

2011 CarswellQue 2881, 2011 QCCS 1736

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Bordeau Santore (Estate) v. Bordeau

Estate of the late Theresa Bordeau Santoro, Plaintiff vs Louis (Lewis) Bordeau, Defendant and, Curtis Santoro,  
Cross-Defendant

Quebec Superior Court

Tessier J.C.S.

Heard: December 6-7, 2010

Judgment: April 12, 2011

Docket: C.S. Qué. Montréal 500-17-046281-088

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Counsel: Me Andrew Bird, for the plaintiff

Me Nicholas Dodd, Me David Schulze, for the defendant

Subject: Contracts; Estates and Trusts; Property; Public

***Tessier, J.C.S.:***

#### JUDGMENT

1 Since 1869 and until April 17th, 1985, an Indian woman married to a non-Indian was losing her status as an Indian. Such a fate underlies the present litigation involving the possession of land located in the reserve of Kahnawake near Montreal. Plaintiff Curtis Santoro, the son of the late Theresa Bordeau Santoro, as heir and executor, claims that her estate should have lawful possession of the land in question as a result of a verbal agreement whereby defendant Louis (Lewis) Bordeau would hold the land as a nominee in trust or *prête-nom* for her until her reinstatement as an Indian. Such agreement is denied by defendant who holds a valid certificate of possession issued by the Minister of Indian Affairs and Northern Development.

2 In his motion for declaratory judgment, plaintiff on behalf of the estate asks the Court to declare that the *prête-nom* verbal agreement entered into by defendant and Theresa Bordeau Santoro is valid and opposable to defendant and that the land form part of her estate and should be treated in accordance with her last will.

3 In his contestation, defendant Lewis Bordeau alleges that the land was transferred to him on a permanent and unconditional basis and that he is and should remain in its lawful possession.

4 The Court wishes to point out, at the outset, that this judicial declaration, though it may serve to settle a private dispute, cannot enforce an agreement or ensure a legal transfer of the contested land under the Indian Act [FN1]. Such power belongs to the Minister of Indian Affairs and Northern Development who is the superintendent general of Indian Affairs[FN2]. Section 24 of the Indian Act provides that no transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister. Similarly, a person who claims to be entitled to possession of lands in a reserve by devise or descent shall be deemed not to be in lawful possession of those lands until the possession is approved by the Minister[FN3]. Such ministerial power is consistent with the ownership of the land by the Crown, since a reserve means "a tract of land, the legal title to which is vested in Her Majesty"[FN4].

5 The claim in dispute has to do with the whole of Lot 97, Block F and the whole of Village Lot 305 B in the Indian reserve of Kahnawake.

### **Legal and factual context**

6 Louis Bordeau and his wife Mary Bordeau, both Indians, were living in the reserve of Kahnawake where they raised their children, including Theresa, born in 1928, and Angus, the father of defendant Lewis Bordeau. After the death of her husband, Mary, his sole heir, became the holder of the land in 1954 in accordance with his last will of August 6<sup>th</sup>, 1952. A certificate of possession was issued in her name, as provided by the Indian Act [FN5]. Theresa Bordeau married Thomas Santoro, a non-Indian, in 1953. They had three children: Curtis Santoro, the plaintiff, Louis and Jennifer. Lewis Bordeau and Curtis Santoro are thus cousins. Thomas Santoro died in 1980 and Jennifer Santoro died in 2006.

#### ***1. Prohibition***

7 Upon her marriage to a non-Indian, Theresa Bordeau Santoro lost her status as an Indian and could not hold land on the reserve. S.12(1)(b) of the Indian Act[FN6] then in force provided that "a woman who is married to a person who is not an Indian" cannot be registered as an Indian in the Indian Register (established in 1951). This prohibition was eliminated in 1985 by amendments to the Indian Act[FN7] passed on June 17<sup>th</sup>, 1985 and backdated to April 17<sup>th</sup>, 1985, so that they could conform to the equality provisions of the Charter of Rights and Freedoms[FN8] which had come into force three years earlier on that day.

