HER MAJESTY THE QUEEN (Appellant) v. JESSE HIRAM IRELAND and DAVID JAMIESON (Respondents)

[Indexed as: **R. v. Ireland**]

Ontario Court of Justice (General Division), Gautreau J., November 7, 1990

L.C. McCaffrey, Q.C., for the appellant Crown
P. Williams, for the respondents

The respondent Oneida Indians were acquitted of hunting without a license and hunting in the closed season, contrary to the provincial *Game and Fish Act,* R.S.O. 1980, c.182. It was admitted that the elements of the offence were made out and that the hunting took place off reserve in part of the territory ceded under the Treaty of 1701, signed at Albany, New York. By that treaty, to which the Oneidas were a party, the Iroquois Confederacy ceded all of the territory which is now southwestern Ontario to the British in return for a guarantee of free and undisturbed hunting rights over the ceded territory forever. It was further admitted that the treaty was validly created by competent parties; it is a treaty within the meaning of s.88 of the *Indian Act,* R.S.C. 1985, c.I-5; and it applies to the respondents.

Held: Appeal dismissed.

1. Treaties with Indians should be given a liberal interpretation in favour of the Indians. A treaty must not be interpreted in isolation but must be looked at in its historical context. Judicial notice can be taken of the historical facts surrounding it. If there is evidence of how the parties understood the terms of the treaty, it may be used to give meaning to its terms.

2. The effect of s.88 of the *Indian Act* is to exempt Indians from provincial legislation which conflicts with their treaty rights, even if the provincial legislation is of general application.

3. The hunting rights guaranteed by the treaty were neither contingent on the re-conquest of the territory nor limited to protection from interference by other tribes.

4. The Crown argued that the Five Nations, which included the Oneidas, abandoned the territory in the late 1690s and took up residence in New York state. The Oneidas only returned to Canada in 1840 when they purchased the lands where they now live. The Crown argued that this constituted an extinguishment of any treaty rights which they may have had. Treaty rights are not extinguished by mere non-use; there must be other clear and unequivocal evidence of an intention to abandon and release the rights.

5. The hunting rights have not been extinguished unilaterally by Crown use of the territory. A treaty and the rights created under it cannot be extinguished without the consent of the parties. It makes no difference if the use in question is one of occupation or one of management and conservation.

6. There are two rights in opposition here: the Crown's ownership and consequent rights to use and develop the land and the Indians' right to hunt freely. There are no limiting factors in the treaty. The British government wished to colonize, use and develop the land for its benefit. Therefore it is unreasonable that absolute rights should have been granted to the Indians which would paralyze the Crown's use of the lands. On the other hand, the British wanted the Iroquois as their allies, and understood the importance of free and uninterrupted hunting to them. Therefore it is unreasonable that absolute rights should have been intended for the Crown which would paralyze the Indians' right to hunt. The parties must have intended that the competing rights be reconciled, and this reconciliation would vary with time and circumstances. A treaty must be seen as a living document which evolves with changing times according to the underlying original intent.

7. It is not sufficient that the province has legislated with respect to hunting on this land or even that the lands have been occupied. The Crown must establish that the use and occupancy of these lands cannot be reasonably accommodated to the exercise of Indian hunting rights. There was no evidence to permit the Court to make any findings of conflict or incompatibility between the two rights.

8. Because the Crown did not meet the onus to prove that s.88 does not apply, the appeal was dismissed.

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GAUTREAU J:

Introduction

Nearly 300 years ago, the Confederacy of Iroquois Indians entered into a treaty with the British. This was July 19th, 1701 at Albany, New York. Under the treaty, the Iroquois ceded all of the territory which is now southwestern Ontario to the British in return for a guarantee of free and undisturbed hunting rights over the lands in the territory forever.

The question on this appeal is whether these hunting rights may be exercised today on non-reserve lands in Elgin County, unrestricted by the provisions of the *Game and Fish Act,* R.S.O. 1980, c. 182, of Ontario.

Occurrence

The respondents, are Oneida Indians. They were charged with hunting without a licence and hunting in the closed season contrary to the *Game and Fish Act.* They were found with a firearm and two recently killed racoons in a cornfield, adjacent to a wooded area, in Elgin County on January 21, 1987. It is admitted that the elements of the offence have been made out and that the area where the hunting took place was not part of an Indian reserve but is part of the territory ceded under the Treaty of 1701. It is also acknowledged that the Oneidas are one of the Five Nations of the Iroquois Confederacy who were parties to the treaty.

