NATURAL RESOURCES TRANSFER AGREEMENTS, THE TRANSFER OF AUTHORITY, AND THE PROMISE TO PROTECT THE FIRST NATIONS' RIGHT TO A TRADITIONAL LIVELIHOOD: A CRITICAL LEGAL HISTORY

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The legal history of paragraph 12 of the National Resources Transfer Agreements *have been focused almost entirely on the development of the case law interpreting First Nations hunting rights, law that took a narrow, formalistic approach to interpretation. This article uses critical legal history to fill in this historical context and help us understand the evolution of the regulatory regime prior to 1930, the conflict over wildlife, and the class interests represented in this regulatory regime. This analysis will illuminate the importance of the treaties to First Nations, especially their ability to continue their traditional livelihood, as promised during treaty negotiations. The intention behind paragraph 12 was to transfer authority to the provinces to regulate First Nations' hunting, while ensuring that the governmental obligations to look out for First Nations' interests in access to the wildlife were also secured.*

L'histoire légale du paragraphe 12 des Conventions sur le transfert des ressources naturelles s'est concentrée presque exclusivement sur le développement de la jurisprudence interprétant de façon étroite et formaliste les droits de chasse des Premières nations. Le présent article utilise l'histoire légale critique pour étoffer ce contexte historique et pour nous aider à comprendre l'évolution du régime de règlementation avant 1930, le conflit autour de l'accès aux ressources fauniques et les intérêts de classe représentés par ce régime de règlementation. La présente analyse éclairera l'importance des traités pour les Premières nations, en particulier quant à la capacité de maintenir leur mode de vie traditionnel, tel que promis lors des négociations de traités. Le paragraphe 12 avait pour but de transférer aux provinces l'autorité de règlementer la chasse autochtone tout en s'assurant que soient respectées les obligations gouvernementales d'agir, pour ce qui touche à l'accès à la faune, dans les intérêts des Premières nations.

I. INTRODUCTION

First Nations people believe that the treaties their forefathers negotiated gave them legal protection for their traditional livelihoods, which at that time

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included barter, trade. and selling the surplus products of the hunt. On the other hand, officials of both levels of Canadian governments have taken the position that they could regulate these traditional activities, even though they acknowledge that First Nations were assured during the treaty negotiations that they could continue these activities. White sport hunters at the time agreed with government officials that First Nation hunters ought to be regulated the same as themselves. The result was that conflict over wildlife resources was well entrenched by the time the prairie provinces and federal government signed the *Natural Resources Transfer Agreement*[1] (*NRTA*) in 1930.

Paragraph 12 of the *NRTA*[2] was the first instrument to provide constitutional protection for First Nations' right to hunt, as promised during the negotiation of the prairie treaties. This constitutional protection has been limited by the courts' interpretation of paragraph 12, and in particular, by the holding that any commercial aspect of such hunting rights was extinguished by the *NRTA*.[3] This case law has developed through a narrow, doctrinal approach to interpreting the *NRTA* and the intention behind it, an approach that considers only the common law and the statutes without taking into account the history of treaty negotiations and the legal regime at the turn of the century.[4] This historical context is nevertheless important in order to properly understand the intention behind paragraph 12 of the *NRTA*. In turn, a clearer understanding of this context highlights the need to revisit the judicial interpretation of paragraph 12. As will be demonstrated below, the failure to take the broader historical context into account has led courts to get it wrong. This judicial interpretation has formalized and justified the breach of treaties, tarnished the honour of the Crown, and raises questions regarding the morality of such an interpretation.

In the period leading up to the *NRTA*, First Nations' hunting was becoming

1 Schedule to the *British North America Act, 1930* (U.K.), renamed the *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V., c. 26, reprinted in R.S.C. 1985, App. II, No. 26. There were three separate agreements, one for each of the prairie provinces. Legislation enacting them was passed by the Imperial Parliament in the United Kingdom, the Parliament of Canada, and each of the provincial legislatures.

2 Paragraph 12 is the hunting clause in the Alberta and Saskatchewan Agreements, while para. 13 is the identical hunting clause in the Manitoba Agreement.

3 *R. v. Horseman*, [1990] 1 S.C.R. 901.

4 For reviews of the doctrinal approach, see, *e.g.*, Kent McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 1983); D.E. Sanders, "Indian Hunting and Fishing Rights" (1973-74) 38 Saskatchewan Law Rev. 45; and 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.

increasingly restricted by provincial and territorial game laws. Using a critical legal history approach, this article will explore the evolution of this regulatory regime in western Canada from the late 1800s to 1930. This exploration will serve two interrelated purposes. First, it will contribute to an emerging body of scholarship that looks at early wildlife regulation as it affected First Nations.[5] Second, it will set out an essential part of the historical context for the proper interpretation of paragraph 12 of the *NRTA*. This exploration is necessary, because as one commentator argues, "the lack of such [historical] research in the past has hampered the court's ability to deal with issues relating to Indian hunting in the prairie provinces."[6] Indeed, it is clear that we need good historical evidence to assist courts in understanding First Nations' hunting rights because "bad history makes bad law."[7] One might add that the lack of history also makes bad law.

The critical legal history approach that will be taken in this article is a step towards better informed interpretation of the hunting rights provision in the *NRTA*. Legal historian Robert Gordon explains that legal history was traditionally studied from "inside the box" — that is, by focusing on case law history and statutes in isolation from anything external to the legal system.[8] Critical legal history, on the other hand, explores "outside the box"

5 See, *e.g.*, Frank Tough, "Game Protection and the Criminalization of Indian Hunting in Ontario, 1892-1931" [unpublished research report for the Ontario Native Affairs Secretariat, June 1994]; Robert Irwin, "Not Like the Others: The Regulation of Indian Hunting and Fishing in Alberta" in Richard Connors & John M. Law, eds., *Forging Alberta's Constitutional Framework* (Edmonton: University of Alberta Press, 2005) 237; Anthony G. Gulig, "'We Beg the Government': Native People and Game Regulation in Northern Saskatchewan" (2003) 28 Prairie Forum 81; Lise C. Hansen, "Indian Trapping Territories and the Development of the Registered Trapline System in Ontario" [unpublished historical report for the Ontario Native Affairs Secretariat, 1989]; Brenda Ireland, "'Working a Great Hardship on Us': First Nations People, the State, and Fur-Bearer Conservation in British Columbia Prior to 1930" (1996) 11 Native Studies Rev. 65; Bennett McCardle, *Rules of the Game: The Development of Government Controls Over Indian Hunting and Trapping in Treaty Eight (Alberta) to 1930* (Edmonton: Treaty and Aboriginal Rights Research, Indian Association of Alberta, 1976); Richard T. Price & Shirleen Smith, "Treaty 8 and Traditional Livelihoods: Historical and Contemporary Perspectives" (1993-94) 9 Native Studies Rev. 51; Brian Calliou, "Losing the Game: Wildlife Conservation and the Regulation of First Nations Hunting, 1880-1930" [unpublished Masters Thesis, Faculty of Law, University of Alberta, 2000] [Calliou, *Losing the Game*]; and Brian Calliou, "The Supreme Court of Alberta and First Nations Treaty Hunting Rights: Federalism and Respect for the Queen's Promises" in Jonathan Swainger, ed., *The Alberta Supreme Court at 100: History and Authority* (University of Alberta Press and Osgoode Society, 2007) 133 [Calliou, "Supreme Court of Alberta"].

6 Frank Tough, "Introduction to Documents: Indian Hunting Rights, Natural Resources Transfer Agreements and Legal Opinions From the Department of Justice" (1995) 10 Native Studies Rev. 121 [Tough, "Introduction to Documents"].

7 Franklin S. Gertler & Peter W. Hutchins, "Introduction to Documents: The Marriage of History and Law in *R. v. Sioui*" (1990) 6 Native Studies Rev. 115 at 126.

8 Robert W. Gordon, "J. Willard Hurst and the Common Law Tradition in American Legal

— that is, the external environment in which law is situated, including its development and its enforcement within the relevant historic, economic and social context.[9] Drawing upon disciplines such as the sociology of law and its "law and society" movement [10] as well as social history,[11] critical legal history explores how the law benefits some groups in society and adversely affects others and pays attention to previously marginalized or silenced groups. It also adopts the observations that socio-political contexts shape the law and that law is "the symbolic representation of interests of particular groups, especially groups in power."[12] By stepping outside the narrow confines of the black letter of the statutes or treaty text, this approach gives us a more complete understanding of the socio-political context within which the *NRTA* was negotiated and the extent to which government officials were committed to the Crown's treaty promises to allow the First Nations to continue their traditional livelihood.

The critical legal history approach to exploring the historical backdrop of paragraph 12 of the *NRTA* will allow us to arrive at a clearer understanding of how game laws developed to benefit certain more powerful groups in society at the expense of other groups. In particular, this approach will be used to highlight: a) the class and power dimensions of the conflict over wildlife; b) First Nations' understanding of treaties and the assurances that were made to them regarding preservation of their traditional livelihood;

Historiography" (1976) 10 Law & Society Rev. 9 at 11; and Robert W. Gordon, "Historicism in Legal Scholarship" (1981) 90 Yale Law J. 1017.

9 See, *e.g.*, Barry Wright, "Towards a New Canadian Legal History" (1984) 22 Osgoode Hall Law J. 349; Alan Hunt, "The New Legal History: Prospects and Perspectives" (1986) 10 Contemporary Crisis 201; and Barry Wright, "An Introduction to Canadian Law in History" in W. Wesley Pue & Barry Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 7 [Wright, "Introduction"]. Much influence also comes from British historians such as David Sugarman & Gerry R. Rubin, "Towards a New History of Law and Material Society in England, 1750-1914" in G.R. Rubin & David Sugarman, eds., *Law, Economy and Society, 1750-1914: Essays in the History of English Law* (Abingdon: Professional Books, 1984).

10 See, *e.g.*, Pue & Wright, *ibid.*; Tina Loo & Lorna R. McLean, eds., *Historical Perspectives on Law and Society in Canada* (Toronto: Copp Clark Longman Ltd., 1994); and John McLaren, Robert Menzies & Dorothy E. Chunn, eds., *Regulating Lives: Historical Essays on the State, Society, the Individual, and the Law* (Vancouver: University of British Columbia Press, 2002).

11 British social historians that have been influential include: E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (London: Lane, 1975); Douglas Hay *et al.*, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon, 1975); and John M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton: Princeton University Press, 1986). See also Bryan D. Palmer, "Historiographic Hassles: Class and Gender, Evidence and Interpretation" (2000) 33 Social History 105.

12 June Starr & Jane Collier, "Introduction: Dialogues in Legal Anthropology" in June Starr & Jane Collier, eds., *History and Power in the Study of Law: New Directions in Legal Anthropology* (London: Cornell University Press, 1989) 1 at 24.

c) post-treaty, pre-1930 game regulation pressures and inter-jurisdictional issues; and d) the effective transfer of authority by the federal government to the provinces, including political and moral duties, through section 133 of the *Indian Act*[13] and later through paragraph 12 of the *NRTAs*. My progress though these contextualizing factors surrounding the negotiation of paragraph 12 of the *NRTA* will begin by outlining competing demands on wildlife resources before the treaties, paying particular attention to the class and power dimensions at play in the conflict over wildlife. I will then move on to briefly discuss treaties in the prairie provinces, in order to understand the promises made by the Queen's representatives regarding the continuance of First Nations' traditional livelihoods and how the First Nations understood these promises. Next, I will consider how government officials interpreted these treaty rights and how it affected their ability to administer and govern, including early game regulations and their enforcement and effect on First Nations. Lastly, I will discuss the concept of transfer of authority as a way of understanding the powers exercised by provincial and territorial legislatures under section 133 of the federal *Indian Act* and argue that this transfer included corresponding political and moral duties.

