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Inuit Hunting Rights in the Northwest Territories

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INUIT HUNTING RIGHTS IN THE NORTHWEST TERRITORIES

Peter A. Cumming**
and Kevin Aalto***

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I INTRODUCTION

The question of native hunting and trapping rights is of considerable importance to the native peoples of the Northwest Territories. First, game resources have a practical importance in that they provide food and also a means of livelihood through the trapping of fur-bearing animals. Second, because the Inuit have an autochthonous culture, that is, the people are an integral part of the lands and waters they use and occupy, game resources are of great cultural significance.

The Practical Importance of Hunting Rights

Traditionally, hunting and fishing provided the only sources of food available to the native peoples, although today game may be of decreasing importance in the native diet. There is some truth in the observation by Mr. Justice Monnin in R. v. Daniels that:

... [H]unting for food no longer means the difference between life and death for the Indian and his family, especially nowadays, with all the social security measures available for all Canadian citizens, as well as others available only to Indians.

However, for many Inuit, natural foods obtained through hunting and fishing provide the basic staples of their diet. Moreover, evidence exists to show that the abrogation of native hunting rights has resulted in hardship and
nutritional deprivation. One study\(^7\) dealing with the Inuit of Lake Harbour, Baffin Island, stated that the health of that community was not satisfactory and quoted The Eastern Arctic Patrol Report to the effect that "there is apparent disorganization and lack of communication between the Eskimos and the whites . . . . In some cases of death, malnutrition may have been a contributing factor."\(^9\)

The issue of hunting and trapping rights also has a symbolic importance to native peoples. As Chief Dan George has stated:

> Let no one forget . . . we are a people with special rights guaranteed to us by promises and treaties. We do not beg for these rights, nor do we thank you, . . . we do not thank you for them because we paid for them . . . and God help us the price we paid was exorbitant. We paid for them with our culture, our dignity, and self-respect. We paid and paid and paid until we became a beaten race, poverty stricken and conquered.\(^10\)

By upholding its solemn promises made historically by treaties to protect native hunting and trapping rights, the governments of both the Northwest Territories and the Dominion of Canada can do much to restore the confidence of the native population in their respect for good intentions. It has been observed:

> The question of treaty rights pervades the field of Indian-non-Indian relationships to such an extent that resolution of these differences is a pre-condition to acceptance by the Indian people of most programmes for their benefit and acceptance. The failure of successive governments to live up to the terms and the spirit of the original Treaties is in the eyes of most Indian people interviewed, a stumbling block to their acceptance of the white man's law in its widest terms.\(^11\)

In the negotiations of the various treaties of the latter half of the nineteenth century, the importance of these hunting rights was continually emphasized.

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\(^7\) *Migratory Birds Convention Act*, R.S.C. 1970, c. M-12, he was arrested by an R.C.M.P. constable who confiscated his gun and thereby prevented Sikyea from hunting further.


For example, the reports of the Commissioners representing the Dominion Government at the signing of Treaty No. 8 describe the negotiations as follows:

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing 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, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.\(^{12}\)

Moreover, the hunting rights of native peoples are simply an incident of general aboriginal rights in Canada and have been judicially recognized as such. For example, Mr. Justice Johnson, speaking for a unanimous Northwest Territories Court of Appeal in *Regina v. Sikyea* stated:

The right of Indians to hunt and fish for food on unoccupied Crown lands has always been recognized in Canada—in the early days as an incident of their 'ownership' of the land, and later by the treaties by which the Indians gave up their ownership right in these lands.\(^{13}\)

The Inuit in the Northwest Territories never signed treaties. However, the above commentary on the signing of treaties by Indian peoples is indicative of the importance of hunting rights to native peoples generally. Moreover, the guarantee of hunting rights extended by the Crown at the time of treaty-making indicates the respect which the government had for these rights. Although the current Government of Canada is reluctant to recognize aboriginal rights,\(^{14}\) an outline of some of the leading authorities from Confederation to the present will demonstrate that the rights of Canada's native peoples in the lands they have traditionally used and occupied have a basis as a matter of law and that those rights may not be disturbed without both consent and compensation. Hunting rights are simply one incident of


\(^{13}\) Ibid., p. 152.

\(^{14}\) See, for example, the speech given by Prime Minister Trudeau, August 8, 1969, in Vancouver, British Columbia, reproduced in Cumming and Mickenberg, *Native Rights in Canada*, supra, footnote 1, at p. 331; and, Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (Ottawa: 1969).
In addition, apart from their legal significance, the following synopsis illustrates the historical and moral claims which native peoples have upon the Government of Canada. (Those authorities of particular relevance to the Northwest Territories are marked with an asterisk.)

*(a) In the Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada upon the transference of Rupert's Land to Canada, December, 1867, it was stated:

"And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines." 16

*(b) 1869-70 — The purchase of the Hudson's Bay Company's territories and the acquisition of the Northwestern Territory. The Federal Government accepted responsibility for any claims of the Indians to compensation for land in Rupert's Land and the Northwestern Territory. 17

*(c) 1870 — The Manitoba Act granted land to settle land claims of Metis peoples. 18

(d) 1871-1921 — The numbered treaties and their adhesions speak of the Indians conveying land to the Crown. As the Order-in-Council for Treaty No. 10 demonstrates, the treaty-making was done with a concept of aboriginal title clearly in mind:

"On a report dated 12th July, 1906 from the Superintendent General of Indian Affairs, stating that the aboriginal title has not been extinguished in the greater portion of that part of the Province of Saskatchewan which lies north of the 54th parallel of latitude and in a small adjoining area in Alberta . . . that it is in the public interest that the whole of the territory included within the boundaries of the Provinces of Saskatchewan and Alberta should be relieved of the claims of the aborigines; and that $12,000 has been included in the

15 See generally, Cumming and Mickenberg, Native Rights in Canada, supra, footnote 1, and Regina v. Sikyea, supra, footnote 6, and see especially footnote 13 and accompanying text.


18 S.C. 1870, c. 3, s. 31.
estimates for expenses in the making of a treaty with Indians and in settling the claims of the half-breeds and for paying the usual gratuities to the Indians."  

(e) 1872 — The first *Dominion Act* dealt with the sale of Crown land. Section 42 stated:

"None of the provisions of this Act respecting the settlement of Agricultural lands, or the lease of Timber lands, or the purchase and sale of Mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished."  

This provision remained in the various *Dominion Acts* until 1908 when it was repealed, without any stated reason.

(f) 1875 — The Federal Government disallowed "An Act to Amend and Consolidate the Laws Affecting Crown Lands in British Columbia" stating "There is not a shadow of doubt, that from the earliest times, England has always felt it imperative to meet the Indians in council, and to obtain surrenders of tracts of Canada, as from time to time such were required for the purposes of settlements."  

As authority the Deputy Minister cited the 40th article of The Articles of Capitulation of Montreal and the *Royal Proclamation of 1763*.  

(g) 1876 — A speech of Governor General Dufferin in Victoria upheld the concept of Indian title and criticized the British Columbia Government.

*(h)* 1879 — The *Dominion Lands Act* authorized the granting of land in the Northwest Territories to satisfy "any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds. . . ."
(i) 1888 — In the *St. Catherine’s* case the Federal Government argued that it obtained a full title to land from the Indians by Treaty No. 3.25

(j) The Federal-Provincial Agreements which followed the decision in the *St. Catherine’s* case sometimes employed the following "whereas" clause (taken from the 1924 Ontario Agreement):

"Whereas from time to time treaties have been made with the Indians for the surrender for various considerations of their personal and usufructuary rights to territories now included in the Province of Ontario. . . ." 26

*(k) 1889 — The Federal Government disallowed the Northwest Territories Game Ordinance because it violated Indian treaty hunting rights.27

(l) 1912 — In the boundaries extension legislation for both Ontario and Quebec, the Federal Government made a special provision requiring treaties to be made with the Indians.28

(m) 1930 — The *British North America Act* transferred the ownership of natural resources to the prairie provinces. In each of the provinces the Indians are protected in their right "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."29

*(n) 1946 — The evidence of Mr. R. A. Hoey, Director of the Indian Affairs Branch, May 30, 1946, stated before the Joint Committee of the Senate and House of Commons:

"From the time of the first British settlement in New England, the title of the Indians to lands occupied by them was conceded and compensation was made to them for the surrender of their hunting grounds . . . this rule, which was

25 (1899), 14 App. Cas. 46 at p. 54.
26 S.C. 1924, c. 48.
27 Reprinted in S.C. 1891, at p. 1xi. See also footnotes 72 to 78 and accompanying text, infra.
28 S.C. 1912, c. 40, s. 2(a) (Ontario); S.C. 1912, c. 45, s. 2(c) (Quebec).
confirmed by the Royal Proclamation of October 7, 1763, is still adhered to."

* (o) 1946 — Mr. T. R. L. MacInnes, Secretary, Indian Affairs Branch, stated on June 4, 1946:

"Now it remained for the British to recognize an Indian interest in the soil to be extinguished only by bilateral agreement for a consideration. That practice arose very early in the contracts between the British settlers and the aborigines in North America, and it developed into the treaty system which has been the basis of Indian policy both in British North America and continuing on after the revolutionary war in the United States."

* (p) 1966 — *The Canadian Indian*, a pamphlet published by the Department of Indian Affairs, states:

"Early in the settlement of North America the British recognized Indian title or interests in the soil to be parted with or extinguished by agreement with the Indians and then only to the Crown."

* (q) 1971 — The Dorion Commission Report expressly recognized aboriginal rights, urged an expansive view of the content of aboriginal title and acknowledged the need to compensate native peoples for the extinguishment of their rights.

(r) *Calder v. The Attorney-General of British Columbia* — The issue of the existence of native title was brought before the Supreme Court of Canada which on January 31, 1973 held against the non-treaty Nishga Indians. Three justices found against the Indians on the question of native title, three found in favour of the Indians on this question, and a seventh justice found against the Indians on a purely procedural basis. Thus, the substantive issue of native title was not resolved by the decision. The dissent of Mr. Justice Hall traced the origins of the native peoples’ aboriginal rights and found clear recognition by Canadian law of those rights.

30 Minute No. 1, at p. 31.

31 Joint Committee of the Senate and House of Commons, Minute No. 2 at p. 54.

32 Department of Indian Affairs and Northern Development, *The Canadian Indian*; (Ottawa: 1966), p. 3.


34 [1973], 4 W.W.R. 1; 34 D.L.R. (3d) 145, S.C.R. 313. Justices Laskin and Spence concurred in Mr. Justice Hall’s dissent. Justices Ritchie and Martland concurred in the decision of Mr. Justice Judson. Mr. Justice Pigeon held against the Indians but on a purely procedural issue only.
The Inuit culture and identity are based upon an intimate relationship with the lands and waters they have traditionally occupied and used. Hunting for food and clothing is part of their traditional and continuing culture. Their lands and waters are an integral part of their total being. Few Canadians realize that many Inuit are experiencing within a single lifetime a tremendous cultural transformation from that of a food gathering tribal community to an industrial society. The explorer, Viljalmur Stefansson, in his second expedition to the Arctic from 1908 to 1912 was meeting Inuit communities which had never before had contact with a white person.35 Thus, even if the way of life of the Inuit is changing the need to hunt is instinctive, not unlike, perhaps, the continuing need of Francophone Canadians to express themselves in the French language.

Therefore, the preservation of Inuit hunting rights has the effect of enhancing their cultural identity in a rapidly changing society. The present economic benefits of hunting will be increasingly incidental to the cultural aspects, rooted in thousands of years as a hunting people. The protection of Inuit hunting rights can be viewed as a mechanism to preserve Inuit culture, without cost to the rest of Canadian society.

Assuming that the way of life for the Inuit in the Northwest Territories continues its rapid transformation from the barter economy based upon fur to a wage economy based, it would seem, upon the oil and gas industry, the cultural importance of game will increase. This is because the use of game resources is one of the most significant means by which native peoples can continue to have some sense and experience of the culture and heritage of their ancestors. Additionally, game resources are essential for the creation of the varied and unique creative arts designed and executed by Inuit, by means of which they are able to share their culture with all Canadians.

However, game resources are becoming more and more threatened by the changing economy. The new competing land uses of exploration and development, combined with the concomitant increase in the non-native population which accompanies development, all contribute to the destruction of this valuable resource. Moreover, the hunting rights of native peoples do not today receive the same protection by government that they received historically.

Synopsis of Submission made by this paper

This paper emphasizes the importance of enhancing and protecting Inuit hunting rights as being special rights of a native people within Canadian society. The statement of the Government of Canada36 on August 8, 1973,


36 Department of Indian Affairs and Northern Development, “Statement made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People,” August 8, 1973.
that it is prepared to negotiate a settlement of claims arising from native land rights, is encouraging. However, the apparent emphasis in this statement is upon money compensation for the taking of rights, rather than entrenchment or protection of continuing rights. Because of other political problems in Canada, that is, the possible continuing Federal-Quebec confrontation on the question of further special rights for French Canadians, the Government may be reluctant to deal with Inuit concern with respect to hunting rights, one incident of Inuit land rights, on the basis of any recognition of continuing special hunting rights for the Inuit. If such a position is taken by the Government, it would be a serious mistake. One of the reasons for the present national tragedy in the relationship between native and non-native society in Canada has been the destruction of native identity and pride, with consequential frustration and hostility, through the Government's refusal to respect the native culture. The recognition of hunting rights offers one basis, without significant cost, for a new relationship between native and non-native society. This is particularly important in the Northwest Territories where there is still some time and opportunity for a new and different foundation in the relationship between native peoples and the dominant society in Canada.

There is an obvious need for conservation in respect to game resources in any society to prevent needless and wanton destruction of these resources. As game resources are very important to native peoples, they are the people most vitally interested in conservation measures and game management.

A more general problem in the Northwest Territories is the non-participation by native peoples in the decision-making process of government which affects all major aspects of their lives and society. This is present as well in respect to the specific area of game management, where one finds, for example, that game officers are not usually native persons. Moreover, game management has been placed within the jurisdiction of the Territorial Government by Federal legislation, without any consideration or consultation with native peoples.

37 Ibid., at p. 4 where it is stated: "The Government is now ready to negotiate with authorized representatives of these peoples on the basis that where their traditional interest in the lands can be established, an agreed form of compensation or benefit, will be provided to native peoples in return for their interest." (emphasis added)

38 See the "Remarks on Aboriginal and Treaty Rights," given by Prime Minister Trudeau in Vancouver, British Columbia, one August 8, 1969, reprinted in Cumming and Mickenberg, Native Rights in Canada, supra, footnote 1, Appendix VI. However, what Mr. Trudeau has failed to recognize is that the aboriginal rights question is not one of sovereignty. At the time of the fall of New France, the British fully recognized the property rights of French settlers, as well as the property rights of the native peoples through the Royal Proclamation of 1763.

39 This is a matter of common knowledge throughout the North and has been confirmed in a conversation with Frank Bailey, Chief Game Management Officer for the Keewatin District, Northwest Territories, Tuesday, June 19, 1973. One Inuk game officer has recently been appointed to the Baffin Region.

40 Northwest Territories Act, R.S.C. 1970, c. N-22, s. 14 and generally, the Territorial game legislation which is the subject matter of this brief.
Therefore, the suggested approach for the Government to take is as follows. First, the hunting rights of the Inuit, and other native peoples in the Northwest Territories should be formally recognized in Federal legislation. Such special rights would be on the basis that only native peoples can hunt game for food or livelihood. The present privileges of non-native residents of the Territories to hunt could be retained during their lives, but would not be extended to newcomers.

Second, the Inuit, and other native peoples, should be involved more actively in the process of game management. The Territorial Government would control game management, but only the native peoples could hunt for food or their livelihood, subject to a continuation of the privilege enjoyed by present residents during their lifetime. Society as a whole would decide upon the conservation policy, and would determine when and how hunting could take place. However, upon the determination that hunting could take place, only native peoples could so hunt.

II THE PRESENT ATTITUDE OF THE GOVERNMENT OF THE NORTHWEST TERRITORIES TO INUIT HUNTING RIGHTS

The Government of the Northwest Territories through amendments to its Game Ordinance recently took a further step to dilute the hunting rights of the native peoples in the Northwest Territories. These amendments, which delete specific references to Indians and Inuit from the Game Ordinance, were asserted by the legislators on the basis that they would not substantively change the rights of native peoples in respect to hunting. The purpose of the amendments was stated to be "to delete where possible all specific references to Indians and Eskimos without interfering with any of their rights". During discussion of the amendments by the Council of the Northwest Territories, it was stated by Deputy Commissioner Parker that:

... [T]here was a request by Members of this Council to remove certain statements in the ordinance which appeared to be discrim-

41 "An Ordinance to amend the Game Ordinance of the Northwest Territories; Northwest Territories Ordinances, 1972, c. 6.

42 "An Ordinance Respecting the Conservation of Game," Northwest Territories Ordinances 1960, c. 2 as amended (hereinafter referred to as the Game Ordinance).

43 The hunting rights of Indian peoples in the Northwest Territories were guaranteed by treaty as well (Nos. 8 and 11). There are no treaties with the Inuit of the Northwest Territories.

44 "An Ordinance to Amend the Game Ordinance," supra, footnote 41. Before being passed these amendments were strenuously objected to by the native peoples of the Northwest Territories. In a letter dated July, 1972, Chief Alexis Arrowmaker, Chief Joe Sangris, and Councillors of the Fort Rae Band of Indians wrote to the Minister of the Department of Indian Affairs and Northern Development, Jean Chretien, demanding that the Game Ordinance, which they considered beyond the power of the Northwest Territories Government to pass in the first place, be left untouched. The letter stated in part:
inatory and this is what we did. In removing, where it was not necessary to have it in, the words Indians and Inuit, and dealing in fact, as the Ordinance should, with northern residents. Where it is necessary and important that they be named then this has been done and those words have been retained. There is no diminution whatsoever of the rights of the Indian or Inuit people by any changes that have been made in this ordinance.45

During the same debate Councillor Trimble commented:

It appeared at that time that it was possible to remove the reference to Indian and Eskimo, but not to, in any way remove any rights and privileges that they presently enjoy. It was neces-

As you know Treaty 11 between the Indian people of Fort Rae and the Federal Government was made in 1921 and under that treaty, it was promised that the Indian people would hunt, trap and fish as they always did 'as long as the sun rises in the east and sets in the west and the great river flows.' There were to be no licences or closed seasons and the game was to be protected from encroachment by white people.

The Territorial Council had no right to pass the Game Ordinance in the first place, but now they want to change the Ordinance so that it looks like there never was a Treaty and Indians and Eskimos never existed.

Treaty 11 is unsettled and we insist that all developments upon our lands and all interference with our Treaty Rights stop until the land is settled and our rights are clarified and honoured.

We trust, therefore, that you will instruct the Commissioner and council to stop what they have no right to do and forget this nonsense about changing the Game Ordinance. Reference to Treaty Indians must remain in the Game Ordinance.

The Inuit people, through Inuit Tapirisat of Canada, also strenuously objected to the interference with their rights by the Territorial Council. Their submission on June 5, 1973, entitled Brief to the Federal Government of Canada in Respect to Disallowance of Game Legislation of the Northwest Territories, requesting the disallowance of the Game Ordinance amendments, concluded:

The Federal Government is requested to take positive action:

1) to have the Council of the Northwest Territories remove this limitation (on aboriginal rights);

2) to make the necessary amendments to the Migratory Birds Convention Act through Parliament to redress this injustice; and

3) to have the Council consider and make all amendments to its legislation, i.e. the game legislation, necessary to advance and give realization to native hunting and trapping rights so as to increase the opportunities for natives to pursue their livelihood and source of sustenance, as well as to restore and make known these basic levels of self-identity, culture and heritage.

However, the Minister of Indian Affairs and Northern Development, Mr. Chretien, refused to disallow the amendments. Letter of Mr. Chretien to Inuit Tapirisat of Canada dated July 12, 1973.

sary, and in the opinion of the committee, desirable, to extend the right to a free general hunting licence to those persons who hold a general hunting licence but are not of Indian or Eskimo registration. In other words, to the Metis people primarily, non-registered Indians, and the few other persons in the territory who possess general hunting licences. But in no way were any rights or privileges removed from the Indian and Eskimo people.46

However, it is submitted that the amendments, although recognizing the existence of special rights which the native peoples possess, dilute these rights by extending the same rights to a limited game supply to many others residing in the Territories. Thus, the amendments amount to one more piece of legislation in the continuing flow of laws over the past century diminishing hunting rights and the value of those rights, both as a source of livelihood and as an important item of self-identity of native peoples. Moreover, it is quite possible that there will be a large influx of non-natives into the Northwest Territories in the next few years due to the large development projects presently contemplated. This will eventually result in a continuing excessive demand for an already limited game supply.

