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September 14, 2022

The Hon. Heather Stefanson
Premier of Manitoba
204 Legislative Building
450 Broadway
Winnipeg, MB R3C 0V8

The Hon. Greg Nesbitt
Minister of Natural Resources
and Northern Development
330 Legislative Building
450 Broadway
Winnipeg, MB R3C 0V8

The Hon. Kevin Goertzen
Minister of Justice and Attorney General
104 Legislative Building
450 Broadway
Winnipeg, MB R3C 0V8

The Hon. Alan Lagimodiere
Minister of Indigenous Reconciliation
and Northern Relations
301 Legislative Building
450 Broadway
Winnipeg, MB R3C 0V8

Dear Premier and Ministers:

**RE: Third Request to cancel Non-Indigenous Moose Hunting Licences in GHA's and areas affected by *Moose Conservation Closure Regulation 122/2011*
Request to Suspend All Moose Hunting Licences until Indigenous Food Harvest is Assured
Call on Manitoba to recognize Aboriginal, Treaty, NRTA and s. 35(1) Right of Top Priority**

Further to the letters dated December 7, 2021 and May 30, 2022 from the Manitoba Keewatinowi Okimakanak, Inc., I am writing to once again express the deep concern and disappointment of MKO that the province of Manitoba has yet to reply to either of MKO's letter or to the letter from Chief Nelson Genaille of the Sapotaweyak Cree Nation dated December 3, 2021 or to the letter of May 30, 2022 from the Cross Lake Band/Pimicikamak Okimowin that is co-addressed to each of you or your predecessor Ministers.

By any standard of measurement, the passage of nine months without a substantive direct response on behalf of the Crown to the issues and requests presented in these letters is inconsistent with the promises of Treaty, the NRTA, the rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* or with the *Path to Reconciliation Act*. The letter from the A/Director of the Fish and Wildlife Branch to MKO dated August 18, 2022 makes no mention of the several correspondences from Sapotaweyak, Cross Lake/Pimicikamak and MKO and does not provide or represent a response by the Crown to these letters.

During MKO's meeting with Minister Lagimodiere and Minister Piwniuk on June 7, 2022, Minister Lagimodiere directed senior officials of Natural Resources and Northern Development to "have a conversation" with MKO officials regarding the MKO submissions on June 7, 2022 and the several correspondences from Sapotaweyak, Cross Lake/Pimicikamak and MKO. No such conversation with MKO has been initiated or requested by Manitoba.

MKO notes that the moose season for licenced non-Indigenous hunters in the areas affected by the lottery is now scheduled to open on September 19, 2022. MKO reiterates that Manitoba has now had nine months to consider, respond to and engage Sapotaweyak, Cross Lake/ Pimicikamak and MKO.

As an initial contribution by MKO to the conversation proposed by Minister Lagimodiere, please find attached the formal legal opinion of the Manitoba Public Interest Law Centre which confirms that the assertions and requests in our correspondences are correct in law and concludes:

“Based on Supreme Court of Canada jurisprudence dating back over 30 years, we agree with MKO that “First Nations have a right of top priority to hunt moose for food” and that “until such time as it is confirmed that the food needs of the MKO First Nation communities are met, Manitoba must ensure the Indigenous top priority”.

“Manitoba is vulnerable to a claim of unjustifiably infringing First Nations’ right to harvest moose. The allocation of moose hunting licences to non-Indigenous hunters under the Closure Regulation, the Licences Regulation and lottery system fails to prioritize and accord a top priority to the First Nations’ right to harvest moose for food. In doing so, it is unjustifiably infringing this right.”

Please also find attached MKO Assembly Resolution 2022-08-09, *Ensuring the First Nation Top Priority to Hunt Moose and Demand to Cancel Non-Indigenous Moose Hunting in the MKO Region.*

Accordingly, MKO makes our third request that Manitoba take rights seriously and accord a top priority to the Aboriginal, Treaty, NRTA and the s. 35(1) right of MKO First Nation persons to hunt for food by:

1. Cancelling any licence that may have been issued by Manitoba to non-Indigenous persons to hunt moose in any area affected by the *Moose Conservation Closure Regulation 122/2011*;
2. Immediately cancelling the moose lottery within the MKO region and to cancel any licence that may have been issued to a non-Indigenous person in the areas affected by the lottery; and

MKO further requests that Manitoba:

3. Cancel any licence for non-Indigenous persons to hunt moose within the MKO region issued to outfitters and guides pursuant to the *Allocation of Hunting Licences Regulation*, and
4. Immediately engage the MKO First Nations and MKO to establish an ongoing process to accord the top priority and to inform the MKO First Nations and Manitoba whether the outstanding food requirements of the MKO First Nations are met on a First Nation by First Nation basis.

