

*St. Catherine's Milling and Lumber Co v*

*R*, [1887] 13 SCR 577

[Chief Justice Ritchie, writing for a majority of the Supreme Court, affirmed Chancellor Boyd's decision at trial. Justice Strong, whose judgement is below, wrote a dissent from the majority, arguing that Chancellor Boyd's decision should be overturned.]

**Strong J.** —

By the report of the Judicial Committee of the Privy Council of the 23rd July, 1884, made upon a reference to it of the question of disputed boundaries between the Provinces of Ontario and Manitoba, and which report was adopted by Her Majesty and embodied in the Order in Council of the 11th August, 1884, the territory in which the lands now in question are included was determined to be comprised within the limits of the Province of Ontario. This decision of the Judicial Committee, whilst defining the political boundaries according to the contention of the last named province, does not, however, in any way bear upon the question here in controversy between the Dominion of Canada and the Province of Ontario regarding the proprietorship of the lands now in dispute. The decision of the present appeal depends altogether upon the construction to be placed upon certain provisions of the British North America Act. By the 24th enumeration of section 91 of that act the power of legislation in respect of "Indians and lands reserved for the Indians" is conferred exclusively upon the parliament of Canada By section 109 of the same act,

All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals and royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trust existing in respect thereof, and to any interest other than that of the province in the same.

By sec. 92, enumeration 5, exclusive power of legislation is given to the provinces regarding the management and sale of the public lands belonging to the province, and of the timber and wood thereon.

The contention of the appellants is, that the lands now in question, and which are embraced in the territory formerly in dispute between the Provinces of Ontario and Manitoba, and which have been decided by the Judicial Committee to be within the boundaries of Ontario, were, at the time of confederation, lands which had not been surrendered by the Indians, and consequently come within the definition of "lands reserved for the Indians" contained in sub-section 24 of section 91, and are therefore not public lands vested in the province by the operation of section 109. The province, on the other hand, insists that these are

not “lands reserved for the Indians” within sub-section 24, and claims title to them under the provision of section 109 as public lands which at the date of confederation “belonged” to the Province of Ontario.

It is obvious that these lands cannot be both public lands coming within the operation of section 109 and “lands reserved for the Indians,” and so subject to the exclusive legislative power of the parliament of Canada by force of the 24 sub-section of section 91. The “public lands” mentioned in section 109 are manifestly those respecting which the province has the right of exclusive legislation by section 92 sub-section 6. Then, these public lands referred to in sub-section 5, and which include all the lands “belonging” to the province, are clearly distinct from “lands reserved for the Indians,” since lands so reserved are by section 91 sub-section 24 made exclusively subject to the legislative power of the Dominion. To hold that lands might be both public lands within section 109 and sub-section 5 of section 92, and “lands reserved for the Indians” within sub-section 24 of section 91, would be to determine that the same lands were subject to the exclusive powers of two separate and distinct legislatures, which would be absurd. [...]

The questions to be determined are therefore now restricted entirely to the construction to be placed on the words, “lands reserved for the Indians,” in sub-section 24 of section 91, and we are to bear in mind that whatever are the lands subjected by this description to the exclusive legislative power of the Dominion they cannot be lands belonging to the Province, since all these last mentioned lands are expressly subjected to the exclusive legislative powers of the Provinces. In construing this enactment we are not only entitled but bound to apply that well established rule which requires us, in placing a meaning upon descriptive terms and definitions contained in statutes, to have recourse to external aids derived from the surrounding circumstances and the history of the subject-matter dealt with, and to construe the enactment by the light derived from such sources, and so to put ourselves as far as possible in the position of the legislature whose language we have to expound. If this rule were rejected and the language of the statute were considered without such assistance from extrinsic facts, it is manifest that the task of interpretation would degenerate into mere speculation and guess work.

It is argued here for the appellants, that these words “lands reserved for the Indians” are to have attributed to them a meaning sufficiently comprehensive to include all lands in which the Indian title, always recognized by the crown of Great Britain, has not been extinguished or surrendered according to the well understood and established practice invariably observed by the Government from a comparatively remote period. The respondent, on the contrary, seeks to place a much narrower construction on these words and asks us to confine them to lands, first, which having been absolutely acquired by the crown had been re-appropriated for the use and residence of Indian tribes, and secondly, to lands which, on a surrender by Indian nations or tribes of their territories to the crown, had been excepted or reserved and retained by the Indians for their own

residence and use as hunting grounds or otherwise. In order to ascertain whether it was the intention of Parliament by the use of these words “lands reserved for the Indians” to describe comprehensively all lands in which the Indians retained any interest, and so to include unsundered lands generally, or whether it was intended to use the term in its restricted sense, as the respondent contends, as indicating only lands which had been expressly granted and appropriated by the crown to the use of Indians, or excepted or reserved by them for their own use out of some large tract surrendered by them to the crown, we must refer to historical accounts of the policy already adverted to as having been always followed by the crown in dealings with the Indians in respect of their lands.

