Case Name:

R. v. Hamelin

Between
Her Majesty the Queen, Respondent, and
Stephen Brent Hamelin, Appellant

[2010] A.J. No. 932

2010 ABQB 529

33 Alta. L.R. (5th) 1

[2011] 4 W.W.R. 334

496 A.R. 1

2010 CarswellAlta 1612

Docket: 060157104S1

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

R.A. Graesser J.

Heard: January 12-13, 2010.
Judgment: August 12, 2010.
Released: August 13, 2010.

(224 paras.)

Aboriginal law -- Hunting, fishing and logging rights -- Hunting, fishing or trapping -- Purpose -- For food -- Aboriginal land and waters -- Offences and penalties -- Constitutional issues -- Recognition of existing aboriginal and treaty rights -- Appeals and judicial review -- Of final orders -- Appeal by Treaty 8 Indian from conviction for fishing on closed waters allowed in part -- Trial judge erred in finding Crown's duty of consultation outlined in Mikisew Cree First Nation v. Canada only applied to taking of land -- However, error insignificant because duty of consultation could not establish prima facie infringement -- Trial judge erred in finding appellant could easily fish elsewhere -- Appellant was fishing on reserve waters with pickerel readily available -- Only one lake nearby and appellant did not have boat -- Infringement established -- Conviction set aside and parties to re-attend to argue justification.

Natural resources law -- Fishing -- Offences and penalties -- Fishing out of season -- Appeal by Treaty 8 Indian from conviction for fishing on closed waters allowed in part -- Trial judge erred in finding government's duty of consultation outlined in Mikisew Cree First Nation v. Canada only applied to taking of land -- However, error insignificant because duty of consultation could not establish prima facie infringement -- Trial judge erred in finding appellant could easily fish elsewhere -- Appellant was fishing on reserve waters with pickerel readily available -- Only one lake nearby and appellant did not have boat -- Infringement established -- Conviction set aside and parties to re-attend to argue justification.

Appeal by a Treaty 8 Indian from his conviction for fishing on closed waters. The appellant lived and was fishing on a creek on the reserve that was temporarily closed for fishing as a conservation measure. The appellant was fishing for food, which was his Treaty right. The appellant caught three walleye while fishing. The trial judge rejected the appellant's argument that the Variation that was passed to close the waters for fishing was invalid because the government did not meet its duty of consultation. The trial judge further found that the appellant's Treaty rights were not infringed because there were other open waters nearby where the appellant could easily fish for food. The appellant argued that the trial judge erred in applying the case law and in finding his Treaty rights were not infringed.

HELD: Appeal allowed in part. There was uncontradicted evidence that some level of fishing on the creek could have been permitted and conservation goals still achieved, which suggested the variation order might have been overboard. The government did have a clear duty to consult on issues affecting Aboriginal rights. However, this was a collective duty owed to the Band, not a duty owed specifically to the appellant. The duty was outlined in Mikisew Cree First Nation v. Canada, which the trial judge did misapply by finding that Mikisew only applied to taking of land. However, this error did not have an effect on the end result. While the government may not have met its duty to consult before passing the variation, the first step of analysis under R. v. Sparrow was whether or not there had been a prima facie infringement of the appellant's Treaty rights. Since the appellant did not have a personal right to consultation, if any of his rights were infringed upon, it was his right to fish for food. Therefore, a breach of the duty to consult could not go to establishing a prima facie infringement, though it would be relevant in the second stage of analysis on the justification for the infringement. The trial judge did commit a reversible error in finding that the appellant could have easily fished elsewhere. The creek was on reserve lands with readily available pickerel, the appellant's preferred catch, and was within five minutes of his home. The only other fishing location within half an hour was a lake. However, to reach readily available fish on the lake, one required a boat, which the appellant did not have. The appellant did not have easily accessible fishing for food at another location, so he had established prima facie infringement. Since the trial judge did not find infringement, he never considered the issue of justification. The conviction was set aside and the parties were directed to re-attend to argue justification.

Statutes, Regulations and Rules Cited:

Alberta Fishing Regulations, 1998, SOR/98-246,

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Constitution Act, 1930, s. 35(1)

Fisheries Act, R.S.C. 1985, c. F-14,

Natural Resources Transfer Agreement, S.A. 1930, c. 21, s. 12

Counsel:

David Gates, Q.C., for the Respondent.

Jeffrey R.W. Rath, Nathalie Whyte, Delanie Coad, Rath and Company, for the Appellant.

[Editor's note: A corrigendum was released by the Court on August 19, 2010; the corrections have been made to the text and the corrigendum is appended to this document.]

Reasons for Judgment

R.A. GRAESSER J.:--

Background

1 Mr. Hamelin appeals his conviction on January 11, 2006 for unlawfully fishing on closed waters contrary to the *Alberta Fisheries Regulations*, 1998 (SOR 98-246). He was fined $200.00.

2 Conviction followed a lengthy trial, written argument and oral argument. Wheatley P.C.J. delivered written reasons for the conviction.

Provincial Court Decision

3 The trial focused on the rights of Treaty 8 Indians to fish for food. It also focused on the rights of Government to regulate hunting and fishing rights as part of a *bona fide* scheme of management and conservation of the game stocks.

4 Of significance was the *Natural Resources Transfer Agreement,* S.A. 1930, c. 21 which provides in section 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 to access.

5 The case also highlighted differences between various Treaties entered into between the Government and the First Nations, and the honour of the Crown. Treaty 7 (relevant to ***Lefthand*** and ***Eagle Child***) has different provisions than Treaty 8 (applicable to Mr. Hamelin) and in particular, Treaty 7 has no express provision for conservation regulations. Treaty 8 has been held to have such provision.

6 Many key facts were agreed, including:

1. Mr. Hamelin is a Treaty 8 Indian and resides on the Sturgeon Lake Cree Nation Reserve;
2. The Regulations were in effect at all material times to the Charge;
3. Goose Creek, where Mr. Hamelin was fishing, had been closed by the provisions of the *Regulations* and in particular Variation Order SF03-01;
4. On May 27, 2003 Mr. Hamelin was fishing for food on Goose Creek, using a rod, reel and lure;
5. Mr. Hamelin had advised the Conversation Officer who issued the violation ticket to him that he was aware that Goose Creek was closed to fishing, but that the closure did not apply to him because he was a Treaty Indian;
6. On May 27, 2003, Mr. Hamelin had caught 3 walleye at Goose Creek, which he had kept;
7. The 3 walleye were all under the legal size limit for walleye;
8. At the location where Mr. Hamelin was fishing, Goose Creek flowed through the Sturgeon Lake Cree Nation Reserve, and Mr. Hamelin had a right of access to this

location; and

9. Mr. Hamelin, as a Treaty 8 Indian, had a right to fish for food pursuant to the terms of Treaty 8 and the *Natural Resources Transfer Agreement*, as set out in the *Constitution Act*, 1930, and as protected pursuant to s. 35(1) of the *Constitution Act*.

7 The trial judge considered two main arguments:

1. On behalf of Mr. Hamelin, that because there had been no consultation between the Government and the appropriate First Nation concerning the Variation Order, the Variation Order was invalid because of ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69; and
2. On behalf of the Crown, that the decision of Power J. in ***R. v. Eagle Child***, 2005 ABQB 275, should be applied to the facts and as such, Mr. Hamelin had failed to prove a *prima facie* infringement of his Treaty or *Charter* rights.

8 At the time, neither ***Eagle Child*** nor ***R. v. Lefthand***, 2005 ABQB 748, had been decided by the Court of Appeal. The trial judge was aware that those cases were to be argued together about a month after his decision, and that the two Queen's Bench level decisions were somewhat in conflict with each other.

9 The trial judge rejected Mr. Hamelin's argument on consultation, holding that ***Mikisew*** was of prospective effect in the context of taking up a right and did not have retrospective application.

10 The trial judge applied ***Eagle Child*** (both at the Provincial Court level, [2004] A.J. No. 726 (P.C.) and at the Queen's Bench level).

11 His fact findings, at para. 21 of his decision, were as follows:

> In the case at bar the defendant fished in the restricted waters of Goose Creek, a short distance from the waters of Sturgeon Lake with rod and reel. The evidence is that he returned many fish to the water keeping only three. The evidence is as well that he could have fished by rod and reel in Sturgeon Lake not offending the regulation, a very, very short distance from where in fact he was fishing in Goose Creek. There is ample evidence that he could have exercised his right to fish for food in an easy and accessible manner both in Sturgeon Lake or at other lakes within a close distance of his home. The Defendant was not deprived of a right to fish for food.

12 As a result, he concluded that Mr. Hamelin had not proven a *prima facie* infringements of his rights, and convicted him on the basis of the agreed facts.

Grounds of Appeal

13 Mr. Hamelin argues that the trial decision should be overturned on the following bases:

1. The trial judge erred by distinguishing ***Lefthand*** and applying ***Eagle Child***, or applying them at all;
2. The trial judge failed to follow ***Mikisew*** and erred in his interpretation of ***Mikisew*** that it had prospective application only;
3. The trial judge erred by failing to properly follow the ***Sparrow*** tests; and
4. The trial judge failed to find a *prima facie* infringement of Mr. Hamelin's Treaty 8 right to fish.

Cases Cited

14 The parties submitted a number of cases in support of their arguments. For Mr. Hamelin, I was referred to:

> ***Ahousaht First Nation v. Canada***, 2008 FCA 212; ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010; ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73; ***Housen v. Nikolaisen*** (2002), 211 D.L.R. (4th) 577 (S.C.C.); ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69; ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, 2004 SCC 74; ***R. v. Askov***, [1990] 2 S.C.R. 1199; ***R. v. Badger***, [1996] 1 S.C.R. 771; ***R. v. Eagle Child***, 2005 ABQB 275; ***R. v. Kapp***, 2008 SCC 41; ***R. v. Lefthand***, 2005 ABQB 748; ***R. v. Lefthand***, 2007 ABCA 206; and ***R. v. Sparrow***, [1990] 1 S.C.R. 1075.

15 For the Crown, I was referred to:

> ***Dene Tha' First Nation v. Alberta (Energy and Utilities Board)***, 2003 ABCA 372; ***Halfway River First Nation v. B.C. (Minister of Forests)***, 1999 BCCA 470; ***Liidlii Kue First Nation v. Canada (Attorney General)***, [2000] 4 C.N.L.R. 123; ***Mitchell v. M.N.R.***, [2001] 1 S.C.R. 911; ***Sappier v. Polchies***, 2004 NBCA 56; ***R. v. Aleck***, [2008] B.C.J. No. 1544; ***R. v. Bernard***, 2002 NSCA 5; ***R. v. Brertton***, 1999 ABCA 285; ***R. v. Douglas***, 2003 BCPC 127; ***R. v. Douglas***, 2007 BCCA 265; ***R. v. Hopkins***, [1992] B.C.J. No. 2622; ***R. v. Marshall***, [1999] 3 S.C.R. 456; ***R. v. Morris***, [2006] 2 S.C.R. 915; ***R. v. Morris and Olsen***, 2004 BCCA 121; ***R. v. Nikal***, [1996] 1 S.C.R.1013; ***R. v. Sampson***, [1995] B.C.J. No. 2634; ***R. v. Smallboy***, 2005 ABQB 89; ***R. v. Sundown***, [1999] 1 S.C.R. 393; ***R. v. Tommy***, 2008 BCSC 1095; and ***R. v. Victor***, 2005 BCPC 366; *Fisheries Act*, 31 Victoria, S.C. 1867-68, c.60.

