WARMAN v. FRANCIS ET AL.

(1958), 20 D.L.R. (2d) 627 (also reported: 43 M.P.R. 197)

New Brunswick Queen's Bench, Anglin J., 20 May 1958

Crown Land I--Indians--Constitutional Law II--

Pre-Confederation Indian Reserves--Sale by Provincial Crown before Confederation--Crown grant to purchaser after Confederation --Whether Indian usufructuary rights extinguished--B.N.A. Act, ss. 91(24), 109--Indian Reserves established in New Brunswick (as in other British North American possessions) before Confederation did not involve any grant of title to the Indians but rather gave them a Personal and usufructuary interest therein which could be surrendered by the Indians or extinguished by the Crown which remained the titleholder. After Confederation such reserved lands were caught by s. 109 of the *B.N.A. Act* as "Lands . . . belonging to . . . New Brunswick at the Union . . . [which] shall belong to New Brunswick . . . subject to any trusts existing in respect thereof, and to any Interest other than that of the Province in the same". Moreover, in virtue of s. 91(24), administration of such reserved lands was within exclusive Federal competence, and while beneficial title remained in the Crown in right of New Brunswick they could not be sold unless first surrendered by the Indian Band concerned. Where reserved Indian lands in New Brunswick were the subject of a transaction of sale and purchase in 1866 by the Crown to plaintiff's predecessor in title and it appeared that full payment of the purchase-price was completed in May, 1867 but the actual Crown grant was not issued by the Province until 1868 after Confederation, *held*, the right to the land was settled in equity before Confederation and the land was caught by a trust under s. 109 in favour of plaintiff's predecessor in title, and hence plaintiff was entitled to a declaration of his title thereto as against Indian claimants to rights therein. Although they did not surrender their rights, the Crown in right of New Brunswick had extinguished them before Confederation. [*St Catherines Mllg. & Lbr. Co. v. The Queen*, 14 App. Cas. 46; *Johnson & Graham's Lesee v. M'Intosh*, 8 Wheaton's Rep. 543, apld; *Doe d. Burk v. Cormier*, 30 N.B.R. 142, consd; *Re Eskimos*, [1939], 2 D.L.R. 417, S.C.R. 104, refd to]

Indians--Parties II A--

Action respecting title to land claimed as Indian Reserve-Indians as defendants-- Indians may properly be made defendants in their own right, without any obligation to join any Federal Government officials, where an action is brought respecting title to lands claimed by them as Reserves. Section 31(3) of the *Indian Act*, R.S.C. 1952, c. 149 specifically preserves their right to defend such an action and their position as ordinary litigants (they being Mickmack Indians) was declared by the Treaty of Peace of 1752, between them and the Governor of Nova Scotia. [*Ex p. Tenasse*, [1931] 1 D.L.R. 806, 2 M.P.R. 523; *Campbell v. Sandy*, 4 D.L.R. (2d) 754, [1956] O.W.N. 441, refd to]

ACTION for declaration of title to certain land.

J. E. Murphy, Q.C. and *R. W. Mollins* for plaintiff; *E. T. Richard*, Q.C., and Andrew Paull of North Vancouver, B.C., Grand Chief and President, North American Indian Brotherhood, for defendants; *J. A. Creaghan*, Q.C., for Province of New Brunswick with watching brief; *R. J. Broderick* for the Amalecite Indians of New Brunswick with watching brief.

ANGLIN J.:--The plaintiff is a farmer residing in Kent County, New Brunswick, and alleges that he is the owner of a certain lot of land upon which the defendants cut timber and refused to desist from so doing until served with the writ in this action. The plain- tiff claims damages and an injunction. At the trial he rested his ownership of the lot on a chain of title from a Provincial Crown grant in 1868. The lot was then within the bounds of the Richibucto Reserve which was

first surveyed and established in 1805 by the Government of New Brunswick for use by the Big Cove Band of Mickmack Indians residing along the Richibucto River. Bands of Mickmacks now dwell on various such Reserves scattered along the east coast of New Brunswick and Nova Scotia, which was their habitat before the coming of the White man. The defendants are members of the Big Cove Band. The Reserve and the Band have since Con- federation been administered under the *Indian Act*, R.S.C. 1952, c. 149. The defendants admit going upon the lot and cutting pulpwood, but deny that the plaintiff owns the lot and allege that it is the property of the Band by virtue of a treaty made between King George III and "the Mickmack Nation of Indians" in 1752. They contend also that in any event the Tribe owns the land as aborigines and it has never surrendered its rights.

