POINT v. DIBBLEE CONSTRUCTION COMPANY ET AL.

[1934] 2 D.L.R. 785 (also reported: [1934] O.R. 142, [1934] O.W.N. 88)

Ontario Supreme Court, Armour J., 30 January 1934

Indians--Licence of occupation for constructing highway--Right of Crown to grant--Distinction between licence and lease--Royal Prerogative--Election of council of band--Life chief--Indians' tenure--Action for trespass or ejectment--Statutory remedies-- Jurisdiction of Exchequer Court and of Supreme Court of Ontario--Damages in lieu of injunction.

Neither the provisions of s. 50 of the Indian Act, R.S.C. 1927, c. 98, that no portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown, not of s. 51 as to method of surrender or release, nor any other provisions, prevent the Crown from granting to a company a licence, not exclusive, to use, occupy and enjoy reserve lands for the purpose of constructing a highway. The legal title of such lands is in the Crown. The Indians' tenure is personal and usufructuary and not sufficient to found an action for trespass or ejectment.

Factors which the Court may consider in awarding damages in lieu of an injunction are delay in claiming the injunction and the fact that the injury complained of results in actual benefit to the plaintiff.

R. Danis, for plaintiff; *D. R. Kennedy*, K.C., for Dibblee Construction Co.; *W. L. Scott*, K.C., for Cornwall-Northern New York Internat'l Bridge Corp.

ARMOUR, J.:--This action raises interesting questions as to the rights of Indians living on a reserve with respect to the land in occupation by them. The plaintiff is a member of the St. Regis Band of Indians who occupy, as part of their reserve, Cornwall Island, situated in the River St. Lawrence opposite the Town of Cornwall. The island is about 5 miles long and about &fract34; of a mile in width. The Indians in this band number slightly over 1,700, of whom about 100 live on the island, the remainder on other reserves. The band is presided over by a council elected pursuant to the provisions of ss. 96 and 97 of the Indian Act, R.S.C. 1927, c. 98. It is said that there is no record in the Department of Indian Affairs of any treaty with the St. Regis Band but that, I think, is of no importance in this action, as I assume that this band has had treaty relations with the Crown.

The Ottawa & New York R. Co. and its lessee, the New York Central R. Co., cross the River St. Lawrence at this point and their line runs through the Indian Reserve, their tracks being carried over the Cornwall Canal and the north and south channels of the river by railway bridges. This is the only bridge between Montreal on the east and Niagara Falls on the west, which crosses the St. Lawrence River or any water forming part of the international boundary. For some years past the plan has been discussed in Cornwall and vicinity of converting the railway bridges into bridges for vehicular and pedestrian traffic and linking both the bridges over the north and south channels of the river with a roadway across the Indian Reserve.

This proposal has gained force with the increase in motor vehicle traffic in view of the fact that such an international roadway would connect the King's Highway No. 2 in the Province of Ontario and the Roosevelt Highway in the State of New York. Until recently the railway companies were opposed to the plan but since traffic on this railway line has fallen off they finally agreed to the proposal and by 1932 (Can.), c. 60, the Ottawa & New York R. Co. and its lessee were given power to enter into an agreement with any toll bridge company incorporated either under the laws of the State of New York or under the laws of the Dominion of Canada giving to such toll bridge company the right (subject to the provisions of s. 248 of the Railway Act) to construct a passage floor or way for horses, carriages and automobiles and foot passengers on that part of the bridge within the Dominion of Canada and to make alterations therein, and to construct such approaches thereto as might be necessary. The toll bridge company (subject to s. 41A of the Railway Act) was, by the same Act, given the right to charge and collect tolls or fares from persons using the bridge. The defendant, the Cornwall-Northern New York International Bridge Corp. (which I shall call the Bridge Corp.) was incorporated under the laws of the State of New York, and on November 19, 1932, entered into an agreement by way of a lease with the railway companies as authorized by the above statute.