16 After hearing argument and reserving, and before rendering this decision, counsel referred me to ***Tsuu T'ina Nation v. Alberta (Environment)***, 2010 ABCA 137, which is relevant to the consultation issue. It will also be dealt with herein.

Standard of Review

17 Mr. Hamelin submits that the issues to be determined in this appeal are questions of law, relating to the trial judge's interpretation of applicable law. Thus a correctness standard should be applied to the issues: ***Housen v. Nikolaisen***, (2002), 211 D.L.R. (4th) 577 (S.C.C.), which holds that the standard of review for lower court decisions on questions of law is correctness. For issues of mixed fact and law, the appeal court is to interfere only if there has been palpable and overriding error on the part of the trial judge.

18 The Crown did not specifically address the standard of review. For the purposes of this appeal, I accept that the standard of review is correctness for issues relating to the interpretation of ***Lefthand*** and ***Mikisew***; as to the trial judge's finding that there had been no *prima facie* infringement proven, the standard is palpable and overriding error.

Legal Framework

19 The appropriate starting point for my analysis of the applicable aboriginal rights is ***R. v. Sparrow***, [1990] 1 S.C.R. 1075. In that case, Mr. Sparrow had an aboriginal right to fish in the area that he was fishing when he was charged with fishing with an oversized drift net. Dickson C.J. and La Forest J. held that the words "recognized and affirmed" in s. 35(1) of the *Constitution Act*, 1982, incorporated a fiduciary relationship between the Crown and aboriginals and therefore imported some restraint on the exercise of sovereign power: ***Sparrow***, *supra* at 1109. "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)": ***Sparrow***, *supra* at 1109. The onus is on the government to justify an infringement: ***Sparrow***, *supra* at 1110.

20 The first step is to ask whether the legislation has the effect of interfering with an existing aboriginal right and if it

does, it is a *prima facie* infringement of s. 35(1): ***Sparrow**, supra* at 1111. The first sub-step is to define the characteristics or incidents of the right, or in other words, define its scope: ***Sparrow**, supra* at 1111-1112. The second sub-step is to determine whether the right has been interfered with so as to constitute a *prima facie* infringement of s. 35(1): ***Sparrow**, supra* at 1112. The Supreme Court suggests the following questions which must be asked in order to determine whether the right as scoped has been interfered with:

1. Is the limitation unreasonable?
2. Does the regulation impose undue hardship?
3. Does the regulation deny to the holders of the right their preferred means of exercising that right?: ***Sparrow**, supra* at 1112.

21 The onus of proving a *prima facie* infringement lies on the challenger of the legislation: ***Sparrow**, supra* at 1112. The Court implies that legislation could constitute an interference with a right and therefore a *prima facie* infringement of s. 35(1) where only one of the three questions asked above is answered in the affirmative, meaning that this test is not conjunctive:

> 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: ***Sparrow**, supra* at 1112-1113. [emphasis added]

22 The Supreme Court clarified that not all of these questions need be answered in the affirmative in ***R. v. Gladstone***, [1996] 2 S.C.R. 723 at para. 43:

> 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.

23 Where an interference has been proven by the challenger, the onus shifts to the Crown to prove that the legislation is nevertheless justified: ***Sparrow**, supra* at 1113. Legislation will be justified if it there is a valid legislative objective and if the honour of the Crown is upheld: ***Sparrow**, supra* at 1113-1114. Depending on the circumstances, other questions such as whether there has been as little infringement as possible, whether, in a situation of expropriation, fair compensation is available, and whether there has been adequate consultation with the aboriginal group in question: ***Sparrow,** supra* at 1119. This is not an exhaustive list: ***Sparrow**, supra* at 1119.

24 Thus the ***Sparrow*** test for investigating infringements of aboriginal rights was born. In a shortened format, the test is:

1. Does the legislation interfere with an aboriginal right and therefore constitute a *prima facie* infringement of s. 35(1)? (onus on challenger)

a) What is the scope of the right?
b) Has that right been interfered with?

i) Is the limitation unreasonable?
ii) Does the regulation impose undue hardship? and/or
iii) Does the regulation deny to the holders of the right their preferred means of exercising the right?

2. Can the legislation nevertheless be justified? (Onus on the Crown).

a) Is there a valid legislative objective?
b) Has the honour of the Crown been upheld?

25 ***Sparrow*** dealt with aboriginal rights. In ***R. v. Badger***, [1996] 1 S.C.R. 771, Cory J. applied the ***Sparrow*** test to an aboriginal treaty right. The distinction is important. An aboriginal right is founded in historical evidence; an aboriginal treaty right is founded in the terms of a treaty and any other oral or written representations that may have been made at the time the treaty was negotiated.

26 In ***Badger,*** three individuals were charged with various hunting offences while hunting on private land, and raised as their defence their Treaty 8 right to hunt. The Court held that the Treaty 8 right to hunt had been modified by the *National Resources Transfer Agreement*, and that the reference to the ability to hunt on lands to which Treaty 8 rights holders had a "right of access" was applicable only to private land which was not visibly incompatible with hunting: ***Badger***, *supra* at paras. 49-66.

27 Treaty 8 provides that the right to hunt is specifically "subject to such regulations as may from time to time be made by the Government of the country". Section 12 of the *NRTA*, which modified Treaty 8, also provides that the "laws respecting game in force in the Province from time to time shall apply to the Indians". In ***Badger*** it was the licensing provisions of the Alberta *Wildlife Act* that were impugned. The Court considered whether the legislation under which one of the accused was charged was the type of legislation allowed by the Treaty itself:

> It remains to be seen whether the existing right to hunt was in any other manner circumscribed by a form of government regulation which is permitted under the Treaty: ***Badger***, *supra* at para. 68.

28 At paras. 70 - 73, the Court outlined its test for determining whether the regulation in question fit within the scope of the express regulation clause, whether there was a *prima facie* infringement of the treaty right to hunt, and if so whether that infringement could be justified:

> In light of the existence of these conservation laws prior to signing the Treaty, the Indians would have understood that, by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation. This concept was explicitly incorporated into the *NRTA* in a modified form providing for Provincial regulatory authority in the field of conservation. Paragraph 12 of the *NRTA* begins by stating its purpose:
>
> 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 <u>laws respecting game in force in the Province from time to time shall apply to the Indians</u> .... [Cory J.'s emphasis]
>
> It follows that by the terms of both the Treaty and the *NRTA*, provincial game laws would be applicable to Indians so long as they were aimed at conserving the supply of game. However, the provincial government's regulatory authority under the Treaty and the *NRTA* did not extend beyond the realm of conservation. It is the constitutional provisions of para. 12 of the *NRTA*

> authorizing provincial regulations which make it unnecessary to consider s. 88 of the *Indian Act* and the general application of provincial regulations to Indians.
>
> The licensing provisions contained in the *Wildlife Act* are in part, but not wholly, directed towards questions of conservation. At first blush, then, they may seem to form part of the permissible government regulation which can establish the boundaries of the existing right to hunt for food. However, the partial concern with conservation does not automatically lead to the conclusion that s. 26(1) is permissible regulation. It must still be determined whether the manner in which the licensing scheme is administered conflicts with the hunting right provided under Treaty No. 8 as modified by the *NRTA*.
>
> This analysis should take into account the wording of the treaty and the *NRTA*. I believe this to be appropriate since the object will be to determine first whether there has been a prima facie infringement of the Treaty No. 8 right to hunt as modified by the *NRTA* and secondly if there is such an infringement whether it can be justified. In essence, we are dealing with a modified treaty right. This, I believe, follows from the principle referred to earlier that treaty rights should only be considered to be modified if a clear intention to do so has been manifested, in this case, by the *NRTA*. Further, the solemn promises made in the treaty should be altered or modified as little as possible. The *NRTA* clearly intended to modify the right to hunt. It did so by eliminating the right to hunt commercially and by preserving and extending the right to hunt for food. The Treaty right thus modified pertains to the right to hunt for food which prior to the Treaty was an aboriginal right.
>
> For reasons that I will amplify later, it seems logical and appropriate to apply the recently formulated ***Sparrow*** test in these circumstances. I would add that it can properly be inferred that the concept of reasonableness forms an integral part of the ***Sparrow*** test. It follows that this concept should be taken into account in the consideration of the justification of an infringement. As a general rule the criteria set out in ***Sparrow***, *supra*, should be applied. However, the reasons in ***Sparrow***, *supra*, make it clear that the suggested criteria are neither exclusive nor exhaustive. It follows that additional criteria may be helpful and applicable in the particular situation presented. [Emphasis added]

29 The process followed by Cory J. is a simple one. First, does the regulation in question have as part (or all) of its objective an objective that is permitted by the express regulation clause? Second, even if the objective is permitted, does the regulation in question constitute a *prima facie* infringement of the treaty right to hunt? Third, if so, can it be justified? In other words, simply because the objective of the regulation is permitted by the express regulation clause that does not mean this is the end of the road for the investigation. The Court must go on and determine whether the legislation actually infringes the treaty right.

30 No in-depth analysis of the bounds of the regulation clause is carried out here because that is not the crux of the matter. The crux is whether or not the treaty right to participate in an activity has been unjustifiably infringed. Whether or not the objective of the regulation is permitted by the terms of the treaty itself is a factor which should be taken into account by the Court at the justification phase of the analysis. At the initial phase of the***Badger*** test, it appears that what is important is whether or not there has been a *prima facie* infringement of a treaty right to participate in an activity.

31 The above conclusion is borne out by the process followed by Cory J. in determining whether or not the regulation unjustifiably infringed on the treaty right in question.

32 The Court began its analysis by exploring the objectives of the legislation in question. The Court held that there were two objectives behind the requirement to hold a hunting licence prior to hunting wildlife - safety and conservation - and that both were constitutional (i.e. within the bounds of the express regulation clause found in the *NRTA*): ***Badger***, *supra* at para. 86.

33 As for conservation, the Court held that:

> While the general safety component of the licensing provisions may not constitute a *prima facie* infringement, the conservation component appears to present just such an infringement. Provincial regulations for conservation purposes are authorized pursuant to the provisions of the *NRTA*. However, the routine imposition upon Indians of the specific limitations that appear on the face of the hunting licence may not be permissible if they erode an important aspect of the Indian hunting rights: ***Badger***, *supra* at para. 90.
>
> ... in this case, para. 12 of the *NRTA* specifically provides that the provincial government may make regulations for conservation purposes, which affect the Treaty rights to hunt. Accordingly, Provincial regulations pertaining to conservation will be valid so long as they are not clearly unreasonable in their application to aboriginal people: ***Badger***, *supra* at para. 91.

34 At paras. 92-93 the Court outlined why the legislation is unreasonable:

> Under the present licensing scheme, an Indian who has successfully passed the approved gun safety and hunting competency courses would not be able to exercise the right to hunt without being in breach of the conservation restrictions imposed with respect to the hunting method, the kind and numbers of game, the season and the permissible hunting area, all of which appear on the face of the licence. Moreover, while the Minister may determine how many licences will be made available and what class of licence these will be, no provisions currently exist for "hunting for food" licences.
>
> At present, only sport and commercial hunting are licensed. It is true that the regulations do provide for a subsistence hunting licence. See Alta. Reg. 50/87, s. 25; Alta. Reg. 95/87, s. 7. However, its provisions are so minimal and so restricted that it could never be considered a licence to hunt for food as that term is used in Treaty No. 8 and as it is understood by the Indians. Accordingly, there is no provision for a licence which does not contain the facial restrictions set out earlier. Finally, there is no provision which would guarantee to Indians preferential access to the limited number of licences, nor is there a provision that would exempt them from the licence fee. As a result, Indians, like all other Albertans, would have to apply for a hunting licence from the same limited pool of licences. Further, if they were fortunate enough to be issued a licence, they would have to pay a licensing fee, effectively paying for the privilege of exercising a treaty right. This is clearly in conflict with both the Treaty and *NRTA* provisions.

