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BARRISTERS AND SOLICITORS
"ABORIGINAL LAW ON THE ABORIGINAL SIDE"

ABORIGINAL LAW NEWSLETTER

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IMPORTANT DEADLINE:
SURVIVORS HAVE UNTIL SEPTEMBER 19, 2012 TO CLAIM FOR RESIDENTIAL SCHOOL ABUSE

Independent Assessment Process (IAP)

Since September 2007, as a result of an overall settlement of a residential schools class action Survivors of Indian Residential Schools have been bringing forward compensation claims through the Independent Assessment Process. This out-of-court process provides compensation to Survivors who suffered sexual abuse, physical abuse or other wrongful acts during their time at a residential school. ***Those Survivors who may have a claim, but have not yet applied, should be aware of the time limits for commencing their claims***.

Prior to the Indian Residential School Settlement Agreement, a Survivor could sue Canada and the Churches for sexual abuse when they were ready to do so. This option is no longer available.

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NOTE TO THE READER

This ABORIGINAL LAW NEWSLETTER is intended to provide our general comments on new developments in the law. The NEWSLETTER is not intended to be a comprehensive review of all legal developments. It is not intended to provide legal advice. Readers should not act on information in the NEWSLETTER without first seeking legal advice on the particular matters that are of concern to them.

WHAT'S INSIDE:

SURVIVORS HAVE UNTIL SEPTEMBER 19, 2012 TO CLAIM FOR RESIDENTIAL SCHOOL ABUSE, CONTINUED

In British Columbia, the *old rules* were that a lawsuit for sexual abuse did not have any legal time limits. The *Indian Residential School Settlement Agreement* changed all of that.

There is now a **strict legal deadline** for filing an application to obtain compensation for residential school abuse (sexual, physical or other wrongful acts). The Agreement sets an "IAP Application Deadline". Now all claims must be filed within a five-year window. There is nine months left in that five year period. This means that the IAP Secretariat will only be accepting IAP applications until **September 19, 2012**.

THERE IS NOW A **STRICT LEGAL DEADLINE** FOR FILING AN APPLICATION TO OBTAIN COMPENSATION FOR RESIDENTIAL SCHOOL ABUSE. ALL **IAP** CLAIMS MUST BE FILED BY **SEPTEMBER 19, 2012**.

It is important that all Survivors are aware of the IAP Application Deadline because the *Settlement Agreement* also took away their right to go to court. Unless a survivor opted out of the class action settlement (the deadline for opting out has already passed), the IAP is the only option to be compensated for abuse. **If a residential school Survivor does not submit an IAP Application before September 19, 2012, they will lose their right to obtain compensation for the harms they suffered at residential school.**

CONSULT A LAWYER

Survivors should consult a lawyer to determine if they have a claim and submit their application ***well before the deadline*** to ensure that their rights are protected.

For more information on Indian Residential Schools matters, please call Karim Ramji or Niki Sharma at 1-866-688-4272. Your talk with Karim or Niki is completely free of charge and the number provided above is toll free.

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ROSS V. QUEBEC: MAJOR TAX EXEMPTION WIN, COURT RULES IN FAVOR OF ABORIGINAL FISHERS IN QUEBEC

Background and Case History

In *Ross v. Quebec (Deputy Minister of Revenue),* the Court of Quebec held that the income which Gerard Ross, an aboriginal plaintiff, earned from commercially fishing snow crabs, was exempt from income tax. Canada had determined that the plaintiff was subject to income tax as the fishing income was "not situated on reserve." Ross appealed this decision, arguing that the commercial fishing he did in the St. Lawrence River was connected to a business activity that was entirely situated on the reserve. Therefore, he reasoned, the income was exempt from taxation. The Crown responded that since the fishing took place off reserve the business must therefore be off reserve.

