CA018964
Vancouver Registry

# *Court of Appeal for British Columbia*



BETWEEN:

ST. MARY'S INDIAN BAND AND
ST. MARY'S INDIAN BAND COUNCIL

PLAINTIFFS
(RESPONDENTS)

AND:

THE CORPORATION OF THE CITY OF CRANBROOK

DEFENDANT
(APPELLANT)

AND:

THE ATTORNEY GENERAL OF CANADA

INTERVENOR

Before: The Honourable Mr. Justice Hinds
The Honourable Madam Justice Prowse
The Honourable Mr. Justice Hutcheon

| | |
|---|---|
| J.L. Finlay<br>F. Anderson | Counsel for the Plaintiffs<br>St. Mary's Indian Band and<br>St. Mary's Indian Council |
| C.S. Murdy<br>D.A. Garraway | Counsel for the Defendant<br>The Corporation of the<br>City of Cranbrook |
| J.R. Haig, Q.C. | Counsel for the Intervenor<br>The Attorney General of Canada |
| Place and Date of Hearing: | Vancouver, British Columbia<br>April 7, 1995 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>July 13, 1995 |

Written Reasons by:
The Honourable Mr. Justice Hutcheon

Concurred in by:
The Honourable Mr. Justice Hinds
The Honourable Madam Justice Prowse

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# *Court of Appeal for British Columbia*

***St. Mary's Indian Band and***
***St. Mary's Indian Band Council***

***v.***

***The Corporation of the City of Cranbrook and***
***The Attorney General of Canada***



REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE HUTCHEON

1 The appellant, The Corporation of the City of Cranbrook, was held to be liable to pay property taxes to the respondent, St. Mary's Indian Band, on the ground that the airport operated by the City was part of the Band's reserve. The trial judge held that on the proper interpretation of an amendment in 1988 to the ***Indian Act*** the subject property was part of the reserve despite its surrender for sale by the Band to Her Majesty in 1965 at a value established by appraisal.

2 When the City refused to pay the taxation notice imposing 1992 taxes, the Band sued and obtained judgment in the amount of $334,611.38. This is in contrast to the $35,880 paid to the Band in 1966 as the fair market value of the land at the time. The Attorney General of Canada participated in this action in the role of intervenor.

3 In the document entitled "Surrender Form" signed on 30 December 1965 this provision appears:

> And that should any time the said lands cease to be used for public purposes they will revert to the St. Mary's Indian Band free of charge.

4 The intention, as reflected in the Surrender Form, was that the Government would sell the property. That has not happened and the airport is operated by the City under a 30 year lease at a nominal rent of $1.

5 The trial judge set out the background of the action in these two passages:

> From 1966 to 1992 no taxes were apparently levied by the Band. That was because the ***Indian Act*** permits of taxation only with respect to reserve lands and because of the definition of surrendered lands contained in the ***Act*** as it existed through 1952 to 1988. It read:
>
> > "Surrendered lands means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart."
>
> That definition took these particular lands out of the category of reserve lands with the result that they were not subject to the levy of taxes by the Band, see ***Leonard vs. R. in Right of British Columbia***, [1984] 4 W.W.R. 37 (B.C.C.A.).
>
> In 1988 the ***Act*** was changed. A new subsection was added to the definition of "reserve". Ignoring the exceptions which do not apply in this case, it provided for the first time that "reserve" includes "designated lands". Designated lands were then defined in a new subsection to mean:
>
> > "... a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, <u>otherwise than</u>

> absolutely, released, or surrendered its rights or interests, whether before or after the coming into force of this definition."
>
> I have underlined the words which are important for this discussion.



6 The trial judge went on to hold that the condition that the land should revert to the Band if it should cease to be used for public purposes made the surrender a qualified one as opposed to an absolute one. By amending the ***Indian Act*** in 1988 to define "designated land" Parliament drew lands which were subject to a qualified surrender back into the definition of "reserve". Accordingly the lands in question were subject to the taxing powers of the Band under its by-laws.

7 It is common ground that the 1988 amendment to the ***Indian Act*** was brought about as a result of the decision of this Court in ***Leonard v. R. in Right of British Columbia***, [1984] 4 W.W.R. 37. In that case the Kamloops Band surrendered portions of the reserve in 1980 on the condition that the lands be leased for commercial purposes to persons who did not come within the purview of the ***Indian Act***, and on condition that the rents be used for or by the band. This Court held that the surrendered lands were not part of the reserve and therefore personal property purchased by an Indian on surrendered land was subject to sales tax.

