REX v. COWICHAN AGRICULTURAL SOCIETY

[1951] 1 D.L.R. 96 (also reported: [1950] Ex. C.R. 448)

Exchequer Court of Canada, Thorson P., 21 October 1950

Indians--Crown Lands I--Estoppel II F, G--Disposition of surrendered Indian lands--Leasing without the authority of the Governor in Council--Indian Act (Can.), s. 51--In- validity--Estoppel--

Section 51 of the *Indian Act*, R.S.C. 1906, c. 81 requires a direction by the Governor in Council for there to be a valid lease of surrendered Indian Reserve lands. The responsibility thus vested in the Governor in Council cannot be delegated and any lease entered into without this direction is void. Neither will the Crown be estopped from denying the validity of such lease by reason of having permitted the lessor to proceed over a period of years with expensive improvements. Estoppel cannot defeat the requirements of a statute, especially when they are designed for the protection of a particular class of persons.

Cases Judicially Noted: *St. Ann's Island Shooting & Fishing Club v. The King*, [1950] 2 D.L.R. 225, S.C.R. 211,, folld; *Ramsden v. Dyson*, L.R. 1 H.L. 129, refd to.

Statutes Considered: *Indian Act*, R.S.C. 1906, c. 81, s. 51 (now R.S.C. 1927, c. 98, s. 54).

ACTION for a declaration that a lease of Indian Reserve lands is invalid.

F. A. Sheppard, K.C. and *A. H. Laidlaw*, for plaintiff.

D. M. Gordon, K.C., for defendant.

THORSON P.:--This is an action for a declaration that a lease of certain surrendered Indian Reserve lands made by the Superintendent General of Indian Affairs to the defendant, dated October 16, 1912, is null and void.

The facts have been agreed upon in a statement with supporting documents. The defendant was incorporated in 1888 under the name of Cowichan and Salt Spring Island Agricultural Society and changed its name to its present form in 1913. The lands in question are on Vancouver Island in British Columbia in what is now the City of Duncan and form part of the Indian Reserve of the Somenos Band of Cowichan Indians. On March 24, 1888, the defendant applied to the Department of Indian Affairs for a lease of the lands, comprising 5 acres more or less, to enable it to erect an agricultural hall and lay out grounds to hold annual exhibition shows. On June 29, 1888, the Chief and principal men of the Somenos Band of Cowichan Indians surrendered the lands to Her Majesty the Queen subject to the following conditions:

"TO HAVE AND TO HOLD the same unto Her said Majesty THE QUEEN, her Heirs and Successors forever, in trust to lease and surrender the same to the Cowichan and Salt Spring Island Agricultural Society upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.

"AND upon the further condition that all moneys received from the lease and surrender thereof,

shall, after deducting the usual proportion for expenses of management, be placed at interest, and that the interest money accruing from such in- vestment shall be paid annually or semi-annually to us and our descendants forever."

By Order in Council P.C. 1880, dated August 16, 1888, the said surrender was accepted by the Governor in Council and authority was given for the issue of a lease to the defendant, "at a nominal rental, but on the condition that the Indians of the Somenos Band shall have the right to use the grounds should they at any time wish to hold an Agricultural Exhibition". In November, 1888, the Superintendent General of Indian Affairs executed a lease of the lands to the defendant for a term of 21 years to be computed from September 1, 1888, at a rental of $1 per year, with the condition that the defendant "will allow the Somenos Band of Cowichan Indians to have the use of the property hereby demised should they at any future time or times wish to hold a separate exhibition". On July 9, 1894, the defendant applied to the Superintendent General for a Crown grant of the lands on the grounds that the defendant had put up buildings and made improvements worth $3,000 or $4,000 and that "greater encouragement would be given to the Society to improve the said property were it their own". On October 29, 1894, the Chief and principal men of the Somenos Band of Cowichan Indians surrendered the lands to Her Majesty the Queen "in trust to sell the same to the Cowichan & Salt Spring Agricultural Society". This surrender was never accepted. On January 15, 1895, the Superintendent General informed the defendant by letter that the Department of Indian Affairs could not give the defendant title in fee simple because of the unsettled question between the Government of British Columbia and the Federal Government as to the reversionary right of the former in Indian Reserves but that it would be prepared to renew the lease for as long a period as desired and follow the same up with a patent when the general question affecting the title to Indian Reserves was disposed of. On March 8, 1904, the defendant wrote to the Indian Agent at Duncan asking, if it was still impossible to grant a patent, to have the existing lease cancelled and a new lease granted for 50 years, the reason for the request being that the defendant contemplated making extensive improvements to its Agricultural Hall and that before starting on this work it would like to have a renewal of the lease for a longer period. On June 29, 1904, the Secretary of the Department of Indian Affairs informed the defendant that "in view of representations made that an extension of the lease is desired in view of contemplated extensive improvements to Agricultural Hall, the Department will renew the present lease at its expiration on September 1, 1909, for a further term of 21 years, upon the same terms". On November 29, 1905, the Deputy Superintendent General without waiting for the expiry of the lease, extended it for a further period of 21 years from December 1, 1909, "upon the same terms and conditions" by an endorsement thereon. On a further request for a longer lease the Assistant Deputy Superintendent General, on July 13, 1912, informed the Indian Agent at Duncan that it had been decided to issue a new lease to the defendant for a term of 99 years. On September 5, 1912, the defendant in consideration of a new lease surrendered its lease of September 1, 1888, and the renewal thereof. On September 9, 1912, the Cowichan Indians through their solicitors protested against a further lease of their Reserve, to which the Assistant Deputy Superintendent General replied on October 11, 1912, that the surrender of the Indians was absolute and the Department was satisfied that the proposed lease was not detrimental to the interest of the Indians. On October 7, 1913, the Superintendent General wrote to the defendant asking whether it would agree to pay $450 yearly as rental for the leased lands, being on the basis of 3% of their alleged value of $15,000. On October 28, 1913, the defendant replied that the suggested terms were not satisfactory. On November 28, 1913, the Deputy Superintendent General informed the defendant that "it is considered that the Company

