DOMINION OF CANADA v. PROV. OF ONTARIO

[1910] A.C. 637

Judicial Committee of the Privy Council, Lord Loreburn L.C., Lord Macnaghten, Lord Atkinson, Lord Shaw of Dunfermline and Lord Mersey, 29 July 1910

(On appeal from judgment of Supreme Court of Canada, reported **sub nom. Province of Ontario v. Dominion of Canada, supra** p.221)

Law of Canada--Treaty of October 3, l873, extinguishing the Indian Interest in Lands--Payments by the Dominion under the Treaty--Suit by the Dominion against the Province of Ontario for Contribution as respects Lands within the Province.

By a treaty dated October 3, 1873, the Dominion Government, acting in the interests of the Dominion as a whole, secured to the Salteaux tribe of the Ojibewa Indians certain payments and other rights, at the time extinguishing by consent their interest over a large tract of land about 50,000 square miles in extent, the greater part of which was subsequently ascertained to lie within the boundaries of the Province of Ontario. It having been decided that the release of the Indian interest effected by the treaty enured to the benefit of Ontario, the Dominion Government sued in the Exchequer Court for a declaration that it was entitled to recover from and be paid by the Province of Ontario a proper proportion of annuities and other moneys paid and payable under the treaty:--

***Held*, affirming the judgment of the Supreme Court, that, having regard to the jurisdiction conferred upon the Exchequer Court, the action must be dismissed as unsustainable on any principle of law. In making the treaty, although it resulted in direct advantage to the province, the Dominion Government did not act as agent or trustee for the province or with its consent, or for the benefit of the lands, but with a view to great national interests--that is, for distinct and important interests of their own--in pursuance of powers derived from the British North America Act, 1867.**

***St. Catherine's Milling and Lumber Co. v. The Queen*, (1888) 14 App. Cas. 46, considered.**

Appeal by special leave from a judgment of the Supreme Court (February 12, 1909) which reversed a judgment of Burbidge J. in the Exchequer Court of Canada (March 18, 1907) and dismissed the appellant's suit.

The jurisdiction of the Exchequer Court to decide the controversy in suit between the Dominion and the province was conferred by R. S. C., 1906, c. 140, s. 32, and R. S. O., 1897, c. 49, s. 1.

By the statement of the Dominion of Canada filed in the Exchequer Court on June 13, 1903, the claimant set forth that by a treaty No. 3, known as the North West Angle Treaty, and dated October 3, 1873, between Her late Majesty Queen Victoria by her Commissioners therein named of the one part, and the Salteaux tribe of the Ojibewa Indians of the other part, the said Indians ceded, released, surrendered, and yielded up to the Government of the Dominion for Her Majesty the Queen and her successors for ever all their rights, titles, and privileges whatsoever to the lands thereinafter mentioned, such lands embracing an area of 55,000 square miles more or less, to hold the same to Her Majesty the Queen and her successors for ever. And Her Majesty the Queen thereby agreed and undertook to lay aside reserves of lands in the territories thereby ceded for the benefit of the Indians as therein mentioned, and further to give to her Indians certain presents of money, and also annually to pay to them certain annuities and to give to them certain presents and sums of money for the chiefs and subordinate officers as therein mentioned. And Her Majesty also entered into further agreements with her said Indians as therein mentioned.

The claimant also set forth that in pursuance of the treaty the Dominion had made payments to and for the benefit of the Indians in accordance with its provisions, the details of which were set out in schedules A and B to the said statement, and that the Dominion had also been obliged to make large expenditures of money in making surveys of reserves for the Indians and in conducting the necessary business of the administration of the treaty, the details of which expenditure were set forth in schedule C thereto. Also that after the admission into the Union of the Province of Manitoba in the year 1870 a dispute arose between the Dominion and the Province of Ontario as to the correct northern and western boundary of the said Province of Ontario, and that, arbitrators been appointed to determine the correct boundary, an award was made, by the effect of which out of the 55,000 square miles within the limits of the treaty about 30,000 square miles were found to be within the boundary of the Province of Ontario. Subsequently, in the year 1888, in an action brought by the Attorney-General of Ontario against the St. Catherine's Milling and Lumber Company, Limited, the Judicial Committee of the Privy Council decided that the portion of the

ceded lands found by the Court to be within Ontario formed part of the public domain of Ontario, and were public lands belonging to Ontario by virtue of the provisions of the British North America Act, and the claim that the said lands were the property of the Dominion by reason of the cession of the Indian title to the Dominion was dismissed.

