REX v. BONHOMME

(1917), 38 D.L.R. 647 (also reported: 16 Ex. C.R. 437)

Exchequer Court of Canada, Audette J., 3 May 1917

(Appealed to Supreme Court of Canada, infra p. 288)

PUBLIC LANDS (§ I C--15)--CONSTRUCTION OF CROWN GRANT.

A Crown grant must he construed most strictly against the grantee and most beneficially for the Crown so that nothing will pass to the grantee but by clear and express words.

Information of intrusion to have St. Nicholas Island declared [Statement] part of Indian Reserve.

Paul St. Germain, K.C., for plaintiff; *F. L. Beique*, K.C., for defendant Daoust; *Chas. Lanctot*, K.C., and *N. A. Belcourt*, K.C., for Attorney-General of Quebec.

AUDETTE, J.:--This is an information of intrusion exhibited by the Attorney-General, whereby it is claimed that the Island of St. Nicholas, situate in navigable waters on the River St. Lawrence, in Lake St. Louis, be declared a portion of the Caughnawaga Indian Reserve; that the possession of the island be given the Indians, and that the defendant be condemned to pay the plaintiff the sum of $1,000 for the issues and profits of the said island from June 1, 1907, till possession of the same shall have been given the said plaintiff.

The Province of Quebec, on the other hand, claiming and assuming the ownership of the said Island of St. Nicholas, sold the same for the sum of $400 on December 19, 1906, to the said Dame Rachel Daoust, wife of the said Philorum Bonhomme, as appears by the Crown grant filed herein as exhibit No. 3.

The action was originally taken only as against the defendant Philorum Bonhomme, who by his plea declared the island had not been sold to him but to his wife, and asked that the action as against him be dismissed with costs. His wife, Dame Rachel Daoust, was subsequently added a party defendant. The said Philorum Bonhomme has, since the institution of the action, departed this life, as appears by the certificate of burial filed as ex. No. 4.

The defendant Daoust's grantor, the Province of Quebec, who had sold this Island of St. Nicholas to her, with covenant, intervened in the present case and took (*faitet cause*) upon itself the defence of the said defendant Daoust as her warrantor.

The Crown, in the right of the Federal Government, as having the management, charge and direction of Indian Affairs in Canada, claims the ownership of St. Nicholas Island as forming part of the Seigniory of Sault Saint Louis, as conceded by the King of France to the Jesuits for the Indians on May 29, 1680, and under the augmentation thereto by the further concession of October 31, 1680, by Louis de Buade, Comte de Frontenac, Governor and Lieutenant-General for His Majesty in Canada.

By the first concession, bearing date May 29, 1680, a copy of which is filed herein as ex. No. 1, a

certain parcel of land is so granted, together with *deux isles, islets et battures*--two islands, islets and flats which are situate in front thereof.

It is proved and admitted that St. Nicholas Island is not opposite this first concession and among the islands therein mentioned.

Then by the second concession, bearing date October 31, 1680, a certain piece and parcel of land, immediately adjoining the first concession to the west, is further granted, but without any mention in this latter grant of any island, islet or flats. The Island St. Nicholas is opposite the second concession.

Therefore this St. Nicholas Island obviously did not pass to the Jesuits under the last mentioned concession, unless expressly included in the same in terms specific and unmistakable. No proprietary rights in the said island passed without a specific grant to that effect.

Truly, as I have said in *Leamy v. The King*, 15 Can. Ex. 189, 23 D.L.R. 249; 54 Can. S.C.R. 143, 33 D.L.R. 237, it would be a singular irony of law if the rights to this island could thus be taken away or disposed of by such a grant which is absolutely silent in respect thereto. This Island of St. Nicholas did not under either of these two grants pass out of the hands of the King to the Jesuits for the Indians, and there is no evidence that this island was vested in the plaintiff before Confederation, or taken in any other manner within the scope of s. 91, s.s. 24 of the B.N.A. Act, and the Crown as representing the Federal Government has no title thereto, and the land is vested in the Crown, as rep- resenting the Province of Quebec. *Wyatt v. Attorney-General*, [1911] A.C. 489, *Leamy v. The King, supra; Bouillon v. The King*, 31 D.L.R. 1.