III HISTORY OF GAME LEGISLATION IN THE NORTHWEST TERRITORIES

Introduction

Throughout Canadian history there have been many clear instances of the recognition of the aboriginal rights of Canada’s native peoples in all parts of Canada. The numbered treaties of western Canada, including treaties 8 and 11, are one example of the recognition of these rights and indicate the importance of hunting rights to the native populace. Similarly, the historical development of game legislation in the Northwest Territories evidences the importance of the preservation of game and the rights of native peoples to hunt for food as of right. However, the complete picture of the development of this legislation in the Northwest Territories is a confused one. There are several Federal acts dating back to the latter decades of the nineteenth century dealing directly with this subject as well as many territorial ordinances prescribing game regulations.

The area which is today known as the Northwest Territories was first organized as a territory by the government of Sir John A. MacDonald. On July 15, 1870, the areas formerly known as Rupert’s Land and the Northwestern Territory were admitted into the Dominion as an unorganized territory although it was not until 1875, with the passing of the Northwest Territories Act,47 that a government was established in the area. Until then,
the area was managed from Ottawa where records were centralized and control was exercised by easterners unfamiliar with the west and able to exploit their positions to gain land grants and other favours in the territory. Little initiative was allowed the inhabitants of the area to manage their own affairs and it seemed to be the policy of the Dominion Government that the Indians and Metis should be acculturated into white civilization as quickly as possible so that the area could be opened for settlement. The simple fact that the Government had any policy at all toward the native peoples may be viewed as further evidence of the conscious attempt of the Federal Government to pursue the objective of recognition of native rights of the Royal Proclamation of 1763 which, it is arguable, applies to lands in the Northwest Territories. The policies outlined in the Proclamation of 1763 were also adopted at Confederation in 1867, when Parliament was given the necessary power by section 91(24) of the British North America Act to deal with Indians and the lands reserved to them by the Royal Proclamation. Similarly, the great treaty-making era, which began in the 1870's and lasted until 1923 and includes a portion of the present Northwest Territories, is clear evidence of the desire of the Federal Government to follow the procedures for proper extinguishment of aboriginal rights as enunciated generally in British and Canadian common and statutory law, executive acts, government policy, and in particular, the Royal Proclamation.

With the passing of the Northwest Territories Act in 1875, provisions were made for the establishment of a government structure in the territories. The administration was to be headed by an appointed Lieutenant-Governor.


\[49\] Mr. Justice Sissons in several cases has unequivocally stated that the Proclamation of 1763 did extend to the Northwest Territories. See Regina v. Koonungnak (1964), 45 W.W.R. 282 (N.W.T. Terr. Ct.) and Regina v. Kogogolak (1959), 28 W.W.R. (N.S.) 376 (N.W.T. Terr. Ct.) although these cases have been overruled by Sigeareak E-53 v. The Queen, [1966] S.C.R. 645. Other cases have held that these lands were terra incognita in 1763 and therefore the Proclamation could not apply. See, for example, Calder v. Attorney-General (1971), 13 D.L.R. (3d) 64 (B.C.C.A.), affirmed on appeal to the Supreme Court of Canada, discussed in footnote 34, supra. Regina v. White and Bob (1965), 50 D.L.R. (2d) 613, at p. 619 (Sheppard J.A., dissenting); Regina v. Sikyea (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.), aff'd, [1964] S.C.R. 642. Contra, Regina v. White and Bob, 40 D.L.R. (2d) 613 at pp. 636-645 (Norris, J.A.). See also Native Rights in Canada (2nd ed.) supra, footnote 1, at pp. 26-30, 223-225; and an unpublished paper by Kenneth M. Narvey of Winnipeg. As the ruling by the Supreme Court of Canada in Sigeareak E-13 v. The Queen, [1966] S.C.R. 645 as to the limited geographical scope of the Royal Proclamation of 1763 was really obiter, and as the court's later decision of January 31, 1973, in Calder v. The Attorney General of British Columbia ultimately turned upon a procedural point, the question as to whether the Royal Proclamation of 1763 extends to the Northwest Territories remains an open one. See 38 Sask. L. Rev. (1973-1974).

\[50\] 30 & 31 Vic., c. 3.

\[51\] Treaty Nos. 8 and 11 cover approximately 400,000 square miles of these Territories.

\[52\] 38 Vic., c. 49.
assisted by a five-man appointed council supplemented by elected members. Although intended to be an autonomous legislative body, the council had very little actual power. Administrative functions in respect to the territories were carried out by agents of the Federal Government or by the Lieutenant Governor in his capacity as agent of the Dominion Government, while the Department of the Interior, with its many branches, continued its control and administration over the territories. Moreover, the powers of the council were further circumscribed by the overriding effect of Federal legislation and the disallowance power resting in the Federal Government in respect to territorial ordinances, a power often exercised in connection with early game legislation.53

Early Game Legislation of the Territorial Government of the Northwest Territories

It would appear that the earliest legislation in respect to game in the Northwest Territories was passed by the Territorial Council in the year 1877 after considerable discussion and prodding by westerners concerned about the extermination of the buffalo.54 This Ordinance, entitled "An Ordinance for the Protection of the Buffalo"55 provided generally for restrictions on the hunting of buffalo. The whole intent of the Ordinance was to protect the buffalo against wanton slaughter by white hunters and to preserve it as a source of food for those in need, particularly Indians, both treaty and non-treaty. Section 2 set out the intent of the Ordinance in this fashion:

2. It shall be unlawful at any season, to hunt or kill buffalo from the mere motive of amusement, or wanton destruction, or solely to secure their tongues, choice cuts, or peltries; and the proof in any case, that less than half of the flesh of a buffalo has been used or removed shall be sufficient evidence of the violation of this section.

Another section56 then provided that there would be a closed season on female buffalo for nine months of the year but with the proviso that "nothing contained in this section shall extend or apply to Indians or non-treaty Indians" for the first three months of the closed season. In essence, although putting some restrictions on the native people from hunting female buffalo, the main object of the ordinance was to protect their major food supply. Violations of the Ordinance were punishable by fines up to $100 with

53 Zaslow, supra, footnote 48, at pp. 23-24, 94-95. For examples of use of the disallowance power see, especially footnotes 72 to 78 and accompanying text, infra, and generally, W. E. Hodgins, supra, footnote 21, at pp. 1244-1295. The disallowance in respect to an attempted amendment to Territorial Game Legislation is dealt with in the text accompanying footnote 75.


55 N.W.T. Ordinances, 1877, No. 5.

56 Ibid., s. 4.
Inuit Hunting Rights

one-half to go to the informer.\footnote{57} There was no mention of the Metis and at this time period little was known about the Inuit. Although many Indian leaders had expressed to Federal officials the need for some protection for buffalo to prevent extinction,\footnote{58} the Ordinance was vigorously opposed by them. The Metis resented the inherent discrimination in the ordinance of the failure to mention them, while the Indians were incensed over the white man’s attempt to prevent them the killing of an animal which they felt their “Great Spirit” had provided for them.\footnote{59} The great refugee Sioux chief, Sitting Bull, is recorded as having exclaimed:

When did the Almighty give the Canadian Government the right to keep the Indians from killing the buffalo?\footnote{60}

As a result of this vehement opposition and partly also because the Ordinance was too late to make substantial differences to the preservation of the already depleted herds of buffalo,\footnote{61} it was repealed in 1878.\footnote{62}

No further legislation in respect to game appeared until 1883 when “An Ordinance for the Protection of Game”\footnote{63} was passed. This Ordinance set out closed seasons on certain species of birds, game and fur-bearing animals,\footnote{64} prohibited the injuring, gathering or taking of eggs of any species of wild fowl mentioned in the Ordinance,\footnote{65} provided for penalties for violation of the Ordinance,\footnote{66} and, provided for the appointment of wardens to enforce the provisions.\footnote{67} In addition, it was stated that:

Notwithstanding anything herein contained, it shall be lawful for any traveller, family or other person in a state of actual want, to kill any bird or animal herein mentioned, and to take any egg or eggs hereinbefore referred to for the purpose of satisfying his immediate want, but not otherwise.\footnote{68}

This provision no doubt included native peoples in a state of actual want although no specific mention was made of them in that section. However, in

\footnote{57} Ibid., s. 7.
\footnote{58} Stanley, supra, footnote 54, p. 222. Stanley recounts that when treaty payments were made at Qu’Appelle in 1876, not only each chief but each headman too, expressed concern to government officials regarding the protection of the buffalo.
\footnote{59} Ibid., p. 223.
\footnote{60} Ibid.
\footnote{61} Ibid., s. 732(1)(a)(b)(c).
\footnote{62 N.W.T. Ordinances, 1878, no. 3.
\footnote{63 N.W.T. Ordinances, 1883, no. 8. (The debates of the Council are unavailable and hence it is unclear as to the motivation and reasoning for passing some of these Ordinances.)
\footnote{64 Ibid., ss. 1-4, 7-8.
\footnote{65 Ibid., s. 6.
\footnote{66 Ibid., s. 13.
\footnote{67 Ibid., ss. 9, 11, 12.
\footnote{68 Ibid., s. 18.
another section it was provided that the Ordinance "shall not apply to Indians in any part of the Territories, with regard to any game actually killed for their use only, and not for purposes of sale or traffic." It should be noted that the exemption section for Indians, no mention of Métis being made, was not as wide as that in reference to peoples in actual want, since Indians were still proscribed from taking eggs of wild fowl. Also, the word "game" rather than "bird or animal" was used. It can be presumed, however, from the context of the Ordinance that game, although undefined, refers to both birds and animals. Moreover, the geographical extent of the application of the Ordinance was limited to the southern half of what is now Alberta and Saskatchewan although in a more limited form. Nonetheless, the Ordinance did continue the policy previously set forth in the 1877 Ordinance of preserving for native peoples their traditional sources of food.

Further amendments and consolidations were made to the Game Ordinance in ensuing years although the provisions exempting native peoples from the effects of the closed seasons were continued subject to the proscription against taking the eggs of wild fowl.

In 1889, an amendment was passed to the Game Ordinance which repealed the exemption in respect to Indians and further provided that no buffalo could be killed by any person in any part of the Territories. The response of the Dominion Government to this action by the Lieutenant Governor and the Legislative Assembly of the Territories was to disallow the Ordinance.

In the report of the Minister of Justice on this Ordinance, the Minister stated that:

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69 Ibid., s. 19.
70 Ibid., s. 20.
71 This Ordinance was amended in 1883 by "An Ordinance to Amend Ordinance No. 8 of 1883, respecting the Protection of Game," N.W.T. Ordinances, 1884, No. 33, but this had no effect on the native peoples' food supply. Similarly, it was again amended in 1886 by "An Ordinance to Further Amend Ordinance No. 8 of 1883, entitled 'An Ordinance for the Protection of Game'," N.W.T. Ordinances, 1886, No. 15. In 1887, it was consolidated and again amended, "An Ordinance to Amend and Consolidate, as Amended, the Several Ordinances for the Protection of Game," N.W.T. Ordinances, 1887, No. 11. This Ordinance repealed all others and dropped the geographical limitation in respect to the application of the Ordinance. "An Ordinance for the Protection of Game," N.W.T. Revised Ordinances, 1888, ch. 25, a re-consolidation of the Ordinance, continued the above provisions although a new geographical limitation was imposed to the effect that the Ordinance was not to apply "North of a line drawn one hundred miles North of the North Saskatchewan River," s. 17.
72 "An Ordinance to Amend Chapter 25 of the Revised Ordinances of the Northwest Territories, intituled 'The Game Ordinance'," N.W.T. Ordinances, 1889, No. 11.
73 Ibid., s. 7.
74 Ibid., s. 8.
75 S.C. 1891, at p. bxi
76 "Report of the Hon. Minister of Justice, approved by His Excellency the Governor General in Council on the 1st October, 1890," in W. E. Hodgins, supra, footnote 21, at pp. 1254-1256.
Prior to the acquisition of the Northwest Territories by the Dominion of Canada the whole country with the exception of a small area, had never been surrendered by the Indians inhabiting the same. At the present time, however, almost all the territory south of the 52nd parallel of north latitude, has been divested of the Indian title by the operation of treaties known as Nos. 2, 4, 6 and 7. Each of these treaties, with the exception of No. 2, contains a provision guaranteeing to the Indians certain rights of fishing and hunting over the surrendered territory.

After setting out the various treaty provisions the Minister then continued:

It will be observed that in treaties Nos. 4 and 7, the right of regulating the hunting and fishing is vested in 'the government of the country acting under the authority of Her Majesty', whereas in treaties Nos. 5 and 6 such regulations are to be made by the Government of the Dominion of Canada.

The undersigned is inclined to the opinion that the authority referred to in both cases is the Dominion government or parliament, but whatever doubts there may be as to the meaning of the phrase 'the government of the country acting under the authority of Her Majesty' there can be none as to the meaning of the phrase 'Her Government of the Dominion of Canada', and that the treaties contained in these words, purport to secure to the Indians the right to pursue their advocations of hunting and fishing, subject to any regulations made by your Excellency in Council.

The Ordinance now under review purports to regulate and control the advocations of hunting and fishing by the Indians, as well as by the other subjects of Her Majesty, and in so far as it relates to Indians, is a violation of the rights secured to them by the treatise [sic] referred to.

The undersigned does not consider it necessary to discuss the propriety of these regulations, or whether the Indians should be exempt from the regulations. It is sufficient to observe that the utmost care must be taken, on the part of your Excellency's governments, to see that none of the treaty rights of the Indians are infringed without their concurrence.

The undersigned desires also to observe that it may be doubtful whether the Northwest Assembly has authority to legislate in respect to hunting and fishing upon the public domain of Canada. He does not, however, deem it necessary to do more than call attention to this point, as bearing upon possible future legislation in the Territories, inasmuch as the Ordinance in question would lead to a violation of the terms of the treaties above referred to.

77 Ibid., p. 1255.
78 Ibid., pp. 1255-1256.
By thus disallowing the legislation there was an explicit and continuing recognition of an aboriginal right, guaranteed by treaty in the native peoples to hunt for food for their livelihood. Moreover, the Federal Government by its action, demonstrated that it was prepared to act forcefully to protect those rights.

Following the disallowance there were several further amendments dealing with administrative details but nothing which would alter the right of native peoples to hunt. The game legislation was again consolidated in 1892 and the proviso in respect to the killing of game irrespective of locale or season if actual want necessitated was continued, along with the exemption for Indians. In addition, a new section provided that persons who were not resident in the territories were required to buy a licence for $5.00 to be able to hunt there, thus tending to protect a supply of game for those living in the Territories. The consolidation of 1893 which repealed the previous consolidation of the Ordinance, maintained the proviso for people in need but added another section in respect to rights of Indians to hunt.

The new section stipulated that the Ordinance would "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. . . ." That particular section of the Indian Act was passed in 1890 and provided that:

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

The authority vested in the Superintendent General of Indian Affairs by virtue of this section was exercised at least once. In 1903, by public notice in the Canada Gazette, William Mulock, Acting Superintendent General, proclaimed the game laws in force in the Northwest Territories applicable to

79 "An Ordinance to Amend Chapter 25 of the Revised Ordinances of the Northwest Territories, 1888, intituled 'The Game Ordinance'," N.W.T. Ordinances, 1890, No. 11; "An Ordinance to Amend Ordinance No. 11 of 1890, being an Ordinance to Amend 'The Game Ordinance'," N.W.T. Ordinances, 1891-92, No. 11.

80 "An Ordinance to Amend and Consolidate as Amended 'The Game Ordinance' and Amendments Thereto," N.W.T. Ordinances, 1892, No. 19.

81 Ibid., s. 18.

82 Ibid., s. 19.

83 Ibid., s. 19.

84 53 Vic., c. 29, s. 10.

85 Canada Gazette, 1903, p. 2332.
twenty-two bands of Indians who had signed the treaty. This, however, would not affect the rights of native peoples to hunt on their reserves, since, as was pointed out by the Minister of Justice in his report on the disallowance of the 1889 Game Ordinance, only the Federal Government could infringe upon those rights with the concurrence of the Indians. Although other treaty Indians may have been brought within the purview of the Game Ordinances by virtue of this section, it would never appear to have been made applicable to the Inuit. Moreover, the section did not appear in the 1906 revised version of the Indian Act and by this date, the Federal Government had become directly involved in legislating for the preservation of game in the Northwest Territories. In total, therefore, this new section in the 1893 Territorial Ordinance would not appear to have affected in any practical way native peoples' uninhibited rights to hunt for food, although the Federal Government had new legislated to itself an implicit right to control the hunting habits of any native peoples.

The Territorial Council continued to legislate in respect to game until 1905 by continuing the controls on closed seasons, and the general exemption provisions outlined above. The final consolidation and revision of the Game Ordinance in this time period occurred in 1903. This Ordinance provided in part that there was to be no hunting whatsoever on Sundays, that there was an absolute prohibition on the taking of buffalo or bison, and that there was to be no hunting at night. This Ordinance also discontinued the provision allowing people in need to take game birds or eggs at any time for purposes of meeting immediate wants. The reference to the Indian Act and the power of the Superintendent General of Indian Affairs to make the Ordinance applicable to Indians, was also continued.

This Ordinance, in effect, was the last piece of legislation passed by a

86 The reserve Indians to which this applied included those on the Nut and Fishing Lake, Melfort, Assiniboine River, Fort a la Corne, Cold Lake, Sturgeon Lake, Muskeg Lake, Snake Plain, Sandy Lake, Stony and Whitefish Lakes, Round Plain, Saddle Lake, Goodfish and Whitefish Lakes, and the Moose Woods reserves.

87 See footnotes 75 to 78 and accompanying text, supra.

88 R.S.C. 1906, c. 89.

89 See footnote 101 et seq. and accompanying text, infra.

90 In 1894 "An Ordinance to Prevent Trespass in Pursuit of Game" N.W.T. Ordinance, 1894, No. 20, was passed to provide for penalties for pursuing game onto enclosed land without permission of the owners. This was later incorporated in the Game Ordinance as s. 23, N.W.T. Revised Ordinances, 1890, ch. 85. Further amendments relating to closed seasons were passed in 1895, N.W.T. Ordinances, 1895, No. 15; N.W.T. Ordinances, 1895, No. 19; N.W.T. Ordinances, 1897, No. 26; Revised Ordinances, N.W.T., 1898, ch. 85; N.W.T. Ordinances, 1899, ch. 23; N.W.T. Ordinances, 1901, ch. 23; N.W.T. Ordinances, 1902, ch. 10.

91 Revised Ordinances, N.W.T., 1903, ch. 29.

92 Ibid., s. 3.

93 Ibid., s. 4.

94 Ibid., s. 8.

95 Ibid., s. 18.
Territorial Council until 1948, as far reaching geographical and political changes were occurring in the vast area of the Northwest Territories. In 1882, the southern part of the Territories, comprising much of what is today the western provinces, was divided into four provisional districts named Assiniboia, Saskatchewan, Alberta and Athabasca. Three of these districts, Saskatchewan, Alberta and Assiniboia, were controlled by a legislative assembly in Regina, which might, in part, explain the geographical limitations placed on some of the earlier Game Ordinances by the Territorial Council. However, in those Ordinances where no geographical limitation appeared, it can only be presumed that they were effective throughout the Northwest Territories. The Dominion Government, on the other hand, could legislate for any or all of these districts if it so desired. On most matters the Dominion Government did differentiate between those districts controlled from Regina and the other provincial districts which were established in 1895, the other districts being Franklin, Yukon, Ungava and Mackenzie.