This discussion of historical context sets the stage for the next section of this article: a critical analysis of the case law regarding paragraph 12 of the *NRTA*. Familiarity with this history exposes the problems with current judicial interpretations of paragraph 12, especially the interpretation by Justice Cory in *Horseman*,[14] and highlights the need for revisiting this issue in the courts. I will argue that by failing to consider the historical records or the historical context, and by rarely giving the First Nations' perspective any serious weight, the courts have wrongly interpreted paragraph 12. They have consequently judicially extinguished the commercial aspect of the treaty hunting rights of First Nations in a historical vacuum.

II. THE REGULATION OF HUNTING BEFORE THE *NRTA*

Class and Colonial Interests in Regulating Hunting

Historically, game laws were passed for conservation purposes, but other

13 R.S.C. 1886, c. 43, as am. by 53 Victoria, c. 29.

14 *Supra* note 3.

interests were also advanced through the regulation of game. For example, the collection of revenue through selling licenses created economic motives for the provincial governments.[15] There were also economic incentives for game guardians and police who received a moiety of the fine when they enforced game regulations against hunters.[16] Overall, game legislation tended to serve the interests of sports hunters, who played a key role in advocating for game laws,[17] while the interests of First Nations were rarely considered in local and provincial wildlife regulations.

Game regulation in Canada reflected sports hunters' values that stemmed from a long tradition of hunting values from England.[18] It is therefore important to consider the hunting values and laws prevalent in England prior to the settlement of North America in order to understand the value placed on sport hunting in early Canada. By the 1700s, hunting in England had become the sport of the elite, who used their positions of power and status to exclude the peasants from hunting game. Commoners who hunted were hunting illegally and the "problem" of the poacher arose.[19] On public lands, game became property, the title of which was in the King's name, and legislation was drafted to punish peasants who "poached" the King's game.[20] Thus, in England prior to the nineteenth century, legal hunting was generally only open to the gentry and nobility. Consequently, when commoners immigrated to North America, they felt that one of the individual freedoms they acquired was the right to hunt game. As Wetherell and Kmet explain, hunting in England "was directly linked to upper-class ownership of land," while in North America anyone could hunt on public lands.[21]

Hunting in the British Empire was considered a manly pursuit and hunting

15 Frank Tough, "Conservation and the Indian: Clifford Sifton's Commission of Conservation, 1910-1919" (1992) 8 Native Studies Rev. 61.

16 Calliou, "Losing the Game," *supra* note 5.

17 John F. Reiger, *American Sportsmen and the Origins of Conservation*, rev. ed. (Norman: University of Oklahoma Press, 1986); and Thomas L. Altherr, "The American Hunter-Naturalist and the Development of the Code of Sportsmanship" (1978) 5 J. of Sport Hunting 7.

18 For a discussion of this topic, see Calliou, "Losing the Game," *supra* note 5. See also Don Wetherell & Irene Kmet, *Useful Pleasures: The Shaping of Leisure in Alberta, 1890-1945* (Regina: Alberta Culture and Multiculturalism/Canadian Plains Research Centre, University of Regina, 1990) at 165.

19 For a discussion of Victorian England's poacher problems, see D.J.V. Jones, "The Poacher: A Study in Victorian Crime and Protest" (1979) 22 The Historical J. 825; and Alun Howkins, "Economic Crime and Class Law: Poaching and the Game Laws, 1840-1880" in Sandra B. Burman & Barbara E. Harrell-Bond, eds., *The Imposition of Law* (New York: Academic Press, 1979) 273.

20 Thompson, *supra* note 11.

21 Wetherell & Kmet, *supra* note 18 at 165.

throughout the empire became linked with empire building.[22] Gunn argues that "the early training and instincts of the hunter have much more to do with the expansion of the Empire than is generally realized."[23] Moyles and Owram explain this connection as follows:

> As they explored, and conquered, and extended the Empire, the British hunted. They rode, in a state of imperialistic fervor, all over Victoria's vast dominion, sticking pigs in India, stalking zebra along the African veldt, and charging after buffalo across the Canadian prairie. For many of them, unrestricted hunting was the expected rest and recreation of empire-builders – 'we have done our duty, now we must play'.[24]

MacKenzie highlights the significance of hunting for British imperialism in the nineteenth and twentieth centuries by stating, "the colonial frontier was also a hunting frontier and the animal resource contributed to the expansionist urge . . . . European world supremacy coincided with the peak of the hunting and shooting craze."[25] Descriptions of the "imperial chase" abound in the accounts of wealthy travelers, colonial administrators, soldiers, and hunters who "produced a seemingly endless stream of specialized hunting books, many of them dressed up as natural history."[26]

The game laws reflected notions of a gentlemanly code of conduct. British gentlemen established such a code for the fox hunt "where a primal instinct had been transformed into an elaborate social ritual complete with rules of etiquette and dress."[27] True sportsmen did not hunt for the "mere purpose of killing," but rather, "for the pleasure derived from the invigorating exercise, the enjoyment of nature, the possibility of adding knowledge of natural history, new regions and strange people, and the test of courage and skill demanded by the task."[28] In western Canada, this "same gentlemanly code of conduct prevailed; a code of conduct similar in many ways to that followed by the soldier and the imperial guardian, all of whom were likely to be the same person."[29] Hunting was seen as a "sport," with a "chase" and a fair chance for

22 John M. MacKenzie, *The Empire of Nature: Hunting, Conservation and British Imperialism* (Manchester: Manchester University Press, 1988) at 7.

23 Hugh Gunn, "The Sportsman as an Empire Builder" in John Ross & Hugh Gunn, eds., *The Book of the Red Deer and Empire Big Game* (London: 1925) 137.

24 R.G. Moyles & Doug Owram, "'Hunter's Paradise': Imperial-Minded Sportsmen in Canada" in R.G. Moyles & Doug Owram, *Imperial Dreams and Colonial Realities: British Views of Canada, 1880-1914* (Toronto: University of Toronto Press, 1988) 61 at 61.

25 MacKenzie, *supra* note 22 at 7.

26 *Ibid.*

27 Moyles & Owram, *supra* note 24 at 62.

28 *Ibid.* at 63.

29 *Ibid.*

escape. Wetherell and Kmet state that among the settlers who hunted there was a "formalization of activity through rules, organizations, and concepts about appropriate behaviour, such as fair play."[30] Game regulations came to reflect and legalize these values through restrictions on where hunting could occur at certain seasons of the year, a ban on hunting at night or on Sabbath day, and prohibitions on unfair methods of taking animals such as use of poison, opium, or other narcotics.[31] Anyone not following these codified rules of the chase was deemed a poacher and hunting illegally, including First Nations hunters who continued to hunt according to their traditional mode of life. Thus the imposition of these game laws on First Nations hunters had the effect of criminalizing aspects of their traditional livelihoods.[32]

Other settler interests were also at work in game regulation, such as the desire for First Nations lands and resources. Settler interests in the lands and resources of the west conflicted with the pursuit of traditional livelihoods by First Nations. Conscious of the potential for conflict as well as longstanding obligations, the Crown pursued treaties with the First Nations to promote peaceful relations with settlers and the government. Treaties in turn paved the way for restricting First Nations to their reserves and for civilizing them into the new agricultural economy.[33] The taking up and fencing in of lands for settlement resulted in restrictions on permissible locations for First Nations hunting, especially in the fertile belt where settlers began to farm and ranch. With the disappearance of the buffalo and settlements pushing game animals further away, some First Nations hunters resorted to taking cattle, a practice that caused conflict with farmers and ranchers.[34] Late eighteenth and early nineteenth century settlement in the west thus resulted in what one economic historian termed the "disappearance of the commons," when First

30 Wetherell & Kmet, *supra* note 18 at 165.

31 See, *e.g.*, *An Act for the Protection of Game*, S.A. 1907, c. 14, especially ss. 8, 9, and 16.

32 Tough, "Game Protection," *supra* note 5. For a discussion of the imposition of laws, see Brian Calliou, "The Imposition of State Laws and the Creation of Various Hunting Rights for Aboriginal Peoples of the Treaty 8 Territory" (1999-2000) 1 Lobstick: An Interdisciplinary J. 151.

33 See generally Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples From Earliest Times*, 3d ed. (Don Mills: Oxford University Press Canada, 2002); and Arthur J. Ray, *I Have Lived Here Since the World Began: An Illustrated History of Canada's Native People* (Toronto: Key Porter Books, 1998). On civilizing First Nations for the new agricultural economy, see Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farms and Government Policy* (Montreal & Kingston: McGill-Queen's University Press, 1990).

34 See, *e.g.*, John Jennings, "Policemen and Poachers – Indian Relations on the Ranching Frontier" in A.W. Rasporich & Henry C. Klassen, eds., *Frontier Calgary: Town, City, and Region, 1875-1945* (Calgary: University of Calgary Press and McClelland and Stewart West, 1975) 87; and Vic Satzewich, "'Where's the Beef?': Cattle Killing, Rations Policy and First Nations 'Criminality' in Southern Alberta, 1892-1895" (1996) 9 J. of Historical Sociology 188.

Nations' common property was turned into an open access resource, leading to private settler ownership of lands and ultimately to First Nations' economic degradation.[35]

Game laws contributed to this process of loss by further restricting First Nations hunters. To fully understand how the game legislation of this era affected First Nations hunters, we need to first understand the importance of the traditional livelihood to them and how they sought to protect it in the treaty negotiations. The section below will outline how traditional livelihood rights were dealt with in the treaties, focusing on First Nations' perspectives in particular.

Treaties and the Traditional Livelihood

Although there are written versions of the numbered treaties, there are competing interpretations and cultural understandings of these agreements and what they mean. In light of these competing interpretations, the numbered treaties have generally been interpreted in the political arena according to two approaches. First is the narrow, legalistic approach according to which only the text is examined.[36] This approach has been described by one commentator as the "official history," because the textual documents were recorded by the Queen's officials according to their interpretation of the events that occurred during the treaty negotiations.[37] Politicians and government officials often take this narrow interpretive approach to treaties and view them as a surrender of lands and resources by consent of the First Nations and the extinguishment of any rights that were not specifically written into the text of the treaty.[38]

35 Irene Spry, "The Great Transformation: The Disappearance of the Commons in Western Canada" in Richard Allen, ed., *Man and Nature on the Prairies* (Regina: Canadian Plains Research Centre, 1976) 21.

36 Although government politicians and their officials generally take this narrow stance, the courts have begun to take governments to task and have developed broader treaty interpretation principles: see *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall*]; and *R. v. Badger*, [1996] 1 S.C.R. 771 [*Badger*].

37 David T. McNab, "Treaties and an Official use of History" (1993) 13 Native Studies Rev. 39. For examples of the official version of history, see Alexander Morris, *The Treaties of Canada With the Indians of Manitoba and the North-West Territories Including the Negotiations on Which They Were Based and Other Information Relating Thereto* (Toronto: Coles, 1971 [1880]); and Canada, *Indian Treaties and Surrenders, From 1680 to 1890* (Saskatoon: Fifth House Publishers, 1992 [vol. 1, 1891; vol. 2, 1912]).

38 See, *e.g.*, the discussion by Shin Imai, Katherine Logan & Gary Stein, *Aboriginal Law Handbook* (Toronto: Carswell Thomson Professional Publishing, 1993) at 23-25. See also Kenneth J. Tyler, "Will *Delgamuukw* Eclipse the Prairie Sun?" in Owen Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000) 197. Tyler, a lawyer who has acted on behalf of a variety of provincial governments, states (*ibid.* at 198) that "federal and provincial governments have confidently operated on the assumption

Indeed, one commentator who has acted for the Crown as an expert witness in treaty cases and who expounds the narrow, legalistic approach states, "From the official point of view, Indians have surrendered all land in the three Prairie provinces of Manitoba, Saskatchewan, and Alberta in treaties that extinguished their Aboriginal title."[39]

First Nations, on the other hand, tend to look to the "spirit and intent" of the treaties, which they claim was not documented in the official treaty texts.[40] There is evidence that the Queen's officials did not always write what was negotiated or promised into the text of the treaties. For example, Rene Fumoleau published affidavits of persons present during treaty negotiations who declare that promises were made that were not written down.[41] First Nations generally view the treaties as the basis for a "nation to nation" relationship, which reflects something more akin to a partnership.[42] Under this conception, the treaties are seen as a compact or agreement between sovereign peoples for peaceful relations and for the sharing of the lands and natural resources.[43] First Nations' perspectives on what the treaties mean are also informed by oral histories passed down through stories and public speeches.[44] Legal scholar Brian Slattery states, "In most cases, the treaty was the oral agreement, and the written document just a memorial of that agreement, similar in status to the belts used by some Indian parties. Many such [written] documents have

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that the question of Aboriginal title has been settled [as a result of the numbered treaties] on the Prairies."

