Introduction to Documents: Indian Hunting Rights, Natural Resources Transfer Agreements and Legal Opinions from the Department of Justice

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One of the most enduring controversies stemming from the transfer of natural resources from the Dominion of Canada to the provinces of Manitoba, Saskatchewan and Alberta in 1930 has been a provision for Indian hunting rights. The wording of this paragraph or clause of the Natural Resources Transfer Agreement (NRTA) states:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[1]

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 or trusts that would have to be protected with the transfer of jurisdiction. In point of fact, in 1930, Indian hunting was a side issue to the transfer of vast lands with natural resources and the compensation to the provinces from the federal government for the loss of enjoyment of those lands and resources. If Indian interests were not as clear as the other important trusts and obligations involved with the transfer in 1930, such as leases of Crown lands, then a research problem emerges that requires more investigation than the interpretation of the "plain" text of a political/legal agreement. It is reasonable to suggest that the lack of such research in the past has hampered the courts' ability to deal with issues relating to Indian hunting in the prairie provinces. Judicial interpretations that merely re-examine such documents, devoid of historical context, will

generate inconsistent results.

While the transfer of resources entailed a wide range of trusts and obligations concerning resource use and land tenure, the general constitutional protection for these rights indicates a process that is relevant to contemporary Aboriginal interests. The documents that have been selected for publication concern the scope of the expression "Indians of the Province." This essay will introduce the documents by providing: a historical background on the issue of transferring resources to the prairie provinces; a summary of the important content in the documents; a reconstruction of the extrinsic evidence surrounding the drafting of the transfer agreement; and a brief discussion of the legal literature recounting judicial interpretations concerning NRTA Indian hunting rights. Finally, the relevance of these documents and historical analysis will be related to the Supreme Court's 1990 decision in *Horseman*.

The fact that Manitoba in 1870 (and with boundary extensions in 1881 and 1912) and Saskatchewan and Alberta in 1905 did not obtain control over public lands was a matter of grievance. Federal subsidies in lieu of these administrative powers did not, especially in Manitoba, constrain this political issue. Essentially the political issue entailed the transfer of natural resources to provincial authority and the question of compensation from the Dominion government to provincial government for lost revenue as a consequence of the lack of provincial ownership of lands and resources.

Prairie premiers actively pursued this grievance, especially from 1913. Premiers Walter Scott, R.P. Roblin and Arthur L. Sifton wrote Prime Minister R.L. Borden in 1913 requesting that: "all lands remaining within the boundaries of the respective Provinces, with all natural resources included, be transferred to the said Provinces, the Provinces accepting respectively the responsibility of administering the same."[2] The issue of compensation alluded a quick agreement because the Dominion government would not agree to both the transfer of natural resources and a continuation of federal subsidies.[3] Moreover, the Dominion government maintained that any agreement concerning the transfer of resources would have to be acceptable to the other provinces. Acceptance by other provinces for the transfer would be contingent upon the amount of compensation paid to the prairie provinces. Maritime provinces such as New Brunswick and Nova Scotia argued that they had proprietary interests in western lands, since the Dominion of Canada had purchased Rupertsland and the Northwestern Territory in 1870 for £300,000. Nova Scotia and New Brunswick were concerned about land and resource issues because, in contrast to Ontario and Quebec, their provincial territories did not expand after 1867.

Manitoba's grievance was older than that of Saskatchewan and Alberta, whose claims to compensation could only go back to 1905, the year when these two provinces were created. Manitoban politicians were more intransigent than the other two prairie provinces. The province of Manitoba held that:

> We beg to submit that any permanent settlement of the Natural Resources Question must be based upon ample recognition on the part of the Dominion [of] the inherent British rights of the Prairie Provinces to their natural resources as from the date of provincial organization or responsible government; the restoration of full provincial beneficial control of these which remain unalienated, and compensation upon a fiduciary basis for those which have been alienated by Canada for the purpose of the Dominion.[4]

Thus, Manitoba had advanced a constitutional principle as a means to settle the issue and objected to any arbitrary settlement that might ensue from the partial retention of in perpetuity subsidies in lieu of lands. An accounting of the financial results on a fiduciary basis and not a simple compilation of debits and credits was sought by Manitoba. Premier T.C. Norris argued:

> What we have in mind is the kind of accounting due from a trustee to his beneficiary. Such accounting would start out with the admission that Manitoba was as of right, and in the light of all British precedents, entitled to her public domain since the establishment here of responsible government.[5]

Norris would not give up the federal subsidy in lieu of lands unless the Dominion government would agree to an accounting based on fiduciary principle.[6] In 1921, Prime Minister W.L. Mackenzie King suggested that a quick settlement of the resource issue could be made if the prairie provinces recognized that whatever revenues the Dominion government received were balanced out by expenditures, but that he would agree to a binding tribunal that would consider the accounting of compensation.[7] Manitoba agreed to the idea of a tribunal to consider the question of compensation but rejected the idea that balancing the receipts and expenditures from Crown lands as an acceptable approach to compensation.

Conferences, interviews and correspondence continued through the 1920s. In several throne speeches, Dominion governments had promised to transfer resources to the prairie provinces. This constitutional issue was not quickly resolved. An official understanding between the Manitoba and Dominion governments on how to resolve the natural resources issue was made on 21 April 1922. In this agreement the Dominion government

recognized: the need for adjustments between the Dominion government and the prairie provinces; that the prairie provinces would be placed in a position of equality with other provinces; that an agreement would be negotiated subject to ratification by Parliament and the legislatures; that failure to negotiate an agreement would refer the dispute to arbitration; and that awards made by arbitration would be ratified by the Manitoba legislature and the Dominion parliament.[8] Little progress was made, however. In 1926, the governments of Alberta and Canada reached an agreement for transferring resources. Although this agreement was not enacted by the Dominion Parliament, it did serve as a precursor for the 1930 agreement. Manitoba Premier John Bracken rejected the terms of this agreement, stating that "the terms which have been made with the Province of Alberta are not, and in our opinion never can be, acceptable to the Province of Manitoba."[9] Bracken felt that it was time to submit the question to arbitration and recommended the judicial committee of the Privy Council as the tribunal.

The arbitration did not go to the Privy Council. A conference was held on 3 and 4 July 1928 in Ottawa and it was agreed to use a royal commission as "the method and basis of settlement of the question of the administration and control of the natural resources."[10] To deal with the issue of compensation and subsidies, a royal commission was established for each prairie province.[11] The question of compensation for Alberta and Saskatchewan was dealt with after the agreements had been enacted, whereas Manitoba and the Dominion reached an understanding on compensation during the negotiations. With respect to Manitoba's resources, an Order in Council of 1 August 1928 provided the means for dealing with the financial issues. Manitoba's position on adopting constitutional principles for settling the dispute was accepted:

> The Province of Manitoba to be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources, as from its entrance into Confederation in 1870.[12]

This Order in Council also appointed the commissioners, and gave the commission the power to decide financial and other considerations. After considering the report, both governments would "introduce the necessary legislation to give effect to the financial terms as agreed upon, and to effect the transfer to the province of the unalienated natural resources within its boundaries, subject to any trust existing in respect thereof, and without prejudice to any interest other than that of the Crown in the same."[13] The commission on Manitoba's natural resources was chaired by W.F.A. Turgeon.

The work of these royal commissions was largely concerned with producing a recommendation for financial readjustments that should be made to the provinces. The manner in which lands and resources were alienated was considered by the commissioners. For example, on the issue of Indian annuities, the *Turgeon Report* agreed that

> the Dominion has no legal claim against a Province or against the lands of a Province when an Indian treaty is concluded, because the understanding to pay annuities to the Indians constitute no charge upon the land, which remains the beneficial property of the Provincial Government. It is merely another instance of an act of the federal authority working incidentally to the benefit of a Province.[14]

Thus, the amount of annuities paid by the Dominion government would not be used to defer from the amount that the Dominion theoretically owed to Manitoba. After considering the financial effects of various past policies (subsidies, interest, etc.), or the "balancing of claims," the commissioners laconically calculated that the balance in Manitoba's favour was $4,584,212.49.[15] The settlement proposed by the commissioners was not based on fiduciary principles. During a meeting with the commissioners, the representatives for the province of Manitoba abandoned the demand for compensation based on fiduciary principles, and instead asked for a cash payment of six million dollars and a continuation of the existing subsidies.[16] Subsidies were also agreed upon and this financial compensation package was certainly less than what would have resulted had compensation been calculated on a fiduciary basis.[17] The royal commission for Manitoba resources reported on 30 May 1929, thereby clearing the way for the drafting of the agreement.

