SUPREME COURT OF CANADA

ACKLAND DAVEY et al

v.

RICHARD ISAAC et al

CORAM:

The Right Honourable Bora Laskin, P.C., C.J.C.
The Hon. Mr. Justice Martland
The Hon. Mr. Justice Ritchie
The Hon. Mr. Justice Spence
The Hon. Mr. Justice Pigeon
The Hon. Mr. Justice Dickson
The Hon. Mr. Justice Beetz
The Hon. Mr. Justice de Grandpré

Appeal heard
October 25 and 26, 1976

Judgment pronounced May 31, 1977

Reasons of the Court by

The Hon. Mr. Justice Martland

Concurred in by

The Chief Justice
The Hon. Mr. Justice Ritchie
The Hon. Mr. Justice Spence
The Hon. Mr. Justice Pigeon
The Hon. Mr. Justice Dickson
The Hon. Mr. Justice Beetz
The Hon. Mr. Justice de Grandpré

Counsel at hearing:

For the appellants:

Mr. John Sopinka, Q.C.
Mr. Allan Millward

For the respondents:

Mr. B. H. Kellock, Q.C.
Mr. P. R. Corless

For the Attorney-General of Canada:

Mr. G. W. Ainslie, Q.C.
Mr. L. R. Olsson, Q.C.

For Union of Ontario Indians:

Mr. Paul Williams

For Gary Potts et al:
Mr. Bruce Clark

COUR SUPRÊME DU CANADA

ACKLAND DAVEY et al

c.

RICHARD ISAAC et al

CORAM:

Le très honorable Bora Laskin, C.P., J.C.C.
L'honorable juge Martland
L'honorable juge Ritchie
L'honorable juge Spence
L'honorable juge Pigeon
L'honorable juge Dickson
L'honorable juge Beetz
L'honorable juge de Grandpré

Appel entendu
les 25 et 26 octobre 1976

Jugement prononcé le 31 mai 1977

Motifs de jugement par

L'honorable juge Martland

Souscrivent à l'avis de
M. le juge Martland

Le Juge en chef
L'honorable juge Ritchie
L'honorable juge Spence
L'honorable juge Pigeon
L'honorable juge Dickson
L'honorable juge Beetz
L'honorable juge de Grandpré

Avocats à l'audience:

Pour les appelants:

Me John Sopinka, c.r.
Me Allan Millward

Pour les intimés:

Me B. H. Kellock, c.r.
Me P. R. Corless

Pour le Procureur général du Canada:

Me G. W. Ainslie, c.r.
Me L. R. Olsson, c.r.

Pour Union of Ontario Indians:

Me Paul Williams

Pour Gary Potts et al:
Me Bruce Clark

IN THE SUPREME COURT OF CANADA

ACKLAND DAVEY ET AL

\- v -

RICHARD ISAAC ET AL

MARTLAND J.

IN THE SUPREME COURT OF CANADA

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RICHARD ISAAC ET AL

Coram: The Chief Justice and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

MARTLAND J.:

This appeal is concerned with an action brought by the respondents as plaintiffs against the appellants as defendants for an order for a permanent injunction. The facts giving rise to the action are stated in the judgment at trial of Osler J. whose reasons for judgment have been reported in (1973) 3 O.R. at p. 677. They are as follows:

> This action was commenced ... by the plaintiffs who then constituted the elected council of the Six Nations Band within the meaning of the Indian Act. They sued on behalf of themselves and all other members of the Six Nations Band except the defendants.
>
> ...
>
> The defendants are adherents of a group of Indians, members of the Six Nations Band, who advocate a form of government other than that obtaining under the Indian Act and in particular, a return of the former system of government by persons referred to as "Hereditary Chiefs".
>
> ...
>
> The relief claimed in the action is a permanent injunction restraining the defendants and any persons acting under their instructions from watching or besetting at or adjacent to the Council House in the Village of Ohsweken on the Six Nations Reserve, from obstructing or interfering with the plaintiffs or any other persons seeking entrance to or exit from the Council House and from obstructing or interfering with the lawful use of the Council House by the plaintiffs, their servants, agents, employees or any other person.

> By admission filed as exhibit no. 4, it is established that the doors of the Council House were padlocked during the period between June 25th, 1970 and July 10th, 1970 and between July 12th, 1970 and July 16th, 1970 by or on the express instructions of the defendants other than Joseph Logan and that the said defendants attended upon the Council House grounds and encouraged other Indians to attend upon the Council House grounds during that period. Such acts were carried out for the purpose of denying to the plaintiffs the use of the Council House and the defendants other than Joseph Logan offered to refrain from such acts provided that an arrangement was made whereby the Confederacy Council, being the group to which I have already referred as the "Hereditary Chiefs", be allowed to control all conveyances of land upon the lands commonly known as the Six Nations Reserve.
>
> Joseph Logan does not admit responsibility for the acts described but on the evidence, I find that by virtue of his concurrence in a resolution passed by the council meeting of the Hereditary Chiefs on June 25th, he must be held responsible and is equally liable to be enjoined if judgment is to go against the other defendants.