Counsel with watching briefs on behalf respectively of the Government of New Brunswick and the Amalecite Indians of Western New Brunswick attended the trial. I may add that Mr. Andrew Paull of North Vancouver, B.C., Grand Chief and President of the North American Indian Brotherhood, was heard on behalf of the defendants as a friend of the Court and he ably assisted their counsel.

It appears that the lot in question is one of numerous lots long since occupied by white settlers and which lie within the original bounds of the western end of the Richibucto Reserve; and also that members of the Big Cove Band have from time to time cut or attempted to cut pulpwood on those lots as they considered that the Band was entitled to do so in spite of grants by the Crown to white settlers. I understand that this action was brought at the instance of some of the present owners of such lots to have deter- mined once and for all the dispute over ownership. It has also been intimated that this test case would settle various other questions, such as whether the Crown in the right of the Province or the Crown in the right of Canada had the selling of lots from an Indian Reserve in New Brunswick, and such as riparian rights of fishing. Trial was had in June and August, 1956. Under the pleadings and on the evidence then adduced these large and import- ant issues were raised. By December, 1956, I had prepared a draft of my reasons for judgment which necessarily had to deal at great length with the history and law pertinent to these problems. When this judgment was about to be pronounced new evidence was discovered respecting the history of the plaintiff's grant from the Crown in the right of the Province. Counsel for the plaintiff applied to have this new evidence added to the record. Counsel for the defendants opposed the application, but I considered that it should be granted for without it an adjudication would have been made on an incomplete record of the actual facts, and with those facts in hand it became unnecessary and would have been improper to deal with the larger and general issues otherwise involved. In brief, as will be seen later, the plaintiff's title to his lot can be readily established in law whatever may be the effect of past treaties with the Indians and whether the Province or Canada presently has the power of sale of lots in an Indian Reserve. As counsel have now completed the filing of this new evidence I have redrafted my reasons for judgment.

A preliminary issue was at the trial raised by the defense. It was contended that the defendants as Indians of the Richibucto Reserve registered under the *Indian Act* were wards of the Crown and they might not be sued without prior notification to and the joining of appropriate Government officials. In a sense they may be wards but the *Indian Act* specifically provides that, subject to the terms of any treaty, the general provincial laws apply to them except that the property of an Indian on a Reserve may not be mortgaged or seized for a judgment debt. In *Ex. p. Tenasse*, [1931] 1 D.L.R. 806, 2 M.P.R. 523, the New Brunswick Court of Appeal held that the Town of

Newcastle Civil Court had jurisdiction to entertain a claim and enter judgment for the price of goods sold to an unenfranchised Indian living upon a Reservation; see also *Campbell v. Sandy*, 4 D.L.R. (2d) 754, [1956] O.W.N. 441. The *Treaty of Peace* of 1752 (1 Nova Scotia Archives, p. 683) upon which the defendants mainly rely in this action contains the following: "All Disputes whatsoever that may happen to Arise between the Indians now at Peace and others His Majesty's Subjects in this Province shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same benefits, Ad- vantages & Privileges as any other of His Majesty's Subjects." The right of an Indian to defend an action of this nature is pre- served to him by s. 31(3) of the *Indian Act*. It is clear that the defendants are properly in Court as ordinary litigants.

As to the defences on the main issue: first, as to what are called aboriginal rights. The nature of the interest in land once or now vested in a Tribe or Band of Indians differs throughout Canada, and each instance depends on its historical background: see the Annotation on Indian Lands in Canada by Cameron, 13 S.C.R. (Cameron Ed.) 45. The ancient habitat of the Mickmacks was the eastern shore of what is now New Brunswick and Nova Scotia, and the English sovereign originally laid claim to it by virtue of the voyages of Cabot. The French established small settlements and called the country Acadia. In 1621 the Crown made a grant of what is called Nova Scotia to Sir William Alexander, which embraced the eastern shore in question. In 1632 the Crown ceded Nova Scotia to France by the *Treaty of St. Germain-en-Laye*. By the *Treaty of Utrecht* in 1713 Frances ceded "all Nova Scotia, or Acadia . . . . to the Queen of Great Britain and to her Crown for ever": see Hannay's History of Acadia, 1879, p. 280. There is no evidence that the Mickmacks heretofore claimed to retain or that the Crown recognized any aboriginal proprietary rights in the Indians. In Cameron's Annotation above mentioned he says at p. 50:

"In the treaties before Confederation cession of the lands [by the Indians] was uniformly made in general terms to His or Her Majesty."

