Mintuck v. Valley River Band No. 63A, [1977] M.J. No. 14

Manitoba Judgments

Manitoba Court of Appeal
Guy, Matas and O'Sullivan JJ.A.
Heard: October 19, 1976.
Judgment: February 10, 1977.

[1977] M.J. No. 14 | 75 D.L.R. (3d) 589 | [1977] 2 W.W.R. 309 | 2 C.C.L.T. 1 | 9 C.N.L.C. 210 | [1977] 1 A.C.W.S. 427

Between Gabe Mintuck, (plaintiff) respondent, and Valley River Band No. 63A, Clifford Lynxleg, Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos, (defendants) appellants

(105 paras.)

Counsel

A C. Matthews, Q.C., for the (plaintiff) respondent. R.K. Vohora, for the (defendants) appellants. B.J. Meronek, for the Attorney-General of Canada.

Separate reasons for judgment were delivered by Guy, Matas and O'Sullivan JJ.A.

GUY J.A.

1 This was a long and difficult and, indeed, tragic case. The learned trial judge, Solomon, J., at the conclusion of the trial, awarded $10,000.00 damages to the plaintiff, payable by the Valley River Band. He achieved this by making an order pursuant to Queen's Bench Rule 58; which reads:

> "Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorized by the court to defend, on behalf of, or for the benefit of all."

2 The effect of this was to make the chief and members of council of the Valley River Band No. 63A representatives to defend the Band. The order was made because of the possibility that the Band itself could not be properly described as a suable entity.

3 I would think that on the basis of the judgment of the Supreme Court of Canada in International Brotherhood of Teamsters v. Therien, [1960] S.C.R. 265, at pp. 277 and 278, the Band could well be a suable entity. Mr. Justice Locket said at the pages quoted above:

> "I agree with the opinions expressed by the learned judges of the Court of Appeal in the cases to which I have above referred. The granting of these rights, powers and

> immunities to these unincorporated associations or bodies is quite inconsistent with the idea that it was not intended that they should be constituted legal entities exercising these powers and enjoying these immunities as such. What was said by Farwell, J. in the passage from the judgment in the Taff Vale case which is above quoted appears to me to be directly applicable. It is necessary for the exercise of the powers given that such unions should have officers or other agents to act in their names and on their behalf. The legislature, by giving the right to act as agent for others and to contract on their behalf, has given them two of the essential qualities of a corporation in respect of liability for tort since a corporation can only act by its agents.
>
> The passage from the judgment of Blackburn J. delivering the opinion of the judges which was adopted by the House of Lords in Mersey Docks v. Gibbs, referred to by Farwell J. states the rule of construction that is to be applied. In the absence of anything to show a contrary intention - and there is nothing here - the legislature must be taken to have intended that the creature of the statute shall have the same duties and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. Qui sentit commodum sentire debet et onus."

4 Likewise, there is the statement in Donoghue v. Stevenson (1932) A.C. 562, by Lord Atkin, at p. 580, which is well known:

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

5 Lord Atkin said in the same case at p. 583:

> "... I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong."

6 In short, I agree with the conclusion reached by the learned trial judge that the council of the Valley River Band represented the Band and the Band is capable of suing and being sued through its councillors or agents.

7 The facts in this case were set out by the learned trial judge as follows:

> "Plaintiff, a treaty Indian, resides on the reserve of the Valley River Band No. 63A (the Band). The personal defendants, Clifford Lynxleg, Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos, are all members of the Band and reside on the said reserve. Clifford Lynxleg is the Chief, and Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos are members of the Band Council, duly elected in accordance with the constitution of the Band as provided for by the Indian Act, Cap. I.6, R.S.C. 1970 (the Act).
>
> In accordance with the provisions of the Act, and pursuant to the agreement made between plaintiff and Her Majesty Queen Elizabeth II, represented by the Minister of Indian Affairs and Northern Development (the Minister), and with approval of the Band,

plaintiff rented and was operating a 480 acre farm on the reserve. On May 22, 1969, Her Majesty Queen Elizabeth II, represented by the Minister as lessor, entered into a lease with plaintiff by which the lessor rented to him additional land situated within the Valley River Indian Reserve and being the North-East Quarter of Section 4, Township 26 and Range 25, West of the Principal Meridian in Manitoba. Before the lessor executed this lease in favour of plaintiff, the Chief and Council of the Band, by a resolution duly passed, recommended to the lessor that the lease in question be entered into. The lease was for a term commencing May 1, 1969 and ending December 31, 1979. Under it the plaintiff was to receive the use of the land for the years 1969 to 1973 inclusive, rent free, and was to pay the lessor (sic) a one-third share of the crop in 1974 and continue doing so until the end of the term.

Plaintiff is an excellent farmer and according to knowledgable independent witnesses is a good manager of his farming operations. He has given every indication of being a progressive individual with a keen desire to succeed. He was doing well on his 480 acre farm but agricultural consultants for We Department of Indian Affairs were of opinion that he should have more land if his operations were to be conducted economically. Following their advice, plaintiff rented this additional 160 acres for a ten-year period and started to develop this new land in order to bring it up to the standard of his other farm property.

