C9979

COURT OF APPEAL FOR ONTARIO

TARNOPOLSKY*, KREVER and ARBOUR JJ.A.

B E T W E E N :	
DON HOPTON, DAVID FOOTE, EDWIN KLINE, and HILKKA NUPPONE, on their own behalf and in their capacity as officers of the SKERRYVORE RATEPAYERS ASSOCIATION, and ELENOR NEWPORT, SHARON KAMM and JOHN DRABUK, on their own behalf and in their capacity as directors of the SKERRYVORE RATEPAYERS ASSOCIATION, and the ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO Plaintiffs (Respondents) -and- WAYNE PAMAJEWON, ROGER JONES, MARGARET JONES and SUSAN PAMAJEWON, in their personal capacities and in their representative capacities on behalf of all members of the SHAWANAGA BAND OF INDIANS, and the ATTORNEY GENERAL OF CANADA Defendants (Appellants)	*David Nahwegahbow* and *Roger Daniel Jones* for the appellants Wayne Pamajewon, Roger Jones, Margaret Jones, and Susan Pamajewon, in their personal capacities and in their representative capacities on behalf of all members of the Shawanaga Band of Indians *Marlene Thomas* and *Nanette Rosen* for the appellant the Attorney General of Canada *J.T.S. McCabe, Q.C.* for the respondent the Attorney General of Ontario No one appearing for the other plaintiffs (respondents) ***Heard***: June 25, 1993

BY THE COURT:

This is an appeal from a judgment of Montgomery J. declaring that Shawanaga Road is a public road and granting a permanent

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* Tarnopolsky J.A. died on September 15, 1993.

injunction restraining the Shawanaga Band of Indians [the Band] from preventing public access to the road.

The Geography and History of the Road

The case proceeded at trial on the basis of a detailed Agreed Statement of Facts, and some *viva voce* evidence. A map of the area was attached to the Agreed Statement of Facts for use at trial and is reproduced as an appendix to these reasons. As shown on the map, Shawanaga Road runs some five miles through Shawanaga Indian Reserve (Reserve No. 17) from Highway 559 (Shebeshekong Road) to the western boundary of the Reserve. From there it continues west through Crown land to Shawanaga Landing (Reserve No. 17B) on Georgian Bay. The Shawanaga Band who live on these reserves are part of the Southeastern Ojibwa of the north shores of Lake Huron and Georgian Bay. In 1850, Chief Muckatehmishoquot of the Shawanaga Band was among those who signed the *Robinson-Huron Treaty* surrendering the land save and except several areas which became reserves. The portion of Shawanaga road at issue in this action travels through Reserve 17 and, therefore, is on unsurrendered land.

The first reference to any major road in the area was to the "North West Road" in the Report of Colonization Roads for 1871. The North West Road began as a short road leading north-west from Parry Sound Village and was built for the purpose of settlement. The Government of Upper Canada, and subsequently Ontario, funded

the construction of arterial roads such as the North West Road entirely but its support for the development of access roads was limited to subsidizing the efforts of local residents and industry.

Each year, the North West Road was extended a short distance and in 1879 it entered Reserve 17. Years later, in 1934, the Province of Ontario replaced it with Highway 559 (the "Shebeshekong Road"). Although the right-of-way was not formally transferred to Ontario, the matter was resolved by the Band and the Department of Indian Affairs. Highway 559 now connects with the Trans-Canada Highway which was built across the north-east corner of the Reserve in 1958 after a formal surrender and the payment of compensation pursuant to a Band Council Resolution and the consent of the Governor-in-Council.

Returning to the origins of Shawanaga Road, Reserves 17 and 17B were home to the Shawanaga Band and, although access between Reserve 17 and Parry Sound was facilitated by the North West Road, Shawanaga Landing (Reserve 17B) could only be reached from Parry Sound by a water journey of several hours duration. Thus, during the 1880's the Band cut a trail that branched off from the North West Road and travelled west through Reserve 17, out through Crown land, and on to Shawanaga Landing.

