

The Dickson Court and Native Law

M.B. Nepon*

IN THIS BRIEF INTRODUCTION to the contribution of Chief Justice Dickson to native law I start with two qualifications intended to focus my comments. First, this presentation deals with "native law" issues rather than "aboriginal rights" issues. I am reluctant to describe them as "aboriginal rights" issues because the term "aboriginal rights" has a particular meaning in international law, in constitutional law, and in the common law. However, some of the cases that are, in my view, very important, particularly the cases in which the judgment was written by or concurred in by the Chief Justice, do not have anything to do with aboriginal law in its technical sense but have to do with, for example, the rights and obligations of *Indians* arising under legal regimes such as the *Indian Act*.¹ The second qualification is that I will only be considering cases in which the Chief Justice wrote reasons, whether they were for a unanimous court, for a majority or plurality, or written in dissent. I will not comment in any detail on cases in which he participated but did not write reasons of his own, although even these cases are important in understanding the Chief Justice's overall view with respect to native law issues.

I think the best starting point is *Nowegijick v. R.*,² a decision of the Supreme Court of Canada dealing with the interpretation of a provision of the *Indian Act* that had to do with whether or not an Indian living on reserve, working off reserve, but employed by a Band corporation situated on the reserve, was subject to income tax. In the result, it was determined that, on the proper interpretation of s.87 of the *Indian Act*, he was not required to pay income tax. Chief Justice Dickson wrote the reasons for a unanimous court.

In his reasons for judgment, the Chief Justice made the following comments:

It is legal lore that to be valid exemptions should be clearly expressed. *It seems to me however that treaties and statutes relating to Indians should be liberally construed and*

* Faculty of Law, University of Manitoba.

¹ R.S.C. 1985 c. I-5.

² [1983] 1 S.C.R. 29.

*doubtful expressions resolved in favour of the Indians . . . Indian treaties must be construed not according to the technical meaning of the words but in a sense in which they would naturally be understood by Indians . . . [emphasis added]*³

According to the opinion, statutory provisions or Indian treaties must be given a liberal interpretation, and an interpretation taking into account what the Indian people themselves thought those instruments meant at the time. The Chief Justice's concern was that the terminology of European legal systems does not necessarily fit the native perspective and to that extent, he said, it is the native understanding which must prevail. Using those interpretive rules, the Chief Justice concluded that s. 87 of the *Indian Act*, a rather ambiguous provision as it applies to taxation, does indeed provide immunity from taxation to an Indian in the circumstances of *Nowegijick*.

These interpretive rules which, clearly, add a native perspective to the arid formalism of the past, have been approved, with some qualifications, by judges in every level of court in subsequent cases.

In *Guerin v. R.*,⁴ a case decided after *Nowegijick*, the majority opinion was written by the Chief Justice for himself and three other judges; all members of the panel concurred in the result, however.

At issue in *Guerin* was the appropriate interpretation to be given to a section of the *Indian Act* relating to the surrender of reserve land to the Crown where the Crown had received the surrendered land for the purposes of negotiating a commercial arrangement on behalf of an Indian band. In *Guerin*, it was the Musquam band which — to this day — owns a substantial amount of property in the heart of Vancouver. The band agreed to surrender some 160 acres of land to the federal Crown so that the Crown could negotiate a lease with a group which wanted to build a golf club in Vancouver. In its consultation with the band leading up to the surrender, the Crown officials did not disclose to the band members the material details of the proposed agreement. The bargain struck was on much less favourable terms than had originally been contemplated by the band. The band did not even receive a copy of the lease until 1970, about 12 years after it was signed. On evidence finally available to them in the early 1980s, the band sued the federal Crown in the Federal Court Trial Division, seeking declaratory relief as well as damages for breach of trust. The trial judge awarded the band \$10 million dollars as damages. When the case finally reached the Supreme Court of Canada, although there

³ *Ibid.* at 36.

