REGINA v. SPORT

(1971), 3 C.C.C. (2d) 477

British Columbia County Court, McKay J., 9 June 1971

Motor vehicles -- Highways -- Driving motor vehicle on a road in Indian reserve -- Public access to road upon payment of fee -- No public funds spent on establishing or maintenance of road -- Whether road a public highway -- Motor-vehicle Act (B.C.), s. 2 -- Highway Act (B.C.), s. 8.

Where the public uses a road to gain access to a park for recreation purposes for which a fee is paid and for access to a trail for hiking purposes the road is a highway within the meaning of s. 2 of the *Motor- vehicle Act*, R.S.B.C. 1960, c. 253, even though it is maintained by an Indian band and there is no evidence of public moneys being used in its construction or maintenance. Where the Indian band has extended an invitation to the general public to use the road and is anxious that the public use the road to ensure the financial success of a commercial venture within the reserve, the use by the members of the general public is for their own purposes and not for purposes connected with the reserve.

APPEAL by the Crown against dismissal of an information charging the respondent with operating a motor vehicle on the highway without being the holder of a driver's licence.

D. R. Williams, Q.C., for the Attorney-General of British Columbia.
T. Berger, for respondent.

MCKAY, CO.CT.J.:--This is an appeal by the Crown from the dismissal of an information laid against the respondent, Lawrence Sport charging that he did on or about October 31, 1969, near Bamfield, in the Province of British Columbia, unlawfully operate a motor vehicle on a highway without being the holder of a subsisting driver's licence.

The Crown clearly established that on October 31st the respondent was driving a motor vehicle on a road on the Anacla Indian Reserve No. 12, and that he was not at the time in question the holder of a subsisting driver's licence. The only question in issue is whether the Crown has established that the road in question was a highway.

The Anacla Reserve No. 12, populated by members of the Ohiaht Band of which band the respondent is a member, is located just south-east of Bamfield and containing within its boundaries the Pachena Bay area. Motor vehicle access to the reserve is by a branch road from the Port Alberni-Bamfield highway. The Pachena Bay Road, as I will refer to it, enters the reserve about 400 ft. south of the Pachena River. It proceeds in a westerly direction for about 400 ft. where it merges with a well defined trail coming from the north-east. The merged trail and road then continues alongside the Pachena River until that river empties into Pachena Bay. The merged road and trail then follows the foreshore in a generally easterly direction until it leaves the reserve. The road breaks off from the trail immediately, it leaves the reserve and heads north 200 ft. or so to Camp Ross which I will refer to later. The trail continues along the foreshore. The merged road and trail within the reserve passes immediately in front of a group of homes, a senior citizens complex and a Red & White Food Store, and it was at this point on the Pachena Bay Road that the respondent was driving the motor vehicle. In front of the general store were two Royalite gas pumps. The store, pumps and senior citizens home are all shown in exs. 5 and 7 and on the aerial photo, ex. 8.

The members of the band have constructed approximately 70-80 campsites along the foreshore of Pachena Bay for use by the general public on payment of a fee. The only road access to the campsite area is by way of the aforesaid Pachena Bay Road. The area is designated by the band as Anacla Park. Exhibit 14 is a photograph of a sign at the campsite area listing a $3 fee for camping and a $1 fee for picnicking. At the junction of the Port Alberni-Bamfield Highway and the Pachena Bay Road is a sign reading "Red & White Food Stores" and another of arrow design reading "Pachena Bay" "Anacla Park" and pointing towards Pachena Bay.

At the south-east corner and just outside the reserve is Camp Ross which I gather is a summer camp operated by the Shantymen's Christian Association. The only road access to this camp is over the Pachena Bay Road and the band members have granted access at no charge.

The evidence is clear that Anacla Park is used quite extensively by the general public for camping, picnicking and hiking. I also have no doubt that the general public makes good use of the

general store and gas pumps. There was evidence of a grand opening in August of 1969 attended by many members of the general public. The store and camp grounds are clearly part of a commercial venture by the members of the Ohiaht Band at Anacla.

The road within the reserve is maintained by the band and there was no evidence of public moneys being used in its construction or maintenance.

The first position taken by the Crown is that the road in question is a highway by virtue of s. 8 of the *Highway Act*, R.S.B.C. 1960, c. 172, which reads in part as follows:

> 8 (1) The Minister in his absolute discretion may
> (*a*) make public highways of any width; and
> (*d*) declare the same by a notice in the Gazette setting forth the direction and extent of such highway;

The Crown filed an extract from the Gazette of December 20, 1911, which reads:

DEPARTMENT OF WORKS
PUBLIC HIGHWAY

Alberni, Renfrew, and Esquimalt Districts.