The defence, simply stated, is that the right to hunt in the 1701 treaty between the British Crown and the Five Nation Indians in combination with s.88 of the *Indian Act,* R.S.C. 1985, c.I-5 provides a defence to the charges. Section 35 of the *Constitution Act,* 1982 is also raised as a defence.

Section 88 of the *Indian Act* says that provincial laws are subject to the terms of any treaty. Section 35(1) of the *Constitution Act, 1982* says that aboriginal and treaty rights are "recognized and affirmed"; native rights are thus constitutionally entrenched.

The respondents said they have always hunted in the area and never had licences. Jesse Ireland, who is now 39, said that as a boy he hunted with his uncles and they never had licences either, so far as he knows.

Hunting is part of the way of life of the respondents. It appears they are responsible hunters. Hunting skills and rules are handed down by the males on the maternal side of the clan or tribe. They teach respect for creation and mother earth; one should not cause unnecessary damage to the animals or the environment. They have regard for the mating season and do not hunt at such times. There is a spiritual and religious component in the hunting involving petition and thanksgiving; there is a custom of leaving something with nature if something is taken from nature - in this case one of the racoons was left. It was stated that hunting should be for the community rather than for selfish purposes. The racoons that the accused shot were intended as food for their tables and the tables of some of the older people of the community who could not hunt.

The Trial

The case was heard on September 7 and December 27, *1989* by His Honour Judge G.A. Phillips. On April 2, 1990*,* in a well-considered judgment, he dismissed the charges against both defendants on the ground that: "the defendants' right to hunt as set forth in the Treaty of 1701 must prevail over Section 61 and 64 of the Provincial *Game and Fish Act;* and "the defendants' treaty rights to exercise 'free hunting . . . free of all disturbances' cannot be restricted by virtue of section 88 of the Indian Act."

The Crown has appealed. I think that the trial judge was correct in dismissing the charges but my reasons are somewhat different than his because the Supreme Court of Canada delivered judgment in *R. v. Sioui*, on May 24th of this year, and set forth the principles that are to apply in a

case like this. The case is reported in [1990] 1 S.C.R. 1025, [1990] *3* C.N.L.R. 127, 70 D.L.R. (4th) 427 and was not available to Judge Phillips.

The Treaty

The Treaty of 1701 was signed by John Nanfan, the Lieutenant Governor of New York (the Governor, the Earl of Bellmont having died), and by Robert Livingston, Secretary for Indian Affairs and other officials on behalf of the British. All Five Nations of the Iroquois Confederacy, including the Oneidas, were parties and approximately twenty sachims (chiefs) affixed their signs and seals.

The Treaty describes the lands which are in length about eight hundred miles in bredth four hundred miles," gives the history of the Indians' title and describes its importance to them for hunting.

> . . . our predecessors did four score years agoe totally conquer and subdue and drove them out of that country and had peaceable and quiet possession of the same to hunt beavers (which was the motive caused us to war for the same) for three score years it being the only chief place for hunting in this part of the world that ever wee heard of and after that wee had been sixty years sole masters and owners of the said land enjoying peaceable hunting without any internegotion, a remnant of one of the seven nations called Tionondade whom wee had expelled and drove away came and settled there twenty years agoe disturbed our beaver hunting against which nation wee have warred ever since and would have subdued them long ere now had not they been assisted and succoured by the French of Canada ...

The treaty then cedes the land to the King of England and reserves hunting rights to the Indians which the King of England guarantees.

> Wee say upon these and many other good motives us hereunto moveing have freely and voluntary surrendered delivered up and for ever quit claimed, and by these presents doe for us our heires and successors absolutely surrender, deliver up and forever quit claime unto our great Lord and Master the King of England called by us Corachkoo and by the Christians William the third and to his heires and successors Kings and Queens of England for ever all the right title and interest and all the claime and demand whatsoever which we the said five nations of Indians called the Maquase, Oneydes, Onnondages, Cayouges and Sinnekes now have or which wee ever had or that our heirs or successors at any time hereafter may or ought to have of in or to all that vast Tract of land or Colony called Canagariarchio beginning ... conteining in length about eight hundred miles and in breath four hundred miles including the Country where Beavers and all sorts of wild game keeps and the place called Tjeughsaghrondie alias Fort de tret ...

