

## **"A Clear Intention to Effect Such a Modification"<sup>1</sup>: The NRTA and Treaty Hunting and Fishing Rights**

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*The issue of Indian hunting and fishing in the Canadian prairie provinces (Alberta, Saskatchewan, and Manitoba) is covered in two separate regulatory structures: the Indian Treaties and Section 12 of the Natural Resources Transfer Agreements. In Frank v. The Queen, [1978] 1 S.C.R. 95, Moosehunter v. The Queen, [1981] 1 S.C.R. 282, and R. v. Horseman [1990], 1 S.C.R. 901, the Supreme Court concluded that the treaty right to hunt had been merged and consolidated (at first the court used the terms extinguished and replaced) by the NRTA. This logic led the Alberta Court of Appeal to extend this provision to fishing rights in R. v. Gladue, [1996] 1 C.N.L.R. 153. The Supreme Court modified its position in R. v. Badger, [1996] 1 S.C.R. 771, concluding that the NRTA transferred the regulatory authority over the treaty right to the provinces and extinguished the treaty right to hunt commercially, but did not alter the treaty right to hunt for food within the geographic area of the treaty. In making these decisions, the Supreme Court has had to act without the benefit of historical research on the NRTA. In a 1995 issue of NSR, Frank Tough introduced a number of documents he had retrieved on the subject and called for historians to examine the historical context and the intention and purpose of the framers of section 12. This paper fills this gap in the historical literature and argues the Dominion negotiators did not intend to extinguish treaty rights through the passage of section 12 of the NRTA.*

*La question de la pêche et de la chasse chez les Autochtones dans les provinces des Prairies canadiennes (l'Alberta, la*

*Saskatchewan et le Manitoba) est considérée dans deux structures de règlements distinctes : les traités indiens et l'article 12 dans les Accords de transfert de ressources naturelles. Dans Frank c. la Reine, [1978] 1 R.C.S. 95, Moosehunter c. la Reine, [1981] 1 R.C.S. 282 et R. c. Horseman [1990], 1 R.C.S. 901, la cour suprême a conclu que le droit de chasse dans un traité avait été fusionné et intégré par les Accords de transfert de ressources naturelles (au début la Cour suprême a utilisé les termes éteints et remplacés). Cette logique a mené la cour d'appel de l'Alberta à faire passer cette clause aux droits de pêche dans R. c. Gladue, [1996] 1 R.J.A.C. 153. La Cour suprême a changé de prise de position dans R. c. Badger, [1996] 1 R.C.S. 771, en concluant que les Accords de transfert de ressources naturelles transféraient l'autorité réglementaire du droit des traités aux provinces et éteignait le droit de chasse commerciale dans les traités, mais sans changer le droit de chasser pour se nourrir dans les traités dans la zone géographique du traité. En prenant ces décisions, la Cour suprême a dû agir sans les avantages des recherches historiques sur les Accords de transfert de ressources naturelles. Dans un numéro de 1995 de Native Studies Review, Frank Tough a introduit plusieurs documents qu'il a récupérés sur le sujet et il a demandé à des historiens d'examiner le contexte historique, le but et l'intention des rédacteurs de l'article 12. Ce document comble la lacune qui existe dans la documentation historique et dit que les négociateurs du dominion n'avaient pas eu l'intention d'éteindre les droits des traités avec le passage de l'article 12 des Accords de transfert de ressources naturelles*

## Introduction: Indian Hunting and Fishing in the Prairie Provinces

The issue of Indian hunting and fishing in the Canadian prairie provinces (Alberta, Saskatchewan and Manitoba) is covered in two separate regulatory structures: the Indian treaties and section 12 of the

*Natural Resources Transfer Agreements.*<sup>2</sup> First, in the course of the treaty negotiations, Indian leaders demanded continued access to fish and game resources in return for their acceptance of the treaty. The government's negotiators accepted their demands and, as a result, specific promises were included in the text of Treaties 3 through 8. In Treaties 3, 5 and 6, the promise reads:

Her majesty further agrees with Her said Indians, that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes, by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Dominion.<sup>3</sup>

The clauses in other treaties are similar enough in intent if slightly different in implementation. In Treaties 4, 8 and 10, trapping is itemized as a protected avocation along with hunting and fishing. In Treaty 7, the Blackfoot treaty, only hunting is mentioned. In Treaty 8, "the government of the country" is substituted for "the Government of Her Dominion of Canada" as the regulatory authority. The treaty right, as it appears in the written text of the treaty, contains a geographic limitation (the tract surrendered) and is subject to regulations prepared by the federal government.

The *Natural Resources Transfer Agreements (NRTA)* corrected a longstanding grievance by Manitoba, Saskatchewan and Alberta concerning their status in Confederation. Following the acquisition of Rupert's Land from the Hudson's Bay Company in 1869, the small province of Manitoba was created, and the North-West Territories evolved slowly from "primitive colonial status under Governor and Council in 1870 to responsible government in 1897 and provincial status in 1905."<sup>4</sup> Unlike other Canadian provinces, however, the three



prairie provinces did not control lands and resources. The *Manitoba Act* (1870), the *Saskatchewan Act*, and the *Alberta Act* (1905) kept the lands and resources under federal government control "for the purposes of the Dominion." Not until 1930, with the passage of the *NRTA* by the Imperial Parliament as a schedule in the *Constitution Act* (1930), did the prairie provinces become "equal" with other provinces in the country. The transfer of control over Crown lands to the provinces meant that the issue of access by Indian peoples had to be discussed. Thus Section 12 of the *NRTA* contains a separate regulatory structure for Indian hunting, fishing and trapping rights.

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.<sup>5</sup>

The *NRTA* provides for provincial regulation of Indian hunting, and provides an expanded geographic area for Indian hunting, fishing, and trapping for food. The provisions of section 12 very quickly became entangled in the issue of treaty rights.

The Canadian courts have been active in interpreting and reconciling these two separate regulatory structures. In the legal opinion of federal government solicitors following the transfer, "section 12 does not import anything new into the relationship between the Indian and the Province but merely restates the Indian's position as already set out in the various treaties."<sup>6</sup> Early court cases provided a similar interpretation. In *R. v. Wesley*, [1932] 2 W.W.R. 337, Justice Lunney of the Alberta Supreme Court noted "the Agreement did not, nor was there any intention that it should, alter the law applicable to Indians." Similarly, in *R. v. Smith*, [1935] 2 W.W.W. 433, Justice

Turgeon suggested section 12 should be interpreted "as would establish the intention of the Crown and Legislature to maintain the rights accorded the Indians by Treaty." Historians, however, have been notably negligent in examining the historical context for the making of section 12 of the *NRTA*.

The general textbooks on Indian/White relations in Canada provide a brief introduction to the *NRTA* and its affect on Indian hunting, fishing and trapping rights, but provide no interpretive analysis, nor do they cite any sources of information for students.<sup>7</sup> New scholarly accounts of the economic and social structures of the northern areas of the prairie provinces have addressed some of the crises within Aboriginal society, partially induced by the regulatory structure considered here, but do not provide any analysis of the origin of the *NRTA* right and its conflict with the treaty right.<sup>8</sup> In the best study of the transfer of Dominion control of lands to the provinces, Chester Martin provides virtually no information on the government's intent and purpose regarding section 12.<sup>9</sup>

In 1995, historical geographer and Native Studies professor Frank Tough introduced a number of documents he had retrieved on the *NRTA* and called for historians to examine the historical context and the intention and purpose of the framers of section 12.<sup>10</sup> His call for historical investigation seems especially appropriate in light of the Supreme Court's decisions regarding treaty rights. The Supreme Court has identified three important characteristics of treaty rights and the modification of these rights. First, a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. Second, any limitations that restrict the rights of Indians under treaties must be narrowly construed. And third, there must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.<sup>11</sup> In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Supreme Court discussed the Crown's fiduciary duty to the Aboriginal peoples of Canada. The *Sparrow* decision placed limits on the power of the Crown to extinguish an aboriginal or treaty right through application of the Sparrow test.<sup>12</sup> The majority noted in *R. v. Badger*, [1996] 1 S.C.R. 771, at 778:

Any infringement of the rights guaranteed under the Treaty or the *NRTA* must be justified using the *Sparrow* test. This analysis provides a reasonable, flexible and current method of assessing the justifiability of conservation regulations and enactments. It must first be asked if there was a valid legislative objective, and if so, the analysis proceeds to a consideration of the special trust relationship and the responsibility of the government *vis-à-vis* the aboriginal people. Further questions might deal with whether the infringement was as little as was necessary to effect the objective, whether compensation was fair, and whether the aboriginal group was consulted with respect to the conservation measures.

Although the Supreme Court has thus indicated that historical context is important when examining treaty rights, its recent decisions on the *NRTA* and treaty hunting rights have not considered the historical context or the intent and purpose of the framers of section 12 of the *NRTA*.

In three decisions, made as the court enunciated the principles set out above, the Supreme Court concluded that the treaty right to hunt had been merged and consolidated (at first the court used the terms *extinguished* and *replaced*) by the *NRTA*.<sup>13</sup> In *R. v. Horseman*, [1990] 1 S.C.R. 901, the Supreme Court accepted that the treaty contained a right to hunt and fish commercially, but the majority concluded that the right to hunt commercially disappeared following the *NRTA* and, in return, the Crown extended the geographic extent of the right to hunt for food. In this manner, the Supreme Court concluded that the Crown had maintained its integrity and avoided the appearance of "sharp dealing" as noted in *Sparrow*. This logic led the Alberta court of appeal to extend this provision to fishing rights in *R. v. Gladue*, [1996] 1 C.N.L.R. 153. The Supreme Court modified its position in *R. v. Badger*, [1996] 1 S.C.R. 771. In this case, the Supreme Court concluded that the *NRTA* transferred the regulatory authority over the treaty right to the provinces and extinguished the treaty right to hunt commercially, but did not alter the treaty right to hunt for food within the geographic area of the treaty.<sup>14</sup> Although the



Supreme Court has considered the historical context for the making of the treaty in these decisions, it has not considered the historical context for the origin of section 12 of the *NRTA*. This paper seeks to provide insights into the negotiations leading to section 12 of the *NRTA* and identify the intent and purpose of the framers.

