R. v. *BADGER*: ONE STEP FORWARD AND TWO STEPS BACK?

Catherine Bell

R. v. *Badger*[1] is the most recent statement by the Supreme Court of Canada on the scope of the Indian right to hunt for food recognized in paragraph 12 of the Alberta Natural Resources Transfer Agreement (NRTA).[2] The appellants, Treaty 8 Indians, were hunting on privately-owned land and were charged with various offences under the *Alberta Wildlife Act*.[3] All three were hunting in areas that had been surrendered to the Crown under Treaty 8. The issue before the Court was whether these privately-owned lands were lands to which the appellants had a "right of access" to hunt for food. The majority held that the appellants were entitled to hunt on unoccupied, privately-owned lands if the lands were not put to a visible, incompatible use. An analysis of the physical characteristics of the lands and the effect of the NRTA on the scope of Treaty 8 hunting rights led to the conclusion that only Mr. Ominayak had a right of access to hunt for food. The convictions of Mr. Kiyawasew and Mr. Badger were upheld. A new trial was ordered for Mr. Ominayak on the issue of whether section 26(1) of the *Wildlife Act,* and any regulations passed pursuant to that section, constitute an unjustifiable infringement of Mr. Ominayak's constitutionally protected right to hunt.[4]

On first hearing of this decision, one might question why the Supreme Court considered the ability of Treaty 8 Indians to hunt on unoccupied, privately-owned land an issue of national significance. The answer lies not only in the interpretation of a paragraph of the NRTA common to three provinces, but also in the Court's broader analysis of the interpretation, termination, and constitutional protection of treaty rights. In *Horseman* the Supreme Court accepted the government of Alberta's argument that hunting rights "granted" to Indians under Treaty 8 were "merged and consolidated" in paragraph 12 of the NRTA.[5] Subsequent judicial interpretation of *Horseman* maintained that this was "merely a polite way to describe extinction and replacement," rendering the NRTA the sole source of Indian hunting rights in three prairie provinces.[6] Perhaps the most significant aspect of *Badger* is the rejection of the extinction and replacement interpretation of the NRTAs. This aspect of the decision, combined with the majority's decision to read the Indian understanding of rights of access under Treaty 8 into the interpretation of the NRTA, renders *Badger* a significant step forward for Treaty Nations which continually experience judicial reluctance to give substantive meaning to treaty promises.[7]

At the same time, *Badger* is a disappointing decision. Considered in the broader context of whether, as a matter of law, treaty rights can be extinguished without consent of the First Nation signatories, *Badger* may be taking treaty jurisprudence two steps back. Comments by the Supreme Court in decisions rendered before and after *Horseman* led to speculation about the development of a new judicial framework for assessing the legal force of treaty guarantees.[8] *Horseman* was decided three weeks before the *Sioui* decision in which Lamer C.J. stated that "a treaty cannot be extinguished without the consent of the Indians involved."[9] This

1 [1996] 2 C.N.L.R. 77 (S.C.C.)

2 Paragraph 12 of Natural Resources Transfer Agreement provides that provincial laws respecting game apply to the Indians within the boundaries of the province provided that the Indians shall have the right of "hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and other lands to which the said Indians may have a right of access." The same provision is contained in paragraph 12 of the Saskatchewan agreement and paragraph 13 of the Manitoba agreement.

3 S.A. 1984, c. W-9.1.

4 The action by the Crown against Mr. Ominayak has been stayed.

5 [1990] 3 C.N.L.R. 95 at 102-104.

6 Per Kerans J.A. in *R.* v. *Badger* (1993) 3 C.N.L.R. 143 at 1487 (Alta. C.A.).

7 See, for example, P. Macklem, "First nations, Self-Government and the Borders of Canadian Legal Imagination" (1991) 36 McGill Law Journal 425-455.

8 *Simon* v. *R.*, [1986] 1 C.N.L.R. 153 (S.C.C.) and *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.)

9 *Ibid.* at 1063.

statement combined with the narrow division of the Court in *Horseman* (a 4:3 majority), judicial recognition of the unique legal nature of Indian treaties, and the fiduciary obligation owed by the Crown to First Nations provided an opening to challenge the theory of unilateral extinguishment. The reasoning of the majority, and Lamer C.J.'s support for the dissent in *Badger,* suggests that the Supreme Court is closing this avenue of argument.