8 Since April 17<sup>th</sup>, 1985, a person is entitled to be registered as an Indian in the Indian Register if that person is a person one of whose parents, if no longer living, was at the time of death entitled to be so registered [FN9]. Since her father and mother were Indians, Theresa Bordeau Santoro became eligible to recover her Indian status as a result of these new provisions, following an application from her. As mentioned in a letter of December 17<sup>th</sup>, 1997 from Jane Stewart, then Minister of Indian and Northern Affairs, Theresa Santoro recovered her Indian status on January 26<sup>th</sup>, 1987. Such reinstatement is authorized by s.6(1)(c) of the Indian Act as amended in 1985, which provides that a person is entitled to be registered if the name of that person was deleted from the Indian Register under paragraph 12(1)(b) of the Act. Since January 26<sup>th</sup>, 1987, Theresa Santoro was thus entitled to acquire a right to possession of land in Kahnawake, subject of course to ministerial approval. Such entitlement should however be distinguished from actual and legal possession.

#### ***2. Profile***

9 The house of the Bordeau family in the reserve was the childhood home of Lewis Bordeau, an Indian born on [...] 1943. He was close to his grandmother Mary and keeps fond memories of her. She was kind to him, she

was like a mother to him, it was his first real home. After the divorce of his parents, his father Angus lived there with the members of the family. At age 6, he left Kahnawake and moved to Verdun. His father died three years later. He then lived in several other locations. In 1961, he joined the CN in Montreal where he did administration in work until 1979. During that time, he attended Sir George Williams University (which became part of Concordia University) and McGill, to improve his skills and knowledge in management services and administration. After his marriage in 1965, he moved to Chateauguay where he lived during some 30 years, raising with his wife a family of three children. After his divorce in 1999, he spent ten years in North Carolina, U.S.A., where he worked as an event planner. Now aged 67, he is semi-retired.

10 During his early childhood, Lewis Bordeau lived under the same roof in the reserve with his aunt Theresa. Some time after her marriage, at an unknown date, Theresa Santoro moved to Brooklyn, New York, with her children and her mother Mary. Being a non-Indian, she was not legally allowed to reside on the reserve. Still a widow, she died in Brooklyn on May 17th, 2001, at the age of 72. According to the rather scant information provided by her daughter Jennifer and reported in her death certificate, Theresa Santoro had 12 years of schooling and her usual occupation was with the Board of Education in New York. Curtis, her son, grew up in Brooklyn, along with his sister Jennifer. Theresa Santoro would spend her summer vacation in Kahnawake where her sister Ida Bordeau was living in the house still in the lawful possession of their mother Mary.

11 Mary Bordeau died in Brooklyn on September 4<sup>th</sup>, 1973 at the age of 80. Her death prompted a chain of events, ending in the current litigation.

### ***3. The agreement***

12 In her will of September 3<sup>rd</sup>, 1971, Mary Bordeau gave the two lots in the reserve to her daughter Theresa, also appointed executor of her estate.

13 An application for probate of the will dated November 7<sup>th</sup>, 1973 is submitted for approval to the Minister of Indian Affairs and Northern Development by the District Superintendent of the Montreal District — Caughnawaga (as Kahnawake was then called). Listed in the application form are the names of heirs or next of kin, which include Theresa Santoro and Lewis Bordeau. In accordance with the ending note — "if any heir or next of kin is a non-band member please state same" - Theresa Santoro is designated as a non-member. She is ineligible to inherit the land, i.e. their right of possession, notwithstanding her mother's will. In that connection, s.50(1) of the Indian Act[FN10] states: "A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve". This bequest obviously puts the future possession of the land in jeopardy. Lawful possession may be granted only to a member of the band, by definition an Indian, which Theresa Santoro is no longer since her marriage; if not, the right to possession of the land reverts to the band for future disposition[FN11]. For the time being, the two lots remain in the possession of the estate of Mary Bordeau.

14 A letter dated August 14<sup>th</sup>, 1974 from the Estates Section, Land Administration of the Department of Indian and Northern Affairs to the Montreal District Supervisor confirms that legal impediment: "Please advise Mrs. Santoro that she as a non-Indian by marriage, cannot hold land on the Reserve. Therefore the two land assets should be sold". Theresa Santoro intends to keep the land and the house, presumably if only to provide shelter for her older sister Ida and also to keep her roots in that community where she was born and raised. Presumably after being so advised, she finds a solution to this problem: the land will be transferred by the estate to a member of the band and also of the family who will be granted a certificate of possession and who, while not

living there, will allow her, and also her sister Ida to use the house and land as before. The chosen candidate: her nephew Lewis, who lives in Chateauguay, not far from the reserve. Why him? As explained by Curtis Santoro at the hearing, Lewis is the only suitable male in the family eligible for such lawful possession. Curtis, born on [...], 1959 (aged 51 at the hearing) is about 15 in early Fall 1974 and, being a minor, is thus ineligible to hold in his name a certificate of possession. Moreover, being born of the marriage of an Indian lady with a non-Indian man, he was not entitled to be registered as an Indian and, thus, could not hold land on the reserve.

