The Royal Proclamation, Provincial Legislation & the Maritimes

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Introduction

In the middle decades of the 19th century all three Maritime provinces – Nova Scotia, New Brunswick, and Prince Edward Island – passed legislation arguably permitting the government to sell or lease reserve lands without first taking a surrender from the Mi'kmaq or Maliseet holding the beneficial interest in the reserve. Each of the three colonial acts provided that the proceeds of sale or lease were to be applied to the benefit of the Indians. All three colonial governments invoked the legislation to sell or lease reserve land.

These legislative enactments appear contrary to the stipulations of the *Royal Proclamation*, in particular that

i) no private person could purchase Indian land in the settled colonies of British North America;

ii) if the First Nation decided to sell or lease any part of its lands, then its interest could only be purchased by the Crown; and,

iii) the purchase had to be completed (approved) at a public meeting of the band held for that purpose by the Lieutenant Governor.[1]

Early colonial officials believed the *Royal Proclamation* did not apply in the Maritimes, despite the references to "our Colonies where, We have

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[1] Except as otherwise noticed, the text of the *Royal Proclamation* used in this paper is taken from the version appended to the decision of Madame Chief Justice McLachlin in *R.* v. *Marshall*; *R.* v. *Bernard*; 2005 SCC 43 and attached to this paper as Appendix A.

thought proper to allow Settlement".[2]

This paper raises, without resolving, questions which arise in light of the recent Supreme Court of Canada decision affirming that the *Royal Proclamation* did and does apply in the Maritime provinces.

The *Marshall – Bernard* decision and the *Royal Proclamation*

In the *Marshall* (logging)[3] and *Bernard*[4] cases, heard together in February of 2005, (decision rendered 20 July 2005);[5] Madame Chief Justice McLachlin, proceeding on the basis that the *Royal Proclamation* must be liberally interpreted and any matters of doubt resolved in favour of Aboriginal people, unequivocally stated the *Proclamation* did apply to Nova Scotia.[6] However, after finding the *Proclamation* does apply in the

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[2] See Richard Bartlett, *Indian Reserves in the Atlantic Provinces of Canada*, Saskatoon: University of Saskatchewan Native Law Centre, 1986, Studies in Aboriginal Rights No.9, pp.8-9; W.E. Daugherty, *Maritime Indian Treaties in Historical Perspective*, Ottawa: Department of Indian and Northern Affairs Canada, 1983, p.64, available online at: http://www.ainc-inac.gc.ca/pr/trts/hti/Marit/tremar_e.pdf.

[3] (2002), 203 N.S.R. (2d) 256 (NSSCAD).

[4] (2003), 262 N.B.R. (2d) 1 (NBCA).

[5] *R.* v. *Marshall*; *R.* v. *Bernard*, 2005 SCC 43.

[6] The *Royal Proclamation* joined the former French colonies of Ile St. Jean (Prince Edward Island) and Ile Royale (Cape Breton) to the colony of Nova Scotia which then included what is now New Brunswick. Prince Edward Island was separated from Nova Scotia in 1769. New Brunswick was created in 1784 and in the same year, Cape Breton was separated from mainland Nova Scotia. The Island was rejoined to Nova Scotia in 1820. Thus any reference to "Nova Scotia" in relation to *Royal Proclamation* includes what are now all three Maritime provinces.

Maritimes, the Chief Justice went on to uphold the decisions of the lower courts in Nova Scotia and New Brunswick rejecting the contention of the Mi'kmaq and Maliseet Nations that the *Royal Proclamation* reserved title in all unceded and unpurchased lands to the First Nations of the Maritimes.[7] (She also rejected the defendants' position that Governor Belcher's 1761 proclamation affirmed or awarded Aboriginal title to the Mi'kmaq.)[8] In particular, the Chief Justice stated that the text of the *Proclamation* did not support the argument that it granted the Mi'kmaq (and Maliseet) title to "all the territories of the former colony of Nova Scotia,"[9] rejecting the argument that the *Royal Proclamation* reserved Nova Scotia to the Mi'kmaq and Maliseet on five grounds.

First, she rejected the argument that the wording of the *Royal Proclamation* preamble created Mi'kmaq and Maliseet title in Nova Scotia:

> ... The text supports the Crown's argument that it did not grant the Mi'kmaq title to all the territories of the former colony of Nova Scotia
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> The first provision is the preamble to the part addressing aboriginal peoples which reads:
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> > And whereas it is just and reasonable, and essential to our Interest and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such

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[7] 2005 SCC 43, para. 85. Throughout the decision, both the Chief Justice and Mr. Justice LeBel speak only of "Mi'kmaq" title as the defendants in both cases are Mi'kmaq. However, the Court's decision presumably equally applies to the Maliseet Nation territory in what is now New Brunswick.

[8] 2005 SCC 43, paras. 97-105.

[9] 2005 SCC 43, para. 88.

> Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.
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> As part of the preamble, this does not accord new rights. When the *Royal Proclamation* directed the reservation or annexation of land it used terms of grant ("We do therefore ... declare it to be our Royal Will and Pleasure, that" or "We have thought fit, with the Advice of our Privy Council" or "We do hereby command") and referred to the specific tracts of land ("all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company").[10]

The Chief Justice then turned to the second clause of the *Proclamation* relied upon by the Mi'kmaq and Maliseet in their argument that the *Proclamation* reserved title in Nova Scotia to the Nations:

> We do therefore ... declare it to be our Royal and Will and Pleasure, that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume... to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and Northwest, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.[11]

Her Ladyship found that the phrase underlined merely repeated the wording of the preamble and did not create new rights in land. This interpretation, she stated, is confirmed "by the fact that it does not use

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[10] *R.* v. *Marshall*; *R.* v. *Bernard*, para.s 88-90. Emphasis in original.

[11] *R.* v. *Marshall...*, para. 91. Emphasis in original.

the direct and clear language used elsewhere to reserve lands to the Indians..."[12] If the Respondents' interpretation were correct she noted, then virtually the entire province of Nova Scotia would have been reserved for the Indians, and all settlers then in the province would have been forced to leave. "Yet the historical evidence suggests extensive settlement of Nova Scotia after the *Royal Proclamation*."[13]

Thirdly, she rejected the Respondents' assertion that the section of the *Proclamation* instructing that no private purchases of land from the Indians in the already settled colonies, demonstrates Aboriginal title in the Maritimes:

> The third provision of the *Royal Proclamation* upon which the respondents rely requires that "no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have through proper to allow Settlement." The respondents argue that this reinforces reservation of Nova Scotia to the Indians. This language, however, is equally consistent with referring to newly reserved lands as it is to previously reserved lands and does not definitively argue in either direction.[14]

Fourthly, the Chief Justice found that the jurisprudence, specifically *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, supported the Crown's interpretation that the *Proclamation* did not reserve lands for the Mi'kmaq and Maliseet in the Maritimes:

> In *R.* v. *Sioui*..., this Court held that "the Royal Proclamation... organized the territories recently acquired by

[12] *R.* v. *Marshall*..., para. 92.

[13] *R.* v. *Marshall*..., para. 92.

[14] *R.* v. *Marshall*..., para. 93.

> Great Britain and reserved two types of land for the Indians: that located outside the colony's territorial limits and the establishments authorized by the Crown inside the colony" (p. 1052, *per* Lamer J. (emphasis added)).[15]

Fifthly and finally, the Court found that the "historical context and purpose" of the *Proclamation* does not support the assertion that it granted Nova Scotia to the Mi'kmaq and Maliseet. The *Proclamation*, the Court stated, was part of larger discussions on the administration and management of the new lands Britain was awarded by the *Treaty of Paris*.

