Introduction: The Marriage of History and Law in *R.* v. *Sioui*

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Background to *R.* v. *Sioui*: Issues and Proceedings

As it may be seen from the text of the unanimous judgment of the Supreme Court of Canada, which is reprinted in this issue as Document Three, *R.* v. *Sioui*, like so many important cases, has humble origins.

Georges Sioui, eldest brother of one of the leading families of the Hurons of Lorette, had decided to go into the forest in Jacques-Cartier Park north of the Lorette Reserve to fast and meditate with a visiting Aboriginal friend. His brothers Konrad, Régent and Hugues decided to accompany the other two in order to watch over them, and were accompanied by their wives and children. The children were instructed in traditional matters of religion, fishing and the gathering of berries, plant and roots.

The excursion involved "camping." Small trees were cut for tent poles and fires were made. All four Sioui brothers were charged with offences under the Quebec *Parks Act*[1] for camping and making fires outside of designated areas and for cutting trees.

At trial in the Court of Sessions of the Peace,[2] historical evidence played no significant role. Huron permits to hunt and fish were produced, but the arguments were of a general and legal nature, including that the legislation in question is not a law of general application rendered applicable to Indians by section 88 of the *Indian Act*[3] and that Charter guarantees of freedom of religion[4] made the parks legislation inapplicable to the accused. These arguments were rejected and the Siouis were convicted.

On appeal by way of new trial to the Superior Court,[5] almost no new facts were introduced. Little reliance was placed on the arguments made at the first trial. The defence filed some new documents, including, for the first time, the Governor Murray document of 5 September 1760 (reprinted in this issue as Document One). The document of 5 September 1760 was tendered by François Vincent, a Huron of Lorette who describes himself as an archivist and folklorist. The defence argued

that this document is a valid treaty the effect of which, by virtue of section 88 of the *Indian Act* and section 35 of the *Constitution Act, 1982*,[6] was to render the legislation in question inapplicable to the Siouis.

Arguments based on Aboriginal rights to hunt and fish for food and therefore to move about and set up camp were also put forward. These arguments were rejected by Superior Court Judge Desjardins on the erroneous grounds that there are no such rights within the confines of the 1763 colony of Quebec, which included the park area in question.[7]

In deciding on the validity and nature of the 5 September 1760 document, the judge in the Superior Court made reference to archival and historical material tendered by the defence. The capacity of the Hurons to enter into a treaty as referred to in section 88 of the *Indian Act* and sections 25 and 35 of the *Constitution Act, 1982* was concluded from general reference to relevant legal authorities.

However, proof of the capacity of General Murray to negotiate such a treaty was entirely dependent on proof of his role and powers as military governor of the city and district of Quebec and as the senior British officer available to the Hurons for negotiation on 5 September 1760. The judge of the Superior Court decided, on the basis of various documents and apparently on his own reading of military and colonial history, that Murray only had the power to accept surrenders and grant safe passage and not to negotiate any treaty.

On the related point of the nature of the document itself, the judge fixed on reference in various subsequent documents and works to the "certificate" of 5 September 1760 and on the previous failure of the Hurons of Lorette to rely on the document, as indications that it is not a treaty.

In the Quebec Court of Appeal[8] no new evidence as such was introduced, but the historical record was strengthened by the tendering of various published archival materials and government documents relating to the general historical context of the 5 September 1760 document, particularly in respect of the importance of Indians to the military balance of power and the importance of the Hurons in matters of diplomacy. The most important new documents where published and archival excerpts from the journals of Murray himself and of his subordinate Captain John Knox, which refer to the "peace" and the "treaty" made in September 1760.

By a two-to-one majority, the Court of Appeal reversed the decision of the Superior Court and found that Murray had entered into a valid treaty with the Hurons, that the treaty had survived and had not been altered by the Act of Capitulation of Montreal of 8 September 1760, the

Treaty of Paris of 1763, the Royal Proclamation of 1763, the *Quebec Act* of 1774 or any subsequent legislation.

The decision of Mr. Justice Bisson for the majority in the Court of Appeal shows the first signs of the happy marriage of history and law, which produced a resounding victory for the Hurons in the Supreme Court of Canada. Presented with historical materials relevant both to the treaty itself and to the general state of relations between Indians and Europeans at the time of the Seven Years' War, and armed with a progressive and modern understanding of the law, the majority of the Court of Appeal had no trouble in reading the treaty and the related documents as confirming the intention of the parties on 5 September 1760 to create binding reciprocal treaty obligations.

All arguments based on the Royal Proclamation of 1763 and section 35 of the *Constitution Act, 1982* were dropped in the Court of Appeal.

In the Supreme Court of Canada there were three principal issues as set out in the constitutional questions stated by Chief Justice Dickson: (l) does the September 5, 1760 document constitute a treaty?; (2) if yes, was it still operative at the time of the alleged offences?; and (3) if still yes, did it have the effect of rendering the Quebec *Parks Act* and regulations unenforceable in respect of the respondents?

The historical evidence and materials considered in the Supreme Court related principally to the first question and more specifically to the sub-issues of the capacity and intention of the Hurons on one side and Murray and Great Britain on the other to enter into a treaty. This included evidence relating to colonial policy and the importance of Indian alliances to European powers, nation-to-nation relations between Indian nations and European sovereigns, the actual treaty negotiations and the conclusion of treaty formalities, and finally, the subsequent conduct of the parties.

In sum, the whole of the *Sioui* case as eventually decided by the Supreme Court of Canada rests on the 5 September 1760 document and on various documents relevant to the existence, validity, nature and effect of the treaty and to the political, diplomatic and military climate of the time.

The documents eventually considered included materials in the National Archives of Canada, in the Petit Séminaire in Québec City and in the records of the Legislative Assembly of Lower Canada, as well as materials published in various collections of historical documents, notably *The Papers of Sir William Johnson*,[9] various contemporaneous journals and accounts of events, and modern histories.

Supreme Court Litigation and the Role of Intervenors[10]

Proceedings on penal charges are classically viewed as being primarily between the Crown as representative of the state and the accused. In civil or private litigation there are also typically two parties. In the Supreme Court of Canada in *R.* v. *Sioui*, the Attorney General of Quebec was the appellant appealing from a loss in the Quebec Court of Appeal, and the Siouis, having had their conviction reversed in the Court of Appeal, were respondents.

However, as the Supreme Court of Canada only hears approximately one hundred full cases a year, each may have important effects on matters of policy and on rights far beyond the interests of the immediate parties.[11] Indeed, section 40 of the *Supreme Court Act* provides that leave to appeal may be granted only where the issues or questions of law involved are of public importance.[12]

In this context, section 18 of the *Rules of the Supreme Court of Canada* provides that a person interested in an appeal and who is prepared to make relevant submissions that will be useful to the Court, and different from those of other parties, may intervene in an appeal.[13] The right to intervene is an important and necessary corollary of the increasingly important role played by the Supreme Court in shaping Canadian society. If the court is given the power under the Constitution, and especially by the *Canadian Charter of Rights and Freedoms* and sections 35 and 52 of the *Constitution Act, 1982*, to decide important questions relating to rights and freedoms, including the rights and titles of Aboriginal nations and peoples, then the interested parties must be represented at the hearing of appeals.

Intervenors do not have all of the rights of ordinary parties—their written argument or factum is twenty pages long, half the space accorded to ordinary parties, and where they are permitted to make oral argument, it is usually limited to fifteen minutes, while ordinary parties are generally accorded one full hour. Furthermore, intervenors take the case as they find it and generally cannot bring in new evidence. Nonetheless, as in *R.* v. *Sioui*, in some circumstances intervenors can submit historical materials and documents which may be very helpful to the court and critical to the outcome of the case.

Despite these limits, intervenors have an important and growing role in Supreme Court of Canada litigation.[14] They may provide the Supreme Court with a broader perspective on the issues before the Court, elucidate the relevant historical and social context and provide expert assistance on the relevant principles and law. At the level of the Supreme Court, a judgment must not only provide a legal solution to the particular problem submitted, but must also be workable in the broader context of

the law and Canadian society. It is here that intervenors can be of greatest assistance to the court.

In *R.* v. *Sioui*, the Application for Leave to Intervene and National Chief Georges Erasmus' affidavit in support, reveal that the National Indian Brotherhood/Assembly of First Nations (NIB/AFN) intervened because the case was bound to be an important precedent on a number of important legal issues affecting the rights and interests of its constituent Indian First Nations and their members throughout Canada. The NIB/AFN promised to provide the court with "a broad national review of the relevant historical circumstances, constitutional principles, treaties, law and jurisprudence."

Factums in the Supreme Court of Canada

Argument in the Supreme Court of Canada is both written and oral. The tremendous work-load of the judges and the short time allotted for oral argument make effective written argument indispensable.

Written argument is produced in the form of a "factum," which has four parts: a statement of facts; a statement of the points in issue; concise argument on the points in issue with reference to the relevant facts and law; and, a request for judgment in favour of the party in question.[15]

Factums are submitted to the Court in advance of the hearing. They are read by the judges and summarized, checked for accuracy and criticized by the law clerks (articling students or young lawyers who assist the judges).

By the time a case reaches the Supreme Court the issues have usually been greatly circumscribed. This occurs both formally when parties concede certain points and informally as it becomes clear that certain issues are of lesser importance or less difficult in law. In *R.* v. *Sioui* both processes were at work and it was clear that the most difficult significant issues of national concern in the Supreme Court were the conclusion and continued existence of a treaty.[16]

The key to success in the Supreme Court of Canada is a thorough and well-written factum. Oral argument allows counsel to provide a conceptual overview of their client's position and its compatibility with the existing legal regime as well as to address the specific issues that trouble the court after reading the factums of all parties.

Ideally a factum should be a blueprint for the subsequent judgment of the court, setting out the relevant arguments in a clear and logical order. In its unanimous judgment in *R.* v. *Sioui* (reprinted in this issue as Document Three) the court appears to have been assisted by the structure, concepts, arguments and authorities of the factum of intervenor NIB/AFN.

Historical Scholarship and Materials in the Factum and Judgment in *R.* v. *Sioui*

The factum of the NIB/AFN (reprinted in this issue as Document Two) was developed over a period of some six months and went through at least a dozen drafts.

It was the result of a co-operative and multidisciplinary process. Counsel carefully read the transcripts of the evidence, examined the various exhibits, reviewed the decisions of the lower courts and analyzed the already-filed factum of the appellant. The relevant case law was also reviewed.

Having formulated a preliminary approach, counsel discussed the case in detail with representatives of the NIB/AFN in order to adjust the proposed approach to the needs of the client.

The next step was discussion with counsel for the Sioui brothers in order to learn more of the history of the case and the historical and legal research already carried out, elaborate a strategy for winning the case and to divide up the issues to be addressed by the respondent Sioui brothers and intervenor NIB/AFN.

These consultations and discussions revealed that the most thorny issue was likely to be the conclusion and existence of the treaty and that the historical evidence previously tendered in this regard was perhaps incomplete.

Therefore, counsel for the NIB/AFN contacted various historians, archivists and legal anthropologists with a view to obtaining information regarding historical documentation relevant to the appeal.[17] The material sought primarily concerned the history and nature of relations between Indian nations and the French and the English in order to demonstrate that: (1) in the period leading up to and during the Seven Years' War the French and the British actively sought and competed for military and commercial alliances with Indian nations; (2) European policy at the relevant time included the conclusion of oral and written treaties with Indian nations; (3) treaty negotiations had in fact occurred between the British and the Huron Nation in September 1760; and (4) the subsequent conduct of the parties after September 1760 indicated that a treaty had been then concluded. Historical evidence was also sought in respect of the absence of any effect of the Act of Capitulation of Montreal of 1760, the Treaty of Paris of 1763, the Royal Proclamation of 1763 and the *Quebec Act* of 1774 on the treaty or treaty rights.

This research produced various types of materials: commissions and instructions to military officers and civil authorities, published and unpublished journals of the principal actors and of contemporary observers, letter-books and published collections of letters and documents

(especially *The Sir William Johnson Papers*) and modern studies and histories of the relevant time and events.

The experience of counsel in applying historical and archival research to litigation of Aboriginal and treaty rights gives rise to certain observations.[18]

First, the process requires mutual respect and close collaboration. Where lawyers are acquainted with history and historical method and scholars are acquainted with law and legal method, the marriage of history and law is much more likely to be fruitful. This may have implications for reform in legal and historical training.

Second, without engaging in an impermissible selective reading of history, litigation is necessarily adversarial and the duty of each party is to prove its version of events. It is up to the court to judge the evidence. Therefore, scholars working with lawyers must be sensitive to the need to focus on the facts and issues relevant to the case, rather than the general history of the period.

Third, lawyers working with scholars must be open to new information and new versions of events. It is unfruitful to simply try to pressure scholars into producing the hoped-for materials. For example, the *Instructions from George II to Jeffery Amherst* referred to in the factum (paragraph 8 at pp. 135-36 below) were brought to the attention of counsel during an archival search for the commissions and instructions of General James Murray and Sir William Johnson. At the end of the day, the instructions to Amherst were important in demonstrating that British policy included the negotiation of treaties with Indian nations.

Finally, historical evidence may beg further historical evidence. For example, the appellant claimed that no treaty could have been concluded on 5 September 1760 as there was no record of any treaty formalities such as signatures or marks, speeches and exchange of wampum.

In answer intervenor NIB/AFN submitted evidence of an Indian conference with such formalities that took place on 16 September 1760 (paragraphs 22 and 23 at pp. 141-42 below). However, the record mentions only the presence of representatives of the "eight Indian Nations in Canada." It was therefore necessary to submit further contemporaneous documents showing that such nations included the Hurons of Lorette (paragraph 15 at pp. 138-39 below).

The court concluded that at the 16 September 1760 conference there was "solemn ratification" of the treaty made a few days earlier.[19]

Crown Opposition to the Use of Historical Materials by the NIB/AFN

Cases in the Supreme Court are fundamentally appeals on points of law and are heard on the basis of arguments as to legal effects of the facts as they were proven before the lower trial courts[20] and intervenors are bound by this record.[21]

In certain very restricted circumstances not relevant in *R.* v. *Sioui*, new evidence may be led at the level of the Supreme Court by ordinary parties and intervenors.[22] Motions to lead new evidence are rarely granted.

As we have seen, intervenor NIB/AFN had promised in its Application for Leave to Intervene to provide the court with a review of the relevant historical circumstances. As the evidence already before the Court in this regard was deficient, the difficulty became how to bring new and important historical materials to the attention of the Court without a full motion to lead new evidence under section 62 of the *Supreme Court Act*. Such a motion was unlikely to succeed. It may be noted that counsel for the respondent Sioui brothers also wished to refer to certain new materials, including documents found in the course of research conducted on behalf of the NIB/AFN.

In these circumstances, the respondent Sioui brothers and intervenor NIB/AFN applied for and received directions from a judge of the Court permitting reference in their factums to the historical materials in question. This permission was made conditional on the right of the appellant Attorney General of Quebec to file additional materials in response and the right of any party or intervenor to object to reference to any of the historical materials in question on the grounds that they constituted new evidence which could only be led (as explained above) with the permission of the court.

When the appellant Attorney General of Quebec filed materials in reply, that appeared to be the end of any dispute. However, a few days prior to the hearing of the appeal, the appellant brought a motion to exclude all of the new historical materials submitted by the respondents and by the intervenor NIB/AFN.

The position adopted by the intervenor NIB/AFN on this motion and eventually accepted by the Supreme Court is that generally and in constitutional cases (especially cases involving the Aboriginal and treaty rights of First Nations), the courts need a full appreciation of the relevant historical context, and the parties (including intervenors) may refer to and judges may rely on historical materials not proved in evidence on the basis of judicial notice or presumptive judicial knowledge of facts of history. Judges are also entitled to carry out their own research to supplement the materials submitted by counsel.