35 The Court concluded:

> The present licensing system denies to holders of treaty rights as modified by the *NRTA* the very means of exercising those rights. Limitations of this nature are in direct conflict with the treaty right. Therefore, it must be concluded that s. 26(1) of the *Wildlife Act* conflicts with the hunting right set out in Treaty No. 8 as modified by the *NRTA*. [Emphasis added]
>
> Accordingly, it is my conclusion that the appellant, Mr. Ominayak, has established the existence

> of a *prima facie* breach of his treaty right. It now falls to the government to justify that infringement: ***Badger***, *supra* at paras. 94-95.

36 In other words, although the regulation had a permissible objective, its effects denied the rights holders the ability to exercise those rights and therefore a *prima facie* infringement was established. The fact that the legislative objective was valid was not a shield for the Crown, and the investigation focused on whether the treaty right was actually breached.

37 Cory J. summarized his procedure as follows:

> ... 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 *NRTA*. In this case the impugned provisions should be considered in accordance with the principles set out in ***R. v. Sparrow***, [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: ***Badger***, *supra* at para. 37.

38 This is a difficult paragraph to reconcile with the above analysis. The first two sentences seem to suggest that the first step is to determine whether the regulations fit within the scope of an express regulation clause. The remaining sentences could be read to suggest that if the regulations do not fit within that scope, then the ***Sparrow*** test should be resorted to. However, this is contradictory to the process actually conducted by Cory J. As outlined above, although he held that the objective of the legislation was within the bounds of the express regulation clause, he went on to apply the ***Sparrow*** test to the effects of the legislation to determine whether there was an infringement and then if that infringement could be justified.

39 There, the Crown did not lead any evidence regarding justification and so the justification analysis was never carried out. To the extent that this *obiter* statement by Cory J. conflicts with the actual process which he followed, it is likely that it is the process he actually followed which is binding and not the words contained in para. 37.

40 The Supreme Court noted in the subsequent case of ***Marshall v. Canada***, [1999] 3 S.C.R. 456 [***Marshall No. 1***], that even where a treaty does not have an express regulation clause, legislation can validly infringe upon a treaty right if it can be justified under the ***Badger*** test: see ***Marshall v. Canada***, [1999] 3 S.C.R. 533, [***Marshall No. 2***], at para. 24. In ***Marshall No. 1***, the Supreme Court was called upon to interpret a treaty which did not include an express regulation clause. At para. 61 Binnie J. stated that:

> Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would not constitute an infringement that would have to be justified under the ***Badger*** standard.

41 Echoing this statement at para. 37 of ***Marshall No. 2***, the Court stated that:

> In other words, regulations that do no more than reasonably define the Mi'kmaq treaty right in terms that can be administered by the regulator and understood by the Mi'kmaq community that holds the treaty rights do not impair the exercise of the treaty right and therefore do not have to meet the *Badger* standard of justification.

42 Even where there is no express regulatory clause, some regulation is permissible; the way to determine whether the regulation is permissible is through the application of the ***Badger*** test.

43 Under the test as laid out in ***Badger***, if there is no express regulatory clause an exploration of the objectives of the regulation is largely irrelevant. Instead, all that is required is the application of the test as first laid out in ***Sparrow***. Where there is an express regulation clause, an initial step of determining the objective of the regulation is necessary (however, either way the outcome is not fatal to the infringement inquiry; whether the objective is or is not permitted by the express regulation clause, the Court still needs to determine whether the treaty right has been infringed). What is most pertinent at this stage is the actual effect of the regulation on the right in question. The validity of the objective of the regulation goes to the justification stage. Actual proof of an infringement is required, and thus the investigation under what was step 1(b) of the ***Sparrow*** test is appropriate.

44 Where a treaty right is involved, the ***Badger*** test as outlined above is:

1. Does the legislation interfere with an Aboriginal Treaty Right and therefore constitute a *prima facie* infringement of s. 35(1)? (onus on challenger)

a) What is the scope of the treaty right?
b) What is the objective of the regulation?
c) Has the right, as scoped, been interfered with?

i) Is the limitation unreasonable?
ii) Does the regulation impose undue hardship? or
iii) Does the regulation deny to the holders of the right their preferred means of exercising the right?

2. Can the legislation nevertheless be justified? (Onus on the Crown).

a) Is there a valid legislative objective?
b) Has the honour of the Crown been upheld?

45 This reading of the test is supported ***R. v. Sundown***, [1999] 1 S.C.R. 393, where Cory J. was dealing with another treaty which had an express regulation clause:

> First, provincial legislation that relates to conservation and that passes the justificatory standard set out in ***Sparrow***, supra, at pp. 1111-13, could validly restrict the building of hunting cabins. ***Badger,*** supra, specifically considered the ability of the Alberta government to legislate pursuant to the provisions of para. 12 of its *NRTA* which is identical to para. 12 of the Saskatchewan *NRTA*. Badger held that both Treaty No. 8 and the *NRTA* specifically provided that hunting rights would be subject to regulation pertaining to conservation. It was put in these words at para. 70:
>
> > [B]y the terms of both the Treaty and the *NRTA*, provincial game laws would be applicable to Indians so long as they were aimed at conserving the supply of game. However, the provincial government's regulatory authority under the Treaty and the *NRTA* did not extend beyond the realm of conservation.
>
> Thus, provincial laws that pertain to conservation could properly restrict treaty rights to hunt provided they could be justified under ***Sparrow***. [Emphasis added] (At para. 38.)

46 In other words, Cory J. reiterated in ***Sundown*** that even with an express regulation clause, regulations needed to be justified by the test as laid down in ***Sparrow*** and applied to treaty rights in ***Badger***.

47 The Alberta Court of Appeal recently considered these authorities in the context of Treaty 7 fishing rights and the appeals in ***Lefthand*** and ***Eagle Child***. There, Slatter J.A. followed a different process to determine whether or not a regulation infringed a treaty right.

48 Slatter J.A. stated the following at para. 96:

> It is not disputed that conservation and safety regulations are within the intended scope of the proviso for regulations in the Treaty. As stated in ***Badger*** at para. 70, "... by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation." While the common law would imply such a limit on aboriginal rights anyway (*supra*, para. 77), the wording of the treaties has been interpreted as also recognizing this limit. Regulations in aid of conservation that do not violate any other specific right (for example the rights in the proviso of s. 12 of the Transfer Agreement) do not therefore constitute a breach of Treaty rights that must be justified, but a limit inherent in those rights: ***Badger*** at para. 37; ***Horseman***, [1990] 1 S.C.R. 901 at pp. 934-5; ***Marshall (#1)*** at para. 61. What then are the limits on the Federal government's powers to regulate hunting and fishing for conservation reasons in a case where the treaty right is expressly subject to regulation? There is no binding authority in which this exact issue has been decided. The previously decided cases either involved non-treaty rights, or provincial regulations, or both. [Emphasis added]

49 The principle stated by Slatter J.A. that regulations in aid of conservation do not infringe treaty rights where those treaty rights are subject to an express conservation regulation clause because they are a limit inherent in those rights is drawn from three citations: ***Badger*** at para. 37; ***Horseman*** at pp. 934-5; ***Marshall No. 1*** at para. 61. The citation from ***Horseman*** supports the proposition that the Treaty 8 rights were always subject to conservation regulation. The citation from ***MarshallNo. 1*** supports the proposition that no infringement will be found if a treaty right to fish for a moderate livelihood is subject to a regulation which provides a catch limit that can reasonably be expected to produce a moderate livelihood; in other words this challenge would fail at the first stage of the ***Badger*** test for lack of proof of an infringement. Neither citation appears to provide direct support for Slatter J.A.'s proposition. But paragraph 37 of ***Badger*** may very well support it.

50 However, the problem with paragraph 37 of ***Badger*** is that the process which Cory J. followed directly contradicts this statement as I noted above. His process was to determine first whether there was a valid legislative objective, second, and even if there was a valid objective, whether there was a *prima facie* infringement, and third whether that infringement could be justified. Cory J. chose to leave the justification of the regulation to the third phase of the analysis where the onus would be on the Crown to show that the legislation was within an express regulation clause. He chose as his first step the investigation into whether the treaty right, standing alone, was infringed.

51 Slatter J.A. did not deal with the process followed by Cory J. and instead followed the words in paragraph 37. He held that the limits on the Crown's ability to regulate under the express regulation clause should be determined first before determining whether there was a *prima facie* infringement, his logic being if the regulation was within the bounds of the clause then no infringement could be found. In other words if the regulation could be justified under the express regulation clause, then a *prima facie* infringement investigation was unnecessary. However, this is contradictory to the process actually followed by Cory J. in ***Badger***.

52 Slatter J.A. distinguished the test developed by the Supreme Court in ***Badger*** and ***Marshall***, on the basis that ***Badger*** involved a provincial regulation and a treaty modified by the *NRTA*, while in ***Lefthand*** federal regulations and the express wording of the treaty itself were involved (the *Alberta Fisheries Regulations* having been passed under the Federal *Fisheries Act*). The wording of the *NRTA* was inapplicable to the ***Lefthand*** analysis as Federal legislation was

impugned, negating the need to analyze section 12 of the *NRTA* (which allows provincial conservation laws to apply to treaty rights holders).

53 ***Lefthand*** and ***Eagle Child*** are both Treaty 7 cases. For the purposes of this appeal, the provisions of Treaty 7 and Treaty 8 are not materially different. Slatter J.A. noted one significance difference between the holders of Treaty 8 rights from the holders of Treaty 7 rights. As found in ***Badger***, the Treaty 8 Indians were guaranteed that they "shall have the right to pursue their usual vocations of hunting, trapping and fishing".

54 The Treaty 8 rights and representations made to the Treaty 8 Indians are set out at paras. 39 and 40 of the decision:

> The Hunting Right Provided by Treaty No. 8
>
> 39 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.]
>
> 40 Treaty No. 8, then, guaranteed that the Indians "shall have the right to pursue their usual vocations of hunting, trapping and fishing". The Treaty, however, imposed two limitations on the right to hunt. First, there was a geographic limitation. The right to hunt could be exercised "throughout the tract surrendered ... .saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". Second, the right could be limited by government regulations passed for conservation purposes.

55 Slatter J.A. deals with this at para. 98, noting that even though no similar evidence had been produced by the defendants in ***Lefthand***, "regulations in support of conservation of game stocks are obviously in the interest of all concerned, especially the aboriginals who relied on the game for food." I would note, however, that express representations such as those made to the Treaty 8 Indians as found in ***Badger*** may attract more attention to the honour of the Crown in making such regulations than in cases where no such representations were made.

56 I struggle trying to reconcile ***Lefthand*** with ***Badger.*** The distinguishing feature appears to be that the hunting restrictions in ***Badger*** were found in Provincial regulations that were passed under the *NRTA* while the fishing restrictions in ***Lefthand*** were passed under Federal legislation. Slatter J.A. appears to be holding that the Federal regulatory reservation in Treaty 7 is stronger or less assailable than Provincial conservation regulatory powers under the NRTA.