In this issue of *Native Studies Review* a portion of a justice department legal opinion file on the Natural Resources Transfer Agreement has been reproduced.[18] It is my contention that archival research is required in order to appreciate how Canadian law succeeded in diminishing, affirming or amending treaty and Aboriginal rights. The application of provincial laws to Indian hunting throughout the Dominion, both on- and off-reserve, created a series of disputes. Provincial control over natural resources led to conflicts between Indians and provincial authorities. To some extent, the department of Indian affairs was paralyzed by a feeling that Indian access to resources was caught between federal and provincial powers. To those making decisions, the jurisdiction was not clear. Provinces controlled matters of a local nature, and with the exception of the prairie provinces, controlled natural resources, while the federal government was responsible

for Indians and Indian lands.[19] When a jurisdictional dispute surfaced, the recourse of the department of Indian affairs was to seek a legal opinion from the justice department. As a consequence, some interesting documents, correspondence and legal opinions were generated. These opinions, which are important documents in terms of legal history, have not attracted much interest. Furthermore, the information in these documents, within a detailed historical context, may not have been available to courts. The main collection of these legal opinions has only recently been put under the care of the National Archives. Access to these documents has been restricted and even today some material from these files is not available to researchers.[20]

All too often in Indian history a single source is used to narrate and interpret Indian/White relations. With respect to "policy," most academics and researchers have found comfort in records of the department of Indian affairs held in the National Archives of Canada, known as Record Group 10. In fact, much of the history of Indian/White relations for western Canada is derived from a much smaller set of the record group known as the Black Series. On the question of Metis lands in Manitoba, Doug Sprague has alerted us to the importance of the justice department.[21] Given that much of Indian/White relations touches on law, or the meaning of rights, it is somewhat surprising that more use of justice department records has not occurred. These documents are especially of interest to Native Studies, in which an interdisciplinary approach to law and history make questions about the experience of diminishing, affirming or amending treaty and Aboriginal rights pertinent research.

This justice department file was titled "Interpretation of sec 12 of Alberta Natural Resources Act." Thirteen documents make up this file, spanning the period 12 January 1931 to 7 November 1933. Typed and handwritten notes, correspondence, an unreported judgment and legal opinions comprise the file, and all of this material is concerned with Indian hunting or the transfer agreements. The file opens with a letter from Duncan Campbell Scott, deputy superintendent general of Indian Affairs, 12 January 1931, conveying a request from George Hoadley, minister of agriculture for the province of Alberta. The formal request for an opinion from the province of Alberta was passed to the department of justice from the department of Indian affairs. Hoadley was interested in definitions of "game" and "unoccupied Crown lands."

Document 1 is a memorandum of 6 February 1931 prepared by C.P. Paxton[22] for the deputy minister of justice, W. Stuart Edwards. The memorandum surveys the changing views of the application of provincial laws to Indians and more specifically provides a survey of laws affecting Indian hunting. The problem of federal and provincial jurisdiction over

Indian hunting is traced historically. An explanation of the general intent of section 12 is offered. Paxton does not agree that the definition of game can be left up to the province of Alberta, stating "a construction of clause 12 which would render the right secured to the Indians by the proviso dependent upon the meaning assigned to this term from time to time by the Provincial Game Laws and which would consequently leave the Province free indirectly to defeat the real purpose of the proviso by the simple expedient of restricting the terms 'game' and 'fish' in its legislation." Here caution is offered in order to head off any effort by the province to circumvent Indian access to game and fish by allowing provincial law to define game and fish. Paxton continues on the intent of paragraph 12, stating, "The terms of clause 12 do not appear to me to manifest any intention on the part of the parties to render the right or privilege secured to the Indians by it subject to regulation and possible abridgment at the pleasure of the provincial legislature." On the issue of defining unoccupied Crown lands, Paxton agrees with the province. He argues that the Crown could occupy lands. As a result, lands set aside as game preserves and parks would no longer be unoccupied lands. This memorandum was the basis of the legal opinion of W. Stuart Edwards of 12 February 1931 (Document 2).

On 19 August 1933, Harold W. McGill, deputy superintendent general of Indian Affairs, conveyed to the deputy minister of justice a copy of a letter of 5 August 1933 from W.S. Gray, solicitor with the attorney general's department of Alberta. In this letter (Document 3), Gray tries to derive a definition of Indians for the purposes of the hunting rights section of the NRTA from the *Indian Act*, and therefore he concludes "that the provileges [sic] given to the Indians under Section 12 of the Act are confined to Treaty Indians."

On 30 August 1933, Deputy Minister Edwards provided a legal opinion on the question of the meaning of the term "Indians" with respect to the hunting rights clause of the agreement (Document 4). Consideration is given to the suggestion by W.S. Gray, solicitor for the Alberta attorney general's department, that the term "Indians" in the agreement is based on the *Indian Act*. Edwards disagrees entirely, arguing that the term "Indian" in the *Indian Act* is for the purposes of that act only; and by stating that "a 'non-treaty Indian' is still an Indian, no less than a treaty Indian." He also raises what we know today as the issue of fiduciary responsibilities when he notes that, "Non-treaty Indians, no less than treaty Indians have, ever since the establishment of British Government in Canada, been treated as wards of the Crown and the objects of special consideration and protection." Edwards argues that neither party to the agreement intended to exclude non-treaty Indians and that the broader and natural expression of the term "Indians" is

consistent with "the object of this particular clause of the agreement. . . ." Edwards even suggests that because non-treaty Indians do not have reserves, there is a stronger compelling reason for assuring the right to hunt for non-treaty Indians than for treaty Indians. The significant point in this document is that the deputy minister of justice, who had been involved with negotiations for the transfer of resources, provides a legal opinion on the term "Indians" that is based on an ordinary or natural meaning. He rejects the suggestion that there is any connection between the *Indian Act* or the treaties for a definition of Indian in clause 12 of NRTA. With respect to Indian resource rights, the scope of inclusion for Natural Resources Transfer Agreement is broad, in Edwards's opinion.

On 6 November 1933, Deputy Superintendent General H.W. McGill conveyed to the justice department a request (7 October 1933) by Gray for a reconsideration of the definition of "Indian." Gray asserts that the agreement was intended to continue rights for Indians that had existed under various treaties (Document 5). Specifically, Gray is concerned that a general interpretation of Indian would allow halfbreeds to claim the benefits of the agreement. Thus, Alberta wanted to interpret the NRTA in a manner that restricted the Indian right to hunt and fish for food to treaty Indians. While confusion often exists on the legal distinctions between status and treaty Indians, the province of Alberta was mindful of the difference. It had first suggested that NRTA intended to include *Indian Act* Indians, but when this interpretation was not accepted, Gray suggested that NRTA referred to treaty Indians only.

On 7 November 1933, the justice department provided the department of Indian affairs with another opinion, interpreting the expression "Indians of the Province" as a response to W.S. Gray's request (Document 6). W. Stuart Edwards argues that both treaty and non-treaty Indians are "resident within the limits of Alberta." He suggests that there is nothing in clause 12 that requires a restrictive interpretation and that the phrase "Indians of the Province" "harmonizes with the declared object of the clause." Moreover, this opinion also addresses the question of intent of those who drafted the agreement by pointing out that "each of the two Governments, parties to this Agreement, was well aware of the distinction between treaty and non-treaty Indians; and I am satisfied that if they had intended to limit the benefit of this provision to treaty Indians, they would have taken care to express that intention unambiguously, as they might easily have done: e.g., by using the words 'treaty Indians of the Province'."