⁴ (1984), 13 D.L.R. (4th) 321 (S.C.C.).

was no majority opinion, all the judges of that court concurred in the result and upheld the trial judge both on the issue of liability and on the quantum of damages. Mr. Justice Dickson (as he then was) held that the relationship between the federal Crown and the Indians was fiduciary in nature and that the Crown had violated that fiduciary relationship both in the conduct of negotiations and in failing to make full disclosure to the band.

In this case, Dickson J. had to consider the interest that Indians had in Indian lands and he had to decide whether or not there was a difference of interest as between surrendered land and unsurrendered land. Ultimately, he decided that the Indian interest was the same in either case.

In reaching his conclusion that the federal Crown owed a fiduciary obligation to the Indians of the band, he relied (as he so frequently did) on history, but not exclusively on history. At page 337, he said:

It is worth noting . . . that the reserve in question here was created by the unilateral action of the Colony of British Columbia prior to Confederation.

In the end, he characterized the Indian interest in lands surrendered or unsurrendered as *sui generis* — *i.e.*, different from any other property interest as we understand the term in common law:

. . . the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.

As I have already mentioned, all judges of the court concurred in the result, Madam Justice Wilson (writing for two of the judges) basing her decision on breach of trust and Mr. Justice Estey basing his on a principal-agent relationship.

Consequently, it still remains to be seen how various other issues relating to Indian lands will be resolved. Given certain recent decisions, particularly *Delgamuukw v. British Columbia*⁵ (decided after this paper was delivered), I suspect that such complex matters may have to be resolved in the political arena rather than in the courts.

The next case to which I refer is *Simon v. R.*⁶ *Simon* raised questions which had been considered in lower courts, but had not

⁵ [1991] 3 W.W.R. 97 (B.C.S.C.).

⁶ (1985), 62 N.R. 366 (S.C.C.).

previously been considered in depth by the Supreme Court of Canada. These questions include:

- 1) what is the legal status of an Indian treaty?
- 2) how are the provisions of Indian treaties to be interpreted?
- 3) who has the capacity to enter into treaties? and
- 4) may treaty rights be terminated or extinguished, and if so, how?

Simon, a member of the MicMac nation, was charged in Nova Scotia with having possession of a gun and ammunition in violation of certain provincial legislation. Simon based his defence on the argument that he enjoyed immunity from the provisions of the legislation by virtue of s.88 of the *Indian Act*. That section provides that provincial laws of general application are applicable to Indians with certain exceptions. The relevant exception applicable in this case was a so-called "Peace and Friendship Treaty" which was made in 1752. Section 4 of that treaty guarantees Indians "free liberty of Hunting and Fishing as usual."⁷ The Crown raised a number of alternative arguments in support of its position:

- 1) the document is not a treaty and is not enforceable as such;
- 2) the parties to the document did not have the capacity to make a treaty;
- 3) such treaty rights as these may have been had been previously extinguished; and
- 4) even assuming that the document was an enforceable treaty, on its proper interpretation, it did not protect the activity in question.

According to the Crown, the MicMac tribe and its representatives did not have capacity to make a treaty, because the tribe was not a sovereign entity as that term is understood in international law. In addition, Governor Hobson lacked the capacity to enter into a treaty on behalf of the British government.

On the issue of treaty-making capacity, the Chief Justice applied *Nowegijick*,⁸ maintaining that such matters must be dealt with according to the way the Indians perceived them at the time. The MicMacs thought they had treaty making capacity, the MicMacs

⁷ Treaty of 1752, s.4.

⁸ *Supra*, note 2.

thought Hobson had such capacity, and therefore, although principles of international law might be helpful in resolving such questions, they are not of themselves dispositive of the matter. Once again the Chief Justice described the legal status of Indian treaties as *sui generis*.

In this regard, the Chief Justice makes the following comments:

It is fair to assume that the MicMac would have believed that Governor Hobson, acting on behalf of His Majesty the King, had the necessary authority to enter into a valid treaty with them.⁹

And further:

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.¹⁰

On the basis of this analysis, the Chief Justice held the treaty to be valid and enforceable. Therefore, by operation of section 88 of the *Indian Act*, which in effect exempts treaty rights from the operation of provincial laws, Simon was immune from the application of the provincial law which otherwise would have prohibited his possession of ammunition or guns.

In his reasons in *Simon*, the Chief Justice considered the decision in *R. v. Sylyboy*¹¹ in which County Court Judge Patterson had ruled that the same treaty in issue in *Simon* was invalid because none of the parties had the capacity to enter into a treaty.

According to Judge Patterson:

... 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.¹²

Chief Justice Dickson described these comments as "not convincing" and added:

⁹ *Simon*, *supra*, note 6 at 379.

¹⁰ *Ibid.* at 376.

¹¹ (1928), [1929] 1 D.L.R. 307 (N.S. Co. Ct.).

¹² *Ibid.* at 313.

... 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 the growing sensitivity to native rights in Canada.¹³

In *Simon*, the Crown had also argued that the treaty, if valid and enforceable, only protects the style of hunting known at the time when the treaty was made.

In rejecting this argument, the Chief Justice again relied on his earlier decision in *Nowegijick*. The *Nowegijick* rules of interpretation led to the Chief Justice's conclusion that the treaty-protected right was the *right* to hunt and fish, not the *mode or manner* of the hunting or fishing. He went on to state very clearly that the mode or manner may very well change over time and he speculated about whether the protected treaty right to hunt and fish might include the right to hunt and fish for commercial purposes and not merely for food.

The Crown's final submission in *Simon* was that if the treaty had once been valid and enforceable, it had ceased to exist or had been terminated by the breach by the MicMac of one of its fundamental provisions. This Crown argument was rejected because of insufficient evidence. However, the Chief Justice concluded his comments about extinguishment simply by noting that he was not yet expressing any view on that issue.

*R. v. Sparrow*¹⁴ is the first decision of the Supreme Court of Canada to interpret s.35(1) of the *Constitution Act, 1982*.¹⁵ Sparrow was charged in 1984 under the *Fisheries Act*¹⁶ for fishing with a drift net longer than that permitted by his band's fishing licence. He admitted the facts constituting the offence, but defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the length restriction contained in the band's licence was invalid because it was inconsistent with s.35(1) of the *Constitution Act, 1982*. In the result, the Supreme Court referred the matter back to trial for an appropriate disposition according to the Supreme Court's analysis of s.35.

The unanimous opinion of the Supreme Court of Canada, authored jointly by the Chief Justice and Mr. Justice LaForest, outlined the following propositions:

¹³ *Ibid.* at 314.

¹⁴ [1990] 70 D.L.R. 385 (S.C.C.).

¹⁵ *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁶ R.S.C. 1970 c. F-14.

- 1) Section 35(1) applies to rights in existence when the *Constitution Act, 1982* came into effect.
- 2) It does not revive extinguished rights,
- 3) An existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982.
- 4) The phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.
- 5) An aboriginal right is not extinguished merely by its being controlled in great detail by legislation or subordinate legislation. Historical policy on the part of the Crown can neither extinguish the existing aboriginal right without clear intention nor, in itself, delineate that right. The nature of government regulations cannot be determinative of the content and scope of the existing aboriginal right.
- 6) Section 35 of the *Constitution Act, 1982*, at the very least, provides a solid constitutional base upon which subsequent negotiations can take place and affords aboriginal peoples a measure of constitutional protection against federal and provincial legislative power.
- 7) Section 35(1) is to be construed in a purposive way. A generous and liberal interpretation is demanded given that the provision is to affirm aboriginal rights.
- 8) The words "recognition and affirmation" incorporate the government's responsibility to act as a fiduciary with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power. Federal legislative powers continue, including the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act, 1867*,¹⁷ but must be read together with s.35(1). Federal power must be reconciled with federal duty and such reconciliation demands justification for any government regulation that infringes upon or denies aboriginal rights.