The judgment of the Supreme Court states and applies the rules regarding judicial notice of historical facts in strong terms, confirms the legitimate role intervenors play in such cases, and demonstrates the value of diligent historical research and careful preparation of factums. Mr. Justice Lamer says in a passage which appears at pp. 173-74 of Document Three:

> It was suggested that the Court examine three types of extrinsic evidence to assist it in determining whether the document of September 5 is a treaty. First, to indicate the parties' intent to enter into a treaty, the Court was offered evidence to present a picture of the historical context of the period. Then, evidence was presented of certain facts closely associated with the signing of the document and relating to the existence of the various constituent elements of a treaty. Finally, still with a view to determining whether the parties intended to enter into a treaty, the Court was told of the subsequent conduct of the parties in respect of the document of September 5, 1760.
>
> I should first mention that the admissibility of certain documents submitted by the intervener the National Indian Brotherhood/Assembly of First Nations in support of its arguments was contested. The intervener was relying on documents that were not part of the record in the lower courts. The appellant agreed that certain of these documents, namely Murray's Journal, letters and instructions, should be included in the record provided this Court considered that their admissibility was justified by the concept of judicial notice. I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervener or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge. As Norris J.A. said in *White and Bob* (at p. 629):
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> > The Court is entitled "to take judicial notice of the facts of history whether past or contemporaneous" as Lord du Parcq said in *Monarch Steamship Co. Ld.* [*sic*] v. *Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196 at p. 234, [1949] 1 All E.R. 1 at p. 20, and it is entitled to rely on its own historical knowledge and researches, *Read* v. *Bishop of Lincoln*, [1892] A.C. 644, Lord Halsbury, L.C., at pp. 652-4.

The documents I cite all enable the Court, in my view, to identify more accurately the historical context essential to the resolution of this case.

As already mentioned, one aspect of the historic record that proved particularly important is an account of an Indian conference held eleven days after the conclusion of the treaty. The relevant passage in the judgment is reproduced at pp. 180-81:

> The accounts given by Knox and Murray himself of the events on the days that are critical for this case are quite consistent with British policy, which favoured alliance or at least neutrality for the greatest number of the Indian nations in the newly conquered territories. By holding negotiations to conclude a peace treaty between the Hurons and the British, Murray was only giving effect to this clear policy of Great Britain.
>
> The intervener the National Indian Brotherhood/Assembly of First Nations provided the Court with some very interesting evidence in this regard. It submitted the minutes of a conference between Sir William Johnson and the representatives of the Eight Nations, including the Lorette Hurons, held in Montreal on September 16, 1760 (*The Papers of Sir William Johnson*, vol. XIII, 1962, at p. 163). *Although the appellant objected to the Court considering this document, I feel it is a reliable source which allows us to take cognizance of a historical fact. Its being submitted by the intervener does not in any way prevent the Court from taking judicial notice of it. Indeed, I can only express my appreciation to the intervener for facilitating my research.* [emphasis added]

The minutes of this conference refer in several places to the peace recently concluded between the Eight Nations and the English and their allies (at pp. 163-64):

> B^{r} W^{y}.
> You desired of us to [see] deliver up your People who [may be] are still among us - [We] *As have now settled all matters wth us & we are become firm Friends... .*
>
> a Belt
>
> B^{r}. W.

> *As we have now made a firm Peace w^th^. the Eng^sh^. & y^e^. 6 Nat^s^. we shall endeavour all in our Pow^r^. to keep it inviolably... .*
>
> a large Belt.
>
> [emphasis added by Lamer J.]

Conclusion

A careful reader will see that the following factum (Document Two), may have influenced the organization, approach and content of the judgment of the Supreme Court of Canada in *R.* v. *Sioui* (Document Three).

It is clear from the judgment of Mr. Justice Lamer that mere analysis of the words of the document of 5 September 1760 might not have been sufficient to convince the Court that the British and the Hurons had entered into a treaty. Thus, only by resorting to "extrinsic" evidence (evidence outside of the text of the document in question) of the relevant historical circumstances was the Court able to conclude with assurance that solemn and lasting treaty commitments were intended and were indeed entered into by the Great Britain and the Huron Nation. The relevant passages are as follows and are in the judgment, Document Three, at pp. 172-73:

> *While the analysis thus far seems to suggest that the document of September 5 is not a treaty, the presence of a clause guaranteeing the free exercise of religion, customs and trade with the English cannot but raise serious doubts about this proposition.* It seems extremely strange to me that a document which is supposedly only a temporary, unilateral and informal safe conduct should contain a clause guaranteeing rights of such importance. As Bisson J.A. noted in the Court of Appeal judgment, there would have been no necessity to mention the free exercise of religion and customs in a document the effects of which were only to last for a few days. Such a guarantee would definitely have been more natural in a treaty where "the word of the white man" is given.
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> * * *
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> As this Court recently noted in *R.* v. *Horse*, [1988] 1 S.C.R. 187, at p. 201, extrinsic evidence is not to be used as an aid to interpreting a treaty in the absence of ambiguity or where the result would be to alter its terms by adding words to or subtracting words from the written agreement. This rule also applies in determining the legal nature of a document relating to the Indians. However, a more flexible approach is necessary as the question of the existence of

> a treaty within the meaning of s. 88 of the *Indian Act* is generally closely bound up with the circumstances existing when the document was prepared (*White and Bob, supra*, at pp. 648-49, and *Simon, supra*, at pp. 409-10). *In any case, the wording alone will not suffice to determine the legal nature of the document before the Court. On the one hand, we have before us a document the form of which and some of whose subject-matter suggest that it is not a treaty, and on the other, we find it to contain protection of fundamental rights which supports the opposite conclusion. The ambiguity arising from this document thus means that the Court must look at extrinsic evidence to determine its legal nature.* [emphasis added]

The practice of history surely has purer moments. Nonetheless, rarely can archivists, historians, ethnologists and anthropologists have greater direct influence on public affairs than in contributing to the careful crafting of a factum that proves critical to the outcome of an important Supreme Court of Canada precedent in Aboriginal law.

For their part, lawyers and the law can only benefit by frankly admitting that if courts are to be given important powers to make decisions that have broad implications for fundamental rights and social and economic policy, and especially for the evolution of relations between Canadian governments and Indian First Nations, their decisions must be credible. In order to command respect on all sides, judicial decisions must make thorough and scholarly reference to the knowledge and understanding offered by history and the social sciences as well as the pure and natural sciences where appropriate.

In short, beyond the technical rules of judicial notice of facts of history, the factum that follows (Document Two) and the judgment reached by the Supreme Court of Canada (Document Three) may also indicate that the Brandeis brief[23] has a legitimate place in the Canadian courts.

At a deeper level, there may be a hint of recognition that law is merely another branch of human knowledge that cannot clothe itself in claims of purity and positivism and that must draw from the understanding of other fields. To paraphrase the international law scholar D.P. O'Connell, bad history makes bad law.[24]

Notes

The authors are attorneys with the Montreal firm of Hutchins, Soroka & Dionne. They wish to clearly disclose their role as counsel for intervenor National Indian Brotherhood/Assembly of First Nations in the Supreme Court

of Canada appeal in *R.* v. *Sioui*, [1990] 1 S.C.R. 1025. As such they were responsible for the preparation of the factum that is reprinted here as Document Two and made oral argument in the Supreme Court.

1 R.S.Q., c. P-9.

2 *R.* v. *Sioui* (9 June 1983), Quebec 27-016079-82 (C.S.P., Bilodeau, J.S.P.); summarized in Jurisprudence Express 83-722; and reproduced in the Supreme Court record in the *Dossier imprimé sur appel*, vol. I, pp. 84-119.

3 Section 88 (formerly section 87) of the *Indian Act*, R.S.C. 1985, c. I-5, 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.

4 Section 2(a) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of religion and conscience. Section 3 of Quebec's statutory *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, embodies similar guarantees.

5 *Sioui* v. *Le procureur général de la province de Québec* (6 September 1985), Quebec 200-36-0000104-836 (C.S. (Chambre Criminelle), Desjardins, J.C.S.); summarized in Jurisprudence Express 85-947; and reproduced in the Supreme Court record in the *Dossier imprimé sur appel*, vol. I, pp. 120-178.

6 Section 35 of the *Constitution Act, 1982*, as amended, reads as follows:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

7 These matters were also discussed briefly in the Supreme Court at [1990] 1 S.C.R. 1025 at pp. 1052 and 1063-65 (pp. 175-76 and 184-86 of the judgment reprinted as Document Three in this issue). The language used by the Supreme Court in its discussions of the Royal Proclamation of 1763 risks some confusion, although more so in the English version of the judgment than in the original French. The English text, in regard to the effect of the Royal Proclamation of 1763, uses language such as "granted certain important rights" and "confers rights on the Indians." The French text employs the more confirmatory language "accordait aussi certains droits importants" and "reconnaît des droits aux Indiens." Given the context in which this language is placed (the pre-existing rights of the Huron Nation) and the authorities cited by the Court (*R.* v. *White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C. Ct. of Appeal) affirmed (1965), 52 D.L.R. (2d) 481 (Supreme Court of Canada), Hall J. in *Attorney General of British Columbia* v. *Calder*, [1973] S.C.R. 313 (Supreme Court of Canada), *R.* v. *Secretary of*

State for Foreign and Commonwealth Affairs, [1982] 2 All E.R. 118 (Eng. Ct. of Appeal)), it is safe to say that no damage should be done to the doctrine that the Royal Proclamation of 1763 confirmed Aboriginal rights and was not the source of these rights. The Court's curt statement as to what lands were "reserved" within the 1763 colonies is more problematic and, with respect, incorrect. The accurate view of the Royal Proclamation of 1763 is that Aboriginal rights within the 1763 colony of Quebec subsist on all lands that had not in 1763 been ceded or purchased and respecting which there has been no cession, purchase or extinguishment since 1763. See: *St. Catherines Milling & Lumber Co.* v. *The Queen* (1888), 14 A.C. 46 (Privy Council) at p. 53. For critical discussion of the all-too-prevalent Quebec judicial fallacy that there are no Aboriginal rights within the boundaries of the 1763 colony of Quebec, see: P. Dionne, "Les postulats de la Commission Dorion et le titre aborigène au Québec: vingt ans après," (1991) 51 *Revue du Barreau* 127. See generally: B. Slattery, *The Land Rights of Indigenous Canadian Peoples*, D. Phil. thesis (Oxford University, Faculty of Law, 1979; reprinted, University of Saskatchewan Native Law Centre, 1979); J. Stagg, *Anglo-Indian Relations in North America to 1763 and An Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Department of Indian Affairs and Northern Development, 1981); and, B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Cdn. Bar Rev.* 727. The related issue of the absence of any effect of the *Quebec Act* of 1774 on the Aboriginal rights and titles protected by the Royal Proclamation of 1763 was put to the Supreme Court of Canada in *Ontario (Attorney General)* v. *Bear Island Foundation* (1991), 83 D.L.R. (4th) 381 (S.C.C.), but the Court disposed of the appeal on other grounds.

8 *Sioui* v. *Le procureur général de la province de Québec*, [1987] R.J.Q. 1722, [1987] 4 C.N.L.R. 118 (Que. C.A.); and reproduced in the Supreme Court Record in the *Dossier imprimé sur appel*, vol. I, pp. 179-216.

9 *The Papers of Sir William Johnson*, prepared for publication by the New York State Division of Archives and History (Albany: The University of the State of New York), 14 vols., 1921-1962.

10 For general discussion of the theory and law of intervention see P. Muldoon, *Law of Intervention* (Aurora, Ontario: Canada Law Book, 1989).

11 There has been lively debate in legal theory on the institutional capacity of appointed judges presiding over courts where cases are classically viewed as being bipolar disputes touching only the interests of the immediate parties to adjudicate polycentric issues of public policy, which may affect the interests of many absent and unrepresented parties. Extreme formalist proponents of the classic view, like Ernest Weinrib, idealize the ability of elected legislatures to deal with what they refer to in Aristotelian terms as matters of "distributive justice." They go on to claim that all courts can and should do is settle private disputes by mechanically doing what is referred to again in Aristotelian terms as "corrective justice." This is of course an attempt to paper over the cracks - courts in fact do deal with important public and policy issues. Intervention by interested parties and citizens' groups reduces the danger of decisions being taken without full appreciation of the relevant facts, policy considerations and law. First Nations in Canada have made extensive use of intervention in recent years to protect Aboriginal interests. For general discussion of these and related matters see: Muldoon, *Law of Intervention* at pp. 3-19; P. Weiler, "Two Models of Judicial Decision-Making" (1968), 46 *Cdn. Bar Rev.* 406; A. Chayes, "The Role of the Judge in Public Law

Litigation" (1976), 89 *Harv. Law Rev.* 1281; L.L. Fuller, "The Forms and Limits of Adjudication" (1978), 92 *Harv. Law Rev.* 353; P.L. Bryden, "Public Interest Intervention in the Courts" (1987), 66 *Cdn. Bar Rev.* 490; E. Weinrib, "The Intelligibility of The Rule of Law" in A. Hutchinson and P. Monahan, eds; *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987), p. 59; E. Weinrib, "Legal Formalism" (1988), 97 *Yale Law Jo.* 949; and, A. Hutchinson, "The Importance of Not Being Ernest" (1989), 34 *McGill Law Jo.* 233. For critical views of the Charter, constitutional adjudication and the legitimacy of judicial review see: P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987) and M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989).

12 R.S.C. 1985, c. S-26.

13 S.O.R./83-74, as amended. For discussion of the exercise of the discretion under Rule 18 see the Supreme Court of Canada's decisions in: *Norcan Ltd.* v. *Lebrock*, [1969] S.C.R. 665; and, *Reference re Workers Compensation Act, 1983 (Nfld) (Application to Intervene)*, [1989] 2 S.C.R. 335. See also: B.A. Crane and H.S. Brown, *Supreme Court of Canada Practice 1991-92* (Toronto: Carswell, 1991), pp. 138-46.

14 The National Indian Brotherhood/Assembly of First Nations is among the most active of intervenors, notably in: *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29; *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335; *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025; *Ontario (Attorney General* v. *Bear Island Foundation* (1991), 83 D.L.R. (4th) 381 (S.C.C.); and in the pending appeals in *Her Majesty the Queen in Right of Alberta* v. *Friends of the Oldman River Society*, (S.C.C. No. 21890), judgment reserved 20 February 1991.

15 *Rules of the Supreme Court of Canada*, S.O.R./83-74, as amended, s. 37.

16 It is interesting to note that on the further issue of the effects of the treaty in protecting the customs and religion of the Hurons so as to make the parks legislation in question unenforceable against them, the Court's conclusion was based on the perceived intention of the parties in concluding the 1763 treaty: *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at pp. 1068, 1070-72.

17 McGill University historian Hereward Senior and anthropologist Bruce Trigger as well as archivist Patricia Kennedy of the National Archives of Canada were particularly helpful. The lion's share of the meticulous analysis of the materials gathered was carried out by Melissa Mundell of Montreal.

18 For an anthropological view of advocacy see R. Paine, ed., *Advocacy and Anthropology, First Encounters* (St. Johns's: Memorial University Institute of Social and Economic Research, 1985) and especially Chapter 15, I. La Rusic, "Expert Witness." See also Patricia Kennedy, "Reassembling our scattered documentary heritage" (1990) 17, *The Archivist* 6, at pp. 6-8.

19 *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1058 (pp. 180-81 in Document Three).

20 *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 62.

21 *Rules of the Supreme Court of Canada*, S.O.R./83-74 as amended, Rule 18.

22 *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 62.

23 *Black's Law Dictionary* (St. Paul, Minnesota: West Publishing, 1979) offers the following definition at page 170:

> **Brandeis brief**. Form of appellate brief in which economic and social surveys and studies are included along with legal principles and citations and which takes its name from Louis D. Brandeis, former Associate Justice of Supreme Court, who used such brief while practising law.

This type of brief first gained notoriety when used by Brandeis to present social science data to support the constitutionality of limits on the hours of female labour: *Muller* v. *Oregon*, 208 U.S. 412 (U.S. Supreme Court, 1908). The technique was of critical importance in the famous case of *Brown* v. *Board of Education*, 347 U.S. 483 (U.S. Supreme Court, 1954), where reference was notably made to psychological studies that showed segregated education claiming to be "separate but equal" engenders feelings of inferiority in blacks. In the result the court ordered desegregation and eventually busing to achieve mixed school populations.

The Canadian position is discussed in: P. Hogg, "Proof of Facts in Constitutional Cases" (1976), 26 *U. of Toronto Law Jo.* 386; and in B. Strayer, *The Canadian Constitution and the Courts*, 3d ed., (Toronto: Butterworths, 1988) at pp. 263-97.

24 "... in short, bad history made bad law": D.P. O'Connell, *International Law* (London: Stevens & Sons, 1965), p. 470. O'Connell was discussing the errors in the legal analysis of acquisition of territory during the colonial era as a result of faulty historical analysis.

Document One: The Murray-Huron Treaty of 1760

THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English: -- recommending it to the Officers commanding the Posts, to treat them kindly.

Given under my hand at Lonqueil, this 5th day of September, 1760.

By the Genl's Command,
JOHN COSNAN,
Adjut. Genl.

