

***St. Catherine's Milling and Lumber Co v***  
***R, (1886) 10 OR 196 (HC)***

This was an action brought by Her Majesty the Queen, on the information of the Attorney General for the Province of Ontario against the St. Catharines Milling and Lumber Company, claiming amongst other things, an injunction restraining the cutting of timber by the defendants upon certain lands lying south of Wabigoon Lake, in the district of Algoma.

In the statement of claim it was set out that during the season of the year 1883, the defendants without permission from the Crown or the Province of Ontario, entered upon certain lands situate in and the property of the Province of Ontario, lying south of Wabigoon Lake, in the district of Algoma, and cut pine timber from the said lands amounting to about 2,000,000 feet; that the Canadian Pacific Railway ran immediately north of the said Wabigoon Lake and adjacent thereto, and the defendants had removed about 500,000 feet of the said logs to the north side of the lake, alongside the railway, and intended to remove the same, with the object of having it cut into timber; that of the balance of 2,000,000 feet of pine, some lay on the north side and west side of Wabigoon Lake, the remainder being in the streams and small lakes south of and running into the said lake; that the lands upon which the timber was cut were lands of the Province of Ontario, and the defendants had no right, or title, or authority' whatever entitling them to enter upon the said lands and cut the timber as aforesaid; and the plaintiff claimed a declaration that the defendants had no rights in respect of the timber cut on the said premises, and that the same might be delivered up to the plaintiff; that the defendants might be restrained by the order and injunction of the Court from further trespassing on the said lands, and from cutting timber thereon; that the defendants might be restrained from removing the timber already cut, and might be ordered to pay the damage sustained by the said wrongful acts, and the costs of the action.

By their statement of defence, the defendants alleged that they were a company incorporated under the provisions of the Canada Joint Stock Company Act, 1877, for the purpose of prosecuting a general lumber and milling business within the Dominion of Canada, and in the prosecution of such business, the defendants, during April, 1883, applied to the Government of the Dominion of Canada, and upon payment of \$4,125.52 obtained permission from the Government of Canada to enter upon a certain tract of timber lands situate on the south side of Wabigoon lake, in that portion of the Canadian territory, situated between Lake Superior and Eagle lake, which was the timber land referred to in the statement of claim: that pursuant to the leave and license then obtained during the lumbering season of 1883 and 1884, the defendants did cut about 2,000,000 feet of timber on the said tract of timber lands, intending to remove the same; that the said lands and the timber growing thereon were not the property of the Province of Ontario, but of the Dominion of Canada, and of the Crown

as represented by the Dominion of Canada: that the Government of Canada acted within its power, and in pursuance of its rights in granting to them the permission and license to cut and remove the timber, and they, the defendants, had acted within their strict legal rights; that the tract of land in question, together with the growing timber thereon, was with other land in the said district or territory until recently claimed by the tribes of Indians who inhabited that part of the Dominion of Canada, and that the claims of such tribes of Indians had always been recognized, acknowledged, admitted, and acquiesced in by the various Governments of Canada and Ontario, and by the Crown, and that such Indian claims were as to the lands in question herein paramount to the claim of the Province of Ontario or of the Crown, as represented by the Government of Ontario, and that the Government of the Dominion of Canada in consideration of a large expenditure of money made for the benefit of the said Indian tribes, and of payment made to them from time to time, and for diverse other considerations, had acquired the said Indian title to large tracts of lands in the said territory, including the lands in question in this action, and the timber thereon, and by reason of the acquisition of the said Indian title, as well as by reason of the inherent right of the Crown, as represented by the Government of Canada, the Dominion of Canada, and not the Province of Ontario, had the right to deal with the said timber lands, and at the time of the granting of the said leave and license had, and still have full power and authority to confer upon the defendants the rights, powers, and privileges claimed by them as aforesaid; that long prior to the purchase by the defendants of the right to enter on the said lands and cut the timber, and at the time of such purchase, the Government of Canada had been and were exercising control over the said timber lands, and they, the defendants, made the aforesaid payments and incurred the cost of cutting the said timber in good faith, and the belief that they were acquiring a good and valid title thereto and the defendants submitted that if the Court granted to the plaintiff the relief claimed, payment should be made to the defendants of the moneys so expended by them.

Chancellor Boyd's decision below is difficult to read for the racist language it contains and the racist ideology it espouses. We should be mindful of the real harm this language continues to do, even when read as "historical material" through a present lens.