> In the discussions between the Board of Trade and the Privy Council about what would eventually become the *Royal Proclamation*, the imperial territories were from the beginning divided into two categories: lands to be settled and those whose settlement would be deferred. Nova Scotia was clearly land marked for settlement by the Imperial policy promoting its settlement by the "Planters", "Ulster Protestants", Scots, Loyalists and others... The Royal Proclamation sought to ensure the future security of the colonies by minimizing potential conflict between settlers and Indians by protecting existing Indian territories, treaty rights and enjoining abusive land transactions. Reserving Nova Scotia to the Indians would completely counter the planned settlement of Nova Scotia.[16]

Thus the Mi'kmaq and Maliseet people of the Maritimes are left with a number of questions beginning with:

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[15] *R.* v. *Marshall...*, para. 94.

[16] *R.* v. *Marshall...*, para. 95.

> If the *Royal Proclamation* did not affirm the Aboriginal title of the Nations in the Maritimes, but does apply in the Maritimes, which provisions apply?

Of the five reasons given by the Court in support of its decision that the *Royal Proclamation* did not grant the Mi'kmaq and Maliseet title in the Maritimes, the third reason is the most confusing for researchers and lawyers involved in specific claims work. Is the Court suggesting that as the clause may apply as easily to newly reserved as to previously reserved land, it applies only to newly reserved land, it only applies to "newly reserved land"? The Mi'kmaq of Nova Scotia and New Brunswick were awarded significant tracts of land in the 1780's under Licences of Occupation. Are these lands "newly reserved"? Richard Bartlett, when looking at the Licences of Occupation issued in the 18th century in Nova Scotia and New Brunswick argued they were granted because the government of the day did not believe the *Proclamation* applied to the Maritimes:

> ... in Atlantic Canada it was considered that the Royal Proclamation did not require treating with the Indians for the surrender of aboriginal title or the establishment of reserves. Accordingly, reserves were set apart by executive act, that is, by the issuance of licences of occupation or reservation by order in council.[17]

Although the Mi'kmaq and Maliseet Nations differ with the historical interpretation of the *Royal Proclamation* in Atlantic Canada, they do agree that Licences of Occupation *did* establish reserves and that it was the

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[17] Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada A Homeland A Study in Law and History*, Saskatoon, University of Saskatchewan Native Law Centre, 1990, 14.

intent of the government was that the licenced areas were to be Indian reserves. The Supreme Court has now settled that the *Proclamation* does apply, but has it now created a whole new quagmire: what constitutes a "newly created" reserve which will qualify for protection under the *Royal Proclamation*? The *Ross River Dena Council* v. *Canada*[18] decision on reserve creation in the Yukon provides little guidance for the Maritimes.

The clause cited — "no private Person do presume to make any purchases from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement" — is followed by:

> but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of Our Colony respectively within which they shall lie...[19]

For those more concerned with specific claims than with Aboriginal title, the question for researchers and legal counsel becomes

> If the *Royal Proclamation* does apply in the Maritimes, and while the no private Person may purchase of reserved land in the settled colonies clause is not proof that land was reserved the Mi'kmaq and Maliseet, when land *was* set aside or reserved for the Mi'kmaq or Maliseet — by whatever device

[18] [2002] 2 S.C.R. 816, 2002 SCC 54. The case is discussed below in relation to its possible application to reserve disposition.

[19] taken from the text of the *Royal Proclamation* appended to the decision of Madame Chief.

— do the provisions of the *Royal Proclamation* dealing with surrender and sale then apply?

This question has not yet been addressed by the Courts. We have no ruling on the proper interpretation of the application of the *Proclamation* and the disposal of reserve lands in the Maritimes. The position of the Mi'kmaq and Maliseet Nations, even before the ruling in *R.* v. *Marshall; R.* v. *Bernard, supra,* was and is that the *Royal Proclamation* provides that reserve lands and lands set aside for the Indians in the Maritimes may be taken from the band or Nation for whom those lands were set aside only after a meeting of the affected group, held for the purpose of approving the sale, and the lands in question may only be sold to the Crown.

In *R.* v. *Marshall; R.* v. *Bernard, supra,* the Court did not take the opportunity to avoid further confusion by stating (for example) that in its opinion, the only portions of the *Royal Proclamation* applying to the Maritimes were those which annexed Prince Edward Island and Cape Breton to Nova Scotia.[20] Instead, the Court affirmed the *Proclamation* was to be interpreted liberally and all doubts regarding its application resolved in favour of the Aboriginal people "in light of its status as the "Magna Carta" of Indian rights in North America". [21]

As the Court did not limit the application of the *Proclamation* to only

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[20] "We have alſo, with the Advice of Our Privy Council, thought fit to annex the Islands of *St. John's* and *Cape Breton* or *Isle Royale,* with the lesser Islands adjacent thereto, to Our Government of *Nova Scotia.*" Text of the *Royal Proclamation* 7 October 1763, published in Halifax, 20 January 1764, NSARM, RG1 v.346, no.2, m/f 15419.

[21] *R.* v. *Marshall...*, paras. 86-87.

those sections specifically mentioning Nova Scotia, it must be assumed that the Court intends other portions of the text of the *Proclamation* to apply to Indian rights in the Maritimes. As a "liberal interpretation" of the text of the *Royal Proclamation* did not lead to an affirmation of Mi'kmaq and Maliseet title in the Maritimes, then the Court must intend that the surrender provisions and the licenced trade[22] provisions are to apply.

That being the case, once land was reserved for the Mi'kmaq or Maliseet in the Maritimes, the surrender restrictions in the *Royal Proclamation* were triggered and the Mi'kmaq or Maliseet could not be dispossessed of their lands except in accordance with the *Proclamation*. If these provisions do not mean what the text so clearly states they mean — that Indians must consent to the sale of their lands and that the lands must be sold to the Crown — then it is rendered meaningless as a "Magna Carta" of Indian rights.

The 19th Century Legislation and the Royal Proclamation

Before Confederation, the each of the British North American colonies had its own regime regulating Indian Affairs in the province. In the Maritimes, two of the three provinces passed legislation apparently obviating the requirement to obtain the consent of the Indians prior to selling or leasing Indian lands. Thus, the Mi'kmaq and Maliseet could be dispossessed of their lands without their consent or their lands leased to non-Indians without any say over the terms of the lease. Only one province, Prince Edward Island, did not enact specific legislation varying the *Royal Proclamation's* surrender and sale requirements, although the

[22] See text of the *Royal Proclamation* appended to Madame Chief Justice's opinion.

legislation did make reference to sales of Indian lands.

Prince Edward Island

In Prince Edward Island, the first legislation regulating the conduct of Indian affairs in the province was passed in 1856.[23] Section III of the Act provided

> That the commissioners shall have and take the supervision and management of all lands that have been, are now, or may hereafter be set apart as Indian reservations, or for the use of Indians: they shall, where the same has not been previously done, ascertain and define their respective boundaries, and report to the Governor, or the Administrator of the Government, all cases of intrusion, or of the transfer or sale of such lands as aforesaid, or for the use or possession thereof by the Indians; and generally shall protect such lands from encroachment and alienation, and shall preserve them for the use of the Indians.