As the influx of settlers in the southern districts increased it was decided by 1905 that several of these districts should be made into provinces. As a result, Saskatchewan and Alberta were created, subsuming the old district of Athabasca. A new government was then established for the remaining districts of the Northwest Territories, with the addition of the district of Keewatin which had previously been administered by the province of Manitoba. The Yukon district also became a separate entity apart from the Northwest Territories when it was set up as a distinct political and administrative entity in 1898. The new Northwest Territories government was comprised of an appointed Commissioner and an appointed four-man council, with similar powers to those of the previous Territorial administrations. The seat of government was Ottawa and although a Commissioner was appointed, no council was appointed until 1921. As one commentator has observed, "No new Ordinances were passed, nor were any from the previous government repealed, and no specifically territorial administration was inaugurated.".

Early Dominion Game Legislation

One of the major areas of concern to the Federal Government in the Northwest Territories was the preservation of game. To that end, the first

96 The Game Ordinance of 1903 had one other amendment in 1904, "An Ordinance to amend Chapter 29 of the Ordinances of 1903 (Second Session), intituled 'An Ordinance for the Protection of Game'," N.W.T. Ordinances, 1904, ch. 12.

97 Zaslow, supra, footnote 48, p. 95.

98 Autonomy Bills, S.C. 1905, ch. 3 (Alberta), ch. 42 (Saskatchewan).

99 Yukon Territory Act, 61 Vic., ch. 6.

100 Zaslow, supra, footnote 48, p. 210. For a good discussion of the political development of the north and the north-west see this book generally, especially chs. 1, 4, and 10.
Federal legislation was passed in 1894.101 The Bill was first introduced in the Senate by the former Prime Minister of Canada, the Honourable Mackenzie Bowell, conservative government leader in the Senate. On the first reading of the Bill he outlined the general purpose of the legislation and the pressing need for it in these terms:

... The preservation of the birds and animals in that region is of paramount importance to the Indians and native peoples who rely upon hunting for food, raiment and the necessary trade which supplies them with their other requirements. The object of this Bill is to protect, as far as possible, what remains of this important resource of the country for the Indians and native peoples who would, in the event of the extermination of the animals, either starve to death or make their way out to the settled parts and become the wards of the country. The native himself would appear to have no idea of protecting fur-bearing animals, but slaughters all that comes his way. It is true that the Northwest Council has Ordinances in force protecting game and animals, but the provisions do not extend beyond the legislative districts. It would be unreasonable, of course, to expect the Indians to observe laws preventing them from killing animals when they require them for food, and care has been taken in the Bill proposed that it shall not operate to cause them any hardship, but it is considered of imperative urgency that some immediate steps should be taken to restrict the indiscriminate slaughter of fur-bearing animals by the adoption and enforcement of stringent regulations such as those contemplated by the provisions of the said Bill. ...102

The former Prime Minister continued his speech by discussing the need to protect certain species of animals such as buffalo, musk-oxen, caribou and beaver from slaughter, and repeated again the purpose of the Bill. He stated:

The Government being convinced of the importance of adopting regulations for the preservation of the fur-bearing animals in the district mentioned and in compliance with the numerous appeals which have been made in that behalf by persons more particularly connected with the matter, it is considered that the Act proposed will to a great extent meet the object in view without imposing any hardship upon the Indians or traders. ... Past experience of this country proves the great necessity of taking steps at as early a day as possible for the preservation of the natural food supply of the natives and Indian tribes. ... There may be some difficulty in enforcing the provisions of this Act: still, by appointing guardians with magisterial powers to enforce it, and in securing the co-operation of the Hudson Bay Company, it can be done. It is as much in their interest as ours, that the game and the fur-bearing animals in the Northwest Territories


102 Senate Debates, 1894, p. 286.
should be preserved for the food supply of the Indians. I may add that this Bill does not interfere with the killing of any animal by the Indians, when it is done for the sake of food, to prevent them from starving.\(^\text{103}\)

The strong emphasis which the speaker placed upon the need for preserving the natural food supply of the Indians should be noted.\(^\text{104}\) The native peoples were to be the first users of the game resources based upon their need for the essentials of life such as food and clothing. Moreover, the Bill was clearly intended to protect for native use not only game animals but also certain species of birds, although within the Act itself there are no specific definitions of "game" or "birds". Rather, the sections of the Act speak of "beasts and birds mentioned in this Act."\(^\text{105}\) Beasts specifically referred to were buffalo, musk-ox, elk, moose, caribou, deer, mountain sheep, goats, mink, fishers, marten, otter, beaver, and muskrats. Birds referred to included grouse, partridge, pheasant, prairie chickens, wild swans, wild geese and wild ducks.

As the debate continued in the Senate, Senator Bowell indicated that if the Act provided for the establishment of a closed season in respect to any animal "it would necessarily be prohibitory during that season, except when the Indians need an animal for food; then it would not be prohibitory."\(^\text{106}\)

Clause 8 of the Act exempted Indians who were inhabitants of the country from the provisions of the Act except in respect to closed seasons on buffalo, musk-ox and elk. This clause which received a great deal of discussion, read:

Notwithstanding anything in ss. 4, 5, 6, and 7 of this Act, the beasts and birds mentioned in those sections may be lawfully hunted, taken or killed, and eggs of any of the birds or other wild fowl so mentioned may be lawfully taken, —

(a) By Indians who are inhabitants of the country to which this Act applies, and by other inhabitants of the said Country. But this exception does not apply to buffalo, bison or musk-oxen during the closed seasons for those beasts; . . .

One member, Senator Lougheed, suggested, "Is there any reason why this should not be made to read 'food purposes for Indians'? I think the principle danger to-day arises from the indiscriminate slaughter of game by the Indians."\(^\text{107}\) In reply to this comment and to the question as to the meaning

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103 Ibid., p. 287.

104 The term "Indians" was probably intended to embrace "Metis and Inuit." Note also the Supreme Court of Canada's subsequent interpretation of s. 91(24) of the British North America Act in Re Eskimos, [1939] S.C.R. 104 to the effect that the word "Indians" in s. 91(24) really means all native peoples, that is, Inuit as well as Indians and Metis people.

105 57-58 Vic., ch. 31, ss. 3, 8, 10, and 12.

106 Senate Debates, 1894, p. 287.

107 Ibid., p. 337.
of the term "other inhabitants", Senator Bowell replied:

There are other inhabitants of that country who live in the same manner as the Indians do, and you will see by the clause (b) that explorers, surveyors and travellers, are excluded from the operation of the clause. The object of the Bill is to prevent, as far as possible, the indiscriminate slaughter of game for the purposes of mere pleasure or sport. All the inhabitants of the country to which the Bill applies are practically dependent upon game for food, and exceptions are made and must be made in their favour. Numbers of parties engaged by the Hudson Bay Company are what may be termed half-breeds, and do not come under the category Indians, but they live in the same manner and their habits are very much the same, and it is impossible to interfere with that class of people in that section of the country without endangering its peace.¹⁰⁸

A statement by Senator Allan indicated the great concern which the members of the Senate had that the Indians, and other native peoples, should be able to hunt for food:

I presume the principle which underlies these subsections of clause 8 is just this that in a country like our Northwest the Indians and others who happen to be living there depend entirely upon these animals and birds for food, and it is not desired to restrict them in any way from obtaining whatever they require for their support, but while there is that desire, the object of the Bill would be to some extent to prevent either the Indians or other inhabitants from slaughtering the animals except for food. They would undoubtedly have the right under this clause to kill fur-bearing animals and possibly eat them too.¹⁰⁹

After further discussion of this provision it was passed, although the government leader, Senator Bowell, agreed to reconsider the matter and report at a later date. When the Bill was reintroduced for third reading Senator Masson again raised the consideration of the exemption of Indians from the Bill for food purposes only. "The Honourable Minister", he stated, "was to reconsider clause 8 which gives Indians and other inhabitants liberty to kill animals out of the close season."¹¹⁰ Senator Bowell replied:

I did make inquiry as to that, and it is not considered advisable to interfere with the habits of the Indians or other inhabitants of these territories, who are really more Indians than the Indians themselves, and any attempts to control them would be fraught with a good deal of danger until they become a little more civilized and more used to the habits of the civilized parts of the country. I may also say that the Indians there for years past received instruction from the Hudson Bay officials, who are as anxious to preserve

¹⁰⁸ Ibid.
¹⁰⁹ Ibid., p. 338.
¹¹⁰ Ibid., p. 359.
the game of all kinds as we... and they dissuade them under all circumstances from killing any animal out of season when the fur is not good, except when they actually want for food; and if you attempted to punish them you might create Indian wars which would cost a great deal more than these animals are worth.\textsuperscript{111}

In essence, clause 8(a) of the Bill was under attack because it was not limited to the killing of animals and birds for food. Rather, killing was to be allowed in all seasons indiscriminately except for buffalo and musk-ox. However, as was suggested in the debate, the clause in practice would not apply to animals such as mink, beaver, fisher, marten, etc., which were generally useless except for their skins, and native hunters, knowing this, would not kill these animals in a closed season when their skins were inferior unless they were in the direct need for food. The Senators in their discussions pointed to the Indians as, in their view, the greatest cause of indiscriminate slaughter of birds and animals in the Northwest Territories. The Senators, however, provided no evidence whatsoever to substantiate their accusations. It is well to note also that until the coming of the white man the native peoples had no use for many of these animals and it was only the result of the white man’s demand for the skins of these animals that the native person hunted them.\textsuperscript{112}

When the Bill reached the House of Commons for debate, further time was spent on the provisions of clause 8. The Bill was introduced by the Honourable T. M. Daly, Minister of the Interior and Superintendent General of Indian Affairs, who was questioned by a Mr. Flint in regard to this section:

I think clause ‘a’ of this section is too wide. It seems to me that even Indians and inhabitants of the country should not be allowed to destroy these animals during the close season, except for food. This clause will practically almost annul the general provisions of the Bill, it is so broad. A party of Indians with one trapper or hunter might, during the close season, destroy many of these animals for pleasure or for commercial purposes. I think it would be wise to amend that so as to allow Indians or inhabitants of the country to shoot these animals in the close season for food purposes only.\textsuperscript{113}

The Minister replied:

But unfortunately, the inhabitants of the country are dependent upon the game for their food. The only thing we can do is to prevent these animals from being shot for pleasure by other than inhabitants. The inhabitants are mainly half-breeds, and it is impossible to make the Bill more stringent unless we are prepared to feed these people. So far as the fur-bearing animals are concerned, it is against these people’s own interest to destroy them during the close season for the Hudson’s Bay Company will not

\textsuperscript{111} Ibid., pp. 359-360.

\textsuperscript{112} See footnotes 189 and 190 and accompanying text, infra.

\textsuperscript{113} House of Commons Debates, 1894, p. 3538.
buy the skins of animals shot during that season. So far as other animals and birds are concerned, these peoples must have food, and it seems to me this is as far as we can go in providing against the destruction of these animals.

From the above discussion it is apparent that the major concern of the Government of the day was to prevent the Indians from becoming wards of the state, dependent upon the state for their food. In part, the basis of this policy can be said to be benevolence and concern for the welfare of Indians rather than on a strict aboriginal rights policy per se. However, it seems implicit in the Federal Government's disallowance of the Territorial Ordinance of 1889, combined with the Government's recognition of the native peoples' primary dependence on hunting for their livelihood, that aboriginal rights in respect to the game supply of the Northwest Territories were to continue to receive the recognition given historically by both British and Canadian governments. Whether or not this legislation is based on an articulated aboriginal rights policy or on an "economy" policy of trying to keep native peoples off the welfare rolls, the effect is still that of recognizing a right in the native peoples in respect to that limited game supply.

The extent to which exemptions for Indians and persons with Indian blood applied specifically to Inuit may be questioned since there was not a great deal known at this time about the Inuit or the extent of their geographical occupation. It is likely that they would be included under the term "native peoples" but the debates indicate that "native peoples" or "other inhabitants" referred more to the Metis of the Territories than the Inuit. The probable legislative intent was to include all native peoples although the draughtsman may not have consciously considered the Inuit. In addition, it is interesting to note the fear of the spectre of Indian wars which in part contributed to the eased restrictions in respect to Indians and native peoples hunting out of season. Certainly the amount of debate time given to this Act and the careful consideration which certain parts received would indicate a great awareness on the part of members of the legislative houses of the importance of game in the livelihood of the native peoples of the west and north. This awareness and consideration is in contrast to the cursory discussion which game legislation was to receive in later years.115 It seems that history is too easily overlooked or forgotten.

The Federal Government enacted the Unorganized Territories Game Preservation Act of 1894. This Act applied to the District of Keewatin and to those portions of the Northwest Territories not included within the provisional districts of Assiniboia, Alberta and Saskatchewan.116 This Act also stated that Ordinance No. 8 of 1893 of the Territorial Council was not to apply to that part of the Territories in which the 1894 Act applied.117

In all, the effect of the Act was to prohibit the hunting of wood bison until 1900, and to establish closed seasons on musk-oxen and various fur-
bearing animals. Indians were exempt from the limitations in the Act except for buffalo, wood bison and musk-ox during their closed seasons, while explorers, surveyors or travellers who were in actual need could kill for food. In addition, anyone who had a permit could take game for scientific purposes or domestication. Violations of the Act were to be tried before a judge, a justice of the peace, any commissioned officers or any game guardian appointed under the Act, with penalties in the form of fines or, in default, a jail term.

The Unorganized Territories Game Preservation Act was subject to several amendments and revisions but nothing of a substantive nature was added or taken away from the provisions such as to affect native rights to hunt. However, in 1898 the geographical extent of the Act was curbed when the Yukon district was set up as a Territory. The new Territory was given the power to pass its own Ordinances respecting game and could amend or repeal any of the provisions of the Unorganized Territories Game Preservation Act as it applied to the Yukon.

The Commission on Conservation

By the end of the First World War considerable interest had been aroused among the general public for the conservation, protection and preservation of wildlife throughout Canada. In the Northwest Territories, in particular, there was much concern for several species of game which it was felt were becoming extinct. White settlement had increased in the Territories from 137 non-natives at the turn of the century to more than 500 by 1911. The increase in population resulted from an influx of traders, trappers, meat hunters, and missionaries. This, combined with forest fires, new weaponry, foreign trappers, the use of poison, and the increased use of wild fowl and game as sources of meat in southern markets were strong contributing factors to the severe depletion of game supplies of the Territories and to the possible extinction of several species of game. As a result of this general public concern and the international movement in areas of conservation, the Laurier Government in 1909 set up by statute a Commission of Conservation, with

118 Ibid., s. 8.
119 Ibid.
120 Ibid., ss. 13-14.
122 "An Act respecting the preservation of Game in the Yukon," 63-64 Vic., ch. 34.
123 Zaslow, supra, footnote 48, p. 238.
124 See generally, Zaslow, ibid., p. 242; and, C. Gordon Hewitt, The Conservation of Wild Life in Canada (Charles Scribner’s Sons, New York: 1921), ch. III.
Sir Clifford Sifton, former Minister of the Interior, as its Chairman. \(^{126}\) The members of the Commission were drawn from both Federal and Provincial levels of Government, the Senate and important individuals from the general public. The objects of the Commission were outlined by Sir Clifford Sifton in the first annual report:

The Commission is not an executive nor an administrative body. It has not executive or administration powers. Its constitution gives it power to take into consideration every subject which is regarded by its members as related to the conservation of natural resources, but the results of that consideration are advisory only. In a sentence, the Commission is a body constituted for the purpose of collecting exact information deliberating upon, digesting and assimilating this information, so as to render it of practical benefit to the country, and for the purpose of advising upon all questions of policy that may arise in reference to the actual administration of natural resources where the question of their effective conservation and economical use is concerned. \(^{127}\)

With these objectives in mind the Committees set up within the Commission to deal with various aspects of the conservation of natural resources produced many reports that ultimately paved the way for legislation on many matters. \(^{128}\) In particular, there was much important work done at this time by the Forestry, Public Health, Lands, Mining and Minerals, Agriculture, Waterpower, and Fisheries, Game and Fur Bearing Animals, Committees. Indeed, the Fisheries, Game and Fur Bearing Animals Committee was instrumental in producing many ameliorative policies in respect to the preservation of Canada’s fisheries and wildlife. Moreover, the reports of the Commission and lobbying of the members, who had ready access to the highest levels of government, were a strong impetus toward the completion of the Migratory Birds Convention \(^{129}\) of 1916 and the subsequent Act \(^{130}\) of 1917, and as well the Revision of the Northwest Game Act \(^{131}\) in 1917. The Commission was

\(^{126}\) See generally, Stewart Renfrew "Commission of Conservation" (1971), 19 Douglas Library Notes 17; and Zaslow, supra, footnote 48, at pp. 197-198.


\(^{128}\) For an understanding of the scope of the Commission’s work, see generally, the Annual Reports for the years 1909-1921. The Commission was disbanded by the Meighen government in 1921, "An Act to repeal The Conservation Act and Amendments," 11-12 Geo. V, ch. 23 (1921).

\(^{129}\) The Migratory Birds Convention was concluded between the United States and Great Britain on August 16, 1916.


\(^{131}\) "An Act respecting Game in the Northwest Territories of Canada," 7-8 Geo. V, ch. 36 (hereinafter called the Northwest Game Act).
also instrumental in prodding the Federal Government into establishing an
inter-departmental Advisory Board on Wild Life Protection to develop and
promote legislation and regulations in relation to conservation.

The effect which the Commission of Conservation had on game legis-
lation during this period cannot be over-emphasized. Although their concern
was mainly with preservation of game as an economic resource, they showed
some consideration of the need for food of the native peoples. One member
of the Commission,132 who had prepared many reports for them, stated in
one article that:

The fur trade of the Northwest Territories is not only the chief
occupation of that immense area but it is the only means of liveli-
hood and existence of the population. Unless the fur trade is
maintained an enormous part of the Dominion would be rendered
unproductive, and the native inhabitants would either starve to
death or become a charge on the Government. . . .

As pioneers in the exploitation of the valuable fur resources of
that vast north country, the Hudson's Bay Company, through its
well-known post, has conducted its trade in a manner that would
ensure a constant supply of furs. Their trappers were mainly
Indians and, to a lesser extent, Eskimos. The Indian trapper is a
true conservationist as a rule, insomuch as he will not, in a region
in which he is working, completely exhaust its fur-bearing
animals.133

In another publication the same author stated:

The necessity of a native food supply in northern Canada demands
serious consideration. Among the important aids at the present
time in the utilization and development of the northern territories
are their natural inhabitants, the Indians, and to a lesser degree,
the Eskimos. Further, our moral obligations to the Indians render
it necessary that means shall be taken to ensure them an adequate
food supply and a potential source of revenue. . . . But it cannot
be too often remarked that the Indian, when unspoiled by white
men, is traditionally a conserver of wild life, that is, he uses it but
does not exterminate it. The Indians and the Eskimos knew what
the results would be if they conducted a policy of extermination,
and they took common-sense precautions accordingly. . . . The
Indian will conserve wild life if he believes that it is to his advan-
tage to do so. He is not so 'red in tooth and claw' as many of
those who are frequently accustomed to speak ill of him. His
primitive weapons were playthings compared with the modern
sporting rifles. The wild life constituted his natural means of
subsistence and, with the advent of the Trading companies, of

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132 C. Gordon Hewitt, A Dominion entomologist and consulting zoologist.
133 C. Gordon Hewitt, "Conservation of the Fur Resources of Northern Canada," in
Commission of Conservation, Report of the Eighth Annual Meeting (Federated
revenue. In his primitive state he was merely a unit in that balance of nature that is so marvellously adjusted that while the abundance of species of animals rises and falls, extermination does not follow the preying of one species of animal upon another. For such changes as have been brought about in the Indian's attitude he is not to blame, and the foregoing facts are set forth with a view to removing prejudice in the minds of those who have not seriously considered the rights of the Indian in the matter. Our obligations to them in those areas where tribes still exist who have always lived on the wild life that still constitutes a means of subsistence cannot be overlooked or neglected in developing those regions. 134

These sentiments were often repeated by the Commission in its annual reports. 135.

