ONTARIO MINING COMPANY, LIMITED AND ATTORNEY-GENERAL FOR CANADA v. SEYBOLD ET AL. AND ATTORNEY-GENERAL FOR ONTARIO

[1903] A.C. 73 (also reported: (1902), 72 L.J.P.C. 5, 87 L.T.R. 449, 19 T.L.R. 48)

Judicial Committee of the Privy Council, Earl of Halsbury L.C., Lord Macnaghten, Lord Davey, Lord Robertson and Lord Lindley, 12 November 1902

(On appeal from judgment of Supreme Court of Canada, **supra** p.180)

British North America Act, 1867, s.91 -- Lands in Ontario surrendered by the Indians -- Proprietary Right -- Power of Disposition.

Lands in Ontario surrendered by the Indians by the treaty of 1873 belong in full beneficial interest to the Crown as representing the province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof on the advice of the Ministers of the province and under the seal of the province.

***St. Catherine's Milling Co. v. Reg*., (1888) 14 App. Cas. 46, followed.**

The Dominion Government having purported, without the consent of the province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the said treaty:--

***Held*, that this was ultra vires the Dominion, which had by s.91 of the British North America Act of 1867 exclusive legislative authority over the lands in question, but had no proprietary rights therein.**

The consent of the province having been subsequently provided for by a statutory agreement between the two Governments, the special leave to appeal granted upon the representation of the general public importance of the question involved would probably have been rescinded if a petition to that effect had been made.

APPEAL by special leave from a judgment of the Supreme Court (June 5, 1901) affirming a judgment of the Divisional Court of Ontario which had affirmed a judgment of the Chancellor of Ontario, who had dismissed the appellants' suit with costs.

The appellants, on February 15, 1899, brought their action in the High Court of Justice for Ontario to have it declared

**** Present*: THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.**

that, by virtue of certain letters patent issued by the Crown, as represented by the Government of the Dominion of Canada, to the plaintiffs' predecessors in title, the plaintiffs were the owners in fee simple of certain lands situate on Sultana Island, in the Lake of the Woods, in the province of Ontario, containing 110¾ acres, more or less, including the minerals, precious and base, therein; and that certain other letters patent subsequently issued by the Crown, as represented by the Government of the province of Ontario, comprising, inter alia, the same lands, were void, and were clouds upon the title of the plaintiffs, and should be ordered to be set aside and cancelled.

The respondent Johnston counter-claimed for a declaration that the appellants' patents were void.

The Chancellor of Ontario, under the circumstances, which were not disputed and are stated in their Lordships' judgment, dismissed the action and gave judgment on the counter-claim, declaring the appellants' patents to be void. His judgment, which was substantially affirmed by both the Appellate Courts, proceeded on the grounds that whilst over the Reserve 38 B (which included the lands in suit) the Dominion had legislative and administrative jurisdiction, the territorial and proprietary rights to the soil were vested in the Crown for the benefit of and subject to the legislative control of the province of Ontario; that by the surrender of 1886 the Indian title was extinguished for the benefit of the province, and that no estate could pass to the fee simple of the lands except from the Crown, as represented by the Ontario Government.

The Chief Justice (Sir Henry Strong), besides agreeing with the Chancellor, based his decision more particularly on the reasons given by the Judicial Committee in *St. Catherine's Milling Co. v. Reg*. (1)

The judgment of Gwynne J., which was in favour of the appellants, was based upon the following grounds:---

"(*a*) That the British North America Act excluded all idea of any right of interference, direct or indirect, being possessed by or vested in the legislatures or governments of any of the provinces of the Dominion in relation to the Indians or their

(1) 14 App. Cas, 46.

title to lands reserved for their benefit in any part of the Dominion;

"(*b*) That the British North America Act maintains the distinction between 'lands belonging to the several provinces' and 'Indian lands,' and preserved and maintained the Indians in the enjoyment of the benefit and conditions of all treaties entered into between them and the Sovereign;

"(*c*) That the reserves in this case must be regarded as lands vested in the Crown in trust for the sole use and benefit of the Indians upon the terms and conditions agreed upon as those upon which the trust was accepted by Her late Majesty;

"(*d*) That the provisions of the Indian Acts clearly shew the title of the Indians to lands reserved and the precious metals thereunder to be real and substantial and not illusory;

"(*e*) That unless the Proclamation of 1763 and the treaties made thereunder are a dead letter, and the provisions of the British North America Act relating to Indian lands are illusory and devoid of all significance, the sale by the Crown of their reserves, or such parts thereof as should be surrendered to the Crown upon trust to be sold for their benefit, are within the exclusive legislative authority of the Dominion Parliament;

"(*f*) That the lands in question are in a totally different position from the lands under consideration in the *St. Catherine's Milling Co.'s Case* (1);

"(*g*) That the letters patent to the appellants are therefore valid, and the letters patent under which the respondents claim are null and void in so far as they purport to affect the appellants' title to the land and minerals claimed by them."