Shortly after signing the lease for this additional land, plaintiff started to experience some difficulties with operations on the newly acquired property. It was situated approximately two miles away from his other land and he was obliged to commute daily between the two properties during the farming seasons. The only road to the new farm was through the reserve. Many times plaintiff found it blocked with different vehicles and was not able to get through with farm equipment needed for his operations. Occasionally when he got to the farm he discovered that stray cattle had been allowed to roam freely over his crops, doing considerable damage to them. Sometimes he found members of the band driving trucks over the farm under the pretext they were hunting game, and on occasion plaintiff and his family were intimidated by firearms. Finally, even the Band Chief, Clifford Lynxleg, entered into the picture with harassment. It was obvious eventually that all this interference with farming operations, and harassment of plaintiff and his family, was aimed at getting him to abandon his rights to the lease he had to the new farm.

The leasing of the new farm to plaintiff was approved by the former Council and Chief o[pounds] the Band. Shortly after the lease was executed on May 22, 1969, the incumbent Chief and Council of the Band were defeated in an election and Clifford Lynxleg was elected Chief and the other personal defendants were elected to Council. Harassment and intimidation of plaintiff and his family, and interference with his farming operations, started shortly after this election and continued until the Chief and Council finally passed a resolution which effectively terminated the lease with plaintiff in respect of the new farm."

8 He then gave his judgment in favour of the plaintiff against the Valley River Band in the sum of $10,000.00.

9 There are two points in the reasons for judgment of Solomon, J. which require clarification. The first is this: The Valley River Band council passed a resolution purporting to terminate the lease that the plaintiff Mintuck had with Her Majesty the Queen. They did not terminate that lease, as the learned trial judge stated, because, of course, they could not in law, not being either lessor or lessee named in the lease.

10 What I think the learned trial judge was emphasizing was the fact that the Band Resolution gave formal approval on behalf of the Band to all the harassment which ended in the plaintiff giving up his struggle to reap the benefits of his lease.

11 The second point relates to the duty owed by the Band to the plaintiff and the breach of that duty. It must be noted that following the first five years of the ten year lease, plaintiff was to pay the proceeds of one-third of the share of his crop, not to the lessor (as found by the learned trial judge), but to "the Valley River Band". The eighth covenant of the lessee in the said lease reads:

> "8. That the one-third (1/3) crop share from the 1974, 1975, 1976, 1977, 1978, and 1979 crops shall be marketed, and payment made to the Valley River Band."

12 This is a most important point, and I think effectively deals with the problem as to what duty was owed by the Band as such to the plaintiff. The well known legal maxim quoted by Locke, J. in the Therien case (supra) must surely apply to the case before us: "Qui sentit commodum sentire debet et onus; et e contra." (He who enjoys the benefit ought also to bear the burden; and vice versa.)

13 The Valley River Band being a beneficiary of the work done by the plaintiff to develop and cultivate the land and market the crops, must see to it that nothing is done to hinder or prevent the fulfilment of the contract, and cannot, with impunity, deprive him of his rights which were legally granted to him by the lease. This they did, and they must pay for it.

14 Thus, without reference to Lumley v. Gye, (1843-60) All E.R. 208, 2 E1 & B1 225, 117 E.R. 749, I reach the same conclusion as the learned trial judge. I do not quarrel with his assessment of damage and I would dismiss the appeal with costs.

GUY J.A.

MATAS J.A.

15 This is an appeal from a judgment of Solomon, J., awarding damages of $10,000.00 to plaintiff for wrongful interference with his rights as lessee under a lease of a one-quarter section of land.

16 The land is located on the reserve of Valley River Band No. 63A. The reserve falls within the definition under sec. 2 of the Indian Act RSC 1970, cap. I-6 (the Act) which reads:

> "2. (1) In this Act
>
> ...
>
> 'reserve' means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band;
>
> ..."

17 Plaintiff and personal defendants are members of the Band and live on the reserve. At all material times, Clifford Lynxleg was the Chief, and Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos were members of the Band council, duly elected in accordance with the constitution of the Band as provided for by the Act.

18 The lease, dated May 22, 1969, is for a ten year term from May 1, 1969, to December 31, 1979. It was entered into between the federal Crown as lessor, on the recommendation of a differently constituted Band council, and Mr. Miatuck as lessee. Under its terms the lessor was to receive a one-third share of crop excluding the first five crops which were to belong to Mintuck, but the proceeds of the one-third share for the years 1974-79, inclusive, were to be paid to the Band.