(meaning the defendant) have a vested interest in the property in question, entitling them to favourable consideration as to extension of lease, and it has, therefore, been decided to extend the lease for a term of ninety- nine years, at a nominal rental". The clause permitting use of the property by the Somenos Band of Indians in case they desired at any future time to have a separate exhibition was retained. The new lease, dated October 16, 1912, was sent to the defendant for signature and was returned signed on December 9, 1913. Shortly thereafter the lease was executed by the Deputy Superintendent General and on December 15, 1913, an executed copy was sent to the defendant. No Order in Council was ever passed with reference to the extension of the lease of September 1, 1888, on November 29, 1905, or to the lease of October 16, 1912. By provincial Order in Council No. 1036 (B.C.), dated July 29, 1938, the title to all Indian Reserve lands in the Province of British Columbia was settled in the Dominion of Canada subject to the terms and conditions thereof. On April 11, 1944, the defendant wrote to the Indian Commissioner for British Columbia referring to the letter from the Deputy Superintendent General, dated January 15, 1895, and requesting that, since the general question affecting Indian Reserves had been disposed of and the Department was now in a position to issue patents, means should be taken to grant the defendant a patent. On May 30, 1944, the Indian Commissioner for British Columbia informed the defendant that the only valid surrender was that executed by the Indians in 1888, that such surrender was in trust to lease the lands, and that the Crown could not under the circumstances give title to the defendant without a further surrender from the Indians giving consent to such a transfer.

It was further agreed in the statement of facts that the defendant built a hall and other improvements on the leased lands in 1889, and built a new and larger hall in 1914 at a substantial cost, the funds being largely raised by the sale of de- bentures, that the Indian Agent at Duncan knew of these improvements, that the defendant had no notice until 1944 that the plaintiff or any one on his behalf questioned the validity of any of the leases to the defendant, and that the rents due under the respective leases had at all times been kept up by the defendant and accepted by the Indian Department.

Counsel for the plaintiff submitted that there were two reasons for finding that the lease of October 16, 1912, was void, the first being that it was not directed by the Governor in Council and consequently not authorized as required by s. 51 of the *Indian Act*, R.S.C. 1906, c. 81, and the second that it was a condition of the surrender of June 29, 1888, that the proceeds from any lease should be invested for the Indians, which connoted a lease at a substantial rent, and that since the lease was only for a nominal rental there had been a breach of this condition.

Whether effect should be given to the first reason depends on the construction to be placed on s. 51 of the *Indian Act* of 1906, which read as follows:

"51. All Indian lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part."

The section was in substantially the same form in the 1886 Revision, R.S.C. 1886, c. 43, s. 41, and remained unchanged in the 1927 Revision, R.S.C. 1927, c. 98, s. 54.

Counsel for the defendant argued that no specific Order in Council was required for the 1912

lease, that s. 51 contemplated merely a control by the Government of general matters of policy affecting surrendered Indian Reserve lands and that this did not extend to administrative details such as the issue of a particular lease, that the Order in Council of August 16, 1888, accepting the surrender, gave authority for the issue of a lease to the defendant and that this gave the Superintendent General of Indian Affairs authority to issue not only the lease of September 1, 1888, but also successive leases, such as the extension of November 29, 1905, and the 99-year lease of October 16, 1912, and that consequently this lease was valid although there was no specific direction for its issue by the Governor in Council.

