Court of Appeal for Saskatchewan **Citation: *R v Pierone*, 2018 SKCA 30**
Docket: CACR2987 **Date: 2018-04-27**

Between:

Kristjan H. Pierone

Appellant

And

Her Majesty the Queen

Respondent

Before:	Jackson, Caldwell and Schwann JJ.A.
Disposition:	Appeal allowed; acquittal entered
Written reasons by:	The Honourable Mr. Justice Caldwell
In concurrence:	The Honourable Madam Justice Jackson The Honourable Madam Justice Schwann
On Appeal From:	2017 SKQB 171, Swift Current
Appeal Heard:	December 11, 2017
Counsel:	Dusty T. Ernewein and Kelsey O'Brien for the Appellant Macrina K. Badger for the Respondent

Caldwell J.A.

[1] Kristjan Pierone appeals against a summary conviction appeal court judge's decision in *R v Pierone*, 2017 SKQB 171 [*Appeal Decision*], substituting a conviction for Mr. Pierone's acquittal after trial (*R v Pierone* (16 September 2016) Swift Current (Sask Prov Ct) [*Trial Decision*]) on a charge of unlawfully hunting under s. 25(1)(a) of *The Wildlife Act, 1998*, SS 1998, c W-13.12, namely, that he had hunted wildlife within Saskatchewan "other than at the times, in the places and in the manner prescribed" by that *Act*.

[2] In his appeal to this Court, Mr. Pierone asserts the appeal judge failed to correctly apply the applicable standard of review and failed to correctly apply the "test" outlined in *R v Badger*, [1996] 1 SCR 771. In *R v Badger*, the Supreme Court stated that whether an Indian has a right of access to private land for the purposes of exercising Treaty hunting rights is a question of fact. Having reviewed the matter on this basis, I find the conviction must be quashed. I would reinstate the acquittal entered by the trial judge.

[3] As a preliminary matter, Mr. Pierone requires leave to appeal under s. 4(4) of *The Summary Offences Procedure Act, 1990*, SS 1990, c S-63.1, which confers jurisdiction on this Court to determine second-level summary offence appeals in accordance with s. 839(1) of the *Criminal Code*, RSC 1985, c C-46. In this regard, in *R v Bray*, 2017 SKCA 17, the Court noted:

> [2] The right to appeal against the result of a summary conviction appeal is limited to questions of law alone and is exercisable only with leave of this Court or a judge of this Court (*Criminal Code*, s. 839). Leave to appeal is granted sparingly. In broad terms, an applicant must establish the proposed appeal raises a question of law that is either: (a) significant to the administration of justice generally—i.e., beyond the four corners of the case, or (b) compellingly meritorious in the particulars of the case in question. In its deliberations, the Court will consider whether the offence is serious, whether the applicant is facing a significant deprivation of liberty and whether denial of leave would result in an injustice going unaddressed. [Authorities omitted]

[4] Under these requirements, I am persuaded the appeal raises a question of law that is both significant to the administration of justice generally and compellingly meritorious in the particulars of this case. In the circumstances, I would grant leave to appeal.

[5] As to the appeal itself, the factual background is straightforward and largely undisputed. Mr. Pierone is a status Indian from Treaty 5 territory in northern Manitoba. He enjoys the right to

hunt under that Treaty.[1] He lives in and works from Swift Current, Saskatchewan, which is in Treaty 4 territory. An agreed statement of facts set forth the bare events that had led to the charge of unlawful hunting (as read):

> On September 30, 2015, the accused, Kristjan Pierone, shot a bull moose in a slough bottom of the northeast 10-18-14 West of the 3rd, also called the Land, approximately 70 meters off the roadway.
>
> The Land was owned by [Bymoen] Farming Company Limited and director of that corporation is Terry [Bymoen]. Terry [Bymoen] has the authority to determine who is permitted to hunt on the land and he did not, at any time, give consent to the accused to hunt on the land.
>
> … the accused partially processed the moose on site. The moose was then taken to RBM Meats in Rush Lake for further processing.
>
> The … accused has treaty Indian status and carries a treaty card. He did not have or carry any other valid tags for moose.
>
> And … moose season was not open on September 30, 2015.
>
> [Trial transcript at T2]

[6] In the *Trial Decision*, the judge adopted as additional facts the following circumstances, which were taken directly from the Crown's brief (as read):

> Mr. Pierone is a Treaty 5 status Indian and carries a treaty card. He is an experienced hunter and has done most of his hunting in northern Manitoba and northern Saskatchewan. He -- he describes those areas as open areas with lakes and bush.
>
> …
>
> The land and parts of the land were ceded pursuant to Treaty 4.
>
> Moose season in the area -- in the area was between October 1st and October 14th, 2015.
>
> Mr. Pierone scouted the general area in the days prior to September 30th, 2015, and had been living in Swift Current for approximately two years prior to this date. He was familiar with the area and knew that the land surrounding the slough was used for farming.
>
> … The land was cultivated land punctuated by sloughs which were part of the quarter section. The crop had been taken off the land and stubble remained.
>
> Mr. Stans -- Mr. Stan [a conservation officer] described the slough of the kill site as approximately 70 yards by 60 yards and has a slough that would be farmed in drier years.
>
> And let me just add, the evidence was also prelude [*sic* – proved?] it hadn't been farmed in recent couple of years.