On December 7, 1932, the Governor in Council approved of the work under s. 248 of the Railway Act (ex. 7) and on December 10, 1932, by two separate orders, the Board of Railway Com'rs for Canada authorized the construction of a passageway for vehicular traffic on the bridge and approved of the tariff covering the tolls to be charged (exs. 8 and 9). The proposed roadway crossing the reserve is shown by the plan dated December 27, 1932 (ex. 1), on which appears the land in occupation by the plaintiff and the areas covered by the roadway. Of course the Act, the lease, the order-in-council and the orders of the Board of Railway Com'rs above mentioned do not apply to the roadway across the reserve but to the railway bridges only. The roadway across Cornwall Island is a link but an essential link between the railway bridges over the River St.

Lawrence.

It is obvious that such a highway would be of great benefit to the Indians living on Cornwall Island, and was so regarded by the council of the band. It affords a convenient and permanent means of access to the mainland on either side of the river instead of a precarious crossing on the ice during the winter or by means of boats or canoes during the other seasons of the year.

The official approval of the scheme by the St. Regis Band of Indians was given at a meeting of the council of the band on December 5, 1932. A resolution requesting the Superintendent-General of Indian Affairs to have set apart a road allowance paralleling the railway right-of-way through the reserve on Cornwall Island subject to certain conditions was duly passed on that date and was forwarded to the Department of Indian Affairs (ex. 5). The conditions which are set forth in the resolution forwarded to the department may be briefly summarized as follows:--

1. The title to the roadway was to remain in the Indians.

2. The Indians whose improvements or lands were taken for this road allowance were to be compensated in such sums as might appear to the Superintendent-General of Indian Affairs to be fair and reasonable.

3. The roadway was to be 18 ft. in width and was to be constructed according to the specifications set out.

4. The road allowance was to be suitably fenced, and the two existing crossings over the railway right-of-way preserved.

5. All Indians of the St. Regis Band were to have free use of the bridge for themselves and their vehicles, etc. without the payment of any fare or tolls.

6. All trees or timber cut down during the process of the construction of the road were to become the property of the locatee.

7. Indian labour and teams were to be employed on the road construction where they render satisfactory service.

In consequence of this resolution which was accepted and acted upon by the department as legally expressing the wishes of the band (s. 158), on August 14, 1933, His Majesty the King therein represented and acting by the Superintendent- General of Indian Affairs, granted to the Bridge Corp. a licence of occupation for the purpose of constructing the highway across the lands comprising part of the St. Regis Indian Reserve (ex. 11). The plan therein referred to is the plan on file in the department, of which ex. 1 is a copy. That licence of occupation embodied as part of its terms, the conditions, which the council of the band had set forth in its resolution including the right to the Indians of free passage at all times for themselves and their vehicles across the bridges over the River St. Lawrence, without payment of any charge or tolls. But the licence, differing in this from the resolution of the council of the band, stipulated that the title to the lands described therein and shown on the plan should remain in His Majesty the King. Accordingly the Bridge Corp. entered into contracts for the construction of the roadway and the Dibblee Construction Co. Ltd. became one of its subcontractors. The work of construction commenced on August 18, 1933, and on the date of the trial, about 85% of the road work had been completed, in fact all the work of construction that could be done prior to the winter months had been finished.

Before the work commenced on the land occupied by the plaintiff, the Indian Agent brought him a quit claim deed to sign and a Government cheque for $78.30, the sum that the Superintendent-General deemed to be a fair and reasonable compensation for his land, but the plaintiff refused to sign the deed and to accept the cheque. On August 22, 1933, or a day or so later, the letter (ex. 2) was delivered by the Indian Agent to the plaintiff.

A few days after the work had started on the land he occupies, the plaintiff who claims to be "a life chief," called a meeting of the other life chiefs on the island. At this meeting which was held on August 30, 1933, at the plaintiff's house, about 8 persons were present including a solicitor who was there to advise them. It was then unanimously decided to oppose the road project because those present thought that "it was not brought about regularly." A second meeting was held about a week later when the life chiefs decided upon definite action. These meetings of the life chiefs, so called, have no legal significance. The department in no way recognizes a life chief who is selected by the oldest woman in his own particular clan. Because the elective system of chiefs and councillors has been introduced, the life chiefs by s. 97 of the Act cannot exercise any powers.

