The Bear Island Foundation and Gary Potts, William Twain and Maurice McKenzie, Jr. on behalf of themselves and on behalf of all other members of the Teme-Augama Anishnabay and Temagami Band of Indians *Appellants v.* **The Attorney General for Ontario** *Respondent* and **The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of British Columbia, the Attorney General for Alberta, the Attorney General of Newfoundland, Union of Ontario Indians, Association of Iroquois and Allied Indians, National Indian Brotherhood/Assembly of First Nations, Mocreebec, Randy Kapashesit and Delgamuukw, also known as Earl Muldoe, on his own behalf and on behalf of all members of the House of Delgamuukw, and others** *Interveners*

Indexed as: Ontario (Attorney General) *v.* Bear Island Foundation
File No.: 21435.
1991: May 27, 28, 29, 30; 1991: August 15.
Present: Lamer C.J. and La Forest, Gonthier, McLachlin and Stevenson JJ.
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Indians -- Aboriginal rights -- Land claims -- Title -- Treaties --Appellate court unable to interfere with findings of fact -- Legal findings based on facts subject to appellate review -- Indians found to exercise sufficient occupation to establish aboriginal right.

Courts -- Appellate courts -- Jurisdiction -- Appellate courts unable to interfere with findings of fact of lower courts -- Appellate courts able to deal with legal findings based on those facts.

Respondent Attorney General for Ontario brought action against appellant Bear Island Foundation after the latter had registered cautions against tracts of unceded land on behalf of the Temagami Band of Indians. Respondent sought a declaration that the Crown in right of Ontario has clear title and that the appellants have no interest therein, and further sought certain injunctive relief. The Foundation counterclaimed and sought a declaration of quiet title on the ground that the Temagami have a better right to possession of all the lands by virtue of their aboriginal rights in the land. Ontario claimed that the Temagami had no aboriginal right in relation to the land, or that any right they might have had has been extinguished, either by treaty or unilateral act of the sovereign.

The trial judge found that the appellants had no aboriginal right to the land, and that even if such a right had existed, it had been extinguished by the Robinson-Huron Treaty of 1850, to which the Temagami band was originally a party or to which it had subsequently adhered. These findings were essentially factual, and were drawn from the mass of historical documentary evidence. The counterclaim was dismissed. An appeal to the Court of Appeal was dismissed. On the assumption that an aboriginal right existed, that court held that that right had been extinguished either by the Robinson-Huron Treaty or by the subsequent adherence to that treaty by the Indians, or because the treaty constituted a unilateral extinguishment by the sovereign.

Held: The appeal should be dismissed.

This case raised for the most part essentially factual issues on which the courts below were in agreement. On such issues, the rule is that an appellate court should not reverse the trial judge absent palpable and overriding error which affected his or her assessment of the facts. The rule is all the stronger in the face of concurrent findings of both courts below. A detailed examination of the facts was undertaken by this Court and no issue is taken with the numerous specific findings of fact in the courts below. There was not agreement, however, with all the legal findings based on those facts. In particular, the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right.

It was unnecessary, however, to examine the specific nature of the aboriginal right because that right was surrendered, whatever the situation on the signing of the Robinson-Huron Treaty, by arrangements subsequent to the treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve. The Crown breached its fiduciary obligations to the Indians by failing to comply with some of its obligation under this agreement; these matters currently form the subject of negotiations between the parties. These breaches do not alter the fact that the aboriginal right was extinguished.

Cases Cited

Referred to: *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Century Insurance Co. v. N.V. Bocimar S.A.*, [1987] 1 S.C.R. 1247; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Simon v.*

The Queen, [1985] 2 S.C.R. 387; *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

APPEAL from a judgment of the Ontario Court of Appeal (1989), 68 O.R. (2d) 394, 58 D.L.R. (4th) 117, [1989] 2 C.N.L.R. 73, 32 O.A.C. 66, 4 R.P.R. 252, dismissing an appeal from a judgment of Steele J. (1984), 15 D.L.R. (4th) 321. Appeal dismissed.

W. Ross Murray, *Q.C.*, and *Wendy J. Earle*, for the appellants.

J. T. S. McCabe and *Lorna E. Boyd*, for the respondent.

W. I. C. Binnie, *Q.C.*, *W. A. Hobson*, *Q.C.*, and *Susan L. Reid*, for the intervener the Attorney General of Canada.

René Morin, for the intervener the Attorney General of Quebec.

D. M. M. Goldie, *Q.C.*, and *Norman J. Prelypchan*, for the intervener the Attorney General of British Columbia.

Robert J. Normey, for the intervener the Attorney General for Alberta.