Four years earlier, Farm Plot 40 in Lot 15 at Cape Egmont and Farm Plots 126 and 131 in Lot 55 at Boughton River had been set aside as Indian reserve lands by provincial Order-in-Council.[24]

The lands reserved were of little use to the Mi'kmaq. Lot 15 was in the possession of Acadians. Lot 55 was poorly situated and contained few of the resources necessary to the Mi'kmaq.[25] In 1866 the Indian Commissioner recommended that reserves be sold. The Assembly agreed

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[23] S.P.E.I. 1856, c.10. Full text of the legislation in Appendix B.

[24] Gary P. Gould, and Alan J. Semple, *Our Land: The Maritimes The Basis of the Indian Claim in the Maritime Provinces of Canada*, Fredericton: Saint Annes Point Press, 1980, p.36.

[25] Report of the Indian Commissioners, 17 March 1857, *JLA PEI*, 1857, Appendix P, p.264.

and passed a resolution recommending the lands be sold the purchase monies applied to obtaining new lands for the Mi'kmaq "or otherwise, as the Government shall be advised."[26] (No lands were ever purchased to replace the lands in Lots 15 and 55.)

As the Act is silent about a "transfer or sale of such lands as aforesaid" was to be conducted, it is difficult to determine if this phrase gave authority to the Commissioners to sell Indian lands.[27] Section IV of the Act provided direction to the Commissioners on how to proceed in the case of trespasses on Indian reserve lands, but again makes no specific mention of authority to the Commissioners to sell Indian lands.

New Brunswick and Nova Scotia

In 1844 and 1859 New Brunswick and Nova Scotia respectively passed legislation empowering colonial officials to sell or lease Indian reserve lands. Both the New Brunswick and Nova Scotia legislation prescribed how the sales or leases of Indian land were to be conducted or negotiated how the proceeds of sale were to be applied. (See Appendices C and D for the full text of each of the New Brunswick and Nova Scotia Act respectively.)

For the period from 1844 in New Brunswick and from 1859 in Nova Scotia, to 1867, Mi'kmaq and Maliseet could and did find themselves stripped of their reserve lands, whether or not they wished to surrender and sell or lease the lands in question. In 1844, the New Brunswick government enacted An Act to regulate the management and disposal of

[26] Proceedings of the House, 7 May 1866, *JLA PEI*, 1866, p.90.

[27] see the preamble, ss.I and II of the Act.

the Indian Reserves in this Province.[28] The Act provided that "under the direction and superintendence of the Local Commissioners", the Lieutenant Governor could direct the sale or lease of all or part of a reserve to the highest bidder at public auction.[29] The Act did not require that the band to whom the reserve belonged first consent to that lease or sale. All that was required was that the Lieutenant Governor "by and with the advice aforesaid" consider the sale or lease of the reserve lands "expedient for the best interest of the Indians and the settlement of the country".[30] All proceeds from any sale or lease of reserve lands was to be applied (after the payment of expenses as set out in the legislation)

> to the exclusive benefit of the Indians... First, towards the relief of the indigent and infirm Indians of the several Tribes: Second, towards procuring seeds, implements of husbandry, and domestic animals...[31]

The New Brunswick government sent the legislation to London where it was ratified by Order-in-Council. It was proclaimed in force in September of 1844.[32]

The New Brunswick example was followed in 1859 by the Nova Scotian legislature.[33] Possibly because the legislation was debated and passed

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[28] S.N.B. 1844, c.47. Although the Act was passed in 1844, it was printed in 1845 statutes volume.

[29] S.N.B. 1844, c.47, s.II.

[30] S.N.B. 1844, c.47, s.II.

[31] S.N.B. 1844, c.47, s.VII.

[32] S.N.B. 1844, c.47, note at the end of the Act.

[33] An Act concerning Indian Reserves, S.N.S. 1859, c.14.

after Nova Scotia achieved responsible government, the Nova Scotian government did not seek Imperial approval of their legislative scheme for disposing of reserve land. The Nova Scotia legislation empowered the appointment of Commissioners of Indian Lands who were to protect the same for the benefit of the Mi'kmaq and to "superintend the survey, leasing, and sale thereof... and prevent trespassing on the reserves."[34] The Nova Scotian legislation limited sales to only to purchasers "who are in possession of and have made improvements upon any portion of said reserves", and only of "the land held and occupied by them, agreeably to limits to be defined by the commissioners..."[35] No purchaser was to receive a title to the land sold until the entire purchase price was received by the provincial Receiver General.[36] The purchase funds were to be held in what amounted to an interest-bearing trust account, with the interest income to be applied annually first to the relief of the poor and ill Mi'kmaq and secondly to promoting Mi'kmaq agriculture on reserve lands.[37]

Two questions arise from the sale of Mi'kmaq and Maliseet reserve lands in the 19th century: first, could colonial legislatures pass legislation regarding the disposition of Indian reserve land which contradicted the *Royal Proclamation*; and, second, were the sales valid? In other words, if the proceeds of the leases or sales of Indian reserve lands were not applied as stipulated in the legislation, then were the sales valid?

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[34] S.N.S. 1859, c.14, s.2.

[35] S.N.S. 1859, c.14, s.3.

[36] S.N.S. 1859, c.14, s.4.

[37] S.N.S. 1859, c.14, s.8.

i) Was the colonial legislation valid?

That the Crown itself has doubts about the validity of the colonial legislation was demonstrated shortly after the promulgation of the specific claims policy. In 1973, in one of the first specific claims settled, the Wagmatcook Band negotiated, settled, and received compensation for a loss of reserve lands claim, including lands sold under Nova Scotia's 1859 legislation:

> The Wagmatcook (Middle River) FN, residing near Baddeck, sought restoration of some 3,800 acres of their original reserve which were allegedly alienated without their consent in 1892. These lands were either sold under the provisions of pre-Confederation NS statutes, settled upon by non-Indians without proper authorization or sold in violation of post-Confederation Federal legislation.[38]

The granting of land is part the executive function of government, coming from the exercise of the royal prerogative. While no court in the Maritimes has ever considered the *Royal Proclamation* and its relationship with the legislation passed in New Brunswick and Nova Scotia, in *Ross River Dena Council Band* v. *Canada*,[39] the Supreme Court of Canada *did* consider the prerogative land granting authority of the Crown and legislative 'infringement' or management of that prerogative function. While LeBel, J. stated his ruling "...involves a discussion of the legal position and historical position of the Yukon and not of historical and legal developments spanning almost four centuries and concerning

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[38] See INAC, *Public Information Status Report Specific Claims Branch*, p.250. Claim no. B8260-104. Available online: http://www.ainc-inac.gc.ca/ps/clm/pis6_e.pdf.

[39] *Ross River Dena Council Band* v. *Canada*, [2002] 2 S.C.R. 816, 2002 SCC 54.

every region of Canada,"[40] his decision is useful for analysing the New Brunswick and Nova Scotian legislation in relation to reserve dispossession.

His Lordship observed that reserve *creation* was not a uniform process across this country:

> Canadian history confirms that the process of reserve creation went through many stages and reflects the outcome of a number of administrative and political experiments.
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> ...
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> In the Maritime Provinces, or in Québec, during the French regime or after the British conquest, as well as in Ontario or later in the Prairies and in British Columbia, reserves were created by various methods. The legal and political methods used to give form and existence to a reserve evolved over time. It is beyond the scope of these reasons to attempt to summarize the history of the process of reserve creation throughout Canada. Nevertheless its diversity and complexity become evident in some of the general overviews of the process which have become available from contemporary historical research.[41]

Although *Ross River Dena, supra,* dealt with the reserve creation, not reserve disposition, it may provide guidance for determining the legitimacy the 19th century Maritime legislation regulating the lease and sale of reserve land. Does the *Royal Proclamation* override these statutory enactments and thus voiding any grant or lease made without the consent of the Indians or do the statutory enactments override the *Royal Proclamation*?

