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Aboriginal and Treaty Rights

RECONCILING POWERS AND DUTIES: A Comment on *HORSEMAN*, *SIOUI* and *SPARROW*

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The 1984 ruling of the Supreme Court of Canada in *Guerin v. R.* signalled a new era of judicial opinion on the question of aboriginal and treaty rights.¹ Traditionally, Canadian courts have upheld the ability of the Crown to exercise its jurisdiction over native people to their detriment.² *Guerin* began the movement away from this tradition by creating a new dichotomy in judicial premises: the absolute power of the federal government to unilaterally extinguish aboriginal and treaty rights and the duty of the Crown to act as a fiduciary in its dealings with Canada's first peoples. The tension in judicial reasoning created by this dichotomy and its impact on the legal rights of aboriginal peoples is illustrated by a comparison of the majority and dissenting opinions in *R. v. Horseman*.³ However, decisions rendered within one month of *Horseman* suggest that the direction of the Supreme Court is to resolve the tension by stressing concepts of duty and honour and that the emphasis on federal power in *Horseman* is an anomaly.⁴

The appellant in *Horseman* was a Treaty 8 Indian who killed a grizzly bear in self-defense. A year later, in need of money, he obtained a grizzly bear hunting license and sold the hide. He was subsequently charged with trafficking in wildlife without a license contrary to section 42 of the *Alberta Wildlife Act*.⁵ Two broad issues were before the Supreme Court. Was the *Wildlife Act* constitutionally applicable to Treaty 8 Indians? Were hunting rights granted by Treaty 8 extinguished, reduced or modified by paragraph 12 of the *Alberta Natural Resources Transfer Agreement* (N.R.T.A.)?⁶ In a four to three split, the Supreme Court answered both questions in the affirmative.

Central to the resolution of these issues was the principle that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."⁷ In applying this principle, Mr. Justice Cory accepted the legal power of the Crown to breach its treaty obligations and read a clear intent to limit Indian rights into paragraph 12.⁸ Speaking for the majority, he held that provincial laws of general application are applicable to Indians pursuant to section 88 of the *Indian Act* so long as they do not conflict with treaty rights.⁹ Treaty 8 includes the right to hunt for commercial purposes, but this right was abrogated by paragraph 12 of the N.R.T.A.. The Agreement had the effect

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of merging and consolidating treaty rights of Indians in the province and restricting the province's power to regulate the Indians' right to hunt "for food only"; that is, for sustenance of the Indian hunter or his family. Sustenance is not defined by Cory J., but his reasoning limits its scope to consumption of the product of the hunt. The isolated act of the appellant was characterized as an act of commerce despite the fact that the purpose of the sale was to obtain food for nourishment. As the right to hunt commercially was no longer protected by Treaty 8, the appellant could not raise Treaty 8 as a defence to the charge.

Cory J. rejected arguments that (a) the N.R.T.A. was intended to protect Indian rights; (b) the treaty could not be altered without consent and compensation; (c) endorsing unilateral abrogation brings dishonour to the Crown; and (d) the Crown is the trustee of native hunting rights. Recognizing that it might be "politically and morally unacceptable in today's climate to take such a step...without consultation with and concurrence of the Native peoples affected", he distinguished moral from legal obligations.¹⁰

Alternatively, he argued that the treaty contemplated the power of the Crown to alter hunting rights by providing that they were subject to regulations necessary to protect fish and

fur bearing animals. Further, there was a "quid pro quo": in exchange for the reduction of rights in paragraph 12, the Crown expanded hunting territories and allowed the adoption of non-traditional hunting methods.

The dissenting opinion of Madame Justice Wilson (Dickson C.J. and L'Heureux-Dubé J. concurring) illustrates the dramatic change which occurs in the legal position of native peoples when the Court operates on the premise of honour and duty in applying interpretive principles. The effect is to make the Crown's onus of proving intent to extinguish a true onus by refusing to operate on the presumption that the Crown intends to dishonour its commitments. Describing Treaty 8 as a "solemn engagement," she stated that it should be given an interpretation, if possible given the language, which implements, and is consistent with, the promise of the Crown that the Indians could continue a way of life that centred around unlimited access to wildlife resources. Regulatory powers must also be interpreted in the context of this commitment. Canada committed itself to regulating hunting in a manner that would respect the lifestyle of the Indians and the way in which they traditionally pursued their livelihood.

