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"ABORIGINAL LAW ON THE ABORIGINAL SIDE"

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SUFFICIENTLY CONNECTED—TAXATION VICTORY FOR "COMMERCIAL MAINSTREAM" BUSINESSES ON INDIAN RESERVES (*DICKIE V. THE QUEEN*)

Background and Case History

Reynold Dickie is a status Indian and a member of the Fort Nelson First Nation. For several years, he owned and operated a business of clearing and slashing timber and brush for oil and gas companies. Mr. Dickie contended that because his business was located on-reserve, his business income was exempt from taxation under Section 87 of the *Indian Act*. Canada argued that because the work of clearing and slashing timber and brush took place off-reserve, Mr. Dickie was liable to pay income tax.

This was an appeal brought by Mr. Dickie regarding a reassessment that was made under the *Income Tax Act* against his business.

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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:

SUFFICIENTLY CONNECTED—TAXATION VICTORY FOR "COMMERCIAL MAINSTREAM" BUSINESSES ON INDIAN RESERVES, CONTINUED

The issue was brought before the Tax Court of Canada. Mr. Dickie's operations were large – he employed more than 140 individuals and generated $3.4 million in revenue in the year in question. The administrative centre of the business was at Mr. Dickie's home address on Fort Nelson First Nation Indian Reserve No. 2. Numerous activities were carried out here; including administrative work, accounting, equipment storage and maintenance, orientation meetings for employees, and the preparation of tenders for contract bids. Although all of the contracted labour work was carried out off-reserve, there were no physical or permanent bases at any of the work sites. The Court characterized this type of business as "nomadic", as it holds a base in one area (on-reserve), while engaging in work activities in other, temporary locations (off-reserve).

> THE CONCEPT OF THE "COMMERCIAL MAINSTREAM" HAD BEEN APPLIED IN PREVIOUS CASES TO WEAKEN, OR ELIMINATE, ANY DEMONSTRATED CONNECTION BETWEEN BUSINESS INCOME AND A RESERVE. THE COURT NOTED THAT THIS APPROACH WAS INCORRECT.

Was the Business Income Located On-Reserve?

Section 87 of the *Indian Act* protects the personal property of Indians or Indian Bands from taxation, provided that the personal property (including income) is situated on reserve.

The courts have previously considered this question by analyzing and weighing a number of factors that demonstrate a connection (or lack thereof) between the income and the reserve. This is called the "Connecting Factors Test", which was first articulated by the Supreme Court of Canada in *Williams v. Canada*, and has been upheld by several decisions since.

The Court reviewed a number of similar cases, and identified what they considered relevant factors that would connect or not connect the business income of Mr. Dickie to the reserve. If a sufficient connection was found, Mr. Dickie's business income would be exempt from taxation, as Section 87 of the *Indian Act* would apply.

The Tax Court of Canada's Decision

The following factors were assessed and weighed by the Court:

Type of business and location of business activities

The Court found that the nature of the work (clearing and slashing brush for oil and gas companies) meant that all labour tasks were necessarily performed off-reserve. The Court then turned to aspects of Mr. Dickie's business beyond the labour activities, as these other aspects were vital to the operation of the company and the generation of business. The administrative and managerial components of the business, including the preparation of tenders (which are proposals to secure contracts for the labour work with the oil and gas companies), all took place on-reserve. The Court held that there was strong evidence that these business activities were more than merely incidental. Given this, the location of the...

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SUFFICIENTLY CONNECTED—TAXATION VICTORY FOR "COMMERCIAL MAINSTREAM" BUSINESSES ON INDIAN RESERVES, CONTINUED

business activities was supportive of a connection between Mr. Dickie's business income and the reserve.

Location of customers and where payments are made

Despite the fact that the customers Mr. Dickie was serving were entirely off-reserve, the Court found that because communication between the parties was primarily via email, physical location was irrelevant. The fact that all payments for the work completed were made by cheques delivered to the on-reserve office was seen to be a connecting factor.

Residence of the owners

Mr. Dickie and his spouse both lived on-reserve and had a longstanding history of connections with the community. The residency factor was, therefore supportive of a connection between Mr. Dickie's business income and the reserve.

Where decisions affecting the business are made

The Crown argued that decisions are made by supervisors at the off-reserve worksites. The Court concluded, however, that those decisions were generally limited in nature, and that the more substantive decisions in fact occurred at the on-reserve office, thus supporting a connection.

