UNSEATING *HORSEMAN*: COMMERCIAL HARVESTING RIGHTS AND THE *NATURAL RESOURCES TRANSFER AGREEMENTS*

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R. v. Horseman, [1990] 1 S.C.R. 901, *is the principal judicial authority for the proposition that the* Natural Resources Transfer Agreements (NRTAs) *with the three prairie provinces extinguished the treaty rights of Indians in those provinces to hunt or fish for commercial purposes. This article argues that that proposition — the "extinguishment hypothesis" — needs and deserves reconsideration. It is inconsistent with the rest of current Canadian law on extinguishment. It draws no support from the text or the legislative history of the* NRTAs, *from the arguments offered in favor of it in the* Horseman *decision, or even from the judicial authorities cited there to substantiate it. It was quite unnecessary to the result in* Horseman. *And it has troubling practical consequences for the treaty peoples it affects. The difficult question is how to bring this issue back before the Court for fresh deliberation.*

R. v. Horseman, [1990] 1 S.C.R. 901, *représente la principale autorité judiciaire pour la proposition voulant que les* Conventions sur le transfert des ressources naturelles (CTRN) *avec les trois provinces des prairies ait mis fin aux droits conférés par traité aux Indiens dans ces provinces, de chasser et de pêcher à des fins commerciales. Cet article fait valoir que cette proposition, « l'hypothèse d'extinction », exige et mérite considération. Elle est incompatible avec le reste des lois canadiennes actuelles sur l'extinction. Elle ne s'inspire ni du texte ni de l'historique de la législation des* CTRN, *des arguments présentés en sa faveur dans la décision* Horseman, *ni d'ailleurs des autorités judiciaires mentionnées ici pour en fournir la preuve. Ce n'était pas nécessaire au résultat de* Horseman. *Les conséquences pratiques en sont troublantes pour les peuples des traités que cette décision touche. La question difficile est de savoir comment ramener cette affaire devant la cour pour une nouvelle délibération.*

* Of the Ontario bar. Thanks to Janna Promislow, to two anonymous reviewers, and, as usual, to Kent McNeil and Eileen Hipfner for their careful reading of and perceptive comments on an earlier draft. As usual, their corrections and suggestions materially improved the text. (As always, remaining infelicities are my fault, not theirs.) I owe special thanks to the Honourable Peter Cory, for agreeing to read this work in draft and for encouraging me to proceed with it despite knowing that I would be critical of a Supreme Court decision of his. These are, of course, personal views, not necessarily shared by any clients or colleagues, past or present.

I. INTRODUCTION

On 3 May 1990, in *R. v. Horseman*,[1] the Supreme Court of Canada held unanimously that Treaty 8 — and indeed, all the numbered treaties with Aboriginal peoples[2] — included and protected the Aboriginal parties' right to hunt for commercial purposes throughout their traditional areas. In the words of Justice Cory, who wrote for the majority, "[a]n examination of the historical background leading to the negotiations for Treaty No. 8 *and the other numbered treaties* leads inevitably to the conclusion that the hunting rights reserved by the Treaty included hunting for commercial purposes."[3] Given the relevant phrasing,[4] it seems only reasonable to suppose that commercial fishing and trapping also came within these treaties' intendment and protection.

The majority judgment in *Horseman*, however, is also the leading judicial authority for the proposition that paragraph 12 of the *Alberta Natural Resources Transfer Agreement*[5] extinguished the Treaty 8 Indians' right to hunt

1 [1990] 1 S.C.R. 901 [*Horseman*]. The facts of the case are as follows. In the spring of 1983, Mr. Horseman, an Alberta Treaty 8 Indian, shot, killed, cut, and skinned a moose near his reserve to feed his family. Finding the moose carcass too large for him to carry alone, Mr. Horseman left it in place while he sought help. When he and his colleagues returned, they found a grizzly bear feasting on the moose carcass. The bear charged; Mr. Horseman shot and killed it in self-defence, then skinned it and kept its hide. A year later, needing money to support his family, he obtained a licence to hunt bear in Alberta, then sold to a licensed dealer the bear hide from the year before. He was charged with unlawful trafficking in wildlife, contrary to s. 42 of the *Wildlife Act*, R.S.A. 1980, c. W-9, because he had not been licensed to hunt bear at the time he shot the bear. His defence was that the *Wildlife Act* provision had no application because he had a treaty right to do what he had done: see *Horseman*, *ibid.* at 924-26. Justice Wilson, who wrote for three of the seven-member panel, would have acquitted Mr. Horseman on the basis of the treaty right defence. The majority affirmed the conviction in the courts below but elected, given the circumstances, to stay the proceedings against him.

2 See, *e.g.*, *R. v. Gladue* (1995), 36 Alta. L.R. (3d) 241 (C.A.) [*Gladue*], which held (at para. 3), in part in reliance on *Horseman*, *ibid.*, that comparable language in the English version of Treaty No. 6 had similar effect.

3 *Horseman*, *ibid.* at 928 [emphasis added]. Compare *ibid.* at 929, Cory J. ("I am in complete agreement with the finding of the trial judge that the original Treaty right clearly included hunting for purposes of commerce") and at 912, Wilson J. (dissenting on other grounds).

4 According to the relevant English text of Treaty No. 8, as quoted in *Horseman*, *ibid.* at 927, Cory J. (for the majority):

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

5 The Alberta *Natural Resources Transfer Agreement* [Alberta *NRTA*], an agreement between the

for commercial purposes. In *R. v. Badger*,[6] Justice Cory, again writing for the majority, said that *Horseman* had held "that para. 12 of the [Alberta] *NRTA* evidenced a clear intention to extinguish the treaty protection of the right to hunt *commercially*."[7] Justice Sopinka, in concurring reasons, observed without contradiction that "[t]here is no disagreement that the [Alberta] *NRTA* . . . eliminated the right to hunt for commercial purposes."[8] In *R. v. Gladstone*,[9] the majority identified paragraph 12 of the Alberta *NRTA* as "the document relied on for a finding of extinguishment" in *Horseman* and in *Badger*.[10] And in *R. v. Sundown*,[11] the Court, again relying on *Horseman*, observed that paragraph 12 "extinguished the treaty right to hunt commercially" for Treaty 8 Indians.[12]

Because of *Horseman*, the accepted view today is that paragraph 12 extinguished the Alberta treaty Indians' right to hunt — and, one surely must assume, their rights to fish and trap, as well — for commercial purposes.[13] The Supreme Court, for its part, has done what it can to put this issue behind it. "*Horseman*," the majority said in *Badger* in 1996, "is a recent decision which should be accepted as resolving the issues which it considered."[14]

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governments of Canada and Alberta, is item 2 in the Schedule to the *British North America Act, 1930*, renamed the *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V., c. 26, reprinted in R.S.C. 1985, App. II, No. 26 [*Constitution Act, 1930*] and has the force of constitutional law pursuant to s. 1 of that *Act*. The Schedule to that *Act* also comprises virtually identical federal agreements with Manitoba [Manitoba *NRTA*] and Saskatchewan [Saskatchewan *NRTA*] and a differently focused and structured agreement, irrelevant for present purposes, between the federal government and the government of British Columbia.

6 [1996] 1 S.C.R. 771 [*Badger*].

7 *Ibid.* at para. 46 [emphasis in original]. Compare *ibid.* at para. 83 ("the *NRTA* modified the Treaty right to hunt . . . by eliminating the right to hunt commercially").

8 *Ibid.* at para. 3, Sopinka J. (concurring in the result).

9 [1996] 2 S.C.R. 723 [*Gladstone*].

10 *Ibid.* at para. 38.

11 [1999] 1 S.C.R. 393 [*Sundown*].

12 *Ibid.* at para. 8.

13 In *R. v. Littlewolf* (1992), 4 Alta. L.R. (4th) 47 (Q.B.) [*Littlewolf*], leave to appeal refused (1992), 4 Alta. L.R. (4th) 287 (C.A.) [*Littlewolf* (C.A.)], the Alberta Court of Queen's Bench concluded (at paras. 40-58), with some apparent reluctance, that this was the only defensible interpretation of *Horseman*, *supra* note 1. Compare *R. v. Potts* (1992), 4 Alta. L.R. (3d) 284 (C.A.) [*Potts*], especially at para. 6; and, most recently, *R. v. McKenzie*, 2006 SKPC 51 at para. 19. For recent discussion of these decisions, see Kristy Pozniak, "Modification, Infringement, and the 'Visible, Incompatible' Test: The Impact of *R. v. Badger* on Treaty Hunting Rights in the Prairie Provinces" (2005) 68 Saskatchewan Law Rev. 403 at 413-14. And in *Gladue*, *supra* note 2, the Alberta Court of Appeal specifically held (at paras. 15-22) that the reasoning in *Horseman* applied to treaty rights to fish, as well as to hunt, for commercial purposes.

14 *Badger*, *supra* note 6, at para. 46, Cory J. Compare *Potts*, *ibid.* at para. 5, which said this of *Horseman*: "[W]hen a Supreme Court of Canada decision appears to be on point and quite recent, it is much harder to argue that there is a reasonable prospect that the Supreme Court of Canada will

Eleven years have now passed since *Badger*, seventeen since *Horseman* itself: sufficient time, I hope, to excuse a plea for reconsideration of this conclusion about the effects of paragraph 12. I propose to argue, first, that it is, from a doctrinal standpoint, simply untenable to maintain that paragraph 12's effect was to extinguish commercial harvesting rights; second, that conclusions about extinguishment were completely unnecessary to the result the majority reached in *Horseman*; and third, that no subsequent Supreme Court of Canada jurisprudence depends on acceptance of *Horseman*'s conclusions about extinguishment. Taken together, these three propositions warrant reconsideration and rejection of the extinguishment hypothesis.

The implications of this discussion ramify well beyond the limits of Treaty 8. If paragraph 12, which makes no specific mention of Treaty 8 (or of treaties), extinguished the Treaty 8 peoples' treaty right to harvest commercially, it almost certainly had the same effect, in its generality, on the counterpart rights of all other Indians in Alberta.[15] And because the Manitoba and Saskatchewan *NRTA*s each contain provisions identical to Alberta's paragraph 12,[16] it will, if one accepts this conclusion, be very

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overrule it."

15 For confirmation, see, *e.g.*, *Littlewolf, supra* note 13; *Potts, ibid.*; and *Gladue, supra* note 2. All held, on the strength of *Horseman, supra* note 1, that para. 12 of the Alberta *NRTA* had extinguished the commercial harvesting rights of Treaty 6 Indians.

We can now say with some confidence, on the other hand, that para. 12 of the Alberta *NRTA* had no such effect on any Métis commercial harvesting rights. In *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236 [*Blais*], the Supreme Court held unanimously that Métis are not "Indians" for purposes of para. 13 of the Manitoba *NRTA*, *supra* note 5. The text of this para. 13 is identical to that of para. 12 of the Alberta *NRTA*. Both took constitutional effect at the same time, pursuant to s. 1 of the *Constitution Act, 1930, supra* note 5. The upshot of *Blais* was that Métis in Manitoba are not entitled to the protection from provincial game legislation that para. 13 confers on "Indians" hunting for food in that province. But if Métis are not "Indians" for purposes of entitlement to para. 13's protections, it is difficult to see how para. 13 could apply to them at all, for any purpose. For Métis, there was no "*quid pro quo*" of the sort that the court in *Horseman, supra* note 1, seemed to think sufficient to explain the Alberta *NRTA*'s effect on commercial harvesting rights: see *ibid.* at 933, 936.