19 At pp. 3-4 of his reasons for judgment, Solomon, J said:

> "Shortly after signing the lease ... plaintiff started to experience some difficulties with operations on the newly acquired property. It was situated approximately two miles away from his other land and he was obliged to commute daily between the two properties during the farming seasons. The only road to the new farm was through the reserve. Many times plaintiff found it blocked with different vehicles and was not able to get through with farm equipment needed for his operations. Occasionally when he got to the farm he discovered that stray cattle had been allowed to roam freely over his crops, doing considerable damage to them. Sometimes he found members of the band driving trucks over the farm under the pretext they were hunting game, and on occasion plaintiff and his family were intimidated by firearms. Finally, even the Band Chief, Clifford Lynxleg, entered into the picture with harassment. It was obvious eventually that all this interference with farming operations, and harassment of plaintiff and his family, was aimed at getting him to abandon his rights to the lease he had to the new farm." (emphasis mine)

20 As part of the program of harassment, there were threats of damage to be done to Mintuck's property and threats of serious physical harm to him and his family unless Mintuck desisted from working the land. The threats were made in person and by telephone. The grave nature of the threats may be gleaned from some of the reactive steps taken by Mintuck. He complained, on several occasions, to the R.C.M.P. and to the Department of Indian Affairs. He had his telephone number delisted but that did not help so he had the telephone taken out. His children were sent to a different school. On several occasions the police escorted Mintuck to his land to ensure safe conduct.

21 Interference with plaintiff's farming operations extended from 1970 through to 1971, with greater severity in 1971. Clifford Lynxleg was elected Chief in 1971.

22 Plaintiff operated the farm during the years 1969-71. He did not do any fall work on the land in 1971 but he did some work in the latter part of May, 1972. He was threatened again in 1972 and was warned to stay off the land.

23 A letter dated June 27, 1972, was sent to Mintuck by the Band council, stating that he had not been farming his land in accordance with the lease and giving him 10 days "to make improvements" to the land (Ex. 3). Mintuck said at the trial that in light of all that had taken place and on the advice of his lawyer, he did not return to working the land.

24 On September 14, 1972, the Band council passed a resolution purporting to cancel the lease (Ex. 11). Notice of the resolution was sent to Mintuck by registered mail but he refused to accept delivery. He became aware of the resolution sometime later.

25 The Department of Indian Affairs made some efforts to solve the problem Mintuck was having, but without success. At one stage, it was suggested that a meeting would be held of Mintuck, the Band council and representatives of the Department, with the R.C.M.P. in attendance. The council refused to have the police present; the meeting was not held.

26 The Band hired other people to work the land in 1972 and in subsequent years. At the trial, held on January 21, 1976, Chief Lynxleg said, in direct examination, that as of that date the Band was in possession of the land.

27 At the opening of the trial, counsel for plaintiff moved that para. 2 of the statement of claim be amended by adding, at the end of the paragraph, "and the same is a band to which Section 74 of the said Act applies." Para. 2 would then read:

> "2. The Defendant, Valley River Band No. 63A, hereinafter referred to as the 'Band', is a body of Indians declared by the Governor in Council of the Government of Canada to be a Band under the provisions of the Indian Act, R.S., Chapter 149, and the same is a band to which Section 74 of the said Act applies."

28 Counsel for defendants moved:

1. that the statement of defence be amended by an allegation that plaintiff's claim for damages is barred by The Limitation or Actions Act RSM 1970, cap. L150; and
2. that a further amendment to the statement of defence be made alleging that "the Defendant Valley River Band No. 63A is not a legal entity, and the Plaintiff's action against it as such is improperly constituted and is not maintainable".

29 All the amendments were allowed but none or the amendments was noted on the record as should have been done under Queen's Bench Rule 159. Nor do the amendments appear in the record filed as part of the appeal book in this court.

30 After the amendments were ordered by the learned trial judge, counsel for defendants moved to have the statement of claim struck out. Counsel said to the court that:

> "The proper way for the Plaintiff to have brought this action, My Lord, should have been to sue members of the band on their behalf and on behalf of the rest of the mergers as a representative action. I am referring to Queen's Bench Rule 58 that permits you to do that, ..."

31 The motion was dismissed on the ground that evidence would have to be heard before the motion could be considered. The motion was renewed during the trial and was reserved.

32 Counsel for defendants did not present any submission in this court in respect of The Limitation of Actions Act. I will not deal with this defence.

33 At the conclusion of the trial, plaintiff abandoned:

1. his claim for possession of the land; and
2. his claim for damages against the personal defendants and the Band for damage to his crops.

34 On the latter point, the learned trial judge said at pp. 4-5 of his reasons for judgment:

> "Despite the continuous harassment and interference by members of the Band, plaintiff continued to operate the farm during 1969, 1970 and 1971. His crops were damaged by the actions of some members of the Band, but there was no evidence before the court that the defendants, in their personal capacity, were in any way responsible for such damage, nor could the Band be held liable for those actions ..."

35 Plaintiff continued his claim for damages arising "from the cancellation of the Lease and depriving the Plaintiff of possession of the land."

36 The learned trial judge held that:

> "... The personal defendants, acting in their capacities as Chief and members of Council of the Band duly elected to represent the Band in accordance with its constitution established pursuant to the Indian Act, wrongly passed the resolution rescinding the original approval of the lease and effectively terminating the lease because this action prevented plaintiff from operating his farm as provided for in the lease."

37 It is my respectful opinion that the learned trial judge was in error if he meant to say that it was the resolution of September 14, 1972, which cancelled the lease and dispossessed plaintiff. Standing alone, it did not. Clearly, only the lessor could cancel the lease; the resolution was treated by the lessor only as a recommendation for cancellation and was not acted on.

38 I will consider later the connection between the harassment of plaintiff and the actions of the Band council.

39 There are two points of procedure which should be dealt with before considering the merits.

Jurisdiction:

40 Counsel for defendants and counsel for Department of Justice argued that Court of Queen's Bench did not have jurisdiction in this matter but that exclusive jurisdiction lies in the Federal Court of Canada. 'Sec. 17(2) of the Federal Court Act RSC 1970, 2nd Supp., cap. 10, reads:

> "17.(2) Without restricting the generality of subsection (1), the Trial Division has exclusive original jurisdiction, except where otherwise provided, in all cases in which the land, goods or money of any person are in the possession of the Crown or in which the claim arises out of a contract entered into by or on behalf of the Crown, and in all cases in which there is a claim against the Crown for injurious affection."

41 Under that section the Federal court would have exclusive jurisdiction:

1. in all cases in which the land, goods or money of any person are in the possession of the Crown; or
2. where the claim arises out of a contract entered into by or on behalf of the Crown; and
3. in all cases in which there is a claim against the Crown for injurious affection.

42 Items 1 and 3 do not have any application to the case at bar. The only basis for claiming exclusive jurisdiction in the Federal Court would be that a claim in this cast "arises cut of a contract entered into by or on behalf of the Crown".

43 I agree with the submission of counsel for the Department of Justice that the question of cancellation of the lease to which the federal Crown is a party is a question within the jurisdiction of the Federal Court. Any pronouncement to that end would, in effect, be a finding in respect of Her Majesty and thus within the jurisdiction of that court. Re Smith and Best et al (1975) 54 DLR (3d) 627 at p. 631. But Mintuck is not seeking damages or any relief against the federal Crown.

44 Mintuck has made a claim against defendants who, he alleges, have wrongfully interfered with his contractual relations with the federal Crown and deprived him of his rights as a lessee, causing damage to him. This is a claim in tort against defendants, falling squarely within the jurisdiction of Court of Queen's Bench. To include this kind of action within the meaning of "arises out of", as those words appear in sec. 17(2) would be an unreasonable extension of their meaning. Obviously, if there had never been a lease there could not have been a claim. But not every action, because of a relationship with a federal contract, becomes ipso facto a matter within the exclusive jurisdiction of the Federal Court. I have concluded that the learned trial judge was correct in his rejection of counsel's jurisdictional argument.

Parties:

45 The learned trial judge found that the Band is not a suable entity and made a nunc pro tunc representation order under Queen's Bench Rule 58. The Rule reads:

> "58 Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorized by the court to defend, on behalf of, or for the benefit of, all."

46 Counsel for defendants argued that the judgment was correct in finding that the Band was not a suable entity but erred in making the order because a representation order should not be made in an action in tort.

47 Doubt has been expressed in the authorities whether the rule should ever be applied to actions in tort. Clerk & Lindsell on Torts (14 ed.) para. 196, pp. 110-111, quoting Mercantile Marine Association v. Toms (1916) 2 K.B. 243 and other English cases. The same thought is expressed in Holmested & Gale, Ontario Judicature Act & Rules of Practice Vol. 1, p. 718, para. 31, where reference is made to the impossibility of suing individuals in a representative capacity for damages for tort. The practice in respect of unincorporated associations is referred to in

Holmested, at p. 721, para. 45, where the following statement is made:

> "In certain circumstances it may be possible to obtain an order for representation under this rule, provided the claim made against the association is of an equitable nature: see Barrett v. Harris (1921) 51 O.L.R. 484 at 491, where Middleton J., after reviewing the English and Canadian cases, said 'The result in my opinion, is, that in an action to recover damages for tort the Rule cannot be invoked unless it is intended to be alleged that the unincorporated body is possessed of a trust-fund, and such circumstances exist as entitle the plaintiff to resort to that fund in satisfaction of his claim. In such case the trustees may be appointed to represent the general membership in defending the fund ... Where there are many tort-feasors, the plaintiff has an adequate remedy by suing those whom he can shew to be wrongdoers, and from whom he may expect to levy the amount of any recovery.'
>
> Before making a representation order, the court should have all relevant facts before it to enable it to determine that the case is a proper one for a representation order, and the mere statement that the plaintiffs intend to allege the existence of a trust fund is not sufficient: Body v. Murdoch (1954) O.W.N. 658."