The decision in *Sparrow* is clearly important to the aboriginal peoples mentioned in s. 35 of the *Constitution Act, 1982*. However, it is too early to predict how important this decision may turn out to be. It neither defined aboriginal rights comprehensively nor explored the legally acceptable mechanism of extinguishment, e.g. can an aboriginal

¹⁷ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

right be extinguished by legislative or executive fiat without the prior and explicit agreement of the aboriginal group in question?

In *R. v. Sutherland*,¹⁸ a case which pre-dates *Nowegijick, Guerin and Simon*, the Indian defendants were apprehended while hunting deer for food with the aid of spotlights in a wildlife management area in Manitoba. The Crown relied on a section of the *Wildlife Act of Manitoba*¹⁹ which conclusively deemed wildlife management areas to be "occupied Crown lands to which Indians do not have a right of access for purposes of exercising any rights bestowed upon them under paragraph 13 of the Memorandum of Agreement approved under the *Manitoba Natural Resources Act*."²⁰

Writing the unanimous judgment of the Court the Chief Justice held that the deeming section of the *Wildlife Act* was *ultra vires* the province of Manitoba. The section had effect only in relation to Indians and thus derogated from the right of the federal Parliament to legislate in relation to Indians and Indian land under s. 91(24) of the *Constitution Act, 1867*. The Court held that the province could not arrogate to itself the right to amend, unilaterally, paragraph 13 of the *Natural Resources Transfer Agreement*, by giving words a particular interpretation. The Court then went on to consider whether the wildlife management area was "land to which the Indians had a right of access," such that it fell within the proviso in paragraph 13.

Chief Justice Dickson defined the right of access as access for the purpose of hunting, trapping and fishing game and fish. He recognized that a province could totally deny access to Indians and non-Indians

¹⁸ (1980) 53 C.C.C. (2d) 289 (S.C.C.).

¹⁹ *The Wildlife Act*, R.S.M. 1970, c. W140.

²⁰ R.S.M. 1970, c. N30, passed under the authority of the Natural Resources Transfer Agreement. The Natural Resources Transfer Agreements, entered into between the federal government and, respectively, the Manitoba government, the Saskatchewan government, and the Alberta government are constitutionally entrenched by the *Constitution Act, 1930* (U.K.) 20 & 21 Geo. 5, c. 26 (formerly *British North America Act, 1930*). Each of the agreements provides (e.g., in Article 13 of the Manitoba Agreement):

In order to secure to the Indians of the province the continuance of the supply of game and fish for their support and subsistence Canada agrees that the laws respecting game in force in the province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the province hereby assures to them, of hunting, trapping and fishing game and fish or food at all seasons of the year on all unoccupied Crown lands and on any other land to which said Indians may have a right of access.

alike for hunting, but concluded that once *any* hunting is permitted, then Indians (and other members of the public) have a right of access for the purpose of hunting. This right of access thereafter engaged the proviso in paragraph 13, and guaranteed to the Indians not merely the right to hunt but the right to hunt for food *at any season of the year*.

In *Sutherland*, the area in question was one in which big game could legally be hunted and killed from time to time. It happened that on the day of the alleged offence, there was an open season for black bear and grouse. The deer hunting season had been closed for three years. On these facts the Chief Justice upheld the acquittal of the defendants. The fact that on the day in question deer hunting was prohibited was considered to be irrelevant. The right of access required to engage the proviso was a right of access to hunt generally. Once a right to hunt was established, Indians could hunt any species at any time of the year as long as the hunting was for food.