The reserve in question is located on the shores of St. Lawrence River. The fishing is carried out by Ross and his employees in an area located between five and fifteen kilometres from the reserve during the three-month fishing season. Since the reserve did not have its own dock, the fishing boat had to be moored at the federal fisheries dock located one kilometre from the reserve. The boat's size prevented it from being transported on public roads and thus repairs were done at the federal dock. Federal regulations required that fishers unload their daily catch at the dock. The crabs were then loaded unto Les Crabiers du Nord's truck, a business located off reserve. Les Crabiers du Nord purchased ninety percent of the yearly catch and the remaining was sold or distributed on the reserve. Claire Ross, the plaintiff's wife, managed the accounting and administration from the family home on the reserve.

Was the Income Situated on Reserve?

> "THE CROWN HAS A TENDENCY TO ARGUE THAT WORK IN THE "COMMERCIAL MAINSTREAM" EXCLUDES NATIVE PEOPLE FROM TAX EXEMPTION."

Section 87 of the *Indian Act* protects from taxation an Indian's or Band's personal property situated on reserve. The Courts have concluded that income is a form of "personal property". In the circumstances of this case, the Court concluded that the income earned from the commercial fishing was tax exempt. In order to reach this conclusion, the Court considered the factors that meaningfully connect the income to the reserve.

The Court concluded that a tax exemption applied even though some of the fishing activities were located off-reserve. During the three-month fishing season, most of the actual fishing activities took place outside the reserve, on and in the St. Lawrence River, in the fishing area assigned to Ross and on the dock where he delivered the crabs. The Court held, however, that these requirements and constraints were natural and imposed by geography. They were also legal constraints (imposed by stringent government controls). Justice Lavoie rejected the Crown's argument that since the plaintiff fished in the St. Lawrence River the business is off reserve. Instead the Court concluded that the location of the fishing is only one part of the connecting factors analysis. While it would have been convenient if the snow crabs had marched onto the reserve in an orderly fashion to be captured by Mr. Ross, that is not the reality. The fishing takes place in the St. Lawrence River outside the reserve because that's where the crabs are.

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MAJOR TAX EXEMPTION WIN, COURT RULES IN FAVOR OF ABORIGINAL FISHERS IN QUEBEC, CONTINUED

The Court held that it is the business relation to the reserve that should be considered. The test does not turn merely the fact that some of its activities are undertaken outside the reserve or that the fact that some of its activities are similar to those in the "commercial mainstream".

Justice Lavoie held that the location of the fishing boat is not determinative in establishing the location of the business and the location of the income the business generates. The Court held that the plaintiff's income was earned in circumstances that connect its acquisition to a reserve as an economic base. Commercial fishing is a family tradition in Ross' family. The plaintiff comes from generations of fishermen. There is a strong connection between the business and the individuals who are engaged in it. Ross and the members of his family and the members of the Essipit community who work on his boat all make their homes on the reserve. Accordingly the economic benefit and identification of an economic base establishes that there is a relevant connection between the fishing business and its presence on the Indian reserve.

"THE FACT IS THAT THE INCOME EARNED IS FUNDAMENTALLY CONNECTED TO RESERVE, AND THAT IS THE BASIS FOR THE TAX EXEMPTION."

The Crown has a tendency to argue that work in the "commercial mainstream" excludes Native people from tax exemption. In the judgment, Justice Lavoie stated that this point of view presumes that a business cannot benefit from the tax exemption attached to an Indian reserve because the commercial nature of the activities is similar or identical to that of non-aboriginal businesses. This concept improperly limits the tax exemption as it presupposes that when a First Nation engages in "commercial mainstream" attached to an Indian reserve, they lose their right to tax exemption. The issue is not whether the income was earned in the "commercial mainstream." The issue is whether the income is sufficiently related or connected to the reserve base.

Implications of the *Ross v. Quebec* Decision

This type of precedent creates greater opportunities for First Nations to protect from taxation income generated from property or activities connected to, or integral to the reserve. It is part of a long struggle to correct Canada's legal confusion that focuses on whether income was earned in the "commercial mainstream" rather than whether the income was sufficiently connected to the reserve base. If a computer tablet factory or genetic engineering company located on reserve, there could be little doubt that the income earned by aboriginal people working there would be exempt from income tax. Why should it matter that the company is engaged in the "commercial mainstream." The fact is that the income earned is fundamentally connected to reserve, and that is the basis for the tax exemption.

