Ontario Court of Appeals
Davey et al. v. Isaac et al.[1]
Date: 1974-10-04

Isaac et al.

and

Davey et al.

SCHROEDER, JESSUP AND ARNUP, JJ.A. 4TH OCTOBER 1974.

Burton H. Kellock, Q.C., and Paul D. Amey, for plaintiffs, appellants.

John Sopinka and Alan Millward, for defendants, respondents, except Joseph Logan.

Malcolm Montgomery, Q.C., for defendant, respondent, Joseph Logan.

L.R. Olsson, Q.C., and James Beckett, for Attorney-General of Canada.

[1] The judgment of the Court was delivered by

ARNUP, J.A.:—This action requires the resolution of a dispute between two groups of Indians of the Six Nations residing on the Six Nations Reserve near Brantford. The plaintiffs, who are or were members of the elected Council of the Six Nations Band, support the form of government by elected Council pursuant to the *Indian Act,* R.S.C. 1970, c. I-6, and claim that the Council is lawfully entitled to govern the reserve. The defendants support the traditional form of government by hereditary chiefs and claim that the hereditary chiefs are still the lawful government of the Six Nations Confederacy, which they assert owns in fee simple the lands occupied by its members.

[2] This bald and over-simplified statement of the issues must be broken down into a whole series of interwoven issues that must be separately examined after the long history has been stated, since they cannot otherwise be formulated or understood.

[3] The present proceedings began after the defendants and their supporters asserted their alleged rights by padlocking the Council House at Ohsweken on several occasions in June

[1] A motion for leave to appeal to the Supreme Court of Canada was granted (Laskin, C.J.C., Judson and Spence, JJ.) January 29, 1975.

and July, 1970, thereby preventing the elected Council from using the building for its meetings and administration. This resulted in some tense situations, but rather than permit or provoke confrontations and violence, the plaintiffs sensibly resorted to the Courts to settle the rights of the contending parties. In referring to some of the historical background of the Six Nations Reserve, I preface my résumé of it by pointing out that the hereditary chiefs do not base their claims upon Indian or native title. The nature of native title is relevant only as a background to the interpretation of the so-called “Simcoe Deed”, which the defendants assert conferred an estate in fee simple upon the Six Nations. I list some of the bibliography on Indian title in Appendix “D” [see Appendices, pp. 624-8, *infra*].

[4] I begin the historical background with the Treaty of Paris of February 10, 1763, entered into after the defeat in 1760 of the French in Canada by the British, and the acquisition by conquest of much of French North America. By Royal Proclamation of George III dated October 7, 1763 (R.S.C. 1970, Appendices, p. 123), four “distinct and separate Governments” were established, one of which was Quebec. The stated boundaries of the new area called Quebec did not include much of what is now Ontario. The lands west of the westerly boundary of Quebec, although containing some white settlers, were largely inhabited by Indians other than the Six Nations.

[5] The Proclamation contained several paragraphs dealing with Indians and the lands inhabited by them. These provisions are set out in Appendix “A”. Herein occur the phrases “Lands… reserved to the… Indians” and

> 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 well as 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.

[6] British subjects were forbidden from making any purchases of land so reserved, or from taking possession thereof, and if any subjects had already “seated themselves” upon lands so reserved, they were ordered “to remove themselves” forthwith. Finally, where any Indians desired to dispose of reserved lands, purchase could be made only by the Crown, at a public meeting of the Indians.

[7] The Royal Proclamation of 1763 was superseded in 1774 by the Imperial Statute, 14 Geo. III, c. 83, the Quebec Act. That Act was intended to provide for the permanent government of the newly acquired domain and extended the boundaries set out in the Proclamation "by fixing the interior boundaries on the lines now established as the western limit of Ontario" (*per* Boyd, C, in *R. v. St. Catharines Milling & Lumber Co.* (1885), 10 O.R. 196 at p. 204).