J.A. Murray

Document Two: Factum of the Intervenor: National Indian Brotherhood (Assembly of First Nations)

No. 20628

In The Supreme Court of Canada
(On Appeal, From the Quebec Court of Appeal)

Between:

Attorney General of Quebec

Appellant (Complainant)

And:

Regent G. Sioui
Konrad Sioui
Georges Sioui
Hugues Sioui

Respondents (Accused)

Factum of the Intervenor
National Indian Brotherhood/Assembly of First Nations

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PART I - STATEMENT OF FACTS

1. For the purpose of this appeal, Intervenor National Indian Brotherhood/Assembly of First Nations, (hereinafter sometimes "NIB/AFN") relies upon and accepts as correct the statement of facts set out in Part I of Respondents' Factum.

PART II - POSITION ON CONSTITUTIONAL QUESTIONS STATED

2. Intervenor's position in regard to the constitutional questions stated is as follows:

First question:

The 5 September 1760 document does constitute a treaty within the meaning of section 88 of the *Indian Act*.

Second question:

The treaty of 5 September 1760 and the rights thereunder have not been extinguished and are still operative.

Third question:

This question should be answered in the affirmative.

PART III - ARGUMENT

A. THE HURON/BRITISH TREATY OF 5 SEPTEMBER 1760

(i) The 5 September 1760 document is itself a treaty or evidence of an oral treaty

3. It is the position of Intervenor NIB/AFN that a treaty was negotiated and concluded between the Huron Nation and General Murray on 5 September 1760 and that the 5 September 1760 document (hereinafter sometimes "Exhibit D-7") must be construed as a treaty or, in the alternative, as conclusive evidence that an oral treaty was concluded. The Quebec Court of Appeal thus did not err in holding this document is a treaty within the meaning of section 88 of the *Indian Act* or a recognition by General Murray of an oral treaty just concluded.

Reasons of Paré J.A., Case p. 182 and of Bisson J.A., Case pp. 196-198, 212.

4. In support of the argument set out at paragraph 3, Intervenor NIB/AFN submits the following points to be further developed herein:

(a) Official British policy in the fall of 1760 was that peace should be

made with the Indian Nations in alliance with the French.
(b) General James Murray, as a senior British officer in British North America, was governed by this policy.
(c) The Journals of General James Murray and Captain John Knox, an officer accompanying Murray on the campaign upon Montreal, report clearly that a treaty of peace was concluded with the Huron Nation in September 1760.
(d) The peace so concluded was formalized and confirmed at a conference held in Montreal on 16 September 1760 and relied on by both parties in their subsequent dealings.
(e) The 5 September 1760 document is not a capitulation. The state of war between the Huron Nation and the British terminated on 5 September 1760. Under the 18th century laws of war, capitulations supposed a continuation of the state of war.

Halleck, *International Law* (1861), pp. 652-653, 660-662, App. tab 1.

5. The *diplomatic* and *military* context in which Exhibit D-7 was executed, and the Law of Nations of the time support the holding that a treaty between the Huron Nation and the British was concluded in September 1760. This was the clear intention of the Hurons as confirmed in subsequent Indian conferences, consistent with the oral tradition of Indian Nations. It was also the clear intention of General Murray as confirmed in writing both in his Journal and in the document itself, consistent with the European *modus operandi* of the time. As Mr. Justice Bisson wrote in his reasons accompanying the judgment of the Quebec Court of Appeal:

"Les mots 'These are to certify...' s'expliquent du fait que les Hurons, ne sachant pas écrire, n'ont pu signer et que D-7 était la reconnaissance par le Général Murray du traité verbal qui venait d'être conclu."

Reasons of Bisson J.A., Case p. 198.

See also: *St. Catharine's Milling & Lumber Co.* v. *The Queen* (1887), 13 S.C.R. 577 per Gwynne J. at 633.

(ii) Nation-to-nation relations between the Indian Nations, the French and the English

6. It is well established law that instruments must be construed in the light of the law and facts contemporary to the instrument (the "intertemporal law").

Island of Palmas Case (1928), 2 R.I.A.A. 829 at 845.

In the case of treaties, it is important to consider the historical context and the negotiations surrounding the conclusion of the treaty.

R. v. *White and Bob*, [1965] S.C.R. vi, aff'g (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) at 629, 649.

Simon v. *The Queen*, [1985] 2 S.C.R. 387 at 401-402.

R. v. *Horse*, [1988] 1 S.C.R. 187 at 202-203.

R. v. *Taylor and Williams*, [1981] 3 C.N.L.R. 114 at 120 (Ont. C.A.), leave to appeal to S.C.C. refused 21 December 1981.

7. In the period preceding and immediately following the execution of Exhibit D-7, the relationship between the French Crown and the Indian Nations and between the English Crown and the Indian Nations were those of nation-to-nation.

Hurley, *Children or Bretheren: Aboriginal Rights in Colonial Iroquoia* (1985), pp. 315-18, App. tab 2.

Journal of James Murray, 18 May - 17 September 1760, appendix to Doughty, ed., *An Historical Journal of the Campaigns in North America For the Years 1757, 1758, 1759 and 1760 by Captain John Knox* (1916), 5 September 1760 entry, Vol. III, p. 331, App. tab 3. See also: Case p. 76.

"A Conference at Onondaga," 24-26 April 1748, *The Papers of Sir William Johnson* (hereinafter "*Wm. Johnson Papers*"), (1921), Vol. I, p. 155 at 159, App. tab 4.

8. Contemporary documents indicate clearly that in the years just prior to and during the Seven Years War, the English perceived the French as being successful in their alliances with the Indian Nations of Canada. Forging and maintaining alliances with Indian Nations, including

winning over French Indian allies, was an integral feature of British diplomatic and military policy in North America.

Colden, *The History of the Five Indian Nations of Canada*, (1747), title page and p. 180, App. tab 5.

Hurley, *supra*, p. 217, App. tab 2.

"Benning Wentworth to Sir Thomas Robinson," 3 Sept. 1755, *Wm. Johnson Papers* (1922), Vol. II, p. 2 at 4, App. tab 6.

Instructions from George II to Jeffery Amherst, 18 September 1758, par. 3, National Archives of Canada (MG 18, L 4, file 0 20/8), App. tab 7.

9. During the years leading up to the Seven Years War the English explicitly invoked and applied to their alliances with the Indian Nations the 18th century Law of Nations and the Rules of War as can be seen from a speech by Sir William Johnson, responsible for Indian affairs in British North America and later one of the British Generals who marched on Montreal:

"Brethren of the five Nations in the next place I must tell you I am sent here by Order of your Brother the Governour as also the Governour of Boston to stop your going to Canada, they having heard (to their great concern) that you were determined soon to go that way again which is quite contrary to your Engagements and Contrary to the Custom of all Nations in the World in Time of War."

Speech to the Five Nations at "A Conference at Onondaga," 25 April 1748, *Wm. Johnson Papers* (1921), vol I, p. 155 at 159, App. tab 4.

10. In 1832, United States Supreme Court Chief Justice John Marshall articulated the law and British policy contemporary to Exhibit D-7:

"Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged."

Worcester v. *State of Georgia*, 6 Pet. 515 at 548-549; (1832) 31 U.S. 350.

(iii) The treaty negotiations between the Huron Nation and the English in September 1760

11. Treaty negotiations between the Huron Nation and the English clearly took place in September 1760. The 5 September 1760 document must be construed as a treaty of peace or, in the alternative, as evidence that an oral treaty was concluded. The courts have recognized the legal effect of oral portions of treaties.

R. v. *Taylor and Williams*, *supra* at 120, 124.

Re Paulette et al. and Registrar of Titles (No. 2) (1974), 42 D.L.R. (3d) 8 at 33, 34 (N.W.T. Sup. Ct.).

R. v. *Flett* (1 September 1989), The Pas 55/87 (Man. Q.B.) at 6 aff'g oral reasons recorded by stenographer on 14 May 1987, The Pas (Man. Prov. Ct.).

12. In the days prior to the execution of Exhibit D-7 by General Murray, the official British policy towards the Indian Nations, allied with the French, was that treaties of peace should be concluded with those Nations by which they would undertake not to fight with the French. In return the British would guarantee these Nations peace and protection. This policy was explicitly expressed by Major-General Jeffery Amherst, Commander in Chief of His Britannic Majesty's troops and forces in North America, writing to William Johnson one week before the treaty of 5 September 1760 was concluded between the Huron Nation and General Murray.

> "Camp at Fort William Augustus, 30th. Augst. 1760
>
> Dear Sir
> I Send You with this a Translation of the Letter I received last Night, by which You will See the Temper and Disposition of the Enemys Indians. With this Intelligence, and the Talk You will have from their Sachems, You will be best able to Judge what will be the most likely means to hinder the Indians from Joining the Enemy, in which Case, they may be Assured of being permitted to

Live in Peace and Quiet, and of receiving all the protection, they can desire. I am, with great Truth,

Dear Sir,
Your most Obedient Servant
JEFF; AMHERST"

Wm. Johnson Papers (1951), Vol. X, p. 177, App. tab 8.

13. As the highest ranking British officer at Quebec during the winter and spring of 1759-60 and during his advance on Montreal in August-September 1760, Murray was in communication with Amherst and must have known of and have been governed by this policy (see par. 14 *infra*).

Reasons of Bisson J.A., Case p. 188.

14. General Murray's own Journal indicates clearly by its entry for 5 September 1760 that the General understood that he concluded a treaty of peace with the Huron Nation on that day.

"Sep^{r}. 5th. March'd with them myself and on the road, met the Inhabitants who were coming to deliver their arms, and take the oaths, there two nations of Indians, of Hurons and Iroquois, came in & made their Pace, at the same time Three of Sir William Johnstons Indians came in wth a letter from General Amherst..."

Journal of James Murray, in Doughty ed., *supra*, p. 331, App. tab 3. See also: Case p. 76.

15. The Journal of John Knox clearly indicates that negotiations took place with General Murray and that a treaty or treaties of peace were negotiated with the "different nations, lately in alliance with the enemy." The "Hurons near Quebec" were one of the eight Indian Nations in Canada in alliance with the French.

"Eight Sachems, of different nations, lately in alliance with the enemy, have surrendered, for themselves and their tribes, to General Murray: these fellows, after conferring with his Excellency, and that all matters had been adjusted to their satisfaction, stepped out to the beach opposite to Montreal, flourished their knives and hatchets, and set up the war-shout; intimating to the French, that they are now become our

allies and their enemies. While these Chieftains were negotiating a peace... ."

Doughty, ed., *An Historical Journal of the Campaigns in North America For the Years 1758, 1758, 1759 and 1760 by Captain John Knox*, Vol. II (1914), p. 516, App. tab 9. See also: Appellant's Factum, Vol. 2, tab 12.

Mahon, *Life of General the Hon. James Murray* (1921), p. 262, App. tab 10. See also: Appellant's Factum, Vol. 2, tab 19.

"Canada Indians to Western Indians," 25 Aug. 1763, *Wm. Johnson Papers* (1951), Vol X, p. 792, App. tab 11.

16. It is not correct to equate, as Appellant does, the concluding of peace between the Indian Nations and the English with the laying down of arms and the taking of the oath of allegiance by the Canadian militia and the populace. (Appellant's Factum, par. 43, p. 15). The Indian Nations were considered by the English and the French as allied or belligerent nations to be treated with quite independently from the European powers and quite differently from colonial inhabitants or militia.

17. In the 5 September 1760 entry in General Murray's Journal, set out in paragraph 14 above, a very significant distinction is made between the Canadians (Inhabitants) who are said to be coming to deliver their arms and take the oaths, and the two nations of Indians, of Hurons and Iroquois, who have come to make their peace. There is no confusion of the two. The process for each is separate and distinct. Throughout Murray's Journal the language applied to inhabitants and militia is "deliver their arms" or "bring in their arms" and "take the oaths." The language applied to the Indian Nations is "make the Peace" or "make their Peace." Consistent with the 18th century Laws of War, a clear distinction is made between militia or populace required to lay down arms and take individual oaths of allegiance and belligerent Indian Nations, negotiating peace collectively and "to their satisfaction" through their leaders (Sachems) and not required to lay down arms (see *supra*, par. 15).

Governor Murray's Journal of The Siege of Quebec, 18 September 1759 - 25 May 1760, (1939), 21 September 1759 entry, p. 7, App. tab 12.

Hall, *A Treatise on International Law* (4th ed. 1895), Part III, Chap. IV, pp. 482-483, App. tab 13.

Journal of James Murray in Doughty ed., *supra*, pp. 331-332, App. tab 3.

18. It is quite understandable that during the military advance on Montreal the parties did not have the time for all the usual formalities accompanying treaties of peace. These formalities were subsequently performed (see par. 23 *infra*).

19. It is incorrect to consider Exhibit D-7 as a "capitulation" or evidence of a "capitulation." Under the 18th century laws of war, capitulations were considered to be one of the "conventions" made during the course of war. They did not terminate the state of war, in fact they supposed the war to continue. In the words of Halleck:

> "All these agreements [including capitulations], of whatsoever kind, are included under the general name of *compacts* or *conventions*. These compacts which relate to the pacific intercourse of the belligerents, suppose the war to continue; those which put an end to it, come under the general head of *treaties of peace*, which will be considered in another chapter".
>
> Halleck, *supra*, p. 653, App. tab 1.
>
> See also: Vattel, *The Law of Nations* (rev'd ed., 1793), B. III, Ch. XVI, Sec. 261, App. tab 14.

(iv) Conduct of the parties under the treaty

20. As Appellant asserts (Appellants' Factum, par. 61, p. 20), the conduct of the parties subsequent to the treaty assists in determining if the parties originally intended to conclude a treaty.

> *Simon* v. *The Queen*, *supra* at 404-405.
>
> *R.* v. *Taylor and Williams*, *supra* at 123.

21. The conduct of the actual participants in the period immediately following the treaty should be given most weight. In the days and months immediately following 5 September 1760, the negotiations between the Hurons as one of the eight Indian nations in Canada and the English and the results of those negotiations were referred to in terms such as "a firm

Peace wth the Eng^{sh}" and "the Agreement, jointly made between Us, and our Brethren the English."

> "Indian Conference," Montreal, 16 Sept. 1760, *Wm. Johnson Papers* (1962), Vol. XIII, p. 163 at 164, App. tab 15.
>
> "Canada Indians to Western Indians," 25 August 1763, *Wm. Johnson Papers* (1951), Vol. X, p. 792, App. tab 11.

22. Both the Hurons of Lorette and the English considered that a treaty of peace had been concluded between their Nations on 5 September 1760. At a Conference held at Montreal on 16 September 1760, and attended by representatives of the eight Indian Nations in Canada including, the Huron Nation of Lorette (see par. 15 *supra*, the parties affirmed the "firm Peace" (see par. 23 *infra*) between the eight Nations in Canada, the English and their Indian allies (the Six Nations).

23. This solemn ratification of the 5 September 1760 agreement and document was accompanied by exchange of wampum ("a Belt"), confirms the nature and purpose of Exhibit D-7 as a treaty of peace and contradicts Appellant's contention that no formalities or exchanges of wampum accompanied the negotiations between the English and the Hurons (Appellant's Factum, pars. 50 and 51, p. 18). Representatives of the eight Indian Nations in Canada addressed the Montreal Conference of 16 September 1760 (see *supra*, par. 22), attended by Sir William Johnson, in the following terms:

> You desired of us to [see] deliver up your People who [may be] are still among us - [We] As you have now settled all matters wth. us & we are become firm Friends. We [are] who are present here as Representatives of 8 Nats. do assure you that what you desired shall be fully agreed to as soon as possible.
>
> a Belt
>
> ...
>
> As we have now made a firm Peace wth. the Engsh. & ye. 6 Nats. we shall endeavour all in our Powr. to keep it inviolably... ."
>
> "Indian Conference," Montreal, 16 Sept. 1760, *Wm. Johnson Papers* (1962), Vol. XIII, pp. 163-164, App. tab 5.

Respecting the significance of wampum see: Tooker, "The League of the Iroquois: Its History, Politics and Ritual" in Trigger, ed., *Handbook of North American Indians* (1978), Vol. 15, p. 418 at 422-424, App. tab 16.

B. UNILATERAL OR IMPLICIT EXTINGUISHMENT OF TREATY RIGHTS NOT TO BE PRESUMED

24. Appellant alleges that even if Exhibit D-7 constituted a treaty, the rights thereunder have become null and void, have been abrogated or replaced and cites, surprisingly, as authority the Articles of Capitulation of New France at Montreal of 8 September 1760, the Treaty of Paris of 11 February 1763 and the Royal Proclamation of 7 October 1763 (Appellant's Factum, par. 89, p. 29). Appellant's contention is not supported in law or by the content of the documents.