There then follows the words which are critical in this case

> ... provided and it is hereby expected that wee are to have free hunting for us and the heires and descendants from us the Five nations for ever and that free of all disturbances expecting to be protected therein by the Crown of England ...

The Issues

The fundamental issue is whether the hunting rights contained in the treaty exempt the accused from prosecution under the charging sections of the *Game and Fish Act.*

Section 88 of the *Indian Act* makes provincial laws of general application subject to the terms of any treaty. It reads:

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

Aboriginal and treaty rights are entrenched in the *Constitution Act, 1982.* Section 35(1) of the Act reads as follows:

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

Crown counsel made a number of admissions which greatly assisted the court in considering this case: the Treaty of 1701 was validly created by competent parties; it is a treaty within the meaning of s.88 of the *Indian Act;* it applies to the defendants; and, the territory ceded under it includes Elgin County.

Although the 1701 document is a treaty within the meaning of s.88 of the *Indian Act* and guarantees the Indians free hunting, this does not necessarily mean the respondents are exempt from the provisions of the *Game and Fish Act.* The treaty must be interpreted, and the nature and scope of the rights determined before this can be decided.

Historical Background

The law is clear that a treaty must not be interpreted in isolation but must be looked at in its historical context. Judicial notice can be taken of the historical facts surrounding it. *R. v. Taylor and Williams,* [1981] 3 C.N.L.R. 114, 62 C.C.C. (2d) 227, 34 O.R. (2d) 360 and *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, [1990] 3 C.N.L.R. 127, 70 D.L.R. (4th) 427.

The historical material that was filed at trial includes the following:

EXHIBIT NUMBER TWO – “Documents Relative to the Colonial History of the State of New York” - Volume 3, pages 896 to 911.

EXHIBIT NUMBER THREE – “Historical Sketches of the County of Elgin” - pages 20, 21, 28 and 29.

EXHIBIT NUMBER FOX JR – “The Iroquois Restoration” - Iroquois Diplomacy on the Colonial Frontier, 1701 - 1754" - pages 29 to 69.

EXHIBIT NUMBER FIVE - "New York State Museum Bulletin 78 Archeology 9 - A History of the New York Iroquois" - pages 249-259.

EXHIBIT NUMBER SIX - "An abridgment of the Indian Affairs."

EXHIBIT NUMBER SEVE - "Sir William Johnson papers" - letter from Edward Braddock, April 16, 1755.

EXHIBIT NUMBER EIGHT - "The Livingstone Iroquois Empire" - 1666-1723.

EXHIBIT NUMBER NINE - "The Ambiguous Iroquois Empire" - pages 208 to 213.

EXHIBIT NUMBER TEN - Volume 15 - "Northeast - Southeastern Ojibwa" - pages 760 to 769.

The trial judge described the historical background as follows:

> The Iroquois consisted of five confederated tribes: the Mohawk, Oneida, Onondaga, Cayuga and Seneca which were known in 1701 as the Five Nations (later to become the Six Nations). Their homelands ran parallel to and south of Lake Ontario.
>
> During the 1640's, the Iroquois engaged in a series of wars against the tribes of the upper Great Lakes aimed at defeating the Indians living to the west of their homelands. Initially they met with success, defeating the Hurons, Tobaccos, Neutrals and Eries.
>
> The earliest recorded history of the Indian presence in the area which is now constituted as Elgin County indicates that the Neutrals, an agricultural tribe, occupied a substantial village in the County. The fate of the Neutrals and their neighbours to the north, the Tobacco people, is described by Lajeunesse in "The Windsor Border Region" at page xxxii:
>
> > After the dispersal of the Hurons the Iroquois carried the terrors of their ferocious prowess southwest to the Petuns or Tobacco Nation and then southward to the land of

> the Neutrals. By 1651 the whole of western Ontario ... was nothing but the unpopulated hunting grounds of the Iroquois.

Historian James H. Coyne put it this way

> For generations after the disappearance of the Neutrals, the Iroquois resorted to the region in pursuit of game. The country was described in maps as "Chase de Castor des Iroquois", the Iroquois' beaver ground. (James H. Coyne, “The Country of the Neutrals” Historical Sketches of the County of Elgin.)

Just at the moment when a total Iroquois victory against the western tribes seemed imminent, the French intervened directly in support of the Iroquois' enemies. The conflict escalated into a colonial war which lasted from 1680 to 1701 and pitted the French and their Indian allies against the English and the Iroquois.