57 While there are technical differences between ***Badger*** and ***Lefthand***, the differences do not in my view support a deviation from the analysis enunciated in the Supreme Court 's jurisprudence on the infringement of treaty rights. Whether the express regulation clause is contained in the words of the treaty itself or in the *NRTA* should make no difference to the analysis; the underpinnings are the same. Cory J. stated in ***Badger***, supra at paras. 83-84:

> It will be remembered that the *NRTA* modified the Treaty right to hunt. It did so by eliminating the right to hunt commercially but enlarged the geographical areas in which the Indian people might hunt in all seasons. The area was to include all unoccupied Crown land in the province together with any other lands to which the Indians may have a right of access. Lastly, the province was authorized to make laws for conservation...
>
> The *NRTA* only modifies the Treaty No. 8 right. Treaty No. 8 represents a solemn promise of the Crown. For the reasons set out earlier, it can only be modified or altered to the extent that the *NRTA* clearly intended to modify or alter those rights. The Federal government, as it was empowered to do, unilaterally enacted the *NRTA*. It is unlikely that it would proceed in that manner today. The manner in which the *NRTA* was unilaterally enacted strengthens the conclusion that the right to hunt which it provides should be construed in light of the provisions of Treaty No. 8. [Emphasis added]

58 Both a treaty itself and a treaty as modified by the *NRTA* are agreements delineating the rights of aboriginal peoples. For the purposes of an inquiry into whether or not a treaty right has been unjustifiably infringed, there appears to be no distinction between them. As well, whether the source of the legislation is provincial or federal, the honour of the Crown is equally at stake.

59 I can see no difference in principle or logic that would hold that there is no restriction on the Federal power to enact conservation regulations affecting treaty holders' rights to hunt and fish while Provincial conservation regulatory powers must be reasonable (or "not clearly unreasonable" in Cory J.'s words in para. 91 of ***Badger***).

60 In keeping with the recognized honour of the Crown in dealing with aboriginal peoples and also in adhering to its treaty obligations, it is in my view appropriate to require that the Crown exercise its rights in a reasonable fashion (or at least that it not act unreasonably in doing so, if there is a difference between a duty to act reasonably and a duty to not act unreasonably).

61 The Crown's duty of reasonableness is reinforced with respect to Treaty 8 because of the representations made to the Indians at the time of the signing of the Treaty.

62 Nevertheless, despite my inability to reconcile ***Lefthand*** with ***Badger***, I can find no valid basis for me to distinguish ***Lefthand*** from the case at bar, and I am thus bound by it.

Test in *Lefthand*

63 Slatter J.A.'s process in ***Lefthand*** is threefold. First, he set out to determine whether the regulation was within the type of regulation contemplated by the express regulation clause. In that case, applying his own test, he found that the regulations in question were within the express regulation clause of Treaty 7. As the regulations were permissible, there was no need to go any further. This resolved the case.

64 In *obiter*, Slatter J.A. outlined the process that he would follow should the regulations fall outside of the permissible scope of the regulations. In that event, he advocated a return to the ***Badger*** test to determine whether there was a *prima facie* infringement and if so whether it could nevertheless be justified.

65 The key to this reasoning was the compartmentalization of the issues and the fact that not every interference with a right constitutes a *prima facie* infringement (***Morris***, *supra* at para. 53). Thus, a regulation which is outside the scope of an express regulation clause may nevertheless not interfere with a treaty right to hunt or fish if it fails to pass the first stage of the ***Badger*** test. But if the regulation was permitted by the express regulation clause, then that was the end of the matter.

66 Although no express mention was made of onus, it can be implied that it rested on the challenger to prove that the regulation did not fit within the express regulation clause i.e. "It has not been shown that the regulations are other than a *bona fide* scheme ..." (para. 101), and the "defendants were unable to show there was anything unscientific, unreasonable or over broad" (para. 115), and there was "no evidence that the right to gather food was interfered with" (para. 118).

67 This analysis appears to import the element of justification into the initial analysis.

68 At para. 99, Slatter J.A. laid out his test in terms that are both specific to the facts of ***Lefthand*** and general:

> When assessing whether regulations are within the allowable scope of the Treaty, a customized test is appropriate, but there will be overlap in the factors considered. First, are the regulations a part of a *bona fide* scheme of management and conservation of the game stocks? Second, are the regulations contrary to any express promises or covenants in the Treaty or elsewhere? Third, is there any evidence that the scheme has been structured in a way that discriminates against the aboriginal fishery, and to what extent do the regulations give others priority to the game stocks? Fourth, are the regulations reasonable, in the sense that they are rational and proportional to the conservation objective? Fifth, what practical effect do the regulations actually have on the Indians' ability to exercise their right to hunt and feed themselves? As was stated in *Gladstone*, at para. 43, these factors are all considered globally, to assess whether the regulations are within the scope of the regulations contemplated by the treaty.

Application of Slatter J.A.'s test in Lefthand

69 Where, as in this case, a treaty right is subject to regulation for conservation, the test set down by Slatter J.A. in ***Lefthand*** must be dealt with, although his decision must be read with the Supreme Court's decision in ***Badger***.

70 The ***Badger*** test as outlined above is:

1. Does the legislation interfere with an Aboriginal Treaty Right and therefore constitute a *prima facie* infringement of s. 35(1)? (onus on challenger)

a) What is the scope of the treaty right?
b) What is the objective of the regulation?

c) Has the right, as scoped, been interfered with?

i) Is the limitation unreasonable?
ii) Does the regulation impose undue hardship? or
iii) Does the regulation deny to the holders of the right their preferred means of exercising the right?

2. Can the legislation nevertheless be justified? (Onus on the Crown).

a) Is there a valid legislative objective?
b) Has the honour of the Crown been upheld?

71 In following the ***Badger*** test, it seems to me that (a) the scope of the treaty right involved is the right to fish for food; (b) the regulation Mr. Hamelin was charged under has as its objective conservation of the fish stocks, and would *prima facie* be consistent with the regulation provision in Treaty 8 (as well as s. 12 of the NRTA); (c)(i) the regulation may not be reasonable; (c)(ii) the regulation may impose undue hardship; and (c)(iii) the regulation may deny Mr. Hamelin and other members of his First Nation their preferred means of exercising that right.

72 The ***Badger*** test would, in my view, lead to the onus switching to the Crown to nonetheless justify the regulation.

73 Slatter J.A.'s test has the following steps:

1. Are the regulations a part of a *bona fide* scheme of management and conservation of the game stocks?
2. Are the regulations contrary to any express promises or covenants in the Treaty or elsewhere?
3. Is there any evidence that the scheme has been structured in a way that discriminates against the aboriginal fishery, and to what extent do the regulations give others priority to the game stocks?
4. Are the regulations reasonable, in the sense that they are rational and proportional to the conservation objective?
5. What practical effect do the regulations actually have on the Indians' ability to exercise their right to hunt and feed themselves?

Question 1 - Are the regulations a part of a bona fide scheme of management and conservation of the game stocks?

74 This first question is essentially a restatement of step 1(b) of the ***Badger*** test as outlined above. The answer to this question on the evidence before me is "yes"; there is no suggestion that the Variation Order was not made *bona fide*, or that its objectives were solely related to management and conservation of fish stocks.

Questions 2 to 5

75 Questions 2 to 5 all seek to ascertain the effects of the regulation and as such are compatible with step 1(c) of the ***Badger*** test as outlined above.

Question 2 - Are the regulations contrary to any express promises or covenants in the Treaty or elsewhere?

76 Question 2 explores the express wording of the treaty and any oral or written promises or covenants which may

also form a part of the specific agreement between the Crown and the Aboriginal people. In ***Marshall No. 1***, *supra* at para. 14, Binnie J. made it clear that promises made to the Aboriginal people at the time of the treaty that are not formally included in the written words of the treaty may nevertheless form a part of that agreement.

77 That is particularly relevant here, as this case deals with Treaty 8. As described by Cory J. in ***Badger***, it was represented to the Indian people who negotiated Treaty 8 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."

78 Question 2 is aimed at exploring other promises and covenants of the treaty, and not the express regulation clause which was in issue in ***Lefthand***. It could provide assistance to an investigation into whether or not a regulation is reasonable. However, the boundary between proving an infringement and justifying an infringement is not easily defined, and this particular analysis may prove more useful in the justification phase of the ***Badger*** test where the Crown could point to the absence of conflict with any express provisions of a treaty or other surrounding promises.

79 Having regard to the representations made to the Treaty 8 Indians, it cannot be said that the Federal regulatory power for conservation powers is unlimited. At least with respect to Treaty 8, that power can only be exercised "in the interest of the Indians" and "necessary in order to protect the fish". Those limitations require consideration of the reasonableness of the regulation, not merely that it be *bona fide* and in relation to conservation measures.

80 Here, without looking at the evidence of necessity and reasonableness, it cannot be concluded that the regulatory power was exercised by the Crown in keeping with its regulatory powers.

Question 3 - Is there any evidence that the scheme has been structured in a way that discriminates against the aboriginal fishery, and to what extent do the regulations give others priority to the game stocks?

81 While finding summarily that there was no evidence of discrimination, Slatter J.A. paid particular attention to the question of priority. The regulations in ***Lefthand*** related to a bait ban; in ***Eagle Child*** (as in the case at bar), there was a territorial ban. There was no discrimination against the holders of treaty rights - all such fishers were treated equally.

82 Slatter J.A. appears to reject (at paras. 105 to 107) the notion that there is any clear duty under the Federal regulatory power reserved by the Treaty 7 (as well as Treaty 8) to give priority to aboriginal fishers, as had been determined in ***Badger*** to be the right given to aboriginals by the *NRTA* at para. 93).

83 In Slatter J.A.'s opinion:

> ... the right to regulate reserved in Treaty No.7 includes a right to allocate scarce resources, so long as due regard is given to aboriginal hunting rights, mindful of the fiduciary duties of the Crown in that respect. While aboriginal hunting rights are not limited to subsistence levels, that should be the emphasis when considering issues of priority. The early cases suggesting an absolute priority for aboriginal hunting have been modified by the more recent decisions. No absolute priority or exclusivity need be given to the aboriginal fishers, so long as meaningful recognition is given to their rights. (At 111).

84 He focused on the finding that no priority had been given to non-aboriginal fishers, rather than whether any consideration had been given to of priority to aboriginal needs. In this regard, his test differs somewhat from the ***Badger*** test relating to priority to aboriginal needs.

85 Under ***Badger***, if a challenger could show that the legislation discriminates, or did not give adequate priority to his treaty rights, this could show that the legislation was unreasonable. Under ***Lefthand***, with Federal regulations under a treaty with an express regulatory power in it, the question would appear to be mainly one of discrimination, although Slatter J.A. leaves open the question of priority for aboriginal fishers. There, he noted that the evidence had been that

there was no surplus of fish above the threshold levels required to maintain the fish populations (at para. 113). Essentially, there were no fish to give priority to.

86 Therefore, this question could also be considered under that part of the ***Badger*** analysis. There is in my view overlap between a regulation that is unreasonable and a regulation that is unduly harsh. As such it could also be argued that this question also assists in the investigation of whether the regulation is unduly harsh.

87 The uncontradicted evidence in this case is that there was some level of fishing in Goose Creek that could be permitted without impairing the fish stock. This evidence is in contrast to the evidence in ***Lefthand*** and suggests that the Variation Order here may be overbroad, and failed to give appropriate priority to aboriginal fishers.