The Northwest Game Act

In 1917 the Northwest Game Act was completely revised. Reports prepared by the Commission of Conservation members expressed the view that their greatest fear was the extermination of the musk-ox and caribou. Speaking of the Caribou, one report stated:

The chief reason for its rapid extermination is that traders and whalers are getting into the country, particularly above Coronation Gulf, and are supplying the Eskimos with firearms and other means of rapidly killing caribou, whereas formerly the Eskimos were content to kill all they needed for food with bows and arrows. Now they are encouraged to get all the pelts they can secure for traders and dealers, who take them to Alaska, where they now have few caribou, and elsewhere. Having none themselves they come into our northern territory and encourage the Eskimo to exterminate ours. That is a condition we cannot permit. 136

In relation to musk-ox the report concluded:

Traders and whalers are very anxious to get the hides of musk-ox. It is just a pelt-hunting proposition, and they are being hunted by the Eskimos. On the lower part of Victoria Island and Coronation Gulf the destruction of musk-ox is not so exhaustive as that of caribou. . . . It is interesting to note that if the musk-ox were left to itself, if we had not this commercial hunting by Eskimos and

135 See the Annual Reports generally, and Reports prepared by the Committee on Fisheries, Game and Fur-Bearing Animals.
Indians, who are paid for the pelts, it would possibly continue to exist, without any considerable decrease, owing to the natural difficulties of the barren grounds in the region south of Bathurst Inlet. The Dogrib, Slave and Yellow Knife Indians from the west and settlement and the Eskimos from the east, hunt the musk-ox from their respective regions. The Indians from the west cannot get into the centre of the country because of the natural difficulties of camping, etc., so there might always be a nucleus which neither Eskimo nor Indian could reach. But, with the temptation of reward, they will destroy every musk-ox they see. The Eskimos and Indians, however, are not the only people who destroy these musk-ox.137

Thus, the *Northwest Game Act*138 was revised to provide stronger protection for the wildlife of the north. This new Act provided for closed seasons for game, fur-bearing animals and for birds and their eggs.139 An absolute prohibition on the killing of buffalo was also provided140 to prevent further depletion of the approximately 600 buffalos in the regions north and northwest of Fort Smith.141 The killing of wapiti or caribou and musk-ox was also prohibited except where permitted by Order-in-Council.142 An important new feature of the *Act* and the regulations was the licensing of the fur trade.143 The *Act* provided that no person except native-born Indians, Inuit or Metis who were *bona fide* residents of the Territories were allowed to hunt, trap, trade or traffic in game without a license. In other words, all non-native persons required a license thus implicitly tending to preserve for native use a limited game supply to which they had free access. The possession and use of poisons to get game, a serious problem often commented upon by the Commission on Conservation as causing severe depletion of game reserves, was also prohibited.144 The *Act* also allowed an exemption to native peoples from its general provisions. The *Act* stated that game covered by the *Act* "may be lawfully hunted, taken or killed, and the eggs of birds therein mentioned may be

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138 7-8 Geo. V, ch. 36.
139 *Ibid.*, s. 4(1) and (2).
142 7-8 Geo. V, ch. 36, s. 4(5).
143 *Ibid.*, s. 4(9) and (10)(c).
144 *Ibid.*, s. 9(2)(b).
lawfully taken, by Indians or Eskimos who are bona fide inhabitants of the Northwest Territories, or by other 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.\textsuperscript{145} This was except for buffalo or bison, musk-ox, wapiti or elk, white pelicans, wild swan and eider ducks, to which the provisions of the Act would apply to all inhabitants.

During the debate on the Act in the House of Commons, the Hon. W. J. Roche, Minister of the Interior and the Superintendent General of Indian Affairs noted:

One of the essential things in connection with this Act is to protect the game of the Northwest Territories for the inhabitants of that country. It is their main source of food supply, and if any person is allowed to go in there and indiscriminately slaughter whatever he thinks fit the Indians and the inhabitants of that enormous territory will be deprived of their food supply and will become pensioners of the Government, which would entail large appropriations by this Parliament for supplying them with food. I did not say there was an invasion of this territory by people from the Yukon but I did mention Alaska, and we do not want a repetition of what occurred in Alaska. . . . We are anxious to conserve the animal life, not only for the sake of the animals themselves but to ensure the food supply of the native peoples.\textsuperscript{146}

These sentiments were again repeated in another speech by the Minister on the debate of the Bill. He stated:

So far as the native peoples in the Territories are concerned, they are exempted from many of the provisions of this Act in order to afford them an opportunity to secure a sufficient food supply unless they violate the law in some sanctuary. This legislation is designed to hit those who are coming in for exploiting purposes, and organized bands of hunters who go into the Northwest Territories. One of the reasons for bringing in this legislation is that we have information of Americans going in through the North Passage and coming down and establishing trading posts in various parts of the country. I do not think the penalty is too severe for the class which I refer to, and that is the class to which this legislation will principally apply.\textsuperscript{147}

In the Senate, the Act also received scrutiny and in answer to Senator Daniel's question "How is a knowledge of the Act to be disseminated amongst the people of the North West, especially where the population consists largely of Indians and Eskimo?" Sir Lougheed replied, "The Indians have certain rights which the whites do not."\textsuperscript{148}

\textsuperscript{145} Ibid., s. 4(3).
\textsuperscript{146} House of Commons Debates, 1917, pp. 3669-3670.
\textsuperscript{147} Ibid., p. 3674.
\textsuperscript{148} Senate Debates, 1917, p. 667 (emphasis added).
Clearly then, the Government envisaged protecting the game of the Northwest Territories so that the native peoples could maintain their livelihood from hunting and trapping and not become wards of the state.

It should also be noted that, in comparison to its predecessor, the *Northwest Game Act* covered a wider geographic area thus bringing more native persons within its provisions. Northwest Territories was defined in the *Act* to mean "the Northwest Territories formerly known as Rupert’s Land and the Northwestern Territory (except such portions thereof as are included in the provinces of Ontario, Quebec, Manitoba, Saskatchewan, Alberta and the Yukon Territory), together with all British territories and possessions in North America and all islands adjacent thereto not included within any province except the colony of Newfoundland and its dependencies."149

The Regulations150 passed pursuant to this *Act* also reinforced the policy of allowing native peoples to exercise, almost without hindrance, their ancestral hunting rights. In addition to the exemptions provided by the Act, the Regulations, by virtue of the power vested in the Governor General in Council by the *Act*, allowed native peoples to hunt musk-ox when in need. That provision stated:

Musk-ox may be hunted and killed by Indians, Eskimos or half-breeds who are bona fide inhabitants of the Northwest Territories but only when they are in actual need of the meat of such musk-ox to prevent starvation. No person shall at any time trade or traffic in musk-ox or any part thereof, and the possession of the skins of such musk-ox by any other person than the said Indians, Eskimos or half-breeds shall constitute an offence.151

The licensing system which was set up required non-native residents to pay a fee of $5.00, while the fee for non-resident British subjects was $25.00 and non-residents, $50.00.152 The license holders also were prohibited from hunting on Victoria Island153 which was apparently to be a game preserve for native peoples, and were subject to the bag limits set on the various species of game.154 Although the larger license fee for non-residents was imposed in order to provide some control and limitation on foreign hunters depleting game supplies, it became apparent after several years that this con-

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149 7-8 Geo. V, ch. 36, s. 2(h).
150 Order-in-Council, May 1, 1918 (P.C. 1053), *Canada Gazette*, May 18, 1918, p. 4029.
152 *Ibid.*, s. 2.
continued to be a severe problem. In 1923, to combat this destruction and depletion of game further regulations were passed. The fees for non-residents were increased to $450.00 and non-resident was defined to include those not residing in the Northwest Territories for four consecutive winters. Those Regulations, however, would apparently have proved to be too permissive in respect to non-native sports hunting since the preamble accompanying the subsequent Regulations stated that:

Whereas the Minister of the Interior reports that unless further areas are reserved as hunting and trapping preserves for the sole use of the bona fide aboriginal natives of the North West Territories there is grave danger of those natives being reduced to want and starvation;

And whereas each year increasing numbers of foreign and other non-resident hunters and trappers are going into the country and depleting wildlife and fur resources. . . .

As a result, licensed hunters were prohibited from hunting on Banks Island in addition to Victoria Island as well as four other preserves. These additional preserves, however, proved insufficient to prevent the native populace from being "reduced to want and starvation", because the wild life was "being driven out of said preserves by the exploitation of the same by white traders and other white persons." Therefore, more stringent Regulations were passed to provide for exclusive hunting by native people in several more preserves, although non-natives could hunt on them with permission of the Commissioner. Bona fide prospectors were also allowed to hunt only for food although they could not take "bison, musk-ox or animals usually killed for their fur." Furthermore, the Advisory Board on Wildlife Protection, which had been responsible for the preparation of many of these Orders-in-Council, reported that there was a shortage of caribou skins because of the export provisions of the Northwest Game Act. It was reported that if the export of caribou skins was to be allowed to continue it would "de-

155 See the preamble to Order-in-Council, July 10, 1923 (P.C. 1234), Canada Gazette, July 21, 1923, pp. 239-240. By this time, too, the administration of the Northwest Game Act was transferred from the Commissioner of Dominion Parks, Department of the Interior, to the Commissioner of the Northwest Territories. Order-in-Council, May 20, 1922 (P.C. 1088), Canada Gazette, June 3, 1922, p. 5187.

156 P.C. 1234, s. 34.


158 Ibid. The four preserves set up were in the Peel River, Yellowknife, Backs River and Slave River Areas.

159 Order-in-Council, July 19, 1926 (P.C. 1146), Canada Gazette, July 31, 1926.

160 Ibid., s. 6.

161 Ibid., s. 6(a).
The natives of the only material suitable for their winter clothing and render it difficult for them to endure the rigours of Arctic winter while engaged in hunting and trapping and . . . that the need for the prohibition of the export of caribou skins from the North West Territories is urgent.\textsuperscript{162}\textsuperscript{163} As a result, the exportation of meat of any game or the skins of caribou was prohibited.\textsuperscript{164} Thus, the Federal Government is exercising its jurisdiction over the conservation of game in the Northwest Territories explicitly developed a policy of preserving for the native peoples the right to hunt a limited game supply for food and clothing.

The Sverdrup Islands Affair

The policy of the Federal Government in respect to preserving exclusively for native use the limited game supply of the Northwest Territories was given further reinforcement in 1930 when an exchange of diplomatic notes occurred between Norway and Britain. The issue involved in the exchange of notes concerned sovereignty over the Sverdrup Islands in Canada's Arctic which had been discovered and named by Norwegian explorers. On August 8, 1930, the government of Norway in a note from its Charge d'Affaires in London to the British Secretary of State for Foreign Affairs, acknowledged Canadian sovereignty over these islands.\textsuperscript{165} However, the Norwegian Government's recognition was based on the assumption "that His Britannic Majesty's Government in Canada will declare themselves willing not to interpose any obstacles to Norwegian fishing, hunting or industrial and trading activities in the area which the recognition comprises."\textsuperscript{166} The response of the British Government on behalf of the Canadian Government made clear that the area in question was part of a preserve set aside for exclusive use by native peoples. The note stated:

\ldots His Majesty's Government in Canada . . . wishes, however, to draw attention to the fact that it is the established policy of the Government of Canada, as set forth in an Order-in-Council of July 19, 1926, and subsequent Orders, to protect the Arctic areas as hunting and trapping preserves for the sole use of the aboriginal population of the Northwest Territories, in order to avert the danger of want and starvation through the exploitation of the wild life by white hunters and traders. Except with the permission of the Commissioner of the Northwest Territories, no person other than native Indians or Eskimos is allowed to hunt, trap, trade, or traffic for any purpose whatsoever in a large area of the mainland and in the whole Arctic island area, with the exception of the

\begin{footnotesize}
\begin{enumerate}
\item[162] Order-in-Council, August 18, 1926 (P.C. 1266), \textit{Canada Gazette}, August 28, 1926.
\item[163] \textit{Ibid.}, s. 25 (emphasis added).
\item[164] Dominion of Canada, \textit{Treaty Series}, 1930, No. 17 (Ottawa: 1931), Exchange of Notes, August 8, 1930.
\item[165] \textit{Ibid.}, Exchange of Notes, November 5, 1930.
\end{enumerate}
\end{footnotesize}
southern portion of Baffin Island. It is further provided that no person may hunt or kill or traffic in the skins of the musk-ox, buffalo, wapiti, or elk. The prohibitions apply to all persons, including Canadian nationals.166

The note went on to explain that should the regulations be altered in the future, an application by Norway to share in fishing, hunting, industrial or trading activities in those areas would be given friendly consideration.

In international law, it is possible that this exchange of notes could be construed as a treaty167 whereby Canada would be bound to reserve the area in question for the sole use of native peoples in the Arctic or else grant to Norwegians the concessions first sought in 1930. Indeed, a recent article in a Norwegian newspaper explored the question of whether Norway had any rights in the Canadian Arctic.168 The exchange of notes, however, is important not so much for its international implications, but rather for the domestic government policy which it so strongly articulates.

The Migratory Birds Convention Act

Although the policy of preservation of the game supply for the primary use of the native peoples had been clearly articulated by the Federal Government through the passing of the Northwest Game Act, in the same year another Act was passed which would later be construed as severely curtailing the rights of native peoples to hunt migratory game birds for food. That Act was the Migratory Birds Convention Act,169 passed in pursuance to the Migratory Birds Convention170 concluded between Great Britain and the United States in 1916. The convention resulted from initiatives taken by various game organizations in Canada and the United States, and particularly the Commission of Conservation.171

166 Note from the British Charge d’Affaires, Oslo to the Norwegian Minister for Foreign Affairs, Oslo, November 5, 1930. Treaty Series, 1930, No. 17.

167 "An exchange of notes is an informal method, very frequently adopted in recent years . . . whereby States subscribe to certain understandings or recognize certain obligations as binding them." Quoted in J. G. Castel, International Law (University of Toronto Press, Toronto: 1965) at p. 817. Moreover, as is further pointed out at p. 815, "International law prescribes no form for international engagements. There is no legal distinction between formal and informal engagements. If an agreement is intended by the parties to be binding, to affect their future relations, then the question of the form it takes is irrelevant to the question of its existence. What matters is the intention of the parties. . . ."


169 7-8 Geo. V, ch. 18.


171 See generally, Hewitt, The Conservation of the Wild Life of Canada, supra,
The Act provides, in general, that no important insect-destroying bird shall be shot at any time, that no open season on any species of game bird shall extend longer than three and one-half months, that open seasons shall not be set so as to allow hunting during the breeding season, and, that there shall be no shipment of birds taken contrary to any law between countries. The Act itself makes no references to the hunting rights of native peoples, although the Convention provides for Eskimos and Indians to take Migratory non-game birds such as auks, auklets, guillemots, murres and puffins and their eggs for food and their skins for clothes.\(^\text{172}\) In addition, Indians only were allowed to take "scoters" or Siwash ducks for food at any time of the year but not for sale.\(^\text{173}\) However, in the Regulations\(^\text{174}\) passed pursuant to the Act Indians and Eskimos were allowed to take scoters at any time of the year for food as well as the other non-game birds.

These two minor exemptions were permitted by Order-in-Council, which suggests the Act otherwise extended to native peoples in respect to its prohibitions. However, throughout the debates in both the Senate and House of Commons no consideration or discussion was given to the effect which the Act would have on the right of native peoples to hunt for food during closed seasons. The point that the Migratory Birds Convention Act would appear to curtail the rights of native peoples to hunt wild-fowl was not argued in either of these legislative bodies. It is noteworthy, however, that several of the species of birds covered in the Migratory Birds Convention Act were also covered by the Northwest Game Act. Closed seasons were provided for wild ducks and swans in the Northwest Game Act while wild ducks and wild swans were also included in the definition of migratory game birds in the Migratory

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footnote 124, pp. 264-274; E. W. Nelson, "The Migratory Bird Treaty," in Commission on Conservation, National Conference on Conservation of Game, Fur-Bearing Animals and Other Wild Life (Ottawa: 1919), pp. 74-81; W. F. Sigler, Wildlife Law Enforcement (Wm. C. Brown Co., Dubuque, Iowa: 1956); and, S. S. Hayden, The International Protection of Wild Life (Columbia University Press, New York: 1942), pp. 73-86, wherein it is suggested that Canada objected to an early draft of the Convention because native rights were not recognized. Hayden states: "The Canadians objected to the late date set for the end of spring shooting, and this was changed too. The preservation of native rights... likewise appeared in issue, and so the Indian or Eskimo as long as he hunts in the manner of his fathers is secured in his right to do so," p. 74. However, this greatly overstates the ultimate effect of the Convention provisions in respect to the right of native peoples to pursue their traditional livelihood. It is true that Dr. C. G. Hewitt, the Dominion Entomologist, was involved in informal negotiations with the Chief of the Biological Survey of the United States Department of Agriculture, during which it was agreed that the Convention would be changed before signed by Britain and the United States to allow Indians to take "Scoter for food but not for sale." Order-in-Council, June 29, 1916, P.C. 1537. See also discussion at footnotes 172 to 174 and accompanying text, infra.

172 Schedule to Migratory Birds Convention Act, 7-8 Geo. V, ch. 18, Article II, s. 3.

173 Ibid., Article II, s. 1.

174 Order-in-Council, April 23, 1918 (P.C. 871), Canada Gazette, May 4, 1918, pp. 3851-3853, ss. 4 and 2, respectively. The most recent regulations (P.C. 1971-1465 as amended by P.C. 1971-1968, P.C. 1972-1606) still contain these exemptions for Indians and Eskimos, s. 5(7), as well as providing that a permit is not necessary for Indians and Eskimos to be able to hunt migratory game birds in the Northwest Territories, ss. 5(5)(a) and (b).
Thus, by one Act, native peoples were exempt from being bound by the closed seasons while by the other Act, which had received prior parliamentary passage, the native peoples were apparently bound. This apparent contradiction between the two Acts was not discussed during the debate on either of the Acts.

The failure to discuss native hunting rights during the debate on the Migratory Birds Convention Act would indicate, therefore, that the Northwest Game Act was contemplated by the members of Parliament to be the only piece of legislation to interfere with native hunting rights. This would suggest that there was no real contradiction between the two Acts so far as the legislators were concerned. The Migratory Birds Convention Act was not considered to interfere with native hunting rights. Clearly, the debates and government policy indicated that the Food supplies of the native peoples were of paramount importance and that they should be allowed to hunt for food in spite of closed seasons, except in respect of endangered species.

This is the basis of the argument made by Mr. W. G. Morrow, Q.C. in arguing the appeal of R. v. Sikyea in the Supreme Court of Canada. In that case, an Indian who had shot a duck out of season in the Northwest Territories was charged under the Migratory Birds Convention Act. Sikyea was convicted by a magistrate but a new trial was ordered in the territorial court where Mr. Justice Sissons dismissed the charges holding "that the Migratory Birds Convention Act had no application to Indians engaged in the pursuit of their ancient right to hunt, trap and fish for food at all seasons of the year on all unoccupied Crown lands." The court also pointed out that Treaty No. 11 and the pledge to preserve native hunting rights was made five years after the Migratory Birds Convention Act and that it would be a mockery of the solemn promise made in the treaty to hold that the Act prevented the native peoples from hunting for food during closed seasons.

As a result, since there were no express words in the Act abridging, infringing or abrogating native hunting rights, the court held the Act did not prevent native peoples from hunting for food.

175 Northwest Game Act, 7-8 Geo. V, ch. 36, s. 4(1)(h); Migratory Birds Convention Act, 7-8 Geo. V, ch. 18, s. 3(b).

176 The Migratory Birds Convention Act received first reading on June 21, 1917, while the Northwest Game Act received first reading on June 22. Second and third readings of the Migratory Birds Convention Act were completed on July 21 of that same year while second reading of the Northwest Game Act commenced on July 21 after the passing of the Migratory Birds Convention Act. Third reading of the Northwest Game Act was finally completed on August 17, 1917.

177 Now Mr. Justice Morrow of the Supreme Court of the Northwest Territories.


179 J. Sissons, Judge of the Far North (McClelland and Stewart Ltd., Toronto: 1968), p. 152. For the story of this case see ch. 30.