> THIS DECISION PROVIDES A STRONG PRECEDENT IN FAVOUR OF ABORIGINAL BUSINESS BASED ON-RESERVE BEING EXEMPT FROM TAXATION, DESPITE THEIR LABOUR ACTIVITIES TAKING PLACE OFF-RESERVE.

Place where books and records are kept

As all books and records for Mr. Dickie's business were stored at the on-reserve office, the Court found that this factor was also supportive of a connection between the business income and the reserve.

Nature of work and the "commercial mainstream"

"Commercial mainstream" was interpreted by the Court to describe a business that essentially competed with non-aboriginal owned and operated businesses. This concept had been applied in previous cases to weaken, or eliminate, any demonstrated connection between business income and a reserve. The Court noted that this approach was incorrect. Just because a First Nation individual's on-reserve business may compete with a non-aboriginal business does not provide a reason to negate the finding that the aboriginal business is situated on-reserve.

Ultimately, after working through each of these factors as relevant to Mr. Dickie's business, the Court concluded that his business income was sufficiently connected to the reserve, therefore was exempt from taxation by operation of Section 87 of the *Indian Act*.

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SUFFICIENTLY CONNECTED—TAXATION VICTORY FOR "COMMERCIAL MAINSTREAM" BUSINESSES ON INDIAN RESERVES, CONTINUED

Implications of the Decision

This decision from the Court provides a strong precedent in favour of aboriginal business based on-reserve being exempt from taxation, despite their income-generating labour activities taking place off-reserve.

Perhaps more importantly was the conclusion from the Court that the "commercial mainstream" argument is not to be applied to negate the finding that a business is located on-reserve for the purposes of determining taxation exemption. The Supreme Court of Canada had already made it clear that the "commercial mainstream" position as argued by Canada was a non-starter. The *Dickie* case correctly applied the Supreme Court of Canada's earlier decision on this point.

This case provides further support for economic growth and autonomy by First Nations, and encourages an interpretation of the activities engaged in by First Nations that is not frozen-in-time. The Court demonstrated a progressive perspective that respects and facilitates independent corporate ventures being undertaken by First Nations on their reserves, and will prove to be an important precedent during the ongoing development of First Nations' business capacity.

DISGORGEMENT DAMAGES: CANADA BREACHES A MODERN TREATY BREACH AND MUST PAY UP *(NTI V. CANADA)*

Background and Case History

In 1993, a historic modern day treaty was signed by Canada and the Inuit: the Nunavut Land Claims Agreement (NLCA). Currently, the Inuit under this agreement are represented by the organization Nunavut Tunngavik Incorporated (NTI).

NTI ALLEGED THAT DURING THE TIME THAT THE PLAN WAS NOT IN PLACE, THE INUIT OF NUNAVUT SUFFERED SERIOUS HARMS, AS THE IMPLEMENTATION OF NUMEROUS TREATY PROMISES WAS SIGNIFICANTLY DELAYED.

In 2006, NTI commenced legal action against Canada, alleging breaches of the NLCA, and claiming damages of $1 billion. The NTI applied for a summary judgment to settle part of the claim. In this application, NTI alleged that Canada breached the NLCA by failing to set up a "general monitoring plan" according to the agreed upon timeline. The agreement was signed in 1993, and the plan was to be in place within ten years of that date. By 2006, no efforts had been made by Canada to institute the plan.

The monitoring plan was to address the "long term state and health of the ecosystemic and socio-economic environment" in the Inuit's settlement area. The results from the monitoring plan were critical to the overall functioning of the NCLA.

After NTI began the legal proceedings, the Government of Canada began to take the necessary steps to establish the monitoring plan, and it was finally implemented in its entirety in April 2010, six and a half years after the due date.

NTI alleged that during the time that the plan was not in place, the Inuit of Nunavut suffered serious harms, as the implementation of numerous treaty promises was significantly delayed. The Government, on the other hand, profited from not having spent the money they would have been required to establish the plan.

Accordingly, NTI sought a remedy of disgorgement from Canada. **Disgorgement** is a remedy that is given only in exceptional circumstances. Disgorgement requires that the plaintiff be awarded what the defendant gained by breaching its obligations. In this case, disgorgement would amount to the money Canada saved by not complying with the Treaty.

Did Canada breach their treaty obligation? If so, what is the appropriate remedy?

The first task before the Court was to determine whether Canada had breached its obligation under the NLCA by not implementing a monitoring plan. If so, the Court then needs to determine which remedy, if any, to grant to the plaintiffs, NTI.