In two legal opinions written shortly after the completion of the NRTA, the deputy minister of justice, W. Stuart Edwards, interpreted the expression "Indians of the Province" in a broad manner. He rejected Alberta's

interpretation that the benefit of clause 12 was restricted by an *Indian Act* definition of Indians or by treaties. His reasons can be summarized and paraphrased: 1) that the definition of Indian from the *Indian Act* is for the purposes of that act only; 2) that non-treaty Indians are the objects of special consideration and protection from the Crown; 3) that the wording of the clause or context does not support a restriction on the natural meaning of the expression "Indians"; 4) that non-treaty Indians, without reserves lands, have an even more compelling reason for benefiting from the right to hunt and fish for food; 5) that the expression "Indians of the Province" is plain and includes treaty and non-treaty Indians resident within the limits of Alberta; 6) that the broader interpretation of the expression "Indians" harmonizes with the declared object of the clause; 7) that the assurance of hunting game for food is of no less consequence to non-treaty than to treaty Indians; and finally 8) that the any intention to restrict the right to treaty Indians could have been made clear by using the words "treaty Indians of the Province." When Gray raises the issue of halfbreed hunting under the NRTA, the problem of regulating an activity with no easily identified legal definition of "Indian" was suggested. Interestingly, Edwards does not respond to this problem. He does not rule out Metis hunting under NRTA and he does not agree that this case would confound his analysis. Because Edwards eliminates both treaties and the *Indian Act* as references to the scope of Indian hunting provision of NRTA, he provides an unprecedentedly general definition for the scope of Indian hunting rights.

Other historical records describe a context that supports Edwards's opinion that no intention of restricting the NRTA right to treaty Indians existed. The final wording of the Indian hunting rights clause of the resource agreements can be traced back to mid-December 1929. A typeset draft of the agreement between Manitoba and Canada (12 December 1929) stated:

> 15. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any lands to which the said Indians may have a right of access.[23]

The same wording is found in a typeset version of the Alberta agreement of 14 December 1929.[24] This draft is identical to the wording used in the final

agreements and the statutes. These draft versions of the agreement indicate that by mid-December 1929 a final version of the wording on Indian resource rights was available. Thus, the agreement was made in 1929, but was enacted in 1930.

However, the wording of this agreement is significantly different from the hunting rights clause in a previous agreement. On 9 January 1926 the province of Alberta and the Dominion of Canada had reached an agreement for the transfer of lands. With respect to Indian hunting, paragraph 9 of this agreement stated:

> 9. To all Indians who may be entitled to the benefit of any treaty between the Crown and any band or bands of Indians, whereby such Indians surrendered to the Crown any lands now included with the boundaries of the Province, the Province hereby assures the right to hunt and fish on all the unoccupied Crown lands administered by the Province hereunder as fully and freely as such Indians might have been permitted to so hunt and fish if the said land continued to be administered by the Government of Canada.[25]

A copy of this agreement was scheduled with a House of Commons unnumbered bill titled "An Act respecting the Public Lands in the Province of Alberta." The agreement of 9 January with Alberta was tabled in the House of Commons by Minister of the Interior Charles Stewart on 26 January 1926.[26] This bill was prepared for a first reading in March 1926.[27] In terms of legal and political negotiations, the 1926 agreement advanced a reasonable distance.[28] The agreement was also presented to the Alberta legislature; however, Alberta altered some of the wording of the 9 January 1926 agreement by making changes to the school lands clause.[29] In the House of Commons, the bill remained on the order paper and the substance of the bill was not debated again. The inability to enact the Alberta agreement and to transfer the resources as promised in the throne speech caused the opposition to move a non-confidence motion on 15 June 1926.[30] Nonetheless, the 1926 Alberta agreement is an important document in the history of the transfer of natural resources.

Significant changes occurred between the 9 January 1926 version of Indian hunting rights and the 14 December 1929 version. For example, the 1929 version included trapping. The expression "for food" was stipulated. Also, Indian hunting could not be restricted through closed seasons since the wording "at all seasons of the year" was included. The issue of Dominion and provincial jurisdiction over Indian hunting is stated differently. However, a most significant change in the meaning of "Indian" occurred. The 1929 version, which became the wording in the subsequent Imperial, Dominion

and provincial acts provided a general reference to Indian. The 1926 definition of "Indian" had identified a much narrower population. In essence, the definition in the 1926 draft agreement is a treaty Indian: "Indians who may be entitled to the benefit of any treaty between the Crown and any band or bands of Indians, whereby such Indians surrendered to the Crown any lands." Although inelegant, the references to treaties with the Crown, land surrenders to the Crown, and bands are all terms pertinent to the definition of a treaty Indian. So, in terms of the evolution of these agreements, the definition of "Indian" with respect to Indian resource rights was limited to treaty Indians in the 1926 agreement. We can appreciate that sometime between 9 January 1926 and 12 December 1929, the wording concerning Indian hunting rights changed and took on additional dimensions. Moreover, W. Stuart Edwards's statement that the two governments knew the difference between treaty and non-treaty Indians is borne out. In 1926, the definition of "treaty Indian" had been adopted by Alberta and Canada for the purposes of Indian hunting rights.

Although the 1926 agreement did not come into effect, it provided the basis for many of the terms of the final agreement with respect to trusts and obligations arising from the manner in which the Dominion government had alienated lands in the three prairie provinces. Manitoba opposed the 1926 agreement between Alberta and the Dominion because it was fundamentally opposed to the approach to compensation. Nonetheless, the connection between the 1926 and 1930 agreements is indisputable. The 1926 agreement provided a framework for lands, trusts and obligations. A memorandum of an interview on 27 August 1929 between Manitoba representatives (D.C. McKenzie and R.W. Craig) and Dominion officials (Minister of the Interior Charles Stuart and Acting Deputy Minister Roy A. Gibson) recorded that:

> It was generally agreed that following the basis of the award of the Manitoba Resources Commission, the balance of the terms of the agreement would be along the lines of the agreement signed by the Province of Alberta in January, 1926, insofar as these terms are applicable.[31]

Also at this meeting, clause 9 of the 1926 agreement, concerning Indian hunting, was specifically agreed to by Dominion and Manitoba representatives. Clearly, the 1926 agreement between Alberta and Canada was a significant draft document that led up to the 1930 agreement, which affected the transfer of resources. The final 1929 agreement and the 1926 agreement between Alberta and Canada are linked. The 1929 negotiations between the Dominion and provinces were conducted through the 1926 agreement.

From other typeset drafts of the Manitoba agreement, it is clear that the Indian resource rights wording of the 1926 Alberta agreement were under consideration during the period of active negotiations late in 1929.[32] However, a sixth proof of the agreement (12 December 1929) indicates the change in wording from the 1926 agreement to the final wording used by the 1930 agreement. Therefore, the draft agreements for Alberta and Manitoba indicate that the 1926 wording of the Indian hunting provision was changed no later than mid-December 1929. The wording of the Indian hunting rights in NRTA was consciously changed between October 1929 and mid-December 1929.[33] The references to treaties, land surrenders and bands were dropped. The changes in text between these two agreements indicate that the population benefiting from hunting provision was broadened in 1929.

With respect to the meaning of "Indian" in clause 12 of NRTA, the reconstruction of this chain of documents supports the legal opinions of W. Stuart Edwards of 30 August and 7 November 1933 (Documents 4 and 6). His 1933 interpretation of the 1930 agreement was not a distant retrospect on the intentions of those who had drafted the Indian hunting rights provision in 1929. In fact, Edwards had been deputy minister of justice since September 1924.[34] He had held the position of deputy minister contemporary with the negotiations leading up to the drafting of the agreements. A telegram (25 September 1929) from W. Stuart Edwards to R.W. Craig, Manitoba's legal representative, indicates that the deputy minister of justice was involved in the fashioning of the 1929 agreement.[35]

The legal opinions provided by Edwards and the documents which pinpoint the changes in the definition of Indian for the hunting provision constitute important extrinsic evidence. Research can establish a context; vital historical facts can provide an alternative to attempting retrospective interpretations of text that is not at all plain. In *R.* v. *Sioui*, the Supreme Court relied on extrinsic evidence to determine whether or not a document signed by General Murray in 1760 was, in fact, a valid treaty within the meaning of Section 88 of the *Indian Act*.[36] Lamer J. noted that "The documents I cite all enable the Court, in my view, to identify more accurately the historical context essential to the resolution of this case."[37] If the hunting rights provision of the NRTA is not restricted to just treaty Indians, then the current thinking on this issue might need to be reconsidered. Such a finding has implications for research and litigation strategies.