[1] https://www.aadnc-aandc.gc.ca/eng/1100100028699/1100100028700

> The slough was bordered by a leinen grid -- leinen grid road --
>
> That's L-E-I-N-E-N.
>
> -- grid road. And the edge of the cultivated field on the land follows the contours of the slough. There were no posted signs on the land at the time of the incident.
>
> Mr. [Bymoen, the land owner] did not give Mr. Pierone permission to hunt on his land or right of access to enter upon his land.
>
> Mr. Pierone entered the slough area of the land to shoot moose, process meat and remove the meat from the land. ...
>
> Mr. Pierone drove off Highway 4 along the (INDISCERNIBLE) grid road to the kill site. The roads travelled were part of the provincial grid system.
>
> Mr. Pierone passed houses and farmyards. En route to the kill site, Mr. [Bymoen's] house was within two miles of the land.
>
> [T46–T48]

[7] At trial, the Crown had focused its arguments almost exclusively on whether Mr. Pierone, as a Treaty 5 Indian, is lawfully entitled to hunt within Treaty 4 territory on unoccupied Crown lands or any other lands to which Treaty 4 Indians have a *right of access* pursuant to the *Natural Resource Transfer Agreement, 1930*[2], which provides:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that *the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.*
>
> [Emphasis added]

[8] When determining what had been meant by "other lands to which the said Indians may have a right of access", Cory J. in *R v Badger* examined Indian hunting rights, Treaty 8 (Mr. Badger was a Treaty 8 Indian), oral histories, historical records and oral promises of Crown representatives (in which the words *taken up* are found), the jurisprudence, and the Alberta *Wildlife Act*. Justice Cory summarised his interpretation with these words: "An interpretation of the Treaty properly founded upon the Indians' understanding of its terms leads to the conclusion that the geographical limitation on the existing hunting right should be based upon *a concept of visible, incompatible land use*" (at para 54, emphasis added). This concept of *visible,*

[2] *The Saskatchewan Natural Resources Act*, RSC 1930, c 41, Schedule, Memorandum of Agreement, s. 12.

incompatible land use and those of land being *taken up* and of an Indian having a *right of access* to land, all speak to the same concept.

[9] The importance of *R v Badger* lies in Cory J.'s interpretation of the Treaty right to hunt for food and his conclusion that land must have been put to a *visible, incompatible use* before that right is displaced. I will not here repeat the full interpretation of the Treaty right in *R v Badger* because, as the decisions of the trial judge and appeal judge recognise, it is accepted that Cory J.'s conclusion is applicable to this case. Nonetheless, the following points taken from Cory J.'s analysis of the historical and evidentiary considerations arising in *R v Badger* assist with an understanding of what is meant by the "concept of visible, incompatible land use" (at para 53):

(a) a use must be incompatible with the exercise of the Treaty right in question;

(b) Indians would not have understood the concepts of private and exclusive property ownership separate from actual use;

(c) Indians understood land to have been *required* or *taken-up* for settlement "when buildings or fences were erected, land was put into crops, or farm or domestic animals were present";

(d) enduring church missions would also be understood to constitute settlement;

(e) physical signs shaped the Indians' understanding of settlement because they were the manifestations of exclusionary land use; and

(f) the presence of abandoned buildings would not necessarily signify to the Indians that land was taken up in a way that precluded hunting on them.

[10] Neither of the judges in this case directly addressed this point in his reasons, but I have no hesitation concluding that they each correctly approached the matter on the basis that Treaty 4 and Treaty 5 Indians would reasonably have understood at the time of signing those Treaties that Indians could continue to exercise their right to hunt on lands that had not been *taken up*, i.e., those lands that were not being put to a visible use that was incompatible with hunting.

[11] However, at the trial in Mr. Pierone's case, the Crown made almost no arguments on the issue of whether the land had been taken up. The Crown even declined to address whether a Treaty 4 Indian would have a right of access to the specific land on which Mr. Pierone, a Treaty 5 Indian, had shot the moose. Rather, the Crown steadfastly took the position that the issue did not arise in the circumstances because Mr. Pierone is a Treaty 5 Indian.