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[40] See *Ross River...*, para.41.

[41] *Ross River Dena*, paras. 43-44.

Among other issues, Mr. Justice LeBel examined the royal prerogative and reserve creation, finding that

> ...in my view, the royal prerogative means "the powers and privileges accorded by the common law to the Crown"... The royal prerogative is confined to executive governmental powers, whether federal or provincial. The extent of its authority can be abolished or limited by statute: "once a statute has occupied the ground formerly occupied by the prerogative, the Crown [has to] comply the terms of the statute"... In summary, then, as statute law expands and encroaches upon the purview of the royal prerogative, to that extent the royal prerogative contracts. However, this displacement occurs only to the extent that the statute does so explicitly or by necessary implication.[42]

Thus, in the opinion of the Supreme Court, the royal prerogative may be infringed upon, regulated, overridden, or contracted by the will of the elected legislature as expressed in legislation. In the case of royal prerogative as expressed in the *Royal Proclamation*, this means that a legislative body could vary the terms of the *Royal Proclamation*.

In the case of Prince Edward Island, nothing in the 1856 statute appears to have displaced the terms and conditions of the *Royal Proclamation* either "explicitly or by necessary implication". The Act does not expressly contradict the requirement that the Mi'kmaq be called together to vote on whether or not to sell their lands to the Crown. It simply provided that the Commissioners of Indian Affairs were to undertake the supervision and management of all reserve lands in the province and report to the Lieutenant Governor on the transfer or sale of Indian reserve lands.[43] Thus, logically, if the Act made no provision for the mechanics of the sale

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[42] *Ross River Dena*, para. 54.

[43] S.P.E.I. 1856, c.10, s.III.

of Indian lands in the province, then the provisions of the *Royal Proclamation* regulating the sale of Indian lands remained in effect. In this case, no surrender meetings were held prior to the sale of the Lots 15 and 55 land. The Mi'kmaq of PEI were not consulted prior to the sale of their lands nor is there any indication that they ever agreed to the sale of their land. Therefore, it appears that these sales were invalid. Further, as there is no record of replacement lands ever being purchased for the Mi'kmaq with the proceeds of sale, the government violated the resolution approving the sale passed by the House of Assembly.

Neither the New Brunswick and Nova Scotia legislation make reference to obtaining the consent of the Mi'kmaq or Maliseet prior to offering any of their land for lease or sale. The *Royal Proclamation* clearly states that where lands have been reserved for the Indians, those lands may only be purchased by the Crown *after* a public meeting of the First Nation owning the beneficial interest in the land — which meeting was to be held specifically for the purpose of deciding whether or not to surrender the lands. Neither enactment expressly stated that the provisions of the *Royal Proclamation* with regard to the sale of Indian lands were to no longer to apply and neither statute contained any provision amending, supplementing or contradicting the *Royal Proclamation's* surrender meeting stipulation. Without an express provision varying the royal instructions in the *Proclamation*, the question then becomes determining whether or not the surrender provisions were overridden by "necessary implication".

It might be argued that as the legislation is silent about the need for a surrender meeting prior offering reserve lands for sale, then the requirement was not overridden by the colonial enactments. Thus before

the Local Commissioners in New Brunswick or the Commissioner of Indian Lands in Nova Scotia could offer reserve lands for sale, they had to obtain the consent of the band prior to offering the land for sale. It was *not* a necessary implication of either Act that the surrender provisions of the *Royal Proclamation* were waived or ousted. Insofar as the Acts did not explicitly state that the surrender provisions were no longer of force and effect, then any sale or lease effected under either provincial statute could only be undertaken after meeting the surrender requirements of the *Royal Proclamation.*

The situation in New Brunswick is made the murkier by the Imperial Order-in-Council ratifying the legislation. As it does not appear that the British Crown queried the place of the *Royal Proclamation* in the new regulatory regime, does this indicate that the Crown approved the legislative scheme which apparently does not include surrenders prior to sale?

Finally, there remains the question of the Crown's fiduciary obligations and whether or not the 19th century Maritime legislation met those obligations. As Mr. Justice LeBel noted

> It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights...[44]

If true for reserve creation, then Mr. Justice LeBel's observations must be

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[44] *Ross River Dena*, para.68.

equally true for reserve disposition. The preamble of the New Brunswick legislation clearly states the intent of the Act: to open up New Brunswick for settlement by colonists.[45]

> 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 a footing as to render them not only beneficial to the Indians but conducive to the settlement of the Country[46]

The reserved areas in New Brunswick were significant. For example, a 1783 Licence of Occupation provided 20,000 acres (8094 hectares) for the Mi'kmaq. 51,000 acres (20,720.36 hectares) were set aside on the Richibucto River in 1788. Land from the Tobique Rock (now underwater) on the Tobique River across the breadth of New Brunswick to the Restigouche River was reserved for the Maliseet. Reserves on the Buctouche River, the Little South West Miramichi River, the North West Miramichi and Little Sevogle Rivers were measured in miles, not acres. The New Brunswick government saw these reserves as a barrier to agricultural settlement and lumbering in the province.[47] This appears to have little to do with the Crown's fiduciary duties to the Mi'kmaq and Maliseet of the province.

While the Nova Scotian legislation is silent on its purpose, the legislation

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[45] S.N.B. 1844, c.47, preamble.

[46] S.N.B. 1844, c.47, preamble.

[47] See chapter 7, pp.98-112, L.F.S. Upton, *Micmacs and Colonists Indian-White Relations in the Maritimes 1713-1867*, Vancouver: UBC Press, 1979.

was, in effect, an acknowledgment of defeat. For years, the settlers had been encroaching on reserve lands, especially in Cape Breton. Thousands of acres were lost to the use and benefit of the Mi'kmaq. The 1859 legislation empowered the Commissioner of Crown Lands, who was also the Commissioner of Indian Lands, to sell or lease the reserve lands already encroached upon and settled and improved by trespassers to those trespassers.[48] The government had neither the will nor the means to forcibly eject the adverse possessors. By forcing the trespassers to either pay for the land they had usurped or face ejectment, it was felt some benefit at least would flow to the Mi'kmaq. Again, the legislative purpose appears to have more to do with satisfying the demands of settlers than with ensuring the Crown met its fiduciary duties to the Mi'kmaq of Nova Scotia.

As the purposes of both the New Brunswick and Nova Scotia legislation were at least as much to foster colonization and agricultural settlement by white settlers as protecting the First Nations of the region, did either piece of legislation meet the Crown's fiduciary obligations to the Mi'kmaq and Maliseet?

ii) Were the sales and leases effected under the legislation valid?

As the honour of the Crown is always at stake in any of its dealings with the First Nations and other Aboriginal people of Canada, the Crown must ensure that it meets its fiduciary obligations with respect to the First Nations. In both Nova Scotia and New Brunswick, active specific claims are challenging sales made under the pre-Confederation legislation. In

[48] For an examination of Indian Affairs in Nova Scotia and squatters on reserve land in Nova Scotia see chapter 6, particularly pp.87, 95-96, in L.F.S. Upton, *Micmacs and Colonists*, *supra*.

Prince Edward Island, the Mi'kmaq Confederacy of Prince Edward Island is investigating the potential specific claims of the Lennox Island and Abegweit Bands in relation to lost reserve land in the province.

