ST. ANN'S ISLAND SHOOTING AND FISHING CLUB LIMITED v. THE KING

[1950] 2 D.L.R. 225 (also reported: [1950] S.C.R. 211)

Supreme Court of Canada, Kerwin, Taschereau, Rand, Estey and Locke JJ., 21 February 1950

(On appeal from judgment of Exchequer Court of Canada, supra p.594

Crown I B, II A -- Estoppel II A -- Lease of surrendered Indian lands--Statutory requirement of authorizing Order in Council -- Invalidity of lease in absence of Order in Council-- Whether estoppel arises--Indian Act (Can.)--

Section 51 of the *Indian Act*, R.S.C. 1906, c. 81, provided, *inter alia*, that "All Indian lands . . . surrendered . . . to His Majesty . . . shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender". *Held*, s. 51 im- posed an imperative requirement of a direction by the Governor in Council before surrendered Indian land could be validly leased; and in the absence of an authorizing Order in Council, a lease with a private Club entered into by the Superintendent General was not binding. It was immaterial that a prior lease had been authorized by Order in Council since the efficacy of the Order was exhausted on the termination of that lease. No estoppel could arise in the face of s. 51 even though the Superintendent General held himself out as authorized to execute a lease and as a result money was expended by the Club in improving the property.

Cases Judicially Noted: *Gooderham & Worts Ltd. v. C.B.C.*, [1947], 1 D.L.R. 417, A.C. 66, 1 W.W.R. 1 refd to.

Statutes Considered: *Indian Act*, R.S.C. 1906, c. 81, s.51.

APPEAL from a judgment of Cameron J., [1949] 2 D.L.R. 17, dismissing a petition for a declaration of a right to renewal of a lease of surrendered Indian lands. Affirmed.

A. S. Pattillo, K.C. and *A. J. Macintosh*, for appellant.

Lee A. Kelley, K.C. and *W. R. Jackett*, K.C., for respondent.

KERWIN J.:--I would dismiss this appeal. It is unnecessary to consider that part of the reasons for judgment of the trial Judge [[1949] 2 D.L.R. 17] dealing with the argument that the Crown was estopped from denying the validity of the tenancy of the appellant since counsel for the appellant stated that he did not now advance any such claim. As to the other points. I agree with the trial Judge.

During the argument a question was asked as to whether a contention could be advanced that the surrender "to the end that said described territory may be leased to the applicants for the purpose of shooting and fishing for such term and on such conditions as the Superintendent of Indian Affairs may consider best for our advantage", was really a surrender upon condition, and that if the condition were not fulfilled the land would revert. It was suggested in answer thereto that this would not assist the appellant and this was made quite clear by Mr. Jackett when he pointed to

ss. 2(*i*) and (*k*), 19, 48 and 49 of the *Indian Act*, R.S.C. 1906, c. 81. If by some means the lands again became part of the reserve, then s. 49 would apply and, except as in Part I otherwise provided, no release or surrender of a reserve or a portion therof shall be valid or binding unless the release or surrender complies with the specified conditions.

The determination of the case really depends upon s. 51 of the Act. These lands were Indian lands which had been surrendered and, therefore, in the wording of the section "shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part". Mr. Jackett pointed out that counsel for the appellant wanted s. 51 to be read as if the words "subject to the conditions of surrender and the provisions of this Part" preceded "all Indian lands etc. . . .", thus inserting those words, which now appear at the end, at the very commencement, and without taking into consideration the fact that the two parts of the section are separated by a semicolon. Reference was also made to s. 64 but the collocation of the word "deed" with "lease or agreement" shows that a surrender could not be included under the word "deed".

The trial Judge answered the question in the negative and dismissed the claim with no costs to either the claimant or the respondent but there is no reason why costs in this Court should not go against the unsuccessful appellant.