[12] The trial judge, however, saw things differently. He rejected the Crown's argument that Treaty 5 status precluded Mr. Pierone from exercising his Treaty right to hunt in Treaty 4 territory. The trial judge then went on to accept Mr. Pierone's submissions, finding that "the site of the kill … was not land that … was being put to any visible use, which was incompatible with the aboriginal [*sic*; Treaty] right to hunt for food." That is, the trial judge found the land had not been taken up and, therefore, that Mr. Pierone had a right of access to it to exercise his Treaty right to hunt. When it came to addressing the verdict in light of his findings, the trial judge said this:

> Clearly, Mr. Pierone is a status Indian and entitled to hunt according to the -- in accordance with the provisions of the *Natural Resources Transfer Agreement* and the *Saskatchewan Wildlife Act*. On the day in question, he entered onto -- onto an uncultivated slough -- slough bottom which abutted the roadway. *Pursuant to the rule in Badger, he had the right to enter the land -- enter and hunt on this land-- to -- on land at this description without the owner's express… permission.* This right, which extends to all treaty Indians in the province of Saskatchewan, pursuant to the *Natural Resources Transfer Act* and the -- and "Indians within the boundaries thereof" … of the province of the Saskatchewan, and not just to adherence of a particular treaty.
>
> Accordingly, I am satisfied that the hunting activities conducted by the accused in question were entirely in accordance with his rights of this Treaty and *Indian Act*. I find him not guilty.
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> [T49–T50, emphasis added]

[13] The Crown appealed against the acquittal entered by the trial judge. Although the Crown had made it the focal issue at trial, the Crown conceded in the summary conviction appeal that Mr. Pierone is lawfully entitled to hunt within Treaty 4 territory on unoccupied Crown lands and any other lands to which he has a right of access. For this reason, that legal issue was not at play in the appeal before the appeal judge and is not relevant to the appeal before us. However, the Crown's concession led the appeal judge to characterise the appeal before him as follows: "The sole issue in this case is whether or not the trial judge made a palpable and overriding or manifest

error in rendering the judgment in this case that he did dismissing the charge against Mr. Pierone" (at para 9). In this regard, the appeal judge's overall conclusion was:

> [30] Accordingly, I find and conclude that there was no basis in the facts and circumstances for any conclusion other than Mr. Pierone was guilty of unlawfully hunting contrary to ss. 25(1)(a) of *The Wildlife Act, 1998* as charged. Any other conclusion constitutes palpable and manifest error in law.

The appeal judge therefore set aside the acquittal and entered a conviction.

[14] Mr. Pierone now appeals to this Court against the conviction entered under the *Appeal Decision* by asserting the appeal judge failed to "correctly apply the standard of review" and failed to "correctly apply the test outlined in *R v Badger*." For the reasons that follow, I conclude that I need only address the allegation of error in respect of the standard of review.

[15] An allegation in this Court that a summary conviction appeal court judge has erred by failing to adhere to a standard of appellate review is an allegation of an error of law. In assessing the allegation as a ground of appeal, this Court must determine whether the summary conviction appeal court judge identified the correct standard of review and, if so, whether the summary conviction appeal court judge applied it correctly in the circumstances of the case.

[16] The questions put at issue by an appellant guide the summary conviction appeal court's identification or selection of the appropriate standard or standards of review. In its notice of appeal in this case, the Crown identified the questions for the appeal judge as whether the trial judge had "erred in law in concluding that Mr. Pierone had a Treaty right to hunt on the privately owned land in issue and misapplied the leading case law on these matters." As noted, the appeal judge identified this as raising a single issue in respect of which he found the standard of review was "palpable and overriding or manifest error" (at para 9) or "palpable and manifest error in law" (at para 30).

[17] Admittedly, determining the precise nature of the question the Crown had put before the appeal judge is not without its difficulty. The Crown had expressed the issue in terms of an error in law in its notice of appeal. However, as I see it, the issue the Crown had placed before the appeal judge actually raised a question of fact alone. At core, I say this because no one in this case has asked the courts to distinguish *R v Badger* or to reinterpret the Treaty right to hunt. To be clear about this, there is no question that Mr. Pierone, as a status Treaty 5 Indian who enjoys

Treaty hunting rights, may lawfully exercise those rights on Treaty 4 territory. There is no question that Mr. Pierone was lawfully exercising his right to hunt for the purpose of feeding his family. There is no question that the *Natural Resource Transfer Agreement, 1930* lawfully places geographic limits on Mr. Pierone's Treaty hunting rights. There is no question that *The Wildlife Act, 1998* is a constitutional statute.

[18] With all of that set to one side, the relevance of *R v Badger* lies in its identification, through the record of the three cases addressed in that decision, of the evidence that can inform the factual conclusion as to whether an Indian holds a right of access to private land for the purposes of exercising a Treaty right to hunt. I recognise that the Crown and Mr. Pierone, as well as many courts, have referred to the "*test*" in *R v Badger* but, for the purposes of determining the right of appeal and the applicable standard of review, as I read that decision, "test" is a term of no legal consequence. Rather, Cory J. interpreted the Treaty right to hunt and, in doing so, reduced the issue in future cases to whether the land was being put to a visible, incompatible use, which he said is a *question of fact* (at paras 58 and 61).