39 Thomas Flanagan, "Aboriginal Land Claims in the Prairie Provinces" in Ken Coates, ed., *Aboriginal Land Claims in Canada: A Regional Perspective* (Toronto: Copp Clark Pitman Ltd., 1992) 45 at 45.

40 See, *e.g.*, Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Edmonton: Treaty and Aboriginal Rights Research, 1987); and Walter Hildebrandt, Sarah Carter & Dorothy First Rider, eds., *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill-Queen's Press, 1996).

41 René Fumoleau, *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland and Stewart, 1973).

42 Harold Cardinal, "Indian Nations and Constitutional Change" in J. Anthony Long & Menno Boldt, eds., *Governments In Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) 83, states that when treaties were signed, "Indian First Nations viewed themselves as independent sovereign nations entering into formal treaty agreements" (at 84).

43 Brian Calliou, "1899 and the Political Economy of Canada's North-West: Treaty 8 as a Compact to Share and Peacefully Co-Exist" in Michael Payne, Donald Wetherell & Catherine Cavanaugh, eds., *Alberta Formed — Alberta Transformed* (Edmonton and Calgary: University of Alberta Press and University of Calgary Press, 2006) 300; and John Foster, "Indian-White Relations in the Prairie West During the Fur Trade — A Compact?" in Price, *supra* note 40, 181.

44 For the acceptance of oral histories by social scientists and the courts, see Brian Calliou, "Methodology for Recording Oral Histories in the Aboriginal Community" (2004) 15 Native Studies Rev. 73; Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty To First Nations: Breaking Down the Barriers of the Past" (1992) 30 Alberta Law Rev. 1274; and John Borrows, "Listening for a Change: The Courts and Oral Traditions" (2001) 39 Osgoode Hall Law J. 1.

proven to be unreliable guides to the oral compacts."[45] Finally, First Nations also feel strongly that treaties are sacred and solemn agreements that cannot be unilaterally abrogated or altered by the Crown.[46]

The differences behind these two interpretive approaches are illustrated by the surrender clause. A well-known example of conflicting interpretations, the surrender clause stated that the First Nations, "hereby cede, release, surrender, and yield up . . . all their rights, titles and privileges whatsoever to the lands." A contemporary First Nation leader has translated this clause as "I quit the land," commenting that "there is no way they would have agreed to this."[47] Regarding Treaties 8 and 11, which were negotiated with the Dene of the Northwest Territories, one expert has explained the difficulty in translation and communication of such a foreign concept as land surrender:

> How could anybody put in the Athapaskan language through a Métis interpreter to monolingual Athapaskan hearers the concept of relinquishing ownership of land, I don't know, of people who have never conceived of a bounded property which can be transferred from one group to another. I don't know how they would be able to comprehend the import translated from English into a language which does not have those concepts, and certainly in any sense that Anglo-Saxon jurisprudence would understand.[48]

Thus, problems in language, translation, world view, concepts of land and attitudes to natural resources were all factors that would have caused difficulty in a mutual understanding. John Borrows, an Aboriginal legal scholar, argues that most of the treaty process was "deeply flawed"; that at the negotiations "one can detect dishonesty, trickery, deception, fraud, prevarication, and unconscionable behaviour on the part of the Crown"; and that "[i]n most treaties, there was no consensus or 'meeting of the minds' on

45 Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Canadian Bar Rev. 196. The Supreme Court of Canada has recognized the importance of oral history evidence in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

46 Chief John Snow, "Identification and Definition of Our Treaty and Aboriginal Rights" in Menno Boldt & J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 41 at 42, states, "I remind all treaty and registered Indians that the treaties are sacred covenants; they are binding documents; and they must not be altered unilaterally by the government of Canada."

47 Chief Charlie Desjarlais, "Panel Discussion" (At the Duty to Consult Aboriginal People: Implications for Resource Development on Traditional Lands in Alberta Workshop, hosted by the Canadian Institute of Resources Law and the Arctic Institute of North America, Calgary, Alberta, 8 June 1998) [unpublished].

48 Testimony of Dr. June Helm, Anthropologist in *Re Paulette* (1973), 39 D.L.R. (3d) 45 (S.Ct. of the N.W.T.), quoted in Richard Daniel, "The Spirit and Terms of Treaty Eight" in Price, *supra* note 40, 47 at 95 [Daniel, "The Spirit and Terms of Treaty Eight"].

the question of the Crown receiving sovereignty or underlying title to the land from Aboriginal peoples."[49] For example, the Queen's representatives did not discuss what land surrender meant in the Treaty 6 negotiations.[50] In the Treaty 8 negotiations, the documentary evidence illustrates that there was "surprisingly little effort to explain the implications" of the treaty surrender wording, a fact that led one commentator to query "why this crucial issue of the control of land and resources was avoided, or passed over lightly."[51] Thus, the Queen's representatives neglected to discuss or explain to the First Nations leaders during treaty negotiations important political-legal consequences of accepting the treaty.

The Queen's representatives also made many express promises during the treaty negotiations that did not make it into the text of the treaties or were altered and reduced in the process. Treaty promises regarding traditional livelihood provide one such example.[52] The right to hunt was written into the treaty documents, but it was far more restrictive than the oral assurances made by the Queen's representatives. The written version of the hunting clause from Treaty No. 8:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[53]

As will be demonstrated below, the oral assurances regarding hunting were more generous.

Treaty researcher Richard Daniel argues that the First Nations would have "sought to protect their way of life and their access to natural resources"

49 *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 113.

50 John Leonard Taylor, *Treaty Research Report: Treaty Six (1876)* (1985), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/trts/hti/t6/tre6_e.pdf >

51 Daniel, "The Spirit and Terms of Treaty Eight," *supra* note 49 at 95.

52 For an overview of the numbered treaties, see Arthur J. Ray, J.R. Miller & Frank Tough, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000). Treaties 3 to 11 all included promises to First Nations to continue their traditional hunting lifestyle written into the text of the treaties. Treaties 1 and 2 did not have the hunting right written into the treaty, but the assurance was made at the time and recorded in contemporaneous documents.

53 *Report of the Commissioners for Treaty No. 8*, in *Treaty No. 8, Made June 21, 1899 and Adhesions Reports, etc.* (Ottawa: Queen's Printer, 1966) [*Treaty Commissioners' Report*].

during the treaty negotiations.[54] These objectives were reflected during Treaty 8 negotiations by First Nations leaders who expressed concern that they might be tied to reserves and that their access to the lands and resources would be curtailed. As René Fumoleau explains, they sought assurances from the Government that their freedom to hunt, trap, fish, and move freely would be preserved.[55] To these concerns Commissioner Laird responded, "We understand stories have been told you, that if you made a treaty with us you would become servants and slaves; but we wish you to understand that such is not the case, but that you will be just as free after signing a treaty as you are now."[56] Further assurances addressing First Nations' concerns to preserve their traditional livelihood included Commissioner Ross' statement that "As all the rights you now have will not be interfered with, therefore anything you get in addition must be a clear gain."[57] To the First Nations, such assurances and promises meant that they would be as free to hunt, fish, trap, and gather after signing the treaty as before and could continue their traditional economy of bartering, trading and selling any surplus products of the hunt.[58]

Other evidence supporting the First Nations' view of the treaty right to hunt is the testimony of Peace River Jim Cornwall. A witness to the Treaty 8 negotiations, Cornwall swore an affidavit stating that the First Nations would not sign the treaty unless they were assured that the continuation of their traditional hunting, fishing and trapping livelihood was guaranteed:

> 5. The Commissioners finally decided, after going into the whole matter, that what the Indians suggested was only fair and right but that they had no authority to write it into the Treaty. They felt sure the Government on behalf of the Crown and the Great White Mother would include their request and they made the

54 *Supra* note 48 at 55.

55 *Supra* note 41 at 100.

56 Charles Mair, *Through the Mackenzie Basin: An Account of the Signing of Treaty No. 8 and the Scrip Commission, 1899* (Edmonton: University of Alberta Press, 1999) at 56. See also Richard Daniel, "Hunting, Fishing and Trapping Rights: White Competition and the Concept of Exclusive Rights for Indians" (1976) [unpublished, Research Papers on the Implementation of Treaty 8, Treaty and Aboriginal Rights Research, Indian Association of Alberta] [Daniel, "Hunting, Fishing and Trapping Rights"].

57 *Treaty Commissioners' Report*, *supra* note 53 at 6. Similar assurances were made in the other treaties as well. For example, Commissioner Laird recorded that during the Treaty 7 negotiations, First Nations "were also assured that their liberty of hunting over the open prairie would not be interfered with, so long as they did not molest settlers." Morris, *ibid.* at 257.

58 This commercial activity has strong documentary evidence supporting it; see Arthur J. Ray, "Commentary on the Economic History of the Treaty 8 Area" (1995) 10 Native Studies Rev. 169; Arthur J. Ray, *Indians in the Fur Trade: Their Role as Trappers, Hunters, and Middlemen in the Lands Southwest of Hudson Bay, 1660-1870* (Toronto: University of Toronto Press, 1974); and Calliou, "Losing the Game," *supra* note 5.

following promises to the Indians:

a) Nothing would be allowed to interfere with their way of making a living, as they were accustomed to and as their forefathers had done

b) The old and destitute would always be taken care of, their future existence would be carefully studied and provided for, and every effort would be made to improve their living conditions

c) They were guaranteed protection in their way of living as hunters and trappers, from white competition; they would not be prevented from hunting and fishing as they had always done, so as to enable them to earn their living and maintain their existence.[59]

The reluctance of the First Nations to take treaty can also be seen in the treaty commissioners' report from Treaty 8. The commissioners' report states: "Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians."[60] First Nations leaders were comforted by such assurances and reasoned that "it would be unreasonable to furnish the means of hunting and fishing if laws were so restricted as to render it impossible to make a livelihood by such pursuits."[61]

The commissioners further enticed First Nations leaders to sign by assuring them that "only such laws as to hunting as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made."[62] Through these words, the commissioners were promising that regulations would not "render it impossible to make a livelihood." These statements by the commissioners, as the Crown's representatives, were of a political and moral nature akin to a fiduciary duty.[63] These Crown representatives made explicit assurances to First Nations leaders that the part of the hunting clause that made the First Nations' hunting right "subject to" game regulations would only be exercised in the Indians' interests. First

59 James K. Cornwall, "Affidavit," quoted in Fumoleau, *supra* note 41 at 74-75.

60 *Treaty Commissioners' Report*, *supra* note 53 at 6.

61 *Ibid.*

62 *Ibid.*

63 This political and moral duty precedes the legal fiduciary duty, which was not recognized by courts until the decision in *Guerin v. The Queen*, [1984] 2 S.C.R. 335. For an overview of the legal development of the fiduciary duty see Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) [Rotman, *Parallel Paths*]; and Leonard I. Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Power and Responsibility" (1994) 32 Osgoode Hall Law J. 735 [Rotman, "Provincial Fiduciary Obligations"].

Nations were open to game laws, but only those that protected the game in their interest and regulated White competition.[64] These assurances allowed the First Nations to support game regulations; they had been promised that only laws that would conserve the game in accordance with their interests would be made.

