Indian Hnnting Rights: *Dick* v. *R.*, *Jack and Charlie* v. *R.* and *Simon* v. *R.*

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The author discusses three recent decisions of the Supreme Court of Canada which focus on provincial regulation of Indian hunting rights. The three decisions in turn consider the application of section 88 of the *Indian Act*, freedom of religion, and the nature and interpretation of Indian treaties.

L'auteur commente trois décisions récentes de la Cour suprême concernant la réglementation provinciale des droits de chasse des Indiens. Les trois décisions ont considéré tour à tour l'article 88 de la *Loi sur les Indiens*, la liberté de religion ainsi que la nature de l'interprétation des traités indiens.

I. Introduction

In three recent cases, the Supreme Court of Canada discussed provincial regulation of Indian hunting rights. *Dick* v. *R.*[1] and *Jack and Charlie* v. *R.*[2] upheld the convictions of non-treaty Indians charged with killing deer out of season under the British Columbia *Wildlife Act*.[3] In *Dick* the deer had been shot for food; in *Jack*, to provide meat for a religious ceremony. The *Dick* decision is significant for its discussion of section 88 of the *Indian Act*,[4] which deals with the application of provincial laws to Indians. *Jack* raises the issue of freedom of religion.

In the third case, *Simon* v. *R.*,[5] the Supreme Court of Canada allowed the appeal of a treaty Indian charged with possession of a gun and ammunition contrary to the Nova Scotia *Lands and Forests Act*.[6] This decision is noteworthy because of its comments on the nature and interpretation of Indian treaties.

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[1](1985), [1985] 2 S.C.R. 309, 62 N.R. 1, [1986] 1 W.W.R. 1 [hereinafter *Dick* cited to S.C.R.].
[2](1985), [1985] 2 S.C.R. 332, 62 N.R. 14, [1986] 1 W.W.R.21 [hereinafter *Jack* cited to S.C.R.].
[3]R.S.B.C. 1979, c. 433.
[4]R.S.C. 1970, c. I-6.
[5](1985), [1985] 2 S.C.R. 387, 62 N.R. 366.
[6]R.S.N.S. 1967, c. 163.

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II. Constitutional Framework

Regulation and protection of Indian hunting rights are complicated by the division of jurisdiction between the federal and provincial governments; subsection 91(24) of the *Constitution Act, 1867*[7] allocates jurisdiction over "Indians and Lands Reserved for Indians" to the federal government, yet the provinces may pass legislation aimed at game management and conservation. The application of provincial laws is dealt with in section 88 of the *Indian Act*:

> 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 other order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provisions for any matter for which provision is made by or under this Act.

Section 88 has been the focus of many of the hunting rights decisions since that section was added to the *Indian Act* in 1951.

III. Provincial Regulation of Non-Treaty Hunting Rights

A. *Earlier Cases*

Even before the introduction of section 88, courts generally prohibited provincial regulation of Indian hunting which took place on a reserve, or in accordance with a treaty.[8] Where the right to hunt was not protected by a treaty, however, provincial regulation was usually allowed, so long as the provincial legislation was aimed at the conservation of game rather than at the regulation of Indians. This approach was confirmed by section 88.

Until the *Dick* and *Jack* cases, the most recent Supreme Court of Canada decision in this area was *Kruger and Manuel* v. *R.*,[9] decided in 1977. In that case, non-treaty Indians had been charged with hunting in closed season without a permit, contrary to the British Columbia *Wildlife Act*. The hunting had taken place on unoccupied Crown lands within the traditional hunting grounds of their band. It was argued that the British Columbia Court of Appeal had erred in holding that the *Wildlife Act* was a law of general application within the meaning of section 88, and in holding that section 88 referentially incorporated provincial legislation.

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[7](U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

[8]P. Cumming & N. Mickenberg, eds, *Native Rights in Canada*, 2d ed. (Toronto: General Publishing, 1972) at 209. For a review of hunting and fishing cases, see also D.E. Sanders, "Indian Hunting and Fishing Rights" (1974) 38 Sask. L. Rev. 45.

[9](1977), [1978] 1 S.C.R. 104, 75 D.L.R. (3d) 434 [hereinafter *Kruger* cited to S.C.R.].

Dickson J. identified two *indicia* for determining whether a provincial statute is a law of general application. First, the territorial reach of the law must be examined.[10] If it is found that the law extends uniformly throughout the province, the court must then consider the "intention and effects of the enactment".[11] In order to qualify as a law of general application, legislation "must not be 'in relation to' one class of citizens in object and purpose".[12] This does not mean that the law must have an absolutely uniform impact. "The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group."[13] The British Columbia *Wildlife Act* was held to have met this second test:

> [I]t is clear that in object and purpose the Act is not aimed at Indians. ... Provincial game laws, which have as their object the conservation and management of provincial wildlife resources, have been held by this Court not to relate to Indians *qua* Indians. ... It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. Were this so, s. 88 would not operate to make the Act applicable to Indians.[14]

Once the *Wildlife Act* had been held to be a law of general application, section 88 determined the outcome. "In the absence of treaty protection Indians are brought within provincial regulatory legislation."[15] Having reached this conclusion, it was unnecessary for the Court in *Kruger* to decide whether the *Wildlife Act* had been referentially incorporated by section 88, or whether it applied *ex proprio vigore*, since in either case the appeal would have failed.[16]

B. Dick *v.* R.

1. The Facts

While fishing with other members of the Alkali Lake Band, the appellant, a non-treaty Indian, shot a deer for food. This took place within the traditional hunting grounds of the Alkali Lake Band. Dick was charged with killing wildlife in closed season contrary to subsection 3(1) of the British Columbia *Wildlife Act*.