It seems that the plaintiff had a grievance because the steam shovel started work on his property first and that the roadway was widened there. There is nothing in either of these suggestions. That the steam shovel commenced work on his property first was due solely to the exigencies of the contract, and the road was necessarily widened to accommodate the traffic which would be halted at the custom house to the south.

On September 12, 1933, the writ in this action was issued and served the next day. The plaintiff then moved, on October 5, for an interim injunction to prevent the defendants proceeding further with the construction of the roadway but the learned Judge who heard the motion refused to grant one and referred the matter to the trial Judge.

The roadway cost some $60,000 and it has been completed so far in accordance with the plans and specifications. All the terms and conditions in the licence have been observed and fulfilled. I am also satisfied by the evidence that there was no other way to complete the road, that the

railway right- of-way across the reserve could not have been used; and that it would not have been practical to lay out the road so as not to cross the land occupied by the plaintiff.

All the Indians on the reserve whose lands were affected by the roadway have accepted compensation awarded them by the Superintendent-General except the plaintiff, and although he was offered a Government cheque covering what I find is an adequate compensation for the land in his occupation affected by the roadway, he refused to accept it and brings this action to assert his rights. He asks for an injunction restraining the defendants from trespassing on the lands in his occupation, damages for illegal trespass, a mandatory order compelling the defendants to put the land in the condition in which it was prior to the time the defendants trespassed upon the same and for further and other relief.

The plaintiff maintains that there was no authority under the Indian Act or otherwise to give the Bridge Corp. the licence of occupation, which, he says, virtually amounts to an expropriation of the lands occupied by him; that the council of the chiefs exceeded their powers under the Act, in forwarding the resolution above referred to; and that the Crown having acquiesced for some time past in the plaintiff's occupation of the lands in question, cannot now say that he has no right thereto. He also says that the compensation offered to him for the land covered by the roadway is quite inadequate, and suggests that figure should be at least $625 based on 25 years' rent at $25 per annum.

The defendants assert that the action of the Crown in issuing the licence of occupation was quite within its general powers, and that the road was established by the Superintendent-General and specifically authorized by s. 47 of the Act as amended. They also question the right of the plaintiff to bring this action which, it is argued, is in effect an action of ejectment, and they aver that the plaintiff's possession of the lands in question was not such as to enable him to bring any action, in respect thereof, since he has never had issued to him a location ticket for the land under the Indian Act; and that the right to bring this action would, if, at all, be the right of the Superintendent- General alone. The defendants also dispute the jurisdiction of this Court to try the action and they say that the Exchequer Court of Canada alone can hear it.

That part of the land in occupation by the plaintiff which is now covered by the road amounts to 1.305 acres. For this the plaintiff was offered $78.30 by the Superintendent-General. It is true that this offer is in the form of a Government cheque and was therefore not a legal tender of the amount, but in view of the plaintiff's definite refusal to accept that amount of compensation, it would have been useless, I find, to have made the tender in legal form. I find on the evidence that the value of the land in the occupation of the plaintiff and covered by the roadway was $35 an acre. Indeed, this valuation was fixed by the plaintiff himself in an agreement as to the distribution of the estate of his deceased father, entered into by him with other members of the family on May 13, 1932. The amount offered him by the Superintendent-General I find was a fair and full compensation, not only for the land covered by the roadway, but also for all other claims for damages the plaintiff may have had.

Assuming that this Court has jurisdiction, is the plaintiff entitled to an injunction? The defendants resist this part of the plaintiff's claim on the ground of his delay in taking action to assert his rights and to prevent the building of the road because, as he stated in his examination for discovery, he had known for several years of the proposal to build this road, and notwithstanding this fact that he had, more than once, been officially notified that it had been definitely decided to proceed with the work, he waited until the construction was well under way before issuing his writ. This delay, alone, the defendants say, disentitles the plaintiff to an injunction even if he should be entitled to damages.

In *Shelfer v. London Electric Lighting Co.*, [1895] 1 Ch. 287, Smith, L.J., at p. 322, stated, as a good working rule, that damages may be given in substitution for an injunction in cases where there are found in combination the four following requirements, namely, where the injury to the plaintiff's legal rights is:--(1) Small; (2) capable of being estimated in money; (3) can be adequately compensated by a small money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction.