Shawanaga Road was and continues to be an unpaved sand-based road. Roads in the area are difficult to maintain because

the terrain is rough and rocky, the underbrush grows up, the winters are severe and fires cause crosslay to burn and trees to fall across them. In 1889 the Shawanaga Band wrote to the Commissioner of Crown Lands for assistance in repairing Shawanaga Road noting its use by lumbermen and for Her Majesty's mail and observing it to be "one of the useful roads in this section of the country". The Province granted the Band funds for maintenance in the two years following and Chief Pawis oversaw the work. With the exception of this occasion, though, Shawanaga Road was maintained by statute labour performed by band members and others until the 1920's. Statute labour was the duty imposed on certain male residents to contribute their labour to the maintenance of roads and highways.

With the advent of the automobile, it became desirable to fit the road for a new kind of traffic. In 1923 the Band purchased two road scrapers and in 1924 approval was given by the federal Department of Indian Affairs for an expenditure from the Band's capital fund to improve the road. When the provincial Minister of Public Works refused a petition in 1927 by band members and local residents for a grant to make the road safe for motor traffic, the Band resolved to spend its own funds. However, on the advice of John Daly, the Indian Agent in Parry Sound, the federal Department of Indian Affairs denied authorization for the expenditure. The following year, after further petitions, a grant was made to make two miles of the road safe for motor traffic.

John Daly and the local member of the legislative assembly sought jointly to reach agreement between the federal and provincial governments on sharing the cost of the road work. Some expenditures were made on both sides over the next few years and the Band bought a grader in 1931. In 1932, the Department of Indian Affairs asked the Province whether it would be willing to work on the two mile stretch of the road between the Reserves which was on Crown land. The Province replied that it had insufficient funds and the Band restricted their efforts for the remainder of that year to the portions inside the Reserves. John Daly wrote to the Secretary of the Department of Indian Affairs expressing his indignation that the Band, having maintained the road for over half a century, and having permitted non-members to use it, would continue to be saddled with the responsibility of maintaining the portion that passed through the Crown land between their reserves.

Although the *Highway Improvement Act* (colloquially known as "The Good Roads Act") had been passed over a decade earlier, Shawanaga Road was among those that remained under the jurisdiction of the provincial Department of Northern Affairs and funds for road works were generally not forthcoming. *Ad hoc* agreements were reached to share the cost of road work undertaken in 1935-38, but it was not until the responsibility for roads which had previously come under the *Northern Development Act* was transferred to the Ministry of Highways that Shawanaga Road began to benefit from the subsidies provided under the *Highway Improvement Act*. In 1939,

with the approval of the federal government, the Shawanaga Band passed a resolution abolishing statute labour on its reserves, as required by the Ontario Highways Department in order to become eligible for the subsidies allocated to road repair under the *Highway Improvement Act*. From that time until 1988 about 60% of the funds required to maintain Shawanaga Road came from the Province. The balance came from the federal government or Band funds and sand and gravel were provided by the Band at no extra charge. As discussed below, since 1988, the Province has maintained the road entirely.

Correspondence in 1939, 1947 and 1954 indicates that improvement of Shawanaga Road was necessary and beneficial for tourist and personal traffic, although Band use accounted for about 90%. Since the 1950's the Band or its lessees have operated a tourist facility including rental cottages and a marina at Shawanaga Landing (Reserve 17B) and for over half a century vacationers destined for Skerryvore were a source of revenue as they travelled to Shawanaga Landing and from there to Skerryvore by boat.

In 1892/93, Ole Hansen settled on Georgian Bay a short distance north of Shawanaga Landing at the place that later came to be known as Skerryvore. He was granted a patent in 1899 upon performing the required settlement duties. In 1908 a hotel was opened there. In 1961-62, Bert Taylor received permission and a

50% subsidy from the Province to build Skerryvore Road, connecting Skerryvore to the stretch of Shawanaga Road that is between the Reserves. Between 1969 and 1972 the houses and cottages of Skerryvore were built and sold. During the construction period, the developer received permission from the Band to erect signs along Shawanaga Road, directing motorists to the Skerryvore development. At the time of the trial, approximately 22 families lived year round at Skerryvore.

