R. v. STEVENSON ET AL.

Manitoba Court of Queen's Bench, Jewers J., June 25, 1986

D. Harvey and V. Toews, for the Crown
G. Brodsky, Q.C., and S. Simmonds, for the accused

The accused, all members of the Peguis Indian Reserve, appealed their convictions for mischief causing damage to public property, contrary to s.387(3)(a) of the Criminal Code, R.S.C. 1970, c.C-34.

The accused burned a bridge on a provincial highway which passed over their reserve. The bridge had been built in 1955 and had been in poor condition for some years. The band had been urging the provincial government to repair the bridge since 1973. In 1979 a provincial engineer inspected the bridge and recommended replacement and, in the interim, repair and a load restriction. Despite this and further urging by the band the government did nothing and in 1984, to protest the condition of the bridge as well other problems on the reserve, the accused blockaded the road and burned the bridge.

The band had signed Treaty 1 in 1871 and had been granted the St. Peters Reserve. Treaty 1, unlike the subsequent treaties, does not contain a provision reserving to the government the right to take reserve lands for public purposes. That reserve had been surrendered by the band in 1907 and the band had moved to the land which is now the Peguis Reserve. There was some question as to the legality of that surrender. In 1930 the Peguis Reserve was set aside by order-in-council and thus became subject to the Indian Act, R.S.C. 1970, c.I-6. In 1958, with the consent of the band, a further order-in-council, made pursuant to s.35 of the Indian Act, transferred to the province the lands required for the road.

The accused raised the following defences: (1) that the bridge was band property in that land set aside under Treaty 1 was "forever . . . inalienable"; (2) that the accused acted under a colour of right in that they had a reasonable belief that the bridge belonged to the band; and (3) that the defence of necessity applied.

Held: Appeal dismissed.

1. The land was not set aside under Treaty 1 but was "separate and distinct" land set aside by order-in-council in 1930. Therefore it "may not necessarily follow" that rights beyond hose conferred by the Indian Act can be claimed. Section 18 of the Indian Act states that reserve land is owned by the Government of Canada and s.35 authorizes the transfer of reserve lands to the province for public purposes. Therefore the road is public property. The utility of the road lessened if there was no bridge across the river. The bridge was used by both the public and those who lived on the reserve. Therefore the road, including the bridge was public property.

2. It was not considered appropriate to interfere with the finding of the trial judge that the accused did not have an honest reasonable belief that the bridge was the property of the Peguis Reserve.

3. Since alternative courses of action which did not involve a breach of the law were available to the accused, the defence of necessity failed.

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JEWERS J. The accused are all members of the Peguis Indian Reserve in the province of Manitoba, and they are charged that on 6th May 1984, at the Peguis Indian Reserve, they did unlawfully commit mischief by wilfully damaging, without legal justification or excuse, and without colour of right, public property, to wit, a bridge, by burning same, which damage did exceed $50 contrary to s.387(3)(a) of the Criminal Code of Canada. They were convicted of this charge in Provincial Court on 28th June 1985, and each accused was fined $100 (on default, ten days). They appeal to this court from that conviction.

The bridge forms part of Provincial Road 224, which runs through the Peguis Indian Reserve in Manitoba, and is known as the Harwill Bridge. It crosses the Fisher River.

The bridge was of wooden construction, built in 1955, with an average lifespan of 30-35 years. Mr. Lautens, a bridge engineer employed by the province of Manitoba, inspected the bridge on 27th August 1979 at the request of the Peguis Band. He noted many deficiencies, including rotting timber, rotting travelling planks, missing bridge members, lack of earth fill behind the bridge abutment, cracked main beams and broken sway braces. He recommended that a replacement structure be built, and further recommended that , in the interim, the noted deficiencies be repaired and the load limit be restricted to 11 000 pounds. The learned trial judge found that the bridge was in poor condition in 1984. This finding is fully supported by the evidence.

The province did nothing with respect to the bridge from 1979 until 1984, and did not carry out the work recommended by Mr. Lautens.

