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Donovan & Company
Barristers and Solicitors

ABORIGINAL LAW NEWSLETTER

Notes for British Columbia First Nations

THE PURSUIT OF RECONCILIATION AND RIGHTS RECOGNITION

Kapp et al. v. *Her Majesty the Queen*

Supreme Court of Canada File Number: 31603

In December of 2007, Allan Donovan and Bram Rogachevsky appeared at the Supreme Court of Canada on behalf of the intervener Haisla Nation in the important case of R. v. Kapp.

The case involved a challenge by a group of commercial fishers to the Pilot Sales Program, an aspect of the Department of Fisheries and Oceans' Aboriginal Fisheries Strategy. Specifically, the fishers argued that the portion of the Pilot Sales Program that permitted members of the Musqueam, Burrard and Tsawwassen First Nations to access a commercial salmon opening violated the equality rights of non-aboriginal commercial fishermen.

The case raised many important issues. In its sub-

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missions, the Haisla Nation addressed the ability of litigants to use the Charter as a basis to challenge interim agreements entered into between the Crown and Aboriginal Nations.

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Section 25 of the Charter protects aboriginal, treaty, and "other rights and freedoms" from Charter-based challenges. The Haisla Nation advanced the position that "other rights and freedoms" include those rights and freedoms provided for by way of instruments, including accommodation agreements, that are integral to the process of reconciliation. These agreements are a critical step in the reconciliation of those s. 35 rights with Crown sovereignty.

The Haisla Nation argued that the Pilot Sales Program and other forms of accommodation offered by the Crown, are the critical means available to pursue the reconciliation that the Supreme Court of Canada has directed all parties to seek. Until the differing views of the Crown and First Nations on the ownership of land in British Columbia are ultimately settled, the interim means of recognizing and respecting asserted claims of rights and title, that is consultation and accommodation, must be protected.

... consultation and accommodation must be protected.

Both the commercial fishers and the Crown argued that the protection for "other rights and freedoms" should not extend to accommodation agreements or the provision of other benefits to First Nations that may not be shared by others in society. The Haisla Nation, however, argued that these rights and freedoms are an explicit recognition of the *sui generis* rights of aboriginal people. If a right or freedom furthers the process of reconciliation of these rights with Crown sovereignty, it must be entitled to the protection of s. 25.

The Haisla Nation therefore asked the Court to grant protection from Charter challenge to the rights and freedoms provided by way of instruments, including accommodation agreements, that recognize and ac-

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commodate s. 35 rights and title on an interim basis and that further the process of reconciliation, the ultimate purpose of s. 35 of the Constitution.

A decision of the Court in this case is expected sometime this year. The full text of the Haisla Nation's submissions may be found on the Donovan & Company website at www.aboriginal-law.com.

SPECIFIC CLAIMS REFORM: SIGNIFICANT CHANGES IMPROVE THE PROCESS

The Specific Claims process has the potential to make a real contribution to Aboriginal Nations. The settlement of a specific claim reserves a longstanding grievance and injects much needed money (and often land) into the aboriginal community.

The potential has been frustrated in recent years through a hopeless institutional gridlock that has developed at the Specific Claims Branch of INAC and at the Department of Justice.

Over the years the rate of claims filing has greatly exceeded the glacial pace of claims processing. The waiting period for receiving an acceptance or a claim (or even a rejection!) ballooned from a few years to several decades. Justice delayed was swiftly becoming justice denied.

On May 30, 2008 Bill C-30, the *Specific Claims Tribunal Act*, passed by a unanimous House of Commons vote. It promises to put in place some much needed changes. Most significantly, the legislation places a three year time limit on the processing of a claim. The Crown must now move a claim from filing to either acceptance or rejection within three years. If Canada does neither within the allotted three year period, the Aboriginal Nation will then be free to take its claim to a newly created independent tribunal.

Three years may not sound like a tight schedule for Canada to either accept or reject a claim. Considering, however, that the time limit applies to the entire backlog of specific claims, the deadline is revolutionary. Canada will have to either radically alter its slow-moving claims review process or face the prospect of hundreds of specific claims flooding the new tribunal.

The new tribunal itself is a breakthrough. For many years Canada was the final judge of whether a specific claim was valid – Canada was the "judge, jury and executioner".

That changed, somewhat, with the formation of the Indian Claims Commission (the ICC) – a body that would investigate and provide detailed reports concerning rejected specific claims. The problem was these reports were just recommendations. Canada often declined to follow them when the ICC validated a specific claim. The new tribunal is different – it will be able to bind Canada and award damages.

