SUPREME COURT OF CANADA

CITATION: R. *v.* Morris, [2006] 2 S.C.R. 915, 2006 SCC 59

DATE: 20061221
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BETWEEN:

Ivan Morris and Carl Olsen
Appellants
and
Her Majesty the Queen
Respondent
- and -
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General for Saskatchewan, Attorney General of Alberta, Eagle Village First Nation (Migizy Odenaw), Red Rock Indian Band, Conseil de la Nation huronne-wendat, Te'mexw Treaty Association, Chief Allan Claxton and Chief Roger William
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 61) Deschamps and Abella JJ. (Binnie and Charron JJ. concurring)

JOINT DISSENTING REASONS: (paras. 62 to 140) McLachlin C.J. and Fish J. (Bastarache J. concurring)

R. *v*. Morris, [2006] 2 S.C.R. 915, 2006 SCC 59

Ivan Morris and Carl Olsen *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General for Saskatchewan, Attorney General of Alberta, Eagle Village First Nation (Migizy Odenaw), Red Rock Indian Band, Conseil de la Nation huronne-wendat, Te'mexw Treaty Association, Chief Allan Claxton and Chief Roger William *Interveners*

Indexed as: R. *v*. Morris

Neutral citation: 2006 SCC 59.

File No.: 30328.

2005: October 14; 2006: December 21.

Present: McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for british columbia

Aboriginal law — Treaty rights — Right to hunt — Two members of Tsartlip Indian Band charged under provincial wildlife legislation of hunting with firearm during prohibited hours and hunting with illuminating device — Whether treaty right to hunt includes right to hunt at night with illuminating device — Whether provincial legislation of general application infringes band's treaty right to hunt — Whether provincial legislation applicable to band by virtue of s. 88 of Indian Act — Wildlife Act, S.B.C. 1982, c. 57, ss. 27(1)(d), (e), 29 — Indian Act, R.S.C. 1985, c. I-5, s. 88.

Constitutional law — Indians — Provincial wildlife legislation — Two members of Tsartlip Indian Band charged under provincial wildlife legislation of hunting with firearm during prohibited hours and hunting with illuminating device — Whether valid provincial legislation of general application inapplicable to band because it interferes with band's treaty right to hunt — Whether provincial legislation nonetheless applicable by virtue of s. 88 of Indian Act — Constitution Act, 1867, ss. 91(24), 92(13) — Indian Act, R.S.C. 1985, c. I-5, s. 88 — Wildlife Act, S.B.C. 1982, c. 57, s. 27(1)(d), (e).

The accused, both members of the Tsartlip Indian Band of the Saanich Nation, were hunting at night when they shot at a decoy deer set up by provincial conservation officers to trap illegal hunters. They were arrested and charged with several offences under British Columbia's *Wildlife Act*, including: (1) hunting wildlife with a firearm during prohibited hours (s. 27(1)(d)); (2) hunting by the use or with the aid of a light or illuminating device (s. 27(1)(e)); and (3) hunting without reasonable consideration for the lives, safety or property of other persons (s. 29). At trial, as a defence to the charges under s. 27(1), the accused raised their right "to hunt over the unoccupied lands . . . as formerly" under the North Saanich Treaty of 1852. They also

introduced evidence that the particular night hunt for which they were charged was not dangerous. The trial judge found that "night hunting with illumination was one of the various methods employed by the Tsartlip [people] from time immemorial". However, despite the evidence that night hunting by Tsartlip hunters had yet to result in an accident, he nonetheless concluded that the accused did not have a treaty right to hunt at night because hunting at night with an illuminating device was "inherently unsafe". The trial judge entered convictions on count 1, conditionally stayed count 2 because of the rule against multiple convictions arising from the same delict, and entered acquittals on count 3. Both the summary conviction appeal judge and the majority of the Court of Appeal upheld the convictions based on the prohibition of night hunting (s. 27(1)(d)).

Held (McLachlin C.J. and Bastarache and Fish JJ. dissenting): The appeal should be allowed. The convictions are set aside and acquittals entered.

Per Binnie, Deschamps, Abella and Charron JJ.: The Tsartlip's right to hunt at night with the aid of illuminating devices is protected by the North Saanich Treaty. The historical context indicates that the parties intended the treaty to include the full panoply of hunting practices in which the Tsartlip people had engaged before they agreed to relinquish control over their lands. One of those practices was night hunting and, as the trial judge acknowledged, night hunting by the Tsartlip includes, and always has included, night hunting with the aid of illuminating devices. Even on a literal construction, the language of the treaty supports the view that the right to hunt "as formerly" means the right to hunt according to the methods used by the Tsartlip at the time of and before the treaty. The right of the Tsartlip to hunt at night with illuminating devices has of necessity evolved from its pre-treaty tools to its current implements, and the use of guns, spotlights, and motor vehicles reflects the current state of the evolution

of the Tsartlip's historic hunting practices. However, it is acknowledged that it could not have been within the common intention of the parties that the Tsartlip would be granted a right to hunt dangerously, since no treaty confers on its beneficiaries a right to put human lives in danger. This is confirmed by the language of the treaty itself, which restricts hunting to "unoccupied lands", away from any town or settlement. Since British Columbia is a very large province, it cannot plausibly be said that a night hunt with illumination is unsafe everywhere and in all circumstances, even within the treaty area at issue in this case. Accordingly, while s. 29 of the *Wildlife Act*, which prohibits hunting or trapping "without reasonable consideration for the lives, safety or property of other persons", is a limit that does not impair the treaty rights of aboriginal hunters and trappers, paras. (d) and (e) of s. 27(1), which apply without exception to the whole province, are overbroad and infringe the treaty right to hunt. Something less than an absolute prohibition on night hunting can address the concern for safety. [14] [25-35] [40] [59]

The relevant provisions of the *Wildlife Act* are valid provincial legislation under s. 92(13) of the *Constitution Act, 1867*. Since treaty rights to hunt lie squarely within federal jurisdiction, provincial laws of general application that are inapplicable because they impair "Indianness" may nonetheless be found to be applicable by incorporation under s. 88 of the *Indian Act*. While, on its face, s. 88 cannot be used to incorporate into federal law provincial laws that conflict with the terms of any treaty, the provinces may regulate treaty rights under certain circumstances. Provincial legislation of general application that interferes in an insignificant way with the exercise of that right do not infringe the right; but where, as in the case of s. 27(1)(d) and (e), such legislation is found to conflict with a treaty in a way that constitutes a *prima facie*

infringement, the protection of treaty rights prevails and the provincial law cannot be incorporated under s. 88 of the *Indian Act*. [42-46] [50] [54]

Per McLachlin C.J. and Bastarache and Fish JJ. (dissenting): The impugned ban on night hunting with a firearm (s. 27(1)(d)) is valid provincial legislation that applies to the accused. [82]

The *Wildlife Act* falls in pith and substance within the province's powers. It is not directed at a federal head, like Indians, but more generally at safety, a matter within provincial power. The ban on night hunting is an integrated part of a broader provincial scheme applicable to all British Columbians and aimed at assuring the safety of the province's hunters and residents. Since this provision does not conflict with federal legislation, the doctrine of paramountcy has no application. Finally, where a provincial law of general application does not affect a treaty right, and does not otherwise touch upon core Indianness, that law applies *ex proprio vigore*, without recourse to s. 88 of the *Indian Act*. Provincial legislation that falls outside the internal limits on the treaty right that the parties to the treaty would have understood and intended does not encroach on the treaty right. [82] [87] [92]

A treaty must be interpreted in a manner that best reconciles the interests of the parties to it. The right to hunt protected by the treaty is subject to an internal limit: it does not include the right to hunt in an inherently hazardous manner. Rather, the right to hunt must be exercised reasonably. Although, at the time the treaty was signed, the practice of hunting at night did not pose the same dangers as it does today, the parties to the treaty must have understood that the right to hunt did not carry with it a right to hunt dangerously. Furthermore, just as the methods and means of exercising the right should

not be frozen in time, neither should the government's legitimate safety concerns. Adapting the exercise of treaty rights to modern weaponry without adapting the corollary legitimate safety concerns would lead to unacceptable results. [82] [108] [110] [115]

Here, s. 27(1)(d) of the *Wildlife Act* regulates the internal safety limit on the treaty right of the accused. A ban on night hunting with a firearm is a reasonable exercise of the Province's regulatory power in defining this internal limit. Since the regulation of dangerous hunting falls outside the scope of the treaty right to hunt, no treaty right is engaged. Accordingly, as no aboriginal right is asserted, and as the provincial law does not otherwise go to Indianness, the law applies *ex proprio vigore*. [82] [129] [132]

Cases Cited

By Deschamps and Abella JJ.

