The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians

[1981] 4 C.N.L.R. 86

England and Wales
Court of Appeal (Civil Division)
Royal Courts of Justice, London

Lord Denning M.R., Lord Justice Kerr and Lord Justice May

January 28, 1982

Louis Blom-Cooper, Q.C. and Richard Drabble, for the applicants.
Robert Alexander, Q.C. and Simon Brown, for the Secretary of State.
Andrew Morritt, Q.C. and Peter Irvin, for the Government of Canada.

The applicants brought this application for a declaration that treaty or other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of Her Government in the United Kingdom. The application was dismissed by the High Court of Justice, Queen's Bench Division. The applicants appealed.

Held: (per Lord Denning M.R.)

1. The Royal Proclamation of 1763 and the Indian treaties created obligations which were binding on the single and indivisible Crown of the United Kingdom.
2. However, at the Imperial Conference of 1926 it was recognized that, as a result of constitutional practice, the Crown was no longer indivisible. Thereafter the Crown was separate and divisible for each self-governing dominion or province or territory.
3. When the Crown became divisible, the obligations which were previously binding on the Crown simpliciter were also divided. As a result, the

obligations of the Crown under the Royal Proclamation and the Indian treaties became the obligations of the Crown in respect of Canada. They were no longer the obligations of the Crown in respect of the United Kingdom.

4. It is, therefore, not permissible for the Indian peoples to bring an action in the United Kingdom to enforce these obligations. Their only recourse is in the courts of Canada.

(per Lord Justice Kerr)

1. Once an overseas territory has an established government, that government is distinct from the government of the United Kingdom.
2. Any obligations of the Crown in such an overseas territory are the responsibility of the Crown in right of that territory; they are not the responsibility of the Crown in the right of the United Kingdom.
3. The British North America Act, 1867 and its successors created an all-embracing federal governmental structure for Canada. The rights and obligations in relation to the Indian peoples are therefore the responsibility of the Crown in right of the Dominion or Provinces of Canada, not of the Crown in right of the United Kingdom.
4. The power over Canadian legislation retained by the Crown in right of the United Kingdom by sections 55 to 57 of The British North America Act, 1867 is irrelevant in this case because an overseas government can have rights and obligations without being wholly independent.

(per Lord Justice May)

1. Although the Crown at one time was one and indivisible, with the development of the Commonwealth this is no longer so. In matters of law and government the Queen of the United Kingdom is entirely independent and distinct from the Queen of Canada.
2. Any treaty or other obligations which the Crown had entered into with the Indian peoples of Canada in right of the United Kingdom become the responsibility of the Government of Canada with the attainment of independence, at the latest with the Statute of Westminster, 1931.
3. Furthermore, the rights granted to the Alberta Indians by Treaty No. 6, signed in 1876, were granted by the Crown in right of Canada and not by the Crown in right of the United Kingdom.
4. This court has no jurisdiction to consider the issues raised by this application. Further, any enforcement of the rights and obligations in question could only be carried out in Canada and would be subject to Canadian law.

Appeal dismissed. Application refused.

On January 29, 1982, the Court of Appeal refused an application for leave to appeal to the House of Lords.

Editor's note: The various points of law considered by the Court of Appeal are itemized in the subject index of this volume.

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LORD DENNING, M.R.:--

1. THE INDIAN PEOPLES COME HERE

Over 200 years ago, in the year 1763, the King of England made a Royal Proclamation under the Great Seal. In it he gave solemn assurance to the Indian peoples of Canada. These assurances have been honoured for the most part ever since. But now the Indian peoples feel that the assurances are in danger of being dishonoured. They are anxious about the Canada Bill which is now before the Parliament of the United Kingdom. Under it there is to be a net Constitution for Canada. The Indian peoples distrust the promoters of the Bill. They feel that, if it is passed, their own special rights and freedoms will be in peril of being reduced or extinguished. They have not gone to the courts of Canada for redress. They have come to this court. They say that the assurances which were given 200 years ago -- and repeated in treaties 100 years later -- were binding on the Crown of the United Kingdom. So they come to the courts of this country to plead their case. They come in particular from Alberta, Nova Scotia and New Brunswick. But the other Indian peoples from the other provinces are watching closely too. They want to see what happens. Seeing that their claim is against the Crown in respect of the United Kingdom, they are entitled, I think, to come here to put their case. They ask this court to make a declaration "that treaty or other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of Her Government in the United Kingdom".

This is disputed by the Department of State in the United Kingdom. When the matter was under consideration by the Foreign Affairs Committee of the House of Commons, the question was put to the Foreign and Commonwealth Office:

> Has the United Kingdom any treaty or other responsibilities to Indians in Canada?

