

February 3, 1988

MEMORANDUM/NOTE DE SERVICE

TO/A: E.A. Bowie, Q.C.
Assistant Deputy Attorney General

FROM/DE: W. B. Scarth
Vancouver Regional Office

SUBJECT/OBJET: Roy Anthony Roberts et al
v. Her Majesty the Queen et al

Comments/Remarques

During our meeting in Vancouver last week (January 29th) I undertook to write you with respect to an issue which arises in the above captioned case and which, in my view, should be considered in the context of not only this case but also of the claims based on aboriginal rights being made in British Columbia.

Shortly put, it is fundamental to our defence in Roberts that the two reserves in question be determined by the Court to have been allotted to the Cape Mudge Band prior to 1900. On the other hand, the interests of the Crown in the Gitksan Carrier and Pasco actions would no doubt be better served by a ruling that reserves in British Columbia were not created until at least 1930 because there will then be available a stronger argument that provincial legislation has effectively extinguished certain aboriginal rights insofar as reserve lands are concerned.

To the above I would add that our position has, in previous cases, been that reserves were established in or before 1887, notwithstanding the lands were not conveyed to Canada by British Columbia until 1930. The Province, on the other hand, has traditionally taken the position that the lands did not become "lands reserved for the Indians" until 1938. (See Moses et al v. The Queen et al [1977] 4 W.W.R. 474, at p. 477; Dunstan et al v. Hell's Gate Enterprises Ltd. et al (1985) 22 D.L.R. (4th) 568, at pp. 597-8.)

Insofar as the Roberts case is concerned, the significance of arguing that the two reserves were allotted to the Cape Mudge Band prior to 1900 may be seen from the following summary:

Comments/Remarques

A. The Claim

1. The Campbell River Indian Band has sued the Cape Mudge Indian Band and Federal Crown in the Federal Court for, amongst other things, declarations that Reserves Nos. 11 and 12 have at all times been set aside for the exclusive use and benefit of the Campbell River Indian Band. That Band presently occupies, and since prior to the turn of the century, has occupied, Reserve No. 11; members of the Cape Mudge Band presently occupy, and at all times have occupied, Reserve No. 12. In its defence the Cape Mudge Band claims an entitlement to occupy both reserves. The Crown's position, as pleaded, is that members of the Campbell River Band are, and since about 1907, have been, in lawful occupation of and entitled to the use and benefit of Reserve No. 11, and that members of the Cape Mudge Band are and at all times material have been in lawful occupation of and entitled to the use and benefit of Reserve No. 12.

B. Historical Background

1. In 1879, Gilbert Malcolm Sproat, a Commissioner appointed to settle the Indian land question in British Columbia, allotted reserves to the Laich-kwil-tach Tribe, of which the Campbell River and Cape Mudge Bands are members. Apparently his allotments were not approved, as required by the Orders-in-Council appointing him, by the B.C. Chief Commissioner of Lands and Works.
2. In October, 1886, Peter O'Reilly, then B.C. Reserve Commissioner, set aside a number of reserves for the Laich-kwil-tach Tribe. He was able to set aside one reserve (No. 10 not in issue) for Cape Mudge, but was unable to define the boundaries of Nos. 11 and 12 owing to the absence from the area of the Indians.
3. Then, in 1888, Ashdown H. Green, Chief Surveyor of the Reserve Commission, was appointed by the Federal Government (P.C. dated May 29, 1888), upon the request of the Provincial Government, "to determine the

Comments/Remarques

extent, and boundaries of the Indian Reserves at Campbell River. In his Report Mr. Green forwarded to the Chief Commissioner of Lands and Works, for his approval, a sketch and Minute of Decision of the reserves as defined by him, Mr. Green, "for the use of the 'Laich-kwil-Tach' tribe". The sketch outlines both reserves, and is headed by the caption:

"Laich-kwil-Tach (Eu-cla-taw) Indians
We-way-A-kay Band"