(i) Presumption of continuance in force of a treaty

25. Even accepting *arguendo* that the terms of the Articles of Capitulation of New France, the Treaty of Paris or the Royal Proclamation disclose an intention on the part of the parties involved to extinguish the rights protected by the treaty of 5 September 1760, such extinguishment is not possible in law.

26. This Court has recently stated that the principles of international treaty law are not determinative in matters respecting Indian treaties and that an Indian treaty is unique, is an agreement *sui generis*, which is neither created nor terminated according to international law. Nonetheless, the Chief Justice did state that it may be helpful in some instances to *analogize* the principles of international treaty law to Indian treaties.

Simon v. *The Queen, supra* at 404.

27. In *Simon*, the Chief Justice appeared to use the analogy of international law when asserting that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions ("material breach"), in holding that the party arguing for the termination of a treaty bears the burden of proving the circumstances and events justifying termination and in concluding that the Crown had failed to prove that the treaty of 1752 was terminated by "subsequent hostilities."

Simon v. *The Queen, supra* at 404.

Brownlie, *Principles of Public International Law* (3d ed., 1979), p. 615.

28. Treaty rights cannot, in law, be unilaterally *extinguished*. The consent of both parties to a treaty must be obtained in order to affect a legal extinguishment. In certain exceptional circumstances an aggrieved party may *terminate* a treaty.

Vienna Convention on the Law of Treaties, 23 May 1969, Can. T.S. 1980 No. 37, Arts. 54 and 60, App. tab 17.

Namibia Case, Adv. op., [1971] I.C.J. Rep. 16 esp. at pars. 91-101.

29. To assert the extinguishment of a right provided under a treaty, the abrogation or termination of the entire treaty must normally be established. A treaty right is not easily severable from the instrument of which it forms part. This was the doctrine applying in the 18th century, particularly in regard to treaties of peace.

> "We cannot consider the several articles of the same treaty as so many particular and independent treaties: for though we do not see the immediate connection between every one of these articles, they are all connected by this common relation, that the contracting powers pass them with a view to each other, by way of compensation."

Vattel, *supra*, B. II, Ch. XIII, Sec. 202 and B. IV, Ch. IV, Sec. 47, App. tab 14.

30. The integrity of contract or treaty provisions has for centuries been a fundamental principle of all legal systems including those of the Indian Nations of Canada, the English and French during the colonial period in Canada, and that of Canada in the post-colonial period. It has been accepted as part of the Law of Nations and is today part of customary international law (*pacta sunt servanda*). The validity and continuance in force of a treaty and of consent to be bound is presumed.

R. v. *White and Bob, supra* at 649.

Simon v. *The Queen, supra* at 404. 405-406.

Vattel, *supra*, B. II. Ch. XV, Secs. 219, 220, App. tab 14.

Brownlie, *supra*, p. 618.

Williams & de Mestral, *An Introduction to International Law* (2d ed., 1987), pp. 341-342.

Vienna Convention on the Law of Treaties, 23 May 1969, Can. T.S. 1980 No. 37, Preamble, App. tab 17.

31. The Law of Nations applying during the 18th century recognized the sanctity of conventions and contracts made by a sovereign but falling short of "public treaties." The rules governing "public treaties" applied by analogy.

Vattel, *supra*, B. II, Ch. XIV, Sec. 214, App. tab 14.

32. Even if Exhibit D-7 could be construed as articles of capitulation, which is denied (see par. 19 *supra*), 18th and 19th century laws of war held that capitulations were inviolable, and binding on successor states.

Campbell v. *Hall* (1774), 1 Cowp. 204 at 208 (Eng. K.B.).

Vattel, *supra*, B. III, Ch. XVI, Sec. 263, App. tab 14.

Oppenheim, *International Law, Vol. II: War and Neutrality*, (2nd ed., 1912), p. 289, App. tab 18.

O'Connell, *International Law* (1965), p. 346.

33. There is a useful and important distinction to be made between treaties that are "void" and treaties that are "voidable." Certain grounds for termination must be invoked by a party and so the treaties concerned are not void *ab initio* but voidable. Grounds for termination rendering a treaty voidable would be material breach, impossibility and fundamental change in circumstances.

Brownlie, *supra*, p. 618.

Williams & de Mestral, *supra*, pp. 364-365.

"Treaties," 87 *Corpus Juris Secundum*, Sec. 8, p. 932.

34. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. It is the offended party not the offending party, that may invoke such breach. The offending party may not rely upon its own actions in breach of treaty to escape from its obligations or duties under the treaty: *nemo auditur propriam turpitudinem allegans*. Until the termination or suspension of a treaty provision is required by the *offended party*, the provision and any rights, duties or obligations therein stipulated continue to exist.

Williams and de Mestral, *supra*, p. 365.

Vienna Convention on the Law of Treaties, *supra*, Art. 60, App. tab 17.

35. In *Simon* the Chief Justice adopted the "useful comment of Norris J.A. of the British Columbia Court of Appeal in *R.* v. *White and Bob*" on the subject of the sanctity of "the word of the white man" and the reliance placed upon it by the Indian Nations.

Simon v. *The Queen, supra* at 409-410.

R. v. *White and Bob*, *supra* at 648-649.

36. The recognition by the courts including, of course, this Court, of the sanctity of Indian treaties and the importance of the treaty process and treaties to Indian Nations allows us to apply *by analogy* certain principles of international law, including the presumption of validity and continuance in force of a treaty and consent to be bound.

(ii) Material or continuing breach of a treaty does not operate to terminate a treaty or extinguish treaty rights

37. It is well established law that provinces cannot extinguish or interfere with Indian treaties or treaty rights. The terms of the treaty are paramount.

Kruger v. *The Queen*, [1978] 1 S.C.R. 104 at 111-112, 114-115.

38. It is submitted, furthermore, that the leading cases of *Sikyea* v. *The Queen*, [1964] S.C.R. 642 and *R.* v. *George*, [1966] S.C.R. 267 do not stand for the principle that treaty rights can be unilaterally extinguished.

39. These cases articulate a conception of Parliamentary sovereignty prevailing before the coming into force of the *Constitution Act, 1982*. Under that conception, Parliament could pass legislation having the effect of suspending or interfering with the exercise of a treaty right. In so doing, Parliament could breach a treaty. Such a breach could be considered as a material or continuing breach permitting the injured party to demand termination, but is not tantamount to extinguishment of the treaty, a treaty provision or a treaty right. The Courts are now so holding.

> "In the result, I must conclude that the Indians' rights under Treaty No. 6 continue to exist on April 17, 1982 despite the provisions in the *Migratory Birds Regulations* which prohibit them from exercising the right to hunt migratory birds outside of the 'open season.' The right itself was not extinguished. Parliament could pass legislation that has the effect of suspending or interfering with the exercise of the right and in doing so may have breached the treaty. It did not in my opinion extinguish the right."
>
> *R.* v. *Arcand*, [1989] 2 C.N.L.R. 110 at 117 (Alta. Q.B.) aff'g [1988] 4 C.N.L.R. 91 (Alta. Prov. Ct.).
>
> See also: *R.* v. *Flett, supra* at 8-9.

40. In *Sikyea*, Johnson J.A. of the Northwest Territories Court of Appeal did not use the expression "extinguished" but rather referred to a process of "breach of treaty." The term "abrogate" is used once, but only in echoing the reasons for judgment of Sissons J.T.C. and then in conjunction with the terms "abridged or infringe upon." These expressions "breach," "abridge" and "infringe upon" imply interference with the exercise of a right or an infraction or violation of obligations, engagements or duties either by commission or omission. "Extinguishment," on the other hand, refers to destruction or cancellation of a right, power, contract and "connotes the end of a thing, precluding the existence of future life therein."

> *Sikyea* v. *The Queen* (1964), 43 D.L.R. (2d) 150 (N.W.T., C.A.) at 158.
>
> *Black's Law Dictionary* (5th ed., 1979), pp. 170-71, 524-525.

41. Indeed Mr. Justice Johnson expressed the opinion in *Sikyea* that the breach, as opposed to termination or extinguishment of Indian treaty rights, occasioned by the implementation of the *Migratory Birds*

Convention Act and *Regulations* was unintentional on the part of the Government of Canada, an "infringement by omission" rather than the destruction or cancellation of a right. Johnson J.S.'s analysis was upheld by this Court and continues to be authority.

> "The judgment of Johnson, J.A. in the *Sikyea* case had stood over the years as a correct treatment of the history of Indian hunting claims, rights and disappointments."
>
> *R.* v. *Flett, supra* at 7.
>
> *Sikyea* v. *The Queen* (1964), 43 D.L.R. (2d) 150 (N.W.T. C.A.) at 158, aff'd [1964] S.C.R. 642 at 646.

42. In *Simon*, the Chief Justice referred to *Sikyea* and *George* as authority for Parliament to "derogate" from treaty rights, not as authority to "extinguish" such rights.

> *Simon* v. *The Queen*, *supra* at 411.

43. Moreover, the Chief Justice posed two important caveats with respect to the legal possibility of extinguishment of treaty rights. He specifically stated that he did not wish to be taken as expressing any view on whether, as a matter of law, treaty rights may be extinguished and he implied that the federal paramountcy found in section 88 of the *Indian Act* may be curtailed since the coming into force of the *Constitution Act, 1982*. On the latter point he wrote:

> "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*."
>
> *Simon* v. *The Queen, supra* at 411, 407.
>
> See also: *Daniels* v. *White and The Queen*, [1968] S.C.R. 517 per Hall J. dissenting at 530-533, 538-539.

44. Prior to the coming into force of the *Constitution Act, 1982*, there may have been no remedy against the exercise of Parliamentary sovereignty resulting in breaches and continuing breaches of treaty provisions. The *Constitution Act, 1982* now provides a remedy. Sections 35 and 52 of the *Constitution Act, 1982* together have the effect of

entrenching existing treaty rights. Rights that have been interfered with do not cease to exist.

> "The inclusion of s. 35, coupled with s. 52, in my opinion, does entrench existing treaty rights. The Constitution itself not only recognizes but affirms these rights. Surely the use of both words suggest something more than mere notice. Affirm, at a minimum, must at least be an assertion that the right exists. Once a right is given constitutional recognition and affirmation, it seems to me it must receive constitutional protection. Section 52 of the Constitution provides that any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> I am of the opinion that the regulation, being in breach of the treaty, is inconsistent with the right provided in s. 35 of the Constitution and is to that extent of no force or effect."

R. v. *Arcand, supra* at 118 (Alta. Q.B.).

See also: *R.* v. *Flett, supra* at 9.

(iii) The Articles of Capitulation of New France of 8 September 1760, the Peace of Paris of 11 February 1763 and the Royal Proclamation of 7 October 1763

45. Accepting *arguendo* that extinguishment of treaty rights without the consent of the affected party is legally possible, the terms of the Articles of Capitulation of New France, the Treaty of Paris and the Royal Proclamation do not disclose any such intention and provide no support for allegations of extinguishment.

46. Contrary to the contention of Appellant (Appellant's Factum, pars. 90-95, pp. 29-30,) the 5 September 1760 treaty was not replaced or rendered null by the Articles of Capitulation of New France of 8 September 1760. The Indian Nations, allies of the French, were considered by the British to be separate nations, separate peoples, with whom a separate peace was made (see *supra*).

47. An examination of the terms of the Capitulation of 8 September 1760, in particular Articles 40 and 41, reveals a clear intention both on the part of Governor Vaudreuil and on the part of General Amherst to

distinguish between the "Indians Alliés de Sa M^{té} tres Chretienne" on one hand and the "francois, Canadiens, Et Accadiens," on the other. Article 40 refers to the Indian Nations as allies and, insofar as it has any relevance to the Hurons, it merely confirms, in its opening sentence, the terms of peace concluded with the Huron Nation on 5 September 1760. Article 41, seeks a neutral status for the French, Canadians, and Acadians. This is refused by Amherst with the notation "Ils deviennent Sujets du Roy."

"Articles of Capitulation, Montreal" in Shortt & Doughty, eds., *Documents Relating to the Constitutional History of Canada 1759-1791*, Part I (rev'd 2d ed., 1918), p. 7, App. tab 19.

48. Appellant's reference to Articles 8 and 9 (Appellant's Factum, par. 92, p. 29) is totally inappropriate. Article 8 contemplates protection of the sick and wounded. Article 9 refers to the Indian allies of the English not the allies of the French. These Indians are not equated with the Canadians as Appellant alleges, but are considered as military allies of the conquering army. The same comments apply to Article 51. Article 9 is refused by Amherst and certainly cannot be invoked as overriding Exhibit D-7.

49. Appellant's reference to Article 50 (Appellant's Factum, par. 92, pp. 29-30) is irrelevant as the 5 September 1760 document did not constitute articles of capitulation and in any event could not be replaced or altered without the consent of the Huron Nation.

50. In the period between the Capitulation of 8 September 1760 and the Peace of Paris, the English made continued attempts to cultivate their peace with the Indian Nations. In so doing, reference was made to "the Peace established between the English" and the Indian nations, not to the Capitulation.

"From Jeffery Amherst" to Sir William Johnson, 9 May 1762, *Wm. Johnson Papers* (1951), Vol. X, pp. 450-451, App. tab 20.

51. Appellant, in observing that the Peace of Paris did not directly contemplate the Indian nations, confirms the position of Intervenor NIB/AFN, that separate peace had been made with the Indian nations. The Peace of Paris of 10 February 1763 was concluded between and concerned only the two European belligerent nations, the English and the French. The British/Huron peace was concluded on 5 September 1760,

the British/French peace two and one half years later on 10 February 1763.

52. The contention of the Appellant that the Royal Proclamation of 7 October 1763 did not recognize the rights under Exhibit D-7 in respect of the territory occupied by the Hurons is incorrect and, in any event, irrelevant. It is inconceivable that a document described by the courts as "the Indian Bill of Rights" and analogous to Magna Carta be construed as extinguishing rights of Indian people. The Royal Proclamation is not the sole source of Indian title and rights but rather recognized pre-existing titles and rights and reflected the existing policy of military and commercial alliances with the Indian Nations.

St. Catharine's Milling & Lumber Company v. *The Queen* (1887), 13 S.C.R. 577 at 651-652, 662-663 per Gwynne J.

Calder v. *Attorney General of British Columbia*, [1973] S.C.R. 313 at 322-323 and 328.

Guérin v. *The Queen*, [1984] 2 S.C.R. 335 at 376-77 per Dickson J.

The Queen v. *The Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86 at 91-92 (C.A. Eng.).

PART IV - ORDER SOUGHT

54. The order sought by Intervenor NIB/AFN is that the three constitutional questions should be answered in the affirmative and that the Appeal herein be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Montreal, October 17, 1989

Peter W. Hutchins
OF COUNSEL FOR INTERVENOR
NATIONAL INDIAN BROTHERHOOD/
ASSEMBLY OF FIRST NATIONS

Document Three: Supreme Court of Canada, Reasons for Judgment, *R.* v. *Sioui*

Attorney General of Quebec

Appellant (Complainant)

v.

Régent G. Sioui
Conrad Sioui
Georges Sioui
Hugues Sioui

Respondents (Accused)

and

Attorney General of Canada and
National Indian Brotherhood/
Assembly of First Nations

Interveners

INDEXED AS: R. V. SIOUI

File No.: 20628

1989: October 31, November 1; 1990: May 24.

Present: Dickson C.J. and Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

On Appeal From The Court Of Appeal For Quebec

Indians -- Treaty -- Rights -- Customs and religion -- Huron band Indians charged with cutting down trees, camping and making fires in places not designated in Jacques-Cartier park contrary to provincial regulations -- Whether regulations applicable to Hurons practising customs and religious rites -- Whether document signed by General Murray in 1760 guaranteeing them free exercise of their customs and religion is a treaty -- Whether treaty still in effect -- Whether territorial scope of treaty extends to territory of park so as to make regulations unenforceable in respect of accused -- Indian Act, R.S.C., 1985, c. I-5, s. 88 -- Regulation respecting the Parc de la Jacques-Cartier, (1981) 113 O.G. II 3518, ss. 9, 37.

