

Privy Council Appeal No. 103 of 1925.

Price Brothers and Company, Limited - - - - *Appellants*

v.

The King - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1926.

Present at the Hearing :

VISCOUNT HALDANE.

LORD SHAW.

LORD WRENBURY.

LORD DARLING.

LORD SALVESEN.

[*Delivered by* LORD SALVESEN.]

This is an appeal from a judgment of the Supreme Court of Canada dated the 20th May, 1925. The Trial Judge decided in favour of the appellants who were the plaintiffs in the action, and his judgment was unanimously confirmed by the Court of King's Bench. The Supreme Court of Canada by a majority reversed the judgment of the King's Bench, Duff J. dissenting.

The question at issue may be very simply stated. The appellants are the successors in title to a grant made by King Louis XIV of France in 1693 of the seigniorie of lake Metis and the surrounding area extending to one French league in depth. The lake discharges into a river of the same name which in its turn has its outlet to the river St. Lawrence. In the original concession which was granted by the Intendant of New France to a certain Louis Rouer the lake is said to be situated about twelve

or fifteen leagues from the river St. Lawrence, and in this deed the subject of the grant is thus described :—

“ Lac appellé Mitis, avec une lieue de terre de profondeur tout autour d'Iceluy”

This grant apparently required ratification by the King, and such ratification was duly granted on the 15th April, 1694, the exact words of the grant being :—

“ . . . du lac appellé Mitis avec une lieue de terre de profondeur tout autour d'Iceluy”

At the time of the grant it is common ground that the whole of this part of Canada had only been partially explored. There were no roads, and the country, except the coastal region where there was a very sparse population, was entirely uninhabited except for a few native hunters. It has remained so in the neighbourhood of the lake in question until the present day, but for the last fifty years or more lumbering operations have been going on in part of the area alleged to be comprised in the grant.

The locality in question was never surveyed until at the instance of the then proprietors a Mr. Ballantyne was sent in 1836 to make a survey with a view to an application by them for commutation of the original tenure into one of free soccage, a proceeding sanctioned by the Act 3, Geo. IV, Ch. 119, which empowered the Crown to accept surrenders of feudal grants and to re-grant the same in free and common soccage. Mr. Ballantyne, who was a sworn surveyor, made what proves to have been, except for one matter to which reference will afterwards be made, a complete and accurate survey of the lake waters which discharge into the river Metis. It disclosed that there were three bodies of water, together extending to about fifteen miles in length, which Mr. Ballantyne described as three sections of one lake, the most northerly being a long and narrow sheet of water connected by a channel about two miles long with a larger expanse which again was connected by a short channel of a quarter of a mile with another sheet of water of considerable area. Mr. Ballantyne reported that the whole extent of the lake, “ *i.e.*, from the point A to the point B ” (these letters being placed at the extreme ends of the lake as described by him) “ is almost a perfect level.” This is the only part of the report which has proved to be inaccurate. In point of fact the level of the most southerly sheet of water is about 8 feet higher than the level of the next into which it discharges by a stream a quarter of a mile in length which must have flowed at a considerable speed under the conditions which then prevailed. On the other hand, there was practically no difference in level between the other two bodies of water which have been described, and the channel between them was as free from current as the lake waters themselves.

From the point of view of a geographer, as there was a difference of level between the most southerly body of water and the lower lake, it would be proper to describe the upper or most southerly body of water as a separate lake. The question in

controversy between the parties now is whether the subject of the grant consists simply of the upper lake at the higher level as the Crown contend, and as the Supreme Court has held, or as the appellants contend, embraces the whole three sheets of water with their connecting channels, which Mr. Ballantyne described as sections of one lake. This question must be determined, not by reference to accurate geographical conditions as they have now been ascertained, but on a construction of the grant itself as applied to the knowledge of the locality which was then available. This question is by no means free from difficulty, as is evidenced by the great diversity of opinion in the Courts below, and can only be determined on a consideration of the terms of the grant itself and of the presumable intention of the granter in so far as this can be derived from the information as to the locality which was then available. At this date this can only be conjectured from plans and other documents of which a large number have been produced with a view to elucidating the question at issue.