SPECIFIC CLAIMS REFORM (CONT.)

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The tribunal will be comprised of Superior Court judges – chosen by Canada – but with the input from the Assembly of First Nations. Monetary awards are capped at $150 million per claim, with a $250 million annual settlement budget. The tribunal option is a valuable one and may well serve to inject some much needed energy and innovation into the specific claims process as a whole.

The reform is not without its flaws. The most obvious question is what becomes of larger specific claims – those that substantially exceed the tribunal's $150 million limit? Canada has promised, in a "political" agreement with the Assembly of First Nations, that it will establish an alternative process for addressing claims over $150 million. But will this political agreement be honoured?

Recent political agreements between Canada and the Assembly of First Nations often seem as though they were written in water. They have been discarded (the Kelowna Accord) or simply broken (the political agreement that day students at residential schools would be eligible for the common experience payment). Will this political agreement fare any better?

For the majority of specific claims, however, the legislative reform is a positive development. Whether the change will deliver "Justice at Last" as promised in Canada's glossy brochures, depends on whether Canada's commitment to implementation matches its ambitious legislative reform.

Donovan & Company has filed over 112 specific claims for over 27 British Columbia First Nations. Please contact Allan Donovan or Jennifer Griffith for a free consultation about the status of your Nation's specific claims: 604-688-4272 .

FIDUCIARY DUTY OF CHIEF AND COUNCIL

Much as Canada owes a fiduciary duty to all First Nations, so do the Chiefs and Councils of all First Nations owe a fiduciary duty to the members of their First Nations.

This fiduciary duty is imposed by the Courts on the Chief and Council of a First Nation, because: (1) Chief and Council are able to exercise power over the members of the First Nation, (2) Chief and Council can exercise their power in a way that affects the legal position of the members, and (3) the members are peculiarly vulnerable to decisions of Chief and Council.

As a result, Chief and Council are required to use their power with a high degree of good faith and loyalty towards the members and in the best interests of the members, without let-

FIDUCIARY DUTY OF CHIEF AND COUNCIL (CONT.)

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ting their own interests conflict in any way with the interests of the members.

The Supreme Court of British Columbia has said, however, that any claim of breach of fiduciary duty must be examined carefully to see if the breach that is alleged has the necessary level of dishonesty or disloyalty. It is not always necessary for there to be dishonesty. Disloyalty by itself would likely be enough (for all of this see the *Assu* case at 1998 CanLII 4684).

The nature of the fiduciary duty of Chief and Council was further defined in the by the B. C. Supreme Court in the following passage from the *Solomon* case 2007 BCSC 459 (CanLII):

"It is also equally clear now that recovery based upon fiduciary duties is confined to cases where the fiduciary personally takes advantage of a relationship of trust or confidence for her direct or indirect personal advantage. As such, persons doing their best in difficult circumstances are protected from the shame and stigma of disloyalty or dishonesty which is a foundation of breach of fiduciary duty (*C.A. v. Critchley* 1998 CanLII 9129 (B.C.C.A.), (1998), 60 B.C.L.R. (3d) 92 at paras. 85 and 151-154 (C.A.) (*Critchley*)). The nature of a fiduciary obligation determines the nature of the breach so that incompetence or failure to obtain the best result does not constitute breach unless there is also the stench of dishonesty or disloyalty (*Girardet v. Crease & Co.* 1987 CanLII 160 (B.C.S.C.), (1987), 11 B.C.L.R. (2d) 361 at p.362 (S.C.); *Critchley* at para. 151; *F.S.M. v. Clarke* 1999 CanLII 9405 (B.C.C.S.), [1999] 11 W.W.R. 301 (B.C.S.C.) at para.186; *Wewayakai Indian Band* at paras. 35-36. Simple failure to act in the best interest of the band may not be sufficient to found a breach of fiduciary obligation. As stated by the Supreme Court of Canada in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 35 (S.C.C.), [1989] 2 S.C.R. 574 at 596, fiduciary obligation must be reserved for situations that are truly in need of the special protection that equity affords."

A Chief or a member of Council can be required to give back to their First Nation any profit that is realized by the Chief or the member by advancing their interests over the interests of the Nation. Decisions made in breach of a fiduciary duty can also be overturned.