Applied: *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [1999] 3 S.C.R. 533; **referred to:** *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *R. v. White* (1964), 50 D.L.R. (2d) 613; *R. v. Bartleman* (1984), 55 B.C.L.R. 78; *Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79; *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Badger*, [1996] 1 S.C.R. 771; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *R. v. Côté*, [1996] 3 S.C.R. 139;

R. v. Nikal, [1996] 1 S.C.R. 1013; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Gladstone*, [1996] 2 S.C.R. 723.

By McLachlin C.J. and Fish J. (dissenting)

R. v. Sparrow, [1990] 1 S.C.R. 1075; *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *R. v. Francis*, [1988] 1 S.C.R. 1025; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sundown*, [1999] 1 S.C.R. 393; *Myran v. The Queen*, [1976] 2 S.C.R. 137; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Paul* (1993), 142 N.B.R. (2d) 55; *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43; *R. v. White* (1965), 52 D.L.R. (2d) 481, aff'g (1964), 50 D.L.R. (2d) 613; *Prince v. The Queen*, [1964] S.C.R. 81; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Seward* (1999), 171 D.L.R. (4th) 524; *R. v. Bernard* (2002), 200 N.S.R. (2d) 352, 2002 NSCA 5, leave to appeal refused, [2002] 3 S.C.R. vi; *R. v. Pariseau*, [2003] 2 C.N.L.R. 260; *R. v. Southwind*, [1991] O.J. No. 3612 (QL); *R. v. King*, [1996] O.J. No. 5458 (QL); *R. v. Harris*, [1998] B.C.J. No. 1016 (QL); *R. v. Ice*, [2000] O.J. No. 5857 (QL); *R. v. Stump*, [2000] 4 C.N.L.R. 260; *R. v. Barlow* (2000), 228 N.B.R. (2d) 289, leave to appeal refused, [2001] N.B.J. No. 145 (QL), 2001 NBCA 44; *Turner v. Manitoba* (2001), 160 Man. R. (2d) 256, 2001 MBCA 207;

R. v. Augustine (2001), 232 N.B.R. (2d) 313, leave to appeal refused, [2001] N.B.J. No. 190 (QL), 2001 NBCA 57; *R. v. Maurice*, [2002] 2 C.N.L.R. 273, 2002 SKQB 68; *R. v. Pitawanakwat*, [2004] O.J. No. 2075 (QL), 2004 ONCJ 50; *R. v. Yapput*, [2004] O.J. No. 5055 (QL), 2004 ONCJ 318; *R. v. Maple*, [1982] 2 C.N.L.R. 181; *R. v. Machimity*, [1996] O.J. No. 4365 (QL); *R. v. Polches* (2005), 289 N.B.R. (2d) 72, 2005 NBQB 137.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 91(24), 92(13).

Constitution Act, 1982, s. 35.

Indian Act, R.S.C. 1985, c. I-5, s. 88.

Indian Act, S.C. 1951, c. 29.

Wildlife Act, S.B.C. 1982, c. 57, ss. 27(1)(d), (e), 28(1), 29.

Treaties

North Saanich Treaty of 1852.

Authors Cited

Wilkins, Kerry. "Of Provinces and Section 35 Rights" (1999), 22 *Dal. L.J.* 185.

APPEAL from a judgment of the British Columbia Court of Appeal (Lambert, Huddart and Thackray JJ.A.) (2004), 194 B.C.A.C. 107, 317 W.A.C. 107, 25 B.C.L.R. (4th) 45, 237 D.L.R. (4th) 693, [2004] 2 C.N.L.R. 219, [2004] 5 W.W.R. 403, [2004] B.C.J. No. 400 (QL), 2004 BCCA 121, affirming a judgment of

Singh J., [2002] 4 C.N.L.R. 222, [2002] B.C.J. No. 1292 (QL), 2002 BCSC 780, upholding the convictions entered by Higinbotham Prov. Ct. J., [1999] B.C.J. No. 3199 (QL). Appeal allowed, McLachlin C.J. and Bastarache and Fish JJ. dissenting.

Louise Mandell, Q.C., Ardith Wal'petko We'dalx Walkem, Bruce Elwood and *Michael Jackson, Q.C.*, for the appellants.

Lisa J. Mrozinski and *Paul E. Yearwood*, for the respondent.

Mitchell R. Taylor and *Mark Kindrachuk, Q.C.*, for the intervener the Attorney General of Canada.

Ria Tzimas and *Elaine M. Atkinson*, for the intervener the Attorney General of Ontario.

René Morin, for the intervener the Attorney General of Quebec.

John G. Furey, for the intervener the Attorney General of New Brunswick.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Sandra C. M. Folkins and *Angela Edgington*, for the intervener the Attorney General of Alberta.

Diane Soroka, for the intervener the Eagle Village First Nation (Migizy Odenaw).

Harley I. Schachter, for the intervener the Red Rock Indian Band.

Michel Beaupré and *Simon Picard*, for the intervener Conseil de la Nation huronne-wendat.

Written submissions only by *Robert J. M. Janes* and *Dominique Nouvet*, for the intervener Te'mexw Treaty Association.

Written submissions only by *Jack Woodward* and *David M. Robbins*, for the intervener Chief Allan Claxton.

Written submissions only by *David M. Rosenberg*, *Patricia Hutchings* and *Jay Nelson*, for the intervener Chief Roger William.

The judgment of Binnie, Deschamps, Abella and Charron JJ. was delivered by

1 DESCHAMPS AND ABELLA JJ. — This case raises the question whether a provincial government acting within its constitutionally mandated powers can interfere with treaty rights and, if so, to what extent.

2 In 1852, James Douglas, Governor of the Colony of Vancouver Island, representing the British Crown, enshrined in a treaty the recognition that the Saanich

Nation would be "at liberty to hunt over the unoccupied lands; and to carry on our fisheries as formerly". Ivan Morris and Carl Olsen, both members of the Tsartlip Band of the Saanich Nation, were charged, among other charges, under s. 27(1)(d) and (e) of British Columbia's *Wildlife Act*, S.B.C. 1982, c. 57, for doing what the Tsartlip have done, as the trial judge noted, "from time immemorial": hunting for food at night with the aid of illuminating devices.

3 As a defence to the charges under s. 27, Morris and Olsen raised their right to hunt under the North Saanich Treaty of 1852 ("Treaty"). The Crown concedes that Morris and Olsen have a right to hunt but asserts a ban on hunting at night. Morris and Olsen counter that they were observing safe hunting practices and that provincial regulations cannot affect their treaty right.

4 In this case, we conclude that the Tsartlip's right to hunt at night with the aid of illuminating devices is protected by treaty. Although the prohibition against dangerous hunting contained in s. 29 of the *Wildlife Act* is a limit that does not infringe the treaty right, the complete prohibition on hunting at night with an illuminating device set out in s. 27 is overbroad because it prohibits both safe and unsafe hunting, and, in the case of aboriginal hunters, infringes their treaty right.

5 The evidence at trial was that the Tsartlip's historic aboriginal practice of hunting at night with illumination has yet to result in a single known accident caused by those engaging in it. In our view, paras. (d) and (e) of s. 27(1) of the *Wildlife Act*, despite being part of a valid provincial law of general application, prohibit the exercise of a protected treaty right and are inapplicable in this case. We would therefore allow the appeal, set aside the convictions and enter acquittals.

1. Background

6 Morris and Olsen were arrested on November 28, 1996 on Vancouver Island for breaches of prohibitions contained in the *Wildlife Act*: hunting of wildlife with a firearm during prohibited hours (s. 27(1)(d)); hunting by the use or with the aid of a light or illuminating device (s. 27(1)(e)); hunting without reasonable consideration for the lives, safety or property of other persons (s. 29); and, in the case of Olsen only, discharging a firearm at wildlife from a motor vehicle (s. 28(1)).

7 The backdrop to the prosecution of Morris and Olsen was a change of administrative policy on the part of the provincial Crown, acting through conservation officers. The evidence is that the Tsartlip had hunted at night for generations until the charges were laid in this case. They had received confirmation from the Minister of Forests, David Zirnhelt, that there would be no prosecutions in connection with the exercise of hunting and fishing rights pursuant to the Treaty. On the basis of this assurance, the Tsartlip entered into an arrangement with Doug Turner, Chief Enforcement Officer of the Conservation Officer Service for Vancouver Island, whereby any treaty beneficiary charged in relation to night hunting was instructed to phone Mr. Turner. Once Mr. Turner received confirmation that the hunter in question was a member of the Saanich Nation, the hunter would be released. This arrangement, it appears, ended with Mr. Turner's retirement in 1996.

8 In November of that year, not long after Mr. Turner's retirement, a conservation officer was invited to speak at a "rod and gun" club meeting where members expressed dissatisfaction about Indians engaged in night hunting. A decoy

operation was promptly organized to trap night hunters, as a result of which Morris and Olsen were arrested and charged. The Tsartlip were not forewarned of the operation and no discussion took place after the charges were laid.

9 The trial in Provincial Court lasted five days. Morris and Olsen raised their rights under the Treaty as a general defence to the charges. The conservation officer acknowledged that safety concerns are inversely proportionate to the remoteness and density of the population.

10 Morris and Olsen led evidence to the effect that night hunting is part of the Tsartlip tradition and has been carried on in safety for generations. They also introduced evidence that the particular night hunt for which they were charged was not dangerous. Morris and Olsen were caught by provincial conservation officers using a mechanical black-tailed deer decoy. The decoy was set up on unoccupied lands 20 metres off a gravel road. It was, one of the conservation officers testified, a spot chosen for its safety. Officer Gerald Brunham explained the choice of site as follows:

> Q Were there any residences in that vicinity?
>
> A Not within two kilometres.
>
> . . .
>
> Q And you chose that particular [hunting] site because of safety aspects?
>
> A Yes.
>
> Q So would it be accurate to say that there were no private property, no campers, no dwellings within the range that a bullet would travel?
>
> A Yes.
>
> Q And you chose that specific hillside so that if a bullet did go through your decoy it would go into a hill and into the trees?

A That's right.

11 The trial judge found that "night hunting with illumination was one of the various methods employed by the Tsartlip [people] from time immemorial" ([1999] B.C.J. No. 3199 (QL), at para. 19). However, despite the evidence that night hunting by Tsartlip hunters had yet to result in an accident, he nonetheless concluded that Morris and Olsen did not have a treaty right to hunt at night because hunting at night with an illuminating device was "inherently unsafe" (para. 25).