A final important source of evidence is the First Nations' own understandings as passed down through their oral histories in stories, songs and public speeches. A Treaty 8 Cree Elder from the Sucker Creek First Nation, who was over one hundred years old when interviewed in 1972, reported his understanding that First Nations at the treaty negotiations were told that "no one will ever stop you from obtaining these animals anywhere" and that "[y]ou will always make your livelihood that way."[65] Further, a Treaty 7 Blood Elder stated that free access to "wildlife [was] promised as well as the freedom to roam and get food and clothing."[66]

Hunting is integral to First Nations societies. First Nations were dependent on wildlife for their subsistence and traditional economy. Hunting also has great cultural and social significance for First Nations. It is a way of relating spiritually to the land and animals.[67] Kent McNeil argues that "[h]unting, fishing and gathering were integral parts of their daily lives, and affected every aspect of their culture, including their religion" and concludes that "these rights remain not only an economic necessity for many Indians but also a link with their cultural heritage and a symbol of their unique position in Canadian society."[68] More than twenty years after Treaty 8 was signed, there was ongoing government recognition of the importance of First Nations' traditional livelihood:

> The fur trade of the north is not only the chief occupation of that immense area, but it is the only means of livelihood and existence of the population. Unless the fur trade is maintained an enormous section of the Dominion would be rendered unproductive, and the native inhabitants would either starve to death or become a charge on the government.[69]

64 See, *e.g.*, Daniel, "Hunting, Fishing and Trapping Rights," *supra* note 56.

65 Isadore Willier, of Sucker Creek Reserve in Treaty 8 territory, quoted in Daniel, "The Spirit and Terms of Treaty Eight," *supra* note 48 at 93.

66 Hildebrandt, Carter & First Rider, *supra* note 40 at 120-21.

67 Shelley D. Turner, "The Native American's Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, The Effect of European Contact and the Continuing Fight to Observe a Way of Life" (1989) 19 New Mexico Law Rev. 377.

68 McNeil, *supra* note 4 at 1.

69 C. Gordon Hewitt, *The Conservation of the Wild Life of Canada* (New York: Charles Scribner's Sons, 1921) at 258-59.

The government did not want First Nations to become dependent upon them for rations and intended that First Nations hunters would continue their traditional livelihood, in both its subsistence and commercial aspects.[70] Crown and First Nations' perspectives both support the view that the treaties protected First Nations' traditional livelihood activities. Nevertheless, while First Nations believed that the treaty protected their traditional way of life and gave them priority access to wildlife resources on their traditional lands, the government believed that a full surrender of land and resources occurred.

Because so many assurances did not make it into the text of the treaties, one needs to look beyond the treaty text itself to understand the protection the First Nations had felt they had negotiated.[71] This broader, historical perspective assists us, in turn, in interpreting paragraph 12 of the *NRTA*, which was drafted to address the Crown's treaty obligation to First Nations and the accompanying moral and political duties flowing from treaties. Equipped with this understanding, we can now explore the hunting regime after the prairie treaties were entered into and before 1930.

Post-Treaty Regulation Pressures and Interjurisdictional Confusion

Hunting regulations were necessary to conserve wildlife. The crowding out of game animals caused by the increased settlement of east-central North America during the 1800s in combination with the increased numbers of hunters who felt that they had the freedom to hunt led to a serious decline in animals. The commoditization of wildlife in North America led to overexploitation and played a significant part in the destruction of many species. Buffalo were taken for their meat and buffalo robes and, later, their hides were used for industrial belts. Birds were taken for their plumage.[72] There were also periodic shortages of fur-bearing animals and occasional overtrapping of certain geographic areas.[73] These shortages and shocking declines raised concerns in some sectors

70 McCardle, *supra* note 5 at 2, stated that "generally speaking, the federal government was willing to undertake responsibility for protection of the Indian hunter's way of life" because they did not want the Indians to become dependent upon government welfare.

71 See *Marshall* and *Badger*, *supra* note 36, for the legal interpretive principle that it is now necessary to go beyond the treaty text to understand and interpret treaties.

72 Frank Gilbert Roe, *The North American Buffalo: A Critical Study of the Species in its Wild State* (Toronto: University of Toronto Press, 1951); William A. Dobak, "Killing the Canadian Buffalo, 1821-1881" (1996) 27 Western Historical Quarterly 33; and Robin W. Doughty, *Feather Fashion and Bird Preservation: A Study in Nature Protection* (Berkeley: University of California Press, 1975).

73 Arthur J. Ray, "Periodic Shortages, Native Welfare, and the Hudson's Bay Company" in Ken S.

of settler society, particularly sports hunters and naturalists. Responding to their interests in conservation, the Dominion government and its provincial and territorial counterparts began to legislate over hunting,[74] regulating access to game animals, including seasonal limits, permitted methods of hunting, and restrictions on hunting on Sabbath day.[75] In legislating and enforcing these statutes, government officials interpreted the nature and scope of the treaty hunting clauses themselves to determine the extent to which game regulations could restrict First Nations hunters. Eventually, the courts would play a significant role in the interpretation of First Nations' hunting rights as provided in the treaty texts and later in paragraph 12 of the *NRTA*.

An early example of such legislation stems from the North-West Territories, the region from which the prairie provinces were later formed. The federal government delegated authority to the North-West Territories Council, the local legislature in the northwest in 1875. In 1877, the territorial council used this authority to pass a game ordinance respecting the protection of buffalo.[76] The main object of that ordinance, according to Cumming and Aalto, was "to protect their [Indians'] major food supply."[77] The local legislators attempted to enforce their game regulations on First Nations hunters, but the federal government, at the start, would not allow their application to First Nations because of the treaty right protecting them. In fact, the federal government disallowed some local game laws early on.[78]

In Manitoba, the interaction between provincial and federal governments played out differently. Although section 91 (24) of the *British North America*

Coates & Robin Fisher, eds., *Out of the Background: Readings on Canadian Native History*, 2d ed. (Toronto: Irwin, 1998) 83. See also the controversial book by historian Calvin Martin, *Keepers of the Game: Indian-Animal Relationships and the Fur Trade* (Berkeley: University of California Press, 1978), where he argues that some First Nations overtrapped because they felt their sacred pact with the animals was broken when they began to suffer from diseases they believed the animals gave to them. For a variety of critiques of Martin's thesis, see Shepard Krech III, ed., *Indians, Animals, and the Fur Trade: A Critique of Keepers of the Game* (Athens: University of Georgia Press, 1981).

74 See, *e.g.*, Reiger, *supra* note 17; and Altherr, *supra* note 17. See also Janet Foster, *Working for Wildlife: The Beginning of Preservation in Canada* (Toronto: University of Toronto Press, 1978).

75 The term "game" has not been consistently defined in the academic literature and had varying definitions in the developing game laws. I use the term game here to include small and big game animals as well as birds that are hunted for food, sport, or commerce.

76 *An Ordinance for the Protection of Buffalo*, North-West Territories Ordinances, 5/1877.

77 Peter A. Cumming & Kevin Aalto, "Inuit Hunting Rights in the Northwest Territories" (1974) 38 Saskatchewan Law Rev. 251.

78 The Territorial Council amended their game ordinance in 1889 to repeal the exemption for First Nations hunters, but the federal government responded by disallowing it on the basis that, *inter alia*, it would conflict with treaty hunting provisions; see *ibid.* at 267. For a general discussion of disallowance, see Alan Wilson, "Disallowance: The Threat to Western Canada" (1974-75) 39 Saskatchewan Law Rev. 156.

Act, 1867[79] expressed the exclusive jurisdiction of the federal government over "Indians and lands reserved for Indians," the newly formed province of Manitoba refused to accept the exclusivity of federal authority. Manitoba passed its first hunting regulations in 1883 and caused immediate conflict by applying these regulations to First Nations hunters. The Department of Indian Affairs officials sent a request to Manitoba officials to allow "certain indulgences in regard to the killing of game out of season to Indians" but the province refused.[80] A legal opinion was provided by the Department of Justice stating that "no restrictions be placed on Indians killing game at any time for their own use as they were assured by Treaties."[81] Manitoba game officials continued to charge First Nations hunters and the Manitoba Superior Court upheld the conviction of a First Nations hunter in the 1886 case of *R. v. Robertson*, deciding that the authority to regulate hunting and trapping was the exclusive power of the province pursuant to section 92(13) and section 92(16) of the *BNA Act, 1867* as matters falling within local concerns and civil and property rights.[82]

Provincial and territorial officials argued that their laws ought to apply to First Nations as they would to other hunters. They often cited the proviso in treaty hunting clauses that allowed game regulations to be made from time to time by the government of the country. The federal government was concerned about getting into a jurisdictional conflict with provincial and local governments. It was aware of and concerned with the political pressure exerted by forces that came to be known as the "provincial rights movement."[83] Furthermore, provinces had won some significant decisions at the Privy Council, which expanded the scope of provincial powers while limiting the scope of federal powers. The result was a noticeable decentralizing trend in the interpretation of the constitutional division of powers.[84] The federal government soon

79 Renamed the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*BNA Act, 1867*].

80 National Archives of Canada (NAC), RG 10, Vol. 3692, File #14069, Lawrence Vankoughnet, Superintendent General of Indian Affairs to John A. Macdonald, 30 September 1884.

81 NAC, RG 10, Vol. 3692, File #14069, Lawrence Vankoughnet, Superintendent General of Indian Affairs to Minister of Justice, 8 April 1885.

82 *R. v. Robertson* (1886) in John S. Ewart, ed., *Reports of Cases Argued and Determined in the Court of Queen's Bench, Manitoba With Tables of Cases and Principal Matters*, vol. 3 (Winnipeg: Robert D. Richardson, 1886) 613.

83 See, generally, Norman McL. Rogers, "The Genesis of Provincial Rights" (1933) 14 Canadian Historical Rev. 9; and Robert C. Vipond, "Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada" (1985) 18 Canadian J. of Political Science 267.

84 See, *e.g.*, *St. Catherine's Milling v. The Queen* (1888), 14 App. Cas. 46 (J.C.P.C.). See, generally, Alan C. Cairns, "The Judicial Committee and Its Critics" (1971) 4 Canadian J. of Political Science 301.

backed off from its position of not allowing local game laws to apply to "their Indians." Indeed, not only did it back off, the section below will argue that the federal government abandoned its responsibilities towards First Nations by delegating its authority over of Indian hunters to the provincial and territorial legislatures.

Transfer of Federal Authority

By the turn of the twentieth century, the federal government was feeling the pressure from sports hunters, tourist and guiding businessmen along with the local and provincial legislators who lobbied for game laws to apply equally to First Nations. After examining the documentary record, historian Bennett McCardle argued that during the 1880s, the Department of Indian Affairs based its definition and nature of First Nations hunting rights on the treaties, while in the 1890s, its view of First Nations hunting rights had shifted to an understanding based on its general power over "Indians" in section 91(24).[85] In other words, rather than focus on the treaty right as a guarantee of the continuance of the traditional livelihood, the federal government reacted to the political pressure and began to focus on its jurisdiction to legislate over "Indians."

In 1890, after much pressure from provincial and local government officials, along with lobbying efforts by sports hunters, the federal government exercised its constitutional authority under section 91(24) and amended the *Indian Act* to include section 133.[86] Section 133 provided that:

> The Superintendent General may, from time to time, by public notice, declare that, on or after the day therein named, the laws respecting game in force in the Province of Manitoba or the Western Territories, or respecting such game as is specified in such notice, shall apply to Indians within the said Province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient.[87]

Section 133 provided for the federal government's delegation of authority to

85 McCardle, *supra* note 5.

86 *An Act to Further Amend 'The Indian Act,'* 53 Victoria, c. 29, amending *The Indian Act*, R.S.C. 1886, c. 43. For a more detailed discussion and analysis of the development of s. 133 and the proclamations bringing many First Nations under local game laws, see Calliou, "The Supreme Court of Alberta and First Nations Treaty Hunting Rights" and "Losing the Game," both *supra* note 5. NAC, RG 10, Vol. 6732, File #420-2 contains a petition addressed to the Minister of the Interior and Superintendent General of Indian Affairs from the Calgary Rod and Gun Club dated 3 February 1893 [Calgary Petition]. Although slightly later in time, this petition is still close enough to illustrate the kind of political pressure they exerted on the Department of Indian Affairs and forms the basis of my inference that such pressures, along with political pressure from provincial and local legislators, caused the department to amend the *Indian Act* with s. 133.