Please contact Brennan Manoakeesick, MKO Chief of Staff, at (204) 795-0449 and at brennan.manoakeesick@mkonorth.com and Michael Anderson, MKO Policing and Public Safety Advisor, at (204) 202-4182 and at michael.anderson@researchanalyst.ca to confirm Manitoba’s responses to this urgent matter.

Sincerely,



Grand Chief Garrison Settee
MANITOBA KEEWATINOWI OKIMAKANAK, INC.

Encl. 2
cc. MKO First Nations
Byron Williams, Director, Public Interest Law Centre

Manitoba Keewatinowi Okimakanak, Inc.
41st Annual General Assembly
Opaskwayak Cree Nation
August 23, 24, & 25, 2022

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Resolution #2022-08-09

RE: ENSURING THE FIRST NATION RIGHT OF TOP PRIORITY TO HUNT MOOSE AND DEMAND TO CANCEL LICENCED NON-INDIGENOUS MOOSE HUNTING IN THE MKO REGION

WHEREAS, As confirmed by the Supreme Court of Canada decision in *R. v. Sparrow*, the MKO First Nations exercise a constitutionally-protected right of top priority to hunt moose for food in accordance with the Aboriginal right, which top priority applies to the promises of Treaty, paragraph 13 of the Schedule to the *Manitoba Natural Resources Transfer Act, 1930* (MNRTA) and the rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*;

WHEREAS, Since 2011, Manitoba has imposed a closure of moose hunting by all persons including rights-holding First Nations persons through the *Moose Conservation Closure Regulation 122/2011* in Game Hunting Areas (GHA) 12, 13, 13A, 14, 14A, 18, 18A, 18B, 18C, 21, 21A (excluding Black Island), 29, 29A, on designated lands or any land in GHA 26;

WHEREAS, The *Moose Conservation Closure Regulation 122/2011* purports to licence hunting by non-Indigenous persons at the same time as the rights-based Indigenous harvest is restricted, as Manitoba suggested in the *Moose Conservation Closure Regulation* and in a letter from Manitoba to the Sapotaweyak Cree Nation dated November 10, 2021;

WHEREAS, On April 20, 2022, Manitoba announced a moose lottery for the issuance of licences to non-Indigenous hunters which affects Game Hunting Areas (GHAs) 2A, 4, 6A, 7, 7A, 9A, 10, 11 in the MKO region; and

WHEREAS, Manitoba has taken no known steps to inform itself and to ensure that any outstanding food requirements of First Nations are met and to ensure that the potential harvest of moose by licences non-Indigenous hunters does not unjustifiably infringe the top priority to a rights-based harvest by First Nations of sufficient moose to meet the food needs of a community.

THEREFORE, BE IT RESOLVED, The MKO Chiefs in Assembly demand that until such time as it is jointly confirmed between the MKO First Nations and Manitoba that the top priority to harvest moose to meet the food needs of the MKO First Nation communities is met, Manitoba must:

- a) Immediately discontinue the issuance of any licences and cancel any licences that have been issued to non-Indigenous persons for the foreseeable future in the MKO region;
- b) Immediately cancel the moose lottery and cancel any licence that may have been issued; and
- c) Immediately engage the MKO First Nations and MKO to establish an ongoing process to accord the top priority and to inform the MKO First Nations and Manitoba whether the outstanding food requirements of the MKO First Nations are met on a First Nation by First Nation basis.

MOVED BY: Chief David Monias, Pimicikamak Cree Nation
SECONDED BY: Councillor Reynold Cook, Sapotaweyak Cree Nation (Proxy)
CARRIED: YES
Vote: For: 14 Opposed: 0 Abstentions: 0

*Certified copy of a Resolution adopted at the MKO 41st Annual General Assembly
August 23, 24 & 25, 2022*


MKO Grand Chief Garrison Settee



To: Manitoba Keewatinowi Okimakanak, Inc.