The action was dismissed at trial but the judgment was reversed by the Court of Appeal, whose reasons are reported in 5 O.R. (2nd) (1975) at p. 610.

When the appeal to this Court was heard some of the points raised by the appellants and discussed in the courts below were abandoned. The appellants' essential submission to this Court was that the orders in council which had provided for the selection of the Council of the Six Nations Indian Band by elections in accordance with *The Indian Act* were invalid. These orders in council are P.C. 1629 made on September 17, 1924, and P.C. 6015 made on November 12, 1951. The earlier order was revoked by the later order, which was to the same effect. We are, therefore, concerned with P.C. 6015. It reads as follows:

> His Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration and pursuant to the powers conferred by section seventy-three of The Indian Act, is pleased to order as follows: -
>
> 1. It is hereby declared that after the fifteenth day of November, 1951, the Council of the Six Nations Indian Band in the Province of Ontario, consisting of a Chief and Councillors, shall be selected by elections to be held in accordance with The Indian Act;
>
> 2. The Chief of the said Indian Band shall be elected by a majority of the votes of the electors of the Band, and the Councillors of the said Indian Band shall be elected by a majority of the votes of the electors of the section in which the candidate for election resides and which he proposes to represent on the Council;
>
> 3. The Reserve of the said Six Nations Indian Band shall for voting purposes be divided into six electoral sections, each containing as nearly as may be an equal number of Indians eligible to vote; two councillors shall be elected to represent each of the said sections; and the said electoral sections shall be as set forth on a map of the Reserve marked "32/3-5 Electoral Sections - Tuscarora Indian Reserve" dated October 29, 1951, of record in the Indian Affairs Branch of the Department of Citizenship and Immigration;
>
> 4. Order in Council P.C. 1629 of 17th September 1924, relating to elections to the Council of the Six Nations Band of Indians, is hereby revoked.

The authority for making this order is stated in it to be s. 73 of *The Indian Act*, which was enacted in 1951 as C. 29. It provided as follows:

> 73. (1) Whenever he deems it advisable for the good government of a band, the Governor in Council may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

The appellants contend that the Governor in Council lacked authority to enact P.C. 6015 because the Six Nations Indians did not constitute a "band" within the definition of

that word in s. 2(1)(a) of *The Indian Act*, which provided as follows:

> 2. (1) In this Act,
> (a) "band" means a body of Indians
> (i) for whose use and benefit in common, lands, the legal title to which is vested in His Majesty, have been set apart before or after the coming into force of this Act,
> (ii) for whose use and benefit in common, moneys are held by His Majesty, or
> (iii) declared by the Governor in Council to be a band for the purposes of this Act;

The word "reserve" is defined in s. 2(1)(o) of the Act as meaning "a tract of land, the legal title to which is vested in His Majesty, that has been set apart by His Majesty for the use and benefit of a band".

The main issue at trial and on the argument before the Court of Appeal was in respect of paragraph (i), the contention of the appellants being that legal title to the lands occupied by the Six Nations was not vested in the Crown because the patent of the Grand River lands to the Six Nations executed by Governor Simcoe, in the name of George III on January 14, 1793, was effective to pass title to the lands to all members of the Six Nations Band in fee simple. This submission was accepted by the judge at trial. His conclusion was, however, reversed by the Court of Appeal, which held that the tract of land in question was still vested in the Crown subject to the exercise of traditional Indian rights.

Without wishing to cast any doubt on the conclusion reached by the Court of Appeal I do not think it is necessary in the present case to make a final decision on the matter of title to the lands because, in my opinion, the validity of

P.C. 6015 can be founded on paragraph (ii) of s. 2(1)(a) which provides that a "band" means a body of Indians "for whose use and benefit in common, moneys are held by His Majesty".

The statement of defence of the defendant Logan admitted that "the plaintiffs are an elected council of the Six Nations Band elected pursuant to *The Indian Act* by sections 73, 74, 75, 76, 77, 78 and 79". The statement of defence of the other defendants contained the following paragraph:

> 11. By virtue of the sale of certain lands belonging to the Six Nations Indians to the British Government and by virtue of the sale of certain mineral, oil, gas and timber rights on Indian Reserves, a trust fund was set up for the benefit of the Six Nations Indians of the proceeds of the above-mentioned sales, with the Federal Government of Canada acting as Trustee. To date the Six Nations Indians have never received an accounting by the Federal Government of Canada with respect to the use of these trust funds.

The appellants introduced into evidence, as a part of their case, questions and answers from the examination for discovery of the respondent, Isaac, who was examined on behalf of all the respondents. The following question was put to Mr. Isaac by counsel for the appellants and his reply follows:

> Mr. Isaac, I understand that certain funds are held in trust for the Six Nations Indians by the Federal Government, is that correct?
>
> Yes.

Similar evidence was given, on cross-examination, by the respondent Staats.

There is thus clear evidence, introduced by the appellants, that moneys are held by the Crown for the use and benefit of the Indians of the Six Nations. The trial judge dealt with this issue in the following passage in his reasons for judgment:

> . . . For reasons already given, the Six Nations group of Indians do not comprise a band by virtue of their landholdings, there is no evidence that at the time of the passage of the Indian Act of 1951 moneys were held by Her Majesty for their use and benefit and it could only be said that the Act applied to this group if it was declared to be a band for the purposes of the Act as contemplated in section 2(1)(a)(iii).