In the mid 1970's the Shawanaga Band began to receive complaints from Skerryvore cottagers concerning the condition of Shawanaga Road. The Band considered the matter and decided that it was financially unable to improve the standard of maintenance. In 1976, it came to the attention of the Ministry of Transportation and Communication that Shawanaga Road was in disrepair, the Band was financially incapable of undertaking reconstruction and the Skerryvore Local Roads Board did not have jurisdiction to expend funds for road works within the Reserve. The Ministry allotted funds for clearing, grading, drainage and granular base from the west end of Shawanaga Village to the west boundary of the Reserve and the Band supplied the sand fill.

In 1976, the Band passed a by-law under Section 81 of the *Indian Act* restricting the use of the road on the Reserve. In the winter of 1977-78, the Skerryvore Local Roads Board paid for snowploughing on a portion of the road on the Reserve. In 1978,

Chief Margaret Jones wrote to the Skerryvore Local Roads Board stating that the Band considered Shawanaga Road to be a private road and that anyone using the road without either the Band's consent or a licence would be considered a trespasser. A draft form of a licence was enclosed. By resolution on April 13, 1981, the Band Council stated that the Road would be closed to the general public until satisfactory arrangements could be made for the Band to receive compensation for the use of the Road. On April 30, a notice to this effect was published in the local newspapers and in Toronto.

Residents of Skerryvore commenced this action, and were granted an interim injunction in May of 1981 to restrain the Band from interfering with access to the Road. The Band has complied with the injunction and since then the Province has paid the entire cost of maintenance and repair of the Shawanaga Road from the Band Village to the western boundary of the Reserve.

The Decision Below

In a decision released February 19, 1990, Montgomery J. found the following facts:

> – At all times from 1850 the public has had unimpeded use of Shawanaga Road. In 1978, but not before, the appellant Band took the position that the road is a private road and that the Band could and would prevent use of it by the public without payment to the Band.

- Rather than object to public use of the road, the Band encouraged such use to 1978.
- Statute labour on the road was abandoned by the Band in order to enable provincial expenditure for its repair and maintenance.
- The federal Department of Indian Affairs has always considered the road to be a public road.
- The Province of Ontario has spent money on the maintenance and repair of the road at the invitation of the chiefs of the Band and the federal Department of Indian Affairs over many years.

Montgomery J. then declared Shawanaga Road to be a public highway by virtue of the common law doctrine of dedication and in addition, or in the alternative, by virtue of a provision in a pre-Confederation statute regulating roads travelling through Indian lands which continues in force in Ontario as s. 257 (now s. 261) of the *Municipal Act, R.S.O. 1990, c.M.-45.*

Issues

I The Doctrine of Dedication

At issue is whether the common law doctrine of dedication applies to unsurrendered land to permit rights to accrue to the public through a course of conduct on the part of either or both the Shawanaga Band and the Federal Government. The Band and the Attorney General of Canada submit that unsurrendered land is inalienable except through formal surrender to the Crown pursuant to the *Indian Act* and the applicable treaty law. On the other hand, the Attorney General of Ontario contends that the common law

applies without distinction to unsurrendered land unless a statute clearly provides otherwise.

At common law, to establish that a road has been dedicated to public use in perpetuity, the party advancing the claim must demonstrate:

(a) an intention on the part of the owner to dedicate, and

(b) acceptance by the public of the road as a highway.

(*Reed v. Lincoln* (1974) 6 O.R. 391 at 395 (C.A.))

The intention to dedicate is a matter of fact that may be inferred from the surrounding circumstances: *Eyre v. New Forest Highway Board* (1892), 56 J.P. 517 at 517 (U.K. C.A.); *Rideout v. Howlett* (1913), 13 D.L.R. 293 at 296 (N.B.C.A.); *O'Neil v. Harper* (1913), 28 O.L.R. 635 at 644. However, as noted in *O'Neil, supra*, at 643,

> the proper way of regarding these cases is to look at the whole of the evidence together ... [because] a dedication must be made with intention to dedicate. The mere acting so as to lead persons into the supposition that the way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction. (citing Lord Denman CJ. in *Barraclough v. Johnson* (1838) 8 A.& E. 99 at 103).