This has happened in the following cases:

1. a Chief participated in decisions to use funds of the First Nation to:

   - provide her with a mobile home for her own use on reserve,
   - repay her student loan, and
   - pay her children's private school fees

   (the *Gilbert* case at 1992 CanLII 921),

2. a Chief failed to observe the proper procedure as Chief when he and his Council were dealing with land for which the Chief was the locatee (the *Louie* case at 1993 CanLII 620),

3. there was a failure to make all decisions of Chief and Council at a duly convened meeting,

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as required by subsection 2(3) of the *Indian Act,* at which a fair hearing was given to those who might object to the decisions (the *Balfour* case at 2006 FC 213 (CanLII)),

4. there was a failure to follow the First Nations established procedure for Chief and Council to make decisions (also the *Balfour* case at 2006 FC 213 (CanLII)),

5. a Chief and a Councillor obtained a permit to sell tobacco when they were Chief and a member of Council and, although they did not personally profit from it until they lost an election, they then kept the permit and started to keep the profit from the permit for themselves (the *Silver* case at 2002 BCSC 944 (CanLII)), and

6. the Chief and the two Councillors of a First Nation awarded themselves lucrative contracts at the end of their term, even though each left the room when each of their contracts was discussed and they acted with legal advice (the *Annapolis* case at 2004 FC 1728).

A Chief or one or more members of Council have, however, been able to defend themselves against claims for a breach of fiduciary duty where:

1. they have given funds held for the benefit of a child to the child's primary care giver instead of keeping the funds in an interest-bearing account until the child reached the age of 19 (the *Williams* case at 2003 FCT 50 (CanLII),

2. they have appointed a relative of a member of Council as the Manager of the First Nation but that member of Council withdrew when all decisions about that appointment were made (the *Assu* case at 1998 CanLII 4684),

3. the Chief and the rest of Council accused one Councillor of a breach of her fiduciary duty where the Chief and the rest of Council had not followed proper Council procedures themselves and the Councillor had not voted in any proceedings of Council from which she had personally benefited (the *Solomon* case, 2007 BCSC 459 (CanLII)).

There are some fundamental rules for the Chief and Council of a Firat Nation that flow from all of this. They are as follows:

1. the interests of the First Nation should always come before your personal interest,

2. if you have a personal interest in a matter to be decided by Chief and Council, you should explain your personal interest to the rest of Council, leave the meeting while it is being discussed, refrain from voting on the decision or signing the Council Resolution evidencing the decision and refrain from trying to persuade the other members of Council to vote in favour of your personal interests, and

3. proper procedure should always be followed, especially in giving a fair hearing to members

STRUCTURING A FIRST NATION'S BUSINESS

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pecially in giving a fair hearing to members whose interests might be affected by a decision and in giving that hearing before the decision is made.

For further information concerning the obligations of Chief and Council please contact Merrill Shepard or Jennifer Griffith at 604-688-4272.

STRUCTURING A FIRST NATION'S BUSINESS

When a First Nation is faced with a business opportunity, it has a number of considerations on how to proceed. What experience does the First Nation have in the industry? What is the risk of liability? How involved should the First Nation's political leaders be in the business? How can the business minimize its exposure to taxes?

While it may be tempting for a First Nation's leaders to try to set up and run a business directly, this is generally discouraged because of the risk of liability and the popular desire to have politicians focus on policy and have different people run businesses within the rules set by the politicians.

There are a number of options that each have their place.

Corporations

Often, a First Nation will want to create a corporation. In this structure, the business will be overseen by a *Board of Directors*. It is common for some of the Directors to also be members of the First Nation's leadership (e.g. sitting on Chief and Council) but this should be kept to a minimum for various reasons.

The Directors often hire *Officers* (like a President, Treasurer, CEO, etc.) to manage the day to day affairs of the business. Some corporations don't have Officers, though, in which case the Directors play a more "hands on" role in hiring and supervising contractors or employees.

Corporations are owned by *Shareholders,* who are entitled to elect the Directors, receive the profits from the corporation and, in the event that the corporation is dissolved, to receive the assets of the corporation (after all debts are paid).

As the courts have indicated some doubts about the legal capacity of a First Nation, the shares are sometimes held by a *Society* that represents the First Nation, sometimes by an individual (e.g. a member of Council) who holds the shares *in trust* for the First Nation, and sometimes even by an *Indian Act* Band directly, as represented by the Chief & Council.

The profits of the corporation go to the shareholders, but the shareholders are not bound by the liabilities of the business.

Corporations are taxed at a lower rate than individuals, but cannot directly share the tax exemptions that are provided to Bands or status Indians under the *Indian Act* or *Income Tax Act*. The profits that corporations pay to a Band can be tax exempt in the hands of the Band, if it is properly structured.