[19] For this reason, as I interpret it, the Crown's summary conviction appeal did not truly call upon the appeal judge to find legal error in the trial judge's application of "the leading case law on these matters." Given *R v Badger*, I find the issue before the appeal judge was not one of Treaty interpretation, constitutionality or the application of the law to the facts, but of whether the trial judge had erred when he found *as a fact* that the land upon which Mr. Pierone had shot the moose was not then being put to a visible, incompatible use, i.e., whether it had been taken up and, therefore, whether Mr. Pierone had a right of access to it.

[20] It is not open to the Crown to raise a question of fact in an appeal against an acquittal on an indictable offence (*Criminal Code*, s. 676(1)(a)). However, it is now settled that Parliament has conferred an all-but-symmetrical right of appeal on the Crown and offenders alike in summary conviction appeals under s. 813 of the *Criminal Code*: *R v Abramoff*, 2018 SKCA 21 at para 18; *R v Boyer*, 2018 SKCA 6 at para 34; *R v Wetzel*, 2013 SKCA 143 at paras 18 and 71-75, 427 Sask R 261; *R v Johnson*, [1986] 6 WWR 238 (Sask CA); *R v Nelson*, [1979] 3 WWR 97 (Sask CA); see also, *R v Labadie*, 2011 ONCA 227 at para 50, 275 CCC (3d) 75.

[21] The difference between the limited rights of appeal under ss. 675 and 676 of the *Criminal Code* in indictable matters and the open-ended right of appeal under s. 813 in summary conviction matters means the Crown may appeal against an acquittal after the trial of a summary conviction offence on questions of law, mixed fact and law, and fact alone. Nonetheless, whether the right of appeal is grounded under ss. 675, 676 or 813, the appeal itself in each case invokes the same appellate powers under s. 686, with such modifications as the circumstances may require (*Criminal Code*, s. 822(1)).

[22] As to modifications in Crown appeals against acquittals, the appeal court may allow the appeal where it is of the opinion that (i) the *verdict* should be set aside on the ground that it is unreasonable or cannot be supported by the evidence, (ii) the *judgment* of the trial court should be set aside on the ground of a wrong decision on a question of law, or (iii) on any ground finding a miscarriage of justice. Questions of fact alone would fall to be addressed under the ground that the verdict of acquittal is unreasonable or cannot be supported by the evidence. However, given the presumption of innocence and the corresponding burden on the Crown to prove its case beyond a reasonable doubt, "[i]t may be open to doubt, however, whether an acquittal based on a reasonable doubt can be unreasonable" per Watt J.A. in *R v Labadie* (at para 60). Nonetheless, as we received no submissions on this point, I would leave that doubt to be resolved another day.

[23] What remains to be determined under s. 813 is the standard of review applicable in a Crown appeal against an acquittal on a question of fact. To be clear, an appeal of this nature is an allegation that the verdict of acquittal is unreasonable or unsupported by the evidence, which is a question of law that engages the standard of review confirmed in *R v Biniaris*, 2000 SCC 15 at para 36, [2001] 1 SCR 381. However, I conclude the discrete questions of fact raised in this context are themselves assessed on the standard set forth in *R v R.P.*, 2012 SCC 22, [2012] 1 SCR 746:

> [9] … *The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge* (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19−21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).

> [10] Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7).
>
> [Emphasis added]

[24] On this basis, I find the two standards of review identified by the appeal judge were incorrect and that that misidentification led him to approach the issue before him incorrectly. However, it also follows from the foregoing that the appeal judge could not himself have erred *in law* in the application of *R v Badger* to the facts as he saw them because there is no true legal *test* in *R v Badger* to misapply. For this reason, and because all appeals are taken from a result, no purpose will be served by further addressing the analysis in the *Appeal Decision*.

[25] In these circumstances, all that remains is for this Court to determine afresh whether the trial judge committed the error of fact that the Crown raised through its appeal to the summary conviction appeal court. That is, in the circumstances of this appeal we must place ourselves in the same position as the appeal judge and determine whether the trial judge's finding that the land in question was not being put to a visible, incompatible use was a finding of fact essential to the verdict that was either (a) plainly contradicted by the evidence relied on by the trial judge in support of that finding or (b) incompatible with evidence that had not otherwise been contradicted or rejected by the trial judge.

[26] In this case, the Court's analysis must be framed by the fact that Mr. Pierone's acquittal had been grounded in a so-called *affirmative defence* to the charge of unlawful hunting, namely, that the out-of-season killing of the moose had resulted from the lawful exercise of his Treaty hunting rights. I say this even though I have some difficulty with the characterisation of an Indian's Treaty right to hunt for food as giving rise to a defence. It might be better understood as the presumption of a lawful right to hunt that the Crown must disprove or rebut beyond a reasonable doubt whenever the accused is an Indian so as to make out the offence unlawful hunting under *The Wildlife Act, 1998*. However, because the result of this appeal would be the same under each approach, the distinction is not material. Furthermore, the trial judge proceeded on the basis that a Treaty right gave rise to a defence, and the appeal can only be taken to have been presented to us in those terms.