These aspects of the decision are not peripheral to our reasons for reading it or to the doctrinal development of Aboriginal title. They are closely linked to elements of classical legal reasoning on which the decision is based. Pay close attention to the ways in which Chancellor Boyd's racist assumptions about and misrepresentations of Indigenous peoples rely on ideas about "natural order" that we have seen in other materials so far in this course.

**Boyd, C.—**

The Province of Ontario seeks the intervention of the Court in order that the St. Catharines Milling and Lumber Company may be restrained from trespassing and cutting timber on lands claimed by the Province. The defendants justify

under license obtained from the Government of Canada in April, 1883, by virtue of which they assert the right to cut over timber limits on the south side of Wabigoon (or Wabegon) Lake, in that portion of Canada situated between Lake Superior and Eagle Lake. The defendants further plead specially that the place in question forms part of a district till recently claimed by tribes of Indians, who inhabited that part of the Dominion, and that such claims have always been recognized by the various Governments of Canada and Ontario, and by the Crown; that such Indian claims were paramount to the claim of the Province of Ontario, and that the Dominion have by purchase acquired the said Indian title, and by reason thereof, as well as by inherent right, the Dominion and not the Province is alone entitled to deal with the said timber limits.

The colonial policy of Great Britain as it regards the claims and treatment of the aboriginal populations in America, has been from the first uniform and well-defined. Indian peoples were found scattered wide-cast over the continent, having, as a characteristic, no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians it was not thought that they had any proprietary title to the soil, nor any such claim thereto as to interfere with the plantations, and the general prosecution of colonization. They were treated “justly and graciously,” as Lord Bacon advised, but no legal ownership of the land was ever attributed to them. The Attorney-General in his argument called my attention to a joint opinion given by a “multitude of counsellors,” about 1675, touching land in New York, while yet a province under English rule. I think it accurately states the constitutional law in these words :

Though it hath been and still is the usual practice of all proprietors to give their Indians some recompense for their land, and so seem to purchase it of them, yet that is not done for want of sufficient title from the King or Prince who hath the right of Discovery, but out of prudence and Christian charity least otherwise the Indians might have destroyed the first planters (who are usually too few to defend themselves) or refuse all Commerce and Conversation with the planters, and thereby all hopes of converting them to the Christian faith would be lost. In this the Common law of England and the Civil law doth agree. . . . Though some planters have purchased from the Indians yet having done so without the Consent of the Proprietors for the time being, the title is good against the Indians but not against the Proprietors without a confirmation from them upon the usual terms of other Plantations.”—Vol. xiii. “Documents relating to Colonial History of the State of New York,” p. 486.

Of the six counsel who sign this opinion, one (Richard Wallop) became Cursitor Baron of the Exchequer; another (Henry Pollexfen) became Chief Justice of the Common Pleas, and a third (Holt) was afterwards Chief Justice of England.

In a classical judgment, Marshall, C. J., has concisely stated the same law of the mother-country which the United States inherited and applied with such modifications as were necessitated by the change of government to their dealings

with the Indians. I quote passages from *Johnson v. McIntosh*, 8 Wheat., p. 595, &c.:

According to the theory of the British constitution, all vacant lands are vested in the Crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative. . . . This principle was as fully recognized in America as in the island of Great Britain. . . . So far as respected the authority of the Crown no distinction was taken between vacant lands and lands occupied by the Indians. . . . The title, subject to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title.

At p. 588 :

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

This right of occupancy attached to the Indians in their tribal character. They were incapacitated from transferring it to any stranger, though it was susceptible of being extinguished. The exclusive power to procure its extinguishment was vested in the Crown, a power which as a rule was exercised only on just and equitable terms. If this title was sought to be acquired by others than the Crown, the attempted transfer passed nothing, and could operate only as an extinguishment of the Indian right for the benefit of the title paramount. See judgment of Burns, J., in *Doe d. Sheldon v. Ramsay*, 9 U.C.R. at p. 133.