Bicknell, K.C., and *Greer*, for the appellants, contended that judgment should be entered for them in terms of their claim. They relied upon the grounds taken by Gwynne J. By the British North America Act, 1867, in order to ensure uniformity of administration, the British Parliament placed all lands held in trust for Indians and Indian affairs under the legislative control of the Dominion: see s.91, sub-s.24. It would be subversive of the policy of that Act to allow any interference by the provincial governments with Indian lands or Indian affairs. Sect. 109, which vests in the several provinces the lands situated therein, does so subject (1.) to any trust in respect thereof; (2.) to any interest other than that of the province. It was contended that the trusts then existing in respect of Indian reserves, theretofore set apart by treaty, were continued. *St. Catherine's Milling Co. v. Reg*. (1) decides that the title in unsurrendered lands held by the Indians under the Proclamation of 1763 is "an interest other than that of the province" under this section. The consideration for the extinction of that interest in a very large tract of territory was the setting apart thereout of Indian reserves of 365,225 acres, which accordingly are to be dealt with by the Crown in the same way as the reserves held in trust in 1867. This case is not governed by *St. Catherine's Milling Co. v. Reg.* (1), for the lands in that case were of an entirely different nature. In them the Indian title had been extinguished for the public uses of the province. The lands now in suit are lands held by the Crown in trust to sell and dispose of them for the benefit of the Indians; and consequently there is no beneficial interest in them in the province of Ontario. What is called the surrender of these lands to the Crown is in reality a consent by the Indians, as required by the treaty, to the sale thereof by the Crown. It did not, and was not intended to, extinguish their title, but to consent to its conversion into money for their benefit. The reserves selected under the treaty never were lands belonging to the province within the meaning of s.109. They belonged to the Crown, and neither to the Dominion nor to the province. They can only be disposed of by such statutory authority as is applicable to them. That statutory authority is vested in the Dominion, and the appellants have acquired title by virtue of Dominion legislation: see Consolidated Statutes of Canada, 1859, c. 9, ss. 10 to 18; and after 1867, 31 Vict. c. 42,32 & 33 Vict. c. 6, 39 Vict. c. 18, and 43 Vict. c. 28; Revised Statutes of Canada, 1886, c. 43. Besides, the province of Ontario must be deemed to have acquiesced in the selection of reserves by the officers of the Dominion Government, and did not before the dealing with Reserve 38 B express any dissatisfaction therewith.

Newcombe, K.C., and *Loehnis*, for the Attorney-General of the Dominion, contended that the letters patent under which the appellants claimed were issued by the Dominion pursuant to British North America Act, 1867, s.91, sub-s. 24, and Revised Statutes of Canada, c. 43,s. 41. The title to the reserve in this case is vested in the Crown as representing the Dominion; if not, it has in its own right the power of sale and disposition over them, under a trust arising from the surrender in 1886. That surrender did not confer a like power on the province. Ontario has the benefit of the surrender, and cannot object to the execution of the stipulations made in favour of the Indians. Nor is her authority or consent necessary to the conversion of an Indian reserve into money for the benefit of the Indians.

Blake, K.C., for the Attorney-General of Ontario, contended that there was no question of general public importance affecting Ontario warranting the application for leave to appeal, and that accordingly the appeal should be dismissed on that ground alone. After the decision in *St. Catherine's Milling Co. v. Reg*. (1) Canada was advised that she had no right to create a reserve of the land in question, and that patents issued by her were void. She thereupon entered into negotiations with Ontario, which resulted in a statutory agreement under 54 & 55 Vict. (Canada) c. 5 and 54 Vict. (Ontario) c. 3, which is in force, though delays have occurred in its execution. The intention is to fulfil it, and it had before suit finally disposed of the question now raised.

J. M. Clark, K.C., for the respondents.
Newcombe, K.C., replied.

The judgment of their Lordships was delivered by---

LORD DAVEY. In this case leave was given by His Majesty in Council, on the advice of this Board, to appeal against a judgment of the Supreme Court of Canada dated June 5, 1901. In their petition for leave to appeal the appellants, the Ontario Mining Company, alleged that the title to 365,225 acres of land, purporting to have been set aside by the Dominion Government as reserves for the Indians, was affected by the judgment, and represented that the question involved was one of great constitutional and general importance, affecting not only the Dominion and Provincial Governments, but also all the Indians in the province of Ontario. By the Order in Council giving the appellants leave to appeal it was ordered that the Government of the Dominion of Canada and the Government of the province of Ontario should be at liberty to intervene in the appeal, or to argue the same upon a special case raising the legal question or questions in dispute. The two Governments have availed themselves of this liberty, and were represented by counsel on the hearing of the appeal. A preliminary objection was taken to the appeal being heard on its merits by counsel for the respondents, and also by counsel for the Ontario Government, on the ground that the petition for leave to appeal did not disclose an agreement made between the Governments of the Dominion and of Ontario and confirmed by their two Legislatures respectively, which, it was said, if disclosed, would have shewn that the question between the parties to the litigation did not, as alleged, affect the title to the large tract of land mentioned, and that in existing circumstances there was not any question of constitutional or general importance involved affecting either the Governments or the Indians. Their Lordships will postpone for the present their consideration of this objection.