From: Byron Williams and Natalie Cops¹

Date: September 13, 2022

Topic: MKO Legal Opinion - Moose Conservation and Allocation Measures

Overview

Prioritizing First Nation harvesting rights for food is a mandatory constitutional obligation.

When the Crown regulates the constitutionally protected hunting or fishing rights of First Nation persons for conservation purposes, it must prioritize First Nation harvesting of the game or fish population subject to regulation. The Crown must ensure any outstanding food requirements of a First Nation are met and given top priority before issuing licenses to non-Indigenous hunters or fishers.

Similarly, when the Crown regulates the allocation of populations of animals in a game hunting area that are harvested by First Nation persons pursuant to the exercise of harvesting rights it must give top priority to First Nation harvesting of the population of animals.

The *Moose Conservation Closure Regulation* (“*Closure Regulation*”), the *Allocation of Hunting Licences Regulation* (“*Licenses Regulation*”) and the lottery system for the distribution of moose hunting licences to non-Indigenous hunters fail to accord top priority to the right of First Nations Peoples to harvest moose for food.

These regulations and the lottery system are vulnerable to a constitutional challenge that Manitoba has unjustifiably infringed the rights of First Nations Peoples to harvest moose for food.

¹ Byron Williams is the Director of the Public Interest Law Centre of Legal Aid Manitoba. Natalie Cops is an independent lawyer providing analytical support on legal matters involving the law-making capacity of MKO First Nations.

Background

We have reviewed the *Closure Regulation*², the *Licences Regulation*³ and lottery system⁴ as well as written materials by MKO,⁵ the Pimicikamak Okimowin⁶ and the Sapotaweyak Cree Nation.⁷

Historically and currently, First Nation peoples in Manitoba have harvested moose for food, social and ceremonial purposes. The right to harvest moose is recognized by treaty, by the *Natural Resources Transfer Agreement*,⁸ and by Section 35 of the *Constitution Act, 1982*.⁹ Information provided by MKO suggests that First Nations peoples in Manitoba struggle to harvest enough moose to exercise this right and to meet community needs.¹⁰

At this time, the lands on which First Nations peoples have traditionally harvested moose are regulated by Manitoba. These lands are divided into Game Hunting Areas (“GHA”). Manitoba purports to manage the GHAs to conserve and enhance wildlife populations.¹¹

Due to concerns with declining moose populations, Manitoba enacted conservation measures to protect and recover existing population levels. The *Closure Regulation* prohibits any person (including First Nations) from harvesting moose in certain GHAs.¹² In other GHAs, rather than enact a hunting closure, Manitoba has introduced a lottery system to manage the number of non-First Nations hunters harvesting moose in those areas.¹³

Pursuant to section 4 the *Licences Regulation*, the Crown allocates new hunting licences to eligible outfitters or guides:

² *Moose Conservation Closure Regulation*, Man Reg 122/2011, s 4(1). [*Moose Conservation Closure Regulation*].

³ *Allocation of Hunting Licences Regulation*, Man Reg 77/2006 [*Licences Regulation*].

⁴ Press Release, PROVINCE ANNOUNCES CHANGES TO MOOSE HUNTING IN SOME AREAS TO HELP PROTECT MOOSE POPULATION (20 April 2022) online: [Province of Manitoba | News Releases | Province Announces Changes to Moose Hunting in Some Areas to Help Protect Moose Population \(gov.mb.ca\)](https://www.gov.mb.ca/news/releases/2022/04/20220420_moose_hunting.html).

⁵ MKO, *Ensuring the First Nation Right of Top Priority to Hunt Moose - Cancellation of Licenced Non-Indigenous Moose Hunting in the MKO Region*, June 7, 2022. Grand Chief Garrison Settee, *Second Request*, May 30, 2022. Grand Chief Garrison Settee, *Request to cancel Non-Indigenous Moose Hunting Licences in GHA’s and areas affected by Moose Conservation Closure Regulation 122/2011 Call on Manitoba to recognize Aboriginal, Treaty, NRTA and s. 35(1) Right of Top Priority*, December 7, 2021.

⁶ Chief David Monias, *Request to Cancel Moose Lottery and All Licenced Harvesting in Cross Lake Resource Area Call on Manitoba to recognize Aboriginal, Treaty, NRTA, NFA and s. 35(1) Right of Top Priority*, May 30, 2022.