Since a finding of dedication results in the disposition of an interest in land, the whole of the evidence must be carefully

examined to ensure that the disposition was, in fact, intended. In some cases, permitting the public to pass over one's land was found to merely indicate an intention to act as a "good neighbour" and not an intention to dedicate a road. In such cases, the road did not become public: *Bateman v. Pottruff*, [1955] O.W.N. 329 (C.A.); *Reed v. Lincoln* (1974), 6 O.R. (2d) 391 (C.A.).

In *Dunstan v. Hell's Gate Ent.* (1987) 45 D.L.R. (4th) 677, 20 B.C.L.R.(2d) 29 (B.C.C.A.), several river rafting companies sought use of an access road on a reserve between Lytton-Lilloet Highway and a sandbar on the Fraser River where they launched their rafts. All but one were content to contract with the Band for the use of the road, but Hell's Gate Enterprises insisted that the road was a public highway. The British Columbia Court of Appeal held that the evidence of use and public expenditure was insufficient to establish an intention on the part of the Crown to dedicate the trail to the public for use as a highway through dedication. Rather, the Court found that the expenditures merely reflected a recognition on the part of the Crown of a public responsibility to make travel over the trail a little easier, in the absence of available roads. In coming to that conclusion the Court referred to the Manitoba Court of Appeal in *Taylor v. Clanwilliam*, [1924] 4 D.L.R. 218, [1924] 2 W.W.R. 1153, 34 Man. R. 319 in which Mathers C.J.K.B. cited with approval the following passage from the English case of *Dunlop v. York*:

> In a new country like Canada it would never do to admit user by the public too readily as evidence of an intention to dedicate. Such user is very generally permissive, and allowed in a neighbourly spirit, by reason of access to market or from one part of a township to another, being more easy than by the regular line of the road, than the rights of the owner should be affected.

Chief Justice Mathers goes on to speak of the prairie landowner

> ...who never dreams of objecting until it becomes necessary to use the land and who would be surprised by the suggestion that his friendly tolerance might be construed as evidence of the dedication of a public right-of-way

With regard to the Shawanaga Road, the learned trial judge examined the evidence concerning the history of the use and maintenance of the road and concluded that "a proper inference of intention to dedicate the road as a public road can be drawn with respect to both the Band and the Department of Indian Affairs."

With respect, quite apart from the principles referred to above with respect to findings of dedication, we do not think that it was open to the trial judge to reach that conclusion, in light of the *sui generis* nature of native title. The nature of Indian interest in land was described in *C.P.R v. Paul*, [1988] 2 S.C.R. 654 at 677 as follows:

> Before turning to the jurisprudence on what must be done in order to extinguish the Indian interest in land, the exact nature of that interest must be considered. Courts have generally taken as their starting point the case of *St. Catherine's Milling and Lumber Co. v. the Queen* (1888), 14 App. Cas. 46 (P.C.) in which Indian title was described at p. 54 as a "personal and usufructuary right". This has at times been interpreted as meaning that Indian title is merely a personal right which cannot be elevated to the status of a proprietary interest so as to compete on an equal footing with other proprietary interests. However, we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown .... This feature of inalienability was adopted as a protective measure for the Indian population lest they be persuaded into improvident transactions ....

The nature of native title, including the feature of inalienability, is inconsistent with the doctrine of dedication being applicable to unsurrendered land. Both treaties and statutes reflect the concern that native land customs might be misconstrued, and in particular, that failure by the Indians to assert proprietary rights against others might result in unintended transfers of those interests. The *Royal Proclamation*, the *Robinson Huron Treaty* and the successive *Indian Acts* all prohibit the disposition of any part of unsurrendered land except through formal surrender to the Crown. The *Royal Proclamation* stated

> And We do thereby strictly forbid, on Pain of our Displeasure, all our loving subjects from making any Purchases or Settlements whatever,

> and taking possession of any of the Lands above reserved, without our special leave and Licence for that purpose first obtained. (*Royal Proclamation of 1763*, R.S.C. 1985, Appendix II, No. 1)

and the *Robinson-Huron Treaty* of 1850 provided that the Chiefs and principal men

> ... further promise and agree that they will not sell, lease or otherwise dispose of any portion of their Reservations without the consent of the Superintendent-General of Indian Affairs ....