In "A New Era in Metis Constitutional Rights: The Importance of *Powley* and *Blais*" (2004) 41 Alberta Law Rev. 1049, Catherine Bell and Clayton Leonard entertain a different view. "It is possible," they argue (at 1065-66), "that there was a greater appreciation of Metis as a separate and distinct people in southern and central Manitoba before such appreciation developed in other Prairie Provinces." For that reason, and because the Alberta Court of Queen's Bench had held in *R. v. Ferguson*, [1993] 2 C.N.L.R. 148, that Métis are Indians for purposes of the Alberta *NRTA*, they suggest that *Blais* may not govern interpretation of the Alberta and Saskatchewan *NRTA*s. My own view is that courts, after *Blais*, would need truly compelling reasons to hold that the word "Indian," despite occurring in identically worded provisions in virtually identical agreements negotiated more or less in tandem and given effect simultaneously in the same constitutional instrument, meant something different in the Alberta and Saskatchewan *NRTA*s than in the Manitoba *NRTA*.

16 See Manitoba *NRTA*, *ibid.* at para. 13; and Saskatchewan *NRTA*, *supra* note 5 at para. 12. No such

difficult for any treaty Indian hoping to harvest for sale in either province to defeat the inference that the *NRTA* extinguished his or her community's right to do so.[17]

II. PARAGRAPH 12 AND THE EXTINGUISHMENT HYPOTHESIS

The "broad purpose" of the *NRTA*s with the three prairie provinces, according to the Supreme Court in *Blais*, "was to transfer control over land and natural resources to the three western provinces."[18] They "arose as part of an effort to put the provinces of Alberta, Manitoba and Saskatchewan on an equal footing with the other Canadian provinces by giving them jurisdiction over and ownership of their natural resources."[19] "The purpose of para. 13 of the [Manitoba] *NRTA* [paragraph 12 of the Alberta and Saskatchewan agreements]," the Court added, "is to ensure respect for the Crown's obligations to 'Indians' with respect to hunting rights. It was enacted to protect the hunting rights of the beneficiaries of Indian treaties and the *Indian Act* in the context of the transfer of Crown land to the provinces."[20] Here, for the record, is the text of paragraph 12 of the Alberta *NRTA*:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[21]

Here too is the amended text of section 1 of the *Constitution Act, 1930*:

> The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the *Constitution Act, 1867*, or any

provision appears in Canada's *NRTA* with British Columbia.

17 See, *e.g.*, *Sundown*, *supra* note 11 at para. 8 (invoking *Horseman*, *supra* note 1, to explain the impact of para. 12 of the Saskatchewan *NRTA* on hunting rights in Treaty 6); and *Blais*, *supra* note 15, where the Court, again citing *Horseman*, *ibid.*, and *Badger*, *supra* note 6, observed (at para. 32) that para. 13 of the Manitoba *NRTA* "took away the right to hunt commercially while protecting the right to hunt for food and expanding the territory upon which this could take place."

18 *Blais*, *ibid.* at para. 12.

19 *Ibid.* at para. 10.

20 *Ibid.* at para. 32.

21 *Supra* note 5 at para. 12. Compare Saskatchewan *NRTA*, *supra* note 5 at para. 12; and Manitoba *NRTA*, *supra* note 5 at para. 13.

> Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.[22]

Two propositions, in my judgment, follow necessarily from these provisions.

First, "there can be no doubt that para. 12 of the *NRTA* is binding law," that it is binding generally, not just on the parties to the Alberta *NRTA*, "[p]ursuant to s. 1 of the *Constitution Act, 1930*,"[23] or that the "*NRTA* is a constitutional document."[24]

Second, as *Horseman* correctly observed, "the Transfer Agreements were meant to modify the division of powers originally set out in the *Constitution Act, 1867*."[25] Taken together, section 1 and paragraph 12 remove any doubt that "the laws respecting game in force in the Province from time to time" — *i.e.*, the province's own game laws[26] — "shall apply to the Indians within the boundaries thereof," subject only to the rights to hunt, fish, and trap for food reserved to Indians by paragraph 12's closing words. Section 1 appears even to exempt provincial "laws respecting game" from displacement by valid federal legislation that conflicts with such laws.[27]

For purposes of simplicity within the present discussion, I propose to accept, as well, two propositions that have potential to be more controversial.

The first of these is that the federal and imperial governments had, at the time the *NRTA*s took effect in 1930, all the power they needed to extinguish, more or less at will, the rights protected in Treaty 8,[28] and that a constitutional

22 *Constitution Act, 1930*, *supra* note 5, s. 1, as amended. by s. 53(2) of the *Constitution Act, 1982*, s. 53(2), being Schedule B of the *Canada Act 1982*, (U.K.), c. 11 [*Constitution Act, 1982*].

23 *Badger*, *supra* note 6 at para. 47.

24 *Blais*, *supra* note 15 at para. 17.

25 *Supra* note 1 at 933. For the original division of powers, see ss. 91-95 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

26 See *Prince & Myron v. The Queen*, [1964] S.C.R. 81 at 84.

27 This seems to me to follow all but necessarily from section 1's provision that the "agreements set out in the Schedule to this Act . . . shall have the force of law notwithstanding anything in . . . any Act of the Parliament of Canada." The full text of s. 1 of the *Constitution Act, 1930* accompanies note 22.

28 See, *e.g.*, *Horseman*, *supra* note 1 at 934, Cory J.:

> [A]lthough it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native peoples affected, nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned and has not been challenged in this case.

instrument would have been the surest means available by which to achieve an intention to extinguish. Those disposed to dispute this proposition might point to the Supreme Court's 1985 decision in *Simon v. The Queen*,[29] where a unanimous Court stated explicitly that it did "not wish to be taken as expressing any view on whether, as a matter of law, treaty rights may be extinguished,"[30] and, perhaps to greater effect, to *R. v. Sioui*,[31] a unanimous decision released exactly three weeks after *Horseman*. According to *Sioui*, "[t]he very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned."[32] No Indian collectivities were parties to the *NRTAs*; neither, to the best of my knowledge, were any consulted in the negotiations that led to those agreements. But never mind. These are issues best pursued elsewhere.

The other such proposition is that "acts of commerce," even those that happen to involve or feature game or fish and to have taken place to facilitate purchase of food for subsistence, are not entitled to any of the protection that paragraph 12 bestows on Indian harvesting "for food."[33] I assume, therefore, that Indians in Alberta who engage in commercial harvesting are subject, pursuant to paragraph 12, to such Alberta game legislation as may, by its terms, apply to their activity.

The question is whether all these propositions, taken together, amount to

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Compare *ibid.* at 936.

29 [1985] 2 S.C.R. 387 [*Simon*].

30 *Ibid.* at 407.

31 [1990] 1 S.C.R. 1025 [*Sioui*].

32 *Ibid.* at 1063. At issue there was whether an agreement concluded between the English and the French could extinguish a prior treaty between the English and the Hurons. The answer was no.

33 Justice Wilson, dissenting in *Horseman*, *supra* note 1, argued unsuccessfully (at 919) that the Court:

> should be prepared to accept that the range of activity encompassed by the term "for food" [in para. 12] extends to hunting for "support and subsistence," *i.e.* hunting not only for direct consumption but also hunting in order to exchange the product of the hunt for other items as was their wont, as opposed to purely commercial or sport hunting.

She would have acquitted Mr. Horseman, whose activity fit that description, on that basis. See generally *ibid.* at 913-22. The majority, however, despite having acknowledged (at 925) that Mr. Horseman "decided to sell the grizzly bear hide" because he "found himself in the unfortunate position of being out of work and in need of money to support his family," concluded (at 936) that the "courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting 'for food' but rather was an act of commerce." Compare *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686 at para. 25 [*Sappier*] (wood obtained pursuant to an Aboriginal right to harvest trees for a community's domestic needs "cannot be sold, traded or bartered to produce assets or raise money . . . even if the object of such trade or barter is to finance the building of a dwelling").

proof that paragraph 12 extinguished Treaty 8 peoples' treaty right to hunt for commercial purposes. To answer it, we must first call to mind the requirements for proving extinguishment.

The Test for Proof of Extinguishment

First, as even *Horseman* acknowledged, "the onus of proving either express or implicit extinguishment lies upon the Crown"[34] or, by extension, on the party alleging extinguishment.

Second, "[g]iven the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises."[35]

Third, we have known since *R. v. Sparrow*[36] — a decision released exactly four weeks after *Horseman* — that "the test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."[37] *Sparrow* did not deal with treaty right claims, but the Court in *Badger* seemed content to require "evidence of a clear and plain intention on the part of government to extinguish treaty rights"[38] and it would, from a doctrinal standpoint, be almost unthinkable to conclude that the law protects treaty rights less well than Aboriginal rights from extinguishment.[39] Any such conclusion might compromise the integrity[40] — not to mention the future attractiveness to Aboriginal peoples — of the treaty-making enterprise.

Finally, as the *Horseman* majority acknowledged, "any ambiguities in the wording of the Treaty or document must be resolved in favour of the Native people."[41] "A corollary to this principle," the Court added in *Badger*, "is that any limitations which restrict the rights of Indians under treaties must be

34 See *Horseman*, *ibid.* at 930, Cory J. Compare, *e.g.*, *Simon*, *supra* note 29 at 406; *Sioui*, *supra* note 31 at 1061-66; and *Badger*, *supra* note 6 at para. 41. The same is true in respect of extinguishment claims about Aboriginal rights: see most recently *Sappier*, *ibid.* at para. 57.

35 *Simon*, *ibid.* at 405-406, cited with approval in *Sioui*, *ibid.* at 1061, and in *Badger*, *ibid.* at para. 41.

36 [1990] 1 S.C.R. 1075 [*Sparrow*].

37 *Ibid.* at 1099.

38 See *Badger*, *supra* note 6 at para. 41.

39 There is, again, at least some doctrinal basis for doubting that treaties or treaty rights could be extinguished at all: see notes 29-32 and the accompanying text.

40 See, *e.g.*, *Badger*, *supra* note 6 at para. 41 ("the honour of the Crown is always at stake in its dealing[s] with Indian people"). Compare, *e.g.*, *R. v. [Donald] Marshall*, [1999] 3 S.C.R. 456 at paras. 49-52 [*Marshall*].

41 *Horseman*, *supra* note 1 at 930, Cory J. Compare *Badger*, *ibid.* at para. 41.

narrowly construed."[42] We have known since *R. v. Sutherland*[43] that this is the proper way of construing the very constitutional text that was at issue in *Horseman*.[44]

In brief, a mainstream measure (a statute or other ordinary legal instrument) cannot extinguish a treaty right unless, at a minimum, the party alleging extinguishment can demonstrate, by way of strict proof, that it expresses a clear and plain intention on the part of competent authority to extinguish the relevant right. The bearers of the treaty right are entitled to the benefit of any doubt or ambiguity about the measure's meaning or intent, even if the measure is a constitutional instrument.[45]

How does paragraph 12 of the Alberta *NRTA* measure up against these standards?