180 Ibid.
The case was appealed to the Court of Appeal\textsuperscript{181} where the appeal was allowed and the conviction restored. The Court of Appeal, speaking through Mr. Justice Johnson, agreed that the treaty rights to hunt should be respected, and cited McGillivray, J.A.’s decision in \textit{R. v. Wesley}\textsuperscript{182} that:

\begin{quote}
It is true that Government regulations in respect of hunting are contemplated in the Treaty but considering that Treaty in its proper setting I do not think that any of the makers of it could by any stretch of the imagination be deemed to have contemplated a day when the Indians would be deprived of an unfettered right to hunt game of all kinds for food on unoccupied Crown land.\textsuperscript{183}
\end{quote}

However, Mr. Justice Johnson concluded that the Act did abrogate the rights of native peoples. He stated:

\begin{quote}
It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations. How are we to explain this apparent breach of faith on the part of the Government, for I cannot think that it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaking the treaty that they had made with the Indians.\textsuperscript{184}
\end{quote}

In his submissions on appeal to the Supreme Court of Canada, Mr. Morrow argued that:

\begin{quote}
The preamble to the Convention Act points to the purpose or reason for the Convention, namely 'many of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants . . . as well as to agricultural crops . . . .' Unless one is to consider that the above was merely a 'veiled' purpose and that the real reason was to provide sport for the more populated areas of Canada and the United States, it is submitted that the Convention, the Act and the Regulations thereunder must be for the purpose of preserving a source of food.\textsuperscript{185}
\end{quote}

\textsuperscript{181} (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.).
\textsuperscript{182} (1932), 4 D.L.R. 774 (Alta. App. Div.).
\textsuperscript{183} \textit{R. v. Sikyea}, supra, footnote 178, at p. 158.
\textsuperscript{184} \textit{Ibid.}, at p. 163.
\textsuperscript{185} Factum of the Appellant, \textit{R. v. Sikyea}, Supreme Court of Canada.
Moreover, it was argued that:

In a case of an Indian hunting for food, the provisions of the Migratory Birds Convention Act and the Regulations thereunder, when read in conjunction with other legislation of equal importance and effect, namely, the Northwest Territories Act, as amended cannot have application. . . .

Ibid. In addition to these arguments, the effect of section 87 of the Indian Act, R.S.C. 1970, c. 1-6 (now section 88), was also argued. That section provides generally that all laws of general application in a province apply to Indians subject to the terms of any treaty. It was therefore arguable that this section could be construed as a declaration of paramountcy of the treaty over the Migratory Birds Convention Act. In a later case, The Queen v. George, [1966] S.C.R. 267, the effect of section 87 was given consideration. In that case an Indian had shot two ducks out of season on a reserve and the court held that section 87 was not applicable in the situation since it only applied to provincial laws and not Federal laws of general application. Therefore, the provisions of the Migratory Birds Convention Act were not subject to any treaty terms. There was some question as to whether this argument may have been more strongly argued in the Sikyea case since it received no mention by the court in its judgment. In an exchange of correspondence between Mr. Morrow and the Right Honourable J. R. Cartwright, former Chief Justice of the Supreme Court of Canada, the matter was clarified. Mr. Morrow stated in a letter to Mr. Justice Cartwright of January 31, 1966, that:

Section 87 was argued in the Appeal Court when it sat at Yellowknife in the Northwest Territories, and again my notes show very definitely, and I have a very clear recollection of arguing section 87 of the Indian Act in the hearing before Your Lordships when I was there, and again re-arguing the effect of section 87 in my reply after the respondent had been heard. . . .

I think the real worry that I had in arguing section 87 of the Indian Act on the Sikyea case was the use of the word 'province' in that section. The Sikyea case was a case coming from the Northwest Territories, and, of course, it could be suggested that a territory was not a province and, therefore, section 87 could not possibly apply. I don't know whether this is the reason why this argument was not discussed in the Sikyea judgment, or whether it was just my own lack of forcefulness as counsel.

In his reply letter of February 3, 1966, Mr. Justice Cartwright commented:

Whatever the reason, in my consideration of Sikyea I did not direct my mind to the effect which section 87 might have upon the problem. In George it finally appeared to me to be decisive. I know that I had not considered it in Sikyea and in seeking an explanation of this I examined the reasons in all the courts. . . .

It may be that we put Section 87 aside because of the words 'in force in any province.' It was only in considering the George case that clause (24) of Section 35 of the Interpretation Act came to my attention: In every Act unless the context otherwise requires . . . (24) "province" includes the Northwest Territories and the Yukon Territory. . . .

If you have any doubts as to the forcefulness of your argument based on section 87 in Sikyea these should be dispelled by the fact that in George the argument based on Section 87 was the one chiefly relied on and after the fullest consideration it was decisively rejected by every member of the Court except myself. It is clear from the reasons of the majority in George delivered by Mr. Justice Martland that however fully section 87 had been argued in Sikyea it would not have affected the result.
In other words, the major legislation in respect to game in the Northwest Territories was the *Northwest Game Act* which had received wide discussion in respect to the hunting rights of native peoples. Thus, it is submitted that the *Migratory Birds Convention Act* was never intended and should not be construed as a limitation on the hunting rights of native peoples which were clearly recognized in the contemporaneous *Northwest Game Act*. Moreover, the term ""game"" in the *Northwest Game Act* meant and included "all wild animals and *wild birds protected by this Act* or any Regulation and the heads, skins and every part of such animal or bird,""187 further reinforcing the paramount effect of that *Act*.

The primary purpose of the *Migratory Birds Convention Act* was to prevent depletion of reserves of those migratory birds useful to man or harmless to him, meaning those which destroyed insects or were a source of food.188 The Commission of Conservation, whose members had been actively involved in promoting the Convention and the *Act*, viewed game legislation and the bird legislation as protecting an economic resource.189 It had been noted, too, by Commission members, that the real culprit in destroying much of the wildlife was not the native peoples but the white sportsman.190 Moreover, the discussion in Parliament surrounding the *Northwest Game Act* is ample evidence of the fact that the Indians, which

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187 7-8 Geo. V, c. 36, s. 2(d) (emphasis added).
190 The Commission of Conservation members recognized this fact. In a discussion of the relation of native peoples and wildlife at the *Conference on Wild Life*, 1919, supra, footnote 189, the following conversation took place between Commission members:

Mr. W. F. Tye: We have heard a number of remarks about the destruction of game by the Indians, and one would imagine they were the people principally at fault. But does anyone say that the Indian is the man who has destroyed the game of this continent? Surely we are big enough to put the blame where it belongs—that is on the white man. In the early days, when I was in the western country, there were just as many Indians and there was plenty of game—buffalo, deer, antelope, small game of all kinds. The Indians were there and the white men were not. . . . The country was then filled with little lakes, and I am sure you could go to one of these small lakes and see 1,000,000 ducks, geese, swans, and birds of that kind. And there were more Indians in that country than there are now, and the game was there. The Indian killed because he required the food. He killed the buffalo because he required the skins to make tepees, but the white man came in, with his insatiable desire for furs, and not only taught his own people to kill off the game, but taught the Indian as well. The Indian has learned bad habits, now he kills the game not only for food, but, in imitation of the white man, also by way of useless slaughter. If you are going to preserve the game the first thing to do is to make the whites obey the law. The white man makes the laws, the Indian does not; the white man is used to obeying laws, the Indian is not. First make the white man obey the laws, and the Indian will, in the course of time, follow. It is to supply the demands of the white man the Indian does the killing.
would include Inuit, should not become a ward of the government but should support themselves.\textsuperscript{191} Surely the signatories\textsuperscript{192} to the Convention could not have intended the provisions of the Convention to prevent the native peoples pursuing their normal livelihood, but rather, intended it to control the indiscriminate slaughter of game birds by white sportsmen.

The emphasis on control of sports hunting rather than the preservation of a limited food supply for native peoples is more apparent in the approach of the United States to the convention and bird protection legislation.\textsuperscript{193} This is partly because the position of native peoples in the United States in respect to hunting rights is somewhat different from the rights of Canadian native peoples. The hunting rights of those Indians in the United States who have entered into treaties with the government, in which hunting rights have been expressly reserved to them, are not specifically abrogated by international treaty, although it is within the power of Congress to do so.\textsuperscript{194} Thus, under a

\begin{quote}
Mr. W. C. J. Hall: In the far north, where the Indian has the territory all to himself, have you ever known him to kill the game in such a way as to exterminate it...? How about the Arctic Circle, where the Indian [Inuit] is not molested by the white man? Have you ever heard anything of the Indian exterminating the game there?

Mr. Tye: No, and the same applies to the country which is now Saskatchewan and Alberta; before the white man went there, there was no extermination whatever. There was a superabundance of game; therefore, we are the people who are responsible—let us accept the blame," pp. 38-39.

In another report, Dr. C. G. Hewitt commented: "The statement that the Eskimos are respecting the law, and keeping track of the close seasons by means of calendars, is true. They are a superior people, and they appreciate that the preservation of fur depends upon a close season; and, although this is not required, many of them will not kill meat out of season. They are preserving the animals for their proper season..." See, "The Conservation of our Northern Mammals," supra, footnote 136, at p. 40.

\textsuperscript{191} See footnotes 101 to 114 and accompanying text, supra.

\textsuperscript{192} The terms of the Convention were expressly approved by the Canadian Government prior to signing. See Order-in-Council re Migratory Bird Treaty, P.C. 1247, May 31, 1915; P.C. 1537, June 29, 1916.

\textsuperscript{193} A report has been prepared for the Fish and Wildlife Service, United States Department of the Interior by Albert M. Day entitled "Northern Natives, Migratory Birds, and International Treaties (1969)." However, the report has been classified by that Department as being for internal use only and is unavailable for public release. Letter from C. R. Bavin, Chief, Division of Law Enforcement, to the authors, April 17, 1973.

\textsuperscript{194} Association on American Indian Affairs, \textit{Federal Indian Law} (United States Government Printing Office, Washington: 1958), pp. 495-500. See also, Felix S. Cohen, \textit{Handbook of Federal Indian Law} (University of New Mexico, Albuquerque: 1971), pp. 285-286. No federal permits are required by Indians in the United States to hunt birds and it was indicated to the authors that the \textit{Migratory Birds Act} in the United States is not enforced on reservations because there are very few reservations in migratory game bird flight areas. Discussion with Dr. G. W. Cooch, Director of Migratory Birds Division, Canadian Wildlife Service, January 5, 1973.
treaty in which Indians were reserved the right to hunt all kinds of birds at any time in any manner, the United States Government can impose no restrictions as to when and what kinds of birds the Indians may kill upon the reservation.\textsuperscript{195} Indians outside reservations, on the other hand, are treated as any other citizen in respect to game laws,\textsuperscript{196} but only because the Indians apparently at the time of treaty-making did not retain the right to hunt in non-reserve lands ceded under the treaties. The effect of the \textit{Migratory Birds Convention Act}, in Canada, however, has been to abrogate hunting rights of native peoples expressly guaranteed by treaty, whether hunting on\textsuperscript{197} or off a reserve.\textsuperscript{198}

The emphasis on the control of sports hunting is even more pronounced in a similar Convention entered into between the United States and Mexico in 1936.\textsuperscript{199} That Convention was intended to protect not only migratory birds but also game mammals. It was stated in the preamble to that Convention that the purpose of it was to "permit a rational utilization of migratory birds for the purposes of sport as well as for food, commerce and industry," the United States, in enacting this Convention, merely amended their legislation\textsuperscript{200} pursuant to the United States—Great Britain Convention, thus further emphasizing the fact that the United States Convention was apparently directed to the control of sports hunting, although a secondary purpose of the Convention was to thereby preserve the food supply of the native peoples as well as to protect game birds from extinction. In respect to Mexico, it is interesting to note too, that although a closed season was provided for wildfowl, the \textit{Civil Code of Mexico} allows indigenes to take such fowl at any time regardless of season.\textsuperscript{201}

Another argument which can be put forth in support of the paramountcy of the \textit{Northwest Game Act} over the \textit{Migratory Birds Convention Act} and particularly for the construction of the latter Act as designed to control sports hunting is one provided by doctrines of international law. It is an accepted principle of international law in interpreting treaties that a reasonable approach to the sense of the words used rather than a literal sense should be followed, especially where there are two possible divergent interpreta-

\begin{footnotesize}
\begin{enumerate}
\item Sigler, \textit{ibid}.
\item "Convention between the United States of America and Mexico for the protection of migratory birds and game mammals," February 7, 1936, 50 U.S. Stat. 1311.
\item 74th Congress, Sess. II, ch. 634.
\end{enumerate}
\end{footnotesize}
Inuit Hunting Rights

Thus, where there are two statutes in possible conflict such as the Migratory Birds Convention Act and the Northwest Game Act, the more reasonable interpretation is that it was never intended by Parliament to abrogate the right of native peoples to hunt for food. Moreover, the International Law Commission has stated that recourse may be had to preparatory work or the circumstances of the conclusion of a treaty if the interpretation of the treaty "leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the Treaty." In this instance, since there was an obvious bias towards the control of the white man's hunting habits in the approach of the signatories to the United States—Great Britain Convention and the subsequent convention with Mexico, the Convention and Act in Canada should not be interpreted as infringing or limiting native hunting rights.

Territorial Authority over Game Preservation

The Federal Government remained in the arena of game preservation legislation in the Northwest Territories until 1948 when a decision was made to put the preservation of game clearly within the powers of the Commissioner in Council of the Northwest Territories. This involved an amendment to the Northwest Territories Act and the repeal of the Northwest Game Act. In the Senate, it was stated by Senator W. A. Buchanan that the purpose of the Act accomplishing the above was to give the Commissioner of the Northwest Territories in Council the power to make Ordinances respecting the preservation of game. He stated:

At present, this can only be done by the Governor in Council under the Northwest Game Act. The intention of the Bill is the repeal of the Northwest Game Act and to permit a more convenient and speedy procedure to be followed for the regulation of game preservation in the Territories.

In the House of Commons, the Bill received a similar cursory discussion as the acting Minister of Mines and Resources, J. A. MacKinnon, explained to


205 "An Act to Amend the Northwest Territories Act," 11-12 Geo. VI, ch. 20 (1948). Section 1 is the amendment to the Northwest Territories Act; section 3 repeals the Northwest Game Act.

206 Senate Debates, 1948, p. 115.
the House that provincial governments administer their own game and fur regulations. "Similarly," he continued,

... [T]he Yukon Territorial government deals with these matters by territorial Ordinances. It is desired to place the Northwest Territories Council in exactly the same position so that the administration of these particular resources which are of intimate concern to the local people should be subject to control and administration by the Northwest Territories Council. This will enable necessary changes in policy to be made effective promptly to meet the changes which often occur suddenly owing to climate conditions or forest fires. Already the Northwest Territories Council has been authorized to fix and does fix the royalties which must be paid by those exporting furs from the Territories.

There was no discussion of the native peoples' special rights to hunt as they existed under the Northwest Game Act and no stipulations were made in respect to the enlargement of the Commissioner in Council's powers as to how native peoples should be treated with regard to these rights. The Federal Government, in one quick action, had abdicated this area of responsibility thus giving effect to game legislation of the Council of the Northwest Territories. The special rights of native peoples, of particular importance because of the heavy dependence upon game supplies for food, were set aside without any apparent direction to the legislators of the Northwest Territories that such rights must be recognized and continued. The Federal Government had, in a very cavalier way, repealed the Northwest Game Act with no discussion of the reason and prime motivating force behind the passage of the Act in the first place—the preservation and protection of a limited game supply in the Northwest Territories so that the native peoples of the area would be able to pursue their livelihood as they had since time immemorial.

As a result of this new power, a Game Ordinance was passed by the Territorial Council in early 1949 to deal with the preservation of game. By this Ordinance, anyone desirous of hunting was required to have a hunting license of the necessary category for the type of game being hunted. This included native peoples. The fee for non-natives was $5.00 for a general hunting license and there was no fee for all native persons coming within the definition of Indian or Eskimo. Indians and Inuit who possessed a general


208 Debates, House of Commons, 1948, p. 3423.


210 Ibid., s. 4 and Schedule E.
hunting license were allowed to hunt caribou for food in March, which was part of the closed season, and allowed to kill a specified number of caribou for clothing for another month and a half also during the closed season.\textsuperscript{211} These exemptions, however, were only permissive since the Ordinance stated that native persons "may" take caribou during such times and "may" be issued a license to take caribou for clothing. The provisions in the old Ordinances and the predecessor Federal legislation in respect to taking game to prevent starvation was continued in this Ordinance as well as a provision allowing native persons to hunt in game preserves though only if they were born in the Territories and held a general hunting license.\textsuperscript{212} In 1953, the limited right to hunt caribou during the closed season was further restricted by a new Game Ordinance\textsuperscript{213} which provided that any person, not just native persons, could hunt caribou during portions of the closed season for clothing though only with the Commissioner's permission.\textsuperscript{214} Moreover, the number of caribou which could be taken for food was limited to five and the geographical area was somewhat restricted.\textsuperscript{215} The total effect, therefore, was to allow greater access to a more restricted game supply and hence further limit the hunting rights of native peoples. This trend was briefly interrupted in 1955 when native peoples and all holders of a general hunting license were allowed to hunt non-migratory game birds and big game other than musk-ox on all unoccupied Crown land all year for food and to hunt on occupied Crown land with the permission of the occupier.\textsuperscript{216} In addition, Indians and Inuit holding general hunting licenses and other general hunting license holders were allowed to hunt fur-bearing animals on game preserves, though not non-migratory game birds.\textsuperscript{217} However, in succeeding years this was restricted by prohibiting the hunting of caribou, musk-ox and polar bears in these areas.\textsuperscript{218} The special provisions respecting the taking of caribou for food and clothing at specific times during the closed season were also soon repealed, thus, further limiting hunting rights of native peoples unless they could show they were close to starvation.\textsuperscript{219}

\textsuperscript{211} Ibid., s. 33(1) and (2).

\textsuperscript{212} Ibid., s. 24(2)

\textsuperscript{213} "An Ordinance respecting the Preservation of Game in the Northwest Territories," N.W.T. Ordinances, 1953, 1st Sess., ch. 25.

\textsuperscript{214} Ibid., s. 25(5) and (6).

\textsuperscript{215} Ibid.

\textsuperscript{216} "An Ordinance to Amend the Game Ordinance," N.W.T. Ordinances, 1955, 1st Sess., ch. 3, s. 2(1) and "An Ordinance to Amend the Game Ordinance," N.W.T. Ordinances, 1955, 2nd Sess., ch. 14, s. 1.

\textsuperscript{217} Ibid., N.W.T. Ordinances, 1955, 2nd Sess., ch. 14, s. 7.

\textsuperscript{218} "An Ordinance to Amend the Game Ordinance," N.W.T. Ordinances, 1957, 1st Sess., ch. 1, s. 1; also, "An Ordinance to Amend the Game Ordinance," N.W.T. Ordinances, 1958, 1st Sess., ch. 1, s. 1.

\textsuperscript{219} "An Ordinance to Amend the Game Ordinance," N.W.T. Ordinances, 1958, 1st Sess., ch. 1, s. 3.
In 1960 a new revised Ordinance was passed which consolidated the above provisions in respect to hunting although it should be noted that whereas the previous Federal legislation had been concerned only with the preservation of the game supply for the benefit of the native peoples, the Territorial legislation extended this to all general hunting license holders. The *Northwest Game Act* had included "all other inhabitants of the territories" in their exemption clause but as indicated in the discussion of the Bill the "other inhabitants" referred to that class of people who lived like Indians, that is, the Metis. Today, the greater population of the Territories would make the group possessing general hunting licenses much larger, thus allowing a greater number of people to hunt a limited game supply upon which many native persons depend. In this respect, game legislation throughout this century can be viewed as a continuing chipping away at the rights of native peoples to pursue their ancient livelihood in respect to a limited game supply. Their rights are further threatened and proscribed at present by the encroachment of exploration firms in the north to the extent that exploration activities adversely affect the game supply.

Moreover, there is a paradox. The Federal Government has the constitutional authority to enact any legislation it chooses in the Northwest Territories, under the general legislative jurisdiction given by the *British North America Act*. Assuming legislative authority is given by Parliament to the Territorial Government, legislation enacted by the Territorial Government would be effective. Parliament has, as has been pointed out, obviously conferred some legislative authority upon the Territorial Government in respect to game management.

To the extent the Territorial Government has enacted legislation which infringes upon native hunting rights, and that infringement is sanctioned by the conferred authority of Parliament, then Parliament has given an authority to the Territorial Government which it could not give to any provincial government.

By s. 91(24) of the *British North America Act*, Parliament has exclusive authority to legislate in respect to hunting rights. Parliament could not confer upon a province the authority to infringe upon hunting rights, historically protected by the law, without an amendment to the *British North America Act*.