The respondents are members of the Huron band on the Lorette Indian reserve. They were convicted by the Court of Sessions of the Peace of cutting down trees, camping and making fires in places not designated in Jacques-Cartier park contrary to ss. 9 and 37 of the *Regulation respecting the Parc de la Jacques-Cartier*, adopted pursuant to the Quebec *Parks Act*. The respondents appealed to the Superior Court against this judgment by way of trial *de novo*. They admitted committing the acts with which they were charged in the park, which is located outside the boundaries of the Lorette reserve. However, they alleged that they were practising certain ancestral customs and religious rites which are the subject of a treaty between the Hurons and the British, a treaty which brings s. 88 of the *Indian Act* into play and exempts them from compliance with the regulations. The treaty that the respondents rely on is a document of 1760 signed by General Murray. This document guaranteed the Hurons, in exchange for their surrender, British protection and the free exercise of their religion, customs and trade with the English. At that time the Hurons were settled at Lorette and made regular use of the territory of Jacques-Cartier park. The Superior Court held that the document was not a treaty and dismissed the appeal. A majority of the Court of Appeal reversed this judgment. The Court found that the 1760 document was a treaty and that the customary activities or religious rites practised by the Hurons in Jacques-Cartier park were protected by the treaty. Section 88 of the *Indian Act* made the respondents immune from any prosecution. This appeal is to determine (1) whether the 1760 document is a treaty; (2) whether it is still in effect; and (3) whether it makes ss. 9 and 37 of the *Regulation respecting the Parc de la Jacques-Cartier* unenforceable in respect of the respondents.

Held: The appeal should be dismissed.

The 1760 document is a treaty within the meaning of s. 88 of the *Indian Act*. Though the wording of the document does not suffice to determine its legal nature, the historical context and evidence relating to facts which occurred shortly before or after the signing of the document indicate that General Murray and the Hurons entered into an agreement to make peace and guarantee it. They entered into this agreement with the intention to create mutually binding obligations that would be solemnly respected. All the parties involved were competent to enter into this treaty. Even if Great Britain was not sovereign in Canada in 1760, the Hurons could reasonably have believed that it had the power to enter into a treaty with them and that this treaty would be in effect as long as the British controlled Canada. The circumstances prevailing at the time

indicate that Murray had the necessary capacity to enter into a treaty, or at least that the Hurons could reasonably have assumed he did in view of the importance of his position in Canada at the time. In the case of the Hurons, though they could not claim historical occupation or possession of the lands in question, this did not prevent them from concluding a treaty with the British Crown. A territorial claim is not essential to the existence of a treaty within the meaning of s. 88 of the *Indian Act*.

The treaty was still in effect when the offences with which the respondents were charged were committed. The Act of Capitulation of Montreal in 1760 and the Treaty of Paris in 1763 did not have the effect of terminating rights resulting from the treaty. At the time, France could no longer claim to represent the Hurons. Since the Hurons had the capacity to enter into a treaty with the British Crown, they were the only ones who could give the necessary consent to its extinguishment. Similarly, the silence of the Royal Proclamation of 1763 regarding the treaty cannot be interpreted as extinguishing it. The change in use of the land by legislation in 1895 (creation of the Jacques-Cartier park) also did not terminate the right protected by the treaty. If the treaty gives the Hurons the right to carry on their customs and religion in the territory of the park, the existence of a provincial statute and subordinate legislation will not ordinarily affect that right. Finally, non-user of the treaty over a long period of time does not result in its extinguishment.

Although the treaty gives the Hurons the freedom to carry on their customs and religion, it makes no mention of the territory over which these rights may be exercised. As there is no express indication of the territorial scope of the treaty, it must be interpreted by determining the intention of the parties at the time it was concluded. When the historical context is given its full meaning, the interpretation that is called for is that the parties contemplated that the rights guaranteed by the treaty could be exercised over the entire territory frequented by the Hurons in 1760, so long as the carrying on of the customs and rites was not incompatible with the particular use made by the Crown of this territory. This interpretation would reconcile the Hurons' need to protect the exercise of their customs and the desire of the British conquerors to expand. It gave the British 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 suzerainty, and it allowed the Hurons to continue carrying on their rites and customs on the lands frequented to the extent that those rites and customs did not interfere with enjoyment of the lands by their occupier. The Hurons could not reasonably expect that the use would remain forever what it was in 1760. Jacques-Cartier park is land occupied by the Crown, since the province has set it aside for a specific use. The

park falls within the class of conservation parks and is intended to ensure the permanent protection of territory representative of the natural regions of Quebec or natural sites presenting exceptional features, while rendering them accessible to the public for the purposes of education and cross-country recreation. This type of occupancy is not incompatible with the exercise of Huron rites and customs. For such an exercise to be incompatible with occupancy of the park by the Crown, it must not only be contrary to the purpose underlying that occupancy but it must prevent the realization of that purpose. Crown lands are held for the benefit of the community (exclusive use is not an essential aspect of public ownership) and the activities with which the respondents are charged do not seriously compromise the Crown's objectives in occupying the park. Neither the representative nature of the natural region where the park is located nor the exceptional nature of this natural site are threatened. These activities also present no obstacle to cross-country recreation. Under s. 88 of the *Indian Act*, the respondents could therefore not be prosecuted since the activities in question were the subject of a treaty.

Cases Cited

Applied: Simon v. *The Queen*, [1985] 2 S.C.R. 387; *R.* v. *White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.); referred to: *Jones* v. *Meehan*, 175 U.S. 1 (1899); *R.* v. *Taylor and Williams* (1981), 62 C.C.C. (2d) 227; *R.* v. *Horse*, [1988] 1 S.C.R. 187; *Worcester* v. *State of Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Calder* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313; *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 A11 E.R. 118.

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Act to establish the Laurentides National Park, 1895, S.Q. 1895, 58 Vict., c. 22.

Constitution Act, 1982, s. 35.

Indian Act, R.S.C., 1985, c. I-5 [formerly R.S.C. 1970, c. I-6], s. 88.

Parks Act, R.S.Q., c. P-9, ss. 1(c), (e), 11.

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APPEAL from a judgment of the Quebec Court of Appeal, [1987] R.J.Q. 1722, 8 Q.A.C. 189, [1987] C.N.L.R. 118, reversing a judgment of the Superior Court, J.E. 85-947, dismissing the respondents' appeals by way of trial *de novo* from their convictions for offences under the *Parks Act*, J.E. 83-722. Appeal dismissed.

Robert Décary, Q.C., and René Morin, for the appellant.

Jacques Larochelle and Guy Dion, for the respondents.

Jean-Marc Aubry, Q.C., for the intervener the Attorney General of Canada.

Peter W. Hutchins and Franklin S. Gertler, for the intervener National Indian Brotherhood/Assembly of First Nations.

Solicitors for the appellants: The Department of Justice, Ste-Foy; Noël, Décary, Aubry & Associés, Hull.

Solicitor for the respondents: Jacques Larochelle, Québec.

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

Solicitors for the intervener National Indian Brotherhood/Assembly of First Nations: Hutchins, Soroka & Dionne, Montréal.

English Version of Reasons

SUPREME COURT OF CANADA
THE ATTORNEY GENERAL OF QUEBEC

and

REGENT SIOUI, CONRAD SIOUI,
GEORGES SIOUI AND HUGUES SIOUI

and

THE ATTORNEY GENERAL OF CANADA
NATIONAL INDIAN BROTHERHOOD/
ASSEMBLY OF FIRST NATIONS

CORAM:

The Chief Justice and Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka. Gonthier. Cory and McLachlin JJ.

Lamer J. --

I – Facts and Relevant Legislation

The four respondents were convicted by the Court of Sessions of the Peace of cutting down trees, camping and making fires in places not designated in Jacques-Cartier park contrary to ss. 9 and 37 of the *Regulation respecting the Parc de la Jacques-Cartier* (Order in Council 3108-81 of November 11, 1981, (1981) 113 O.G. II, 3518), adopted pursuant to the *Parks Act*, R.S.Q., c. P-9. The regulations state that:

> 9. In the Park, users may not:
>
> 1. destroy, mutilate, remove or introduce any kind of plant or part thereof.
>
> However, the collection of edible vegetable products is authorized solely for the purpose of consumption as food on the site, except in the preservation zones where it is forbidden at all times;
>
> 37. Camping and fires are permitted only in the places designated and arranged for those purposes.

The *Parks Act*, under which the foregoing regulations were adopted, provides the following penalties for an offence:

> 11. Every person who infringes this act or the regulations is guilty of an offence and liable on summary proceedings, in addition to the costs, to a fine of not less than $50 nor more than $1,000 in the case of an individual and to a fine of not less than $200 nor more than $5,000 in the case of a corporation.

The respondents appealed unsuccessfully to the Superior Court against this judgment by way of trial *de novo*. However, the Court of Appeal allowed their appeal and acquitted the respondents, Jacques J.A. dissenting.

The respondents are Indians within the meaning of the *Indian Act*, R.S.C., 1985, c. I-5 (formerly R.S.C. 1970, c. I-6), and are members of the Huron band on the Lorette Indian reserve. They admit that they committed the acts with which they were charged in Jacques-Cartier park, which is located outside the boundaries of the Lorette reserve. However, they alleged that they were practising certain ancestral customs and religious rites which are the subject of a treaty between the Hurons and the British, a treaty which brings s. 88 of the *Indian Act* into play and exempts them from compliance with the regulations. Section 88 of the *Indian Act* states that:

> 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 by-law 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.

The document the respondents rely on in support of their contentions is dated September 5, 1760 and signed by Brigadier General James Murray. It reads as follows:

> THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of

trading with the English: -- recommending it to the Officers commanding the Posts, to treat them kindly.

Given under my hand at Longueil, this 5th day of September, 1760.

By the Genl's Command, J.A. MURRAY
JOHN COSNAN,
Adjut. Genl.

The Hurons had been in the Quebec area since about 1650, after having had to leave their ancestral lands located in territory which is now in Ontario. In 1760, they were settled at Lorette on land given to them by the Jesuits eighteen years earlier and made regular use of the territory of Jacques-Cartier park at that time.

II – Judgments

A. *Court of Sessions of the Peace*

The questions regarding the existence of a treaty, its extinguishment and its scope were not raised before Judge Bilodeau of the Court of Sessions of the Peace: J.E. 83-722. The respondents argued instead that the regulations were adopted without authority, that they were illegal because they were too vague and imprecise and that they had not been infringed, at least as regards the cutting down and mutilation of trees. Judge Bilodeau rejected each of these arguments.

Finally, the respondents contended that as the relevant provincial legislation was not of general application, s. 88 of the *Indian Act* made them immune to prosecution under this legislation. Judge Bilodeau concluded that the provincial legislation was general in scope and so found the respondents guilty of the offences with which they were charged.

B. *Superior Court*

The issue which is the subject of the appeal to this Court was considered by Desjardins J.: J.E. 85-947. He rejected the respondents' argument that the document of September 5 was a treaty, on the ground that Murray had neither the powers nor the intention to enter into a treaty giving territorial rights to the Hurons. He concluded that it was actually a certificate of protection or a safe conduct, and based his conclusion on the fact that neither the Huron nation nor the Sovereign ever regarded the document of September 5 as a treaty.

In the Superior Court the respondents also made the following argument, which was then abandoned in the subsequent appeals: an

ancestral right to hunt and fish for their sustenance and that of their families was enjoyed by the Hurons over the territory in question and necessarily implied the right to move about and set up their tents. Desjardins J. considered that such a right had not been proven and that, even if it had been, the provincial legislation would nonetheless have regulated its exercise.

C. *Court of Appeal*

In the Quebec Court of Appeal, [1987] R.J.Q. 1722, the respondents abandoned all arguments based on ancestral rights, rights that might result from the Royal Proclamation of October 7, 1763 or s. 35 of the *Constitution Act*, 1982.

Bisson J.A., as he then was, whose opinion was concurred in by Paré J.A., saw the document of September 5 as a treaty by which the Hurons surrendered to the British and made peace in exchange for British protection and the free exercise of their religion, customs and trade with the English. The presence of this specific mention of free exercise of religion, customs and liberty of trading with the English is, in the view of the majority, the decisive factor making the document at issue a treaty. Bisson J.A. further concluded that the Act of Capitulation of Montreal had not extinguished the treaty. On the question of whether the customary activities or religious rites practised by the Hurons in Jacques-Cartier park were protected by the treaty, Bisson J.A. considered that all the evidence tended to show that the Hurons moved freely in the area in 1760 and carried on religious and customary activities there. Accordingly it followed, he said, that s. 88 of the *Indian Act* made the respondents immune from any prosecution for the activities with which they were charged, since the latter were the subject of a treaty whose rights could not be limited by provincial legislation.

Jacques J.A., dissenting, considered that the respondents' claim was of an essentially territorial nature and that neither the document at issue nor the Royal Proclamation of October 7, 1763 conferred rights of this kind on the native peoples.

III – Points at Issue

The appellants are asking this Court to dispose of the appeal solely on the basis of the document of September 5, 1760 and s. 88 of the *Indian Act*. The following constitutional questions were stated by the Chief Justice:

1. Does the following document, signed by General Murray on 5

September 1760, constitute a treaty within the meaning of s. 88 of the *Indian Act* (R.S.C. 1970, c. I-6)?

> "THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English: -- recommending it to the Officers commanding the Posts, to treat them kindly.
> Given under my hand at Longueil, this 5th day of September, 1760.
> By Genl's Command,
> JOHN COSNAN, J.A. MURRAY
> Adjut. Genl."

2. If the answer to question 1 is in the affirmative, was the "treaty" still operative on 29 May 1982, at the time when the alleged offences were committed?

3. If the answers to questions 1 and 2 are in the affirmative, are the terms of the document of such a nature as to make ss. 9 and 37 of the *Regulation respecting the Parc de la Jacques-Cartier* (Order in Council 3108-81, *Gazette officielle du Québec*, Part II, November 25, 1981, pp. 3518 *et seq.*) made under the *Parks Act* (R.S.Q., c. P-9) unenforceable in respect of the respondents?

To decide the case at bar I will consider first the question of whether Great Britain, General Murray and the Hurons had capacity to sign a treaty, assuming that those parties intended to do so. If they had, I will then consider whether the parties actually did enter into a treaty. Finally, if the document of September 5, 1760 is a treaty, I will analyse its contents to determine the nature of the rights guaranteed therein and establish whether they have territorial application.

IV – Analysis

A. *Introduction*

Our courts and those of our neighbours to the south have already considered what distinguishes a treaty with the Indians from other

agreements affecting them. The task is not an easy one. In *Simon* v. *The Queen*, [1985] 2 S.C.R. 387, this Court adopted the comment of Norris J.A. in *R.* v. *White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) (affirmed in the Supreme Court (1965), 52 D.L.R. (2d) 481), that the courts should show flexibility in determining the legal nature of a document recording a transaction with the Indians. In particular, they must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration. To the question of whether the document at issue in *White and Bob* was a treaty within the meaning of the *Indian Act*, Norris J.A. replied (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.

As the Chief Justice said in *Simon, supra*, treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians (at 410). In our quest for the legal nature of the document of September 5, 1760, therefore, we should adopt a broad and generous interpretation of what constitutes a treaty.

In my opinion, this liberal and generous attitude, heedful of historical fact, should also guide us in examining the preliminary question of the capacity to sign a treaty, as illustrated by *Simon* and *White and Bob*.

Finally, once a valid treaty is found to exist, that treaty must in turn be given a just, broad and liberal construction. This principle, for which there is ample precedent, was recently reaffirmed in *Simon*. The factors underlying this rule were eloquently stated in *Jones* v. *Meehan*, 175 U.S. 1 (1899), a judgment of the United States Supreme Court, and are I think just as relevant to questions involving the existence of a treaty and the capacity of the parties as they are to the interpretation of a treaty (at pp. 10-11):

> In construing any treaty between the United States and an Indian tribe, it must always be borne 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 a 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.

The Indian people are today much better versed in the art of negotiation with public authorities than they were when the United States Supreme Court handed down its decision in *Jones*. As the document in question was signed over a hundred years before that decision, these considerations argue all the more strongly for the courts to adopt a generous and liberal approach.

B. *Question of Capacity of Parties Involved*

Before deciding whether the intention in the document of September 5, 1760 was to enter into a treaty within the meaning of s. 88 of the *Indian Act*, this Court must decide preliminary matters regarding the capacity of Great Britain, General Murray and the Huron nation to enter into a treaty. If any one of these parties was without such capacity, the document at issue could not be a valid treaty and it would then be pointless to consider it further.

As to General Murray's capacity, the appellant argued that Bisson J.A. erred in suggesting that he had admitted Murray's capacity to enter into a treaty. He said he only admitted that the signature on the document was that of Murray and that the document was a safe conduct. As I consider that Murray had the capacity to enter into a treaty, the question of whether or not an admission was made in this regard is of no importance.

I will first examine the capacity of Great Britain to enter into a treaty and then consider that of Murray and the Hurons.