He then went on to hold that P.C. 6015 did not constitute a declaration within the requirements of paragraph (iii) of s. 2(1)(a).

The Court of Appeal, in view of its decision that title to the tract of land in question was vested in the Crown, did not have to deal with the application of paragraph (ii).

In Volume I of the publication entitled "Indian Treaties and Surrenders", which covers the period from 1680 to 1890, published by the Queen's Printer in 1891, there appears a copy of an indenture dated April 2, 1835, made between a group of people described as "Sachems or Chiefs and Principal Men of the Six Nations Indians" and King William the Fourth, under the terms of which there was surrendered to King William the Fourth a portion of the lands on the banks of the Ouse or Grand River, which had been the subject matter of the grant by King George the Third. The lands were surrendered for the purpose of being sold and the monies arising therefrom to be applied for the use and benefit of the Six

Nations Indians and their posterity. In the absence of evidence to the contrary, I think I am entitled to presume that these are the lands referred to in paragraph 11 of the statement of defence of the defendants other than Logan, the proceeds of the sale of which form a part of the trust fund mentioned in that paragraph. That trust fund must have arisen before Confederation and well before orders in council P.C. 1629 and 6015 were enacted.

In any event, I am not in agreement with the view expressed by the trial judge that the absence of evidence as to the time when the Crown commenced to hold the trust funds for the use and benefit of the Indians of the Six Nations would be decisive of this issue. It is necessary to consider the circumstances which gave rise to the present proceedings and the nature of the relief sought. The case arose because of the padlocking by the appellants of the Council House which had been occupied and used by the respondents in their capacity as the elected council of the Six Nations Band. What was sought by the respondents was an injunction to restrain the appellants from obstructing the respondents and others from seeking entrance to the Council House and from making use of it.

The statement of defence of the appellants, other than the appellant Logan, denied that the respondents had any status to maintain the action, alleging that the Six Nations were by right a sovereign and independent nation. There was no allegation in the pleadings that P.C. 1629 and P.C. 6015 were invalid and no request for a declaration that they were invalid. The allegation of sovereignty and

independence was later abandoned. The contention that the Six Nations was not a band within the definition in *The Indian Act* was developed at the trial.

In my opinion, when P.C. 6015 was produced, and was, by consent, made an exhibit at the trial, there was a presumption as to its validity and, if the appellants sought to attack it, the onus rested upon them to prove that it was invalid. This necessitated proof that the Six Nations were not a band, which, in turn, required the appellants to show that the Six Nations were not a body of Indians within paragraph (i) or paragraph (ii) or paragraph (iii) of s. 2(1)(a).

Insofar as paragraph (ii) is concerned it was the appellants, other than Logan, who pleaded the existence of a trust fund administered by the Crown and who adduced evidence to establish that fact. If the appellants desired to rely upon the non-existence of that fund when P.C. 6015 was enacted it was for them to plead that fact and also to establish it in evidence.

In view of the conclusion which I have expressed with respect to the application of paragraph (ii), it is not necessary to reach a firm conclusion as to the application of paragraph (iii). On this point the trial judge said:

> The Order-in-Council is, in my view, a plain exercise of the power contemplated by section 73(1) to apply certain portions of the Act to an existing band. It does not, however, constitute a declaration that a certain body of Indians is a band for the purposes of this Act as contemplated by section 2(1)(a)(iii). That declaration must be separately made and cannot be implied simply because action is taken under section 73(1).

Paragraph (iii) of s. 2(1)(a) states that a band means a body of Indians "declared by the Governor in Council to be a band for the purposes of this Act". P.C. 6015 declares that after November 15, 1951, the Council of the Six Nations Band shall be selected by elections to be held in accordance with *The Indian Act*, and it recites the authority of s. 73 of that Act. It is certainly arguable that, in view of the above declaration, the Six Nations are, by P.C. 6015, declared to be a band for the purposes of the Act.

In my opinion the order in council, P.C. 6015, was valid. It provided for the election of a Council of the Six Nations Indian Band. In paragraph 3 of the order in council provision is made for six electoral sections and it is stated that "The Reserve" is divided into those sections. It might be objected that there is no "reserve" unless the title to the land is vested in the Crown. In my view, any difficulty in this regard is overcome by s. 36 of the Act, which provides:

> 36. Where lands have been set apart for the use and benefit of a band and legal title thereto is not vested in His Majesty, this Act applies as though the lands were a reserve within the meaning of this Act.

As the elected council of the Six Nations Band, the respondents were properly entitled to use the Council House, the property of the Band for council purposes. I do not think it was necessary to enact a by-law under s. 80(h) of the Act to assert that use. In any event, the appellants were not lawfully entitled to prevent the use of the Council House by the elected council.

The other points raised in argument by the appellants before this Court were disposed of by the Court of Appeal and I agree with their disposition.

I would dismiss the appeal with costs. There should be no costs payable by or to the Attorney General of Canada or any of the intervenants.