[8] The Six Nations resided south of the Great Lakes, primarily in what are now the States of New York, Pennsylvania and Ohio. In 1775, war broke out between the American colonies and Britain. Many (but not all) of the Six Nations Indians fought for the British. Some tried to maintain neutrality. Some campaigned with the Americans. As it became increasingly clear that the British were losing the war, their allies from the Six Nations became increasingly anxious as to what would happen after the war, despite reassurances from Sir Guy Carleton, Governor of Quebec, and his successor (from 1778 to 1786), Sir Frederick Haldimand. There is little doubt that some of these assurances were intended to bolster the morale of the Indian supporters of the British cause at a time when their anxiety was justified.

[9] The war ended in September, 1783. The treaty of peace contained no definitive provisions concerning the territorial rights of the Six Nations. Those Indians who had fought with the British, or even remained neutral, rightly discerned that they could no longer remain in what was now to be American territory. (The new boundary, as negotiated, was the middle of the Great Lakes.)

[10] Joseph Brant, a highly intelligent, educated and influential Mohawk chief who had ably supported the British during the war, pressed the Governor and ultimately the authorities in Britain for definitive action implementing the promises made to the Six Nations that their loyalty would be rewarded. Consideration was given to creating an Indian settlement in the Cataraqui District, but ultimately Brant gave priority to the valley of the Grand River. (A minority in fact chose to go to the allotted site at the Bay of Quinte.)

[11] I omit many of the ancillary events. In May, 1784, Haldimand on behalf of the Crown purchased from the Mississagas a large tract roughly described as six miles deep on either side of the Grand River from Lake Erie to the head of the river. On October 25, 1784, he issued the "Haldimand Proclamation" (Appendix "B").

[12] Brant interpreted the Haldimand Proclamation as having two effects:

(i)—as being full national recognition of the Six Nations as an independent national community;

(ii)—as a grant of the Grand River lands to the Six Nations in fee simple.

The British Government firmly resisted both propositions, and the Crown's position has never changed. At least some members of the Six Nations have perpetuated Brant's position. (The allegation of national sovereignty was made in this very action but abandoned at trial.)

[13] Western Quebec was reorganized by the *Constitutional Act* of 1791 [R.S.C. 1970, Appendices, p. 139] as Upper Canada. In that year Colonel John Graves Simcoe was made Lieutenant-Governor of Upper Canada. He clashed almost at once with Brant over disposal by the Indians of any part of the Grand River lands. On January 14, 1793, Simcoe issued what is most often described as "Simcoe's Patent" (Appendix "C"). The defendants herein choose to call it the "Simcoe Deed".

[14] It is a matter of history that Brant always refused to recognize the Simcoe Patent. He asserted it had no effect because the Haldimand Proclamation had already conveyed the fee simple to the Six Nations. Professor Johnston (see Appendix "D") states (p. xlvi, footnote 8) that "the Six Nations, it would appear, have never recognized the so-called 'Simcoe Deed'". It may be thought ironical that after 180 years, the hereditary chiefs take the position in this action that the very "deed" Brant and his successors repudiated is now said to have given the fee simple to the Six Nations. (It has long ago been authoritatively decided by the Courts that the Haldimand Proclamation did not do so.)

[15] The Six Nations continued to be governed by the hereditary chiefs, chosen according to ancient customs and usages said to date from the 14th century. Over the years substantial portions of the lands originally purchased by the Crown and reserved for the use of the Six Nations have been surrendered to the Crown and conveyed to others, until the original very large tract is reduced to its present size. As of 1969, there were approximately 10,000 members of the Six Nations, of whom about half were in actual residence on the tract (I use this neutral word purposely).

[16] On March 20, 1923, Lieutenant-Colonel Andrew T. Thompson, K.C., was appointed a Commissioner by federal Order in Council to investigate and inquire generally into the affairs

of the Six Nations Indians. As a result of his report dated September 15, 1924, the Governor in Council on September 17, 1924, passed Order in Council P.C. 1629 which provided that from and after its date, Part II of the *Indian Act* [then R.S.C. 1906, c. 81], should apply to the Six Nations Band of Indians. The Six Nations Indian reserve was divided into six sections as shown on an attached plan, and it was provided that two councillors should be elected to represent each of the six sections. A new *Indian Act* having been passed, P.C. 1629 was revoked and replaced on November 12, 1951, by P.C. 6015, which did not change the substance of what had been enacted in 1924, but changed the electoral districts.