12 They were both convicted of hunting during prohibited hours contrary to s. 27(1)(d), and Olsen was convicted of discharging a firearm at wildlife from a motor vehicle contrary to s. 28(1). However, despite his conclusion that night hunting was inherently unsafe, the trial judge acquitted the appellants on the count of hunting without reasonable consideration for the lives, safety or property of other persons (s. 29). As well, the trial judge conditionally stayed the charges of hunting with the use or aid of a light or illuminating device contrary to s. 27(1)(e), based on the rule in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729.

13 The convictions based on the prohibition of night hunting (s. 27(1)(d)) were upheld by a summary conviction appeal judge ([2002] 4 C.N.L.R. 222, 2002 BCSC 780) and by the majority in the Court of Appeal for British Columbia, with Lambert J.A. dissenting ((2004), 25 B.C.L.R. (4th) 45, 2004 BCCA 121). The only provisions at issue in the appeal before us are s. 27(1)(d) and (e).

2. Analysis

14 The analytical framework in which to consider this case can be divided into two parts. The first step is to determine whether the impugned provisions of the *Wildlife Act* impair a treaty right. This entails characterizing the scope of the treaty right claimed by Morris and Olsen and delineating any limits on that right. We acknowledge at the outset that there is no treaty right to hunt dangerously. Thus s. 29 of the *Wildlife Act*, which prohibits hunting or trapping "without reasonable consideration for the lives, safety or property of other persons", is a limit that does not impair the treaty rights of aboriginal hunters and trappers. At issue are the limits imposed by s. 27(1)(d) and (e). In our view these prohibitions, presented as safety measures in relation to the Tsartlip, are overbroad and infringe the treaty right to hunt.

15 The second step is to analyse whether the impugned provisions of the *Wildlife Act* are valid and applicable under the constitutional division of powers in ss. 91 and 92 of the *Constitution Act, 1867* and under s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5. In our view, because paras. (d) and (e) of s. 27(1) are inconsistent with the Treaty, they do not apply to Morris and Olsen either directly, of their own force, as provincial law, or as incorporated federal law under s. 88 of the *Indian Act*.

2.1 *Evolution of the Treaty Right*

16 Between 1850 and 1854, 14 treaties were concluded with bands living on Vancouver Island. These came to be known as the Douglas Treaties, named after James Douglas, Governor of the Colony of Vancouver Island at the time. The Treaty alone covers approximately 22,000 hectares situated on lands that are partly uninhabited and partly inhabited.

17 In exchange for the surrender by the Saanich of their lands on Vancouver Island, the Crown made a number of commitments to them, including the following guarantee:

> [I]t is . . . understood that we [the Saanich Tribe] are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly. [Emphasis added.]

Each of the 14 treaties contained this commitment in the same formulation.

18 The language of the Treaty stating "we are at liberty to hunt over the unoccupied lands" exemplifies the lean and often vague vocabulary of historic treaty promises. McLachlin J., dissenting on other grounds, stated in *R. v. Marshall*, [1999] 3 S.C.R. 456 ("*Marshall No. 1*"), at para. 78, that "[t]he goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed". This means that the promises in the treaty must be placed in their historical, political, and cultural contexts to clarify the common intentions of the parties and the interests they intended to reconcile at the time.

19 The Douglas Treaties were the reflections of oral agreements reduced to writing by agents of the Crown. The historical background to these treaties has been ably documented by the B.C. Court of Appeal in three decisions: see *R. v. White* (1964), 50 D.L.R. (2d) 613; *R. v. Bartleman* (1984), 55 B.C.L.R. 78; and *Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79. This historical context reveals an overriding intention that the methods by which the Saanich traditionally hunted be brought within the Treaty's protection.

20 First, it was in the interest of all parties to preserve traditional hunting and fishing practices among the Tsartlip and other Douglas Treaty bands. As Lambert J.A. stated in *Bartleman*, at p. 90:

> [A]t the time of the treaties, it was a concern of the colonial government not to disturb the Indian people in their traditional food-gathering activities. It was in the interest of the government of the colony of Vancouver Island and of the Indians that the Indians should be able to support themselves in their traditional ways.

21 The interests of the colonial government in preserving the traditional Tsartlip way of life were a reflection of the economic and demographic realities of the region, including concerns for the safety and security of the small number of settlers. Norris J.A. summarized these imperatives as follows in *White*, at p. 657:

> [I]t was at the time of Douglas particularly important for the maintenance of law and order that Indian rights be respected and interpreted broadly in favour of the Indians, not merely for the due administration of law, but also for the safety of the settlers who constituted a minority of, at the most, 1,000 persons, there being 30,000 Indians on Vancouver Island alone, apart from the warlike tribes to the north, who always constituted a raiding threat and against whom the maintenance of friendship with the local Indians afforded a measure of security.

22 Second, the historical record discloses that Governor Douglas represented to the Indian peoples with whom he entered into treaties that the treaties would secure for them the right to continue their pre-treaty hunting practices. In a letter to the Colonial Secretary dated May 16, 1850, Douglas stated the following:

> I informed the natives that they would not be disturbed in the possession of their Village sites and enclosed fields, which are of small extent, and that they were at liberty to hunt over the unoccupied lands, and to carry on their

> fisheries with the same freedom as when they were the sole occupants of the country. [Emphasis added.]
>
> (See *White*, at p. 651.)

23 Douglas wrote a similar confirmation to the Speaker and members of the House of Assembly of British Columbia, advising them that:

> [The Indians] were to be protected in their original right of fishing on the Coasts and in the Bays of the Colony, and of hunting over all unoccupied Crown Lands: and they were also to be secured in the enjoyment of their village sites and cultivated fields.
>
> (*Bartleman*, at p. 89)

24 These external acknowledgments by Douglas are significant where, as here, the treaty was concluded orally and subsequently reduced to writing. The oral promises made when the treaty was agreed to are as much a part of the treaty as the written words: see *Marshall No. 1*, at para. 12.

25 The promises made by Douglas confirm that the parties intended the Treaty to include the full panoply of hunting practices in which the Tsartlip people had engaged before they agreed to relinquish control over their lands on Vancouver Island.

26 One of those practices was night hunting. The trial judge acknowledged the "considerable body of evidence supporting the fact that night hunting has been an accepted practice of the Tsartlip people from pre-treaty days to the present" (para. 18). His most significant finding about night hunting was that it includes, and always has included, hunting with the aid of illuminating devices:

> [N]ight hunting with illumination was one of the various methods employed by the Tsartlip people from time immemorial. [para. 19]

27 This finding reflected the evidence of Tom Sampson, a member of the Tsartlip Indian Band who had hunted for 56 of his 65 years. He described the various ways illumination was historically used in night hunting, including:

> . . . a carbide light, it was what the coal miners used to use, and prior to that we used — in fishing, we used the hollowed out part of our canoe and we used pitch from a tree, the stumps we would cut out and shape and put in front of the canoe as a light for hunting and fishing.

28 The relevant provision of this Treaty, as previously noted, states that the Tsartlip "are at liberty to hunt over the unoccupied lands; and to carry on [their] fisheries as formerly". There is no dispute, at least for the purposes of this case, that the words "as formerly" apply to both the hunting and fishing clauses.

29 As McLachlin J. stated in *Marshall No. 1*, at para. 78, these words "must be given the sense which they would naturally have held for the parties at the time". She also said that "[t]reaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories". Even on a literal construction, the language of the Treaty supports the view that the right to hunt "as formerly" means the right to hunt according to the methods used by the Tsartlip at the time of and before the Treaty. This would obviously include those methods the Tsartlip have used in hunting "from time immemorial".

30 From 1852 to the present, the tools used by the Tsartlip in hunting at night have evolved. From sticks with pitch to spotlights and from canoes to trucks, the tools

and methods employed in night hunting have changed over time. These changes do not diminish the rights conferred by the Treaty. The right of the Tsartlip to hunt at night with illuminating devices has of necessity evolved from its pre-treaty tools to its current implements. As McLachlin C.J. observed in *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, at para. 25:

> . . . treaty rights are not frozen in time. Modern peoples do traditional things in modern ways. The question is whether the modern trading activity in question represents a logical evolution from the traditional trading activity at the time the treaty was made . . . . Logical evolution means the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology.

31 This approach has led the Court in other cases to acknowledge, for example, that hunting with a rifle and ammunition is the current form of an evolving right whose origins were hunting with a bow and arrow (*Simon v. The Queen*, [1985] 2 S.C.R. 387), and that a treaty right to erect a log cabin for hunting purposes flows from the former use of mossy lean-to shelters (*R. v. Sundown*, [1999] 1 S.C.R. 393).

32 The evidence in this case makes clear that the use of guns, spotlights, and motor vehicles reflects the current state of the evolution of the Tsartlip's historic hunting practices. Morris testified at trial that the Tsartlip used to hunt at night with

> what they called torch lamps, and I heard this story told to me by our older hunters, that they used sticks with pitch on the end of them to do the same kind of hunt [but that the Tsartlip had] moved into these new tools of the spotlight and of the gun, where it's made it easier for us to hunt. And then we use our vehicles instead of walking or paddling a canoe.