Applying the Test to Paragraph 12

The first thing to notice in this context is that neither paragraph 12 nor section 1 of the *Constitution Act, 1930*[46] makes any mention of Indian treaties, extinguishment, or commercial activity. This in itself may not be decisive. The Supreme Court said in *Gladstone* that "to extinguish an aboriginal right the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of aboriginal rights";[47] the same, I am prepared to assume, is equally true in respect of treaty rights. But it is, at an absolute minimum, more difficult to compile "strict proof"[48] that a given measure extinguishes any such rights when the measure in question says nothing at all about the rights, about the activity to which they pertain, or about extinguishment. One needs at least something to go on if one seeks to demonstrate a clear and plain

42 *Badger, ibid.*

43 [1980] 2 S.C.R. 451 [*Sutherland*].

44 See *ibid.* at 461-62 (discussing the interpretation of para. 13 of the Manitoba *NRTA*, which, again, is identical to para. 12 of the Alberta *NRTA*). Compare *Blais, supra* note 15 at para. 17: "The *NRTA* is a constitutional document. It must therefore be read generously within these contextual and historical confines. A court interpreting a constitutionally guaranteed right must apply an interpretation that will fulfill the broad purpose of the guarantee and thus secure 'for individuals the full benefit of the [constitutional] protection.'"

45 *Sutherland, ibid.*; *Sparrow, supra* note 36 at 1106-107.

46 See Alberta *NRTA, supra* note 5 at para. 12; and *Constitution Act, 1930, supra* note 5, s. 1.

47 *Gladstone, supra* note 9 at para. 34. Compare *Sappier, supra* note 33 at para. 57. Thus, in *Osoyoos Indian Band v. Town of Oliver*, 2001 SCC 85, [2001] 3 S.C.R. 746, the Supreme Court held (at para. 57) that s. 35 of the *Indian Act*, an expropriation provision, "evinces a clear and plain intention to authorize the taking of 'any interest' in reserve land, which, in the context of the *Indian Act*, necessarily includes the aboriginal interest in reserve land."

48 See note 35 and the accompanying text.

intention to abrogate forever a right confirmed in "an agreement whose nature is sacred."[49] What, if anything, is there in the text of paragraph 12 that might support an inference of extinguishment?

One might be tempted to begin by pointing to the fact that paragraph 12 withholds from Indian commercial harvesting activity in Alberta the special constitutional protection it confers expressly on Indians hunting game or fish for food there.[50] Fair enough. But *Gladstone* confirms that "the failure to recognize an aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right."[51] The same, again, must surely be true when the rights in question are treaty rights. If paragraph 12 bespeaks an intention to extinguish rights it leaves unmentioned, one must find that intention elsewhere within the provision.

The only part of paragraph 12 that has any relation to commercial harvesting is the part that ensures "that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof."[52] Since 1930, in other words, the Indians in Alberta who engage in commercial harvesting have been subject to any relevant terms of such otherwise valid laws about game as Alberta might choose to enact. But we know from more recent Supreme Court of Canada jurisprudence that subjecting a right, or even an activity protected by a right, to extensive regulation does not suffice, in itself, to extinguish the right. In *Sparrow*, where the Crown had produced a sequence of federal fisheries regulations in an effort to show that it had extinguished the Aboriginal food fishing right of the Musqueam, the Court said that the Crown had "confuse[d] regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished."[53] *Gladstone* reconfirmed that a party attempting to prove extinguishment "must demonstrate more than that, in the past, the exercise of an aboriginal right has been subject to a regulatory scheme."[54] And in *Delgamuukw v. British Columbia*,[55] the Supreme Court held that even measures "necessarily inconsistent" with treaty or Aboriginal rights do not suffice merely on that account to extinguish such rights.[56]

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49 See *Badger*, *supra* note 6 at para. 41.

50 See note 33 and the accompanying text.

51 *Gladstone*, *supra* note 9 at para. 36, quoted at greater length in note 60 and the accompanying text.

52 See note 21 and the accompanying text.

53 *Sparrow*, *supra* note 36 at 1097.

54 *Gladstone*, *supra* note 9 at para. 34.

55 [1997] 3 S.C.R. 1010 [*Delgamuukw*].

56 *Ibid.* at para. 180, cited with approval for this purpose in *Sappier*, *supra* note 33 at para. 60.

The scheme at issue in *Gladstone* — a British Columbia case about an Aboriginal right to fish for a commercial market — deserves a closer look here. One of the instruments alleged to have extinguished the commercial fishing rights of the Heiltsuk people was a 1917 federal regulation providing that "[a]n Indian may at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used for himself and his family, *but for no other purpose*" and authorizing the Chief Inspector of Fisheries to impose new kinds of restrictions on Indian fishing for food in British Columbia.[57] This new regulation was enacted, according to its own terms, because "after commercial fishing began it became eminently desirable that all salmon that succeeded in reaching the upper waters should be allowed to go on to their spawning beds unmolested"[58] and because the previous regulation had proved ineffective "in preventing the Indians from catching salmon in such waters for commercial purposes."[59] It was, in other words, an absolute prohibition on Indian commercial fishing in British Columbia, enacted and strengthened with a view to curtailing Indian commercial fishing there. Yet here is what the Supreme Court said about this regulation:

> The language of the Regulation suggests that the government had two purposes in enacting the amendment to the existing scheme: first, the government wished to ensure that conservation goals were met so that salmon reached their "spawning grounds"; second, the government wished to pursue those goals in a manner which would ensure that the special protection granted to the Indian food fishery would continue. The government attempted to meet these goals by making it clear that no special protection was being granted to the Indian commercial fishery and that, instead, the Indian commercial fishery would be subject to the general regulatory system governing commercial fishing in the province.
>
> Under the *Sparrow* test for extinguishment, this Regulation cannot be said to have extinguished the aboriginal right to fish commercially held by the appellants in this case. The government's purpose was to ensure that conservation goals were met, and that the Indian food fishery's special protection would continue; its purpose was not to eliminate aboriginal rights to fish commercially.[60]

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57 Order in Council, P.C. 2539 (11 September 1917), amending s. 8(2) of the *British Columbia Special Fishery Regulations*, 1915, quoted in *Gladstone*, *supra* note 9 at para. 35 [emphasis added]. The text of the regulation is quoted in full in the *Gladstone* decision, *ibid.*

58 Preamble, quoted in *Gladstone*, *ibid.* [emphasis added in *Gladstone* removed].

59 Quoted in *Gladstone*, *ibid.*

60 *Gladstone*, *ibid.* at paras. 35-36. The Court added (at para. 36):

> It is true that through the enactment of this regulation the government placed aboriginal rights to fish commercially under the general regulatory scheme applicable to commercial fishing, and therefore did not grant the aboriginal commercial fishery special protection of the kind given to aboriginal food fishing;

Paragraph 12, I submit, is, in every relevant respect, a vessel less well equipped to convey extinguishment intentions than the 1917 regulation held in *Gladstone* not to have extinguished commercial fishing rights in British Columbia. To begin with, although it resembles the British Columbia regulation in having a conservation objective, paragraph 12's conservation objective — "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence . . . ."[61] — is not independent of Aboriginal peoples' needs or interests, but is linked to them explicitly. On its face, it was enacted for the Alberta Indians' own good. One can easily imagine circumstances in which commercial harvesting might be not only compatible with, but perhaps necessary to, "their support and subsistence." Second, and in the end more important, paragraph 12, unlike the 1917 federal fisheries regulation, does not prohibit Alberta Indians from doing anything; indeed, it does not even impose a regulatory scheme on their commercial harvesting. All it does is authorize the Alberta legislature, if that body so chooses, to include Alberta Indians' commercial harvesting in such "laws respecting game" as it may elect to enact. If the 1917 fisheries regulation did not suffice to extinguish the commercial harvesting rights of those Indians to whom it pertained, I can think of no principled basis on which to maintain today that paragraph 12, in every respect a less robust provision, sufficed to do so.[62]

> however, the failure to recognize an aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right.

61 See note 21 and the accompanying text.

62 It is arguable, perhaps, that para. 12 at least authorized the Alberta legislature to extinguish the commercial harvesting rights of Alberta Indians. This question deserves some further thought; my current inclination, though, is to doubt that para. 12 had that effect. From a division of powers standpoint, all that para. 12 (read together with s. 1 of the *Constitution Act, 1930, supra* note 5) does is to privilege Alberta's "laws respecting game." In *Delgamuukw, supra* note 55, however, the Supreme Court held unanimously (at para. 180) that:

> > a law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights without being ultra vires the province . . . . [T]he only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, proprio vigore, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.
>
> See, to similar effect, the concurrences of Justice LaForest (at para. 206) and Justice McLachlin (at para. 209).
>
> By definition, in other words, an Alberta law that purported to extinguish Indians' Aboriginal rights — and probably, for the same reason, their treaty rights, as well — would not be a law respecting game but a law in relation to Indians. But even if I am wrong about this, it will not follow automatically that the Treaty 8 Indians' rights to hunt commercially have been extinguished. All it will mean is that one must look at the relevant Alberta legislation alleged from time to time to have

The Supreme Court, of course, thought otherwise. It said explicitly that its conclusion in *Gladstone* about the 1917 B.C. regulation could coexist with its earlier conclusion that paragraph 12 extinguished the Treaty 8 Indians' right to hunt commercially. The difference, it said, is that paragraph 12 "is a provision in a constitutional document . . . aimed at achieving a permanent clarification of the province's legislative jurisdiction and of the legal rights of aboriginal peoples within the province," whereas the regulation "was merely a statutory document dealing with an immediate conservation concern and was subject to amendment through nothing more elaborate than the normal legislative process."[63]

This is, no doubt, a legitimate difference between the two provisions. I fail to see, however, what it has to do with the present issue. One could, I suppose, infer that only "constitutional document[s]" are capable of extinguishing Aboriginal (or treaty) rights: that mere "statutory document[s] . . . subject to amendment through nothing more elaborate than the normal legislative process" are not. But this is hardly what *Gladstone* suggests; the Court, after all, spends six additional pages considering in detail the "statutory document" alleged to have extinguished the Heiltsuk fishing right.[64] And even if one accepted that view, it would not follow routinely that *this particular* constitutional document had the effect of extinguishing treaty rights to harvest commercially. Nothing in *Gladstone* suggests that constitutional documents are, as such, exempt from the "clear and plain intention" requirement for extinguishment. Quite the contrary; the relevant passage there asserts that "the *NRTA* can be seen as evincing the necessary clear and plain intention to extinguish aboriginal rights to hunt commercially."[65] How the Court reached that conclusion, it does not say. Surely it cannot have meant that every "permanent clarification of [a] province's legislative jurisdiction and of the legal rights of aboriginal peoples

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extinguished such rights and appraise that legislation against the usual tests for extinguishment. For discussion of those tests, see notes 34-45 and the accompanying text.

63 *Gladstone*, *supra* note 9 at para. 38. The rest of the relevant passage reads as follows:

> The NRTA was aimed at achieving a permanent clarification of the province's legislative jurisdiction and of the legal rights of aboriginal peoples within the province; the Regulation was aimed at dealing with the immediate problems caused by the fact that an insufficient number of salmon were reaching their spawning grounds. The intention of the government in enacting the Regulation must, as a consequence, be viewed quite differently from its intention in enacting the NRTA, with the result that while the NRTA can be seen as evincing the necessary clear and plain intention to extinguish aboriginal rights to hunt commercially in the province to which it applies, the Regulation cannot be seen as evincing the necessary clear and plain intention to extinguish aboriginal rights to fish commercially in British Columbia.