⁷ Chief Nelson Genaille, *Demand to Immediately Cancel Licencing of Non-Indigenous Moose Hunts Recognize Sapotaweyak’s Treaty and NRTA Right of Top-Priority to Hunt Moose*, December 2, 2021.

⁸ Schedule 1 to the *British North America Act, 1930* (U.K.), renamed the *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V., c. 26, reprinted in R.S.C. 1985, App. II, No. 26 (the *Memorandum of Agreement* with respect to the administration and control of natural resources in Manitoba) [*NRTA*].

⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*].

¹⁰ MKO, *Ensuring the First Nation Right of Top Priority to Hunt Moose - Cancellation of Licenced Non-Indigenous Moose Hunting in the MKO Region*, June 7, 2022.

¹¹ *The Wildlife Act*, RSM 1987, c W130, ss 2(1), 3(1).

¹² *Moose Conservation Closure Regulation*, *supra* note 2 at 4(1).

¹³ Press Release, PROVINCE ANNOUNCES CHANGES TO MOOSE HUNTING IN SOME AREAS TO HELP PROTECT MOOSE POPULATION (20 April 2022) online: [Province of Manitoba | News Releases | Province Announces Changes to Moose Hunting in Some Areas to Help Protect Moose Population \(gov.mb.ca\)](https://www.gov.mb.ca/news/releases/2022/04/20220420_moose_hunting.html). Based on information provided by MKO, it is our understanding that First Nations peoples in these GHAs also struggling to harvest enough moose to exercise their rights and meet community needs.

for a particular species of animal in a game hunting area to operators if it determines that there is a sufficient number of the species in the game hunting area to allow additional hunting opportunities after taking into account the expected harvest of that species in the game hunting area by

- (a) residents of Manitoba; and
- (b) clients of operators who are hunting under hunting licences that have already been allocated.

The *Licences Regulation* does not distinguish or expressly take in account the expected harvest of animals by First Nations before allocating new hunting licences to eligible outfitters or guides.

After the Crown implements conservation measures, it must accord a top priority to First Nations rights holders. The current scheme allocates licenses to non-Indigenous hunters without properly determining whether First Nations' constitutional right to hunt moose for food is met, nor does it accord top priority to Indigenous hunters to harvest moose.

As explained below, Manitoba is legally vulnerable for failing to fulfill this obligation.

Manitoba's Obligations to First Nations

First Nations hold constitutionally protected treaty and Aboriginal rights to harvest moose for food, social and ceremonial purposes.

Paragraph 13 of Schedule 1 of the *Natural Resources Transfer Agreement* recognizes the constitutional right of First Nations peoples in Manitoba to harvest moose for food:

13. 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.¹⁴

Section 35 of the *Constitution Act, 1982* recognizes and affirms First Nations' right to harvest moose. The existence of this constitutional right requires the Crown justify any infringement of the right to harvest moose.

¹⁴ *NRTA*, *supra* note 7, emphasis added. Based on section 13 of the *NRTA* as well as recent jurisprudence, a strong argument can be made that Manitoba has a constitutional obligation to manage the GHAs to conserve and enhance wildlife populations in order to ensure that First Nations are able to exercise the food hunting right. See for example, *Yahey v British Columbia*, 2021 BCSC 1287.

An infringement of the right to harvest moose occurs where legislation or government action results in a “meaningful diminution” on the exercise of that right.¹⁵ Demonstrating an infringement has a low threshold and “includes anything but an insignificant interference with that right.”¹⁶

When First Nations have demonstrated that legislation or government action has infringed their rights, it is open to the Crown to justify its conduct. Legislation or government action can be justified only if it occurs for a compelling and substantial purpose and appropriately prioritizes the infringed right.¹⁷

Conservation of species, including moose, is recognized as a compelling and substantial purpose.¹⁸

Assuming it has a valid conservation purpose, Manitoba may limit the extent First Nations may harvest moose. However, in doing so, it must ensure First Nations are given priority access to moose after conservation measures are considered.¹⁹ Known as the doctrine of top priority, it requires ensuring First Nations can meet the needs of their communities before any moose are allocated to non-Indigenous hunters.²⁰

The Supreme Court of Canada outlined this doctrine in *Sparrow, supra*, in the context of the allocation of fish to accord a top priority to the “Indians’ food requirements”:

While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians’ food requirements *must* be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then *all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right.* If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.²¹

¹⁵ *R v Morris*, 2006 SCC 59 at para 53 [*Morris*].

