SIMON V. R.

Supreme Court of Canada, Dickson C.J., Beetz, Estey, McIntyre, Chouinard, Wilson and Le Dain JJ., November 21, 1985

Bruce H. Wildsmith, for the appellant
Robert E. Lutes and Brian Norton, for the respondent
Graydon Nicholas, for the intervenor the Union of New Brunswick Indians, Inc.
John P. Merrick Q.C. and Bruce Clarke, for the intervenor the Native Council of Nova Scotia
John Rook and Martin Freeman, for the intervenor the Attorney General of Canada
J.T.S. McCabe, for the intervenor the Attorney General for Ontario
J.T. Keith McCormick, for the intervenor the Attorney General of New Brunswick

The appellant, a registered Micmac Indian, appealed his conviction for illegal possession of a rifle and cartridges under s.150(1) of the Lands and Forests Act, R.S.N.S. 1967, c.163. The appellant contended that the right to hunt set out in the Treaty of 1752, in combination with s.88 of the Indian Act, R.S.C.1970, c.I-6, granted him immunity from prosecution under the Lands and Forests Act.

The Court of Appeal (see [1982] 1 C.N.L.R. 118) upheld the trial judge's ruling that the Treaty of 1752 did not exempt the appellant from the provisions of the provincial legislation. The issue before the Court was whether, pursuant to the Treaty of 1752 and s.88 of the Indian Act, the appellant had the right to hunt which precludes his prosecution for offences under the Lands and Forests Act.

Held: Appeal allowed

1. The Treaty of 1752 was validly created by competent parties. The parties entered into the treaty with the intention of creating mutually binding obligations which would be solemnly respected.

2. The treaty, by providing that the Micmac should not be hindered from but should have free liberty of hunting and fishing as usual, constitutes a positive source of protection against infringements on hunting right and covers the activities engaged in by the appellant. The fact that the right to hunt already existed at the time the treaty was entered into does not negate or minimize the significance of the protection of hunting rights expressly included in the treaty.

3. The Crown failed to prove that the Treaty of 1752 was terminated by subsequent hostilities. An Indian treaty is unique: it is an agreement sui generis which is neither created or terminated according to the rules of international law.

4. It was not proven that the appellant's treaty hunting rights were extinguished. The Court expressed no view on whether treaty rights could be extinguished.

5. The appellant is a Micmac Indian covered by the treaty. The appellant established a sufficient connection with the Indian band, signatories to the Treaty of 1752. The appellant admitted at trial that he was a registered Indian under the Indian Act and a member of the Shubenacadie Band Number 02 living in the same area as the original Micmac Indian tribe. Though this evidence was not conclusive proof that he was a direct descendant of the Micmac Indians covered by the treaty, it is sufficient because the Micmacs did not keep written records. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on the Treaty of 1752.

6. The Treaty of 1752 is a "treaty" within the meaning of s.88 of the Indian Act. Section 88 includes all agreements concluded by the Crown with the Indians that would otherwise be enforceable treaties, whether land was ceded or not. None of the Maritime treaties of the 18th century cede land. To say that s.88 applies only to land cession treaties would be to limit severely its scope and run contrary to the principle that Indian treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians.

7. Section 150(1) of the Lands and Forests Act restricts the appellant's right to hunt under the treaty. The restrictions imposed in the section conflict with the appellant's right to possess a firearm and ammunition in order to exercise his free liberty to hunt over the lands covered by the treaty. Therefore, by virtue of s.88, the clear terms of the treaty must prevail over s.150(1) of the Lands and Forests Act.

8. In view of the fact that s.88 of the Indian Act covers the circumstances of the case and provides the necessary protection to the appellant, it was not necessary for the determination of the appeal to consider s.35(1) of the Constitution Act, 1982.

DICKSON C.J.: This case raises the important question of the interplay between the treaty rights of native peoples and provincial legislation. The right to hunt, which remains important to the livelihood and way of life of the Micmac people, has come into conflict with game preservation legislation in effect in the province of Nova Scotia. The main question before this Court is whether, pursuant to a Treaty of 1752 between the British Crown and the Micmac, and to s.88 of the Indian Act, R.S.C. 1970, c.I-6, the appellant, James Matthew Simon, enjoys hunting rights which preclude his prosecution for offences under the Lands and Forests Act, R.S.N.S. 1967, c.163.

I

Facts

The appellant is a member of the Shubenacadie Indian Brook Band (No.2) of the Micmac people and a registered Indian under the Indian Act. He was charged under s.150(1) of the Lands and Forest Act with possession of a rifle and shotgun cartridges. The two charges read:

> On the 21st day of September, 1980 at West Indian Road, Hants County, Nova Scotia, [he] did unlawfully commit the offence of illegal possession of shotgun cartridge loaded with shot larger that AAA, contrary to s.150(1) of the Lands and Forests Act;

and that:

> On the 21st day of September, 1980 at West Indian Road, Hants County, Nova Scotia, [he] did unlawfully commit the offence of illegal possession of a rifle during closed season contrary to s.150(1) of the Lands and Forests Act.

Section 150(1) of the Lands and Forest Act provides:

> 150(1) Except as provided in this Section, no person shall take, carry or have in his possession any shot gun [shot-gun] cartridges loaded with ball or with shot larger that AAA or any rifle,
>
> (a)in or upon any forest, wood or other resort of moose or deer; or
>
> (b)upon any road passing through or by any such forest, wood or other resort; or
>
> (c) in any tent or camp or other shelter (except his usual and ordinary permanent place of abode) in any forest, wood or other resort.

