LEONARD ET AL. *v.* THE QUEEN

(1976), previously unreported

Federal Court, Trial Division, Collier J., 18 June 1976

COLLIER J.: The plaintiff, Margaret Leonard, is an Indian (*Indian Act*, R.S.C. 1970, c.I-6). She brings suit on her own behalf and purportedly as trustee for the other six plaintiffs. I shall refer throughout these reasons to Margaret Leonard as the plaintiff. She is the real litigant. Four of the plaintiffs are her sisters, one is her mother, and the remaining plaintiff is a cousin. The sisters, the cousin and the mother have all married persons who are not Indians. The claim is essentially for a declaration that she is the owner of a certain tract of land in the Kamloops Indian Reserve No. 1. The parcel of land is that on which the buildings and grounds of the Kamloops Indian Residential School are situated. (The property is not presently used for school purposes. The buildings are used as a hostel.)

The plaintiff asserts her rights flow from her great-grandparents, and the alleged rights or title to the property which they had in the latter part of the 19th century. Understandably, there were no witnesses who could testify from personal knowledge; those with actual knowledge are long since dead; a good deal of the matters to be recounted have, in reality, merely been handed down orally through succeeding generations in the plaintiff's family and in the Kamloops Indian Band. There is, as well, a dearth of documentary evidence, particularly from the plaintiff's side. That is also understandable. There is a similar paucity of documentary evidence (one way or the other) from the defendant's side. If documentary facts are available, it seems likely they would be found in records kept over the years by federal departments charged with the administration of Indian affairs. I assume those records were searched by the defendant, and no documents (other than those tendered in evidence), helpful to either side, were unearthed.

The plaintiff traces her interest or right back to Abraham Leroux (LaRue) and his wife Mary or Marie ("Old Mary" or "Old Marie"). It is suggested the area in controversy (then approximately 160 acres) was occupied or in the possession of Abraham and his wife prior to July 29, 1877. I cannot make any finding to that effect. There are no facts, historical or based on reasonably trustworthy hearsay handed down through generations, to substantiate the plaintiff's suggestion.

On the materials before me one must, I think, commence any historical account as of 1877. On July 29 of that year the Kamloops Indian Reserve No. 1 was formally created and came under federal jurisdiction. It included the area the plaintiff claims. Abraham LaRue and his wife by 1888, in all

probability, occupied or had possession of the 160 acres. They held it by Indian custom, modified I suppose, by federal legislation in the various *Indian Acts*. The *Indian Act* of 1876, S.C. 1876, c.18, is relevant. By s.3(6), the legal title to a reserve was in the Crown federal. Sections 6 to 9 were as follows:

> 6. In a reserve, or portion of a reserve, subdivided by survey into lots, no Indian shall be deemed to be lawfully in possession of one or more of such lots, or part of a lot, unless he or she has been or shall be located for the same by the band, with the approval of the Superintendent-General:
>
> Provided that no Indian shall be dispossessed of any lot or part of a lot, on which he or she has improvements, without receiving compensation therefor, (at a valuation to be approved by the Superintendent-General) from the Indian who obtains the lot or part of a lot, or from the funds of the band, as may be determined by the Superintendent-General.
>
> 7. On the Superintendent-General approving of any location as aforesaid, he shall issue in triplicate a ticket granting location title to such Indian, one triplicate of which he shall retain in a book to be kept for the purpose, the other two he shall forward to the local agent, one to be delivered to the Indian in whose favor it was issued, the other to be filed by the agent, who shall permit it to be copied into the register of the band, if such register has been established:
>
> 8. The conferring of any such location title as aforesaid shall not have the effect of rendering the land covered thereby subject to seizure under legal process, or transferable except to an Indian of the same band, and in such case, only with the consent of the council thereof and the approval of the Superintendent-General, when the transfer shall be confirmed by the issue of a ticket in the manner prescribed in the next preceding section.
>
> 9. Upon the death of any Indian holding under location or other duly recognized title any lot or parcel of land, the right and interest therein of such deceased Indian shall, together with his goods and chattels, devolve one-third upon his widow, and the remainder upon his children equally; and such children shall have a like estate in such land as their father; but should such Indian die without issue but leaving a widow, such lot or parcel of land and his goods and chattels shall be vested in her, and if he leaves no widow, then in the Indian nearest akin to the deceased, but if he have no heir nearer than a cousin, then the same shall be vested in the Crown for the benefit of the band: But whatever may be the final disposition of the land, the claimant or claimants shall not be held to be legally in possession until they obtain a location ticket from the Superintendent-General in the manner prescribed in the case of new locations.