Ultimately, the tide of war turned in favour of the French and their Indian allies. As the strength of the Iroquois began to wane, the Ojibwa, who controlled the northern shores of Lakes Huron and Superior, entered upon a career of expansion and defeated the Iroquois in a series of skirmishes which ended in complete victory at the outlet of Burlington Bay. The Ojibwa were sole occupants of Western Ontario at the time the treaty of 1701 was signed.

An Anglo-French peace treaty known as the Treaty of Ryswick was signed in 1697 but the French refused to recognize the Five Nations as English subjects and demanded that the Iroquois make a separate peace before the war against them would be stopped. The Iroquois' situation deteriorated rapidly and they ultimately accepted neutrality. Internally, the Five Nations were divided into a peace faction, which wanted to negotiate with the French and a loyal pro-English faction. The result was that at the same time the Iroquois were negotiating the Grand Peace Treaty of 1701 with the French, their deputies were meeting with English officials at Albany and on July 19, 1701, entered into the treaty which is involved in these proceedings.

There is a final historical footnote which relates to aboriginal title in this area and that is that the Indians who drove the Iroquois from this area ceded the lands to the British Crown by the "Great Deed" on the 17th day of May, 1790, without reserving the right to hunt and fish.

There are a few matters that I wish to add. Furs, in particular beaver, were very important to the Iroquois. This led them to the territory ceded by the treaty; they took it by conquest. In *The Iroqouis Restoration,* by Richard Aquila, it is stated that by the mid- 1660s the Iroquois were the dominant force in the western country "After years of fighting, the five nations had finally secured control of vast lands which could provide the beaver furs needed for the vital Albany trade" (p. 38).

When the Iroquois signed the treaty of neutrality with the French, the Grand Council Treaty of 1701, they were still concerned that their right to hunt in the western lands be secure. They acknowledged in the treaty the right of other tribes to hunt and live there; and they were unsure that their right to hunt would be protected. It appears that the significant reason for the Iroquois signing the treaty with the British, was to protect their source of furs in the western country.

The English entered the treaty because they had a strong interest in the western land. This territory would serve their strategic and expansion purposes, and, equally important, it would help secure the Iroquois as their allies. (See Aquila, pp. 30-69 and Jennings p. 211.)

Finally, I should mention a historical fact that will be important to the argument of abandonment. The Oneidas, when driven out of southwestern Ontario in the late 1600s, lived in New York State until the 1840s when they sold their lands and came to southwestern Ontario where they purchased new lands: see the transcript at p. 23. The Crown said that they arrived as immigrants without claiming any rights under the old treaty when they came but I have seen no evidence to support this.

Grounds of Appeal

The Crown mounted three main attacks on the respondent's defence.

(1) The historical circumstances of the treaty show that it was not intended to be absolute, but conditional upon an occurrence which did not take place; in addition, the guarantee of free hunting was limited to protection from other tribes.

(2) The rights given to the Indians under the treaty were extinguished by abandonment.

(3) The rights were extinguished, or at least qualified, by the subsequent use and development of the lands by the Crown.

General Principles

Before dealing with these arguments I wish to set forth some of the general principles of law that apply to Indian treaty rights.

1. Paramountcy

It is clear that the effect of s.88 of the *Indian Act* is to exempt Indians from provincial legislation if it is at odds with their treaty rights. The terms of the treaty have paramountcy even if the provincial legislation is of general application. *R. v. Kruger,* [1978] 1 S.C.R. 104 at 114-15 [1977] 4 W.W.R. 300, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434, 14 N.R. 495, *Simon v. The Queen,* [1985] 1 S.C.R. 387 [1986] 1 C.N.L.R. 153, 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366, and *R. v. Sioui, supra,* at p. 1065 [pp. 153-54 C.N.L.R.].

2. Interpretation

It is clear that treaties with Indians should be given a liberal interpretation in favour of the Indians. Treaty provisions should not be whittled down by technical excuses; the honour of the Crown is at stake. They are to be construed "not according to the technical meaning of the words, but in the sense that they would naturally be understood by the Indians": *Simon, supra,* at p. 402 [p. 167 C.N.L.R.]. In *Sioui* Lamer J. at 1036 [p. 134 C.N.L.R.] quoted from *Jones v. Meehan,* 175 U.S. 1 (1899) as follows:

> In construing any treaty between the United States and an Indian tribe, it must always ... be born in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

When interpreting a treaty a court is entitled to and should take judicial notice of the historical facts and circumstances surrounding the making of the treaty; moreover, the court is entitled to rely on its own historical knowledge and research in doing so. (*Sioui* p. 1051 [p. 144 C.N.L.R.].)