64 *Ibid.* at paras. 31-37.

65 *Ibid.* at para. 38, quoted in full in note 63.

within the province"[66] has the effect of extinguishing treaty or Aboriginal rights. Section 35 of the *Constitution Act, 1982*,[67] to take the most obvious counterexample, does not.

A final possibility is that the "clear and plain intention" test for extinguishment applies in some different, less rigorous way to constitutional instruments than to ordinary statutory instruments: that identical text might suffice to extinguish treaty or Aboriginal rights if encoded in the constitution but not if enacted in a mere statute. If this were the point the Court in *Gladstone* intended to make, however, it would have been easy enough (and much more efficient) for it to say so explicitly. Inferring such a discrepancy seems impossible to reconcile with the Supreme Court's acceptance, in *Horseman* and elsewhere, that ambiguities in constitutional and statutory documents alike "must be resolved in favour of the Native people."[68]

The uncomfortable fact is that nothing on the face of paragraph 12, even when read in conjunction with section 1 of the *Constitution Act, 1930*, supports the conclusion that that provision operated to extinguish pre-existing treaty rights to hunt for commercial purposes in Alberta. Before we reject that conclusion outright, however, it seems only fair to consider briefly — even though the Supreme Court itself did not do so in *Horseman* — the rest of the text of the *NRTA*s and the legislative history to see if anything there helps substantiate the extinguishment hypothesis.

Neither, in my judgment, assists for this purpose. We know from *Blais* that the *NRTA*s were "not a grant of title, but an administrative transfer" — a transfer, not a diminution — "of the responsibilities that the Crown acknowledged at the time towards 'the Indians within the boundaries' of the Province — a transfer with constitutional force."[69] The principal purpose of the transfer was, again, "to put the provinces of Alberta, Manitoba and Saskatchewan on an equal footing with the other Canadian provinces by giving them jurisdiction over and ownership of their natural resources."[70] Section 1 of the three prairie *NRTA*s is explicit on this point. The transfer of beneficial interest to the provincial Crown takes place "[i]n order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *Constitution Act, 1867*."[71] Like the beneficial

66 See the text accompanying note 63.

67 *Supra* note 22.

68 See notes 41-44 and the accompanying text. See also *Sparrow*, *supra* note 36 at 1106-108.

69 *Blais*, *supra* note 15 at para. 19.

70 *Ibid.* at para. 10.

71 Alberta *NRTA*, *supra* note 5, s. 1, quoted in *Blais*, *ibid.* at para. 10.

interest that section 109 conferred on the original provinces, the interest the prairie provinces acquired pursuant to section 1 is "subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same." As in 1867, the conferral of beneficial interest on the provincial Crowns was not to take place at the expense, or to the prejudice, of pre-existing Aboriginal interests. Further, and perhaps more important, no one has ever suggested that the details of Confederation operated to extinguish within the confederating provinces such pre-existing harvesting rights (commercial or not) as Aboriginal peoples already had. Construing paragraph 12 as having extinguished commercial harvesting rights in the prairie provinces would not, therefore, accord those provinces parity with the original provinces; it would confer upon them a special advantage.

Two details of the *NRTAs*' negotiating history cast further doubt on the supposition that their framers meant to extinguish treaty rights to harvest game and fish for commercial purposes.[72] Both emerge from comparisons between the final text of the *NRTAs* with the prairie provinces and earlier drafts, including an unexecuted 1926 agreement between Alberta and Canada.[73] In the 1926 document, and in subsequent *NRTA* draft text until early October 1929, the phrasing confined the intendment of the relevant provision "[t]o all Indians who may be entitled to the benefit of any treaty between the Crown and any band or bands of Indians, whereby such Indians surrendered to the Crown any lands now included within the boundaries of the Province." Initially, in other words, the provision that became paragraph 12 pertained exclusively to *treaty* Indians. The final text, by contrast, pertains generically "to the Indians of the Province,"[74] whether or not they happen to be the beneficiaries of pre-existing treaty — or, indeed, any — rights to harvest game or fish, for any purpose. The drafters' deliberate decision not to focus exclusively on Indians protected by treaty discourages an inference that paragraph 12, in its final form, was meant to target, for any purpose, treaty rights or those to whom they belong.[75]

72 For detailed discussion of the *NRTAs*' negotiating history, see Frank J. Tough, "The Forgotten Constitution: The *Natural Resources Transfer Agreements* and Indian Livelihood Rights, ca. 1925-1933" (2004) 41 Alberta Law Rev. 999. Tough's article is the source of the historical references in the next two paragraphs of text.

73 See Agreement Made On The Ninth Day of January, 1926 Between The Dominion Of Canada And The Province Of Alberta: On the Subject of the Transfer To The Province Of Its Natural Resources (Ottawa: F.A. Acland, King's Printer, 1926), AM (RG 17, A1, file 14), discussed in Tough, *ibid.* at 1018-25.

74 See text accompanying note 21.

75 Compare Tough, *supra* note 72 at 1037.

The other key detail is the explicit inclusion of "trapping" in the final text of paragraph 12 and its counterpart provisions in the Saskatchewan and Manitoba *NRTAs*. Frank Tough comments helpfully on this development:

> The 1929 version added the express category "trapping." The inclusion of trapping indicates a greater appreciation for the traditional way of life and this improvement can be attributed to HBC counsel David H. Laird. That this change occurred at the behest of the Hudson's Bay Company, indicates that some provision for commercial activity was added to the paragraph after the stipulation "for food" had been made to the 1929 draft. Understandably, if there had been a clear and plain intent to eliminate all traces of a commercial right, then the word "trapping" would not have been added to the text of para. 12 at the behest of the HBC. The inclusion of trapping added a commercial dimension to para. 12.[76]

A straightforward reading of the text of paragraph 12 itself discourages strongly the supposition that that provision extinguished Treaty 8 Indians' commercial harvesting rights. In the absence of contrary indications from the rest of the *NRTA* text or legislative history, one is driven to conclude that paragraph 12 does not meet the standard requirements for extinguishment of treaty rights.

If this is as obvious as it seems, one is driven to wonder what might have prompted the majority in *Horseman* to conclude otherwise. That question, needless to say, deserves inquiry next.

The Majority Reasons in *Horseman*

In rejecting the submission that paragraph 12 left room for the survival of Treaty 8 Indians' rights to harvest for commercial purposes, Justice Cory, who wrote for the majority, relied on five propositions. Two — "that the Transfer Agreements were meant to modify the division of powers originally set out in the *Constitution Act, 1867*"[77] and that "the power of the Federal Government to unilaterally make such a modification [*e.g.*, to extinguish treaty rights] is unquestioned and has not been challenged in this case"[78] — have received attention above.[79] Neither, whether considered individually or together, tells us anything about the nature of the modification undertaken in paragraph 12

76 *Ibid.* at 1036-37. "For both the HBC and Indians," Tough observes elsewhere (*ibid.* at 1025), "traditional access to Crown lands for livelihood purposes was vital. Otherwise, it would be difficult for the HBC to continue its commercial fur trade operations. The HBC was not impressed by what it regarded as undue regulation of the traditional economy."

77 *Horseman*, *supra* note 1 at 933.

78 *Ibid.* at 934.

79 See notes 25-32 and the accompanying text.

or about the relationship between that provision, as drafted, and the rights in Treaty 8. This, on anyone's reckoning, cannot constitute sufficient proof of extinguishment.

The third proposition is this:

> Further, it must be remembered that Treaty No. 8 itself did not grant an unfettered right to hunt. That right was to be exercised 'subject to such regulations as may from time to time be made by the Government of the country.' This provision is clearly in line with the original position of the Commissioners who were bargaining with the Indians. The Commissioners specifically observed that the right of the Indians to hunt, trap and fish as they always had done would continue with the proviso that these rights would have to be exercised subject to such laws as were necessary to protect the fish and fur bearing animals on which the Indians depended for their sustenance and livelihood.
>
> . . .
>
> Obviously at the time the Treaty was made [1899] only the Federal Government had jurisdiction over the territory affected and it was the only contemplated 'government of the country.' The Transfer Agreement of 1930 changed the governmental authority which might regulate aspects of hunting in the interests of conservation. This change of governmental authority did not contradict the spirit of the original Agreement as evidenced by federal and provincial regulations in effect at the time. Even in 1899 conservation was a matter of concern for the governmental authority.[80]

Again, there is little here with which one need, or should, disagree.[81] The English text of Treaty 8[82] says clearly that the hunting, fishing, and trapping rights to which it pertains are subject to at least some government regulation. As a result of paragraph 12, provincial "laws respecting game" were among the government regulations to which those rights would be subject.[83] From this, however, it does not follow that some of those rights no longer existed after paragraph 12 came into effect. If anything, this reasoning suggests the opposite. The "spirit of the original Agreement," as described in this passage,

80 *Horseman*, *supra* note 1 at 934-36.

81 There is one noteworthy exception. The reference to "federal and provincial regulations in effect at the time" seems incongruous here, given that Alberta (and Saskatchewan) did not become provinces until 1905, six years after Treaty 8 took effect. One could, I suppose, construe "at the time" here to refer to 1930, the year the *NRTA* took effect. But it's hard to understand what one might learn about "the spirit of the original [1899] Agreement" from provincial regulations enacted subsequent to that date, especially given that the federal government was "the only contemplated 'government of the country" "at the time the Treaty was made."

82 See note 4 for the relevant text.

83 This makes perfect sense, at least, after one has acknowledged that the federal order had the power at the relevant time to modify the treaty's terms unilaterally. See notes 28, 78 and the accompanying text.

contemplated perpetuation of the relevant rights but subject to regulation. Rights that no longer exist no longer stand in any need of regulation.

This brings us to the fourth proposition in Justice Cory's argument:

> In addition, there was in fact a *quid pro quo* granted by the Crown for the reduction in the hunting right. Although the Agreement did take away the right to hunt commercially, the nature of the right to hunt for food was substantially enlarged. The geographical areas in which the Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. . . . Nor are the Indians subject to seasonal limitations as are all other hunters. . . . Indians are not limited with regard to the type of game they may kill. . . . It can be seen that the *quid pro quo* was substantial. Both the area of hunting and the way in which the hunting could be conducted was extended and removed from the jurisdiction of provincial governments.[84]

Read carefully, this passage does not offer independent support for the extinguishment hypothesis; it presupposes, and tries to excuse, the conclusion that paragraph 12 extinguished treaty Indians' commercial harvesting rights. Its argument is that paragraph 12 was not unfair to Aboriginal peoples, even if extinguishment was among that provision's effects. Even if one adopts this view, one has no additional reason for supposing that paragraph 12 embodied a clear and plain intention to extinguish such rights; the most one may have is a slightly clearer conscience about having done so. Even that result is open to question when one looks more broadly at the *quid pro quo*.