87 *An Act to Further Amend 'The Indian Act,' ibid.*, s. 10.

the Superintendent General of Indian Affairs to sub-delegate authority to the territorial or provincial legislature to pass laws that would apply to First Nations, a matter of exclusive federal jurisdiction. This delegation of authority to the Department of Indian Affairs shifted the political pressure from the federal cabinet to the Department, which soon felt that same pressure from the White sports hunters, tourist guides, businessmen, and game guardians regarding application of the local game laws to First Nations hunters.

Sports Hunters' Interests and Broadening the Scope of Section 133

Sports hunters' gun clubs in this era were organized as lobby groups. As a letter between gun clubs in two different provinces stated, "One of our main objects is to get legislation passed to meet local requirements, and the introduction and protection of game birds from other provinces and countries which are likely to be beneficial to sport."[88] These sports hunters' clubs lobbied for game laws to regulate the seasons of hunting and the acceptable methods so that they could benefit by continuing to carry out their hunting for sport.

After the passage of section 133, sports hunters shifted their attention to the Department of Indian Affairs. In 1893, the Calgary Rod and Gun Club sent a petition to the Minister of the Interior and Superintendent General of Indian Affairs by. Identical petitions were also sent by the sports hunters' clubs in Lethbridge, Edmonton, Red Deer, McLeod, Maple Creek, and Moose Jaw.[89] The petitions expressed their purposes simply, as for "the protection of game" and "the encouragement of sport with gun and rod." However, the real intention of the petitions is evident in statements that local game laws "are generally carefully observed by white men," with enforcement carried out by the gun clubs, but that there was a necessity to restrict First Nations' hunting because "the efforts of your petitioners and the objects of the game laws, are practically nullified and defeated owing to the fact that these laws are held not binding on the Indians."[90] These sports hunters saw the conflict between their interests and those of First Nations hunters and considered the subjection of First Nations hunters to the game laws to be necessary to allay "the irritation that naturally exists among settlers and sportsmen." As a result, they lobbied the federal government to place First Nations hunters "on the same footing

88 Glenbow Archives (GA), M1327, Box II, File #22, Wooley Dod to E.G. Burtch of the Vancouver Gun Club, 24 January 1912.

89 Calgary Petition, *supra* note 86. Each typed petition was identical but each had its own list of signatures attached.

90 *Ibid.*

as white men, in respect of game laws."[91] Their view that game laws ought to have absolutely equal application to all hunters illustrates the failure of sports hunters and other settlers to understand and respect the First Nations' unique situation and interests in the protection of their traditional livelihood through treaties.

These petitions reflected the sports hunters' desire for "the protection of game" — that is, for wildlife conservation. However, they also show clearly that the sports hunters wanted the game protected for the encouragement of sport with gun and rod. The sports hunters wanted game protection laws that limited the season and method of legal hunting, but only for their own benefit. Similar arguments and political pressures were being waged by settlers, especially businessmen who ran lucrative tourist and guiding outfits.[92]

The conflict between the interests of First Nations and sports hunters is further illustrated in the differing values that each constituency placed on wildlife. In the early 1900s, the value placed by sports hunters upon big game for "trophy" hunting was clear. As a natural resources manager wrote: "The first animal of importance, from the sportsman's viewpoint, is the Rocky Mountain big horn. No finer trophy exists in America than the head of the big-horn sheep."[93] Sportsmen's clubs thought it made good economic sense to have tourist sports hunters pay big money to secure a trophy head of a mountain sheep. For instance, a representative of the Campfire Club of North America explained that "[t]aking a sheep as worth $10 to $15 to a settler for meat, compare that with the figures given you ($1000) as to the value of that animal, even from a straight business viewpoint, when sought after by visiting sportsmen. The argument is irresistible."[94] Such values led sportsmen and businessmen providing guiding services to big game hunters also to lobby to remove the Stoney First Nations from the new Banff National Park.[95] This value placed on game animals by sports hunters contrasts with the value of the animals to First Nations who depended upon them for food,

91 *Ibid.*

92 Calliou, "Losing the Game," *supra* note 5.

93 W.N. Millar, "The Big Game of the Canadian Rockies: A Practical Method for its Preservation" in Canada, Commission of Conservation, Committee on Fisheries, Game and Fur-Bearing Animals, *Conservation of Fish, Birds and Game* (Toronto: the Methodist Book and Publishing House, 1916) 100 at 101.

94 Fredrick K. Vreeland, "Prohibition of the Sale of Game" in *Conservation of Fish, Birds and Game, ibid.*, 93.

95 See, *e.g.*, Theodore Binnema & Melanie Niemi, "'Let the Line be Drawn Now': Wilderness, Conservation, and the Exclusion of Aboriginal People from Banff National Park in Canada" (2006) 11 Environmental History 724.

clothing, shelter, and their traditional livelihood. For example, uses of the buffalo included: bones became knives, handles, hammers and needles; sinew provided thread or rope; bladders became vessels to hold liquids; hides became teepee coverings, coats, shirts, leggings, and moccasins.[96]

As a result of the lobbying pressure, T. Mayne Daly, Superintendent General of Indian Affairs, issued his first public notice pursuant to the power under section 133 of the *Indian Act* in June 1893, bringing forty-six Indian bands located in Treaties 4, 6 and 7, plus "stragglers at Medicine Hat, Maple Creek, Moose Jaw and Swift Current," within the scope of the territorial game laws.[97] Interestingly, these "stragglers" were from many of the same communities where the Rod and Gun Club petitions originated. Word of this public notice was met with an immediate outcry from First Nations leaders, who protested to Indian Affairs officials that their treaties guaranteed them the ability to continue their traditional livelihood as before.[98] The Department of Indian Affairs responded by reminding First Nations leaders that laws protecting game were in the best interests of the Indians, that the text of the treaties reserved the authority for the federal government to regulate Indian hunting, and it could no longer make exceptions for Indian hunters. It argued that it was preferable to provide rations and aid to Indians than to allow year-round hunting.[99] Thus, one effect of section 133 was for the federal government to abandon its assurances to the First Nations made in the name of the Queen, as well as to move away from its position that First Nations ought to be self-sufficient. The Department of Indian Affairs continued to issue public notices bringing more First Nations under the authority of local and provincial game laws. Examples included the Stoney Indians at Morley in 1895 and several First Nations on the parkland periphery of the fertile belt in 1903.[100]

Transfer of Authority and the Duty to Look Out for First Nations' Interests

In issuing public notices bringing more prairie First Nations under territorial and provincial game laws, the federal government took advantage of the delegation potential of section 133. However, an appeal decision by Justice

96 Spry, *supra* note 35 at 24, lists the many uses of the buffalo for the First Nations.

97 NAC, RG 10, Vol. 6732, File #420-2, Public Notice of the application of game laws to named First Nations, signed by T. Mayne Daly.

98 NAC, RG 10, Vol. 6732, File #420-2, Letter from Indian Agent J.A. Markle of Birtle, Manitoba to the Indian Commissioner at Regina, 2 November 1893.

99 *Ibid.* and NAC, RG 10, Vol. 6732, File #420-2, Letter from the Deputy Superintendent General of Indian Affairs to the Assistant Indian Commissioner in Regina, 13 November 1893.

100 See Calliou, "Losing the Game," *supra* note 5, Appendix.

Stuart of the Alberta Supreme Court in the 1910 *Stoney Joe* case indicates that the federal government could not completely abandon its powers and duties with respect to First Nations through this section.[101]

Stoney Joe, a Treaty 7 Indian, was charged with killing game without a license and selling heads of mountain sheep contrary to section 11 of the 1907 Alberta *Game Act*.[102] Indian Agent T.J. Fleetham of the Stoney agency was able to convince the Department of Indian Affairs to pick up the expenses to hire lawyer Stanley S. Jones to defend this test case. In his words, "I think it is only fair to Indians that this matter should finally be settled as they believe according to Treaty 7 they are still entitled to hunt in unsettled parts of the province."[103] Fleetham seemed sure that the court would convict the defendants and thought it would make the Stoney First Nations "understand again they must respect the laws of the Country either Dominion or Provincial."[104]

The issue before the court in *Stoney Joe* was whether the accused was subject to the provincial game regulations. At trial, Magistrate Sibbald convicted Stoney Joe. On appeal, Justice Charles A. Stuart, sitting alone as the Supreme Court of Alberta in Calgary, overturned the conviction and acquitted Stoney Joe.[105] He held that although the Superintendent General of Indian Affairs proclaimed, by public notice in 1894, that the Stoney First Nations specifically were subject to the territorial game laws, any later game laws or amendments to existing laws would not apply to the First Nations without a further review and new declaration.[106] Thus, Justice Stuart found a continuing duty on the Superintendent General of Indian Affairs to review provincial or territorial game laws before declaring that they would apply to First Nations hunters. In other words, he held that the federal government department had to review hunting regulations every time they were amended or new laws were passed.

Justice Stuart began his analysis by discussing Treaty 7, the treaty the

101 *R. v. Stoney Joe* (1910, Alta. S.C.). This nine-page, initially unreported decision was found buried in the Indian Affairs archives by treaty rights researchers (NAC, RG 10, Vol. 6732, File #420-2A). This decision was not followed by other courts. After its discovery by the researchers, it was published as *R. v. Stoney Joe* (1910), [1981] 1 C.N.L.R. 117 (Alta. S.C.) [*Stoney Joe*]. Although I have viewed the original archived document, my citations refer to the reported version of the case.

102 *An Act for the Protection of Game, supra* note 33.

103 NAC, RG 10, Vol. 6732, File #420-2A, Letter from T.J. Fleetham, Indian Agent, Stony Agency, Morley, to the Secretary, Department of Indian Affairs, Ottawa, 27 June 1910.

104 *Ibid.*

105 *Stoney Joe, supra* note 101.

106 *Ibid.* at 122. The reference to "territorial" here relates to game laws passed before Alberta became a province in 1905. The Alberta game laws under which Stoney Joe was charged replaced the earlier territorial laws.

Stoney First Nations entered into on 22 September 1877. He looked beyond the written text of the treaty and took a broad, liberal approach, noting that during the treaty negotiations "no mention was made to the Indians of the question of the possibility of regulations being made restricting their right to hunt. At least in the account given by Commissioner Laird no mention [was] made of such a contingency."[107] Justice Stuart did not think it necessary to enquire whether the provincial game law came within the meaning of the word "regulation" as used in the treaty. Rather, his enquiry was directed at the questions of whose jurisdiction it was to regulate First Nations' hunting and whether the present provincial game law applied to the Stoney defendant.

Although his approach focused on jurisdictional responsibility for First Nations, Justice Stuart also placed considerable weight on the morality and honour of the government in its policies and choices. For example, Justice Stuart acknowledged the solemnity and sacredness of the treaty along with the honour of the Crown, stating that "a treaty or contract between Her Majesty and them should be and I think always has been considered as being sacred and inviolable" and that if such a treaty is violated by statute, it is up to "the conscience of the Crown and Parliament to repair the wrong."[108] Justice Stuart nevertheless felt bound by the doctrine of parliamentary supremacy, holding that "if Parliament by inadvertence has in fact passed a statute imposing regulations which go beyond the intention of the treaty, such a statute is valid and binding upon the Indians."[109] Justice Stuart attempted to reconcile the apparent contradiction of this doctrine with the inviolability of treaties by pointing to the exclusive federal power over "Indians and lands reserved for Indians" under section 91(24) of the *BNA Act, 1867* and holding that provincial game laws could not of themselves apply to First Nations. Thus, *Stoney Joe* rendered treaties subject to unilateral change by legislative action, but only by Parliament.

Despite Justice Stuart's finding that provinces could not regulate First Nations directly, provincial game laws were still potentially applicable to them. At issue was the principle of delegation between the federal and provincial legislatures. Legal counsel for the Crown, Mr. Short, K.C., argued what was the federal government's official position at the time: that the federal government had the power to transfer to a provincial legislature the power to legislate upon a subject that the constitution placed within its jurisdiction.