In reaching this conclusion, the Chief Justice anticipated the comments that he was to make later in *Nowegijick*.²¹

He wrote:

This proviso should be given a broad and liberal construction. History supports such an interpretation as do the plain words of the proviso. The right assured is, in my view, the right to hunt game (any and all game) for food at all seasons of the year (not just "open seasons") on lands to which they have a right of access (for hunting, trapping and fishing). An interpretation which would recognize in Indians only the right of access accorded all other persons, in the absence of proof of a "special, peculiar right of access," has the effect of largely obliterating the right of hunting for food provided for in the proviso.²²

The Chief Justice did not invariably decide cases in favour of the native point of view. In the *Sparrow* case, the Chief Justice did not say (as some seem to have suggested) that the native point of view will always prevail. Although it is a very favourable decision to Canada's aboriginal people, much of what is considered to be favourable is clearly dicta. (Indeed it may take a Supreme Court ruling in e.g. the *Delgamuukw* case to determine how much of the dicta in *Sparrow* will live on as law.)

Note must be made of the fact that Dickson (and La Forest) emphasized that s. 35 rights are not absolute.

The test for justification of a limitation of aboriginal rights requires that a *bona fide* legislative objective must be achieved in such a way

²¹ *Supra*, note 2.

²² *Sutherland*, *supra*, note 18 at 297-98.

as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal people. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. Section 35(1) of the *Constitution Act, 1982* does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

In *R. v. Mousseau*,²³ the Indian defendant who at the time was hunting for food, was charged with a number of hunting offences including hunting during the closed season, contrary to the provisions of the *Wildlife Act of Manitoba*. Although he was convicted in Provincial Judges' Court, and on first appeal in the County Court of Minnedosa, the convictions were quashed by a majority of 3:2 in the Manitoba Court of Appeal. In *Mousseau* the Chief Justice of the Court of Appeal explained paragraph 13 of the Manitoba agreement as follows:

The general import of para. 13 is to make applicable to the Indians within the province, in the interests of securing continued supply of game and fish for their support and subsistence, the provincial game laws from time to time in force in the province. There is, however, an important proviso to the foregoing. Indians hunting, trapping and fishing game and fish "for food" are not subject to provincial game laws if hunting, trapping, or fishing on (i) unoccupied Crown lands, or (ii) on any other lands to which Indians may have a "right of access."²⁴

The particular question for the court in the *Mousseau* case was whether Indians in Manitoba have a right of access to public roads and road allowances. It was the accused's argument that if he did have a primary right of access, and he was hunting for food, he was immune from provincial game laws.

In a decision written by the Dickson, the Supreme Court of Canada held unanimously against the accused and entered a guilty verdict. The Chief Justice did not resolve the ambiguity in paragraph 13 out of context. That would have been uncharacteristic of his approach.

Paragraph 13 cannot be read as meaning that whenever an Indian can enter onto land for a purpose unrelated to hunting, say, for employment or recreation, he can also hunt.

²³ (1980), 111 D.L.R. (3d) 443 (S.C.C.).

²⁴ *Ibid.* at 445.

Respondent's argument would give the Indians hunting rights at all seasons of the year, and by any means, in all places to which the public has access, such as highways, parks, community pastures, public golf courses, recreation areas, picnic grounds. *The meaning given to the word "access" in the proviso must be limited to the subject matter of the whole paragraph in which the proviso appears, namely, hunting by Indians. . . .* In my opinion, the Indians have the right to hunt, trap, and fish, game and fish for food at all seasons of the year on . . . any occupied Crown lands to which the Indians, or other persons, have a right of access, by virtue of statute or common law or otherwise, *for the purpose of hunting, trapping or fishing. . . .* [emphasis added]²⁵

Although it has been said that it is characteristic of Dickson to interpret provisions of statutes and treaties in favour of native people liberally, he did not allow that approach to carry him too far.

In *Myran v. R.*,²⁶ the issue was whether paragraph 13 of the *Manitoba Natural Resources Transfer Agreement* provides immunity for Indians hunting for food on lands to which they have a right of access when they are charged with hunting without due regard for the safety of other persons contrary to the provisions of the *Wildlife Act of Manitoba*. Writing the decision of the unanimous Court, Dickson had no difficulty in concluding that paragraph 13 did *not* provide such immunity. At page 5, he explains:

In my opinion there is no irreconcilable conflict or inconsistency in principle between the right to hunt for food assured under paragraph 13 . . . and the requirement . . . of the *Wildlife Act* that such right be exercised in a manner so as not to endanger the lives of others. The first is concerned with conservation of game to secure a continuing supply of food for the Indians of the province and protect the right of Indians to hunt for food at all seasons of the year; the second is concerned with the risk of death or serious injury omnipresent when hunters fail to have due regard for the presence of others in the vicinity.

In the result, the defendants were convicted.

THE DICKSON LEGACY: NATIVE LAW

HOW THEN DO WE EVALUATE DICKSON'S LEGACY? He was clearly at the forefront of the Court, throughout his career, in advancing the legal claims of native peoples. *Guerin*, *Nowegijick* and *Sparrow* will stand as landmark decisions in the area. Toward the end of his tenure, however, there are several cases in which his colleagues and lower

²⁵ *Ibid.* at 449.

²⁶ (1975), 58 D.L.R. (3d) 1 (S.C.C.).

courts did not choose to follow his lead. In *R. v. Horseman*,²⁷ one of the main issues for the court was whether or not certain hunting rights granted by Treaty 8 (the right to hunt for commercial purposes) had been extinguished by paragraph 12 of the *Alberta Natural Resources Transfer Agreement*. The Court, by a majority of 4-3, concluded that paragraph 12 had abrogated the treaty-protected right to hunt for commercial purposes. The Chief Justice and Madam Justice L'Heureux-Dubé joined Madam Justice Wilson in her vigorous dissent.

In *Mitchell v. Peguis Indian Band*,²⁸ the Court was required to interpret ss. 87, 89 and 90 of the *Indian Act* to determine the validity of garnishment proceedings initiated by Mitchell purporting to attach monies owed to certain Indians, by the Manitoba government, for taxes which had been collected illegally by the Government. All seven judges of the Supreme Court agreed in the result; however, there were 3 different sets of reasons, including one set by Dickson.

LaForest J., writing for himself and 6 others on this point, significantly modified the rules of interpretation formulated by Dickson in *Nowegijick*:²⁹

I note at the outset that I do not take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.

But as I view the matter, somewhat different considerations must apply in the case of statutes relating to Indians. Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Given this fact, I do not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision. Rather, I think the approach must be to read the act concerned with a view to elucidating what it was that parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretive method. As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at

²⁷ [1990] 1 S.C.R. 901.

²⁸ (1990) 110 N.R. 241 (S.C.C.).

²⁹ *Supra*, note 2.

limiting or abrogating them. Thus if legislation bears on treaty promises courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown. [emphasis added]³⁰

Dickson, on the other hand, repeated the *Nowegijick* principle in his opinion without the qualifications added by Mr. Justice LaForest.

In *Delgamuukw*,³¹ McEachern C.J.B.C. found it necessary to limit an aspect of the Chief Justice's reasoning in *Sparrow*. He concluded that the priority given to native interests may be less where there is a vast territory involved to which there are many claims to competing use. In the end it may be that the Courts will adopt a balance point on many issues that is closer to the interests of the larger society and farther from native interests than the Chief Justice would have liked.

In the long run, the fate of native peoples will depend at least as much on political processes as on legal ones. Indeed, Dickson's legacy may be at least as much political as legal. After his retirement from the Court, he was appointed to make recommendations on the terms of reference and the composition of a Royal Commission on Aboriginal Peoples. On his suggestions, the government settled on a process with a sweeping mandate and a composition that consists almost entirely of aboriginal people and of persons known to be sympathetic to their cause. If the Royal Commission ends up having a significant impact on public policy, we shall have to take that impact into account in assessing Dickson's contribution to native issues.

³⁰ *Supra*, note 28 at 269-70.

³¹ *Supra* note 5.