Question 4 - Are the regulations reasonable, in the sense that they are rational and proportional to the conservation objective?

88 It is not enough, in my view, to say that the regulations relate solely to conservation. Rationality and proportionality are key elements of reasonableness. Here, the evidence supports a conclusion that a total ban on fishing in Goose Creek was not necessary to appropriately conserve the fish stock. Mr. Walty's uncontradicted evidence was that a quota could be established on Goose Creek to take into consideration a traditional Indian spring fishery there, without doing harm to the fishery. Such a quota would require monitoring, however.

89 The location of this fishery is on Reserve lands, as opposed to public lands where aboriginals may also exercise their treaty rights. That is a factor which is relevant to the rationality and proportionality arguments. It is also significant that fishing for food is a treaty right that was amplified by the *NRTA.* There is certainly a reasonable argument that the Variation Order here, being a total ban on fishing, while being rational, was overbroad.

Question 5 - What practical effect do the regulations actually have on the Indians' ability to exercise their right to hunt and feed themselves?

90 This is a test that may roll together two aspects of the ***Badger*** test: undue hardship and preferred means. The practical effect of the regulation here was that Mr. Hamelin was not allowed to fish for food in a location within easy walking distance of his home, in circumstances where he was virtually assured of catching edible fish, at a time of year and in a location where many generations of aboriginals caught fish.

91 Is it undue hardship for Mr. Hamelin to avoid fishing in these circumstances, recognizing that the ban was for a relatively short period of the year? This is again an arguable point. I do not think it is necessary for Mr. Hamelin to establish that he was hungry and had no other way of feeding himself but for fishing. Or that he had no means or resources to travel to the alternate locations suggested by the Crown. More importantly, the evidence indicated that relatively few of the Sturgeon Lake Cree First Nation members fished in Goose Creek in the spring. Individual hardship is not as relevant a consideration as hardship for treaty rights holders as a group.

92 Here, there was some impact on Mr. Hamelin's ability to exercise his food-fishing rights. The evidence does not go so far as to support a finding that his right was interfered with to the point of undue hardship.

Conclusion on *Badger-Lefthand* tests

93 As noted above, under ***Badger*** alone I would have found a *prima facie* infringement of Mr. Hamelin's treaty rights. Under ***Lefthand***, I find that while the regulations are a part of a *bona fide* scheme of management and conservation of the fish stock, they may be contrary to the promises made to the Treaty 8 Indians. While there is no evidence that the regulatory scheme here has been structured in a way that discriminates against the aboriginal fishery, and does not gives others any priority to the fish stocks, it gives no priority to the aboriginal fishery in circumstances where there is a surplus of fish beyond those necessary to protect to preserve the fish stock. While being rational, the regulation may thus be overbroad as a quota system might be feasible for Goose Creek. And while there is some

practical effect on Mr. Hamelin's ability to exercise his treaty rights, the effects do not go to undue hardship.

94 In my view, there is sufficient basis to move past this step in the analysis, and to consider whether there has been a *prima facie* breach of Mr. Hamelin's rights.

The *Badger* Test as Augmented by Lefthand

95 Given the above discussion, I consider it appropriate to consider the questions posed in ***Lefthand*** as guidelines which may help a Court to determine whether a *prima facie* infringement has been established under the ***Badger*** test.

96 I repeat the ***Badger*** test below as augmented by ***Lefthand*** for ease of reference. Where possible and necessary, I have changed the wording of the questions in ***Lefthand*** to make them more generic:

1. Does the legislation interfere with an Aboriginal Treaty Right and therefore constitute a *prima facie* infringement of s. 35(1)? (onus on challenger)

a) What is the scope of the treaty right?
b) What is the objective of the regulation?
c) Has the right, as scoped, been interfered with?

i) Is the limitation unreasonable?

I) Are the regulations contrary to any express promises or covenants in the Treaty or elsewhere?
II) Is there any evidence that the scheme has been structured in a way that discriminates against the aboriginal activity, and to what extent do the regulations give others priority to the resource?
III) Are the regulations rational and proportional to the legislative objective?

ii) Does the regulation impose undue hardship? or
iii) Does the regulation deny to the holders of the right their preferred means of exercising the right?

I) What practical effect do the regulations actually have on the Indians' ability to exercise their right?

2. Can the legislation nevertheless be justified? (onus on the Crown).

a) Is there a valid legislative objective?
b) Has the honour of the Crown been upheld?

1.

The trial judge erred by distinguishing *Lefthand* and applying *Eagle Child*, or applying them at all

Trial decisions in Eagle Child and Lefthand

97 Although the trial judge did not have the benefit of the Court of Appeal's decision, the state of the law at the time of his decision is relevant by way of background to this appeal.

98 In both ***Eagle Child*** and ***Lefthand***, both Power J. and Phillips J. respectively relied on the ***Sparrow*** two-stage analysis for reviewing alleged legislative infringements of aboriginal rights:

1. Has the challenger established that the legislation has the effect of interfering with an existing aboriginal right? (the *prima facie* infringement step); and
2. If *prima facie* infringement has been found, has the Crown justified the infringement?

99 In ***Eagle Child***, the accused had been convicted of fishing in closed waters. His challenge to the conviction was on the basis of his Treaty 7 rights to fish for food.

100 Power J. considered the first step of *prima facie* infringement, and noted that ***Sparrow*** poses three (non-exhaustive) factors to be considered in determining whether the interference amounts to a *prima facie* infringement:

* is the limitation unreasonable?
* does the regulation impose undue hardship?
* dies the regulation deny to the holders of the right their preferred means of exercising that right? (at para. 30).

101 He considered (at paragraph 33) various phrases used by the Supreme Court in defining *prima facie* infringement:

* adverse restriction on the exercise of their right
* unnecessary infringement on the interests protected by the right
* erodes an important aspect of the right
* is a meaningful diminution of the right

102 While noting that the majority of the British Columbia Court of Appeal held that "any infringement" of a treaty right required justification, Power J. cited Huddart J.A.'s dissent. It is clear from ***Mikisew*** (paras. 30 and 31) that the challenger must go beyond proving "any infringement" to get past the first step in ***Sparrow***.

103 Power J. noted at para. 40 that:

> No evidence was presented to the Court on how the right as held by Treaty 7 is exercised, or on the interest protected by the right. Without this information the Court cannot determine the effect of the regulation on the exercise of the right. The Appellant has not met the evidentiary burden to prove a prima facie infringement.

104 He continued at paras 42 and 43:

105 There is no evidence before the Court on the following matters:

1. How frequently Eagle Chief or members of the Blood Band or Treaty 7 fish;
2. The areas they prefer to fish;
3. The time, times of year they prefer to fish;
4. Their preferred food fish;
5. Their preferred methods of fishing;
6. The extent of their food fishing; and

> 7. Whether they preferred to fish the St. Mary River, as opposed to the numerous other water bodies in the vicinity of the Blood Reserve that were open to harvest.

106 Without such evidence the Court cannot determine whether there is an adverse affect or meaningful diminution.

107 He also reviewed evidence of the proximity of other bodies of water not affected by the closure of the St. Mary River, and held at paras. 46 and 47:

> This Court agrees with the conclusion of the trial judge that the evidence indicated that the closed time on the lower St. Mary River did not result in an undue hardship to Mr. Eagle Child or the Blood Band nor was it an unreasonable interference on the right.
>
> The numerous nearby water bodies that were open for harvest, indicate that the closed time on the St. Mary River did not result in a substantial geographical and seasonal restriction on the right.

108 ***Eagle Child*** thus never moved past the first step in ***Sparrow***.

109 In ***Lefthand***, Phillips J. recognized that not every interference of an existing right would constitute a *prima facie* interference. She stated at paragraph 44:

> Interference of any degree or significance with the exercise of an Aboriginal or Treaty right does not necessarily constitute a *prima facie* infringement.

110 She considered whether a bait ban was unreasonable in the context of a Treaty 7 Indian fishing for food, and found that it did. She then proceeded to the justification stage. In that stage, she concluded that the Crown's failure to consult in any meaningful way with Treaty 7 Indians was fatal and quashed the conviction.

111 Following the trial judge's decision on January 11, 2006, ***Lefthand*** and ***Eagle Child*** were heard by the Court of Appeal. They were heard together and are reported as ***R. v. Lefthand***, 2007 ABCA 206. Essentially, Power J.'s decision in ***Eaglechild*** was affirmed; Phillips J.'s decision on ***Lefthand*** was overturned. ***Eaglechild***'s conviction stood; ***Lefthand***'s conviction was restored.

112 In choosing between the two conflicting decisions in January, 2006, Wheatly P.C.J. rode the winner.

113 That being said, it is still necessary to explore whether the trial judge erred in the manner in which he applied ***Eagle Child*** to the facts in the case.

114 In paragraph 100, he held that the onus is on the party challenging the regulation to show that the regulations are "other than a *bona fide* scheme of management and conservation of the fish stocks". This determination is consistent with what was done in Slatter J.A.'s analysis on the appeal.

115 I will deal with the implications of ***Lefthand*** and ***Eagle Child*** both in the context of the duty to consult and prima facie infringement.

2.

The trial judge failed to follow *Mikisew* and erred in his interpretation of *Mikisew* that it had prospective application only

Duty to Consult - Application of *Mikisew*

116 Mr. Hamelin argues that ***Mikisew*** establishes a duty on the part of the Government to consult with First Nations

beyond land rights, and the duty applies to the implementation of fishery regulations. He submits that the trial judge erred in finding no duty to consult.

117 Mr. Hamelin also argues that the trial judge erred in finding that ***Mikisew***, and the duty to consult, should have prospective application only.

118 Further, Mr. Hamelin argues that the circumstances here raise the honour of the Crown and that honour has been breached by the implementation of the fishery regulations here.

119 Mr. Hamelin's argument on the duty to consult relies on ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, [2004] 3 S.C.R. 550, 2004 SCC 74, ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, 2004 SCC 73 and ***Mikisew***, submitting the trial judge erred in finding that the duty to consult applied only to the issue of lands.

120 The Crown responds that ***Taku***, ***Haida*** and ***Mikisew*** create a framework for the review of Crown conduct in the course of planned or proposed government action that may affect aboriginal and treaty rights. Because no consultation had taken place, and the Variation Order was implemented, the proper time and place for consideration of the duty to consult was within the ***Sparrow*** framework as part of the second branch of the test dealing with justification.

121 Support for that position is found in the minority reasons of Conrad J.A. at para. 154 in ***Lefthand***:

> It is not necessary for me to consider the issue of whether appropriate consultation occurred in either of these appeals. Where, as here, the impugned government action is already complete and the right being asserted is already established, consultation is appropriately considered under the justification portion of the infringement analysis. Given my finding that the claimants have not demonstrated a prima facie infringement of their rights, it is not necessary for me to consider possible justifications.

122 Slatter J.A. stated for the majority:

> The defendants in these appeals made frequent references to the honour of the Crown, seeking in that general phrase rebuttals to specific arguments of the prosecution. There is no indication on this record that the *Alberta Fishery Regulations* are anything other than a good faith attempt by the Crown to manage the fisheries. There is no hint of sharp dealing here, and these appeals can be resolved without assessing the Crown's honour.
>
> But even if there was a failure to consult, the remedy would not be to ignore the regulation, perhaps endanger the fish stock, and then collaterally attack the regulation when charged. The Councils must be taken to have known that the regulations were in force. Anyone complaining about the regulation or the failure to consult should have contacted the regulators and discussed whether the ban was really needed. Absent agreement, the solution was to directly attack the regulation, not to disobey it (Slatter J.A. at 46).

123 Slatter J.A. also noted at para. 49:

> Whatever the scope of the right to be consulted may be, it is a perishable right. It is the type of right that expires if it is not asserted in a timely manner. The objective of consulting is to seek input before acting; once the act is done the failure to consult is moot. A failure to consult does not nullify an administrative act. Once an administrative act has been implemented, its validity must be tested based on whether it does or does not properly respect aboriginal rights. Even absent consultation, the decision maker may have "got it right". If the decision violates aboriginal

> rights, then the failure to consult is moot. Once the act is done, failure to consult just becomes a part of the justification analysis: ***Mikisew Cree*** at para. 59 (see *infra*, para. 139). ***Sparrow*** confirms that the failure to consult is part of the justification analysis, but never suggests it is a threshold issue on the validity of the regulations. Whatever may be the position on collateral attack generally, collateral attack for an alleged failure to consult is not available.

Analysis

124 Two things appear from the relevant cases:

1. The duty to consult on matters is broader than the taking up of land. ***Haida*** and ***Taku River*** both involved fishing rights, and no "lands" were taken up. ***Mikisew*** holds that there is a duty to consult, as part of the honour of the Crown, before taking up lands even where a treaty contemplates that the Crown has the right to take up lands covered by First Nations treaty rights for certain purposes (at para 51); and
2. Failure to consult where treaty rights (such as hunting and fishing) are interfered with does not automatically require justification under the ***Sparrow*** tests (***Mikisew*** at para. 32).

125 It is clear from the decision in ***Mikisew*** that the Supreme Court contemplated that shortcomings in the consultation process might be the subject of a ***Sparrow***-type justification.

> In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon. Viewed in light of the facts of this case, we should qualify ***Badger***'s identification of two inherent limitations on Indian hunting, fishing and trapping rights under Treaty 8 (geographical limits and specific forms of government regulation) by a third, namely the Crown's right to take up lands under the treaty, which itself is subject to its duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights. Such a third qualification (not at issue in ***Badger***) is fully justified by the history of the negotiations leading to Treaty 8, as well as by the honour of the Crown as previously discussed.
>
> As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to ***Mikisew*** procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its procedural obligations, quite apart from whether or not the ***Mikisew*** could have established that the winter road breached the Crown's substantive treaty obligations as well.
>
> ***Sparrow*** holds not only that rights protected by s. 35 of the *Constitution Act*, 1982 are not absolute, but also that their breach may be justified by the Crown in certain defined circumstances. The ***Mikisew*** rights under Treaty 8 are protected by s. 35. The Crown does not seek to justify in ***Sparrow***-terms shortcomings in its consultation in this case. The question that remains, therefore, is whether what the Crown did here complied with its obligation to consult honourably with the ***Mikisew First Nation***.

126 ***Mikisew*** essentially turned on whether the Crown's honour had been fulfilled in its consultation process with the Mikisew.

127 Binnie J., for a unanimous court, stated at para 31:

> I agree with Rothstein J.A. (in the decision below) that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in ***Sparrow***. In ***Sparrow***, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.

128 At para. 34, Binnie J. stated:

> In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. ***Haida Nation*** and ***Taku River*** set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (***Haida Nation***, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.

129 In ***Mikisew***, a case involving Treaty 8 rights, the Federal Government approved a winter road to go through the Mikisew's reserve, without consulting them. The Mikisew objected that the road had the effect of closing that area to hunting and trapping. Binnie J. noted that Treaty 8 contemplated that "portions of the surrendered land would be taken up and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not." (At para. 30). He contrasted ***R. v. Sparrow***, [1990] 1 S.C.R. 1075, which involved a charge of fishing with a drift net longer than that permitted by the terms of the accused's Band's food fishing licence. Binnie J. distinguished ***Sparrow*** to some extent, on the basis that in ***Sparrow***, the Musqueam fishing rights had not been affected by treaty rights, and their fishing rights were not agreed to be subject to lands "not required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (Treaty 8). Despite the express provisions of Treaty 8, Binnie J. held that any changes are expected to be managed "honourably" by the Crown (para. 31).

130 At para. 48 he quoted Rothstein J.A. (as he then was) from the Federal Court of Appeal decision below, ([2004] 3 F.C.R. 436 (C.A.):

> What Rothstein J.A. actually said at para. 18 is as follows:
>
> 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. [Emphasis added.]

131 Binnie J. then commented:

> The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over its traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue

> after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a ***Sparrow*** justification, would be a legitimate First Nation response.

132 It is clear from ***Mikisew*** that the specific treaty rights granted to First Nations under treaties must be analysed in the context of the duty to consult in any particular case. But it is also clear from ***Mikisew*** and the Alberta Court of Appeal in ***Lefthand*** that failure to consult is dealt with in the justification stage under ***Sparrow***, and not in the context of a *prima facie* interference with an existing right.

133 Mr. Hamelin argues that a the failure to consult in this case (it being acknowledged by the Crown that there was no consultation by the Crown before implementing the Variation Order) requires justification by the Crown in the event the challenger establishes that the impugned regulation may interfere with an existing right. For the purpose of requiring justification, "interference" is not quantified or qualified.

134 Accepting this argument would place the procedural right to be consulted ahead of the substantive aboriginal right protected by law or by treaty (or both). With respect, that puts form over substance. If establishing a *prima facie* interference with a right requires that the potential interference be significant, or at least more than theoretical or *de minimus*, surely the duty to consult must be viewed in a similar light. Why would failing to consult on an interference that does not amount to a *prima facie* interference for the purposes of ***Sparrow*** require justification, when the interference itself does not require justification?

135 I recognize that ***Mikisew*** requires a case by case determination as to the degree to which the conduct contemplated by the Crown would adversely affect rights so as to trigger a duty to consult (at para. 34). The trigger is whether or not the contemplated conduct "might adversely affect" a right. The variable lies in determining the nature and extent of consultation, when triggered. As noted by Binnie J., the "low end" may only require notice, disclosure of information, and discussion".

136 I do not read ***Mikisew*** as saying, however, that all breaches of procedural rights require justification. Indeed, in ***Mikisew***, there was no attempt to justify. The case proceeded on the adequacy of the consultation. But the Court had already rejected the argument that the taking up of some 23 sq. kilometres of land within the whole of Wood Buffalo National Park for the road was not significant. The Court noted at para. 47 that "twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trapline". The notion that the claimants could hunt or trap elsewhere does not satisfy the Treaty 8 negotiations promise (as noted in ***Badger***, [1996] 1 S.C.R. 771) that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it".

137 Binnie J. held that "this promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines".

138 Following recognition of a duty to consult in ***Sparrow***, ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, developed the concept further. Lamer C.J. held that the duty to consult in the context of legislative decisions infringing upon proven claims of aboriginal title was imperative, stating at para. 168:

> ... There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified. 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.

139 In dealing with the issue in ***Lefthand***, Slatter J.A. (for the majority) held at para. 59:

> Once enactments are in place, consultation only becomes an issue if a *prima facie* breach of an aboriginal right is sought to be justified (citing ***Mikisew*** at para. 59).

140 In other words, the absence of consultation is not a factor in determining whether a *prima facie* breach has occurred.

141 Recently, in ***Tsuu T'ina Nation v. Alberta (Environment)***, 2010 ABCA 137, the Alberta Court of Appeal considered the duty to consult in the context of the development of the water management plan for the South Saskatchewan River Basin, approved by the Lieutenant Governor in Council on August 30, 2006. The Court of Appeal reviewed the judicial history of the duty to consult. At para. 42, the Court noted that the rights which "are or may be affected" were as yet unproven and were the subject of litigation between the appellant First Nations and the Province, and that for the purposes of the application, the appellant First Nations were not relying on any *prima facie* breach.

142 At para 46, the Court held:

> In my view, there should not be three separate tests to determine whether a duty to consult exists, and it is inappropriate to try to define the test by simply referring to the circumstances of a particular case in which the duty was found to exist. The underlying theme of the cases in which a duty to consult has been found is that the honour of the Crown is always at stake when it deals with aboriginal peoples. In other words, the question is always whether the honour of the Crown requires that consultation and appropriate accommodation take place when a proposed government action threatens to adversely affect aboriginal peoples. The test is broad and sensitive to differing factual circumstances. The particular circumstances in the earlier cases are but examples of instances where the duty exists. These circumstances, of course, may usefully be examined to provide analogies to the circumstances of the case before the court. However, the existence of the duty does not depend upon the exact correspondence to the circumstances in other cases.

143 The Court of Appeal noted that it was likely to be difficult for the appellant First Nations to establish the rights they were asserting, and in the circumstances of the tenuous nature of the "rights", held that the duty to consult before completing the plan was at the "very low end of the scale". The Court expressly rejected the argument that because the chambers judge [[2008] A.J. No. 980] found that the plan did not, in fact, have an adverse impact on either treaty or aboriginal rights, that finding was dispositive in negating any duty to consult (at para. 68).

144 At para. 69, the Court concluded that a plan that had the potential to adversely affect the express Treaty rights of the appellant First Nations, as well as water rights claimed by them within the area, triggered a duty to consult.

145 The Court proceeded to determine whether the duty to consult had been satisfied. It held that it had been met.

146 In ***Tsuu T'ina Nation***, the appellant First Nations sought declaratory relief and an order setting aside the Order in Council which had approved the plan. The chambers judge ruled that a duty to consult had arisen, but that it had been met. As a result, it was not necessary for him to deal with whether or not an Order in Council could be set aside. On appeal, the appellant First Nations withdrew their request to set aside the Order in Council, and only sought declaratory relief.

147 I do not read ***Tsuu T'ina Nation*** as holding that whenever a duty to consult has arisen, there is an automatic jump to the justification stage of ***Sparrow***. There may be a right to seek declaratory relief, but the granting of declaratory relief is discretionary. Beyond declaratory relief, it is my view that the challenger must still establish a *prima facie* infringement.

148 The Court of Appeal held at para. 69 that it was sufficient to trigger the duty to consult if the plan "might" adversely affect the appellant First Nations' rights. The duty arose before the plan was approved, and the fact that it ultimately did not have any adverse impact did not retroactively eliminate the need to consult.

149 What is key, however, is the remedy being sought. In ***Tsuu T'ina Nation***, the issue squarely before the Court was

whether the duty had been met. There was no attempt to justify any infringement. In this case, the issue is whether or not there has been a *prima facie* infringement, such as to require the Crown to justify the infringement, as well as dealing with the duty to consult. ***Tsuu T'ina Nation*** does not open the door to an automatic analysis of whether the duty to consult has been met or not, whenever it can be shown to have arisen.

150 Prospectively, of course, the situation may be different. Before a right is infringed, First Nations may have the ability to seek remedies to enforce the duty to consult. But in an after-the-fact situation as with the charges against Mr. Hamelin, his rights have not been infringed unless it can shown that the consequences amounted to a *prima facie* infringement within the meaning of ***Sparrow***. The Variation Order is not automatically invalidated if a duty to consult was not met. That is only one factor in the justification analysis, and the justification door does not open until a *prima facie* infringement has been established.

151 A further consideration is that the duty to consult is a duty that is owed collectively, and not to an individual such as Mr. Hamelin. He was not owed a personal duty to be consulted about potential impacts to his fishing rights. The fact that he was not consulted is not relevant. If any of his rights were infringed, they related to his right to fish for food. His ability to raise the absence of consultation with his Band or collective representatives arises at the justification stage, not at the *prima facie* infringement stage.