107 *Ibid.* at 118.
108 *Ibid.*
109 *Ibid.*

Justice Stuart rejected that argument and confined the delegation to that from Parliament to the Superintendent General of Indian Affairs. He felt that the "point involved is a very grave one" in that it raised an issue of delegation of powers.[110] He reasoned that if he accepted the Crown's position, the result would be a large discretion left to the provinces to legislate in respect of Indians in future. In his view, allowing Parliament to delegate its authority in this manner suggested would be unconstitutional.

Justice Stuart relied on *Hodge v. The Queen*[111] to support his rejection of the Crown's position. In this 1883 decision, the Judicial Committee of the Privy Council rejected an argument that the federal government of Canada was merely a delegate of the Imperial Parliament in London that could not further delegate its authority to a provincial legislature. The Privy Council found that the *BNA Act, 1867* gave the federal, as well as provincial, governments powers as "plenary and ample" as the Imperial Parliament. Thus, the federal government could delegate authority to a provincial legislature. However, the authority to delegate by a government with exclusive constitutional powers did not allow it to abandon its authority completely through delegation. Extending these principles to the *Stoney Joe* case, Justice Stuart found that section 133 of the *Indian Act* meant the federal government occupied the field and, when in conflict with provincial game laws, the principle of paramountcy meant that the federal law was paramount. On the other hand, Justice Stuart also found that the federal government's power to legislate over Indians included the authority to create legislation that refers to a territorial or provincial game law of general application, which in turn would subject First Nations to those laws. He termed this process "legislating by reference" and felt it was constitutional because "the law adopted and applied is known and is before Parliament for its consideration."[112]

In applying these principles — legislating by reference and delegation of powers — to the circumstances of the *Stoney Joe* case, Justice Stuart noted that the *Indian Act* had been amended with the addition of section 133 in 1890, which provided authority to the Superintendent General of Indian Affairs to declare by public notice that certain named First Nations would be subject to the local legislature's game laws. He also noted that in 1894, the Superintendent General published a section 133 notice in the Canada Gazette proclaiming that the game laws in force in the North-West Territories "shall

110 *Ibid.* at 120.

111 *Hodge v. The Queen* (1883), 9 App. Cas. 117 (J.C.P.C.). He also relied on a textbook: Alpheus Todd, *Parliamentary Government in the British Colonies*, 2d ed. (London: Longmans, 1894) at 570.

112 *Stoney Joe*, *supra* note 101 at 120.

apply to the Stony [*sic*] Indians whose Reserve is situated at Morleyville."[113] He found as fact that "no further or other notice has ever been published or given up to the present time"[114] and, further, that section 11 of the 1907 Alberta *Game Act* did not appear in the territorial *Game Ordinance* when the public notice proclaimed that game laws in force in 1894 were to apply to the Stoney First Nations. As a result, he held that the wording of the public notice of 1894 was not sufficient to cause section 11 of the 1907 *Game Act*, a regulation later in time, to apply to the Stoney First Nations. Lastly, it is arguable that in applying the principles in this manner, Justice Stuart recognized an ongoing fiduciary-like duty on the federal government to look out for the interests of the First Nations when considering whether provincial game regulations should apply to First Nations.

Stoney Joe was the only case that examined section 133 and subsequent case law did not refer to it. However, the relationship between federal jurisdiction over Indians and Indian lands and provincial authority over natural resources and property and civil rights itself remained a matter of controversy. Section 133 went through a number of changes through the years, but its wording and purpose remained largely the same.[115] Given that its effect is similar to section 88 (formerly section 87) in the present-day *Indian Act* section 133 (and its successors) can be viewed as its precursors. Sections 133 and 88 both provide that provincial laws of general application will apply to First Nations through the incorporation by reference principle. Both allow for provincial game laws to apply to First Nations hunters, except that section 88 contains a proviso that laws of general application are subject to treaties and other federal statutes. And although the language may not say so explicitly, the effect of these sections is for the federal government to delegate authority to legislate over Indians to provincial governments. As we shall see below, paragraph 12 of the *NRTA* is effectively another delegation of federal authority to the provinces to legislate over First Nations.

What we learn from this historical development of the authority to regulate hunting and over wildlife resources prior to 1930 and this early decision is that, at least in Justice Stuart's court, there was judicial support for viewing treaties as solemn, inviolable agreements containing assurances that First Nations' traditional livelihood would be preserved and protected. As a result

113 *Ibid.* at 119.

114 *Ibid.*

115 Section 133, which became s. 66 in R.S.C. 1906, c. 43, s. 1, and s. 69 in R.S.C. 1927, c. 81, s. 1, "remained an integral element of the *Indian Act* until the 1951 revisions." Irwin, "Not Like the Others," *supra* note 4 at 261.

of the principle of parliamentary supremacy, provincial and territorial laws could not apply to First Nations hunters who had treaty rights without federal review.[116] The federal government, however, had the authority to legislate over "Indians" pursuant to their legislative power under section 91(24). This power gave Parliament the ability to modify or interfere with treaty rights unilaterally. We also see from Justice Stuart's language that there was a political and moral obligation on the federal Crown to look out for the interests of First Nations before any game laws were to be made applicable to First Nations hunters.

During the pre-1930 era, the prairie provinces (but not the North-West Territories) had the constitutional authority to regulate game according to the *Robertson* decision, and their laws could apply to the First Nations within the region with federal approval pursuant to section 133 of the *Indian Act*. The federal government, however, still maintained control over the natural resources in Manitoba, Saskatchewan, and Alberta. The prairie provinces desired to benefit from the natural resource revenue and negotiated for nearly a decade with the Dominion government, ultimately signing the *Natural Resources Transfer Agreements, 1930*.[117] The changes — or lack thereof — introduced through the *NRTA* with respect to provincial authority to regulate hunting by First Nations will be discussed below.

116 For the concept of parliamentary supremacy, see, *e.g.*, George Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 Law Quarterly Rev. 591; and J.R. Mallory, "The Courts and the Sovereignty of the Canadian Parliament" (1994) 10 Canadian J. of Economics and Political Science 165.

117 *Supra* note 1. For discussions of the negotiation process, see the articles in this issue by Jim Mochoruk, "Manitoba and the (Long and Winding) Road to the *Natural Resources Transfer Agreement*" (2007) 12 Rev. of Constitutional Studies/Rev. d'études constitutionnelles 255; and Nicole C. O'Byrne, "'A rather vexed question . . .': The Federal-Provincial Debate over the Constitutional Responsibility for Métis Scrip" (2007) 12 Rev. of Constitutional Studies/Rev. d'études constitutionnelles 215, which add to an emerging scholarship that examines the *NRTA* through archival documents. See also 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, "The Forgotten Constitution"]; Tough, "Introduction to Documents," *supra* note 6; Robert Irwin, "'A Clear Intention to Effect Such a Modification': The *NRTA* and Treaty Hunting and Fishing Rights" (2000) 13 Native Studies Rev. 47 [Irwin, "A Clear Intention"]; and Thomas Flanagan & Mark Milke, "Alberta's Real Constitution: The Natural Resources Transfer Agreement" in Connors & Law, *supra* note 5, 191.

III. THE REGULATION OF FIRST NATIONS HUNTING AFTER THE *NRTA*: INTERPRETING PARAGRAPH 12

The Protection of the Traditional Livelihood and the Transfer of Authority Through Paragraph 12

The previous section has suggested that the federal government had a duty to ensure that First Nations' access to wildlife would be respected by the provincial governments, even if it would have preferred to have fully delegated the matter to the provinces. This section discusses how paragraph 12 of the *NRTA* reflects this duty, and then move on to consider problems in how the courts have interpreted paragraph 12.

The *NRTA* was negotiated between the Dominion Government of Canada and the three prairie provinces.[118] Although paragraphs 10, 11 and 12 address First Nations' rights, First Nations were not involved in any way in these negotiations. The federal government unilaterally transferred its interest in the natural resources and lands in those provinces to them without any consultation or input by First Nations. It is important to remember that First Nations were politically powerless at this time: they could not vote in federal or provincial elections until 1960,[119] and a 1927 amendment to the *Indian Act* made it illegal for them to raise any money to bring a claim against the government.[120] First Nations were thus without voice on the issues around protecting their ability to continue their traditional livelihood that they had worked hard to secure through the treaty negotiations. Nevertheless, it is arguable that the federal government was aware of its moral duty to look out for the interests of First Nations and that this duty is reflected by limitations on the delegation of legislative authority apparent in the text of paragraph 12.

The federal government agreed to confer on the prairie provinces the power

118 See the text accompanying note 1.

119 See Darlene Johnston, "First Nations and Canadian Citizenship" in William Kaplan, ed., *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queen's University Press, 1993); and Joseph Krauter & Morris Davis, *Minority Canadians: Ethnic Groups* (Toronto: Methuen, 1978).

120 *An Act to Amend the Indian Act*, 17 Geo. V., c. 32, s. 6. See E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986) at 157; and Gail Kellough, "From Colonialism to Economic Imperialism: The Experience of the Canadian Indian" in John Harp & John R. Hofley, eds., *Structured Inequality in Canada* (Scarborough: Prentice-Hall of Canada, 1980) 343.

to regulate First Nations' hunting except when hunting for food. Paragraph 12 of the *NRTA* sets out this agreement as follows:

> In order to secure 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.[121]

The text of paragraph 12 can be broken down into two provisions: one that actually transfers the authority to the prairie provinces to regulate First Nations' hunting ("Canada agrees that the laws respecting game in force in the Province from time to time shall apply to Indians within the boundaries thereof "), and another that limits the authority of the provinces to regulate First Nations when hunting for food purposes ("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"). Thus, when First Nations hunters were hunting for sport or for commercial purposes, they fell under provincial authority as a result of this transfer of authority. However, provincial legislative powers were expressly limited when it came to regulating First Nations' access to wildlife for food.[122]

Bringing History Back In: The Purpose of Paragraph 12

In interpreting the purpose of the paragraph 12 transfer of authority, its first words — "In order to secure the supply of game and fish for their support and subsistence" — provide a starting point that recent historical research allows us to explore. Frank Tough and other historians have recently surfaced historical evidence that, contrary to the Court's finding in *Horseman*, there was no intention on the part of the federal government drafters of paragraph 12 to extinguish the commercial aspect of the treaty hunting rights of First Nations. Instead, the federal intention was to protect such rights through provincial legislation to conserve game, all the while leaving First Nations' food hunting free from legislative restrictions.[123] The opening phrase of paragraph

121 *Supra* note 1. See paragraph 13 in the Manitoba *NRTA*.

122 There was some question as to whether paragraph 12 also prevented the province from regulating non-food hunting on reserve lands. This was decided in favour of the province's legislative capacity in *Cardinal v. Alberta (Attorney General)*, [1974] S.C.R., but it is worth noting that Justice Laskin dissented on this point.

123 See Tough, "The Forgotten Constitution," *supra* note 117; Tough, "Introduction to Documents,"

12 thus reflects Frank Tough's findings that officials at the Department of Indian Affairs were concerned about ensuring the supply of game animals to First Nations and advocated for First Nations to be able to hunt for food any time of year, notwithstanding provincial game laws.[124] Tough argues that the "inclusion of Indian hunting rights in this agreement indicates that there had been serious problems of provincial encroachment upon Indian hunting and that the federal government was aware that it had certain general obligations and trusts that would have to be protected with the transfer of jurisdiction."[125] Historian Robert Irwin also completed an extensive review of the historical documents and concluded that there was no clear federal intention to extinguish First Nations' commercial hunting rights.[126]

From my own review of the primary documents it is evident that there were three types of hunting being carried on before 1930. There was hunting for food. There was also hunting for sport, practiced by sports hunters who valued the prize trophy heads. Finally, there was commercial hunting and trapping, which involved the sale of the products of the hunt.[127] Indeed, trade among First Nations pre-dated trade with European settlers and fur traders.[128] Furs, hides, moccasins, fresh meat, dried meat, pemmican, fish, plants and roots as well as other products of their hunting, fishing, trapping, and gathering were traded with other First Nations.[129] After European contact, barter and trade for goods increased as the First Nations combined their traditional livelihood with a new global trading economy.[130] These commercial hunting activities were allowed by provincial regulations well into the 1920s through the issuance of "market" licences.[131]

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supra note 6; and Irwin, "Not Like the Others," *supra* note 4.