[Footnote] "No surrender of aboriginal rights has been made by the Indians in the Province of Quebec or the Maritime Provinces."

So far as we are concerned with the Mickmacks this can only mean that there was no surrender because there were no proprietary rights in our law in the circumstances. The historical background does not differ materially from that of the eastern coast of North America colonized by the British. In *Johnson & Graham's Lessee v. M'Intosh* (1823), 8 Wheaton's Rep. 543, Marshall C.J. was dealing with land in Virginia and said (pp. 588, 595 and 596):

"All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. . . .

"According to the theory of the British constitution, all vacant lands are vested in the crown. . . .

"So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. . . . The lands, then, to which this proclamation [of 1763 hereinafter mentioned] referred, were lands which the king had a right to grant, or to reserve for the Indians."

Following on the *Treaty of Utrecht* the Mickmacks did not remain as a foreign nation (in the international sense) dwelling on British territory, but became British subjects. If a treaty was made

with the tribe it was in the nature of a special agreement based on good- will and expediency made by the Crown with a body of inhabitants: see MacKenzie on Indians and Treaties in Law (1929), 7 Can. Bar Rev. 561. As subjects of the Crown they came under the law of the country, and any interest they might thereafter have in land was only what the law of the new regime afforded them.

Next, as to the interest of the Band in the Richibucto Reserve, New Brunswick was made a Province separate from Nova Scotia in 1784. The Commission and Instructions from His Majesty to the first governor in Chief of New Brunswick gave him authority to make grants of land which "shall be good and effective in law against us our Heirs and Successors". There was then only one Reserve for Mickmacks which had been established on the northwest branch of the Miramichi River by a "License of Occupation" issued by Governor Parr of Nova Scotia in 1783. The Richibucto Reserve was established by Order of the Governor in Council of New Brunswick in 1805. It comprised large areas on both sides of the Richibucto River. Its extent was reduced to an area on the north bank only by an Order in Council dated February 25, 1824:

"Ordered that a Reserve be made for the use of the Richibucto Indians on the north side of Richibucto River extending from etc."

The lot in question in this suit lies within the bounds given in the above order. The land for the Reserve was of course Crown land administered by the Governor in Council. There is no evidence as to when the Band was organized which now claims title to the Reserve.

It is contended for the defendants that the land in this Reserve was once within the territory occupied by the Mickmacks and contemplated in early days by treaties with the tribe and various proclamations. There is, however, no evidence of the limits of that territory on the east coast, but as the eastern boundary of the Reserve is some 13 miles from the coast it might well be that such contention is warranted.

In 1752, as appears from evidence adduced for the defendants, one of the Chiefs of the Mickmacks made a proposal for peace to the Governor of Nova Scotia and offered to bring all the tribes of the Mickmacks to enter into a treaty. The Governor replied in writing: "It is with pleasure that we see thee here to commune with us touching the burying of the hatchet between the British children of His puissant Majesty King George and his children the Mickmacks of this Country . . . . You have acknowledged him for your Great Chief and Father. He has ordered us to treat you as our Brethren . . . . We will not suffer that you be hindered from hunting or fishing in this country as you have been in use to do, and if you shall think fit to settle your wives and children upon the River Shebenaccadie no person shall hinder it nor shall meddle with the land where you are .... "

On November 22, 1752, the Governor "on behalf of His Majesty" entered into a treaty with delegates "of the Tribe of Mick Mack Indians Inhabiting the Eastern Coast of the said Province of Nova Scotia or Acadie" and the delegates executed it "for themselves and their said Tribe their heirs and the heirs of their heirs for- ever". The only terms therein that are material to the present problem were:

2. . . . that the Indians shall have all favour, Friendship and Protection shown them from this His Majesty's Government . . .

