BASTIEN V. HOFFMAN

(1867), 17 L.C.R. 238 (also reported: 16 R.J.R.Q. 264)

Lower Canada Queen's Bench, Duval C.J., Drummond, Badgley, and Mondelet JJ., 19 June 1867

Held:--That since the passing of the law respecting Indians and Indian lands (C.S.L.C.c. 14,) all rights of action relating to those lands, whether founded upon ownership or occupancy, are vested in the Commissioner appointed under that Act; and no individual member of an Indian tribe can maintain a real action in his own name concerning lands appropriated for the use of the tribe.

Jugé:--Que, depuis la passation de l'acte c.14, S.R.B.C., concernant les Sauvages et les terres des Sauvages, le commissaire appointé par cet acte est investi, par rapport à ces terres, de tous les droits d'action résultant de la possession ou du droit de propriété; qu'aucun membre d'une tribu de Sauvages ne peut soutenir isoléément en son nom une action réelle, au sujet des terres appropriées pour l'usage de sa tribu.

Judgment rendered the 19th June, 1867.

The appellants, by their declaration, alleged that they were proprietors, by prescriptive possession of thirty years and upwards, of "an emplacement of forty-five feet front "by a half arpent in depth, situate in the parish of St. "Ambroise, bounded to the east by the street of the "Indian village of Lorette, to the west by the river St. "Charles, to the north by Charles Picard, and to the "south by J.B. Sébastien;" that the respondent, F.M. Hoffman, separated as to property from her husband, had constructed and kept up, for the use of a mill which she worked in the neighborhood, a wooden flume, by means of which she carried through the property alleged to belong to the appellants, the waters of the river St. Charles, causing thereby to the appellants damages to the amount of £50 per annum. They concluded by demanding the demolition of the flume, and that Mrs. Hoffman be condemned to pay to them the amount of £75 damages, for past occupation.

The respondents met this action, 1. by the general issue; and 2. by the following allegations in their pleadings: 1. That the plaintiffs are Huron Indians, that the property is situated in the Indian village of Lorette, and is vested by law in the Commissioner of Indian Lands for Lower Canada; 2. That by the law and custom of the tribe, a family cannot possess more than one emplacement or habitation, and that the appellants are elsewhere provided in the village; 3. That Indians are not allowed to accumulate emplacements in the village as property, the land being the common property of the tribe; 4. That the appellants never had the lawful possession of the emplacement in question; 5. That the respondents erected the mill race or flume with the permission of the chiefs, of the commissioner, and of the appellants themselves.

After issue joined, proof adduced, parties heard, the Superior Court, (Taschereau, J.,) pronounced judgment as follows:

"La Cour ayant examiné la procédure et la preuve de "record, et entendu les parties par leurs avocats respectifs "finalement au mérite; considérant que le terrain que les "demandeurs allèguent leur appartenir, décrit en leur "déclaration en cette cause, est situé dans les limites d'un

"village sauvage, en la paroisse Saint Ambroise, dans le "district de Quebec, destine a l'usage de la tribu des Sau- "vages Hurons, et occupé par les membres de la tribu; "considérant que la possession et occupation de toutes et "chacune des terres du vit village, et notamment du ter- "rain en question, sont en loi censées être et résider dans "le Commissaire des Terres des Sauvages, qui seul a droit "en son nom d'exercer tous et chacun les droits de pro- "priété ou de possession, relatifs aux dites terres, apparte- "nant au propriétaire, possesseur ou occupant de telles "terres ou lots de terre; considérant que l'action en cette cause, pour les causes et considérations exprimées en la "déclaration des demandeurs, savoir, comme ayant trait à "la propriété et possession d'un terrain formant partie des "terres affectées a l'usage de la dite tribu des Sauvages "Hurons, ne leur compétait pas en leur propre et privé "nom, mais qu'icelle action aurait dû être instituée par et "au nom du dit Commissaire, maintient l'exception pé- "remptoire en droit perpétuelle des défendeurs, et renvoie "l'action des demandeurs, avec dépens."