1. Capacity of Great Britain

At this preliminary stage of the analysis, and for purposes of discussion, it has to be assumed that the document of September 5, 1760 possesses the characteristics of a treaty and that the only issue that arises concerns

the capacity of the parties to create obligations of the kind contained in a treaty.

The appellant argued that the British Crown could not validly enter into a treaty with the Hurons as it was not sovereign in Canada in 1760. The appellant based this argument on the rules of international law, as stated by certain eighteenth and nineteenth century writers, which required that a state should be sovereign in a territory before it could alienate that territory. (See E. de Vattel, *The Law of Nations or Principles of the Law of Nature* (1760), vol. II, book III, para. 197; E. Ortolan, *Des moyens d'acquérir le domaine international ou propriété d'État entre les nations* (1851), para. 167.)

Without deciding what the international law on this point was, I note that the writers to whom the appellant referred the Court studied the rules governing international relations and did not comment on the rules which at that time governed the conclusion of treaties between European nations and native peoples. In any case, the rules of international law do not preclude the document being characterized as a treaty within the meaning of s. 88 of the *Indian Act*. At the time with which we are concerned relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens. The *Simon* decision, *supra*, is clear in this regard: an Indian treaty is an agreement *sui generis* which is neither created nor terminated according to the rules of international law (see p. 404).

Of course, if the document is a treaty, it could not have been binding on France if Canada had remained under its sovereignty at the end of the war. It would be fair to assume that the Hurons knew enough about warfare to understand that a treaty concluded with the enemy would be of little use to them if the French regained *de facto* control of New France.

Both *Simon* and *White and Bob* make it clear that the question of capacity must be seen from the point of view of the Indians at that time, and the Court must ask whether it was reasonable for them to have assumed that the other party they were dealing with had the authority to enter into a valid treaty with them. I conclude without any hesitation that the Hurons could reasonably have believed that the British Crown had the power to enter into a treaty with them that would be in effect as long as the British controlled Canada. France had not hesitated to enter into treaties of alliance with the Hurons and no one ever seemed to have questioned France's capacity to conclude such agreements. From the Hurons' point of view, there was no difference between these two European states. They were both foreigners to the Hurons and their

presence in Canada had only one purpose, that of controlling the territory by force.

2. General Murray's Capacity

The appellant disputes Murray's capacity to sign a treaty on behalf of Great Britain on the ground that he was at that time only Governor of the city and district of Québec and a brigadier general in the British Army. As Governor, he was subject to the authority of His Majesty's Secretary of State for the Southern Department, and as a soldier he was the subordinate of General Amherst, the "Commander in Chief of His Britannic Majesty's Troops and Forces in North America." It is true that Murray's capacity to enter into this treaty is less obvious than that of Great Britain to "treat" with the Indians.

In *Simon* Dickson C.J. cited with approval, at p. 400, N.A.M. MacKenzie in "Indians and Treaties in Law" (1929), 7 *Can. Bar Rev.* 561, on the question of a person's powers to enter into a treaty with the Indians:

> 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.

The Chief Justice went on as follows, at p. 401:

> 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.

To arrive at the conclusion that a person had the capacity to enter into a treaty with the Indians, he or she must thus have represented the British Crown in very important, authoritative functions. It is then necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty. To determine whether the Hurons' perception of Murray's capacity to sign a treaty on behalf of Great Britain was reasonable, the importance of the part played by the latter in Canada in 1760 has to be established.

Although during the siege of Québec James Murray was the fourth ranking officer in the British military hierarchy in Canada, after the death of Wolfe and the departure of Townshend and Monckton he became the highest ranking officer in the British Army stationed in Canada. General Amherst was the highest military authority in North America and his authority covered all British soldiers in Canada. Murray received the command of the troops at Quebec from him. A very important fact is that since 1759 Murray had also acted as military governor of the Quebec district, which included Lorette. He had used his powers to regulate, *inter alia*, the currency exchange rate and the prices of grain, bread and meat and to create civil courts and appoint judges (*Governor Murray's Journal of the Siege of Quebec* (1939), pp. 10, 11, 12, 14, 16 and 17).

At the time the document under consideration was signed, General Amherst and his troops were occupied in crossing the rapids upstream of Montreal and it was not until some days later, probably on September 8, 1760, that they reached that city (see in this regard the work of F.X. Garneau, *Histoire du Canada français* (1969), vol. 3, at pp. 269-72). In my view, therefore, the respondents are correct in stating that on September 5, 1760 Murray was the highest ranking British officer with whom the Hurons could have conferred. The circumstances prevailing at the time, in my view, thus support the respondents' proposition that Murray in fact had the necessary capacity to enter into a treaty. Furthermore, if there

is still any doubt, I think it is clear in any event that Murray had such authority in New France that it was reasonable for the Hurons to believe that he had the power to enter into a treaty with them.

It is useful at this point to note a passage from the decision of the British Columbia Court of Appeal in *White and Bob*, cited with approval by this Court in *Simon* (at p. 649):

> In the section [88] "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.

Murray was one of those persons who could reasonably have been assumed to be capable of giving the word of the white man. Finally, I would even go so far as to say that Murray, as Governor of the Quebec district, might reasonably have been regarded by the Hurons living in that district as the person most competent to sign a treaty with them. The fact that they belonged to the territory which was Murray's responsibility and in which he represented His Majesty, in my opinion, entitled them to assume he had the capacity to enter into a valid treaty with them.

In short, even apart from my conclusion with respect to Murray's actual authority to sign a treaty, I am of the view that the Hurons could reasonably have assumed that, as a general, Murray was giving them a safe conduct to return to Lorette, and that as Governor of the Quebec district, he was signing a treaty guaranteeing the Hurons the free exercise of their religion, customs and trade with the English. In either case no problems concerning Murray's capacity would invalidate the treaty, if there was one.

For all these reasons, therefore, I conclude that Murray had the necessary powers to enter into a treaty with the Hurons that would be binding on the British.

3. Capacity of the Hurons

The appellant argues that the Hurons could not enter into a treaty with the British Crown because this Indian nation had no historical occupation or possession of the territory extending from the St-Maurice to the Saguenay. Without going so far as to suggest that there cannot be treaties other than agreements under which the Indians cede land to the Crown, the appellant argues that a treaty could not confer rights on the

Indians unless the latter could claim historical occupation or possession of the lands in question. The appellant deduces this requirement from the fact that most of the cases involving treaties between the British and the Indians concern territories which had traditionally been occupied or held at the time in question by the Indian nation which signed the treaty. The academic commentary cited by the appellant also deals with the aspect of historical occupation or possession of land found in treaties with Indians.

There is no basis either in precedent or in the ordinary meaning of the word "treaty" for imposing such a restriction on what can constitute a treaty within the meaning of s. 88 of the *Indian Act*. In *Simon* (at p. 410) this Court in fact rejected the argument that s. 88 applied only to land cession treaties. In the Court's opinion that would limit severely the scope of the word "treaty" and run contrary to the principle that Indians treaties should be liberally construed and uncertainties resolved in favour of the Indians. The argument made here must be rejected in the same way. There is no reason why an agreement concerning something other than a territory, such as an agreement about political or social rights, cannot be a treaty within the meaning of s. 88 of the *Indian Act*. There is also no basis for excluding agreements in which the Crown may have chosen to create, for the benefit of a tribe, rights over territory other than its traditional territory. Accordingly, I consider that a territorial claim is not essential to the existence of a treaty.

I therefore conclude that all the parties involved were competent to enter into a treaty within the meaning of s. 88 of the *Indian Act*. This leads me to consider the next question: did General Murray and the Hurons in fact enter into such a treaty?

C. *Legal Nature of the Document of September 5, 1760*

1. Constituent Elements of a Treaty

In *Simon* this Court noted that a treaty with the Indians is unique, that it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law. In that case the accused had relied on an agreement concluded in 1752 between Governor Hopson and the Micmac Chief Cope, and the Crown disputed that this was a treaty. The following are two extracts illustrating the reasons relied on by the Chief Justice in concluding that a treaty had been concluded between the Micmacs and the British Crown (at pp. 401 and 410):

> 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 Treaty was an exchange [of] solemn promises between the Micmacs and the King's representative entered into to achieve and guarantee peace. It is an enforceable obligation between the Indians and the white man and, as such, falls within the meaning of the word "treaty" in s. 88 of the *Indian Act*.

From these extracts it is clear that what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity. In the Court of Appeal Bisson J.A. in fact adopted a similar approach when he wrote (at p. 1726):

> [TRANSLATION] I feel that in order to determine whether document D-7 [the document of September 5, 1760] is a treaty within the meaning of s. 88 of the *Indian Act*, the fundamental question is as follows: is it an agreement in which the contracting parties ... intended to create mutual obligations which they intended to observe solemnly?

In *White and Bob, supra*, Norris J.A. also discussed the nature of a treaty under the *Indian Act*. As he mentioned in the passage I have already quoted, the word "treaty" is not a term of art. It merely identifies agreements in which the "word of the white man" is given and by which the latter made certain of the Indians' cooperation. Norris J.A. also wrote at p. 649:

> In view of the argument before us, it is necessary to point out that on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status. Reliance on instances where this has been done is merely to compound injustice without real justification at law. The transaction in question here was a transaction between, on the one hand, the strong representative of a proprietary company under the Crown and representing the Crown, who had gained the respect of the Indians by his integrity and the strength of his personality and was thus

> able to bring about the completion of the agreement, and, on the other hand, uneducated savages. The nature of the transaction itself was consistent with the informality of frontier days in this Province and such as the necessities of the occasion and the customs and illiteracy of the Indians demanded ... The unusual (by the standards of legal draftsmen) nature and form of the document considered in the light of the circumstances on Vancouver Island in 1854 does not detract from it as being a "Treaty."

This lengthy passage brings out the importance of the historical context, including the interpersonal relations of those involved at the time, in trying to determine whether a document falls into the category of a treaty under s. 88 of the *Indian Act*. It also shows that formalities are of secondary importance in deciding on the nature of a document containing an agreement with the Indians.

The decision of the Ontario Court of Appeal in *R.* v. *Taylor and Williams* (1981), 62 C.C.C. (2d) 227, also provides valuable assistance by listing a series of factors which are relevant to analysis of the historical background. In that case the Court had to interpret a treaty, and not determine the legal nature of a document, but the factors mentioned may be just as useful in determining the existence of a treaty as in interpreting it. In particular, they assist in determining the intent of the parties to enter into a treaty. Among these factors are:

1. continuous exercise of a right in the past and at present,
2. the reasons why the Crown made a commitment,
3. the situation prevailing at the time the document was signed,
4. evidence of relations of mutual respect and esteem between the negotiators, and
5. the subsequent conduct of the parties.

2. Analysis of the Document in Light of These Factors

(a) *Wording*

Bisson J.A. of the Court of Appeal felt that the document of September 5, 1760 was a treaty because there was no need to include a reference to religion and customs in a mere safe conduct. In view of the presence of protection for certain "fundamental" rights, the document of September 5, 1760 was thus a treaty within the meaning of s. 88 of the *Indian Act*.

Several aspects of the wording of the document are consistent with the appellant's position that it was an act of surrender and a safe conduct rather than a treaty. The following is a brief review of the appellant's five

main arguments in this regard. First, the document opens with the words "These are to certify that..." which would suggest that the document in question is a certificate or an acknowledgement of the Hurons' surrender, made official by Murray in order to inform the British troops. Bisson J.A. gave these introductory words an interpretation more favourable to the Hurons: the Hurons did not know how to write and the choice of words only makes it clear that the document of September 5, 1760 recorded an oral treaty.

Second, General Murray used expressions which appear to involve him only personally, which do not suggest that he was acting as a representative of the British Crown. Thus, the following expressions are used:

1. "having come to me,"
2. "has been received under my Protection,"
3. "By the General's Command."

Although the Hurons had surrendered to His Britannic Majesty, wording the document in this way could tend to show that Murray intended only to give his personal undertaking to protect the Hurons, without thereby binding the British Crown in the long term. Murray, it is argued, had only offered the Hurons military protection and had no intention of entering into a treaty.

Thirdly, the orders given to British soldiers stationed in Canada ("no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE ... recommending it to the Officers commanding the Posts, to treat them kindly ... By the Genl's Command") would more naturally form part of a document such as a safe conduct or pass than of a treaty.

These points bring out the unilateral aspect' of the document of September 5: it could be an administrative document issued by General Murray, recognizing that the Hurons had laid down their arms and giving orders to British soldiers accordingly. Finally, the document was signed only by the General's representative with no indication that it had been assented to by the Hurons' in one way or another. The main purpose of the document is thus, it is argued, to recognize the surrender, and what was more important to the Hurons, allow them to return to Lorette safely without fear of being mistaken for enemies by British soldiers they might meet along the way.

Fourth, the reference to a specific event, namely the return journey to Lorette, as opposed to a document recognizing rights in perpetuity or without any apparent time limit, could show that the purpose of this

document was not to settle long-term relations between the Hurons and the British. The temporary and specific nature of the document would indicate that the parties did not intend to enter into a treaty.

Fifth, the document does not possess the formality which is usually to be found in the wording of a treaty. First, it is not the General himself who signed the document, but his adjutant on his behalf. Second, the language used in the document does not have the formalism generally accompanying the signature of a treaty with Indians. Here, for example, are extracts from the treaty at issue in *Simon* (at pp. 392-93 and 395):

> 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:
>
> * * *
>
> 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.

The appellant argues that the Hurons did not formalize the document either by their signature (which would not be absolutely necessary to make it a treaty) or by the use of necklaces or belts of shells which were the traditional method used by the Hurons to formalize agreements at the time. Clearly, this argument has weight only if the document accurately indicates all the events surrounding the signature. Otherwise, extrinsic proof of solemnities could help to show that the parties intended to enter into a formal agreement and that they manifested this intent in one way or another.

While the analysis thus far seems to suggest that the document of

September 5 is not a treaty, the presence of a clause guaranteeing the free exercise of religion, customs and trade with the English cannot but raise serious doubts about this proposition. It seems extremely strange to me that a document which is supposedly only a temporary, unilateral and informal safe conduct should contain a clause guaranteeing rights of such importance. As Bisson J.A. noted in the Court of Appeal judgment, there would have been no necessity to mention the free exercise of religion and customs in a document the effects of which were only to last for a few days. Such a guarantee would definitely have been more natural in a treaty where "the word of the white man" is given.

The appellant and the Attorney General of Canada put forward certain explanations for the presence of such guarantees in the document:

1. the free exercise of religion and customs was part of the protection under which General Murray received the Hurons;
2. the free exercise of religion and customs is mentioned because these benefits had been conferred on Canadians laying down their arms earlier.

As this Court recently noted in *R.* v. *Horse*, [1988] 1 S.C.R. 187, at p. 201, extrinsic evidence is not to be used as an aid to interpreting a treaty in the absence of ambiguity or where the result would be to alter its terms by adding words to or subtracting words from the written agreement. This rule also applies in determining the legal nature of a document relating to the Indians. However, a more flexible approach is necessary as the question of the existence of a treaty within the meaning of s. 88 of the *Indian Act* is generally closely bound up with the circumstances existing when the document was prepared (*White and Bob, supra,* at pp. 648-49, and *Simon, supra,* at pp. 409-10). In any case, the wording alone will not suffice to determine the legal nature of the document before the Court. On the one hand, we have before us a document the form of which and some of whose subject-matter suggest that it is not a treaty, and on the other, we find it to contain protection of fundamental rights which supports the opposite conclusion. The ambiguity arising from this document thus means that the Court must look at extrinsic evidence to determine its legal nature.

(b) *Extrinsic Evidence*

It was suggested that the Court examine three types of extrinsic evidence to assist it in determining whether the document of September 5 is a treaty. First, to indicate the parties' intent to enter into a treaty, the Court was offered evidence to present a picture of the historical context

of the period. Then, evidence was presented of certain facts closely associated with the signing of the document and relating to the existence of the various constituent elements of a treaty. Finally, still with a view to determining whether the parties intended to enter into a treaty, the Court was told of the subsequent conduct of the parties in respect of the document of September 5, 1760.

I should first mention that the admissibility of certain documents submitted by the intervener the National Indian Brotherhood/Assembly of First Nations in support of its arguments was contested. The intervener was relying on documents that were not part of the record in the lower courts. The appellant agreed that certain of these documents, namely Murray's Journal, letters and instructions, should be included in the record provided this Court considered that their admissibility was justified by the concept of judicial notice. I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervener or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge. As Norris J.A. said in *White and Bob* (at p. 629):

> The Court is entitled "to take judicial notice of the facts of history whether past or contemporaneous" as Lord du Parcq said in *Monarch Steamship Co., Ld.* v. *Karlshamns Oljefabriker* (AIB), [1949] A.C. 196 at p. 234, [1949] 1 All E.R. 1 at p. 20, and it is entitled to rely on its own historical knowledge and researches, *Read* v. *Bishop of Lincoln*, [1892] A.C. 644, Lord Halsbury, L.C., at pp. 652-4.