[27] In that regard, in *R v Fontaine*, 2004 SCC 27, [2004] 1 SCR 702, Fish J., writing for the Court, observed that the persuasive and evidential burdens in affirmative defences, unlike reverse onus defences, are divided. In particular, he wrote:

> [56] As regards these "ordinary", as opposed to "reverse onus" defences, the accused has no persuasive burden at all. *Once the issue has been "put in play"* (*R. v. Schwartz*, [1988] 2 S.C.R. 443), *the defence will succeed unless it is disproved by the Crown beyond a reasonable doubt.* Like all other disputed issues, however, defences of this sort will only be left to the jury where a sufficient evidential basis is found to exist. That foundation cannot be said to exist where its only constituent elements are of a tenuous, trifling, insignificant or manifestly unsubstantive nature: there must be evidence in the record upon which a properly instructed jury, acting judicially, could entertain a reasonable doubt as to the defence that has been raised.
>
> [57] From a theoretical point of view, "reverse onus" defences and "ordinary affirmative defences" may thus be thought to be subject to different evidential burdens. But in this as in other branches of the law, pure logic must yield to experience and, without undue distortion of principle, to a more practical and more desirable approach. *In determining whether the evidential burden has been discharged on any defence, trial judges, as a matter of judicial policy, should therefore always ask the very same question: Is there in the record any evidence upon which a reasonable trier of fact, properly instructed in law and acting judicially, could conclude that the defence succeeds?*
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> [Italics emphasis added, underline in original]

See also *R v Cinous*, 2002 SCC 29 at paras 48–91, [2002] 2 SCR 3, per McLachlin C.J.S. and Bastarache J. (L'Heureux-Dubé and LeBel JJ. concurring; Gonthier and Binnie JJ. concurring under separate reasons; and Iacobucci, Major and Arbour JJ. dissenting); and *R v Gunning*, 2005 SCC 27 at paras 30–33, [2005] 1 SCR 627, per Charron J. for the Court.

[28] Given how Cory J. in *R v Badger* interpreted the Treaty right to hunt, there would seem few constituent elements to the defence raised by Mr. Pierone in answer to the charge of unlawful hunting under *The Wildlife Act, 1998*. That is, the defence is "in play" when there is evidence in the record that an accused is a status Indian who was exercising his Treaty right to hunt for food on land said to be unoccupied. At that point, recognising that the Crown has the burden of persuasion throughout a trial, the defence will succeed unless the proposition put in play by the defence of a Treaty right to hunt is disproved by the Crown beyond a reasonable doubt (*R v Fontaine*).

[29] As noted earlier in these reasons, it has been established under the agreed statement of facts that Mr. Pierone is an Indian who was hunting for food in a slough bottom adjacent to a

grid road. The question for this Court is, therefore, whether the Crown had established beyond a reasonable doubt that the slough upon which Mr. Pierone had shot and killed a moose was then being put to a *visible use* that was *incompatible* with the exercise of his Treaty right to hunt.

[30] Returning to the standard of review, given the foregoing, I have no hesitation concluding that an error of fact as to whether land was being put to a visible, incompatible use impugns a finding of fact essential to the affirmative defence raised in this case and, therefore, one that is essential to the verdict (*R v R.P.* at para 9). The question then is whether that finding is plainly contradicted by the evidence the trial judge relied upon or incompatible with evidence that had not otherwise been contradicted or rejected by the trial judge.

[31] Axiomatically, because each case that deals with the concept of visible, incompatible land use is assessed on its own facts, the factual circumstance assessed in each case facilitates a greater understanding of the affirmative defence. In that regard, Cory J.'s examination of the relevant evidence in the three separate appeals determined under *R v Badger* identifies some of the evidence courts may consider when determining whether an Indian's right of access to private land to hunt for food has been displaced by a visible, incompatible land use. Justice Cory wrote:

> [67] The first is Mr. Badger. He was hunting on land covered with second growth willow and scrub. Although there were no fences or signs posted on the land, a farm house was located only one quarter of a mile from the place the moose was killed. The residence did not appear to have been abandoned. Second, Mr. Kiyawasew was hunting on a snow-covered field. Although there was no fence, there were run-down barns nearby and signs were posted on the land. Most importantly, the evidence indicated that in the fall, a crop had been harvested from the field. In the situations presented in both cases, it seems clear that the land was visibly being used. Since the appellants did not have a right of access to these particular tracts of land, their treaty right to hunt for food did not extend to hunting there. As a result, the limitations on hunting set out in the *Wildlife Act* did not infringe upon their existing right and were properly applied to these two appellants. The appeals of Mr. Badger and Mr. Kiyawasew must, therefore, be dismissed.
>
> [68] However, Mr. Ominayak's appeal presents a different situation. He was hunting on uncleared muskeg. No fences or signs were present. Nor were there any buildings located near the site of the kill. Although it was privately owned, it is apparent that this land was not being put to any visible use which would be incompatible with the Indian right to hunt for food. Accordingly, the geographical limitations upon the Treaty right to hunt for food did not preclude Mr. Ominayak from hunting upon this parcel of land. This, however, does not dispose of his appeal. It remains to be seen whether the existing right to hunt was in any other manner circumscribed by a form of government regulation which is permitted under the Treaty.