48 The nature of this principle was referred to in Williston and Rolls, The Law of Civil Procedure, vol. 1, p. 217, where the following statement appears:

> "It has been held in a number of cases that a representation order cannot be made in a tort action unless it is intended to allege that the association is possessed of a trust fund and that the persons whom it is sought to name as defendants are the trustees of it ...
>
> The requirement of the existence of a trust fund is somewhat illogical. In a case in contract it can easily be argued that members only intended to authorize the pledging of their credit up to the limit of a certain fund. In an action in tort there can be no such implied restriction. The only question should be whether the members are personally or vicariously responsible. It is hard to see how the existence of such a fund can be of any assistance in answering either of these questions. The rule seems too strongly established in Ontario, however, to be easily overruled."

49 Counsel for Mintuck argued that although the Act does not say that a Band is a legal entity capable of being sued, it does not say it cannot be sued. By implication, the argument goes, the court must find that since a Band is recognized as a legal entity for some purposes under the Act it must be a legal entity for all purposes.

50 After analyzing the structure, assets and functions of a Band, Solomon, J., said at pp. 21-22 of his reasons for judgment:

> "... The Band and its Chief and Council are the defendants in plaintiff's statement of claim and all filed defences. The Chief and members of Council were examined for discovery. During the hearing the personal defendants gave evidence in support of their personal defences and in support of the defence of the Band. In a word, all defendants were represented by counsel during the hearing, all participated is opposing plaintiff's claim and the court heard all evidence adduced on their behalf.
>
> Plaintiff was certain the Band was a legal entity capable of being sued without an order under Queen's Bench Rule 58. No order was asked for under Rule 58, nor did the court

make one before the hearing of this matter. I feel, however, the court has power to make such order now. Queen's Bench Rule 156 provides:

> 'A proceeding shall not be defeated by any formal objection, but all necessary amendments may be made on proper terms as to costs or otherwise to secure the advancement of justice, the determining the real matter in dispute, and the giving of judgment according to the very right and justice of the case.'

Under Rule 155, this court has the power to grant necessary amendments to the pleadings and make all necessary orders required by Queen's Bench Rules in order to render a judgment according to the rights of parties and justice of the case. I am accordingly granting all necessary amendments and am making, nunc pro tunc an order under Rule 58 that Clifford Lynxleg, Lawrence Ironstand, Cecil Rattlesnake and Joseph Shingoos, who are Chief and Council respectively of the Band, represented and defended on behalf of all other members of the Band except plaintiff, as well as on their own behalf, and that all other members of the Band except plaintiff, as well as individual defendants, are bound by the judgment and proceedings in this action."

51 I agree with the conclusion of Solomon, J. and would hold that the representation order was made correctly.

52 I should add that the style of cause in the copies of pleadings filed in this court are in the same form as they were when the action was started.

Merits:

53 Solomon, J., based the finding of liability on the authority of Lumley v. Gye (1843-60) All E.R. 208, 2 E1 & B1 225, 117 E.R. 749, Temperton v. Russell et al (1893) 1 Q.B. 715, and Posluns v. Toronto Stock Exchange and Gardiner (1965), 46 D.L.R. (2d) 210. I prefer to rest the liability of the Band on the tort of intimidation and unlawful interference with economic interests and the doctrine of "adoption" of a tort.

54 There is a useful discussion in Clerk & Lindsell, supra, at pp. 414-420, as part of a general discussion of the several shadings in the categories of the general tort of procuring a breach of contract. O'Sullivan, J.A., in giving judgment of this court discussed these principles in the recent case of Gershman v. Manitoba Vegetable Producers' Marketing Board (1977) 69 DLR (3d) 114 at p. 119 et seq. The law with respect to the tort of intimidation is summarized in Huljich v. Hall (1973) 2 NZLR 279 (C.A.) at pp. 285-286, where the following comment is made.

> "The action for intimidation has had recent confirmation in the judgment of the House of Lords in Rookes v Barnard (1964) AC 1129; [1964] 1 All E.R. 367. Rookes v Barnard, as is well known, was an example of the use of unlawful threats made to the plaintiff to interfere with the liberty of action of a third person with resulting damage to the plaintiff. But there can be intimidation by threats to interfere with the liberty of action of the plaintiff himself. As Salmond says (Salmond on Torts 14th ed) 523) 'Although there seems to be little authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him'. But essential to the definition of this tort is the intention on the part of one person to compel another to take a particular course of action. 'Threat' in this connection means 'an intimation by one to another that unless the latter does or does not do something the former will do something which the latter will not like': Hodges v Webb

(1920) 2 Ch 70, 89, per Peterson J. Two recent cases emphasize this requirement of an intention to compel a particular course of action: J T Stratford & Son Ltd v Lindley (1965) AC 269; [1964] 2 All E.R. 209 (in the judgments of the members of the Court of Appeal) and more recently in Morgan v Fry (1968) 2 CS 710; [1968] 3 All E.R. 452 where Lord Denning said:

> 'According to the decision in Rookes v Barnard the tort of intimidation exists, not only in threats of violence, but also in threats to commit a tort or a breach of contract. The essential ingredients are these: there must be a threat by one person to use unlawful means (such as violence or a tort or a breach of contract) so as to compel another to obey his wishes: and the person so threatened must comply with the demand rather than risk the threat being carried into execution. In such circumstances the person damnified by the compliance can sue for intimidation' (ibid, 724; 455)."