4. It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting and Fishing as usual ....

It is of interest to note that in *R. v. Syliboy*, [1929] 1 D.L.R. 307, 50 Can. C.C. 389, a Nova Scotia Court doubted whether this was a treaty and whether it had been made with the Mickmack Tribes as a whole. In any event, it is clear that the treaty did not concede or grant any title to land, and did not repeat the Governor's equivocal expression in his previous letter -- "nor shall (we) meddle with the land where you are".

Early in 1762 the Governor of Nova Scotia received from His Majesty instructions (apparently forwarded to all the Governors of Colonies in North America) which were entitled "Incroachments upon the Possessions and Territories of the Indians in the American Colonies". In consequence the Governor issued the following proclamation in May, 1762, a copy of which the defendants also put in evidence:

"His Majesty by His Royal Instruction, Given at the Court at St. James' the 9th day of December, 1761, having been pleased to Signify, That the Indians have made, and still do continue to make great Complaints, that Settlements have been made, and Possessions taken of Lands, the Property of which they have by Treaties reserved to themselves, by Persons claiming the said Lands, under Pretence of Deeds of Sale & Conveyance, illegally, fraudulently, and surreptitiously obtained of said Indians, and that His Majesty had taken this matter into His Royal Consideration, as also the fatal Effects which would attend a Discontent among the Indians in the present situation of Affairs, and being determined upon all Occasions to support and protect the said Indians in their just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into with them . . . I do accordingly publish this proclamation . . . requiring all persons whatever, who may either willfully or inadvertently have seated themselves upon any Lands so reserved by or claimed by the said Indians, without any lawful Authority for so doing, forthwith to remove therefrom. And, Whereas Claims have been made in behalf of the Indians for (describing points on the east coast from Canso to Bay de Chaleur) as the Claims and Possessions of the Indians, for the more special purpose of hunting, fowling and fishing, I do hereby strictly injoin and caution all persons to avoid all molestation of the said Indians in their said claims, till His Majesty's pleasure in this behalf be signified. And if any person or persons have possessed themselves of any part of the same to the prejudice of the said Indians in their Claims before specified or without lawful Authority, they are hereby required forthwith to remove, as they will otherwise be prosecuted with the utmost Rigour of the Law."

Expressions in that proclamation possibly relevant to the title to land should be construed in the light of a further document put in evidence by the defendants. It is a letter from the Governor under date of July 2, 1762, to The Lords Commissioners for Trade and Plantation in London, enclosing his proclamation of May 4, 1762. The letter contains the following: "In obedience to this Royal Instruction from His Majesty, I caused a Proclamation to be published in His Majesty's name injoining all persons against any molestation of the Indians in their claims. Lest any difficulties might arise, it appeared advisable, previous to the proclamation, to inquire into the Nature of the Pretensions of the Indians for any part of the lands within this Province. A return was accordingly made to me for a Common-right to the Sea Coast from Cape Fronsac onwards for Fishing without disturbance or Opposition by any of His Majesty's Subjects. This claim was therefore in- serted in the Proclamation that all persons might be notified of the Reasonableness of

such a permission, whilst the Indians themselves should continue in Peace with Us, and that this Claim should at least be entertained by the Government, till His Majesty's pleasure should be signified. After the proclamation no claims for any other purposes were made. . . . . Your Lordships will permit me humbly to remark that no other Claim can be made by the Indians in this Province, either by Treaties or long possession (the Rule, by which the determination of their Claims is to be made by virtue of this His Majesty's Instructions) since the French derived their Title from the Indians and the French ceded their Title to the English under the Treaty of Utrecht."