The dispute is between rival claimants under grants from the Governments of the Dominion and of Ontario respectively. The appellants claim to be entitled to certain lands situate on Sultana Island, in the Lake of the Woods, within the province of Ontario, and the minerals thereunder, under letters patent, dated March 29, 1889, April 30, 1889, September 2, 1889, and July 23, 1890, issued by the Government of the Dominion to their predecessors in title. The respondents claim an undivided two-thirds interest in the same lands and minerals under letters patent issued to them by the Government of Ontario, and dated January 16, 1899, and January 24, 1899. The action was brought by the appellants against the respondents in the High Court of Justice of Ontario, and their claim was to have the letters patent of Ontario, under which the respondents claimed, declared void and set aside and cancelled, and for consequential relief. One of the respondents, on the other hand, counter-claimed for similar relief respecting the letters patent of the Dominion under which the appellants claimed title.

The lands in question are comprised in the territory within the province of Ontario, which was surrendered by the Indians by the treaty of October 3, 1873, known as the North-West Angle Treaty. It was decided by this Board in the *St. Catherine's Milling Co.'s Case* (1) that prior to that surrender the province of Ontario had a proprietary interest in the land, under the provisions of s.109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty. In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the British North America Act, 1867, "it must always be kept in view that wherever public lands with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown." Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

After the making of the treaty of 1873, the Dominion Government, in intended pursuance of its terms, purported to set out and appropriate portions of the lands surrendered as reserves for the use of the Indians, and among such reserves was one known as Reserve 38 B, of which the lands now in question form a part. The Rat Portage band of the Salteaux tribe of Indians resided on this reserve.

On October 8, 1886, the Rat Portage band surrendered a portion of Reserve 38 B, comprising the land in question, to the Crown, in trust to sell the same and invest the proceeds and pay the interest from such investment to the Indians and their descendants for ever. This surrender was made in accordance with the provisions of a Dominion Act known as the Indian Act, 1880. But it was not suggested that this Act purports, either expressly or by implication, to authorize the Dominion Government to dispose of the public lands of Ontario without the consent of the

Provincial Government. No question as to its being within the legislative jurisdiction of the Dominion therefore arises.

The action was tried before the Chancellor of Ontario, and by his judgment of December 2, 1899, it was dismissed with costs. By a second judgment of December 22, 1899, on the counter-claim it was declared that the several patents under the Great Seal of Canada, under which the appellants claimed, were ultra vires of the Dominion and null and void as against the respondents. On appeal to the Divisional Court these judgments were affirmed.

The reasons of the learned Chancellor for his decision are thus summarized in his judgment.

"Over the Reserve 38 B the Dominion had and might exercise legislative and administrative jurisdiction, while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the province of Ontario. The treaty land was, in this case, set apart out of the surrendered territory by the Dominion---that is to say, the Indian title being extinguished for the benefit of the province, the Dominion assumed to take of the provincial land to establish a treaty reserve for the Indians. Granted that this might be done, yet when the subsequent surrender of part of this treaty reserve was made in 1886 the effect was again to free the part in litigation from the special treaty privileges of the band, and to leave the sole proprietary and present ownership in the Crown as representing the province of Ontario. That is the situation so far as the title to the land is concerned."

The learned judge expressed his opinion that it was not proved that the Provincial Government had concurred in the choice or appropriation of the reserves, though in the view which he took of the case he considered it immaterial.

In the Divisional Court Street J. expressed himself as follows:---

"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 Chief Justice adopted the reasons of the learned Chancellor.

There was a second appeal to the Supreme Court. The majority of the learned judges in that Court held that the case was governed by the decision of this Board in *St. Catherine's Milling Co. v. Reg*. (1), and the appeal was dismissed. Gwynne J. dissented, but the reasons for his opinion given by that learned and lamented judge seem to be directed rather to shew that the decision of this Board in the previous case was erroneous.