"We-way-A-kay" is a reference to the Cape Mudge Band. In issue is whether Mr. Green was officially allotting these reserves to the Laich-kwil-Tach Tribe and, indeed, whether he was authorized to do so. I am seeking advice from our historical researchers as to whether either reserve was, prior to 1900, in fact allotted to a specific Band. The documents we have, (letters, memoranda, etc.) however, indicate Indian Affairs treated both reserves as being set aside for the use and benefit of the Cape Mudge Band until about 1907 when the Cape Mudge Band, by resolution, 'ceded' Reserve No. 11 to the Campbell River Band.

During our discussion I mentioned the existence of a Proclamation dated December 15, 1876, by which the Governor-in-Council exempted all reserves and Indian lands in British Columbia from the operation of the surrender provisions of the Indian Act. A copy of this Proclamation is enclosed. I am told this Proclamation remained in effect until 1951, at which time the provision of the Indian Act under which it was authorized was repealed.

I am also enclosing the text of the resolution by which the Cape Mudge Band 'ceded' Reserve No. 11 to the Campbell River Band. On the basis that Reserve No. 11 had been allotted to the Cape Mudge Band by Mr. Ashdown Green and that they were lawfully in occupation of and entitled to the use and benefit of that reserve, we will have to argue that the Cape Mudge Band, by virtue of the Proclamation, legally 'surrendered' their rights to Reserve No. 11 to the Campbell

Comm. Remarques

River Band, retaining, of course, the right to be in lawful occupation of Reserve No. 12 which had similarly been allotted to them.

4. Finally, the 1902 Schedule of Indian Reserves appears to have given rise to an error with respect to entitlement to occupy Reserve No. 12. The error arose because a handwritten note was made on the Schedule, presumably following the 'ceding' resolution, indicating the Campbell River Band occupied Reserve No. 11 (which is in fact correct). Existing ditto marks below the handwritten notation were not altered so as to indicate that Cape Mudge continued to occupy No. 12 (as it in fact does).
5. This "error" was recognized but perpetuated in the Report of the McKenna McBride Commission made in 1916 and B.C. Order-in-Council 1036 (passed in 1938) by which reserve lands in British Columbia were conveyed by the Province to Canada. The plaintiffs (Campbell River Band) will undoubtedly argue that the combined effect of the recommendations contained in the Report of the Royal Commission, the legislation and Orders-in-Council pertaining to those recommendations, and the conveyance of the lands to Canada, was to vest the right to occupy both reserves in the plaintiffs. We will have to argue that the Royal Commission merely confirmed the boundaries of these two reserves, but did not allot either reserve to a specific band, that having been done by the reserve Commissioners in the last century and that the effect of the legislation is not to vest in the plaintiffs any right to occupy Reserve No. 12. (I point out, parenthetically, that Ian Binnie, during his time as Associate Deputy Minister, suggested, because of its wider impact, that we not challenge the validity of what was done by the Royal Commission. With respect, I continue to concur with that advice, and suggest it is a question of defining more narrowly what the Commission did, at least insofar as the Reserves in question are concerned.)

3rd February 1988

Comments/Remarques

I have discussed the reserve creation issue briefly with Mrs. Koenigsberg, and am scheduled to meet with her again for the purpose of determining the approach she and Mr. Macaulay intend taking in Gitksan Carrier and Pasco. I shall, of course, seek her views as to whether she feels those cases would be seriously prejudiced by the approach I am taking in Roberts.

As we discussed, it would be advisable to have Bob Green's views on the matter. I am sending a copy of this memorandum to him.

In the meantime, I am proceeding to conduct the Crown's defence as outlined above. Short of legislation we probably have no alternative. If you have a contrary view to the above approach please let me know.

WBS

W.B.S.

WBS/dg

c.c. R. L. Evans, Q.C.
R. J. Green, Q.C.
I. G. Whitehall, Q.C.