If there is evidence, by conduct or otherwise, of how the parties understood the terms of the treaty, it may be an aid in giving meaning to its terms. (*R. v. Taylor and Williams, supra,* referred to with approval in *Sioui* at p. 1045 [pp. 140-41 C.N.L.R.].)

The First Argument Advanced by the Crown - Contingent and Limited Rights

The Crown argued that the guarantee of free hunting rights was not absolute but was contingent on the re-conquest of the territory which was occupied by other Indians, who were allies of the French, as well as the French themselves. This was to take place forthwith. It never happened and therefore the treaty is of no consequence.

It was also argued that free hunting in the historical context was not an absolute guarantee of free hunting but only that the British would protect the right of the Iroquois to hunt in the territory undisturbed by other Indians.

I do not think these arguments are well founded- The treaty says that the Iroquois Nations are to have free hunting, free of all disturbances and protected by the Crown of England. It is a clear and positive statement of the rights of the Indians. There is no suggestion that these rights were contingent on a particular event at a particular time, nor is there any suggestion that the King of England only guaranteed the Iroquois protection from interference by other tribes. Neither is there anything in the surrounding circumstances that leads to such a conclusion.

I believe that this interpretation is consistent with *Simon* where the Chief Justice said at p. 401 [pp. 166-67 C.N.L.R.]:

> ... 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 rights.

Simon involved a question of whether Indian treaty rights to hunt were insulated from the restrictions of the Nova Scotia *Provincial Lands and Forests Act.*

It goes without saying that the 1701 treaty would go for naught if the territory remained under the dominion of others, but it did not. The British gained possession under Treaty of Paris, 1763.

If there is any evidence by conduct or otherwise of how the parties understood the terms of the treaty, such understanding is of assistance in giving content to the treaty. There is such evidence here and it supports the position of the Indians.

The respondents and other members of their tribe have hunted in the area covered by the treaty without provincial hunting licences and without following provincial hunting seasons. This is evidence of the Iroquois' understanding that these treaty rights were to be free of all disturbances.

The Crown has relied upon the grant of the land to support its territorial claims. They treated the grant as an actual one, not contingent. This is seen in the instructions given to Sir William Johnson, the Imperial Superintendent General of Indian Affairs, by General Edward Braddock, the Commander of the Forces, on April 16, 1755. The tenor of the instructions is that, on the authority of the Five Nations Deed of 1701, the British had a right to the land and a right to take military action to expel the French.

> It appearing that the French have from time to time by Fraud & Violence built strong Forts within ye Limits of the saied Land, contrary to the purport of the [saied] Covenant Chain of ye saied Deed & Treaty, you are in my Name to Assure the Saied Nations that 1 am come by His Majesty's Order to destroy all ye saied Forts & to build such others as shall protect & secure the saied Lands to them their Heirs & Successors for ever according to ye: intent & Spirit of the Saied Treaty & therefore call upon them to take up the Hatchet & come & take Possession of their own Lands.

<u>The Second Argument Advanced by the Crown: The Hunting Rights have been Extinguished by Abandonment</u>

The Crown argued that the Five Nations, which include the Oneidas, abandoned the territory in the late 1690s and took up residence in New York State. The Oneidas only returned to Elgin County in 1840 when they purchased the lands where they now live. The Crown says this abandonment for 140-150 years constitutes an extinguishment of any treaty rights that they may have had. (I must point out that the respondents argued that other Iroquois tribes had lived in the territory at some time while the Oneidas were absent.)

Can non-use extinguish treaty rights? I should not think so. Even an easement in property law is not extinguished by mere non-use; there must be other clear and unequivocal evidence of an intention to abandon and release the easement. Mere non-user, without more, is neither here nor there. See *Liscombe v. Maugham* (1927), 62 O.L.R. 328 (Ont. C.A.). It is all the more so where treaty rights are concerned. A treaty is a solemn, sacred agreement between the Crown and the

Indians and there are sovereign elements to it. This being the case, much more is required than mere non-use to show abandonment - even if the non-use is for 150 years.

