

## MCLEAN v. MCISAAC

( 1885 ), 18 N.S.R. 304

**Nova Scotia Supreme Court, McDonald C.J., Smith, Weatherbe, Rigby and Thompson JJ., 4 August 1885**

**Before MCDONALD, C. J., and SMITH, WEATHERBE, RIGBY, and THOMPSON, J. J.**

***(Decided August 4th, 1885.)***

*Action against Indian Commissioner for arrest of a person trespassing on Indian Reserve.--Verdict for plaintiff set aside.*

PLAINTIFF having continued to trespass upon a portion of the Indian Reserve Lands at Whycocomagh, Inverness, by cutting hay, etc., after notice to cease doing so, one of the defendants, as Indian Agent and Justice of the Peace, issued a warrant under which plaintiff was arrested by the sheriff, assisted by another defendant, who was called upon by the sheriff for that purpose, and, after trial and conviction, was committed to jail in default of the fine imposed under chapter 28 of the Dominion Acts of 1880, sec. 27. Plaintiff thereupon brought an action claiming damages for the arrest, and the jury having found a verdict in his favor against the Judges charge, the verdict was set aside with costs.

A rule was taken to set aside a verdict for plaintiff in an action claiming damages for assaulting the plaintiff and committing him to prison, and for trespass, &c. The facts appear fully in the judgment.

*Graham, Q.C.*, in support of rule, cited *Acts of 1880*, chap. 28, sec. 7; *Revised Statutes*, (1st series,) chap. 28, sec. 3.

*Pearson, contra.*--The plaintiff was in possession of the land in question for a long time, and the hay carried away was the product of his labor. The part of the verdict relating to the assault cannot be sustained, but I think the verdict in relation to the trespass can be. The plaintiff was in possession of the land and the question is whether Mr. McIsaac had a right to take the hay cut by him. Mr. McIsaac's authority under the Act is only to prosecute before the magistrate. He has no right to enter unless he shows title. We have the right to consent to a verdict against us on the first and second counts. The evidence on the remaining counts is sufficient to sustain the verdict.

*Graham, Q.C.*--There is sufficient evidence to show title in the Crown, as whose representative Mr. McIsaac entered. Unless there is statutable authority I do not consent to a verdict on the first two counts. The case is not one for the exercise of the discretion of the court. The return which is in evidence shows that this land was reserved for the Indians under the statute of 1852. This is admitted. (WEATHERBE, J.--There is evidence that the government were selling it.) I think not after 1852. The plaintiff admits that this land was part of the reserve, and admits the title of the government. He sought to purchase from them. The Dominion statute of 1880, chapter 28, gives the Dominion Government jurisdiction in regard to all Indian lands. McIsaac was acting under the statutes; *Acts of 1881*, chap. 17, sections 9, 11, 12; *Acts of 1882*, chap. 30, sec. 3. The

Dominion Government had power to deal with these lands, and, under the acts, Mr. McIsaac had power to lay the information. (WEATHERBE, J. How would the fact of the plaintiff being in possession at the time of the transfer to the Dominion Government affect the question?) The plaintiff was only a trespasser. I think it would make no difference.

*Pearson* replied.

McDONALD, C.J., (August 4th, 1885,) delivered judgement as follows :--

The declaration in this case contained three counts:

1. That the defendants assaulted and imprisoned the plaintiff and kept him imprisoned, &c.
2. That the defendants assaulted and imprisoned the plaintiff's son, a minor, in plaintiff's employ, and kept him imprisoned, &c.
3. That the defendants broke and entered land of the plaintiff, described in the writ, and cut grass, broke down fences, &c.

The defendants pleaded separately, each denying the allegations of the plaintiff, and also special pleas justifying the commission of the acts complained of on the ground that the plaintiff and his son were trespassing on the Indian reserve at Whycocomagh, in the County of Inverness, C. B., for which county the defendant McIsaac was Indian agent for the purposes of the Indians Act of 1880. Both defendants pleaded to the third count that the plaintiff was not in possession of the locus. The cause was tried before Mr. Justice McDONALD, at Port Hood, when the jury, contrary to the instructions of the learned Judge, found a verdict for the plaintiff. The fact as they appeared in evidence were, shortly, as follows:

The plaintiff, Donald McLean, twenty or twenty-five years ago, squatted on certain Crown lands at Whycocomagh, in the County of Inverness, reserved by the Crown for the use of the Indians of that district, under authority of Acts for that purpose passed by the Legislature of Nova Scotia. The control and management of these lands by the British North America Act were transferred, with the general management of Indian affairs, to the Dominion Government, and are now, and have, since 1867, been managed by the Indian Department of that government under the authority of statutes passed in that behalf. The defendant, Rev. Donald McIsaac, was by minute-of-council, dated 23rd May, 1878, appointed Indian agent for the County of Inverness, succeeding Joseph B. McDonald, Esquire, who had previously occupied that position. The plaintiff, it appears, had applied to the Government of Nova Scotia for a grant of the land now in dispute, but was refused; and the title is still in the Crown, and the land forms a portion of the Indian reserve above referred to. There is contradictory evidence as to the length of time the plaintiff has occupied the land, and the character of that occupation, but it appears with sufficient certainty that he and his family have partially cleared the locus, and have erected fences, and cut hay upon it for at least twelve or fifteen years, and, as the plaintiff testifies, over twenty years. This possession has never been authorized by the Crown, or by any person representing the Crown or the Indian Department, nor does it appear that the plaintiff ever asserted any right or title in himself till this action was commenced. On 1st February, 1879, the defendant McIsaac addressed a letter to the plaintiff stating that he was in receipt of instructions from the Indian Department to notify him that if he was, after that date, found trespassing upon the Indian reserve at Whycocomagh, by cutting wood, scantling, timber, &c., or removing or making hay thereon,

or removing the same off the reserve, or otherwise encroaching on the vested rights of the Indians, or the Indian Department, proceedings would be taken to impose on him the penalties provided by section 16, Indian Act, 1876. In consequence of this notice the plaintiff in the following June, addressed a communication to the Deputy Superintendent of Indian affairs claiming that he had occupied the land in question for twenty-five years, and asking for compensation for improvements.

The Indians continued to complain of the intrusion by the plaintiff upon their reserve, and the defendant McIssac, as the Indian agent of the district, authorized and instructed the defendant Livingstone and others, members of the Indian Board of the County of Inverness, to enter upon the lands now claimed by the plaintiff, and cut and carry away the hay growing upon the same.

This is the trespass complained of in the third count. The plaintiff, however, refused to abandon his possession of the lands in question, and, in 1882, on complaint on oath made by the defendant Livingstone, and several other members of the Indian Board, at Whycocomagh, a warrant was issued by the defendant McIsaac, in his capacity of Indian Agent, and, *pro hac vice* Justice of the Peace, to apprehend the plaintiff and his son for a violation of the Act in relation to Indian affairs. The plaintiff was apprehended, and, with his son, tried before the stipendiary magistrate of the county, and duly convicted of the offence charged; and, in default of payment of the fine imposed under the statute, was committed to jail. This is the imprisonment complained of in the first and second counts of the declaration. Sec 20, of the Act of 1880<sup>(1)</sup>Sic. Section 22., provides that "no person or Indian, other than an Indian of the band, shall settle, reside, hunt upon, occupy or use any land or marsh," upon such reserve, and section 27 enacts "that if any person or Indian other than an Indian of the band to which the reserve belongs, without license in writing of the Superintendent-General, or of some officer deputed by him for that purpose, trespass upon any of the said lands \* \* \* by cutting, carrying away or removing therefrom \* \* \* timber or hay thereon, the person so trespassing shall, on conviction therefor, before any stipendiary magistrate forfeit and pay the sum of twenty dollars \* \* \* and, if any part of it remains unpaid, the Superintendent-General \* \* may commit the person in default to the common jail." Chap. 17, sec. 30, Dominion Acts, 1881, enacts "all sheriffs, &c., to whom any such process is directed by the Superintendent- General or by any officer or person by him deputed \* \* \* shall obey the same, and all other officers shall upon reason- able requisition assist in the execution thereof," and, by chap. 20, sec. 3. of the Acts of 1882, all powers given to stipendiary or police magistrates to dispose of cases of infraction of the Act of 1880 are conferred upon the Indian agents. It appears, therefore, that the plaintiff's occupation of this Indian reserved land was unauthorized and illegal, was continued after due notice and warning by the duly constituted authority, in defiance of which he carried away the hay from these lands, and, on proceeding duly taken by the defendant, as Indian agent, and, on due trial, he was convicted of the offence charged against him, and in due course committed to prison. The only evidence against the defendant Livingstone on the first and second counts, is that he assisted the sheriff in making the arrest under the warrant. The justification pleaded to that charge is fully proved, viz., that he assisted the sheriff on his requisition and on his command, and not at the request or on the command of the Indian agent. In my opinion the justification pleaded was fully sustained by the evidence as to all the counts in the declaration, and as the charge of the learned Judge was full and comprehensive as to the facts, and entirely unobjectionable in point of law, the verdict may, in my opinion, be properly characterized as perverse, and should be set aside. It is not necessary to discuss the right of the Indian agent to enter upon and take the hay from these

reserves for the benefit of the Indians entitled to the produce of the land. The plaintiff does not, or rather did not pretend to hold adversely to the Crown. He was, as he admits, leniently treated in being allowed to purchase that portion of these reserved lands which he had made valuable by his labour, and of which he received grant from the Crown, and his attempt to appropriate what he had acquired no right or title to, has got him into the difficulty of which he complains. As against a private owner, where he had not acquired title by twenty years' possession, he could not maintain this action for trespass. In *Butcher v. Butcher*, Lord TENTERDEN, C. J., said: "If he who has the right to land enters and takes possession he may maintain trespass. It is not necessary that the party making the entry should declare that he enters to take possession," and BAYLEY, J., in the same case, said, "*Lawton v. Costen*, 7 T. R., 431, is an authority to show that a party wrongfully holding possession of land cannot treat the rightful owner who enters on the land as a trespasser. I think that a party having a right to the land acquires, by entry, the lawful possession of it, and may maintain trespass against any person who, being, in possession at the time of his entry, wrongfully continues upon the land."

The verdict will be set aside with costs.