[17] It was shown at the trial that only a small percentage of the members of the Band entitled under the *Indian Act* to vote for councillors have exercised that right. In effect, the majority of the Six Nations living on the reserve have refused to recognize the application of the *Indian Act* to them and to the reserve.

[18] In 1959, an action brought by Mrs. Verna Logan, the wife of the defendant Joseph Logan in this action, was tried by the late Mr. Justice King (*Logan v. A.-G. Can.,* [1959] O.W.N. 361, 20 D.L.R. (2d) 416 *sub nom. Logan v. Styres et al.*). In that action she asserted the existence of the Six Nations as a Sovereign State. That contention failed. In the course of his judgment King, J., specifically found that P.C. 6015 was not *ultra vires.*

[19] I now come to the issues raised by the respective parties. I state first those raised by the defendants:

(1) The Simcoe Deed granted the Grand River valley lands to the Six Nations Confederacy in fee simple.

(2) That deed is not void by reason of any uncertainty as to the grantees.

(3) It contains a condition subsequent which is invalid as offending the rule against perpetuities, or which, alternatively, is repugnant to the grant and therefore invalid.

(4) The deed was never disclaimed in law by the Six Nations.

(5) The lands are not a “reserve” within the meaning of the *Indian Act,* and the Six Nations are not a “band” under that Act.

(6) The plaintiffs do not have an interest that entitles them to an injunction even if they are validly elected as councillors, and even if the Six Nations do not hold the land in fee simple.

(7) The judgment in the *Logan* case does not create estoppel by record.

(8) The Crown has dealt so unfairly with the Six Nations and particularly with trust funds belonging to them that its conduct constitutes "unclean hands", and since the plaintiffs claim by virtue of a federal statute to be the elected councillors, the plaintiffs are "tainted" with unclean hands which they bring into a Court of equity seeking equitable relief.

[20] The defendant Logan, an advocate of a form of government other than that under the *Indian Act,* asserted in his statement of defence that the entire *Indian Act* was inoperative by reason of the *Canadian Bill of Rights,* 1960, c. 44. Alternatively he pleaded that all but three sections of the *Indian Act* were inoperative. In argument counsel for Logan expanded upon his pleaded defence and asserted that the appropriate Minister had never authorized the use of the Council House; that the "Haldimand Deed" did not have the Great Seal on it and accordingly could convey nothing in law; nevertheless, the Haldimand pledge of 1779 was a "solemn and binding treaty", which Parliament had not overridden by enacting the *Indian Act.* He further asserted, under the heading of "he who seeks equity must do equity" that the Government, in enacting P.C. 6015, had overlooked that the hereditary chiefs were religious leaders and their ouster was therefore "inequitable". He receded in argument from his position that the entire Act was inoperative to the position that those sections which set up a system of government by councillors was inoperative.

[21] The submission of Mr. Kellock for the plaintiffs may be summarized thus:

(1) The title of the Six Nations to the reserve is and always has been the same as Indian title elsewhere in Canada. Neither the Haldimand Proclamation nor the Simcoe Deed conveyed a legal title in fee simple to the Six Nations Band.

(2) If the Simcoe Deed was operative to convey legal title, it had been disclaimed by the Six Nations.

(3) The lands occupied by the Six Nations constituted in 1924 and subsequently a "reserve" within the meaning of the *Indian Act.*

(4) The Six Nations Confederacy constituted a “band” within the meaning of that Act. The Crown held trust funds on behalf of the band.

(5) The *Indian Act,* and particularly those sections relevant to this case, were not rendered inoperative by the enactment of the *Canadian Bill of Rights.*

[22] Counsel for the Attorney-General supported, in a separate argument, the submission of Mr. Kellock that the Six Nations was a “band”, although urging that the question was not open on the pleadings. He also argued that there was a trust fund, held by the Crown for the band, and supported the argument that the legal title to the land had at all times been in the Crown and that the Simcoe Deed did not have the effect contended for by the defendants. He also supported the argument of Mr. Kellock on the *Canadian Bill of Rights.*

[23] Other issues raised and discussed on the argument of the appeal were:

(1) The Haldimand Proclamation was not under the Great Seal; it was said that the Great Seal was first placed on the document in 1834 by Sir John Colborne. The Simcoe Patent or Deed was under the Great Seal of Upper Canada. The argument was that the Haldimand instrument could not be given common law effect as a deed, whereas the Simcoe instrument could.

