

LOGAN v. STYRES ET AL. (sub nom. LOGAN v. ATTORNEY-GENERAL OF CANADA)

(1959), 20 D.L.R. (2d) 416 (also reported: [1959] O.W.N. 361)

Ontario High Court , King J., 3 September 1959

Constitutional Law II--Indians--

Statutory provision for surrender of part of Indian Reserve-- Whether competent for Dominion to interfere with internal self government of Indian band--Haldimand Deed--Simcoe Deed-- The Parliament of Canada has legislative authority under s. 91(24) of the *B.N.A. Act* to provide for the surrender of reserved Indian lands, even though this be done by a method which interferes with the system of internal government of Indian bands by hereditary chiefs. Members of the Six Nations Indians who settled on reserved land conveyed by the Haldimand Deed of October 25, 1784 (sometimes called the Haldimand Treaty), a transfer confirmed by the Simcoe Deed of January 14, 1793, did so under the protection of the Crown, and they and their posterity consequently owed allegiance to the Crown, becoming subjects thereof. It cannot therefore be contended that they are immune from the competent laws of Canada, however unfair or unjust it may be in particular circumstances to interfere with their traditional system of internal government.

ACTION to enjoin an intended surrender of part of an Indian Reserve.

M. Montgomery, R. E. Pringle and J. H. Gardner, for plaintiff; *R. F. Wilson, Q.C., and C. E. Woollcombe*, for defendants.

KING, J.:--In the statement of claim the plaintiff is described as a member of the Six Nations Indian Band residing upon the Six Nations Indian Reserve near Brantford, Ontario, and the wife of Joseph Logan, Jr., a Mohawk Chief of the Six Nations Indians. The constituent members of the said Six Nations Indians are the Mohawk, the Oneida, the Onondaga, the Cayuga, the Seneca and the Tuscarora.

In the Course of her evidence the plaintiff stated that she was nominated to bring the action on behalf of the hereditary Chiefs of the Six Nations Indian Band and although the defendants submitted that the plaintiff, as an individual member of the Six Nations Indian Band, had no status to maintain the action for the relief claimed, I have nevertheless allowed the action to proceed.

The defendant, Clifford E. Styres, is chief councilor of the elected council of the said Six Nations Indian Band and the defendant R. J. Stallwood is superintendent of the Six Nations Indian Agency at Brantford, Ontario.

The Six Nations Indian Reserve at Brantford consists of slightly more than 45,000 acres of land set aside for the use and benefit of the Six Nations Band.

The present action is for an injunction to restrain the defendants from taking any steps to facilitate the surrender of 3.05 acres of land being a part of the said Reserve and for a declaration that Order in Council P.C. 1629 dated September 17, 1924 and Order in Council P.C. 6015 [[1951] S.O.R. 528] dated November 12, 1951 are *ultra vires* the powers of His Excellency the Governor-General of Canada acting for and with the advice and consent of the Queen's Privy Council for Canada.

Briefly, the position taken by the plaintiff is that the Six Nations Indians in the latter part of the eighteenth century and subsequently were the faithful allies of the British Crown and that they continue to the present day to be such faithful allies and that they never were and are not today subjects of the Crown. The plaintiff then takes the further position that the Six Nations Indians, not being subjects of the Crown, it was *ultra vires* the powers of the Parliament of the United Kingdom to enact section 91(24) of the *B.N.A. Act*, whereby the legislative authority of the Parliament of Canada is made to extend to all matters coming within the classification "Indians, and Lands reserved for the Indians" insofar as the said Six Nations Indians are concerned. If this be so the plaintiff then states that it is *ultra vires* the powers of the Parliament of Canada to enact the *Indian Act*, R.S.C. 1952, c. 149 insofar as the said Six Nations Indians are concerned and that likewise the Orders in Council already referred to and made pursuant to the *Indian Act* are likewise *ultra vires* insofar as the Six Nations Indians are concerned.

If the plaintiff is able to establish the above then I am of the opinion that judgment should be given for the relief asked but of course it is a formidable task that the plaintiff has undertaken.

The difficulties would appear to have arisen with the Orders in Council already referred to. Almost from time immemorial the Indian Bands which formed, first the Five Nations Confederacy, and later the Six Nations Confederacy were governed by their hereditary Chiefs. I have used the term "hereditary Chiefs" to describe the system whereby the Clan Mothers designated a Chief from among the male members of certain families within the Clan. The Orders in Council to which objection is taken set up a system whereby elected Councilors would supplant the hereditary Chiefs among other matters in dealing with the surrender of Reserve lands. It would appear that many of the Six Nations Indians, a great majority in fact, do not recognize the authority of the Parliament of Canada to provide for elected Councilors or to provide for the surrender of Reserve lands by means of a vote. Such members of the Six Nations Indians, it would appear, simply refrain from voting at all and in the proposed surrender of the lands in question when a vote was held on July 27, 1957, only 53 votes were cast out of which 30 voted for surrender and 23 against surrender and this out of about 3,600 eligible voters. It is the elected Councilors who negotiate the terms of surrender and in the present case Cockshutt Farm Equipment Ltd. proposed to purchase the 3.05 acres of land in question for the sum of \$25,000 and the elected Councilors accepted this proposed purchase-price and arranged for a vote on the surrender to Her Majesty the Queen of the land in question so that it might be sold to the proposed purchaser. I have given the result of the second vote which was taken on the question of surrender. The first vote which was held in the preceding month was much the same with 54 persons having voted, 37 for the surrender, 16 against the surrender and one rejected ballot, but since the majority of those entitled to vote did not vote on the first occasion, the second vote was called for.

It should be remembered that the *Indian Act* provides in ss. 39 and 40 that the Governor in Council may accept or refuse a surrender of land so that it is still quite possible for the Governor in Council to take the position that the surrender of the land in question in this action should be refused. From the evidence given at the trial it is difficult to see what advantage would accrue to the Six Nations Indians by surrendering the land in question.

Before turning to the evidence in this action I should say that in my opinion all of the witnesses were honest witnesses who were endeavoring to tell the truth. Indeed, there is no dispute about any facts of any consequence. I should say, however, that the plaintiff was given some leeway in presenting the historical background of the plaintiff's claim and in putting forward the merits of the hereditary system of Chiefs as opposed to the elective system of Councilors. The defendants did not consider it necessary to present any evidence with respect to the merits of the hereditary system as opposed to the elective system so that only one side of this matter was before the Court.

A start has to be made at some stage and I believe a satisfactory point at which to begin is with the Haldimand Deed dated October 25, 1784, which followed the conclusion of the American Revolution and which in its recitals sets out a sufficient background. It follows:

"Frederick Haldimand Captain General and Governor in chief of the province of Quebec and Territories depending thereon etc etc etc General and Commander in Chief of His Majesty's Forces in said province and the Frontiers thereof -- etc -- etc -- etc --

----- *Whereas His Majesty* having been pleased to direct that in consideration of the early attachment to his cause manifested by the *Mohawk Indians* and of the loss of their settlement which they thereby sustained -- that a convenient tract of land under his protection should be chosen as a safe and comfortable retreat for them and others of the *Six Nations*, who have either lost their settlements within the *Territory* of the *American States*, or wish to retire from them to the British -- I have at the earnest desire of many of these *His Majesty's faithful allies* purchased a tract of land from the *Indians* situated between the *Lakes Ontario, Erie and Huron*, and I do hereby in His Majesty's name authorize and permit the said *Mohawk Nation* and such others of the *Six Nation Indians* as wish to settle in that quarter to take possession of and settle upon the Banks of the *River* commonly called *Ouse or Grand River*, running into *Lake Erie*, allotting to them for that purpose *six miles deep from each side of the river* beginning at *Lake Erie* and *extending in that proportion to the head of the said river* which them and their posterity are to enjoy for ever. -----

Given under my hand and seal at arms at the Castle of St. Lewis at Quebec this twenty-fifth day of October one thousand seven hundred and eighty-four and in the twenty- fifth year

of the reign of our Sovereign *Lord George
The Third* by the Grace of God of Great
Britain, France and Ireland *King* Defender
of the *Faith* and so forth.

Fred- Haldimand

-----*By His Excellency's Command*-----
R. Mathews"

It should be noted that the foregoing document is a deed and is not in any sense a treaty although in the course of the evidence it was referred to as the Haldimand Treaty from time to time.

In the surrender of their lands from time to time the Six Nations Indians trace their title to the lands to this Haldimand Deed and in a typical document of surrender there is included the recital "Whereas His late Majesty did by a certain instrument, bearing date the twenty-fifth day of October, in the year of Our Lord one thousand seven hundred and eighty-four, under the hand and seal of Sir Frederick Haldimand, then Governor of Quebec, allot and grant unto us upon the banks of the said river running into Lake Erie six miles deep from each side of the said river, beginning at Lake Erie and extending in that proportion to the head of the said river."

However, there is another document upon which the Six Nations Indians rely and it is known as the "Simcoe Deed" dated January 14, 1793, and it is as follows:

"J. Graves Simcoe

(Great Seal of Canada)

"George the Third, by the Grace of God, King of Great Britain, France and Ireland, Defender of the Faith, and so forth. To all to whom these presents shall come, Greeting!