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[10] *Ibid.* at 110.
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.* at 110 and 112.
[15] *Ibid.* at 112.
[16] *Ibid.*

2. Lower Court Decisions

Arthur Dick was convicted at trial and fined fifty dollars. The County Court upheld the conviction, and his appeal to the Court of Appeal was dismissed, with one dissenting judgment.[17]

Seaton J.A. dismissed the appeal on the grounds that the case could not be distinguished from *Kruger*.[18] While MacDonald J.A. acknowledged that the appellant in this case had presented more evidence "as to the practical and cultural significance of hunting"[19] than had been available in *Kruger*, he dismissed the appeal as not raising questions of law alone.

Lambert J.A., dissenting, interpreted the *Kruger* test for determining whether a particular law had "cross[ed] the line demarking laws of general application from other enactments" as turning on effect rather than on intention. Since the effect, although not the intention, of the *Wildlife Act* was to impair the status and capacity of Indians, Lambert J.A. concluded that it was not a law of general application within the meaning of section 88.[20] Using the same test, Lambert J.A. also held that the provincial legislation regulated Indians *qua* Indians, and therefore must be read down so as not to apply to the appellant.[21]

3. The Supreme Court of Canada Decision

The unanimous Supreme Court of Canada decision, dismissing Dick's appeal, was delivered by Beetz J.[22] This decision clearly separated the question of effect from that of intention. Relying chiefly on the dissenting decision in the court below, Beetz J. accepted that the application of the *Wildlife Act* might impair the capacity and status of the appellant, and regulate him *qua* Indian. Thus, without section 88 of the *Indian Act*, the *Wildlife Act* would have to be read down to preserve its constitutional validity.[23]

However, Beetz J. held that the issue of whether the *Wildlife Act* was a law of general application within the meaning of section 88 must be decided on the basis of intention rather than effect.[24] As it had not been "established that all of [its] legislative policy ... singles out Indians for special

[17] *R.* v. *Dick* (1982), 3 C.C.C. (3d) 481 at 485 (B.C.C.A.).
[18] *Ibid.* at 483-84.
[19] *Ibid.* at 495.
[20] *Ibid.* at 491.
[21] *Ibid.* at 492.
[22] The other members of the Court were Dickson C.J. and Estey, McIntyre and Chouinard JJ.
[23] *Supra*, note 1 at 320-21.
[24] *Ibid.* at 323-24.

treatment",[25] the *Wildlife Act* was a law of general application within the meaning of section 88.

Because of his earlier finding that the *Wildlife Act* could not apply to the appellant *ex proprio vigore*, it was also necessary for Beetz J. to consider whether section 88 of the *Indian Act* referentially incorporated the *Wildlife Act* so that it could take effect as federal legislation. Distinguishing between provincial laws "which can be applied to Indians without touching their Indianness",[26] and those, like the *Wildlife Act* which cannot, Beetz J. held that the former would apply to Indians *ex proprio vigore* even without section 88, while the latter would be referentially incorporated by that section.

4. Commentary

a. Section 88 of the Indian Act

The significance of the *Dick* decision lies in the Court's interpretation of section 88 of the *Indian Act*. The *Kruger* decision did not appear to separate the issues of intention and effect. It is true that the Court in *Kruger* referred to the object and purpose of the *Wildlife Act*, and stated that the policy of the *Act* would have to be impairment of the status and capacity of Indians in order for section 88 to be avoided.[27] However, Dickson J. also stated that whatever the purpose of provincial legislation, it could not be considered a law of general application if "by its effect, [it] impairs the status or capacity of a particular group".[28] Thus, while legislative intention was important, this view held that the impact of legislation would also affect whether or not it could be considered a law of general application.

Since the Chief Justice did not dissent in *Dick*, presumably he accepted Beetz J.'s interpretation of his earlier decision. It could be argued, however, that *Dick* changes the test set out in *Kruger*[29] by separating it into two distinct questions. According to *Dick*, a court must first ask itself whether the provincial legislation has the effect of regulating Indians *qua* Indians. If it does, a court must then consider whether this was intended by the legislature. If the effect was intended, then the *Act* is *ultra vires*; if not, then the statute is a law of general application within the meaning of section 88 of the *Indian Act*.

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[25] *Ibid.* at 326.
[26] *Ibid.*
[27] *Supra*, note 9 at 112.
[28] *Ibid.* at 110.
[29] The two tests set out in *Kruger* were territorial scope and the "intention and effect" of the legislation.

b. Regulating Indians qua *Indians*

The discussion in *Dick* begins with a consideration of whether application of the *Wildlife Act* would impair the appellants' status and capacity as Indians.[30] While *Kruger* held that the *Act* did not have this effect, it was accepted in *Dick* that such impairment might well result. Therefore, even if it were later determined that this effect was unintended, the *Wildlife Act* could not apply to Indians *ex proprio vigore.* It would have to be read down, so as to avoid the regulation of Indians *qua* Indians.

c. Laws of General Application

Lambert J.A. had suggested that the same test be used to determine whether provincial legislation regulated Indians *qua* Indians, and whether it was a law of general application. However, Beetz J. rejected this approach because it blurred the two issues:

> The tests which Lambert J.A. applied ... are perfectly suitable to determine whether the application of the *Wildlife Act* to the appellant would have the effect of regulating him *qua* Indian, with the consequential necessity of a reading down if it did; but ... they have nothing to do with the question whether the *Wildlife Act* is a law of general application. On the contrary, it is precisely because the *Wildlife Act* is a law of general application that it would have to be read down were it not for s.88 of the *Indian Act.* If the special impact of the *Wildlife Act* on Indians had been the very result contemplated by the Legislature and pursued by it as a matter of policy, the Act could not be read down because it would be in relation to Indians and clearly *ultra vires.*[31]

After separating the two issues as he did, and discussing the impact of the *Act* in the context of regulation of Indians *qua* Indians, it is not surprising that Beetz J. focused on intention rather than on effect in determining whether the *Wildlife Act* was a law of general application within the meaning of section 88 of the *Indian Act.* While Lambert J.A. had dismissed legislative intent as "abstract"[32] and not particularly useful, Beetz J. saw intention as

> an essential ingredient of a law which discriminates between various classes of persons, as opposed to a law of general application. This in my view is what Dickson J. meant when ... he wrote:
>
> > It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians.[33]

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[30]Asking whether provincial legislation would impair the status and capacity of Indians is another way of asking whether that legislation regulates Indians *qua* Indians.