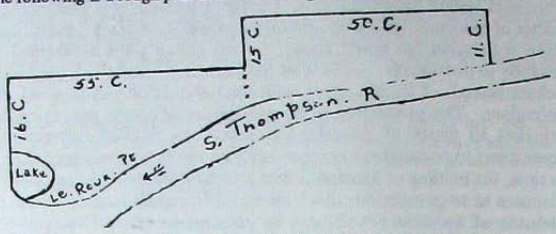
The Revised Statutes of 1886, c.43, contained similar provisions, with this difference. The 1876 legislation, it will be noted, provided for the location of an Indian on a particular lot or lots in a reserve ". . . subdivided by survey into lots. . .", and the issuing of location tickets for those surveyed lots. The 1886 provisions, on the other hand, did not limit location of Indians and the issuing of location tickets to reserves subdivided by survey into lots.

The plaintiff cannot say whether her grandparents were ever located, or were ever issued location tickets. For the defendant, it is said this is, as a matter of evidence, fatal to the claim; s.6 of the 1876 statute, and s.16 of the 1886 legislation are relied upon: ". . no Indian shall be deemed to be lawfully in possession . . . unless he has been or is located . . .", and location tickets issued. I do not agree with the submission put forward by the defendant. The production or no of location tickets is not, to my mind, relevant to proof of genealogical title. As between adverse living contestants to possession of certain lands on the reserve at a particular point in time, the holding of location tickets may have been crucial in determining disputes as to possession. As I see it, other satisfactory evidence, in the absence of location tickets, can be adduced to prove historical title or possession.

In this case I think it can reasonably be inferred to the extent of probability that Abraham and his wife were, at some time after 1877, lawfully in possession of the 160 acres; that Abraham died in 1888 or before; that his widow Old Mary survived him; that she then came into lawful possession of the land in question. For those findings I rely on Exhibits 2 and 3. On July 30, 1888 the Indian superintendent in British Columbia wrote (in part) to the superintendent-general of Indian affairs as follows, concerning the selection of a school site (Exhibit 2):

> I have the honor to report my return on the 28th instant from Kamloops. With reference to the erection of Industrial school buildings in the Interior, I am of opinion that Kamloops is the most appropriate location and more centrally situated for all purposes, than any other point I could name in that region.
>
> . . .
>
> I took several days in examining the large reserve opposite Kamloops, conferring with the Indians Etc. and have selected a site which is certainly a very superior one in every respect.
>
> It is situated on the south side of Mount St. Paul which affords it ample shelter and protection during the winter, while the situation on the banks of the South Thompson is not only picturesque, but excellent for drainage and an unlimited supply of good water. The place proposed for a building site is enclosed and cultivated by the widow of a voyageur named Le Roux but she is willing to vacate it if reimbursed for the cost of moving viz.
>
> | | |
> |---|---|
> | Fences | 15.00 |
> | Dwelling | 25.00 |
> | Stable | 25.00 |
> | Clearing ground | 100.00 |
> | | $ 165.00 |

The following is a rough plan thereof covering an area of about 160 acres.



Adjoining the Le Roux point, is a beautiful flat of rich land consisting of 40 acres which with irrigation would be most productive.

. . .

The Indians were delighted to hear of the proposed establishment of the School and my visit among them was of a most satisfactory character in other respects.

A further letter dated February 8, 1889, from an H. Moffatt to the superintendent-general, is as follows (Exhibit 3):

British Columbia
520 G. Indian Office
Victoria Feby 8th, 1889.

Sir,

In view of the tenders lately advertised by the Public Works Department for the erection of the Industrial School at Kamloops, being accepted, I have the honor to state that it is very important that before the contract is let, the widow Le Roux (on whose property it is proposed to place the building) should be recompensed for her improvements, the approximate costs of which will be as follows. viz.