### Argument: The Intent and Purpose of Section 12 of the *NRTA*

The Dominion negotiated section 12 of the *NRTA* in the context of regulatory disputes regarding the regulation of Indian rights to hunt, fish and trap. In the period prior to the passage of the *NRTA*, the Dominion government insisted that the treaty right was subject to regulation and that nothing in the treaty was intended to mean that Indian peoples had an unrestricted right to hunt, fish or trap. The records make it clear, however, that the Department of Indian Affairs negotiated with the regulatory authorities for subsistence rights for both treaty and non-treaty Indian peoples during the pre-*NRTA* period. By 1920, the Department of Indian Affairs also recognized that the regulation of hunting and trapping, and the licensing of fishing, was within the provincial sphere of powers in those provinces that controlled their lands, but believed it could use its authority under *BNA Act* sec. 91(24) to secure special provision for Indian peoples. Conflicts with provincial authorities had emerged over this issue not only in the three prairie provinces, but also in Ontario and British Columbia, as provincial authorities sought to include Indian peoples within their regulatory regimes.

With this perspective in mind, three basic objectives of the Department of Indian Affairs can be ascertained during the negotiation of the *NRTA*. First, the department sought to provide for provincial regulation of the Indian peoples' treaty right to hunt and trap, and provincial licensing of Indian fishing rights. Second, it sought to ensure that Indian access to unoccupied Crown lands for hunting and fishing would be continued following the transfer of lands to the provincial sphere. Third, they intended to ensure that the special subsistence privileges for Indian peoples that the department had obtained in the regulatory environment would be maintained. These

three objectives remained consistent throughout the negotiations. In negotiations with Alberta leading to the 1926 agreement, the three goals were achieved by a clause providing that Indian access to unoccupied Crown lands to exercise treaty rights to hunt and fish would remain unchanged following the transfer. As the negotiations reached a climax with Manitoba in 1929, however, the third concern of the Department of Indian Affairs became the most important. This concern for the maintenance of subsistence provisions reflects the growing concerns regarding provincial regulation of Indian hunting rights and the need for a provision for Indian peoples in the Treaty 1 and Treaty 2 area where they did not have a treaty right to hunt, fish and trap. Any mention of the treaty right, in this context, would have eliminated the department's ability to protect the subsistence privileges of the Indian peoples in the Treaty 1 and Treaty 2 areas; consequently, mention of the treaty right was removed from section 12 of the *NRTA*. The Dominion government, however, did not intend to merge and consolidate the treaty right with the passage of the *NRTA*. Rather than a limitation on the practice of the treaty right by Indian peoples, the *NRTA* was intended to limit the ability of provinces to regulate Indian hunting, trapping and fishing rights.

### The Treaty Right to Hunt and Fish

The hunting and fishing clauses in the treaties did not appear randomly. Continued access to fish and game resources and the maintenance of traditional avocations, including commercial trapping and fishing practices, were an essential aspect of the treaty negotiations. During the negotiations for Treaty 6 at Fort Carlton, the assembled chiefs requested the "liberty to hunt and fish on any place as usual." They were assured by Lieutenant Governor Alexander Morris that "we did not want to take the means of living from you, you have it the same as before, only this, if a man, whether Indian or Half-Breed, had a good field of grain, you would not destroy it with your hunt."<sup>15</sup> Similar promises were heard at most of the treaty negotiations, and in her excellent study of the treaties, historian Jean Friesen notes, "at treaty time the Indians heard nothing that would cause them to question their assumption of Indian open access to resources."<sup>16</sup> The treaties thus contained the specific promise: "Indians shall have the right



to pursue their avocations of hunting and fishing throughout the tract surrendered." Indian peoples believed this promise gave them the right to continue pursuing a traditional economy. This right would include commercial and subsistence practices, since both occupied important places in the traditional economic lifestyle.<sup>17</sup>

The Indian hunting and fishing rights set out in the treaties were subject to regulation, nevertheless. Duncan Campbell Scott informed the Indian Affairs minister in 1918:

We have always held that there is no stipulation in the treaties which would give the Indians exclusive rights to hunting and fishing in the surrendered districts, or which would render them immune from the law, but we have endeavoured to obtain a lenient treatment for them.<sup>18</sup>

Both the Indians and the government, however, understood that regulation meant conservation of the resource for the continued use by Indian peoples. In the period after 1821, for example, the Hudson's Bay Company had made numerous efforts to conserve game resources, and the Indian communities of the prairies were well aware of this issue.<sup>19</sup> Moreover, by the time of the signing of Treaty 6, buffalo and fur-bearing animals had declined in numbers and needed the protection of regulations. Indeed, demands for conservation of the buffalo came from the Indians during the negotiations.<sup>20</sup> Commissioner Morris remarked that he informed the Indians the matter would be considered by the North-West Council. Similarly, several references in the records of Indian Affairs indicate that the government considered regulations designed for conservation purposes to be in the best interests of the Indians. Regulation, consequently, would conserve and protect wildlife for future exploitation. It would not inhibit access as much as improve the commercial exploitation of the resource. Regulation, it was understood, would not interfere in the pursuit of commercial or subsistence hunting and fishing practices but instead ensure their continued viability. This perspective was consistent with the explanations made during the negotiation of the treaties. In explaining the right to continue hunting and fishing in

Treaty 8, for example, David Laird noted: "that only such laws as to fishing and 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."<sup>21</sup> The sole regulatory authority specified in the treaties, however, was the government of the Dominion, and this soon became an issue of concern.

## The Regulation of Indian Hunting and Fishing

The government's interpretation of constitutional and statutory devices were essential in this regard. Under the *Constitution Act*, section 91(24), governance of Indians and lands reserved for Indians is a federal jurisdiction. This section was the basic head of power under which the treaties and any other government obligation to the Indians could be fulfilled. Perhaps just as important, under section 91(24) the Dominion had responsibility for Indians inside and outside the bounds of treaty. By the time of Confederation, Canada had developed an Indian policy focused on the principles of protection and civilization.<sup>22</sup> The basic tenet of this policy was to teach the Indian how to survive in the modern Western world and encourage them to participate within the Canadian commercial economy. The Dominion implemented this policy through the *Indian Act* and the Department of Indian Affairs. Although Indians clearly fell within Dominion government jurisdiction, Indian hunting rights were not so clearly defined.

Neither hunting nor game are itemized in sections 91 or 92 of the *Constitution Act*. It soon became clear, however, that the power to regulate game fell to the provinces. Regulation of hunting and trapping according to the decision in *R. v. Robertson* [1886] 3 Man R. 613 fell within the bounds of section 92(13) — "matters of a local concern" — and section 92(16) — "civil and property rights" — of the *Constitution Act*. In his decision, Justice Killam at page 616 noted that two issues led to this conclusion:

One is that the Provincial Legislatures have, from the very inception of the Union, assumed to enact laws of the nature of the game protection clauses in question, while the Do-

minion Parliament has never attempted to do so, and the right of the Legislatures to do so has never been questioned by the officers of the Crown for the Dominion, either by exercise of the veto power or otherwise; the other is the somewhat analogous subject of "Sea coast and inland fisheries" is by s.s. 12 of the 91st section of the British North America Act, placed among the subjects upon which the Dominion Parliament has exclusive authority to legislate.

Fisheries were not a local issue because of the migratory nature of fish between sea and river and the relationship between the fishery and the Dominion powers over navigation and shipping. Game, Killam concluded, was not migratory and did not intersect other areas of Dominion government interest, and was thus a local issue. Within a province, he decided, game management was an exclusive domain of the provincial authorities. This concurred with the Dominion decision to grant the power to manage game resources to the North-West Territories Council, a government with far less authority than a province, in 1875.<sup>23</sup>

The regulation of Indian hunting slowly became more, rather than less, confusing. While the provincial governments passed legislation to regulate hunting and trapping, including Indian hunting and trapping, the Department of Indian Affairs continued to consider treaty obligations as an important consideration. The Department of Indian Affairs consequently chose to negotiate with the provinces regarding Indian hunting rights. The department's primary concern was to ensure access to game for subsistence purposes. Early legislation in Manitoba appeared to respond to this issue and also reflected the province's concern regarding the regulation of Indian hunting rights on reserves. Manitoba's first game laws appeared in the *Agricultural Statistics and Health Act* (1883). Section 61 provides that the regulations "shall not apply to Indians within the limits of their reserves with regard to any animals or birds killed at any period of the year for their own use only, and not for the purpose of sale or traffic."<sup>24</sup> Still, the Dominion government sought to ensure that it had the ability to protect Indian peoples from provincial regulations. It acted



within the parameters established within the *Indian Act*. An amendment to the *Indian Act* (1890) provided that application of the game laws of Manitoba and North-West Territories to Indian people could occur at the prerogative of the Superintendent General of Indian Affairs.<sup>25</sup> Section 69 remained an important aspect of the *Indian Act* in 1927. It read:

The Superintendent General may, from time to time, by public notice, declare that, on and after the day therein named the laws respecting game in force in the province of Manitoba, Saskatchewan or Alberta, or the Territories, or respecting such game as is specified in such notice, shall apply to Indians within said province or Territories, as the case may be, or to Indians in such parts thereof as to him seems expedient.<sup>26</sup>

It should be recognized that only the prairie provinces and territories, areas where the federal government controlled the lands and Indian treaties had been negotiated without the concurrent agreement of the provincial authorities, were enumerated in section 69.<sup>27</sup>

Following the Dominion government's disallowance of earlier North-West Territories game ordinances because of the impact these had on Indians, the 1893 game ordinance passed by the North-West Territorial government fell into line with the Dominion's policy. It ordered:

This Ordinance shall only apply to such Indians as it is specially made applicable to in pursuance and by virtue of the powers vested in the Superintendent General of Indian Affairs of Canada by Section 133 of the *Indian Act*, as enacted by 53 Victoria, Chapter 29, sec. 10.<sup>28</sup>

Following the creation of Alberta, this provision disappeared. The first provincial law in Alberta (1907) made no provision for Indian hunting rights. This led to confusion regarding the actual application of provincial laws regarding hunting and trapping. North-West Ter-

territorial game ordinances had been applied to a variety of bands in the territorial districts of Assiniboia, Saskatchewan and Alberta, by announcements made 1 July 1893 and 1 May 1903. When the new provinces of Alberta and Saskatchewan were created in 1905, the Department of Indian Affairs assumed that the announcements of 1893 and 1903 meant Indians belonging to the enumerated bands were subject to provincial game laws.<sup>29</sup> In *R. v. Stoney Joe* (1910 unreported), however, Justice Charles Stuart of the Alberta Supreme Court ruled that only the game law in force at the time of the announcement applied.<sup>30</sup> The Stoney Indians at Morley agency, he decided, were subject to the 1893 game ordinance of the North-West Territories rather than the *Alberta Game Act*. In his reasons, he also noted that in areas where the Dominion had not passed regulations under the section, Indians were subject to provincial game laws of general application. When Alberta requested that the Superintendent General apply provincial game laws to Indians in Alberta, the Deputy Superintendent of Indian Affairs, Frank Pedley, refused. Pedley noted that, under the *Alberta Game Act*, Indian peoples had to pay for licences for subsistence hunting, and this was unacceptable. Alberta eventually agreed to waive the licence fees.<sup>31</sup> The *Alberta Game Act* (1912) provided:

The Lieutenant Governor in Council may authorize the refund to any treaty Indian of the amount paid by him for any licence under the provisions of this Act upon a certificate being furnished by any Indian agent under his hand that such person is a treaty Indian on the Reserve under his control.<sup>32</sup>

The *Alberta Game Act* also contained a clause providing for unrestricted hunting for food by residents in the north of 55 degrees latitude.<sup>33</sup> Following the passage of this act, the Superintendent General announced in 1914 that the game laws of Alberta would apply to the Stoney Indians at Morley Agency, the most problematic of the hunting bands in Alberta in the eyes of both governments. In the period following this decision the Dominion made no other proclamations

for Indian peoples of the prairie provinces.<sup>34</sup>

Despite the ruling in *R. v. Stoney Joe*, the Department of Indian Affairs, as a policy practice, continued to inform Indians that they were subject to provincial regulations, and continued to consider an announcement made under the *Indian Act* of significant importance. This perspective emerged from conflicts in Ontario. Provisions for continued hunting and fishing rights existed in the pre-Confederation Robinson treaties covering the area around the Great Lakes, and problems in Ontario regarding provincial regulation of Indian hunting led the department to seek legal advice from the department of justice. The assistant deputy minister of justice noted in an opinion 5 October 1917:

It seems to me that it is for your Department [Indian Affairs] to determine, having regard to the terms of the Indian treaties or otherwise, to what extent the Indians should be immune from the Provincial game laws and that then that immunity should be provided by legislation, either of the Province if the Province will yield to the Dominion, otherwise by legislation of the Dominion in the exercise of its paramount power with regard to Indians and lands reserved for Indians.<sup>35</sup>

In a memorandum to the minister in 1919, Duncan Campbell Scott illustrates the confusion in the Department of Indian Affairs:

There may be some doubt as to whether the game laws of the province [Manitoba] would apply to Indians within that part of the province covered by treaties Nos. 1 and 2 without there formally being applied under Section 66 [later sec. 69] of the *Indian Act*, but there can be no doubt that they would not apply to the other parts of the province in view of the stipulation in the treaties covering the same, without a formal notice being given under said Section 66 of the *Indian Act*. I think it in the interest of the Indian that the game laws should be made to apply to the whole Province.<sup>36</sup>



Although no announcement was made, the Superintendent General of Indian Affairs, Arthur Meighen, informed the House of Commons in 1920 that Indians outside their reserves had to comply with provincial regulations regarding the preservation of game.<sup>37</sup> Similarly, in a circular letter to Indian agents in 1926, long-serving Department of Indian Affairs Secretary J. D. McLean wrote:

At the recent conference of the Chief Federal and Provincial Game Officials held at Ottawa, attention was drawn to the fact that many of the Indians do not seem to understand that they are required to respect close seasons for hunting and trapping and other Provincial regulations for the protection of game and fish. Will you please explain to the Indians of your Agency that they must strictly comply with the Game Laws and that failing to do so they render themselves subject to the penalties provided therein.<sup>38</sup>

The Dominion continued to negotiate with the provinces for subsistence rights, nevertheless.<sup>39</sup> The emphasis on subsistence is reflected in the regulatory structure the Dominion developed for the Northwest Territories in this period. While earlier acts regulating game in the Northwest Territories had allowed unlimited hunting by Indians and Inuit,<sup>40</sup> this changed in 1917 and by 1927 the *Northwest Game Act* noted:

Notwithstanding anything contained in subsections one and three, the game therein mentioned may be lawfully hunted, taken or killed, and the eggs of birds therein mentioned may be lawfully taken, by Indians or Eskimos who are *bona fide* inhabitants of the said territories, and by explorers or surveyors who are engaged in any exploration, survey or other examination of the country, but only when such persons are actually in need of such game or eggs to prevent starvation.<sup>41</sup>

Hunting rights in some areas of Treaty 8 and all of the Treaty 11 area,

consequently, had been regulated for conservation purposes excepting hunting the resource for food.

Conditions in the prairie provinces continued to deteriorate in the late 1920s as the increasing number of White settlers, trappers, commercial fishermen and sport hunters threatened game resources. While both the Dominion and the province considered the issue seriously, efforts to solve the problem floundered on the issue of jurisdiction. The Department of Indian Affairs sought to establish exclusive game and trapping preserves for Indian people.<sup>42</sup> The provinces, meanwhile, agreed that such jurisdictions held promise, but sought to restrict Indian hunting and trapping to the preserves. They desired to open other areas of the province to only White hunters and trappers, since the provinces had responsibility for their activities, they voted in provincial elections, and they paid licensing fees to the province for their trap lines. The Department of Indian Affairs, however, expressed significant concerns about this project.

It is obvious that if the Indians are to confine their trapping activities to the areas set aside for their exclusive use, they will in effect be waiving their treaty right to trap anywhere in the province. It is assumed that any such waiver can only be made by the Indians themselves, and the attitude which they might take towards any such proposition has not been discussed to date with the Indian Department.<sup>43</sup>

The problem eventually led to a collapse of the negotiations. As a result, Indians and White commercial hunters and trappers competed for the game resources and traditional conservation habits disappeared. The discussions of conservation issues illustrates a second problem that slowly emerged regarding the regulation of Indian hunting and trapping: Indians were not only hunters and trappers, but also fishermen.

The regulation of the inland fishery in Canada is more complex than the regulation of hunting and trapping.<sup>44</sup> Under the *Constitution Act*, section 91(12), conservation of the inland fishery falls within federal jurisdiction, and the Dominion exercised its authority through

the Department of the Marine and Fisheries and the *Fisheries Act*. Section 45 of the *Fisheries Act* (1914) provided for regulation of the inland fishery through order-in-council.<sup>45</sup> Disputes between the Dominion and the province of Ontario in the 1880s and 1890s, however, had resulted in increased provincial participation in the regulation of fisheries. Ontario claimed a proprietary colonial right in many inland lakes and channels under section 109 of the *BNA Act*, and in 1898 the judicial committee of the privy council agreed. The Dominion retained responsibility for catch limits and closed seasons (conservation of the stock), but Ontario, by virtue of its proprietary rights, had the authority to issue licences.<sup>46</sup> Over time, it became Dominion practice to pass provincially drafted regulations for the inland fishery in all provinces except the prairie provinces. In this manner, the Dominion reconciled its power to conserve the fishery with provincial ownership of the fishery.

In subsequent discussions the Dominion and Ontario agreed that provincial regulations, as long as they remained sufficiently general, would apply to Indians.<sup>47</sup> The Dominion government, nevertheless, believed it had the power to protect Indian fishing rights within this arrangement. According to a legal opinion offered by the Department of Justice:

Such laws passed and not disallowed would be valid and binding even if they operated to deprive Indians of rights assured by treaty. If, however, provisions clearly contrary to treaty it might well be held to be improper and unjustifiable use of the Legislative power.<sup>48</sup>

This perspective continued to influence the Department of Indian Affairs throughout the period under study. Deputy Superintendent General Duncan Campbell Scott informed his minister in 1918 that his department "could not well object to any reasonable legislation being applied to Indians as such legislation would be in their interests as much as in the interests of the white man." The Department, however, did not believe that Indian hunting and fishing privileges secured under treaty were "subject to any legislation that the Legis-



lature of Ontario might see fit to enact."<sup>49</sup> The minister apparently agreed. Arthur Meighen wrote:

the constitutional power of the Province [Ontario] to regulate fishing and hunting, even as applicable to Indians, is undoubted. The question remaining is, as to how far this Department should, as representing the Indians, endeavour to modify the actual application of Provincial regulations in deference to the Robinson treaties as affecting such Indians.<sup>50</sup>

Meighen also noted that the department could hardly protest regulations designed to conserve the stock since these were in the interests of the Indians themselves.

The fishing disputes in Ontario were important to the decisions on the *NRTA*, since the agreements were intended to set the prairie provinces on an equal footing with the other provinces. Under the terms of the *NRTA*, the prairie provinces gained control of Crown lands and resources and thus obtained a proprietary right in the inland fishery. Section 9 of the *NRTA* gave the provinces ownership of the inland fishery, while the Dominion retained its ability to regulate for the purposes of conservation of the stock under Section 91(12) of the *Constitution Act* and exercised its powers under the *Fisheries Act*. This new regulatory environment appeared consistent with those established in the rest of Canada following the Ontario disputes of the 1890s. It is also important, however, to examine the regulatory regime in place in the prairie provinces prior to the *NRTA*. During this era the Department of Indian Affairs sought special subsistence fishing privileges similar to those on hunting for Indian peoples.