(2) The “Simcoe Deed” could not as a matter of law create a fee simple interest because the alleged grantees were an unincorporated group, incapable in law of taking title.

(3) The “invalid condition subsequent” argument is irrelevant because the rule against perpetuities does not apply against the Crown.

(4) The plaintiffs had no right to sue in a representative capacity as they purported to do.

[24] Osler, J., in a considered judgment ([1973] 3 O.R. 677, 38 D.L.R. (3d) 23), reached the following conclusions:

(1) The “Simcoe grant” of 1793 was effective to pass title to all members of the Six Nations Band in fee simple. Accordingly, the entire tract, less those parts disposed of by the band since 1793, has at all time been held by the Six Nations in fee simple.

(2) P.C. 1629 of 1924 and P.C. 6015 of 1951 were both *ultra vires* as unauthorized by the *Indian Act* as it stood at each of the relevant dates. The Six Nations were not a “band” because the legal title to the reserve was not vested in the Crown, and the so-

called Six Nations Reserve was not a “reserve” within the meaning of the *Indian Act,* for the same reason. He found further support for this conclusion by stating there was no evidence that at the time of the passage of the *Indian Act* of 1951, c. 29, moneys were held by His Majesty for the use and benefit of the Six Nations, and further that there had been no declaration that the Six Nations was a band for the purposes of the Act, as contemplated by the then s. 2(1) (*a*) (iii).

(3) If not duly elected, the plaintiffs could not sue in a representative capacity on behalf of themselves and all other members of the Six Nations Band except the defendants, because it was conclusively shown that the plaintiffs represented only a small fraction of the Indian population on the reserve.

(4) The entire *Indian Act* was inoperative by reason of the *Canadian Bill of Rights.*

[25] It is convenient to deal with the last point first. When Osler, J., gave his judgment on July 11, 1973, he relied, quite properly, on his own judgment in *Bedard v. Isaac et al.,* [1972] 2 O.R. 391, 25 D.L.R. (3d) 551, in which he had held thats. 12(1) (*b*) of the *Indian Act* was inoperative. Not long before, judgment had been given by the Federal Court of Appeal in the case of *Re Lavell and A.-G. Can.,* [1972] 1 O.R. 396n, 22 D.L.R. (3d) 188, [1971] F.C. 347, reversing the decision of Grossberg, Co.Ct.J., [1972] 1 O.R. 390, 22 D.L.R. (3d) 182. Since the delivery of the judgment of Osler, J., the Supreme Court of Canada has dealt with both matters: *A.-G. Can. v. Lavell; Isaac et al. v. Bedard,* 38 D.L.R. (3d) 481, 23 C.R.N.S. 197, 11 R.F.L. 333, deciding concurrently both an appeal from the Federal Court and a direct appeal from the judgment of Osler, J. In both cases the appeals were allowed in a 5-4 decision.

[26] Since the Supreme Court has held that s. 12(1) (b) of the Indian Act is not inoperative, it is obviously wrong to hold the entire Act inoperative, but in addition, the reasoning of the majority in these two cases makes it perfectly clear that those sections of the Indian Act which are relevant to the decision of this case are not inoperative by reason of the enactment of the Canadian Bill of Rights. I do not find even in the dissenting judgment of Laskin, J., with whom Abbott, Hall and Spence, JJ., concurred, any support for the proposition that the entire Indian Act is now inoperative. Reading all of the judgments against the background of R. v. Drybones, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, the respondents’ contention must be rejected. Considering the powers of Parliament to legislate in relation to Indians and lands reserved for Indians under head 24 of s. 91 of the British North America

Act, 1867, I find no provision in the Indian Act relevant to this case that is rendered inoperative by the kind of discrimination to which the Canadian Bill of Rights relates. In particular, its provisions for the election of councillors and for government of the band by the elected Council are in my opinion valid and operative.