15 An arrangement had to be made with Lewis Bordeau to save and keep the land. What kind of arrangement? Two conflicting versions are offered about what took place, at the heart of this litigation, one by Lewis Bordeau, the defendant, the other one by Linda Louise Bordeau and, also to a certain extent, by Anna Cecilia Charlie on behalf of the plaintiff Curtis Santoro. The evidence is unanimous on one point: the two lots were eventually transferred to Lewis Bordeau, with the consent of Theresa Santoro. With or without a condition? There lies the dispute.

16 First, the testimony of Lewis Bordeau at the hearing and at his examination on discovery of April 6<sup>th</sup>, 2009.

17 After the death of Mary Bordeau, while living in Chateauguay, he received a phone call from his aunt Theresa. She told him there was a problem with the estate because she had lost her status as an Indian, so that the land left by her mother other could not be transferred to her. She asked if the property could be transferred to him: "you will take the land, I will transfer it to you". He replied: "Here is what I can do, I will accept the deal and you may live there until you die". She agreed and told him she would see a lawyer in Brooklyn to have the proper documents prepared. Those documents were sent to him, he signed them at his home and returned them without ever meeting the American lawyer. He kept a copy of the documents in a safe at his house. They were lost when he moved at the time of his divorce and are no longer available.

18 Lewis Bordeau had no physical meeting with Theresa Santoro. Everything, he says, was done by telephone and by mail. The understanding was that Theresa and her sister Ida could use the house until they pass away. He never charged rent and was not involved in the household expenses. Due to this arrangement, life continued as before without any apparent change.

19 Linda Louise Bordeau, aged 66, offers at the hearing a different version about the content and the place of conclusion of this verbal agreement. She is the daughter of John Bordeau, the brother of Theresa, and thus is her niece. She lived in that house of the Bordeau family on the reserve until the age of 5, then lived for one year when she was 6 years old in New York and came back to Kahnawake which she left at the age of 14. She hardly had any contact, if any, with her cousin Lewis since her early childhood.

20 She testifies at the hearing that in the 1970's, late 1970's, she went to the house of Theresa Santoro in Kahnawake, at her request, being informed that she would make a proposal to Lewis Bordeau. She wanted to hear what he would say. She was sitting in a room near the kitchen with Anna Cecilia Charlie, a friend of the family. She heard Theresa speak to Lewis in the kitchen, who asked him: would he sign the property back if she regains her status? He replied: "You will get it back". Being satisfied with that answer, she left immediately the house, without seeing Lewis Bordeau.

21 This testimony means that Lewis Bordeau agreed to hold the land in his name and to transfer it back to Theresa Santoro at her request, if and when she would have regained her status as an Indian and thus would then be legally entitled to have a certificate of possession in her name. Needless to say, this testimony is offered in

support of the plaintiff's motion.

22 Anna Cecilia Charlie, aged 75, never saw Lewis Bordeau. She was sitting in another room with Linda Louise Bordeau. "I could not hear too much. I heard nothing", she testifies at the hearing. Obviously, her testimony cannot support the plaintiff's motion since she has no knowledge about the content of this alleged agreement.

23 Lewis Bordeau denies that such meeting in the kitchen ever took place. Everything was done over the phone. Linda Louise Bordeau and Anna Cecilia Charlie were never present at any meeting he had with his aunt Theresa. He did not even recognize these two witnesses at the hearing. He left the reserve at the age of 6 (i.e. in 1949) and had no contact with them.

#### ***4. Transfer of the land***

24 Using the form "Transfer of Land in an Indian Reserve under the Indian Act", Theresa Santoro transfers the two lots to Lewis Bordeau in consideration of the sum of \$1.00 on June 17th, 1975. These two documents are signed in the presence of a notary public in Nassau County, State of New York. The documents signed on that date for the transfer of the whole of Village Lot no 305 B and the whole of Reserve Lot no 97, Block F, are sent by letter of July 3<sup>rd</sup>, 1975 from the Land and Estates supervisor to the administrator of Estates, both in Kahnawake.