STRUCTURING A FIRST NATION'S BUSINESS (CONT.)

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Limited Partnerships

Under this structure, the *Limited Partner* would be entitled to a share of the profits, and would only have to cover liabilities incurred by the *General Partner* up to the extent of their investment in the partnership (which could be as low as $1). However, Limited Partners have no right to participate in the management of the business, and if they do, they risk being treated as General Partners with full liability.

Where a First Nation has no expertise in an industry and wants to rely wholly on an experienced partner to run the business (i.e. the First Nation would simply receive a share of the profits and get reports on the business), Limited Partnerships can be a good fit.

Profits that a Band receives as a Limited Partner in a business can also be exempt from taxation if the Limited Partnership is properly structured.

Joint Ventures & Partnerships

Joint Ventures and Partnerships both involve two different entities working together on a business and both sharing in the risks and rewards. Under a Partnership, the Partners are each liable for the other Partner's debts. The Partners generally share decision making, but often spell out detailed rules on how they will work together in a Partnership Agreement. While many business discussions with First Nations use the words "partnership" or "partners", in our experience the parties rarely create an actual Partnership to pursue the business, as the shared liabilities of a Partnership require an exceptional amount of trust in your partners.

Under a Joint Venture, the parties spell out more specific roles in pursuing a project together and each are responsible for the risks and rewards for their "area" of responsibility. Joint Ventures are generally created to pursue a specific project that lasts for a relatively short period of time (e.g. to build a bridge).

Combinations of the Above

When the scale or complexity of a business is large enough, it is also possible to combine the above structures. For example, a First Nation may create a corporation, and have the corporation be a general partner in a limited partnership with the First Nation. The limited partnership may, in turn, enter into a joint venture with a third party.

At Donovan & Company, we have experience in creating, structuring and maintaining all of these types of business entities for our First Nation clients. To discuss these options, please contact members of our Business Development Section, including Merrill Shepard, Karim Ramji, Chris Roine or Bram Rogachevsky at 604-688-4272.

COMPENSATION AND HEALTH SUPPORT FOR SURVIVORS OF INDIAN RESIDENTIAL SCHOOLS

The implementation of the Indian Residential School Settlement Agreement is under way. For Survivors of residential schools, the agreement provides compensation for being forced to attend a residential school. Survivors may also receive compensation for any sexual or severe physical abuse they suffered at the school by starting a claim under the Independent Assessment Process [IAP].

The Common Experience Payment

The Common Experience Payment [CEP] is for every Survivor who resided at residential school. A Survivor can apply to receive $10,000 for the first year they went to a listed residential school and $3,000 for every year after that. Those who have not applied for a CEP yet, can find a form at: http://www.ainc-inac.gc.ca/rqpi/index-eng.asp or at your nearest Service Canada office.

Some eligible Survivors have applied for a CEP and have been denied payment for years in which they remember attending a residential school. If this happens the Survivor may submit a reconsideration form that provides information to show they were at the school for the unpaid years. The Survivor has six months from the date noted on the top of their CEP decision letter to apply for the Reconsideration Process.

Indian Day Schools are not included in the settlement agreement. Day School Survivors are not eligible for the CEP and can not enter the IAP with their claims of abuse. Day School Survivors may be able to start a court claim for sexual abuse by staff of a Day School. If a Day School Survivor would like to pursue a court claim, they should talk to a lawyer about doing so.

Claims of Sexual and Severe Physical Abuse

Any Survivors that experienced sexual abuse or severe physical abuse at a residential school can submit a claim under the IAP. This is an out-of-court process that provides compensation for proven abuse. It is recommended that Survivors hire a lawyer for the IAP because the process has a strong legal component.

An IAP claim begins with a 20-page form in which the Survivor must provide details of the abuse and how the abuse has impacted their life. If you have hired a lawyer, he or she will collect documents on your behalf and, with your permission, attempt to resolve the claim through negotiations. The process may end with a hearing in which an adjudicator listens to the Survivor's story hears legal arguments, and awards compensation for proven abuse.

Health Support Programs

Reliving traumatic childhood memories is an extremely difficult process and payments based upon this trauma can have negative impacts on the lives of Survivors and their families. It is of the utmost importance that Survivors beginning claims for compensation are supported, healthy and safe.

Health Canada has established an Indian Residential Schools Resolution Health

COMPENSATION AND HEALTH SUPPORT FOR SURVIVORS OF INDIAN RESIDENTIAL SCHOOLS (CONT.)