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221 30-31 Vic., c. 3.

222 The extent of the jurisdiction of the Territorial Government is discussed at footnotes 297 to 299, and accompanying text, infra.

223 Generally, this is the subject matter of the whole paper but for the most recent example, see the Brief from Inuit Tapirisat of Canada to the Federal Government requesting the disallowance of "An Amendment to Amend the Game Act," N.W.T. Ordinances, 1972.

224 For example see Regina v. Bob and White (1965), 50 D.L.R. (2d) 613 (B.C.C.A.) aff'd (1966) 52 D.L.R. (2d) 481 (S.C.C.) wherein it was held that a provincial game law could not interfere with hunting rights guaranteed to Indians by federal legislation in combination with existence of a treaty guaranteeing those rights. In other words, in the absence of a constitutional amendment to allow them to do so, provinces cannot interfere with hunting rights guaranteed by treaty.
Thus, there is an ironic situation. The Territorial Government's overall legislative authority does not even closely approximate the jurisdictional power of any province. However, in a single area, that of native hunting rights, the Territorial Government may have greater legislative authority than any province can have. This is only because of the apparent position in recent years of the Federal Government to never challenge the Territorial Government in its infringement upon native hunting rights.\textsuperscript{225}

The further result may be that the Federal Government's current refusal to protect hunting rights in the Northwest Territories has left the native peoples without the traditional protection through the courts. When a province interferes with hunting rights, the courts will afford protection.\textsuperscript{226} However, to the extent the legislative authority of the Territorial Government is sanctioned by Parliament, the Territorial legislation could not be attacked, at least on the basis of not being within its legislative competence under the \textit{British North America Act}. The Territorial Government would argue it has the delegated authority to legislate in respect to "Indians and Lands Reserved for Indians,"\textsuperscript{227} at least so far as hunting rights are concerned.

\section*{IV\quad \textbf{LEGAL EFFECT OF LEGISLATION IN RELATION TO INUIT HUNTING RIGHTS}}

In the previous section, the evolution of game legislation in the Northwest Territories was canvassed along with the infringement of native hunting rights which has occurred. However, a major issue which remains to be discussed is whether or not this legislation, from the standpoint of the law, is indeed applicable to the native peoples of the Northwest Territories. Certainly the legislation is administered as though it applies to native peoples. Can the Commissioner in Council of the Northwest Territories lawfully pass legislation which does abrogate or infringe native hunting rights? The argument can be made, at least in respect to the pre-1960 period, that since there are no treaties with the Inuit people\textsuperscript{228} then their aboriginal rights are unsurrendered and hence the Game Ordinance of the Northwest Territories cannot infringe upon their hunting rights because it does not apply to them.

This, in effect, is the reasoning of Mr. Justice Sissons in the case of \textit{R. v.}\textsuperscript{225}

\begin{itemize}
\item \textsuperscript{225} For example, see refusal to disallow the recent amendment by the Territorial Council to the Game Ordinance, \textit{supra}, footnote 44.
\item \textsuperscript{226} \textit{R. v. Bob and White}, \textit{supra}, footnote 224. Mr. Justice Davey in British Columbia Court of Appeal stated: ". . . [T]heir (Indians') peculiar rights of hunting and fishing over their ancient hunting grounds arising under agreements by which they collectively sold their ancient lands are Indian affairs over which Parliament has exclusive authority, and only Parliament can derogate from those rights." (1965), 50 D.L.R. (2d) 613, at p. 618.
\item \textsuperscript{227} \textit{British North America Act}, 30-31 Vict., c. 3, s. 91(24).
\item \textsuperscript{228} See footnote 43, \textit{supra}.
\end{itemize}
In that case, which occurred in 1959, an Inuk had shot a musk-ox contrary to the provisions of the Game Ordinance. Mr. Justice Sissons, who heard the case, acquitted the accused and made the following observations during the course of his judgment:

Traditionally, this is the land of the Eskimos—Inuit, i.e.—the people (par excellence)—and from time immemorial they have lived by hunting and fishing.

Historically, in accord with the equitable principles of the British Crown, they have been assured of their right to follow their avocations of hunting and fishing.

In the early days the Eskimos were considered as a tribe or nation of Indians. The Supreme Court of Canada has held that Eskimos are 'Indians' within the contemplation of s. 91(24) of the B.N.A. Act, 1867, ch. 3 (Reference re Term 'Indians', [1939] S.C.R. 104) and under the exclusive jurisdiction of the Dominion.

In 1763 a Royal Proclamation was issued following the Treaty of Paris. This Proclamation conserving the hunting rights of the Indians has been spoken of as the Charter of Indian Rights. It is the Magna Carta of the Eskimos. Indians have their Treaties. Eskimos have none. Indians have the Indian Act, R.S.C. 1952, Ch. 159. This Act does not apply to Eskimos. There is no Eskimo Act. This proclamation is the only bill of rights the Eskimos have as Eskimos. They seem to have nothing else. What they have is extremely important and far reaching, and must be guarded and upheld by the court.

In these days when there is much talk of a Canadian Bill of Rights it is well to keep in mind the rights of the Eskimos. Talk of a new Canadian Bill of Rights would be rather strange and futile if at the same time we treat the old Eskimo Bill of Rights as a dead letter.

I think the Royal Proclamation of 1763 is still in full force and effect as to the lands of the Eskimos. The Queen has sovereignty and the Queen’s writ runs in these Arctic 'lands and territories.' This is the Queen’s court and its needs must be observant of the 'Royal will and pleasure' expressed 200 years ago and of the rights royally proclaimed. The Queen’s justice is a 'loving subject' and would not wish to incur 'the pain of the Queen’s displeasure.'

The lands of the Eskimos are reserved to them as their hunting grounds. It is the royal will that the Eskimos 'should not be molested or disturbed' in the possession 'of these lands.' Others should tread softly, for this is dedicated ground.
There has been no treaty with the Eskimos and the Eskimo title does not appear to have been surrendered or extinguished by treaty or by legislation of the Parliament of Canada.

The Eskimos have the right of trapping, hunting and fishing game and fish of all kinds, and at all times, on all unoccupied Crown Lands in the Arctic.

This right could be abridged or extinguished and the Eskimos could be prohibited from shooting musk-ox or polar bear or caribou but this would have to be by legislation of the Parliament of Canada.

*The Game Ordinance* of the Northwest Territories cannot and does not apply to the Eskimos.230

Because of this decision and the reasoning of Mr. Justice Sissons, the Federal Government passed an amendment231 to the *Northwest Territories Act*232 which clearly made the legislation of the Territorial Government in respect to game applicable to the native peoples. Instead of appealing the decision of Mr. Justice Sissons, the Government chose the direct route of legislation, perhaps implicitly agreeing with the court’s decision that the territorial legislation was not applicable to native peoples. In finding as he did, Mr. Justice Sissons had followed the lead provided by Mr. Justice MacGillivray of the Alberta Court of Appeal in *Rex. v. Wesley*233 which dealt with the application of provincial game laws to native peoples. In that case, a treaty Indian was charged with shooting a deer whose antlers were shorter than the length permitted by *The Game Act of Alberta*. 234 The decision of the case turned upon the effect which s. 12 of the Natural Resources Agreement235 had upon provincial game laws. The Natural Resources Agreements were entered into between the Federal Government and each of the three prairie provinces and contain an identical clause designed to protect native hunting and fishing rights as follows:

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


234 R.S.A., 1922, c. 70.

235 *The Alberta Natural Resources Act*, 1930, c. 21 (Alta.).
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.  

In particular, emphasis was placed upon the phrase "for food" which appeared in that section of the Agreement. Mr. Justice MacGillivray stated:

If the effect of the proviso is merely to give to the Indians the extra privilege of shooting for food 'out of season' and they are otherwise subject to the game laws of the province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section [the Natural Resources Agreement, s. 12] supports the view that this was the intention of the lawmakers. I think the intention was that in hunting for sport or commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a different position from the white man who, generally speaking, does not hunt for food and was by the proviso to s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial. 

Moreover, it was stated:

In the result I hold that in turning over to Alberta the public domain in the province the Dominion has sought and the province has given an assurance which has been confirmed by the Imperial Parliament, that Indians hunting for food may kill all kinds of wild animals regardless of age or size wherever they may be found on unoccupied Crown lands or other lands to which they have a right of access at all seasons of the year and that they may hunt such animals with dogs or otherwise as they see fit and that they need no license beyond the language of s. 12 [of the Natural Resources Agreement] to entitle them so to do.

The judgment given by Mr. Justice Sissons in *Kogogolak*, especially as it held territorial game legislation inapplicable to Inuit, was also followed in


238 Ibid., p. 345.
With respect to liquor legislation. In *R. v. Otokiak* 239 Sissons, J., held that a section of the territorial liquor legislation, being special legislation for Eskimos, was *ultra vires* of the territorial council essentially for the same reasons that the game legislation was. In other words, legislation in respect to Eskimos was within the exclusive jurisdiction of the Federal Government and hence territorial legislation did not apply to them.

The Federal Government acted quickly to plug this gap in the applicability of territorial legislation to native peoples. A memorandum prepared by the Department of Indian Affairs 240 stated the government's approach to the problem of Indian and Eskimo hunting rights. The memorandum stated in part:

In a judgment handed down in 1959 Magistrate Sissons stated that in the absence of any clear indication to the contrary, he held that only the Parliament of Canada was competent to legislate with effect on Eskimos. He stated that Indians had their own Act (Indian Act) and their Treaties as protection but that Eskimos had no such enactments in their favour. The effect of this judgment was to establish that the Game Ordinances had no application to Eskimos and to cast some doubt in its application to Indians.

Two courses were given to the Department of Northern Affairs if they were to have control over Indian and Eskimo hunting (1) an appeal which, if successful, would settle the Eskimo question but leave the Indian problem unsolved. (2) [sic] work authority from Parliament to make the Northwest Territories Game Ordinance applicable to both Eskimos and Indians.

The latter course was chosen and, during this last session of Parliament, a Bill was introduced (Bill 60-1960) to amend the Northwest Territories Act and authorize the Commissioner in Council to pass game legislation applicable to Indians in the Northwest Territories. This would have had the effect of making the Northwest Territories Game Ordinance, in its entirety, applicable to Indians who would then be in exactly the same position as other residents of the Territories.

However, during consideration in Committee, the Bill was amended to provide that it was not to be construed as authorizing the Commissioner in Council to make Ordinances restricting or prohibiting Indians from hunting game other than game declared by the Governor in Council in danger of becoming extinct. In this form it was enacted. 241

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240 The memorandum was prepared by Hugh R. Conn, Chief, Economic Development Division, dated October 11, 1960.

In 1960, an amendment\textsuperscript{242} was passed to the \textit{Northwest Territories Act}\textsuperscript{243} whereby s. 17 was amended by the addition of the following clause:

\begin{quote}
All laws of general application in force in the territories are, except where otherwise provided, applicable in respect of Eskimos in the territories.
\end{quote}

At the same time, an amendment to the \textit{Yukon Act}\textsuperscript{244} was also passed which was almost identical to the \textit{Northwest Territories Act} amendment. Since the \textit{Yukon Act} amendment was dealt with first, much of the discussion in Parliament related to this amendment although the same questions and discussion relates equally to the \textit{Northwest Territories Act} amendment. In introducing the Bill providing for the amendments in the Senate, the Honourable George S. White stated:

The second broad subject with which the Bill deals is the application of territorial ordinances. Here the primary purpose is to clarify the intentions of Parliament with respect to the game resources of the Yukon Territory. The Yukon administration has had the control of game for over 60 years, and this control is the same as that which applies in the various other provinces which have the prime responsibility for wildlife resources.

Since 1900 these resources have been administered under Territory legislation, which until recently was taken as applying to all residents without regard to racial origin. However, owing to a court case in the Territories last year an interpretation was given which caused some doubt as to whether or not the Yukon administration had the necessary power to deal with game.\textsuperscript{245}

Later, the same speaker in respect to the Northwest Territories amendment Bill stated:

The first clause of this Bill is with respect to Territorial Ordinances in regard to game. As I explained yesterday, the game in the Territories is under their own jurisdiction, but in a court decision of a year ago this jurisdiction was questioned for the first time, and this amendment is to make it perfectly clear that the Territorial authorities have power to deal with game.\textsuperscript{246}

\begin{itemize}
\item\textsuperscript{242} \textit{An Act to Amend The Northwest Territories Act}, S.C. 1960, c. 20.
\item\textsuperscript{243} R.S.C. 1970, c. N-22.
\item\textsuperscript{244} \textit{The Yukon Act}, R.S.C. 1970, Y-2.
\item\textsuperscript{245} \textit{Senate Debates}, June 1, 1960, p. 735.
\item\textsuperscript{246} \textit{Ibid.}, p. 754.
\end{itemize}
In discussion of the Bill some concern was shown by some members of the Senate that by passing this amendment the rights of Eskimos were being affected in some way in spite of the protestations of the government. The Honourable A. K. Hugesson stated:

Apparently there are two principal provisions of the Bill. The first authorizes the Commissioner to make regulations in respect of game in the Northwest Territories that are to be applicable to Indians and Eskimos. I assume that there is very good reason for that provision, but I trust that when the Bill goes before the committee it will be ascertained that there is no interference with any of the treaty or other rights of the Indian and Eskimo population in respect to that particular matter.247

He later stated:

There may be some treaty rights being interfered with here and we should be very careful that we are not taking them away without compensation. 248

The Honourable George S. White replied to these comments in this way:

The only reply I can give the Honourable Senator from Inkerman in reference to section 2 is that in reading excerpts from the judgment which brought these changes I find the court gave the opinion that the game laws did not apply to Eskimos; and, despite the fact that in the Northwest Territories Act there is a list of things over which the Commissioner in Council has jurisdiction, the Act especially provides for the preservation of game.249

In the House of Commons the Bill was introduced by Mr. Alvin Hamilton who explained the origin and purpose of the amendment in this fashion:

In the Northwest Territories a resolution was passed last year asking the federal government to make clear the legality behind their right to pass ordinances on game matters. This we have done. . . .

This matter only arose because last year a judicial decision was handed down in the Northwest Territories which pointed out that in the opinion of the presiding judge the territorial council had no power to make game ordinances in so far as they affected Eskimos. This put the game legislation in question. We had turned over the management of the game to the Northwest Territories in 1948. The territorial government had passed ordinances dealing with game, now a judicial decision had put this jurisdiction in doubt.

247 Ibid., p. 755.
248 Ibid.
249 Ibid.
As a result they met and passed a resolution calling on the federal government to amend the Northwest Territories legislation in such a way as to make clear without any doubt that they had power to deal with game matters. Then to make certain that they recognized that the interests of the Indian and Eskimo were protected, the last section of their resolution was framed in these words, which I wish to put on the record and to which I ask all honourable members to give their undivided attention because they have the traditional duty of protecting the Indian in Canada: 'And further that the Council undertakes that in all cases and at all times the basic rights of Eskimos and Indians to hunt and trap on unoccupied Crown land shall be preserved and shall be abridged only to ensure the conservation of game animals as a continuing resource to such extent as is necessary for their livelihood.'

The Minister then went on to observe that:

Here I might point out that there are other protections for the Indian and Eskimo. First, the legislative body, the territorial council, has the right to pass legislation, and the commissioner who is appointed by the federal government has the right not to sign that legislation. That is one control to make certain that the rights of the Indian and Eskimo are protected.

The second protection is the fact that all ordinances of the territorial governments must have the approval of the Governor General in Council, and this means the approval of the Indian Affairs branch of the Department of Citizenship and Immigration. If these two protections are not sufficient, then the committee should seriously consider adding an amendment to clause 4 to make clear that the traditional right is not in any way abrogated.

The question of consultation with the native peoples was raised during the debate and the government's attitude to such consultation became apparent. One member questioned the Minister:

Can the committee be advised as to whether the Eskimos and Indians were told that there might be a change in the law with regard to their game rights?

The Minister, Mr. Hamilton replied:

When the amendment to the Northwest Territories Act was produced the head of the Indian Affairs branch sat in on the committee, and of course he is a member of the Northwest Territories Council.

Inuit Hunting Rights

The answer to the question clearly indicates that the government had not directly approached the native peoples to canvass their opinions and thoughts on what should be the best method of amending the Act so as not to infringe upon their hunting rights. Again the government had acted peremptorily in respect to the traditional rights of the native peoples.

In addition to the above amendment, another amendment was passed dealing with hunting rights. This amendment provided in part:

(2) . . . [T]he Commissioner in Council may make ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Eskimos, and ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories, unless the contrary intention appears therein, are applicable to and in respect of Indians and Eskimos.

(3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown Lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.254

As Mr. Justice Sissons pointed out in his autobiographical account of his life in the North:

These words appear to guarantee the Eskimos' traditional rights to hunt, but their real meaning was explained by an Order-in-Council which followed the passage of the legislation and blandly completed the bureaucratic coup.255

The Order-in-Council256 in question read:

His Excellency, the Governor General in Council, on the recommendation of the Minister of the Northern Affairs and Natural Resources, pursuant to subsection 3 of section 14 of the Northwest Territories Act, is pleased hereby to declare musk-ox., barren-ground caribou and polar bear as in danger of becoming extinct.

The passing of this Order-in-Council was apparently also done without the consultation of native peoples as to whether such animals were abundant or not. As Mr. Justice Sissons commented:

The Eskimos, and most other people of the North, do not consider the musk-ox, caribou or polar bear in danger of extinction. On my flights across the northern land I had seen many of all three and could not see any danger as long as the Eskimo hunted them for

256 P.C. 1960-1256.
food. The danger was from slaughter by sportsmen, often from aircraft, a practice which was becoming notorious.\textsuperscript{257}

The official description of the passage of this Order-in-Council would appear to support the position of Mr. Justice Sissons:

The temporary effect of the amendment was to completely nullify the first paragraph of the Bill and defeat the original intent of the Department of Northern Affairs which was to bring Indians completely and beyond any doubt under the authority of the Game Ordinance.

The next step, therefore, was to have some species declared in danger of becoming extinct. This was done under authority of P.C. 1960-1255 dated September 14, 1960, copies of which were forwarded to the Department on October 4th, \textit{without supporting detail}. Musk-ox, caribou and polar bear are now claimed as game in danger of becoming extinct which means that Indians' special privileges with respect to these animals have been abolished and they revert to the same position as other residents of the territory who are eligible for general hunting licences.\textsuperscript{258}

\textsuperscript{257} Sissons, J., \textit{supra}, footnote 255, at p. 122.

\textsuperscript{258} Memorandum of Hugh R. Conn, \textit{supra}, footnote 240, at pp. 3-4 (emphasis added). It would appear, also, from a perusal of available government correspondence at this time that the government was concerned more with the limits of Indian hunting rights and the enforcement of the new provisions against the Indians, than with the Inuit. One of the methods used by local Indian Affairs administrators was the withholding of ammunition allotments required by treaty. The situation is outlined in a letter of December 28, 1960, from H. M. Jones, Director in the Department of Indian Affairs to J. G. McGilp, Regional Supervisor of Indian Agencies in which it was stated:

I believe you are quite correct in deciding to continue the issue of ammunition required to meet the treaty obligation. However, I feel that it would be wise to reconsider your decision to withhold the issue of additional ammunition supplied on the basis of established need, to Indians who maintain the position that they intend to disregard the provisions of Order-in-Council, P.C. 1960-1256. It may well be the withholding ammunition might have a temporary restraining effect on the hunters, but I doubt if the Department could justify such action for the following reasons:

1. The Indians can, in fact, acquire ammunition from other sources and more likely they will do so.

2. The penalty for infraction of the law in such cases has already been established and it might even be argued that by denying a hunter ammunition prior to the hunt would be attempting to punish him for an illegal act which might never be perpetrated.

3. By attempting to withhold the issue of ammunition which they might need badly, we could be accused of denying them the opportunity to shoot male caribou and other big game which they could take quite legally.