33 This evidence reveals that the weapons, means of transportation and illuminating devices used in hunting have become more modern. But changes in method do not change the essential character of the practice, namely, night hunting with illumination. What was preserved by the Treaty and brought within its protection was hunting at night with illuminating devices, not hunting at night with a particular *kind* of weapon and source of illumination. This conclusion is dictated by the common intentions of the parties to the Treaty, as distilled from the context in which the Treaty was entered into. The purpose of the hunting clause was to preserve the traditional Tsartlip way of life, including methods of gathering food. It was, in addition, designed to benefit the settlers, whose interests at the time lay in friendship with the Indian majority on Vancouver Island.

34 Each of these interests could best be met by simultaneously ensuring both the protection of the settlers and the continuation of the hunting methods traditionally used by the Tsartlip. The common intention which best reconciles the interests of the parties is one that brings a right to hunt as they always had within the ambit of the Treaty. This includes the right to hunt at night with illumination.

35 We agree, as stated earlier, that it could not have been within the common intention of the parties that the Tsartlip would be granted a right to hunt dangerously, since no treaty confers on its beneficiaries a right to put human lives in danger. This limitation on the treaty right flows from the interest of all British Columbians in personal safety. It is also confirmed by the language of the Treaty itself, which restricts hunting to “unoccupied lands”, away from any town or settlement. British Columbia is a very large province, and it cannot plausibly be said that a night hunt with illumination is

unsafe everywhere and in all circumstances, even within the treaty area at issue in this case.

36 This Court stated in *R. v. Marshall*, [1999] 3 S.C.R. 533 ("*Marshall No. 2*"), at para. 37, that "regulations that do no more than reasonably define the . . . treaty right in terms that can be administered by the regulator and understood by the . . . community that holds the treaty rights do not impair the exercise of the treaty right" (emphasis deleted). As well, as noted in *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 89, "reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food".

37 The question, therefore, is how to identify and define internal limits on a treaty right. The consensual nature of treaty rights and their specific origin and structure dictate that a respectful approach be adopted. Individual statutory provisions have to be evaluated to determine whether, based on the available historical evidence, they are consistent with the common intention of the parties to the treaty.

38 In our view, the best reconciliation of the parties' intentions is one that preserves as much as possible the ancient practices the Tsartlip would have understood as forming part of their "liberty to hunt" under the Treaty, subject only to the limit that they do not have a right to put lives or property at risk. Thus, at the very least, the safety limitation in the Treaty should not be drawn so broadly as to exclude *all* night hunting. It could not have been within the common intention of the parties to completely ban night hunting, which was a long-accepted method of hunting for food.

39 Nor can it be said that such a blanket exclusion should now be implied as a matter of law. If a night hunt is dangerous in particular circumstances, it can (and should) be prosecuted under s. 29. Here, the appellants were acquitted of dangerous hunting. The implicit limitation found by our colleagues the Chief Justice and Fish J. has a scope that interferes with the time-honoured right instead of allowing for the right to be exercised subject only to principled limitations. Protected methods of hunting cannot, without more, be wholly prohibited simply because in some circumstances they could be dangerous. All hunting, regardless of the time of day, has the potential to be dangerous.

40 The blanket prohibition of s. 27(1)(d) and (e) applies, of course, throughout British Columbia, including the vast regions of the interior. Much of the north of the province is uninhabited except by aboriginal people, and there are areas where even they are seen only occasionally. To conclude that night hunting with illumination is dangerous everywhere in the province does not accord with reality and is not, with respect, a sound basis for limiting the treaty right.

2.2 *Constitutional Division of Powers*

41 Having found that the Tsartlip's treaty rights include the right to hunt at night and with illumination, we must now determine whether the impugned provisions of the *Wildlife Act* are nevertheless applicable from the perspective of the constitutional division of powers in ss. 91 and 92 of the *Constitution Act, 1867*. By virtue of s. 91(24), Parliament has exclusive power to make laws in relation to "Indians, and Lands reserved for the Indians". Provincial laws whose "pith and substance" relates to this head of power are *ultra vires* and invalid (*Kitkatla Band v. British Columbia (Minister of Small*

Business, Tourism and Culture), [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 67). However, provincial laws of general application that affect Indians only incidentally and are enacted under a provincial head of power will be found to be *intra vires* and valid.

42 In this case, there is no question that the relevant provisions of the *Wildlife Act* are valid provincial legislation under s. 92(13) of the *Constitution Act, 1867*, which refers to Property and Civil Rights in the Province. However, where a valid provincial law impairs "an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians" (*Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031, at p. 1047), it will be inapplicable to the extent of the impairment. Thus, provincial laws of general application are precluded from impairing "Indianness". (See, for example, *Dick v. The Queen*, [1985] 2 S.C.R. 309, at p. 326.)

43 Treaty rights to hunt lie squarely within federal jurisdiction over "Indians, and Lands reserved for the Indians". As noted by Dickson C.J. in *Simon*, at p. 411:

> It has been held to be within the exclusive power of Parliament under s. 91(24) of the *Constitution Act, 1867*, to derogate from rights recognized in a treaty agreement made with the Indians.

This Court has previously found that provincial laws of general application that interfere with treaty rights to hunt are inapplicable to particular Aboriginal peoples. (See, for example, *Simon*, at pp. 410-11; *Sundown*, at para. 47.) Where such laws are inapplicable because they impair "Indianness", however, they may nonetheless be found to be applicable by incorporation under s. 88 of the *Indian Act*.

2.3 *Section 88 of the Indian Act*

44 Section 88 reflects Parliament's intention to avoid the effects of the immunity imposed by s. 91(24) by incorporating certain provincial laws of general application into federal law. Section 88 reads as follows:

> **88.** Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

45 But as the opening words of this provision demonstrate, Parliament has expressly declined to use s. 88 to incorporate provincial laws where the effect would be to infringe treaty rights. And this Court held in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 86, that one of the purposes of s. 88 is to accord "federal statutory protection to aboriginal treaty rights". Thus, on its face, s. 88 cannot be used to incorporate into federal law provincial laws that conflict with the terms of any treaty.

46 The clear language of this treaty exception in s. 88 is qualified by statements in this Court's jurisprudence that the provinces may regulate treaty rights under certain circumstances. In *Marshall No. 2*, at para. 24, for example, this Court held that

> the federal and provincial governments [have the authority] within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives . . . . [Emphasis added.]

That statement must of course be read in the context of the particular right under consideration in *Marshall No. 1*, namely a commercial right of access to resources

harvested (and traded) from the outset by aboriginals in common with non-aboriginal inhabitants. After Confederation, some of the resources came to be regulated federally (e.g. the fishery), while others were regulated provincially (e.g. those harvested by trapping). In the case of the provincially regulated resources, the Court was not prepared to read the treaty right as requiring that access to them for purposes of *commercial* exploitation be subject to parallel and potentially conflicting federal and provincial oversight. That is not this case, which requires us to consider the more general question of what degree of provincial legislative interference with a non-commercial treaty right will trigger the s. 88 protection of treaty rights. Further consideration of the Court's position with respect to treaty rights of a commercial nature should be left for a case where it is directly in issue.

47 Where, as in this case, non-commercial rights are in issue, a distinction must be drawn between insignificant interference with the exercise of the treaty right and *prima facie* infringement of the right.

48 Regarding insignificant interference, this Court considered in *Côté* whether a provincial regulation requiring the payment of a small access fee for entry into a controlled harvest zone infringed a treaty right to fish. The fee was not revenue generating, but was intended to pay for the ongoing maintenance of roads and facilities within the controlled zone. Lamer C.J. held that this provincial regulation "impose[d] a modest financial burden on the exercise of th[e] alleged treaty right" (para. 88), thereby representing an insignificant interference with a treaty right, and consequently did not infringe that right.

49 In contrast in *Badger* this Court considered that a licensing scheme that imposed conditions as to the "hunting method, the kind and numbers of game, the season and the permissible hunting area" (para. 92) infringed the appellants' treaty right to hunt. Cory J., writing for the majority, held that this licensing scheme constituted a *prima facie* infringement of the appellants' treaty right to hunt, since it "denie[d] to holders of treaty rights . . . the very means of exercising those rights" and was found to be "in direct conflict with the treaty right" (para. 94).

50 Insignificant interference with a treaty right will not engage the protection afforded by s. 88 of the *Indian Act*. This approach is supported both by *Côté* and by *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J. rejected the idea that "anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement" (para. 91 (emphasis added)). Therefore, provincial laws or regulations that place a modest burden on a person exercising a treaty right or that interfere in an insignificant way with the exercise of that right do not infringe the right.

51 A *prima facie* infringement, however, will trigger the s. 88 treaty right protection. In determining what constitutes a *prima facie* infringement of a treaty right, it is helpful to consider the Court's jurisprudence on this point. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1112, Dickson C.J. and La Forest J. listed three questions that may assist in this determination:

> First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?

52 As Lamer C.J. pointed out in *R. v. Gladstone*, [1996] 2 S.C.R. 723, care should be taken, in considering these questions, not to import an element of justification when attempting to identify an infringement. He stated the following, at para. 43:

> The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

53 Essentially, therefore, a *prima facie* infringement requires a "meaningful diminution" of a treaty right. This includes anything but an insignificant interference with that right. If provincial laws or regulations interfere insignificantly with the exercise of treaty rights, they will not be found to infringe them and can apply *ex proprio vigore* or by incorporation under s. 88.

54 The protection of treaty rights in s. 88 of the *Indian Act* applies where a conflict between a provincial law of general application and a treaty is such that it amounts to a *prima facie* infringement. Where a provincial law of general application is found to conflict with a treaty in a way that constitutes a *prima facie* infringement, the protection of treaty rights prevails and the provincial law cannot be incorporated under s. 88.