Many parliamentary recognitions of these principles might be cited, but let one or two suffice. There is to be found an affirmation of the established doctrine, that the ungranted and waste lands of the country are vested in the Crown, for the public, subject to the Indian title which is capable of being dealt with by way of extinguishment only, and not by way of transfer, in the *Dominion Statute*, 33 Vic. ch. 3, see s. 30, 31 and 32. There is also a very emphatic declaration of the customary Indian lands policy to be found in the address to Her Majesty from the Senate and House of Commons of Canada in December, 1867, praying for the extension of the Dominion to the shores of the Pacific, in which it is represented that upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines. Following this up, the same legislative bodies in May, 1869, resolved that upon the transference above mentioned, "it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer." This being embodied in the address subsequently presented to the Queen, the transfer was consummated by Imperial Order in Council of June 23rd, 1870, Article 14 of which stipulated that "any claims of Indians to compensation for lands required

for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government:" 35 Vic. (D.) p. lxiii.

At the time of the conquest, the Indian population of Lower Canada was, as a body, Christianized, and in possession of villages and settlements, known as the "Indian Country." By the terms of capitulation they were guaranteed the enjoyment of these territorial rights in such lands which, in course of time, became distinctively and technically called "Reserves." By a Quebec ordinance of Guy Carleton of 1777, (17 George III. ch. 7, sec. 3,) it was declared unlawful for any person to settle in the Indian country within that Province without a written license from the Governor, and no person was allowed to trade without license in any part of the Province upon lands not granted by His Majesty.

But in Upper Canada the native tribes were in an untaught and uncivilized condition, and it became necessary to work out a scheme of settlement which would promote immigration and protect both red and white subjects so that their contact in the interior might not become collision. A *modus vivendi* had to be adjusted. The course of civilized colonization in the North-West at this day presents, in its essential features, a counterpart of what was going on in the now thickly-populated parts of Upper Canada at the beginning of this century. And the manner of dealing with the rude red-men of the North-West, in the way of negotiating treaties for the surrender of their lands, and conciliating them in the presence of an ever-advancing tide of European and Canadian civilisation is but a reproduction, or rather a continuation and an expansion of the system which had commended itself as the most efficient in Old Canada. The inevitable problem in view of the necessary territorial constriction of the Indian occupants of those vast expanses over which they and their forefathers have fished and hunted and trapped from time immemorial was and is this: how best to subserve the welfare of the whole community and the state, how best to protect and encourage the individual settler, and how best to train and restrain the Indian so that being delivered by degrees from dependency and pupillage, he may be deemed worthy to possess all the rights and immunities and responsibilities of complete citizenship. These three considerations, mainly, have shaped the policy of the Government in the past as in the present. For an admirable *resumé* of what has been done in the earlier history of Canada, I will avail myself of some passages to be found in a joint report of Messrs. Rawson, Davidson & Hepburn, on Indian affairs prepared in 1844, and printed among the Journals of the Legislative Council of Canada, vol. 4, as appendix EEE of the session 1844-1845, and the Journals of the Legislative Assembly of Canada, appendix to vol. 6., as appendix T of the session of 1847. I may, at this point also mention how greatly I have been indebted to another joint report of Vice-Chancellor Jameson, Mr. Justice Macaulay, and this same Mr. Hepburn, of 1840, which is printed as a supplement to the later report of 1844: Journals of the Legislative Assembly of Canada, appendix to vol. 6, appendix No. 1 to appendix T. These two papers form a compendium of valuable knowledge and research not readily accessible elsewhere.

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But it is argued for the defendants that the key to unlock the meaning of the Act of 1867 must be sought in the Royal Proclamation of 1763.

The scope and object of that instrument, therefore, require to be considered. The primary intent of the proclamation was to provide, temporarily, for the orderly conduct of affairs in the settled parts of all the territory newly acquired in America, which was for that purpose subdivided into the four Governments of Quebec, East Florida, West Florida, and Grenada, and to encourage further settlement by the promise of the immediate enjoyment of English law. Power was conferred upon the governors and councils of the three colonies on the continent to grant such lands as were then or thereafter should be in the power of the Crown to dispose of, on such terms and conditions as might be necessary and expedient for the advantage of the grantees, and the improvement and settlement of the colonies. So far as lands lay without the limits of these colonies, the governors were forbidden to grant patents, or to deal with them, and this chiefly on account of the several nations or tribes of Indians who were living under British protection. That prohibition was to last only “for the present, and till the King’s further pleasure” should be known, and it is preceded by a recital that it is just, and reasonable, and essential to our interest, and the security of our colonies, that such 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 for them or any of them, as their hunting grounds.”

The proclamation next proceeds to deal with that part of the country which would then embrace the land now in question as follows: ” 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 the territory granted to the Hudson’s Bay Company; as also all the land 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 whatsoever, or taking possession of any of the lands above reserved without our especial leave and license for that purpose first obtained; and we do further strictly enjoin and require all persons whatsoever, 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.”