LANGLOIS, for appellants:--Les appelants pouvaient-ils diriger eux-mêmes leur action, ou devait-elle être instituée au nom du Commissaire des Terres des Sauvages? Pour résoudre ce point, il faut référer au statut refondu du Bas- Canada, ch.14, sec.7: "The Governor may appoint from "time to time a Commissioner of Indian Lands for Lower "Canada, in whom and in whose successors by the name "aforesaid, all lands or property in Lower Canada, appropriated for the use of any tribe or body of Indians, shall "be vested in trust for such tribe or body, and who shall "be held in law to be in the occupation and possession of "any lands in Lower Canada actually occupied or possess- "ed by any such tribe or body in common, or by any chief "or member thereof or other party for the use or benefit "of such tribe or body, and shall be entitled to receive and "recover the rents, issues and profits of such lands and pro- "perty, and shall, in and by the name aforesaid, subject "to the provisions hereinafter made, exercise and defend "all or any of the rights lawfully appertaining to the pro- "prietor, possessor or occupant of such lands or property." Et section 10: "Nothing herein contained shall be con- "strued to derogate from the rights of any individual Indian "or other private party, as possessor or occupant of any "lot or parcel of land forming part of or included within "the limits of any land vested in the Commissioner afore- "said."

Ce statut a été passé en l'année 1850. Les terres réservees pour les tribus des sauvages étaient alors comme aujourd'hui, occupées partie en commun, et partie par les individus de la tribu. Par exemple, il y a la forêt où ils prennent en commun leur bois de chauffage, les rues et les chemins et les places publiques pour l'usage de la tribu. Ces parties sont possédées en commun, et pour la protection des droits et des intérêts de la tribu, il convennait de nommer un administrateur, et c'est là ce que le statut a eu pour but. Quant aux lots de terre possèdès par les memebres de la tribu, la section 10 leur réserve expressément leurs droits. Ce statut n'a done pas eu pour but de mettre les individus de la tribe sous la tutelle du commissaire. mais seulement de donner à la tribu un représentant pour les choses possédées par elle en commun. Il semble que cette Cour lui a donné cette interpretation dans la cause Nianentsiasa et Akwirente, *et al*. (1) 3,L.C. Jurist, p.31.

Une autre prétention des intimés, est, que les appelants ayant un autre lot de terre qu'ils occupent dans le village, n'ont pas droit à celui dont il s'agit. Ils invoquent sur ce point une prétendue coutume chez les sauvages. La preuve qu'ils ont produite pour établir cette coutume ne les justifie pas entièrement dans cette prétention. Il est vrai qu'un individu, voulant s'établir dans le village, doit faire aux chiefs la demande d'un lot pour y bâtir sa maison, et qu'il n'a pas droit d'en obtenir plus d'un. En effet, il serait injuste envers les autres membres de la tribu de lui en

accorder plus d'un. Mais si, possédant déjà un lot pour sa résidence et celui de sa famille, il lui en échoit un autre par succession de son père ou de as mère, ou de tout autre parent, ou si, étant veuf, il se remarie à une veuve qui en possède elle-même un, rien dans cette coutume ne l'empêche de jouir des deux lots de son vivant, et de les transmettre à ses descendants ou autres parents. Les témoins mêmes des défendeurs reconnaissent ces exceptions. Les appelants, à ce sujet, se trouvent dans un cas analogue à ceux qui viennent d'être cités. L'appelant occupe avec sa famille le lot qui lui vient de son père, et le lot qui forme le sujet de ce procès est échu à son épouse et à ses trois soeurs, par succession de leur grand'mère, Marie Simon Ignace.

Parkin, Q.C., for respondents.--The vesting in the Commissioner is matter of public law; while the customs are fully proved by the chiefs of the tribe, and indeed result from the tenure itself, which is only usufructuary, to be equally divided among a number of individuals, under the control of the body of directors, which, in this instance, is the ancient and national council of chiefs.