The Supreme Court concedes that governmental power is not absolute now that treaty rights have constitutional protection in section 35 of the *Constitution Act, 1982*. Rather, some limits are placed on the power to extinguish treaty rights through the application of the *Sparrow* test. By adopting this test, the Court maintains that it is appropriate to balance treaty rights with non-Aboriginal government interests in order to assess the constitutional validity of legislation that interferes with the exercise of contemporary treaty rights. This is a process common to judicial determinations of the constitutionality of legislation that interferes with the contemporary exercise of Aboriginal rights. Although the majority recognizes that *Sparrow* does not provide an exhaustive list of factors to be considered in the balance, their failure to articulate stricter standards of justification for the extinguishment of treaty rights suggests that a higher standard of protection for treaty rights will not be assumed by Canadian courts.[10]

A Step Forward?

The first issue addressed in *Badger* is whether "Indians who have status under Treaty No. 8 have the right to hunt for food on privately owned land which lies within the territory surrendered under that Treaty?"[11] In answering this question, the majority gives substantive meaning to the interpretive principle that treaties "must be interpreted in the sense that they would naturally have been understood by the Indians at the time of signing."[12] Recognizing that this principle involves consideration of the context within which Treaty 8 was negotiated (including oral agreements not necessarily reflected in the written text of the Treaty), Cory J. considers the evidence of historians, elders, and reports of treaty commissioners to interpret the Treaty 8 right to hunt "throughout the tract surrendered... saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."[13] In his opinion, Indian signatories of Treaty 8 would have understood that land had been " required or taken up" if the visible use of the land was incompatible with the exercise of their right to hunt. Consequently, the determination of whether a Treaty 8 Indian has access to hunt on private lands requires a factual analysis of the particular land use in each case. Following this line of reasoning, he concludes that only Mr. Ominayak can establish a land use compatible with the treaty right to hunt as he was hunting on uncleared muskeg and there were no fences, signs or buildings "near the site of the kill."[14]

Although the endorsement of the visible, incompatible-use test reflects the understanding of Indian signatories to Treaty 8, the benefit to them seems to diminish in its application. The threshold for establishing incompatible use is very low and the test does not expressly take into consideration the subjective knowledge of the Indian hunter or the reasonableness of his belief that he has a right of access. The result is an analysis which is balanced in favour of the paper-title holder. For example, there were no fences or signs posted on the land where Mr. Badger was hunting. There was a farmhouse about a quarter of a mile away that "did not appear to have been abandoned."[15] Although this would be relevant in an assessment of the reasonableness of Mr. Badger's belief that he had a right of access, this is not stated as a relevant factor in the analysis of visible use. Further, Justice Cory's reasoning suggests that the Court will interpret the geographical limits of the land at issue liberally in its search for fences, signs and buildings. Regardless of the current use of the farmhouse, it was a quarter mile away. The section on which Mr. Badger was hunting was not put to a visibly incompatible use such as growing crops. Rather, it was unposted brush land with willow regrowth and scrub.

Despite these problems, the *Badger* decision represents a limited victory by supporting the principle that Treaty Indians in the prairie provinces may, in certain circumstances, have the right to hunt on privately-owned lands without the consent of the land owner. It is also a significant victory because the majority rejects the notion that all treaty rights to hunt are extinguished and replaced by the NRTA. Prior to *Sparrow*, a debate existed in Canadian jurisprudence regarding the expression of legislative intention required to extinguish an Aboriginal right. *Sparrow* clarified that if the sovereign's intention to extinguish is

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10 The dissent (Sopinka J. and Lamer C.J.) agrees that the principles in *Sparrow* can be applied by analogy. Unlike the majority, they do not support the conclusion that hunting rights in the NRTA(s) are rights that are also constitutionally protected in s.35 of the *Constitution Act, 1982*.

11 *Supra* note 1 at 86.

12 *Ibid.* at 96.

13 Quoted in *ibid.* at 95.

14 *Ibid.* at 102.

15 *Ibid.* Cory J. may be assuming that Badger would know this because he is from the area he was hunting in but this presumption is not stated.

not "clear and plain,"[16] then an Aboriginal right survives and receives section 35 constitutional protection. *Sparrow* was not argued or considered by the Supreme Court in *Horseman* when it held that the NRTA extinguished the commercial right to hunt. As a result, the issue of whether the treaty right to hunt was extinguished, in whole or part, was addressed again in *Badger*.

In *Badger*, the majority decided that paragraph 12 of the NRTA evinced a clear and plain intention to extinguish the treaty right to hunt commercially and that *Horseman* supported this conclusion. However, paragraph 12 did not extinguish the treaty right to hunt for food. Rather, in the words of Justice Cory, the "NRTA did, to the extent that its intent is clear, modify and alter the right to hunt for food provided in Treaty No. 8."[17] Consequently the hunting right in Treaty 8, as modified by the NRTA, receives constitutional protection. Alleged interference with the treaty right to hunt for food on unoccupied land must be read in "light of the fact that this aspect of the treaty right continues in force and effect" and is protected as an existing treaty right by section 35 of the *Constitution Act, 1982*.[18] Adopting this analysis, Cory J. further argues that the constitutional validity of provincial regulation that limits the right to hunt on private land must be determined by adopting the *Sparrow* test. In his opinion, the manner in which the licensing scheme is set up results in "a *prima facie* infringement of the Treaty 8 right to hunt as modified by the NRTA."[19] As a result, a new trial is ordered on the issue of whether the province can justify infringement of Mr. Ominayak's right to hunt.

Various interpretative principles outlined in *Badger* and the *Sparrow* test were identified by Cory J. Justice Cory recites the following principles before his analysis of the NRTA:

(a) a treaty represents a solemn exchange of promises which are "sacred" in nature;

(b) it is always assumed that the Crown intends to fulfill treaty obligations;

(c) ambiguities in the treaty are to be resolved in favour of the Indians;

(d) restriction of treaty rights are to be narrowly construed; and

(e) the onus on the Crown is "strict proof" of extinguishment.[20]

Contrary to these principles of interpretation, Cory J. adopts a rigid and segmented approach to the definition of treaty rights. It is an approach which equates the exercise of a treaty right with the right itself. Adopting this approach, the right to hunt commercially is not a method of exercising the more fundamental right to hunt for one's livelihood or "vocation" as promised in Treaty 8.[21] Rather, it is a separate and divisible right in a bundle of rights that constitute the treaty right(s) to hunt. The termination of the right to hunt commercially is not a limit on the exercise of a broader right to hunt, but the clear and plain extinguishment of an independent hunting right in the bundle. Unless a clear and plain intention is found to the contrary, the remaining modes of exercise (what Cory J. calls "rights") survive the NRTA and receive section 35 protection.

This divisible concept of the right to hunt does not reflect the understanding of Indian signatories to the treaties and is superimposed on the interpretation and delineation of the promises exchanged.[22] Strong arguments by dissenting members of the Supreme Court reject this approach to the definition of Aboriginal and treaty rights. They suggest that the appropriate conceptualization of the right is a broad one which rejects the notion of dividing the right to pursue the "vocation" of hunting into separate and distinct rights. At the very least, disagreement at this level suggests that the scope of the right is ambiguous. Moreover, treaty principles articulated above require that such ambiguities be resolved in favour of the Indian signatories.

A related issue is whether the NRTA can have the effect of bifurcating and extinguishing rights which are not regarded as divisible by the Indian Nation affected. Where *Badger* suggests this is a possible effect, *Sparrow* suggests it is not, leaving one wondering if the Supreme Court is retreating from the spirit of its earlier decision. The conclusion that the right protected by section 35 is the "hunting right set out in Treaty 8 *as modified* by the NRTA" runs contrary to the *Sparrow* proposition that rights which have been regulated but not extinguished are protected in section 35 in their original unmodified form. It also contradicts the direc-

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16 Prior to this decision, two theories of extinguishment could be applied. One was that the exercise of sovereignty inconsistent with the survival of an Aboriginal right was sufficient to terminate. The other, stated first by Hall J. in the *Calder* case, was that the intention to extinguish must be clear and plain. See *Calder* v. *A.G. of B.C.* (1973), 34 D.L.R. (3d) 145 (S.C.C.).

17 *Supra* note 1 at 94.

18 *Ibid.*

19 *Ibid.* at 108.

20 *Ibid.* at 92.

21 Treaty 8 reads " the said Indians shall have the right to pursue their usual vocations of hunting, trapping and fishing...."