The lake waters from which the river Metis ultimately emerges lie in a basin of low hills now, as then, covered with timber, which apparently constitutes the chief value of the grant. At the upper end there is a circle of hills coming close down to that end of the lake, with the result that tributaries are short and unimportant. The forest surrounding the lake waters is dense and, even at the present time, difficult to traverse, and the locality was no doubt much more inaccessible at the time when the grant was made, and would be most easily reached in canoes by following the course of the river Metis. Once arrived at the first still water the Indian navigator would have no difficulty in paddling his canoe along the whole fifteen miles or so of connected waterway, the only check to rapid navigation consisting in the short stretch of a quarter of a mile in which there must have been a comparatively rapid current proportional to the fall of 8 feet already referred to. Probably the original grantee had himself explored in this way the lake waters in question as he would scarcely rely merely upon the reports of Indians as to the nature of the country enclosing the lake area in going to the trouble and expense of applying for a concession. From the point of view of the native hunter it seems highly probable that as these three bodies of water were easily navigable from end to end, they would be considered as one lake to which a single name could be applied. As observed from any of the surrounding heights, the water would appear to be one continuous stretch, and the upper and middle sections would appear to merge into each other. From this point of view, the slight difference of level between the upper waters and the lower, although geographically important, would not appear to have any significance. It is common knowledge that in partially explored countries, where lakes are numerous, whole chains of lakes which are entirely distinct are known by a single name, although as the country becomes settled distinctive names may be given to each. The view that the appellants

present is that *prima facie* any person applying for a grant of land in such a region would treat the whole lake area as one body and by means of it define the boundaries of the land which it was his object to acquire under the peculiar feudal tenure applicable to seigniories. The object of these grants was to encourage colonisation from France and the seignior was only entitled to retain a small portion of the grant as his domaine, being under obligation to give off the remainder to settlers as and when they emerged, at very low rents. Under such circumstances there would be no reason to apply for a relatively small area, and as there were no competing claims the King would be favourably disposed towards any applicants for land in a remote district when his object was to settle the country with immigrants from France, and so increase its value to the French monarchy. It is plain from the documents that the application made by Louis Rouer was granted without restriction or limitation of any kind. Although the area claimed by the appellants extends to over 100,000 acres, it had no value at the time of the grant, nor for long after, as the anticipated settlement of immigrants, which alone would have given it value, never took place.

As might be expected, there is no contemporaneous evidence bearing upon the subject of the grant. The earliest map produced dates from 1755. It is obviously not prepared as a result of any survey of the hinter-land in which lake Metis was situated, but it represents the river Metis flowing from a single body of water, the area of which as shown being much smaller than the area as now ascertained. The same is true of all the other maps prior to the date of Ballantyne's survey, one of which was prepared by a Mr. John Mitchell on the instructions of the Lord Commissioners for Trade and Plantations. Other maps in 1815, 1826, 1827, 1828, 1829 and 1830 are to the same effect. The plan of 1829 which was issued from the Surveyor-General's Office at Quebec, and is signed by Mr. Bouchette, the official head of that office, appears to have been prepared from later and better observation of the locality, because it represents a lake approximately of the length of the three sections, although it is woefully inaccurate as regards its area and form. All these maps indicate that according to the information of the persons who penetrated into this comparatively remote area, on whose information the maps must have been based, lake Metis was treated as one body of water bearing one name, and there is no evidence of the various sections as Ballantyne described them having possessed separate names, until we come to 1870. Ballantyne himself states that the hunters and old settlers of the district, who had often frequented these parts, gave the appellation of lake Metis to the whole extent, and he points out that if the intention of the grant was merely to give one section the granting of a league all round any one of the sections must inevitably encroach upon the other. While his statement is of value as to the then repute, it is undoubtedly open to the observation that it was prepared on the instructions of the owners of the seigniority whose interest it was to claim the largest extent of

land as being embraced in the grant. His plan of the lake and report thereon were communicated to Mr. Bouchette, the Surveyor-General, and it is noteworthy that the claim which was then made to the whole three sections, although shown to be connected by narrow channels, and as regards the connection between the upper and the middle sheets by a stream, excited no surprise in the mind of Mr. Bouchette, although he was fully aware of the terms of the grant. As a cautious official, however, he would not commit the Government to an approval of the actual survey made until it had been subsequently verified, but ultimately the request of the then owner of the seigniority that its outline as laid down by Mr. Ballantyne might form part of the records of the Surveyor-General's Office was granted and both his report and plan have remained in the custody of the Government since that date.