The trite maxim and rule of law for guidance in the construc- tion of a Crown grant is well and clearly defined and laid down in Chitty's Prerogatives of the Crown, p. 391-2, in the following words:--

> In ordinary cases between subject and subject, the principle is, that the grant shall be construed, if the meaning be doubtful, most strongly against the grantor, who is presumed to use the most cautious words for his own advantage and security, but in the case of the King, whose grants chiefly flow from his royal bounty and grace, the rule is otherwise; and Crown grants have at all times been *construed most favourably for the King,* where a fair doubt exists as to the real meaning of the instrument . . . Because general words in the King's grant never extend to a grant of things which belong to the King by virtue of his prerogative, for such ought to be expressly mentioned. In other words, if under a general name a grant comprehends things of a royal and of a base nature, the base only shall pass.

Approaching the construction of the second grant with the help of the rule above laid down, it must be found that in the absence of a special grant especially expressed and clearly formulated, the Island of St. Nicholas obviously did not pass.

Had it been the intention by the second concession to grant the island opposite the lands mentioned in the same, the same unambiguous course followed in the first concession would have been resorted to, and the island would have been mentioned in the grant.

A Crown grant must be construed most strictly against the grantee and most beneficially for the Crown so that nothing will pass to the grantee but by clear and express words. The method of construction above stated seeming, as judicially remarked, *per* Pollock, C.B., *East Archipelago Co. v. Reg.*, 2 E. & B. 856 at 906, 7; 1 E. & B. 310, to exclude the application of either of the legal maxims, *expressio facit cessare tacitum* or *expresio unius est exclusio alterius*. That which

the Crown has not granted by express, clear and unambiguous terms, the subject has no right to claim under a grant, Broom's Legal Maxims (8th ed.) pp. 463-464.

The plaintiff endeavouring to shew title by possession called a number of Indians who were heard as witnesses to prove possession by them, shewing that the Indians of the Caughnawaga Reserve had always considered St. Nicholas Island as part of the reserve. The evidence discloses that some of the Indians residing on the reserve had at times a small shack and had sown patches of potatoes and corn on the island, and it is contended they thereby acquired title by possession (arts. 2211 et seq., C.C. Que.). This contention must be dismissed from consideration, because possession of ungranted land by roaming Indians could not remove the fee from the hands of the Crown. There cannot be any ownership of any territory acquired by possession or prescription by Indians because *les uns possèdent pour les autres. Corinthe v. Séminaire de St. Sulpice, 5 D.L.R. 263, 21 Que. K.B. 316; [1912] A.C. 872. And I further find that no help could be found in favour of the plaintiff, in respect of the title to the said island in the Royal Proclamation of 1763, as mentioned at p. 70, Houston Const. Doc. of Canada, because the lands therein referred to as reserved for the Indians are outside of Quebec, and the territory in question herein. In fact, they are lands outside the four distinct and separate governments, styled respectively Quebec, East Florida, West Florida, and Grenada (14 App. Cas. 46 at 53-4). Moreover, the Indians have not and never had any title to the public domain.*

These contentions have also been considered in the St. Catherine's Milling & Lumber Co. v. The Queen, 13 Can. S.C.R. 577; 14 App. Cas. 46. The Crown had all along proprietary right on these lands upon which the Indian title might have been a burden, but which never amounted to a fee. And while not desirous of repeating here what was so clearly stated in the St. Catherine's case in respect of the Indian title, yet I wish to draw attention to the fact that it was decided beyond cavil in that case, that only lands specifically set "apart and reserved for the use of the Indians are lands reserved for Indians within the meaning of sec. 91, item 24, of the B.N.A. Act." See also Attorney- General v. Giroux, 53 Can. S.C.R, 172, 30 D.L.R. 123. The Island of St. Nicholas never fell within the term "Lands reserved for Indians," and therefore never came within the operation of the B.N.A. Act, sec. 91 (24).

The Island of St. Nicholas, as part of the lands belonging to the Province of Quebec, at the Union, passed to the Province of Quebec, at Confederation, under the provisions of s. 109 of the B.N.A. Act, 1867, the rights retained to the federal power under secs. 108 and 117 being always safeguarded. Therefore the plaintiff has no fee in the island, and the Province of Quebec had obviously the right to grant the same to the defendant Daoust, as it did.

It is not without some sentiment of regret that I feel bound to find against this alleged Indian title, and I trust that the Indians, the wards of the State, will realize and understand there never existed any title giving them St. Nicholas Island. The fact that they were not prevented from frequenting it (and some of the white men as appears by the evidence did also from time to time visit the island) was indeed perhaps more referable to the grace, bounty and benevolence of the Crown, as represented by the Province of Quebec, and cannot now constitute an acknowledgment of an erroneous and unfounded right or title to the island.

There will be judgment dismissing the action with costs against the plaintiff on all issues. Action dismissed.