152 Any restriction on hunting, fishing or trapping within the lands covered by Treaty 8 may adversely affect the treaty rights. That is so with respect to the surrendered lands with respect to which Treaty 8 Indians have a right of access; it is more so with respect to reserve lands themselves where there is more than just a right of access. A fishing ban (or bait restriction) on waters to which Treaty 8 Indians have a right of access undoubtedly "might have an adverse effect" on the rights of a treaty Indian to fish for food. ***Mikisew*** appears to hold that in such circumstances, the duty to consult is triggered. The nature and extent of consultation may be at the low end of the spectrum, and may only require notice to be given. But any notice must clearly be prior notice. The nature and extent of consultation may be different between surrendered lands and reserve lands, but I need not consider that here.

153 In my view the Variation Order did have the effect of affecting fishing rights, and the duty to consult was triggered. There was no prior notice given, and the procedural duty of consultation was not met.

154 I do not go so far as to say that a finding such as that means that the honour of the Crown has been violated. Such a finding would have to come out of the justification stage, following a finding that the regulation or infringement is not justified. One of the factors to be considered there is consultation, but it has never been held that the failure to consult is automatically fatal to justification, or automatically constitutes a breach of the Crown's honour. Consultation is but one of a number of factors to consider at the justification stage.

155 My conclusion is that a failure to consult does not result in a bye to the justification round. Establishing a failure to consult does not allow the challenger to leap-frog over the *prima facie* interference step under ***Sparrow***. The effect of a failure to consult may be considered at the justification stage, but only where the infringement amounts to a *prima facie* infringement as that term has been interpreted by the courts since ***Sparrow***.

156 Not all infringements meet that test; thus the failure to consult on an alleged infringement that does not meet the test does not require justification.

157 While I am in agreement with Mr. Hamelin that the trial judge erred in his interpretation of ***Mikisew***, namely that it applied only to the taking of land and would in any event have prospective effect only, consideration of the failure to consult would only occur at the justification stage (as was the case in ***Lefthand***) and the trial judge did not get to that stage of the analysis because of his finding on *prima facie* infringement.

158 Thus, while the trial judge erred in law in his interpretation of ***Mikisew***, his errors had no effect on the result. Mr. Hamelin's grounds of appeal relating to ***Mikisew*** are dismissed.

159 In a prosecution such as this, lack of consultation or deficiencies in consultation are not a "stand alone" defence and they do not go to the validity of the restriction on a treaty right. These matters instead are part of the ***Sparrow*** justification test, and are to be considered in that context.

160 This finding would appear to be consistent with the British Columbia Court of Appeal's views on consultation as expressed in ***Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)***, 2009 BCCA 67.

161 Before getting to justification and consultation issues, the challenger must first establish a *prima facie* infringement of his Treaty rights.

3. **The trial judge erred by failing to properly follow the *Sparrow* tests.**

4. **That the trial judge failed to find a *prima facie* infringement of Mr. Hamelin's Treaty 8 right to fish.**

162 I will deal with these grounds of appeal together.

163 The trial judge's finding that Mr. Hamelin had not proven a *prima facie* infringement of his fishing rights is based on his finding that:

> ... he could have fished by rod and reel in Sturgeon Lake not offending the regulation, a very, very short distance from where in fact he was fishing in Goose Creek. There is ample evidence that he could have exercised his right to fish for food in an easy and accessible manner both in Sturgeon Lake or at other lakes within a close distance of his home. The Defendant was not deprived of a right to fish for food. (At para. 21).

Evidence

164 Mr. Hamelin acknowledged in the agreed statement of facts that he was fishing in Goose Creek on May 27, 2003 when it was closed for fishing. He had driven there, taking 3 to 5 minutes to get there. It was otherwise a 15 minute walk from his home on the Sturgeon Lake Cree Nation Reserve. He was fishing with his 6 year old son. In about an hour, he had caught about 20 fish, throwing back the smaller ones and keeping 3 for dinner. The fish he kept were undersized.

165 He testified that he was fishing on reserve lands. He was fishing for his preferred species of fish - pickerel. His parents and grandparents had fished in creeks on the Reserve in the spring when the fish were spawning. His choice of location was based on ease of fishing. Other lakes were too far away to be convenient for him; the nearby lake was mainly frozen over and it would be difficult to catch pickerel there at that time He did not have a boat.

166 Mr. Goodswimmer, a Band elder, testified on behalf of Mr. Hamelin. He testified that he had lived for 49 years on the Sturgeon Lake Cree Nation Reserve and his grandfather had been a signatory to the Treaty 8 Adhesion in 1909. Sturgeon Lake and Goose Creek were chosen as reserve lands because of the good fishing, and it was part of their Nation's traditional hunting and fishing area. He testified as to fishing in Goose Creek by the community since pre-treaty days; that Goose Creek was always fished in the spring because it was easy to get fish from there; and that it offered the best spring fishing. It was easy to get to because it was within walking distance of the main settlement, and there was an abundance of fish because of spawning. He testified that few community members fished on the shore of Sturgeon Lake.

167 Dr. Gordon Walder testified on behalf of Mr. Hamelin. He was qualified as an expert in fish resources and management. He testified that he had found no instances where native sports fishing had high impact on the Sturgeon

Lake Management Plan of October, 2002. He testified that fish in Sturgeon Lake were generally of poor quality in that they tended to be small. He saw no evidence that native food fishing was a major concern. In his opinion, 400 walleye could be removed each spring from Goose Creek without any significant impact on the fishery.

168 Several witnesses testified on behalf of the Crown.

169 Officer Dave Barrett was the fish and wildlife officer that ticketed Mr. Hamelin. He testified that while the ice was off the lake on May 25, shore fishing was likely to be more successful at that time of year than lake fishing. He said that fish spawn in various locations, including in the lake, but that there is a higher concentration of spawning fish in Goose Creek. He testified that spawning went into the first week in June.

170 David Walty was the senior manager responsible for the Northwest Boreal Region Fish Habitat and Population Management Program for Alberta Fish and Wildlife and had held that position since 1981. He testified that he had been involved in the closing of Goose Creek in 1982. A committee had been involved with a member of Sturgeon Lake Cree Nation on the committee, although there was no evidence that the member had been appointed to that committee by the Nation.

171 Mr. Walty opined that a quota could be set on Goose Creek for spring fishing. He referenced a September 8, 1996 meeting with the Chief and Council where it was stated that the Band was in favour of protecting the walleye population, but that the "closure was a further infringement on their traditional rights".

172 He acknowledged that fishing on Sturgeon Lake might be difficult or impossible at the point in the spring when the lake was still frozen over but the ice was unsafe. Fishing was easiest in the spring in Goose Creek, when the fish were spawning.

173 He also testified that the spawning beds were entirely within the Sturgeon Lake Cree Nation Reserve. He was aware that in the past the Chief and Council exercised some access control by selling permits, and he was not aware of any abuse of the fishery by First Nation fishers.

174 Mr. Walty's evidence differed from Officer Barrett's, in that Mr. Walty believed that spawning was over by May 25. He acknowledged that it was thus possible that there were no spawning fish when Mr. Hamelin was ticketed on May 27. He also opined that there was a good chance that Mr. Hamelin caught mainly male fish, as a studied ratio was 80 male fish to 20 female fish.

175 Mr. Walty was of the view that a fishery on Goose Creek was possible, but that it required management.

176 Dr. Sullivan, another Crown fish expert, testified that the exact time for spawning varied each year according to water temperature, and that he could not put a calendar date on the season.

177 Despite this evidence, it was admitted by Mr. Hamelin that he caught and kept 3 fish from Goose Creek, when it was closed to fishing. Issues such as size, gender and spawning are not relevant to the charge.

Analysis

178 The trial judge's finding as to the availability of other fishing areas is consistent with the findings in ***Eagle Child*** that "the numerous nearby water bodies that were open for harvest, indicate that the closed time on the St. Mary River did not result in a substantial geographical and seasonal restriction on the right" (at para. 47) and that the limit "does not amount to a *prima facie* infringement because there were numerous other nearby water bodies open for harvest" (at para. 48).

179 In ***Lefthand***, it was noted by Phillips J. that "at all times material to the charge, most of the bodies of water in the vicinity of the Livingston River were open to harvest and some allowed fishing with bait" (at para. 12).

180 These were the points focused on by Slatter J.A. in ***Lefthand***.

181 Mr. Hamelin was obviously alive to the issues raised in ***Eagle Child*** and the evidentiary deficiencies in it. Evidence was led on each of the areas identified by Power J. therein:

1. How frequently Mr. Hamelin or fellow Band members fished;
2. The areas they prefer to fish;
3. The time, times of year they prefer to fish;
4. Their preferred food fish;
5. Their preferred methods of fishing;
6. The extent of their food fishing; and
7. Whether they preferred to fish the specific location, as opposed to the numerous other water bodies in the vicinity of the Sturgeon Lake Cree Nation Reserve that were open to harvest.

182 The evidence of Mr. Hamelin and his witness Mr. Goodswimmer dealt with each of these issues. Mr. Hamelin testified that he preferred walleye (pickerel) and that he fished perhaps 10 times a year on Sturgeon Lake and several times a year on Goose Creek. He testified that Goose Creek was his preferred area to fish in April because the walleye were spawning in the creek at that time and it was easy to catch them, and that the location was only a short drive from his home on the reserve. His preferred method of fishing was rod and reel, as nets were too expensive for him and he did not have a boat.

183 The closest body of water (as noted by the trial judge) is Sturgeon Lake, into which Goose Creek runs.

184 Mr. Hamelin was cross-examined as to lakes in the vicinity of Sturgeon Lake, including Swan Lake, Long Lake, Goose Lake, Smoke Lake, Musreau Lake, Snipe Lake, Meekwap Lake, Iosegun Lake, Lesser Slave Lake and Utikumasis Lake. Goose Lake was the closest, but Mr. Hamelin testified that it was difficult to reach.

185 He was not familiar with driving times to some of the lakes identified, but thought that Swan Lake was probably a half hour drive away, Long Lake would be about a 1/2 hour drive, Snipe Lake would be about a 45 minute drive, Smoke Lake would probably be an hour away, and the others he knew would be more than an hour away.

186 The trial judge was faced with contradictory evidence as to whether Sturgeon Lake was free of ice or not. Officer Barrett said it was, by May 25. Mr. Hamelin testified that it was 3/4 ice covered. There was also contradictory evidence in the Crown's case as to whether fish were still spawning in Goose Creek after May 25. Officer Barrett said that spawning continued until early June; Mr. Walty said that it ended by May 25.

187 Officer Barrett acknowledged that the catch rates for pickerel from shore fishing were not high, but he had seen some individuals catch pickerel from the shore.

188 Mr. Hamelin acknowledged that his choice of location for fishing that day was because there was "easier access to where the fish are", not that it would have been impossible to fish elsewhere. He would not have expected the same level of success at fishing in the lake, because "there's really no fish in the lake except for whitefish and ling and perch", and that he wouldn't expect much success fishing from the shore because there were "too many weeds and sticks. You'd have to go quite a ways out to get past the weeds to start fishing." To do that, he would need a boat, which he didn't own.