The judgment of TASCHEREAU and LOCKE JJ. was delivered by

TASCHEREAU J.:--By petition of right filed in December, 1945, the suppliant-appellant claimed that it was entitled to a renewal of a lease of certain premises, from the Superintendent General of Indian Affairs, dated May 19, 1925. The first document to which we have been referred is a resolution dated March 18, 1880, adopted by the Council of the Chippewas and Pottawatomie Indians of Walpole Island, purporting to authorize an original lease to the St. Ann's Shooting and Fishing Club, of St. Ann's Island. Pursuant to this resolution, the Superintendent General of Indian Affairs executed the lease on May 30, 1881, "for the purpose of shooting over the same and angling and trawling in the waters thereof" for a period of 5 years, renewable on its expiration for a like term.

Following the execution of this lease, the officers of the Club raised certain questions as to the validity of the lease, and more particularly as to whether there had been a surrender of the lands as required by the *Indian Act*, 1880 (Can.), c. 28, an acceptance thereof by the Governor-General in Council, and finally, an Order in Council authorizing the lease. A further meeting of the Indians was therefore held in February, 1882, and a formal surrender was executed in due form, and on February 24th of the same year, the Indian Superintendent at Sarnia wrote to the Club that for the purpose of the lease, a formal surrender had been given, and that the defect in the preliminary proceedings had been remedied. In April, 1882, Order in Council P.C. 529 was passed purporting to accept the surrender, and on April 18th, the Department again advised the Club that the surrender had been accepted, and that the lease had been con- firmed by the said Order in Council.

In 1884, 1892, 1894, 1906 and 1915, new leases were entered into between the same parties, but only those of 1894, 1906 and 1915 contained provisions for renewal. In all these leases, except the first one, trustees signed the agreements with the Superintendent General, on behalf of the St. Ann's Island Shooting and Fishing Club.

In May, 1925, the Superintendent General of Indian Affairs signed a new lease with Geoffrey T. Clarkson and Walter Gow, acting as trustees for the St. Ann's Island Shooting and Fishing Club, and it provided that the lessees should be entitled on the expiration of the term granted, to renewals for further successive periods of ten years at rentals to be fixed by arbitration.

The lessees have been in possession of the lands in question since 1881, and have expended substantial amounts for the permanent improvement of their facilities as a hunting and fishing club, including the erection of a clubhouse and other buildings and the opening up of ditches and canals. On September 4, 1945, Geoffrey T. Clarkson and Walter Gow assigned their interest in the lease to the appellant.

Some correspondence was then exchanged between the Department of Indian Affairs and the Club, as to the renewal of the lease, but as the parties could not agree, it was therefore decided that the question should be referred to the Exchequer Court of Canada for adjudication. Pursuant to the dispositions of the General Rules and Orders of the Court, the appellant filed a statement of claim on December 17, 1945, and asked for a declaration that the Club was entitled to a renewal of the lease dated May 19, 1925, for a further term of ten years, and subject to the stipulations and provisions contained in the lease of May 19, 1925, save as to rental. The claimant also asked that the annual rent to be paid during the term of the renewal of the lease, from October 1, 1944, to September 30, 1955, be determined by the judgment, instead of by arbitration.

Cameron J., [[1949] 2 D.L.R. 17] before whom the matter came, reached the conclusion that as the lease of 1925 was never authorized by Order in Council, it was, as well as the provisions for renewal, wholly void.

These lands in question were formerly part of a "Reserve" for the use or benefit of the Chippewas and Pottawatomie In- dians of Walpole Island, and there is no doubt that they could not be originally leased in May, 1881, to the predecessors of the appellant, unless they had been *surrendered* to the Crown. The effect of a surrender is to make a reserve or part of a reserve, "Indian lands", defined in s. 2 of the *Indian Act*, para. (*k*) as "any reserve or portion of a reserve which has been surrendered to the Crown".

The necessary surrender was made as a result of the meeting held by the Indians in February, 1882, and which was accepted by Order in Council P.C. 529 in April of the same year. This Order in Council reads as follows:

"Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 3rd April, 1882.