22 See, for example, R. Price, *The Spirit of the Alberta Indian Treaties* (Edmonton: Pica Pica Press, 1987) at 82-84, and references to the testimony of elders on the concept of the right in *Horseman*, *supra* note 5 and *Badger*, *supra* note 1.

tion in *Sparrow* that these rights are to be interpreted flexibly and in a manner "sensitive to the Aboriginal perspective itself on the meaning of the rights at stake."[23] Applying the logic of *Badger* to the facts in *Sparrow* would have resulted in the separation of the Musqueum right to fish into three separate and distinct rights: the right to fish for food, the right to fish for ceremonial purposes, and the right to fish for social purposes. This approach was rejected by Dickson C.J. who was unwilling to equate an aspect, or mode of exercise of a right, with the more fundamental right itself. One might distinguish *Sparrow* on the basis that the intent of the federal government to extinguish aspects of the right to fish was not clear and plain. Consequently, splitting the right to fish into separate and distinct rights was not a necessary outcome. On the other hand, the necessary effect of the NRTA, which extinguishes the commercial right to hunt, is the bifurcation of Treaty 8 hunting rights. This distinction loses ground when one considers the disagreement by former members of the Supreme Court as to the necessary effect of the NRTA. The purpose of the NRTA was to transfer resources to the provinces and, in that context, to ensure that promises made to Indians under the treaties were fulfilled. In this way, adopting interpretive principles endorsed in *Badger*, paragraph 12 is properly interpreted as an attempt to respect *solemn* promises and to *fulfill* treaty obligations. The fact that the province is given power to regulate the right, that the right is modified by the wording of the NRTA and is substantially regulated at the day of trial does not necessarily suggest commercial aspects of the right are extinguished. It is equally plausible to interpret paragraph 12 as limiting the exercise of a broader treaty right rather than extinguishing aspects of a right. Again, such reasonable ambiguities ought to be resolved in a way that benefits the Indians.[24]

Viewing the NRTA as an amending document on the one hand, and treaty rights as divisible by expression of clear legislative intent on the other, allows Justice Cory to uphold *Horseman* on the question of extinguishment and apply *Sparrow* to surviving rights to hunt for food. Through simpler intellectual gymnastics, he could have easily accepted a broader interpretation of *Horseman* and agreed with the dissent in *Badger* that the treaty right to hunt was merged, consolidated and "subsumed in a document of higher order."[25] Adopting this approach, the *Sparrow* test can only be applied by analogy to temper the provincial regulatory powers recognized in paragraph 12.

So why does Justice Cory opt for the compromise position? One can only speculate. It is hard to imagine that the presence of seven interveners representing the assembly of First Nations and other Treaty Nations from across Canada did not impress upon the court the importance of this issue to First Nations. A finding that treaty rights to hunt were extinguished in the prairie provinces by the NRTA(s) would have disregarded the importance of their survival to First Nations and rendered the promise of protection in section 35 meaningless in relation to an integral part of Aboriginal life. Further, it could have led to litigation against the federal Crown for breach of fiduciary obligation arising from the extinction and replacement of all hunting, trapping and fishing rights promised by treaty and the transfer of legislative power over these rights to the provinces.[26] On the other hand, a finding that the NRTA simply regulated the exercise of treaty rights to hunt would allow First Nations to demand justification for interference with the commercial right to hunt, a process which *Horseman* supposedly put to rest. Rather than face the embarrassment of concluding that *Horseman* was implicitly overruled by a decision rendered 3 weeks later in *Sioui*, or require that the issue of commercial rights come before the court again for justification analysis, it was simpler for the majority in *Badger* to allow bifurcation of the right — a compromise that saved face, allowed some application of *Sparrow*, and recognized the importance to Treaty Nations of treaty rights in general and the right to hunt in particular.

Two Steps Back?

Whether one accepts the reasoning of the majority or the dissent in *Badger*, it is clear the current Supreme Court is not willing to question the power of the federal government to unilaterally abrogate treaty rights. This presumption of power flows through both opinions without meaningful consideration of limitations that could have been placed on its exercise by the consensual thesis articulated in *Sioui* or the less controversial concept of fiduciary obligation. The 1984 ruling of the Supreme Court in *Guerin*[27] recognized the legal duty of the Crown to act as a fiduciary in its dealings with First Nations. The lack of attention paid to this principle in *Badger* is somewhat shocking as it is the main instrument through which the court can "police the power imbalances in the relationship [between the Crown and First Nations] and ensure that the conduct of the Crown

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23 *Supra* note 1 at 111 and note 12 at 411.