Since the prairie provinces had no proprietary right to the inland fishery prior to 1930, regulation of Indian participation in the fishery of the prairie provinces developed under the control of the Dominion government and the Department of Marine and Fisheries. As early as October 1893, the Department of Indian Affairs identified the necessity of regulating Indian and Metis fishing for commercial purposes while making special provision for subsistence. According to Indian

Commissioner Hayter Reed, the department desired that they "might be allowed to fish in the close season to meet their own immediate wants." By November, the Department of Marine and Fisheries had passed regulations "to permit fishing during the prescribed close season, in such cases where the local fishery officer is satisfied that the applicant for licences intends to fish for the supply of local wants, and not for export out of the locality."<sup>51</sup> The newly consolidated regulations, announced in 1894, placed Indian fishermen on equal footing with all other fishermen with the special provision that:

16. These regulations shall apply to Indians and half-breeds, as well as to settlers and all other persons; provided always that the Minister of Marine and Fisheries may from time to time set apart for the exclusive use of the Indians, such waters as he may deem necessary, and may grant to Indians or their bands, free licenses to fish during the close-seasons, for themselves or their bands, for the purpose of providing food for themselves, but not for the purpose of sale, barter, or traffic.<sup>52</sup>

The Department of Indian Affairs continued to consider the issue carefully, and the Deputy Superintendent General insisted that the treaty right required "free" access to licences, and that it would be preferable to allow Indians to fish during the closed season for subsistence.<sup>53</sup>

This emphasis on protecting Indian subsistence rights continued to be one of the most important issues in designing regulatory structures for the fisheries. Continued declines in the fish stocks led the Dominion to appoint commissions to examine the fisheries in Manitoba, Saskatchewan and Alberta in 1909. The *Dominion Alberta and Saskatchewan Fisheries Commission* conducted public hearings, and met with sport fishermen, local fish and game associations, businessmen and community leaders, Indians, traders and missionaries. The Indians, traders and missionaries all argued that Indians should be able to take and cure fish during the spawning season. First, they noted that the Indians had been promised a continuation of their tra-

ditional fishing practices in the treaty; and second, the Indians depended on the large catches during this season, dried and preserved, to feed themselves during the winter trapping season. Still, the commissioners concluded:

to allow the taking of fish in the close season [spawning] is in no wise a solution of the Indian question, and it should be faced in a proper manner by the Indian Department. We cannot uphold this claim of the Indians as being for their own and their children's welfare, not to mention that of the fisheries generally, and therefore recommend a rigid close season be maintained except as elsewhere provided for under the heading "Permit for Indians."<sup>54</sup>

The "Permit for Indians" was defined as:

Indians and Half-breeds, resident in the two Provinces, should be granted free of charge an annual permit for the use of 60 yards of net, not more than one for each family, the fish to be used solely by the holder of the permit and his family, and no sale of fish is to be allowed. This permit shall allow Indians and Half-breeds to take fish during the close season for their necessary daily consumption, but not for the purpose of curing or hanging.

If an Indian or Half-breed wishes to fish for sale, he should be placed under the same restrictions as White men.<sup>55</sup>

In their reasons for this decision, the commissioners indicated that their desire to conserve the fish stocks and the jurisdictional questions regarding Indian fishing had influenced their decision. They wrote, "it is the duty of the Fishery Department to conserve the fish that the best results will follow, and to this end a rigid close season is necessary;" and "if the Fishery Department undertakes to practically feed the Indians by allowing them to fish in the close season it is taking upon itself duties which properly belong to the Indian Department." Further, they noted: "If this practice were allowed it would be



to the detriment of the Indian himself in a few years. We have found that he has already depleted some lakes."<sup>56</sup> While the treaty right combined Indian Affairs and fishing practices, the Dominion jurisdictional arrangement tended to divide them.

The ensuing regulation of Indian fishing in the prairie provinces shows how the Dominion efforts at conservation intersected with the treaty right to fish and the need for fish for subsistence by Indian peoples. The fisheries department, it is clear, believed that the treaties allowed it to impose regulations for the purpose of conservation. In disputes with the Fisher River band in Manitoba, for example, the Dominion enforced the regulations through the Department of the Marine and Fisheries. These regulations, like those in Ontario, placed Indian people on an equal footing with non-Indian fishermen in the commercial fishery and forced compliance on Indians with regard to net size and the close season. Any Department of Indian Affairs concerns regarding the impact of regulations on the treaty right to fish had to be negotiated with the Fisheries of officials. The Department of Indian Affairs expressed satisfaction, however, that fisheries laws had not been enforced:

against the Indians as to prevent their obtaining supplies of fish for their own domestic use....Of course, any Indians engaged in commercial fishing must conform with the laws the same as white people.<sup>57</sup>

This enforcement of the law was clearly discretionary, since the *Fisheries Act* contained no mention of Indian peoples or treaty privileges. The Dominion apparently viewed fishing for subsistence as essential to the community and as posing no threat to conservation measures. It also considered its regulatory position as consistent with the text of the Treaties, which provided for regulation of the Indian avocation fishing.

By the 1920s, therefore, a regulatory environment had emerged on the prairies in which Indians, both treaty and non-treaty, were subject to provincial game laws and federal fisheries regulations. In

both of these cases, however, the Department of Indian Affairs had sought concessions for Indian people when hunting or fishing for subsistence. The problem continued to be noted in the *Annual Report of the Department of Indian Affairs* in 1929. The report blamed White commercial hunters and trappers for the shortage of game, and argued special concessions for Indian people were required.<sup>58</sup> Indian agents in the north, meanwhile, frustrated with the attitude of the provincial authorities, suggested some solution had to be worked out during negotiations for the transfer of lands and resources. During this period, they argued, concessions with the province could be won.<sup>59</sup>

### The Alberta Resources Transfer Agreement of 1926

The *NRTAs* were intended to correct long-standing grievances from the prairie provinces regarding their status as equal partners in Confederation. The issue of transferring control of Crown lands to the provinces had been discussed as early as 1912 and was one of the key issues promoted by the Progressive Party in the 1920s.<sup>60</sup> Finally, in 1925, the King government entered into serious negotiations with the province of Alberta, the least recalcitrant of the three provinces. The negotiators then asked the Indian Affairs Branch for their input into the process. The Department of Indian Affairs identified the creation of new reserves following future settlement of aboriginal claims, the disposition of unused and surrendered reserve lands and the monies that might accrue from these surrenders, and the necessity for continued Indian access to Crown lands for hunting and fishing as itemized in the treaties as the most pressing concerns. The department also expressed some concern about regulating the Indian hunting and trapping right since game resources fell under provincial jurisdiction.

After discussions with Deputy Superintendent General D. C. Scott, Colonel O. M. Biggar, counsel for Canada in the negotiations, noted the concerns of Indian Affairs regarding game management. In a memorandum of their meeting sent to Scott for his clarification, Biggar remarked that the "Department of Indian Affairs is just as much, or even more concerned to secure the preservation of game

than the provincial authorities themselves." He recognized the concerns the department had for hunting Indians in the north, "and it is not without importance that, notwithstanding the game laws, they should be allowed to hunt and fish out of season for their own food." All of these comments came before any mention of the treaties or a treaty right to hunt and fish. Finally Biggar concluded:

There are provisions about hunting and fishing in all the Alberta treaties (Williams is to send me copies of these). The provisions in certain treaties gives the Indians a right to hunt and fish on all unoccupied lands subject only to such regulations as the Dominion may make on the subject. The northern territory, however, which is from this point of view the most important, confers the right only subject to such regulations as are now made by law on the subject, and suggest therefore that the Provincial laws might be applicable. Moreover, on the transfer to the Province of the Crown lands, it might at least be argued that the permission the treaties give to enter upon unoccupied lands for the purpose of hunting and fishing came to an end, since these lands were no longer under the control of the authority by which the treaty was made. It would appear, however, that the better opinion would be that, since it was the Crown which made the treaty, and the Province equally with the Dominion was the Crown, the permission to the Indians still stood. It would nevertheless be advisable to include in the arrangement with Alberta a provision definitely making the Indian treaty provisions apply. Probably it will not be necessary at this stage to raise the question of whether an Indian properly on unoccupied lands is liable under provincial game laws. It would appear advisable to leave this for subsequent settlement, since the question relates to general legislative administration of Crown lands as such.<sup>61</sup>

This concern for hunting and fishing rights, interestingly, always remained peripheral in debates in the House of Commons.



After reviewing the Indian Affairs material, Colonel Biggar summarized the concerns for the prime minister as: a) a need for land to grant reserves following future surrenders of Aboriginal title; b) protection of former reserve lands and cash accumulated following the disposition of land by bands no longer requiring or agreeing to surrender their reserve; c) guaranteeing Indians right to hunt and fish on unoccupied lands according to treaty; and d) continued relief of Indians from the obligation to comply with provincial fish and game laws. Colonel Biggar argued that the first and second issue were easily covered in a general clause governing reserve lands, and no special provision would be necessary. These two issues form the basis for sections 10 and 11 of the *NRTA* and, once the issue of returning surrendered lands to the domain of the Crown in the right of the province had been solved, caused few disputes during the negotiations.

The third issue was more problematic, he noted. While it might be intimated that the provinces would be bound by the treaties and that the Indians would continue to have access to unoccupied Crown lands for the purpose of hunting and fishing, a special provision would be negotiated. Biggar, noting his discussions with Scott, wrote:

In the circumstances it would be advisable to include in the agreement a provision that the right of Indians to enter upon all unoccupied Crown lands for the purpose of hunting and fishing should continue, notwithstanding the transfer of lands to the Province, to be the same as if the lands had remained under the administration of the Dominion.<sup>62</sup>

Thus, the issue of Indian hunting and fishing rights was first introduced to the *NRTA* negotiations in terms of continued treaty right of access to Crown lands.