Counsel for the defendants also put in evidence the Royal Proclamation of 1763 issued by His Majesty with respect mainly to the boundaries and Governments of the territories of Quebec, East Florida, West Florida and Grenada taken over under the Treaty of Paris. (The Proclamation will be found in the Revised Statutes of Canada, 1952, Vol. VI, p. 6127.) The Proclamation also dealt with the treatment of and Reserves for Indians in all other territories in North America and therefore included Nova Scotia as it then was. Counsel contended that in view of expressions used in the Proclamation the Crown conceded that the Indians owned their Reserves. But the Proclamation has been otherwise construed by Her Majesty on the advice of the Judicial Committee of the Privy Council in *St. Catherine's Mllg. & Lbr. Co. v. The Queen ex rel. A.-G. Ont.* (1888), 14 App. Cas. 46. By treaty in 1873 a tribe of Ojibbeway Indians surrendered to the Government of Canada for Her Majesty its right and title to lands it occupied in Ontario. The Privy Council said in part [pp. 52-9]:

"Acting on the assumption that the beneficial interest in these lands had passed to the Dominion Government, their Crown Timber Agent, on the 1st of May, 1883, issued to the appellants the St. Catherine's Milling and Lumber Company, a permit to cut and carry away one million feet of lumber from a specified portion of the disputed area. The appellants having availed them- selves of that licence, a writ was filed against them . . . at the instance of the Queen on the information of the Attorney-General of the Province (of Ontario) . . . The territory in dispute has been in Indian occupation from the date of the proclamation (of 1763) until 1873 . . . Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never 'been ceded to or purchased by' the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the goodwill of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories'; and it is declared to be the will and pleasure of the sovereign that, 'for the present', they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished . . . The ceded territory was at the time of the union, land vested in the Crown, subject to 'an interest other than that of the Province

in the same', within the meaning of sect. 109 (of the B.N.A. Act); and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some other provision of the Act of 1867 other than those already noticed . . . It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority . . . The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title."

This view in 1888 of the nature of the Indian title was in effect that which prevailed in New Brunswick with respect to the Re- serves which the Governor in Council "made" in New Brunswick shortly after its establishment as a Province in 1784. The volume of the Statutes of New Brunswick for 1838 contains as an Appendix a report by the Commissioner of Crown Lands enumerating the "Lands reserved for the use of the Indians in this Province . . . the time such reserves were made." At the foot thereof is the following:

"Nature of Reserves--To occupy and possess during pleasure." In the archives of the Provincial Secretary's Office there is a copy of a letter dated November 1, 1851:

"Gentlemen

"I am to inform you that His Excellency the Lieut. Governor has been pleased to appoint you Commissioners of the Indian Reserve at the Little Falls Madawaska and if the appointment be accepted it will become your duty to notify the occupants thereon that the fee or title on ownership of land is in the Crown and not in the Indians whose right to it consists merely in the guarantee of the Government that they shall have the personal use of the land for their own advantage in all respects but no right or power is given to them to alienate or give any part of it to others which cannot be done without the express authority and consent of Her Majesty's Representative in Council.

"I have the Honor etc.
"(sgd) J. R. Partelow."

"L. R. Coombes
and John Emmerson
Madawaska, Victoria."

It is also of historical interest that the Mickmacks for their part did not in the early days of the last century apparently entertain any view of their interest which was in conflict with that above mentioned. In 1844 the Legislature of New Brunswick (as will be noted hereinafter) decided to have the Reserves in the Province surveyed, subdivided and sold. The following memorandum for the Lieutenant-Governor is of record in the archives of the Provincial Secretary's Office:

"Secretary's Office
8 July 1845

"Memorandum

"Louis Julian Junior (son of the Chief) wishes an order from His Excellency to the effect that he shall have a portion of the up- per reserve on the Northwest Miramichi, and the whole of the re-

serve opposite Beaubair's Island set apart for the exclusive use and occupation of his tribe (the Mickmacks). He makes no objections to the improvements of the settlers on the reserves being fully protected.

(Endorsement on back of memorandum over the initials of the Lieutenant-Governor)

"It is my wish that the provisions of the Act in all that relates to the interests of the Indians and in the settlement of their locations should be construed liberally."

It is clear therefore on the relevant evidence and the highest authority that:

(a) No treaty or agreement by the Crown with the Mickmacks conceded or vouchsafed to them any paramount title to any land.

(b) The Richibucto Reserve was "made" by the Government of New Brunswick in 1824 from its Crown lands "for the use of" Indians such as the Big Cove Band now residing thereon.