[27] It follows that the plaintiffs, or some of them, have status as elected members of the Council to maintain this action and to claim to represent the band. I say “or some of them” because the action began in July, 1970, and as new councillors have been elected they have been added as plaintiffs, without objection from the defendants; four new members of the Council were added at the opening of the appeal, on consent, and the formal order issued in this case should so provide.

[28] I turn next to the contention that the Simcoe Deed conveyed an absolute title in fee simple to the Six Nations Confederacy. This submission is based upon extracting from the Simcoe Patent certain words which are terms of art in the law of real property of England and Canada and urging that the common law effect of the extracted words should be applied to the document so as to interpret it as a deed in fee simple. The task of the Court is to construe the Simcoe Patent to determine what it was meant to do. In this task the Court must not only look at the words used in the document, but must construe those words against the background of the history and the facts existing at the time it was executed.

[29] The nature of Indian title in Ontario, and the policy of the British Crown in relation to Indians and their rights has been authoritatively determined in a series of cases, in which much of the historical background is recounted, particularly in those cases decided when the events of the last 15 years of the 18th century were still present in the minds of living persons in the middle of the 19th century, and were recorded in documents available to the Judges of that time. As Osler, J., did, I find the judgment at trial of Chancellor Boyd—a most learned, accurate and respected Judge—in *R. v. St. Catharines Milling & Lumber Co.,* to be of great assistance. It is reported in (1885), 10 O.R. 196. The history of public lands is dealt with at pp. 203-6, and the colonial policy of Great Britain concerning the aboriginal populations in America is dealt with at length commencing at p. 206. The judgment was affirmed, 13 O.A.R. 148, 13 S.C.R. 577, and by the Privy Council, 14 App. Cas. 46. Other cases dealing with various aspects of the history of the times, and certain books and articles on Indian title are listed in Appendix “D”.

[30] For the purposes of this case, it is sufficient to say that Indian title in Ontario has been "a personal and usufructuary right, dependent upon the good will of the Sovereign". Indian lands were reserved for the use of the Indians, as their hunting grounds, under the Sovereign's protection and dominion. The Crown at all times held a substantial and paramount estate underlying the Indian title. The Crown's interest became absolute whenever the Indian title was surrendered or otherwise extinguished. These are the words of the Privy Council (*per* Lord Watson) in St. *Catharines Milling & Lumber Co. v. The Queen,* at pp. 54-5, and this statement of the legal position has been followed ever since.

[31] Osler, J., recognized that the proposition of fee simple ownership involved finding that the Six Nations had had conferred upon them by the British Crown a type of Indian interest which was unique, or virtually unique, in North America. Prior to 1784 the Six Nations had not been in occupation of any of the Grand River valley. In my opinion the intention of the Haldimand Proclamation and of the Simcoe Deed was the same. It was to confer upon the loyal subjects of the Crown within the Six Nations Confederacy who had come to Upper Canada the same rights as were enjoyed by those Indians who had always been there. Both documents were in accord with and implemented the policy enunciated in the Proclamation of 1763.

[32] The Simcoe Patent was not intended to be a conveyance of land, in the English sense and the English form, using the English conveyancing language. The words used in it ("given and granted", "do give and grant", "and their heirs for ever", "to and for the sole use and behoof of them and their heirs for ever freely and clearly of and from all and all manner of Rents, fines and services whatever to be rendered by them") were not intended to create, and did not create a unique interest in the Six Nations which no other Indians in Canada enjoyed. They are consistent with what Boyd, C, and the Privy Council stated to be the policy and intention of the Crown. That intention is in accord with other language in the patent, such as "to be held and enjoyed by them in the most free and ample manner and according to the several customs and usages of them the said Chiefs Warriors Women and people of the Six Nations", and with the immediately succeeding language that the true intent and meaning of the patent is for the purpose of assuring the said lands to the Indians and their heirs "and of securing to them the free and undisturbed possession and enjoyment of the same".