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Support Program available to survivors who have applied for a CEP or an IAP claim. This program can provide Survivors with access to professional counselling, emotional support, cultural support and the costs of transportation to access their healing. A Survivor in British Columbia can access this program by calling: 1-877-477-0775.

For more information on Indian Residential Schools matters, please call Karim Ramji or Niki Sharma (toll free) at 1-866-688-4272.

INAUGURAL NICARAGUAN CHILDREN'S FUND GALA

Allan and Mona Donovan have taken their three kids to Nicaragua twice in the past year and will soon be making a third trip in July. They all fell in love with the place! The scenery, the language, the history…but most of all, the people, made Nicaragua remarkable.

Despite enormous adversity and hardship, the people of Nicaragua never seem to lose their zest for living. Each member of the Donovan family felt that they had been changed forever by getting to know Nicaragua and its people. They all felt that giving something back would be an appropriate way to thank the Nicaraguans for teaching them a little about what really matters. Thus, the Nicaraguan Children's Foundation was created in the winter of 2007 (charitable tax status pending).

Thanks to the generosity of many donors, there is an elementary school in a small coastal fishing town in southern Nicaragua that now has actual bathrooms (no more knocking on neighbours' doors)! A tiny school in a remote rural area is now equipped with scissors and a dictionary for the teacher and uniforms, shoes and backpacks for all the students.

In January 2008 members of our law firm joined together to organize an inaugural gala at the Vancouver Rowing Club in Stanley Park with the hope of raising $10,000 to build a much needed special needs school in Nicaragua. The public schools in Nicaragua are unable to accommodate these kids and children with disabilities often simply stay home. Allan vowed to shave his head if $10,000 was raised at the gala. With much energy and enthusiasm, possibly fuelled by thoughts of a boss who resembled "Mr. Clean", and after numerous weeks of planning, the gala was held on April 4, 2008. Our inaugural gala raised over $14,000 and Allan received the scariest shave of his life!

Our most sincere thank you to all of those who attended or otherwise supported this event.

Donovan & Company
Barristers and Solicitors

6th Floor, 73 Water Street
Vancouver, B.C.
V6B 1A1

Phone: 604-688-4272
Fax: 604-688-4282
E-mail: allan_donovan@aboriginal-law.com

For More Information Visit Our Website:
http://www.aboriginal-law.com

Donovan & Company:
Energy and Experience
"Aboriginal Law on the Aboriginal Side"

Donovan & Company provides services in all areas of aboriginal practice including litigation, Specific Claims, Treaty negotiations, residential schools claims, aboriginal business ventures, natural resource ventures, tax matters and negotiations with government and industry concerning a wide range of issues facing First Nations.

The Lawyers at Donovan & Company practice in a wide range of areas in the service of Aboriginal Nations and Aboriginal peoples. Please feel free to call any one of us at any time.

Our Lawyers:

Allan Donovan	Litigation for First Nations; Treaty negotiations; aboriginal rights and title issues; taxation exemption issues; specific claims; strategic planning; consultation and accommodation issues. Email: *allan_donovan@aboriginal-law.com*
Merrill W. Shepard	Tax law; trust law; aboriginal business ventures; corporate; commercial transactions; contracts and agreements. Email: *merrill_shepard@aboriginal-law.com*
Karim Ramji	Residential schools litigation; contracts and agreements; aboriginal commercial transactions; joint ventures; aboriginal rights and title issues. Email: *karim_ramji@aboriginal-law.com*
Chris Roine	Treaty negotiations; consultation and accommodation issues; governance; business development; specific claims. Email: *chris_roine@aboriginal-law.com*
Myriam Brulot	Specific claims (research, writing, and negotiation) Email: *myriam_brulot@aboriginal-law.com*
Jennifer Griffith	Aboriginal rights and title; specific claims (including funding applications and administration); consultation and accommodation issues, environmental issues, land use planning; business issues Email: *jennifter_griffith@aboriginal-law.com*
Bram Rogachevsky	Environmental issues, aboriginal rights and title; consultation and accommodation issues; Treaty negotiations; corporate matters. Email: *bram_rogachevsky@aboriginal-law.com*
Niki Sharma	Residential schools litigation; aboriginal rights and title; specific claims; consultation and accommodation. Email: *niki_sharma@aboriginal-law.com*
Nathalie Golay	Specific claims; legal research; aboriginal rights and title; consultation and accommodation. Email: *nathalie_golay@aboriginal-law.com*

And introducing Shayla Point, our new articling student and member of the Musqueam Indian Band!