Bamfield Creek to Carmanah Point

Notice is hereby given that the following highways, 66 feet in width, are established, viz.:--

(1) Commencing at a point near the mouth of Bamfield Creek, being the centre of the West Coast Trail, as defined by the Marine and Fisheries Department of the Dominion of Canada; thence south-easterly following the centre line of the said trail and its extension to Carmanah Point, a distance of thirty miles, more or less, and having a width of 33 feet on each side of the said centre line.

(2) Also all branch trails to the shore from the said West Coast Trail shall have a width of 66 feet and shall extend from the West Coast Trail across the foreshore to low-water mark.

THOMAS TAYLOR

Minister of Public Works.
Public Works Department,
Victoria, B.C., 20th December, 1911. de21

It is the Crown's submission that the road within the reserve apart from the initial 400 ft. follows the exact route of the trail referred to in the above-mentioned Gazette notice and that the trail is merged in the road. In support of this submission the Crown through a Mr. Bernard White, B.C. Land Surveyor, introduced an aerial photograph of the reserve and the immediately surrounding area. This photograph shows a well defined trail merging with the road some 400 ft. within the reserve and carrying on as I have already described. Mr. White also produced Map No. 1K dated January 4, 1955, compiled and drawn by the Geographic Division, Surveys and Mapping Branch, Department of Lands, Forests and Water Resources of British Columbia, which is a map of the south-western portion of British Columbia. On this map is shown the trail from Bamfield to Carmanah Point. It is the only trail shown in that immediate area and is clearly the one referred to in the Gazette. It also appears to follow the route I have described through the reserve. Mr. White then produced a provisional plan of resurvey of the rectinlinear boundaries of Anacla Indian Reserve No. 12 based on a survey in 1967 by I.M.D. Fox, surveyor for the Department of Indian Affairs in British Columbia. This survey shows the trail through the reserve including various bridges -- the trail is referred to as the "Life Saving Trail". This plan is of the same scale as the aerial photograph and Mr. White caused to be prepared a tracing of the plan which when superimposed on the aerial photograph shows that the road within the reserve, apart from the initial 400 ft., follows the trail.

In my view the Crown has established beyond a reasonable doubt that the road within the reserve boundaries, apart from the initial 400 ft. or so, is within the area designated by the Minister in the December 20, 1911, Gazette notice.

Counsel for the respondent points out that the trail covered by the Gazette notice is called the West Coast Trail while the trail shown on the Indian Affairs Department Plan is called the Life

Saving Trail. This has caused me no trouble as I am of the view that a British Columbia Court can take judicial notice of the historical fact that the West Coast Trail was constructed prior to the turn of the century as a life saving trail, permitting access from Bamfield to the treacherous and unprotected stretch of coastline between Bamfield and Port Renfrew.

In the event that I ruled, as I have, that the road was designated as a highway by the Minister under s. 8(1) (*a*) of the *Highway Act*, counsel for the respondent submitted that the designation ceased on the transfer of Indian lands from His Majesty the King in the right of the Province of British Columbia to His Majesty the King in the right of the Dominion of Canada by O.C. 1036, approved July 29, 1938, under the authority of s. 93 of the *Land Act*, R.S.B.C. 1936, c. 144, and s. 2 of the *Indian Affairs Settlement Act*, 1919 (B.C.), c. 32. Excepted from the transfer were "all traveled streets, roads, trails and other highway existing over or through said lands". I have found that the trail in question was designated as a highway in 1911 and it would therefore be excepted from the transfer.

In the event that I am wrong in the foregoing I will deal with the furthest submission of the Crown that the road in question is a highway by virtue of the definition of highway in the *Motor-vehicle Act*, R.S.B.C. 1960, c. 253, s. 2, which reads:

"Highway" includes every highway within the meaning of the *Highway Act*, and every road, street, lane, or right-of-way designed or intended for or used by the general public for the passage of vehicles, and every private place or passage-way to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited.

The Crown relies first on the words, "or used by the general public for the passage of vehicles". There is no question but that the general public does use the road to gain access to Anacla Park for both camping and picnicking and also for access to the West Coast Trail for hiking purposes. The band has extended an invitation to the general public to use the road and is, of course, anxious that the public does use the road to ensure the financial success of the Anacla Park venture.

Counsel for the respondent referred to *R. v. Joe*, an unreported decision of the British Columbia Court of Appeal (No. 222/69 -- October 22, 1969), in support of his position. In that case the road in question was on an Indian Reserve and presumably had been built and maintained by band funds. Members of the general public did from time to time use the road for the purpose of visiting Indian friends, delivering supplies and rendering services to residents on the lands and for the attendance by non-Indians at social and sporting events. Davey, C.J.B.C., who delivered the judgment of the Court had this to say:

The question raised here turns upon the definition of "highway" in the *Motor-vehicle Act*, and I read:

" 'Highway' includes every highway within the meaning of the *Highway Act* and every road, street, lane or right-of-way designed or intended for or used by the general public for the passage of vehicles, and every private place or passage-way to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited."

The only branch of that definition which it is submitted by the Crown (appellant) catches the respondent are the words, "or used by the general public for the passage of vehicles".