(c) The Royal Proclamation of 1763 applied to such a Reserve if and when made and it vested only a "personal and usufructuary" interest in the Band of the Richibucto Reserve, which interest was "dependent on the goodwill of the Sovereign". Such interest might be "surrendered" by the Band or "extinguished" by the Sovereign.

d) There is no evidence that the Mickmacks (prior to the present case) ever claimed any greater interest in lands on the east coast of New Brunswick or in this Reserve in particular.

Finally, as to the plaintiff's claim of title to his lot. The journals of the New Brunswick Legislature contain the following under date of February 23, 1838:

"On motion of Mr. Weldon

"Whereas there are various tracts of land in the County of Kent, reserved for the use of the Indians, lying in an uncultivated state, and which are of no benefit to the Indians, but tend much to retard the improvement and settlement of lands lying in the neighborhood of such Reserves; therefore

Resolved, that an humble Address be presented to His Excellency the Lieutenant Governor, praying that His Excellency will adopt such measures, whereby the said Reserves or portions thereof may be disposed of to persons desirous of becoming settlers, and making permanent improvements; the proceeds arising from the disposal of such Reserves or any part thereof, to be appropriated by Commissioners to be appointed by His Excellency for the benefit of aged and distressed Indians interested in such Reserves."

Apparently this resolution provoked consideration of the situation with respect to the Indian Reserves throughout the rest of the Province. In the result, in 1844 the New Brunswick Legislature passed a statute entitled "An Act to Regulate the Management and Disposal of the Indian Reserves in this Province" [c.47]. Its pre- amble was:

"Whereas the extensive Tracts of valuable Land reserved for the Indians in various parts of this Province tend greatly to retard the settlement of the Country, while large portions of them are not, in their present neglected state, productive of any benefit to the people, for whose use they

were reserved: And whereas it is desirable that these Lands should be put upon such footing as to render them not only beneficial to the Indians but conducive to the settlement of the County."

It is not necessary to review the provisions and effect of this Act because it was repealed in 1854 when it was included, sightly revised, as c. 85, "Of Indian Reserves", in the Revised Statutes of that year. It is, however, important to note that, in view of the interest in the Reserves vested in the Indians by the Royal Proclamation of 1763, it was essential to refer the proposed legislation to the Sovereign for approval. That this was done is shown by a footnote to the Act as follows: (This Act was finally enacted, ratified and confirmed by Order of Her Majesty in Council, dated 3rd September, 1844, and published and declared in the Province on the 25th day of September, 1884).

The following are extracts from the Act of 1854 which are material to our present problem:

"1. The Governor in Council shall cause surveys to be made of the Indian Reserves ....

2. The Governor in Council shall cause such Reserves, or any part thereof, to be leased or sold under the direction of the local Commissioners to the highest bidder . . . . upon the conditions determined by the Governor in Council ....

3. The Governor in Council shall appoint Commissioners, not exceeding three for each County containing such Reserves, who shall look after the same, superintend the survey and sale thereof . . . . take charge of the interests of the Indians generally in their respective Counties.

7. The proceeds annually arising from the sales and leases . . . . deducting expenses . . . . shall be applied to the exclusive benefit of the Indians . . . . first, for the relief of indigent and infirm Indians; second, for procuring seed, implements of husbandry, and domestic animals, as the Governor may direct . . . ."

"10. The local Commissioners . . . . shall lay off any tract of such Reserves, or any part thereof, into villages or town plats for the exclusive benefit of the Indians of their County . . . . ; location tickets of these lands free of expense shall be granted to such Indians as the Governor in Council may deem fit objects therefor, to any of whom the Governor in Council may make absolute grants thereof free of expense, after they shall have resided upon and improved the same for at least ten years."

Comment on these two statutes was made by Chief Justice Allen in the New Brunswick Court of Appeal in *Doe d. Burk v. Cormier* (1890), 30 N.B.R. 142 at pp. 149-50:

"There never has been any doubt in this Province, that the title to the land in the Province reserved for the use of the Indians, remained -- like all the other engrafted lands -- in the Crown, the Indians having, at most, a right of occupancy. The Act 7 Vic. cap. 47, passed with a suspending clause, and confirmed by the Queen in 1844, fully recognized this. That Act was continued by the Revised Statutes of the Province, cap. 85, enacted in 1854. That chapter, of course, ceased to have any operation when the Dominion Parliament legislated on the subject; but the right of the Crown, as represented by the Government of this Province, to manage and sell the lands reserved for the use of the Indians, remained in the Executive Government of this Province, under sub-section 5 of section 92 of the British North America Act . . . . I therefore think that the grant (from Canada) under which the plaintiff claimed was inoperative, and conveyed no title."