In a paper published in February 2007, Allan Donovan of our firm described the Crown's "commercial mainstream" argument as a "jurisprudential blind alley". Sadly it is a route that Canada drives again and again. On June 2011, the Deputy Minister of Revenue appealed the decision to the Quebec Court of Appeal. We will keep you posted!

HALALT V. BRITISH COLUMBIA: COURT VICTORY ON CONSULTATION AND ACCOMMODATION

Background and Case History

On July 13, 2011, the British Columbia Supreme Court delivered its decision on *Halalt v. British Columbia*. The decision put a halt to the Chemainus Wells Project, which involved the construction and operation of a well field adjacent to Halalt's Reserve to extract groundwater from the Chemainus Aquifer. The Court held that B.C.'s Environmental Assessment Office (EAO) breached its duty to consult with the Halalt First Nation and accommodate its asserted Aboriginal rights and title.

"THE CENTRAL ISSUE IN THIS CASE WAS WHETHER THE PROVINCE MET ITS CONSTITUTIONAL OBLIGATIONS TO CONSULT WITH HALALT AND ACCOMMODATE ITS ASSERTED ABORIGINAL RIGHTS AND TITLE."

In the spring of 2003, the local government proposed a number of wells to be established in order to replace the current surface water system with groundwater. The idea was to provide a secure and reliable year-round source of drinking water to Chemainus. The Chemainus Wells Project, as originally proposed, consisted of three year-round groundwater extraction wells sited on the Chemainus Aquifer. Much of this Aquifer lies beneath Halalt's I.R. No. 2. As part of the environmental assessment, several tests and studies were conducted on the Chemainus River. The studies confirmed that groundwater extraction during the drier summer months could reduce river flows and negatively affect fish. To prevent this impact, the District suggested that the Project be modified to exclude summer groundwater extraction except in the case of emergencies. If further tests showed that there were no serious effects from operating the well during the summer, the District would remove this restriction and operate all the wells on a year-round basis. Neither the EAO nor the District told Halalt about the proposed modifications of the Project.

The respondent Ministers eventually approved a modified version of the Project in 2009. A Certificate was issued which allowed for the construction of two wells and the operation of one well from October 15 to June 15.

Halalt argued that the Province was aware of its Aboriginal rights and title to the Project area and it failed to discharge its constitutional duty to consult with Halalt and reasonably accommodate its interests regarding the Project. Halalt asked the Court to strike down the Certificate.

In response to Halalt's petition, the Province conceded that it owed a duty to consult with the Halalt during the Environmental Assessment Process and to accommodate potential infringements to its asserted Aboriginal rights and title. The Province argued, however, that the EAO had engaged in "deep consultation" with Halalt and that accordingly the Province had met its constitutional duties. The Province argued that the Certificate was a reasonable accommodation of Halalt's interests because the original proposal was modified by reducing the amount of groundwater extraction and limiting the months of the year during which extraction could occur.

The central issue in this case was whether the Province met its constitutional obligations to consult with Halalt and accommodate its asserted Aboriginal rights and title.

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COURT VICTORY ON CONSULTATION AND ACCOMMODATION, CONTINUED.

The Supreme Court of British Columbia's Ruling

The Court held that the Province failed to adequately consult with Halalt during the environmental assessment and failed to reasonably accommodate their interests. The Court halted the Project until the EAO engaged in deep consultation with Halalt and accommodated its interests. If these requirements are met the operation of the wells may continue.

> "THE PROVINCE ADMITTED THAT THE PROJECT, AS ORIGINALLY PROPOSED AND AS MODIFIED, HAD THE POTENTIAL TO HAVE A NEGATIVE IMPACT ON THE ABORIGINAL RIGHTS CLAIMED BY HALALT."

Justice Wedge applied a three–step test to determine whether British Columbia had met its legal obligation. The first step was to identify whether the Province had knowledge of potential Aboriginal claim or right. In this case, the Province acknowledged that it was aware from the beginning of the environmental assessment of a potential claim by Halalt to Aboriginal title and rights concerning the proposed Project area. With respect to Aboriginal title, the Province was aware that Halalt claimed Aboriginal title over the Chemainus Watershed including the land within and adjacent to I.R. No 2. It was also aware that Halalt claimed, as part of its Aboriginal title, the groundwater underlying its traditional territory and I.R. No. 2. The first step was met.