The fourth issue, the relationship between Indian hunters and provincial game laws, was not a problem specific to the prairie provinces. As previously noted, it had also emerged from disputes with Ontario where a similar provision on hunting and fishing rights existed in the pre-Confederation Robinson treaties. Scott believed a

clause in the *NRTA* would alleviate future problems over jurisdiction and regulation. It offered an opportunity for Indian Affairs to resolve its conflicts with Alberta over conservation measures as well. Colonel Biggar, however, dismissed the need for inclusion of such a clause. He wrote:

The fourth point has no relation to lands, but to legislative jurisdiction over Indians as such, and since this is assigned by the British North America Act exclusively to the Dominion. I think that it is unnecessary and would be dangerous to make any reference to the subject in an agreement with the Province of Alberta which must be confirmed by concurrent statutes; the only possible effect of a provision on this point would be to narrow unnecessarily the Dominion's present plenary power.<sup>63</sup>

The Dominion government's position during the negotiations of 1925, consequently, should be regarded as an effort to protect their legislative authority over Indian peoples and to ensure the continuation of the treaty right to pursue the avocation of hunting and fishing on unoccupied Crown lands subject to regulation. Ironically, the fourth point, dismissed by Biggar, would eventually emerge in the *NRTA* and form the central issue of contention in interpreting the agreements.

In the first drafts of the agreement being negotiated with Alberta, the Dominion followed the Indian Affairs Branch recommendations and inserted a clause protecting the right of treaty Indians to hunt and fish on Crown lands. Section 9 of the agreement read:

To all Indians who may be entitled the benefit of any treaty between the Crown and any band or bands of Indians, whereby such Indians surrendered to the Crown any lands now included within the boundaries of the Province, the Province hereby assures the right to hunt and fish on all 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 lands had continued to be administered by the Government of Canada.<sup>64</sup>

Since the policy of the Department of Indian Affairs had been to make treaty Indians subject to Alberta game laws, this clause was perfectly acceptable to Alberta and remained relatively unchanged throughout the negotiations. The clause called for the continuation of the regulatory environment existing at the time of the transfer of lands to the province. It appeared in the memorandum of agreement reached between Alberta and the Dominion 9 January 1926 and caused no debate in the legislature of the province nor the parliament of the Dominion.

### The 1929 Negotiations of the *NRTA*

The Alberta deal died in 1926, however, over the protection offered to Roman Catholic school rights in the *Alberta Act*.<sup>65</sup> By the time the Supreme Court assured the Dominion that protecting these school rights was within the Dominion jurisdiction, Manitoba's refusal to accept the terms of the Alberta deal because of the financial terms it contained overshadowed other issues. A royal commission headed by Saskatchewan Justice W. F. A. Turgeon solved the compensation issue with Manitoba in 1928, and subsequently the King government attempted to strike a deal with that province instead of Alberta.<sup>66</sup> The shift to Manitoba had implications for the negotiations from the perspective of Indian Affairs. Most importantly, Treaties 1 and 2 covering southern Manitoba did not contain specific provisions regarding Indian hunting and fishing. As negotiations between Manitoba and the Dominion neared completion in August of 1929, the Department of Justice consulted with Duncan Campbell Scott once again. The two clauses of the Alberta agreement regarding Indian reserves and Indian access to unoccupied Crown lands for hunting and fishing remained unchanged, but Manitoba had requested clarification of the 'privileges of hunting and fishing the Indians within the Province are now entitled to under Dominion laws.'<sup>67</sup> Scott's reply to this enquiry transformed the clause in the *Natural Resources Transfer Agreement* and set the tone for subsequent debates over Indian hunting and fish-



ing rights in the prairie provinces.

Scott noted that Manitoba was covered by Treaties 1 through 5. Treaties 1 and 2 contained no provisions regarding hunting and fishing, but Treaties 3, 4 and 5 contained clauses on this issue. These clauses, as previously noted, provided for a continuation of the Indian avocations of hunting and fishing subject to Dominion regulations. Rather than focus on the nature of section 9 and point out that the treaty provided for access to Crown lands not "required or taken up for settlement, mining, lumbering or other purposes," Scott returned to the issue of regulating Indian hunting and fishing rights, which Biggar had dismissed in 1925. He reviewed the jurisdictional arrangement under the terms of the *Indian Act*, and noted no public proclamation by the Superintendent General had been made in the case of Manitoba:

I am inclined to think that in the absence of Public Notice given under the provision of said Section 69 of the *Indian Act* the Game Laws of the Province could not prevail against the provisions of the Treaties.<sup>68</sup>

He then expressed satisfaction with section 9 of the Alberta agreement and noted it preserved whatever rights the Indians may now enjoy. Scott's position emphasised the paramount authority of the Dominion under section 91(24) and avoided reference to the department's practice of making Indians subject to provincial game laws, Arthur Meighen's attitude while Superintendent General of Indian Affairs, and Justice Stuart's decision in *R. v. Stoney Joe* (*supra*). It seems deliberately inflammatory, reflected a similar hard-line stance he had taken in 1919, and intimated that Manitoba had no ability to control Indian hunting and fishing within the province without a specific provision, despite departmental practice. Scott appeared to fear that Manitoba desired the complete removal of any mention of Indian hunting and fishing rights in the *NRTA*.

Scott may have been following his Indian agents' advice and using the *NRTA* negotiations to win concessions on Indian hunting and trapping preserves. The provincial authorities had proved unwilling

to develop this system and game resources continued to be threatened. With little alternative commercial activity available to northern Indians, the department faced the daunting task of feeding Indians should the game resource fail. Scott returned to the issue of ensuring access to game for subsistence in his letter. He counselled the Acting Deputy Minister of Justice:

I may say that with the development of the country and the entry of outside hunters and trappers into the northern regions of the Province where the Indians rely almost entirely upon game for their subsistence, their plight is becoming more desperate year by year with the disappearance of game and while, as I stated, I think the Indians in these regions have the full rights granted by treaties it is a question in my mind as to whether it would not be advisable to have it now set forth in this agreement that the Indians in these northern regions shall have the right to take game at all times for their subsistence, and I should like to discuss this matter with you before the agreement is finally completed.<sup>69</sup>

Scott made no mention of fishing. The suggestion that special provision be made for hunting for subsistence is interesting, nonetheless, since Treaty 5 covering the northern regions of Manitoba had clear provisions regarding the continuation of the Indian avocation of hunting and fishing subject to regulation. Similarly, Scott had assured the acting deputy minister that the clause as accepted in 1926 protected these rights. Acting Deputy Minister of Justice Chisholm, despite the opinion of earlier negotiators, agreed to discuss these concerns further with Scott, and the process of changing the clause in the Natural Resources Transfer Agreements had begun. Manitoba's ability to regulate Indians within the game jurisdiction and DIA's desire to incorporate subsistence hunting privileges by Indian communities became the topics of negotiation.

In a draft of the agreement sent to Scott by W. W. Cory, Deputy Minister of the Interior, 7 October 1929, the hunting and fishing clause from the 1926 Alberta agreement remained unchanged, but a note

appears following the clause to the effect that Dr. Scott's concern "has not yet been settled." Biggar later forwarded the clauses under discussion to Scott. They clearly attempted to deal with Scott's concern for subsistence hunting in northern regions and solve the regulatory confusion regarding regulation of Indian hunting rights. The clause contained no mention of fish or fishing. Someone at Indian Affairs added the word *fish* after *game* in all areas of the clause, including the words "laws respecting game *and fish* in force in the Province from time to time." By 12 December 1929, a new clause appeared in the draft agreement with Manitoba, making mention only of "laws respecting game in force in the Province" and provoked no response from Indian Affairs or Scott.<sup>70</sup> The new clause incorporated into the Manitoba [sec. 13], Alberta [sec. 12] and Saskatchewan [sec. 12] resource transfer agreements provided:

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<sup>71</sup>

The regulatory aspects of section 12 resembled, in many respects, the practice of regulations negotiated by the Department of Indian Affairs in the years prior to 1930. They reflect the primary importance the third objective of Indian Affairs in the later negotiations.

### Section 12 and the Treaty Right

An "Explanatory Memorandum re: Manitoba Resources Agreement" found in the Indian and Northern Affairs files at the National Archives certainly suggests that the government had no intention of changing the status of the treaties or federal powers to regulate In-



dian affairs or federal power over Indians in the fishery. It noted:

Paragraph 13—Section 69 of the *Indian Act* RSC 98, empowers the Superintendent General of Indian Affairs to apply the provincial game laws to the Indians in any of the three Western Provinces, or any part of any of them. What is in effect Canada's agreement by this clause to apply the provincial game laws to the Indians in Manitoba is accordingly compensated for by the provisions of the agreement that the application of these laws shall not deprive the Indians of their right to hunt and fish for food.<sup>72</sup>

The ramifications of section 12 are given even less clarity in the "Explanation to Accompany Bill No. providing for the ratification of the Agreement with Province of Alberta for the Transfer of its Natural Resources," where it reads "The rights of hunting, trapping, and fishing on unoccupied Crown lands are secured to the Indian."<sup>73</sup> Given this explanation of section 12 and Dominion game management regimes established in the Northwest Territories, it is not surprising the section produced no debate in the House of Commons. Surely a clause that had the ramification of changing the treaty rights of Indians and limiting the federal government's constitutional authority to regulate Indian hunting and fishing would produce some debate from one thoughtful member. Indeed, the issue of treaty rights and provincial game laws would be raised by Members of Parliament in subsequent years.<sup>74</sup>

It is possible that the Dominion officials believed that they had protected the Indian treaty right in the *NRTA*. The treaty right was "subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada." Delegating this regulatory authority to Manitoba, Alberta and Saskatchewan was not a significantly new perspective. The Dominion had provided for the application of provincial game laws in these provinces under section 69 of the *Indian Act* and had a long-standing policy of making Indians subject to provincial regulation in this field. Remarks by the minister responsible for Indian Affairs follow this logic. Following que-

ries from a Member of Parliament in 1940 regarding the failure of the Dominion to fulfil its treaty obligation regarding the fishing right at Fisher River in Manitoba, the minister, Thomas Crerar, noted that the government saw nothing incompatible between the treaty right to fish and the regulatory environment. Treaty 5 gave the Cree at Fisher River the right to fish subject to regulations. Dominion fishing regulations had therefore been enforced in the region prior to the *NRTA*. Next, Crerar noted that the provisions of the *Indian Act*, sec. 69, provided for the transfer of this regulatory authority to province by public proclamation and this procedure had been followed. The *NRTA*, he continued, confirmed that provincial laws would apply for regulatory purpose. He concluded that a violation of the treaty had therefore not occurred.<sup>75</sup> In other words, Crerar believed section 12 was consistent with the treaty right to pursue the avocation of hunting and fishing.