[32] In decisions subsequent to *R v Badger*, the courts of this province have identified additional circumstances, supplementing evidence of the nature considered by Justice Cory. For example, in *R v Ahenakew*, 2000 SKQB 425, 197 Sask R 195, Ryan-Froslie J. (as she then was) wrote:

> [11] In the case at bar, it is clear that there was a three strand fence and gate around the land in issue. This, coupled with the close proximity of residences, constituted "visible use" of the land in question. The use was incompatible with that of hunting. Only if the appellants had obtained the consent of the owner would they have the right to hunt on the said land. This is not the same situation as the P.F.R.A. or co-op pasture land. In those instances the appellants had "consent" to hunt on that land once the cattle were removed. They had no such consent in the case at bar. The facts are not unlike those set out in *R. v. Peeace* (1999), 182 Sask. R. 9 (Q.B.) and approved by the Saskatchewan Court of Appeal at (2000), 189 Sask. R. 117 (C.A.). The "visibly incompatible" test does not necessarily require the actual presence of people or domestic animals. The fact that the land in question was visibly in use as pasture would be sufficient to render it incompatible with hunting.

[33] The facts of *R v Peeace* (1999), 182 Sask R 9 (QB), aff'd 2000 SKCA 16, 189 Sask R 117, are also instructive. They were related by Krueger J. in his summary conviction appeal decision:

> [4] The appellant, George Peeace, is a member of the Yellow Quill First Nation which was a party to Treaty No. 4. On October 15, 1995, he shot, with a high powered rifle, two cow moose for food. The land on which the moose were shot was privately owned. It was at the time in summer fallow, although there were some unbroken bush covered areas. It had been cropped the previous year and it was the intention of the owner to plant a cereal crop the following year. There were no signs, fences, buildings, corrals or domestic animals on the land. The owner and his family lived approximately two miles away. There was another occupied farm site about a mile away, however, because of the terrain the farm buildings could not be seen from the spot where the moose were shot. The appellant did not seek or obtain permission to hunt on the private land.

Importantly, Mr. Peeace had conceded at trial that the land in question had been *blackened*, was being *rested*, and would be "seeded next spring" (Court of Appeal decision at para 5). That is, that it had been and was still being put to an agricultural use.

[34] Although his reasons are short and were given orally, I am satisfied from my review of the transcript that the trial judge well-understood that the evidential and persuasive burdens lay with the Crown. It is also clear that the Crown did not present any argument on the concept of visible, incompatible use as it pertained to the land in question. Recall, the Crown asserted that the sole issue before the trial judge was whether Mr. Pierone, as a Treaty 5 Indian, could exercise his Treaty 5 hunting rights on Treaty 4 territory. The Crown maintained this focus even though

Mr. Pierone had advanced a defence that focused on the concept of visible, incompatible land use and in the face of questions from the trial judge, who had tried to delve further into that concept in the circumstances of this case.

[35] The trial judge sought briefs from counsel on the issue and, when the trial resumed after a two-month adjournment, the trial judge inquired as to whether there would be further submissions. Having been told there would be none, the trial judge rendered his verdict dismissing the information. The transcript records the trial judge's analysis of the issues before him. As it is relatively short and unreported, I will reproduce it here:

> THE COURT: Not surprisingly, the accused argues that the place and circumstances of the kill fell within the rules set out in a Supreme Court of Canada -- the *Badger* case, found at [1996] 1 SCR 771, which -- I'm having trouble reading my own handwriting. I think the word is decided. Which decided from that day on (INDISCERNIBLE) land where there were no buildings. The -- where the site of the kill was permissible because it was not land that was -- that was being put to any visible use, which was incompatible with the aboriginal right to hunt for food.
>
> The Crown's submission -- it is the Crown's submission and the rule in *Badger*'s case does not apply to Mr. Pierone because he is not [*sic*] a Treaty 5 Indian -- because he is a Treaty 5 Indian and not a Treaty 4 Indian. And in the Crown's brief, it reads as follows. Page 7. Mr. Pierone is -- and this is a quote from the Crown brief. Paragraph 20. (as read)
>
> > Mr. Pierone is a different person than *Ahenakew* and *Badger*. Mr. Pierone is a Treaty 5 Indian and was living on Treaty 4 land. He can not claim the rights given to -- to Treaty 4 Indians to hunt on this land 'cause he is not entitled to the benefits of Treaty 4. Mr. Pierone may have a treaty right to hunt on lands surrendered to Treaty 5, but he does not have a similar right to hunt on Treaty 4 land. Therefore, Mr. Pierone cannot turn to the -- to a treaty right as Mr. Badger and Mr. Ahenakew could to invoke -- could invoke, in order to justify the hunt. He can only rely on Section 12 of the *NRTA*, the *Natural Resources Transfer Agreement*.
>
> Paragraph 12 of the *Natural Resources Transfer Agreement* set out this -- set out in many places. But I'll read it from page 4 of the Crown brief just 'cause (INDISCERNIBLE) hand. (as read)
>
> > In order to secure to the Indians of the Province --
>
> And then, of course, where we say parenthetically is the province of Saskatchewan.
>
> > In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries --
>
> Placing emphasis upon the words within the boundaries thereof. And thereof is referring to the province of Saskatchewan.