In some of the leading texts or common authorities on the law and Aboriginal people, the Natural Resources Transfer Agreement has not made

an appearance or has been handled in a laconic and formalistic manner. The NRTA received no attention in Shin Imai, Katherine Logan and Gary Stein, *Aboriginal Law Handbook*.[38] Thus, their discussion of the source of hunting, fishing and trapping rights is rather incomplete, and the important issues raised in *Horseman* were relegated to a few crude generalizations in the footnotes. (Despite the fact that this judgment has some important implications for commercial treaty rights in the Treaty 9 territory, *Aboriginal Law Handbook* did not take note.) *Consolidated Native Law Statues, Regulations and Treaties: 1994* also completely omitted the Natural Resource Transfer Agreements.[39] Cumming and Mickenberg in *Native Rights in Canada* referred to the NRTA in the context of Native hunting rights and provide a useful discussion and analysis of early cases concerning the right of access and provincial legislative attempts to modify this hunting right.[40] The legal literature on the provisions of paragraph 12 of the NRTA is often limited to reproducing cases in which particular interpretations have been made. Zlotkin considered the effect of the *Constitution Act, 1930* on treaty hunting and fishing rights by selecting judicial interpretations of federal and provincial laws.[41] In *Aboriginal Law: Cases, Materials And Commentary*, Thomas Isaac selected part of the *Horseman* judgment and briefly traced several judicial interpretations concerning NRTA hunting rights.[42] Nonetheless, NRTA has not generated the same level of legal and historical analysis as the Royal Proclamation of 1763 or treaties. Most discussions have stuck very close to the case law and have not exhibited scholarly inquiry.

In *Native Law*, Jack Woodward provided a clear explanation of parts of the hunting provision by examining the failure of provincial governments to limit the agreement, the right of access and the definition of Indians within the boundaries of the province. Woodward succinctly explained the Court's interpretation of paragraph 12 of NRTA and treaty rights:

> The agreements effectively merged and consolidated the treaty rights of the Indians in the area and restricted the power of the provinces to regulate the Indians' right to hunt for food. This brought about two important differences in the rights themselves. Under the treaties, hunting rights were general; under the agreements, hunting has been restricted to hunting for food. Under treaties, hunting rights were restricted to the tract of the land surrendered by the treaty; under the agreements, hunting rights were expanded to the whole area of the prairie provinces.[43]

Courts, as Woodward and others have reported, have accepted the view that

the drafters of NRTA intended to merge and consolidate treaty hunting rights in the provinces of Manitoba, Saskatchewan and Alberta. According to this analysis, the right to hunt has been extended beyond specific treaty territory boundaries.

An interesting consideration of the hunting rights provision of the NRTA is Kent McNeil's 1983 analysis in *Indian Hunting, Trapping And Fishing Rights in the Prairie Provinces of Canada*.[44] He explored the meaning of the "game laws paragraph" by considering the reported cases that have interpreted paragraph 12 with respect to impact on jurisdiction, the definitions of "Indians of the Province," its non-effect with respect to fisheries and the rights of access to lands for hunting. Most significantly, he considered several cases that dealt with the definition of "Indian" in paragraph 12 of the agreement and found that those decisions "failed to deal adequately with the constitutional issue raised by the interpretation of 'Indians' in the game laws paragraph."[45] His discussion of *Laprise*, in which a non-treaty Indian, after hunting barren-ground caribou, attempted to use paragraph 12 of the NRTA to assert a hunting right, is a useful analysis of the problems interpretation without the benefit of historical records.[46] McNeil also quoted at length Edwards's 1933 correspondence to the department of Indian affairs concerning the definition of "Indians." He did not identify these records as legal opinions; nonetheless, Edwards's correspondence led McNeil to reflect on the decisions concerning the scope of the right: "It is therefore respectfully suggested that these decisions should not be taken as authority for the proposition that the term 'Indians' in the game laws paragraph means treaty Indians."[47] Additionally, McNeil, in contrast to some court decisions, did not consider the *Indian Act* of 1927 to be the source for a definition of "Indian" in the NRTA, but that

> The fact that the term "Indians" is not defined, and the fact that it appears in a document which has constitutional force, leads to the conclusion that it has the same meaning as that term in the original *Constitutional Act*. It is a principle of statutory interpretation that where the same term is used more than once in the same statute it is to be given the same meaning unless there is sufficient reason for assigning it another meaning. It is submitted that the same principle should apply to the different documents making up the Constitution of Canada. Since there are no compelling reasons for assigning the 1927 *Indian Act* definitions to the term "Indians" in the game laws paragraph, it is concluded that the term bears the same meaning as "Indians" in section 91(24).[48]

Thus, McNeil completes the argument made by W. Stuart Edwards by arguing that "Indians of the Province" means the definition of "Indian" from section 91(24) of the *Constitution Act, 1867*. Regrettably, little note has been taken of McNeil's argument.

The contemporary concern about the scope of commercial treaty rights has become related to the problem of determining the meaning of "Indians of the Province" in paragraph 12 of the NRTA. In *R.* v. *Horseman*, the proposition that treaty Indians can exercise commercial hunting rights was considered by the Supreme Court of Canada.[49] The appellant, Bert Horseman, a treaty Indian from the Treaty 8 area, had killed a grizzly bear in self-defence, but had later sold the hide after obtaining a bear licence. He was convicted of unlawfully trafficking in wildlife, contrary to section 42 of the *Wildlife Act* of Alberta.[50] The Supreme Court identified the pertinent constitutional question as, "In particular, were the hunting rights granted by Treaty 8 of 1899 extinguished, reduced or modified by paragraph 12 of the Natural Resources Transfer Agreement, as confirmed by the *Constitution Act, 1930*?"[51] Given the ambiguity of paragraph 12 of the NRTA, this question could be answered by developing an argument deriving from the existing judicial interpretations or new historical evidence could have been sought. The Court was not unified in *Horseman*. Cory J. wrote the judgment in which Lamer, La Forest and Gonthier JJ. concurred, but Wilson J. wrote a lengthy dissent.

In *Horseman*, based largely on Ray's evidence (see Arthur J. Ray, "Commentary on the Economic History of the Treaty 8 Area," in this issue of *NSR*), the Supreme Court agreed that Treaty 8 included commercial hunting rights.[52] In 1899, when Treaty 8 was signed, the "usual vocation" of Indians included commercial activities. The enthusiasm in which the entire Court embraced the historical reality of commercial hunting indicates that the information and argument was novel. However, in the majority decision the Court accepted the argument that paragraph 12 of NRTA had merged and consolidated the original treaty rights in a manner such that the original commercial hunting rights no longer existed. The argument that a hunting right had merged and consolidated was supported by a long legacy of judicial interpretations arising out disputes concerning paragraph 12 of the NRTA.[53] Thus, the Court found the evidence concerning a commercial hunting right persuasive; nonetheless, the majority judgment found that such a right had ceased to exist because of the Natural Resources Transfer Agreement of 1930.

In the majority decision in *Horseman*, the merger and consolidation

explanation for the hunting rights paragraph of NRTA was expanded. Cory J. argued:

> In addition, there was in fact a *quid pro quo* granted by the Crown for the reduction in the hunting right. Although the Agreement did take away the right to hunting commercially, the nature of the right to hunt for food was substantially enlarged. The geographically areas in which the Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. For example, they may hunt deer with night lights and with dogs, methods which are or may be prohibited for others. Nor are the Indians subject to seasonal limitations as are all other hunters. That is to say, they can hunt ducks and geese in the spring as well as the fall, just as they may hunt deer at any time of the year. Indians are not limited with regard to the type of game they may kill. That is to say, while others may be restricted as to the species or sex of the game they may kill, the Indians may kill for food both does and bucks; cock pheasants and hen pheasants; drakes and hen ducks. It can be seen that the *quid pro quo* was substantial. Both the area of hunting and the way in which hunting could be conducted was extended and removed from the jurisdiction of provincial governments.[54]

Thus, in this "something for something" arrangement, the federal Crown extinguished a commercial hunting right but expanded the potential of Indian hunting by explicitly restricting provincial regulation of Indian hunting.