The intent and purpose of the Dominion government in negotiating Section 12, consequently, could be considered a modification of the treaties to include the provinces in the regulatory authorities under treaty, with an important limitation placed upon the regulatory power of the provinces (but not on the Dominion). The right to hunt and fish for food on unoccupied Crown lands becomes a special privilege granted to all Indian peoples and is separate from the treaty right. Moreover, the new right does not interfere with the treaty right. The disappearance of the word *treaty* from the clause in December 1929 is significant in that all Indians, not simply treaty Indians, were entitled to the right to hunt, trap and fish on unoccupied crown lands for food. Indians subject to treaty still retained the right to pursue the avocation of hunting and fishing on unoccupied Crown lands surrendered by them, subject to regulations.

### Government Interpretations of Section 12 after 1930

The statements emerging from Indian Affairs and the Department of the Interior following the *NRTA* demonstrate that the Dominion officials did not believe the *NRTA* had replaced any treaty rights. Scott suggested that an important new right had been granted to Indians.

In a circular letter following the transfer he informed the Indian agents:

This agreement confers a very important privilege upon the Indians which they should avail themselves of with due regard for the purpose for which it is intended. The department has received reports of abuses by Indians, such as wanton slaughter, the sale of game to whites, and other illegal note. It is desired that at the Treaty payments during the present year, you will hold a meeting of the Indians of each band and explain to them that while they have the privilege of taking game or fish for food required for their own use, they must not, in any case take game for commercial purposes of any kind, in any way contrary to the law, and that wanton slaughter will not be tolerated.<sup>76</sup>

The opinion of the Department of the Interior, while agreeing that an extraordinary right had been granted, appeared to believe the treaty right continued. Deputy Minister H. H. Rowatt informed the department solicitor, Mr. Daly, in 1933:

When Premier Anderson was here he spoke to our Minister about the rights of Indians to take game in the Province and our Minister explained that by the Natural Resources Transfer Agreement no new rights were accorded to Indians, that they were merely confirmed in the rights they have had all along; further, that the Province seem to have the remedy for abuses in their own hands because the extraordinary right of the Indian is only to kill for *food* on *unoccupied* lands of the Crown.<sup>77</sup>

Similarly, Rowatt himself had two years earlier acknowledged that the treaty right continued when he requested that the Department of Justice determine if "the Migratory birds treaty over-rides any of the formal Indian treaties which insured the Indians definite hunting rights" in the province of Saskatchewan.<sup>78</sup> He did not ask for a similar review of the *NRTA*.



Other positions taken by Dominion officials indicate that the Dominion never intended to give up its ability to protect Indian hunting and fishing rights in the prairie provinces. In a 1930 letter drafted by Colonel O. M. Biggar, counsel for the Dominion during negotiations, at the request of W. M. Cory, a solicitor with the Department of the Interior, it notes:

The effect of the agreement with the Province is, of course, in no sense to surrender the right of the regulation now possessed by the Dominion Parliament by which, indeed, any regulatory power of Indians must of necessity remain vested by virtue of the provisions of the British North America Act.<sup>79</sup>

That the Dominion did not believe it had given up authority to legislate on Indian hunting and fishing under section 91(24) following the *NRTA* is apparent in the continued applicability of section 69 of the *Indian Act*. Although section 12 of the *NRTA* would apparently make section 69 of the *Indian Act* redundant, the Dominion did not remove section 69 in its 1936 amendments to the *Indian Act*. This decision suggests they were still unsure of the province's ability to enforce regulations against treaty Indians without the power of the Dominion through the *Indian Act*. When the government did eventually replace sec. 69 in 1952, it broadened the application of provincial authority rather than removing the clause. Section 87 enshrined treaty rights in federal legislation and applied all provincial laws of general application to Indian peoples.

The Department of Indian Affairs, however, accepted a contradictory legal opinion from Deputy Justice Minister W. Stuart Edwards, and communicated it to Saskatchewan Premier J. T. M. Anderson. It noted:

With regard to the meaning of the term "game" in the proviso of clause 12, the stipulation set out in this clause was embodied in the agreement for the purpose declared in the introductory words, viz., "in order to secure to the Indians

of the Province the continuance of the supply of game and fish for their support and subsistence." For the attainment of that object, it being no doubt in the interests of the Indians themselves that laws should be enacted and enforced with a view to the preservation of the game and fish, Canada agreed "that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof," and thereby undertook not to exercise its paramount legislative power under section 91, head No. 24, of the British North America Act, 1867, so as to override, as to the Indians within the Province, the Provincial Game Laws from time to time in force. But that agreement as to the application of the Provincial Game Laws to the Indians is expressly qualified by the stipulation set out in the proviso whereby "the said Indians shall have the right . . . of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands."<sup>80</sup>

A second opinion by Edwards follows a similar logic. He argued that all Indians, not simply treaty Indians, were considered in the agreement. He noted the term *Indian* in the *NRTA* had the same meaning as *Indian* in section 91(24) of the BNA Act, and thus implied all Indians had the rights provided in the section.<sup>81</sup> This position follows on his earlier interpretation of section 12 as an agreement not to use the Dominion's paramount authority under section 91(24).

Like the Dominion, Manitoba did not consider its regulatory regime following the 1930 transfer to be a violation of the treaty right. The Manitoba director of game and fisheries, A. G. Cunningham, defended his regulatory authority at Fisher River in 1939, by pointing to the Dominion precedents. He wrote:

I am informed this [special fishing preserve] or relative matters in respect to special fishing rights allegedly conferred on Indians by the Treaty Agreements have been brought forward recurrently by Indians during the past twenty years. However, the Fishery Administration while a

Dominion charge has consistently refused to give any consideration to them and steadfastly maintained that an Indian fishing commercially must submit to the same laws and restrictions as white commercial fishermen. While, as you know, we have made some concessions, it is felt we must in the main adhere to the precedent set by the Dominion.<sup>82</sup>

Manitoba government officials, consequently, did not believe that the treaty right had been extinguished and replaced. They simply argued that the new regulatory environment did not breach the agreement.

## Conclusions

The Supreme Court has concluded that the *NRTA* extinguished the treaty right to hunt commercially. In the most recent case, *R v. Badger*, Justice Cory for the majority noted that the decisions in *Moosehunter* and *Horseman* to the effect that the *NRTA* ended the treaty right to hunt commercially were reasonable and valid. As the Supreme Court decided in *Horseman*:

The hunting rights reserved to the Indians in 1899 by Treaty No. 8 included hunting for commercial purposes, but these rights were subject to governmental regulation and have been limited to the right to hunt for food only—that is to say, for sustenance for the individual Indian or the Indian's family—by para. 12 of the Transfer Agreement.<sup>83</sup>

The Court in *Badger* also concluded “that the Treaty No. 8 right to hunt has *only* been altered or modified by the *NRTA* to the extent that the *NRTA* evinces a clear intention to effect such a modification.”<sup>84</sup> In this regard, the historical evidence clearly indicates that the Dominion intended to transfer the regulatory authority over treaty hunting and trapping rights and the licencing of treaty fishing rights to the provincial governments.

The historical evidence also makes it clear, however, that the Dominion did not seek to limit or extinguish any element of the treaty



Indian hunting and fishing rights with the passage of the *NRTA*. What then does the historical evidence suggest the Dominion intended in passing section 12 of the *NRTA*?

**First**, the Dominion intended to ensure that Indians maintained their treaty right of access to unoccupied Crown lands for the purpose of hunting, trapping and fishing.

**Second**, the Dominion hoped to conserve game through wise management in the belief that this was important to the Indians because of their treaty right to continue their avocation of hunting and fishing and their reliance upon fish and game for subsistence.

**Third**, the Dominion recognized that, subsequent to the transfer of lands, the regulatory system for hunting and fishing would resemble that in Ontario where the provincial government set hunting regulations and licensed fishing. The Dominion negotiators therefore sought to ensure to all Indian peoples subsistence privileges on unoccupied Crown lands, consistent with the regulatory structure they had negotiated prior to the *NRTA*, by placing limits on the provincial regulatory authority.

In making its decisions on Indian treaty hunting and fishing rights and the *NRTA*, the Supreme Court has not had the benefit of this historical context. Some members of the Supreme Court have acknowledged the need for historical investigation of the intent and purpose of the negotiators of the *NRTA*. The court divided four to three in *Horseman*, and Justice Wilson for the minority remarked:

We should not readily assume that the federal government intended to renege on the commitment it had made. Rather we should give it an interpretation, if this is possible on the language, which will implement and be fully consistent with that commitment.