[31]*Supra,* note 1 at 321-22.

[32]*Supra,* note 17 at 489.

[33]*Supra,* note 1 at 324.

Beetz J. concluded that the *Wildlife Act* was a law of general application:

> In the previous chapter, I have assumed that its application to appellant would have the effect of regulating [him] *qua* Indian. However, it has not been demonstrated ... that this particular impact has been intended by the provincial legislator. While it is assumed that the *Wildlife Act* impairs the status or capacity of appellant, it has not been established that the legislative policy of the *Wildlife Act* singles out Indians for special treatment or discriminates against them in any way.[34]

d. *Referential Incorporation*

Without section 88 of the *Indian Act*, the *Wildlife Act* would have had to be read down so as not to encroach on federal jurisdiction by regulating Indians *qua* Indians.Therefore, in this case, the precise effect of section 88 was of greater importance than in *Kruger*. Unless section 88 referentially incorporated the *Wildlife Act*, it could not apply to the appellant.

Until the decision in *Dick*, there had been no conclusive holding by the Supreme Court of Canada as to whether or not section 88 incorporated provincial legislation by reference.[35] Beetz J. resolved the uncertainty by distinguishing between two kinds of provincial laws; those which did not impair the status and capacity of Indians, and thus could apply *ex proprio vigore*, and those which could not. The second category is referentially incorporated by section 88 of the *Indian Act*.[36]

C. Jack and Charlie *v.* R.

1. The Facts

Anderson Jack and his brother-in-law shot a deer out of season to provide Mrs Jack with deer meat for a religious ceremony in honour of her great-grandfather. At trial,[37] an anthropologist testified that the Coast Salish people, to whom the appellants belonged, believed that spirits of the dead had the same needs as the living. The ceremony to be performed by Mrs Jack, described as "a very ancient traditional ceremony"[38] among her people, was intended to provide food for the dead. Meat was to be burnt and

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[34] *Ibid.* at 325-26.

[35] *Natural Parents* v. *Superintendent of Child Welfare* (1975), [1976] 2 S.C.R. 751, 60 D.L.R. (3d) 148, 6 N.R. 491.

[36] *Supra*, note 1 at 326-27.

[37] *R.* v. *Jack and Charlie* (1979), 50 C.C.C. (2d) 337 (B.C. Prov. Ct), aff'd (1982), 139 D.L.R. (3d) 25 (B.C.C.A.), aff'd (1985), [1985] 2 S.C.R. 332.

[38] *Ibid.* at 340.

the "essence of the food ... [to be] transmitted through the smoke to the essence of the deceased person".[39]

2. Lower Court Decisions

At trial, the appellants were convicted of killing wildlife out of season, contrary to paragraph 4(1)(c) of the British Columbia *Wildlife Act*, but were given absolute discharges. The arguments that the application of the *Wildlife Act* interfered with the appellants' freedom of religion and regulated them *qua* Indians were dismissed by the British Columbia County Court and Court of Appeal.

Taggart J.A. dealt with the first ground of appeal by stating

> [w]hile freedom of religion is a fundamental right, the authorities binding on us make it clear that the freedom must be exercised in accordance with the general law.[40]

He dismissed the second argument on the grounds that the test set out in *Kruger* had not been met; it had not been shown that the policy of the *Wildlife Act* was to restrict Indian religion.[41]

Craig J.A. dismissed the appellants' arguments as either lacking merit, or not raising questions of law alone.[42]

Hutcheon J.A. dissented, holding that the *Wildlife Act* should be read down so as not to restrict the appellants' right of freedom of religion.[43]

3. The Supreme Court of Canada Decision

The unanimous decision in *Jack* was also delivered by Beetz J.[44] He did not discuss the authorities cited by the appellants in support of their argument based on the freedom of religion because he found that these authorities did not answer two submissions by the Crown which were "fatal to the position of the appellants".[45] The Crown had argued that obtaining the deer meat was not actually part of the religious ceremony and, therefore, the case could not be distinguished from *Kruger*.[46] The Crown also argued

[39] *R. v. Jack and Charlie* (1982), 139 D.L.R. (3d) 25 at 33, [1983] 5 W.W.R. 193, 67 C.C.C. (2d) 289 (B.C.C.A.) [hereinafter *Jack* cited to D.L.R.].
[40] *Ibid.* at 34.
[41] *Ibid.* at 37.
[42] *Ibid.* at 39.
[43] *Ibid.* at 44.
[44] The other members of the Court were Dickson C.J., Estey, McIntyre and Chouinard JJ.
[45] *Supra*, note 2 at 343.
[46] *Ibid.*

that the appellants' motive in shooting the deer was not relevant to the question of criminal liability.[47]

Accepting both these arguments, Beetz J. held that "the prohibition of deer killing by the *Wildlife Act* raises no question of religious freedom."[48] The appellants' second ground of appeal, that provincial interference with Indian religion amounted to the regulation of Indians *qua* Indians, was so closely connected to the first issue that it too was disposed of by this finding.[49]

The appellants had also argued that, even leaving religion aside, "hunting is at the root of the culture and way of life of the Coast Salish people so that its prohibition attains [to] the appellants *qua* Indians".[50] Beetz J. dismissed this argument as "indistinguishable"[51] from the issues raised in *Dick*, which had been decided the same day.