> -- provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and other lands to which the said Indians have a right of access.
>
> I do not believe the agreement that I just read from, nor the Saskatchewan *Wildlife Act* intended to draw this distinction -- this distinction drawn by the Crown and its words to not express that intention. Rather, the words -- the word "Indian" carries the same meaning as is given in the *Indian Act*. Clearly, it includes all Indians who in -- who in the personally -- who meet the qualifications set out in the *Indian Act*, resulting in the person in question possessing a treaty card. Mr. Pierone is such a person.
>
> Clearly, Mr. Pierone is a status Indian and entitled to hunt according to the -- in accordance with the provisions of the *Natural Resources Transfer Agreement* and the *Saskatchewan Wildlife Act*. On the day in question, he entered onto -- onto an uncultivated slough -- slough bottom which abutted the roadway. Pursuant to the rule in *Badger*, he had the right to enter the land -- enter and hunt on this land -- to -- on land at this description without the owner's express commission -- permission. This right, which extends to all treaty Indians in the province of Saskatchewan, pursuant to the *Natural Resources Transfer Act* and the -- and "Indians within the boundaries thereof" (quotes around Indians within the boundary thereof) of the province of the Saskatchewan, and not just to adherence of a particular treaty.
>
> Accordingly, I am satisfied that the hunting activities conducted by the accused in question were entirely in accordance with his rights of this treaty and *Indian Act*. I find him not guilty.
>
> [T48–T50]

Although largely conclusory in terms of the issue pending before this Court, the trial judge undoubtedly determined that the Crown had not discharged its burden of persuasion on the evidence before him—i.e., the Crown had not disproved the defence beyond a reasonable doubt.

[36] I find no error in the trial judge's conclusion. In my assessment, the evidence did not establish beyond a reasonable doubt that the slough was being put to a *visible* use that was *incompatible* with hunting.

[37] To explain this conclusion, I begin from the premise that Treaty 4 and Treaty 5 Indians would reasonably have understood at the time of signing those Treaties that they could continue to exercise their right to hunt on land *in the nature of the slough in question*. I have approached the matter on the basis that Indians at the time of Treaty-signing—i.e., Treaty 4 in 1874 and Treaty 5 in 1875—would not have had an appreciation of the principles of real property law then or now in play. The Treaties predate the enactment of the Torrens system in what is now Saskatchewan under the *Territories Real Property Act*, RSC 1886, c 26, and their negotiation

and signing took place contemporaneous with the great survey under the *Dominion Lands Act*, SC 1872, c 23, which gave rise to the quadrilateral- or grid-system of legal land descriptions and boundaries in what is now southern Saskatchewan (see, Georgina R. Jackson, Master of Titles, *Land Titles in Saskatchewan: Manual of Law and Procedures, Saskatchewan Land Titles Offices*, vol 1 (Regina: Saskatchewan Justice, 1988) at 1–2)[3]. These concepts were not part of Indians' historical understanding of land *ownership* (I use that word guardedly) or use. In this regard, I agree with and adopt the conclusion drawn by the trial court in *R v Peeace*, [1999] 3 CNLR 286 (Sask Prov Ct)[4], where Ebert P.C.J wrote:

> [23] I am not convinced that the Supreme Court of Canada in dealing with the issue [in *R v Badger*] ever considered that there would be defined spatial boundaries that would determine where hunting was allow[ed]. The trial Court was to consider the specific circumstances and make a case specific determination of whether or not the land was being put to visible [in]compatible use. In my view, the definition of the area in a specific legal or spatial dimensions would not be reflective of either the Aboriginal understanding of the right to hunt or the Supreme Court of Canada's direction regarding interpretation of Aboriginal rights. There is also no evidence before this Court that Indians would have been aware of such concepts of land ownership. It was the visible occupation of the land that signaled that it was being taken up for settlement or other purposes.
>
> …
>
> [28] The determination of whether the area to be considered in applying the *Badger* test ought to be set out in sections or quarter sections, in my view, is not in accord with the reasoning or the principles set out in *Badger*.

[38] I note in addition that the Court in *R v Bartleman* (1984), 13 CCC (3d) 488 at 506 (BCCA), stated:

> ... [T]he hunting must take place on land that is unoccupied in the sense that the particular form of hunting that is being undertaking does not interfere with the actual use and enjoyment of the land by the owner or the occupier.

