

Simon v. The Queen, [1985] 2 S.C.R. 387

James Matthew Simon *Appellant*;

and

Her Majesty The Queen *Respondent*;

and

The Union of New Brunswick Indians, Inc., the Native Council of Nova Scotia, Attorney General of Canada, Attorney General for Ontario and Attorney General for New Brunswick *Interveners*.

File No.: 17006.

1984: October 23; 1985: November 21.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Wilson and Le Dain JJ.

on appeal from the court of appeal for nova scotia

Indians -- Treaty rights -- Right to hunt -- Provincial law restricting that right -- Whether or not treaty rights prevail -- Indian Act, R.S.C. 1970, c. I-6, s. 88 -- Lands and Forests Act, R.S.N.S. 1967, c. 163, s. 150(1) -- Constitution Act, 1982, s. 35.

Appellant, a registered Micmac Indian, was convicted under s. 150(1) of Nova Scotia's *Lands and Forests Act* for possession of a rifle and shotgun cartridges. Although appellant admitted all essential elements of the charges, it was argued 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 the provincial act. Article 4 of that Treaty stated that the Micmacs have "free liberty of Hunting & Fishing as usual" and s. 88 provided that provincial laws of general application applied to Indians, subject to the terms of any treaty. The Court of Appeal upheld the trial judge's ruling that the Treaty of 1752 did not exempt appellant from the provisions of the provincial *Lands and Forests Act*. At issue here was whether or not appellant enjoys hunting rights, pursuant to the Treaty of 1752 and s. 88 of the *Indian Act*, which preclude his prosecution for certain offences under the *Lands and Forests Act*.

Held: The appeal should be allowed.

Both Governor Hopson and the Micmac had the capacity to enter into the Treaty of 1752 and did so with the intention of creating mutually binding obligations. The Treaty constitutes a positive source of protection against infringements on hunting rights and the fact that these rights existed before the Treaty as part of the general aboriginal title did not negate or minimize the significance of the rights protected by the Treaty. Although the right to hunt was not absolute, to be effective, it had to include reasonably incidental activities, such as travelling with the necessary equipment to the hunting grounds and possessing a hunting rifle and ammunition in a safe manner.

The Treaty of 1752 continues to be in force and effect. The principles of international treaty law relating to treaty termination were not determinative because an Indian treaty is unique and *sui generis*. Furthermore, nothing in the British conduct subsequent to the conclusion of the Treaty or in the hostilities of 1753 indicated that the Crown considered the terms of the Treaty terminated. Nor was it demonstrated that the hunting rights protected by the Treaty have been extinguished. The Court expressed no view whether, as a matter of law, treaty rights can be extinguished.

Appellant is an Indian covered by the Treaty. He was a registered Micmac Indian living in the same area as the original Micmac Indian tribe which was a party to the Treaty. This was sufficient evidence to prove appellant's connection to that tribe. In light of the Micmac tradition of not committing things to writing, to require more, such as proving direct descendancy, would be impossible and render nugatory any right to hunt that a present day Micmac would otherwise have.

The Treaty of 1752 is an enforceable obligation between the Indians and the Crown and is therefore within the meaning of s. 88 of the *Indian Act*. Section 88 operates to include all agreements concluded by the Crown with the Indians that would be otherwise enforceable treaties, whether or not land was ceded.

Appellant's possession of a rifle and ammunition in a safe manner was referable to his treaty right to hunt and was not restricted by s. 150(1) of the *Lands and Forests Act*. Section 88 of the *Indian Act*, which applies only to provincial legislation, operates to exempt Indians from legislation restricting or contravening a term of any treaty and must prevail over s. 150(1) of the *Lands and Forests Act*.

It was not necessary to consider s. 35 of the *Constitution Act, 1982* since s. 88 of the *Indian Act* covered the present situation and provided the necessary protection for the appellant.