I was referred to *Attorney General v. Bear Island Foundation* (1985), 49 O.R. (2d) 353 at 436, [1985] C.N.L.R. 1 at 77, 15 D.L.R. (4th) 321 as an authority for extinguishment of Indian rights through non-use and abandonment, but the case is not an authority for extinguishment of treaty rights; it deals only with aboriginal rights.

In any event, the answer to the problem is found in *Sioui* at p. 1066 [p. 154 C.N.L.R.]:

> Finally, the appellant argues that non-user of the treaty over a long period of time may extinguish its effect. He cites no authority for this. I do not think that this argument carries much weight: a solemn agreement cannot lose its validity merely because it has not been invoked to, which in any case is disputed by the respondents, who maintain that it was relied on in a seigneurial claim in 1824. Such a proposition would mean that a treaty could be extinguished merely because it had not been relied on in litigation, which is untenable.

The Third Argument Advanced by the Crown: Have the Hunting Rights been Extinguished Unilaterally by Crown Use of the Territory?

The Crown argued extinguishment based on use of the lands by the Crown. It was said that the use of the lands is incompatible with free hunting and the Indians' rights must yield because the Crown's right to use the land, based on ownership, is superior. If the Crown decides to use the land in a way which is incompatible with free hunting, the latter must give way; the Crown can, as owner, extinguish the rights unilaterally.

There are two aspects to the use of the land by the Crown. The first is that by Crown grants it has given the land over to private use for such things as farming. Free hunting on such lands would be incompatible with private use. The second is that responsible use and enjoyment of the territory requires management and conservation of wildlife resources. Ibis is what the *Fish and Game* Act is all about. Free hunting by its nature, is incompatible with the statute and use.

In *Simon* it was argued that absolute title to the land covered by the treaty rests with the Crown and therefore the Crown had the right to extinguish any Indian rights on such lands. Further, it was said that the Crown, through occupancy by the white man under Crown grant or lease, had extinguished native rights in lands outside of reserves.

Chief Justice Dickson said it was not necessary to come to a final decision and he did not wish to be taken as expressing an opinion on whether, as a matter of law, treaty rights could be extinguished, but he pointed out that finding that a treaty right has been extinguished has serious and far-reaching consequences (pp. 405, 407 [pp. 169-70 C.N.L.R.]).

I think it can now be said that a treaty and the rights created under it cannot be unilaterally extinguished. It requires consent. In *Sioui* at p. 1063 [p. 152 C.N.L.R.] it was said:

> It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred: *Simon, supra,* at p. 410, and *White and Bob supra,* at p. 649. The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned. Since the Hurons had the capacity to enter into a treaty with the British, therefore, they must be the only ones who could give the necessary consent to its extinguishment.

This was said in a context that asked whether it would be contrary to the general principles of law for an agreement between the English and the French to extinguish a treaty between the English and the Hurons. Despite the contextual difference, the same reasoning must apply and the same answer given when asking if one of the parties to a treaty can extinguish it without the consent of the other. Similarly it makes no difference if the use in question is one of occupation or one of management and conservation.

Limitation of Treaty Rights Based on Intent or Expectations of the Parties

Although I conclude that treaty rights cannot be extinguished or limited unilaterally, that does not exclude their limitation or extinguishment based on original intent or the common expectation of the parties.

There are two rights in opposition here: the Crown's ownership and consequent rights to use and develop the land and the Indians' right to hunt freely. There are no limiting factors in the treaty. Therefore one can reason that the Indians may hunt anywhere in the territory and this includes private property. This could lead one to suppose that they might hunt racoons in the backyard of a private home. With respect, I believe that this goes beyond what the parties intended or what is reasonable. To permit it would be to trample on the Crown's ownership rights. On the other hand, it would be equally unreasonable for the Crown to argue that its legal title and its right to use, develop and enjoy the lands can frustrate, and in effect abolish, the hunting rights of the Indians.

Neither of these positions is reasonable. The answer must come from interpretation of the treaty by determining the intention of the parties. How did they intend to solve the problem if rights came into conflict?