25 A letter dated November 11<sup>th</sup>, 1977 from the Administration of Estates informs the Montreal District manager that "since all legacies are paid, we will now transfer Village Lot 305 B and Reserve Lot 97, Block F, to Lewis Bordeau, to whom Theresa Santoro, non-member, quit claimed her interests. Title document will be issued in due course." On November 18<sup>th</sup>, 1977, the administrator of the estate of Mary Bordeau transfers to Lewis Bordeau the two lots, which is approved on November 22<sup>nd</sup> by the Chief, Property and Estates Management in accordance with section 49 of the Indian Act. These instruments are entered on January 4<sup>th</sup>, 1978 into the Register of Indian Lands in Ottawa in accordance with sections 21 and 55 of the Indian Act. A certificate of possession in accordance with section 20 of the Indian Act is issued on January 16<sup>th</sup>, 1978 by the Registrar certifying that Lewis Bordeau is entitled to the possession of lot 305 B and of lot 97, Block F in the reserve. A new certificate of possession is issued on January 9<sup>th</sup>, 2001 having the same purpose and effect.

26 Theresa Santoro has thus renounced any right she may have in the land. The lawful possession of the two lots has been transferred by her on behalf of the estate of the late Mary Bordeau to Lewis Bordeau. Section 20(2) of the Indian Act provides that "the Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein".

27 Theresa Santoro, then a non-Indian, never had lawful possession of that land. Under the Indian Act, Lewis Bordeau still has the lawful possession of the two lots.

#### ***5. The aftermath***

28 Life went on as before without any visible change. Theresa Santoro, while residing in Brooklyn with her family, continued to go back to Kahnawake during the summer, where Ida was living full time, without any financial contribution to or from Lewis Bordeau. According to the agreement reported by him, they may occupy the house and land for as long as they are using it.

29 The amendments to the Indian Act in 1985 brought some change in the behaviour of Theresa Santoro. After regaining her status as an Indian on January 26<sup>th</sup>, 1987, she wanted to have the land back. According to documentary evidence secured from the Department of Indian and Northern Affairs, she wrote a letter dated July 19<sup>th</sup>, 1988 (not available) followed by a reply of November 18<sup>th</sup>, 1988 from Bill McKnight, then Minister of Indian and Northern Affairs. The letter of the Minister mentions that departmental records indicate that she quit claim her land in the estate of her mother, which choice would appear to have been made freely. "I regret, therefore, that in the circumstances the department is unable to assist you to regain possession of the land." Copy of that letter is not sent to Lewis Bordeau.

30 Theresa Santoro then contacted the Chief of the Mohawk Council of Kahnawake, the late Richard White, who sent a letter of August 14<sup>th</sup>, 1989 to Lewis Bordeau at his address in Chateauguay, whereby he requests the return of the land. "I trust that you honour your word and return her land in the very near future." Lewis Bordeau testifies that he called the Chief of the Band to deny and to rectify the facts alleged in that letter, based on his version of events. Nothing more came from the Band Council.

31 According to documentary evidence in the file, Theresa Bouanani, an attorney in St-Philippe-de-Laprairie, after having written to the Department of Indian and Northern Affairs, received a reply, copy of which (not available) is attached to her letter of September 16<sup>th</sup>, 1997 mailed to Theresa Santoro at her address in Brooklyn. She informs her client that other meetings are going to be set up with the Department. On December 17<sup>th</sup>, 1997, Jane Stewart, then Minister of Indian Affairs and Northern Development, replies to the letter of September 11<sup>th</sup>, 1997 (not available) from Theresa Bouanani. After mentioning that Theresa Santoro had recovered her Indian status on January 26<sup>th</sup>, 1987, the Minister suggests that she contact Lewis Bordeau, to see whether any accommodating arrangements can be made. The previously mentioned letter of Bill McKnight of November 18<sup>th</sup>, 1988 is attached to that reply.

32 No other known steps were taken afterwards by Theresa Santoro to regain possession of the land. Theresa Bouanani has not testified at the hearing, being reportedly unreachable.

33 As mentioned before, Theresa Santoro died at the age of 72 in Brooklyn on May 17<sup>th</sup>, 2001. In her will of August 26<sup>th</sup>, 1999, she bequeaths to her three children, Curtis, Jennifer and Lewis Santoro in equal shares Village Lot 305 B and Reserve Lot 97, while appointing Jennifer as the executrix of her estate.

34 Since at least 1995 until July 2001, Ida Bordeau paid to her sister Theresa a monthly rent of \$200 — much to the later surprise of Lewis Bordeau, unaware of such financial arrangement. At the time of Theresa Santoro's death and since 1999, Lewis Bordeau was residing and working in North Carolina. Ida continued to live alone in the house on the reserve after Theresa passed away. Aged 91 and unable to take fully care of herself due to poor health, Ida needed someone in the house to attend to her needs. Her nephew Curtis Santoro lived with her from May 2004 until mid-July 2006, when she moved to a permanent care facility. He did not pay any rent and stayed there until October 2006.