8 To remedy the matter, the ***Indian Act*** was amended to redefine "reserve" to include "designated lands" as that phrase is defined in the ***Act***. For convenience I repeat the definition of designated lands:

> "designated lands" means a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition;

9 In the introduction of Bill C-115, the Parliamentary Secretary to the Minister of Indian Affairs told the House, among other things:

> There are two main purposes to this Bill: first, to clarify the legal status of Indian lands; second, to establish the legal foundation for property taxation by band councils.
>
> . . . .
>
> The Bill before us will establish that a surrender may take one of two forms - first, an absolute surrender for sale which would remove land completely of all Indian interests and take it out of reserve, which is extremely rare, and second, a surrender for lease or some other restricted purpose, in which case the land remains part of the reserve. Setting aside part of a reserve for leasing is not a surrender, nor is it a release of the Indian interest in the land.
>
> In order to facilitate and strengthen the distinction between these two types of surrender, land surrendered for lease would be termed "designated land" and the process of such non-absolute surrender would be termed "designation". This terminology is obviously far

superior to the word "surrender", and the symbolic importance of this change is of great value.

As a result of these amendments Indian communities will be able to set land aside for development without fear of losing the Indian status of the land. The rights they obtain through the Indian Act will continue to apply, such as voting rights in band elections, protection of cultural property, and the power to govern the land through by-laws.

The last point is very important. At present it is not at all clear in the Indian Act whether the word "reserve" includes surrendered land of any type. There is, therefore, a risk that when land is surrendered for lease it might cease to be defined as part of the reserve and the by-law powers of the band council could not govern the land. This is a totally unacceptable loss of Indian jurisdiction and control of Indian land. It would also mean a very serious vacuum of local jurisdiction over leased Indian land. This has taken place in many instances across Canada and is why the band at Kamloops requested the change. This situation cannot be permitted to continue.

One of the most important by-law powers that bands need is their power to tax use of the land. That brings me to the second purpose of these amendments, which is to establish clearly that band councils have the power to tax any interest or use of reserve lands in order to defray their costs as the government of that land. Such taxation power is obviously indispensable to any form of modern government. Some bands may not wish to use this power, but it must be there for bands which wish to exercise it.

In fact, Section 83 of the Indian Act has provided a taxation power for band councils since 1951. It is possible, however, that the power might apply only to Indians. It may not, as presently worded, apply to non-Indian leaseholders. The amendments will make certain that non-Indians are covered.

10 The following provisions of the amending Act are important to the arguments of the City and the intervenor:

"2. The heading preceding section 37 and sections 37 and 38 of the said Act are repealed and the following substituted therefor:

SURRENDERS AND DESIGNATIONS

Sales

37.(1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

Other Transactions

(2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

Surrender to Her Majesty

38.(1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

Designation

(2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted."

11 The approach of the trial judge was to consider the nature of the surrender when it occurred in 1966. Following that approach he examined the relevant sections of the ***Indian Act*** in force in 1966 and concluded that the surrender was the kind of qualified surrender contemplated by section 38(2) of that ***Act***.

> **38.**(1) A band may surrender to Her Majesty any right or interest of the band and its members in a reserve.
>
> (2) A surrender may be absolute or qualified, conditional or unconditional.



12 The trial judge held that the minutes of negotiation could not be looked at to show the sense in which the words of surrender were used and that the nature of the surrender must be determined from its wording alone. With respect, I think in this case the court is entitled to know the purpose of the surrender, the background of the negotiations and the context in which the parties to the surrender were operating. (see ***Prenn v. Simmonds***, [1979] 1 W.L.R. 1381, 1385.

13 It is clear from the minutes of the negotiation meeting of July 30, 1965, that the City of Cranbrook, was intent on obtaining land for an airport site.

14 I quote relevant passages from the minutes:

> . . . .
>
> Mr. Nimsick [described as "attorney representing St. Mary's Band] stated that a long-term lease (99 yrs.) would be preferred, but an outright sale would be considered providing the land would revert to the Band for a nominal sum of $1.00 if and when it was no longer required for airport purposes.
>
> . . . .

> The advantages of a long-term lease were again discussed and explained by Agency Staff. The Council decided that they would rather have an outright sale.
>
> It was moved by Chief Birdstone and seconded by Councillor Whitehead that the following resolution be passed:
>
> THAT THE St. Mary's Band Council do accept the offer for sale of an acreage of St. Mary's Indian Reserve No. 1, to be determined by legal survey, at Sixty Dollars ($60.00) per acre, said area to be used for airport purposes, on the following terms and conditions:
>
> 1. THAT the land be sold to Her Majesty the Queen in the Right of Canada for the price and consideration of Sixty Dollars ($60.00) per acre, such land to be returned to the St. Mary's Indian Band by Her Majesty the Queen in the Right of Canada, for the price and consideration of One Dollar ($1.00), upon such land being no longer required as an airport site.
>
> . . . .