The second question was whether the Project had the potential to adversely affect a claim or right of Halalt First Nation. The Province admitted that the Project, as originally proposed and as modified, had the potential to have a negative impact on the Aboriginal rights claimed by Halalt. Specifically, the Province acknowledged that interference with the flow levels of the River had the potential to adversely impact Halalt's asserted Aboriginal right to fish, to gather plants and to bathe for ceremonial purposes. Accordingly the second step of the test was met as well.

The third step was for the Province to consult with Halalt and assess the strength of their claim for Aboriginal title or rights and the potential impacts of the Project on Aboriginal title or rights claimed. The Province argued that since the EAO decided to engage in deep consultation with Halalt, the adequacy of its strength of claim was irrelevant. Justice Wedge disagreed. The Court concluded that the Province could not simply skip the assessment of strength of claim. The EAO had an obligation to determine Halalt's strength of claim and to assess the extent of its obligation to consult. There was no evidence that British Columbia even conducted a proper strength of claim assessment. The Court concluded Halalt was entitled to a timely and transparent assessment of its strength of claim.

The Court found that the EAO failed to consult with the Halalt with respect to the impacts of year–round operation of the well field. Accordingly, it failed to engage in adequate consultation. Accordingly, it failed to engage in adequate consultation. The EAO did not consult with Halalt about the proposed modifications of the Project before they were made. Furthermore, the EAO did not inform Halalt about its recommendation to cancel the Project. When the Project was further modified to limit operations during the summer months, there was no consultation. All of the scientists and consultants were well aware that summer pumping was inevitable, and in the future there would be a need to extract groundwater

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COURT VICTORY ON CONSULTATION AND ACCOMMODATION, CONTINUED.

> "THE JUDGE FOUND THAT MOST OF THE MEASURES CHARACTERIZED BY THE PROVINCE AS ACCOMMODATIONS WERE NOT ACTUALLY ACCOMMODATIONS; THEY WERE NOT RESPONSIVE TO THE CONCERNS OF HALALT…. THE PROVINCE FAILED TO FULFILL ITS CONSTITUTIONAL DUTY TO ACCOMMODATE HALALT'S INTERESTS."

during the summer when water is scarce. Given that the District clearly intended to extract groundwater on a regular basis during the summer low flow periods of the River, the EAO should have assessed the impacts of Halalt's interests on that basis.

There was no actual dialogue with Halalt about the specific accommodations the Province said they made to avoid infringing Halalt's potential Aboriginal rights. The judge found that most of the measures characterized by the Province as accommodations were not actually accommodations; they were not responsive to the concerns of Halalt. Rather the Crown's purported accommodations were a response to the studies and tests which indicated serious environmental concerns with the original proposed Project. The Court found that the Province failed to fulfill its constitutional duty to accommodate Halalt's interests.

Going Forward

This decision will guide consultation and accommodation on future projects. It emphasizes the importance of the Crown conducting proper strength of claim assessments of asserted Aboriginal rights and title. Failure to assess these claims can lead to an incorrect consultation process. Perhaps most importantly, the Court rejected the Province's argument that there had been a lot of consultation over a long period and that this ought to suffice. The Court noted that British Columbia was confusing a long consultation process with a legally acceptable consultation process.

> "THE COURT CONCLUDED HALALT WAS ENTITLED TO A TIMELY AND TRANSPARENT ASSESSMENT OF ITS STRENGTH OF CLAIM."

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Donovan & Company provides services in all areas of aboriginal practice including litigation, specific claims, treaty negotiations, residential schools claims, aboriginal business issues, corporations, trusts, natural resource ventures, tax matters, negotiations with government and industry, and other issues faced by First Nations.

The lawyers at Donovan & Company practice exclusively in the service of Aboriginal Nations and Aboriginal peoples concerning a wide range of issues. Please feel free to contact any one of us at any time.

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