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BETWEEN:

BRICK CARTAGE LIMITED .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Crown—Petition of Right—Negligence—Crown Liability Act, S. of C. 1952-53, c. 30, ss. 3(1) and 4(4) and (5)—Indian Act, R S.C. 1952, c. 149, ss 34, 35 and 39 to 41—Possessory right of Indians in lands of Indian Reserve—Maintenance of bridge on Indian Reserve—Whether Indian Band or Council or employee an agent or servant of Crown in right of Canada—No reason to believe bridge structurally defective—No evidence that those responsible for maintenance of bridge were negligent either as occupiers or as municipality charged with maintenance of highway.

The suppliant claimed compensation for damage to its truck and for loss of use resulting from the collapse of a bridge on the Six Nations Indian Reserve near Brantford, Ontario while the truck was crossing it, alleging that the bridge had been allowed to depreciate and was in a state of disrepair through the failure and default of the Six Nations Band Council, under whose sole jurisdiction it was, to keep it in repair.

Held: That the petition of right does not make out a cause of action under s. 3(1) of the *Crown Liability Act* unless the Six Nations Indian Band Council or its agents or servants are, as a matter of law, servants of Her Majesty in right of Canada, or Her Majesty in right of Canada, as a matter of law, owns, occupies, possesses or controls the bridge in question in such a way as to impose on Her Majesty a duty to maintain it through the operations of the Band Council, its servants or agents.

2. That under the Royal Proclamation of 1763 and the *British North America Act of 1867*, the Crown in right of Ontario has a bare legal title in Indian lands in Ontario, it being subject to a possessory right of the Indians in the lands in which possessory right is vested in the Indian band until some part of the land is allocated to an individual Indian, is surrendered and sold or is expropriated, the Parliament of Canada having exclusive legislative jurisdiction in relation thereto.
3. That for all practical purposes, possession by an Indian band of land is of the same effect in relation to day to day control thereof as possession of land by any person owning the title in fee simple and neither the Crown nor any government official has any right or status to interfere with such possession by the band except when such right or status has been conferred by or under statute.
4. That the bridge in question was in the possession of the Indian band at all relevant times.
5. That maintenance of roads in the reserve was carried on by the band through its elected representatives, with the same help and supervision from the Provincial authorities as a municipal corporation in Ontario received and with the same supervision and control in relation to expenditure of band or public monies as is imposed generally by the *Indian Act*.
6. That no possible basis in law has been put forward for regarding the band, its council or any officer or servant employed by it as being an agent, officer or servant of the Crown in right of Canada.
7. That there is no evidence to support in any way that the Crown in right of Canada or any officer or servant thereof had any authority, responsibility or control, either in fact or in law, in relation to the bridge in question or its maintenance.
8 That there was no basis in law pleaded and no evidence adduced to establish any liability of the respondent under the only statutory authority for such liability to which any reference was made, viz s 3(1) of the *Crown Liability Act*.
9. That the bridge in question was very old and served as a connection in a lightly travelled gravel road but there was no evidence that two surveys that had been made had disclosed any structural defects in it nor was there any evidence that any reasonable inspection of the bridge would have revealed any cause to be apprehensive of its ability to sustain any traffic that might be expected.
10 That the suppliant's truck and the one that immediately preceded it over the bridge were both in excess of the weights permitted by Ontario provincial law on secondary roads.
11. That there is no evidence upon which to base a finding that the authorities responsible for the maintenance of this bridge were guilty of any negligence, whether the matter is viewed from the point of view of the liability of an occupier to an invitee or of an Ontario municipality to maintain a highway within *McReady v. County of Brant* [1939] S C R. 278.
12 That a person who sends a modern vehicle weighing many tons over rural roads that were constructed when vehicles of such great weight were unknown has a very heavy onus to satisfy himself that a particular road is fit to receive his vehicle before moving it over it.
13 That the amount of damages has not been proven since no person with any personal knowledge of all the relevant facts gave evidence with respect thereto

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PETITION OF RIGHT for damage to a motor vehicle.