35 Meanwhile, Curtis and Jennifer Santoro sent a letter dated April 18<sup>th</sup>, 2005 to the Mohawk Council of Kahnawake complaining that Lewis Bordeau was not entitled to have possession of the land in question, mentioning that the house and property had been left to them by their late mother. They also state in it that Lewis Bordeau is not the nephew of her mother, nor a native — which is untrue and not contested at the hearing. This letter mentions that there was an agreement she would sign the property over to him and when she gets reinstated he would sign it back over to her. "We would like to have this issue resolved as Lewis Bordeau is not en-

titled to the above mentioned house and property". The record does not indicate any steps taken by the Band Council as a follow-up to that letter, which Lewis Bordeau had no knowledge of.

36 While in Montreal, Lewis Bordeau visited his aunt Ida at the permanent care center after July 2006 and learned that she had given her key to Curtis Santoro; she believed he was still occupying the house she had permanently left. Lewis Bordeau did not have any prior contacts with his younger cousin Curtis. According to his testimony, Lewis Bordeau believed he was now in a position to take physical possession of the house, no longer to be occupied by his aunt Ida, in accordance with the verbal agreement with his late aunt Theresa. Concluding that Curtis Santoro had no right to live in the house and after ascertaining that the latter was occupying it, he had the door locks changed. Curtis Santoro left the house in October 2006.

37 Lewis Bordeau thus took possession of the house which, he noticed, was in bad shape. He did some renovation work, replacing for instance the toilet, bathtub, showerhead, faucets and the floor of the bathroom, installing new plumbing in the kitchen and later on, changed the entire roof. He lived there during a few years, in the house of his early childhood.

38 In a letter dated October 9<sup>th</sup>, 2008, Yanick Gros-Louis, Estates Advisor at the Department of Indian and Northern Affairs, advised counsel for Curtis Santoro that the Department cannot transfer back the two lots in question to the estate of Theresa Bordeau Santoro, noting that this constitutes a third attempt following the two previous requests on the same subject commented by the Ministers in their letter of November 18<sup>th</sup>, 1988 and December 17<sup>th</sup>, 1997, above mentioned.

39 Curtis Santoro, acting both personally and on behalf of the Estate of the late Theresa Bordeau Santoro, filed in early July 2007 in the Federal Court of Canada, trial division, a statement of claim against Lewis (Louis) Bordeau, seeking a transfer of the land. He also filed in the Federal Court in February 2009 an application for judicial review of the decision rendered in the above mentioned letter of October 9<sup>th</sup>, 2008, invoking in these two cases the verbal agreement in support of the position herein adopted. Both proceedings have since been discontinued without any adjudication on the merit, before the presentation of the present motion in Superior Court.

40 This motion for declaratory judgment seeks a ruling about the current entitlement to lawful possession of the land in question: Lewis Bordeau or the estate of Theresa Santoro?

## **Analysis**

### ***1. Legal consequences***

41 Pursuant to the Civil Code of Quebec, and setting aside for a moment the Indian Act, Theresa Santoro would have been a legatee by general title when her mother bequeathed in her will of September 3<sup>rd</sup>, 1971 the right to possession of the land in question. However, when there are conflicting provisions, the Indian Act prevails over provincial civil law. Section 88 of the Indian Act states that all laws of general application in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with the Indian Act and except to the extent that those provincial laws make provision for any matter for which provision is made by or under the Indian Act. Public law expressed in the Indian Act supersedes private law set out in the Civil Code in case of conflictual provisions.

42 When Mary Bordeau died on September 4<sup>th</sup>, 1973, Theresa Santoro did not and could not become a legatee by general title of the land, because of the prohibition then in force in the Indian Act: she became a non-

Indian following her marriage and thus was barred from acquiring such right of possession by will or descent. The bequest of the two lots is deemed to have lapsed, because that land could not be devolved to her, due to her legal incapacity to accept it. The right of possession remained in the intestate succession of Mary Bordeau. Again, due to her non-Indian status, she could not inherit.

