

MILLER v. THE KING

[1948] Ex.C.R. 372

Exchequer Court of Canada , O'Connor J., 21 May 1948

(Appealed to Supreme Court of Canada, *infra* p. 298)

Crown--Petition of Right--Argument on question of law--No cause of action disclosed--Petition of Right held not to lie against Respondent.

Held: That when suppliants sought relief for a breach of trust alleged to have resulted from the surrender of certain lands owned by the Six Nations Indians and such land was held in trust by the Crown solely for the purpose of granting the same to purchasers chosen by the Six Nations and such purchase money was received not by the Crown but by the trustee appointed by the Indians, a Petition of Right claiming damages for breach of trust does not lie against respondent.

ARGUMENT on question of law ordered to be set down and disposed of before the trial.

The argument was heard before the Honourable Mr. Justice O'Connor at Ottawa.

Auguste Lemieux, K.C. for suppliants.

W. R. Jackett and *D. W. H. Henry* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

O'CONNOR J. now (May 21, 1948) delivered the following judgment:

In a Petition of Right the suppliants, Frank Miller, Chief Councillor of the Six Nations of the Grand River, on behalf of himself and all others, members of the said Six Nations of the Grand River, and the said Six Nations of the Grand River, claim damages for breach of trust on the facts herein set out.

On the application of the respondent an order was made to have the following question determined prior to the hearing:

1. Assuming the allegations of fact contained in the Petition of Right read with the particulars filed by the Suppliants on October 21, 1943, and September 5, 1944, pursuant to orders made by the President of this Honourable Court on June 3, 1942, and December 21, 1943, respectively, to be true, does a Petition of Right lie against the Respondent for any of the relief sought by the Suppliants in the said Petition?

If a Petition of Right would otherwise lie against the Respondent for any of the relief sought by the said Petition, is the said Petition barred by the Exchequer Court Act and the Statute of Limitations (Ontario) as alleged by paragraph 19 of the Statement of Defence herein?

The facts alleged in the petition and the particulars appear to be:

The suppliants allege that part of certain lands granted to the Six Nations by a deed, dated October 25, 1784, and confirmed by a patent dated January 14, 1793, was surrendered to the

respondent on February 5, 1798, by Captain Joseph Brant under a power of attorney from the Six Nations, dated November 2, 1796, and that such lands were held by the respondent in trust for the Six Nations to sell the said lands and to invest the proceeds for the purpose of providing an annuity for the Six Nations and their posterity.

The suppliants also allege:

4. About the year 1784 was formed in the Province of Upper Canada with the consent and approval of His Late Majesty George the Third, what is now known as the Department of Indian Affairs and which from its formation to the present time, by its superintendent General of Indian Affairs or other officer or officers charged with its control and management from time to time as an Express Trustee, has assumed the control and management as such of the lands and property of the Indians in Canada and has established what is known as the Indian Trust Fund handling and receiving, paying and being responsible as such Express Trustee for all Indian money paid to it or which should be collected and paid to it and generally and since its formation acting as Express Trustee for the Indians in Canada, including your suppliants, and maintaining the relationship of such Trustee and cestui que trust in respect of such Indian properties from its formation to the present time constituting such Indians as minors and wards of said Department, which status only has been accorded them to the present day.

The suppliants allege that the construction of the dam at Dunnville, Upper Canada, in 1826 by the Welland Canal Company, flooded and permanently destroyed 1826 80/100 acres which were a portion of the lands surrendered by Captain Brant, and although Section 9 of the Act incorporating the Welland Canal Company, being Statute 4, George IV, Chap. 17, expressly provided that compensation should be made to any tribe of Indians whose land was damaged by the construction of the canal, the respondent failed to collect from the proprietors of the said Welland Canal the amount of such damage.

The suppliants also allege that the Government of Upper Canada on October 20, 1886, passed an Order-in-Council declaring 368 7/10 acres, being a portion of the lands surrendered by Captain Brant, to be a free grant to the Grand River Navigation Company, and that the respondent did not collect the value of the lands conveyed to the said company.

The suppliants further allege that the respondent out of the monies realized from sales of the lands surrendered by Captain Brant on February 5, 1798, purchased worthless shares of the Grand River Navigation Company illegally and unlawfully.

The suppliants claim payment for:

- (a) The value of the lands destroyed by the flooding, and
- (b) the value of the lands contained in the free grant, and
- (c) repayment of the cash paid for the shares of the Grand River Navigation Company out of the funds of the Six Nations arising from the sale of their land.

While the suppliants allege in paragraph 4 of the petition that the Superintendent General of Indian Affairs was an Express Trustee for the Six Nations because he assumed the control and management of their lands and property, there is no further allegation of any kind in respect to this.

But it is specifically alleged in paragraph 8 that the lands destroyed by flooding (claim (a)) and in paragraph 11 that the lands in the free grant (claim (b)), were portions of the lands surrendered by Captain Brant.

The claims under (a) failure to collect compensation, and (b) the making of the free grant, are made on the basis that the surrender by Captain Brant created a trust and made the respondent an Express Trustee for the Six Nations and that (a) and (b) constitute a breach of trust.