"On a Memorandum, dated 7th March 1882, from the Superintendent General of Indian Affairs, submitting for acceptance by Your Excellency in accordance with the provisions of the Indian Act 1880, Section 37, Subsection 2, a Surrender, dated 9th February 1882, made to the Crown by the Chippewa and Pottawatomie Indians of Walpole Island, of that portion of their Reserve known as 'St. Ann's Island' and the marshes adjacent thereto, for the purpose of the same being leased for the benefit of said Indians to the 'St. Ann's Island Shooting and Fishing Club' for shooting and fishing purposes, and in confirmation of a lease covering said premises issued by this Department on the 30th of May 1881, to the aforesaid 'St. Ann's Island Shooting and Fishing

Club'.

"The Committee advise that the surrender be accepted and submit the same for Your Excellency's approval."

It followed that St. Ann's Island became an "Indian Reserve", and in view of s. 51 of the *Indian Act*, could be leased or sold only with the approval of the Governor-General in Council. This section 51 reads as follows: "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."

It is argued on behalf of the appellant that the effect of P.C. 529 is not only to accept the surrender of the lands to the Crown, and to confirm the original lease of May, 1881, but also to authorize the Superintendent General of Indian Affairs, to enter into further agreements with the appellant, as he did.

I am unable to agree with this contention. When the Indians surrendered the lands "to the end that said described territory may be leased to the applicants . . . for such term and on such conditions as the Superintendent General of Indian Affairs may consider best for our advantage", the lease with the appellant had then been signed, and the terms of the surrender indicate that its contents were known to all. The object of the surrender was to legalize what was rightly thought to be illegal, and to ratify what had been done. The same may be said of the Order in Council. But neither the authorization to the Superintendent in the surrender, nor P.C. 529 can be construed in my opinion as authorizing the Superintendent at the expiration of the lease, to enter into fresh agreements with the appellant nearly 50 years later, and in which can be found different conditions. When this lease came to an end, P.C. 529 which had authorized it, had served its particular purpose and a new one was therefore needed, in view of the imperative terms of s. 51, to vest in the Superintendent the necessary authority to lease these lands anew.

In view of the declaration of counsel for the appellant that he does not rely on the point raised in the Court below, that the respondent is estopped from denying the validity of the tenancy of the claimant, it is unnecessary to deal with it.

The appeal should be dismissed with costs.

The judgment of RAND and ESTEY JJ. was delivered by

RAND J.:--The question in this appeal is whether what purports to be a lease executed by the Superintendent General of Indian Affairs to the predecessor trustees of the appellant be- came binding on the Dominion Government. It was made in 1925 for the term of 20 years with an option for "renewal leases . . . for successive periods of ten years" and was the last of a succession between the same parties dating from 1881. It covers certain lands and waters within an Indian reservation, and was given primarily for fishing and hunting purposes, al- though not so expressly restricted.

The matter originated in a resolution passed on March 18, 1880, by the Indian Band Council authorizing the letting of what was known as St. Ann's Island to trustees for the St. Ann's Island Shooting and Fishing Club on terms approved by the Council, which was followed by a

document signed by the Superintendent General dated May 30, 1881. The term was for 5 years from May 1, 1881, renewable for a like period; and it was provided that the lands and any buildings erected on them would at the "end, expiration, or other determination" of the lease or renewal be yielded up without any allowance being made for improvements.

Under the *Indian Act* of 1880, a surrender of the Indian interest was required before an effective lease could be made. On February 6, 1882, as a result of enquiries made by the lessees, at a meeting of the Band, an instrument was signed on its behalf which, after referring to the resolution of March 18, 1880, formally surrendered the lands to Her Majesty "to the end that said described territory may be leased to the applicants for the purpose of shooting and fishing for such term and on such conditions as the Superintendent General of Indian Affairs may consider best for our advantage". Then following a recital that an executed lease had been read and explained, it declared approval of its terms and the confirmation of its execution by the Superintendent General.