"Know ye, that whereas the attachment and fidelity of the Chiefs, Warriors, and people of the Six Nations, to Us and Our Government has been made manifest on divers Occasions by their spirited and zealous Exertions, and by the Bravery of their conduct, and We being desirous of showing Our Approbation of the same and in recompense of the Losses they may have sustained of providing a convenient Tract of Land under Our protection for a safe and suitable Retreat for them and their Posterity, Have of Our Special Grace, certain Knowledge and mere motion, given and granted and by these Presents Do Give and Grant to the Chiefs, Warriors, Women and People of the said Six Nations and their Heirs forever, All that District or Territory of Land, being Parcel of a certain District lately purchased by Us of the Mississauga Nation, lying and being in the Home District of Our Province of Upper Canada, beginning at the Mouth of a certain River formerly known by the name of the Ouse or Grand River, now called the River Ouse, where it empties itself into Lake Erie, and running along the banks of the same for the space of Six Miles on each side of the said River, or a space co-extensive there- with, conformably to a certain Survey made of the said Tract of Land, and annexed to these Presents, and continuing along the said River to a Place called or known by the Name of the Forks, and from thence along the main Stream of the said River for the space of Six Miles on each side of the said Stream, or for a space equally extensive therewith, as shall be set out by a Survey to be made of the same to the utmost extent of the said River as far as the same has been purchased by us, and as the same is bounded and limited in a certain Deed made to Us by the Chiefs and People of the said Mississauga Nation, bearing Date the Seventh Day of December, in the year of Our Lord One Thousand Seven Hundred and Thirty-Two; To have and to Hold the said District or Territory of Land so bounded as aforesaid of Us, Our Heirs and Successors, to them the Chiefs, Warriors, Women and People of the Six Nations, and to and for the sole use and Behoof of them and their Heirs for ever, Freely and Clearly of and from, all, and all manner of rents, fines, and services whatever to be rendered by them or any of them to Us or Our Successors for the same, and of and from all conditions, stipulations and agreements whatever, except as hereinafter by Us expressed and declared. Giving and granting, and by these Presents confirming to the said Chiefs, Warriors, Women, and People of the said Six Nations and their Heirs, the full and entire possession, use, benefit and advantage of the said district or territory, to be held and enjoyed by them in the most free and ample manner, and according to the several customs and usage's of them the said Chiefs, Warriors, Women, and People of the said Six Nations; Provided always, and be it understood to be the true intent and meaning of these Presents, that, for the purpose of assuring the said lands, as aforesaid to the said Chiefs, Warriors, Women, and People of the Six Nations, and their Heirs, and of securing to them the free and undisturbed possession and enjoyment of the same, it is Our Royal will and pleasure that no transfer, alienation, conveyance, sale, gift,

exchange, lease, property or possession, shall at any time be had, made, or given of the said district or territory, or any part or parcel thereof, by any of the said Chiefs, Warriors, Women or People, to any other nation or body of people, person, or persons whatever, other than among themselves the said Chiefs, Warriors, Women and People, but that any such transfer, alienation, conveyance, sale, gift, exchange, lease or possession shall be null and void, and of no effect whatever, and that no person or persons shall possess or occupy the said district or territory or any part or parcel thereof, by or under pretence of any such alienation, title or conveyance as aforesaid, or by or under any pretence whatever, upon pain of Our severe displeasure.

"And that in case any person or persons other than them, the said Chiefs, Warriors, Women and People of the said Six Nations, shall under pretence of any such title as aforesaid presume to possess or occupy the said district or territory or any part or parcel thereof, that it shall and may be lawful for Us, Our heirs and successors, at any time hereafter, to enter upon the lands so occupied and possessed by any person or persons other than the people of the said Six Nations, and them the said intruders thereof and therefrom, wholly to dispossess and evict, and to resume the part or parcel so occupied to Ourselves, Our heirs and successors; Provided, always, that if at any time the said Chiefs, Warriors, Women and People of the said Six Nations should be inclined to dispose of and surrender their use and interest in the said district or territory or any part thereof, the same shall be purchased for Us, Our heirs and successors, at some public meeting or assembly of the Chiefs, Warriors, and People of the said Six Nations, to be holden for that purpose by the Governor, Lieutenant-Governor, or person administering Our Government in Our Province of Upper Canada.