This being a Crown appeal from a judgment upon a trial *de novo* under the *Summary Convictions Act*, R.S.B.C. 1960, c. 373, the Crown is restricted to questions of law. In order to appreciate what the questions of law are, I must read the judgment of the learned County Court Judge. After reciting the facts, he continued, at p. 39 of the Appeal Book: "I am left only to consider the matter of whether it is used by the general public, and I hold it is not." I interpolate that that would seem to be a finding of mixed fact and law. He continued:

"True, it is used by members of the general public by authority of the Indian band in charge of reservation No. 2 for the purpose, among other things, of servicing 'residences on these lands, for delivering supplies to residents of these lands, for the attendance by non-Indians at social events on the land in company with their Indian friends, and sports events likewise'."

The first question of law which the Crown raises is this: it says that the restricted use by members of the public, by invitation of the Indians, or for purposes incidental to the use of the reserve, is a use by the general public, simply because the members who come in are themselves members of the public; and Crown counsel submits that, by failing to place that interpretation upon

the words in the definition "use by the general public for the passage of vehicles" the learned trial Judge has erred in law and that his finding of fact that this is not used by members of the public cannot stand.

I have not the slightest doubt that the learned trial Judge, in that respect, was quite right. It might be too much to say that people who do come on to this reserve come on at the invitation, express or implied, by the Indians or the band; but, in any event, they come on to the land for purpose which are incidental to the ownership of the property by the Indians; and this cannot be said, although they are members of the general public, to be a use of the road by the general public. If the argument of Crown counsel is sound (and he concedes this is the case) it must mean that every serviceman, every merchant, every person who has business with a farmer who uses the farmer's road through his property from the highway to his residence, must likewise be using the road as the general public and so that road falls within the definition of "highway" as contained in the *Motor-vehicle Act*. Such an extension of the argument I think shows its absurdity.

I have no hesitation in saying that the words in the definition of "highway" as being one "used by the general public for the passage of vehicles" means used by members of the general public for their own purposes and not for purposes connected with the reserve.

Under those circumstances, the first ground of appeal must fail.

That raises for consideration the appeal by the Crown on the second branch of the learned trial Judge's judgment, which was an additional ground for acquitting the respondent, namely, that to be a use by the general public within the definition of "highway" in the *Motor-vehicle Act* it must be a use by the public as a matter of right, in support of which counsel for the Crown (appellant) cited the judgment of Forbes, Dist.Ct.J., in Saskatchewan, in *R. v. Johns (No.2)* (1963), 41 C.R. 380, 45 W.W.R. 65. I find it unnecessary to decide that question. It is purely academic.

In my view the circumstances in this case are quite different in that the use by the members of the general public is, in the words of the learned Chief Justice, "for their own purposes and not for purposes connected with the Reserve".

McClellan, Co.Ct.J., at the trial *de novo* in the *Joe* case held that to be a use by the general public within the definition of "highway" in the *Motor-vehicle Act* it must be a use by the public as a matter of right. The learned Chief Justice, as indicated in his reasons above quoted, did not need to deal with this point. I have some difficulty with the phrase "as a matter of right". It is quite true that the band could refuse admittance if one refused to pay the entrance fee and could refuse admittance, for example, if a person was drunk or otherwise obnoxious. I suppose too that the band could arbitrarily refuse admittance to anyone for any reason -- whether reasonable or otherwise, and to that extent the general public does not as a matter of right have the use of the roadway. The true situation is however that a family could plan on travelling from Port Alberni to Anacla Park knowing full well that on payment of the prescribed fee they would be granted access to the park over the road in question. In my respectful view the statement by my learned brother McClellan on this aspect of the matter is too broad if it was meant to cover a situation such as the one before me.

I find that the roadway in question is a highway in that it is used by the general public for the passage of vehicles.

The final Crown submission is that the roadway in question comes within the last branch of the definition of "highway" in the *Motor-vehicle Act* which reads: "and every private place or passage-way to which the public, for the purpose of parking or servicing of vehicles, has access or is invited". Anacla Park and the roadway leading to it is private land in the sense that Indian reservation lands are private. I have already found that the general public is invited by the band to park their vehicles at Anacla Park for the purpose of camping, picnicking or hiking and to use the roadway through the reserve for the purpose of getting to the park. Under those circumstances the roadway in question is a highway in that it is a private passage-way to which the public has access to and is invited to use for the purpose of parking.

Before closing these reasons I should mention that one Arthur Peters, a former Chief of the Ohiaht Band, testified that the band had put up "no trespassing" signs from time to time but that they were always being torn down. Whatever the situation was prior to the construction of the campsite it seems clear that the band did not put up such signs on the road once the campsite was in operation.

The appeal is allowed. No submissions were made as to the penalty to be imposed but as this was in the nature of a test case I impose a fine of $5 or in default one day.

Appeal allowed; conviction entered.