124 Tough concludes that "[t]here is no historical evidence that a derogation of treaty livelihood rights was intended or occurred and, in fact, the actual needs for those living the Indian mode of life became a priority in December 1929," the eve of the signing of the final draft of paragraph 12. "The Forgotten Constitution," *ibid.* at 1044.

125 Tough, "Introduction to Documents," *supra* note 6 at 121.

126 Irwin, "A Clear Intention," *supra* note 117.

127 Wetherell & Kmet, *supra* note 18.

128 GA, File #M1175, Henry Stelfox, "Peter Pangman." Stelfox learned from the Stoney First Nations that they traded various products of the hunt with the Kootenai [*sic*], Salish, and Shuswap First Nations from the west side of the Rocky Mountains.

129 *Ibid.*

130 Steven High, "Native Wage Labour and Independent Production During the 'Era of Irrelevance'" (1996) 37 Labour/LeTravail 243, states that First Nations did not enter into an era of irrelevance after the fur trade, but instead they "not only participated in the capitalist economy during this [period] but did so selectively in order to strengthen their traditional way of life" (at 244).

131 Calliou, "Losing the Game," *supra* note 5; and Wetherell & Kmet, *supra* note 18. In fact, Chief Game Guardian Benjamin Lawton of the Department of Agriculture issued yearly reports that listed the number and types of licenses issued each year, some of which were called market licenses;

From Tough's work it is apparent that when it negotiated the *NRTA*, the federal government knew it had to protect the traditional livelihood promised to First Nations. It is also evident that the federal government knew about these three forms of hunting and it should have known from the *Stoney Joe* case that courts were willing to recognize a duty on it to protect First Nations' livelihood rights. From these starting points, paragraph 12 of the *NRTA* can be viewed as the federal government attempting to fulfill its duties to First Nations by ensuring that their hunting for food was not to be restricted by provincial regulation. These starting points also cast the transfer of authority over what the provincial regulators saw as "commercial" aspects of First Nations' livelihood rights as an attempt to ensure that First Nations' hunting, trapping and gathering activities would remain secure by transferring authority to the provinces "to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence." In other words, paragraph 12 can be read as the federal government's attempt to delegate its treaty obligations to regulate wildlife activities only to conserve the supply of game animals and fish for the best interests of the First Nations.

Under this reading, the federal obligations being transferred to the prairie provinces in paragraph 12 stem from the treaty relationship.[132] The treaties resulted in, according to the Crown, a surrender of exclusive access to the traditional lands and natural resources of particular First Nations but with the First Nations retaining rights to pursue their traditional livelihoods on these lands. This aspect of the treaties gives rise to a special relationship between the Crown and the First Nations. In addition, there were promises and assurances made during treaty negotiations that the Crown had a duty to ensure were respected. In transferring authority to the prairie provinces through the *NRTA*, these obligations should have been part of the package. Justice Kerans of the Alberta Court of Appeal discussed the fiduciary aspect of paragraph 12 in *R. v. Badger*:

> Whether by virtue of its special constitutional role respecting Indians, or its Treaty obligations to them, Canada saw that it had a duty to secure the supply [of game

see "Report of Chief Game and Fire Guardian" in the *Annual Report of the Department of Agriculture of the Province of Alberta 1913* (Edmonton: J.W. Jeffery Government Printer, 1914) 76.

132 The treaty relationship includes fiduciary elements. For discussion of fiduciary aspects of the treaty relationship and in the Crown-Aboriginal relations more generally, see Rotman, *Parallel Paths*, *supra* note 63; Rotman, "Provincial Fiduciary Obligations," *supra* note 63; Richard H. Bartlett, "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: Guerin v. The Queen" (1984-1985) 49 Saskatchewan Law Rev. 367; and Michael J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 Univ. of British Columbia Law Rev. 19.

> and fish for the Indians]. Paragraph 12 transferred this obligation to the provinces in question. It is now the constitutional duty of these provinces to perform whatever obligations Canada had.[133]

There has been a neglect of this moral and political duty in judicial interpretation of paragraph 12. If judges had taken these obligations into account, they might not have been so quick to accept that the Crown could breach its treaty promises to protect the traditional livelihood rights of First Nations.

Critiquing How Judges Have Interpreted Paragraph 12

There are some important problems with the cases that have interpreted paragraph 12. One is that they essentially fail to follow the legal principles laid down in *Sparrow*[134] regarding the extinguishment of Aboriginal and treaty rights — that is, a right continues to exist if there is no clear and plain intention to extinguish it. As Kerry Wilkins argues, surely the words in paragraph 12 do not express such an intention, nor does the historical record support such a conclusion.[135] Furthermore, this approach is contrary to the many pronouncements made by the courts that treaties are sacred, inviolable agreements and that governments are presumed — based upon the honour of the Crown — not to breach treaty terms intentionally.[136]

All of these problems are evident in the leading case, *R. v. Horseman*.[137] There, Justice Cory concluded for the majority that Treaty No. 8 included and protected First Nations' right to hunt for commercial purposes. However, having found the commercial hunting right in the treaty, Justice Cory went on to hold that paragraph 12 of the *NRTA* extinguished the commercial hunting right. In *Badger*, Justice Cory again wrote for the majority and again stated that paragraph 12 "evidenced a clear intention to extinguish the treaty protection of the right to hunt commercially."[138] In neither decision does he refer to any historical evidence that this was the intention of the *NRTA*'s drafters. Instead, he relies upon judicial precedents that developed the "merger and consolidation" theory. The merger and consolidation theory posits that paragraph 12 of the *NRTA*, being a constitutional document drafted with

133 *R. v. Badger* (1993), 135 A.R. 286 at 292 [*Badger* (Alta. C.A.)].

134 *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

135 See, in this issue, Kerry Wilkins, "Unseating *Horseman*: Commercial Harvesting Rights and the *Natural Resources Transfer Agreements*" (2007) 12 Rev. of Constitutional Studies/Rev. d'études constitutionnelles 135.

136 *Ibid.*

137 *Supra* note 3.

138 *Badger, supra* note 36 at para. 46.

the federal government's participation, merged and consolidated the treaty right to hunt into the rights as set out in paragraph 12. Justice McNiven in the *Strongquill* case in 1953 was the first to use the term "merged and consolidated."[139] He found that an accused "treaty Indian" had a right to hunt "for food" only within a forest preserve, holding that the effect of paragraph 12 of the *NRTA* was that "the rights heretofore enjoyed by the Indians whether by treaty or by statute were merged and consolidated."[140] On this view, there was really little need to look at the treaty assurances or any historical evidence; one had only to look to the wording of paragraph 12.

Many judges picked up on the merger and consolidation theory in subsequent cases. In *Frank* in 1978, the Supreme Court said, "It would appear that the overall purpose of para. 12 of the Natural Resources Transfer Agreement was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians."[141] In *Sutherland* in 1980, it cited with approval this passage from *Frank*.[142] And in the 1981 *Moosehunter* decision, the Court again said that "[t]he Agreement had the effect of merging and consolidating the treaty rights of the Indians in the area and restricting the power of the provinces to regulate the Indian's right to hunt for food."[143]

Characterizing the matter before the court as a commercial aspect of hunting facilitates Justice Cory's justification of the breach of the treaty promises, because the intention he imagines for the drafters of paragraph 12 corresponds with seeing them as conservationists who protected the natural resource through regulatory measures that limited the "marketing" of animal products. Yet "market" hunting licences were regularly issued through the Chief Game Guardian's office during the 1920s, when paragraph 12 was drafted. Such activities were not banned outright but were, rather, regulated by the provincial government.[144] Furthermore, First Nations hunters were, at the time, carrying out their traditional livelihood, including trading, bartering, or selling any surplus products of the hunt. Instead of viewing the matter as a "commercial" matter *per se*, the Court could have viewed it as part of a system of barter, trade, and sale of the surplus of the hunt.[145] This is

139 *R. v. Strongquill* (1953), 8 W.W.R. 247 (Sask. C.A.).

140 *Ibid.* at 267.

141 *Frank v. The Queen*, [1978] 1 S.C.R. 95 at 100.

142 *R. v. Sutherland*, [1980] 2 S.C.R. 451 at 460.

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

144 See text and citations, *supra* note 131.

145 Catherine Bell, "*R. v. Badger*: One Step Forward and Two Steps Back?" (1997) 8 *Constitutional Forum constitutionnel* 21 at 23, also comments on the difficulty of separating the commercial from the subsistence activities of the traditional livelihood of First Nations.

historically what was being practised. In fact, the historical records left by fur traders indicate that First Nations did not necessarily increase their taking of animals for furs just because the price of fur went up. Instead, they actually brought in fewer furs when the price went up, because a higher price for fewer furs was sufficient for their subsistence and support.[146]

The treaty text states that the First Nations shall have the right to "pursue their usual vocations of hunting, trapping and fishing." Characterizing the matter as a traditional livelihood right that deserved protection pursuant to a "solemn" promise of the Queen's representatives premised upon the duty and honour of the Crown, as Madam Justice Wilson did in her dissenting judgment in *Horseman*, would have led to a different analysis. This traditional livelihood could be characterized as a "moderate livelihood," as the Supreme Court of Canada did in the *Marshall* fishing case.[147] Instead, Justice Cory's segregation of commercial hunting from hunting for food follows a long line of colonial thinking where hunting was viewed as a privilege of the settler class and as an activity that could be exploited for large profits when big game tourist hunters paid for their hunts, all of which depended on restricting First Nations' open access to this natural resource.

On the matter of where First Nations could hunt, the Court in *Badger* was a little more open to considering historical evidence to assist it in its decision-making. In that case, the Court accepted the testimony of an historian and a Treaty 8 elder to establish that First Nations would have understood the lands to which they had a right of access to be those lands that were not taken up and put to visible use. Thus, on this matter, Justice Cory and the majority of Justices took a broader, more liberal approach, considering extrinsic evidence and the historical context to come to a more historically sound conclusion. It would have been absurd for the Court to hold that First Nations hunters could not hunt on privately owned lands that had not been put to visible use; it would have required them to stop and do a title search to determine if such vacant lands were privately owned each time they spotted an animal on such lands.

In his written reasons in *Badger*, Justice Kerans of the Alberta Court of Appeal gave a stinging critique of the reigning interpretation of paragraph

146 This phenomenon is discussed in Arthur Ray & Don Freeman in *Give Us Good Measure': An Economic Analysis of Relations Between the Indians and the Hudson's Bay Company Before 1763* (Toronto: University of Toronto Press, 1978).

147 *Marshall, supra* note 36.

12.[148] He stated that he found the approach of the majority in *Horseman* regarding the effect of paragraph 12 upon the treaty rights "deeply troubling." He nevertheless felt bound by precedent to follow the reasoning in that case, and held that the treaty right in issue in *Badger* (hunting for food on private lands) had been extinguished by its merger and consolidation into paragraph 12. Although the Supreme Court overturned him on this point,[149] Justice Kerans's "disquiet" regarding *Horseman* is still relevant. Considering the merger and consolidation theory as "merely a polite way to describe extinction and replacement,"[150] Justice Kerans expressed his concern that "whatever happened in 1930 happened without the participation of one party to the Treaty. The aboriginal Canadians were not invited to participate in the negotiations leading to the 1930 agreements."[151] He did not view the governments that negotiated these agreements as having been "guilty of affront" to Aboriginal peoples, but rather considered that these governments "did not believe they were changing any native rights."[152] He went on to state, "I fear the notion of 'merger and consolidation' is the result of a patina applied by a later generation of judicial interpretation."[153] According to Justice Kerans, it was judicial decisions that extinguished the commercial aspect of the traditional livelihood, not the intention of the drafters. He also stated that paragraph 12 was not about the extinction of treaty rights; rather, the intention was "to have been an attempt to confer on one level of government, the province, a broad power to regulate the hunt, subject to those rights."[154] He looked to the operative words of paragraph 12, which provide that "Canada agrees that the laws respecting game in force in the province from time to time shall apply to the Indians," to conclude that this paragraph deals "with legislative power. It amounted to a transfer, or perhaps a delegation, of legislative function from Canada to the provinces."[155]

The courts have developed canons of construction to guide the interpretation of treaties with Aboriginal peoples.[156] This guidance includes statements by the

148 *Badger* (Alta. C.A.), *supra* note 133 at 288-96.