4. Commentary

The significance of the *Jack* decision lies in the Supreme Court of Canada's treatment of the freedom of religion issue. Since the hunting incident had taken place before the entrenchment of the *Canadian Charter of Rights and Freedoms*,[52] the appeal was based on the proposition that freedom of religion existed as a "fundamental principle of law".[53]

The appellants then argued that this right, although not absolute, required a balancing of sincere religious belief and compelling state interest.[54] This was the approach taken by Hutcheon J.A. in his dissenting judgment:

> The hunting and killing was a part of a religious ritual of the Coast Salish people of 20,000 years' duration. The ritual is not harmful to society, is not opposed to the common good and is not in violation of the rights of any other individual.[55]

Interestingly, the Crown did not challenge the existence of a common law right of religious freedom. Instead it argued that the Act in question did not form part of the religious ceremony, and therefore, that freedom of

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[47]*Ibid.*

[48]*Ibid.* at 345-46.

[49]*Ibid.* at 346.

[50]*Ibid.*

[51]*Ibid.*

[52]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

[53]*Supra*, note 2 at 338. Beetz J. noted that the question had not been raised "whether the *Canadian Bill of Rights* might govern the *Wildlife Act* if the latter Act applied to Indians not *ex proprio vigore* but by referential adoption under s. 88 of the *Indian Act*."

[54]*Ibid.* at 339. Beetz J. noted that this test appeared to be patterned on s. 1 of the *Charter*.

[55]*Supra*, note 39 at 41.

religion was not in issue and the case was indistinguishable from *Kruger*. The Crown also argued that motive did not affect criminal liability.[56]

Beetz J. accepted the Crown's arguments and concluded that the case did not raise the question of religious freedom. He made no finding as to the nature of a common law right of religious freedom, or whether such a right might include some kind of balancing test. Had the hunting occurred after 15 April 1982, the appellants could have based their freedom of religion argument on the *Charter*. Beetz J.'s reasoning, however, precludes any consideration of the scope of the right guaranteed in section 2 of the *Charter*, or of the restrictions on that right justified by section 1.

To bring the *Charter* into play, it would have to be shown that the activity in question was actually part of the religious ceremony. It is arguable that the approach taken by Beetz J. was unnecessarily narrow. While it might be possible to keep frozen deer meat available at all times, this might not be easily managed; during the open season, hunters would have to kill enough deer to feed the community and also to provide for any religious ceremonies during the coming months. This might be so difficult to do that restrictions on hunting would in fact restrict religious practice, even if the hunting is not a part of the burning ceremony itself. The obtaining of deer meat might be seen as a necessary incident of the ceremony, as in the next case to be discussed, carrying a gun was seen as incidental to the right to hunt.[57]

IV. Provincial Regulation of Treaty Hunting Rights

A. Earlier Cases

Even before the introduction of section 88 of the *Indian Act*, courts generally upheld treaty rights over provincial legislation.[58] However, it had to be determined whether the document relied on was a valid treaty.

In a 1928 decision, *R.* v. *Syliboy*,[59] the Nova Scotia County Court held that a Peace and Friendship Treaty signed in 1752 was not a valid treaty. A MicMac chief living in Cape Breton had been charged under the *Lands and Forests Act* with illegal possession of animal pelts. He argued that the Treaty of 1752 allowed him to hunt and trap at all times.

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[56]*Supra*, note 2 at 343.

[57]See *infra*, note 90 and accompanying text.

[58]See Cumming & Mickenberg, *supra*, note 8.

[59](1928), [1929] 1 D.L.R. 307, 50 C.C.C. 389 (N.S. Co. Ct) [hereinafter *Syliboy* cited to D.L.R.].

The Nova Scotia County Court found that the Treaty did not extend to Cape Breton, and also went on to consider the effect of the Treaty, should this be incorrect. The Crown had argued that Indian attacks on the British terminated the Treaty. Patterson Co. Ct J. found that after 1752 the MicMac "were carrying on in the characteristic Indian way a war against Britain"[60] but held that treaty rights would only have been "suspended during the war and would become operative again when peace came."[61]

However, Patterson Co. Ct J. concluded that the Treaty itself was invalid because neither the MicMacs nor Governor Hopson had had the authority to enter into the Treaty. Having stated that "[t]reaties are unconstrained Acts of independent powers",[62] Patterson Co. Ct J. held that

> the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized.[63]

The Court also held that Governor Hopson had never been authorized to sign treaties on Britain's behalf.[64]

Section 88 of the *Indian Act* confirmed the paramountcy of treaty rights over provincial legislation. A court still had to determine, however, whether the treaty in question was a valid treaty within the meaning of section 88. In 1965, in *R.* v. *White and Bob*,[65] the Supreme Court of Canada upheld a decision of the British Columbia Court of Appeal which approached this question in a liberal manner.[66] A written surrender of Indian lands to the Hudson's Bay Company was held to constitute a valid treaty, protecting hunting rights set out in it from provincial legislation.

B. Simon *v.* R.

1. The Facts

James Simon, a MicMac Indian, was charged with possession of a gun and ammunition contrary to subsection 150(1) of the Nova Scotia *Lands and Forests Act*. Simon argued that the Peace and Friendship Treaty exempted him from provincial game legislation.

[60] *Ibid.* at 311.
[61] *Ibid.* at 312.
[62] *Ibid.* at 313.
[63] *Ibid.*
[64] *Ibid.* at 314.
[65] (1965), [1965] S.C.R. vi, 52 D.L.R. (2d) 481 n.
[66] *R.* v. *White and Bob* (1964), 50 D.L.R. (2d) 613, 52 W.W.R. 193 (B.C.C.A.), aff'd (1965), [1965] S.C.R. vi. [hereinafter *White*].