24 See, for example, Wilson J. (Dickson C.J. and L'Heureux-Dube J. concurring) in *Horseman*, *supra* note 5 and Kerans J.A., *Badger* (Alta C.A.) 3 [1993] C.N.L.R. at 148-154

25 Per Sopinka J. (Lamer C.J. concurring) *supra* note 1 at 82

26 *Ontario (A.G.)* v. *Bear Island Foundation*, [1991] 3 C.N.L.R. 79 (S.C.C.) This action could still be made based on unilateral termination of an aspect of the right but it may be more difficult as the court in *Horseman* suggested compensation has already been given through the increase in the areas of land to which Indians have a right of access to hunt.

27 [1984] 2 S.C.R. 335.

conforms to a standard of fairness and honour."[28] In *Badger,* consideration of the fiduciary concept is reduced to the judicial jingle that "the honour of the Crown is always at stake" and "it is always assumed that the Crown intended to fulfill its treaty obligations."[29] However, as discussed above, the logical outcome of applying these principles to paragraph 12 in a way that promotes fulfilment, rather than termination of treaty rights, is not forthcoming. Further, there is no discussion of the acceptability of federal conduct, assuming the effect of the NRTA is to extinguish a hunting right, apart from the statement that it is "unlikely that [the government] would proceed in that [unilateral] manner today."[30] This lack of discussion is also disturbing as intervening counsel in *Badger* argued breach of fiduciary obligation. Further, in a recent decision, the Supreme Court suggested failure to comply with treaty obligations could be a breach of fiduciary obligation.[31]

The failure to give substantive meaning to the fiduciary principle is equally evident in the majority's mechanical application of the *Sparrow* test to treaty rights without considering stricter obligations that might arise if one accepts that treaties provide dual protection to what might otherwise be characterized as Aboriginal rights.[32] It is plausible that treaty promises give rise to a stricter duty of adherence by the Crown because of a dual fiduciary obligation: the general obligation of the Crown to act in the interests of Aboriginal peoples over whom they exercise significant control and the specific obligation of the Crown to fulfill express promises in the treaty.[33] *Sparrow* maintains that these obligations are of an ongoing nature and must be considered in the justification of actions that interfere with the exercise of existing Aboriginal rights. Alternatively, a stricter standard of conduct could also arise if treaties are viewed as terminating Aboriginal rights, because the treaty becomes the sole source of what was formerly a common law right. The exercise of the right becomes dependant on the willingness of the Crown to respect promises in the treaty. Regardless of their effect on Aboriginal rights, treaty rights represent "an exchange of solemn promises" which should also exact a higher standard of care for assessing the honourableness of government conduct.

The mechanistic application of the *Sparrow* criteria in *Badger* shows a lack of appreciation for the variation of levels of fiduciary obligation that may arise in different contexts. In this way it seems to take Aboriginal and treaty rights jurisprudence a significant step backward. Rather than recognizing the uniqueness of government obligations associated with the fulfilment of treaty guarantees, Cory J. suggests that the criteria for assessing the honour of the Crown applies equally to the infringement of Aboriginal and treaty rights. Drawing on aspects of similarity between the two types of rights, he argues that their inclusion in section 35 supports a common approach to infringement and that the "recognized principles to be considered and applied in justification should generally be those set out in *Sparrow*."[34]

A more favourable interpretation of the enforceability of treaty rights that gives meaning to the fiduciary principle would apply a strict duty of adherence to section 35 treaty rights. The question should not be whether there has been the least possible infringement of a right to effect a particular government objective, but whether or not infringement is necessary at all. A more relevant criteria when assessing treaty breaches is whether or not the Crown properly considered and exhausted the possibility of less intrusive measures. Similarly, when the breach of a treaty right is at stake, the process of consultation requires stricter scrutiny. The standard of making reasonable attempts to inform and consult is not enough.[35] Rather, it may be more appropriate to acquire consent to termination unless such consent is unreasonably withheld. Although the Supreme Court does not close the door on these types of arguments, its failure to recognize the significant differences in the legal nature of Aboriginal and treaty rights and the obligations flowing from them does little to encourage a more progressive analysis by a lower court.