Assuming that the New Brunswick and Nova Scotia legislation is valid, that the *Royal Proclamation* as a manifestation of royal prerogative was entirely overridden and that surrenders were not necessary, the sales effected under the legislation might still be invalid. Both provincial statutes stipulated how purchase monies were to be collected, how they were to be held by the provincial treasuries, and how funds were to be expended. In both provinces, questions have arisen about the proceeds of the land sales and leases of reserve lands.

In Nova Scotia, the Waycobah Band is seeking the return of thousands of acres of reserve land "sold" between 1859 and the early 1870's. Researchers for both the Band and the Department are valiantly trying to untangle the accounts of purchase monies received – or not received. Apparently, the Commissioner of Crown Lands, who was also the Commissioner of Indian Lands, authorized what might best be described as "hire purchase" sales of reserve lands. Purchasers were permitted to pay over time for their lands. Many (apparently) never paid the full purchase price for their lands. Sales, therefore, were incomplete. Other claims involving sales of reserve land pursuant to the 1859 legislation are either in research or are part of discussions with Indian Affairs.[49]

[49] The Waycobah claim, first filed in 1980 is now with the Department of Justice. See: INAC, *Public Information Status Report Specific Claims*, available at: http://www.ainc-inac.gc.ca/ps/clm/pis6_e.pdf. The Confederacy of Mainland Mi'kmaq is collecting information on the sales of Shinimacas reserve land and the Acadia Band is discussing the sale of the Roseway River lands with Indian Affairs.

The account statements for each of the parcels of reserve land sold by the provincial government are incomplete at best and incomprehensible at worst. None of the accounts kept by either the Commissioner of Indian Affairs, nor those of the Receiver General appear to show that the purchase monies received were actually expended as stipulated by the Act concerning Indian Reserves.[50]

In New Brunswick, the situation was scarcely better. A legal opinion has been signed by the Department of Justice in the Metepenagiag Mi'kmaq Nation's assertions that sales of Red Bank Reserve lands under the 1844 legislation were illegal. INAC has prepared a counter-research report in the Tobique First Nation's claim that seven lots in the Tobique Reserve were sold by the New Brunswick government, contrary to the Royal Proclamation and contrary to the Crown's fiduciary duty owed to Indian persons in the disposition of reserve lands as the sales were made pursuant to the 1844 statute.[51]

Conclusion

The Supreme Court of Canada has clearly stated that the *Royal Proclamation* applies in the Maritime provinces. While the Court found that the *Proclamation* did not ground or give the Mi'kmaq and Maliseet title in the region, some portion of the *Proclamation* must have some force

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[50] Some of the account "statements" were forwarded to Ottawa and now form part of the RG10 collection (NAC RG10 vols.459-461). Others are found at the Nova Scotia Archives and Records Management and still others seem to have made their way to the files of the provincial Attorney General.

[51] See INAC, *Public Information Status Report Specific Claims*, New Brunswick, available at: http://www.ainc-inac.gc.ca/ps/clm/pis4_e.pdf.

and effect if it applies in the Maritimes. Surely if the Court intended that the only portion of the *Royal Proclamation* to apply in the region was that adding Prince Edward Island and Cape Breton to the province of Nova Scotia, then it would have clearly and explicitly so stated — particularly as the *Royal Proclamation* "must be interpreted liberally, and any matters of doubt resolved in favour of aboriginal peoples."[52]

It is the position of the Mi'kmaq and Maliseet Nations that the surrender provisions of the *Royal Proclamation* applied and apply to the Maritime provinces. No reserve land could be sold to private parties. Only the Crown could purchase reserve lands, and only after the band or bands holding the beneficial interest in the reserve at a general meeting called for that purpose consented to the sale or lease of their lands. If, as the Mi'kmaq and Maliseet people assert, the surrender provisions applied in the Maritimes, did the legislation passed in the 19th century by each of the provincial governments obviate the need for a surrender prior to sale or lease of reserve lands?

It is clear that the Supreme Court of Canada has accepted that an elected legislative body could and can encroach upon the jurisdiction traditionally part of the royal prerogative, including the administration of Crown lands. In the context of the *Royal Proclamation* provisions requiring that Indian lands be surrendered to the Crown, a colonial legislative assembly might have had the authority to override or amend the *Royal Proclamation*. However, as stated by Mr. Justice LeBel, "this displacement occurs only to the extent the statute does so explicitly or by

[52] *R.* v. *Marshall; R.* v. *Bernard, supra,* para. 86.

necessary implication."[53] The 1856 Prince Edward Island legislation was absolutely silent on the procedure for selling or leasing Indian reserve land. As there was no explicit repeal of the surrender instructions in the *Royal Proclamation*, and as it was not "necessary" that the instructions be voided to accomplish a sale of reserve land, it can be argued that the surrender provisions of the *Royal Proclamation* remained in full force and effect on the Island. Therefore, the sales of the Indian reserve lands in Lots 15 and 55 are invalid and void *ab initio* as no surrenders were ever taken from the Mi'kmaq of PEI.

Both New Brunswick and Nova Scotia did pass legislation which can be construed as overriding the surrender provisions of the *Royal Proclamation*. Neither statute explicitly states that reserve lands could be sold or leased by the government without the necessity of first taking a surrender. It must determined whether or not it was a "necessary implication" for the operation of the statutes that the surrender provisions of the *Royal Proclamation* be nullified? It can be argued that no, either government could have ensured that the band or bands owning the reserve land first agree to surrender their interest prior to invoking the statutory mechanics for the sale or lease of reserve land and thus the 1844 and 1859 legislation did not entirely vacate the royal prerogative with regard to Crown lands set aside as Indian reserves.

In the alternative, if the New Brunswick and Nova Scotia legislation did entirely subsume the royal prerogative and the surrender and sale instructions set out in the *Royal Proclamation*, thus nullifying the need for a prior surrender before selling or leasing reserve land; to satisfy the

[53] *Ross River Dena, supra*, para. 54.

honour of the Crown and to meet its fiduciary duties to the First Nations of the provinces, the colonial governments were obligated to strictly follow the statutory instructions regarding the collection, management and dispersal of the proceeds of sale. Based on the documentary evidence from both provinces, it does not appear that either New Brunswick or Nova Scotia met their respective statutory duties. Thus, any sale or lease of Indian reserve land under the statute may be null and void and the lands purportedly sold or leased remain Indian reserve land.

The real purpose of the 1844 legislation was to strip the Mi'kmaq and Maliseet of New Brunswick of significant portions of their reserve lands to permit settlement by white colonists and farmers. The Nova Scotia legislature passed its 1859 Act permitting the sale and lease of reserve lands because it did not have the political will to enforce the boundaries of the reserves, particularly in Cape Breton, and it was unwilling to forcibly eject the trespassers on the reserves. Instead, it determined that it would sell to those trespassers the land they were illegally occupying. In neither case did the purpose of the legislative enactments meet the fiduciary duties of the colonial governments nor did the legislation in any way uphold the honour of the Crown. Even if the two Acts *did* override the *Royal Proclamation*; because they failed to meet the standard of behaviour expected of the governments, each sale or lease under the statutes have created outstanding lawful obligations of the Crown — despite their 'validity'.

Finally, each Act contained express instructions for the collection, management and dispersal of proceeds from the sales and leases. Although the record is, (or perhaps because), so confused and unclear, it

is virtually impossible to determine if all purchase monies were ever collected from the purchasers and lessees. If the statutory provisions were not followed in full, then each and every sale or lease is invalid and the Crown has outstanding lawful obligations accruing from these purported sales and leases.