43 The rules of devolution of the Civil Code could have applied, still subject to the same condition: only an Indian may inherit such land in a reserve. Through representation of his late father Angus, Lewis Bordeau was an eligible heir, along with other Indian and eligible heirs in the family. The right to possession of the land could only be transferred to an Indian by the estate. Consequently, such right never entered the patrimony of Theresa Santoro; it did not belong to her. The amendments to the Indian Act in 1985 do not have a retroactive effect; they cannot validate what was not valid twelve years before. The bequest of the land was void. Section 28(1) of the Indian Act provides that any deed, instrument, document by which a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

44 One cannot give what one does not have. Theresa Santoro did not transfer to Lewis Bordeau a right to possession which belonged to her. Such right, remaining in the estate of Mary Bordeau, was transferred in her capacity as liquidator of the estate to Lewis Bordeau on June 17<sup>th</sup>, 1975.

45 Similarly, Theresa Santoro could not dispose in her will of August 16<sup>th</sup>, 1999 of a right not legally belonging to her, still in the patrimony of Lewis Bordeau. That bequest of the land to her children is null and void. She never had a certificate of possession of that land, as required by s.20 of the Indian Act.

46 Lewis Bordeau is the only one entitled to the lawful possession of the land at issue. Theresa Santoro agreed to transfer to him the right owned by Mary Bordeau and her estate. He is still in such lawful possession, as evidenced by the certificate of possession issued under the Indian Act. Simply put, the only question to decide is the following: was that right of possession transferred to him on a permanent and irrevocable basis or was it subject to a condition, similar to a right of redemption, such condition being that the land would be transferred back to Theresa Santoro if and when she would have regained her status as an Indian.

## ***2. Probative value***

47 The plaintiff contends that his mother was entitled to benefit from that right of possession after she was registered as an Indian on January 26<sup>th</sup>, 1987, as a result of a verbal agreement he did not witness, which would have taken place in the kitchen of the house on the reserve in the Fall of 1974. He relies on the version of two witnesses.

48 What happened between Theresa Santoro and Lewis Bordeau concerning that transfer of the land? As mentioned, there is conflicting evidence offered by Lewis Bordeau and Linda Louise Bordeau. The third witness, Anna Cecilia Charlie, does not offer any useful evidence at the hearing: she did not hear anything. The Court should thus appreciate the probative value of the testimony of Lewis Bordeau and of Linda Louise Bordeau (art. 2845 C.c.Q.).

49 Linda Louise Bordeau testifies that, while seated in another room, she heard Lewis Bordeau in the kitchen stating that Theresa Santoro would get back the property. Upon hearing that reply, she immediately left the house without meeting him. Strange behaviour, similar to the conduct of a spy on command; did she anticipate that she would be called as a witness some 35 years later to testify on that subject? The agreement could have

been simply written down on the spot on a piece of paper for any potential future use or reproduced in a document drafted by an attorney, for instance in New York when Theresa Santoro transferred the land in June 1975. No such documentary evidence has been produced, nor alleged. Although not living in Kahnawake since the age of 14, the witness hides in that room at that very and precise moment — what a coincidence — and left incognito. "I wanted to hear that statement, otherwise I would have seen a lawyer". To do what? To force Lewis Bordeau through an injunction to enter into such verbal agreement or to sign a written agreement?

50 Linda Louise Bordeau, according to her testimony, lost sight of Lewis Bordeau when she was aged 3 or 4. Yet, just by hearing his voice, several years later, she was able to identify him. Any identification rests on hearsay evidence; the only eyewitness would have been Theresa Santoro. This witness seems to have an excellent memory about the content of this brief exchange of words between Theresa Santoro and Lewis Bordeau. However, she has bad and vague memory about the approximate time such important verbal commitment would have occurred. According to her testimony, it happened in the 1970's, late 1970's, which is quite vague. We know that any verbal agreement occurred before June 17<sup>th</sup>, 1975, when Theresa Santoro signed the transfer of land in front of a notary public in New York, and after the letter of August 14<sup>th</sup>, 1974, following which she was presumably advised by the district supervisor that she could not hold land on the reserve. Such news prompted her to contact her nephew Lewis. Surprisingly, this witness clearly heard what would have been said in the kitchen, while her companion in the same room did not hear a single word.

51 Linda Louise Bordeau gave a previous statement, under oath, which is not consistent with her testimony in Court. In a detailed affidavit of November 13<sup>th</sup>, 2007 filed in support of the motion, she declares (at paragraph 5) that Theresa Santoro convened a meeting at the house which took place during the Fall of 1974 in the kitchen in the presence of Theresa, herself the witness, Lewis Bordeau, Ida and Anna Cecilia Charlie. Here, at the hearing, she is not in the presence of Lewis Bordeau whom she did not meet and is sitting in an adjacent room. Oddly enough, that presence in the kitchen is not confirmed by Anna Cecilia Charlie who, according to her testimony, was seated in another room with Linda Louise Bordeau.

