

Oct 15, 1996

Court File No. 21521/95-

ONTARIO COURT (GENERAL DIVISION)

B E T W E E N:

CHIEF RICHARD KAHGEE and BERNICE KAHGEE, HARRIET KEWAQUOM,
LORNE MANDAWOUB, MARIE MASON, JAMES RITCHIE, RITA ROOT,
MELVIN ROOTE, FRANK SHAWBEDEES, ARNOLD SOLOMON, CAROL
SOLOMON and CARMAN ROOTE ON THEIR OWN BEHALF AND ON BEHALF
OF THE MEMBERS OF THE CHIPPEWAS OF SAUGEEN FIRST NATION

Plaintiffs

- and -

THE CORPORATION OF THE TOWNSHIP OF AMABEL,
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,
HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
THE ATTORNEY GENERAL OF CANADA, BARBARA TWINING,
LARRY TWINING, DAVID DOBSON, ALBERTA LEMON,
SAUBLE BEACH DEVELOPMENT CORPORATION
ESTATE OF WILLIAM ELDRIDGE, and ESTATE OF CHARLES
ALBERT RICHARDS

Defendants

**STATEMENT OF DEFENCE AND COUNTERCLAIM, WITH CROSSCLAIM
(OF BARBARA TWINING, LARRY TWINING,
DAVID DOBSON, ALBERTA LEMON)**

1. These Defendants admit the facts set out in paragraphs 3, 5 and 9 of the Statement of Claim.
2. These Defendants deny the remaining allegations in the Statement of Claim and put the Plaintiffs to the strict proof thereof.
3. These Defendants state that their chain of title traces to Crown Patent and that their Deeds of title provide ownership in lands to Lake Huron.

4. These Defendants state that they have become aware of the "companion proceeding" referred to in paragraph 9 of the Statement of Claim and assert the following:

a. This proceeding should be stayed as an abuse of process in that:

i. Similar relief is sought in the action commenced on January 18, 1990;

ii. The Plaintiffs knew or ought to have known of the title claims of these Defendants, at the time the "companion action" was commenced and deliberately chose not to include these Defendants as necessary parties to that action, essentially using that action as a negotiating tool for political and economic purpose rather than the litigation of real title issues;

iii. That the Plaintiffs maintain the two actions for the purpose of making inconsistent and contradictory pleadings. For the purposes of current proceedings, the Plaintiffs seek to challenge the validity or fulfilment of treaties referred to in that Statement of Claim. For the purposes of the companion proceeding, the Plaintiffs seek to accept the validity or fulfilment of those treaties

for the purposes of taking the benefits that may accrue with them;

b. In the alternative, these Defendants state that the Plaintiffs are estopped from proceeding against them, in this action. For particulars, see paragraphs 6, 9 and 10 below.

5. These Defendants state that the Plaintiffs do not represent and cannot trace their representative capacity to the Saugeen Indians who entered into the treaty surrenders referred to in paragraphs 3 through 6 of the Statement of Claim in the "companion action".

6. These Defendants state that from time-to-time over the past 50 years, native indians, purporting to represent the Saugeen Band, have approached these Defendants or their predecessors in title attempting to assert some claim in the property of these Defendants. At all times these Defendants have resisted those claims and have, in fact, sought and received assurances from the Attorney General of Canada that these Defendants are legally entitled to their property. These Defendants state that they have maintained their beach properties, and paid taxes and insurance on them, relying on these representations. Particulars follow:

a. On the 15th of November, 1968, the Head of the Land Surveys and Title Section for the Department of Indian Affairs and Northern Development assured Mr. H. Dobson in writing that his

Department was "not aware of any claim by the Saugeen Band of Indians to Lakeshore lands fronting "his" property" and that "there was no evidence of any continuing indian interest in Lot 26, Concession D, Township of Amabel";

- b. On the 30th of October, 1968, The Honourable Jean Chretien (then the Superintendent General of Indian Affairs) assured the Dobson's Member of Parliament that the Attorney General of Canada had received no claim from the Saugeen (Chippewa) Band to the Dobson lands;
 - c. On June 15, 1948, one Harold Dobson received correspondence from the Superintendent of the Indian Affairs Branch confirming that the Letters Patent (to which the Dobson title traces, "did not provide for marine allowance along the shore of Lake Huron, the lots extending to the high water mark."
7. With respect to Alberta Lemon and the Twinings, they provide the following particulars on which they rely:
- a. On the 18th of October, 1944, D. J. Allan (the Superintendent of Reserves and Trusts) wrote to their predecessor entitled J.K. Davison (relating to his inquiries regarding surveys, confirming that his understanding was correct when he asserted that the lands of the Saugeen Reserve do

not extend opposite Lot 26 to 34, Concession D, Township of Amabel and that there was no provision for marine allowance along the shore of Lake Huron, these lots extending to the shore;

- b. That they were privy to and relied on the particular inquiries made by their neighbour, Harold Dobson who had made general inquiries on behalf of "affected land owners" and then received and distributed the responses (referred to in subparagraph (a) above) to his neighbours.

8. The Defendants each state that they have jealously protected their title to their beach properties, recognizing their significant value and, at times, earning commercial income from such property. Further, they have openly and notoriously demonstrated their right to control the use of such property, from time-to-time. Particulars are as follows:

- a. All Defendants have been levied property tax by the Township of Amabel, recognizing their respective ownership rights in the property in question and all Defendants and their predecessors have paid such realty tax and other charges, as levied;
- b. All Defendants have controlled the use of the beach property from time-to-time by the installation and maintenance of posts, patrolling

public use and access, signs proclaiming ownership and have closed off public use, where necessary, to demonstrate their rights to title and their rights to control the property;

- c. From time-to-time the Twinings have entered into license agreements with the Township, permitting public pedestrian and vehicular access for purposes of allowing the public an opportunity to enjoy their beach property (for example, the Twinings have allowed the Township to place a Band Shell on their beach property through license arrangement and for consideration;
- d. Most recently, the Twinings have entered into a written arrangement with the Township to impose parking charges on the public for the use of their beach property;
- e. The Defendants Twining and Dobson have allowed and encouraged controlled public use of their properties to enhance revenues arrived from commercial businesses, which they operate on such properties, at the beach;
- f. David Dobson and his father and uncle before him have operated a beach, restaurant "take-out business" since at least the 1940's and have clearly proclaimed their rights of ownership in the property and right to use it through the

erection of a building, the control of parking, the establishment of concrete pads and outdoor tables and the use of railway ties to demarcate public access;

- g. The Defendants all state that the Township of Amabel has always recognized the Defendants' right to control the use of their property by way of written agreement, by-law and other means, over the course of many decades.

9. In addition to the fact that the Defendants and their predecessors have acquired title to their properties for valuable consideration, tracing to Crown Patent, notice of which is deposited in the Land Registry Office in Walkerton, Ontario. They also assert that they have possessed the property adversely to the interests of any other claiming parties and have done so over the course of their ownership (and predecessor ownership) since the granting of their Crown Patents. The Defendants further plead and rely upon the provisions of the Limitations Act, R.S.O. 1990, Chapter L.15 and in particular Sections 4 and 15 thereof.

10. The Defendants state that the Plaintiffs are now estopped from bringing or continuing this action or any related action because of undue delay and because of attempts to litigate this same issue before. In or about the month of October of 1976, Chief James Mason of the

Saugeen Indian Reserve advised members of the public, in a press interview, that the Band had officially submitted a legal claim to the same land in question in this current litigation, advising among other things that there was a survey error and a final survey had established the true line. That same press publication also put the Band on notice of Ross Dobson's position which was that the Dobson's owned their land to the water and that letters from the Department of Indian Affairs had provided such confirmation.

11. These Defendants therefore submit that the Defendants' claims be dismissed as against them with costs payable to them as between a solicitor and his own client in the circumstances.