Section 4 of that Treaty states that the Indians shall have "free liberty of Hunting & Fishing as usual".[67]

2. Lower Court Decisions

In *R.* v. *Simon*,[68] the trial judge accepted the Peace and Friendship Treaty as valid, but held that any hunting and fishing rights had been extinguished by Crown land grants to settlers.[69]

The Court of Appeal admitted that the decision in *Syliboy* had "had some doubt cast upon it"[70] by the liberal approach taken in *White* but cited with approval one of its own decisions[71] which described section 4 of the 1752 Treaty as falling "very far short in words and substance from being ... a special franchise or privilege replacing the more nebulous aboriginal rights."[72] The Court of Appeal also held that as a treaty of peace, the 1752 Treaty would have been terminated by later hostilities.[73] Finally, it found that the appellant had not sufficiently established his connection "by descent or otherwise" with the Indians who had signed the Treaty.[74]

3. The Supreme Court of Canada Decision

The Supreme Court of Canada decision, delivered by Dickson C.J.,[75] held that the 1752 Treaty had been validly created by competent parties who intended to create "mutually binding obligations".[76] Dickson C.J. went on to find that section 4 of the Treaty "constitute[d] a positive source of protection against infringements on hunting rights."[77] The right to hunt was interpreted as "embody[ing] those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting grounds."[78]

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[67]*Supra*, note 5 at 393.

[68]Portions of trial judge's decision are set out in the Court of Appeal decision at (1982), 49 N.S.R. (2d) 566, 134 D.L.R. (3d) 76.

[69]*Ibid.* at 570.

[70]*Ibid.* at 572.

[71]*R.* v. *Cope* (1981), 49 N.S.R. (2d) 555, 132 D.L.R. (3d) 36 (C.A.).

[72]*Ibid.* at 564.

[73]*Supra*, note 68 at 577.

[74]*Ibid.*

[75]The other members of the Court were Beetz, Estey, McIntyre, Chouinard, Wilson and Le Dain JJ.

[76]*Supra*, note 5 at 401.

[77]*Ibid.* at 401-2.

[78]*Ibid.* at 403.

The Supreme Court of Canada also held that the Crown had not proven that the Treaty had been terminated by subsequent hostilities, or extinguished by land grants to settlers.[79] It was then determined that the appellant had sufficiently established his connection to the Indians who had originally entered into the Treaty.[80]

Having thus established that the appellant's hunting rights were protected by the Treaty of 1752, it was only necessary to consider whether the Treaty fit within section 88 of the *Indian Act*. This was answered affirmatively,[81] thus exempting the appellant from conflicting sections of the *Lands and Forests Act*.

4. Commentary

Although the appellant had asked that the case be decided solely in relation to the 1752 Treaty so as not to jeopardize other MicMac treaty or aboriginal rights, it seems likely that the decision in *Simon* will be seen as relevant to other treaties. In his decision, the Chief Justice commented on the creation and nature of Indian treaties, the interpretation of, entitlement to, and extinguishment of treaty rights, and the meaning of section 88 of the *Indian Act*.

a. The Creation of Valid Treaties

Syliboy had held that the MicMac lacked the capacity to enter into the Peace and Friendship Treaty of 1752. In *Simon*, the Chief Justice described Patterson Co. Ct J.'s conclusions as "not convincing"[82] and noted that

> the language used by Patterson J. ... reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada.[83]

Pointing out that other cases had "implicitly assumed"[84] the Treaty of 1752 to be valid, Dickson C.J. held that the MicMac signatories had had the power to enter into the Peace and Friendship Treaty. He also found that Governor Hopson, as the legal representative of the Crown, was authorized

[79] *Ibid.* at 403-7.
[80] *Ibid.* at 407-8.
[81] *Ibid.* at 408-10.
[82] *Ibid.* at 399.
[83] *Ibid.*
[84] *Ibid.* at 400.

to sign the Treaty. In this discussion, the Chief Justice took account of Indian perceptions at the time:

> 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.[85]

In determining the validity of the 1752 Treaty, the Court also examined the intention of both parties:

> 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.[86]

The implications of Dickson C.J.'s findings are clear: Indian nations, whatever their status may have been in international law, had the capacity to enter into binding treaties with the Crown, and their reasonably-held perceptions of the treaty-making process may be relevant to the issue of validity. It would seem that, as in the common law of contract, the intention of the parties is determined on an objective rather than on a subjective basis.

b. The Nature of Indian Treaties

Faced with the difficulty of characterizing Indian treaties, some writers have described them as possessing aspects of both international treaties and private contracts. In *Simon*, Dickson C.J. emphasized that an Indian treaty is not simply a hybrid of other kinds of agreements. Indian treaties are unique and therefore not to be judged by the standards developed for other kinds of agreements:

> While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.[87]

Dickson C.J. also held that treaties which affirm existing aboriginal rights, rather than create new ones, provide "a positive source of protection against infringements"[88] of those rights. Thus, in the 1752 Treaty,

> [t]he fact that the right to hunt already existed at the time the Treaty was entered into by virtue of the MicMac's general aboriginal right to hunt does

[85] *Ibid.* at 401.
[86] *Ibid.*
[87] *Ibid.* at 404.
[88] *Ibid.* at 401.

> not negate or minimize the significance of the protection of hunting rights expressly included in the Treaty.[89]

This not only supports the view that aboriginal rights exist independently of any grant from the Crown, but also allows such rights, if confirmed by treaty, the benefit of any extra protection given to treaty rights.

c. *The Interpretation of Treaty Rights*

In *Nowegijick* v. *R.*[90] Dickson J. held that Indian treaties are to be interpreted in a fair, large and liberal manner, in favour of the Indians. This approach is evident in his interpretation of section 4 of the 1752 Treaty.