52 Also disturbing is the detailed affidavit signed on that same day by Anna Cecilia Charlie, also filed in support of the motion, of similar content. There, she was in the kitchen and heard everything that Lewis would have said, of identical content to what is reported by Linda Louise Bordeau in her affidavit. Here, in the courtroom, she is no longer in the kitchen and has not heard a thing.

53 These conflicting versions affect the reliability and credibility of these two witnesses, all the more as they are not supported by any circumstantial evidence. If such meeting took place in the Fall of 1974, why would Theresa Santoro come back to Kahnawake while residing in New York, while a simple phone call to Lewis Bordeau would have been sufficient? Why wait until June 17<sup>th</sup>, 1975 to sign the transfer of the land? Why go to a lawyer in New York, instead of seeing someone in Montreal as she did years later? Why summon Lewis Bordeau to the house in Kahnawake, when she had previously gone to his house in Chateauguay to give him \$250 bequeathed in the will of her mother? The evidence indicates that Theresa Santoro was coming back to Kahnawake only during her summer vacation — which is compatible with her employment at the Board of Education in New York. During the school year, including the Fall, she was residing in New York with her children, including Curtis Santoro who was a teenager at the time.

54 On the basis of the verbal and unconditional agreement reported by Lewis Bordeau, Theresa Santoro achieved what she wanted at the time: she keeps the house and the land until her death. Otherwise, she would have lost the use of the land. There were no reasonable expectations in 1974 of any future change in her status

set by a legal rule in force for more than a century. The Charter of Rights and Freedoms of 1982 was not in sight at the time — there is no evidence to the contrary — nor could she anticipate amendments to the Indian Act in 1985. The agreement described by Lewis Bordeau gave her a peace of mind for the rest of her life. Her knowledge of that legal barrier prompted her to call her nephew from New York, which led to the unconditional transfer of land in June, 1975.

55 The behaviour of Lewis Bordeau is consistent with the agreement reported by him. He never interfered with the use of the land by Theresa Santoro or Ida Bordeau, did not collect any rent and took physical possession of the house when the last occupant left it. He then acted as a true lawful possessor of the house by doing extensive renovation work at his own expense and by living in it.

56 The onus of proof lies with the plaintiff Curtis Santoro (art. 2803 C.c.Q.) who must establish on the balance of probabilities (art. 2804 C.c.Q.) that Lewis Bordeau verbally agreed before June 17<sup>th</sup>, 1975 to transfer back the land to Theresa Santoro if and when she would regain her status as an Indian. The only direct evidence of such agreement comes from the testimony of Linda Louise Barbeau at the hearing, not consistent with her previous statement by detailed affidavit and not supported by circumstantial evidence. The Court finds that it cannot rely on that witness to reach the conclusion sought by the plaintiff, for lack of reliability and credibility. There is no preponderant evidence that Lewis Bordeau acted as a *prête-nom* or was a party to a verbal counter letter (art. 1451 C.c.Q.). No legally enforceable secret contract was concluded, nor is there any sufficient evidence that may contradict or vary the terms of the writing of June 17<sup>th</sup>, 1975 (art. 2863 C.c.Q.) or may attack the validity or truthfulness of the certificate of possession issued in the name of defendant Lewis Bordeau. The plaintiff has not discharged his burden of proof.

57 Lewis Bordeau is a credible and reliable witness. He gave a straightforward, sincere and logical testimony, supported by the weight of the evidence. The Court fully accepts his version of the events in litigation. This first-hand evidence denies the existence of any verbal and secret counter letter favoring the position herein adopted by the plaintiff. The right of possession held by the estate of his grandmother was transferred to him on a permanent and irrevocable basis, without any contrary conditions. The certificate of possession truly reflects the actual legal rights of Lewis Bordeau.

58 Theresa Santoro probably had second thoughts when she recovered her Indian status on January 26<sup>th</sup>, 1987, most likely in the manner of "if I would have known that...I would have..." This unpredictable event in 1987 does not have any retroactive effect and does not alter the validity of the transfer of land pursuant to the provisions of the Indian Act in force at such time.