The deficiencies in the bridge had been evident for some time, and as early as 1973, the band had been pressing the government to rectify the problem. By a resolution of 8th November 1979, the Peguis Band urged that the bridge be replaced by the province. All this was to no avail. Finally, to bring matters to a head, the accused determined to take the drastic action of burning the bridge. There is evidence that they were motivated, not only by the poor condition of the bridge, but also by other conditions on the reserve, including alleged overcrowded and poor housing conditions. They issued a press release to this effect. They blocked off the road with earth and burned the bridge.

The accused have raised a number of defences to the charge of mischief: that the bridge was not a public bridge, but was owned by the band; that in burning the bridge, they acted under a colour of right; and that the legal defence of necessity applied. I reject the argument that the bridge was not public property, and was owned by the band.

The lands forming the Peguis Indian Reserve were set aside for the purpose of the reserve by virtue of an order passed by the Governor General in Council of 14th July 1930. The lands were then owned by the Government of Canada, and the order-in-council recited that on the recommendation of the Minister of the Interior, and under and by virtue of s.74, c.113, R.S.C. 1927 (the Dominion Lands Act) , the lands were withdrawn from the operation of the Act and set apart for the use of the Indians as Peguis Indian Reserve.

The lands then came under the operation of the Indian Act and by virtue of s.18 of that Act, they continued to be held by Her Majesty for the use and benefit of the band. In other words, prior to and at the time of the order-in-council, the lands were owned by the Government of Canada and, following the order, they continued to be owned by the Government of Canada pursuant to the provisions of the Indian Act. The lands were not owned by the band and, in my view, are not owned by the band, although they are to be held by the Government of Canada for the use and benefit of the band.

On 1st May 1958 the Governor General in Council passed a second order-in-council. pursuant to s.35 of the Indian Act consenting to 1the taking of a portion of the reserve lands by the Province of Manitoba, and the transferring of the lands to the administration and control of the Province of Manitoba for the purpose of creating a road through the reserve." This was the road in question which included the Harwill Bridge.

The order-in-council was registered in Winnipeg Land Titles Office on 7th July 1958 as No. D18219, and a document entitled "Plan of Survey of Public Road" with respect to the road in question was deposited in the Winnipeg Land Titles Office as Plan No. 6672 on 18th December 1957.

Thereafter, the road was used for general public purposes and maintained by the province of Manitoba.

The authority for the taking of the road by the province of Manitoba may be found in s.35 of the Indian Act which reads as follows:

> 35. (1) Where by an Act of the Parliament of Canada or a provincial legislature, Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.
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> (3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.
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> (4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

Under the above provision, the Governor in Council is empowered to authorize a transfer or grant of reserve lands to a province for public purposes. It was under that law which the Government of Canada, purported to transfer the lands designated for the road to the province of Manitoba.

Moreover, it is to be noted that in authorizing the transfer, the Government of Canada did not act arbitrarily. The order-in-council recites that the Indian locatees, whose lands are affected by the road, have approved the transfer without payment of compensation by reason of the advantage of the road to the Peguis Band and Indian locatees. The consent of the band was evidenced by a band council resolution dated 20th January 1958, in which the band resolved "to transfer to the Province of Manitoba, the highway through the Peguis Indian Reserve, as shown on a plan of survey ... etc."

In my opinion, the legal effect of the above actions and documents was to transfer the lands taken for road purposes from the ownership of the Government of Canada to the ownership of the province of Manitoba. The band council resolution itself refers to a "transfer" to the "Province of Manitoba"; the order-in-council makes reference to the facts that the province of Manitoba has "applied for" the land, and recites the "transfer" referred to in the band resolutions; and further, the order-in-council consents to the "taking" of the lands by the province of Manitoba and the "transfer" of the "administration and control" of the lands to the province; finally, s.35 of the Indian Act enables the Government of Canada to authorize a "transfer or grant" of lands to a province for public purposes. These words and phrases all connote the notion of a transfer of ownership in the land from the Government of Canada to the province of Manitoba.