This paper can only raise questions about the operation of the *Royal Proclamation* in the Maritimes and its relation to the 19th century legislation. A clear policy statement from the Crown about its approach to the 19th century legislation or a directive from the Supreme Court of Canada on its application and relationship to the *Royal Proclamation*, is necessary to answer the questions raised.

APPENDIX A

Appendix to decision of Madame Chief Justice McLachlin in *R.* v. *Marshall*; *R.* v. *Bernard*, 2005 SCC 45

Royal Proclamation (1763)

Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to our Crown by the late Definitive Treaty of Peace, concluded at Paris, the 10th Day of February last; and beings desirous that all Our loving Subjects, as well of our Kingdoms as of our Colonies in America, may avail themselves with all convenient Speed, of the great Benefits and Advantages which must accrue therefrom to their Commerce, Manufactures, and Navigation, We have thought fit, with the Advice of our Privy Council, to issue this our Royal Proclamation, hereby to publish and declare to all our loving Subjects, that we have, with the Advice of our said Privy Council, granted our Letters Patent under our Great Seal of Great Britain, to erect, within the Countries and Islands ceded and confirmed to Us by the said Treaty, Four distinct and separate Governments, stiled and called by the Names of Quebec, East Florida, West Florida and Grenada, and limited and bounded as follows, viz.

...

We have also, with the Advice of Our Privy Council, thought fit to annex the Islands of St. John's, and Cape Breton or Isle Royale, with the lesser Islands adjacent thereto, to Our Government of Nova Scotia.

...

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. We do therefore, with the Advice of our Privy Council, declare it to be our

Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and NorthWest, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be our Royal Will and Pleasure, for the present as aforesaid to reserve under our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid.

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial Leave and Licence for that Purpose first obtained.

And, We do further strictly enjoin and require all Persons whatever, who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests,

and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of Our Colony respectively within which they shall lie: and in case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the Name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose; And we do by the Advice of Our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever provided that every Person who may incline to trade with the said Indians do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:

And we do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in Case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

And We do further expressly enjoin and require all Officers whatever, as

well Military as those Employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charged with Treasons, Misprisions of Treason, Murders, or other Felonies or Misdemeanours, shall fly from Justice, and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed of which they stand accused, in order to take their Trial for the same.

until the same, or a memorial thereof, shall be duly registered in the proper office for the registry of deeds in this Island.

IV. And whereas it is uncertain, whether an Act passed by the General Assembly of this Island, in the fifty-ninth year of the reign of King George the Third, intituled "An Act for barring estates tail," ever received the royal allowance, whence doubts have arisen as to the validity of all titles that have been or have been intended to have been converted into estates in fee simple, under and by virtue of the provisions contained in the said last herein recited Act; for remedy whereof: Be it declared and enacted, that all estates tail, or in reversion or remainder, that have been or have been intended to have been barred, or defeated, or enlarged into estates in fee simple, and every act, matter and thing whatsoever had, made, done or executed, under and by virtue of the provisions of the said last hereinbefore recited Act, are declared to be as valid and effectual, to all intents and purposes, as if the said recited Act had received the royal allowance.

Enacts that all acts done under 59 G. 3, c. 9, shall be valid, &c.

V. This Act shall not go into operation, nor be of any force or effect, until Her Majesty's assent thereto shall be known, and notification thereof published in the *Royal Gazette* newspaper of this Island.

Suspending clause.

*** This Act received the royal allowance on the 22d day of October, 1856, and notification thereof was published in the *Royal Gazette* newspaper of this Island, on the 27th November, 1856.

CAP. X.

An Act relating to the Indians of Prince Edward Island.

[Passed April 14, 1856.]

WHEREAS it is found necessary and expedient, in order to protect the Indians in the possession of any lands now belonging to them, or which may hereafter be granted or given to them, or any of them, that commissioners be appointed to take the supervision and management thereof:

I. Be it enacted, by the Lieutenant Governor, Council and Assembly, that immediately after the passing of this Act, it shall and may be lawful for His Excellency the Lieutenant Governor in Council to appoint commissioners for Indian affairs, and from time to time to fill up vacancies occurring from death, resignation or otherwise.

Lt. Governor in Council authorised to appoint commissioners for Indian affairs, &c.

II. That the Governor in Council may, from time to time, issue instructions to the commissioner or commissioners, for their guidance.

Instructions to be issued to commissioners.

III. That the commissioners shall have and take the supervision and management of all lands that have been, are now, or may hereafter be set apart as Indian reservations, or for the use of Indians: they shall, where the same has not been previously done, ascertain and define their respective boundaries, and report to the Governor, or the Administrator of the Government, all cases of intrusion, or of the transfer or sale of such lands as aforesaid, or for the use or possession thereof by the Indians; and generally shall protect such lands from encroachment and alienation, and shall preserve them for the use of the Indians. Duties of commissioners.

IV. In all cases of encroachment or tresspass upon any such lands, where the damage or injury committed shall not exceed the sum of five pounds, it shall be lawful to proceed, by information, in the name of Her Majesty, before any one or more of Her Majesty's Justices of the Peace for the County; and where the damage or injury committed shall exceed the sum of five pounds, then such information shall be proceeded with in the Supreme Court, notwithstanding the legal title to the land may not be vested in the Crown. Actions for encroachment, &c., on Indian lands, how and where prosecuted.

V. The commissioners shall, when practicable, communicate with any chief or chiefs of the resident Indians, and explain the wishes of the Governor, and invite his or their co-operation in the permanent settlement and instruction of their people; and shall parcel out a portion of the reservations to each family, where the same has not been previously done, with such limited power of alienation or exchange as may be authorized by the Lieutenant Governor; and also shall aid them in the purchase of implements and stock, with such assistance as they may deserve; and generally shall take such other measures as may seem necessary to carry out the object of this Act, with the approval of the Lieutenant Governor. Further duties of commissioners.

VI. The commissioners shall, at the close of every year, furnish the Lieutenant Governor, for the information of the Legislature, with reports of their proceedings, and an account of their receipts and expenditure, with the numbers of heads of families settled and children educated; and generally such other information, as may enable the Lieutenant Governor and Legislature to judge of the value and correctness of their proceedings. Commissioners to report yearly to Lt. Governor, &c.

CAP. XI.

An Act to amend the Act incorporating the Bank of Prince Edward Island. 18 Vic. c. 10.

☞ This Act remains in force, but has been printed in the volume of private and local Acts, pursuant to directions of Act 24 Vic. c. 8.

ACTS

OF

THE GENERAL ASSEMBLY

OF

HER MAJESTY'S PROVINCE

OF

NEW BRUNSWICK,

PASSED IN THE YEAR

1845.

FREDERICTON:

PRINTED BY JOHN SIMPSON, PRINTER TO THE QUEEN'S MOST EXCELLENT MAJESTY.

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CAP. XLVII.

An Act to regulate the management and disposal of the Indian Reserves in this Province.

Passed 13th April 1844.

Preamble.

'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 a footing as to render them not only beneficial to the Indians but conducive to the settlement of the Country;'

Surveys of the Indian Reserves authorized.