I may add that the learned Chief Justice also remarked in his judgment that the Indian Reserve lands in New Brunswick were not affected by the Royal Proclamation of 1763. With the greatest respect I would think that such remark was in error for the terms of the Proclamation were broad enough to include what was later New Brunswick: see *Re Eskimos*, [1939], 2 D.L.R. 417, S.C.R. 104. I would also question the validity of the above observation that the Government of New Brunswick retained after Confederation the power "to manage and sell the lands reserved for the use of the Indians". Section 91(24) of the *B.N.A. Act* vested in the Do- minion Parliament exclusive legislative authority over "Indians, and Lands reserved for the Indians". This to my mind imports the right of management and also to provide, as has been done in every *Indian Act* of the Dominion since 1867, that no land in a Reserve may be sold unless first surrendered by the Band concerned. Thus the power of sale of its "public lands", otherwise preserved to the Province by the *B.N.A. Act*, is subject now to such restriction when part of an Indian Reserve. Such observation may not be necessary to resolving the present case, as will appear later, but I digress to make it in view of some of the submissions made by counsel in argument based on the *Burk* case.

There is still another matter to be tidied up. By c. 42 of its Statutes of 1868 the Dominion Parliament first dealt with its management of Indian Reserves. Section 32 thereof provided as follows:

"The eighty-fifth chapter of the Revised Statutes of New Brunswick [1854] respecting Indian Reserves is hereby repealed, and the Commissioners under the said chapter shall forthwith pay over all monies in their hands arising from the selling or leasing of Indian Lands or otherwise under the said chapter to the Receiver General of Canada. . . . And all Indian lands and property now vested in the said Commissioner, or other person whomsoever, for the use of the Indians, shall henceforth be vested in the Crown and shall be under the management of the Secretary of State."It is a nice question whether the Parliament of Canada had the power under s. 129 of the *B.N.A. Act* to repeal the New Brunswick Statute of 1854 in so far as the latter dealt with the survey and disposal of Indian Reserve lands in which the Province retained the proprietary title subject to the interest of the Indians, but the matter is academic now for the *St. Catherine's Mllg.* case in 1888 established that such lands upon surrender were fully the property of the Province, and they may not now be disposed of by the Province until surrender. The latter clause of the above repealing section shows, however, a misconstruction of the New Brunswick Act of 1854. It did not vest any title in the Commissioners. Further- more, if the clause purported to vest the title to Indian Reserves in the Crown in the right of Canada, it showed a misconception of the extent of the Dominion power to legislate with respect to "lands reserved for Indians". At Confederation the Richibucto Reserve was Provincial Crown land set apart for the use of the Indians, and they had a vested interest therein, as we have seen, because of the effect of the Royal Proclamation of 1763. Section 109 of the *B.N.A. Act* provided that: "All lands . . . . belonging to . . . . New Brunswick at the Union . . . . shall belong to New Brunswick . . . . subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province is the same."

The plaintiff's lot is in the southern half of a 100-acre tract of land in the Richibucto Reserve, which tract was the subject of a petition by one George Horton to the Lieutenant-Governor of New Brunswick in 1866. The petitioner stated in his petition that he was "desirous of purchasing one hundred or less acres of Crown Land on the Indian Reserve" etc., and it appears from the recommendation for "the favourable consideration of the above" endorsed at the foot of the

petition and signed by two men who were probably the Commissioners having charge of that Reserve that the tract hall been improved "by the petitioner and his father". No reference is made in the petition to the New Brunswick Statute of 1854 authorizing the sale of lots from the Indian Reserves, but the petition is described on its back as "Indian Reserve Petition No. 5097" and in all I think it may be fairly assumed that the document deals with an intended purchase and sale under that statute. The next document in the chain of title also put in evidence subsequently to the trial is a quit-claim deed dated September 22, 1866, by which George Horton sold his interest in the tract for $550 to the Hon. David Wark of Richibucto. Apparently it was Wark who completed the payments due the Crown for the tract. There are notations on the back of the petition: "All paid May, 1867"; "Ordered to proceed 29/4/68"; "12484 25/9/68". The last notation obviously refers to the New Brunswick Crown Grant given David Wark of the tract in question being grant No. 12484 under date of September 25, 1868. (This grant was ex. P-1 of the trial record, and it was the above petition and quit-claim deed that were discovered and introduced in evidence after the trial. The significance of this discovery hereafter appears.)