In Testimony Whereof, We have caused these Our Letters to be made Patent, and the Great Seal of our said Province to be hereunto affixed, Witness. His Excellency John Graves Simcoe, Esquire, Lieutenant-Governor and Colonel Commanding Our Forces in Our said Province. Given at Our Government House, at Navy Hall, this fourteenth day of January, in the year of Our Lord one thousand seven hundred and ninety-three, in the thirty-third year of Our Reign.

"(Signed) Wm. Jarvis, Secretary.

Recorded February 20th, 1837.

Lib. F., Folio 106.

"(Signed) D. Cameron, Sy. and Regr.

(Initialed) J.G.S."

The purpose of the Simcoe Deed would seem to be to confirm the grant already made by the Haldimand Deed. In each of these deeds it is made clear that those of the Six Nations Indians settling on the lands therein described do so under the protection of the Crown. In my opinion, those of the Six Nations Indians so settling on such lands, together with their posterity, by accepting the protection of the Crown then owed allegiance to the Crown and thus became subjects of the Crown. Thus, the said Six Nations Indians from having been the faithful allies of the Crown became, instead, loyal subjects of the Crown.

The position which the Six Nations Indians have taken throughout the years is perhaps best stated in their own words in the submission made by them to the representatives of the United Nations at San Francisco, California, U.S.A., on April 13, 1945 and which was as follows:

"On behalf of the people of the Six Nations Indians settled upon part of the territory granted to them pursuant to the pledge given by the British Crown and granted under the terms of the Haldimand Treaty of March 1784, we, the representatives of the above named people of the Six Nations Indians, appeal to the conscience of the democratic nations for action to correct the deep injustice under which we are suffering.

"In accord with the terms of the proposal made to us by representatives of the English Crown, we as a sovereign people accepted the terms of the Haldimand Treaty and settled upon the territory thereby granted to us. A few years after our occupation of the territory and before it was fully settled a large part of the territory was alienated from us by methods and on terms which did a deep injustice to our people and all their descendents. One, Joseph Brant, using an alleged power of attorney from the Six Nations Indians dated November 2, 1796, leased large sections of our territory to white people. No revenue whatsoever accrued to the people of the Six Nations Indians for such leases and until now we have been unable to secure either restoration of the property which was granted to us and our descendents and friends in perpetuity, nor to secure compensation for its alienation.

"Our claim for abrogation of the so-called leases under which this property was alienated from us or, failing such abrogation, compensation for such alienation or revenues from all such lands, is

based upon the fact that, according to the terms of the India Act (which deny to Indians the legal status of a person) and the terms under which the land was granted to us, the methods by which the above named Brant disposed of said lands were illegal and cannot be justified either in the eyes of the law or by the conscience of governments.

"We appeal to the representatives of the governments and peoples of the United Nations gathered here in this historic conference at San Francisco to aid the people of the Six Nations Indians in securing these fundamental rights Our appeal for restoration of the property rights guaranteed to us in 1784 is based first of all upon our duty, as parents, to protect the rights and the futures of our children, but it is based also upon our solemn obligation to protect the rights of our people as a whole. We, the people of the Six Nations Indians, who fought as allies of the British Crown during the American revolutionary war, accepted the grant of lands described in the Haldimand Treaty and came to Canada from the United States to settle on these lands in the spirit and in the understanding that we were doing so as a sovereign people. As a nation we now appeal to the conscience of the nations of the world. We appeal for the restoration of those lands which the terms of the Haldimand Treaty guaranteed the people of the Six Nations 'and their posterity are to enjoy forever'.

"Verification of all the above statements is to be found in the copy of Sessional Paper No. 151 tabled in the House of Commons Canada on April 5th, 1945, which is attached.

ON BEHALF of the people of the Six Nations Indians on the Grand River at Brantford, Ontario . . .
....."

From the evidence before me, however, it would appear the strongest case for the Six Nations Indians should be based upon the submission that Parliament should not make the Order in Council to which objection is taken applicable to the Six Nations Indians rather than that Parliament cannot make such Orders in Council applicable. It seems to me much might be said on that score.

I am of the opinion that the Six Nations Indians are entitled to the protection of the laws of the land duly made by competent authority and at the same time are subject to such laws. While it might be unjust or unfair under the circumstances for the Parliament of Canada to interfere with their system of internal Government by hereditary Chiefs, I am of the opinion that Parliament has the authority to provide for the surrender of Reserve land, as has been done herein, and that Privy Council Order P.C. 6015 is not *ultra vires*. It should be noted that P.C. 1629 has been revoked by P.C. 6015, so it is not necessary to consider P.C. 1629 further.

In my opinion, therefore, the plaintiff is not entitled to an injunction and is not entitled to the declaration asked for.

The plaintiff's action is therefore dismissed but, under the circumstances, without costs.

Action dismissed.