That case was approved in *Leeds Industrial Co-op. Soc. v. Slack*, [1924] A.C. 851 (H.L.), where it was held that the Court had jurisdiction to award damages in lieu of an injunction, and applied in *Duchman v. Oakland Dairy Co.*, [1928] 1 D.L.R. 9, 63 O.L.R. 111. Tolton v. C.P.R. (1892), 22 O.R. 204, may also be referred to.

The delay on the part of a plaintiff in applying for an in- junction is a ground for refusing to exercise the Court's power to issue one. *Folkestone Corp. v. Woodward* (1872), L.R. 15 Eq. 159; *Ware v. Regent's Canal Co.*, 3 De G. & J. 212, 44 E.R. 1250; *Attorney-General v. Sheffield Gas Consumers Co.*, 3 De G. M. & G. 304, 43 E.R. 119. This is a case in which I think both on principle and by reason of his delay, the plaintiff is not entitled to an injunction.

Although the Court cannot hold an injury compensated for by a benefit which results from it, yet the fact that a benefit does result to the plaintiff from the act complained of is an element to be considered in deciding whether an injunction should be granted or damages given. I have no difficulty in coming to the conclusion that this roadway will be a great benefit not only to the Indians on Cornwall Island in general but also to this plaintiff in particular.

In short I think that this is a case where damages should be given in lieu of an injunction, that is, assuming that the plaintiff is entitled to succeed at all in this action. It is true that he has refused to accept the compensation, adequate for his damages, which the Superintendent-General offered, but no doubt, and notwithstanding any adverse termination of his suit, the department will pay the plaintiff the sum of $78.30 which it received for him and was included in the amount paid by the Bridge Corp. as the consideration for its licence of occupation (ex. 12).

It was argued for the plaintiff that the council of the band had no authority to forward the resolution to the Superintendent-General requesting him to have set apart a road allowance through the reserve. His statement of claim was amended at the trial to permit him to sue on behalf of himself and all other Indians of the St. Regis Indian Reservation. As all other Indians whose lands were affected by this road have approved of it by accepting the compensation awarded them, the amendment does not extend his claims any further. The plaintiff, it is true, questions the proper constitution of the council of the band, but that is not a matter with which I can deal. The elective system by which chiefs and councillors are chosen was, many years ago, introduced as far as this band is concerned (ex. 10) and the plaintiff, although he may be a life chief, cannot exercise any powers as he has not been elected under the provisions of the Act. Section 98 of the statute affords the only means by which the election of the chiefs and councillors can be set aside.

There was much argument as to whether the licence of occupation (ex. 11) granted by the Crown to the Bridge Corp. was, in fact, a lease. For the plaintiff it was strenuously maintained that the document in question was a lease of the land to the Bridge Corp. and that no such power could be exercised by the Crown in respect of land in an Indian Reserve. With this contention I do not agree.

It is true that the Bridge Corp. is thereby granted the right, privilege and easement (for the purpose of constructing a high- way thereon) to use, occupy and enjoy the lands and premises lying to the east of the railway right-of-way crossing the island and being part of the reserve as shown on the plan (ex. 1), but such use, occupation and enjoyment is not exclusive but subject to the rights of the public, including the Indians, at all times to use and to pass over the road and bridges. The Bridge Corp. pays no rent for the licence and the consideration $798.46 there- in mentioned is the sum total of the amounts the Superintendent- General had fixed as fair and reasonable compensation payable to the Indians who were in occupation of the lands affected by the roadway. The Bridge Corp. has no exclusive use, occupation or enjoyment of the property, and that fact makes, I think, the distinction between a licence and a lease.

Moreover the licence does not purport to withdraw from the reserve the land covered by the roadway; the title to the land remains in the Crown and the ownership thereof does not pass to the Bridge Corp. All the licence amounts to is this. The Crown grants the Bridge Corp. the right to enter upon its lands and to construct a highway thereon and for that purpose to use and occupy the land covered by the highway. The Bridge Co. has no power to charge fares or tolls for the use of the roadway. It can only collect tolls for use of the bridges. Of course no persons other than those living on the island could use the road without first crossing one or other of the bridges, but the Indians are excepted from the payment of any fares or tolls when using either road or bridges. Therefore neither s. 50 of the Act which provides that no reserve or portion of a reserve shall be sold alienated or leased until it has been released or surrendered to the Crown nor s. 51, which enacts that no release or surrender of a reserve or a portion of a reserve shall be valid or binding unless assented to by the band in the way provided, applies to the licence granted the Bridge Corp.