It was not until the year 1855 that the de Rouvilles obtained the deed of commutation for which they had made application 19 years earlier. In the grant which proceeds from the British Crown the area is described as follows :—

“ that certain tract of waste and uncultivated land, lands and tenements known by the name of the Fief and Seigniority of the Lake Metis situate in the County of Rimouski in the District of Kamouraska heretofore forming part of the District of Quebec, which said Lake lying on the South Bank of the River St. Lawrence discharges itself into a River of the same name (Metis) emptying itself into the said River St. Lawrence and being at a distance of about ten or eleven leagues from the said River St. Lawrence together with all the Isles, Islands and Islets which may be found therein and one league of land in depth all round the said Lake and the appurtenances . . . ”

This grant was, of course, made in full knowledge of the claim of the de Rouvilles as to the extent of the seigniority based upon an accurate configuration of the whole three sheets of water. It is noteworthy that while in the original grant the nearest end of the lake is stated to be about 14 or 15 leagues from the St. Lawrence, the statement of the distance is now corrected to 10 or 11 leagues, showing that more accurate information had been by that time obtained by the Crown officials for the actual distance following the windings of the river is a little over 33 miles. From then onwards all of the many maps produced (with the exception of two of quite recent date in 1895 and 1916), including several issued by Government Departments, show a line round the lake Metis indicating the extent of the seigniority exactly in accordance with the claim made in 1836. The cumulative effect of this evidence in their Lordships' view is that during the whole period up to some years before 1870 the three bodies of water had been known by a single name, and that the area comprised in the grant was that which the appellants now claim. In 1870, however, the Crown caused a survey to be made by a Mr. Breen who reported that there was a difference in level of about 8 feet between the upper and middle sections, and between the middle and lower sections hardly any fall, and he concluded that the upper section, which he refers to as the “ grand

lac Metis," constitutes a separate lake, leaving the name lac Metis attributable to the two remaining sections, although by that time they had apparently received individual names, namely, Lac de l'Anguille and Lac de la Croix. Notwithstanding this subsequent maps describe the three bodies of water as Lac Metis upper, middle and lower. The explanation of the separate names probably lies in the fact that these waters had become more frequented by anglers and lumbermen, and that it had been found convenient to designate the separate sections by different names.

Mr. Breen's report caused a great difficulty in the minds of the Crown officials founded entirely on the difference in level between the upper lake and the others. The Crown at length came to the conclusion that the grant to the appellants' predecessor must be taken to be limited to what Breen had called the "grand lac Metis," which necessarily involved a large encroachment upon the middle lake. An alternative view was that it might apply to the two lower sections with a league all round these, and encroaching to the extent of almost a half on what was now described for the first time as the "grand lac Metis." The former view has been taken by the Crown and adopted by the majority of the Supreme Court. Their Lordships are of opinion that this view of the grant is not consistent with its terms. The grand lac Metis does not discharge into the river Metis because there is no evidence that the connection between it and the middle body of water was ever known by that name, and even if that could be affirmed it does not correspond with the distance of 10 or 11 leagues from the river St. Lawrence as described in the grant of 1855. The mere fact that this lake is geographically more accurately described as a separate lake than as a section of one lake has very little significance in view of the established repute for nearly two centuries of the three bodies of water as forming one lake, and bearing one name. It is, besides, extremely unlikely that the original applicants for a concession would have sought to obtain the lake and land around it which was most remote from the coast and therefore most difficult to settle. The terms of the grant are on the other hand entirely consistent with the view of the appellants, that the name lake Metis was at the time of the grant, and until recently, applied to all the lake waters which discharged into the river Metis at a distance of 10 or 11 leagues from the St. Lawrence. Their Lordships are, therefore, in full agreement with the result reached by the learned Trial Judge, and by the Court of King's Bench, which is also supported by one member of the Supreme Court.

As to the only other point which has been raised, that called by the learned Trial Judge "estoppel," their Lordships content themselves with saying that they entirely adopt the reasoning of the Trial Judge and of Mr. Justice Duff in repelling this plea for the Crown.

Their Lordships will accordingly humbly advise His Majesty that the judgment appealed from should be reversed with costs, and that of the Trial Judge restored, the appellants to have the costs of the appeal.

In the Privy Council.

PRICE BROTHERS AND COMPANY, LIMITED

o.

THE KING.

DELIVERED BY LORD SALVESEN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.
1926.