Their Lordships agree with the Courts below that the decision of this case is a corollary from that of the *St. Catharine's Milling Co. v. Reg*. (1) The argument of the learned counsel for the appellants at their Lordships' bar was that at the date of the letters patent issued by the Dominion officers to their predecessors in title the land in question was held in trust for sale for the exclusive benefit of the Indians, and therefore there was no beneficial interest in the lands left in the province of Ontario. This argument assumes that the Reserve 38 B was rightly set out and appropriated by the Dominion officers as against the Government of Ontario, and ignores the effect of the surrender of 1873 as declared in the previous decision of this Board. By s.91 of the British North America Act, 1867, the Parliament of Canada has exclusive legislative authority over "Indians and lands reserved for the Indians." But this did not vest in the Government of the Dominion any proprietary rights in such lands, or any power by legislation to appropriate lands which by the surrender of the Indian title had become the free public lands of the province as an Indian reserve, in infringement of the proprietary rights of the province. Their Lordships repeat for the purposes of the present argument what was said by Lord Herschell in delivering the judgment of this Board in the *Fisheries Case* (2) as to the broad distinction between proprietary rights and legislative jurisdiction. Let it be assumed that the Government of the province, taking advantage of the surrender of 1873, came at least under an honourable engagement to fulfil the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion Government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and location of the lands to be so appropriated could

(1) 14 App. Cas. 46.
(2) Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, &c., [1898] A.C. 700.

only be effectively made by the joint action of the two Governments.

It is unnecessary to say more on this point, for as between the two Governments the question has been set at rest by an agreement incorporated in two identical Acts of the Parliament of Canada (54 & 55 Vict. c. 5) and the Legislature of Ontario (54 Vict. c. 3), and subsequently signed (April 16, 1894) by the proper officers of the two Governments. In this statutory agreement it is recited that since the treaty of 1873 the true boundaries of Ontario had been ascertained and declared to include part of the territory surrendered by the treaty, and that, before the true boundaries had been ascertained, the Government of Canada had selected and set aside certain reserves for the Indians in intended pursuance of the treaty, and that the Government of Ontario was no party to the selection, and had not yet concurred therein; and it is agreed by art. 1 (amongst other things) that the concurrence of the province of Ontario is required in the selection. By subsequent articles provision is made, "in order to avoid dissatisfaction or discontent among the Indians," for full inquiry being made by the Government of Ontario as to the reserves, and in case of dissatisfaction by the last-named Government with any of the reserves already selected, or in case of the selection of other reserves, for the appointment of a joint Commission to settle and determine all questions relating thereto.

The learned counsel of the appellants, however, says truly that his clients' titles are prior in date to this agreement, and that they are not bound by the admissions made therein by the Dominion Government. Assuming this to be so, their Lordships have already expressed their opinion that the view of their relative situation in this matter taken by the two Governments was the correct view. But it was contended in the Courts below, and at their Lordships' bar was suggested rather than seriously argued, that the Ontario Government, by the acts and conduct of their officers, had in fact assented to and concurred in the selection of, at any rate, Reserve 38 B, notwithstanding the recital to the contrary in the agreement. The evidence of the circumstances relied on for this purpose was read to their Lordships; but on this point they adopt the opinion expressed by the learned Chancellor Boyd that the province cannot be bound by alleged acts of acquiescence on the part of various officers of the departments which are not brought home to or authorized by the proper executive or administrative organs of the Provincial Government, and are not manifested by any Order in Council or other authentic testimony. They, therefore, agree with the concurrent finding in the Courts below that no such assent as alleged had been proved.

It is unnecessary for their Lordships, taking the view of the rights of the two Governments which has been expressed, to discuss the effect of the second surrender of 1886. Their Lordships do not, however, dissent from the opinion expressed by the Chancellor of Ontario on that question.

To revert now to the preliminary objection, their Lordships do not desire to impute any want of good faith to the advisers of the appellants. They may have thought that their clients were not bound by the statutory agreement, and that it was not, therefore, necessary to mention it in their petition for leave to appeal. But the omission to do so was a grave and reprehensible error of judgment, for the existence of the agreement supplies an answer to the allegation of the general public importance of the questions involved, upon which the petition for leave to appeal was founded, as regards both the two Governments and the Indians. If the objection had been taken in a petition to rescind the leave granted, it would probably have succeeded, and their Lordships would now be amply justified in refusing to hear the appeal on its merits. But it was necessary to hear the argument in order to appreciate the objection; and the appeal has had this advantage, that it has enabled Mr. Blake, as counsel for Ontario, to state that he and the learned counsel for the Dominion, acting under authority from their respective Governments, have arranged terms for their adoption which will, it is hoped, have the effect of finally settling in a statesmanlike manner all questions between the Governments relating to the reserves.

Their Lordships will humbly advise his Majesty that the appeal should be dismissed. The appellants will pay the respondents' costs of it; but the interveners will neither pay nor receive costs.

Solicitors for appellants: *Harrison & Powell*.
Solicitor for respondents: *S. V. Blake*.
Solicitors for Dominion of Canada: *Charles Russell & Co*.
Solicitor for province of Ontario: *S. V. Blake.*