I am unable to agree that the statutory requirements imposed by s. 51 of the *Indian Act* are subject to the limitation implied in this argument. In my judgment, the decision in *St. Ann's Island Shooting & Fishing Club Ltd. v. The King*, [1949] 2 D.L.R. 17, [1950] Ex. C.R. 185; [1950], 2 D.L.R. 225, S.C.R. 211, is conclusively against such a narrow view of the section. There the claimant sought a renewal of a lease of certain sur- rendered Indian lands in the County of Kent in Ontario, dated May 19, 1925, made by the Superintendent General of Indian Affairs to trustees for the claimant, pursuant to a provision in the lease for such renewal, but the validity of the lease was called in question on the ground that there had been no Order in Council directing it, although an earlier lease, dated May 30, 1881, had been confirmed by an Order in Council. The issue before the Court was thus the same in principle as that now under discussion. And the claimant's arguments in support of the validity of the lease were similar to those advanced in this case. These were carefully considered by Cameron J. and rejected. He was of the opinion that s. 51 of the *Indian Act* was imperative in its requirements that only by a direction of the Governor in Council could surrendered Indian lands be validly managed, leased or sold, and that the disposition of such lands was thereby placed directly under the control of the Government. His conclusion was that the section required an Order in Council as the necessary preliminary to the validity of the 1925 lease and that since there was no Order in Council referable to it there had been non-compliance with the imperative provisions of the section and the lease and the provisions for renewal therein were void. In the Supreme Court of Canada the judgment of this Court was unanimously affirmed. Kerwin J. agreed with the opinion of Cameron J., and Taschereau J., speaking also for Locke J., took the same wide view of s. 51 of the *Indian Act* and held that although the original lease of 1881 had been approved by an Order in Council this did not authorize the Superintendent General of Indian Affairs to make the lease of 1925 and the imperative terms of s. 51 required a new Order in Council for its validity. And Rand J., speaking also for Estey J., agreed that s. 51 required a direction by the Governor in Council for a valid lease of Indian lands. At p. 232 D.L.R., p. 219 S.C.R., he gave a convincing reason for the wide view that ought to be taken of the section: "The language of the statute embodies the accepted view that these aborigines are, in effect, wards of the state, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of Governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General."

It was his opinion that the efficacy of the Order in Council confirming the original lease was exhausted by it and that be- fore a new lease could be considered valid it must appear that it was made under the direction of the Governor in Council.

The principles thus laid down in the *St. Ann's* case, *supra*, ought to be applied in this one. It must, I think, be considered settled law that s. 51 of the *Indian Act* requires a direction by the

Governor in Council before there can be a valid lease of surrendered Indian Reserve lands, that the responsibility for controlling the leasing of such lands thus vested in the Gover- nor in Council cannot be delegated to the Superintendent General of Indian Affairs or anyone else and that a lease of such lands without the direction of the Governor in Council is void. It follows that since the lease of October 16, 1912, was made without a direction by the Governor in Council it is void and the Court so declares.

This finding makes it unnecessary to deal with the second reason advanced for submitting that the lease was invalid. Moreover, the question whether a lease at a nominal rental was inconsistent with the conditions of the surrender of 1888 and, therefore, void could properly be the subject of judicial determination only if there were a lease at a nominal rental that had been made under the direction of the Governor in Council and such is not the case here.

There remains only the submission by counsel for the defendant, which he made one of his main arguments, that by reason of standing by and allowing the defendant to proceed with substantial improvements on the lands in question the Crown is estopped from contending that the lease is invalid for non-compliance with the requirements of s. 51 of the *Indian Act*. I have considered the authorities submitted to me, including *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129, and the doctrine of equitable estoppel of which it was said to be the source, but have come to the conclusion that the authorities upon which the defendant relied do not apply to the facts of this case and that the defendant cannot set up any estoppel. In my judgment, there cannot be an estoppel to defeat the express requirements of a statute, particularly when they are designed, as s. 51 of the *Indian Act* is, for the protection of the interests of special classes of persons. I follow the opinion on this subject expressed by Rand J. in the *St. Ann's* case, *supra*, although there was no argument on the subject of estoppel in that case when it came before the Supreme Court of Canada, and the views of Cameron J. in this Court who held, after full argument on the subject, that the Crown could not be estopped from alleging that the requirements of s. 51 of the *Indian Act* had not been complied with.

For the reasons given there will be judgment declaring that the lease of October 16, 1912, is null and void. The plaintiff is also entitled to costs.

Judgment accordingly.