Recall, to begin, that paragraph 12 pertains not just to the treaty Indians within the province of Alberta but much more generally to "the Indians of the province": "the Indians within the boundaries thereof."[85] Recall, as well, that this did not result from inadvertence but from a conscious decision in the course of negotiation of the terms of the *NRTAs*.[86] Paragraph 12, therefore, protects *all* Indians in Alberta, not merely those who are subject to treaties, from provincial restrictions on harvesting game or fish for food on lands to which they have rights of access. For those Indians who did not already have treaty (or Aboriginal) rights to hunt, fish or trap in Alberta, such protection was, and is, a windfall. From a policy standpoint, there is nothing wrong

84 *Horseman*, *supra* note 1 at 933. See also *ibid.* at 934, where Justice Cory quotes with approval the observation of Justice Laskin, dissenting in *Cardinal v. Alberta (Attorney General)*, [1974] S.C.R. 695 at 722, to the effect that para. 12 "does not expand provincial legislative power but contracts it," and a passage from *Myran v. The Queen*, [1976] 2 S.C.R. 137, describing the breadth of the right to hunt for food that para. 12 expressly protects.

85 For the full text of para. 12, see the text accompanying note 21.

86 See notes 73-75 and the accompanying text.

with that. But if we treat this benefit as the *quid* in an equation in which the *quo* is unilateral extinguishment of other rights reserved to just some of those Indians — rights, in the case of *Horseman*, for which the Treaty 8 peoples had bargained, and sacrificed significantly — the implications quickly seem more troubling. Such an interpretation puts the Crown in the position of having rewarded Indians that had no pre-existing rights to hunt or fish in Alberta at the expense of Indians that had treatied with the Crown to secure just such rights. How can one reconcile this with the Court's observation in *Blais* that paragraph 12 and its Manitoba and Saskatchewan analogues were enacted "to ensure respect for the Crown's obligations to 'Indians' with respect to hunting rights[:] . . . to protect the hunting rights of the beneficiaries of Indian treaties and the *Indian Act* in the context of the transfer of Crown land to the provinces"?[87]

Recall, in addition, that paragraph 12 affords the Treaty 8 Indians exercising their treaty harvesting rights no protection at all from *federal* hunting or fishing legislation.[88] In respect of the federal order, therefore, the notion of *quid pro quo* has no application; there *is* no *quid*.[89]

Finally, if the Court considered it apposite to conjure a *quid pro quo* to help account for paragraph 12, it could have done so well enough without resorting to the extreme of postulating extinguishment of pre-existing treaty rights to harvest game or fish for commercial purposes. Elsewhere, the *Horseman* majority observed that the *NRTA* had "changed the governmental authority which might regulate aspects of hunting in the interests of conservation."

87 See note 20 and the accompanying text.

88 See, *e.g.*, *Daniels v. White and the Queen*, [1968] S.C.R. 517 [*Daniels*]; and *R. v. Elk*, [1980] 2 S.C.R. 166 [*Elk*]. Thanks to Kent McNeil for suggesting this point to me.

89 In *Gladue*, *supra* note 2, the Alberta Court of Appeal entertained (at paras. 15-21) but rejected an argument that para. 12 could not have extinguished treaty commercial harvesting rights as against the federal Crown because the *NRTA* afforded no *quid pro quo* in respect of the federal order. It does not follow, the court concluded (at para. 20), from the fact that para. 12 affords no protection from federal law "that the Natural Resources Transfer Agreements (enacted as constitutional amendments) did not have the effect of extinguishing hunting and fishing rights which may have been included in treaties but were not specifically protected in para. 12." It added this (at para. 21):

> Daniels and Elk [both *ibid.*] do not deal with extinguishment. The appellant's position would lead to the incongruous result that certain Treaty rights survived as against the federal Crown and not the provincial Crown, although historically, by virtue of s. 91(24) of the *Constitution Act, 1867* . . . Canada could legislate to affect or extinguish aboriginal and treaty rights while the provinces could not.

This conclusion seems to me sound as far as it goes. It still, however, leaves us bereft of reasons for accepting the extinguishment hypothesis in the first place.

Constitutional change seemed necessary to subject the Treaty 8 hunters to Alberta legislation because "only the Federal Government had jurisdiction over the territory affected and it was the only contemplated 'government of the country'" at the time Treaty 8 was made in 1899.[90] (We now know that, apart from the *NRTAs* and any special contrary provisions in particular treaties, the provinces have never had constitutional authority to interfere significantly with Aboriginal peoples' treaty rights.)[91] Whatever *quid* the Court may have thought that paragraph 12 conferred on Alberta's treaty Indians, subjecting their pre-existing commercial harvesting rights to provincial law would have been ample *quo* to exact in return.

So far, then, we still have no rationale for the Court's acceptance in *Horseman* of the extinguishment hypothesis. We turn now to the fifth and final proposition in the majority's argument on the issue: the one that, frankly, is the heart of the matter:

> The short answer to the appellant's position [*viz.*, that commercial harvesting rights survived the Alberta *NRTA*] is that para. 12 of the 1930 Transfer Agreement was carefully considered and interpreted by Chief Justice Dickson in the three recent cases of *Frank v. The Queen* . . . ; *R. v. Sutherland* . . . ; and *Moosehunter v. The Queen*. These cases dealt with the analogous problems arising from the Transfer Agreements with Manitoba and Saskatchewan which were worded in precisely the same way as the Transfer Agreement with Alberta under consideration in this case. These reasons constitute the carefully considered recent opinion of this Court. They are just as persuasive today as they were when they were released. Nothing in the appellant's submission would lead me to vary in any way the reasons so well and clearly expressed in those cases.[92]

The even shorter answer, then, is that the *Horseman* majority concluded that commercial hunting activity was "no longer a right protected by Treaty No. 8"[93] because it felt bound by Supreme Court of Canada precedent to do so. Paragraph 12 "merged and consolidated" the harvesting rights in Treaty 8.[94] End of conversation.

It would hardly do, of course, to criticize the Court for relying on unanimous, recent Supreme Court of Canada precedent. It does seem fair and appropriate, though, to ascertain whether the decisions cited as precedent in *Horseman* really do support the proposition they are taken to have established. Here, then, is what the *Horseman* majority had to say about those decisions:

90 See quotation in the text accompanying note 80.
91 See *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915 [*Morris*].
92 *Horseman*, *supra* note 1 at 932-33.
93 *Ibid.* at 936.
94 See *ibid.* at 930-32.

The merger and consolidation theory was first put forward by McNiven J.A. in *R. v. Strongquill* (1953), 8 W.W.R. (N.S.) 247 (Sask. C.A.). He stated at pp. 267-268:

> Pars. 10, 11 and 12 of the said agreement refer to Indians and with respect to the matters therein dealt with the rights heretofore enjoyed by the Indians whether by treaty or by statute were merged and consolidated. *Vide Rex v. Smith*, [1935] 2 WWR 433, 64 CCC 131, where Turgeon, J.A. says at p. 436:
>
> > It follows therefore that whatever the situation may have been in earlier years *the extent to which Indians are now exempted from the operation of the game laws in Saskatchewan is to be determined by an interpretation of par. 12*, given force of law by this Imperial statute.

In *Cardinal v. Attorney General of Alberta*, [*supra* note 84], Martland J., for the majority, expressed the opinion that the 1930 Transfer Agreement operated so as *to extend provincial jurisdiction in the form of game laws to Indian Reserves.* At page 707 he wrote:

> The opening words of the section define its purpose. It is to secure to the Indians of the Province a continuing supply of game and fish for their support and subsistence. It is to achieve that purpose that *Indians within the boundaries of the Province are to conform to Provincial game laws*, subject, always, to their right to hunt and fish for food.

In later decisions Dickson J., as he then was, adopted this approach. It was his view that the Transfer Agreement operated so as to cut down the scope of Indian hunting rights. In *Frank v. The Queen*, [[1978] 1 S.C.R. 95], at p. 100, he commented:

> It would appear that the overall purpose of the para. 12 of the Natural Resources Transfer Agreement was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food.

Similarly, in *Moosehunter v. The Queen*, [[1981] 1 S.C.R. 282], at p. 285, he wrote:

> The Agreement had the effect of merging and consolidating the treaty rights of the Indian in the area and restricting the power of the provinces to regulate the Indians' right to hunt for food. *The right of Indians to hunt for sport or commercially could be regulated by provincial game laws but the right to hunt for food could not.*[95]

95 *Ibid.* at 931-32 [emphases added]. The citation from *Sutherland, supra* note 43 at 460, mentioned but not quoted in the text of this passage from *Horseman, ibid.*, merely reproduces the passage quoted here from *Frank v. The Queen*, [1978] 1 S.C.R. 95 at 100 [*Frank*].

The first thing to notice about this lengthy passage is that it does not say anywhere that any treaty rights have been extinguished.[96] Apart from adopting the nomenclature of merger and consolidation, all these embedded precedents say is that paragraph 12 renders Indians subject to provincial game laws.[97] The quotation from *Moosehunter* with which the *Horseman* passage concludes, in fact, speaks expressly of the "*right* of Indians to hunt for sport or commercially" being "regulated by provincial game laws."[98] This is the language of regulation, not the language of extinguishment.[99]

These precedents, therefore, do not support the extinguishment hypothesis unless one assumes that extinguishment results necessarily from the process of "merger and consolidation" ascribed to paragraph 12 and to its counterpart provisions in the Saskatchewan and Manitoba *NRTAs*. Our inquiry requires, therefore, that we look more closely at the notion that paragraph 12 simply replaced, in a constitutional instrument, the harvesting rights that Treaty 8 had guaranteed to its Aboriginal parties.

This issue received extensive attention in *Badger*.[100] Quoting with approval the passage from *Frank*[101] set out and relied on in *Horseman*,[102] Justice Sopinka adopted full strength the notion that "it was the intention of the framers of para. 12 of the *NRTA* to effectuate a merger and consolidation of the Treaty rights."[103] "If this was the intention," he added:

> and I conclude that it was, then the proper characterization of the relationship between the *NRTA* and the Treaty rights is that the sole source for a claim involving the right to hunt for food is the *NRTA*. The Treaty rights have been subsumed in a document of a higher order. The Treaty may be relied on for the purpose of assisting

96 In *Gladue*, *supra* note 2, the Alberta Court of Appeal acknowledged (at para. 13) that "[n]either Dickson J. nor Cory J. used the word 'extinguishment' when referring to treaty rights" in these decisions, but added, without further argument or elaboration, that "that was the effect of the judgments." The latter proposition is precisely the one now at issue.

97 *Sutherland*, *supra* note 43, the other decision mentioned (but not quoted) by the *Horseman* majority, is to exactly similar effect (at 461): "Paragraph 13 of the [Manitoba *NRTA*, the counterpart provision to paragraph 12], it is true, makes provincial game laws applicable to the Indians within the boundaries of the province."

98 *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282 at 285 [emphasis added] [*Moosehunter*].

99 It is surely of some significance here that Chief Justice Dickson, on whose earlier *NRTA* decisions Justice Cory relied almost exclusively for his conclusions in *Horseman*, *supra* note 1, was himself among the dissenters in *Horseman*. He appears not to have shared the view that those decisions entailed the doctrinal consequences that Justice Cory had ascribed to them.

100 *Supra* note 6.

101 *Supra* note 95.

102 See quotation in the text accompanying note 95.

103 *Badger*, *supra* note 6 at para. 7. See generally *ibid.* at paras. 2-9.

> in the interpretation of the *NRTA*, but it has no other legal significance.[104]

Had this been the majority judgment in *Badger*, one might well have felt driven today to accept that paragraph 12, and its counterparts in the other *NRTA*s, had operated to extinguish the pre-existing harvesting rights confirmed in treaties with prairie Indians and to replace them with a uniform constitutional scheme that protected hunting for food. This is, in my judgment, the inference to which the reasoning in *Horseman* leads necessarily if one construes it as reasoning about extinguishment. If "merged and consolidated" means "subsumed and replaced," then paragraph 12 must have subsumed and replaced *all* the harvesting rights in (for example) Treaty 8.