[39] Turning to the evidence in this case, the agreed statement of facts and additional findings of fact set out the basic circumstances (see paras 5 and 6 of these reasons). Further, I note that, although not the subject of express findings of fact by the trial judge, the testimony of the Crown's sole witness, a conservation officer, supported the following:

(a) there were no residences in the immediate area;

(b) there were no game preserves in the area;

[3] http://www.publications.gov.sk.ca/freelaw

[4] Although the same style of cause and contemporaneous, this is a different case than the *R v Peeace* case referred to earlier in these reasons.

(c) there were no pasture lands in the area;

(d) the slough was not fenced-off or separated from the agricultural land around it; and

(e) the contour of the slough was "sort of in a semi-circle out into the field".

In addition, the photograph of the kill site introduced into evidence through the conservation officer depicts an overgrown, wet slough-bottom at a lower elevation than the surrounding cultivated field.

[40] Mr. Pierone, who was the sole defence witness, testified in chief and under cross-examination to the following effect, but, again, there were no express findings of fact with regard to this testimony:

(a) he did not walk on any cultivated land or drive on any stubble;

(b) he could not see any houses, yard sites, livestock, or equipment from the area of the slough;

(c) he did not think sloughs off the grid roads were owned by farmers;

(d) he would not have shot the moose if it had been on cultivated land; and

(e) there was a farm along the grid road immediately off the highway, but none for the next five or six miles to where the slough was located.

[41] Presumably, the trial judge had not focused on this evidence because the Crown's arguments at trial had directed his gaze elsewhere but the evidence nevertheless either supports or is not inconsistent with his overall conclusion. Moreover, this evidence was uncontradicted and unchallenged in cross-examination.

[42] On this basis, I find the land in question for the purposes of determining whether there had been a visible, incompatible use is the *slough* in which Mr. Pierone shot and killed the moose. It does not extend to the full quarter section of cultivated farmland upon which the slough is located, although that land and the agricultural use to which it was being put is still

relevant to the analysis (e.g., if there had been animals, buildings, or equipment present or indicated). I draw this conclusion because the slough is sufficiently large in area (60 by 70 metres or yards), geographically distinct from the cultivated field, and at a lower elevation, being a slough. There was no evidence as to the calibre or range of Mr. Pierone's rifle or as to how far a bullet fired from it might have travelled. Nor was there any indication other than that Mr. Pierone had simply stopped on the grid road, walked down the bank of the road allowance into the edge of the slough (about 70 metres) and fired one shot from a short distance, downing a standing moose. His second shot had been a *coup de grâce* fired at closer range. Mr. Pierone processed the moose carcass in the slough and removed the meat from the slough all without accessing the cultivated field. That is, nothing on the evidence suggests the cultivated part of the quarter section had been involved in or affected by Mr. Pierone's hunt.

[43] As to the slough itself, in the sister case to *R v Badger* (namely, *R v Ominayak*), Mr. Ominayak had been hunting on uncleared muskeg, with no fences or signs posted, no buildings located near the site of the kill, which led the Court to find the land was not being put to any visible use that was incompatible with the right to hunt for food. The same may be said in this case. There were no buildings near the slough or the quarter section of land upon which it sat, or in the immediate area. There were no fences. There were no posted signs. The remainder of the quarter section was cultivated land (a stubble field at the time) and had, thereby, been put to a visible, incompatible land use; but, the same cannot be said of the slough. It had not been farmed in a couple years, or since Mr. Pierone had moved to the area. On the evidence then, although the slough may have been used, its use at the time was not *incompatible* with the hunt as carried out by Mr. Pierone.

[44] The trial judge's oral reasons were undoubtedly conclusory in respect of the issue before this Court. However, I am not persuaded the trial judge failed to appreciate the concept of visible, incompatible use explained in *R v Badger*. Having reviewed the evidence at trial, I am unable to find the trial judge's factual conclusion that the slough was *not* being visibly put to a use that was incompatible with Mr. Pierone's exercise of his Treaty right to hunt was either plainly contradicted by the evidence or incompatible with evidence that had not been otherwise contradicted or rejected by the trial judge. For this reason, there is simply no basis to interfere with the trial judge's factual conclusion.

[45] In short, I find the Crown did not disprove Mr. Pierone's defence to the charge of unlawful hunting under *The Wildlife Act, 1998* beyond a reasonable doubt. I, therefore, conclude the verdict dismissing the information was not unreasonable or unsupported by the evidence.

[46] I would allow the appeal, quash the conviction entered at the Court of Queen's Bench and reinstate the dismissal of the information against Mr. Pierone.

"Caldwell J.A."
Caldwell J.A.

I concur.

"Caldwell J.A."
for Jackson J.A. per authorisation

I concur.

"Schwann J.A."
Schwann J.A.