In the Commentaries of Chancellor Kent and in some decisions of the Supreme Court of the United States we have very full and clear accounts of the policy in question. It may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsundered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested. This short statement will, I think, on comparison with the authorities to which I will presently refer, be found to be an accurate description of the principles upon which the crown invariably acted with reference to Indian lands, at least from the year 1756, when Sir William Johnston was appointed by the Imperial Government superintendent of Indian affairs in North America, being as such responsible directly to the crown through one of the Secretaries of State, or the Lords of Trade and Plantation, and thus superseding the Provincial Governments, down to the year 1867, when the confederation act constituting the Dominion of Canada was passed. So faithfully was this system carried out, that I venture to say that there is no settled part of the territory of the Province of Ontario, except perhaps some isolated spots upon which the French Government had, previous to the conquest, erected forts, such as Fort Frontenac and Fort Toronto, which is not included in and covered by a surrender contained in some Indian treaty still to be found in the Dominion Archives. These rules of policy being shown to have been well established and acted upon, and the title of the Indians to their unsundered lands to have been recognized by the crown to the extent already mentioned, it may seem of little importance to enquire into the reasons on which it was based. But as these reasons are not without some bearing on the present question, as I shall hereafter shew, I will shortly refer to what appears to have led to the adoption of the system of dealing with the territorial rights of the Indians. To ascribe it to moral grounds, to motives of humane consideration for the aborigines, would be to attribute it to feelings which perhaps had little weight in the age in which it took its rise. Its true origin was, I take it, experience of the great impolicy of the opposite mode of dealing with the Indians which had been practised by some of the Provincial Governments of the older colonies and which had led to frequent

frontier wars, involving great sacrifices of life and property and requiring an expenditure of money which had proved most burdensome to the colonies. That the more liberal treatment accorded to the Indians by this system of protecting them in the enjoyment of their hunting grounds and prohibiting settlement on lands which they had not surrendered, which it is now contended the British North America Act has put an end to, was successful in its results, is attested by the historical fact that from the memorable year 1763, when Detroit was besieged and all the Indian tribes were in revolt, down to the date of confederation, Indian wars and massacres entirely ceased in the British possessions in North America, although powerful Indian nations still continued for some time after the former date to inhabit those territories. That this peaceful conduct of the Indians is in a great degree to be attributed to the recognition of their rights to lands unsurrendered by them, and to the guarantee of their protection in the possession and enjoyment of such lands given by the crown in the proclamation of October, 1763, hereafter to be more fully noticed, is a well known fact of Canadian history which cannot be controverted. The Indian nations from that time became and have since continued to be the firm and faithful allies of the crown and rendered it important military services in two wars — the war of the Revolution and that of 1812.

The American authorities, to which reference has already been made, consist (amongst others) of passages in the commentaries of Chancellor Kent, in which the whole doctrine of Indian titles is fully and elaborately considered, and of several decisions of the Supreme Court of the United States, from which three, *Johnston v. McIntosh*, *Worcester v. State of Georgia*, and *Mitchell v. United States*, may be selected as leading cases. The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognise it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognized and applied in British North America. Chancellor Kent, referring to the decision of the Supreme Court of the United States, in *Cherokee Nation v. State of Georgia*, says: —

The court there held that the Indians were domestic, dependent nations, and their relation to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied until that right should be extinguished by a voluntary cession to our government.

On the same page the learned commentator proceeds thus: —

The Supreme Court in the case of *Worcester* reviewed the whole ground of controversy relative to the character and validity of Indian rights within the territorial dominions of the United States, and especially with reference to the Cherokee nation within the limits of

Georgia. They declared that the right given by European discovery was the exclusive right to purchase, but this right was not founded on a denial of the Indian possessor to sell. Though the right of the soil was claimed to be in the European governments as a necessary consequence of the right of discovery and assumption of territorial jurisdiction, yet that right was only deemed such in reference to the whites; and in respect to the Indians it was always understood to amount only to the exclusive right of purchasing such lands as the natives were willing to sell. The royal grants and charters asserted a title to the country against Europeans only, and they were considered as blank paper so far as the rights of the natives were concerned. The English, the French and the Spaniards were equal competitors for the friendship and aid of the Indian nations. The Crown of England never attempted to interfere with the national affairs of the Indians further than to keep out the agents of foreign powers who might seduce them into foreign alliances. The English Government purchased the alliance and dependence of the Indian Nations by subsidies, and purchased their lands when they were willing to sell at a price they were willing to take, but they never coerced a surrender of them. The English Government considered them as nations competent to maintain the relations of peace and war and of governing themselves under her protection. The United States, who succeeded to the rights of the British Crown in respect of the Indians, did the same and no more; and the protection stipulated to be afforded to the Indians and claimed by them was understood by all parties as only binding the Indians to the United States as dependent allies.

Again the same learned writer says;

The original Indian Nations were regarded and dealt with as proprietors of the soil which they claimed and occupied, but without the power of alienation, except to the Governments which protected them and had thrown over them and beyond them their assumed patented domains. These Governments asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair purchase, under the sanction of treaties; and they held all individual purchases from the Indians, whether made with them individually or collectively as tribes, to be absolutely null and void. The only power that could lawfully acquire the Indian title was the State, and a government grant was the only lawful source of title admitted in the Courts of Justice. The Colonial and State Governments and the government of the United States uniformly dealt upon these principles with the Indian Nations dwelling within their territorial limits.