Furthermore, in my opinion, the bridge clearly formed part of the lands. The plan filed in the land titles office shows the road crossing the Fisher River. Obviously, the utility of the road would be very much reduced if there was no bridge across the river. The bridge was open to everyone, including those who did not live on the Peguis Reserve, and it was owned by a public authority, namely, the province of Manitoba. In my view, the road, including the bridge, was public property. I am in full agreement with the learned trial judge who stated at p. 310:

> In my opinion, the bridge clearly is part of the roadway which was transferred to the province and is therefore public property.

The notion that the road and bridge are not public property but band property, rests on Treaty 1 made between Her Majesty the Queen and the Chippewa and Cree Indians on 3rd August 1871, which created the St. Peters Reserve in Manitoba. By that treaty, Her Majesty the Queen "agrees and undertakes to lay aside and reserve for the sole and exclusive use of the Indians" the lands in question. The subsequent treaties reserved to the Crown the right to acquire portions of the lands for public purposes upon paying compensation to the Indians. However, Treaty 1 contained no such clause and accordingly it may be arguable that the Crown could not legally acquire any of the lands for public purposes. The lands would forever be inalienable and remain the property of the Indians on the reserve.

In 1907 the St. Peters Reserve surrendered their lands to the Government of Canada, and between 1908 and 1912, the Indians on the reserve moved from St. Peters to their present location in the Peguis Reserve. However, the legality of this surrender was called into question by the majority of a Royal Commission appointed by the Manitoba government in 1911. In 1914, the Attorney General of Canada laid an information in the Exchequer Court of Canada alleging that the surrender was improper and should be overturned. However, the government had second

thoughts about this action and passed legislation validating the titles to the land in the former St. Peters Reserve which by then had been acquired by non-Indians. Mr. J. Gallo, a historian and former director of the Aboriginal Rights Research Centre, now manager of Treaty Land Entitlement Claims for the Lands Branch, Department of Indian Affairs, Manitoba Region, was called as a defence witness. He referred to certain studies which had been conducted, concluding that the St. Peters surrender was illegal, and he said it was arguable that the members of the Peguis Band still retained their rights under the original Treaty 1, and by virtue of that treaty still had the exclusive right to the reserve lands, no part of which could be transferred to the province of Manitoba, or to anybody else for that matter.

The studies to which Mr. Gallo referred were not placed before the court, and neither the trial judge nor I have had the benefit of the detailed reasoning which led to the conclusion that the St. Peters surrender was illegal, and that the provisions of Treaty 1 apply to the present Peguis Reserve. I am obviously not now in a position to find that the St. Peters surrender was illegal, and even if it was, it may not necessarily follow that the full provisions of the treaty, including the exclusive land rights claimed by the Indians, would apply to the lands on the Peguis Reserve. The Peguis Reserve was not created by Treaty 1, but rather by an order-in-council passed in 1930 affecting lands separate and distinct from those in the original St. Peters Reserve. There was nothing in the order-in-council precluding the taking of lands for public purposes pursuant to s.35 of the Indian Act. It may well be that the present members of the Peguis Reserve can maintain claims to the old lands on the St. Peters Reserve, but it may not necessarily follow that they could claim rights beyond those conferred in the Indian Act to the lands on which they presently reside in the Peguis Reserve.

Moreover, the point was not argued, but I raise the question: Would the granting of the "sole and exclusive use" of the reserve land for the Indians preclude the type of transfer which occurred here? As I have said, there was no attempt to arbitrarily seize the lands for the road from the Indians; in fact, they agreed to the transfer because they recognized what must have been obviously [sic] to all, that It was clearly in their best interests to have the road go through the reserve. Surely, even if they did not have the exclusive use of the property, this would not prevent the Indians from agreeing to give up part of that right, particularly when they stood to gain and benefit from the transfer.

In any event, I cannot make a finding on the material before me that the band owned the bridge; all the evidence before the court points to the opposite conclusion that the bridge was public property.