55 In discussing the tort of unlawful interference with economic interests, the learned editors of Clerk & Lindsell, supra, put the matter in this way, at p. 425:

> "There exists a tort of uncertain ambit which consists in one person using unlawful means with the object and effect of causing damage to another. In such cases, the plaintiff is availed of a cause of action which is different from those so far discussed. For example, in Stratford (J.T.) & Son Ltd. v. Lindley" (supra) "two of their Lordships gave, as an alternative ground of their decision that an injunction should lie, the fact that the defendants had used unlawful means to interfere with the business of the plaintiffs. 'In addition to interfering with existing contracts the respondents' action made it practically impossible for the appellants to do any new business with the barge hirers. It was not disputed that such interference with business is tortious if any unlawful means are employed.' Such 'interference with business' does not require proof that existing contracts have been broken or interfered with; but the cause of action exists only when the defendant has brought about the damage by use of unlawful mans. As in the torts earlier discussed, damage is clearly essential to the cause of action and such damage must be shown to have been, or to be about to be, caused by the unlawful interference."

56 The facts outlined earlier in these reasons support the finding by the learned trial judge that individual members of the Band were guilty of harassment of Mintuck and interference with his operation of the farm. In my view, these acts constitute the torts of intimidation, and unlawful interference with Mintuck's economic interests. If the Band council had not entered the dispute in its official capacity, the Band could not be held liable for damages suffered by Mintuck as a result of the earlier tortious acts. Nor could the participation of Chief Lynxleg, as a party to the harassment, make the Band liable. But the Band took official actions which had the effect of adopting the tortious acts of its members. It sent the letter of June, 1972, passed the resolution of September, 1972, did not meet with Mintuck, and took possession of the land.

57 These acts of the Band council must be considered in relation to the earlier events. The earlier wrongful acts of individual Band members were supported and reinforced by the council. The effect of the council's actions must have been expected. Plaintiff, by the conjunction of the acts of the Band members and the acts of the council, way precluded from asserting his rights under the lease.

58 The suggestion by defendants that Mintuck is still the lessee and could therefore use the land if he chose, has a hollow ring, in view of the history of the relationship between the parties.

The court is obliged to look at the factual situation and to determine the applicable legal principles in light of these facts; we cannot decide the case in a vacuum. It is true that the contract between Mintuck and the federal Crown was not breached in a strict legal sense; Mintuck is still the lessee. But to all intents and purposes, as a result of harassment by Band members, he has lost the benefit of the lease by being prevented from using the land. The effect is exactly the same as if he were no longer the lessee.

59 There is a discussion of the ancient doctrine of ratification of torts in the text Vicarious Liability in the Law of Torts by P. S. Atiyah. After discussing this concept in relation to the modern law of torts, the learned author, at p. 314, refers to Sedleigh-Denfield v. O'Callaghan et al (1940) A.C. 880 (H.L.) (a case of nuisance) as an example of liability in tort resting on the adoption of an act of another where no question of agency arises, and makes the comment:

> "... but such liability has never been rested on ratification though clearly it has affinities with it."

60 At pp. 904-905, in Sedleigh-Denfield, Lord Wright said:

> "Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it ..."

61 I see no reason, in principle, to limit the doctrine to cases of nuisance. I believe the proposition may be applicable to the torts under consideration in the case at bar, if the facts warrant it. In my opinion, under the circumstances here, the actions of the Band council make the doctrine applicable to the Band.

62 Did the council have knowledge of the harassment when it took official action? All the councillors lived on the reserve. Chief Lynxleg was a party to the harassment and was aware of complaints of interference made by Mintuck to the R.C.M.P. Lawrence Ironstand, one of the councillors, acknowledged that when he was on the council, complaints were received from Mintuck about interference with working the land. It is a reasonable conclusion that the councillors knew of the harassment. It was with the possession of that knowledge that the letter of June 27 was sent to Mintuck, calling on plaintiff to work the land.

63 There was no apparently valid reason for sending the letter. The learned trial judge found (and the evidence supported that finding) that Mintuck is an excellent farmer and a good manager of his farming operations. In the absence of interference, it is reasonable to infer that he would have performed his duties as lessee and there would not have been any need to advise Mintuck on how to farm the land. Nor was there any true need for the Band to assume

the responsibility of maintaining the land. The letter and the taking over of maintenance of the land served as official sanction for the harassment which, up to that point, had merely been the actions of individual members of the Band. The prejudicial position of the Band was compounded by the refusal of the Band council to meet with Mintuck.