The action was tried by the Honourable Mr. Justice Cattanach at Brantford.

P. A. Ballachey, Q.C. for suppliant.

N. A. Chalmers for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CATTANACH J. now (August 14, 1964) delivered the following judgment:

This is a Petition of Right for damages to a motor vehicle, known as a "boom transport", sustained when a bridge on the Six Nations Indian Reserve, near Brantford, Ontario, collapsed while the vehicle was crossing it. The Petition of Right, in addition to damages for physical injuries to the vehicle, claimed damages for loss of use, but this claim was abandoned at trial. A Counterclaim by the Crown was also abandoned at trial.

The Petition of Right alleges that the bridge in question was under the sole jurisdiction of the Six Nations Indian Band Council and that it was in a state of disrepair and had been allowed to depreciate to the knowledge of the Council and its servants and agents "to the extent that the supporting abutments of the bridge, had deteriorated to the point that they allowed the bridge to collapse." It also alleges that the damages complained of were caused by the failure and default of the Six Nations Band Council to keep the bridge in repair. On these allegations relief is sought against Her Majesty in right of Canada, under section 3(1) of the *Crown Liability Act,* c. 30, Statutes of Canada, 1952-53, which reads as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, or
>
> (*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

The Petition of Right does not make out a cause of action under this provision unless, on the one hand, the Six Nations Indian Band Council or its agents or servants are, as a matter of law, servants of Her Majesty in right of Canada or, on the other hand, Her Majesty in right of Canada, as a matter of law, owns, occupies, possesses or

controls a bridge on the Six Nations Indian Reserve in such a way as to impose on Her Majesty a duty to maintain it through the operations of the Band Council, its servants or agents.

The case was argued by counsel for both parties on the assumption that the Indian Reserve on which the accident occurred was in an area to which the reasoning of the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen*[1] is applicable. It would have been preferable if there had been evidence to show that the area in question is land that was subject to the Royal Proclamation of 1763 and that it was in the occupation of the Indians at the time of that Proclamation together with evidence that it had never been surrendered by the Indians. However, as the area in question is in Ontario, and as it appears from the evidence that it has not been surrendered, I propose to view the case on the assumption that those facts have been established.

I do not propose to repeat the careful exposition of the legal rights in relation to Indian lands that can be found in Lord Watson's judgment in the above case at pages 53 and those following. It is sufficient for the purposes of this judgment to enumerate the significant points, which are:

(1) the Royal Proclamation of 1763 conferred on the Indians a possessory right in lands occupied by them at that time in the territories to which the Proclamation applied;

(2) those lands (hereafter referred to as "Indian lands") were vested in the Crown subject to the Indians' possessory rights;

(3) upon surrender or other extinguishment of the Indians' possessory right, the Crown's title became a right to full and restricted ownership;

(4) by virtue of the Proclamation of 1763, the Indian possessory right could only be extinguished by a formal contract, duly ratified at a meeting of the Chiefs, for surrender to the Crown;

(5) the Imperial Government assumed the responsibility for the welfare of the Indians and of supervising relations between the Indians and others, to the exclusion of the colonial governments (the Imperial Government did not surrender this function until 1860);

(6) immediately prior to 1867, the Crown title in Indian lands was vested in Her Majesty in the right of the pre-confederation Province of Canada;

(7) by the British North America Act, 1867, the Crown title in Indian land in Ontario became vested in Her Majesty in right of Ontario, with the consequence that, upon a surrender or other extinguishment of the Indian possessory right, the full and

[1] 14 App. Cas. 46.