It is a well established principle of interpretation that "treaties and statutes relating to Indians should be construed liberally and doubtful expressions resolved in favour of the Indians" so that the terms are understood "in the sense in which they would naturally be understood by the Indians": *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36; *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 402; *R. v. Sioui*, [1990] 1 S.C.R 1025 at 1031. Accordingly, neither the fine distinction urged by the Attorney General of Ontario between the dedication of a road and the "alienation" or "disposition" of property in the soil, nor the subtle evolution of the phraseology in the applicable sections of the *Indian Act* can operate to render the doctrine of dedication applicable to unsurrendered land if the application of that doctrine violates the way in which the treaty would naturally be understood to operate by the Indians.

The Shawanaga Band were entitled to govern themselves in accordance with a reasonable belief that, in the absence of formal surrender to the Crown pursuant to the applicable treaty and statute law, their interests in their land were fundamentally inalienable. Thus, the common law doctrine of dedication is not applicable to unsurrendered land. Put differently, it can be said that the *sui generis* nature of Native title renders impossible an inference of an intention to dedicate, ie., to transfer permanently to the use of the public a previously private right of way.

The respondent Attorney General of Ontario submits that for the purposes of the law of dedication, the owner of the land is Canada, and that, by 1939, federal officials had indicated an intention to dedicate. The respondent contends that the Superintendent General was empowered by ss. 4-5 of the *Indian Act* to dispose of unsurrendered land and that the conduct of the officials of the Department of Indian Affairs resulted in the dedication of Shawanaga Road to public use notwithstanding the absence of an order-in-council, surrender or other formal procedure.

The relationship between the Crown and Indians with respect to their land has been characterized as a one of trust, but once again, this is only a characterization. In *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 387, Dickson CJ. said that "the fiduciary obligation which is owed to the Indians by the Crown is

sui generis". This has been interpreted by Professor Hogg to include

> duties that are foreign to the traditional meaning of a fiduciary. In particular, an obligation to consult with aboriginal people before their interests are affected by governmental action ... although a traditional trustee is rarely under any obligation to consult the beneficiaries in the course of administering the trust. (Hogg, *Constitutional Law of Canada* 3rd ed. (1992) at 681n.)

Moreover, the finding in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099 that extinguishment of aboriginal rights whether by voluntary surrender, by statute, or by constitutional amendment, would not be inferred from unclear language, casts doubt on the claim that a treaty-based interest in land could be transferred by an inference drawn from the independent conduct of government officials. Compelling support for this can be found in the concurring judgment of Wilson J. in *Guerin, supra*, at 349, 352 where she holds that the Indian interest "cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree" and that "Indian title has an existence apart altogether from s. 18(1) of the *Indian Act* ... [and i]t would fly in the face of the clear wording of the section to treat that interest as terminable at will by the Crown without recourse by the Band." In sum, the Crown owed a fiduciary obligation to the Shawanaga Band in respect of their land and was incapable of

disposing of that land without consulting with them; and a disposition could not be inferred in the absence of clear statutory language. Accordingly, the conduct of government officials was incapable of resulting in a dedication of Shawanaga Road to public use. Moreover, this argument proceeds on the assumption that unsurrendered land on a reserve is capable of dedication, be it by the Band or by government officials. We are of the view that it is not.

It is instructive that no case of road dedication involving unsurrendered land was cited. For a road to be found to have been dedicated based on a course of conduct, it must be possible to draw an inference of the owner's intentions from the owner's actions. We do not think that such an inference was open in the present case.