The answer given by that Office on 11th November 1980 was:

principle in relation to Canada, which is interesting because the case was decided before the British North America Act, 1867, was Re Holmes (1861), 2 Johnson & Hemming 527. This concerned disputes arising out of certain lands vested in the Crown, in the then Province of Upper Canada, in relation to which a Petition of Right was brought in the Court of Chancery here. It was held by the Vice-Chancellor, Sir William Page Wood, that, whether or not the Crown was a trustee of the land, the situs of any resulting rights and obligations lay in Canada and that these were only enforceable there. He said that "as the holder of Canadian land for the public purposes of Canada, the Queen should be considered as present in Canada, and out of the jurisdiction of this court". In other words, any resulting rights and obligations existed only in right or respect of the Crown in what was then Upper Canada, and not in right or respect of what was then Great Britain.

An even more important illustration for present purposes of the same principle is to be found in the decision of the House of Lords in Attorney-General v. Great Southern and Western Railway of Ireland, [1925] A.C. 754, which has been followed in the Australian courts in relation to similar problems as between Australia and Papus in Faithorn v. Territory of Papua (1938), 60 Comm'th L.R. 772, and as between the rights of the Crown in respect of the Commonwealth of Australia and the State of New South Wales in Federal Commissioner of Taxation v. Official Liquidator of E.O. Farley Ltd. (1940), 63 Comm'th L.R. 278. The importance of this case for present purposes is that it shows that there may be a devolution of rights and obligations of the Crown in respect of the government of Great Britain to another government within the Commonwealth without any express statutory or other transfer, but merely by virtue of the creation of the new government and of the assignment to it of responsibilities which relate to the rights and obligations in question. This was a point on which Mr. Blom-Cooper strongly sought to rely in relation to the Crown obligations arising out of the Royal Proclamation and the various Indian treaties, particularly those before 1867, which he contended had never been formally transferred to the Federal or Provincial governments of Canada.

The facts of that case were briefly as follows. By agreements made in 1917 and 1918 between the President of the Board of Trade in Britain, which were subsequently transferred to the Minister of Transport, and a railway company in what was then Southern Ireland, certain rights of compensation were conferred on the company in consideration of the company taking up the rails and sleepers on portions of their line, since these were required for public purposes in the war effort. Thereafter the Irish Free State was created with "the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa", and a Provisional Government was established. Then, by an Order in Council which recited that a Ministry of Economic Affairs had been set up within the Provisional Government, responsible for (inter alia) transport, including functions hitherto performed by the Minister of Transport and the Board of Trade, the corresponding functions were transferred to the Provisional Government together with (purportedly) "any property, rights and liabilities" connected with these functions. The company thereupon brought a Petition of Right, contending that, notwithstanding these enactments, the responsibility for the obligations under the original agreement remained with the British Government. The

company's contention in relation to the purported transfer of liabilities under the Order in Council was that these had not been effectively transferred, either on the true construction of the Order, or because the Order was ultra vires and to that extent void. This contention failed.

Although most of the speeches proceeded on the basis of the construction of the Order, it is clear that in the view of the House the same result also followed from the mere devolution of governmental responsibility for the matters to which the obligations related. In particular, the following passage (at page 773) is worth citing from the speech of Viscount Haldane in which Lords Dunedin and Carson concurred:

> In the present case Parliament transferred the duty of producing the fund out of which the liability in question, when it accrued, should be met to the Irish Parliament. It thereby declared its intention not itself to provide the money required out of its own Consolidated Fund. It does not matter whether the liability was in terms transferred to the Irish Government. By its very character it would cease when it became operative to be a liability of the British Consolidated Fund and become one of the Irish legislature Central Fund, if they chose to so provide.

This is a clear illustration, of the highest authority, of the second of the principles concerning the situs of Crown obligations to which I have referred. Its effect is that such obligations exist only in respect of that government within the realm of the Crown against which such obligations can be enforced.

In the light of the foregoing principles, I return to the position in relation to all obligations assumed by the Crown under the Royal Proclamation and the various treaties with the Indian peoples of Canada. The treaties fall into two parts; the Maritime Treaties, which also covered what is now part of the Province of Quebec, and which were made before the British North America Act, 1867, and the subsequent treaties numbered 1 to 11 which were thereafter made in relation to what became parts of the Prairie Provinces, the North Western Territory, and British Columbia. For this purpose it is unnecessary to revieW the historical and constitutional development in Canada, which has extended into the present century. It is also irrelevant to consider whether, as maintained by the applicants but denied on behalf of the Secretary of State and the Government of Canada, the pre-1867 treaties were mere treaties of peace, or whether these also gave obligations concerning "personal and usufructuary" rights of the Indian peoples, in particular in relation to hunting and fishing. I am content to assume this in favour of the applicants for present purposes. Finally, it is irrelevant to consider whether any Crown obligations under these treaties arose in respect of the Crown in Great Britain, or whether -- as I am inclined to think -- they would already have arisen in respect of the developing governments of the Maritime Provinces and Quebec. It is sufficient to turn directly to the British North America Act, 1867.

This Act created the Dominion of Canada, then constituted by the four Provinces of Ontario,

Quebec, Nova Scotia and New Brunswick. By section 146 it provided for the admission of Newfoundland, Prince Edward Island, British Columbia, Rupert's Land and the North-Western Territory by Order in Council, as subsequently happened. It set up the structure of Dominion and Provincial legislatures and executive governments in Canada. The executive power was to remain vested in the Crown, to be exercised for the Dominion by the Governor-General appointed by the Sovereign, in certain cases in conjunction with the newly created Queen's Privy Council of Canada. Executive power within the Provinces was vested in Lieutenant-Governors to be appointed by the Governor-General and responsible to him. A "Consolidated Reserve Fund" for Canada was created, and it was provided that the Dominion was to be liable for the debts and liabilities of each Province.