At trial before Judge R.E. Kimball, the following principal facts were admitted by the appellant:

1. The appellant James Matthew Simon is a registered Indian under the Indian Act and an adult member of the Shubenacadie – Indian Brook Band of Micmac Indians. He is a member of the Shubenacadie Band Number 02.

2. On September 21st, 1980, at about 3:30 p.m., he was driving a Chevrolet truck on West Indian Road, a public highway in Colchester County, Nova Scotia. This road is not in an Indian Reserve, but is adjacent to the Shubenacadie Indian Reserve.

3. Simon was stopped by the R.C.M.P. He was found in possession of an operable .243 calibre rifle with scope and a leather shell container with six live and two spent .243 calibre shells as well as two live twelve gauge shotgun shells loaded with shot, larger than size AAA and during closed season, all within the meaning of s.150(1) of the Lands and Forests Act, and the other provisions and regulations made under the Act.

4. The rifle was test fired by a firearm expert and found to be operable. All the live shells were also examined and found to be operable. All shells were found to have been ejected from the rifle chamber and not its magazine. The two spent shells had been fired from the rifle.

5. Simon had no license or other authority under the Lands and Forests Act permitting him to be in possession of the rifle and shells and shotgun cartridges.

6. The West Indian Road passes through or by a forest, wood, or other resource frequented by moose or deer.

Although all essential elements of the charges were admitted by Simon, it was argued on his behalf at trail that the right to hunt set out in the Treaty of 1752, in combination with s.88 of the Indian Act, offered him immunity from prosecution under s.150(1) of the Lands and Forest Act.

Section 88 of the Indian Act reads as follows:

> 88.Subject to the terms of any treaty and any other Act of the Parliament of Canada, 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 such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act. (Emphasis added)

The Treaty of 1752, the relevant part of which states at article 4 that the Micmacs have "free liberty of hunting and Fishing as usual", provides:

Treaty or

Articles of Peace and Friendship Renewed

Between

> His Excellency Peregrine Thomas Hopson Esquire Captain General and Governor in Chief in and over His Majesty's Province of Nova Scotia or Acadie Vice Admiral of the same & Colonel of One of His Majesty's Regiments of Foot, and His Majesty's Council on behalf of His Majesty.

AND

> Major Jean Baptiste Cope chief Sachem of the Tribe of Mick Mack Indians, Inhabiting the Eastern Coast of the said Province, and Andrew Hadley Martin, Gabriel Martin and Francis Jeremiah members & Delegates of the said Tribe, for themselves and their said Tribe their heirs and the heirs of their heirs forever. Begun made and Concluded in the manner from & Tenor following, viz.
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> 1. It is agreed that the Articles of Submission & Agreements made at Boston in New England by the Delegates of the Penobscot Norridgwolk & St. John's Indians in the Year 1725 Ratifyed and Confirmed by all the Nova Scotia Tribes at Annapolis Royal in the Month of June 1726 and lately Renewed with Governor Cornwallis at Halifax and Ratifyed at St. John's River, now read over Explained & Interpreted shall be and are hereby from this time forward renewed, reiterated and forever Confirmed by them and their Tribe, and the said Indians for themselves and their Tribe and their heirs aforesaid do make and renew the same Solemn Submissions and promises for the strict Observance of all the Articles therein Contained as at any time heretofore hath been done.
>
> 2. That all Transactions during the late War shall on both sides be buried in Oblivion with the Hatchet, And that the said Indians shall have all favour, Friendship & Protection shewn them from this His Majesty's Government.
>
> 3. That the said Tribe shall use their utmost Endeavours to bring in the other Indians to Renew and Ratify this Peace, and shall discover and make known any attempts or designs of any other Indians or any Enemy whatever against His Majesty's Subjects within this Province so soon as they shall know thereof and shall also hinder and Obstruct the same to the utmost of their power, and on the other hand if any of the Indians refusing to ratify this Peace shall make War upon the Tribe who have now Confirmed the same; they shall upon Application have such aid and Assistance from the Government for their defence as the Case may require.
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> 4. It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of hunting and Fishing as usual and that if they shall think a Truck house needful at the River Chibenaccadie, or any other place of their resort they shall have the same built and proper Merchandize, lodged therein to be exchanged for what the Indians shall have to dispose of and that in the mean time the Indians shall have free liberty to bring to Sale to

Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage.

5. That a Quantity of bread, flour, and such other Provisions, as can be procured, necessary for the Familys and proportionable to the Numbers of the said Indians, shall be given them half Yearly for the time to come; and the same regard shall be had to the other Tribes that shall hereafter Agree to Renew and Ratify the Peace upon the Terms and Conditions now Stipulated.

6. That to Cherish a good harmony and mutual Correspondence between the said Indians and this Government His Excellency Peregrine Thomas Hopson Esq. Capt. General & Governor in Chief in & over His Majesty's Province of Nova Scotia or Accadie Vice Admiral of the same & Colonel of One of His Majesty's Regiments of Foot hereby promises on the part of His Majesty that the said Indians shall upon the first day of October Yearly, so long as they shall Continue in Friendship, Receive Presents of Blankets, Tobacco, some Powder & Shott, and the said Indians promise once every year, upon the said first of October, to come by themselves or their Delegates and Receive the said Presents and Renew their Friendship and Submissions.

7. That the Indians shall use their best Endeavors to save the Lives & Goods of any People Shipwrecked on this Coast where they resort and shall Conduct the People saved to Halifax with their Goods, and a Reward adequate to the Salvadge shall be given them.

8. That all Disputes whatsoever that may happen to arise between the Indians now at Peace and others His Majesty's Subjects in this Province shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefits, Advantages & Priviledges as any others of His majesty's Subjects.