[33] The words of the Simcoe Patent prohibiting alienation by the Indians to anyone not of the band are also in keeping with the policy of the times and the understanding of both the Indians and the Crown even prior to the Haldimand Proclamation, and enunciated in 1763. The Haldimand Proclamation, much shorter and with less recital of the reason for the gratitude of the Crown, was expressed in terms of His Majesty "authorizing and permitting (the Mohawk Nation and other of the Six Nations Indians) to take possession of and settle upon the banks of the river…". That Proclamation concluded: "which them & their Posterity are to enjoy for ever". The intention of the last quoted language was the same as the language of the Simcoe Deed "to them and their heirs for ever".

[34] This approach to a document dealing with natives and their rights is in accord with the approach taken in several 20th century cases which I list without discussion: *Amodu Tijani v. Secretary, Southern Nigeria,* [1921] 2 A.C. 399 at p. 402; *Sunmonu v. Disu Raphael,* [1927] A.C. 881; *Sakariyawo Oshodi v. Moriamo Dakolo et al.,* [1930] A.C. 667; *Oyekan et al. v. Adele,* [1957] 2 All E.R. 785 at p. 789. Useful reference may also be made to Prof. Smith's article "The Concept of Native Title" (see Appendix "D").

[35] This conclusion eliminates from further consideration a whole series of issues much canvassed upon the argument, including the significance of lack of seals, whether there was a condition (subsequent which was void either as being in derogation of the grant or as offending the rule against perpetuities, whether the rule against perpetuities binds the Crown, whether the deed itself created the Six Nations as a corporation, and if not, whether the deed was invalid as a deed because of the unincorporated nature of the alleged grantees, and whether the deed had been disclaimed by the Indians.

[36] The finding further destroys the basis upon which Osler, J., found that the two Orders in Council were invalid. When P.C. 1629 of 1924 was passed, its statutory basis was s. 173 of the *Indian Act,* R.S.C. 1906, c. 81, and the ancillary provisions of ss. 174, 176, 177 and 182. In summary, Part II of the Act could be made applicable to a "band of Indians". "Band" was defined in s. 2 (*d*) as meaning:

> (*d*). …any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown…

"Reserve" was defined [in s. 2 (*i*)] as meaning:

(i). …any tract or tracts of land set apart by treaty… for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart…

(For the later definitions of “band” and “reserve” see 1951 (Can.), c. 29, s. 2(1) (*a*), carried into R.S.C. 1952, c. 149, and R.S.C. 1970, c. I-6.) To be a “reserve” a tract of land had to be vested in the Crown. Similar vesting in the Crown was required for a body of Indians to be a statutory “band”.

[37] Mr. Sopinka’s clients alleged and Osler, J., found that since the tract in question was vested in the Six Nations and not in the Crown, the Six Nations could not be a “band” under the *Indian Act* nor could the tract be a “reserve”. It would follow that the Act could not be made to apply. Osler, J., accordingly held that both Orders in Council were *ultra vires.*

[38] Since I have concluded that the tract in question is still vested in the Crown, subject to the exercise of traditional Indian rights, the land at both relevant dates was within the definition of “reserve” and the Six Nations were within the definition of “band”. Therefore, the 1925 Order in Council was authorized by the statute then in force, and so also was P.C. 6015 of 1951.

[39] It is therefore unnecessary to consider the argument that the judgment of King, J., in *Logan v. A.-G. Can.* (*supra,* and Appendix “D”) operates as an estoppel by record against the defendants in respect of the validity of these Orders in Council.

[40] It remains to deal with one defence to the claim for an injunction, which is put thus by Mr. Sopinka in his factum:

…The members of the Six Nations Band Council are agents of the Crown and are the representatives and amanuenses of the Crown… Because the members of the Band Council are agents of the Crown any inequitable acts of the Crown bar the Band Council from seeking the equitable remedy of an injunction.

The point is without merit. No express provision of the *Indian Act,* and no implied underlying policy of that Act make the members of an elected Council agents of the Crown. Without expressing any opinion as to whether there have been any inequitable acts on the part of the Crown, the plaintiffs could not be “tainted” by them.