I. Be it enacted by His Excellency the Lieutenant Governor, Legislative Council and Assembly, That from and after the passing of this Act it shall and may be lawful for His Excellency the Lieutenant Governor or person administering the Government for the time being, by and with the advice of Her Majesty's Executive Council, from time to time to cause surveys to be made of the Indian Reserves in the respective Counties of this Province where such Reserves are situate, or of such portion or parts thereof as His Excellency the Lieutenant Governor, by and with the advice aforesaid, may deem expedient, such surveys to distinguish the improved from the unimproved lands in the respective Reserves, and the green forests from the burnt lands, and the lands fit for settlement from those unfit for that purpose, with such other information as His Excellency the Lieutenant Governor may deem it desirable to obtain.

Any part of these Reserves may be sold or leased at Auction.

II. And be it enacted, That it shall and may be lawful for His Excellency the Lieutenant Governor or person administering the Government for the time being, by and with the advice aforesaid, to cause such Indian Reserves or any part or parts thereof, under the direction and superintendence of the Local Commissioners to be appointed under the provisions of this Act, to be leased or sold to the highest bidder by Public Auction, in the Shire Town of the County wherein such Reserves are situate, giving sixty days previous notice thereof in the Royal Gazette, and by posting hand bills in three of the most public places in the County where such Reserves are situate, upon such terms and conditions, and in case of leases subject to such reserved rent, and for such term not exceeding fifty years, as His Excellency the Lieutenant Governor, by and with the advice aforesaid, may deem expedient for the best interest of the Indians and the settlement of the Country.

Commissioners for Indian interests to be appointed.

III. And be it enacted, The better to carry into effect the object of this Act, it shall and may be lawful for His Excellency the Lieutenant Governor or person administering the Government, by and with the advice aforesaid, to appoint one or more Commissioners, not exceeding three for each County in which such Reserves are situate, for the purpose of looking after the Reserves in their respective

respective Counties, and superintending the survey and sale thereof, or such part or parts thereof as may from time to time be directed by the Lieutenant Governor to be sold under the provisions of this Act, and also to look after the interest of the Indians generally of the Counties in which such Reserves are situate, and to prevent trespassing thereon.

Commissioners to execute services required by this Act, keep Accounts, and make semi-annual Returns.

IV. And be it enacted, That it shall be the duty of the said Commissioners of the respective Counties, and they are hereby required well and faithfully to attend to and execute the services required of them under the provisions of this Act, and to keep a regular and correct account of all the lands leased and sold under their supervision, and the proceeds of such sales and leases, and all other monies coming into their hands under the provisions or any of the provisions of this Act for behoof of the Indians, whether from the proceeds of such sales and leases, or from the rents, issues and profits of such Reserves, or from any other source, and to make semi-annual returns of their doings, receipts and expenditures under oath, with the necessary vouchers, to His Excellency the Lieutenant Governor.

Monies arising from sales or leases to be paid to the Commissioners, and by them to the Treasurer, minus Commission and expenses.

V. And be it enacted, That all the monies arising or that shall arise from the sales and leases of the Indian Reserves in the respective Counties, together with the rents, issues and profits of such Reserves, shall be paid into the hands of the local Commissioner or Commissioners of the County, who are hereby required to receive the same, and to pay over such monies semi-annually into the hands of the Provincial Treasurer, less a Commission of five per centum on all such monies received and paid by them for their trouble, and also less the costs of survey and other necessary expenses incurred in and about the carrying out the provisions of this Act.

Treasurer to keep a separate account of such monies.

VI. And be it enacted, That it shall be the duty of the said Treasurer, and he is hereby required to keep a distinct and separate account of all monies so paid into his hands by such Commissioners, shewing the amount received from each County.

Monies to be appropriated exclusively for the benefit of the Indians.

VII. And be it enacted, That the monies annually arising from the sale and leasing of the said Reserves, and also from the rents, issues and profits thereof, after payment of expenses aforesaid, shall be applied to the exclusive benefit of the Indians, having regard as far as practicable to applying the proceeds of the several Reserves in accordance with the terms in which such Reserves have been made, in the following manner, viz:—First, towards the relief of the indigent and infirm Indians of the several Tribes: Second, towards procuring seeds, implements of husbandry, and domestic animals, in such manner and proportion as His Excellency the Lieutenant Governor shall direct; which money shall be drawn from the Treasury by Warrant under the hand and seal of His Excellency the Lieutenant Governor, in favor of the local Commissioner or Commissioners, as required for the purposes aforesaid: Provided always, that the amount to be annually drawn from the Treasury of these monies, shall not exceed the amount of the rent, issues and profits realized from the Reserves the preceding year, and the annual interest of the purchase money of the lands sold and placed in the hands of the Treasurer, under the provisions of this Act.

Monies paid to the Treasurer to bear Interest.

VIII. And be it enacted, That all the monies so paid into the hands of the Treasurer shall be on Interest from one month after they are so paid into the Treasurer's hands until they are again paid out, which Interest shall be provided for by an annual grant of the Legislature.

Improvements made by persons in possession of Land to be protected in sales or leases.

IX. And be it enacted, That in the leasing, sale and disposal of the Indian lands or portions thereof, due regard shall in all cases be had to the improvements made by the person or persons who may be in possession of the lands to be

be sold, whether under sale or lease from the Indians or otherwise, so as to secure to the person or persons who shall have made such improvements, a fair and just remuneration for the same.

Lands may be laid off in Villages or Town Plots and Grants made to Indians.

X. And be it enacted, That it shall and may be lawful for the local Commissioners, or the major part of them, under the direction of His Excellency the Lieutenant Governor, to lay off any Tract or Tracts of the Indian Reserves, or any part or parts of the same, into Villages or Town Plots for the exclusive benefit of the Indians of the County in which such Town Plot shall be situate, and to apportion such Villages or Town Plots into allotments of not more than fifty nor less than five acres, Location Tickets of which shall be granted from time to time by His Excellency the Lieutenant Governor to such Indians as His Excellency may deem fit objects for such exclusive appropriations, and to any or all of whom it shall and may be lawful for His Excellency the Lieutenant Governor, by and with the advice aforesaid, to make absolute Grants after the Indians to whom such Location Tickets have issued shall have resided upon and improved the same for a period of not less than ten years.

Grants to be free of expense.

XI. And be it enacted, That all Grants and Location Tickets made under the provisions of this Act shall issue to the parties free of expense.

An advance of £150 from the Treasury authorized to carry on the Surveys.

XII. And be it enacted, That in order to cause proper surveys to be made, and otherwise to carry into effect the provisions of this Act, it shall and may be lawful for His Excellency the Lieutenant Governor or Administrator of the Government, to draw by Warrant from the Treasury a sum not exceeding one hundred and fifty pounds, to be refunded to the Treasury from the proceeds of the Indian Lands.

Suspending clause.

XIII. And be it enacted, That this Act shall not come into operation until Her Majesty's Royal approbation shall be thereunto first had and declared.

[*This Act was finally enacted, ratified and confirmed by Order of Her Majesty in Council, dated 3d September*, 1844, *and published and declared in the Province on the 25th day of September*, 1844.]

CAP. XLVIII.

An Act to enable Her Majesty's Government to carry into effect within the Province the provisions of the Fourth Article of the Treaty of Washington.

Passed 13th April 1844.

Preamble.