The claim of the Dominion of Canada was for a declaration that (1.) inasmuch as the benefit of the aforesaid surrender accrues to Ontario, that province shall relieve the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty by virtue of the said treaty, and which have been, or may be, fulfilled by the Dominion of Canada; (2.) the Province of Ontario has held, and now holds, the portion of the ceded lands which lie within the province charged with and subject to the payment of a proportion of the annuities and other moneys paid to and for the Indians under the terms and stipulations of the treaty; (3.) the Dominion of Canada is entitled to recover from, and be paid by, the Province of Ontario a proper proportion of annuities and other moneys so paid as aforesaid; (4.) all proper accounts be taken to ascertain the amount payable to the Dominion in respect of the said annuities and other moneys so paid as aforesaid.

By its answer the Province of Ontario denied liability, and, further, counter-claimed in respect of certain revenue received by the Dominion pending a determination of the boundaries of the province and arising out of the lands eventually adjudged to belong to the province.

The judgment of the Judicial Committee in *St. Catherine's Milling and Lumber Co. v. The Queen* (1) 14 App. Cas. 46. decided that the surrender of so much of the area of 55,000 square miles as was situated in the Province of Ontario enured to transmit to the province in terms of s. 109 of the British North America Act, 1867, the entire beneficial interest in such lands, and in the course of the judgment there occurred this passage: (1) 14 App. Cas. at p. 60. "Seeing that the benefit of the surrender accrues to her, Ontario must of course relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government."

Burbidge J. by his judgment declared the province liable to pay to the Dominion all such sums paid by the Dominion as were referable to the extinguishment of the Indian title, in the proportion which the area of the treaty lands within Ontario bears to the whole treaty area. All other questions, including the question what sums of money so paid by the Dominion were referable to the extinguishment of the Indian title, were reserved for further consideration and adjudication. He considered that, with respect to that portion of the lands surrendered to the Crown which were situated within the province, "the Dominion Government occupied a position analogous to that of a bona fide possessor or purchaser of lands of which the actual title was in another person. The question of extinguishment of the Indian title in these lands could not with prudence be deferred until such boundaries were determined. It was necessary to the peace, order, and good government of the country that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiations for the treaty without consulting the province. The latter, although it claimed the lands to be surrendered or the greater part thereof, raised no objection and did not ask to be represented in such negotiations. The case bears some analogy to one in which a person in consequence of unskillful survey or in the belief that the land is his own makes improvements in lands that are not his own. In such a case the statutes of the old Province of Canada made, and those of the Province of Ontario make, provision to protect him from loss in respect of such improvements or to give him a lien therefor. The case, however, appears to me to bear a closer analogy to one in which a bona fide possessor or purchaser of real estate pays money to discharge an existing incumbrance or charge upon the estate having no notice of any infirmity in his title. In such a case, as stated by Mr. Justice Story in *Bright v. Boyd*, (1) (1841) 1 Story's Reports, 479, 498. the possessor or purchaser was according to the principles of the Roman law entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him." He also considered that the views expressed in Lord Watson's judgment (2) 14 App. Cas. 60. should be taken as a part or condition of the judgment in favour of the province, and that, although such views found no place in the formal judgment pronounced, it was proper that he should give effect to the view there expressed that the Province of Ontario was liable, to indemnify the Dominion against a portion of the expenditure incurred in discharge of the obligations created by the treaty.

The judgment on further consideration (December 4, 1907) referred it to the registrar to take certain accounts necessary to give effect to the declaration.

Both judgments were reversed by the Supreme Court by a majority of one (Idington, Maclennan, and Duff JJ., Girouard and Davies JJ. dissenting).

The judgment of the majority dealt first with the scope of the jurisdiction of the Court of

Exchequer, to which Court, by identical statutes, the Dominion and the province had committed jurisdiction over controversies between them, and held that the statutes in question required any controversy submitted under them to be determined in accordance with and by the application of legal principles, and not by considerations of mere convenience and propriety.

Idington J. held that there was no foundation in law or fact for the theory that the Dominion acted as an agent for the province, but that the Dominion was impelled to settle with the Indians by virtue of its obligations to the Province of British Columbia, and for other reasons not referable to its wardship over or duties towards such Indians; and that the pronouncement in Lord Watson's judgment in 14 App. Cas.60 was a mere dictum.