The legal title to the land set apart by treaty or otherwise for the use or benefit of a particular band of Indians is in the Crown. The tenure of the Indians is a personal and usufructuary right, dependent upon the good will of the Sovereign. They have no equitable estate in the lands *A-G. Que. v. A-G. Can.* (1921), 56 D.L.R. 373; *Reg. v. St. Catharines Mllg. & Lbr. Co.* (1885), 10 O.R. 196; affd 13 A.R. (Ont.) 148; affd 13 S.C.R. 577; affd 14 App. Cas. 46. For the history of the public lands of Ontario and the Canadian policy upon Indian questions see the classic judgment of Boyd, C., in 10 O.R., at p. 203, and the Report on the Affairs of the Indians in Canada (1842) Appendix EEE of the Journals of the Legislative Assembly of the Province of Canada, vol 4. The land comprising Cornwall Island is the property of His Majesty the King in the right of the Dominion of Canada (B. N. A. Act, s. 91(24); *The King v. Easterbrook*, [1929] Ex. C.R. 28, affd [1931], 1 D.L.R. 628, S.C.R. 210). And that is the reason why no release or surrender by the Indians of any reserve or portion of a reserve to any person other than His Majesty is valid (ss. 50 to 54). This being so, how can the prerogative right of the Crown to deal with its own property be fettered? "No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound there- by:" Interpretation Act, R.S.C. 1927, c. 1, s. 16.

There is, in my reading of the Indian Act no limitation upon this prerogative right. The provisions of s. 48, whereby "no portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council" and the compulsory taking by any company or municipal or local authority, having the statutory power is regulated, refer obviously to the case where land is taken away or withdrawn from the

reserve and the title to the land so taken passes from the Crown to the company, municipal or local authority concerned. Even in such instances the compensation paid is for the use of the band of Indians for whose benefit the reserve is held and for the benefit of any Indian who has *improvements* (not land) taken or injured.

From a reading of ss. 34 and 35 it is apparent that it is contemplated by the Act that persons other than Indians might occupy or use any land occupied by the band provided the authority or licence of the Superintendent-General so to do was first obtained.

That Indian Reserves such as Cornwall Island must have roads in or through them is apparent. This necessity is recognized by the Act by giving in s. 101 the chief or chiefs of any band or council the power, subject to confirmation by the Governor in Council, to make rules and regulations as to "(e) the construction and maintenance of water courses, roads, bridges, ditches and fences." By s. 47 the duty of keeping roads in order in accordance with the instructions received from the Superintendent-General is placed upon the band and by s-s. 3 which was added by 1933 (Can.), c. 42, s. 5, "The Superintendent General shall have the authority to determine where roads shall be established on a reserve." I conclude, therefore, that both by virtue of his prerogative and under the Act itself His Majesty had the power to grant the licence of occupation to the Bridge Corp.

The plaintiff's interest in the land for which he asks dam- ages may now be considered. The title to it is in the Crown subject to his occupational right as regulated and defined by the Act. It will be remembered that he had never been located under s. 21, nor had any location ticket been issued to him under s. 22; indeed none had been issued to any Indian on Corn- wall Island. Therefore by s. 21 the plaintiff is not to be deemed to be lawfully in possession of any land in the reserve. It is true that for its own purposes the Department of Indian Affairs recognized whatever interest the plaintiff as an individual Indian had in the parcel of land he occupied and for the purposes of this roadway even treated the land as being his. The department approved of the Point family agreement (ex. 3) previously referred to and thereby recognized the plaintiff's occupational rights in the land which he had acquired from his father. No doubt had the plaintiff wished to transfer his land to another member of the band the department would have given its approval. Indeed this was a sensible attitude for the department to take because it is much better that the Indians on the reserve should settle amicably among themselves the boundaries of the properties they occupy and achieve some permanency of land holding rather than be subject to continual departmental interference.