If the Hon. David Wark had been given his New Brunswick Crown grant promptly in May, 1867, when the payments for the tract had been completed there would be no difficulty about his title for the grant would have been clearly valid under the New Brunswick Statute of 1854. However, in the circumstances now of record I think that the difficulties raised by Confederation on July 1, 1867, can be resolved and that the grant stands as the plain- tiff's source of title. The difficulty arises from the repeal of the New Brunswick Statute of 1854 by the Canadian Parliament's c. 42 of its Acts of 1868 dealing with Indian Affairs, which came in- to force in March, 1868. The above notations on Horton's petition show that it was in April, 1868, that apparently the appropriate authorities in New Brunswick ordered that proceedings on the petition be carried out, and it was not until September, 1868, that the New Brunswick Crown grant was actually issued. Were these proceedings subsequent to March, 1868, valid? The essential element is the completion of the payments for the tract, and in view of the admissible evidence of a grant I think that it is proper to take the notation on an ancient document of payments being completed as good and sufficient evidence thereof. In that event, Wark was entitled to his grant in May, 1867, and in equity his rights were settled as of that time. When the Province went into Confederation New Brunswick held the tract in trust for him as provided generally by s. 109 of the *B.N.A. Act*. The subsequent order to proceed and the issuing of the grant by New Brunswick were merely administrative or ministerial acts which the Province was bound to carry out under the maxim that "equity looks on that as done which ought to have been done": see Hals., 3rd ed., para. 544, p. 338; Snell's Principles of Equity, 22nd ed., p. 22; *McIntyre v. Royal Trust Co.*, [1946] 1 D.L.R. 655, 53 Man. R. 353 (C.A.); *Turvey & Mercer v. Lauder* (1956), 4 D.L.R. (2d) 225 (Can. S.C.).

In short, the plaintiff's source of title was this Crown grant to Wark and it was validly made under the New Brunswick Statute of 1854 which the defendants as members of the Big Cove Band cannot impugn no matter what their interest in the Richibucto Reserve may be under any prior treaties with the Sovereign or otherwise.

There are also in evidence documents showing a chain of title from this grant to the plaintiff respecting the lot in question.I may add that there are further documents in evidence purporting to show, *inter alia*, that in 1875 the Crown in the right of Canada made a grant to Senator David Wark of this lot, and that the Big Cove Band in 1879 surrendered to the Crown in the right of Canada a number of lots in the Reserve including the one in question. The validity of that

surrender and the grant was vehemently attacked at the trial by counsel for the defendants, but it is not necessary to consider them in view of the plaintiff's title being sup- portable on other grounds as above shown. Why such surrender and grant, at least in so far as we are concerned with the lot in question, were thought necessary by those concerned at the time is now a matter of conjecture. I would venture to suspect that they were due to the view which the Dominion authorities took of their rights with respect to Indian Reserves prior to the *St. Catherine's Mllg.* case in 1888.

In the result, the plaintiff is entitled to a declaration that he is the owner in fee simple of the lot described in his statement of claim, and the defendants and their servants and agents are en- joined from trespassing or cutting timber on the said lot. The evidence does not establish that the defendants were the persons who actually cut and carried away all the pulpwood which has lately disappeared from this lot. On such evidence as there is as against the defendants I assess the damages as follows: Douglas Francis, $100; Stephen Simon, $25; Peter J. Augustine, $25. These defendants will pay the costs of the proceedings apart from those relating to the introduction of evidence subsequently to the trial. Costs respecting the latter will be borne by the plaintiff. Costs are to be taxed under Column I of the Supreme Court scale. The name of Louis Claire is stricken from the record as he was not served with the writ.

Judgment for the plaintiff.