Further, Chancellor Kent, in summarising the decision of the Supreme Court in *Mitchell v. United States*, states the whole doctrine in a form still more

applicable to the present case. He says:

The Supreme Court once more declared the same general doctrine, that lands in possession of friendly Indians were always, under the colonial governments, considered as being owned by the tribe or nation as their common property by a perpetual right of possession; but that the ultimate fee was in the crown or its grantees, subject to this right of possession, and could be granted by the crown upon that condition; that individuals could not purchase Indian lands without license, or under rules prescribed by law; that possession was considered with reference to Indian habits and modes of life, and the hunting grounds of the tribes were as much in their actual occupation as the cleared fields of the whites, and this was the tenure of Indian lands by the laws of all the colonies.

It thus appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned; in other words, that the *dominium utile* is recognized as belonging to or reserved for the Indians, though the *dominium directum* is considered to be in the United States. Then, if this is so as regards Indian lands in the United States, which have been preserved to the Indians by the constant observance of a particular rule of policy acknowledged by the United States courts to have been originally enforced by the crown of Great Britain, how is it possible to suppose that the law can, or rather could have been, at the date of confederation, in a state any less favorable to the Indians whose lands were situated within the dominion of the British crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments? Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such, and consequently, that the 24th sub-section of section 91, as well as the 109th section and the 5th sub-section of section 92 of the British North America Act, must all be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments.

The voluminous documentary evidence printed in the case contains numerous instances of official recognition of the doctrine of Indian title to unceded lands as applied to Canada. Without referring at length to this evidence I may just call attention to one document which, as it contains an expression of opinion with

reference to the title to the same lands part of which are now in dispute in this cause by a high judicial authority, a former Chief Justice of Upper Canada, is of peculiar value. In the appendix to the case for Ontario laid before the Judicial Committee in the Boundary Case we find a letter dated 1st of May 1819 from Chief Justice Powell to the Lieutenant Governor, Sir Peregrine Maitland, upon the subject of the conflict then going on between the North West and Hudson's Bay Companies, and of which the territory now in question was the scene. The Chief Justice, writing upon the jurisdiction of the Upper Canada Courts in this territory and of an act of Parliament relating thereto, says:

The territory which it affects is in the crown and part of a district, but the soil is in the aborigines and inhabited only by Indians and their lawless followers.

There cannot be a more distinct statement of the rights claimed by the appellants to have existed in the Indians than this, and if the soil, *i.e.* the title to the soil, was in the Indians in 1819 it must have so remained down to the date of the North West Angle Treaty No. 3 made in 1873.

[...]

To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsundered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations; that such property of the Indians was usufructuary only and could not be alienated, except by surrender to the crown as the ultimate owner of the soil; and that these rights of property were not inaptly described by the words "lands reserved for the Indians," whilst they could not, without doing violence to the meaning of language, be comprised in the description of public lands which the Provinces could sell and dispose of at their will. Further, we find from the conjunction of the word "Indians" with the expression "lands reserved for the Indians" in the 24 subsection of section 91 of the British North America Act, that a construction which would place unsundered lands in the category of "public lands" appropriated to the Provinces would be one which would bring different provisions of the act into direct conflict, since such lands would be subject to the disposition of the local legislature under sub-sec. 5, and at the same time it would be within the powers of the Dominion Parliament, in the exercise of its general right of legislation regarding the Indians, to restrain surrenders or extinguishments of the Indian title to such lands, and thus to render nugatory the only means open to the Provinces of making the lands available for sale and settlement. Then, there being but two alternative modes of avoiding this conflict, one by treating the British North America Act as by implication abolishing all right and property of the Indians in unsundered lands, thus at one stroke doing away with the traditional policy above noticed,

and treating such lands as ordinary crown lands in which the Indian title has been extinguished, the other by holding that such unsurrendered lands are to be considered as embraced in the description of “lands reserved for the Indians,” it appears to me that the first alternative, which would attribute to the Imperial Parliament the intention of taking away proprietary rights, without express words and without any adequate reason, and of doing away at a most inopportune time with the long cherished and most successful policy originally inaugurated by the British Government for the treatment of the Indian tribes, is totally inadmissible and must be rejected. The inevitable conclusion is, that the mode of interpretation secondly presented is the correct one, and that all lands in possession of Indian tribes not surrendered at the date of confederation are to be deemed “lands reserved for the Indians,” the ultimate title to which must be in the crown, not as representing the Province, but in right of the Dominion, the Indians having the right of enjoyment and an inalienable possessory title, until such title is extinguished by a treaty of surrender which the Dominion is alone competent to enter into. To these considerations must be added the further and weighty reason, that the construction just indicated is most fair and reasonable, inasmuch as the Dominion, being burdened with the support and maintenance of the Indians, ought also to have the benefit of any advantage which may be derived from a surrender of their lands.

*Appeal dismissed with costs.*