Premier needs a history lesson on rights

MATT MCPHERSON

LAST week, Premier Brian Pallister said night hunting by indigenous people is a "dumb practice" that could lead to a "race war." Pallister asserted night hunting is dangerous for everyone and that "rights do not trump responsibilities." This week, on the heels of the premier's comments, the province is apparently now entertaining the idea of a complete ban on night hunting.

Dangerous hunting at night is a serious safety concern. But night hunting isn't inherently dangerous. Responsible, safe night hunting has been practised by indigenous peoples across Canada for many generations. It's also a practice that Canadian courts recognize as an important way for indigenous people to exercise their treaty rights.

In addition to having little basis in law, the premier's statements are counterproductive and potentially inflammatory. They undermine the constitutionally protected legal rights of indigenous peoples, and at the same time, they stoke resentment against indigenous peoples.

First, let's address the idea of a blanket ban on night hunting. This is a legal non-starter. Where treaty rights to hunt at night exist, they are protected by the Constitution. Efforts to institute a ban on night hunting by indigenous people would very likely be struck down by the courts.

The law on this issue is clear. The Supreme Court of Canada decided in 2006 night hunting was not any more dangerous than good, old-fashioned daytime hunting. In R. v. Morris, members of Tsartlip Nation in B.C. were charged while exercising their long-held treaty right to hunt at night. The Supreme Court considered similar arguments to those being trotted out now by the premier and rejected them. The court acknowledged that treaty rights are not "frozen in time." Using flashlights and rifles to hunt is not unfair, it is simply a reasonable evolution of the treaty right. Nor does the use of modern methods somehow transform night hunting into an inherently dangerous activity. The majority of the court wrote in Morris: "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."

This is not to say night hunting can never be unsafe. But given that regulations exist to prohibit dangerous hunting, it is both unnecessary and a breach of treaty rights to single out indigenous hunters. It is also worth noting that, a decade or so earlier in the R. v. Horseman decision, the Supreme Court recognized treaty rights provide special benefits to indigenous peoples. That decision recognized that First Nations in Alberta were expressly entitled to hunt using methods not available to non-indigenous hunters (including night hunting) as a result of the Natural Resources Transfer Agreement.

The suggestion the province could ban night hunting is all the more outrageous because it chips away at already-threatened indigenous harvesting rights. Through treaties, indigenous peoples made huge concessions to the settlers (whether those treaties are read as surrenders of land or simply as agreements to share the land). In either case, the protection of harvesting rights was central to the bargain.

But it's clear that the premier doesn't understand that bargain. The premier said: "Young indigenous guys going out and shooting a bunch of moose because they can. Because they say it's their right. It doesn't make any sense to me."

It may not make sense to the premier, but treaty rights are an essential part of the fabric of Canada. Manitoba would not exist were it not for those treaties, and the Crown has an obligation to honour them. Where legitimate issues arise, such as safety or conservation, they should be resolved through consultation with First Nations.

Loose talk that blames indigenous hunters for creating a danger (without any apparent evidence) is corrosive. It undermines any efforts at real reconciliation and is likely to promote discrimination and racism.

Take, for example, the 1999 decision of the Supreme Court of Canada in R. v. Marshall, which affirmed the fishing rights of Mi'kmaq in Nova Scotia. This set off a wave of vandalism, threats and harassment against Mi'kmaq fishers and their families in Burnt Church (Esgenoopetitj) by non-indigenous fisherman. Traps were destroyed, boats were rammed and shots were fired. Burnt Church became a national crisis that dragged on for several years.

Less well-known, but perhaps even more disturbing, is the case of the Saugeen Ojibway Nation in Ontario. In the early 1990s, a court affirmed the Saugeen Ojibway's right to a commercial fishery. Local sport fisherman did not take kindly to this. They began a campaign of intimidation against the Saugeen Ojibway that included threats, gunshots being fired at Saugeen Ojibway fishermen, the cutting and destruction of nets and arson and culminated in a mob of 35 non-indigenous men beating and seriously stabbing three Saugeen Ojibway fishermen.

In both of these cases, violence was visited on the indigenous harvesters simply because they wanted to exercise their constitutionally protected rights. The Crown in both cases failed to protect the rights of the indigenous nations and failed in its role to foster reconciliation.

The history of Manitoba, as everywhere else in Canada, is one of almost constant violation of treaty promises by the Crown and ever-increasing exploitation of the lands and resources of indigenous peoples.

Indigenous peoples have paid a steep price for their rights, and whether the premier likes it or not, the Crown signed the treaties, and he has an obligation to honour them and to uphold the law.

Matt McPherson is a partner at the Toronto law firm Olthuis Kleer Townshend. His practice is focused on litigation and negotiation, and he represents First Nations across Canada.