Wilson J. agreed that the Crown can unilaterally abrogate treaty rights, but she emphasized that the intent to alter Treaty 8 obligations by paragraph 12 of the N.R.T.A. must be unambiguous. In her view, paragraph 12 was intended to protect Treaty 8 rights.¹¹ Not satisfied that the government made an "unambiguous decision" to renege on its Treaty 8 obligations (and in view of the implications of bad faith) she concluded that the phrase "for food" is designed to draw a distinction between traditional practises protected by treaty (which may include a right of exchange) from sport hunting or hunting for purely commercial purposes. The sale of the hide was for food and fell outside the range of activities that the province could regulate by means of the *Wildlife Act*.¹²

Sioui and *Sparrow* suggest that the Supreme Court is following Justice Wilson's lead by tempering power with notions of duty and honour. In *Sioui*, the accused family was charged with a violation of the *Quebec Parks Act*¹³ after they entered a provincial park, cut branches, lit campfires, and built a shelter, contrary to the park regulations. They alleged that they were practising certain ancestral customs and religious rites protected by a treaty between the Huron and the British. Three issues were raised before the Supreme Court:

- (1) Was an informal document signed by General Murray of the British Army in 1760 a treaty?
- (2) If so, was the treaty still in effect?
- (3) Did the treaty make certain provisions of the *Parks Act* unenforceable against the respondents?

The Court held that the respondents were exercising existing treaty rights and that provisions of the *Parks Act* inconsistent with these rights were unenforceable against the respondents.

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The alleged treaty guaranteed protection, free exercise of religion and customs, and trade with the English in exchange for peace but it did not specify the territory over which these rights could be exercised. Speaking for the majority, Mr. Justice Lamer (as he then was) stated that formalities are of secondary importance in the creation of a treaty. The essential criteria are the intention to create legal obligations, the presence of mutually binding obligations, and a certain measure of solemnity. In his analysis of these elements, he emphasized the understanding of the Huron signatories to the document and the British practise of entering treaties.

Most interesting is Justice Lamer's description of the historical relations between Great Britain and Canada's first peoples as "nation-to-nation" relations. Referring to Canada's first peoples as independent nations, and affording them sufficient autonomy to enter into solemn agreements with the Crown, he characterized the Indian-Crown relationship as falling somewhere between "the kind of relations conducted with sovereign states and relations such states had with their own citizens."¹⁴ These notions of indigenous nationhood and solemnity affected Lamer's interpretation of the Crown's power of extinguishment and his willingness to find intentional breach. For example, he held that the English could not extinguish the Huron treaty by entering an agreement with the French. Emphasizing the sacred nature of treaties, he stated consent of the Huron was required. Other examples are the limitations placed on the theory of extinguishment by occupancy. In his view occupation must be totally inconsistent with treaty rights. The treaty right must not only be contrary to the purpose underlying the occupancy, but must also prevent the realization of the purpose.

The shift in premise from power to duty and honour is also evident in the *Sparrow* decision. *Sparrow* is the first decision of the Supreme Court of Canada to interpret section 35(1) of the *Constitution Act, 1982*.¹⁵ Arguably it can be distinguished from previous cases on the basis that it concerned the power of the federal government to regulate aboriginal rights after their entrenchment in the Constitution. However, statements made about the historical powers of the Crown, the Crown's fiduciary obligations, and principles of interpretation suggest that the future trend may be to hold the Crown to a "high standard of honourable dealing."¹⁶

Mr. Sparrow was charged in 1984 under the *Fisheries Act* for fishing with a drift net longer than that permitted by his band's fishing license.¹⁷ The issue before the Supreme Court was whether Parliament's power to regulate fishing is limited by section 35(1) and more specifically, whether the net length restriction was inconsistent with that provision. The Court prescribed the analytical process required to resolve the issue and then sent the matter back to the trial court.

The Supreme Court confirmed that section 35(1) only applies to rights in existence when the *Constitution Act, 1982* came into effect. Rights are affirmed thereby in their historic, unregulated form, subject only to prior extinguishment. The regulation of a right does not necessarily have the effect of extinguishing it.

In drawing distinctions between regulation and extinguishment, the Court placed limits on pre-1982 federal powers of extinguishment. The Court unequivocally stated that the test for extinguishment to be adopted is the "clear and plain" test enunciated by Mr. Justice Hall in the *Calder* case.¹⁸ The Court concluded that there is nothing in the *Fisheries Act* or its regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. Permits issued under the Act were simply a matter of controlling the fisheries and not a method of defining the underlying rights of Indian peoples.

In contrast, the Court failed to set limits on the type of rights that can be categorized as aboriginal rights. Further, it emphasized aboriginal rights must be interpreted flexibly so as to allow their exercise in a contemporary manner. Speaking generally on the nature of fishing rights, the Court stated that interpretation of this right must be "sensitive to the aboriginal perspective itself on the meaning of the rights at stake."¹⁹ Adopting this perspective, it is artificial to distinguish between the right to fish and the particular manner in which that right is exercised.

The interpretive framework for section 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. When the purpose of the affirmation of aboriginal rights was considered, the Court concluded that a generous, liberal interpretation of the words was demanded. It is within this framework that the Court determined the effect of section 35(1). First, the section provides a constitutional basis upon which negotiations can take place. Second, it affords aboriginal peoples constitutional protection against provincial legislative power. Third, federal legislation affecting the exercise of aboriginal rights enacted under a federal head of power after 1982 will not automatically invoke section 52 and be rendered of no force or effect. Rather, the validity of the legislation is to be determined by a two part procedure.