Deborah J. Paquette, for the intervener the Attorney General of Newfoundland.

William B. Henderson and *Alan Pratt*, for the intervener Union of Ontario Indians.

Brian A. Crane, *Q.C.*, for the intervener Association of Iroquois and Allied Indians.

Peter W. Hutchins, *Diane H. Soroka* and *Franklin S. Gertler*, for the intervener National Indian Brotherhood/Assembly of First Nations.

Murray Klippenstein and *Gary Stein*, for the interveners Mocreebec and Randy Kapashesit.

David Paterson and *Louise Mandell*, for the intervener Delgamuukw, also known as Earl Muldoe, on his own behalf and on behalf of all members of the House of Delgamuukw, and others.

The following is the judgment delivered by

THE COURT -- The respondent Attorney General for Ontario brought action against the appellant, the Bear Island Foundation, after the latter had registered cautions against tracts of unceded land north of Lake Nipissing, Ontario, on behalf of the Temagami Band of Indians. By this action, the respondent sought a declaration that the Crown in right of Ontario has clear title to the land in question and that the appellants have no interest therein, and further sought certain injunctive relief. The Foundation counterclaimed and sought a declaration of quiet title on the ground that the Temagami have a better right to possession of all the lands by virtue of their aboriginal rights in the land. Ontario claimed that the Temagami had no aboriginal right in relation to the land, or that any right they might have had has been extinguished, either by treaty or unilateral act of the sovereign.

Steele J. ((1984), 49 O.R. (2d) 353) found that the appellants had no aboriginal right to the land, and that even if such a right had existed, it had been extinguished by the Robinson-Huron Treaty of 1850, to which the Temagami band was originally a party or to which it had subsequently adhered. These findings were essentially factual, and were drawn from the mass of historical documentary evidence adduced over the course of 130 days of trial. Steel J. also dismissed the counterclaim.

Reference may be made here to the reasons why Steele J. refused to find that the Indians had established an aboriginal right. The gist of these reasons may be found in the following passage from his reasons for judgment, at p. 373:

I will deal with the entitlement of the defendants to aboriginal rights in the Land Claim Area. I find that the defendants have failed to prove that their ancestors were an organized band level of society in 1763; that, as an organized society, they had exclusive occupation of the Land Claim Area in 1763; or that, as an organized society, they continued to exclusively occupy and make aboriginal use of the Land Claim Area from 1763 or the time of coming of settlement to the date the action was commenced.

An appeal to the Ontario Court of Appeal ((1989), 68 O.R. (2d) 394) was dismissed. On the

assumption that an aboriginal right existed, the court held that that right had been extinguished either by the Robinson-Huron Treaty or by the subsequent adherence to that treaty by the Indians, or because the treaty constituted a unilateral extinguishment by the sovereign.

This case, it must be underlined, raises for the most part essentially factual issues on which the courts below were in agreement. On such issues, the rule is that an appellate court should not reverse the trial judge in the absence of palpable and overriding error which affected his or her assessment of the facts: *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Century Insurance Co. v. N.V. Bocimar S.A.*, [1987] 1 S.C.R. 1247; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2. The rule is all the stronger in the face of concurrent findings of both courts below. We have undertaken a detailed examination of the facts on this basis. We do not take issue with the numerous specific findings of fact in the courts below, and it is, therefore, not necessary to recapitulate them here.

It does not necessarily follow, however, that we agree with all the legal findings based on those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right; see, in this context, *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In our view, the trial judge was misled by the considerations which appear in the passage from his reasons quoted earlier.

It is unnecessary, however, to examine the specific nature of the aboriginal right because, in our view, whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve. It is conceded that the Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians. These matters currently form the subject of negotiations between the parties. It does not alter the fact, however, that the aboriginal right has been extinguished.

For these reasons, the appeal is dismissed.

Appeal dismissed.

Solicitors for the appellants: Borden & Elliot, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

Solicitors for the intervener the Attorney General of Canada: McCarthy, Tétrault, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland: The Attorney General of Newfoundland, St. John's.

Solicitors for the intervener Union of Ontario Indians: Blaney, McMurtry, Stapells, Toronto.

Solicitors for the intervener Association of Iroquois and Allied Indians: Gowling, Strathy & Henderson, Ottawa.

Solicitors for the intervener National Indian Brotherhood/Assembly of First Nations: Hutchins, Soroka & Dionne, Montréal.

Solicitors for the interveners Mocreebec and Randy Kapashesit: Iler, Campbell & Associates, Toronto.

Solicitors for the intervener Delgamuukw, also known as Earl Muldoe, on his own behalf and on behalf of all members of the House of Delgamuukw, and others: Mandell Pinder, Vancouver.