15 Against that background, I quote the habendum from the terms of surrender:

> TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors in trust to sell the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people.
>
> AND upon the further condition that all moneys received from the sale thereof, shall be credited to our Capital Trust funds at Ottawa. And that should any time the said lands cease to be used for public purposes they will revert to the St. Mary's Indian Band free of charge

16 The trial judge considered the effect of the habendum in this passage:

> The intervenor's submission that this was an absolute surrender even though on condition, brings me to the question of what was absolute and what was qualified under the old s.38(2). In my opinion the trust conditions that the land be sold and the proceeds be credited to the Capital Trust Funds at Ottawa were conditions subsequent to the surrender. Failure to observe them would not alter the effectiveness of the surrender. But the provision for future reverter qualified the extent of the rights that the Crown obtained by the surrender, just as it would have limited the estate which a grantee would have received from a grantor had this been a conveyance between non-Indians involving non-Indian lands. In my opinion that resulted in this surrender being a qualified one, as opposed to an absolute one.

17 Earlier the trial judge had discussed his reasons for preferring the description of a qualified surrender:

> Old s.38(2) contains its own alternative types of surrender. It might be absolute or qualified, conditional or unconditional. To return to the Oxford Dictionary definition quoted above, an absolute surrender would appear from it to be one that does not contain a qualification or condition. One that contains a qualification or condition cannot, according to the dictionary, be said to be absolute. But old s.38(2) in effect contains its own definition which contradicts the dictionary, because it contemplates a surrender which may, at the same time, be both absolute and conditional. Moreover, the section contemplates a qualified surrender, both conditional and unconditional. There is no definition of "qualified" in the Act. The Shorter Oxford English Dictionary (1973 Edition) defines it at p.1723 to include:
>
> "limited, modified, or restricted in some respect".
>
> The surrender here was modified by the condition that the land should revert to the Band if it should cease to be used for public purposes. In my opinion that made this a qualified surrender rather than an absolute one. That is so even though the Indian Act provides that the Band does not hold land for itself. That provision would prevent the land from going back to the Band in fact, and only allows it to be held by the Crown on behalf of the

> Band. However, the intent of the provision for reversion, contained in this form of surrender drawn by Her Majesty for the Band, was clearly that the benefit of those rights to the enjoyment of land that are peculiar to Indian tile should, under that circumstance, revert to the Band.



18 I agree with the trial judge that "one must look to the statute as it existed when the surrender was made to see how it could then be done and with what effect". I further agree with him that s.38(2) contemplates a surrender which may, at the same time, be both absolute and conditional. In my view that describes the surrender of the lands with which we are concerned.

19 Firstly I note that the provision for reversion is contained in a clause of conditions. Secondly it is clear that the change from "airport purposes" in the minutes of the negotiating minutes to "public purposes" in the reversion clause indicates a longer postponement of the reversion than first contemplated.

20 Thirdly, and most importantly, the trial judge erred in law when he said that the provision for future reverter limited "the estate which a grantee would have received from a grantor had this been a conveyance between non-Indians involving non-Indian lands".

21 In the case of ***In re Taxation of University of Manitoba Lands***, [1940] 1 W.W.R. 145 (MAN.C.A.) certain lands were conveyed by the Dominion

Government to the University of Manitoba. It was argued that the University was not the owner of an estate in fee simple because of this reverter provision:

> "Provided always, that if at any time hereafter the said University shall be dissolved or shall cease to exercise its functions as a University, then, and in such case, any and all of the said lands which may remain unsold shall revert to and become revested in Us and Our successors as of Our and their former estate therein, subject to any mortgage or pledge which may have been given by the said University; and all funds in the hands of the said University, their successors or assigns, the proceeds of, or which in any way result from the sale, lease, mortgage, pledge or other disposal of the said lands, shall be immediately paid over to Us, Our successors or assigns.

22 Mr. Justice Robson, writing for the majority said at pages 162-163:

> The second proviso provides for reverter in case the University shall be dissolved or cease to exercise its functions as a University. To my mind this is no more than a condition subsequent. Whether it is repugnant to the deed and so void need not be discussed. At all events the estate remains vested in the University absolutely meanwhile.
>
> . . . .
>
> The case was argued as if the University were a bare trustee of the land for the Crown. It is in no such position. The University is beneficial owner of the land subject to a right in the Crown to require a reconveyance of the residue on hand in case the University dissolves or cease to function. Until that at present remote possibility happens and is seized upon by the Crown the University's title remains that of a person holding in fee simple.