Cases Cited

R. v. Isaac (1975), 13 N.S.R. (2d) 460; *R. v. Cope* (1982), 1981 CanLII 2722 (NS CA), 49 N.S.R. (2d) 555; *R. v. Syliboy*, 1928 CanLII 352 (NS SC), [1929] 1 D.L.R. 307; *R. v. Simon* (1958), 1958 CanLII 477 (NB CA), 124 C.C.C. 110; *R. v. Francis* (1969), 1969 CanLII 848 (NB CA), 10 D.L.R. (3d) 189; *R. v. Paul* (1980), 1980 CanLII 2819 (NB CA), 30 N.B.R. (2d) 545; *R. v. Atwin and*

Sacobie, [1981] 2 C.N.L.R. 99; *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982s <) 2 All E.R. 118; *R. v. Paul and Polchies* (1984), 58 N.B.R. (2d) 297; *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29; *R. v. White and Bob* (1964), 1964 CanLII 452 (BC CA), 50 D.L.R. (2d) 613, aff'd [1965] S.C.R. vi, 1965 CanLII 643 (SCC), 52 D.L.R. (2d) 481; *Francis v. The Queen*, 1956 CanLII 79 (SCC), [1956] S.C.R. 618; *Pawis v. The Queen*, 1979 CanLII 2598 (FC), [1980] 2 F.C. 18, (1979), 102 D.L.R. (3d) 602; *Calder v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] S.C.R. 313; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832); *R. v. Polchies and Paul*; *R. v. Paul and Paul* (1982), 43 N.B.R. (2d) 449; *R. v. George*, 1966 CanLII 2 (SCC), [1966] S.C.R. 267; *R. v. Sikyea* (1964), 1964 CanLII 510 (NWT CA), 43 D.L.R. (2d) 150; *Frank v. The Queen*, 1977 CanLII 152 (SCC), [1978] 1 S.C.R. 95; *Kruger v. The Queen*, 1977 CanLII 3 (SCC), [1978] 1 S.C.R. 104; *R. v. Paul and Copage* (1977), 24 N.S.R. (2d) 313; *R. v. Batisse* (1978), 1978 CanLII 1640 (ON SC), 19 O.R. (2d) 145; *R. v. Taylor and Williams* (1982), 1981 CanLII 1657 (ON CA), 34 O.R. (2d) 360; *R. v. Moses* (1969), 1969 CanLII 384 (ON SC), 13 D.L.R. (3d) 50; *R. v. Penasse and McLeod* (1971), 1971 CanLII 1219 (ON CJ), 8 C.C.C. (2d) 569; *Cheeco v. The Queen*, [1981] 3 C.N.L.R. 45, referred to; *R. v. Mousseau*, 1980 CanLII 194 (SCC), [1980] 2 S.C.R. 89, distinguished.

Statutes and Regulations Cited

Constitution Act, 1867, ss. 91(24), 92(13), (16).

Constitution Act, 1982, s. 35.

Indian Act, R.S.C. 1970, c. I-6, s. 88.

Lands and Forests Act, R.S.N.S. 1967, c. 163, s. 150.

Authors Cited

MacKenzie, N. A. M. "Indians and Treaties in Law" (1929), 7 *Can. Bar Rev.* 561, 561-568.

Upton, L. F. S. *Micmac and Colonists: Indian - White Relations in the Maritimes 1713-1867*, Vancouver, University of British Columbia Press, 1979.

APPEAL from a judgment of the Nova Scotia Court of Appeal (1982), 1982 CanLII 3703 (NS CA), 49 N.S.R. (2d) 566, dismissing an appeal from a conviction by Kimball J. Appeal allowed.

Bruce H. Wildsmith and Graydon Nicholas, for the appellant.

Robert E. Lutes and Brian Norton, for the respondent.

Graydon Nicholas, for the intervener the Union of New Brunswick Indians, Inc.

J. P. Merrick, Q.C., and *Bruce Clarke*, for the intervener the Native Council of Nova Scotia.

John Rook and Martin Freeman, for the intervener the Attorney General of Canada.

J. T. S. McCabe, for the intervener the Attorney General for Ontario.

J. T. Keith McCormick, for the intervener the Attorney General for New Brunswick.

The judgment of the Court was delivered by

1. THE CHIEF JUSTICE--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.

The main issue was the applicability of provincial legislation to treaty rights.