In *Horseman*, the authority to modify the treaty was linked to the *quid pro quo* thesis.

> It is thus apparent that although the Transfer Agreement modified the treaty rights as to hunting, there was a very real *quid pro quo* which extended the native rights to hunt for food. In addition, although it might be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the native peoples affected, nonetheless the power of the federal government to unilaterally make such a modification is unquestioned and has not been challenged in this case.[55]

The court reasoned that a *quid pro quo* had been created in 1930; the right to commercial hunting had been exchanged for larger hunting rights. In terms of the historical evolution of judicial interpretations, first treaty

rights were merged and consolidated with NRTA; and then with *Horseman*, having to confront commercial rights, the Supreme Court found that a *quid pro quo* was added to the already merged and consolidated treaty rights.

In *Horseman*, the Court provided an important judgment on the issue of treaty hunting rights in the prairie provinces, in direct answer to the constitutional question concerning the NRTA extinguishment, reduction or modification of the hunting rights "granted" by Treaty 8, the Court decided:

> In summary, the hunting rights granted by the 1899 Treaty were not unlimited. Rather they were subject to governmental regulation. The 1930 Agreement widened the hunting territory and the means by which the Indians could hunt for food thus providing a real *quid pro quo* for the reduction in the right to hunt for purposes of commerce granted by the Treaty of 1899. The right of the federal government to act unilaterally in that manner is unquestioned. I therefore conclude that the 1930 Transfer Agreement did alter the nature of the hunting rights originally guaranteed by Treaty 8.[56]

As a result, the *quid pro quo* of 1930 has become central to the argument that paragraph 12 of the NRTA merges and consolidates treaty hunting rights in Manitoba, Saskatchewan and Alberta.

In *Horseman* the Supreme Court divided—Justice Wilson wrote a dissenting view.[57] This argument appreciated the oral evidence concerning the meaning of Treaty 8 and the problem of attempting to distinguish between commercial and subsistence hunting. Wilson J. incorporated evidence from several historical studies of Treaty 8 and carefully laid out the interpretative principles that courts have applied to Indian treaties. The principle of the need for a fair, large and liberal construction in the Indians' favour was stated. The dissent noted that courts "must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time."[58] Wilson drew from the existing judicial interpretations with respect to the merger and consolidation of the original treaty rights by arguing that paragraph 12 of the NRTA was "an attempt to respect the solemn engagement embodied in Treaty 8, not as an attempt to abrogate or derogate from that treaty."[59] Consequently, paragraph 12 granted the province the power to regulate sport and commercial hunting, but not reduce the traditional right to hunt for support and subsistence. Wilson pointed out that "The respondent in this appeal [Province of Alberta] has not pointed to any historical evidence in support of its claim that para. 12 of the Transfer Agreement was intended to limit the Indians' traditional right to hunt and fish (which included a right of exchange) to one confined to hunting and

fishing for personal consumption only."[60] With respect to the scope of the use of the expression "for food" the dissent cautioned that "it seems to me that we should be very reluctant to accept any reading of the term 'for food' that would constitute a profound inroad into the ability of Treaty 8 Indians to engage in the traditional way of life which they believed had been secured to them by the treaty."[61] This dissent also suggested that provinces did not have the right to regulate Indian hunting, which would have the effect of negating the "gains" acquired by the agreement. In *Horseman*, Wilson summarized:

> But in my view the historical evidence suggests both that the Indians had been guaranteed the right to hunt for their support and subsistence in the manner that they wished for some four decades before the Transfer Agreement was ratified and that it is doubtful whether the provinces were ever in a legitimate constitutional position to regulate that form of hunting prior to the Transfer Agreement. As a result, I have difficulty in accepting my colleague's conclusion that the Transfer Agreement involved some sort of expansion of these hunting rights. Moreover, it seems to me somewhat disingenuous to attempt to justify any unilateral "cutting down of hunting rights" by the use of terminology connoting a reciprocal process in which contracting parties engage in a mutual exchange of promises. Be that as it may, I see no evidence at all that the federal government intended to renege in any way from the solemn engagement embodied in Treaty 8.[62]

The dissent thus challenged the *quid pro quo* argument by seeking historical evidence for such an intention and by questioning unilateral nature of what had been constructed, by inference, as a contract of mutual exchange.[63]

While Wilson J. provided an alternative interpretation of paragraph 12 of NRTA, one which made more use of historical evidence and which drew extensively upon judicial interpretations concerning various features of the Indian hunting rights paragraph of NRTA, the dissent shared the premise of the majority decision that paragraph 12 of NRTA dealt exclusively with treaty rights. The idea that rights were merged and consolidated was not reconsidered. Wilson's dissent raised important questions about the lack of evidence concerning the federal government's intent to alter a treaty when the agreement was drafted. Nonetheless, the point about the lack of evidence concerning the intentions of the federal government applies to both interpretations in *Horseman*. The argument that paragraph 12 of the NRTA is a solemn commitment to treaties is reasonable as a presupposition, but with no explicit evidence of the government's intention, it cannot be

accepted as a final conclusion.[64] Such evidence is lacking because paragraph 12 of the NRTA is not a treaty right.

Even if one were to accept as an assumption that paragraph 12 of the agreement concerns treaty hunting rights, a number of problems confound the interpretations found in *Horseman*. The conclusion that rights were merged, consolidated and modified does not stand up to external verification on a practical level. While all the justices in *Horseman* accepted the existence of Indian commercial hunting in 1899, the Court did not explain how the situation had changed so that in 1929 the traditional economy was no longer in need of cash. Or, alternatively, an explanation is required to justify how the modification of hunting rights would have compensated for the loss for commercial income required by the traditional economy. In all likelihood, the need for cash was greater in 1929 than in 1899; and if the federal government intended to cut down the commercial hunting right, then there also must have been a recognition on its part to provide cash subsidies.[65] Although there may not have been an explicit recognition of commercial hunting rights in 1929, as a special category of right, policy makers were aware that the traditional economy required cash. Thus, the Court grasped the historical context of 1899, but did not consider what the traditional economy required in 1929, or how those needs could have been disregarded by the Crown in 1929. If the commercial right was cut down, then from where was this cash going to come? The limitation of provincial regulation would not have had the effect of generating cash for the traditional economy. Again there was a serious need to consider the nature of the Native economy at the time of the agreements. The Court had considered the historical context of the Native economy in 1899, but not in 1929. While the theoretical *quid pro quo* may appear to be substantial in 1990, did the loss of a commercial right constitute a fair exchange in 1929?

Several other internal and external reasons make it difficult to confirm the thesis that commercial rights were modified in 1929 through merger, consolidation and modification. The term "trapping," which clearly involves a commercial dimension, was consciously added to the 1929 agreement. In 1929, and for some two centuries prior, the term "trapping" connoted an involvement in the production of furs for exchange. Trapping "for food" would have been within the scope of the traditional economy. The conscious inclusion of trapping with the intention to cut down a commercial treaty right would be contradictory. Furthermore, the written versions of Treaties 1 and 2 did not provide for hunting rights, which surely complicates the intentions of the drafters of the Manitoba agreement. For a *quid pro quo* to really come into existence, policy makers would have had to have been attempting to merge, consolidate and modify unwritten treaty rights in

1929. Added to the absence of historical evidence supporting the *quid pro quo* thesis is the problem that the exchange of a commercial hunting right for an enlarged hunting does not stand up to practical scrutiny.