Justice Sopinka, however, did not write for the majority in *Badger*; his were concurring reasons, on behalf of two members of the seven-judge panel. More important, the notion of merger and consolidation was the very issue — the only issue of consequence — on which his opinion differed from that of the majority. Justice Cory, who wrote again for the majority, responded as follows to Justice Sopinka's reasoning on this issue:

> Pursuant to s. 1 of the *Constitution Act, 1930*, there can be no doubt that para. 12 of the *NRTA* is binding law. It is the legal instrument which currently sets out and governs the Indian right to hunt. However, the existence of the *NRTA* has not deprived Treaty No. 8 of legal significance. Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfil its promises. *Treaty rights can only be amended where it is clear that effect was intended.* It is helpful to recall that Dickson J. in *Frank* . . . observed at p. 100 that, while the *NRTA* had partially amended the scope of the Treaty hunting right, "of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food" (emphasis added [in *Badger*]). I believe that these words support my conclusion that *the Treaty No. 8 right to hunt has only been altered or modified by the NRTA to the extent that the NRTA evinces a clear intention to effect such a modification.* This position has been repeatedly confirmed in the decisions referred to earlier. *Unless there is a direct conflict between the NRTA and a treaty, the NRTA will not have modified the treaty rights.*[105]

According to the majority in *Badger*, therefore, some wholesale "merger and consolidation" of Treaty 8 hunting rights was not the effect of paragraph 12. Instead, its effect on treaty harvesting rights is to be discerned from interpretation of the provision *together with* the relevant part of the treaty.

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104 *Ibid.* at para. 8.

105 *Ibid.* at para. 47 [all underlining in original; all italics (except case names, "*Constitution Act, 1930*," and "*NRTA*") added].

In the absence of "direct conflict," there is no modification, let alone extinguishment, of the treaty right.[106]

This brings us back full-circle to the task of construing paragraph 12. As the discussion above suggests,[107] the only clear intention that paragraph 12 can be said to evince in respect of treaty commercial harvesting rights is the intention to ensure their subjection to provincial "laws respecting game." Inferring extinguishment from this generic intention and effect "confuses," as the Supreme Court reminded us, "regulation with extinguishment."[108] As regards "direct conflict between the *NRTA* and a treaty," it is arguable, in my judgment, that there is no conflict at all between the *NRTA* and the harvesting rights in Treaty 8 because of the "Government of the country" clause embedded in the terms of the treaty itself.[109] As *Horseman* itself has acknowledged, "[t]his change of governmental authority" ensured through paragraph 12 "did not contradict the spirit of the original Agreement" captured in the treaty.[110]

There is, I believe, one final reason to reject the suggestion that paragraph 12 (or its counterparts elsewhere) extinguished, or subsumed and replaced, harvesting rights guaranteed in the numbered treaties. The words "the Province" in paragraph 12 of the Alberta *NRTA* refer exclusively to the province of Alberta; when the same words appear in the counterpart provisions in the Manitoba and Saskatchewan *NRTA*s, they refer there exclusively to Manitoba and Saskatchewan, respectively. The rights and powers mentioned in paragraph 12, therefore, exist exclusively within, and pertain exclusively to, the province of Alberta (or Manitoba, or Saskatchewan). Such impact as paragraph 12 and its analogues have on treaty harvesting rights necessarily stops at the borders of the province to which the particular *NRTA* pertains. No one has ever suggested that the Alberta *NRTA*, for instance, could affect in any way the rights of Indians hunting or fishing, whether for food or commercially, in Quebec or Nova Scotia.

The harvesting rights protected originally in the numbered treaties, however, extend, by the terms of their English text, "throughout the tract surrendered as heretofore described."[111] The "tract[s] surrendered" in these treaties bear no geographic relationship to the boundaries of the provinces within which today one finds those tracts. The "tract surrendered" in Treaty 8, for instance,

106 *Ibid.*

107 See notes 46-76 and the accompanying text.

108 See *Sparrow, supra* note 36 at 1097.

109 See, again, the text reproduced in note 4.

110 *Supra* note 1 at 935-36, quoted at greater length in text in note 80.

111 For Treaty No. 8, see the text quoted in note 4.

extends some distance into northeastern British Columbia. So, therefore, do the protected harvesting rights of the Treaty 8 Indians. The same is true in respect of the tracts surrendered in Treaties 3 and 5, both of which straddle the border between Manitoba and Ontario.[112]

At an absolute minimum, then, it follows that the Alberta *NRTA* can have no effect on commercial harvesting rights that Treaty 8 Indians have in British Columbia (or the Manitoba *NRTA* on the counterpart rights that the Indians in Treaties 3 and 5 have in Ontario). But if those rights survive undisturbed in British Columbia (and Ontario), how can one speak sensibly of their having been extinguished anywhere? The numbered treaties, again, did not individuate geographically the harvesting rights they codified, such that those rights could be extinguished piecemeal. The rights extend — and survive, or not — "throughout the tract surrendered." Whatever else may be true of the Alberta (or the Manitoba) *NRTA*, therefore, its intention cannot have been to extinguish rights in Treaty 8 (or in Treaties 3 or 5) because those rights extend outside the only province to which the *NRTA*, by its own terms, pertains. The most an *NRTA* can plausibly be taken to have done is to have imposed new controls on the exercise of such rights within the relevant province: *i.e.*, to have subjected the commercial aspects of these rights to provincial "laws respecting game."

What Difference Does It Make?

The preceding analysis concludes that paragraph 12 of the Alberta *NRTA* did not extinguish the Treaty 8 Indians' right to harvest game or fish for commercial purposes; it ensured instead that provincial game laws could govern their engagement in commercial harvesting activity. Put differently, paragraph 12's effect was to equip Alberta to bring all commercial harvesting activity in the province — Indians' and others' — within the same single regulatory regime: to subject the Treaty 8 Indians to the same restrictions as govern all other commercial harvesters there.

From a legal standpoint, this result is not especially problematic. In *Marshall*, the Supreme Court made a point of observing that "a general right enjoyed by all citizens can nevertheless be made the subject of an enforceable treaty

112 For the harvesting rights provisions in Treaties Nos. 3 and 5, see, *e.g.*, Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based* (Toronto: Belfords, Clarke, 1880; Saskatoon: Fifth House Publishers, 1991) at 323 (Treaty No. 3), 346 (Treaty No. 5).

promise"[113] and proceeded to give examples of provisions in other treaties whose whole point was to put the Aboriginal parties in the same position as everyone else in the relevant respect.[114] But from a practical standpoint, it is tempting in this situation to wonder what all the fuss has been about. If the Treaty 8 Indians, now that paragraph 12 is in effect, are in no better position than other commercial Alberta harvesters, what is the point of insisting that they still have a treaty right to harvest fish and game for commercial purposes?[115] What good is such a right doing them, in the wake of paragraph 12 of the *NRTA*? Why not just say, for simplicity's sake, that the *NRTA* extinguished the right?

One obvious answer follows from the discussion just concluded. It may well make a great deal of difference to many Treaty 8 Indians whether they still have a treaty right to harvest commercially within that part of their "tract surrendered" that lies in British Columbia (and to many Indians in Treaties 3 and 5 whether they still have a treaty right to harvest commercially in Ontario), where the *NRTA* provisions do not reach.[116] But even within Alberta (or, in the case of Treaties 3 and 5, Manitoba), the way we describe the Indians' situation makes a difference.

To see why, it is helpful to return briefly to *Marshall*, a decision that upheld a limited treaty right to harvest game and fish commercially. There, the Supreme Court drew "a distinction . . . between a liberty enjoyed by all citizens and a right conferred by a specific legal authority, such as a treaty, to participate in

113 *Marshall*, *supra* note 40 at para. 45.

114 See *ibid.* at paras. 45-46 [emphasis in original]:

> In *[R. v.] Taylor and Williams* [(1981), 62 C.C.C. (2d) 227 (Ont. C.A.), leave to appeal refused, [1981] 2 S.C.R. xi], at p. 235, the treaty was found to include a term that "[t]he Rivers are open to all & you have an equal right to hunt on them," and yet, despite the reference to equal rather than preferential rights, "the historic right of these Indians to hunt and fish" was found to be incorporated in the treaty . . . .
>
> Similarly, in *Sioui* [*supra* note 31], at p. 1031, as mentioned above, the treaty provided that the Hurons would be "received upon the *same terms* with the Canadians" (emphasis added [in *Marshall*]), yet the religious freedom, which in terms of content was no greater than that of the non-aboriginal inhabitants in 1760, was in 1990 accorded treaty protection.

[Original emphasis in *Taylor and Williams* altered in *Marshall*].

115 See, *e.g.*, Pozniak, *supra* note 13 at 412: "Recognizing the *NRTA* as governing is, in practical terms, not much different than extinguishment." She adds, however, that "the message sent by the latter is. The extinguishment of treaty hunting rights would suggest that the federal government intended to amend the solemn treaties, as opposed to merely allow the prairie provinces to regulate hunting rights. As such," she concludes, "recognizing the Agreement as governing is not the equivalent of extinguishment."

116 See notes 110-12 and the accompanying text.

the same activity."[117] "The issue here," it continued:

> is not so much the content of the rights or liberties as the level of legal protection thrown around them. A treaty could, to take a fanciful example, provide for a right of the Mi'kmaq to promenade down Barrington Street, Halifax, on each anniversary of the treaty. Barrington Street is a common thoroughfare enjoyed by all. There would be nothing "special" about the Mi'kmaq use of a common right of way. The point is that the treaty rights-holder not only has the right or liberty "enjoyed by other British subjects" but may enjoy special treaty *protection* against interference with its exercise.[118]

Likewise, the difference a Treaty 8 right to fish commercially would make in Alberta, even today, lies in the "special treaty protection" it would confer in relation to applicable Alberta law. This protection takes two forms, each potentially significant.

First, there is good reason to say that Indians' treaty rights qualify in mainstream law as "vested rights." A recent Supreme Court decision[119] identifies two criteria constitutive of a vested right. The first is that "the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract,"[120] *i.e.*, that the right at issue must arise from circumstances or legal arrangements specific to the claimants.[121] The rights protected in Treaty 8 seem to satisfy this requirement; they belong, by reason of that treaty, specifically to the parties to Treaty 8.[122] The second requirement is that the claimant's "legal situation must have been sufficiently constituted at the time of the new statute's commencement."[123] "[R]ights and obligations resulting from a contract," the Court added, "are usually created at the same time as the contract itself."[124] *Horseman* itself acknowledged that "the original

117 *Marshall, supra* note 40 at para. 45.

118 *Ibid.* at para. 47 [emphasis in original].

119 *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530 [*Dikranian*].

120 *Ibid.* at para. 37.

121 Thus, for example, "[t]he mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists"; neither is "the mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute": *ibid.* at para. 39.

122 It is true that the Court in *Dikranian* goes on to say (*ibid.*) that "the right must be vested in a specific individual," but the context there did not require it to contemplate the status of collective rights that derive from enforceable agreements. It certainly seems to make sense, for example, to say that collective agreements in unionized workplaces confer vested rights on the members of the bargaining units to which those agreements pertain.