The documents I cite all enable the Court, in my view, to identify more accurately the historical context essential to the resolution of this case.

The appellant argues that the historical context at the time the document of September 5 was concluded shows that the parties had no intention to enter into a treaty. The respondents and the intervener the National Indian Brotherhood/Assembly of First Nations, on the other hand, maintain that the historical background to this document supports the existence of a common intent to sign a treaty.

On September 5, 1760, France and England were engaged in a war begun four years earlier, which ended with the Treaty of Paris signed on February 10, 1763. About a year earlier, the battle of the Plains of Abraham had allowed the British to take control of Quebec City and the surrounding area. During the year following this victory, British troops had worked to consolidate their military position in Canada and to solve

the supply and other practical problems engendered by the very harsh winter of 1759.

In his work An *Historical Journal of the Campaigns in North-America for the Years 1757, 1758, 1759 and 1760* (1769), at p. 382 (day of September 3, 1760), Capt. Knox also relates the efforts of General Murray to win the loyalty of the Canadians. General Murray at that time invited French soldiers to surrender and Canadians to lay down their arms. He had made it widely known that he would pardon those who surrendered and allow them to keep their land. He had also promised them that he would make larger grants of land and protect them. He gave those who responded to his appeal and took the oath of allegiance to the British Crown safe conducts to return to their parishes. Steps were also taken to inform the Indians who were allies of the British of these changes of allegiance so as to ensure that they would not be attacked on the way back.

As the advantageous position and strength of the British troops became more and more apparent, several groups did surrender and it appears that this movement accelerated in the days preceding that on which the document at issue was signed. In his *Historical Journal, supra,* at the entries for September 1, 2 and 3, 1760, Knox indicates that:

> The whole parish of Varenne have surrendered, delivered up their arms, and taken the oaths; their fighting-men consisted of five companies of militia: two other parishes, equally numerous, have signified their intentions of submitting to-morrow.
>
> * * *
>
> The Canadians are surrendering every-where; they are terrified at the thoughts of Sir William Johnson's Indians coming among them, by which we conjecture they are near at hand.
>
> * * *
>
> The regulars now desert to us in great numbers, and the Canadian militia are surrendering by hundreds.

In fact, the total defeat of France in Canada was very near: the Act of Capitulation of Montreal, by which the French troops stationed in Canada laid down their arms, was signed on September 8, 1760 and signalled the end of France's *de facto* control in Canada.

Great Britain's *de jure* control of Canada took the form of the Treaty of Paris of February 10, 1763, a treaty which *inter alia* ensured that the "Inhabitants of Canada" would be free to practise the Roman Catholic religion. Some months later, the Royal Proclamation of October 7, 1763 organized the territories recently acquired by Great Britain and reserved

two types of land for the Indians: that located outside the colony's territorial limits and the establishments authorized by the Crown inside the colony.

From the historical situation I have just briefly outlined the appellant deduced that the document at issue is only a capitulation and that the legal nature of such a document should not be construed differently depending on whether it relates to the Indians or to the French. The Court has before it, he submitted, only a capitulation comparable to a capitulation of French soldiers or Canadians, which cannot be elevated to the category of a treaty within the meaning of s. 88 of the *Indian Act* simply because an Indian tribe was a party to it. In other words, as Murray signed the same kind of document with respect to the Indians, the French or the Canadians his intent could not have been any different. The appellant also maintains that, like the capitulations of the Canadians and the French soldiers, this document was only temporary in nature in that its consequences would cease when the fate of Canada was finally settled at the end of the war.

I consider that, instead, we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations. The papers of Sir William Johnson (*The Papers of Sir William Johnson*, 14 vol.), who was in charge of Indian affairs in British North America, demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with the North American Indians. As an example, I cite an extract from a speech by Sir Johnson at the Onondaga Conference held in April 1748, attended by the Five Nations:

> Brethren of the five Nations I will begin upon a thing of a long standing, our first Brothership. My Reason for it is, I think there are several among you who seem to forget it; It may seem strange to you how I a Foreigner should know this, But I tell you I found out some of the old Writings of our Forefathers which was thought to have been lost and in this old valuable Record I find, that our

> first Friendship Commenced at the Arrival of the first great Canoe or Vessel at Albany. ... [Emphasis added.]
>
> (*The Papers of Sir William Johnson*, vol. I, 1921, at pp. 157-58.)

As the Chief Justice of the United States Supreme Court said in 1832 in *Worcester* v. *State of Georgia*, 31 U.S. (6 Pet.) 515 (1832), at pp. 548-49, about British policy towards the Indians in the mid-eighteenth century:

> Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged. [Emphasis added.]

Further, both the French and the English recognized the critical importance of alliances with the Indians, or at least their neutrality, in determining the outcome of the war between them and the security of the North American colonies.

Following the crushing defeats of the English by the French in 1755, the English realized that control of North America could not be acquired without the cooperation of the Indians. Accordingly, from then on they made efforts to ally themselves with as many Indian nations as possible. The French, who had long realized the strategic role of the Indians in the success of any war effort, also did everything they could to secure their alliance or maintain alliances already established (Jack Stagg, *Anglo-Indian Relations in North America to 1763* (1981); "Mr. Nelson's Memorial about the State of the Northern Colonies in America," September 24, 1696, reproduced in O'Callaghan ed., *Documents relative to the Colonial History of New York* (1856), vol. VII, at p. 206[1]; "Letter from Sir William Johnson to William Pitt," October 24, 1760, in *The Papers of Sir William Johnson*, vol. III, 1921, at pp. 269 *et seq.*; "Memoire de Bougainville sur l'artillerie du Canada," January 11, 1759, in *Rapport de l'archiviste de la Province de Québec pour 1923-1924* (1924), at p. 58; *Journal du Marquis de Montcalm durant ses campagnes en Canada de 1756 à 1759* (1895), at p. 428).

England also wished to secure the friendship of the Indian nations by treating them with generosity and respect for fear that the safety and development of the colonies and their inhabitants would be compromised

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1 The original of this document is marked "Colonial Office 323, vol. 2, document A42."

by Indians with feelings of hostility. One of the extracts from Knox's work which I cited above reports that the Canadians and the French soldiers who surrendered asked to be protected from Indians on the way back to their parishes. Another passage from Knox, also cited above, relates that the Canadians were terrified at the idea of seeing Sir William Johnson's Indians coming among them. This proves that in the minds of the local population the Indians represented a real and disturbing threat. The fact that England was also aware of the danger the colonies and their inhabitants might run if the Indians withdrew their co-operation is echoed in the following documents: "Letter from Sir William Johnson to the Lords of Trade," November 13, 1763, reproduced in O'Callaghan ed., *op. cit.*, at pp. 574, 579 and 580[2]; "Letter from Sir William Johnson to William Pitt," October 24, 1760, in *The Papers of Sir William Johnson*, vol. III, at pp. 270 and 274, Ratelle, *Contexte historique de la localisation des Attikameks et des Montagnais de 1760 à nos jours* (1987); "Letter from Amherst to Sir William Johnson," August 30, 1760, in *The Papers of Sir William Johnson*, vol. X, 1951, at p. 177; "Instructions from George II to Amherst," September 18, 1758, National Archives of Canada (MG 18 L 4 file O 20/8); C. Colden, *The History of the Five Indian Nations of Canada* (1747), at p. 180; Stagg, *op. cit.*, at pp. 166-67; and by analogy Murray, *Journal of the Siege of Quebec, supra*, entry of December 31, 1759, at pp. 15-16.

This "generous" policy which the British chose to adopt also found expression in other areas. The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.

Whatever the similarities between a document recording the laying down of arms by French soldiers or Canadians and the document at issue, the analogy does not go so far as to preclude the conclusion that the document was nonetheless a treaty.

Such a document could not be regarded as a treaty so far as the French and the Canadians were concerned because under international law they had no authority to sign such a document: they were governed by a European nation which alone was able to represent them in dealings with other European nations for the signature of treaties affecting them. The colonial powers recognized that the Indians had the capacity to sign

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[2] *The original of this document is numbered "Colonial Office 323, vol. 18, document R51," pp. 97-116. Note that the reproduction in O'Callaghan wrongly gives the date of November 13, 1763. The document is in fact dated November 18, 1763.*

treaties directly with the European nations occupying North American territory. The *sui generis* situation in which the Indians were placed had forced the European mother countries to acknowledge that they had sufficient autonomy for the valid creation of solemn agreements which were called "treaties," regardless of the strict meaning given to that word then and now by international law. The question of the competence of the Hurons and of the French or the Canadians is essential to the question of whether a treaty exists. The question of capacity has to be examined from a fundamentally different viewpoint and in accordance with different principles for each of these groups. Thus, I reject the argument that the legal nature of the document at issue must necessarily be interpreted in the same way as the capitulations of the French and the Canadians. The historical context which I have briefly reviewed even supports the proposition that both the British and the Hurons could have intended to enter into a treaty on September 5, 1760. I rely, in particular, on Great Britain's stated wish to form alliances with as many Indians as possible and on the demoralizing effect for the French, the Canadians and their allies which would result from the loss of this long-standing Indian ally whose allegiance to the French cause had until then been very seldom shaken.

Let us now turn to the second type of extrinsic evidence proposed by the parties, namely evidence relating to facts which were contemporaneous with or which occurred shortly before or after the signing of the document of September 5, 1760.

The respondents first presented evidence that the document of September 5, 1760 was the outcome of negotiations between Murray and certain Indian nations, including the Hurons, who wished to make peace with the British Crown. Knox's Journal, *supra*, reports the following events for September 6 (at p. 384):

> Eight Sachems, of different nations, lately in alliance with the enemy, have surrendered, for themselves and their tribes, to General Murray: these fellows, after conferring with his Excellency, and that all matters had been adjusted to their satisfaction, stepped out to the beach opposite to Montreal, flourished their knives and hatchets, and set up the war-shout; intimating to the French, that they are now become our allies and their enemies. While these Chieftains were negotiating a peace, two of our Mohawks entered the apartment where they were with the General and Colonel Burton ... [Emphasis added.]

Although it is not entirely clear, Knox appears to be relating here events which took place the preceding day, on September 5. This

interpretation is confirmed by the fact that Murray makes no reference in his Journal to any meeting with the Indians on the 6th but mentions one on the 5th, while Knox records no meeting with the Indians on the 5th. Both are thus probably speaking of the same meeting on September 5.

The foregoing passage shows that the document of September 5 was not simply an expression of General Murray's wishes, but the result of negotiations between the parties. This document was thus not simply a unilateral act, a simple acknowledgment or safe conduct, but the embodiment of an agreement reached between the representative of the British Crown and the representatives of the Indian nations present, including the representative of the Lorette Hurons.

Knox goes on to say that the Mohawks wanted to turn on the various Indian groups allied with the French who had just concluded peace with the British. Murray and Burton intervened and the Mohawks merely made threats against them. What is significant for purposes of this case is that these threats reflected the Mohawks' perception as to the nature of the agreement which had just been concluded between the eight Sachems and Murray. The Mohawks said the following (at p. 385):

> Do you remember, when you treacherously killed one of our brothers at such a time? Ye shall one day pay dearly for it, ye cowardly dogs—<u>let the treaty be as it will:</u>—I tell you, we will destroy you and your settlement. ... [Emphasis added.]

The view taken by these Indians was apparently shared by Murray himself. The note written by Murray in his Journal, on September 5, 1760, indicates that he considered that a peace treaty had been concluded with the Indian nations in question:

> Sepr. 5th. March'd with them myself and on the road, met the Inhabitants who were coming to deliver their arms, and take the oaths, there two nations of Indians, of Hurons and Iroquois, came in & <u>made their Pace</u>. ... [Emphasis added.]
>
> (Knox, *Appendix to an Historical Journal or the Campaigns in North America for the Years 1757, 1758, 1759 and 1760* (1916), at p. 831)

The accounts given by Knox and Murray himself of the events on the days that are critical for this case are quite consistent with British policy, which favoured alliance or at least neutrality for the greatest number of the Indian nations in the newly conquered territories. By holding

negotiations to conclude a peace treaty between the Hurons and the British, Murray was only giving effect to this clear policy of Great Britain.

The intervener the National Indian Brotherhood/Assembly of First Nations provided the Court with some very interesting evidence in this regard. It submitted the minutes of a conference between Sir William Johnson and the representatives of the Eight Nations, including the Lorette Hurons, held in Montreal on September 16, 1760 (*The Papers of Sir William Johnson*, vol. XIII, 1962, at p. 163). Although the appellant objected to the Court considering this document, I feel it is a reliable source which allows us to take cognizance of a historical fact. Its being submitted by the intervener does not in any way prevent the Court from taking judicial notice of it. Indeed, I can only express my appreciation to the intervener for facilitating my research.

The minutes of this conference refer in several places to the peace recently concluded between the Eight Nations and the English and their allies (at pp. 163-64):

> Br. Wy.
>
> You desired of us to [see] deliver up your People who [may be] are still among us -- [We] As you have now settled all matters wth. us & we are become firm Friends... .
>
> a Belt
>
> Br. W.
>
> As we have now made a firm Peace wth. the English. & ye. 6 Nats. we shall endeavour all in our Powr. to keep it inviolably.
>
> a large Belt.
>
> [Emphasis added.]

These words were spoken by spokesmen for the Eight Nations and clearly show that the Indians and Sir William Johnson considered that relations between these Indian nations and the British would now take the form of an alliance ("firm friends"). This new situation was undoubtedly the outcome of the peace concluded between the parties, a peace desired by the Eight Nations as well as the British ("...we have now made a firm Peace with the English... ").

Finally, it is worth noting that each of the contributions made by spokesmen at this conference was followed by the presentation of a belt to solemnize the content of the undertakings that had just been made or the words which had just been spoken. As we saw earlier, the appellant contends that the document of September 5, 1760 is not a treaty, *inter alia*, because the tokens of solemnity that ordinarily accompanied treaties between the Indians and the British are not present. I think it is

reasonable to conclude that the circumstances existing on September 5 readily explain the absence of such solemnities. Murray was not given notice of the meeting, and *a fortiori* its purpose, and it was therefore largely improvised. Murray also had very little time to spend on ceremony: his troops were moving towards Montreal and were on a war footing. He himself was busy organizing the final preparations for a meeting between his army and that of Amherst and Haviland in Montreal, for the purpose of bringing down this last significant French bastion in Canada. Although solemnities are not crucial to the existence of a treaty, I think it is in any case reasonable to regard the presentation of belts at the conference on September 16 as a solemn ratification of the peace agreement concluded a few days earlier.

Lastly, the Court was asked to consider the subsequent conduct of the parties as extrinsic evidence of their intent to enter into a treaty. I do not think this is necessary, since the general historical context of the time and the events closely surrounding the document at issue have persuaded me that the document of September 5, 1760 is a treaty within the meaning of s. 88 of the *Indian Act*. The fact that the document has allegedly not been used in the courts or other institutions of our society does not establish that it is not a treaty. Non-user may very well be explained by observance of the rights contained in the document or mere oversight. Moreover, the subsequent conduct which is most indicative of the parties' intent is undoubtedly that which most closely followed the conclusion of the document. Eleven days after it was concluded, at the conference to which I have just referred, the parties gave a clear indication that they had intended to conclude a treaty.

I am therefore of the view that the document of September 5, 1760 is a treaty within the meaning of s. 88 of the *Indian Act*. At this point, the appellant raises two arguments against its application to the present case. First, he argues that the treaty has been extinguished. In the event that it has not been, he argues that the treaty is not such as to render ss. 9 and 37 of the *Regulation respecting the Parc de la Jacques-Cartier* inoperative. Let us first consider whether on May 29, 1982, the date on which the respondents engaged in the activities which are the subject of the charges, the treaty still had any legal effects.

V – Legal Effects of Treaty of September 5, 1760 on May 29, 1982

The appellant argues that, assuming the document of September 5 is a treaty, it was extinguished by the following documents or events:

1. the Act of Capitulation of Montreal, signed on September 8, 1760;
2. the Treaty of Paris signed on February 10, 1763;

3. the Royal Proclamation of October 7, 1763;
4. the legislative and administrative history of the Hurons' land; and
5. the effect of time and non-user of the treaty.