The claim under (c) purchase of worthless shares, is made on the basis that the surrender by Captain Brant created a contract and that (c) was "in breach of the contractual agreement" as set out in paragraph 15 of the petition.

The surrender by Captain Brant of February 5, 1798, described in paragraph 15 of the Petition of Right is fully set out in the particulars and consists of the minutes of the meeting of the Executive Council of Upper Canada of February 5, 1798, and the letter from the Honourable Peter Russell, president of the council, to the Duke of Portland, secretary for the Colonies. The power of attorney under which Captain Brant acted is recited in the minutes. From these documents it is clear that Captain Brant under a power of attorney dated November 2, 1796, surrendered to His Majesty the 352,707 acres on behalf of the Six Nations (at that time Five Nations) which "he prayed in their name that His Majesty would be graciously pleased to grant in certain portions", to five purchasers named and "leaving a blank for another portion which they are hereafter to recommend for". The surrender was accepted.

Minutes of the Council meeting state:

The Attorney General then produced the Deeds of Grant (five in number) Which the President signed in presence of the Board and ordered that the Great Seal of the Province shall be affixed thereto and that the Secretary of the Province shall be instructed not to deliver the said Deeds to any of the Parties to whom the said Lands are thereby conveyed, unless they shall produce and leave with him a Certificate under the hands and Seal, of the Honourable D. W. Smith, Wm. Claus, Esqr., and Alexr. Stewart, Esqr., Trustees authorized by the Five Nations to receive Mortgages of the said Lands; Certifying that the said Parties have done everything required of them, and necessary to secure to the Five Nations, and their Posterity the stipulated Annuities and Considerations which they agreed to give for the same.

The letter from the president of the Executive Council to the secretary for the Colonies states:

The Five Nations having appointed the Acting Surveyor General, the Superintendent of Indian Affairs in this District, and Alexander Stewart, Esqr., Barrister at Law, their Trustees to receive for their use Mortgages and other Securities for the Payment to them of the several and respective considerations stipulated, I have directed the Secretary of the Province not to issue to the Parties any of these Deeds, before they have delivered to him an order for so doing signed by each of the three Trustees.

The Secretary of the province was instructed to hand the deeds to the purchasers when the trustees appointed by the Six Nations certified that they had received mortgages and other securities for the payment of the considerations stipulated.

There is no allegation that the deeds of Grant were not eventually given to the purchasers or that the trustees did not receive the purchase monies. On the contrary it is alleged that the shares of the Grand River Navigation Company were purchased out of the monies arising from the sale of the lands surrendered by Brant:

The Crown did not hold the lands in trust for the Six Nations except for the purpose of granting the same to the purchasers chosen by the Six Nations. And the purchase money was received not by the Crown but by the trustees appointed by the Indians.

In the particulars furnished pursuant to the order dated June 3, 1943, the suppliant (Part III (a) (1)) gives particulars of the surrender by Captain Joseph Brant of "lands on the Grand River, mentioned in a schedule thereto attached dated January 15, 1798 . . ." referred to in paragraph 8 of the petition, and in (a) (2) gives particulars of a further surrender dated February 5, 1798, referred to in paragraph 13 of the petition. The date of the surrender mentioned in Part III (a) (1) of the particulars furnished pursuant to the order dated June 3, 1943, is not given but is described as "mentioned in a Schedule thereto attached dated January 15, 1798". In (b) it is described as of January 15, 1798. The attention of counsel was called to this and after investigating he informed the court that this was in error and that no surrender was made on January 15, 1798.

It was also pointed out to counsel for the suppliants that on the facts alleged in the petition and in the particulars that the Crown was not a trustee in respect to the lands surrendered by Brant on February 5, 1798, except for the purpose of granting the lands to the purchasers and there was no allegation that the Crown had not done so. And the facts alleged were that the purchase monies were to be paid to the three trustees appointed and authorized by the Six Nations "to receive for their (Six Nations) use mortgages and other securities for the payment to them of the several and respective considerations stipulated". So that the three individuals were the trustees not the Crown.

Counsel then moved to:

- (a) Examine an officer of the Department.
- (b) To amend the petition by alleging that the trustees were appointed by the Crown, and that the trustees had failed to procure the Deeds for the purchasers and failed to collect the purchase price.

It was then pointed out to him that this was in direct conflict with the statements in the particulars furnished by the suppliants, in which he had quoted the minutes of the meeting of the Executive Council of Upper Canada, dated February 5, 1798, and the letter to the Duke of Portland from the president of the Executive Council.

Counsel for the suppliants then asked for further time in which to investigate, and for leave to submit a further brief. In the brief submitted he pointed out that Brant had only surrendered part of the lands in the original grant and that there was then a balance remaining. He asked leave to amend the petition by changing the petition so as to allege that the lands damaged by flooding and the lands contained in the free grant were *not* part of the lands surrendered by Brant, but were part of the remaining lands in the original grant.

But if the relief sought is not based on a breach of the Brant trust, then there would not appear to be any basis for the claim, or if there is a basis, it would be a new cause of action, which would require a new petition and a new fiat.

The motion to examine an officer of the Crown and all the motions to amend will be refused.

For the reasons I have given, the first question of law is, therefore, answered in the negative, and it is not necessary to deal with the second question.

The costs will be costs in the cause.