In *Sioui* the Court was dealing with the question of whether the Indians could continue to practice their religious rites and customs in the Parc: de la Jacques-Cartier if this involved cutting down trees, camping and making fires contrary to the *Quebec Parks Act*. The Court said at p. 1068 [p. 155 C.N.L.R.]:

> In my view, the treaty essentially has to be interpreted by determining the intention of the parties on the territorial question at the time it was concluded. It is not sufficient to note that the treaty is silent on this point. We must also undertake the task of interpreting the treaty on the territorial question with the same generous approach toward the Indians that applied in considering earlier questions. Now as then, we must do our utmost to act in the spirit of Simon.

In interpreting the document the court must consider the language used and the original intent if any reliable evidence can be found. The original intent must be considered in its broad aspect, that is, the underlying intent. What did the parties intend and contemplate would be accomplished? The interpretation must be realistic and reflect the intention of both parties, not just one of them. "The court must choose from among the various possible interpretations of the common intention the one which best reconciles the Huron's interests and those of the conqueror" (*Sioui* p. 1069 [p.156 C.N.L.R.]).

I think it can be concluded from history that the British government wished to colonize, use and develop the land for its benefit. Therefore it is unreasonable that absolute rights should have been granted to the Indians which paralyze the Crown's use of the lands. On the other hand, the British wanted the Iroquois as their allies, and understood the importance of free and uninterrupted hunting to them. Therefore it is unreasonable that absolute rights should have been intended for the Crown which would paralyze the Indians' right to hunt. The conclusion must be that the parties intended that the competing rights should be reconciled, and this reconciliation would vary with time and circumstances. The rights are not frozen in time. A treaty must be seen as a living document that evolves with changing times according to the underlying original intent. When the rights of the parties conflict they must be adjusted. I think this view is supported by Chief Justice Lamer at pp. 1071-72 [p. 157 C.N.L.R.] of *Sioui*:

> Accordingly, I conclude that in view of the absence of any express mention of the territorial scope of the treaty, it has to be assumed that the parties to the treaty of September 5 intended to reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand. Protecting the exercise of the customs in all parts of the territory frequented when it is not incompatible with its occupancy is in my opinion the most reasonable way of reconciling the competing interests. This, in my view, is the definition of the common intent of the parties which best reflects the actual intent of the Hurons and of Murray on September 5, 1760. Defining the common intent of the parties on the question of territory in this way makes it possible to give full effect to the spirit of conciliation, while respecting the practical requirements of the British. Ibis gave the English the necessary flexibility to be able to respond in due course to the increasing need to use Canada's resources, in the event that Canada remained under British sovereignty. The Hurons, for their part, were protecting their customs wherever their exercise would not be prejudicial to the use to which the territory concerned would be put. The Hurons could not reasonably expect that the use would forever remain what it was in 1760.

I assume that he would have added, if confronted with the problem, that the Crown's right to use and develop the territory would have to be adjusted to accommodate the Indians' right to hunt. The Crown's right can be exercised to the extent that it does not make the Indians' right of free hunting meaningless. At what point does this happen? Fortunately I do not have to decide this on this appeal. The answer comes more easily; the case against the Indians must fail because of an inadequate evidentiary base. There is not enough evidence to permit the Court to make any findings of conflict or incompatibility between the two rights.

Evidence of Incompatibility

It is not sufficient that the province has legislated with respect to hunting on this land or even that the lands have been occupied. The Crown must establish that the type of use and occupancy, to which this land is subject, is incompatible with the exercise of free hunting on it by the respondents. It is up to the Crown to prove that the use and occupancy of these lands cannot be reasonably accommodated to the exercise of the Indians' hunting rights. (*Sioui* p. 1072 [p. 157 C.N.L.R.].)

The Crown presented no evidence as to what land the respondents were hunting on, who owns it or what it is used for; neither was there any evidence of the nature and extent of the hunting involved; nor was there any evidence that the proper use of the lands requires management of wildlife as provided by the statute and that the exercise of hunting rights by the Indians cannot be accommodated to this.

This lack of evidence is fatal. The proof on the Crown in cases like this is high. What Chief Justice Dickson said in *Simon* in relation to the extinguishment of rights applies even though we are not talking of extinguishment but of conflict and incompatibility. He said at p. 406 [pp. 170-71 C.N.L.R.]:

> 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 lands in question, it would be impossible to determine whether the appellant's treaty hunting rights have been extinguished.

Conclusion

Because the Crown has not met the onus to prove that s.88 does not apply, the appeal is dismissed.

In view of this it is not necessary to consider the application of s.35(1) of the *Constitution Act, 1982*.