The appellants, while fully admitting the fee simple to be in the Commissioner, claim under sec. 10 of the Act cited, as possessors or occupants. It is clear that they never were occupants. Nor have they ever been lawful possessors . The only possession they urge is, having seized upon the lot *de facto*, and to give them colour of *seizin* having erected a portion of a habitation to comply with the law requiring actual occupancy. But this building is only a pretence, having never assumed the condition of a habitable house, while the appellants have long possessed another dwelling in which they have always resided. But the possession itself which they invoke was in its origin vicious, having originated in fraud and violence. (1) Pothier, Possession, Nos.17 et seq.. The alleged possession of thirty years is without proof, and even if proved could give no title, being a possession contradictory of the legal title, and the mere possession of a usufructuary.

DRUMMOND, J.--That the property in question forms part of a large tract of land appropriated for the use of the Huron tribe of Indians admits of no donbt. All the Indians of that tribe, recognized as such, whether of pure or mixed blood, or adopted according to Huron customs, were, and continue to be, proprietors *par indivis*,--or to use the English term perfectly analogous, tenants in common, of the whole tract. From the time of the first grants for the use of the Indian tribes in Lower Canada, the property thus held in common was usually managed by the chiefs elected from time to time by each tribe. In these chiefs was recognized the power of apportioning out the tract under their control to heads of families,--one building lot or emplacement to each,--with the right of possession of the land occupied by the buildings and improvements, but with no right of property in the soil, beyond that which each held as one of the tenants in common of the whole tract. It was also held by the usages of the various tribes that the chiefs had the right of disposing of certain lots, for the interest of the community at large. But the administration of these properties by the chiefs having proved unsatisfactory and inefficient, the Executive of the day thought proper to propose, for the adoption of the Legislature, the bill which now forms the 14th chapter of the Consolidated Statutes of Lower Canada. By this statute, it was enacted amongst other things as follows: section 7., "The Governor may appoint from time to "time a Commissioner of Indian Lands for Lower Canada, in "whom and in whose successors, by the name aforesaid, all "lands or property in Lower Canada, appropriated for the "use of any tribe or body of Indians, shall be vested "in trust for such tribe or body, and who shall be held in "law to be in the occupation and possession of any lands "in Lower Canada actually occupied or possessed by any "such tribe or body in common, or by any chief or "member thereof, or other

party, for the use or benefit of "such tribe or body, and shall be entitled to receive and "recover the rents , issues and profits of such lands and pro- "perty, and shall, in and by the name aforesaid, subject to "the provisions hereinafter made, exercise and defend all "or any of the rights lawfully appertaining to the pro- "prietor, possessor or occupant of such lands or property."

It is therefore clear that, since the passing of this law, all rights of action, whether founded upon ownership or occupancy, are vested in the Commissioner of Indian Lands for Lower Canada, in whose person the Executive Government has wisely combined this office with that of Assistant Com- missioner of Crown Lands.

The 10th section of this Act, invoked by the appellants, which runs as follows: "Nothing herein contained shall "be construed to derogate from the rights of any indivi- "dual Indian or other private party, as possessor or occu- "pant," was evidently intended to protect such rights of occupancy, founded on usage, as have been above alluded to, and as are mentioned by Elie Siouï, one of the oldest chiefs, in his deposition, page 13, of the respondents' case, "sont pas maîtres du terrain; ils n'ont que la maison bâtie "dessus pour leur occupation." The rights protected are possessory, not real. They import a defensive, not an aggressive power.

Now the appellants found their right upon a title alleged to have been acquired by prescriptive possession. The uninterrupted possession of thirty years is far from being clearly proved, even as to the skeleton house built upon the property, and is not proved at all in relation to the space occupied by the flume which they seek to demolish. But even if it were fully, clearly, indubitably proved, as to the whole, and even if all rights of action relating to these Huron Lands had not been vested by our Legislature in a commissioner, the plaintiffs would have no right of action, because neither they nor any other individual member of the Huron tribe possess one foot of property in which the whole *communauté*; or tribe has not a share, and because no tenant in common, *propriétaire par indivis*, can acquire by prescription, or plead prescription, against his cotenant. The judgment appealed from should therefore, in my opinion, be confirmed, with costs in both Courts.

Judgment confirmed, (Mondelet, J., *dissentiente*.)

CASUALT, LANGLOIS, ANGERS, & COLSTON, for appellants. PARKIN, Q.C., for respondents.