In Faith & Testimony whereof the Great Seal of the Province is hereunto appended, and the Partys to these Presents have hereunto interchangeabley Set their Hands in the Council Chamber at Halifax this 22nd day of Nov. 1752 in the 26th Year of His Majesty's Reign.

(signatures deleted)

II

Lower Court Judgments

Nova Scotia Provincial Court

For the purposes of his decision, Judge Kimball assumed that the 1752 document was a valid treaty and that the appellant was entitled to claim its protection as a direct descendant of the original Micmac Indian Band. Nevertheless, he convicted the appellant. His conclusion, based largely upon R. v. Isaac (1975), 13 N.S.R. (2d) 460 (N.S.S.C., App.Div.), is best summarized in his own words:

> I am satisfied that any right which the defendant may have to hunt off the reserve is not applicable to the area where the offence took place. It is my opinion that any right which the defendant may have to hunt on that said land has been extinguished "by Crown grant to others or by occupation by the white man." There is little evidence as to the nature of the area in question, but the admitted facts establish that the defendant was at the material time the only occupant driving on the West Indian Road, a public highway in Colchester County, Province of Nova Scotia and that the road is not in an Indian Reserve but adjacent to the Shubenacadie Indian Reserve. I am satisfied that the area in question is an area which has been occupied extensively by the white man for farming as a rural mixed-farming and dairy-farming area. I am prepared to take judicial notice of the fact that the area is made up of land where the right to hunt no longer exists because the land has been settled and occupied by the white man for purposes of farming and that the Crown grants have been extended to farmers for some considerable length of time so that any right which might have at one time existed to the defendant or his ancestors, to use or occupy the said lands for purposes of hunting, has long since been extinguished.

Nova Scotia Supreme Court, Appellate Division

An appeal by way of stated case to the Nova Scotia Supreme Court, Appellate Division, was dismissed (reported at (1982), 49 N.S.R. (2d) 566, [1982] 1 C.N.L.R. 188). The question stated by Judge Kimball for opinion was the following:

> Did I err in law in holding that the Treaty of 1752 did not exempt the accused MicMac Indian from the provisions of s.150(1) of the Lands and Forests Act?

MacDonald J.A. (Hart J.A. concurring) rejected, on three grounds, the appellant's argument that the Treaty of 1752 was a treaty within s.88 of the Indian Act, thus rendering the appellant immune from the provisions of the Lands and Forests Act.

First, he concluded that the Treaty of 1752 provided no positive source of protection for hunting rights. On this point, MacDonald J.A. cited Cope v. The Queen (1982), 132 D.L.R. (3d) 36, 65 C.C.C. (2d) 1, 49 N.S.R. (2d) 555, [1982] 1 C.N.L.R. 23 (N.S.S.C., App.Div.), where MacKeigan C.J.N.S. found that the clause recognizing the liberty to hunt and fish in the Treaty of 1752 was "very far short in words and substance from being a grant by the Crown of a special franchise or privilege replacing the more nebulous aboriginal rights" and that the document could not "be considered a treaty granting or conferring new permanent rights" [p.30 C.N.L.R].

Secondly, MacDonald J.A. held that even if the treaty were valid at one time, it was effectively terminated in 1753 when the Micmac chief, Major Jean Baptiste Cope, and his band killed six Englishmen at Jeddore. MacDonald J.A. noted that the treaty was one of peace and that the resumption of hostilities by the Indians in Nova Scotia terminated automatically, and for all time, any obligations to them under the treaty.

Finally, MacDonald J.A. stated that even if he were wrong in his conclusion that the treaty was terminated by the actions of the Indians, the appellant could not, in any event, claim the protection of the treaty because he had not established any connection by "descent or otherwise" with the original group of Indians.

In a concurring judgment, Jones J.A. added that it was clear from the case law, in particular R. v. Isaac, supra, that any rights of Indians to hunt and fish under the terms of "any treaty or otherwise" had been restricted to reserve lands. Furthermore, Jones J.A. held that, in claiming the exemption from the application of the general laws of the province under s.88 of the Indian Act, the burden was on the appellant to show that he was exercising a right to "hunt . . . as usual" under the treaty. This, in his view, had not been done.

The appeal was accordingly dismissed and the convictions were affirmed.

III

The Issues

This appeal raises the following issues:

1. Was the Treaty of 1752 validly created by competent parties?

2. Does the treaty contain a right to hunt and what is the nature and scope of this right?

3. Has the treaty been terminated or limited?

4. Is the appellant covered by the treaty?

5. Is the treaty a "treaty" within the meaning of s.88 of the Indian Act?

6. Do the hunting rights contained in the treaty exempt the appellant from prosecution under s.150(1) of the Lands and Forests Act?

In addition, the following constitutional question was framed by Chief Justice Laskin:

> Are the hunting rights referred to in the document entitled "Treaty of Articles of Peace and Friendship Renewed" and executed November 22, 1752, existing treaty rights recognized and affirmed by s.35(1) of the Constitution Act, 1982?

In his factum, the appellant asks this Court to dispose of the appeal on the sole basis of the effect of the Treaty of 1752 and s.88 of the Indian Act. Therefore, if the treaty does not exempt the

appellant from s.150(1) of the Lands and Forests Act, he requests that the appeal be dismissed without prejudice to the Micmac position based on other treaties and aboriginal rights.

The respondent agreed with this approach. I will, therefore, restrict my remarks to the Treaty of 1752 and s.88 of the Indian Act. It will be unnecessary to deal with aboriginal rights, the Royal Proclamation of 1763, or other treaty rights.

IV

Was the Treaty of 1752 Validly Created by Competent Parties?