The missing premise in this judgment is the assumption that the expression "Indians of the Province" in NRTA means exclusively treaty Indians. It would be difficult to argue that the original treaty rights were merged, consolidated and modified with the creation of paragraph 12 if the expression "Indians of the Province" included a category of Indians that were not treaty Indians. The idea that a *quid pro quo* was consummated in 1929 would also seems to require some discernible historical evidence or an historical context. In my examination of federal and provincial archival records, I have yet to find evidence that an intention to modify treaty rights existed. Moreover, the existence of a *quid* in this equation requires that a commercial treaty hunting right was recognized by policy makers when the agreement was being negotiated and drafted. This does not seem to be the case, and the consideration or recognition of this dimension of treaty rights develops after 1930. Only as a result of oral history and recent archival research has the commercial aspect of the traditional economy, existing at the time of treaty negotiations, been revealed. If commercial rights were not appreciated or recognized in 1929, then there is no *quid*, and without a *quid*, there is no *quid pro quo*. Put simply, commercial hunting rights could not have been given up for merged and consolidated rights unless the right to hunt commercially was recognized by the drafters of the NRTA during the 1929 negotiations. If a *quid pro quo* was not created in 1929, then Wilson's argument that the intention to recognize treaty rights in the NRTA becomes the more plausible interpretation stemming form *Horseman*. Still, this interpretation could only be sustained by setting aside the historical context of the 1926 and 1929 negotiations and the legal opinions of W. Stuart Edwards. The absence of historical records documenting an intention to merge and consolidate treaty Indian hunting rights is consistent with the interpretation that the expression "Indians of the Province" identifies a much larger group of Aboriginal people than the category "treaty" Indians.

In situations affecting the rights of Aboriginal people in which courts are grappling with potentially ambiguous wording, the need for research on legislative intent is clear. The legal opinions of the deputy minister of the department of justice, W. Stuart Edwards, and the historical records concerning the development of the agreement provide valuable sources with respect to the interpretations of paragraph 12 of the Natural Resources Transfer Agreement. Figure 1 provides an easy-to-comprehend visual summary of the essential drafts of the Indian hunting rights clause. Treaty

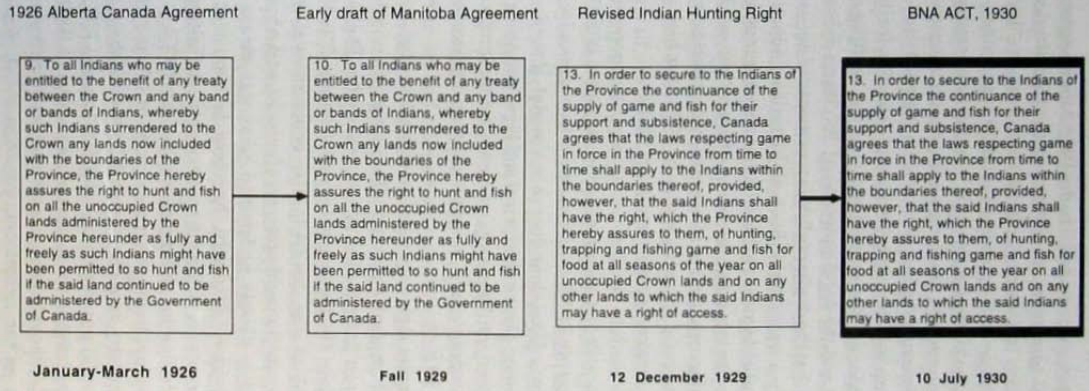

Figure 1. The Drafting of the Indian Hunting Rights Clause of the Natural Resources Transfer Agreement, 1930

Indian hunting rights were considered in the 1926 Alberta agreement, but by the time of the 1930 agreement, confirmed by the *Constitution Act, 1930*, references to treaties had been dropped in favour of "Indians of the Province." While the overall agreement of 1929 was framed by the 1926 Alberta agreement, the hunting rights provisions were altered qualitatively. The 1933 legal opinions of W. Stuart Edwards provide a reasoned argument for rejecting a restriction of the Indian hunting rights provision to just treaty Indians. Edwards proposed an ordinary or natural definition for the expression "Indians of the Province." The reconstruction of the drafting of the NRTA from 1926 to 1930 and the legal opinions of W. Stuart Edwards provide historical evidence that the drafters of the agreement did not, with clear and plain intent, modify a treaty right. Such an historical inductive approach seems to be a more reliable means to identify legislative intent. In *Horseman*, a deductive tendency to telescope the axiom of a *quid pro quo* back to 1930 seems to be unsatisfactory. And in *Horseman*, the underlying logic is that the Supreme Court could perceive rights in 1990 that had already been derogated by policy makers some sixty years earlier.

Future research needs to break down the thesis that paragraph 12 of the NRTA merged, consolidated and modified treaty rights into clear research questions concerning intent. What sort of extrinsic evidence is relevant? The analytical reasoning in *Sioui* should serve as a model. If the Supreme Court can successfully pursue a line of historical and legal reasoning with respect to a 230 year old, and until recently, somewhat obscure document, then surely the same process could be applied to an agreement negotiated between 1926 and 1929.[66]

The NRTA hunting rights are not a mere legal vestige, brought to life by litigation of Aboriginal claimants. These rights are relevant to the contemporary interest in treaty and Aboriginal rights. The *Saskatchewan Fisheries Regulations, 1995*, now employs a definition of "Indian" deriving from paragraph 12 of the NRTA.[67] The constitutional status of the agreement and the constitutional protection for treaty and Aboriginal rights will ensure a need to clearly understand what was meant by the term "Indians of the Province." Similarly, the recent decision in *R.* v. *Ferguson* indicates that the courts are willing to reconsider the definition of "Indian" for the purpose of the hunting rights paragraph of the NRTA.[68] Ernest Frank Ferguson, an individual living the Indian mode of life and of mixed non-treaty and Métis ancestry, was charged with hunting without a licence and with being in unlawful possession of wildlife. Goodson P.C.J. found that "the hunting rights clause in the Agreement refers to all 'Indians' not just 'treaty Indians'."[69] Although the court admitted documents pertaining to the legislative history of the agreement, Goodson P.C.J. decided that the

correspondence between Canada and Alberta, including the opinions of W. Stuart Edwards, "should receive little or no weight since the correspondence occurs after the passing of the legislation."[70] While this may have been the first time a court was in a situation to consider the legislative history of the NRTA, it may not have had a full appreciation of the historical context or an understanding of the position that W. Stuart Edwards held between the draft legislation of 1926 and the 1933 legal opinions. Whether or not courts ever give any weight to Edwards's opinions, these documents remain important records in Native history. The fact that the Alberta attorney general's office raised this question so soon after the enactment of the agreement demonstrates that some ambiguity existed. Moreover, the fact that this legal issue was directed to the department of justice in 1933 indicates that Edwards, as deputy minister of justice, had expertise in this area of governance. For the purposes of understanding the legal history of treaty and Aboriginal rights, Edwards's authority to interpret legislative intent for the purposes of contemporary courts can be separated from the facts and logic of his 1933 arguments. Irrespective of the authority of the source, these arguments are cogent.

Paragraph 12 of the Natural Resources Transfer Agreement was not an isolated event, so what must be borne in mind is that the NRTA was not the consequence of a single legislative authority acting under a clear and plain mandate to extinguish or modify a treaty or Aboriginal right. Rather, it was a product of full-blown constitutional process. The Indian hunting rights provision was not the central issue of the negotiations of 1929–30; however, a long list of trusts and obligations were involved in this constitutional process. In this sense, the historical context of the negotiations serves to remind us of the larger purpose of the agreements. If the definition of "Indian" for the hunting rights clause of the NRTA is not limited to treaty Indians, then land surrender treaties are an unlikely "source" for this right. The historical analysis stemming from the records created as a result of the agreement supports the argument made by Kent McNeil that the expression "Indians of the Province" should be interpreted from a constitutional perspective. Edwards's point that the Crown had responsibilities to Indian people (Document 4) suggests that perhaps the Dominion government acted out of some general fiduciary reasons. Certainly, at this point, Crown fiduciary duties as the source of the hunting rights provision of the NRTA is as plausible an explanation of the process as the *quid pro quo* thesis. The compilation of historical evidence thus far indicates that the government did not unilaterally modify a treaty through agreements with provinces, but may have acted on a higher constitutional authority to protect Indian hunting from the threat of provincial regulations. Is it possible that the Dominion

government, on its own, sought to protect Indian hunting from provincial regulations with the force of the constitution?

A realization that paragraph 12 of NRTA did not affect treaty rights means that the treaty hunting rights that existed, as in the case of Treaty 8, in 1899, are not now jeopardized. If anything, the precedent by which treaty rights could be merged, consolidated and modified, with the absence of corroborating extrinsic evidence with respect to intent, posed a more serious problem to treaty rights. The expression "Indians of the Province" of course includes treaty Indians. Consequently, treaty Indians as "Indians of the Province" would have the benefits of the NRTA and the treaties.

