Simon v. The Queen, [1985] 2 SCR 387, 1985 CanLII 11 (SCC)

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* Headnotes

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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*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html)*,*[*s. 35*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec35_smooth)*.*

                  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](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html#sec88_smooth) of the [*Indian Act*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html), 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](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html#sec88_smooth) 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*](https://www.canlii.org/en/qc/laws/stat/rsq-c-t-9/latest/rsq-c-t-9.html). At issue here was whether or not appellant enjoys hunting rights, pursuant to the Treaty of 1752 and [s. 88](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html#sec88_smooth) of the [*Indian Act*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html), which preclude his prosecution for certain offences under the [*Lands and Forests Act*](https://www.canlii.org/en/qc/laws/stat/rsq-c-t-9/latest/rsq-c-t-9.html).

*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](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html#sec88_smooth) of the [*Indian Act*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html).[Section 88](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html#sec88_smooth) 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)](https://www.canlii.org/en/qc/laws/stat/rsq-c-t-9/latest/rsq-c-t-9.html#sec150subsec1_smooth) of the[*Lands and Forests Act*](https://www.canlii.org/en/qc/laws/stat/rsq-c-t-9/latest/rsq-c-t-9.html). [Section 88](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html#sec88_smooth) of the [*Indian Act*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html), 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)](https://www.canlii.org/en/qc/laws/stat/rsq-c-t-9/latest/rsq-c-t-9.html#sec150subsec1_smooth) of the [*Lands and Forests Act*](https://www.canlii.org/en/qc/laws/stat/rsq-c-t-9/latest/rsq-c-t-9.html).

                  It was not necessary to consider [s. 35](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec35_smooth) of the [*Constitution Act, 1982*](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) since [s. 88](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html#sec88_smooth) of the [*Indian Act*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html) covered the present situation and provided the necessary protection for the appellant.

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

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