The respondent raised the issue of the capacity of the parties for two reasons which are stated at p.8 of the factum:

> The issue of capacity is raised for the purpose of illustrating that the Treaty of 1752 was of a lesser status than an International Treaty and therefore is more easily terminated. The issue is also raised to give the document an historical legal context as this issue has been raised in previous cases.

The question of whether the Treaty of 1752 constitutes an international-type treaty is only relevant to the respondent's argument regarding the appropriate legal tests for the termination of the treaty. I will address this issue, therefore, in relation to the question of whether the Treaty of 1752 was terminated by hostilities between the British and the Micmac in 1753.

The historical legal context provided by the respondent consists primarily of the 1929 decision of Judge Patterson in R. v. Syliboy, [1929] 1 D.L.R. 307 (Co.Ct.) and the academic commentary it generated immediately following its rendering. In the Syliboy case Judge Patterson addressed the question of the capacity of the parties to enter into a treaty at pp.313-14:

> Two considerations are involved. First, did the Indians of Nova Scotia have status to enter into a treaty? And second, did Governor Hopson have authority to enter into one with them? Both questions must I think be answered in the negative.
>
> (1)"Treaties are unconstrained Acts of independent power." But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by Treaty with discovery and ancient possession; and the Indians passed with it.
>
> Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food, presents, and the right to hunt and fish as usual – an agreement that, as we have seen, was very shortly after broken.
>
> (2) Did Governor Hopson have authority to make a treaty? I think not. "Treaties can be made only by the constituted authorities of nations or by persons specially deputed by them for that purpose." Clearly our treaty was not made with the constituted authorities of Great Britain. But was Governor Hopson specially disputed by them? Cornwallis' commission is the manual not only for himself but for his successors and you will search it in vain for any power to sign treaties.

It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. With regard to the substance of Judge Patterson's words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capactiy are not convincing.

No court, with the exception of the Nova Scotia Supreme Court, Appeal Division in the present case, has agreed explicitly with the conclusion of Judge Patterson that the Indians and Governor Hopson lacked capacity to enter into and enforceable treaty. The Treaty of 1752 was implicitly

assumed to have been validly created in R. v. Simon (1958), 124 C.C.C. 110 (N.B.S.C., App.Div.); R. v. Francis (1969), 10 D.L.R. (3d) 189 (N.B.S.C., App.Div.); R. v. Paul, [1981] 2 C.N.L.R. 83, 54 C.C.C. (2d) 505, 70 A.P.R. 545, 30 N.B.R. (2d) 545 (C.A.); R. v. Cope, supra; R. v. Atwin and Sacobie, [1981] 2 C.N.L.R. 99 (N.B.Prov.Ct.); R. v. Secretary of State for Foreign and Commonwealth Affairs: ex parte Indian Assoc. of Alta. and Others, [1981] 4 C.N.L.R. 86, [1982] 2 All E.R. 118 (C.A.); R. v. Paul and Polchies (1984), 58 N.B.R. (2d) 297 (Prov.Ct.) [reported supra at p.105]. In R. v. Isaac, supra, Cooper J.A., after noting Judge Patterson's conclusions on the validity of the Treaty of 1752, expressed doubt as to their correctness, at p.496:

> The Treaty of 1752 was considered in Rex v. Syliboy . . . . It was there held by Patterson, Acting C.C.J., that it did not extend to Cape Breton Indians and further that it was not in reality a treaty. I have doubt as to the second finding and express no opinion on it, but I have no doubt as to the correctness of the first finding.

N.A.M. MacKenzie, in "Indians and Treaties in Law" (1929), 7 Can.Bar.Rev. 561, disagreed with Judge Patterson's ruling that the Indians did not have the capacity, nor the Governor the authority, to conclude a valid treaty. MacKenzie stated at p.565:

> As to the capacity of the Indians to contract and the authority of Governor Hopson to enter into such an agreement, with all deference to His Honour, both seem to have been present. Innumerable treaties and agreements of a similar character were made by Great Britain, France, the United States of American and Canada with the Indian tribes inhabiting this continent, and these treaties and agreements have been and still are held to be binding. Nor would Governor Hopson require special "powers" to enter into such an agreement. Ordinarily "full powers" specially conferred are essential to the proper negotiating of a treaty, but the Indians were not on a par with a sovereign state and fewer formalities were required in their case. Governor Hopson was the representative of His Majesty and as such had sufficient authority to make an agreement with the Indian tribes.

The treaty was entered into for the benefit of both the British Crown and the Micmac people, to maintain peace and order as well as to recognize and confirm the existing hunting and fishing rights of the Micmac. In my opinion, both the Governor and the Micmac entered into the treaty with the intention of creating mutually binding obligations which would be solemnly respected. It also provided a mechanism for dispute resolution. The Micmac Chief and the three other Micmac signatories, as delegates of the Micmac people, would have possessed full capacity to enter into a binding treaty on behalf of the Micmac. Governor Hopson was the delegate and legal representative of His Majesty the King. It is fair to assume that the Micmac would have believed that Governor Hopson, acting on behalf of His Majesty the King, had the necessary authority to enter into a valid treaty with them. I would hold that the Treaty of 1752 was validly created by competent parties.

V

Does the Treaty Contain a Right to Hunt and What is the Nature and Scope of this Right?

Article 4 of the Treaty of 1752 states, "it is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of hunting and Fishing as usual . . . ". What is the nature and scope of the "liberty of hunting and Fishing" contained in the treaty?

The majority of the Nova Scotia Court of Appeal seemed to imply that the treaty contained merely a general acknowledgement of pre-existing non-treaty aboriginal rights and not an independent source of protection of hunting rights upon which the appellant could rely. In my opinion, the treaty, by providing that the Micmac should not be hindered from but should have free liberty of hunting and fishing as usual, constitutes a positive source of protection against infringements on hunting right. The fact that the right to hunt already existed at the time the treaty was entered into by virtue of the Micmac's general aboriginal right to hunt does not negate or minimize the significance of the protection of hunting rights expressly included in the treaty.