I

Facts

2. 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 Forests Act* with possession of a rifle and shotgun cartridges. The two charges read:

Facts: a status Mi'kmaq charged under provincial legislation for possession of a firearm and amo.

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 than AAA, contrary to Section 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 [Section 150\(1\)](#) of the [Lands and Forests Act](#).

[Section 150\(1\)](#) of the [Lands and Forests 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 than 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.

3. 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 licence 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.

4. Although all essential elements of the charges were admitted by Simon, it was argued on his behalf at trial 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 Forests Act*.

5. 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.

S. 88 of the Indian Act referentially incorporates provincial laws of general application making them applicable to Indians; this addresses the division of powers issue.

(Emphasis added.)

6. The Treaty of 1752, the relevant part of which states at article 4 that the Micmacs have "free liberty of Hunting & 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 & Francis Jeremiah, Members and 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, form and Tenor following, vizt:

1°. It is agreed that the Articles of Submission and Agreement, made at Boston in New England by the Delegates of the Penobscot Norridgwook & St. John's Indians, in the year 1725 Ratified & Confirmed by all the Nova Scotia Tribes, at Annapolis Royal, in the month of June 1726, & lately renewed with Governor Cornwallis at Halifax, & Ratified at St. John's River, now

read over, Explained and 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 & Renew the same Solemn Submissions and promisses for the Strickt 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 Majestys 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.

4°. It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting & Fishing as usual: and that if they shall think a Truckhouse 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 said Indians shall have free liberty to bring for 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.

the "hunt as usual" clause is similar to the "hunt as formerly" clauses in the Douglas treaties on Vancouver Island in the 1850s. The truckhouse provision becomes the issue later in the Marshall decisions.

5°. That a Quantity of Bread, Flour, & such other Provisions as can be procured, necessary for the Familys, and proportionable to the number 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 & mutual Correspondance between the said Indians & this Government, His Excellency Peregrine Thomas Hopson Esqr. Captain 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, and some Powder & Shot; and the said Indians promise once every Year, upon the 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 Endeavours to save the lives and goods of any People Shipwrecked on this Coast, where they resort, and shall Conduct the People saved to Halifax with their Goods, & 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 benefit, Advantages and Priviledges, as any others of His Majesty's Subjects.

In Faith and Testimony whereof, the Great Seal of the Province is hereunto Appended, and the party's to these presents have hereunto interchangeably Set their Hands in the Council Chamber at Halifax this 22nd day of Nov. 1752, in the Twenty sixth year of His Majesty's Reign.

(Signatures deleted.)

(Emphasis added.)

II

Lower Court Judgments

Nova Scotia Provincial Court

7. For the purposes of his decision, Kimball J. 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.C.A.), 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

8. An appeal by way of stated case to the Nova Scotia Supreme Court, Appellate Division, was dismissed (reported at (1982), [1982 CanLII 3703 \(NS CA\)](#), 49 N.S.R. (2d) 566). The question stated by Kimball J. 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 [section 150\(1\)](#) of the [Lands and Forests Act](#)?

9. 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](#).
10. First, he concluded that the Treaty of 1752 provided no positive source of protection for hunting rights. On this point, Macdonald J.A. cited [R. v. Cope](#) (1982), [1981 CanLII 2722 \(NS CA\)](#), 49 N.S.R. (2d) 555 (N.S.C.A.), where MacKeigan C.J.N.S., at p. 564, 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".
11. 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.
12. 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.

13. 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.
14. The appeal was accordingly dismissed and the convictions were affirmed.

III

The Issues

15. 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*?
16. In addition, the following constitutional question was framed by Chief Justice Laskin:

Are the hunting rights referred to in a document entitled "Treaty or 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*?
17. 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.

Main issues were the validity of the Treaty of 1752 and s. 88 of the Indian Act.

IV

Was the Treaty of 1752 Validly Created by Competent Parties?

18. 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.

19. 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.