Neither the documents nor the legislative and administrative history to which the appellant referred the Court contain any express statement that the treaty of September 5, 1760 has been extinguished. Even assuming that a treaty can be extinguished implicitly, a point on which I express no opinion here, the appellant was not able in my view to meet the criterion stated in *Simon* regarding the quality of evidence that would be required in any case to support a conclusion that the treaty had been extinguished. That case clearly established that the onus is on the party arguing that the treaty has terminated to show the circumstances and events indicating it has been extinguished. This burden can only be discharged by strict proof, as the Chief Justice said at pp. 405-6:

> 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.

The appellant did not submit any persuasive evidence of extinguishment of the treaty. He argues, first, that the treaty had become obsolete because the Act of Capitulation of Montreal replaced all other acts of capitulation, thereby extinguishing them. This argument is based on article 50 of the Act of Capitulation, which reads as follows:

> [TRANSLATION] The present capitulation shall be inviolably executed in all its articles, and bona fide, on both sides, notwithstanding any infraction, and any other pretence, with regard to the preceding capitulations, and without making use of reprisals. [Emphasis added.]

As I have concluded that this is a peace treaty and not a capitulation, art. 50 has no application in this case, so far as extinguishment of the treaty of September 5 is concerned. That article was designed to ensure that the signatories would comply with the Act of Capitulation, in spite of the existence of reasons for retaliation which the parties might have had as the result of breaches of an earlier act of capitulation. Article 50 can only apply to preceding acts signed on behalf of France, such as the Act of Capitulation of Québec in late 1759. I see nothing here to support the

conclusion that this article was also intended to extinguish a treaty between an Indian nation and the British.

The appellant also cites art. 40 of the Act of Capitulation of Montreal, which provides that:

> [TRANSLATION] The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they chuse to remain there; they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty. They shall have, as well as the French, liberty of religion, and shall keep their missionaries. [Emphasis added.]

France could not have claimed to represent the Hurons at the time the Act of Capitulation was made, since the latter had abandoned their alliance with the French some days before. As they were no longer allies of the French, this article does not apply to them. In my opinion, the article can only be interpreted as a condition on which the French agreed to capitulate. Though the Indian allies of the French were its beneficiaries, it was fundamentally an agreement between the French and the British which in no way prevented independent agreements between the British and the Indian nations, whether allies of the French or of the British, being concluded or continuing to exist. Further, I think it is clear that the purpose of art. 40 was to assure the Indians' of certain rights, not to extinguish existing rights.

It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons. 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.

The same reasoning applies to the appellant's argument that the Treaty of Paris of February 10, 1763 between France and England terminated the treaty of September 5, 1760 between the Hurons and the English. England and France could not validly agree to extinguish a treaty between the Hurons and the English, nor could France claim to represent the Hurons regarding the extinguishment of a treaty the Hurons had themselves concluded with the British Crown.

The appellant then argued that it follows that the Royal Proclamation of October 7, 1763 extinguished the rights arising out of the treaty of September 5, 1760, because it did not confirm them. I cannot accept such a proposition: the silence of the Royal Proclamation regarding the treaty at issue cannot be interpreted as extinguishing it. The purpose of the Proclamation was first and foremost to organize, geographically and politically, the territory of the new American colonies, namely Quebec, East Florida, West Florida and Grenada, and to distribute their possession and use. It also granted certain important rights to the native peoples and was regarded by many as a kind of charter of rights for the Indians: *White and Bob, supra*, at p. 636; *Calder* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 395 (Hall J., dissenting); *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 All E.R. 118 (C.A.), at pp. 124-25 (Lord Denning). The very wording of the Royal Proclamation clearly shows that its objective, so far as the Indians were concerned, was to provide a solution to the problems created by the greed which hitherto some of the English had all too often demonstrated in buying up Indian land at low prices. The situation was causing dangerous trouble among the Indians and the Royal Proclamation was meant to remedy this:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions. ...
>
> And We do further declare it to be our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

I see nothing in these passages which can be interpreted as an intention on the part of the British Crown to extinguish the treaty of September 5. The Proclamation confers rights on the Indians without necessarily thereby extinguishing any other right conferred on them by the British Crown under a treaty.

Legislative and administrative history also provides no basis for concluding that the treaty was extinguished. In 1853, 9,600 acres of land located outside the territory at issue were ceded to the Hurons by the Government of Lower Canada. These lands were within the boundaries of the lands frequented by the Hurons when the treaty of September 5 was concluded. In 1903 the Hurons again ceded these 9,600 acres, without reserving the rights that had been granted to them under the treaty of September 5. The Attorney General of Quebec considers that by making this cession without reservation, the Hurons indicated beyond all doubt that this document was not a source of rights so far as they were concerned. This argument cannot stand. Assuming that the 9,600 acres ceded were initially the subject of the treaty, the absence of any reservation in the deed ceding this territory clearly cannot be interpreted as a waiver of the benefits of the treaty in the territory which was not the subject of the cession, whatever the effect of the absence of such a reservation may be with respect to the territory ceded.

The appellant further argues that by adopting the *Act to establish the Laurentides National Park*, S.Q. 1895, 58 Vict., c. 22, and by making the territory in question a park, the Quebec legislator clearly expressed his intention to prohibit the carrying on of certain activities in this territory, whether or not such activities are protected by an Indians treaty.

Section 88 of the *Indian Act* is designed specifically to protect the Indians from provincial legislation that might attempt to deprive them of rights protected by a treaty. A legislated change in the use of the territory thus does not extinguish rights otherwise protected by treaty. If the treaty gives the Hurons the right to carry on their customs and religion in the territory of Jacques-Cartier park, the existence of a provincial statute and subordinate legislation will not ordinarily affect that right.

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.

In view of the liberal and generous approach that must be adopted

towards Indians rights and the evidence in the record, I cannot conclude that the treaty of September 5 no longer had any legal effect on May 29, 1982.

The question that arises at this point is as to whether the treaty is capable of rendering ss. 9 and 37 of the Regulations inoperative. To answer this it will now be necessary to consider the territorial scope of the rights guaranteed by the treaty, since the appellant recognizes that the activities with which the respondents are charged are customary or religious in nature.

VI – Territorial Scope of Rights Guaranteed by Treaty of September 5, 1760

Although the document of September 5 is a treaty within the meaning of s. 88 of the *Indian Act*, that does not necessarily mean that the respondents are exempt from the application of the *Regulation respecting the Parc de la Jacques-Cartier*. It is still necessary that the treaty protecting activities of the kind with which the respondents are charged cover the territory of Jacques-Cartier park. The appellant argues that the territorial scope of the treaty does not extend to the territory of the park. The respondents, on the other hand, argue that the treaty confers personal rights on them and that they are in no way seeking to assert rights of a territorial nature.

Although this case does not involve a territorial claim as such, in that the Hurons are not claiming control over territory, I am of the view that exercise of the right they are claiming has an essential territorial aspect. The respondents argue that they have a right to carry on their customs and religious rites in a specific territory, namely that of the park. The substantive content of the right cannot be considered apart from its territorial content. Just as it would distort the nature of a right of way to consider it while ignoring its territorial aspect, one cannot logically disregard the territorial aspect of the substantive rights guaranteed by the treaty of September 5, 1760. The respondents must therefore show that the treaty guaranteed their right to carry on their customs and religious rites in the territory of Jacques-Cartier park.

The treaty gives the Hurons the freedom to carry on their customs and their religion. No mention is made in the treaty itself of the territory over which these rights may be exercised. There is also no indication that the territory of what is now Jacques-Cartier park was contemplated. However, for a freedom to have real value and meaning, it must be possible to exercise it somewhere. That does not mean, despite the importance of the rights concerned, that the Indians can exercise it anywhere. Our analysis will be confined to setting the limits of the promise made in the treaty, since the respondents have at no time based

their argument on the existence of aboriginal rights protecting the activities with which they are charged.

The respondents suggest that the treaty gives them the right to carry on their customs and religion in the territory of the park because it is part of the territory frequented by the Hurons in 1760, namely the area between the Saguenay and the St-Maurice. In their submission, customs as they existed at the time of the treaty and as they might reasonably be expected to develop subsequently are what the British Crown undertook to preserve and foster.

The appellant argued in the Court of Appeal that the free exercise of the customs mentioned in the document of September 5, 1760 has to be limited to the Lorette territory, a territory of 40 arpents by 40 arpents. In this Court, he argues that even if the treaty covers the activities with which the respondents are charged, these rights must be exercised in accordance with the legislation designed to protect users of the park and to preserve it. He further argues that, except as regards the cutting of trees, the legislation only affects the way in which the right can be exercised, not the substance of the right. This should be a sufficient basis for requiring the Hurons to observe the legislation. In his intervention the Attorney General of Canada argues that the respondents' claim is essentially a territorial one and that in order to establish their rights, the respondents must show a connection between the rights claimed and their exercise in a given territory. He is of the view that the document in the present case does not connect the freedom of exercise of religion, customs and trade with the English to any territory.

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*.

The historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it. As MacKinnon J.A. said in *Taylor and Williams*, *supra*, at 232:

> Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.

Before I again turn to history, the problems raised by the territorial question should be briefly stated. There are two rights in opposition here: the provincial Crown's right of ownership over the territory of the park and the Hurons' right to exercise their religion and ancestral customs on this land. The ownership right suggests that ordinarily the Crown can do whatever it likes with its land. On the other hand, a very special importance seems to attach to territories traditionally frequented by the Hurons so that their traditional religious rites and ancestral customs will have their full meaning. Further, the Hurons are trying to protect the possibility of carrying on these rites and customs near Lorette on territory which they feel is suited to such purposes.

Bisson J.A., for the majority of the Court of Appeal, adopted the respondents' position that the territory which is the subject of the treaty is that frequented by the Hurons in 1760. In that case one can only note that if the rights of the Hurons are defined without introducing any limiting factor, a vast area would be subject to the rights recognized by the treaty of September 5, 1760. This could mean that persons who moved into the area frequented by the Hurons after 1760 may have limited the rights resulting from the treaty by making their exercise more difficult. This proposition might even lead one to suppose, *a priori*, that the Hurons could cut down trees and make fires on private property that had been part of the territory frequented by them at that time. With respect, I feel that adopting such a position would go beyond what General Murray intended. Even a generous interpretation of the document, such as Bisson J.A.'s interpretation, must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' interests and those of the conqueror.

On the other hand, to accept the argument that the parties intended to limit the scope of the treaty to the Lorette territory would mean introducing a very severe restriction that is not justified by the wording of the document since Lorette is mentioned only as a destination for safe-conduct purposes. Given the nature of Indian religious rites and especially Indian customs at the time, any significant exercise of such rights would require territory extending beyond Lorette.

I consider that both the first and the second positions are unsatisfactory. In my view, neither one succeeds in deducing the common intention of the parties from the historical context. The interpretation which I think is called for when we give the historical context its full meaning is that Murray and the Hurons contemplated that the rights guaranteed by the treaty could be exercised over the entire territory frequented by the Hurons at the time, so long as the carrying on of the

customs and rites is not incompatible with the particular use made by the Crown of this territory.

Let us look first at the relationship the Hurons had with the territory the respondents claim is covered by the treaty. No one argued that the area between the Saguenay and the St-Maurice was land over which there was an aboriginal title in favour of the Hurons. In fact, a group of about 300 people had been brought into the area around Quebec by the Jesuits in 1650 ("Relation au R.P. Claude de Lingendes par Paul Ragueneau," of September 1, 1650, in *Relations des jésuites contenant ce qvi s'est passé de plus remarquable dans les missions des Pères de la Compagnie de Jesus dans la Nouvelle-France* (1858), vol. 2, at pp. 25 *et seq.*) and its relatively recent presence in the Lorette area suggests that the Hurons did not have historical possession of these lands.

Next, the policy of the British toward the Indians in territorial matters has to be considered. In quite general terms, the evidence shows that during the Seven Years' War the British had adopted a conciliatory attitude toward the Indians because of the lesson they had learned from their earlier defeats at the hands of the French. As I mentioned earlier, they had realized the important role the Indians would necessarily play in the war between the mother countries. The British had also understood the importance for the security of the colony of continuing peace with the Indians once the war was over. I adopt the observations of Bisson J.A. in describing Murray's attitude to the Hurons (at p. 1728):

> [TRANSLATION] In this connection, the reference to customs in treaty D-7 takes on particular importance, as Murray held the Hurons in high regard and undoubtedly wanted to be as much help to them as possible.

However, the British Crown's desire to colonize the conquered land and use that land for its benefit also cannot be doubted. Murray had been engaged for years in a war the purpose of which was to expand the wealth, resources and influence of Great Britain. It is unlikely he would have granted, without further details, absolute rights which might paralyze the Crown's use of the newly conquered territories.

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. This 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 suzerainty. 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. Before the treaty was signed, they had carried on their customs in accordance with restrictions already imposed by an occupancy incompatible with such exercise. The Hurons were only asking to be permitted to continue to carry on their customs on the lands frequented to the extent that those customs did not interfere with enjoyment of the lands by their occupier. I readily accept that the Hurons were probably not aware of the legal consequences, and in particular of the right to occupy to the exclusion of others, which the main European legal systems attached to the concept of private ownership. Nonetheless I cannot believe that the Hurons ever believed that the treaty gave them the right to cut down trees in the garden of a house as part of their right to carry on their customs.

Jacques-Cartier park falls into the category of land occupied by the Crown, since the province has set it aside for a specific use. What is important is not so much that the province has legislated with respect to this territory but that it is using it, is in fact occupying the space. As occupancy has been established, the question is whether the type of occupancy to which the park is subject is incompatible with the exercise of the activities with which the respondents were charged, as these undoubtedly constitute religious customs or rites. Since, in view of the situation in 1760, we must assume some limitation on the exercise of rights protected by the treaty, it is up to the Crown to prove that its occupancy of the territory cannot be accommodated to reasonable exercise of the Hurons' rights.

The Crown presented evidence on such compatibility but that evidence did not persuade me that exercise of the rites and customs at issue here is incompatible with the occupancy.

Jacques-Cartier park is a park that falls within the class of conservation parks. The Parks Act describes them in the following way:

> 1. ...
> (c) "conservation park" means a park primarily intended to ensure the permanent protection of territory representative of the natural regions of Québec, or of natural sites presenting exceptional features, while rendering them accessible to the public for the purposes of education and cross-country recreation;

Cross-country recreation is given the following definition, again in s. 1 of the Act:

> (e) "cross-country recreation" means a type of recreation characterized by the use of little frequented territory and the use of relatively simple equipment;

Under the *Regulation respecting the Parc de la Jacques-Cartier*, the park is divided into environmental zones, which are portions of the park for moderate use set aside for the discovery and exploration of the environment, and preservation zones, for limited use and set aside for the conservation, observation and enjoyment of the environment.

For the exercise of rites and customs to be incompatible with the occupancy of the park by the Crown, it must not only be contrary to the purpose underlying that occupancy, it must prevent the realization of that purpose. First, we are dealing with Crown lands, lands which are held for the benefit of the community. Exclusive use is not an essential aspect of public ownership. Second, I do not think that the activities described seriously compromise the Crown's objectives in occupying the park. Neither the representative nature of the natural region where the park is located nor the exceptional nature of this natural site are threatened by the collecting of a few plants, the setting up of a tent using a few branches picked up in the area or the making of a fire according to the rules dictated by caution to avoid fires. These activities also present no obstacle to cross-country recreation. I therefore conclude that it has not been established that occupancy of the territory of Jacques-Cartier park is incompatible with the exercise of Huron rites and customs with which the respondents are charged.

VII – Conclusion

For all these reasons, I would dismiss the appeal with costs.

I would dispose of the constitutional questions stated by the Chief Justice as follows:

> 1. Does the following document, signed by General Murray on

5 September 1760, constitute a treaty within the meaning of s. 88 of the *Indian Act* (R.S.C. 1970, c. 1-6)?

> "THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English: -- recommending it to the Officers commanding the Posts, to treat them kindly.
> Given under my hand at Longueil, this 5th day of September, 1760.
>
> By the Genl's Command,
> JOHN COSNAN, J.A. MURRAY.
> Adjut. Genl."

Answer: Yes.

2. If the answer to question 1 is in the affirmative, was the "treaty" still operative on 29 May 1982, at the time when the alleged offences here committed?

Answer: Yes.

3. If the answer to questions 1 and 2 are in the affirmative, are the terms of the document of such a nature as to make ss. 9 and 37 of the *Regulation respecting the Parc de la Jacques-Cartier* (Order in Council 3108-81, *Gazette officielle du Québec*, Part II, November 25, 1981, pp. 3518 *et seq.*) made under the Parks Act (R.S.Q., c. P-9) unenforceable in respect of the respondents?

Answer: Yes.