Such an interpretation accords with the generally accepted view that Indian treaties should be given a fair, large and liberal construction in favour of the Indians. This principle of interpretation was most recently affirmed by this Court in Nowegijick v. The Queen, [1983] 1 S.C.R. 29, 46, N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20. I had occasion to say the following at p.36 [p.94 C.N.L.R.]:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It

> seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians . . . . In Jones v. Meehan, 175 U.S. 1, it was held that "Indian treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians."

Having determined that the treaty embodies a right to hunt, it is necessary to consider the respondent's contention that the right to hunt is limited to hunting for purposes and by methods usual in 1752 because of the inclusion of the modifier "as usual" after the right to hunt.

First of all, I do not read the phrase "as usual" as referring to the types of weapons to be used by the Micmac and limiting them to those used in 1752. Any such construction would place upon the ability of the Micmac to hunt an unnecessary and artificial constraint out of keeping with the principle that Indian treaties should be liberally construed. Indeed, the inclusion of the phrase "as usual" appears to reflect a concern that the right to hunt be interpreted in a flexible way that is sensitive to the evolution of changes in normal hunting practices. The phrase thereby ensures that the treaty will be an effective source of protection of hunting rights.

Secondly, the respondent maintained that "as usual" should be interpreted to limit the treaty protection to hunting for non-commercial purposes. It is difficult to see the basis for this argument in the absence of evidence regarding the purpose for which the appellant was hunting. In any event, article 4 of the treaty appears to contemplate hunting for commercial purposes when it refers to the construction of a truck house as a place of exchange and mentions the liberty of the Micmac to bring game to sale: see R. v. Paul, supra, at p.563 per Ryan J.A., dissenting in part.

It should be clarified at this point that the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself, an example for which is travelling with the requisite hunting equipment to the hunting grounds. In this case, the appellant was not charged with hunting in a manner contrary to public safety in violation of the Lands and Forests Act but with illegal possession of a rifle and ammunition upon a road passing through or by a forest, wood or resort of moose or deer contrary to s.150(1) of the same Act. The appellant was simply travelling in his truck along a road with a gun and some ammunition. He maintained that he was going to hunt in the vicinity. In my opinion, it is implicit in the right granted under article 4 of the Treaty of 1752 that the appellant has the right to possess a gun and ammunition in a safe manner in order to be able to exercise the right to hunt. Accordingly, I conclude that the appellant was exercising his right to hunt under the treaty.

VI

Has the Treaty Been Terminated or Limited?
(a) Termination by Hostilities

In accordance with the finding of the Nova Scotia Court of Appeal, the Crown argued that the Treaty of 1752 was terminated and rendered unenforceable when hostilities broke out between the Micmac and the British in 1753. The appellant maintained that the alleged hostilities were sporadic and minor in nature and did not, therefore, nullify or terminate the treaty. It was further argued by the appellant, relying on L.F.S. Upton, Micmacs and Colonists: Indian - White Relations in the Maritimes 1713-1867 (1979), that the English initiated the hostilities and that, therefore, the Crown should not be permitted to rely on them to support the termination of the treaty. Finally, the appellant submitted that, even if the Court finds that there were sufficient hostilities to affect the treaty, at most it was merely suspended and not terminated.

In considering the impact of subsequent hostilities on the peace Treaty of 1752, the parties looked to international law on treaty termination. While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement sui generis which is neither created nor terminated according to the rules of international law. R. v. White and Bob (1964), 50 D.L.R. (2d) 613 at 617-18 (B.C.C.A.); aff''d (1965), 52 D.L.R. (2d) 481 (S.C.C.); Francis v. The Queen, [1956] S.C.R. 618 at 631; Pawis v. The Queen (1979), 102 D.L.R. (3d) 602 at 607, [1979] 2 C.N.L.R. 52 (F.C.T.D.).

It may be that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions. It is not necessary to decide this issue in the case at bar since the evidentiary requirements for proving such a termination have not been met. Once if has been established that a valid treaty has been entered into, the party arguing for its termination bears the burden of proving the circumstances and events justifying termination. The inconclusive and

conflicting evidence presented by the parties makes it impossible for this Court to say with any certainty what happened on the eastern coast of Nova Scotia 233 years ago. As a result, the Court is unable to resolve this historical question. The Crown has failed to prove that the Treaty of 1752 was terminated by subsequent hostilities.

I would note that there is nothing in the British conduct subsequent to the conclusion of the Treaty of 1752 and the alleged hostilities to indicated that the Crown considered the terms of the treaty at an end. Indeed, His Majesty's Royal Instructions of December 9, 1761, addressed inter alia to the Governor of Nova Scotia, declared that the Crown "was determined upon all occasions to support and protect the . . . Indians in their just rights and possessions and to keep inviolable the treaties and compacts which have been entered into with them . . .". These Royal Instructions formed the basis of the Proclamation issued by Jonathan Belcher, Lieutenant Governor of Nova Scotia on May 4, 1762 which also repeated the above words.

I conclude from the foregoing that the Treaty of 1752 was not terminated by subsequent hostilities in 1753. The treaty is of as much force and effect today as it was at the time it was concluded.