55 Where a *prima facie* infringement of a treaty right is found, a province cannot rely on s. 88 by using the justification test from *Sparrow* and *Badger* in the context of s. 35(1) of the *Constitution Act, 1982*, as alluded to by Lamer C.J. in *Côté*, at para. 87. The purpose of the *Sparrow/Badger* analysis is to determine whether an infringement by a government acting within its constitutionally mandated powers can be justified. This justification analysis does not alter the division of powers, which is dealt with in s. 88. Therefore, while the *Sparrow/Badger* test for infringement may be useful, the framework set out in those cases for determining whether an infringement is justified does not offer any guidance for the question at issue here.

3. Application to This Case

56 There is no treaty right to hunt dangerously. Thus, the prohibition against hunting "without reasonable consideration for the lives, safety or property of other persons" set out in s. 29 of the *Wildlife Act* is a limit that does not infringe the Tsartlip's treaty right to hunt. As stated earlier, the requirement to hunt safely was clearly within the common intention of the parties to the Treaty, as reflected by the language of the Treaty itself, which restricts hunting to "unoccupied lands". Where a treaty beneficiary is proven to have hunted dangerously, the Treaty does not provide a defence to charges brought under s. 29.

57 However, based on an understanding of the common intention of the parties to the Treaty, the Tsartlip's treaty right includes the right to hunt at night with illumination, with the modern incarnation of their ancestral method, namely the use of firearms.

58 The legislative prohibition set out in s. 27(1)(d) and (e) of the *Wildlife Act* is absolute, and it applies without exception to the whole province, including the most northern regions where hours of daylight are limited in the winter months and populated areas are few and far between. The Legislature has made no attempt to prohibit only those specific aspects or geographic areas of night hunting that are unsafe by, for example, banning hunting within a specified distance from a highway or from residences. The impugned provisions are overbroad, inconsistent with the common intention of the parties to the treaties, and completely eliminate a chosen method of exercising their treaty right.

59 We respectfully disagree with our colleagues the Chief Justice and Fish J. that nothing short of a total ban on night hunting can address safety concerns. We believe that it would be possible to identify uninhabited areas where hunting at night would not jeopardize safety. This finding is supported by the evidence in this case that the Tsartlip's practice of night hunting with illuminating devices has never been known to have resulted in an accident, and that the conservation officers, in setting up the location for their mechanical decoy, were easily able to locate an area where night hunting could be practised safely. These facts amply demonstrate how something less than an absolute prohibition on night hunting can address the concern for safety.

60 We have no difficulty concluding, therefore, that the categorical ban on night hunting and hunting with illumination constitutes a *prima facie* infringement of a treaty right. A categorical prohibition clearly constitutes more than an insignificant interference with a treaty right. Although provincial laws of general application that are inapplicable to aboriginal people can be incorporated into federal law under s. 88 of the

Indian Act, this cannot happen where the effect would be to infringe treaty rights. Because paras. (d) and (e) of s. 27(1) of the *Wildlife Act* constitute a *prima facie* infringement, they cannot be incorporated under s. 88 of the *Indian Act*.

61 For these reasons, we would allow the appeal, set aside the convictions and enter acquittals.

The reasons of McLachlin C.J. and Bastarache and Fish JJ. were delivered by

THE CHIEF JUSTICE AND FISH J. (dissenting) —

I

62 Ivan Morris and Carl Olsen were caught in a trap set by conservation officers to catch hunters who violate the law.

63 There is no dispute that Mr. Morris and Mr. Olsen violated a provincial ban on hunting at night with a firearm. The appellants argue that the ban does not apply to them in virtue of an aboriginal treaty signed in 1852. The Crown, however, argues that the treaty conveys no right to hunt dangerously, and asserts that this justifies a total ban on night hunting.

64 We conclude that the treaty right to hunt is subject to an internal limitation which excludes dangerous hunting. We further conclude that hunting at night with a firearm, as trial courts across the country have held, is hazardous and validly prohibited

on that ground by provincial legislation of general application. In the result, we find that a provincial ban on night hunting with a firearm does not affect the appellants' treaty right to hunt.

65 With respect to those who are of a different view, we would therefore dismiss the appeal and affirm the convictions of both appellants.

II

66 On the evening of November 28, 1996, the appellants were driving in the woods when they spotted what they took for a deer. Morris, the driver, stopped the vehicle to allow Olsen to shoot at the deer from the passenger seat. The rifle was then passed by Olsen to Morris across two children who were also in the front seat. Morris himself then fired two shots from outside the vehicle.

67 The appellants had in fact been shooting a decoy with reflecting eyes set up by conservation officers to trap illegal hunters. They were charged with the following offences under the British Columbia *Wildlife Act*, S.B.C. 1982, c. 57: (1) hunting wildlife with a firearm during prohibited hours (s. 27(1)(d)); (2) hunting wildlife by the use or with the aid of a light or illuminating device (s. 27(1)(e)); (3) hunting without reasonable consideration for the lives, safety or property of other persons (s. 29); and (4) discharging a firearm at wildlife from a motor vehicle (Olsen only) (s. 28(1)).

68 They argued that they enjoy a right to hunt under the terms of the North Saanich Treaty. That treaty was entered into by the ancestors of the Tsartlip Indian Band and James Douglas, Chief Factor of the Hudson's Bay Company and Governor of the

Colony of Vancouver Island at the time, and is generally referred to for that reason as the "Douglas Treaty".

69 There is no dispute that the appellants are covered by the Douglas Treaty. It was admitted at trial that they are both Indians within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, and that they have ancestral ties to the Tsartlip Indian Band, a member of the Saanich First Nation. It was admitted as well that the ancestors of the Tsartlip Indian Band were signatories to the Douglas Treaty and that the Douglas Treaty is a treaty within the meaning of s. 88 of the *Indian Act* and s. 35(1) of the *Constitution Act, 1982*.

70 The outcome of this appeal therefore turns entirely on the nature and extent of the right to hunt that may be set up in virtue of the Douglas Treaty against the application of provincial hunting laws of general application, such as the law that concerns us here.

III

71 At trial, Higinbotham Prov. Ct. J. concluded that all of the elements of the offences of hunting with a firearm during prohibited hours and hunting by the use or with the aid of a light or illuminating device contrary to s. 27(1)(d) and (e) of the *Wildlife Act* had been proven beyond a reasonable doubt: [1999] B.C.J. No. 3199 (QL), at para. 24. In his view the appellants had failed to establish that the Douglas Treaty protected them from prosecution under those provisions. He reached this conclusion by applying *R. v. Sparrow*, [1990] 1 S.C.R. 1075, where the Court set out an infringement/justification framework for determining whether an impugned statute passes constitutional muster.

72 With the Crown's consent, Higinbotham Prov. Ct. J. conditionally stayed the proceedings with respect to hunting wildlife by the use or with the aid of a light or illuminating device because of the rule against multiple convictions arising from the same delict (*Kienapple v. The Queen*, [1975] 1 S.C.R. 729) and we have not been asked to revisit this matter.

73 Higinbotham Prov. Ct. J. declined to convict the appellants on the charge of hunting without reasonable consideration for the lives, safety or property of other persons for two reasons: First, because he was not satisfied that the Crown's specific allegations in respect of this count had been made out; and second, because he could not "rely solely on the evidence that night hunting is inherently unsafe to record a conviction on this count" (para. 25), since this evidence had already founded the appellants' convictions under s. 27(1)(d).

74 Higinbotham Prov. Ct. J. did, however, convict Mr. Olsen of discharging a firearm at wildlife from a motor vehicle contrary to s. 28(1) of the *Wildlife Act.*

75 Mr. Olsen and Mr. Morris appealed to the Supreme Court of British Columbia, where Singh J. held that to exercise a treaty or aboriginal right without due regard or consideration for public safety is not a reasonable exercise of that right: [2002] 4 C.N.L.R. 222, 2002 BCSC 780. He therefore concluded, without recourse to the *Sparrow* test, that the *Wildlife Act* did not conflict with or impact on the treaty right. As a result, he found that the appellants were in fact subject to the *Wildlife Act*, which he accepted as valid provincial legislation of general application aimed at ensuring safety.

76 The appellants further appealed to the Court of Appeal of British Columbia, where each of the three justices who heard the appeal wrote separate reasons: (2004), 25 B.C.L.R. (4th) 45, 2004 BCCA 121.

77 Thackray J.A. held that because s. 27(1) of the *Wildlife Act* prohibits only hunting at night and not the right to hunt itself, it was a law of general application that applied to Indians of its own force and effect (or, as is sometimes said, "*ex proprio vigore*").

78 Huddart J.A. concluded that the appellants did not establish that night hunting was an element of the aboriginal right to hunt "integral to the distinctive culture" of the Tsartlip (para. 213). In her view, the *Wildlife Act* prohibition on night hunting therefore did not violate the core hunting right protected by the treaty.

79 Lambert J.A. dissented. He held that the *Wildlife Act* affected Indian laws, customs, traditions and practices in relation to hunting for food and ceremonial purposes and therefore "str[uck] at the core of Indianness" (para. 18). In his view, the core of Indianness encompasses within it the right to hunt for food by the Indians' own preferred means.

80 Accordingly, Lambert J.A. found that the *Wildlife Act* prohibitions do not apply of their own force to members of the Tsartlip Indian Band because only federal legislation can strike at the core of Indianness, except where provincial legislation is incorporated into federal law ("invigorated") by s. 88 of the *Indian Act*.