An argument by the Crown that the words "as usual" limited thc Indians to hunting with weapons used in 1752 was dismissed as "an unnecessary and artificial constraint out of keeping with the principle that Indian treaties should be liberally construed."[91] An argument that the Treaty referred only to hunting for non-commercial purposes was also rejected.[92] Not only did the Court refuse to read section 4 as restricting the method or purpose of hunting; it interpreted the section as "reflect[ing] a concern that the right to hunt be interpreted in a flexible way that is sensitive to the evolution of changes in normal hunting practices."[93]

The Chief Justice also read section 4 as extending protection to "those activities reasonably incidental to thc act of hunting itself".[94] Obviously a right to hunt would be seriously restricted if carrying a gun and ammunition on the way to the hunting area were prohibited. The only requiremcnt is that this be done "in a safe manner".[95]

d. *Entitlement to Claim Treaty Rights*

The Court of Appeal had held that the connection between the appellant and the MicMacs who originally entered into the Treaty was not sufficiently clear. Dickson C.J. disagreed. The fact that Simon was a Nova Scotia MicMac Indian and a member of the Shubenacadie Band established his entitlement to claim the protection of the Treaty, which had bcen signed by the Chief

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[89] *Ibid.* at 402.
[90] (1983), [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193.
[91] *Supra*, note 5 at 402.
[92] *Ibid.* at 403.
[93] *Ibid.* at 402.
[94] *Ibid.* at 403.
[95] *Ibid.*

and other delegates of the Shubenacadie MicMac Tribe of Nova Scotia. The Chief Justice stated:

> True, this evidence is not conclusive proof that the appellant is a *direct* descendant of the MicMacs covered by the *Treaty of 1752*. It must, however, be sufficient, for otherwise no MicMac Indian would be able to establish descendency. The MicMacs do not keep written records. MicMac traditions are largely oral in nature. To impose an impossible burden of proof would, in effect, render nugatory any right to hunt that a present day Shubenacadie MicMac Indian would otherwise be cntitled to invoke based on this Treaty.[96]

e. The Termination or Extinguishment of Treaty Rights

The Supreme Court of Canada stated "[i]t may be that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions";[97] however, this question did not have to be determined because the Crown was unable to adduce sufficient evidence to support its argument that the Treaty of 1752 had been terminated by later MicMac attacks on the British. Holding that

> [o]nce it has been established that a valid treaty has been entered into, the party arguing for its termination bears the burden of proving the circumstances and events justifying termination,[98]

the Court found that on the evidence available, it could not "say with any certainty what happened on the eastern coast of Nova Scotia 233 years ago."[99]

As already noted, the Chief Justice also held that principles of termination derived from international law are not necessarily relevant to Indian treaties.[100]

The Crown had also argued that any hunting rights found in the 1752 Treaty had long since been extinguished by government grants and leases to white settlers. Here, too, the burden lay with the Crown, and

> [g]iven 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 whcre the issue arises.[101]

The Court held that sufficient proof had not been presented; the Crown had not shown where the appellant intended to hunt, or the past and present uses of those lands.

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[96] *Ibid.* at 407-8.
[97] *Ibid.* at 404.
[98] *Ibid.*
[99] *Ibid.*
[100] *Ibid.*
[101] *Ibid.* at 405-6.

Having described briefly the kinds of evidence which the Crown might have presented but did not, the Court hastened to say that even this would not necessarily be enough to prove the extinguishment of treaty rights. Dickson C.J. stated, "I do not wish to be taken as expressing any view on whether, as a matter of law, treaty rights may be extinguished".[102]

f. Section 88 of the Indian Act

Having discussed the creation and interpretation of the 1752 Treaty, it was then necessary for the Court to consider whether it was a treaty within the meaning of section 88 of the *Indian Act*. If the Treaty were found to fit within section 88, then its terms would prevail over conflicting provincial legislation.

The Court of Appeal had held that a treaty which simply confirmed existing rights, rather than created new ones, did not fit within section 88. In light of his statement that a treaty which confirms existing aboriginal rights still provides an independent source of protection for those rights, it is not surprising that Dickson C.J. concluded that "the fact that the Treaty did not *create* new hunting and fishing rights but merely *recognized* pre-existing rights does not render s. 88 inapplicable".[103]

The Crown had also argued that section 88 contemplated only those treaties which ceded land to the Crown. The Chief Justice responded, "I can see no principled basis for interpreting s.88 in this manner."[104] Instead, section 88 was interpreted as including "all agreements concluded by the Crown with the Indians that would otherwise be enforceable treaties, whether land was ceded or not."[105]

V. Conclusion

Other cases dealing with Indian hunting rights have interpreted section 88 of the *Indian Act* as protecting treaty rights, but not non-treaty aboriginal rights, from provincial regulation. Therefore, the significance of the *Dick*, *Jack*, and *Simon* decisions ean be said to lie less in the final outcome than in the reasoning.

[102] *Ibid.* at 407. Of course, s. 35 of the *Constitution Act, 1982*, now brings an added complexity to this issue.
[103] *Ibid.* at 409.
[104] *Ibid.*
[105] *Ibid.* at 410.

A. Dick *v.* R.

Dick provides a two-part test for determining whether provincial laws apply to status Indians. The court must first decide whether the provincial legislation has the effect of regulating Indians *qua* Indians. If the *Act* does not impair the status or capacity of Indians, then it applies to Indians *ex proprio vigore.* However, if the statute in question does regulate Indians *qua* Indians, then the court must move to the second part of the test, and ask whether this was the intended effect. If so, the statute is *ultra vires,* because it encroaches on federal jurisdiction over "Indians and Lands Reserved for Indians". If the effect of regulating Indians *qua* Indians was not intended, then the legislation is a law of general application within the meaning of section 88 of the *Indian Act.* Assuming that it meets the other criteria found in section 88, the provincial legislation is referentially incorporated into federal law, and is applicable to Indians.

It was suggested earlier that this two-part test is somewhat different than the test used in *Kruger*; the *Dick* decision separates effect and intention in a way that the earlier case did not. Arguably, the newer approach makes it even less likely that a provincial law will not apply to Indians. The provincial legislature will not usually make laws aimed specifically at Indians; instead it will be the unintended effect of provincial legislation which is complained of. However, the fact that a law is found to regulate Indians *qua* Indians will not be enough to prevent the application of that law to Indians. The legislation will simply be referentially incorporated by section 88 of the *Indian Act.* In *Kruger*, intention and effect were more interrelated; had the Court in *Kruger* accepted, as it did in *Dick*, that the *Wildlife Act* impaired the status and capacity of Indians, the legislation would probably not have been found to be a law of general application within the meaning of section 88 of the *Indian Act.*

B. Jack and Charlie *v.* R.

Because section 88 was discussed fully in the *Dick* decision, *Jack*, which was decided the same day, focused on the question of freedom of religion. This freedom is interpreted narrowly; protection is extended only to the religious ceremony itself, and not to the preparation for that ceremony.