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unrestricted ownership would become vested in Her Majesty in right of Ontario (since 1924, there has been a Dominion-Provincial agreement designed to ensure to the Indians the full benefit of Indian land—see chapter 48 of the Statutes of 1924);

(8) by the British North America Act, 1867, the Parliament of Canada acquired exclusive legislative jurisdiction in relation to Indians and lands reserved for the Indians.

In the exercise of its legislative authority in relation to "Indians and lands reserved for the Indians," the Parliament of Canada has enacted the *Indian Act,* 1952 R.S.C. c. 149, as amended, by section 18 of which the Crown is declared to hold Indian lands "for the use and benefit" of the respective bands, i.e. the Indians' possessory title under the Proclamation of 1763 is recognized by Parliament and assigned to the respective bands. This Act contains provisions under which a band's possessory right in particular parts of a reserve may be vested in an individual Indian and thus attain, for all practical purposes, all the incidents of common law ownership of land in fee simple. It also contains provisions for electing band councils and confers on a band council power to make by-laws for various purposes, including "the construction and maintenance of . . . roads, bridges . . . and other local works". There is also a provision, being section 34, that a band shall *inter alia* ensure that the roads and bridges within the reserve occupied by the band are maintained in accordance with instructions issued from time to time by the Superintendent, who is an official under the Minister of Citizenship and Immigration. Other provisions in the Act to which reference should be made are section 35, under which lands in a reserve may be taken for public purposes, and sections 39 to 41, under which lands in a reserve may be surrendered by the Indians for disposition to third persons.

The situation appears to be that the Crown in right of Ontario has a bare legal title in Indian lands in Ontario during the continuance of the possessory right of the Indians. It further appears that the possessory right of the Indians is vested in the band, i.e. the particular group of Indians as a group, until some part of the land is allocated to an individual Indian, is surrendered and sold or is expropriated.

For all practical purposes, possession by an Indian band of land is of the same effect in relation to day to day control thereof as possession of land by any person owning the

title in fee simple. Neither the Crown nor any government official has any right or status to interfere with such possession by the band except when such right or status has been conferred by or under statute.

There is no evidence that the bridge that is the subject matter of this Petition of Right has ever been allocated to an individual Indian, surrendered or expropriated. I should also say that there is no evidence of any instruction of the Superintendent with regard to the maintenance of bridges under section 34 of the *Indian Act* and there is no evidence of any by-law in that connection passed by the Band Council. I, therefore, find that the bridge was in the possession of the Indian Band at all relevant times.

There is no sufficient evidence as to who constructed and maintained the roads in the reserve and particularly the bridge in question, but what evidence there was convinces me that maintenance, at least, was carried on by the band through its elected representatives, with the same help and supervision from the Provincial authorities as a Municipal Corporation in Ontario received, and with the same supervision and control in relation to expenditure of band or public monies as is imposed generally by or under the *Indian Act*. No possible basis in law has been put forward for regarding the band, its council or any officer or servant employed by them as being an agent, officer or servant of the Crown in right of Canada.

There is no evidence that suggests in any way that the Crown in right of Canada or any officer or servant of the Crown in right of Canada, had any authority, responsibility or control, either in fact or in law, in relation to this bridge or its maintenance.

There is no basis in law pleaded, and no evidence was led, to establish any liability of Her Majesty in right of Canada under the only statutory authority for such liability to which any reference was made, namely, section 3(1) of the *Crown Liability Act*.

The foregoing reasons, effectively conclude the matter and, in my view, the suppliant is not entitled to the relief sought in its Petition of Right.

However, I do not propose to leave the matter without expressing my conclusions on the questions of fact concerning the alleged negligence of those who did have responsibility for the maintenance of the bridge and the quantum of damages.