> It is the title to the land that is under discussion here. No one is questioning that the Crown has an immature personal right to certain performance but it is in my opinion the right of a covenantee and not a present estate or interest in the land.

23 The subject of a condition subsequent is discussed in ***Anger and Honsberger Law of Real Property***; 2nd ed., (Aurora:Canada Law Books Inc., 1985) at page 125 where the University of Manitoba case is cited:

> The fee simple upon condition subsequent is similar on its face to the determinable fee. However, it is created by the addition of a condition to a grant in fee simple, which may cut the estate short at the instance of the grantor. Thus, in a grant "to A in fee simple, provided the land is used for a school", the estate may be determined by the grantor when it is no longer so used.
>
> . . . .
>
> In a fee simple upon condition subsequent the grantor retains a *right of entry*, or a right of entry for condition broken. Again, this is a mere right not coupled with an interest in land and it is not an estate or interest itself.

In Megarry and Wade, ***The Law of Real Property***, 3rd ed. (London:Stevens and Sons Limited, 1966) at page 77 it is said that the difference between a determinable fee and a fee simple defeasible by condition subsequent is not always easy to discern. Words such as "if it happens that" or as in ***University of Manitoba Lands*** "if at any time hereafter" operate as a condition subsequent. In my opinion, these are equivalent to the words used in the present case: "should [at]

any time the said lands ceased to be used for public purposes." See also ***R. v. McKellar*** (1972), 3 O.R. 16. (H.C.J.)



24 Thus, contrary to the conclusion of the trial judge, the reverter provision in the Surrender Form at common law would be treated as a condition subsequent, a right not coupled with an interest in land. I note that the trial judge did not have the benefit of the decision in ***University of Manitoba Lands***.

25 On behalf of St. Mary's Indian Band, counsel submitted that the common law concept of a condition subsequent could not apply to Indian interest in reserve land. He cited ***Delgamuukw v. The Queen*** (1994), 30 B.C.A.C. 1 and quoted Mr. Justice Macfarlane at page 37:

> The authorities which I have cited under the heading of "Proving Aboriginal Rights" indicate the futility of attempting to characterize aboriginal rights as proprietary or non-proprietary. I agree it is not correct to regard such rights as nonproprietary because they are inalienable. They are personal in that sense but that does not end the inquiry. In the end, **aboriginal interest is a right of use and occupation of a special nature - best described as *sui generis*. To stretch and strain property law concepts in an attempt to find a place for these unusual concepts which have arisen in a special context is, in my opinion, an unproductive task.**

26 There can be no doubt that the title of St. Mary's Indian Band to the lands in the reserve is *sui generis* - of its own kind or class. Its attributes include, in the first instance the sharing

of the use and occupation by all members of the Band. I say in the first instance because a particular parcel may be allocated to one of the members and, as in ***Derrickson v. Madsen*** (1987), 15 B.C.L.R. (2d) 125 (B.C.C.A.) that member may lease the parcel to non-members of the Band. As that case illustrates, the ordinary rules of real property law apply to that arrangement.



27 On this appeal the St. Mary's Indian Band relied upon the reverter provision for the proposition that, by way of a qualification to the surrender, the Band retains an interest in the land. In my opinion, this proposition has nothing to do with the *sui generis* nature of Indian title. It depends instead, upon a concept of real property that one may completely surrender the property to another but retain an interest in the lands.

28 This is the same proposition of a determinable fee that the trial judge relied upon in the passage quoted earlier in Paragraph 15. I have already stated that, based on the authorities, the reverter provision in the Surrender Form would be treated as a condition subsequent.

29 In this case I see no reason in principle that property law concepts cannot be used in interpreting the provisions of the ***Indian Act***, 1952. In my opinion, the provisions in the surrender instrument are properly viewed as an absolute surrender subject to

a condition. As a consequence, the land in question has not become "designated lands" as defined in the 1988 amendment and therefore has not become part of the reserve so as to be liable for taxes.

30 The contrary view reached by the trial judge leads to a startling result. Under its lease with the Federal Government the City of Cranbrook paid $1 in rent for a 30 year period. The startling result is that the City would be called upon to pay property taxes of about $297,000 for the 1992 taxation year and a similar or even larger amount for each year thereafter. The City would receive no value whatsoever in the form of services. No one suggests that the 1988 amendment itself was intended to bring about such a consequence and I do not think the interpretation of the Surrender Form leads to that conclusion. I would allow the appeal accordingly.

"The Honourable Mr. Justice Hutcheon"

I AGREE:

"The Honourable Mr. Justice Hinds"

I AGREE:

"The Honourable Madam Justice Prowse"