64 The resolution in September, although it did not come to the attention of Mintuck immediately and had no effect on him, neutralized the Department of Indian Affairs who were placed in the invidious position of not being able to help Mintuck because of the official stance taken by the Band. And it was evidence to support the finding of the learned trial judge that the Chief and council of the Band had "endorsed" the harassment of plaintiff.

65 These acts of the council can only be explained on the basis that the council was adopting the prior tortious acts of Band members and impliedly approved those acts. Harrisons & Crossfield, Limited v. London and North-Western Railway Company (1917) 2 K.B. 755 at p. 758. By virtue of these official acts of its duly elected council, the Band became liable for the torts of intimidation and unlawful interference with Mintuck's economic interests. Plaintiff suffered deprivation of his rights and the Band became responsible for damages ensuing from that deprivation.

66 I would dismiss the appeal of defendants from the award of damages.

67 Because of that conclusion, it is not necessary to consider the nature and effect in damages, of the taking of possession of the land by the Band council.

Cross-appeal:

68 Plaintiff cross-appealed, alleging error on the part of the learned trial judge in not finding the Band is a legal entity or body corporate capable of being sued and in not allowing a higher amount for damages. Appellant also appealed the quantum, alleging errors in law and in fact, on the part of the learned trial judge in making the allowance of $10,000.00.

69 I have dealt with the status of the Band earlier in these reasons.

70 The learned trial judge said that the evidence on quantum was "not very good". I agree with that statement.

71 Solomon, J., mentioned two factors in particular, - loss of profit for a seven year period (which he discounted substantially) and loss of money by plaintiff on the balance of his operations because his expenses had to be met solely from the receipts from his other land, - a much smaller acreage. He then said that "taking all factors into consideration" he would allow $10,000.00 by way of damages.

72 The rights of the lessee and thus his economic interests have been adversely affected by the torts of defendants which prevented Mintuck from using the land. The extent of that effect cannot be determined with precision. Although there may be arithmetical errors in the method used by the learned trial judge and there nay be arguable bases for increasing or decreasing the quantum, I am satisfied that the figure allowed is a reasonable one. It is not one which calls for interference by an appellate court.

73 In the result, I would dismiss the appeal with costs and would dismiss the cross-appeal without costs.

MATAS J.A.

O'SULLIVAN J.A.

74 I agree that the appeal and the cross-appeal should be dismissed but I am unable to agree entirely with some of the opinions expressed by the learned trial judge or these expressed by my brothers Guy and Matas.

75 The facts are set out in their reasons for judgment.

76 The learned trial judge awarded to the Plaintiff $10,000.00 in damages basing himself on "the principle of law that interference by a third party with contractual relations between two other parties is actionable."

77 He relied on Lumley v. Gye (1843-60) All E.R. 208, 117 E.R. 749. Temperton v. Russell (1893) 1 Q.B. 715, and Posluns v. Toronto Stock Exchange (1965) 46 D.L.R. (2d) 210.

78 With respect I think the learned trial judge erred in basing himself on interference with contractual relations.

79 The lease between the Plaintiff and the Queen has not been cancelled in law or in fact. There has been no breach whatever of the Plaintiff's contractual relationship with the Queen. Legally the Plaintiff has always been entitled to go to his farm and work it.

80 As the editors of Clerk and Lindsell on Torts (14th ed.) para. 794, say:

> "... on principle, if no breach eventuates, there should be no tort ..."

81 I am aware of the dicta of Lord Denning, M.R. in Torquay Hotel Co. Ltd. v. Cousins et al (1969) 2 Ch. 106 at 138:

> "... The time has come when the principle should be further extended to cover 'deliberate and direct interference with the execution of a contract without that causing any breach ..."

82 Lord Denning's dicta have been mentioned with apparent approval in a number of Canadian cases, including Einhorn v. Westmount Investments Ltd. et al (1969) 6 D.L.R. (3d) 71 by Disbery, J. of the Saskatchewan Court of Queen's Bench, and Mark Fishing Co. Ltd. et al v. United Fishermen & Allied Workers Union et al (1972) 24 D.L.R. (3d) 585 by Maclean, J.A. and Robertson, J.A. of the British Columbia Court of Appeal. The judgment was affirmed on further appeal to the Supreme Court of Canada (1974) 38 D.L.R. (3d) 316.

83 Nevertheless I would not be prepared to follow Lord Denning's view without a decision to do

so by the Supreme Court of Canada. I think the law in Canada is that expressed by Lord Donovan in J.T. Stratford & Son Ltd. v. Lindley et al (1965) A.C. 269 at p. 340:

> "... The argument that there is a tort consisting of some indefinable interference with business contracts, falling short of inducing a breach of contract, I find as novel and surprising as I think the members of this House who decided Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch (1942) A.C. 435 would have done ..."