4. In short, as long as there is big game which Indians can hunt for food, legally, we could hardly justify refusing to issue the customary amounts of
Nonetheless, in light of this amendment to the *Northwest Territories Act*, the provisions of the Game Ordinance were enforced against native people hunting out of season for those species mentioned in the Order-in-Council. The government, in enacting the Order-in-Council had failed to realize the great significance of these game animals in the life of the native peoples. Of particular importance to the native peoples of course was the caribou, and although only the barren-ground caribou, of the several species of caribou, was declared in danger of becoming extinct, as pointed out in the memorandum of the Department there was no evidence accompanying the Order as to why these species were selected. This again demonstrates the failure of the Government to analyze carefully the needs of native peoples and the failure to consult with them as to how to deal with these supposed problems.

Mr. Justice Sissons, who was watchful of the rights of native peoples, relates that there were several instances of convictions under the Game Ordinance wherein the Inuk charged was deprived of a fair trial due to lack of counsel. Mr. Justice Sissons wrote to the Department of Justice and suggested that these convictions should be quashed because of this and because the conviction was contrary to his finding in the *Kogogolak* case. Mr. Justice Sissons refused to believe that the Parliament of Canada would use such a “ruse” as the amendment and Order-in-Council to limit the traditional hunting rights of the Inuit. It appears that the Department of Justice instructed Crown Counsel at Yellowknife to move to quash the convictions. However, after consultation with the Department of Northern Affairs, the Department of Justice then gave instructions to the Crown Counsel to

ammoniation based, of course, on the need in each case.

Consequently, unless you are in possession of facts or information that would tend to refute more clearly the wisdom of this course, I would ask that you discuss the matter with Mr. Bryant and then advise Chief Bruneau that issues of ammunition will continue on the same basis as practised before the provisions of the Order-in-Council became effective. When an issue is made, the recipient should be told that big game for food is to be taken only in accordance with the law. He can, of course, refuse to take the ammunition but it should not be denied him simply because of a statement by Chief Bruneau that Indians would shoot female caribou.

259 In the memorandum of Hugh R. Conn, *supra*, footnote 240, there would appear to be some confusion as to the species of caribou declared as becoming extinct since it is stated in one section that:

Only one of the species named is of any consequence to Indians, that is the caribou. In that respect, it must be noted that no distinction is made in the Order-in-Council between barren ground caribou which is still in a precarious position and the woodland or mountain caribou which are reported to be very abundant.


261 *Supra*, footnote 239.

disregard his previous instructions and to let the convictions stand. The agency of government charged by statute with responsibility for protection of the rights of native peoples was the very agent which surreptitiously strived to prevent those rights from being protected. The Department of Justice and Northern Affairs thus implicitly encouraged contempt for the rule of law. The only judicial authority on whether the Game Ordinances applied to the Inuit or not was Kogogolak and the government ignored this decision, preferring to convict individuals on the basis of their unsupported belief and interpretation as to the meaning of the new Northwest Territories Act amendment. It was as a result of this series of transactions and the obstinacy of the Department of Northern Affairs to deal honestly and in a straightforward manner according to Mr. Justice Sissons’ standards, that Mr. Justice Sissons heard another hunting rights case and again found the Game Ordinance inapplicable to the Inuit.

In R. v. Koonungnak the accused had shot a musk-ox which had strayed near his camp. The defendant had never seen a musk-ox before and was afraid that the animal would attack the camp and so shot it to prevent such an attack. At his trial, an R.C.M.P. constable, who was by virtue thereof also a game warden, was both the informant and prosecutor, while the justice of the peace who heard the case was a game warden and area administrator of the Department of Northern Affairs. The accused was convicted. When Mr. Justice Sissons heard of the facts he personally intervened and instructed a Yellowknife solicitor to file an appeal on behalf of the accused which was heard before Mr. Justice Sissons. During the course of his lengthy reasons for judgment in the quashing of the conviction, many topics were canvassed. In particular, the conviction was quashed because the accused was deprived of a fair trial according to standards set forth in the Canadian Bill of Rights. That is, the prosecutor and judge were not impartial; the accused was deprived of the right to retain and instruct counsel; he was compelled to give evidence and received no protection against self-incrimination; he was deprived of the right to the assistance of an independent interpreter as opposed to a court interpreter; and, he was not informed as to what rights he had or whether he had any rights. As a result, it was Mr. Justice Sissons’ finding that the accused was not sufficiently informed as to be able to plead to the charge or to understand what pleas were available to him.

In addition, it was found that the accused had a good defence to the charge. Since he was afraid of impending harm to the camp, the defence of self-defence was available to him and should have been allowed at the original trial. Moreover, in granting an acquittal Mr. Justice Sissons reapplied the Canadian Bill of Rights to the recent amendments of the Northwest Territories Act which had supposedly removed any doubt that the Territorial Council could legislate in respect to restricting the hunting rights of native peoples. Mr. Justice Sissons declared:

263 Ibid.
265 S.C. 1960, c. 44.
Inuit Hunting Rights

Vested rights are not to be taken away without express words or necessary intendment or implication. The Canadian Bill of Rights also stands in the way.

The legislation recognizes that the Eskimos have hunting rights. (Omit top line)

The legislation recognizes that the Eskimos have hunting rights. It is clear that these rights are being abridged or infringed. Also, it is clear that contrary to the Canadian Bill of Rights there is discrimination here, and in the Game Ordinance by reason of race. An Indian or Eskimo may not hunt musk-ox, polar bear or caribou. There is no such restriction on the white men, except recently as to musk-ox.

It is not expressly declared that the legislation shall operate notwithstanding The Canadian Bill of Rights. The provisions are inconsistent with The Canadian Bill of Rights... 

The Ordinances of the Northwest Territories in relation to the preservation of game in the Territories are not applicable to and in respect of Indians and Eskimos and cannot be made so without the concurrence of the Indians and Eskimos.

These Ordinances should have been disallowed at the time they were proposed because they infringe on the hunting rights of the Eskimos and also discriminate against the Eskimos.266

Mr. Justice Sissons continued his one-man attack on the restrictive game laws of the Northwest Territories as they applied to the Inuit in another case the following year. This was the case of Kalloor v. R267 in which the accused was convicted before the magistrate of abandoning game fit for human consumption. On a trial de novo before Mr. Justice Sissons he was acquitted on the grounds that he had not in fact or law abandoned the game and that the Game Ordinance did not apply to Inuit based on the reasoning of Kogogolak and Koonungak.

The Crown then prepared a notice of appeal in this case outlining an all-out attack on Mr. Justice Sissons' position in regards to hunting rights. However, the appeal was never proceeded with.268

The issue of whether the Game Ordinances of the Northwest Territories applied to Inuit was eventually brought squarely before the Territorial Court of Appeal and the Supreme Court of Canada in Sigeareak E1-53 v. The Queen,269 another case in which Mr. Justice Sissons had declared, on an appeal by way of stated case from the magistrate, that the Game Ordinance

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266 Supra, footnote 264, at pp. 306-307.
268 Sissons, supra, footnote 255, ch. 30.
did not apply to the Inuit. However, a further appeal was taken to the Territorial Court of Appeal which reversed Mr. Justice Sissons and ordered a conviction to be entered against the accused on the ground that the Game Ordinance did apply to the Inuit. Moreover, it was held that the Proclamation of 1763 had no application in the case before the court as the territory involved was clearly within the former Hudson's Bay Company lands which were considered to be excluded from the benefit of the Proclamation. As a result, the court found it unnecessary to decide whether the Proclamation was applicable to Inuit as well as to Indians. On a further appeal to the Supreme Court of Canada, the judgment of the Court of Appeal was upheld. In the course of its judgment, that court speaking through Mr. Justice Hall declared that the Proclamation of 1763 had no application in the region in which the offence took place because that region was part of the Hudson's Bay Company lands to which the Proclamation does not and never did apply.270

The Court also dealt with the substantive issue of whether the Game Ordinance applied to the Inuit and held that the Federal Government did have the authority to pass the amendment to the Northwest Territories Act and the Order-in-Council, as a result of which, the game laws did apply to the Inuit.271 Thus, another chapter in the continuing attack and lessening of Inuit traditional hunting rights was closed. The Inuit, it would appear, were now subject to the whims of the bureaucracy in Yellowknife. The continuing assertion would be that Inuit hunting rights are never really affected by the actions of the Territorial Government. As noted, the assertions of both the Territorial and Federal Governments at the time of the 1960 amendment to the Northwest Territories Act were that native rights were not being interfered with, but that conservation measures were necessary to prevent extinction of certain species of game.

The Inuit have always practised conservation measures and supported them when they were necessary. However, given a limited supply of game available for hunting, sound conservation and game management practise dictate that that limited supply should only be hunted by native peoples. Any extension of hunting to non-natives in respect to this limited game supply necessarily dilutes native hunting rights. For example, to the extent that

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270 This is an arguable proposition, however, given recent research into the matter, especially that of Kenneth Narvey who prepared a long opinion on the matter and submitted it to Mr. Justice Hall after his decision in the Calder case, supra, footnote 34. See 38 Sask. L. Rev. (1973-1974). See also. Native Rights In Canada (2nd edn.), supra, footnote 1, at pp. 26-30, 223-225, and the cases cited in footnote 49, supra.

271 However, it is submitted that if it could be shown that aboriginal rights were constitutionally entrenched by virtue of the series of acts and Orders-in-Council through which Rupert's Land (the Hudson's Bay Company Territories) was transferred to the Crown, then these limitations on the hunting rights of the Inuit would be ultra vires of both the Territorial and Federal Governments. Indeed, preliminary research into the matter suggests that in respect to the former Hudson's Bay Company territories it may be beyond the scope of the authority vested in the Federal Government by virtue of section 91(24) of the British North America Act to abrogate native rights because these rights can be construed as being constitutionally entrenched.
non-natives can hunt caribou, the native peoples hunting rights in respect to caribou are necessarily compromised. Yet, the apparent continuing quest of the Territorial Government is to dilute native rights, although the stated premise always is that "There is no diminution whatsoever of the rights of the Indian or Inuit people . . . by such changes." 272

Apparently, the continuing position of the Federal Government, now that it has purportedly turned over jurisdiction in respect to game management to the Territorial Government as of 1960, is to assert that questions in respect to native hunting rights are no longer matters of federal concern.

Therefore, in the absence of a change of position on the part of government, the Inuit will be forced to return to the courts for protection of their hunting rights. The question then is, are there any further arguments in support of Inuit hunting rights?

The Canadian Bill of Rights in Relation to Hunting Rights

The Canadian Bill of Rights273 asserts as one of the fundamental freedoms which have existed and shall continue to exist in Canada "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law."274 Since property is not defined in the Bill of Rights, the general connotation of the concept can be said to be that of a right which has value, does not depend on another's courtesy and is capable of ownership. Therefore, hunting rights, which are based upon aboriginal title, can be considered as a form of property. The Bill of Rights does not say that the right to enjoyment of property is absolute, rather it states that this right can be destroyed or impaired only through due process of law.

As yet, there is no Canadian jurisprudence attempting to define "due process of law" as the term is used in the Bill of Rights. However, the concept behind the phrase is fundamental to English law and dates back to the Magna Carta275 when the barons rebelled against the "violation of the customary by the arbitrary." In addition, the "law of the land" was "conceived to inhere as reason in the human establishment of England, as fixed percepts and principles of law by which the Sovereign himself was bound. . . ."276 In one legislative enactment of the fourteenth century it was stated that:

... [N]o man of whatever estate or condition that he be, shall be put out of land or tenement . . . without being brought in answer by due process of law.277

272 See footnote 45, supra, and accompanying text.
273 S.C. 1960, c. 44.
274 Ibid., s. l(a).
275 June 15, 1215; re-issued 1297, 25 Edw. 1.
277 2 Edw. III, c. 3.
The concept of "due process" has been more clearly incorporated into the American Bill of Rights as a limitation on legislative power. The concept has been discussed in many American cases although most of the definitions which have been postulated are very wide and nebulous. For example, it is said to embody the principles of justice "implicit in the concept of ordered liberty," and is something "so rooted in the traditions and conscience of our people as to be ranked as fundamental." However, it is clear that "due process" has been interpreted as a limitation which is broader than a mere requirement that proper procedure be followed. It is seen as "a limitation on law which to a degree of unreasonableness affects personal liberties or property." In his discussion of the matter, the late Mr. Justice Rand was of the opinion that the provisions of the Canadian Bill of Rights also encompass more than a strictly procedural definition. Section 2, he argued, deals exhaustively with procedural matters, and to state that "due process" is merely procedural would render the declaration of rights in s. 1(a) meaningless:

If the inclusion [of certain procedural rights, e.g. right to counsel, in s. 2] were intended to imply that . . . substantive law is not within the scope of due process, that the latter is restricted to whatever adjectival rules or jural constructs may lie beyond the enumeration of s. 2 . . . , then it could be said that the declarations are of no significant value, wordy symbols signifying little.

Therefore, on this basis, any federal law or regulation purporting to expropriate hunting rights without appropriate compensation being given, would be a violation of the Bill of Rights. Unquestionably, the Federal

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281 *Rand, supra*, footnote 276, p. 189.

282 *Ibid., p. 187.*

282a The argument that provisions of the Canadian Bill of Rights are violated by any abrogation of the Inuit right to hunt involves other issues. As already discussed, for the Canadian Bill of Rights to be operative, a court would have to accept the argument that the right to hunt is a property right. The weight of authority suggests a court would consider the right to hunt a property right. See Gerard V. La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (University of Toronto Press: 1969), at pp. 112, 119, and 120. Note the Inuit position is particularly strong, because the Inuit have never surrendered their native title, so their right to hunt is simply one incident of that native title. In this regard, their position perhaps is stronger than that of treaty Indians in relying upon the right to hunt by treaty in respect to unoccupied Crown land for which a surrender had been made at the time of the treaty-making. However, further issues will arise. As put forward by the above-mentioned author:
The abolition of the Indian right to hunt on Crown lands pursuant to treaty would not appear to violate the provisions of the Canadian Bill of Rights. But, when R. v. Sikyea came before the Territorial Court of the Northwest Territories, Sissons, J. held that it did. The case arose from the following circumstances. In 1960, following R. v. Kegogolak in which the same judge had held a Northwest Territories game ordinance ineffective to curtail hunting and fishing by Eskimos, the Dominion parliament enacted an amendment to the Northwest Territories Act providing that territorial ordinances were subject to certain exceptions, applicable to Indians and Eskimos. But, in R. v. Sikyea, Sissons, J. held the amendment ineffective as violating the Canadian Bill of Rights. He pointed out that the Bill declared that all acts of parliament must be so construed as not to infringe upon any rights or freedoms mentioned in the Bill unless there is a provision in an act that it is to operate notwithstanding the Bill of Rights. The only possible rights the learned judge could have alluded to in this context are the right of the individual to the enjoyment of property and the right not to be deprived thereof except by due process of law which are set forth in section 1 of the Bill. One must assume that the Indian and Eskimo privileges of hunting and fishing were not regarded as the enjoyment of property because nothing is said about it in the higher courts. It might be thought that a different result would follow from the interference with the Indians' right to reserved lands, but it is difficult to believe that the termination of such privileges by the instrument creating it can be looked upon as an arbitrary revocation of it. The privilege under the 1763 proclamation was expressly accorded the Indians (and Eskimos) "for the present, and until our (i.e. the sovereign's) further Pleasure be Known." As the Privy Council put it in the St. Catherine's Milling case, the right is dependent on the good will of the sovereign. Responsibility for the exercise of the sovereign's functions in this field is now vested in the federal authorities. Indian and Eskimo rights over the former Hudson's Bay Company territory is of the same character. Apart from the requirements of the Indian Act, the privilege could in all probability also be abrogated by a federal order in council without recourse to parliament.

It should be noted that the administration and control of Indian lands is included in the grant of legislative power. This includes the right of the Crown in right of the Dominion to recover possession of reserved lands improperly in the possession of an individual, and, except as modified by statute, possibly the power of abrogating the Indian title.

The arguments raised have to be considered. First, the case of R. v. Sikyea (1962), 40 W.W.R. 494; reversed (1964), 43 D.L.R. (2d) 150, which was affirmed by Sikyea v. R. (1964) S.C.R. 642, referred to in the passage above, involved a treaty Indian and a hunting right based upon a treaty provision, rather than a hunting right based upon an unsurrendered native title. The situation between the treaty Indians and the non-treaty Inuit may be distinguishable upon this basis. Second, the higher courts did not appear to deal directly with the question as to whether hunting and fishing rights were or were not regarded as enjoyment of property within the meaning of the Canadian Bill of Rights. The question appears to remain an open one. Additionally, exception must be taken to the assertion in the passage above that:

... [I]t is difficult to believe that the termination of such privilege pursuant to the instrument creating it can be looked upon as an arbitrary revocation of it. The privilege under the 1763 proclamation was expressly accorded to Indians (and Eskimos) 'for the present, and until our (i.e. the sovereign's) further Pleasure be Known.' As the Privy Council put it in the St. Catherine's Milling case, the right is dependent on the good will of the sovereign.

The first point is that the 1763 Proclamation was not the exclusive source of native land rights. On this point, both the majority and dissenting justices in Calder v. Attorney-General of B.C. (1973), 34 D.L.R. (3d) 145 per Judson, J. at p. 152 and per Hall, J. at pp. 203-205, appear to be in agreement.
Second, the language in the *Proclamation*, that "the right is dependent upon the good will of the sovereign," does not lead to the necessary conclusion that the sovereign can exercise its discretionary power in an arbitrary fashion and without due process, at least in the absence of expressly stating that it is intending to exercise its power in such way. Considering when the *Proclamation* was made, 1763, and considering the subsequent history of the implementation of the *Proclamation*, it is far from clear that the power of the sovereign could be exercised arbitrarily and without due process. Moreover, as the government has the ultimate power to expropriate in all events, all property rights in Canada are hypothetically at the "(P)leasure" of the government. The *Proclamation* of 1763 need not receive this narrow interpretation, nor need the *Canadian Bill of Rights* receive this narrow interpretation in its applicability to any violation of native title, even if the title should be found by a court to be created by the 1763 *Proclamation*.

A third point is that there is a significant history of statutory recognition of native title in the Northwest Territories and Canada generally, subsequent to the *Proclamation* of 1763. See generally, Cumming and Mickenberg, *Native Rights in Canada* (2 ed.) (Indian-Eskimo Association of Canada and General Publishing Co. Ltd.: 1972). The argument can be made that such recognition now limits or circumscribes the manner in which title can be dealt with, even if the *Proclamation* gave unfettered discretion to the sovereign.

Finally, it can be argued in respect to the area of the Northwest Territories which was formerly Rupert's Land and part of the Hudson Bay Company territories, that there is a constitutional obligation on the part of the federal government to recognize native title and to obtain a surrender thereof following the principles set forth in the *Proclamation*. The existence of this constitutional obligation has been mentioned by Mr. Justice Morrow in the recent decision of the Supreme Court of the Northwest Territories given on September 6, 1973 (as yet unreported) *In the Matter of an Application by Chief Francois Paulette et al to lodge a certain Caveat with the Registrar of Titles of the Land Titles Office for the Northwest Territories* at pp. 36-37. It would be a mockery of the obligations assumed by Canada at the time of the transference of the Hudson's Bay Company territory to Canada, if the obligation was in effect "dependent on the good will of the sovereign."

Following are some preliminary arguments dealing with this constitutional obligation, prepared by a research assistant to the I.T.C. Land Claims Project. There are three main issues which arise when considering whether aboriginal title, as it relates to the Hudson's Bay Company territory (Rupert's Land), has been entrenched into the *British North America Act* (30 & 31 Vict., ch. 3).

First, it is necessary to examine the terms and conditions surrounding the admission of the territory into Canada, with a view to ascertaining whether the aboriginal title of the Indians and Inuit was recognized at that time. There were several steps which led to the admission of the territory. By the *Rupert's Land Act*, 1868 (31 & 32 Vict., c. 105(Imp.)), the Imperial Parliament granted Her Majesty the right to accept a surrender, upon terms, of the lands, privileges and rights of the Hudson's Bay Company Territory. Section 5 of the Act gave the British Crown the power to declare, by means of an Order-in-Council, that Rupert's Land be admitted as a part of the Dominion of Canada. Section 146 of the *B.N.A. Act* had also allowed for the admission, stating that the provision of such an Order-in-Council would have the same effect as if enacted by the United Kingdom Parliament.