If the argument that the NRTA merged, consolidated and modified treaty rights does not stand up to empirical tests and logical interrogation, then the search for a fair, large and liberal interpretation of the hunting right would still benefit by the sort of economic history presented by Arthur Ray. If further historical research does not clear up the disputes concerning of paragraph 12 of the Natural Resources Transfer Agreements, perhaps the ambiguity should be resolved in favour of the "Indians of the Province." The transfer of natural resources was a long, drawn-out constitutional wrangle, intermeshed with regional politics and the federal/provincial jurisdictional disputes, but the search for a satisfactory understanding of the Indian hunting rights provision is proving to be an even more enduring feature of Canadian confederation.

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Notes

1 In the Alberta and Saskatchewan agreements, the Indian hunting right is found in paragraph 12, whereas the same wording is found in paragraph 13 in the Manitoba agreement. Three Memorandums of Agreement were made: 1) Dominion of Canada and the Province of Manitoba (14 December 1929); 2) Dominion of Canada and the Province of Alberta (14 December 1929); and 3) Dominion of Canada and Province of Saskatchewan (20 March 1930). By convention, these agreements are referred to as the Natural Resources Transfer Agreement, 1930. The content of these agreements are very similar. The sections of the agreements are usually referred to as paragraphs or clauses. These agreements were enacted at the provincial, federal and Imperial levels. See *The Manitoba Natural Resources Act*, S.M. 1930, c. 30 [assented to 19

February 1930]; *The Alberta Natural Resources Act*, S.A. 1930, c. 21 [assented to 3 April 1930]; *The Saskatchewan Natural Resources Act*, S.S. 1930, c. 87 [assented to 10 April 1930]; *The Alberta Natural Resources Act*, S.C. 1930, c. 3; *The Manitoba Natural Resources Act*, S.C. 1930, c. 29; *The Saskatchewan Natural Resources Act*, S.C. 1930, c. 41 [all assented to on 30 May 1930]; and the *British North America Act, 1930* (U.K.), c. 26 [assented to 10 July 1930]. The long title of the Imperial statute is "An Act to confirm and give effect to certain agreements entered into between the Governments of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan respectively." The agreement with British Columbia involved the railroad lands that had been administered by the department of the interior. The *British North America Act, 1930* has been retitled the *Constitution Act, 1930*.

2 Provincial Archives of Manitoba, public records of the Ministry of Natural Resources, RG 17, A1 file 2, Scott, Roblin, Sifton to Borden, (ca 22 December 1913) (hereafter PAM, RG 17).

3 The creation of the provinces of Alberta and Saskatchewan and the northward extension of Manitoba borders in 1912 had established, in perpetuity, per capita grants from the Dominion government in lieu of natural resources. In 1913 the western provinces were seeking the transfer of natural resources and continuation of the per capita grants. At this time, the Dominion government was still concerned that provincial control over natural resources might affect homestead policies and a continued flow of immigration.

4 PAM, RG 17, A1 file 2, Copy of Memorandum quoted, Meighen to Norris (24 December 1920).

5 PAM, RG 17, A1 file 2, Norris to Meighen (10 March 1921).

6 Meighen was not quick to agree to compensation based on a fiduciary principle because this could make the Dominion government responsible for moneys that it should have received and not just what it actually received. He suggested that this could mean that Canada would be responsible for the sale value of homestead lands. Homestead lands were not sold and were essentially free. Such a land policy was designed to encourage immigration and settlement. Thus, the Dominion had not collected revenue from the agricultural lands at anywhere near the theoretical value of the homestead lands.

7 PAM, RG 17, A1 file 2, Mackenzie King to Norris (20 February 1922).

8 Canada, *House of Commons Debates*, 1922, vol. 2, (Ottawa: F.A. Acland, King's Printer, 1922) pp. 1017–18.

9 PAM, RG 17, A1 file 2, Bracken to Mackenzie King (13 January 1927). See also *House of Commons Debates*, 1929, vol. 1, p. 35.

10 Privy Council, Order in Council 1258 (1 August 1928), found in Hon. W.F.A. Turgeon, Chairman, Hon. T.A. Crerar and Charles M. Bowman, Esq., *Report of the Royal Commission on the Transfer of the Natural Resources of Manitoba* (Ottawa: F.A. Acland, King's Printer, 1929), p. 5 (hereafter *Turgeon Report*). Turgeon was a Justice of the Saskatchewan Court of Appeals and former attorney general of Saskatchewan. Crerar had been leader of the Progressive Party and a cabinet minister in the union government. Bowman was chairman of the board of Mutual Life Assurance Company of Canada. See J.D. Mochoruk, "The Political Economy of Northern Development: Governments and Capital Among Manitoba's Resource Frontier, 1870–1930," (Ph.D. dissertation, University of Manitoba, 1992), p. 514.

11 See Hon. A.K. Dysart, Hon. T.M. Tweedie and George C. McDonald, *Report of the Royal Commission on the Natural Resources of Alberta* (Ottawa: J.O. Patenaude, King's Printer, 1935). The Royal Commission for Saskatchewan Resources included: Hon. A.K. Dysart, Hon. H.V. Bigelow and George C. MacDonald. Oliver Master served as secretary for these commissions.

12 *Turgeon Report*, p. 5.

13 *Turgeon Report*, p. 5.

14 *Turgeon Report*, p. 39.

15 *Turgeon Report*, p. 45.

16 Mochoruk, pp. 516–517.

17 Mochoruk has suggested that at least $200 million would be owed to Manitoba for the loss of land, timber and mineral resources had the fiduciary principle been used to determine compensation, see Mochoruk, pp. 528–529.

18 National Archives of Canada, public records of the Department of Justice, RG 13, file 198/31 (hereafter NAC, RG 13).

19 Provincial jurisdiction over game is deemed to stem from section 92 (13), "Property and Civil Rights," and 92 (16), "Matters of a merely local or private Nature" of the *Constitution Act, 1867*, whereas 91 (24) of the *Constitution Act, 1867* gives Parliament exclusive jurisdiction over "Indians, and Lands reserved for the Indians."

20 Material from a hunting rights file has been severed on the grounds of solicitor-client privilege. Sometime copies of the justice department legal opinions relating to Indian issues will end up in Indian Affairs files.

21 See D.N. Sprague, "The Manitoba Land Question, 1870–1882," *Journal of Canadian Studies* 15, no. 3 (1980): 74–84.

22 In 1935, C.P. Paxton was senior advisory counsel for the department of justice.

23 PAM, RG 17, A1 file 1, "An Agreement between the Dominion of Canada and the Province of Manitoba: On the Subject of the Transfer of the Natural Resources of Manitoba" (Ottawa: F.A. Acland, King's Printer, 1926), 6th proof of the agreement, 12 December 1929.

24 Agreement Made on the Fourteenth Day of December, 1929 between the Dominion of Canada and the Province of Alberta on the Subject of the Transfer of the Natural Resources of Alberta (Ottawa: F.A. Acland, King's Printer, 1929). Copy found in NAC, RG 22, vol. 17, file 70.

25 Agreement Made on the Ninth Day of January, 1926 between the Dominion of Canada and the Province of Alberta: On the Subject of the Transfer to the Province of Its Natural Resources (Ottawa: F.A. Acland, King's Printer, 1926). Typeset copy found in PAM, RG 17, A1, file 14.

26 *House of Commons Debates*, 1926, vol. 1, pp. 428–429.

27 The wording of the Indian hunting rights clause was identical to the agreement of 9 January 1926. Typeset copy of the proposed bill can be found in PAM, RG 17, A1, file 14.

28 On 18 March 1926, Prime Minister W. L. Mackenzie King moved that the House go into committee to consider a resolution on the transfer of resources to Alberta. *House of Commons Debates*, 1926, vol. 2, p. 1665.

29 Minister of Justice Ernest LaPointe explained this development in the House of Commons. See *House of Commons Debates*, 1926, vol. 4, pp. 3922–23, 3976–77. The issue of school lands with respect to the transfer of resources got confused with a provision of the *Alberta Act* concerning schools. The bill passed in the Alberta legislature on third reading. See *The Canadian Annual Review of Public Affairs: 1925–26* (Toronto: The Canadian Review Company, 1926), pp. 494–96.