Fences	15.00
Dwelling	25.00
Clearing Ground	100.00
	$ 165.00

In connection with this matter, I beg to refer you to Supt. dt. Powell's Report of July 30th 1888 No. 619 S.

Would you kindly favor me with instructions in regard to the same.

I have the honor to be
Sir,
Your Obd't. Servant,
H. Moffatt.

The Honorable
The Supt. General
of Ind. Affairs.

The federal department obviously treated the widow Le Roux as having possession of the particular site. Exhibit 3 refers to it as her property. No mention is made of any interest in the property by children of Old Mary and Abraham. There is no information before me, one way or another, as to whether Abraham left a will dealing with the particular land, or whether his estate devolved by intestacy. Nor is it possible to determine whether the 1876 or the 1886 legislation in that respect is applicable, because the date of Abraham's death is unknown. Section 9 of the *Indian Act, 1876* (earlier set out) did not provide for devise by will of "located" land of a male Indian. It merely provided that, on death, one-third share went to the widow, and the remainder to his children equally. If there were no issue, then the widow took the whole interest.

The comparable section in the Revised Statutes of 1886 (s.20) reads as follows:

DESCENT OF PROPERTY

20. Any Indian who holds, under location ticket or other duly recognized title, any parcel of land upon the reserve of his band, or upon a reserve of any other band, upon which he, or he and his family, or any of them, resided at the date of his death, may devise the same by will, as well as his personal effects or other property of which he is the recognized owner, to such member or members of his family or relative or relatives, as to him seems proper; provided the said will, after his death, is consented to by the band owning the said reserve, and approved of by the Superintendent General, and that such devise is not to any relative who is not entitled to reside upon the reserve of the band on which the property devised is situated, or to any relative farther removed than a second cousin:

2. The devise may be made subject to such trusts as to the devisor seems proper, if the same are within the provisions of this Act, or any other Act respecting Indian affairs:

3. If such will is not assented to or approved of, as aforesaid, the Indian shall be deemed to have died intestate:

4. Upon the death of any Indian who holds, under location ticket or other duly recognized title, any parcel of land, and who has died intestate, the right and interest therein of such deceased Indian shall, together with his goods and chattels devolve one-third upon his widow, if any, if she is a woman of good moral character and was living with her husband at the time of his death, and the remainder upon his children, in equal shares, if they are Indians within the meaning of this Act, and such children shall have a like estate in such land as their father had; but the Superintendent General may, in his discretion, direct that the widow, if she is of good moral character, shall have the right to occupy such parcel of land, and have the use of such goods and chattels during the term of her widowhood:

5. During the minority of such children, the administration and charge of such land and goods and chattels as they are entitled to, as aforesaid, shall devolve upon the widow, if any, of such deceased Indian, if she is a woman of good moral character and was living with her husband at the time of his death; and as each male child attains the age of twenty-one years, and each female child attains the age or marries before that age, with the consent of the said widow the share of such male or female child shall be conveyed or delivered, as the case

may be, to him or her; but the Superintendent General may, at any time, remove the widow from such administration and charge, and confer the same upon some other person, and, in like manner, may remove such other person and appoint another, and so, from time to time, as occasion requires:

6. If any such Indian dies without issue, leaving a widow of good moral character, such lot or parcel of land, and his goods and chattels, shall be vested in her, and if he leaves no widow, then they shall be vested in the Indian nearest of kin to the deceased; but if he has no heir nearer than a cousin, the same shall be vested in Her Majesty for the benefit of the band:

7. Whatever is the final disposition of the land, the claimant shall not be held to be lawfully in possession until he obtains a location ticket from the Superintendent General, in the manner prescribed in regard to new locations:

8. The Superintendent General may, whenever there are minor children, appoint a fit and proper person to take charge of such children and their property, and may remove such person and appoint another, and so, from time to time, as occasion requires:

9. The Superintendent General may decide all questions which arise respecting the distribution, among those entitled, of the lands and goods and chattels of a deceased Indian, and may also do whatsoever he, under the circumstances, thinks will best give to each claimant his share, according to the true intent and meaning of this Act, whether such share is part of the lands or goods and chattels themselves, or is part of the proceeds thereof, if it is thought best to dispose thereof – regard always being had in any such disposition to restrictions upon the disposition of property in a reserve.[1]