Counsel for the defence submitted that the accused had acted with colour of right because they honestly believed that the bridge was band property, which they had every right to destroy. Actually, it was only Chief Stevenson who professed any such belief, and at best, it could only be applicable in his case. His belief was based on his knowledge of the history of the St. Peters surrender and a 595 page legal opinion which was said to have supported the belief. That opinion was not put before the court, and it is not clear to what extent Mr. Stevenson had read and digested the opinion. Still, I suppose that the history of the surrender and the legal opinion might have formed the basis for an honest belief that the road, and the bridge in particular, did, indeed, belong to the Indian band. On the other hand, a person with knowledge of the history and the report might only have concluded that a reasonable argument could be made for the proposition that the band owned the bridge. Indeed, Mr. Gallo referred to the proposition as "arguable" without expressing an unshakable and firm belief that it was correct. It was for the trial judge in this case to say what the t rue belief and attitude of Chief

Stevenson was. He dealt with the matter in this way:

> Can it be said that Stevenson had an honest belief that the Peguis Band owned the bridge? He was aware of the Order-in-Council establishing the reserve on its present site. He was aware of the Order-in-Council granting the Harwill Road to the province. He was aware of the band's request to the province of Manitoba by letter of 15th May 1973 and 4th November 1980 concerning the state of the bridge. I quote from the letter of 15th May 19 73 from the band to the Province of Manitoba:
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> > Harwill Road -- Plan 4018 -- definitely Provincial responsibility. Roads not maintained as often as should be as school buses travelling on it. Bridge in very bad shape, dangerous.

> The evidence does not establish, and I am not convinced on a balance of probabilities, that Stevenson had an honest belief that the bridge was the property of the Peguis Reserve.

Counsel for the defence was critical of this passage, saying that mere awareness of the orders-in-council and the statement that the road was the provincial responsibility did not lead inexorably to the conclusion that Chief Stevenson had no honest belief that the road and bridge belonged to the band. Perhaps not, but they are surely cogent factors which the learned trial judge was entitled to take into account in deciding the credibility of Chief Stevenson's statement of belief. He might very well have added the point that the band had been calling upon, and clearly expected, the provincial government to replace the bridge. Why would they expect the government to replace a bridge which was not government, but band, property? However, for my purposes, the most important consideration is that the learned trial judge had the opportunity to actually see and hear Chief Stevenson testify and to judge first hand, in the light of all of the factors pointing to public ownership, whether Chief Stevenson really held the belief which he professed to hold. The trial judge had made his finding in this regard and it would not be appropriate for me to interfere with that finding. The defence of colour of right must fail.

It was argued that the defence of necessity applied. I reject this argument also. The defence of necessity was recently dealt with by the Supreme Court of Canada in Perka v. R., [1984] 2 S.C.R. 233, [1984] 6 W.W.R. 289, 42 C.R. (3d) 113, 1 C.C.C. (3d) 385, 13 D.L.R. (4th) 1, 55 N.R. 1 [B.C.], and following the authority, the learned trial judge posed the question "Do the actions of the accused Involuntarily, inevitably and unavoidably offer no reasonable opportunity for an alternative course of action that does not involve a breach of the law?" See reasons for judgment, p. 314. He answered that question by saying the bridge could have been blocked of f as it was on the day of the fire by dumping loads of earth at both ends, or it could have been barricaded and posted and closed off to prevent both pedestrian and vehicular traffic.

The bridge was in poor condition, but it was still being used. Vehicular traffic, including school buses, was passing over it. Heavy government equipment for dragging and snow ploughing went over the bridge once or twice monthly in the year prior to the burning. If the accused considered the bridge to be a danger to themselves, their alternative was not to use the bridge, and to encourage other members of the band not to do so. There were alternate routes across the river which they could have used (and presumably did use after the bridge was burned out). The learned trial judge made the point (p.313) in reference to the press release that the stated purpose for burning the bridge was to bring to the attention of governmental authorities conditions on the reserve as well as the state of the bridge. The band wanted to make a point. The trial judge said they could have simply blocked off the bridge. That might have involved a breach of provincial laws respecting the placing of materials on a public highway, but at least it would have been preferable to destroying the bridge.

The defence of necessity must fall.

In the result, the evidence clearly supports the findings made by the learned trial judge. I agree with him that the various defences advanced must fail, and accordingly the appeals are dismissed.