ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

British Columbia v. New Westminster Indian Band No. 566, 2022 BCCA 368

Court of Appeal for British Columbia, Newbury, Butler, DeWitt-Van Oosten JJA, 3 November 2022

Whether an insurance policy for an Indian Band was exempt from taxation.

Key words: Tax, British Columbia, Canada, Insurance, Indian Band, Person

1. The appeal decision was delivered by Newby JA, with whom the other justices concurred.

2. The New Westminster Indian Band No. 566, also known as the Qayqayt First Nation (the Band) did not have a reserve, but was suing for monetary compensation for the taking of its land in the 1890s.

3. To undertake the litigation, the Band borrowed funds from a Canadian Bank and entered into a policy of insurance with a London-based insurer to provide any shortfall between the loan and the proceeds of its compensation claim.

4. The Band sought to be exempt from tax on the insurance premiums paid on the policies under the Insurance Premium Tax Act, R.S.B.C. 1996, c. 232 (the IPTA). There was a 2% tax calculated on the gross premiums subject to certain exclusions. Generally, bands are not required to pay provincial sales tax, tobacco tax, or motor fuel tax when those goods are purchased on First Nation land, and where the goods are for the use of the band.

5. Before the Primary Court, the Band argued that:

    - it was not caught by s. 4 of the IPTA because the word "person" as used in the definition of "taxpayer" in s. 1(1) does not include Indian bands or First Nations;
    - s. 87 of the Indian Act provides an exemption; and
    - s. 4 of the IPTA was "constitutionally inoperative".

6. The Primary Court reviewed the major case authorities about the unique treatment of a band under Canadian law, noting in summary that (at [28]):

> Although the Court of Appeal found that an Indian Band is a "juridical person" that can sue and be sued in its own name, in doing so, it endorsed the decision in Montana Band and its determination that, having been created by statute rather than by the consent of its members, an Indian Band is a unique creature. This recognition is consistent with the construct that, despite its status as a juridical person, an Indian Band is nevertheless something other than a mere "person" at common law.

7. The Primary Court held that the Band was not a "person" within the definition of "taxpayer" in the IPTA and was, therefore not liable for tax on its insurance premiums.

8. Because the Band was not a "person" within the meaning of the IPTA, it was not necessary for the Primary Court to consider whether s. 87 of the Indian Act would exempt the Band from paying tax under the IPTA, assuming the Band was caught by the wording of the IPTA itself. That section exempted from taxation "the personal property of an Indian or a band situated on a reserve". So, was the insurance policy personal property, and was it situated on a reserve? The Primary Court noted that it was conceded that the insurance policy was personal property, but it had no connection with any "reserve", since the Band did not have one.

9. The Crown in right of British Columbia appealed the decision on the ground that the Primary Court erred in law by interpreting the word "person" under the IPTA as not including a "band" as defined in the Indian Act, and whether s. 87 of the Indian Act nevertheless exempted the Band from liability for tax.

10. The Court of Appeal, after examining the cases, the context, and principles of statutory interpretation found (at [55]):

> …that a band can be both a unique entity and a "person".

11. Since the Court of Appeal, disagreeing with the primary judge, found that the Band was a "person" under the IPTA, its exemption under s. 87 of the Indian Act became the crucial issue of the case.

12. Whether the s. 87 of the Indian Act would exempt the Band from paying tax was a matter of whether the facts involved "the personal property of an Indian or a band situated on a reserve". The Court of Appeal noted (at [80]):

> …the purpose of the exemption in s. 87 is to protect the ability of First Nations to benefit from their reserve properties and to guard against "efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and the chattels on that land base." (Mitchell at 130–1.) It would be ironic, to say the least, to permit the Crown (here in right of the Province) to benefit from the alleged wrongful taking of the Band's reserve when the Crown (in right of Canada) was and is bound to protect First Nations' rights in respect of reserves. The apparent failure of the Crown to do so in the 19th century should not now enable it to compound the wrong by claiming a tax on premiums incurred by the Band for the purpose of seeking compensation years later — premiums that constitute a liability of the Band to a third party.

13. And (at [82]):

> In my respectful view, a purposive analysis of s. 87 as intended to protect the reserves of First Nations from the depredations of governments and creditors leads to the conclusion that although the Band is now without a reserve, and may never recover its reserve lands per se, its efforts to obtain compensation under the Specific Claims Tribunal Act for the taking of its reserve are still connected to "a reserve".

14. Therefore, although the Band had no reserve, its claim was sufficiently connected with a reserve.

15. Thus, the Court of Appeal upheld the Primary Court decision, but on a different basis. Although the Band was a "person" under the IPTA, the insurance premiums payable to the insurer were "personal property situated on a reserve" within the meaning of s. 87 of the Indian Act, and therefore exempt from taxation by British Columbia.

IMPLICATIONS

The Appeal Court noted (at [84]):

> Last, it seems to me that in this era of reconciliation, courts should recognize that traditional ways of interpreting statutes in relation to First Nations may be inadequate in unique fact situations such as the one before us. At the end of the day, the extension of the phrase "personal property situated on a reserve" to include "personal property strongly connected to a reserve" seems a small step, and an appropriate one.

There is an extensive discussion in the case about the definition of a person and the nature of an Indian band. A band, as an enduring entity with its own government, is a unique type of legal entity under Canadian law. The rights and obligations of a band are quite distinct from the accumulated rights and obligations of the members of the band. A band is neither an unincorporated association nor a group of tenants-in-common because membership does not confer a present right of possession of band property.

VIEW THE CASE

This case may be viewed at https://www.canlii.org/en/bc/bcca/doc/2022/2022bcca368/2022bcca368.html

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Date of creation: December 2022

Number of case: 2022-173