[41] The only relief claimed in the action is an injunction. If an injunction is granted against the defendants, their servants and agents, I do not think it is necessary to enjoin in terms "any persons acting under their instructions and any other persons having notice of the order", as requested in the prayer for relief. In view of the pronouncements made in these reasons, and having regard to the availability of existing remedies against persons who breach an injunction after notice of it, no wider form of injunction is required.

[42] I would therefore allow the appeal, set aside the judgment of Osler, J., and in place thereof direct that judgment issue for a permanent injunction restraining the defendants, their servants and agents:

> (i)—from watching, besetting or attempting to watch or beset at or adjacent to the Council House in the Village of Ohsweken on the Six Nations reserve in the County of Brant;
>
> (ii)—from obstructing or interfering with the plaintiffs, their servants, agents, employees or any other persons seeking lawful entrance to or exit from the said Council House;
>
> (iii)—from obstructing or interfering with the lawful use by the plaintiffs, their servants, agents, employees or any other person of the said Council House;
>
> (iv)—from ordering, aiding, abetting, counselling or encouraging in any manner whatsoever any person to commit the acts mentioned in clauses (i), (ii) and (iii).

The plaintiffs are entitled to their costs of this appeal and of the trial against all of the defendants.

Appeal allowed.

APPENDIX "A"

EXCERPTS FROM THE ROYAL PROCLAMATION

FOLLOWING THE TREATY OF PARIS

No. 1

THE ROYAL PROCLAMATION

October 7, 1763

BY THE KING, A PROCLAMATION GEORGE R.

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 being desirous that all Our loving Subjects, as well of our Kingdom 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, styled and called by the names of Quebec, East Florida, West Florida and Grenada, and limited and bounded as follows, viz.

First—The Government of Quebec bounded on the Labrador Coast by the River St. John, and from thence by a Line drawn from the Head of that River through the Lake St. John, to the South end of the Lake Nipissim; from whence the said Line, crossing the River St. Lawrence, and the Lake Champlain, in 45. Degrees of North Latitude, passes along the High Lands which divide the Rivers that empty themselves into the said River St. Lawrence from those which fall into the Sea; and also along the North Coast of the Baye des Chaleurs, and the Coast of the Gulph of St. Lawrence to Cape Rosleres, and from thence crossing the Mouth of the River St. Lawrence by the West End of the Island of Anticosti, terminates at the aforesaid River of St. John.

…

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 North West, 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:

…

Given at our Court at St. James's the 7th Day of October 1763, in the Third Year of our Reign.

GOD SAVE THE KING

APPENDIX "B"

THE HALDIMAND PROCLAMATION, 1784

Whereas His Majesty having been pleased to direct that in Consideration of the early Attachment to His Cause manifested by the Mohawk Indians, & of the Loss of their Settlement they thereby sustained that a Convenient Tract of Land under His protection should be chosen as a Safe & Comfortable Retreat for them & others of the Six Nations who have either lost their Settlements within the Territory of the American States, or wish to retire from them to the British—I have, at the earnest Desire of many of these His Majesty's faithfull Allies purchased a Tract of Land, from the Indians situated between the Lakes Ontario, Erie, & Huron and I do hereby in His Majesty's name authorize and permit the said Mohawk Nation, and such other of the Six Nation Indians as wish to settle in that Quarter to take Possession of, & Settle upon the Banks of the River commonly *called Ours* [Ouse] or Grand River, running into Lake Erie, allotting to them for that Purpose Six Miles deep from each Side of the River beginning at Lake Erie, & extending in that Proportion to the Head of the said River, which them & their Posterity are to enjoy for ever.

Given under my Hand & Seal &c. &c.