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DISGORGEMENT DAMAGES: CANADA BREACHES A MODERN TREATY BREACH AND MUST PAY UP, CONTINUED

The usual remedy for not fulfilling contractual obligations is **expectation damages** – that is, an award of money that would essentially place the plaintiff in the position they would have been in had the obligations been performed by the other party. For example, if the agreement was that A agrees to sell a car worth $1000 to B for $300, and A then sells the car to another party instead, B would be entitled to expectation damages in the amount of $700. In cases where expectation damages cannot be calculated, however, the Court has two options: (1) most often, to award **nominal damages** (awards that are very small in their amount, and are given to confirm that a wrong had been committed against the plaintiff); or (2) in exceptional circumstances (discussed below), to award **disgorgement damages**.

THE COURT HELD THAT THERE WAS A BREACH OF FIDUCIARY DUTY, AND CHARACTERIZED CANADA'S CONDUCT AS "[FALLING] BELOW EVEN THE MOST MINIMAL STANDARD EXPECTED".

The Nunavut Court of Justice's Decision

After analyzing the available evidence, the Court held that Canada did not have the discretion as to when it would establish the monitoring plan. It had an obligation to do so by 2003.

The Court awarded of disgorgement damages for this breach of treaty. Generally, the "exceptional circumstances" in which such a remedy is fitting are: (1) when there is a breach of fiduciary duty; or (2) when there is a contractual breach between parties that have a fiduciary relationship and expectation damages cannot be calculated.

The Court held that in this case there had been a breach of fiduciary duty, and characterized Canada's conduct as "[falling] below even the most minimal standard expected".

The Court calculated the disgorgement amount based on projected costs of implementing the plan, as agreed upon by a working group assembled under the NLCA (which included members from both the Inuit and Government parties). The working group had estimated the cost of implementing the monitoring plan at $11.3 million over five years. Given that the monitoring plan was delayed well beyond the agreed upon timeline, Canada was held to owe nearly $15 million to the NTI.

Implications of the Decision

This decision demonstrates a high level of respect for the special nature of modern day treaties made between First Nations and Government, and the importance of the parties fulfilling the mutually agreed upon promises.

By providing the remedy of disgorgement, this case underlines the duty of the Crown to implement the promises made under modern day treaties, or else be faced with significant monetary penalties.

THE APPEAL FROM TSIHLQOT'IN: PART VICTORY, PART LOSS

Background and Case History

In 1989 the Crown authorized logging activity in the traditional territory of the Tsihlqot'in Nation. After years of declarations, injunctions, blockades, and more, the Tsihlqot'in brought a claim before the Court, seeking: (1) a declaration of Aboriginal title to 438,000 hectares of land in the west central interior of British Columbia; (2) a declaration of Aboriginal rights across this area; and (3) damages from the infringement of these Aboriginal rights and title.

In 2007, after nearly five years of trial, Justice Vickers of the British Columbia Supreme Court released his reasons for judgment - almost 500 pages in length. In his decision, Justice Vickers: (a) dismissed the Tsihlqot'in claim to Aboriginal title, without prejudice to their ability to make new claims to portions of land within the claim area; (b) declared Aboriginal rights of the Tsihlqot'in throughout the area; and (c) found that these rights had been unjustifiably infringed by Crown sanctioned forestry activities.

Importantly, the dismissal of the title claim was based on Justice Vickers' interpretation of the claim as being "all or nothing" to the area at issue; a technical point. That is, since the claim submitted by the Tsihlqot'in was seeking a declaration of Aboriginal title to the entire claim area, Justice Vickers considered himself bound to either completely accept or reject the claim, and unable to declare title to portions of the area therein. Justice Vickers did find that the evidence would have been sufficient to prove title to a significant portion of the Territory, had the claim been pleaded differently.

> IN TAKING A TERRITORIAL APPROACH, THE TSIHLQOT'IN SUBMITTED THAT ABORIGINAL TITLE COULD BE ESTABLISHED BY DEMONSTRATING PRESENCE OVER, AND EXCLUSIVE USE OF, A BROAD TRACT OF LAND. THIS CONTRASTS WITH A SITE-SPECIFIC APPROACH, WHICH REQUIRES PROOF OF INTENSIVE AND REGULAR USE OF A PARTICULAR AREA OF LAND IN ORDER FOR A FIRST NATION TO ESTABLISH ABORIGINAL TITLE.

Issues on Appeal

All three parties appealed the decision of Justice Vickers.