Duff J., with whose opinion Maclennan J. concurred, agreed with Idington J. as to the motives of the Dominion in making the treaty, and considered that under these circumstances there was no principle on which a Court of Equity could proceed to adjust equitably as between the Dominion and the province the burden of the obligations undertaken by the former; that Lord Watson's remark was a mere dictum, the preferable view of its import being that, upon the facts as they appeared, as a matter of fair dealing Ontario would be expected to assume the obligations in question, but that, in deciding controversies between the two Governments, the Exchequer Court could only apply some appropriate rule or principle of law, and that the pronouncement, even if more than a mere dictum, would not be conclusive of the appeal before them.

Newcombe, K. C., and *Clauson*, for the appellant, contended that the judgment of Burbidge J., whose decision was upheld by the dissenting judges in the Supreme Court, was right. The case was concluded by the authority of the principle laid down by Lord Watson's judgment in 14 App. Cas. 46. The majority of the Supreme Court recognized that the claim of the Dominion was naturally equitable, and that the province which obtained the benefits of the treaty, so far as it affected the lands in which it had the beneficial interest, should bear the burdens which the treaty imposed thereon. It was unnecessary to resort to any technical rule of law or equity as laid down by authority. It had been a public duty devolving on the Dominion to extinguish the Indian title; and it discharged that duty for the benefit of all concerned. The resulting burdens should be adjusted in proportion to the benefits accepted. It was contended that the Crown in right of the Dominion represented the union of all the provinces and that payment by the Dominion was payment by all the provinces jointly. If the sole benefit of a particular treaty provision made by the Dominion enured to the exclusive benefit of one province , the resulting liability should be borne by that province and not shared by the other provinces which did not participate in the accruing advantages. The principle invoked by the Dominion in this case was that the obligations and liability incurred to obtain the surrender of the Indian title were in effect a commutation of the burden of that title upon the lands, and as such remain a charge upon the lands. In such a case as this no distinction should be drawn between the Crown acting in right of the Dominion and the Crown acting in right of the province. If a distinction can be made, it should be held that the Dominion acted in obtaining the treaty and freeing the lands from the Indian title, so far as regards the lands situated within the province, as agent for the province. The benefits secured by the treaty passed to the province upon the acceptance by the province of the lands surrendered. By that acceptance the province accepted also the liabilities which the treaty created in respect thereof. Even if no principle of municipal law could be found applicable, the case should be governed on such principles of equity and fairness as regulate the respective rights and obligations of distinct and independent States, and by those principles a State accepting advantages under a public treaty must bear the liabilities involved thereby, thus accepting the treaty as a whole. It cannot accept such portion as is in its favour and repudiate the liability which acceptance involves and ratifies. Reference was made to the judgment of Strong C.J. in *Province of Ontario v. Dominion of Canada, In re Indian Claims* (1) (1895) 25 Can. S. C. R. 434, 505., and to *Attorney-General for the Dominion v. Attorney-General for Ontario* (2) [1897] A. C. 199, 210.; *Ontario Mining Co. v. Seybold* (3) [1903] A.C. 73.; *Johnson v. M'Intosh* (4) (1823) 8 Wheaton (21 U.S.) 543.; *Worcester v. State of Georgia* (5) (1832) 6 Peters (31 U. S.) 515.; *Mitchell v. United States.* (6) (1835) 9 Peters (34 U. S.) 711.

C. H. Ritchie, K.C., and *Shepley, K.C.*, for the respondent. were not heard.

The judgment of their Lordships was delivered by LORD LOREBURN L.C. In this appeal the only question argued was whether or not the Dominion of Canada is entitled to recover from the Province of Ontario a proper proportion of annuities and other moneys which the Dominion bound itself in the name of the Crown to pay to an Indian tribe and its chiefs under a treaty of October 3, 1873. There has been a marked difference of opinion in the Canadian Courts. Burbidge J. decided in favour of the Dominion, but on appeal to the Supreme Court of Canada three out of five learned judges reversed that judgment. The various opinions delivered in both Courts have dealt with the case so exhaustively and so clearly that nothing new really remains to be said, and the matter at issue has been reduced to a simple though extremely important point.

The treaty of 1873 was made between Her late Majesty Queen Victoria, acting on the advice of the Dominion Government, and the Salteaux tribe of the Ojibewa Indians. Its effect was to extinguish by consent the Indian interest over a large tract of land about 50,000 square miles in extent, and in return it secured to the Indians certain payments and other rights agreed to and promised by Her Majesty. At that time it had not been ascertained whether any part of this land was included within the Province of Ontario, but it is now common ground that the greater part of it lies within the Ontario boundaries. In making this treaty the Dominion Government acted upon the rights conferred by the Constitution. They were not acting in concert with the Ontario Government, but on their own responsibility, and it is conceded that the motive was not any special benefit to Ontario, but a motive of policy in the interests of the Dominion a whole.