20. The historical legal context provided by the respondent consists primarily of the 1929 decision of Acting Judge Patterson in *R. v. Syliboy, 1928 CanLII 352 (NS SC)*, [1929] 1 D.L.R. 307 (Co. Ct.) and the academic commentary it generated immediately following its rendering. In the *Syliboy* case Patterson J. addressed the question of the capacity of the parties to enter into a treaty at pp. 313-14:

Impt historical case which relied on the 'Indians are savages' argument. The Court in Simon rejects it.

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 powers." 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 Britian not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

'Savages' and doctrine of discovery from the 1928 Syliboy decision.

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 deputed 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.

21. 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 Patterson J.'s words, leaving aside for the moment the question of whether treaties are international-type documents, his conclusions on capacity are not convincing.

the Court in *Simon* marks a new direction

22. No court, with the exception of the Nova Scotia Supreme Court, Appeal Division in the present case, has agreed explicitly with the conclusion of Patterson J. that the Indians and Governor Hopson lacked capacity to enter into an enforceable treaty. The Treaty of 1752 was implicitly assumed to have been validly created in *R. v. Simon* (1958), 124 C.C.C. 100 (N.B.C.A.); *R. v. Francis* (1969), 1969 CanLII 848 (NB CA), 10 D.L.R. (3d) 189 (N.B.C.A.); *R. v. Paul* (1980), 1980 CanLII 2819 (NB CA), 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 Association of Alberta*, [1982] 2 All E.R. 118 (C.A.); *R. v. Paul and Polchies* (1984), 58 N.B.R. (2d) 297 (Prov. Ct.) In *R. v. Isaac, supra*, Cooper J.A., after noting Patterson J.'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.

23. N. A. M. MacKenzie, in "Indians and Treaties in Law" (1929), 7 *Can. Bar Rev.* 561, disagreed with Patterson J.'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 America 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.

24. 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.

The document is a valid treaty.

V

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

25. 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 & Fishing as usual...." What is the nature and scope of the "liberty of Hunting & Fishing" contained in the Treaty?
26. 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 rights. 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.

The treaty gives rise to a positive right

27. 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 CanLII 18 (SCC), [1983] 1 S.C.R. 29. I had occasion to say the following at p. 36:

The court reiterates the Nowegijick principle-- fair, large and liberal construction in favour of Aboriginal people.

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 (1899), it was held that Indian treaties "must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians".

28. 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.

29. 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.

30. 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.

31. 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 of 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.

the treaty right includes activities "reasonably incidental" to exercising the right.

VI

Has the Treaty Been Terminated or Limited?

(a) Termination by Hostilities

32. 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, *Micmac 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.

33. 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), 1964 CanLII 452 (BC CA), 50 D.L.R. (2d) 613 (B.C.C.A.), at pp. 617-18, aff'd [1965] S.C.R. vi, 1965 CanLII 643 (SCC), 52 D.L.R. (2d) 481; *Francis v. The Queen*, 1956 CanLII 79 (SCC), [1956] S.C.R. 618, at p. 631; *Pawis v. The Queen*, 1979 CanLII 2598 (FC), [1980] 2 F.C. 18, (1979), 102 D.L.R. (3d) 602, at p. 607.

Treaties with Indigenous people are *sui generis*

34. 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 it 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.

the burden is on the Crown to prove a treaty was terminated.

35. 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 indicate 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.

36. 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.

The Treaty of 1752 alive and in effect.

(b) Termination by Extinguishment

37. The respondent's argument that the Treaty of 1752 has been extinguished is based on *R. v. Isaac, supra*, at pp. 476, 479; *Calder v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] S.C.R. 313, at p. 321; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941), at p. 347; *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), at pp. 586-88, and *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832). 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.

38. 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. Santa Fe Pacific R. Co.*, *supra*, at p. 354, "extinguishment cannot be lightly implied".

Extinguishment require strict proof of fact.

39. 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 CanLII 194 (SCC), [1980] 2 S.C.R. 89, is not relevant.

40. 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".

41. 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. 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.

Extinguishment requires specific evidence.

VII

Is the Appellant an Indian Covered by the Treaty

42. 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.

43. 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.