30 *House of Commons Debates*, 1926, vol. 5, p. 4493.

31 PAM, RG 17, A1, file 1, memorandum of an interview that D.G. McKenzie and R.W. Craig, representing the province of Manitoba, had with Minister of the Interior, Chas. Stewart and Acting Deputy Minister Roy A. Gibson, 27 August 1929. This memorandum does not give the exact date of the January 1926 agreement. However, with respect to the Indian hunting provision, the wording of paragraph 12 does not change between 9 January 1926 and the agreement that was scheduled with the bill prepared for the House of Commons in March 1926. The agreement of 9 January 1926 was not an unfinished draft; see *House of Commons Debates*, 1929, vol. 1, p. 191.

32 See PAM, RG 17, A1, file 1, for evidence of a variety of drafts leading to the final agreement.

33 On 7 October 1929, W.W. Cory, deputy minister of the department of the interior, forwarded a copy of the draft agreement, which employed the 1926 wording of the Indian hunting provision, to Duncan C. Scott, Deputy Superintendent General of Indian Affairs. See NAC, public records of the Department of Indian Affairs, RG 10, vol. 6820, file 492-4-2, pt. 1.

34 W. Stuart Edwards was deputy minister of justice from the end of September 1924 to 30 September 1942.

35 The telegram informed Craig that "Interior department advises that draft agreement is being speeded up as much as possible and that you will be advised so soon as first draft has been completed." PAM, RG 17, A1, file 1. According to Mochoruk, Craig was a close friend of Crerar, connected to mining developments in northern Manitoba, a former Liberal MP and had been attorney general for Bracken. Mochoruk, pp. 515–16.

36 *R.* v. *Sioui* [1990] S.C.R. at 1025, 3 C.N.L.R. 127, 56 C.C.C. (3d) 225, 70 D.L.R. (4th) 427, 109 N.R. 22, 30 Q.A.C. 280; Sioui v. Qué [1987] 4 C.N.L.R. 118, [1987] R.J.Q. 1722, 8 Q.A.C. 189 (*sub nom.* R. c. Sioui) leave to appeal to S.C.C. granted 87 N.R. 80n. This judgment has also been published by *Native Studies Review* 6, no. 2 (1990): 151–93. The Sioui judgment is also found in Peter Kulchyski, *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: University of Toronto Press, 1994), pp. 182–211.

37 *R.* v. *Sioui* [1990] S.C.R. at 1050.

38 Shin Imai, Katherine Logan and Gary Stein, *Aboriginal Law Handbook* (Toronto: Carswell Thomas Publishing, 1993).

39 *Consolidated Native Law Statutes, Regulations and Treaties: 1994* (Toronto: Carswell Thomson Professional Publishing, 1993).

40 Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada* 2nd. ed. (Toronto: General Publishing, 1972), pp. 211–14.

41 Norman K. Zlotkin, "Post-Confederation Treaties," in *Aboriginal Peoples and the Law*, edited by Bradford W. Morris (Ottawa: Carleton University Press, 1985), pp. 356–97.

42 Thomas Isaac, *Aboriginal Law: Cases, Materials, and Commentary* (Saskatoon: Purich Publishing, 1995), pp. 141–52, 237–38. Isaac did not take note of the problem of the definition of "Indian" in the NRTA.

43 Jack Woodward, *Native Law* (Toronto: Carswell, 1989), p. 319.

44 Kent McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 1983).

45 McNeil, p. 26.

46 *R.* v. *Laprise*, [1978] 6 W.W.R. 85, [1978] C.N.L.B. (No. 4) 118, (Sask. C.A).

47 McNeil, p. 28. He used Indian Affairs copies of the Edwards correspondence and not the department of justice file.

48 McNeil, p. 29. On the matter of the term "Indian" in 91(24) see Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867," *Saskatchewan Law Review* 43 (1978–79): 37–80.

49 *R.* v. *Horseman*, [1990] 1 S.C.R. 901, 3 C.N.L.R. 95, 73 Alta. L.R. (2d) 193, 55 C.C.C. (3d) 353, 108 A.R. 1, 108 N.R. 1, reversing [1987] 5 W.W.R. 454, 53 Alta. L.R. (2d) 146, 4 C.N.L.R. 99, 78 A.R. 351, affirming [1986] 2 C.N.L.R. 94, 69 A.R. 13, which reversing [1986] 1 C.N.L.R. 79, leave to appeal S.C.C. granted [1988] 2 W.W.R. lxvii, 56 Alta. L.R. (2d) lviii, 83 A.R. 160n, 87 N.R. 72n. I have cited C.N.L.R.

50 *Wildlife Act* R.S.A., 1980, c. W-9.

51 *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 107.

52 Cory J. wrote that "An examination of the historical background leading to the negotiations for Treaty 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the treaty included hunting for commercial purposes." *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 100; and "I am in complete agreement with the finding of the trail judge that the original treaty right clearly included hunting for purposes of commerce." *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 101.

53 Cory J. wrote that "These cases dealt with the analogous problems arising from the Transfer Agreements with Manitoba and Saskatchewan which were worded in precisely the same way as the Transfer Agreement with Alberta under consideration in this case. These reasons constitute the carefully considered recent opinion of this Court. They are just as persuasive today as they were when released." *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 104. The cases referred to included *Frank* v. *The Queen*, *R.* v. *Sutherland* and *Moosehunter* v. *The Queen*.

54 *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 104. The clarification of provincial jurisdiction with respect to Indian hunting was an important development. In Ontario, the provincial government's success at derogating treaty resource rights was a long, drawn-out battle in which important questions concerning legitimate jurisdictional authority were sidestepped.

55 *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 105. It is worth noting here the use of "native" and not "treaty Indians." Not only would the political and moral climate be

problematic, but the current constitutional climate would not permit the unilateral modification to treaty rights.

56 *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 106.

57 *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 108-119; Dickson C.J. and L'Heureux-Dubé J. concurred with Wilson J.

58 *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 109.

59 *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 115.

60 *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 115.

61 *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 116.

62 *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 118.

63 If the federal/provincial context of the entire constitutional agreement is kept in mind, then the idea that the Dominion of Canada sponsored a *quid pro quo* becomes less likely. It also raises an interesting problem of what role a province could play in negotiating changes to an Indian treaty.

64 *R.* v. *Horseman*, [1990] 3 C.N.L.R. at 113. Wilson argued: "Mindful of the government of Canada's responsibilities under a series of numbered treaties with Indians, the parties to the Transfer Agreement inserted a paragraph dealing with the Indians' treaty rights to hunt, fish and trap."

65 For information on Indian incomes in this era, see Arthur J. Ray, *The Canadian Fur Trade in the Industrial Age* (Toronto: University of Toronto Press, 1990), pp. 199–221.

66 For a discussion of research and litigation strategies involving extrinsic evidence, see Franklin S. Gertler and Peter W. Hutchins, "Introduction: The Marriage of History and Law in *R.* v. *Sioui*," and their factum in the Supreme Court, *Native Studies Review* 6, no. 2 (1990), pp. 115–30, 132–50.

67 "Saskatchewan Fishery Regulations, 1995," *Canada Gazette*, Part II. Vol. 129, No. 11, pp. 1482. The new regulations state 'Indian' means an Indian within the terms of paragraph 12 of the Memorandum of Agreement, known as the Saskatchewan Natural Resources Transfer Agreement, being the agreement entered into between Canada and Saskatchewan on 20 March 1930 and confirmed by the *Constitution Act, 1930*, 20-21 Geo. V, c. 26 (U.K.). I would like to thank Clem Chartier for pointing out this source.

68 *R.* v. *Ferguson*, [1994] 1 C.N.L.R. 117 (Alta. Q.B.) affirming [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct.).

69 *R.* v. *Ferguson*, [1993] 2 C.N.L.R. at 148. This judgment also dealt with the use of the term "non-treaty Indian" under the 1927 *Indian Act*.

70 *R.* v. *Ferguson*, [1993] 2 C.N.L.R. at 150.