84 To like effect are the dicta of Viscount Simonds for the Judicial Committee of the Privy Council in Attorney-General for New South Wales v. Perpetual Trustee Co. (Ltd.) et al [1955] 1 All E.R. 846 at p. 854:

> "It does not appear to their Lordships that Lumley v. Gye throws much light on the problem to be solved in the present case. If the law had developed in all respects logically, that case would be an authority for saying that, if Miss Wagner had not been maliciously enticed from the service of the Plaintiff but had been, by battery or otherwise, wrongfully prevented from serving him, the Plaintiff would have had a good cause of action against the wrongdoer. But it has never been suggested that that is the law ..."

85 In any event, I do not think that it is appropriate to invoke the tort of unlawful interference with contractual relations when a Defendant acts directly against the Plaintiff. If the Queen were to sue the Defendants on the ground that the Defendants by their actions against Mintuck interfered with his carrying out of his contract with the Queen, thereby causing damage to the Queen, that would be a case for considering the tort of interfering with contractual relations. Again, if the Queen in this case had broken the lease or otherwise ceased to carry out her obligations under the lease and if Mintuck sued the Defendants for damages arising therefrom, that also would be a case requiring consideration of the tort of interference with contractual relations.

86 On the facts of the case before us, however, it seems to me that for the Plaintiff to recover against the Defendants, he must establish what is sometimes called a "two-party" tort.

87 There is no doubt that the Plaintiff suffered damage in 1970 and 1971 as a result of harassment on the part of certain band members aimed, as the learned trial judge said, "at getting the Plaintiff to abandon his rights to the lease he had to the new farm."

88 I am unable to see, however, how this harassment was adopted by the band through the band council.

89 I agree with the learned trial judge on this branch of the case. As he said,

> "There was no evidence before the court that the defendants, in their personal capacity, were in any way responsible for such damage, nor could the Band be held liable for those actions."

90 Indeed, counsel for the plaintiff recognized this when he abandoned the claim for damage done by individual members of the Band.

91 What the learned trial judge awarded damages for was the loss which the Plaintiff sustained as a result of not being able to enjoy his leasehold interest in the farm. He held that the Plaintiff

had lost approximately $2,000.00 per year for seven years, the years 1973-1979 inclusive, and he capitalized this loss at the round figure of $10,000.00.

92 The damages awarded by the learned trial judge are, therefore, damages for loss of use of the leasehold land. The Plaintiff has not farmed the land since 1972 and he therefore suffered damage.

93 I think the reasons that the Plaintiff did not farm the land since 1972 are twofold. On the one hand, he was afraid to do so because of the acts of intimidation and personal violence on the part of individual Band members. If this were the only reason, he would have no cause of action against the Band itself and he has, in any event, abandoned this aspect of his claim.

94 But, another reason for his not farming the land is that the Band itself dispossessed him. Such dispossession was wrongful.

95 The chief of the Band, Clifford Lynxleg, said on his examination for discovery:

> "164. Do I understand you to say that the Valley River Band has retained possession of this quarter section of land, namely, NE 1/2 of 4 from sometime in the summer of 1972 until the present tine?
>
> A. Yes."

96 I, therefore, think that there was evidence to justify a finding that the Band was guilty of the two-party torts of intimidation and unlawful interference with economic interests. I also think the facts justify a finding of trespass quare clausum fregit.

97 The damages flowing from the torts, which resulted in dispossession by the Band, must he limited to the years 1972, 1973, 1974, 1975 and perhaps 1976. In 1976, at the time of the trial, the Plaintiff could have recovered possession of the farm but chose not to do so. He cannot attribute his failure to enjoy the farm in 1977 to 1979 to the torts of the Band.

98 The learned trial judge gave damages for the years 1973-79. I think it was error for him to do so, but when confronted with the question of what amount should be awarded, I am faced with the problem that the damages are not susceptible of precise quantification.

99 There is no doubt that the Plaintiff sustained a significant loss. It may be that he did not do all he could to mitigate his damages, but that was for the Defendant to plead and prove.

100 Far from pleading mitigation, far from offering the Plaintiff to cease their unjustified dispossession, the Defendant Band admitted in their Statement of Defence that the Band had cancelled the Plaintiff's lease by its resolution of September 14, 1972 and claimed to be justified in so doing. It was only at the trial in 1976 that the Defendants submitted that the lease in fact had not been cancelled and that the Plaintiff could resume possession.

101 Under all the circumstances, I would not interfere with the global sum at which the learned trial judge assessed the damages.

102 On the questions of the band's suability and the jurisdiction of Manitoba's courts, I agree with the conclusions reached by my brothers and by the learned trial judge.

103 I do not think that the Band is an artificial person but the funds of the group can be got at in a proper case by naming individuals to represent the Band and by giving judgment, as was done here, with the right of execution limited to the assets of the Band.

104 While normally a nunc pro tunc order should be made only in rare cases, I agree there were special circumstances in the case before us, where counsel moved for the first time at trial to dispute a matter which had been admitted in the statement of defence.

105 Subject to proper amendments being made on the record, I accordingly agree that the appeal should be dismissed with costs and the cross-appeal should be dismissed without costs.

O'SULLIVAN J.A.

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