(b) Termination by Extinguishment

The respondent's argument that the Treaty of 1752 has been extinguished is based on R. v. Isaac, supra, at pp.476, 479; Calder et al. v. The Attorney General of B.C., [1973] S.C.R. 313 at 321; United States v. Santa Fe Pacific Ry. Co., 314 U.S. 339 at 347 (1941); Johnson and Grahams Lessee v. McIntosh, 21 U.S. 543 at 586-88 (1823); and Worchester v. Georgia (1932), 31 U.S. 515. The respondent submits that absolute title in the land covered by the treaty lies with the Crown and, therefore, the Crown has the right to extinguish any Indian rights in such lands. The respondent further submits, based on Isaac, that the Crown, through occupancy by the white man under Crown grant or lease, has, in effect, extinguished native rights in Nova Scotia in territory situated outside of reserve lands. As the appellant was stopped on a highway outside the Shubenacadie Reserve, the respondent argues that the Treaty of 1752 affords no defence to the appellant regardless of whether the treaty is itself valid.

In my opinion, it is not necessary to come to a final decision on the respondent's argument. Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises. As Douglas J. said in United States v. Sante Fe Pacific Ry. Co., supra, at p.354, "extinguishment cannot be lightly implied".

In the present appeal the appellant was charged with the offence of possession of a rifle and ammunition on a road passing through or by a forest, wood or other resort. The Agreed Statement of Facts does not disclose whether or where the appellant had hunted or was intending to hunt. In particular, there is no evidence to sustain the conclusion that the appellant had hunted, or intended to hunt, on the highway which might well raise different considerations. Hence this Court's decision in R. v. Mousseau, [1980] 2 S.C.R. 89, 31 N.R. 620, [1980] 4 W.W.R. 24, [1980] 3 C.N.L.R. 63, is not relevant.

It seems clear that, at a minimum, the treaty recognizes some hunting rights in Nova Scotia on the Shubenacadie Reserve and that any Micmac Indian who enjoys those rights has an incidental right to transport a gun and ammunition to places where he could legally exercise them. In this vein, it is worth noting that both parties agree that the highway on which the appellant was stopped "is adjacent to the Shubenacadie Indian Reserve" and "passes through or by a forest, wood, or other resource frequented by moose or deer".

The respondent tries to meet the apparent right of the appellant to transport a gun and ammunition by asserting that the treaty hunting rights have been extinguished. In order to succeed on this argument it is absolutely essential, it seems to me, that the respondent lead evidence as to where the appellant hunted or intended to hunt and what use has been and is currently made of those lands. It is impossible for this Court to consider the doctrine of extinguishment 'in the air'; the respondent must anchor that argument in the bedrock of specific lands. That has not happened in this case. In the absence of evidence as to where the hunting occurred or was intended to occur, and the use of the appellant's treaty hunting rights have been extinguished. Moreover, it is unnecessary for this Court to determine whether those rights have been extinguished because, at the very least, these rights extended to the adjacent Shubenacadie reserve. I do not wish to be taken as expressing any view on whether, as a matter of law, treaty rights may be extinguished.

Is the Appellant an Indian Covered by the Treaty

The respondent argues that the appellant has not shown that he is a direct descendant of a member of the original Micmac Indian Band covered by the Treaty of 1752. The trial judge assumed that the appellant was a direct descendant of the Micmac Indians, parties to the treaty. The Nova Scotia Supreme Court, Appellate Division, on the other hand, relied on the decision of the New Brunswick Court of Appeal in R. v. Simon, supra, and held that the appellant had not established any connection by "descent or otherwise" with the original group of Micmac Indians inhabiting the eastern part of Nova Scotia in the Shubenacadie area.

With respect, I do not agree with the Appellate Division on this point. In my view, the appellant has established a sufficient connection with the Indian band, signatories to the Treaty of 1752. As noted earlier, this treaty was signed by Major Jean Baptiste Cope, Chief of the Shubenacadie Micmac tribe, and three other members and delegates of the tribe. The Micmac signatories were described as inhabiting the eastern coast of Nova Scotia. The appellant admitted at trial that he was a registered Indian under the Indian Act, and was an "adult member of the Shubenacadie – Indian Brook Band of Micmac Indians and was a member of the Shubenacadie Band Number 02". The appellant is, therefore, a Shubenacadie - Micmac Indian, living in the same area as the original Micmac Indian tribe, party to the Treaty of 1752.

This evidence alone, in my view, is sufficient to prove the appellant's connection to the tribe originally covered by the treaty. True, this evidence is not conclusive proof that the appellant is a direct descendant of the Micmac Indian covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmac did not keep written records. Micmac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present-day Shubenacadie Micmac Indian would otherwise be entitled to invoke based on this treaty.

The appellant, Simon, as a member of the Shubenacadie Indian Brook Band of Micmac Indians, residing in Eastern Nova Scotia, the area covered by the Treaty of 1752, can therefore raise the treaty in his defense.

VIII

Is the Treaty a "Treaty Within the Meaning of s.88 of the Indian Act?

Section 88 of the Indian Act stipulates that, "Subject to the terms of any treaty . . . , 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 . . . ".

The majority of the Appellate Division held that it was extremely doubtful whether the Treaty of 1752 was a "treaty" within the meaning of s.88, primarily because it was merely a general confirmation of aboriginal rights and did not grant or confer "new permanent rights". MacDonald J.A. also concluded that the 1752 document could not be considered a "treaty" under s.88 because it was made by only a small portion of the Micmac Nation and it did not define any land or area where the rights were to be exercised. The respondent urges these views upon this Court. The respondent further submits that the word "treaty" in s.88 of the Indian Act does not include the Treaty of 1752 even under the extended definition of "treaty" enunciated in R. v. White and Bob, supra, because the treaty did not deal with the ceding of the land or delineation of boundaries.