The statute, ss. 25 to 33, permits Indians to devise or bequeath property of any kind in the same manner as other persons subject generally to the approval of the Superintendent- General, but by s. 31 a claimant of land in a reserve or of any interest therein as devisee or legatee or heir of a deceased Indian (as the plaintiff is) shall not be held to be lawfully in possession thereof or to be the recognized owner thereof until he shall have obtained a location ticket therefor from the Superintendent-General.

From the foregoing facts and statutory provisions it is clear that the plaintiff had no possessory title to the land he occupied in the reserve. He could acquire none against the Crown, nor can the acts or attitude of the department or the servants of the Crown create an estoppel since the doctrine of estoppel does not apply to or operate against the Crown. Nor could the doctrine of acquiescence be invoked by him from the behaviour of the officers of the Crown: *The King v. Easterbrook, supra.* What right, then, has the plaintiff to maintain this action ? Clearly, I think, none. Nor does it matter whether this action is really an action for ejectment as the defendants claim, or an action for trespass, as the plaintiff says it is. The former is an action for the recovery of land; the latter, *quare clausum fregit*, is an action for the wrong committed in respect of the plaintiff's land by entry on the same without lawful authority.

Trespass constitutes a tort. He could not successfully bring an action of ejectment against the Crown in respect of the land he occupies, nor sue the Crown for a trespass to it. How then can he successfully sue the licensees of the Crown, acting under its authority for an entry on the Crown's lands? In neither case has the plaintiff the requisite possession to maintain the action against the defendants. Were this not enough to dispose of the plaintiff's right to bring this action the provisions of the Indian Act provide another reason. Sections 34, 35, 115 and 116 afford summary methods of dealing with persons who trespass on or occupy or use land in a reserve. The appropriate action is taken by the Superintendent-General and not by the Indians or the band. The Superintendent-General has, by s. 4, the control and management of the lands and the property of Indians in Canada. Again if possession of any lands reserved for the Indians is withheld or adversely occupied or claimed by any person, or if trespass is committed thereon, by s. 39, the possession may be recovered for the Indians or damages may be recovered in an action at the suit of His Majesty on behalf of the Indians entitled to possession or the relief or damages. Such action may be instituted by information of the Attorney- General for Canada upon the instructions of the Superintendent- General of Indian Affairs. The Exchequer Court of Canada shall have jurisdiction to hear and determine any such action.

I think that s-s. 4 of s. 39 merely preserves the existing remedies or modes of procedure available to the Superintendent- General such, for example, as are afforded by ss. 34, 35, 65, 115

or 116. Section 65 which was mentioned during the course of the argument refers only to Indian lands, that is, a reserve or portion of a reserve which has been surrendered to the Crown and is not applicable here. The statute having provided the remedies for the recovery of land in a reserve unlawfully taken, occupied or used by any person, which remedies are to be put in motion by the Superintendent-General and no one else, a suit or action for that purpose by an Indian must necessarily be excluded. The right of the Crown to recover possession of lands is one incident to the control and management of lands reserved for Indians, given it by the B. N. A. Act, *The King v. McMaster*, [1926] Ex. C.R. 68.

It is true that s. 106 gives Indians and non-treaty Indians "the right to sue for debts due to them or in respect of any tort or wrong inflicted upon them or to compel the performance of obligations contracted with them." While a trespass to land is a tort or wrong inflicted upon the person entitled to the possession of the land, the section when read with the whole Act refers, I think, to a personal tort such as an assault. Anyhow an action such as the present one must, in view of the plaintiff's limited right of occupation and of the statutory provisions for the recovery of land and the removal of trespassers therefrom above mentioned, be excepted from the rights of action given to Indians by this section.

Finally, I am of the opinion that the plaintiff's action, if he has one at all, should have been brought in the Exchequer Court of Canada. His claim arises out of a contract entered into on behalf of the Crown. The issues raised by the plaintiff and his claims in this action are by s. 18 of the Exchequer Court Act, R.S.C. 1927, c. 34, in the exclusive original jurisdiction of that Court. This Court, therefore, has no jurisdiction to entertain this action.

For these reasons the plaintiff's action will be dismissed without costs.