- The Tsihlqot'in Nation argued that the trial judge erred in not declaring Aboriginal title over the whole claim area, or, in the alternative, that he erred in holding the claim was "all or nothing", and in not declaring Aboriginal title over a portion of the claim area.
- Canada submitted that Justice Vickers erred by permitting the plaintiffs to bring other Aboriginal title claims in the future.
- British Columbia argued that the trial judge made numerous errors with respect to his findings on Aboriginal rights.

The Court of Appeal's Decision

In the unanimous judgment from the British Columbia Court of Appeal, the following issues were addressed:

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THE APPEAL FROM TSIHLQOT'IN: PART VICTORY, PART LOSS, CONTINUED

1) The "All or Nothing Claim" to Aboriginal Title

The Court of Appeal disagreed with the trial court on this issue, and found that the claim for Aboriginal title was not an all or nothing claim. Rather, the Court of Appeal held that a declaration of Aboriginal title to portions of land within the claim area would not have prejudiced the defendants, and as such, could have been granted.

2) The Test for Aboriginal Title

Two different theories of Aboriginal title were advanced by the parties: the Tsihlqot'in argued a claim to title based on aboriginal territory, whereas the defendants argued that claims to title must be site-specific.

In taking a territorial approach, the Tsihlqot'in submitted that Aboriginal title could be established by demonstrating presence over, and exclusive use of, a broad tract of land. This contrasts with a site-specific approach, which requires proof of intensive and regular use of a particular area of land in order for a First Nation to establish Aboriginal title.

The Court of Appeal agreed with the Defendants, and concluded that Aboriginal title must be proven on a site-specific basis. In situations where tracts of land were historically used less intensively and less regularly (as would be the case for many nomadic and semi-nomadic groups), the Court held that the recognition of aboriginal rights, rather than title, may be sufficient to preserve and protect the traditional uses by Aboriginal groups.

The Court found the site-specific approach to be in line with their interpretation of the test for Aboriginal title established by the Supreme Court of Canada in the *Delgamuukw* decision. The Court of Appeal cited passages in *Delgamuukw*, which suggested that "an intensive presence at a particular site was what the Court had in mind" when formulating the test for Aboriginal title.

Furthermore, the Court of Appeal held that a territorial approach to title, as submitted by Tsihlqot'in, was at odds with the goal of reconciliation, which essentially requires the protection of the traditional rights of First Nations "without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal".

In the end, while the Court of Appeal disagreed with the Trial Judge's reasoning, it endorsed his overall conclusion: the dismissal of the Aboriginal title claim without prejudice to their ability to bring site-specific Aboriginal title claim, in the future.

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THE APPEAL FROM TSIHLQOT'IN: PART VICTORY, PART LOSS, CONTINUED

3) The Claim for Aboriginal Rights

Justice Vickers declared that the Tsihlqot'in held various Aboriginal rights throughout the claim area, including: the right to hunt and trap, the right to trade in skin and pelts for the purposes of securing a moderate livelihood, and the right to capture and use horses for transportation and work. The Court of Appeal did not interfere with any of these findings. Notably, even though horses were introduced by Europeans to the continent, it was held that the Tsihlqot'in began to use them before contact with Europeans. Accordingly, the right to capture and use horses was viewed as an Aboriginal right.

The Court of Appeal endorsed the Trial Judge's conclusion that the Aboriginal rights of the Tsihlqot'in people had been unjustifiably infringed by forestry activities authorized by British Columbia. It was affirmed that the threshold for establishing the infringement of an aboriginal right is low and that, once demonstrated, the burden of proving that the infringement is justified shifts to the Government. In this case, although the Government argued that the objectives of the forestry activities were to provide economic benefits and deter the spread of the pine beetle, Justice Vickers did not find the evidence sufficient, to justify the infringement. The Court of Appeal did not alter this finding of fact.

Implications of the Decision

The most notable outcome of this decision was the Court's interpretation of Aboriginal title, and the clarification given to the test established by the Supreme Court of Canada in *Delgamuukw*. In concluding that the test for Aboriginal title is site-specific rather than territorial, the Court of Appeal has set a precedent that will affect the approach to title claims in British Columbia. If this decision is upheld on appeal, certain First Nations may be unable to hold Aboriginal title over the vast territories in which they traditionally practiced their way of life. Instead, "a network of specific sites over which title can be proven, connected by broad areas in which various identifiable Aboriginal rights can be exercised".

This case will likely be heard at the Supreme Court of Canada. If the Supreme Court of Canada "grants leave to appeal" (agrees to hear the case) this appeal will be crucial in shaping legal rules that will govern First Nations' claims of Aboriginal rights and title.

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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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