81 With respect to s. 88 of the *Indian Act*, Lambert J.A. found that the initial words "[s]ubject to the terms of any treaty" meant "that the treaty, properly interpreted, cannot be impinged on or affected [in its exercise] by the statutory provision" (para. 31). He went on to find that the *Wildlife Act* prohibitions were in direct conflict with the treaty right and therefore s. 88 could not be used to incorporate the impugned provisions of the *Wildlife Act.*

IV

82 For the reasons that follow, we conclude that the impugned ban on night hunting with a firearm is valid provincial legislation that applies to the appellants. The relevant provisions of the *Wildlife Act* prohibit unsafe hunting practices, which is in pith and substance a matter within the legislative jurisdiction of the provinces. They do not conflict with federal legislation and the doctrine of paramountcy therefore has no application. Finally, the right to hunt protected by the Douglas Treaty is subject to an internal limit: It does not include the right to hunt in an inherently hazardous manner. Or, put differently, the right to hunt under the treaty must be exercised reasonably and hunting practices that are inherently hazardous are antithetical to the reasonable exercise of the right to hunt. The impugned provision of the *Wildlife Act* regulates this internal limit. Since the regulation of dangerous hunting falls outside the scope of the treaty right to hunt, no treaty right is engaged. As there is no aboriginal right asserted, and as the law does not otherwise go to Indianness, the law applies *ex proprio vigore* and does not need to be incorporated by s. 88 in order to apply to Indians.

V

83 Section 91(24) of the *Constitution Act, 1867* gives Parliament exclusive legislative authority over "Indians, and Lands reserved for the Indians". Aboriginal and treaty rights fall squarely within Parliament's jurisdiction under s. 91(24).

84 Although s. 91(24) attributes exclusive jurisdiction over "Indians" and "Lands reserved for the Indians" to Parliament, valid provincial legislation normally applies to aboriginal persons. It is well established that "First Nations are not enclaves of federal power in a sea of provincial jurisdiction" (*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 66).

85 The validity of a provincial enactment is a condition precedent to its application to aboriginal Canadians. A provincial law that does not fall within a provincial head of power is invalid and of no force or effect. Provincial legislation that, in pith and substance, relates to "Indians" or "Lands reserved for the Indians" — or any other matter within exclusive federal jurisdiction — is *ultra vires*. However, provincial legislation that merely has an incidental effect on a federal head of power is *intra vires*: *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55, at para. 14. Such incidental effects are without relevance for constitutional purposes (*ibid.*). For instance, in the aboriginal context, provincial traffic legislation applies on reserves (see *R. v. Francis*, [1988] 1 S.C.R. 1025). Valid provincial laws of this type apply *ex proprio vigore* to aboriginal Canadians.

86 Determination of the pith and substance of an enactment requires an examination of its purpose as well as its legal and practical effects: *Kitkatla*, at paras. 53 and 54. Drawing on Chief Justice Dickson's reasons in *General Motors of Canada*

Ltd. v. City National Leasing, [1989] 1 S.C.R. 641, LeBel J. set out in *Kitkatla*, at para. 58, the proper approach for determining the pith and substance of provincial legislation:

> 1. Do the impugned provisions intrude into a federal head of power, and to what extent?
>
> 2. If the impugned provisions intrude into a federal head of power, are they nevertheless part of a valid provincial legislative scheme?
>
> 3. If the impugned provisions are part of a valid provincial legislative scheme, are they sufficiently integrated with the scheme?

87 The *Wildlife Act* falls in pith and substance within the province's powers. It is not directed at a federal head, like Indians, but more generally at safety, a matter within provincial power. The impugned ban on night hunting is an integrated part of a broader provincial scheme applicable to all British Columbians and aimed at assuring the safety of the province's hunters and residents.

88 It follows that the impugned provision applies to the appellants, unless it is excluded by one of the exceptions to the general rule that valid provincial laws of general application apply to aboriginal Canadians. Provincial laws will not apply to Indians if they conflict with federal legislation or engage the doctrine of interjurisdictional immunity.

89 Under the paramountcy doctrine, valid provincial legislation will be rendered inoperative if it enters into an operational conflict with valid federal legislation. Such conflict will exist if simultaneous compliance with both provincial and federal legislation is impossible or if the provincial legislation displaces or frustrates the federal legislative purpose (*Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13). There is some debate as to the order in which the doctrine of paramountcy and

the doctrine of interjurisdictional immunity should be considered by a court, particularly where s. 88 of the *Indian Act* is at issue: see K. Wilkins, "Of Provinces and Section 35 Rights" (1999), 22 *Dal. L.J.* 185. We do not find it necessary to resolve that debate in this case, since there is no conflicting federal legislation on hunting; accordingly, the paramountcy doctrine does not apply.

90 Under the doctrine of interjurisdictional immunity, valid provincial legislation is constitutionally inapplicable to the extent that it intrudes or touches upon core federal legislative competence over a particular matter. Thus, exclusive federal jurisdiction under s. 91(24) protects "core Indianness" from provincial intrusion: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 177. Valid provincial legislation which does not touch on "core Indianness" applies *ex proprio vigore.* If a law does go to "core Indianness" the impugned provincial legislation will not apply unless it is incorporated into federal law by s. 88 of the *Indian Act*.

91 Indian treaty rights and aboriginal rights have been held to fall within the protected core of federal jurisdiction: *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 411; *Delgamuukw*, at para. 178. It follows that provincial laws of general application do not apply *ex proprio vigore* to the hunting activities of Indians that are protected by a treaty.

92 If, however, a provincial law of general application does not affect a treaty right, and does not otherwise touch upon core Indianness, that law applies *ex proprio vigore*, without recourse to s. 88. Legislation that falls outside the internal limits on the treaty right that the parties to the treaty would have understood and intended would not encroach on the treaty right.

93 Many aboriginal and treaty rights are subject to internal limits. In *R. v. Marshall*, [1999] 3 S.C.R. 456 ("*Marshall No. 1*"), and *R. v. Marshall*, [1999] 3 S.C.R. 533 ("*Marshall No. 2*"), the Court held that the treaty right to trade for necessaries was subject to an internal limit to a catch that would produce a moderate livelihood. In similar fashion, safety may operate as an implicit or definitional limit on aboriginal or treaty rights. In *R. v. Badger*, [1996] 1 S.C.R. 771, Cory J. wrote, at para. 89, that:

> . . . reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food. Similarly these regulations do not infringe the hunting rights guaranteed by Treaty No. 8 as modified by the *NRTA*.

94 In *R. v. Sundown*, [1999] 1 S.C.R. 393, the Court held that "there [is] no inconsistency in principle between a treaty right to hunt and the statutory requirement that the right be exercised in a manner that ensured the safety of the hunter and of others" (Cory J., for the Court, at para. 41, citing *Myran v. The Queen*, [1976] 2 S.C.R. 137, at pp. 141-42; see also *R. v. Sutherland*, [1980] 2 S.C.R. 451, at p. 460; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282, at p. 289; and *Simon*, at p. 403).

95 Provincial legislation may apply to matters included within "core Indianness" if it is incorporated by s. 88 of the *Indian Act*, which provides:

> **88.** Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

96 The Court clarified the effect of s. 88 of the *Indian Act* in *Dick v. The Queen*, [1985] 2 S.C.R. 309. The Court noted that for the purposes of s. 88 there are two categories of provincial laws: (1) laws which can be applied to Indians without touching their Indianness; and (2) laws which cannot apply to Indians without regulating them *qua* Indians (pp. 326-27). The first category of provincial laws applies to Indians without any constitutional difficulty. The second category cannot apply to Indians by reason of the doctrine of interjurisdictional immunity. It is to this second category of provincial legislation that s. 88 of the *Indian Act* is directed. Thus, s. 88 incorporates provincial laws of general application that are otherwise constitutionally inapplicable to Indians — laws that are precluded from applying to Indians by the doctrine of interjurisdictional immunity because they affect core Indianness, a matter under federal jurisdiction.

97 However, as may be readily observed from its text, s. 88 does not incorporate all provincial laws that are otherwise inapplicable by reason of the doctrine of interjurisdictional immunity. Section 88 operates, *inter alia*, "[s]ubject to the terms of any treaty". In other words, s. 88 cannot incorporate a provincial law that conflicts with a treaty right.

98 What type or degree of conflict is required between a provincial law of general application and a treaty to engage the treaty exception's protection? On the authorities, an insignificant burden on a treaty right is not enough: see, for example, *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 88. At the other end of the spectrum, a more searching "unjustified infringement" test would be inappropriate: Section 88 was adopted in 1951 (S.C. 1951, c. 29), more than 30 years before the emergence of the concepts of justification associated with s. 35 of the *Constitution Act, 1982* were introduced.

99 In our view, a *prima facie* infringement test best characterizes the degree of conflict required to engage the protection of the treaty exception. Legislation that places no real burden on the treaty right does not constitute a *prima facie* infringement and would not trigger the treaty exception. Legislation which engages the internal limits of a treaty right does not affect the treaty right at all, and therefore, *a fortiori*, does not constitute a *prima facie* infringement.