Although the appellant's argument in *Jack* was based on a pre-*Charter* concept of freedom of religion, as a very recent Supreme Court of Canada decision, *Jack* is likely to be considered relevant to the interpretation of paragraph 2(a) of the *Charter.*[106] A narrow interpretation of that provision might create particular problems for aboriginal people.

[106]S. 2(a) of the *Charter* states: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; . . . ."

Religion is an integral part of traditional aboriginal life, completely interwoven with the political, social, and cultural activities of the community, and closely tied to the land and its resources.[107] For this reason, simply ensuring that religious institutions are allowed to exist, or protecting specific acts of worship may not be enough to protect aboriginal religions.[108] Furthermore, religious ceremonies reflect the traditional lifestyle of the community. Thus, the burning ceremony is appropriate to a people who have always hunted and fished. It may be impractical to expect extra deer meat to be kept on hand at all times in case it is needed for a religious ceremony. Therefore, without an exemption from provincial game legislation, the Coast Salish may in fact be precluded from carrying out burning ceremonies during much of the closed season.

The situation in *Jack* demonstrates that as external control of aboriginal communities increases, there is a danger that aboriginal religion will be affected, even if unintentionally. Thus, in this case, regulation of hunting in fact expands to regulation of religion. Arguably, a broader interpretation of "freedom of religion" than that found in *Jack* will be needed to protect aboriginal religion.

C. **Simon** *v.* **R.**

Simon may have a significant impact on at least three areas of aboriginal rights: the interpretation of existing treaties, the interpretation of new land claims agreements, and the process by which land claims are negotiated.

1. Interpretation of Existing Treaties

The interpretation of Indian treaties may take place either when it is argued that a particular activity is protected by the treaty, or where a specific claim has been made. Specific claims have been defined as

> claims relating to outstanding lawful obligations of the federal government arising from its failure to live up to the terms of the treaties, to fulfil its obligations under the *Indian Act*, or to discharge properly its responsibility for reserve lands.[109]

In either context, *Simon* can be used to argue that treaties are to be interpreted in a large, fair, and liberal manner, in favour of Indians. In particular,

[107] J. Olson & R. Wilson, *Native Americans in the Twentieth Century* (Salt Lake City: Brigham Young University Press, 1984) c. 1.

[108] A. Hayward, "*R.* v. *Jack and Charlie* and the *Constitution Act, 1982*: Religious Freedom and Aboriginal Rights in Canada" (1984) 10 Queen's L.J. 165 at 181.

[109] Canada, Department of Indian and Northern Affairs, *Living Treaties: Lasting Agreements* (Ottawa: Dept of Indian Affairs & Northern Development, 1985) at 12.

Dickson C.J.'s comment that section 4 of the 1752 Treaty must be "interpreted in a flexible way that is sensitive to the evolution of changes in normal hunting practices"[110] may be seen as requiring that treaties be read so as to take account of changes which have taken place in the condition and lifestyle of Indians since the treaties were signed.

Simon also establishes that the reasonably-held perceptions of the Indians who negotiated the treaty may be relevant, that treaty terms which confirm existing aboriginal rights are to be afforded the same protection as those terms which create new rights, and that Indian treaties are to be interpreted by standards specifically developed for those treaties, rather than by rules borrowed from other kinds of agreements. Finally, the Chief Justice's reference to the "growing sensitivity to native rights"[111] suggests that, in the future, treaties may be interpreted in ways which are more beneficial to Indians.

2. New Land Claims Agreements

In many parts of Canada, treaties were never signed. Aboriginal claims in these areas are based on aboriginal title; that is, on the fact that aboriginal peoples occupied and used the lands in question, and did not surrender their title to the Crown.

Until 1973, the federal government refused to acknowledge aboriginal title as a valid basis for land claims. However, after the Supreme Court of Canada decision in *Calder* v. *A.G. British Columbia*,[112] Prime Minister Trudeau admitted, "Perhaps you have more legal rights than we thought you had... ."[113]

In *Calder*, the Nishga Indians had sought a declaration that they still held aboriginal title to large areas of land in British Columbia. The Indians ultimately lost on a procedural point,[114] and the Supreme Court of Canada split evenly on the question of whether the Nishga's aboriginal title had been extinguished, but all six of the Justices who addressed the issue of aboriginal title held that this title existed independently of any government grant.

[110]*Supra*, note 5 at 402.

[111]*Ibid.* at 399.

[112](1973), [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [hereinafter *Calder* cited to S.C.R.].

[113]Research Resource Centre, Indian Claims Commission, *Indian Claims in Canada: An Introductory Essay and Selected List of Library Holdings* (Ottawa: Information Canada, 1975) at 25.

[114]A majority of the Court held that without a fiat of the Lieutenant-Governor of the Province, the Court lacked jurisdiction to grant a declaration which would impugn the title to land held by the Crown in right of the Province.

> [T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means ... .[115]

Several months after the *Calder* decision, the federal government acknowledged that aboriginal title had not necessarily been extinguished by treaties or legislation before lands were taken.[116] In 1974, an Office of Native Claims was established to hear claims based on aboriginal title and treaty promises — that is, comprehensive and specific claims.

Since 1974, agreements have been reached on three comprehensive claims: the James Bay and Northern Quebec Agreement and the North Eastern Quebec Agreement, both signed in 1978, and the Inuvialuit Final Agreement signed in 1984.[117] Six more claims are being negotiated (the federal government will not negotiate more than six claims at one time) and fifteen other claims have been accepted for negotiation.[118]

The agreements arising out of comprehensive claims[119] may need to be interpreted in the future. It seems that the *Simon* decision would be as relevant to these new agreements as it is to the earlier treaties. *Simon* would suggest that disputes arising out of these newer agreements are also to be resolved in a way that is liberal, flexible and sensitive to aboriginal rights, and which takes account of aboriginal perceptions and expectations.

3. Land Claims Process

Not only is *Simon* likely to affect the interpretation of land claims agreements; it may also be relevant to the actual process by which those agreements are reached.

In any claim based on aboriginal title, whether that claim is made in the courts or through the comprehensive claims process, it will be asked whether the community making the claim traditionally occupied and used the land in question and, then, whether this aboriginal title has been extinguished. The federal government has taken the position that aboriginal title can be explicitly extinguished or implicitly "superseded by law".

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[115]*Calder, supra*, note 112 at 328.
[116]*Supra*, note 113 at 27.
[117]*Supra*, note 109 at 13.
[118]*Ibid.* The six claims which are presently being negotiated were made by the Council of Yukon Indians, the Dene and Métis of the Northwest Territories, the Tungavik Federation of Nunavut, the Nishga Tribal Council, the Conseil Attikamek-Montagnais and the Labrador Inuit Association.
[119]The rights contained in land claims agreements are "recognized and affirmed" by s. 35 of the *Constitution Act, 1982.*

> The federal government has considered claims based on aboriginal title to be superseded by law in instances in which, ... general legislation has paved the way for a pattern of settlement and third party alienations inconsistent with continued aboriginal use and occupancy.[120]

The federal government has been able to take this position because in *Calder* the Supreme Court of Canada split on the issue of extinguishment. As mentioned earlier, it was agreed that aboriginal title existed independently of any grant from the Crown; however, the Court was evenly divided on the question of extinguishment.

Judson J.[121] held that the Nishga's title had been extinguished, although no treaty had been signed in the area. Proclamations of the Governor of the colony of British Columbia had allowed for the sale of Crown lands, and both the colony and the province of British Columbia had alienated some Crown lands to settlers and to the federal government. Judson J. concluded:

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.[122]

Hall J.[123] held that aboriginal title could not be superseded in this way. Noting that the Nishga had never surrendered their title by treaty, and that only a "few small parcels"[124] of land within the area claimed had been alienated by the Crown, Hall J. stated: "Once aboriginal title is established, it is presumed to continue until the contrary is proven."[125] Furthermore, since aboriginal title is a "legal right", it cannot "be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation."[126]

In 1985, the federal government appointed a Task Force to review its comprehensive claims policy. In its recently completed Report,[127] the Task Force recommends, in effect, that the government move from the position of Judson J. to that of Hall J. The *Simon* decision is used to buttress the

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[120]*Supra*, note 109 at 44. The term "superseded by law" is also used to refer to instances where "the aboriginal societies have ceased to use and to occupy the core area of their land in a traditional manner".

[121]Martland and Ritchie JJ. concurred with Judson J.

[122]*Calder, supra*, note 112 at 344.

[123]Spence and Laskin JJ. concurred with Hall J.

[124]*Calder, supra*, note 112 at 345.

[125]*Ibid.* at 401.

[126]*Ibid.* at 402.

[127]*Supra*, note 109.

conclusion that "[t]he proposition that aboriginal title can be implicitly superseded by law lacks a solid legal basis".[128]

In *Simon*, it was argued that

> absolute title in the land covered by the Treaty lies with the Crown and, therefore, the Crown has the right to extinguish any Indian rights in such lands. The respondent further submit[ted] ... that the Crown, through occupancy by the white man under Crown grant or lease, has, in effect, cxtinguished native rights in Nova Scotia in territory situated outside of reservc lands.[129]

Although couched in terms of treaty rights, this argument is very similar to the one made in *Calder*, and like Hall J. in the earlier case, the Court in *Simon* concluded:

> [g]iven the serious and far-reaching consequences of 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.[130]

Dickson C.J. does not describe in detail what proof would be sufficient; this was not necessary since the Crown did not present any evidence as to where *Simon* had intended to hunt, or to the use being made of those lands, and the Court refused to "consider the doctrine of extinguishment 'in the air'".[131] However, the Chief Justice states, "I do not wish to be taken as expressing any view on whether, as a matter of law, treaty rights may be extinguished".[132] This suggests that there is some doubt as to whether the rights in question could have been extinguished at all; certainly such extinguishment would not be easily proven.

Although *Simon* deals with aboriginal rights which had been confirmed by treaty, it may still be seen as relevant to claims based solely on aboriginal title. More specifically, *Simon* may affect any discussion of whether aboriginal title may be superseded by law. The consequences of finding aboriginal title to have been extinguished would seem to be at least as "serious and far reaching" as finding that hunting rights had been extinguished. Therefore, a court should require "strict proof of the fact of extinguishment". Arguably, it is open for a court to decide that the existence of legislation allowing white settlement would not, in itself, be sufficient to meet this burden of proof. A court might require, as did Hall J. in *Calder*, that the aboriginal

[128]*Ibid.* at 45.

[129]*Supra*, note 5 at 405.

[130]*Ibid.* at 405-6.

[131]*Ibid.* at 406.

[132]*Ibid.* at 407. *Simon* did not deal with s. 35 of the *Charter*. However, the fact that treaty rights (including rights acquired by land claims agreements) are "recognized and affirmed" by that section may strengthen the proposition that such rights cannot now be unilaterally extinguished.

title have been surrendered to the Crown, or extinguished by "specific legislation".

It seems then, that *Simon* could affect the comprehensive claims process in two ways. First, the federal government may see *Simon* as strengthening the recommendations of the Task Force, and may alter its policy on those comprehensive claims which until now have been seen to be "superseded by law". Second, whether or not the comprehensive claims policy is formally changed, *Simon* may be seen as increasing the likelihood that claims based on aboriginal title would be successful in the courts. This would strengthen the bargaining power of aboriginal communities involved in the comprehensive claims process.

If *Simon* affects the interpretation of existing treaties, and the negotiation and interpretation of land claims agreements, clearly its impact on aboriginal rights will be substantial.