The surrender was accepted by a minute of the Privy Council approved by the Governor-General on April 3, 1882 (P.C. 529) as follows:

"On a Memorandum, dated 7th March 1882, from the Superintendent General of Indian Affairs, submitting for acceptance by Your Excellency in accordance with the provisions of the Indian Act, 1880, Section 37, Subsection 2, a Surrender, dated 9th February 1882, made to the Crown by the Chippewa and Pottawatomie Indians of Walpole Island, of that portion of their Reserve known as 'St. Ann's Island' and the Marshes adjacent thereto, for the purpose of the same being leased for the benefit of said Indians to the 'St. Ann's Island Shooting and Fishing Club' for shooting and fishing purposes, and in confirmation of a lease covering said premises issued by this Department on the 30th of May 1881, to the aforesaid 'St. Ann's Island Shooting and Fishing Club.'

"The Committee advise that the surrender be accepted and submit the same for Your Excellency's approval."

The first lease was superseded by another executed in 1884, which in turn was followed by others in 1892, 1894, 1906, 1915, and finally by that now in question. In those of 1884 and 1892 there was no provision for renewal, but an option to renew for ten years was contained in the instruments of 1894, 1906 and 1915.

Section 51, R.S.C. 1906, c. 81, (the *Indian Act*) provided: "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."

Cameron J., before whom the reference made by the Minister under s. 37 of the *Exchequer Court Act*, R.S.C. 1927, c. 34, came, construed the surrender to be absolute but held that s. 51 required for the validity of the lease of 1925 that it should have been directed by the Governor in Council, and, as admittedly no other Order in Council than P.C. 529 of April 3, 1882 had been made, found it void.

The contention of the appellant is that the surrender was on the condition that the lands should thereafter be subject to a right of leasing by the trustees, on terms satisfactory to the

Superintendent General, which, if not perpetual, would continue so long as the Superintendent General determined; that by acceptance of the surrender the condition became fixed and without more or by virtue of s. 64 of the Act, the Superintendent General became competent thereafter to deal with the lands in relation to the Club as he might consider for the benefit of the Band.

I find myself unable to agree that there was a total and definitive surrender. What was intended was a surrender sufficient to enable a valid letting to be made to the trustees "for such term and on such conditions" as the Superintendent General might approve. It was at most a surrender to permit such leasing to them as might be made and continued, even though subject to the approval of the Superintendent General, by those having authority to do so. It was not a final and irrevocable com- mitment of the land to leasing for the benefit of the Indians, and much less to a leasing in perpetuity or in the judgment of the Superintendent General to the Club. To the Council, the Superintendent General stood for the Government of which he was the representative. Upon the expiration of the holding by the Club, the reversion of the original privileges of the Indians fell in to possession.

That there can be a partial surrender of "personal and usufructuary rights" which the Indians enjoy is confirmed by *St. Catherine's Milling & Lbr. Co. v. The Queen*, (1888), 14 App. Cas. 46, in which there was retained the privilege of hunting and fishing; and I see no distinction in principle, certainly in view of the nature of the interest held by the Indians and the object of the legislation, between a surrender of a portion of rights for all time and a surrender of all rights for a limited time.

But I agree that s. 51 requires a direction by the Governor in Council to a valid lease of Indian lands. 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.

But the circumstances here negative any delegation of authority. The Order in Council approved a lease for a definite period on certain stipulations; by its terms, it would come to an end, even with renewal, within ten years; and the efficacy of the Order was exhausted by that instrument.

It was argued that the Crown is estopped from challenging the lease, but there can be no estoppel in the face of an express provision of a statute: *Gooderham & Worts Ltd. v. C.B.C.*, [1947], 1 D.L.R. 417, A.C. 66; and *a fortiori* where the legislation is designed to protect the interest of persons who are the special concern of Parliament. What must appear--and the original trustees were well aware of it--is that the lease was made under the direction of the Governor in Council, and the facts before us show that there was no such direction.

The appeal must be dismissed with costs.

Appeal dismissed.