Abraham and Old Mary had six children, all now dead. There were two boys. One, Cyprian LaRue, was probably born around 1874. He died in 1917 (see Ex.13). The other was Eli. His date of birth and date of death are unknown. Whether he ever married and had children is, on the materials before me, vague or unknown. (The plaintiff said she had bought property allegedly given by "Old Mary" to Eli. I gathered the impression this had been obtained from relatives, either of the plaintiff or Eli, or both.) A similar comment applies to the four remaining children, all girls. To complete this portion of the history, I record that Old Mary, in 1889, married the chief of the Kamloops band, Louis Hli-Hleh-Kan.

I am prepared to accept the plaintiff's contention that (in some manner) the property in question passed to Old Mary on Abraham's death. The inter-departmental correspondence dealing with the establishment of the industrial school clearly indicates that in the eyes of the Indian affairs department, in 1888 and 1889, Old Mary was the person having the interest in the land.[2]

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1 The unwholesome stipulation as to the widow (on an intestacy) being of good moral character continued in the *Indian Act* until 1951.

2 The following is an extract from Ex.25, a document prepared in 1958 by the Indian affairs branch of the Department of Citizenship and Immigration:

> We have had most of our Indian Reserves in this area now for about two-thirds of a century, not much more. For the greater part of that time, in fact until very recently, there

It is then said by the plaintiff that Old Mary, after Abraham's death and before her remarriage, made a division of land which had passed to her on Abraham's death. Cyprian was given the land on which the school sits. Eli was given land elsewhere in the reserve. What, if anything, the female children were allotted, is unclear.

The plaintiff then traces her right through her grandfather, Cyprian. His wife predeceased him. Two children (girls) died without issue. Her father Antoine was born in 1905. He married, in 1922, the person now known as Mary Bennett. Cyprian's remaining child was Hubert LaRue. He died in 1936.

Antoine had seven children. The plaintiff, Louise De Groot, Christine Tronson, and Mary E. Paulson, are all alive. The latter three have married non-Indians. One daughter and one son of Antoine are dead. They were unmarried and had no children. Another son, Gabriel, died in 1957. His widow married a non-Indian. Her name is now Agnes Bennett. Antoine's widow, in 1941, married a non-Indian. Her name is now Mary Bennett.

Antoine's brother Hubert married Frances Casimir. They had one surviving child, Caroline. In 1941 she married a non-Indian. Her name is now Caroline Fortier. Hubert's widow married one Sam Falardeau. She died in 1960. There are six children of that marriage. (I have set out as Appendix A to these reasons a genealogical chart. It is taken basically from Ex.12. The latter chart was not initially accepted by counsel for the defendant as accurate. He, in cross-examination of the plaintiff, brought out some omissions and corrections. I have endeavored to include those in Appendix A, as well as including some other information elicited in evidence.)

I revert to the plaintiff's assertion that the land in question was given by Old Mary to Cyprian. There is no cogent evidence in the form of documents or oral testimony to support that assertion. The position that the site belongs to Cyprian's side of the family is something that has apparently been handed down through Cyprian's descendants, and presumably by Old Mary. The plaintiff testified it was always understood the school site would revert to Cyprian's family, once it had ceased to be used for school purposes.

On the state of the evidence before me (or really the lack of any persuasive tangible evidence) I am unable to find for the plaintiff on this

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has been little attempt made to clarify and accurately record the ownership of individual land holdings within these Reserves. It is understandable then that after these many years of claiming, using, buying and selling and inheriting after the Indian fashion of using that which was one's father's with no form of documentation, a situation confronts us now which is wonderfully entangled and involved, frequently somewhat vexing, occasionally not without amusement, but very serious because the property rights of Indian men and women are the essence of it. It is important now that we clarify and record the ownership of land within Indian Reserves and in such a way that first of all when we speak of a parcel of land we describe it so that it may always be known by the description and that no other parcel of land may ever be mistaken for it, and secondly, that we provide the Branch in Ottawa with complete information so that they will be able to either confirm an Indian as the owner of the parcel or declare it Band Land.

crucial point. To put it another way, the plaintiff's claim, in my view, fails because of lack of any reasonable proof.

I think it much more likely that, as contended by the defendant, Old Mary gave up her interest in the 160 acres to the band or the defendant for use as a school, and was compensated for the value of the improvements.

I have already set out excerpts from Exhibit 2 and Exhibit 3. The relevant portions of Exhibit 4 (March 13, 1889) are as follows:

> I have the honor to acknowledge the receipt of you letter of Feby 28th last requesting to be informed of the widow Le Roux's name in full.
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> In reply, I beg to state that her name is now Mary Hli-hleh-Kan having been married to the Kamloops Chief Louis Hli-hleh-Kan about a month ago.

Exhibit 5 (March 29, 1889) indicates payment of $165 was recommended. Exhibit 6 (April 23, 1889) from the Indian office to the superintendent general reads:

> I have the honor to enclose vouchers in duplicate for the sum of $165.00 being amount paid to Mary Hli-hleh-Kan for her improvements on the site of the proposed Industrial School at Kamloops as per cheque No. 1173 received under cover of your communication of the 2nd instant Form A. File No. 14676/2.

As previously indicated, I am satisfied the probabilities are Old Mary gave up her possessory rights and was compensated, in accordance with the legislation then in effect, for the improvements on the site.[3] Construction of the first school commenced in August 1889. It was completed by the end of that year (see Exhibit 23). The site has been continuously used by the band for school purposes until relatively recently.

That is sufficient to dispose of this action. I do not feel it necessary to express any opinion or comment on the purported surrender by the band (Exhibit 19) in February 1932, for school purposes, of the lands in question.

The action is dismissed. The defendant is entitled, if She insists, to Her costs against the plaintiff Margaret Leonard.

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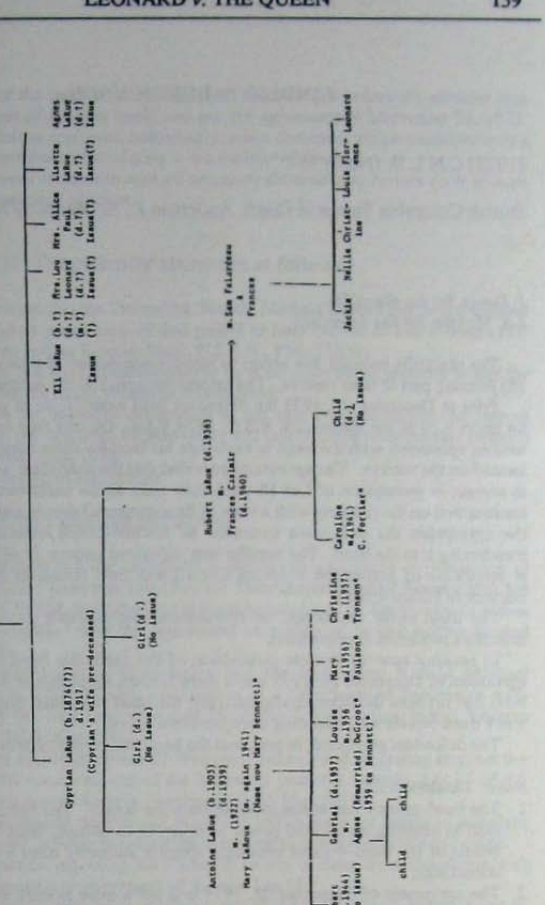
3 Section 16 of the 1886 Statutes provided:

> No Indian shall be deemed to be lawfully in possession of any land in a reserve, unless he has been or is located for the same by the band, or council of the band, with the approval of the Superintendent General: but no Indian shall be dispossessed of any land on which he has improvements without receiving compensation therefor, at a valuation approved by the Superintendent General, from the Indian who obtains the land, or from the funds of the band, as is determined by the Superintendent General.

There is no evidence that the $165 came from the funds of the band. I do not think that affects the question as to whether Old Mary's "title" was extinguished. On my findings, she was paid $165 in satisfaction of her rights, regardless of the source of the funds.



Action dismissed.