COUNTERCLAIM

12. These Defendants counterclaim against the Plaintiffs for the following relief:

- a. For a Declaration that they are the proper and titled land owners of their beach properties, in question in this action and that they are entitled to the sole and exclusive use and benefit of such property, having traced their title to such property to Crown Patents, through predecessor title holders;
- b. In the alternative, for a Declaration that they

have acquired possessory title to the properties in question by way of adverse possession which has been open and notorious since the time of the granting of Crown Patents and for at least the last 50 years, on a continuous basis;

- c. For a Declaration that the Plaintiffs' action be stayed on the basis of abuse of process, undue delay (laches) or estoppel;
- d. In the alternative, damages against the Plaintiffs for their loss of use and occupation of their lands based on the fact that these Defendants have maintained them and improved them for commercial and other reasons, pursuant to the provisions of paragraph 37 of the Conveyancing and Law and Property Act;
- e. For their costs of this Counterclaim, payable as between a solicitor and his own client in the circumstances;
- f. For interest and prejudgment interest on all damage sums that may be found owing to them pursuant to the provisions of The Courts of Justice Act;
- g. For such further and other relief as to this Honourable Court seems just.

13. The Defendants plead and rely upon the facts elsewhere pleaded in this Statement of Defence and

Counterclaim.

BY WAY OF CROSSCLAIM

14. These Defendants crossclaim against Her Majesty the Queen in Right of Canada, the Attorney General of Canada and the Corporation of the Township of Amabel as follows:

- a. As against Her Majesty the Queen in Right of Canada and the Attorney General of Canada, damages in the amount of \$1,000,000.00 on the basis of negligence, negligent misstatement (or negligent misrepresentation) and breach of fiduciary duty;
- b. Damages as against the Corporation of the Township of Amabel in the amount of \$200,000.00;
- c. Interest and prejudgment interest on all sums found owing to them pursuant to the provisions of the Courts of Justice Act, 1984;
- d. Their costs of maintaining the Defence of this action and their Crossclaims payable as between a solicitor and his own client in the circumstances or for such further and other Order as may seem just.

15. These Defendants state that the Plaintiffs have brought an action for relief against these Defendants pleading facts set out in Statements of Claim in Court File

Nos. 21521/95 and 44874/90. These Defendants have disputed the Plaintiffs' right to make such claims in this their Statement of Defence and Counterclaim with Crossclaim.

16. However, in the event that the Plaintiffs are successful in this action then the Defendants plead and rely upon the following facts to support their claim for relief in this Crossclaim against Her Majesty the Queen in Right of Canada and the Attorney General of Canada:

- a. That it is through these parties that these Defendants (and their predecessors) obtained title to the lands in question through Crown Patents;
- b. That recognizing the value of their property, these Defendants have jealously guarded their title interest and received continual title assurances made by the authorized representatives of these Defendants from time-to-time. The particulars of some of these representations are pleaded in paragraph 6 above;
- c. That these Defendants continued to maintain and improve their properties and pay taxes on them, relying on such representations;
- d. That these Co-Defendants have a fiduciary relationship with these Defendants in view of the original grant of title and the title reassurances given from time-to-time and that

these Defendants had every reason to rely on such representations when they were made by highly qualified officials (one of them the current Prime Minister of Canada) which officials had power and control over them;

- e. That if the Attorney General of Canada and Her Majesty the Queen in Right of Canada were negligent in not providing the Plaintiffs with the lands which they are entitled to receive, by surrender and due to survey negligence then the Attorney General for Canada and Her Majesty the Queen in Right of Canada were equally negligent in their continual misleading of these Defendants and their predecessors as to their personal title rights and that these Defendants are estopped from pleading any limitation period for such negligence since the issue of the negligent survey has only been recently discovered by these Defendants through these pleadings.

17. As against the Township of Amabel, the Defendants state that they have paid municipal taxes, as levied from time-to-time on the basis that they are the titled owners and in the event that they are disentitled; then, they claim that the Township has been unjustly enriched by the improper levy of taxes on these Defendants and their predecessors and that such profit should be disgorged to these Defendants and

the Township be called upon to account for taxes paid by them.

Dated: October 15, 1996.

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