123 *Ibid.* at para. 37, citing with approval Pierre-André Côté, *Interpretation of Legislation in Canada*, 3d ed. (Scarborough, ON: Carswell, 2000) at 160-61.

124 *Dikranian, ibid.* at para. 40.

Treaty [8] right clearly included hunting for purposes of commerce."[125] From this, it seems to follow that the Treaty 8 Indians' "legal situation," as regards commercial harvesting rights, was "sufficiently constituted" in 1899, the year that Treaty 8 came into effect.[126] In both these respects, it differs from the legal situation of non-Aboriginal Albertans who have wished to harvest fish or game commercially.

If the Treaty 8 Indians' right to harvest for commercial purposes has survived the implementation of the Alberta *NRTA*, therefore, those rights seem entitled to the benefit of such special protection as mainstream law confers on accrued or vested rights. Most often, such protection takes the form of a presumption in statutory interpretation that an enacting legislature did not, and would not, seek to limit vested rights. According to its classic Canadian formulation:

> A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" . . . unless the language in which it is expressed requires such a construction . . . ; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.[127]

Dikranian adds that "[t]he values embodied in the presumption against interfering with vested rights, namely avoiding unfairness and observing the rule of law, inform interpretation in every case, not just those in which the court purports to find ambiguity."[128] Vested rights, in other words, confer on those who hold them a limited presumptive immunity from otherwise competent legislation of general application. Measures that apply automatically to the rest of us do not routinely apply to those from whose vested rights they would derogate. They govern such rights only when it is abundantly clear that the enacting legislature intended that they do so.[129]

Here, very briefly, is why this matters for practical purposes. Paragraph

125 *Horseman, supra* note 1 at 929, Cory J.

126 This conclusion need not preclude some evolution in the protected scope of the rights so constituted, as long as the original agreement frames the rights with sufficient generality. For useful recent discussion of the evolution of some hunting rights in other treaties, see the majority and dissenting judgments in *Morris, supra* note 91.

127 *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at 638, quoted with approval in *Dikranian, supra* note 119 at para. 33.

128 *Dikranian, ibid.* at para. 36, quoting with approval Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002) at 576.

129 For a similar argument in respect of Aboriginal rights, see Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Saskatchewan Law Rev. 431 at 437-39, 447-48.

12 removed any previous constitutional doubt that Alberta *may* enact and enforce "laws respecting game" that apply to Treaty 8 Indians engaged in commercial harvesting. As mentioned above, it left undisturbed the federal order's pre-existing capacity to regulate treaty Indians' harvesting generally.[130] Whether any given Alberta (or federal) game law *does* apply, however, is a matter of statutory interpretation, legislative measure by legislative measure. In construing those measures, the courts must, of course, give effect to any unmistakable legislative intention, including an intention to interfere with vested rights. Without proof of such an intention, however, they ordinarily are to presume that Alberta (or, in the case of federal legislation, Parliament) did not intend its measure to interfere with any vested rights, including those that still belong to the Treaty 8 Indians. As a result, it may well turn out — this is, again, a matter for case-by-case determination — that at least some Alberta (or federal) "laws respecting game" do not apply to Treaty 8 Indians exercising treaty rights to harvest commercially. This would not be the case if we were driven to conclude that paragraph 12, read in the context of the *Constitution Act, 1930*, had extinguished any such rights.

The other, more familiar and more substantial form of "special treaty protection" is that now available pursuant to section 35 of the *Constitution Act, 1982*.[131] Section 35 recognizes and affirms explicitly "the existing aboriginal and treaty rights of the aboriginal peoples of Canada," including, of course, all surviving Treaty 8 harvesting rights. This means, at an absolute minimum, that it protects such rights from any and all unjustified federal interference.[132]

This on its own would be sufficient reason to pay close attention to whether the commercial harvesting rights in Treaty 8 survived the implementation of paragraph 12 of the *NRTA*. We have known since *Sparrow* that "the rights to which s. 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect": that "extinguished rights are not revived by the *Constitution Act, 1982*."[133] The answer to the extinguishment question determines the relationship now between federal law and authority and Treaty 8 Indians' commercial harvesting activity.

The better view, however, is that section 35 would also protect surviving Treaty

130 See notes 88-89 and the accompanying text.

131 *Supra* note 22.

132 See, *e.g.*, *Sparrow*, *supra* note 36 at 1108-10; *Badger*, *supra* note 6 at para. 79; and *Marshall*, *supra* note 40 at paras. 64-66.

133 *Sparrow*, *ibid.* at 1091.

8 commercial harvesting rights from the unjustified effects of the otherwise valid and applicable provincial "laws respecting game" to which paragraph 12 of the *NRTA* subjects them.[134] A contrary view is arguable: section 1 of the *Constitution Act, 1930* does say, after all, that the *NRTAs*, including paragraph 12, "shall have the force of law notwithstanding anything in the *Constitution Act, 1867*, or any Act amending the same."[135] The *Constitution Act, 1982* does contain provisions that amend the *Constitution Act, 1867*.[136] Somewhat similar reasoning prompted Justice Sopinka to conclude in *Badger*[137] that "s. 35(1) is inapplicable to the provision of the *NRTA* that protects the right of aboriginal persons to hunt for food."[138] The majority in *Badger*, however, after acknowledging that "[t]he *NRTA* only modifies the Treaty No. 8 right,"[139] said that:

> justification of provincial regulations enacted pursuant to the *NRTA* should meet the same test for justification of treaty rights that was set out in *Sparrow*. The reason for this is obvious. The effect of para. 12 of the *NRTA* is to place the Provincial government in exactly the same position which the Federal Crown formerly occupied. Thus the Provincial government has the same duty not to infringe unjustifiably the hunting right provided by Treaty No. 8 as modified by the *NRTA*.[140]

If I am correct in arguing here that "the hunting right provided by Treaty No. 8 as modified by the *NRTA*" retains a commercial component, albeit one now undoubtedly subject to some provincial authority, then contemporary

134 I have argued elsewhere that the constitutional doctrine of interjurisdictional immunity generally renders provincial measures inapplicable, as such, to s. 91(24) Indians' Aboriginal and treaty rights, because the Supreme Court has placed such rights at the core of exclusive federal authority under s. 91(24) of the *Constitution Act, 1867, supra* note 25. See Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dalhousie Law J. 185; and Kerry Wilkins, "Negative Capability: Of Provinces and Lands Reserved for the Indians" (2002) 1 Indigenous Law J. 57. To similar effect, see also McNeil, *supra* note 129; and Kent McNeil, *Defining Aboriginal Title in the '90s: Has the Supreme Court Finally Got It Right?* (Toronto: Robarts Centre for Canadian Studies, York University, 1998). In *Morris, supra* note 91, the Supreme Court agreed unanimously with this conclusion as regards treaty rights. These observations, however, have no relevance in the present discussion because, again, the combined effect of para. 12 of the Alberta *NRTA* and s. 1 of the *Constitution Act, 1930, supra* note 5, is to modify the ordinary division of federal/provincial powers to ensure the application to Indians of provincial "laws respecting game": see notes 26-27 and the accompanying text.

135 The full text of s. 1 of the *Constitution Act, 1930* accompanies note 22.

136 See *Constitution Act, 1982, supra* note 22, ss. 50-51, which add s. 92A and the Sixth Schedule, respectively, to the original text of the *Constitution Act, 1867, supra* note 25.

137 *Supra* note 6.

138 *Ibid.* at para. 12, Sopinka J. (concurring in the majority result). Even so, Justice Sopinka would have applied the *Sparrow, supra* note 36, infringement and justification inquiry "by analogy" to para. 12 of the Alberta *NRTA*. See *Badger, ibid.* at paras. 13-14.

139 *Ibid.* at para. 84, Cory J.

140 *Ibid.* at para. 96.

provincial restrictions on that commercial component necessarily also require justification if they are to apply.[141]

III. NOW WHAT?

In a very recent decision, the Supreme Court reaffirmed that "[i]t is not the practice of this Court to reverse its previous decisions in the absence of compelling reasons to do so."[142] As we saw at the outset,[143] *Horseman* is the principal authority for what I have called the "extinguishment hypothesis": the notion that paragraph 12 of the Alberta *NRTA* extinguished Treaty 8 Indians' commercial harvesting rights. In view of this, is it plausible even to entertain the expectation that the Court might reconsider this issue?

Let me review the analysis so far. I have argued, first, that the extinguishment hypothesis derived from *Horseman* is, from a doctrinal standpoint, wrong and indefensible. It conflicts with the entirety of what we now know to be the Canadian law on extinguishment. It draws no real support either from paragraph 12's legislative history or from the argumentation one finds in the *Horseman* majority judgment. It goes well beyond any propositions supported by the authorities on which the *Horseman* majority relies. And it attributes to paragraph 12 extraordinary, unprecedented extraterritorial consequences. I have pointed out, as well, its substantial and deleterious practical consequences. It deprives the Treaty 8 Indians engaged in their "usual vocations of [commercial] hunting, trapping and fishing"[144] of significant forms of protection from the unjustified or unintended effects of provincial "laws respecting game." In addition, because the relevant part of the English text of Treaty 8 is substantially similar to, where it is not just identical with, counterpart provisions in the other numbered treaties, and because the Manitoba and Saskatchewan *NRTA*s contain provisions identical to Alberta's paragraph 12, the extinguishment hypothesis has repercussions for treaty Indians from northeastern British Columbia to substantial parts of northwestern Ontario.

141 See to similar effect *Littlewolf, supra* note 13 at para. 15: "If [para. 12] is interpreted to mean that some remnant of the right to hunt commercially survived 1930, it would have survived up to the current time to become protected by the 1982 Constitution Act, s. 35(1)."

142 *McDiarmid Lumber Ltd. v. God's Lake First Nation,* 2006 SCC 59, [2006] 2 S.C.R. 846 (citing *R. v. Chaulk,* [1990] 3 S.C.R. 1303; *R. v. B.(K.G.),* [1993] 1 S.C.R. 740; and *Friedmann Equity Developments Inc. v. Final Note Ltd.,* 2000 SCC 34, [2000] 1 S.C.R. 842).

143 See notes 5-14 and the accompanying text.

144 See note 4 for the relevant text of Treaty 8.

If the extinguishment hypothesis had sound doctrinal foundations, one would, of course, abide its significant practical consequences. Conversely, if its practical consequences were negligible, one might be tempted to overlook the dramatic doctrinal anomalies to which it gives rise. When confronted with such practical *and* doctrinal infelicity, however, one hopes that the Supreme Court would at least consider rectification.

Two other considerations, however, also sometimes discourage revisitation of earlier Supreme Court of Canada holdings. Other things equal, the Court will be much more reluctant to disturb the propositions it considers essential than those it considers merely incidental to its dispositions in particular cases.[145] And Supreme Court decisions sometimes acquire momentum of their own, determining sufficient numbers of outcomes in subsequent cases to become, in effect, indispensable, even when one senses, on reflection, that they ought originally to have been decided differently. It is prudent that we consider each of these concerns in turn. Either, if applicable to *Horseman*, might prompt the Court to preserve the extinguishment hypothesis, despite its substantial practical impact and its demonstrable doctrinal arbitrariness.