Most of these arguments have already been addressed in this judgment and can be dealt with briefly at this point. To begin, the fact that the treaty did not create new hunting or fishing rights but merely recognized pre-existing rights does not render s.88 inapplicable. On this point, Davey J.A. stated in R. v. White and Bob, supra, at p.616:

> The force of the first argument seems to depend upon the assumption that s. 87 [now s.88] should be read as if it were subject only to rights created by a Treaty; that would remove from the saving clause rights already in being and excepted from or confirmed by a Treaty. That argument fails to accord full meaning to the words, "subject to the terms of any treaty . . . . " In my opinion an exception, reservation, or confirmation is as much a term of a Treaty as a grant, (I observe parenthetically that a reservation may be a grant), and the operative words of the section will not extend general laws in force in any Province to Indians in derogation of rights so excepted, reserved or confirmed. (Emphasis added)

This holding was followed by the New Brunswick Court of Appeal in R. v. Paul, supra. See also R. v. Polchies and Paul; R. v. Paul and Paul, [1983] 3 C.N.L.R. 131, (1983), 43 N.B.R. (2d) 449

at 453 (C.A.). As I concluded earlier, the treaty was validly created by representatives of the Micmac people and it covers the territory of concern in this appeal.

With respect to the respondent's submission that some form of land cession is necessary before an agreement can be described as a treaty under s.88, I can see no principled basis for interpreting s.88 in this manner. I would adopt the useful comment of Norris J.A. of the British Columbia Court of Appeal in R. v. White and Bob, supra, affirmed on appeal to this Court. In a concurring judgment, he stated at pp.648-49:

> The question is, in my respectful opinion, to be resolved not by the application of rigid rules of construction without regard to the circumstances existing when the document was completed nor by the tests of modern day draftsmanship. In determining what the intention of Parliament was at the time of the enactment of s.87 [now s.88] of the Indian Act, Parliament is to be taken to have in mind the common understanding of the parties to the document at the time it was executed. In the section "Treaty" is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.

In my view, Parliament intended to include within the operation of s.88 all agreements concluded by the Crown with the Indians that would otherwise be enforceable treaties, whether land was ceded or not. None of the Maritime treaties of the eighteenth century cedes land. To find that s.88 applies only to land cession treaties would be to limit severely its scope and run contrary to the principle that Indian treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians.

Finally, it should be noted that several cases have considered the Treaty of 1752 to be a valid "treaty" within the meaning of s.88 of the Indian Act (for example, R. v. Paul, supra; and R. v. Atwin and Sacobia, supra. The Treaty was an exchange of solemn promises between the Micmacs and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man and, as such, falls within the meaning of the word "treaty" in s.88 of the Indian Act.

IX

Do The Hunting Rights Contained in the Treaty Exempt the Appellant from Prosecution under s.150(1) of the Lands and Forests Act?

As a result of my conclusion that the appellant was validly exercising his right to hunt under the Treaty of 1752 and the fact he has admitted that his conduct otherwise constitutes an offence under the Lands and Forests Act, it must now be determined what the result is when a treaty right comes into conflict with provincial legislation. This question is governed by s.88 of the Indian Act, which, it will be recalled, states that "Subject to the terms of any treaty, all laws of general application . . . in force in the province are applicable to . . . Indians".

It is now clear that the words "all laws" in s.88 refer to provincial legislation and not federal legislation. In R. v. George, [1966] S.C.R. 267, Martland J. stated the following with respect to s.88, at p.281:

> This section was not intended to be a declaration of the paramountcy of treaties over Federal Legislation. The reference to treaties was incorporated in a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation. (Emphasis added)

Under s.88 of the Indian Act, when the terms of the treaty come into conflict with federal legislation, the latter prevails, subject to whatever may be the effect of s.35 of the Constitution Act, 1982. 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. See R. v. Sikyea (1964), 43 D.L.R. (2d) 150, R. v. George, supra, R. v. Cooper, supra; R. v. White and Bob, supra, at p.618.

Here, however, we are dealing with provincial legislation. The effect of s.88 of the Indian Act is to exempt the Indians from provincial legislation which restricts or contravenes the terms of any treaty. In Frank v. The Queen, [1978] 1 S.C.R. 95, the Court held, at p.99:

> The effect of this section is to make applicable to Indians except as stated, all laws of general application from time to time in force in any province, including provincial game laws, but subject to the terms of any treaty and subject also to any other Act of the Parliament of Canada.

Similarly, in Kruger v. The Queen, [1978] 1 S.C.R. 104, the Court held, at pp.111-12:

> However abundant the right of Indians to hunt and to fish, there can be no doubt that such rights is subject to regulation and curtailment by the appropriate legislation authority. Section 88 of the Indian Act appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection, Indians are brought within provincial regulatory legislation.

and at pp.114-15 the court held in reference to Indian treaties and s.88:

> The terms of the treaty are paramount; in the absence of a treaty, provincial laws of general application apply.

Therefore, the question here is whether s.150(1) of the Lands and Forests Act, a provincial enactment of general application in Nova Scotia, restricts or contravenes the right to hunt in article 4 of the Treaty of 1752. If so, the treaty right to hunt prevails and the appellant is exempt from the operation of the provincial game legislation at issue.