When, however, by subsequent decisions it was established that, under the British North America Act of 1867, lands which are released from the overlying Indian interest enure to the benefit, not of the Dominion, but of the province within which they are situated, it became apparent that Ontario had derived an advantage under the treaty. And the principle sought to be enforced by the present appeal is that Ontario should recoup the Dominion for so much of the burden under- taken by the Dominion toward the Salteaux tribe as may be attributed to the lands within Ontario which had been disencumbered of the Indian interest by virtue of the treaty.

Their Lordships are of opinion that in order to succeed the appellants must bring their claim within some recognized legal principle. The Court of Exchequer, to which, by statutes both of the Dominion and the province, a jurisdiction has been committed over controversies between them, did not thereby acquire authority to determine those controversies only according to its own view of what in the circumstances might be thought fair. It may be that, in questions between a dominion comprising various provinces of which the laws are not in all respects identical on the one hand, and a particular province with laws of its own on the other hand, difficulty will arise as to the legal principle which is to be applied. Such conflicts may always arise in the case of States or provinces within a union. But the conflict is between one set of legal principles and another. In the present case it does not appear to their Lordships that the claim of the Dominion can be sustained on any principle of law that can be invoked as applicable.

To begin with, this case ought to be regarded as if what was done by the Crown in 1873 had been done by the Dominion Government, as in substance it was in fact done. The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.

So regarding it, there does not appear sufficient ground for saying that the Dominion Government in advising the treaty did so as agent for the province. They acted with a view to great national interests, in pursuance of powers derived from the Act of 1867, without the consent of the province and in the belief that the lands were not within that province. They neither had nor thought they required nor purported to act upon any authority from the Provincial Government. Again, it seems to their Lordships that the relation of trustee and cestui que trust, from which a right to indemnity might be derived, cannot, even in its widest sense, be here established. The Dominion Government were indeed, on behalf of the Crown, guardians of the Indian interest and empowered to take a surrender of it and to give equivalents in return, but in so doing they were not under any special duty to the province. And in regard to the proprietary rights in the land (apart from the Indian interest) which through the Crown endured to the benefit of the province, the Dominion Government had no share in it at all. The only thing in regard to which the Dominion could conceivably be thought trustees for the province, namely, the dealing with the Indian's interest, was a thing concerning the whole Canadian nation. In truth, the duty of the Dominion Government was not that of trustees, but that of ministers exercising their powers and their discretion for the public welfare.

Another contention was advanced on behalf of the appellants --that this is analogous to the case of a bona fide possessor or purchaser of real estate who pays money to discharge an existing incumbrance upon it without notice of an infirmity of title. It is enough to say that the Dominion Government were never in possession or purchasers of these lands, that they had, in fact, notice of the claim thereto of the true owner, though they did not credit it, and that they did not pay off the Indian incumbrance for the benefit of these lands, but for distinct and important interests of their own.

This really is a case in which expenditure independently incurred by one party for good and sufficient reasons of his own has resulted in direct advantage to another. It may be that, as a matter of fair play between the two Governments, as to which their Lordships are not called upon to express and do not express any opinion, the province ought to be liable for some part of outlay.

But in point of law, which alone is here in question, the judgment of the Supreme Court appears unexceptionable.

If the opinions of Burbidge J. and of the two dissenting judges in the Supreme Court are examined, it will be found that they rely almost entirely upon a passage in the judgment delivered by Lord Watson at this Board in the case of *St. Catherine's Milling and Lumber Co.* v. *The Queen.* (1) 14 App. Cas. 60. It must be acknowledged that this passage does give strong support to the view of those who rely upon it, and their Lordships feel themselves bound to regard this expression of opinion with the same respect that has been accorded to it by all the learned judges in Canada. They consider, however, that Idington J. and Duff J. have stated conclusive reasons against adopting the dictum alluded to as decisive of the present case. The point here raised was not either raised or argued in that case, and it is quite possible that Lord Watson did not intend to pronounce upon a legal right. If he did so intend, the passage in question must be regarded as obiter dictum.

In the course of argument a question was mooted as to the liability of the Ontario Government to carry out the provisions of the treaty so far as concerns future reservations of land for the benefit of the Indians. No such matter comes up for decision in the present case. It is not intended to forestall points of that kind which may depend upon different considerations, and, if ever they arise, will have to be discussed and decided afresh.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to costs.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondent: *Freshfields.*