### 3. Time factor

59 Theresa Santoro was in a position since early 1987 to take whatever legal action she could have deemed appropriate for the recognition of her alleged right of possession of the land. Twice, in 1988 and 1997, the Minister advised her that Lewis Bordeau was in lawful possession of the land. The letter of August 14<sup>th</sup>, 1989 of the Chief Richard White to Lewis Bordeau, a copy of which was sent to Theresa Santoro, gives a clear indication of the state of affairs at the time: he is requested to return the land, which he did not do. Yet, she did not institute any proceedings before she passed away more than eleven years later, on May 17<sup>th</sup>, 2001, nor did her estate institute any proceedings in Superior Court before early November 2008, more than twenty years after her registration in the Indian Register. Two proceedings in Federal Court have been discontinued, without any resolution of the dispute.

60 As a rule, the period for extinctive prescription is ten years (art. 2922 C.c.Q.), which applies to a claim based on simulation through a counter letter under art. 1451 C.c.Q.[FN12]. Article 2923 C.c.Q. states that "actions to enforce immovable real rights are prescribed by ten years". If this motion would be such action — which it is not — the recourse of the plaintiff would already be prescribed, without any help for an extension of the delay from the *Act respecting the implementation of the reform of the Civil Code*[FN13] providing transitional rules of law resulting from the coming into force on January 1<sup>st</sup>, 1994 of the Civil Code of Québec which succeeded to the Civil Code of Lower Canada. Of course, this Court has no jurisdiction to enforce a right of possession exclusively governed by the Indian Act[FN14] since that power rests with the Minister of Indian Affairs and Northern Development of Canada. This ruling is purely declaratory.

61 For the above reasons, the Court concludes that the motion for declaratory judgment should be dismissed.

#### 4. Costs

62 There remains one last issue to be adjudicated upon. The defendant Lewis Bordeau claims by cross-demand from plaintiff the payment of extrajudicial disbursements and fees that he should pay to counsel, alleging improper use of procedure under articles 54.1 and following C.c.p. On ruling on whether an action is improper, the Court may condemn a party to pay, in addition to taxable court costs, damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs incurred by that party (art. 54.4 C.c.p.). Such sanction may be imposed if, for instance, the claim is clearly unfounded or frivolous or if the procedural impropriety consists in bad faith (art. 54.1 C.c.p.).

63 Curtis Santoro has no personal and direct knowledge of the agreement at issue which he did not witness. What was said to him by persons other than witnesses at the hearing is hearsay. When he filed his motion, he relied on two affidavits in support of his position, i.e. Linda Louise Bordeau and Anna Cecilia Charlie, which conduct in itself is not unreasonable and a sign of bad faith. Good faith is always presumed (art. 2805 C.c.Q.). The Court cannot conclude that the claim was clearly unfounded and frivolous before its conclusion by judgment. The fact that a case may be somewhat fragile does not mean it is *per se* abusive[FN15]. The institution of an action is not in itself prejudicial. This is the first ruling on that issue which hopefully should bring a final resolution to this dispute and bring peace in the valley.

64 After paying two short and inconclusive visits to the Federal Court, the plaintiff decided to change venue and course of action, presumably and logically on the advice of counsel, which, again, is not in itself proof of bad faith and of procedural impropriety. The Court thus concludes that the above provisions of the Code of civil procedure do not apply here. Costs are to be governed by article 477 C.c.p.

65 *FOR THESE REASONS, THE COURT:*

66 *DISMISSES* the motion for declaratory judgment of the plaintiff, with costs.

[FN1](#) R.S.C. c.I-5.

[FN2](#) Section 3(1) of the Indian Act.

[FN3](#) Section 49 of the Indian Act.

FN4 Section 2(1) of the Indian Act.

FN5 S.C., 1951, c.29.

FN6 S.C., 1951, c.29.

FN7 S.C. 1985, c.27, R.S.C. 1985, c.I.-5.

FN8 R.S.C. 1985, App II, no 44.

FN9 s.6(2) of the Indian Act.

FN10 R.S.C. 1970, c.I.-6.

FN11 s.25 of the Indian Act.

FN12 , 2008 QCCS 346, J.E. 2008-740, paragr. 80.

FN13 L.Q. 1992, c.57, article 6.

FN14 *Delorimier v. Cross* (1937) 62 B.R. 98; *Picard c. Laine*, [1975] C.S. 795, p. 796.

FN15 *Viel c. Les Entreprises immobilières du terroir Ltée*, 2002 R.J.Q. 1262 (C.A.), parag. 82, j.Rochon.

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