First, the aboriginal claimant must prove the existence of an aboriginal right and that the legislation in question has the effect of interfering with that right. If it does have such an effect, it represents a *prima facie* infringement of section 35(1). The onus then shifts to the Crown to justify the interference. The test of justification involves two steps. First, the Crown must establish a valid legislative objective such as conservation

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and management of resources. Second, it must show the objective is attained in such a way as to uphold the honour of the Crown. The Court held that the responsibility of the government to act in a fiduciary capacity must be the first consideration in determining whether the legislation or action in question can be justified.

It is by the second limb of the test, and the interpretation of the words "recognized and affirmed" in section 35(1), that the switch in premises from power to duty is most apparent. The Supreme Court directed that the federal power over Indians under section 91(24) of the *Constitution Act, 1867*²⁰ must be reconciled with the Crown's fiduciary duty which is incorporated in the words "recognition and affirmation." Recognition is achieved through the justification test. Support for this approach is drawn from liberal interpretive principles enunciated in *Nowegijick*²¹ and the "high standard of honourable dealing" suggested by *Guerin*.²² Further, in developing the justification test, the Court emphasized that over the years the rights of Indians have often been "honoured in the breach."²³ It stated that Canada cannot recount with much pride the treatment it has accorded to native peoples by ignoring their legal rights. This approach is to be reassessed in light of contemporary developments in law and the "trust-like" relationship between the Government and aboriginals.²⁴

Despite the evolution in Canadian law from power to duty, the same conceptual shift is not evident in the political arena. Native peoples continue to be subjected to protracted negotiations or expensive and lengthy litigation. Some provincial governments continue to deny aboriginal rights. The result is a general feeling of frustration and desperation. Empowered by the movement in the Supreme Court, it is not surprising that native peoples are demanding recognition of their rights. Oka is particularly revealing, for despite protracted negotiations it was apparent that a golf course was to have more priority than native claims. The Federal Government abdicated its fiduciary responsibility towards natives and classified the conflict as a provincial police matter. The tragedy of Oka will hopefully awaken the Canadian government to its duties and the need to find a peaceful and effective mechanism for resolving aboriginal claims. Until then, one is left asking whether the Supreme Court's new directions will have the practical effect of ending the era of honour in the breach.

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1. (1984) 2 S.C.R. 335.
2. In the area of treaty rights, this power had been tempered on occasion with notions of upholding the honour of the Crown. See, for example, *R. v. Taylor and Williams* (1981), 34 D.R. (2d) 360.
3. [1990] 1 S.C.R. 901.
4. *A.G. Quebec v. Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.); *Sparrow v. R.* (1990), 70 D.L.R. 385 (S.C.C.).
5. R.S.A. 1980, c.W-9
6. Treaty 8 states that "Indians shall have the right to pursue their usual vocations of hunting, trapping and fishing" over surrendered lands subject to "such regulations as may from time to time be made by the Government of the country." Paragraph 12 of the Natural Resources Transfer Agreement provides that provincial laws respecting game are to apply to Indians of the province provided that 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 and other lands" to which they may have a right of access.
7. *Nowegijick v. R.*, [1983] 1 S.C.R. 29 at 36. See also, *Simon v. R.*, [1985] 2 S.C.R. 387
8. The emphasis on power may arise from the majority's concern to protect endangered species. Of particular note is the suggestion by Mr. Justice Cory that "the number of bears slain in self-defence could be expected to increase dramatically" if this was a defence to a charge under section 42. Further, it is the author's understanding that the approach of tempering power with notions of duty emphasized in the dissent was not emphasized by the appellant's counsel in oral argument.
9. *Indian Act*, R.S.C. 1985, c. I-6.
10. *Supra*, note 4 at 934.
11. Ironically, the three decisions cited by the majority to support the view that paragraph 12 derogates from treaty rights were decided by Dickson C.J.C. who concurred in Wilson J.'s dissent. They are *Frank v. R.*, [1978] 1 S.C.R. 95; *R. v. Sutherland*, [1980] 2 S.C.R. 45; and *Moosehunter v. R.*, [1981] 1 S.C.R. 282.
12. *Supra*, note 6.
13. R.S.Q., c. P-9.
14. *Sioui*, *supra*, note 4 at 1038.
15. Being Schedule B of the *Constitution Act, 1982* (U.K.), 1982, c.11.
16. *Sparrow*, *supra*, note 4 at 409.
17. R.S.C. 1985, c. F-14.
18. Prior to this decision, two theories of extinguishment by legislation could be applied. The first was that statutes which do not specifically refer to extinguishment of aboriginal rights, but which evidence intention to exercise sovereignty inconsistent with aboriginal rights, have the effect of extinguishing those rights. The other view, stated by Hall J. in the *Calder* case, was that the onus of proving extinguishment was on the Crown and that the intention to extinguish must be "clear and plain." See *Calder v. A.G. of B.C.* (1973), 34 D.L.R. (3d) 145 (S.C.C.).
19. *Supra*, note 4 at 411.
20. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3.
21. *Supra*, note 8.
22. *Supra*, note 4 at 409.
23. *Ibid.* at 404.
24. *Ibid.* at 408.