100 On this basis, provincial regulatory authority over Indian treaty rights may be summarized as follows:

1. Provincial laws directed at the regulation of treaty rights are *ultra vires*;

2. Valid provincial laws of general application that do not affect or infringe treaty rights apply to Indians either:

   (a) *ex proprio vigore*; or

   (b) through incorporation under s. 88, if they nevertheless touch upon core Indianness in some other manner;

   Valid provincial laws that fall outside of the scope of the treaty right, by virtue of an internal limit on the treaty right, do not go to "core Indianness", and thus apply *ex proprio vigore*. They do not need to be incorporated by s. 88; and

3. Valid provincial laws of general application that constitute a *prima facie* infringement of treaty rights trigger the treaty exception in s. 88 and are constitutionally inapplicable. Provincial laws that impose only an insignificant burden on a treaty right (see *Côté*) do not trigger that exception and are therefore incorporated by s. 88.

VI

101 Having already concluded that the impugned legislation falls under a valid provincial head of power and does not conflict with any federal legislation, we must now determine whether it goes to "core Indianness". If it does, it applies as a result of incorporation under s. 88; if not, the law applies *ex proprio vigore*. The appellants' claim that night hunting does go to Indianness is based on their right to hunt under the Douglas Treaty. In order to determine, then, whether the ban applies to them *ex proprio vigore*, we must ascertain the scope and extent of the right to hunt enshrined in that treaty.

102 The treaty right is set out in para. 2 of the Douglas Treaty, which reads:

> It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

103 This case proceeded on the Crown's concession that the words "as formerly" modified the "liberty to hunt over the unoccupied lands" as well as the "liberty . . . to carry on our fisheries". In our view, this branch of the matter merits little discussion:

The scope of the right to hunt under the Douglas Treaty is not at all dependant on the Crown's concession.

104 For ease of reference, we recall here the findings below.

105 In the Court of Appeal, Lambert J.A. defined the appellants' treaty right as the right to hunt for food and ceremonial purposes according to the Indians' preferred means in accordance with their own laws, customs, traditions and practices, and the safety practices which regulate the manner of hunting (para. 49). Huddart J.A. found that the treaty protected only those rights that are "integral to the distinctive culture" of the Tsartlip (para. 208) and that night hunting, while a traditional practice of convenience, is not part of the core right to hunt protected by the treaty. Singh J. of the British Columbia Supreme Court held that the Douglas Treaty protected a right to hunt as well as the methods and means of hunting. He held nonetheless that the treaty right does not contemplate or, still less, confer a right to hunt dangerously, there being an implicit limitation to the treaty right that prevents unsafe hunting.

106 We prefer the interpretation of Singh J. In our respectful view, Huddart J.A.'s approach tends to blur the distinction between an aboriginal right and a treaty right and Lambert J.A.'s interpretation disregards the internal safety limitations to which that right is necessarily subject.

107 The scope of a treaty right and its internal limits is essentially a matter of treaty interpretation, which in turn refers us back to the intention of the parties to the treaty. "The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both

parties at the time the treaty was signed" (*Marshall No. 1*, at para. 78, *per* McLachlin J. (as she then was), dissenting on other grounds).

108 When the Douglas Treaty was signed, hunting at night was not uncommon. Nor was it particularly dangerous. It would not have been surprising had both the Crown and the North Saanich aboriginals contemplated that the aboriginals would continue to hunt at night. At the time, this practice did not pose the same dangers as it does today (which dangers will be explained in detail below). And the parties may not have even had reason to anticipate that the dangers would grow. But they could not have believed that the right to hunt included a right to hunt dangerously. To impute that belief to them would do injustice to both parties and, would in addition, defy common sense.

109 We use the phrase "hunting dangerously" or "hunting in an unsafe manner" or like expressions in this decision to signify hunting in a manner or under conditions that involve an inherent and especially elevated risk to the lives and safety of others.

110 In our view, the parties to the Douglas Treaty must have understood that the right to hunt did not carry with it a right to hunt in an unsafe manner. They must have understood as well that the Crown did not abdicate its interests or its responsibilities in this regard. The Crown was preoccupied by the need to secure the safety of the settlers. Hunting in an unsafe manner could not have been thought to serve the interests of the aboriginals any more than the interests of the Crown. To find that the Douglas Treaty enshrined a right to hunt in an unsafe manner is plainly irreconcilable with the third *Marshall* principle: Treaties must be interpreted in a manner that best reconciles the interests of the parties to it.

111 On this point, we find the reasoning of the New Brunswick Court of Appeal in *R. v. Paul* (1993), 142 N.B.R. (2d) 55, in relation to an aboriginal treaty right to hunt next to private dwellings, particularly compelling:

> In my view, Mr. Paul's treaty rights must be considered in the context of their exercise. Lamer J., as he then was, said in *Sioui* at p. 1072 that he "could not believe that the Hurons ever believed that the *Treaty* [of 1760] ever gave them the right to cut down trees in a garden as part of their right to carry on their customs". Similarly, and unlike the trial judge, who said that "status Indians" may exercise their treaty rights even in a manner that "is inherently dangerous", I cannot believe that the Indians of the St. John ever believed that they could exercise the rights given them in the *Treaty of Boston* of 1725 in an unsafe manner. . . . [para. 18]

112 The ninth principle of treaty interpretation laid down in *Marshall No. 1* further supports this conclusion: "Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise." (para. 78)

113 The appellants argue that using the ninth principle to restrict rather than expand the scope of a treaty right would "turn this [principle] on its head".

114 As will be more fully explained below, since 1852, the dangers of night hunting have been amplified with the development of modern weaponry. In our view, treaty rights are not impervious to changes of this sort. They do not evolve in a social, environmental or technological vacuum. A right to hunt is not transformed into a right to hunt in an unsafe manner by disregarding unforeseen dangers or new risks.

115 Quite the contrary, the ninth principle simply acknowledges that treaties must be interpreted in a manner that contemplates their exercise in modern society. Just as the methods and means of exercising the right should not be frozen in time, neither should the government's legitimate safety concerns. Adapting the exercise of treaty rights to modern weaponry without adapting the corollary legitimate safety concerns would lead to unacceptable results. One cannot reasonably focus on the former and turn a blind eye to the latter.

116 In *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, this Court held that only the logical evolution of a pre-treaty practice will attract treaty protection. In that case, the evidence showed only a pre-treaty practice of some limited trade in wood products. This evidence was insufficient to establish a treaty right to engage in commercial logging. McLachlin C.J., for the majority, described the standard in these terms:

> Of course, treaty rights are not frozen in time. Modern peoples do traditional things in modern ways. The question is whether the modern trading activity in question represents a logical evolution from the traditional trading activity at the time the treaty was made; *Marshall 2*, at para. 20. Logical evolution means the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology. But the activity must be essentially the same. "While treaty rights are capable of evolution within limits, . . . their subject matter . . . cannot be wholly transformed" (*Marshall 2*, at para. 19). [para. 25]

117 In our view, when the same sort of activity carried on in the modern economy by modern means is inherently dangerous, that dangerous activity will not be a logical evolution of the treaty right.

118 It is true, as the appellants assert, that the treaty protects from encroachment the means and methods of its exercise, such as: timing of the hunt (*R. v. White* (1965), 52 D.L.R. (2d) 481 (S.C.C.), aff'g (1964), 50 D.L.R. (2d) 613 (B.C.C.A.); "season, method [and] limit" of the hunt (*Sutherland*, at p. 460); "method, timing and extent" of the hunt (*Badger*, at para. 90)).

119 However, the fact that the treaty protects the means and methods of hunting does not negate the internal limit on the right: the treaty hunting right does not include the right to hunt in a manner that endangers the safety of the hunter or others. Because dangerous hunting falls outside the scope of the protected treaty right, the province is free to regulate in this area. The issue of safety was not addressed in *Prince v. The Queen*, [1964] S.C.R. 81, and that case's reference to night hunting should not be understood without reference to the subsequent jurisprudence of this Court with respect to safety, including *Myran*, which dealt specifically with the proper interpretation of *Prince*.

120 In *Myran*, Dickson J. (as he then was), speaking for the Court, explained the interplay between "means and methods" jurisprudence and safety this way:

> I think it is clear from *Prince* . . . that an Indian of the Province is free to hunt or trap game in such numbers, at such times of the year, by such means or methods and with such contrivances, as he may wish, provided he is doing so in order to obtain food for his own use and on unoccupied Crown lands or other lands to which he may have a right of access. But that is not to say that he has the right to hunt dangerously and without regard for the safety of other persons in the vicinity. *Prince* . . . deals with "method". Neither that case nor those which preceded it dealt with the protection of human life. I agree with what was said in the present case by Mr. Justice Hall in the Court of Appeal for Manitoba:
>
> In the present case the governing statute is *The Wildlife Act*, *supra*, and in particular Sec. 41(1) thereof. Section 10(1) under which the accused were charged does not restrict the type of game, nor the time or method of

> hunting, but simply imposes a duty on every person of hunting with due regard for the safety of others. Does that duty reduce, detract or deprive Indians of the right to hunt for food on land to which they have a right of access? If one regards that right in absolute terms the answer is clearly in the affirmative; but is that the case? Surely the right to hunt for food as conferred or bestowed by the agreement and affirmed by the statute cannot be so regarded. Inherent in the right is the quality of restraint, that is to say that the right will be exercised reasonably. Section 10(1) is only a statutory expression of that concept, namely that the right will be exercised with due regard for the safety of others, including Indians. [pp. 141-42]

121 The overarching principle, now firmly entrenched in our jurisprudence, is that public safety enjoys preeminent status in matters of this kind. Or to use the words of *Myran*, the right must be exercised reasonably.