On November 19, 1869, by deed, the Hudson's Bay Company surrendered Rupert's Land to the British Crown, along with all the accompanying rights, privileges and powers over the territory. An Imperial Order-in-Council, passed June 23, 1870 (reprinted in *R.S.C. 1970, Appendices*, at pp. 257-263), provided that Rupert's Land would become part of Canada on July 15, 1870.

There were two addresses presented to the Crown from the Canadian Parliament which were incorporated into the Imperial Order-in-Council. The first address was presented in December 1867 (reprinted in *R.S.C. 1970, Appendices*, at p.264).
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It stated that, upon the transference of the territory, the compensation claims of Indians for land needed for settlement purposes would be dealt with in conformity with the established equitable principles that had governed the British Crown in its former aboriginal dealings. A logical inference is that the reference stipulated adherence to those procedures established under the Royal Proclamation of 1763 (R.S.C. 1952), Vol. VI, p. 6127). Two arguments exist which support the drawing of such an inference. Firstly, there is a strong argument that the recognition of aboriginal title and the procedures established under the Royal Proclamation itself actually extended to the Hudson’s Bay Company territory (see footnotes 270 & 49, supra). Secondly, the Federal Crown subsequently entered into treaties within certain areas of the transferred territories, thus recognizing an obligation to adhere to the principles and procedures of the Royal Proclamation. These areas included lands in Saskatchewan, Manitoba and Ontario which had previously been part of Rupert’s Land. Additionally, although no treaties were signed in Quebec, the Quebec government expressly undertook an obligation to settle Indian claims when they received transfer of portions of Rupert’s Land through the Quebec Boundaries Extension Act of 1912 (S.C. 1912, c. 45). Although there is uncertainty as to whether the lands involved in Treaties 8 and 11 in the Northwest Territories were ever part of Rupert’s Land, it is possible that they were. The actions taken by the Federal Crown in extinguishing aboriginal title in some former parts of Rupert’s Land, and expressly recognizing it in others, support the contention that the first address referred to the Royal Proclamation.

Following the first address, the Canadian Parliament passed a series of resolutions which were also incorporated into the Order-in-Council of June 23, 1870. These resolutions (reprinted in R.S.C. 1970, Appendices, at p. 268, stated that it was the duty of the Canadian government to make adequate provision for the protection of Indians who were affected by the Territorial transfer. The second address, in May, 1869 (reprinted in R.S.C. 1970, Appendices, at p. 270), sought the transfer of Rupert’s Land according to the terms and conditions of the resolutions.

The addresses point out that the British Crown recognized the existence of aboriginal title within the Hudson’s Bay Company territory, and also recognized an obligation to settle claims arising from aboriginal title. However, as the lands were being transferred to Canada, this continuing British obligation was to be undertaken by Canada. In both the resolutions and in the second address, the Canadian Parliament and the Governor-in-Council approved the terms of the agreement between the Hudson’s Bay Company and the Government of Canada; and one of the terms was that Canada would dispose of any claims of Indians in regard to lands required for settlement purposes. The language of the agreement with respect to Indian claims is virtually identical to the language embodied in the Order-in-Council.

The agreement, the two addresses, and the resolutions (all of which were incorporated into the Order-in-Council), and the Order-in-Council itself, serve as a recognition of the existence of aboriginal title in Rupert’s Land, consistent with the recognition accorded in the Royal Proclamation of 1763. By virtue of s. 146 of the B.N.A. Act, these provisions had the same effect as if they had been enacted by the British Parliament. Thus, it is strongly arguable that the existence of aboriginal title in Rupert’s Land received both executive and legislative affirmation.

The second issue which arises is whether or not the terms of the Order-in-Council of June 23, 1870, became entrenched into the Canadian constitution by virtue of the B.N.A. Act. As mentioned previously, s. 146 of the B.N.A. Act of 1867 specifically provided for the admission of certain areas, including Rupert’s Land, into the Union. It reads as follows:

It shall be lawful for the Queen . . . on Address from the Houses of Parliament of Canada to admit Rupert’s Land . . . into the union, on such terms and conditions . . . as they are in the Addresses expressed and as the
Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order-in-Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

The B.N.A. Act itself contains no amending section. Amendments can be made only by the Parliament at Westminster. If amendments to various terms of the constitution could only be achieved through this procedure, then such terms would be considered to be constitutionally entrenched. The Canadian constitution consists of the B.N.A. Act of 1867 and all its subsequent amendments. Prior to 1931, British legislation took precedence over Canadian legislation notwithstanding that the B.N.A. Act itself had granted Canada the power to legislate in certain areas. (Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63). In 1931, by the passage of the Statute of Westminster (22 Geo. V, c. 4), the Canadian dominion was granted the right to amend or repeal British legislation insofar as such legislation had effect on the Dominion. This right of repeal, however, was a qualified one. Section 7(1) of the Statute of Westminster excluded the following Acts from its operation:

Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

Thus, if the Order-in-Council of June 23, 1870, which affirmed aboriginal rights, was issued pursuant to any of the statutes noted above, it would be protected by Section 7(1) and not subject to change by either a Dominion or Provincial Parliament.

It is submitted that the Order-in-Council is thereby protected having been issued pursuant to Section 146 of the B.N.A. Act, 1867. It may be argued contra that the wording of the latter part of S. 146 merely offers the impression that the Order-in-Council is the equivalent of an Imperial Statute, as opposed to having been issued pursuant to S. 146. If this were the case, of course, the Order-in-Council would only have been afforded protection up to 1931, and thereafter it would have been subject to abrogation by the Federal or Provincial governments; as such, it would not be constitutionally entrenched.

However, such an argument can be rebutted. Firstly, because the Colonial Laws Validity Act of 1865 prevented Canada from amending British legislation, and because S. 146 had the effect of granting the Order-in-Council the same status as a piece of British legislation, it may be inferred that the Fathers of Confederation intended to give the terms and conditions of the Order-in-Council the equivalent status of the B.N.A. Act, by preventing its unilateral abrogation by both the Dominion and the Province. Thus, the intention of the Fathers of Confederation, the British Crown, and both Parliaments can only be fulfilled by interpreting the Statute of Westminster as not having altered this position. That is, the Order-in-Council must be considered to have been made pursuant to the B.N.A. Act, 1867, and thus not subject to abrogation by the Dominion or the Province.

Secondly, when a territory entered the Union it was obliged to follow the terms and conditions of the B.N.A. Act. The subsequent treaties which were entered into in Manitoba, Saskatchewan and Ontario (formerly parts of Rupert's Land) support the assertion that the terms of the Order-in-Council were recognized to be part of the B.N.A. Act.

Thirdly, the fact that the procedure set out in S. 146, in regard to the entry of a new territory into the Union, is elaborate and detailed, supports the conclusion that the Fathers of Confederation did not intend the terms of the Order-in-Council to be subject to unilateral abrogation.

Finally, one can look to the language of the Order-in-Council itself to determine whether it was 'made' under S. 146. It is submitted that such an examination
fully supports the assertion that the Order-in-Council falls within the protection of the Statute of Westminster. Part of the enacting clause of the Order-in-Council reads as follows:

It is hereby ordered and declared by Her Majesty, by and with the advice of the Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Acts of Parliament (the British North America Act, 1867, and the Rupert’s Land Act, 1868) that . . . Rupert’s Land shall from and after the said date be admitted into and become part of the Dominion of Canada upon the following terms and conditions still remaining to be performed of those embodied in the said second Address of the Parliament of Canada. . . . (emphasis added)

Additionally, both the 1st and 2nd addresses contain references to the provisions of S. 146, in requesting Her Majesty to unite Rupert’s Land and the North-Western Territory into the Dominion.

Thus, there are powerful arguments which support the assertion that the Order-in-Council effectively entrenched aboriginal rights into the Canadian constitution. The result would be that the Order-in-Council received protected status under S. 7(1) of the Statute of Westminster, and thus could not be abrogated by either the Federal or Provincial governments.

The third issue which arises, then, is whether the law has been changed in this regard since 1867. There has not been any alteration in the terms and conditions of the admission of Rupert’s Land into the Union since the Order-in-Council of 1870.

Therefore, in summary, the recognition of aboriginal title was one of the terms surrounding the admission of Rupert’s Land into the Union, the Order-in-Council was given a protected status from unilateral abrogation by the Federal or Provincial governments in the Statute of Westminster, and the law concerning the admission of Rupert’s Land has not subsequently been altered, amended or repealed. Accordingly, the Federal Crown has the delegated responsibility to honour and settle claims rising from the British recognition of aboriginal title. Reference was made to this responsibility during a debate in the House of Commons preceding the resolutions which were passed.

Mention was made of:

. . . the practice of our (British) government as recognizing some rights as belonging to the aborigines of the country . . . and giving them compensation for their lands . . . the Company (Hudson’s Bay) had never pretended to extinguish these aboriginal rights which had preceded theirs. A settlement must be come to with the Indians . . . (Debates, House of Commons, Canada, 1st session, 1st Parliament, 1867-1868, pp. 182, 187.)

There is no reference to the Inuit in the legal documentation concerning the admission of Rupert’s Land, or in the British and Canadian Parliamentary debates of the times. However, because the Supreme Court of Canada in Re Eskimos (1939) S.C.R. 104 held that the term “Indians” in ss. 91(24) of the B.N.A. Act, 1867, included "Eskimos", it is apparent that the same reasoning would apply to the Order-in-Council.

It should be noted that the above arguments bear equal application to the North-Western Territories, which were admitted to the Union at the same time as Rupert’s Land.
Government has the power to abrogate treaty rights and rights guaranteed under the Natural Resources Agreements. The provincial governments do not. Therefore, it is arguable that the Bill of Rights could have been used as an argument in those cases to the effect that compensation should have been granted for the destruction of these rights. There has been no authoritative judicial statement by the Supreme Court of Canada as to the effect of federal legislation on aboriginal rights, apart from the "hunting rights" cases. If and when this matter is litigated, the argument would be that the Bill of Rights declares that these rights are not to be taken except by due process. This would encompass compensation, but might also involve something more such as for example, a requirement that the purpose for which the rights are expropriated be reasonable. Let us consider a hypothetical example. Although the Migratory Birds Convention Act has as its apparently reasonable purpose the conservation of game birds, would it be reasonable to expropriate native hunting rights so that by the time open season arrives the birds have left the Northwest Territories? Is it reasonable to expropriate these rights if the native peoples need to hunt for food and if the number of birds they kill is not sufficient to harm the species? In fact, the government implicitly recognizes the unreasonableness of the Migratory Birds Convention Act in respect to the Inuit because it turns its back and allows the people to hunt game birds out of season for food.

Thus, perhaps the Migratory Birds Convention Act might be held by a court not to be reasonable and to be struck down as contrary to the Bill of Rights, at least insofar as the Act is asserted as limiting native hunting rights. These arguments could be raised in respect to any federal legislation dealing with Inuit hunting rights. Moreover, as the Northwest Territories is not a province, and its legislative jurisdiction simply derivative from federal legislation, these arguments could be used in respect to territorial legislation dealing with Inuit hunting rights. Finally, as the statement of legislative

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285 See cases cited in footnotes 283 and 284, supra.

286 Mr. Justice Rand in his article, supra, footnote 276, at p. 185 pointed out that in the Federal Expropriation Act there is no express declaration of a right to compensation. The word appears in the Act but the right to it is assumed or implied. "Is compensation then for compulsory taking one of those fundamental ideas which we treat as underlying legislation affecting individual rights? Its inclusion within due process is enlightening of the ideas bound up within that phrase."

287 1917, 7-8 Geo. V, c. 18.

intent at both the territorial and federal level when dealing with native hunting rights is always that these rights are not being harmed. The argument that the Bill of Rights is protective of hunting rights is enhanced. That is, rights should not be expropriated by a literal application of legislation when the express legislative intent is not to expropriate rights.

As discussed, it may be that the Bill of Rights covers not only the requirement that compensation must be given for expropriated hunting rights, but also that a law which unreasonably abrogates these rights is inoperative. As is pointed out by Mr. Justice Rand, legislation that would take property for a public purpose without compensation would be a departure "from the norm of living tradition," and would be condemned by due process. "...[B]ut similar distortions and their consequences more subtle are scarcely avoidable and it is in that general control, however, they may arise and in whatever context, that due process finds its full function." The significance of section 14 of the Northwest Territories Act in relation to Inuit hunting rights is discussed elsewhere. Subsection (2) reads:

Notwithstanding subsection (1) but subject to subsection (3), the Commissioner in Council may make Ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Eskimos, and Ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories, unless the contrary intention appears therein, are applicable to and in respect of Indians and Eskimos.

This section has been utilized by the Territorial Government to dilute Inuit hunting rights. This section was enacted through an amendment to the Northwest Territories Act in the same session of Parliament that subsequently passed the Bill of Rights. It can be argued that subsection (2) is invalid because of the absence of "due process" as required by s. 1(a) of the Bill of Rights.

This argument assumes that the "saving clause" of subsection (3) of

289 See, for example, statement by Deputy Commissioner Parker and Councillor Trimble, supra, footnotes 45 and 46 and accompanying text.

290 The Supreme Court of Canada in R. v. Drybones (1970), S.C.R. 282 held s. 95 of the Indian Act, R.S.C. 1970, c. I-6, to be inoperative. See also Sinclair, "The Queen v. Drybones: The Supreme Court of Canada and The Canadian Bill of Rights" (1970, 8 Osg. Hall L.J. 397 in which the author discusses the manner in which The Bill of Rights might be interpreted as a "manner and form" statute.

291 Rand, supra, footnote 276, at p. 190.


293 See footnotes 240 to 263 and accompanying text, supra.

294 See generally, Sissons, supra, footnote 255, chapters 24, 30 and 33.
section 14 is ineffective in protecting hunting rights. Subsection (3) reads:

Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct.

The latter portion of this subsection, as implemented by the Order-in-Council, is, in effect, taking the very rights recognized in the first instance by the "saving clause." However, it is arguable the proviso is invalid because of the absence of "due process" as required by s. 1(a) of the Bill of Rights.

Moreover, there was, it would appear, little empirical evidence to support the inclusion of classifications of animals in the Order-in-Council as being truly in danger of becoming extinct at the time of this enactment. Furthermore, if any species was in danger of becoming extinct, the historical evidence shows a major cause was non-native exploitation. Finally, if the jurisdiction of the Territorial Government to interfere with native hunting rights is founded upon the danger of extinction, it should not be possible for the Territorial Government to allow non-natives to hunt the endangered limited supply. If these criticisms are valid, then the Order-in-Council itself and any legislation of the Territorial Government which is founded upon the Order-in-Council might also be attacked on the basis of being arbitrary, unreasonable and therefore in conflict with the Bill of Rights.

A further criticism of the "saving clause" of subsection (3) is that it is not couched in sufficiently broad language given the history of Inuit hunting rights. The language provides protection in respect to hunting "for food" but says nothing about hunting for livelihood on a broader basis, such as, for example, trapping. The historical record is clear that hunting rights properly extend to the full range of benefits derived from wildlife utilization.

A final argument is that any legislation in respect to game of the Territorial Government must be "in relation to the preservation of game." Thus, it may be argued that legislation which extends a privilege of hunting to non-natives is beyond the jurisdictional power of the Territorial Government to enact as it is not related "to the preservation of game." That is, the jurisdictional power of the Territorial Government at most is to qualify hunting rights for game declared by the Governor in Council to be in danger of becoming extinct for the purpose of "preservation," but not to dilute those hunting rights through extending a privilege of hunting to non-natives. Any legislation which has the effect of diluting native hunting rights is in violation of the resolution of the Territorial Council which was the very premise

295 Supra, footnote 256.

296 See footnotes 258 and 259 and accompanying text, supra.

297 The Northwest Territories Act, R.S.C. 1970, c. N-22, ss. 13(q) and 14(2).
upon which the Federal Government enacted the 1960 amendments to the *Northwest Territories Act*. It appears that before 1960 the concern of legislation clearly was to preserve the game supply for the native peoples. However, since 1960 the Territorial Government has acted as though the preserving of game is for the benefit of all residents of the Northwest Territories.

Even if all the provisions of s. 14 of the *Northwest Territories Act*, the Order-in-Council passed pursuant thereto, and the Territorial Game Ordinance cannot be attacked successfully in court on any of the above arguments, a further point remains. Section 14 at most allows the Territorial Government to compromise native hunting rights for food on unoccupied Crown land if (1) the Territorial legislation is "in relation to the preservation of game" and (2) is in respect to either polar bears, barren-ground caribou, or musk-ox, i.e. those species declared by the Order-in-Council as being in danger of becoming extinct. Therefore, to the extent the Game Ordinance purports to dilute such hunting rights but cannot meet both of these two prerequisites, the legislation should be open to successful challenge before the courts.

This paper has raised many arguments which have not been raised before. However, there are many additional legal arguments supportive of Inuit hunting rights. As Inuit hunting rights are simply one incident of the unsurrendered general Inuit title to lands traditionally used and occupied, the entire law of native land rights is equally protective of hunting rights.

V CONCLUSION

Game resources are important to Inuit for two reasons. First, they have a practical importance in that they provide food and a means of livelihood. Second, because the Inuit have an autochthonous culture, that is, the people are an integral part of the lands and waters they use and occupy, game resources have tremendous cultural significance. Assuming that the way of life for the Inuit continues to change from a fur economy to a wage economy based upon the oil and gas and other industries, the practical importance of game resources may tend to decrease. However, the cultural importance will tend to increase because the use of game resources is the most significant

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298 See the statement of the Hon. Alvin Hamilton quoted at footnote 250 and accompanying text, *supra*.

299 See footnote 220 and accompanying text, *supra*.


301 P.C. 1960-1256.


304 See generally, *Native Rights in Canada* (2nd edn.), especially Part II.
means by which Inuit can continue to have some sense and experience of the
culture and heritage of their ancestors. However, game resources are
increasingly threatened by the changing economy, due to competing land use,
 arising from industrial development, and due to the significant increase in the
non-native population which accompanies development.

Historically, Inuit have enjoyed special hunting rights as one incident of
a general native title in respect to lands traditionally used and occupied. The
legal history in respect to Inuit hunting rights fully supports this statement.
Inuit hunting rights, as has been shown, were zealously protected, at various
times by government. More recently, this history appears to have been for-
gotten or overlooked.

The statement of the government on August 8, 1973, that it is ready to
negotiate a settlement of claims arising from native land rights is encour-
aging. However, the apparent emphasis in this statement is upon money
compensation for the taking of rights, rather than upon the entrenchment or
protection of continuing rights. The government’s reluctance to consider
special rights for natives may arise from other potential political problems in
Canada (e.g. Federal-Quebec confrontation on the question of further special
rights for French Canadians). But the cultural aspirations of Canada’s first
peoples, unique in that they are rooted in their lands and waters, surely
deserve the recognition and support similar to that of the “charter cultures”.
To take a contrary position is to adopt an implicitly racist attitude toward
native peoples.

Accordingly, it is proposed that the following approach ought to be taken
by the Government:

1) Native peoples’ hunting rights should be formally recognized by
federal legislation. Such special rights would be on the basis that only native
people could hunt for food or livelihood in the Northwest Territories. The
present privileges of non-native residents in the Territories to hunt would be
retained during their lives, but would not be extended to newcomers. This
really amounts to a re-affirmation of rights traditionally recognized.

2) There is an obvious need for conservation of wildlife resources in any
society. Because of the importance of game to native peoples, they are the
people most vitally interested in conservation and game management. The
total society through the Territorial Government, would control game
management. However, more suitable mechanisms must be designed which
would ensure effective native participation in all decisions relating to game
resources. This element, too, is a mere re-affirmation of the right of all
citizens to participate in respect to society’s activities and decisions.

The result of the suggested approach would be that all the people in the
Northwest Territories would be involved in game management, but only
native people could hunt for food and livelihood, subject to a continuation of
the privilege enjoyed by present non-native residents, during their lifetime.
The total society would decide as to whether there could be hunting of partic-
ular species. However, once proper game management allowed for some
hunting, the special rights of native peoples would ensure that only they
could hunt.

The above approach could be implemented by the Federal government
with no economic cost. The implementation of such a policy would do much
to assuage the grievances presently felt by Northern natives in regard to their
hunting rights. It would indicate the sincerity of the Canadian government in
its dealings with native peoples. And, finally, it would provide the oppor-
tunity to prevent the self-hostility and loss of independence and pride which
has occurred among the natives in Southern Canada.