¹⁶ *Morris, ibid*; *R v Gladstone*, [1996] 2 SCR 723 at para 151, 137 DLR (4th) 648.

¹⁷ *Tsilhqot’in Nation v British Columbia*, 2014 SCC 14 at para 13 [*Tsilhqot’in Nation*].

¹⁸ *R v Sparrow*, [1990] 1 SCR 1075 at 1115, 70 DLR (4th) 385 [*Sparrow*].

¹⁹ *Sparrow, supra*, note 17, at 1116.

²⁰ *Ibid* at 1116, see *Gladstone, supra* note 16.

²¹ *Ibid* at 1116, emphasis added.

While *Sparrow* addressed aboriginal fishing rights, the law is well settled that the *Sparrow* justification framework applies to the exercise of Treaty rights.²²

When the Crown regulates the exercise of constitutionally protected hunting or fishing rights, or allocates the harvest of game and fish amongst harvesters, the Crown must accord a top priority in the allocation of game or fish to the First Nation food harvest. Before issuing licenses to non-Indigenous hunters, the Crown must take steps to inform itself and to ensure that any outstanding food requirements of First Nations are met.²³ This is a mandatory constitutional obligation.

Limiting First Nation hunting and harvesting rights may be justified for conservation or safety purposes. However, in the case of a conservation-related limitation of the exercise of a right, the Crown cannot shift more resources to a group that “ranks below” the top priority of First Nation rights holders.²⁴

To that end, the Crown cannot grant licenses to non-rights holders while the First Nation remains unable to fully and properly exercise its treaty rights to hunt for food to meet the “Indian food requirements” as set out in *Sparrow*.

There is no constitutionally valid justification for Manitoba to issue licenses to non-Indigenous hunters when First Nations require all the available moose population surplus to the conservation needs to meet the “Indian food requirements” or where the Crown has failed to inform itself of whether the “Indian food requirements” have been met.

Besides the requirement to justify any limit on the right, Manitoba also must ensure any infringement minimally impairs the right at issue.²⁵

The *Moose Conservation Closure Regulation* is an unjustifiable infringement

The *Moose Conservation Closure Regulation* is an unjustifiable infringement. The content of the regulation does not prioritize or minimally impair Manitoba First Nations’ right to harvest moose.

The regulation limits the extent First Nations may harvest moose. Section 4(1) states no person (including First Nations) may hunt or trap moose in certain GHA’s in central and southern Manitoba.²⁶

²² *R. v Badger*, [1996] 1 S.C.R. 771 at 37, 75, 77, 78 and 79 [*Badger*]. See also *R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 SCR 139 at 33 and 74.

²³ *Badger*, *supra* note 21 at 96. See also *R v Reynolds*, 2017 NBCA 36 at 76 – 78.

²⁴ *Sparrow*, *supra* note 17 at 1121.

²⁵ *Tsilhqot’in Nation*, *supra* note 16, at para 77.

²⁶ *Moose Conservation Closure Regulation*, *supra* note 3, s 4(1).

An exception to this prohibition is Section 4.2(2) which provides a limited harvest of up to 60 moose for Indigenous peoples and licenced non-Indigenous hunters.²⁷ Five of these moose may be reserved for licenced non-Indigenous hunters.²⁸

Any limitation placed on the extent First Nations may exercise their right to harvest moose is an infringement.²⁹ While it may be determined that this infringement may serve a compelling and substantial purpose, it fails to meet the standard for justification.

By issuing five moose licences to non-Indigenous hunters at the same time restrictions are imposed on rights-based Indigenous hunters, Manitoba has not accorded top priority to First Nations' harvesting rights.

First Nations assert the moose provided to their communities under this regulation are insufficient to meet their needs. If conservation needs require limiting the harvest of moose, then all moose which remain following conservation measures must go to supporting the constitutionally protected food harvesting rights of First Nations.³⁰ Only after these "food requirements" are met, can licenses be issued to non-Indigenous hunters.

Manitoba has failed to minimally impair the right to harvest moose. A less-impairing means of infringing the right is allocating all moose to First Nations in order to meet the needs of their communities.