II Application of s. 257 of the *Municipal Act*

Section 257 of the *Municipal Act*, R.S.O. 1980, c. 302 provides, *inter alia*, that "...all roads passing through Indian lands...are common and public highways." The trial judge held that Section 129 of the *Constitution Act, 1867* mandates that pre-confederation law will continue and that it follows from s. 129 that s. 257 of the *Municipal Act* dominates over the *Indian Act* in light of its origin in a pre-confederation statute. Section 12 of *An act to provide for the laying out, amending, and keeping in repair the public highways and roads in this province, and to*

repeal the laws now in force for that purpose, came into force in 1810 and provided in part that "any roads passing through the Indian lands, shall be deemed to be common and public highways" (50 Geo III, c. 1, (U.C)).

On its face, s. 257 may appear to suggest that neither dedication nor any other means of acquisition is necessary for roads passing on Indian lands to become public highways. However, such broad interpretation was rejected in *Byrnes v. Bown* (1851), 8 U.C.Q.B. 181 at 184, where the court observed that

> It never could have been meant by that clause that every bye-road or short cut used by the Indians across the plains or the flats was to be established as a permanent highway .... The meaning of that clause, I think, is, that roads which, under the provisions of that act were to acquire the character of legal highways, should have that same legal character where they passed through Indian lands as in other parts of their course, although they might not be (as to such portions of them) public allowances made in any original survey, nor had any public money been expended or statute labour performed on them.

In any event, at the hearing of the appeal, counsel for the Attorney General of Ontario withdrew his argument based on the pre-confederation statute, and conceded that it had been repealed by post-confederation federal legislation. The year after Confederation, the new Parliament enacted *An act providing for the organization of the Department of the Secretary of State of Canada*

and in the Management of Indian and Ordnance Lands, S.C. 1868, c. 42. It contained the following provisions:

> s.6 All lands reserved for Indians or for any tribe, band or body of Indians or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions and no such lands shall be sold, alienated or leased until they have been surrendered to the Crown for the purposes of this Act.
>
> s.42 So much of any Act or law as may be inconsistent with this Act, or as makes any provision in any matter provided for by this Act, other than such as is hereby made, is repealed, except only as to things done, obligations contracted, or penalties incurred before the coming into force of this Act.

Moreover, Parliament has legislated extensively in successive versions of the *Indian Act* with respect to the maintenance and the use of roads on reserves, as well as with respect to the nature of reserve lands. The doctrine of paramountcy prohibits giving s. 257 of the *Municipal Act* the interpretation adopted by the trial judge. Properly interpreted, s. 257 of the *Municipal Act* cannot mean that roads on or passing through Indian lands become public highways by the simple operation of that section. This would be legislation in relation to a matter coming within the exclusive legislative authority of Parliament and, as such, would be *ultra vires*. Section 257 of the *Municipal Act* can do no more than declare public highways for valid provincial purposes roads that have become public highways pursuant

to the provisions of the *Indian Act* by surrender to the Crown and transfer of administration and control of the land to the province.

Conclusion

The appeal is allowed with costs. The decision of the trial judge declaring Shawanaga Road to be a public road is set aside and the permanent injunction that was granted is set aside. The portion of the Shawanaga Road located on the Reserve is declared to be a private road.

File No. 9979

COURT OF APPEAL FOR ONTARIO

TARNOPOLSKY, KREVER and ARBOUR JJ.A.

B E T W E E N :

DON HOPTON, DAVID FOOTE, EDWIN KLINE, and HILKKA NUPPONE, on their own behalf and in their capacity as officers of the SKERRYVORE RATEPAYERS ASSOCIATION, and ELENOR NEWPORT, SHARON KAMM and JOHN DRABUK, on their own behalf and in their capacity as directors of the SKERRYVORE RATEPAYERS ASSOCIATION, and the ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO

Plaintiffs
(Respondents)

- and -

WAYNE PAMAJEWON, ROGER JONES, MARGARET JONES and SUSAN PAMAJEWON, in their personal capacities and in their representative capacities on behalf of all members of the SHAWANAGA BAND OF INDIANS, and the ATTORNEY GENERAL OF CANADA

Defendants
(Appellants)

J U D G M E N T

Released: