation of the regulation, thus substantially reducing hunting within the corridor. It was made clear that the Dene did not support the proposed year around "no shooting" zones nor did the Hunters and Trappers Association. Robert Turner in his evidence indicated that he was under the impression that further consultations would take place and that issues of lack of enforcement, education of hunters and other areas required further consideration.

Due to what the Departments of Renewable Resources and Municipal and Community Affairs considered imperative situations, the proposed regulation was put in force on or about October 16, 1993 without any further notice to interested parties. Advertising was carried out to inform the public as to the new Regulation and that now there were two "no shooting" zones year around.

The Regulation provides that the "no shooting" zones established and the Regulations apply according to their terms before they are published in the Northwest Territories Gazette. This procedure is somewhat suspect considering the provision of the **Statutory Instruments Act**. particularly sections 8, 9, and 19 thereof. However the regulation in question here was gazetted on November 26, 1993 and was properly in force on the date of the alleged offence.

The real issue in this case is whether the aboriginal right to hunt in the area in question exists, and if so is such recognized and affirmed under section 35(1) of the **Constitution Act**, 1982. It follows that the next question is whether the Government of the Northwest Territories had the authority to establish the regulation in question and if so was the proper process followed to allow an infringement of a right protected under section 35(1) of the **Constitution Act**, 1982.

The approach to such issues is set out by the Supreme Court of Canada in **R.** v. **Sparrow** (**supra**), and it is appropriate to follow through the procedure set out in that case and apply such to the circumstances of this case.

Existing Aboriginal Right

Firstly the court must look at whether an aboriginal right existed as of April 17th, 1982 and the extent of that right. There is no doubt that Treaty No 8 provided a right to fish, hunt and trap to persons covered under that Treaty. Treaty No. 8 provides, in part:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocation of hunting, trapping and fishing through the tract surrounded 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

It was admitted that the accused was exercising his right to hunt for food under Treaty No. 8 at the time of the offence. Prior to the taking of treaty in 1900, and continuing up to the present, the members of the Yellowknives Dene Band and their ancestors carried out traditional hunting practices for food in the Ingraham Trail area and within the "no shooting" zones. The evidence without question discloses such was the practice before and after the Ingraham Trail was constructed and was exercised continually to some extent depending upon the availability of game in the area up to the time this regulation was declared in force. This area is a well recognized traditional hunting area of the Yellowknive Dene Band and other aboriginal persons.

In **R.** v. **Sparrow** (supra) at page 1091, the Supreme Court of Canada considered the question of an existing right in the following terms:

> "Existing"
> The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the **Constitution Act**, 1982 came into effect. This means that extinguished rights are not revived by the **Constitution Act** 1982. A number of courts have taken the position that "existing" means "being in actuality in 1982": **R.** v. **Eninew** (1983), 7 C.C.C. (3d) 443 (Sask, Q.B.), at p. 446, aff'd (1984), 12 C.C.C. (3d) 365 (Sask. C.A.) See also **Attorney-General for Ontario** v. **Bear Island Foundation** (1984), 49 O.R. (2d) 353 (H.C.); **R.** v. **Hare and Debassige** (1985), 20 C.C.C. (3d) 1 (Ont. C.A); **Re Steinhauer and The Queen** (1985), 15 C.R.R. 175 (Alta. Q.B.); **Martin** v. **The Queen** (1985), 17 C.R.R. 375 (N.B.Q.B.); **R.** v. **Agawa** (1988, 28 O.A.C. 201.
>
> Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations.

and further at page 1093.

> Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," **supra** at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.

There is no doubt that there existed a right to hunt in the area in question as of April 17, 1992, the coming into force of section 35(1) of the **Constitution Act**, 1982. There is no issue as to whether this right had been extinguished at that point in time, as clearly there has been nothing upon which extinguishment could be established (See **R.** v. **Sparrow** (**supra**) at 1099). Thus there is an existing aboriginal treaty right to hunt in the area in question based on both history and the treaty.

When interpreting treaties, such should be liberally construed and any doubtful expressions resolved in favour of the aboriginal people (**Maueqjick** v. **The Queen** (1983) 1 S.C.R. 29 at p. 36). Further, when approaching the interpretation of treaties, the honour of the Crown is involved and there must not be an appearance of "sharp dealing" (**R.** v. **Taylor and Williams** (1981), 34 O.R. (2d) 360 at p. 367). In **Guerin** v. **The Queen** (1984) 2 S.C.R. 335 the Supreme Court of Canada established that the Crown owed a fiduciary obligation to aboriginal people with respect to lands and such was as a result of the nature of Indian Title (**sui generis**) and the history of powers and responsibilities assumed by the Crown. This fiduciary duty was restated in **R.** v. **Sparrow** (**supra**) at p. 1108 as:

> . . . the 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.

It is from this special relationship basis that section 35 (1) of the **Constitution Act**, 1982 is enshrined. Section 35 (1) is not subject to section 1 of the **Charter**. **R.** v. **Sparrow** (**supra**) at p. 1108:

> In response to the appellant's submission that s. 35 (1) rights are more securely protected than the rights guaranteed by the **Charter**, it is true that s. 35 (1) is not subject to s. 1 of the **Charter**. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the **Constitution Act**, 1982. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

> There is no explicit language in the provision 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, supra**, 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**.

and at page 1110:

> 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.
>
> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35 (1).

In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regulation made pursuant to the **Fisheries Act**. We wish to emphasize the importance of context and a case-by-case approach to s. 35 (1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

Section 35(1) and the Regulation of the Fisheries:

Taking the above framework as guidance, we propose to set out the test for **prima facie** interference with an existing aboriginal right and for the justification of such an interference. With respect to the question of the regulation of the fisheries, the existence of s. 35(1) of the **Constitution Act**, 1982, renders the authority of **R**. v. **Derriksan**, **supra**, inapplicable. In that case, Laskin C.J., for this Court, found that there was nothing to prevent the **Fisheries Act** and the Regulations from subjecting the alleged aboriginal right to fish in a particular area to the controls thereby imposed. As the Court of Appeal in the case at bar noted, the **Derriksan** line of cases established that, before April 17, 1982, the aboriginal right to fish was subject to regulation by legislation and subject to extinguishment. The new constitutional status of that right enshrined in s. 35(1) suggests that a different approach must be taken in deciding whether regulation of the fisheries might be out of keeping with constitutional protection.

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a **prima facie** infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture an existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in **Guerin**, **supra**, at p. 382, referred to as the "**sui generis**" nature of aboriginal rights. (See also Little Bear, "A Concept of Native Title," (1982) 5 Can. Legal Aid Bul. 99)

While it is impossible to give an easy definition of fishing rights it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

> To determine whether the fishing rights have been interfered with such as to constitute a **prima facie** infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a **prima facie** infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a **prima facie** interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

In this case, the creation of year-round "no shooting" zones within the traditional hunting area is an interference with the traditional use of the land within the zones. Not only did the aboriginal people hunt big game in this area, but also other species not defined as big game such as muskrat. With the construction of the road, elderly members of the band gained easier access to their traditional hunting area and allowed them to carry on traditional hunting pursuits later in life. The creation of the year-round "no shooting" zones within part of the traditional hunting area had the effect of interfering with the existing aboriginal right to hunt by means of using a firearm, which has become the preferred method of hunting for food.

The question of whether the regulation is unreasonable must be considered in the overall circumstances. There are the interests of property owners and recreational users as to protection of themselves and their property. There is the matter of the lack of enforcement of the Wildlife Act and other statutes. The aboriginal people affected must be given some priority to other competing interests, in the exercising of the aboriginal right. There were other alternatives to deal with the situation, for example the previous regulation creating the "no shooting" zone under the **Wildlife Act** could have been extended to October 1st of each year from November 1st and thereby cover the caribou migration problem. Further, a restriction upon

non-aboriginal people would have substantially reduced the hunting in the area. Some of the older members of the band simply lack mobility to carry out hunting by other methods such as by dog team or snowmobile. Further, the elderly would be prevented from participation without easy access along the road, as many, including the accused, would no longer have the ability to otherwise exercise their right to hunt in a reasonable manner. The regulation prevents hunting of other animals and birds by using a firearm, the contemporary preferred means of exercising the right to hunt, particularly when the zone covers traditional spring hunting areas, areas where beaver, muskrat and some birds were traditionally hunted. The ties to the land and the pursuit of hunting remain strong in the older members of the band. It is a part of who they are and a major part of the Dene culture and history. In this way the regulation becomes unreasonable, especially when there were less intrusive alternatives.

Under these circumstances, the effect of the regulation unnecessarily infringes the interest protected by the right to hunt. Here the interference is such as to constitute a (**prima facie**) interference with the aboriginal right protected by section 35(1).

Justification:

Continuing to follow the process in **R**. v. **Sparrow (supra)** p. 1113:

> If a **prima facie** interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

The legislative objective here was a concern for public safety due to hunting in areas occupied by cabin owners and recreational users of the area. I have no doubt that public safety

is a valid legislative objective under the circumstances of this case and is as important as conservation concerns. Once a valid legislative objective is found, the second part of justification is considered. Again, as set out in **R.** v. **Sparrow** at 1114:

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

The objective is not to undermine legislative ability and responsibility, but to guarantee that such regulation treat aboriginal people in a manner that ensures their rights are taken seriously. The constitutional recognition and affirmation of aboriginal rights may give rise to conflicts with the interests of others, but the constitutional aboriginal right must receive a priority to ensure the protection of the right is taken seriously. Therefore the justification analysis must address further issues as again established in **R.** v. **Sparrow (supra)** p. 1119:

> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.
>
> We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

As set out above there were other alternatives available that were either considered and rejected or just rejected out of hand. The fact that there were difficulties in enforcing prior regulations under the **Wildlife Act** does not give rise to a right of government regulation to

interfere with an aboriginal right in a more intrusive manner. The question is, could the desired result be obtained in a manner that was less intrusive? The extension of the previous regulation under the **Wildlife Act** to deal with possible early caribou migration may have been sufficient, especially when the aboriginal people through their leaders had agreed to that interference with their aboriginal right to hunt in the area. A restriction upon non-aboriginal people to hunt in the area may as well have been sufficient to obtain the desired results which would recognize the priority to be given to the aboriginal right. The onus is on the Government to establish justification, and I am not satisfied that onus has been met on the issue of as little infringement as possible to effect the desired result. I am not satisfied the Government has exhausted the proper consideration of other less intrusive alternatives (**R.** v. **Dick** [1993] 5 W.W.R. 446 (B.C.C.A.); **R.** v. **Fox** (1994) 71 O.A.C. 50 (Ont. C.A.)

A further issue is with regard to whether the aboriginal people in question have been consulted with respect to the measure to be implemented. The letter from the Deputy Minister of Municipal and Community Affairs dated August 12, 1993 is really advising what the Government of the Northwest Territories is proposing to do with regard to "no shooting" zones. The one meeting that followed was to explain the proposed regulation and the government was made aware of the objections of the representatives of the aboriginal people to be affected. Other alternatives were suggested which the government representatives either ignored or did not consider seriously. In my view this does not amount to meaningful consultation or a deliberation of people on a subject. The priority that must be given to the constitutionally protected aboriginal right in question does not seem to have been recognized on the part of the government. Consultation must require the government to carry out meaningful and reasonable discussions with the representatives of aboriginal people involved. The fact that the time frame for action was short does not justify the government to push forward with the proposed regulation without proper consultation. Otherwise, the recognition and affirmation of aboriginal rights in section 35(1) of the **Constitution Act**, 1982 would become another hollow promise to aboriginal people. Since the judgment in **R**. v. **Sparrow** (**supra**) in 1990, no process has been established to appropriately deal with the requirement of consultations. Such a process would set a standard to be met as to what is required for proper consultation and would provide for the

necessary sensitivity to and respect for the rights of aboriginal peoples. Again, I am not satisfied that the onus on the Government to show justification has been met on the consultation issue (See **R.** v. **Joseph** [1991] N.W.T.R. 263 (Y.T. Terr. Crt.)

I conclude that the justificatory standard set by the Supreme Court of Canada in **R.** v. **Sparrow (supra)** has not been met in the circumstances of this case. Granted the area involved in the "no shooting" zones is a small proportion of the total traditional hunting area, but again that does not justify the infringement. It does not justify the government steam-rolling over aboriginal rights protected under section 35(1) of the **Constitution Act** 1982.

This does not mean that the government cannot implement regulations which infringe upon aboriginal rights, however, the proper steps and standards set out above must be met. I do not intend to infer that aboriginal people's rights cannot be infringed for a valid objective after the necessary steps have been taken and the standards met that ensures sensitivity to and respect for the rights of aboriginal people. As well, aboriginal people must recognize that their protected rights can be infringed as Canadian society develops and the interest of everyone is considered. In the circumstances of this case, if the government had shown the infringement was as little as necessary to reach the desired result and proper consultation had occurred, then the regulation may well be proper and enforceable. However, aboriginal people should be entitled to priority when their rights are being infringed as recognized in **R.** v. **Sparrow** (supra) by the Supreme Court of Canada, which judgment is binding on this court.

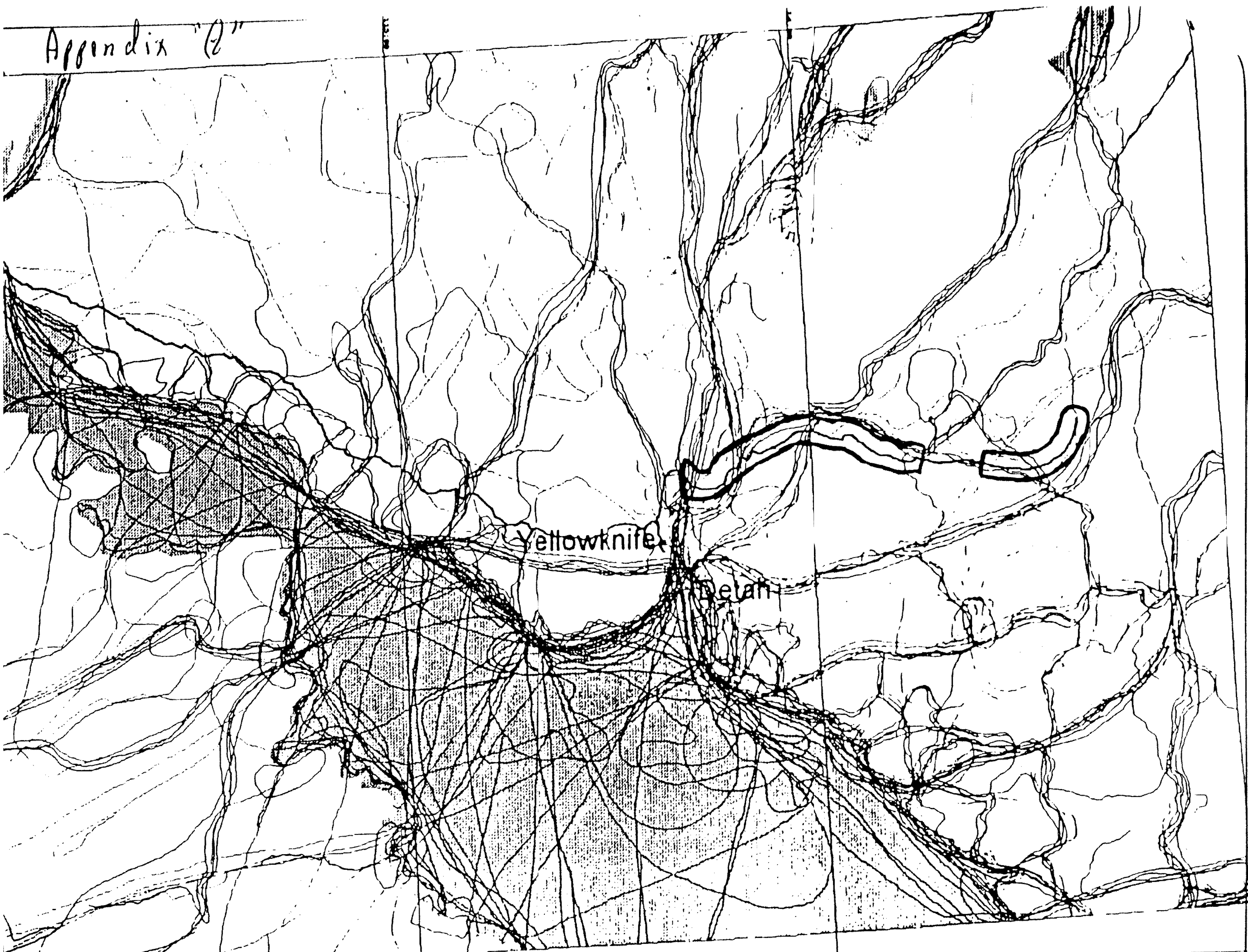
In this case, the government has not met the justification test and I must now consider the result of such non-compliance. The court should interfere with government action only to a degree necessary to protect the aboriginal right in question. As this regulation affects the public generally, including non-aboriginal peoples, it would be inappropriate to strike down the regulation completely. The better approach is to hold that the regulation is not enforceable against this accused, as an aboriginal person. In this way the regulation remains in force against persons not included in the group whose aboriginal right is infringed in the circumstances of the

case. (See **R.** v. **McPherson** (1994) 2 W.W.R. 761 (Man. Q.B.). As the regulation is not enforceable against the accused under the present state of the law, I must find the accused not guilty of the charge under the Ingraham Trail Development Areas Firearms Regulations.

I appreciate that a number of other collateral issues were raised during the trial and a wealth of evidence was put forward. However, this court has limited its analysis to the evidence that directly impacts upon the charges before the court. I would be remiss if I did not acknowledge the magnitude and detail of the information provided by counsel, which provided many hours of interesting reading over the last few months.

R.W. HALIFAX, C.J.T.C.

Appendix "Q"



Yello knife/Detah