As it happens, nothing in *Horseman* turns on acceptance of the conclusion that paragraph 12 extinguished the Treaty 8 Indians' rights to harvest game or fish for commercial purposes. "The sole defence," the Court itself tells us, "raised on behalf of Horseman was that the *Wildlife Act* did not apply to him and that he was within his Treaty 8 rights when he sold the bear hide."[146] All the Crown needed to show, therefore, was that the *Wildlife Act* applied to that transaction. If one accepts that Mr. Horseman's charge did not relate to "hunting . . . for food,"[147] then it follows necessarily from the terms of paragraph 12 that the relevant *Wildlife Act* provision applied to his conduct, whether or not that conduct derived protection from Treaty 8. On the facts of *Horseman* as argued, this is all the Court would have needed to say to support its conclusion convicting him. The Court had no need to consider either section 35 of the *Constitution Act, 1982*[148] or the interpretive presumption against interference with vested rights.[149] Mr. Horseman chose, for whatever reason, not to rely on either.[150]

145 See, *e.g.*, *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 at para. 57 [*Henry*].

146 *Horseman*, *supra* note 1 at 925.

147 There was and is room for dispute about the soundness of this proposition: see note 33. This is an issue for another occasion.

148 See notes 131-41 and the accompanying text.

149 See notes 119-30 and the accompanying text.

150 Section 35 was available to Mr. Horseman at the time; the two incidents giving rise to the charge took place in the spring of 1983 and the spring of 1984, respectively: see *Horseman*, *supra* note 1 at

In fact, the only real use to which the *Horseman* majority put the extinguishment hypothesis was in addressing the problem it thought it saw in section 88 of the *Indian Act*.[151] Section 88 exposes statutory Indians to the effects of certain provincial laws of general application "[s]ubject to," among other things, "the terms of any treaty." If Mr. Horseman could have invoked section 88's protection, the relevant *Wildlife Act* provisions would not have applied to him. Justice Cory reasoned as follows:

> At the outset it must be recognized that the *Wildlife Act* is a provincial law of general application affecting Indians not *qua* Indians but rather as inhabitants of the Province. It follows that the Act can be applicable to Indians pursuant to the provisions of s. 88 of the *Indian Act* so long as it does not conflict with a treaty right. It has been seen that the Treaty No. 8 hunting rights have been limited by the provisions of the 1930 Transfer Agreement to the right to hunt for food, . . . The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as amended by the 1930 Transfer Agreement. Thus the application of s. 42 [of the *Wildlife Act*] to Indians who are hunting for commercial purposes is not precluded by s. 88 of the *Indian Act*.[152]

But section 88 could not have precluded the *Wildlife Act*'s application to Mr. Horseman's hunting in any event, because the *Wildlife Act*'s application did not depend in any way upon section 88. We have known since the Supreme Court's 1985 decision in *Dick v. The Queen* that section 88 pertains exclusively to provincial laws that cannot, for constitutional reasons, apply to Indians as provincial laws.[153] In decisions before[154] and after[155] *Horseman*, the Court has reaffirmed that conclusion repeatedly.[156] Section 88, therefore, had nothing to do with the *Wildlife Act*'s application to Mr. Horseman, because the *Wildlife Act* applied to him of its own force, pursuant to paragraph 12 of the Alberta *NRTA*. And even if this had not been the case, section 1 of the *Constitution Act, 1930*[157] would have sufficed to protect the *Wildlife Act* from the effects of section 88. Section 1, again, provides that paragraph 12, and by

924-25.

151 R.S.C. 1970, c. I-6. See now R.S.C. 1985, c. I-5, as amended.

152 *Horseman, supra* note 1 at 936.

153 [1985] 2 S.C.R. 309 at 326-27.

154 See, *e.g.*, *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 at 296-97; and *R. v. Francis*, [1988] 1 S.C.R. 1025 at 1028-29, 1030-31.

155 See, *e.g.*, *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 86; *Delgamuukw, supra* note 55 at para. 182; and *Morris, supra* note 91 at paras. 96-97, McLachlin C.J.C. & Fish J. (dissenting on other grounds).

156 For further discussion, see Kerry Wilkins, "'Still Crazy After All These Years': Section 88 of the *Indian Act* at Fifty" (2000) 38 Alberta Law Rev. 458 at 465-69, 472-77.

157 *Supra* note 5.

extension the provincial measures to which it gives effect, "shall have the force of law notwithstanding . . . any Act of the Parliament of Canada."[158] Here, too, the Court's invocation of the extinguishment hypothesis was altogether supererogatory.

The answer, therefore, to the first of the two residual concerns about overruling the extinguishment hypothesis is that, here, it simply does not arise. The extinguishment hypothesis is, in the strongest sense, dispensable — *obiter dictum* — to the result in the majority judgment in *Horseman*. Nothing in *Horseman* need have turned on the question of extinguishment.

There remain those other occasions when subsequent Supreme Court decisions cited *Horseman* as having established that paragraph 12 extinguished Alberta Indians' treaty rights to harvest commercially. In none of them did the Court's conclusion or its reasoning depend upon the extinguishment hypothesis. In *Badger*[159] and *Gladstone*,[160] the Court distinguished *Horseman* on the way to concluding that nothing had sufficed to extinguish the section 35 rights — a treaty right in *Badger*, an Aboriginal right to fish for commercial purposes in *Gladstone* — that were at issue there. In each of these cases, *Horseman* posed a doctrinal problem that the majority had to solve en route to its conclusion. The Court could have reached those same conclusions much more expeditiously without, and but for, the extinguishment hypothesis. In *Sundown*[161] and *Blais*,[162] the other two decisions, the Court mentioned *Horseman* only in passing and had no real need to comment at all on commercial harvesting rights or extinguishment. Both dealt exclusively with claims of right to hunt for food. In no way, therefore, does subsequent *NRTA* or Aboriginal rights jurisprudence depend on *Horseman*'s assumption that paragraph 12 extinguished treaty rights to hunt or fish commercially in Alberta.

When a legal proposition is unsound from a doctrinal standpoint, consequential and infelicitous from a practical standpoint, and altogether dispensable from a jurisprudential standpoint, one would like to think one has proved all one needs to prove to earn it authoritative judicial repudiation. This is precisely the status of the extinguishment hypothesis. The challenge today is to find a way to bring the matter before the courts for reconsideration.

158 For the full text of s. 1 of the *Constitution Act, 1930*, *ibid.*, see note 22 and the accompanying text.

159 *Supra* note 6.

160 *Supra* note 9.

161 *Supra* note 11. For the relevant quotation, see the text accompanying note 12.

162 *Supra* note 15. See note 17 for the relevant quotation.

Others have already tried unsuccessfully to do so. In 1992, two Alberta trial judges found ways of distinguishing the *Horseman* majority's observations about extinguishment and acquitted Treaty 6 Indians of provincial commercial hunting infractions.[163] On appeal, the Alberta Court of Queen's Bench found the trial courts' approach "cohesive and appealing,"[164] but reversed the acquittals because "the Supreme Court of Canada has considered the limits on the Indian's right to hunt in the *Horseman* case, . . . expressly rejecting the concept that it included commercial hunting."[165] "The clear meaning of [Justice Cory's] words," the court said, "can bear no other interpretation."[166] It made no difference to the court that the passages in *Horseman* that suggest extinguishment were unnecessary to the result[167] or that they did not sit well with other contemporaneous Supreme Court decisions on section 35 rights.[168] According to the Alberta Court of Appeal, which then refused leave for further appeal:

> the close reading of the text in *Horseman* which we find in the trial decision in the present case is not a method which a court (other than the Supreme Court of Canada) properly could use. It is not open to use that kind of narrow textual analysis (which one might use for an exculpatory clause), in order to get around a decision of the Supreme Court of Canada.[169]

"[N]othing," the same court said in the companion leave application, "could be done for the appellants unless the matter were to reach the Supreme Court of Canada and the Supreme Court of Canada were to overrule or otherwise cut back on their previous, fairly recent decision" in *Horseman*.[170]

The Court of Appeal did not say how an invitation to reconsider *Horseman* might reach the Supreme Court of Canada without a prior hearing on its merits by a provincial appellate court. It did observe, though, that "when a Supreme Court of Canada decision appears to be on point and quite recent, it is much harder to argue that there is a reasonable prospect that the Supreme Court of Canada will overrule it."[171]

163 See *R. v. Potts* (1992), 84 Alta. L.R. (2d) 326 (Prov. Ct.). *R. v. Littlewolf* (1992), 128 A.R. 307, [1992] A.W.L.D. 355 (Prov. Ct.) adopted and applied the same reasoning. *Littlewolf, supra* note 13, is the first appeal decision in both of these proceedings.

164 *Littlewolf, ibid.* at para. 40.

165 *Ibid.*

166 *Ibid.* at para. 45.

167 See *ibid.* at paras. 48-55.

168 *Ibid.* at para. 57. "Even if this is so," the court observed, "*Horseman* stands as the law in Canada regarding Treaty 6 Indians."

169 *Potts, supra* note 13 at para. 6.

170 *Littlewolf* (C.A.), *supra* note 13 at para. 2.

171 *Potts, supra* note 13 at para. 5.

That concern, though cogent enough perhaps when uttered in 1992, barely two years after *Horseman* emerged, deserves less weight in 2007, especially given what we know now about the Canadian law of extinguishment[172] and about the relationship between treaty rights and paragraph 12.[173]

In the interim, the Supreme Court itself has loosened somewhat the reins of precedent. In late 2005, it reminded us that "constitutional decisions are not immutable, even in the absence of constitutional amendment,"[174] and cited a number of fairly recent occasions on which it had overruled or reconsidered its earlier decisions in less time than has now elapsed since release of *Horseman*.[175] In that same decision, the Court repudiated "the proposition that whatever was said in a majority judgment of the Supreme Court of Canada was binding, no matter how incidental to the main point of the case or how far it was removed from the dispositive facts and principles of law."[176] The effect of that notion, the Court continued, would have been "to deprive the legal system of much creative thought on the part of counsel and judges in other courts in continuing to examine the operation of legal principles in different and perhaps novel contexts, and to inhibit or skew the growth of the common law."[177] The Court added this:

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.[178]

172 See notes 34-76 and the accompanying text.

173 See especially notes 105-106 and the accompanying text.

174 See *Henry, supra* note 145 at para. 44, quoting with approval from *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680 at 704.

175 *Henry, ibid.* In *Henry* itself, the Supreme Court overruled in part one decision (*R. v. Kuldip*, [1990] 3 S.C.R. 618) released in the same year as *Horseman, supra* note 1, and overruled outright another decision (*R. v. Mannion*, [1986] 2 S.C.R. 272) decided just four years previous to that, all in the course of clarifying the current state of the law on s. 13 of the Canadian *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982, supra* note 22. See *Henry, ibid.* at paras. 22-51.

176 *Henry, ibid.* at para. 55. The proposition repudiated was thought by some to follow from remarks Justice Chouinard had made for the court in *Sellars v. The Queen*, [1980] 1 S.C.R. 527 at 529 [*Sellars*].

177 *Henry, ibid.* at para. 56.

178 *Ibid.* at para. 57.

My hope is that courts in the prairie provinces, when confronted afresh with treaty Indians' claims of right to engage in commercial hunting, fishing, or trapping, will utilize this new breathing space to facilitate Supreme Court reconsideration of the extinguishment hypothesis. For that hypothesis, as articulated in *Horseman*, simply cannot withstand scrutiny in a jurisprudence that values doctrinal consistency and integrity.