'WHEREAS by the Fourth Article of the Treaty of Washington made and entered into between Her Most Gracious Majesty and the United States of America, it is stipulated "That all Grants of Land made by either party within the Territory which by Treaty falls within the Dominions of the other party, shall be held valid, ratified and confirmed to the persons in possession under such Grants, to the same extent as if such Territory had by this Treaty fallen within the Dominion of the party by whom such Grants were made; and all equitable possessory claims arising from a possession and improvement of any Lot or Parcel of Land by the person actually in possession, or by those under whom such person claims, for more than six years before the date of such Treaty, shall in like manner be deemed valid, and be confirmed and quieted by a release to the person entitled thereto, of the title of such Lot or parcel of Land so described as best to include the improvements made thereon; and in all other respects the two contracting parties agree to deal upon the most liberal principles of equity with the Settlers actually dwelling on the Territory falling to them respectively, which has heretofore been in dispute between them:

And

APPENDIX D

CHAPTER 14.

An Act concerning Indian Reserves.

(Passed the 30th day of March, A. D. 1859.)

SECTION.
1. Surveys, How made—Nature of.
2. Commissioners—Powers, duties of, &c.
3. Commissioners under direction of Governor and Council may sell or lease lands—Such increase of authority to be discretionary.
4. Application of proceeds and rents, &c.
5. Costs of survey, &c., how paid.
6. Separate acct. to be kept by Receiver General.
7. Proceeds of sale to bear interest, chargeable on gen. revenue.
8. Interest how applied—How drawn—Amount.
9. Costs of surveys to be paid out of treasury, and refunded from proceeds of Indian lands.
10. Entry upon Indian reserves after passing of act to disqualify parties entering from recovering grants of them, Party entering how removed.
11. Proceedings on removal.
12. Appeal.

Be it enacted by the Governor, Council, and Assembly, as follows:

How surveys made. Nature of.

1. The Governor in Council may authorise surveys, plans, reports and reports to be made of lands reserved for the benefit of Indians, shewing and distinguishing the improved lands—the forests and lands fit for settlement—the intrusions and their nature and circumstances, and such other information as may be required.

Commissioners, their powers, duties of, &c.

2. The Governor in Council may appoint commissioners for such lands, who shall protect the same for the benefit of the Indians, superintend the survey, leasing, and sale thereof when ordered under the provisions of this act, take charge of the interests of the Indians generally within their respective limits, promote the settlement of the Indians, and prevent trespassing on the reserves.

Commissioners under direction of Governor and Council may sell or lease.

3. The commissioners, under the direction and subject to the approval of the Governor in Council, may agree with parties who are in possession of and have made improvements upon any portion of said reserves within their respective counties, either to lease or to sell to them the land held and occupied by them, agreeably to limits to be defined by the commissioners, for such rent or consideration money as they may consider reasonable and just, and upon their report, approved by the Governor in Council, the Commissioner of Crown Lands is authorised to execute the necessary conveyances to them, the proceeds of such sale and the rents arising under the leases to be paid and applied as hereinafter provided. The increase of the authority hereby granted shall be discretionary with the commissioners and the Governor in Council according to each particular case, and in such cases of intrusion as are not deemed to justify the selling or leasing of the lands settled upon to the intruders, or in cases when an agreement cannot be entered into with them, it shall be the duty of the commissioners to take prompt measures for the removal of the intruders or occupants, and for applying the lands for the benefit of the Indians.

Such increase of authority to be discretionary.

Application of proceeds and rents, &c.

4. The proceeds arising from the sale of such lands shall be paid by the purchasers to the Receiver General, and no conveyance shall be executed by the Commissioner of Crown Lands until the receipt of the Receiver General for the purchase money has been lodged with him. The rents and profits arising from leases of the said lands, or otherwise, shall be collected by the local commissioners, who shall semi-annually pay the same over to the Receiver General.

Costs of survey, &c., how paid.

5. The costs of survey and other unavoidable expenses shall be paid by the Receiver General from the proceeds of sale or the rents and profits of such lands, after the accounts thereof shall be approved by the Commissioner of Crown Lands and audited by the Financial Secretary.

Separate acct. to be kept by Rec. Gen.

6. The Receiver General shall keep a separate account of all monies received and paid by him on account of the said lands or their sales or rents and profits.

Proceeds of sale to bear interest chargeable on genl. revenue.

7. All monies paid into the hands of the Receiver General for the sale of Indian lands shall bear interest at six per cent., which interest shall be chargeable on the general revenues.

Interest, how applied.

8. The interest annually arising from the sales and the rents and profits aforesaid, deducting expenses, shall be applied to the exclusive benefit of the Indians:

First, for the relief of indigent and infirm Indians.

Second, in promoting their settlement on the reserved lands, and in procuring seed, implements of husbandry, and domestic animals, as the Governor may direct.

How drawn. Amount.

The money shall be drawn from the treasury by warrant in favor of the local commissioners as required; the amount annually to be drawn shall not exceed the amount of the rents and profits realized from the reserves the preceding year, and the annual interest of the purchase money of the lands sold and paid into the Treasury.

Costs of surveys to be paid out of treasury, and refunded from proceeds of Indian lands.

9. To provide for the surveys and the carrying the provisions of this act into effect the Governor in Council may authorise the payment of such sums out of the treasury, which shall be refunded from the proceeds of the Indian lands.

Entry upon Indian reserves after passing of act to disqualify parties entering from receiving grants of them. Party entering, how removed.

10. After the passing of this act any entry made by any person upon any part of the Indian reserves, with a view to acquire the possession or occupation of any lands not now in the possession or occupation of such person, shall disqualify the party so entering from receiving from the crown a grant of the lands so entered upon, and such intruder may, upon complaint of any commissioner or commissioners, be summarily removed from the lands so entered upon by the warrant of any two Justices of the peace of the county where the lands lie.

Proceedings on removal.

11. Such warrant shall not issue till after the party has been summoned in the usual form in cases of ordinary proceedings before justices of the peace, and the justices shall

have power to award costs against the party complained of, and to issue execution therefor.

Appeal.

12. The decision of the Justices shall be subject to appeal as in ordinary cases.

CHAPTER 15.

An Act to extend the Provisions of the New Practice Act.

(Passed the 30th day of March, A. D. 1859.)

Sections:
1. Statement in affidavit held to be sufficient.
2. Defendant may negative fact of his being about to leave province, and may be discharged.
3. Prothonotaries may grant time to plead.

Be it enacted by the Governor, Council, and Assembly, as follows:

Statement in affidavit held sufficient.

1. It shall be sufficient to state in the affidavit of debt mentioned in the sixth section of the New Practice Act that the deponent has probable cause for believing, and does believe that the defendant is about to leave the province, and that he fears that the debt will be lost unless such defendant be forthwith arrested, and it shall not be necessary to state in the affidavit the deponent's ground for such belief.

Defendant may negative fact of his being about to leave province, and may be discharged.

2. Nothing in the first section contained shall operate to prevent a defendant so arrested from negativing, under affidavit to be made before a judge or commissioner, the fact of his being about to leave the province, and upon such affidavit, if the same is not contradicted on the part of the plaintiff, such judge or commissioner shall, in his discretion, order his discharge from custody with costs.

Prothonotaries may grant time to plead.

3. The prothonotary in any county, upon affidavit that the defendant has a good defence upon the merits, and that time is required to put in pleas, and that the application is not merely for delay, may grant an order for further time to plead, not exceeding ten days, and not to extend beyond the first day of the term or sittings for which notice of trial may have been given.

CHAPTER 16.

An Act to amend the Act relating to Trusts and Trustees.

(Passed the 30th day of March, A. D. 1859.)

Section:
1. Two judges may exercise powers of supreme court.

Be it enacted by the Governor, Council, and Assembly, as follows:

Two judges may exercise powers of supreme court.

1. The powers which by the act hereby amended are declared to be vested in the supreme court, may be exercised by any two judges of such court.