The proclamation then forbids private persons from presuming to make any purchases from the Indians of any lands reserved to the said Indians “within those parts of our colonies where we have thought proper to allow settlement,” and directs that if at any time the Indians shall be inclined to dispose of the said lands, the same shall be purchased for us at some public meeting of the

Indians to be held for that purpose by the Governor of the colony within which they shall lie.

This proclamation has frequently been referred to, and by the Indians themselves, as the charter of their rights, and the last clause I have condensed relating to the manner of dealing with them in respect to lands they occupy at large, or as a reserve, has always been scrupulously observed in such transactions.

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There is an essential difference in meaning between the “reservations” spoken of in the Royal Proclamation, and the like term in the B. N. A. Act. The proclamation views the Indians in their wild state, and leaves them there in undisturbed and unlimited possession of all their hunting ranges, whereas the Act, though giving jurisdiction to the Dominion over all Indians, wild or settled, does not transfer to that government all public or waste lands of the Provinces on which they may be found at large.

The territorial jurisdiction of the Dominion extends only to lands reserved for them. Now it is evident from the history of “the reserves,” that the Indians there are regarded no longer as in a wild and primitive state, but as in a condition of transition from barbarism to civilization. The object of the system is to segregate the red from the white population, in order that the former may be trained up to a level with the latter. The key-note of the whole movement was struck unmistakably in 1838, by Lord Glenelg, in his instructions to Sir Francis Bond Head: (Appendix to Journals of Assembly, 1837-8, p. 180.) He wrote thus: “The first step to the real improvement of the Indians is to gain them over from a wandering to a settled life, and for this purpose it is essential that they should have a sense of permanency in the locations assigned to them; that they should be attached to the soil by being taught to regard it as reserved for them and their children by the strongest securities.” The distinctive feature of the system in Canada was the grouping of the separate tribes for the purposes of exclusive and permanent residence within circumscribed limits. Those limits were almost invariably allocated at their usual centres of settlement, and within the ambit of their respective hunting ranges as recognized among themselves. Contrasted with this is the plan chiefly followed in the United States, where the main object has been to mass all the Indian nations and tribes in one vast district called “The Indian Territory,” which comprises an area of about 70,000 square miles. But in Canada, the bounds of the separate reserves being ascertained by survey or otherwise, the various communities betake themselves thereto as their “local habitation.” Here they are furnished with appliances and opportunities to make themselves independent of the precarious subsistence procured from the chase; they are encouraged to advance from a nomadic to an agricultural or pastoral life, and thus to acquire ideas of separate property, and of the value of individual rights to which, in their erratic tribal condition, they are utter strangers, so that, ultimately, they may be led to settle down into the industrious and peaceful habits of a civilized people.

Again: the relations between the Government and the Indians change upon the establishment of reserves. While in the nomadic state they may or may not choose to treat with the Crown for the extinction of their primitive right of occupancy. If they refuse the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so, sooner or later, to displace them. If, however, they elect to treat they then become, in a special sense, wards of the State, are surrounded by its protection while under pupillage, and have their rights assured in perpetuity to the usual land reserve. In regard to this reserve the tribe enjoy practically all the advantages and safeguards of private resident proprietors: *Bastien v. Hoffman*, 17 L. C. R. 238. Before the appropriation of reserves the Indians have no claim except upon the bounty and benevolence of the Crown. After the appropriation, they become invested with a legally recognized tenure of defined lands; in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement. It is "lands reserved" in this sense for the Indians which form the subject of legislation in the B. N. A. Act, i. e., lands upon which or by means of the proceeds of which, after being surrendered for sale, the tribes are to be trained for civilization under the auspices of the Dominion. It follows that lands ungranted upon which Indians are living at large in their primitive state within any Province form part of the public lands, and are held as before Confederation by that Province under various sections of the B. N. A. Act. [See sees. 92 (item 5), also sees. 6, 109 and 117.] Such a class of public lands are appropriately alluded to in section 109 as lands belonging to the Province in which the Indians have an interest, i. e., their possessory interest. When this interest is dealt with by being extinguished, and by way of compensation in part, reserves are allocated, then the jurisdiction of the Dominion attaches to those reserves. But the rest of the land in which "the Indian title" so called has not been extinguished remains with its character unchanged as the public property of the Province.

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