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The simple facts are that:

(1) the bridge in question was built in the "horse and buggy" days in the early years of this century;

(2) in 1961, the bridge still served as a connection in a lightly travelled gravel road and was maintained to the same standards as were the many other bridges of the same kind that still continued to be used in the province at that time;

(3) the normal capacity of the bridge, according to an expert called by the suppliant, was in the neighbourhood of 30,000 pounds;

(4) the bridge had been recommended for immediate replacement on the grounds that it was poorly located, it was a very old bridge and it was narrow but, notwithstanding, evidence of two different surveys by representatives of the interested authorities, there was no evidence that such surveys had disclosed any defects of a structural nature in the bridge;

(5) there was no evidence that any reasonable inspection of the bridge before its collapse would have revealed any cause to be apprehensive of the ability of the bridge to sustain any traffic that might be expected;

(6) the suppliant's truck was a very large special piece of equipment, with a loading and unloading boom on it, that weighed 17,000 pounds empty and on the day in question carried a load of 27,000 pounds (some part of this load had been removed prior to the accident);

(7) the suppliant's truck crossed the bridge immediately after a truck that had a weight, including its load, between 43,500 and 46,500 pounds;

(8) both of these trucks were, at the time, in excess of the weights permitted by Ontario Provincial law on secondary roads.

The evidence of expert examination of the ruins of the bridge failed to reveal what had happened to cause its collapse. The sixty foot members were intact and had not failed so that the concrete abutments on which they had rested must have moved, crumbled or been gouged out, but there was no evidence to establish which of these had happened. One expert expressed the opinion that the abutments

had moved over the years but he did not support his opinion by the evidence (but only as being his conjecture as the most likely thing to have happened) and he did not say that there was anything to indicate that any reasonable inspection would have revealed anything to those responsible for the bridge that should have made them apprehensive that there was any danger of collapse.

I do not overlook the evidence that one Martin, an employee of the Band, had indicated to the drivers of the two trucks that they should proceed by a route over this bridge and had told the driver of the leading truck, with whom he was riding, that he knew of no load limit and that the township or band trucks had gone over the bridge many times. There is, however, no evidence that Martin had any authority or special knowledge in respect of the roads and bridges maintained by the Band. Neither do I overlook the presence of a sign visible to traffic coming from the opposite direction to which these trucks were coming, cautioning the drivers to proceed at their own risk.

I find no evidence upon which to base a finding that the authorities responsible for the maintenance of this bridge were guilty of any negligence, whether the matter is viewed from the point of view of the liability of an occupier to an invitee or from the point of view of the liability of an Ontario municipality to maintain a highway within, *McReady v. County of Brant*[1].

Furthermore, I am of the view that a person who sends a modern vehicle weighing many tons over rural roads that were constructed when vehicles of such great weight were unknown, has a very heavy onus to satisfy himself that a particular road is fit to receive his modern heavy vehicle before moving his vehicle over it. In my view, such a person uses such roads at his own risk and cannot transfer the responsibility to his customer or any other person to whom he directs enquiries for information except, possibly, those responsible for the maintenance of the road.

Finally, with reference to the quantum of damages, I find that, notwithstanding, that there was no admission by the respondent concerning either the nature of the physical damages sustained by the vehicle or the reasonableness of the charges, no person with any personal knowledge of all

[1] [1939] S.C.R. 278.

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the relevant facts gave evidence with respect thereto. I cannot, therefore, find that the amount of the damages has been proven. I must also add that I am not able to find on the evidence that the bill for the specialized adjuster's services can be regarded as representing a cost of repairing the physical damages to the truck.

Having regard to the findings I have made, I do not have to form an opinion under subsection (5) of section 4 of the *Crown Liability Act*. There is, however, a question in my mind as to whether, when lack of notice under subsection (4) of section 4 is pleaded by the Crown, the suppliant can ask the Court to make the required finding under subsection (5) unless its reply pleads both the lack of prejudice and the injustice contemplated by subsection (5). In this case, the reply did not plead the injustice contemplated by subsection (5).

There will, therefore, be judgment that the suppliant is not entitled to any portion of the relief sought by its Petition of Right herein and the respondent is entitled to costs.

Judgment accordingly.