Manitoba's lottery system is also not justifiable

Much like the *Moose Conservation Closure Regulation*, the lottery system is an unjustifiable infringement on First Nations' constitutionally protected right to harvest moose. This system allocates licenses to non-First Nations hunters to hunt moose in the same areas, at the same locations preferred by First Nations and at the same times as First Nations hunters. This limits and reduces the availability of moose for First Nations people to hunt for food.

This infringement also fails to accord a top priority to the First Nations' right to harvest moose.

Issuing non-First Nations hunters moose licenses via a draw or lottery means Manitoba fails in its duty to prioritize First Nations' constitutional right to harvest moose. As mandated by the Supreme Court, Manitoba must ensure First Nations are given 'top priority' to hunting licenses.³¹ This priority extends until such time as the First Nations' food and other needs are met.

²⁷ *Moose Conservation Closure Regulation*, *supra* note 3, s 4.2(2).

²⁸ *Ibid*, s 4.4(1).

²⁹ *Badger*, *supra* note 21 at para 94.

³⁰ *Ibid*. Assuming First Nations struggle to harvest sufficient levels of moose for food and other purposes.

³¹ *Badger*, *supra* note 21 at para 94.

Manitoba has neglected to confirm First Nations' food needs have been met before allowing non-First Nations hunters access to licenses through the lottery system. MKO strongly maintains First Nations food and other relevant needs have not yet been met.

Assuming First Nations in the vicinity of the lottery have reduced hunting success and struggle to harvest sufficient levels of moose to meet their food needs as a consequence of competition with licenced non-Indigenous hunters, allocating any moose to non-Indigenous licenced hunters is an unjustifiable infringement on the constitutionally protected rights of First Nations.

Finally, much like the *Moose Conservation Closure Regulation*, the lottery system fails to minimally impair the right. A less impairing means of infringing the right includes allocating all moose to First Nations in order to meet the needs of their communities.

The Allocation of Hunting Licences Regulation is an unjustifiable infringement

Much like the *Moose Conservation Closure Regulation* and the lottery system, the *Allocation of Hunting Licences Regulation* fails to accord a top priority to the First Nations' right to harvest moose and is an unjustifiable infringement of First Nations' constitutionally protected right to harvest moose.

Pursuant to s. 4 of the *Licences Regulation*, there is simply no prioritization of First Nations' right to harvest moose in the Crown's current licensing scheme. The Crown merely considers "residents of Manitoba" and "clients of operators" before allocating licenses to eligible outfitters and guides. The *Licences Regulation* fails to take into account the expected harvest of the species of an animal, including moose, by First Nations persons pursuant to the right to harvest animals for food.

In *Sparrow*, the Supreme Court of Canada distinguished between (i) justifying where Indigenous rights holders assert that Crown regulations directly interfere with the exercise of the harvesting right and (ii) the overarching obligation of the Crown to ensure the top priority for the exercise of the right in any regulatory or allocative scheme or management plans:

The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.³²

Put simply, the Crown must ensure regulations align with the doctrine of priority. The Crown can create and develop conservation and management plans. Yet, when it does, these regulations must respect and recognize Indigenous rights. By allocating licenses to non-

³² *Sparrow*, *supra* note 17 at 1119, emphasis added.

Indigenous hunters and outfitters without ensuring First Nations in these regions can exercise their constitutionally protected rights to harvest moose, Manitoba has failed in its constitutional obligations under the doctrine of priority.

Conclusion

Based on Supreme Court of Canada jurisprudence dating back over 30 years,³³ we agree with MKO that “First Nations have a right of top priority to hunt moose for food” and that “until such time as it is confirmed that the food needs of the MKO First Nation communities are met, Manitoba must ensure the Indigenous top priority”.³⁴

Manitoba is vulnerable to a claim of unjustifiably infringing First Nations’ right to harvest moose. The allocation of moose hunting licences to non-Indigenous hunters under the *Closure Regulation*, the *Licences Regulation* and lottery system fails to prioritize and accord a top priority to the First Nations’ right to harvest moose for food. In doing so, it is unjustifiably infringing this right.

³³ *Sparrow*, *supra* note 17.

³⁴ MKO, *Ensuring the First Nation Right of Top Priority to Hunt Moose - Cancellation of Licenced Non-Indigenous Moose Hunting in the MKO Region*, June 7, 2022.