...one should be extremely hesitant about accepting the proposition that para. 12 of the Transfer Agreement was also

designed to place serious and invidious restrictions on the range of hunting, fishing and trapping related activities that Treaty 8 Indians could continue to engage in.<sup>85</sup>

If the court accepts this historical evidence, then it may address the issue of justification of provincial game regulations that serve to extinguish the treaty right to hunt commercially and provincial fisheries licensing requirements that serve to extinguish the treaty right to fish commercially. These regulations and licensing requirements need to be examined within the parameters of the *Sparrow* test. That the regulation of Indian hunting and trapping under section 12 was intended to "secure to the Indians of the Province the continuance of the supply of game and fish for support and subsistence" seems relevant in any interpretation of these issues. This language reflects the intentions of the treaty negotiators when they discussed regulation with Indian peoples. It adds weight to the historical evidence that suggests the government did not seek to extinguish and replace or merge and consolidate the treaty right with the *NRTA*.

## Notes

1 *R. v. Badger*, [1996] 1 S.C.R. 771, at 805.

2 The *NRTAs* consist of three separate agreements to transfer the land and resources from Dominion to provincial control on the prairie provinces. All were passed by the Dominion Parliament and each province passed its agreement with the Dominion. See *Statutes of Canada*, 20-21 Geo. V, c. 3, c. 29, and c. 41. The sections, or clauses as they are sometimes called, discussed in this paper are identical in each bill, although they have different numbers in the Manitoba Resources Transfer Agreement. In this paper the sections will be referred to by the numbers given in the Saskatchewan and Alberta agreement. The agreements were confirmed by the Imperial Parliament in the *Constitution Act* (1930), 20-21 Geo. V, c. 26, sec 1, and consequently hold constitutional status.

3 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Saskatoon: Fifth House, 1991) contains the text of Treaties 1 through 7. The clause in Treaties 3, 5 and 6 is identical. Some subtle differences exist in Treaties 4 and 7. In Treaties 8 through 11 references to the *Dominion* are replaced by the *Government of the country* and the word *avocation* is replaced by *vocation*. For the text of Treaties 8 and

- 11, the reader could consult René Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland and Stewart, 1975).
- 4 Chester Martin, "The Colonial Policy of the Dominion," *Royal Society of Canada: Proceedings and Transactions*, series 3, vol. 16 (1922), p. 35. See also Chester Martin, *Dominion Lands Policy* (Toronto: Macmillan, 1934, reprinted, 1973); L. H. Thomas, *The Struggle for Responsible Government* (Toronto: University of Toronto Press, 1978); Donald Swainson, "Canada Annexes the West: Colonial Status Confirmed," *Federalism in Canada and Australia: The Early Years*, edited by Bruce Hodgins (Waterloo: Wilfrid Laurier Press, 1978).
- 5 *Statutes of Canada*, 1929, 20-21 Geo. V., c. 3, sec. 12.
- 6 Solicitor to H.H. Rowatt (Deputy Minister, Interior), 2 Dec. 1932, RG 22, vol 22, file 91.
- 7 Donald Purich, *Our Land: Native Rights in Canada* (Toronto: James Lorimer, 1986), 85-87 discusses the *NRTA* only in terms of how the courts have interpreted the *NRTA* right to hunt for food. Olive Dickason, *Canada's First Nations*, 2nd edition (Oxford: Oxford University Press, 1997) makes no mention of the issue. J. R. Miller, *Skyscrapers Hide the Heavens*, rev. ed. (Toronto: University of Toronto Press, 1989), pp. 220-21, provides a single paragraph. A. J. Ray, *I Have Lived Here Since the World Began* (Toronto: Lester, Key Porter Books, 1996), p. 280, states only that "when it [the Dominion] transferred federal control of the natural resources of Manitoba, Saskatchewan, and Alberta to those provinces in 1930, it gave them the power to override the provisions of Treaty 1, 2, and 5 to 8 for the purposes of conservation."
- 8 Don Wetherell and Irene Kmet, *Alberta's North* (Edmonton: University of Alberta and the Canadian Circumpolar Institute, 2000). Frank Tough, *As Their Natural Resources Fail: Native People and the Economic History of Northern Manitoba, 1870-1930* (Vancouver: University of British Columbia Press, 1996). Anthony Gulig, "Sizing Up the Catch: Native-Newcomer Resource Competition and the Early Years of Saskatchewan's Northern Commercial Fishery," *Saskatchewan History* 47 (1995). Two theses also warrant mentioning here: Anthony Gulig, "In Whose Interest? Government-Indian Relations in Northern Saskatchewan and Wisconsin, 1900-1940" (Ph.D. thesis, University of Saskatchewan, 1997); and Richard Daniel, "Indian Rights and Hinterland Resources: The Case of Northern Alberta" (M.A. thesis, University of Alberta, 1977).
- 9 Chester Martin, "*Dominion Lands*" Policy, edited with an introduction by L.H. Thomas (Toronto: McClelland and Stewart, 1973), 204-226.
- 10 Frank Tough, "Introduction to Documents: Indian Hunting Rights, Natural Resources Transfer Agreements and Legal Opinions from the Department of Justice," *Native Studies Review* 10, no. 2 (1995), 121-67.
- 11 See *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 404; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at 36; *Simon v. The*



- Queen*, [1985] 2 S.C.R. 387, at 401-2, 406; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at 1035, 1061, and 1063; *R. v. Badger* [1996] 1 S.C.R. 771 at 802.
- 12 *R. v. Sparrow*, 1 S. C. R. [1990] 1075 at 1123-30. The Sparrow decision was particular to those rights in existence in 1982 and protected under section 35(1) of the *Constitution Act* (1982). Still, the basic parameters of the test seem appropriate to examining any decisions affecting treaty rights prior to 1982 as well.
- 13 *Frank v. The Queen*, [1978] 1 S.C.R. 95; *Moosehunter v. The Queen*, [1981] 1 S. C.R. 282; and *R. v. Horseman* [1990], 1 S.C.R. 901.
- 14 For a discussion of the *Badger* case see Catherine Bell, "R. v. Badger: One Step Forward and Two Steps Back?" *Constitutional Forum Constitutionnel* 8, no. 2 (1997): 21-26. For an examination of the Crown's fiduciary obligation see Leonard Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van Der Peet*," *Constitutional Forum Constitutionnel* 8, no. 2 (1997): 40-45.
- 15 Morris, *Treaties*, 215 and 218.
- 16 Jean Friesen, "Magnificent Gifts: The Treaties of Canada with the Indians of the Northwest 1869-76," *Transactions of the Royal Society of Canada*, Series 5, vol. I (1986), p. 50. See also Friesen, "Grant Me Wherewith to Make My Living," in Kerry Abel and Jean Friesen, *Aboriginal Resource Use in Canada*, (Winnipeg: University of Manitoba Press, 1991), pp. 141-55; and Richard Daniel, "The Spirit and Terms of Treaty Eight," in Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Edmonton: Pica Pica Press, 1987).
- 17 The most prolific writer on the subject of Indian economic practice is Arthur J. Ray. For a summary of the evidence he provided in *R. v. Horseman*, [1990] see A.J. Ray, "Commentary on the Economic History of the Treaty 8 Area," *Native Studies Review* 10 no. 2 (1995): 169-95. His two most important books on this subject are *Indians in the Fur Trade* (Toronto: University of Toronto Press, 1974) and *The Fur Trade in the Industrial Era* (Toronto: University of Toronto Press, 1990). For similar work on Manitoba see Frank Tough, *As Their Resources Fail*, Laura Peers, *The Ojibwa of Western Canada* (Winnipeg: University of Manitoba Press, 1994); and Paul Thistle, *Indian-European Trade Relations* (Winnipeg: University of Manitoba Press, 1987).
- 18 Memo, Scott to Meighen, 21 Nov. 1918, RG10, vol. 6731, file 420-1.
- 19 Arthur J. Ray, "Some Conservation Schemes of the Hudson's Bay Company, 1821-50: An Examination of the Problems of Resource Management in the Fur Trade," *Journal of Historical Geography*, 1 (Jan. 1975): 49-68. Lorne Hammond, "Marketing Wildlife: The Hudson's Bay Company and the Pacific Northwest, 1821-9," *Forest and Conservation History* 37 (Jan. 1993): 14-25.
- 20 Morris, *Treaties*, 195. See also John Leonard Taylor, "Two Meanings of Treaties 6 and 7," in Richard Price, ed. *The Spirit of the Alberta Indian Treaties*, (Edmonton: Pica Pica, 1987): 9-43.

- 21 "Report of the Commissioners for Treaty Eight," Sessional Papers, 1900, no. 8, xxxvi.
- 22 L.F.S. Upton, "The Origins of Canadian Indian Policy," *Journal of Canadian Studies* 8, no. 4 (1973), 51-61; John Tobias, "Protection, Civilization, Assimilation: An Outline History of Canadian Indian Policy," *Western Canadian Journal of Anthropology*, (1976) reprinted in R.D. Francis and Howard Palmer, eds., *The Prairie West: Historical Readings*, (Edmonton: Pica Pica Press). John Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change," in A.S. Lussier and Ian Getty, eds., *As Long As the Sun Shines and the Water Flows*, (Vancouver: University of British Columbia Press, 1983).
- 23 *Statutes of Canada*, 1875, 38 V., c. 49, sec. 7.
- 24 *Statutes of Manitoba*, 46-47 V., c. 19, s. 61.
- 25 *Statutes of Canada*, 1890, 53 V., c. 29, sec. 10
- 26 *RSC*, 1927, c. 98, s. 69.
- 27 It is hard to understand why the Dominion believed it had to isolate Manitoba and the North-West Territories (later Alberta and Saskatchewan) in section 69. Lands had no impact on game laws and as a result, either all provinces or no provinces needed the assistance of section 69 to enforce game laws against Indians in their domains. If it was the treaty issue problems again emerge. While Ontario played a role in the negotiation of Treaty 9, it did not in Treaty 3 covering the North-West Triangle. Similarly, Treaty 8 extended into the Liard River region of B.C.. Neither B.C. nor Ontario are mentioned in section 69.
- 28 Territorial Ordinances, 1893, No. 8, sec. 19. This section replaced an earlier provision which noted: "The provisions of this Ordinance, except section 4 [unlawful damage to a bird's nest], shall not apply to Indians in any part of the Territories, with regard to any game actually killed for their own use, and not for purposes of sale or traffic." Territorial Ordinances, 1892, No. 19, sec. 16.
- 29 RG 10, vol. 6732, file 420-2.
- 30 Copy of this judgement in RG 10, vol. 6732, file 420-2A.
- 31 Frank Pedley (Depy Sup't. Indian Affairs) to Duncan Marshall (Alta Min. of Agric.), 7 June 1911; Marshall to Pedley, 29 Sept. 1911; Pedley to Marshall, 5 Oct. 1911, Benjamin Lawton (Game Guardian) to Pedley, 28 Mar. 1912; RG 10, vol 6732, file 420-2A.
- 32 *Statutes of Alberta*, 1911-12, c. 4, sec. 25(4). Interestingly, this section did not change following the passage of the NRTA See *Revised Statutes of Alberta (RSA)*, 1942, c. 70, sec. 64(t).
- 33 *RSA*, 1942, c. 70, sec. 33.
- 34 See RG 10, vol. 6732, file 420-2A and 420-2B for numerous pieces of correspondence along these lines. Although no record of an announcement could be found, T.A. Crerar to J.T. Thorson (M.P.), 27 July 1940 suggests that a proclamation (no date specified) regarding Manitoba game laws had