149 In its decision in *Badger*, *supra* note 36, the Supreme Court of Canada clarified that only the commercial aspect of the treaty hunting right had been extinguished through paragraph 12 of the *NRTA* (at paras. 43-48).

150 *Badger* (Alta. C.A.), *supra* note 133 at 290.

151 *Ibid.* at 290-91.

152 *Ibid.* at 291.

153 *Ibid.*

154 *Ibid.*

155 *Ibid.*

156 For an examination of these principles, see Leonard I. Rotman, "Marshalling Principles From the *Marshall* Morass" (2000) 23 Dalhousie Law J. 5; and Leonard I. Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 Univ. of

Supreme Court of Canada that the written text of a treaty does not represent the treaty in its entirety, and that extrinsic evidence must also be considered.[157] The Supreme Court has further stated that any ambiguity in a written law must be liberally construed in favour of the First Nations' understanding, with any restrictions on their treaty rights to be construed in the narrowest sense.[158] A great injustice is felt by First Nations when government officials and the courts insist upon only an official, narrow interpretation.[159] The courts have declared that a right no longer exists where there is a "clear and plain intent" to extinguish it.[160] Given this history and the backdrop against which treaty livelihood rights and, by extension, paragraph 12 of the *NRTA* must be read, and given the wording of paragraph 12 itself, there is sufficient ambiguity to require the courts to take a broad, liberal approach to interpreting the livelihood rights protected by paragraph 12. When one takes the liberal approach and considers the context of the treaty negotiations, it is apparent that the First Nations leaders were given repeated assurances by the Queen's officials that their traditional livelihood would be protected.

The problem with the narrow approach to paragraph 12 of the *NRTA* is that the courts have misinterpreted its intent. This problem arose because the Justices in the majority did not consider the historical context and documentary evidence surrounding the negotiations and the drafting of this clause. This narrow, textual approach, which merely interprets the wording of the statute without any contextual analysis, is legal formalism. It privileges the written word over all else.

An historically informed understanding of the intention and obligations behind paragraph 12, and one that takes First Nations' perspectives into account, leads to the conclusion that paragraph 12 represents the federal government's attempt to ensure that game laws would be made to conserve the supply of game animals and fish for the best interests of the First Nations after the transfer of the natural resources to provincial government control. It also represents the federal government's attempt to uphold the Queen's

New Brunswick Law J. 11. For the American example, see Jill de la Hunt, "The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification" (1984) 17 Univ. of Michigan J. of Law Reform 681. A critical assessment of the Supreme Court of Canada's development of treaty interpretation principles is found in Gordon Christie, "Justifying the Principles of Treaty Interpretation" (2002) 26 Queen's Law J. 143.

157 See *Marshall* and *Badger*, *supra* note 36.

158 For these principles, see *Simon v. R.* [1985] 2 S.C.R. 387 at 402; *Nowegijick v. The Queen* [1983] 1 S.C.R. 29 at 36; *R. v. Sioui* [1990] 1 S.C.R. 1025 at 1035; and *Badger*, *ibid.* at paras. 41, 52.

159 Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: Hurtig, 1969).

160 *Sparrow*, *supra* note 134.

promises and meet its moral and political duty to look out for First Nations' interests regarding their traditional livelihood. However, the interpretation of paragraph 12 has resulted in decisions that disrespect the Queen's promises and justify breaches of the Crown's treaty obligations to look after the interests of the First Nations. In essence, the leading cases interpreting paragraph 12 have extinguished what they have isolated, without being informed by the historical context, as the commercial aspect of the larger, treaty-protected livelihood rights. Given these problems, it is time for the courts to revisit their interpretation of paragraph 12.

Getting It Right: A Precedent

Wesley[161] was the first appellate decision to interpret paragraph 12 of the *NRTA*. In two separate sets of reasons, the Alberta court took a broad, liberal approach and considered extrinsic evidence to gain a broader understanding of Aboriginal rights, treaties, and the meaning of paragraph 12. Although the majority of later decisions that refer to *Wesley* did not adopt the court's approach and reasoning,[162] its approach is worth reviewing as precedent from which the jurisprudence on paragraph 12 can be rebuilt.

The defendant, Mr. Wesley, a Treaty 7 Indian and member of the Stoney First Nation, was hunting for food when he was charged for killing a deer with horns smaller than Alberta game regulations allowed, hunting without a licence, and hunting with dogs. The trial judge, who considered only the wording of paragraph 12 and ignored all extrinsic evidence, convicted Mr. Wesley on the first charge.[163] The Court of Appeal unanimously reversed this conviction. Writing for himself, Justice Lunney considered an 1890 report by Justice Minister Sir John Thompson recommending that a North-West Territories game regulation over First Nations be disallowed. The reasons for this recommendation included that the treaties promised continued hunting and that the federal government had a duty to see that no treaty rights of Indians were infringed. Justice Lunney relied on Thompson's reasoning regarding the federal duty to uphold treaty livelihood rights to reach his

161 *R. v. Wesley*, [1932] 4 D.L.R. 774 (Alta. S.C., App. Div.).

162 See, *e.g.*, *Strongquill*, *supra* note 139; *Frank*, *supra* note 141; and *Moosehunter*, *supra* note 143.

163 The trial judge, Magistrate Sanders, interpreted paragraph 12 to allow provincial game laws to apply to First Nations when hunting for food and would not allow two Stoney Elders who were present at the signing of Treaty 7 to testify to their understanding of the treaty promises made. He stated: "'I am not going to be party to allowing a conversation of what they understood. The treaty speaks for itself.'" Quoted in Douglas Sanders, "The Queen's Promises" in Louis Knafla, ed., *Law & Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) 101 at 105.

decision. He also remarked that, in its special provisions for residents of the North, the provincial legislation itself recognized the differences between hunting for food, for sport, or for trafficking. Furthermore, the legislation provided that that until the process prescribed under section 67 of the *Indian Act* (successor to section 133) was followed, the Indians were free to hunt on unoccupied Crown lands or other lands to which they may have a right to access. Justice Lunney thus concluded that the intention of paragraph 12 was not to alter the law applicable to First Nations; in fact, it acknowledged First Nations' right to continue to hunt, fish, and trap.

Justice McGillivray's reasons for the majority of the court took a longer view of the history relevant to the interpretation of paragraph 12 than Justice Lunney. Justice McGillivray considered the Treaty 7 text, the Royal Proclamation of 1763, the Rupert's Land and North-Western Territory Order, the Articles of Capitulation signed in Montreal in 1760, and the Treaty of Paris. These historical documents assisted him in understanding the historical context of Aboriginal rights, treaties, and the protections of traditional hunting territories by the Crown. With all this in mind, Justice McGillivray reviewed the wording of paragraph 12 and concluded that Parliament promised the Indians the:

> supply of game in the future for their support and subsistence by requiring them to comply with the game laws of the Province, subject however to the express and dominant proviso that care for the future is not to deprive them of the right to satisfy their present need for food by hunting and trapping game . . . at all seasons on unoccupied Crown lands or other land to which they may have a right of access.[164]

Informed by the historical context, he found that assurances were made to First Nations by Crown representatives during treaty negotiations that the game supply would be protected for their benefit to continue their traditional livelihood and that paragraph 12 was intended to fulfill those treaty obligations. Justice McGillivray interpreted the general wording of paragraph 12 as making First Nations hunting, other than for food purposes, subject to game laws of the province. He also clearly saw the proviso as restricting the application of provincial game laws when First Nations were hunting for food purposes:

> [I]n hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different

164 *Supra* note 161 at 781.

> position from the white man who generally speaking does not hunt for food.[165]

In his view, paragraph 12 is a reassurance to First Nations of "the continued enjoyment of a right which [they have] enjoyed from time immemorial."[166]

Justice McGillivray also reviewed the Rupert's Land Order. It includes an address to the Queen in which the Senate and House of Commons state that "upon the transference of the territories in question to the Canadian government it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interest and well being are involved in the transfer."[167] The federal government thus acquired, along with the new lands purchased from the Hudson's Bay Company, a duty to protect the "Indians." In his discussion of the meaning of Treaty 7, Justice McGillivray stated that while treaties were not on a higher level than other formal agreements, the Crown was nevertheless obliged to uphold them:

> [It is] the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate and it is not to be thought that the Crown has departed from those equitable principles which the Senate and House of Commons declared.[168]

Further, he noted that the Canadian government wanted the First Nations to be content and permit peaceful settlement, but also that "the Indians were greatly concerned with 'their vocations of hunting' upon which they depended for a living."[169] Such vocations, as the historical record shows, included hunting and trapping for barter and sale as well as for food; their livelihood depended on both. He noted that Governor Laird, one of the Treaty 7 commissioners, had reported assuring the chiefs during the treaty negotiations that "it is your privilege to hunt all over the prairies . . . and that you can rely on all the Queen's promises being fulfilled."[170] Indeed, Justice McGillivray took solace in the fact that First Nations' treaty hunting rights could be fulfilled and protected in his decision, as Governor Laird had promised:

> It is satisfactory to be able to come to this conclusion and not to have to decide that "the Queen's promises" have not been fulfilled. It is satisfactory to think that legislators have not so enacted but that the Indians may still be "convinced of our

165 *Ibid.*
166 *Ibid.*
167 *Ibid.* at 787.
168 *Ibid.* at 788.
169 *Ibid.* at 789.
170 *Ibid.*

> justice and determined resolution to remove all reasonable cause of discontent."[171]

Justice McGillivray's interpretation of paragraph 12 of the *NRTA* is reasonable because it takes the historical duty of the federal government to protect First Nations' interests seriously and respects the treaty promises made on the Queen's behalf. As such, both his and Justice Lunney's reasons provide precedents worth returning to in revisiting the interpretation of paragraph 12.

IV. CONCLUSION

A critical legal history of the development of wildlife legislation in western Canada offers a deeper understanding of the intention behind treaty livelihood rights and their constitutionalized protection in paragraph 12 of the *NRTA*. The intention borne out by the historical record was to preserve the traditional livelihood of First Nations. The critical legal history approach assisted us in reaching this conclusion by exploring the broader political and economic backdrop against which the *NRTA* was negotiated and critically examining the supposed neutrality of our laws and legal institutions. It also helped us to uncover and expose the way laws reflect certain classes in society, particularly in the context of game laws that excluded First Nations' perspectives and values. This exclusion has in turn informed how paragraph 12 has been interpreted and contributed to the historically inaccurate finding of an intent to extinguish commercial hunting rights perpetuated in the jurisprudence on paragraph 12. These insights confirm the observations in other critical work illustrating how the power of law can be used to fulfill the needs of the dominant classes of society at the expense of the more vulnerable.

Government officials, followed by courts, have generally denied First Nations justice when it comes to their treaty rights to a traditional livelihood. The manner in which the officials and judges have interpreted and defined the traditional livelihood rights of First Nations has been a serious cause for discontent. The "Queen's promises" have been breached in this process, and in particular by the judicial extinguishment of the commercial aspect of the right to pursue a traditional livelihood, which First Nations were repeatedly assured would be protected and supported. The federal and provincial governments prosecute First Nations hunters and defend any challenges to their game laws, yet both are in a fiduciary relationship to First Nations. The

171 *Ibid.* at 790. Justice McGillivray was quoting from the Royal Proclamation of 1763, reprinted in R.S.C. 1985, App. 11, No. 1.

continued prosecution and criminalization of the traditional livelihood has contributed to the general feeling of discontent among First Nations and has led to characterizations of Canada as an "unjust society."[172] Our courts need to turn to principles of equity and justice to protect this vulnerable group. Revisiting paragraph 12 of the *NRTA* with a deeper understanding of the treaty relationship and the historical record before it would be a step in this direction and towards removing "all reasonable cause of discontent."

172 Cardinal, *supra* note 159.