25th Oct. 1784

(Signed) Fred: Haldimand

APPENDIX “C”

THE SIMCOE PATENT, 1793

J. GRAVES SIMCOE.

George the third by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith and so forth. To all to whom these presents shall come Greeting—Know ye that whereas the attachment and fidelity of the Chiefs, Warriors and people of the Six Nations to Us and our Government has been made manifest on divers occasions by their spirited and zealous exertions and by the bravery of their conduct and We being desirous of showing our approbation of the same and in recompense of the losses they may have sustained of providing a convenient Tract of Land under our protection for a safe and comfortable Retreat for them and their posterity Have of our special Grace certain Knowledge and mere motion given and granted and by these presents Do Give and Grant to the Chiefs, Warriors, Women and people of the said Six Nations and their heirs for ever All that District or Territory of Land being parcel of a certain District lately purchased by us of the Mississague Nation lying and being in the Home District of Our Province of Upper Canada, beginning at the mouth of a certain River formerly known by the name of Ours or Grand River now called the River Ouse, where it empties itself into Lake Erie and running along the Banks of the same for the space of six miles on each side of the said River or a space co-extensive therewith conformably to a certain survey made of the said Tract of Land and annexed to these presents and continuing along the said River to a place called or known by the name of the forks and from thence along the main stream of the said River for the space of six miles on each side of the said stream or for a space equally extensive therewith as shall be set out by a survey to be made of the same to the utmost extent of the said River as far as the same has been purchased by Us and as the same is bounded and limited in a certain Deed made to us by the Chiefs and people of the said Mississague Nation, bearing date the seventh day of December in the year of our Lord one thousand seven hundred and ninety-two to Have and to Hold the said District or Territory of Land so bounded as aforesaid of Us our Heirs

and successors to them the Chiefs Warriors Women and people of the Six Nations and to and for the sole use and behoof of them and their heirs for ever freely and clearly of and from all and all manner of Rents, fines and services whatever to be rendered by them or any of them to Us or Our Successors for the same and of and from all conditions stipulations and agreements whatever except as hereinafter by Us expressed and declared Giving and Granting and by these presents confirming to the said Chiefs Warriors Women and people of the Six Nations and their heirs the full and entire possession Use benefit and advantage of the said District or Territory to be held and enjoyed by them in the most free and ample manner and according to the several customs and usages of them the said Chiefs Warriors Women and people of the said Six Nations Provided always and be it understood to be the true intent and meaning of these presents that for the purpose of assuring the said Lands as aforesaid to the said Chiefs Warriors Women and people of the Six Nations and their heirs and of securing to them the free and undisturbed possession and enjoyment of the same.

IT IS OUR ROYAL WILL AND PLEASURE that no transfer, alienation conveyance sale gift exchange lease property or possession shall at any time be made or given of the said District or Territory or any part or parcel thereof by any of the said Chiefs Warriors Women or people person or persons whatever other than among themselves the said Chiefs Warriors Women and people, but that any such transfer alienation conveyance sale gift exchange lease or possession shall be null and void and of no effect whatever. And that no person or persons shall possess or occupy the said District or Territory or any part or parcel thereof by or under pretence of any such alienation Title or conveyance as aforesaid or by or under any pretence whatever under pain of our severe displeasure And that in case any person or persons other than them the said Chiefs Warriors Women and people of the said Six Nations shall under pretence of any such title as aforesaid presume to possess or occupy the said District or Territory or any part or parcel thereof that it shall and may be lawful for us our Heirs and Successors at any time hereafter to enter upon the Lands so occupied and possessed by any person or persons other than the people of the said Six Nations and them the said intruders thereof and therefrom wholly to dispossess and evict and to resume the part or parcel so occupied to Ourselves, our heirs and successors Provided always that if at any time the said Chiefs Warriors Women and people of the said Six Nations should be inclined to

dispose of and surrender their use and interest in the said District or Territory or any part thereof the same shall be purchased for Us, our Heirs and Successors at some public meeting or assembly of the Chiefs Warriors and people of the said Six Nations to be holden for that purpose by the Governor, Lieutenant-Governor or person administering Our Government in our Province of Upper Canada, IN TESTIMONY whereof, We have caused these our Letters to be made patent and the great seal of our said Province to be hereunto affixed.

Witness, John Graves Simcoe, Esquire, Lieutenant-Governor and Colonel commanding our forces in Our said Province.

Given at Our Government House at Navy Hall this fourteenth day of January in the year of our Lord, One thousand seven hundred and ninety-three, in the thirty-third year of Our Reign.

APPENDIX “D”

BIBLIOGRAPHY AND BACKGROUND CASES

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