44. 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 Indians covered by the Treaty of 1752. It must, however, be sufficient, for otherwise no Micmac Indian would be able to establish descendancy. The Micmacs 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.

45. 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 defence.

the courts shouldn't place an impossible burden of proof on an Individual to est he/she can rely on treaty rights.

VIII

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

46. 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"

47. 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 land or delineation of boundaries.

48. 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:

S.88 applies equally to new rights created and pre-existing rights recognized by treaty.

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 the 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* (1982), 43 N.B.R. (2d) 449 (C.A.), at p. 453. 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.

49. 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 had 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.

"Treaty' in s. 88 includes all solemn promises made by Crown representatives in a position of authority to Aboriginal people.

50. 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.

'Treaty' in s. 88 includes agreements that do not provide for a land surrender.

51. 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 Sacobie, supra*). The Treaty was an exchange to 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*?

52. 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 any province are applicable to... Indians".

53. 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 CanLII 2 (SCC), [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.)

54. Under s. 88 of the *Indian Act*, when the terms of a 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), 1964 CanLII 510 (NWT CA), 43 D.L.R. (2d) 150; *R. v. George, supra*; *R. v. Cooper, supra*; *R. v. White and Bob, supra*, at p. 618.

Division of powers--exclusive power of Parliament to derogate from treaty rights.

55. 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*, 1977 CanLII 152 (SCC), [1978] 1 S.C.R. 95, the Court held, at p. 99:

.S. 88 exempts Indians from provincial legislation that 'restricts or contravenes the terms of a treaty'.

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.

56. Similarly, in *Kruger v. The Queen*, 1977 CanLII 3 (SCC), [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 right is subject to regulation and curtailment by the appropriate legislative 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.

57. 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.

Does the provincial legislation 'restrict or contravene' the treaty right?

58. Section 150(1) states that no person shall take, carry or possess a rifle or shotgun cartridges loaded with ball or with shot larger than 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 [*sic*].
- (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.
- (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.
- (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*.

59. Section 150(1) of the *Lands and Forests Act* has been held to be aimed "at the prevention of hunting big game by a person without a license [*sic*] 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* (1977), 24 N.S.R. (2d) 313 (N.S.C.A.), at p. 320). 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.

60. 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 his

yes it does

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*.

The provincial legislation is inapplicable because it restricts the treaty right.

61. 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), 1978 CanLII 1640 (ON SC), 19 O.R. (2d) 145 (Dist. Ct.); *R. v. Taylor and Williams* (1982), 1981 CanLII 1657 (ON CA), 34 O.R. (2d) 360 (Ont. C.A.); *R. v. Moses* (1969), 1969 CanLII 384 (ON SC), 13 D.L.R. (3d) 50 (Ont. Dist. Ct.); *R. v. Penasse and McLeod* (1971), 1971 CanLII 1219 (ON CJ), 8 C.C.C. (2d) 569 (Ont. Prov. Ct.); *Cheeco v. The Queen*, [1981] 3 C.N.L.R. 45 (Ont. Dist. Ct.)

62. 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*.

Convictions quashed.

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

X

Constitutional Question: Section 35 of the *Constitution Act, 1982*

64. By order of Chief Justice Bora Laskin, dated May 12, 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 or 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*?

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.

65. 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 intervener, 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).

66. 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*.

B/c of effect of s. 88 it is not necessary to consider s. 35(1).

67. Accordingly, the constitutional question will not be answered.

Conclusions

68. 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.

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

Appeal allowed.

Appeal allowed.

Solicitors for the appellant: Aronson and MacDonald, Halifax.

Solicitor for the respondent: Robert E. Lutes, Halifax.

Solicitor for the intervener the Union of New Brunswick Indians, Inc.: Graydon Nicholas, Fredericton.

Solicitors for the intervener the Native Council of Nova Scotia: Burchell, MacAdam, Hayman & Merrick, Halifax.

Solicitor for the intervener the Attorney General of Canada: Roger Tassé, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: Archie Campbell, Toronto.

Solicitor for the intervener the Attorney General for New Brunswick: J. T. Keith McCormick, Fredericton.