This Act was subsequently extended by amendment and by other Acts until 1930 to the whole of the present territory of the Dominion and Provinces of Canada.

The effect of the 1867 Act and its successors, up to the Statute of Westminster, 1931, was accordingly to create an all-embracing federal governmental structure for Canada, which -- subject to one point discussed hereafter -- was wholly independent and autonomous in relation to all internal affairs. For present purposes only a few of its provisions require to be mentioned specifically. First, sections 91 and 92 conferred exclusive legislative powers upon the Dominion and the Provinces respectively in relation to the matters therein mentioned. By section 91(24), the Dominion Government was invested with exclusive powers in relation to "Indians, and Lands reserved for the Indians". Secondly, however, by section 109 all lands, mines, minerals and royalties belonging to the Provinces were expressly declared to continue to belong to them.

Since the passing of this Act there have been numerous cases, many of which reached the Privy Council, concerning the respective rights and obligations as between the Dominion and the Provinces. In the present context the most important ones arose out of the dichotomy between sections 91(24) and 109: whereas the Dominion Government was vested with exclusive legislative power concerning the Indian peoples and the lands reserved for them, the lands themselves, and the usufructuary rights arising out of them, were vested in the Provinces. The problem was that large parts of these lands were subsequently ceded by the Indians under the treaties Nos. 1 to 11 and accordingly accrued to the Provinces. This dichotomy gave rise to a number of disputes, of which St. Catherine's Milling and Lumber Company v. The Queen on the Information of the Attorney-General for Ontario (1888), 14 A.C. 46 is the leading authority. The issue concerned the right to timber growing on land covered by the Royal Proclamation of 1763 and ceded on behalf of the Salteaux Tribe of Ogibbeway Indians under treaty No. 3 of 1873, subject to certain privileges of hunting and fishing. It Was held by the Privy Council that the Indian usufructuary rights were preserved and did not fall within section 109, but that this section, and the cession under the treaty, vested the whole of the beneficial interest in the land (including its timber, etc.) in the Province to the exclusion of the Dominion, notwithstanding the legislative power of the Dominion under section 91(24).

This decision bas followed in many subsequent cases to which We were referred. It is unnecessary

to discuss these further, other than to mention that I cannot accept that it folloWs from one sentence in the judgment of Lord Watson in the St. Catherine's case (at page 60) that any right or obligation in relation to the Indian peoples remained vested in the Crown in respect of what bas then Great Britain. On the contrary, subsequent decisions of the Privy Council have authoritatively established that the effect of the Act of 1867 and of its successors was to transfer to Canada, as between the governments of the Dominion and of the Provinces, every aspect of legislative and executive power in relation to Canada's internal affairs. Thus in Attorney-General for the Province of Ontario v. Attorney-General for the Dominion of Canada, [1912] A.C. 571 (P.C.), Earl Loreburn, L.C. said at pages 581 and 584:

> It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. ... For whatever belongs to self-government in Canada belongs either to the Dominion or to the Provinces, within the limits of the British North America Act.

(I return to the reference to the limits under the Act hereafter). Similarly, in Bonanza Creek Goldmining Company Ltd. v. The King, [1916] 1 A.C. 566 (P.C.), Viscount Haldane stated at page 579:

> It is to be observed that the British North America Act has made a distribution between the Dominion and the Provinces which extends not only to legislative but to executive authority.

We are here not concerned with the many difficult and complex problems concerning the distribution of power and responsibility as between the Dominion and the Provinces, which have given rise to so much litigation. We are only concerned with the question whether any of these still remain vested in the Crown in right or respect of the United Kingdom; On the basis of the principles discussed earlier in this judgment, and of the British North America Act, 1867 and its successors, there can in my view be no doubt that the answer to this is in the negative. So far as rights and obligations in relation to the Indian peoples of Canada are concerned, the entire devolution of these from the Crown in right of what is now the United Kingdom, to the Crown in right of the Dominion or Provinces of Canada, is further confirmed by numerous Canadian enactments, both Federal and Provincial, culminating in the consolidated Indian Act, 1970. This derives its ultimate constitutional authority under the Crown from section 91(24) of the Act of 1867, as mentioned above, and deals comprehensively with all matters concerning the Indian peoples. The devolution to Canada of all legislative and executive powers in this regard is therefore complete.

It then only remains to deal with one further argument put forward by Mr. Blom-Cooper on behalf of the applicants. This is that, by virtue of sections 55 to 57 of the British North America Act, 1867, the Crown, in right of what is now the United Kingdom, retained the ultimate power over all legislation enacted by the Dominion of Canada. On this basis it is said that the Crown in right of the United Kingdom also indirectly maintained ultimate power over the enactments of the provincial