

THE ONTARIO MINING COMPANY v. SEYBOLD ET AL.

(1900), 32 O.R. 301

Ontario Divisional Court, Armour C.J., Falconbridge and Street JJ., 12 December 1900

(On appeal from judgment of Ontario Chancery, **supra** p.160)

(Appealed to Supreme Court of Canada, **infra** p.180)

*Constitutional Law—Indian Lands—Surrender—Treaty—Crown Patent—
Precious Metals—Acquiescence.*

The judgment of BOYD, C., 31 O.R. 386, affirmed on appeal.

This was an appeal by the plaintiffs from the judgment of BOYD, C., 31 O.R. 386, dismissing with costs an action for a declaration that by virtue of letters patent issued by the Government of the Dominion of Canada to the predecessors in title of the plaintiffs, the latter were entitled to the lands in question, which were part of Sultana island in the Rainy River district, and also to set aside the letters patent issued by the Government of the Province of Ontario to the defendants, and for an injunction and other incidental relief. The facts stated in the report referred to.

The appeal was heard by a Divisional Court composed of ARMOUR, C.J., FALCONBRIDGE and STREET, JJ., on the 7th June, 1900.

Robinson, Q.C., Laidlaw, Q.C., and J Bicknell, for the plaintiffs.

Biggs, Q.C., J.M. Clark, Q.C., R. U. Macpherson, and A.M. Stewart, for several defendants.

Shortly after the hearing and before judgment was delivered, ARMOUR, C.J., having been appointed Chief Justice of Ontario, and FALCONBRIDGE, J., Chief Justice of the Queen's Bench in his stead, the parties to the action filed a consent that the judgment of FALCONBRIDGE, C.J., and STREET, J., should be accepted as the judgment of the Court.

December 12, 1900. FALCONBRIDGE, C.J.:--

For the reasons given in the judgment of the learned Chancellor, 31 O.R. 386, which I adopt, I am of the opinion that this case was well decided, and I think the appeal must be dismissed with costs.

STREET, J.:--

The judgment of the Judicial Committee of the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, has plainly decided that under the terms of the British North America Act, sec. 109, the lands in question in the present action became at Confederation the property of the Province of Ontario, subject to the Indian title, as explained and defined in that judgment. It is further explicitly there held that the surrender by the Indians in the Treaty of 1873 had the effect of extinguishing the Indian title, and not of transferring it to the Government of the Dominion.

The plaintiffs in the present action claim title under a patent issued in the year 1888 by the Government of the Dominion of Canada, and the authority of that Government to deal with the land in question is asserted to be derived, under the facts of this case, from the exclusive power reserved to the Dominion Parliament to pass laws relating to "Indian lands reserved for Indians:" see B.N.A. Act, sec. 91, sub.-sec. 24. The state of facts existing in the present case which did not exist in the *St. Catherine's Milling Company Case* is as follows. In 1879 it appears that certain officers of the Dominion Government set aside the lands in question herein with other lands (being a part of the tract covered by the Treaty of 1873), as a special reserve of the Rat Portage band of Indians. This was done in pursuance of the promise on the part of Her Majesty the Queen, contained in the Treaty, to select and set aside a limited but unascertained portion of the lands affected by the Treaty as a special reserve for the benefit of the Indians who were parties to it. Then, by the Indian Act of the following year, 43 Vict. Ch. 28, passed by the Dominion Legislature, provision was made for the surrender by Indians of lands specially held as reserves for them, and for the sale by the Dominion Government, for the benefit of the Indians so surrendering, of the surrendered Reserves. In 1886 the Rat Portage band of Indians accordingly surrendered the portion of land which had been specially set apart for them as above mentioned, and in the year

1888 the Dominion Government sold and conveyed the land now in question to the predecessors in title of the plaintiffs.

The plaintiff's argument from these facts, and from clause 91(24) of the B.N.A. Act, then is, that we have a legislative authority given to the Dominion Government, to deal with "lands reserved for Indians;" we have certain lands reserved for Indians; we have an Act of the Dominion Legislature authorizing their sale; and we have a sale in pursuance of that Act, under which the plaintiffs claim title.

The obvious defect in this argument, of course, is, that we are bound to hold, under the judgment of the Privy Council, that, upon the surrender of the Indian title effected by the Treaty of 1873, these lands became the property of the Government of the Province of Ontario, in which they were situate. The surrender was undoubtedly burdened with the obligation imposed by the Treaty to select and lay aside special portions of the tract covered by it for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it; but it is equally plain that its ownership of the tract of land covered by the Treaty was so complete as to exclude the Government of the Dominion from exercising any power or authority over it. The act of the Dominion officers, therefore, in purporting to select and set aside out of it certain parts as special reserves for Indians entitled under the Treaty, and the act of the Dominion government afterwards in founding a right to sell these so-called reserves upon the previous acts of their officers, both appear to stand upon no legal foundation whatever. The Dominion Government, in fact, in selling the land in question was not selling "lands reserved for Indians," but was selling lands belonging to the Province of Ontario.

The contention that the Provincial Government must be taken to have assented to the setting aside of these reserves does not appear to be borne out by the facts. An Act of the Provincial Legislature passed in 1891, ch. 3, 54 Vict., sets forth a proposed agreement in which it is expressly declared that the Province was no party to the selection of these reserves and has not concurred therein. Again in April, 1894, the proposed agreement, when executed by the two Governments of the Dominion and the Province, contains the same declaration. There is nothing since that date but controversy between all parties interested—nothing indicating an assent on the part of the Provincial Government to be bound by the action of the Dominion officers in selecting these reserves.

With regard to the claim of the plaintiffs to the right to deal with the precious metals contained in the lands in question, the reasons given by the Chancellor in dealing with that part of the case cover the ground so entirely that it seems unnecessary to do more than to express concurrence in the reasons as well as in the result to which they lead.

Appeal dismissed with costs.

E. B. B.