VII

122 We have concluded that the treaty right to hunt upon which the appellants rely in this case is subject to the internal limit that it cannot be exercised in a manner that is dangerous to the safety of the hunter or others. This is a general description of the limitation. We must still determine how this internal limit may be validly expressed in the regulatory context. Are the courts limited to case-by-case after the fact inquiries into whether a particular hunter on a particular occasion exercised the treaty right to hunt unsafely? Or can the province pass legislation or adopt regulations that define the limits of the right in a way that can be administered and understood by the aboriginal community?

123 The answer to this question is found in this Court's jurisprudence, which affirms the right of the province to determine and direct in advance the limits of a treaty right in a particular regulatory context, provided it does so reasonably. As Cory J., writing for the majority in *R. v. Nikal*, [1996] 1 S.C.R. 1013, stated:

> It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. . . . The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. . . . Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. [Emphasis added; para. 92.]

124 Similarly, in *Marshall No. 1*, the Court, after concluding that the treaty right to fish was inherently limited to quantities reasonably expected to produce a moderate livelihood, stated:

> Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard. [Emphasis in original; para. 61.]

The Court reaffirmed the province's right to define the reasonable limits of treaty rights through regulation in *Marshall No. 2*, stating:

> . . . regulations that do no more than reasonably *define* the Mi'kmaq treaty right in terms that can be administered by the regulator and understood by the Mi'kmaq community that holds the treaty rights do not impair the exercise of the treaty right . . . . [Underlining added; para. 37.]

125 These holdings are consistent with this Court's assertion in *Myran* that the treaty right must be exercised in a reasonable manner. Reasonable regulatory restrictions, including blanket prohibitions, which address legitimate safety concerns, will not infringe the treaty right.

126 The question before us is thus whether the province's ban on night hunting constitutes a reasonable exercise of the province's power to regulate the internal safety limit on the appellants' treaty right. Or, put differently, is this ban a reasonable way, in the regulatory context of the Province of British Columbia, to articulate the internal safety limitation on the treaty right to hunt?

127 The trial judge found that it was. He stated:

> [I]t is undeniably true that the Province of British Columbia has taken a firm and consistent attitude against night hunting, based upon the advice from conservation officers, that the practice is inherently unsafe. Certainly the evidence in this case supports such a finding. It is night hunting that brings added and unacceptable danger, according to the evidence. The evidence establishes that it is dangerous to permit the use of high-powered rifles in the dark, and to leave it to individual hunters to use their common sense to minimize those risks in the face of a sudden opportunity to kill game.
>
> . . .
>
> [I]t is apparent that the use of lights at night brings a new set of problems, even as it eliminates others. Most important, it brings the problem of tunnel vision, where the hunter becomes so focussed on the illuminated target, he tends to fail to be sufficiently aware of the periphery of his view, or even the background. This leads to a significant risk of accidental injury to persons or property. I do not question that proper training and other measures can be taken to reduce the risk, but we do not live in a perfect world. The statutory provision is directed at the issue of safety, and is reasonable on its face as a measure to help ensure that needless risk is avoided. [paras. 11 and 13]

128 These findings, shared by trial and appellate courts across the country, are manifestly reasonable. See *R. v. Seward* (1999), 171 D.L.R. (4th) 524 (B.C.C.A.); *R. v. Bernard* (2002), 200 N.S.R. (2d) 352, 2002 NSCA 5, leave to appeal refused, [2002] 3 S.C.R. vi; *R. v. Pariseau*, [2003] 2 C.N.L.R. 260 (Que. C.A.); *R. v. Southwind*, [1991] O.J. No. 3612 (QL) (Prov. Div.); *R. v. King*, [1996] O.J. No. 5458 (QL) (Prov. Div.); *R. v. Harris*, [1998] B.C.J. No. 1016 (QL) (Prov. Ct.); *R. v. Ice*, [2000] O.J. No. 5857 (QL)

(C.J.); *R. v. Stump*, [2000] 4 C.N.L.R. 260 (B.C. Prov. Ct.); *R. v. Barlow* (2000), 228 N.B.R. (2d) 289 (Q.B.), leave to appeal refused, [2001] N.B.J. No. 145 (QL), 2001 NBCA 44; *Turner v. Manitoba* (2001), 160 Man. R. (2d) 256, 2001 MBCA 207; *R. v. Augustine* (2001), 232 N.B.R. (2d) 313 (Q.B.), leave to appeal refused, [2001] N.B.J. No. 190 (QL), 2001 NBCA 57; *R. v. Maurice*, [2002] 2 C.N.L.R. 273, 2002 SKQB 68; *R. v. Pitawanakwat*, [2004] O.J. No. 2075 (QL), 2004 ONCJ 50; *R. v. Yapput*, [2004] O.J. No. 5055 (QL), 2004 ONCJ 318. For the opposing view see: *R. v. Maple*, [1982] 2 C.N.L.R. 181 (Sask. Prov. Ct.); *R. v. Machimity*, [1996] O.J. No. 4365 (QL) (Prov. Div.); and *R. v. Polches* (2005), 289 N.B.R. (2d) 72, 2005 NBQB 137.

129 The conclusion that a ban on night hunting is a reasonable exercise of the Province's regulatory power in defining the internal limit on the treaty right flows naturally and logically from the defining feature of nighttime — that is, darkness. The evidence at trial was more than sufficient to establish that one's ability to identify objects, estimate distances and observe background and surrounding items is greatly diminished in the dark, posing a real danger to other members of the public.

130 This added danger to hunting causes the risks associated with hunting at nighttime with a firearm to be unacceptably high. The *Wildlife Act* prohibition is a reasonable response to a real danger.

131 In *Seward*, the British Columbia Court of Appeal put it succinctly:

> The introduction of rifles has significantly heightened the danger of hunting. Not just the hunters, but anyone within a mile radius of a hunter is at risk. This is especially so at night when the fact of darkness transforms a dangerous endeavour into a hazardous one. It does not matter that an individual might be able to hunt at night without injuring anyone, the fact

> is that the possibility of death or injury is increased when visibility is decreased and one or more hunters are in the woods. [para. 47]

132 The impugned legislation thus regulates an area which lies entirely outside the treaty right to hunt. It therefore does not conflict at all with the treaty right. No aboriginal right is asserted, and absent a conflicting treaty or aboriginal right, reasonable provincial safety regulation of dangerous hunting practices cannot be said to intrude upon "core Indianness". It follows that the *Wildlife Act* prohibition on night hunting with a firearm is a valid provincial law applicable to the appellants *ex proprio vigore* and without recourse to s. 88.

133 We are not persuaded by the appellants' submission that the provincial power to legislate with respect to safety is restricted to the ability to prohibit unsafe hunting in a *general* manner. If provinces can prohibit "unsafe hunting", there is no reason why they should be precluded from identifying particular practices that are unsafe. This falls within the power of the provinces to reasonably regulate the internal limits on treaty rights, affirmed in *Marshall No. 1* and *No. 2* and *Sundown*.

134 Finally, we offer two brief observations concerning the joint reasons of Justices Deschamps and Abella.

135 First, in their view, the question on this appeal is the extent to which, if at all, provinces may validly interfere with treaty rights. With respect, we only reach that question if the impugned provincial legislation is first found to affect a treaty right. In this case, we are agreed that the Douglas Treaty does not confer a right to hunt dangerously. This renders hypothetical the question posed by our colleagues.

136 Second, Justices Deschamps and Abella find that a ban on hunting with a modern firearm at night is overly broad. They believe that the Douglas Treaty countenances only more limited prohibitions. In our respectful view, this constraint undermines the objective of legislation relating to a hunting practice which courts have consistently found inherently involves an unacceptable and elevated risk to the public.

137 The constitutional questions in the present appeal were stated as follows:

> l. Do ss. 27(1)(d) and (e) of the *Wildlife Act*, S.B.C. 1982, c. 57, constitutionally apply of their own force to the appellants in view of Parliament's exclusive legislative authority under s. 91(24) of the *Constitution Act, 1867*?
>
> 2. If not, do ss. 27(1)(d) and (e) of the *Wildlife Act*, S.B.C. 1982, c. 57, nonetheless apply to the appellants by virtue of s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5?

138 Since the proceedings relating to s. 27(1)(e) were conditionally stayed and no objection was made on appeal, it is not necessary for purposes of this appeal to assess the constitutionality of s. 27(1)(e).

139 With respect to s. 27(1)(d), the first question should be answered in the affirmative. Having concluded that s. 27(1)(d) of the *Wildlife Act* is a reasonable law of general application directed at safety that does not engage the appellants' treaty rights, and which applies *ex proprio vigore*, it is not necessary to answer the second question.

140 For these reasons, we would dismiss the appeal.

Appeal allowed, MCLACHLIN C.J. *and* BASTARACHE *and* FISH JJ. *dissenting.*

Solicitors for the appellants: Mandell Pinder, Vancouver.

Solicitor for the respondent: Ministry of the Attorney General, Victoria.

Solicitor for the intervener the Attorney General of Canada: Department of Justice, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General for Saskatchewan: Saskatchewan Justice, Regina.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Calgary.

Solicitor for the intervener the Eagle Village First Nation (Migizy Odenaw): Diane Soroka Barrister and Solicitor Inc., Westmount.

Solicitors for the intervener the Red Rock Indian Band: Duboff Edwards Haight & Schachter, Winnipeg.

Solicitors for the intervener Conseil de la Nation huronne-wendat: Langlois Kronström Desjardins, Québec.

Solicitors for the intervener Te'mexw Treaty Association: Cook Roberts, Victoria.

Solicitors for the intervener Chief Allan Claxton: Woodward and Co., Victoria.

Solicitors for the intervener Chief Roger William: Rosenberg & Rosenberg, Vancouver.