- been made. RG 10, vol. 6969, file 501/20-2 pt. 1. Duncan Campbell Scott noted that section 69 had not been used with reference to Manitoba. Scott to Deputy Minister of Justice, 4 Sept. 1929, RG 10, vol. 6820, file 492-4-2 pt. 1.
- 35 Opinion 1447/17, W. Stuart Edwards to Scott, 5 Oct. 1917. RG 10, vol. 6731, file 420-1. Position quoted in Memorandum to Scott, 6 Feb. 1925. RG 10 vol. 6820, file 492-4-2 pt. 1.
- 36 Memo Scott to Meighen, 15 Mar. 1919, RG 10, vol. 6731, file 420-1.
- 37 Canada, *Debates*, 1920, 3379.
- 38 Circular J.D. McLean to Agents, 26 Apr. 1926, RG 10, vol. 6732, file 420-2B.
- 39 Statement by Indian Affairs, Dominion and Provincial Game Conference, Jan. 1928, RG 10, vol. 6731, file 420-1-2.
- 40 *Statutes of Canada*, 1894, 57-58 V., c. 31, sec. 8(a).
- 41 RSC, 1927, c. 141, sec. 4(4). Treaty Indian peoples protested against this restriction as a violation of their treaty right to no avail. See Philip Godsell, *Arctic Trader*, (New York: A. L. Burt), 193-94 for an account of the protests against these restrictions at Fort Resolution in 1921.
- 42 This issue was first discussed in 1923. Hoadley to Stewart, 6 Mar. 1923, Scott to Stewart, 13 Nov. 1923, Card to Scott, 22 May 1924 and Scott to Card, 10 June 1924, RG 107 vol. 67327 file 420-2B.
- 43 Memo to file, 27 Oct. 1926, RG 10, vol. 6732, file 420-2B.
- 44 For a commentary on the complex jurisdictional arrangement regarding fisheries in Canada see Gerald La Forest, *Natural Resources and Public Property under the Canadian Constitution*, (Toronto: University of Toronto Press, 1967), 77-79, 157-60, 165-66, 176-82.
- 45 *Statutes of Canada*, 1914, 4-5 Geo V., c.8, sec. 45. See *Revised Statutes of Canada* (RSC), 1927, c. 73, sec. 46.
- 46 *R. v. Robertson* [1882] 6 S. C. R., 52; and *Attorney General for the Dominion of Canada v. Attorneys General for the Provinces of Ontario Quebec and Nova Scotia* [1898] A. C., 700 in *Decisions of the Judicial Council of the Privy Council relating to The British North America Act*, arranged by Richard Olmsted (Ottawa: Queen's Printer, 1954), 418-435. See Lise C. Hansen, "Treaty Fishing Rights and the Development of Fisheries Legislation in Ontario: A Primer," *Native Studies Review* 7 no. 1 (1991) for a discussion of this issue in Ontario.
- 47 This followed upon the traditional policy developed by the Department of Marine and Fisheries that regardless of treaty rights, fisheries regulations applied to Indian peoples. See Margaret Beattie Bogue, "To Save Fish: Canada, the United States, the Great Lakes, and the Joint Commission of 1892," *Journal of American History* 79 no. 4 (1993), 1445.
- 48 This issue was discussed in legal opinion dated 20 July 1897. See "Opinions-Department of Justice" RG 10, vol. 6731, file 420-1.
- 49 Memorandum, Scott to Meighen, 6 Mar. 1918, RG 10, vol. 6731, file 420-



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- 50 Meighen to Scott, 31 Oct. 1918, RG 10, vol. 6731, file 420-1.
- 51 Hayter Reed to T. Mayne Daly, 28 October 1893, RG 10, vol. 1114; A. E. Forget, Circular letter, 24 Nov. 1893, RG 10, vol. 3581, file 878 pt. A.
- 52 Order in Council, 8 May 1894, *Canada Gazette*, 26 May 1894.
- 53 Deputy Superintendent General, "Memorandum for the Information of the Minister re Fishing Privileges Claimed by Indians," 18 Nov. 1895, RG 10, vol. 1117.
- 54 *Dominion Alberta Saskatchewan Fisheries Commission*, (Ottawa, 1912), 31.
- 55 *Ibid.*, 22.
- 56 *Ibid.*, 31.
- 57 J.D. McLean (Assistant Deputy Minister) to T.H. Carter (Agent), 10 April 1915, RG 10, vol. 6969, file 501/20-2 pt. 1.
- 58 *Annual Report of the Department of Indian Affairs to March 31, 1929*, 7-8.
- 59 Canada, *Debates*, 1923, 2146. Richard Daniel, "Indian Rights and Hinterland Resources", pp. 167-76.
- 60 Canada, *Debates*, 1912, 4269. A brief historical summary of the negotiations for each province is found in RG 22, vol. 17, file 70. Readers may also consult Chester Martin, "*Dominion Lands*" Policy, edited with an introduction by L.H. Thomas (Toronto: McClelland and Stewart, 1973), 204-26.
- 61 Memorandum to Scott, 30 Jan. 1925, RG 10, v. 6820, file 492-4-2 Part 1.
- 62 Appendix H: Indian Lands in A Memorandum to Prime Minister by Col. Biggar (copy forwarded to D.C. Scott 17 February 1925). RG 10, vol 6820, file 492-4-2 pt. 1.
- 63 *Ibid.*
- 64 Draft of Alberta Agreement sent to D.C. Scott, May-June 1925 in RG 10, v. 6820, file 492-4-2 Part 1.
- 65 Canada, *Debates*, 1926, 557, 3923. Brownlee to King, 7 April 1926, unpublished Sessional Papers, 1926, 1st session, 15th Parliament, paper no. 75a.
- 66 For correspondence between Manitoba and the King government, see unpublished Sessional Papers, 1926-7, 1st session, 16th Parliament, paper no 172. W.F.A. Turgeon, T.A. Crerar, and Charles Bowman, *Report of the Royal Commission On the Transfer Of Natural Resources Of Manitoba* (Ottawa: King's Printer, 1929).
- 67 J. Chisholm (Acting Deputy Min. of Justice) to Scott, 22 Aug 1929. RG 10, vol. 6820, file 492-4-2 pt. 1.
- 68 Scott to Chisholm, 4 Sept. 1929, RG 10 v. 6820, file 492-4-2 Part 1.
- 69 *Ibid.*
- 70 Cory to Scott and Draft of Manitoba Resources Transfer Agreement, 7 Oct. 1929; Biggar to Scott and copies of new clauses, 12 December 1929. RG 10, vol. 6820, file 492-4-2 pt. 1.
- 71 *Statutes of Canada*, 1929, 20-21 Geo. V., c. 3, sec. 12.
- 72 RG 22, vol. 3, file 6.

73 *Ibid.*

74 Canada, *Debates*, 1934, 3000-3004.

75 Crerar to Thorson, 27 July 1940, RG10, vol. 6969, file 501/20-2 part 1.

76 Duncan Campbell Scott to Agents, 30 May 1931, copy in RG 10, vol 8860, file 1/18-11-2 pt. 1.

77 Memorandum, H.H. Rowatt to Daly, 23 Jan. 1933, RG 22, vol. 22, file 91.

78 Rowatt to W. Stuart Edwards (Deputy Minister, Justice), 12 Nov. 1931, RG 22, vol. 22, file 91. See Dan Gottesman, "Native Hunting and the Migratory Birds Convention Act: Historical, Political, and Ideological Perspectives," *Journal of Canadian Studies* 18, no. 3 (1983): 67-89, for information on the Migratory Birds Convention and Indian hunting rights

79 Draft letter to C.F. Newell, K.C. (Edmonton), 3 March 1930, RG 22, vol 17, file 70.

80 W. Stuart Edwards to Scott, 12 Feb. 1931, opinion 198/31; and Minister of the Interior to J.T.M. Anderson, 4 Feb. 1933, RG 22, vol. 22, file 91.

81 See Frank Tough, "Introduction to Documents: Indian Hunting Rights, Natural Resources Transfer Agreements and Legal Opinions from the Department of Justice," *Native Studies Review* 10, no. 2 (1995): 121-67 for a reprint of this legal opinion and several others. See also Kent McNeil, *Indian Hunting, Trapping and Fishing Rights In the Prairie Provinces of Canada* (Saskatoon: Native Law Centre, 1983), pp. 26-9.

82 A.G. Cunningham (Director of Game and Fisheries, Man) to A.G. Hamilton (Inspector of Indian Agencies), 26 July 1939. RG 10, vol 6969, file 501/20-2 part 1.

83 [1990] 1 S.C.R. 901, at 904.

84 [1996] 1 S.C.R. 771, at 805.

85 [1990] 1 S.C.R. 901, at 913 and 922.