189 He said that his reason to fish in the creek was "just easy access and there was a lot of fish in the creek".

190 Mr. Goodswimmer testified that Goose Creek was the best place on the reserve to catch fish in the spring.

191 What impact did the spring fishing ban on Goose Creek by virtue of the Variation Order have on Mr. Hamelin's

rights? The Variation Order barred him from fishing at a location on his Reserve, within a 15 minute walk from his home. While he could have fished on Sturgeon Lake, which was at least as close to his home as the Goose Creek location, if not closer, his chance of fishing successfully was much less there. He would have had to fish from shore, unless he was able to borrow a boat.

192 From shore, success would be limited because of the presence of weeds and sticks. And he felt he would be unlikely to catch his preferred type of fish. By contrast, fishing for pickerel in Goose Creek was virtually guaranteed to be successful in the spring because of the abundance of fish there. Mr. Hamelin's experience on May 27 was that he caught some 20 fish in less than an hour.

193 Goose Creek is on the Reserve, and had been fished in the spring for many generations. According to the anecdotal evidence of Mr. Goodswimmer, fishing on Goose Creek in the spring by aboriginal peoples predated the applicable treaty.

194 An initial issue is the extent to which aboriginal fishing rights are protected. Certainly Treaty 8 protects the Cree people's right to fish for food. Fishing for food must mean more than being able to put a hook or a net in the water; there must be a reasonable expectation of catching something edible. Otherwise the right is a hollow one. It is clear that Mr. Hamelin's right to fish for food was impacted by the Variation Order to the extent that to comply with the Variation Order, he would have to fish from either a location a similar distance away (Sturgeon Lake) where his chance of catching something was much less than with respect to Goose Creek, and his chance of catching his preferred type of fish was less yet, or he would have to drive at least half an hour away to fish in nearby lakes. There was no evidence as to the likelihood of catching anything (and in particular pickerel) at any of these other lakes.

195 Mr. Hamelin could certainly have fished in several locations within a half hour drive, but it is doubtful that his chance of catching pickerel would be close to the near certainty of catching pickerel in Goose Creek.

196 In his reasons, the trial judge relied on his finding that Mr. Hamelin could have fished for food in an "easy and accessible manner both in Sturgeon Lake or at other lakes within a close distance of his home." He did not deal expressly with Mr. Hamelin's evidence that it would not be easy to fish from the shores of Sturgeon Lake because of weeds and sticks. He also did not deal with Officer Barrett's evidence that the success rates for fishing for pickerel from the shores of Sturgeon Lake were "not high" and they would be higher in Goose Creek.

197 In ***Lefthand***, Slatter J.A. noted at para 101:

> In these appeals the uncontradicted Crown evidence was that there were other waters in the immediate vicinity that were open for fishing (in the case of ***Eagle Child***), and other waters where bait fishing was permitted (in the case of ***Lefthand***). On the evidence the regulations do not offend the covenant for hunting and fishing "throughout the Tract", as there was fishing available in the immediate vicinity for that purpose.

198 He emphasized that treaty rights do not guarantee a "right to fish in every stream at any time" and that the treaty protects an activity and that no "site specific" rights are granted.

199 He also noted that "There is no reason to assume the areas of the Tract open to fishing cannot be regulated. The right to regulate for conservation reasons allows some closing of waters to fishing so long as a reasonable opportunity to hunt or fish for food is preserved in the vicinity".

200 At para. 126, Slatter J.A. discusses *prima facie* infringement:

> In summary, to show a *prima facie* infringement, the defendants must show some unreasonableness, hardship or interference with their preferred way of exercising their rights, to the level set out in the cases.

201 There was no evidence from Mr. Lefthand as to the impact on his ability to feed himself. That case dealt with a bait ban, rather than the closing of a fishery.

202 In ***Eaglechild***, the court dealt with a closed fishery, the St. Mary River. At paras. 132 and 133, Slatter J.A. noted:

> It cannot be doubted that closing the St. Mary River limited, in the short term, the ability of aboriginal people like Eagle Child to fish. It did prevent him, on the day that he was charged, from harvesting trout for food at that precise location. However, when the broader picture is examined, the limitation on Eagle Child's ability to fish was insignificant compared to the overall collective fishing rights of aboriginal people under Treaty No. 7.
>
> Eagle Child called no evidence. While the Crown has admitted that he was fishing for food, he provided no evidence that there were no other meaningful alternatives open to him to gather food. The evidence of the Crown was that there were numerous other bodies of water in the immediate vicinity available for fishing. The evidence was uncontradicted that the seven month closing was the least intrusive solution that would be effective. Eagle Child provided no evidence as to how essential this portion of the St. Mary River was to him for the gathering of food generally, or at the particular time that he was charged. He admitted he rarely fished. Eagle Child noted that one of the Crown witnesses had acknowledged that the closure of the river "possibly" diminished his ability to fish. A mere speculative "possibility" cannot amount to a prima facie infringement of the right in question. The trial judge found that Eagle Child had not proven any *prima facie* infringement of his right to fish: 2004 ABPC 111 (CanLII), 2004 ABPC 111 at paras. 35-7. The summary conviction appeal court judge agreed: 2005 ABQB 275 (CanLII), 2005 ABQB 275 at paras. 38, 43. If Eagle Child wished to assert a positive defence arising from an aboriginal right to fish, it was incumbent upon him to call some evidence to demonstrate that right to the court.

203 Here, Mr. Hamelin did call a defence. He testified as to the importance of the Goose Creek spring fishery for his ability to fish for food that particular day. I do not think it is essential for Mr. Hamelin to give evidence that he and his family were hungry and had no other sources of food. Treaty 8 gives him the right to fish for food at any time, not just when he is hungry and no other sources of food are available to him. Evidence on behalf of Mr. Eagle Child was that the closing of the St. Mary River "possibly" diminished his ability to fish; Mr. Hamelin testified in detail as to the actual impact on him. He testified that he had fished in Goose Creek several times each spring since he was a boy.

204 All this being said, I am not particularly sympathetic to Mr. Hamelin's position. He fished in a creek that was closed for conservation purposes. It was closed for spring fishing only. Restricting fishing for spawning fish is a basic conservation method. He spent most of his time fishing recreationally. By his own account, he caught some 20 fish and threw back all but the 3 he kept. The 3 he kept for food were all undersized, meaning that in ordinary circumstances they could not be kept.

205 Nevertheless, in applying the standard of review, can it be said that the trial judge's finding that Mr. Hamelin could have fished for food in an "easy and accessible" manner both in Sturgeon Lake or at other lakes within a close distance of his home" demonstrates palpable and overriding error?

206 In my view it does. That finding shows a misapprehension of the evidence at trial. There was no evidence as to how likely Mr. Hamelin was to actually catch a fish in any of the locations other than Sturgeon Lake. There was evidence that there were other lakes open for fishing within a half an hour drive (or more), but there was no evidence as to the likelihood of success at that time of year in any of these other locations.

207 I need not deal with whether fishing rights can be species-specific. There was no evidence to contradict Mr. Hamelin's testimony about the ease of catching fish in Goose Creek, and Officer Barrett confirmed that the chance of

catching pickerel from the shore of Sturgeon Lake would not be high, while Goose Creek would be the best place. There was no evidence of the likelihood of catching any other type of fish from the shore of Sturgeon Lake, or from any of the other locations identified in the evidence of any of the parties.

208 The trial judge's conclusion that there were "easy and accessible" alternates to fishing in Goose Creek is thus not supported by any evidence. There was evidence that there were other locations that were accessible. "Nearby vicinity" is not defined, but if it includes locations within a half hour drive (which I need not decide), there was no evidence at all about the ease of fishing, or the likelihood of catching anything.

209 In the absence of evidence as to the quality of fishing at other close locations, it cannot be concluded that there were "easy and accessible" alternatives.

210 In my determination, the trial judge erred in making that fact finding.

211 The evidence does, in my view, fully support the conclusion that Mr. Hamelin has established a *prima facie* infringement of his treaty rights to fish for food by the Variation Order. Uncontradicted evidence (albeit of limited value) was led as to the historical use of Goose Creek by the Cree in the area, pre-treaty. The evidence was also clear that Goose Creek in the spring was the most likely spot in the area to catch fish. That is not surprising, as fish spawned in Goose Creek at the time.

212 But the catching of spawning fish, and the nature of the restrictions on fishing, go to justification, not whether or not Mr. Hamelin has met the first step of the ***Sparrow*** analysis.

213 Unlike the situations in ***Lefthand*** and ***Eagle Child***, Mr. Hamelin testified, and gave evidence on each of the matters considered significant by Power J. at the Queen's Bench appeal in ***Lefthand***.

214 Mr. Hamelin was a regular fisherman on Goose Creek as well as on Sturgeon Lake. Other members of the Sturgeon Lake Cree Nation fished both locations as well. Goose Creek was a preferred area to fish in the spring time, when Mr. Hamelin would customarily fish several times. The preferred fish was pickerel, using rod and reel. The food fishing was not extensive, with Mr. Hamelin keeping 3 or 4 fish per session. Because of the ease of location and the ease of catching fish, this was the preferred location as opposed to other water bodies in the vicinity.

215 The Crown essentially led no evidence to contradict these matters, and argued its case on *prima facie* infringement on the basis of the numerous other bodies of water in the vicinity, especially Sturgeon Lake. But no evidence was led as to the likelihood of actually catching fish from the shores of Sturgeon Lake at this time of year, or catching fish at any of the other locations referred to in the evidence.

216 As I have noted, there are aspects of this case that make Mr. Hamelin's position unsympathetic. But that does not go to whether he has established a *prima facie* case. Those issues may be relevant to justification and proportionality within justification.

217 In my determination, the learned trial judge misapprehended the test for *prima facie* infringement. His failure to consider the likelihood of successfully fishing at any of the other locations led to his making a palpable and overriding error in concluding that there had been no *prima facie* infringement of Mr. Hamelin's right to fish for food.

***Prima facie* Infringement**

218 The trial judge's finding that Mr. Hamelin's rights were not violated in any significant way because of the availability of alternate fisheries in reasonable proximity to Goose Creek amounted to a reversible error. A similar finding was key in ***Lefthand***. Without that finding, the ***Sparrow*** test for *prima facie* infringement was met.

Result

219 In these circumstances, I have two choices. I could quash the decision and order a new trial, or I could consider the evidence of justification that was put forward by the Crown. The Crown closed its case, such that this is not a situation where the trial was bifurcated in any way.

220 A new trial would serve little purpose. Much of the evidence was uncontradicted; many of the main facts were put before the trial judge by agreement. The Crown led evidence on justification, and the trial judge could have reviewed that evidence and decided the matter on the basis of that evidence, if he had found that Mr. Hamelin had established a *prima facie* case of infringement. The same evidence is available to me by way of the trial transcript.

221 The arguments before me focused largely on whether a failure to consult automatically rendered the Variation Order invalid (which I found it did not); whether ***Lefthand*** essentially obviated the need to consider *prima facie* breach and justification (which I found it did not); and whether the availability of alternate fisheries was determinative (which I found it was not). Justification was not argued.

222 As a result, the most appropriate manner of resolving this matter is for the conviction to be set aside, and for the parties to reattend before me to argue, on the record, the issue of justification.

223 I leave it to the parties to make arrangements with the trial coordinator to find a suitable time to argue this issue before me.

Concluding Remarks

224 I am grateful to counsel for the quality of their written materials and their oral arguments.

R.A. GRAESSER J.

* * * * *

Corrigendum
Released: August 19, 2010

Please note that under Appearances, counsel should be shown as follows:

Davie Gates, Q.C., for the respondent.

Jeffrey R.W. Rath, Nathalie Whyte, Delanie Coad, Rath and Company, for the Appellant.

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