The concept of fiduciary obligation combined with the characterization of treaties as *sui generis* created legal space to argue against the legal presumption that the Crown can unilaterally extinguish treaty rights. This argument is clearly rejected by Cory J. when he states that "treaty rights are the result of mutual agreement, [but] they, like Aboriginal rights, may be unilaterally abridged."[36] Particularly disappointing is the union of Lamer C.J. with the dissenting opinion of Sopinka J. on this point. In *Sioui*, Lamer C.J. described the historical

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28 M.E. Turpel, "Working Principles for Reform: Full Compliance With Crown Fiduciary Duties" in *Indian Claims Commission Proceedings*, Special Issue on Land Claims Reform (Ottawa: Canada Communications Group, 1995) at 84.

29 *Supra* note 1 at 92.

30 *Ibid.* at 107.

31 *Ontario (A.G.)* v. *Bear Island Foundation*, [1991] 3 C.N.L.R. 79 at 81.

32 See *Simon* v. *R.*, *supra* note 8 for articulation of the theory that treaties protect existing Aboriginal rights.

33 M.E. Turpel raises the question of a stricter duty of adherence but does not elaborate further on the content of the duty in her work cited at *supra* note 28.

34 *Supra* note 1 at 107.

35 *R v. Nikal* [1996] 3 C.N.L.R. 178.

36 *Supra* note 1 at 105.

relations between Great Britain and First Nations in Canada as nation-to-nation relations. Recognizing that the treaties were solemn agreements he stated that the Indian-Crown relationship fell somewhere between the "kind of relations conducted with sovereign states and relations that such states had with their own citizens."[37] These notions of sovereignty and solemnity seemed to impact on Chief Justice Lamer's interpretation of the Crown's ability to terminate treaty rights when he held that the English could not extinguish a treaty with the Huron by entering into an agreement with the French. Emphasizing the sacredness of the treaties, he argued that the consent of the Huron was required. In his words, "the very definition of a treaty ... [made] it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned."[38]

It was hoped by counsel for the appellants and the intervenors in *Badger* that the effect of the NRTA would be reconsidered in this light. Instead, Lamer C.J. supports Sopinka J.'s conclusion that treaty rights were merged and consolidated in the NRTA despite the lack of participation of the Treaty Nations affected and the absence of any reference in Sopinka J.'s reasoning to the *Sioui* case. It is hard to avoid the conclusion that Lamer C. J. is not supportive of the more liberal treaty jurisprudence that his *obiter* comments in *Sioui* helped generate. This leaves one asking what Chief Justice Lamer had in mind when he made those comments. Perhaps he draws a distinction between pre- and post-confederation treaties. The treaty at issue in *Sioui* was between Great Britain and the English. The issue of the federal government's power to unilaterally abrogate treaty rights under 91(24) was not in issue. Regardless of Lamer C.J.'s intent, it is clear that he supports the demise of a more progressive treaty jurisprudence, as does the rest of the Court in *Badger*.

[37] *Supra* note 8 at 1038.
[38] *Ibid. at 1063.*

CONCLUSION

The recent categorization of treaty rights as *sui generis* has not resulted in significant change in an area of law that really counts to First Nations — the survival of treaty rights. Doctrines of unilateral extinguishment coupled with the exclusion of meaningful fiduciary analysis and selective substantive application of interpretive rules leaves First Nations seeking the legal enforcement of treaty rights against the Crown in a precarious position. Although *Badger* encourages the incorporation of Aboriginal understandings into the analysis of Treaty rights, judicial reluctance to significantly disempower the Crown in the area of extinguishment leaves treaty rights in a vulnerable position. Despite strong arguments supporting the theory that treaty rights cannot be terminated without the consent of those affected, *Badger* makes it clear that this is not the current theory adopted by the Supreme Court of Canada. It is possible that lower courts will apply stricter standards of justification to temper legislated interference with existing treaty rights than those suggested in *Badger* — the Supreme Court does not preclude this approach. At a minimum, one can hope that judicial recognition of the "duty and honour of the Crown to carry out the promises contained in ... treaties with the exactness which honour and good conscience dictate" will act as a catalyst for the infusion of standards such as necessity, rather than reasonableness and consent, or mere consultation, in assessing the legitimacy of legislation infringing upon the exercise of constitutionally-protected treaty rights. However, the tendency of lower courts to be more conservative in their analysis suggests that this movement may not occur without more explicit direction from the Supreme Court.❑

Catherine Bell
Faculty of Law, University of Alberta.