Section 150(1) states that no person shall take, carry or possess a rifle or shotgun cartridges loaded with ball or with shot larger that AAA in certain areas of the province except as provided in the section. The exceptions are set out in s.150(2) to s.150(4) which read:

> 150.(2) Any person may hunt with a shotgun [shot-gun] using cartridges loaded with ball or with one rifle during the big game season for which he holds a valid big game license.
>
> 150.(3) Any person may carry or transport shotgun [shot-gun] cartridges loaded with ball or rifles that are dismantled or rendered inoperable in or upon any forest, wood, or road which is in the usual way of travel to or from a hunting camp which that person is to occupy, two days before the opening and two days after the closing of the open season for any big game.
>
> 150(3A) The Minister or a person authorized by him may issue a permit to a person authorizing him to take, carry or have in his possession any rifle during the period in which a rifle is prohibited for the purpose and in accordance with the conditions stated in the permit.
>
> 150(4) Any person may take, carry or have in his possession in any forest, wood, or other resort of rabbits, any rifle of a .22 calibre or less that is equipped with a rim fire mechanism between the sixteenth day of November and the fifteenth day of February following both dates inclusive.

As mentioned, the appellant admitted at trial that he had no licence or other authority permitting him to be in possession of the rifle and shotgun cartridges under the Lands and Forests Act.

Section 150(1) of the Lands and Forests Act has been held to be aimed "at prevention of hunting big game by a person without a licence and out of season" (R. v. Isaac, supra, at p.491). Part III of the Lands and Forests Act, which includes s.150(1), has also been held to be "valid provincial legislation . . . designed basically for the protection of game within the Province . . . [coming] within s.92(13) and (16) of the British North America Act . . . " (R. v. Paul and Copage, [1978] C.N.L.B. (no.4) 43, (1977), 24 N.S.R. (2d) 313 at 320 (N.S.S.C., App.Div.)). After examining this provincial Act, it is clear that the intent of the Nova Scotia legislature, in enacting s.150(1), was to promote the preservation of wildlife in the province by restricting hunting to certain seasons of the year and by requiring permits.

In my opinion, s.150 of the Lands and Forests Act of Nova Scotia restricts the appellant's right to hunt under the treaty. The section clearly places seasonal limitations and licensing requirements, for the purposes of wildlife conservation, on the right to possess a rifle and ammunition for the purposes of hunting. The restrictions imposed in this case conflict, therefore, with the appellant's

right to possess a firearm and ammunition in order to exercise this free liberty to hunt over the lands covered by the treaty. As noted, it is clear that under s.88 of the Indian Act provincial legislation cannot restrict native treaty rights. If conflict arises, the terms of the treaty prevail. Therefore, by virtue of s.88 of the Indian Act, the clear terms of article 4 of the treaty must prevail over s.150(1) of the provincial Lands and Forests Act.

Several cases have particular relevance. These also deal with charges similar to those in the present case where Indians were accused of unlawful possession of certain objects without the permit required under provincial legislation. In each case, the accused Indians raised their treaty rights in defence and it was held that they should be acquitted because they were not bound by the terms of the provincial statutes: See R. v. White and Bob, supra; R. v. Paul, supra; R. v. Atwin and Sacobie, supra; R. v. Paul and Polchies, supra; R. v. Batisse (1978), 19 O.R. (2d) 145, 84 D.L.R. (3d) 377 (Dist.Ct.); R. v. Taylor and Williams (1982), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114 (C.A.); R. v. Moses (1969), 13 D.L.R. (3d) 50 (Ont.Dist.Ct.); R. v. Penasse and McLeod (1971), 8 C.C.C. (2d) 569 (Ont.Prov.Ct.); Cheeco v. R. [1981] 3 C.N.L.R. 45 (Ont.Dist.Ct.).

I conclude that the appellant has a valid treaty right to hunt under the Treaty of 1752 which, by virtue of s.88 of the Indian Act, cannot be restricted by provincial legislation. It follows, therefore, that the appellant's possession of a rifle and ammunition in a safe manner, referable to his treaty right to hunt, cannot be restricted by s.150(1) of the Lands and Forests Act.

I would accordingly quash the convictions and enter verdicts of acquittal on both charges.

X

Constitutional Question: Section 35 of the Constitution Act, 1982

By order of Chief Justice Bora Laskin, dated the 12th of May, 1983, the following constitutional question, repeated for convenience, was framed for consideration by this Court.

> Are the hunting rights referred to in a document entitled "Treaty of Articles of Peace and Friendship Renewed" and executed November 22, 1752, existing treaty rights recognized are affirmed by s.35(1) of the Constitution Act, 1982?

Section 35(1) of the Constitution Act, 1982 reads:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

An affirmative answer to the constitutional question was sought by the Attorney General of Canada and the Union of New Brunswick Indians, Inc. who were granted leave to intervene in the appeal. A negative answer to the constitutional question was sought by the Attorneys General of New Brunswick and Ontario who were also granted leave to intervene. The intervenant, the Native Council of Nova Scotia, took the position that this appeal did not require a substantive interpretation or application of s.35(1) because s.88 of the Indian Act provided protection to the appellant without the necessity of relying on s. 35(1).

In my view, s.88 of the Indian Act covers the present situation and provides the necessary protection to the appellant, Simon. As a result, it is not necessary for the determination of this appeal to consider s.35(1) of the Constitution Act, 1982.

Accordingly, the constitutional question will not be answered.

Conclusions

To summarize:

1. The Treaty of 1752 was validly created by competent parties.

2. The treaty contains a right to hunt which covers the activities engaged in by the appellant.

3. The treaty was not terminated by subsequent hostilities in 1753. Nor has it been demonstrated that the right to hunt protected by the treaty has been extinguished.

4. The appellant is a Micmac Indian covered by the treaty.

5. The Treaty of 1752 is a "treaty" within the meaning of s.88 of the Indian Act.

6. By virtue of s.88 of the Indian Act, the appellant is exempt from prosecution under s.150(1) of the Lands and Forests Act.

7. In light of these conclusions, it is not necessary to answer the constitutional question raised in this appeal.

I would, therefore, allow the appeal, quash the convictions of the appellant and enter verdicts of acquittal on both charges.