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ASSESSOR OF AREA 25 - NORTHWEST-PRINCE RUPERT

v.

N & V JOHNSON SERVICES LTD. & GLEN WILLIAMS, et al

Supreme Court of British Columbia (A880027) Vancouver Registry

Before MADAM JUSTICE SOUTHIN Vancouver, April 15, 1988

Christopher M. Considine for the appellant
Peter R. Grant for the respondent

Reasons for Judgment

April 19, 1988

This is an appeal by way of Stated Case by the Assessor against the decision of the Assessment Appeal Board dated the 29th October, 1987.

The Board held that certain lands were not subject to assessment essentially because of s. 34 (4) of the Assessment Act, R.S.B.C. 1979, c. 21.

In the Stated Case, the Board sets out the facts thus:

1. The subject matter of this appeal is lands upon which a service station and restaurant are operated situated on the Gitwangak Indian Reserve held under lease by the respondent, N & V Johnson Services Ltd., incorporated under the Companies Act of British Columbia on the 18th day of February, 1976.
2. At all material times all the shareholders of the respondent, N & V Johnson Services Ltd., have been members of the Gitwangak Indian Band, namely Norman Johnson and his wife Vina Johnson.
3. A Certificate of Possession for the lands was issued to Norman Johnson both by the Band Council and the Ministry of Indian and Northern Affairs pursuant to the provisions of the Indian Act.
4. The respondent was incorporated to enable the shareholders of the company to obtain financing for the construction of the service station and restaurant on the lands through debenture financing as required by the Federal Business Development Bank.

At Norman Johnson's request the Minister of Indian Affairs and Northern Development granted a lease of the land to the respondent corporation.

5. At the request of Norman Percy Johnson, one of the shareholders of the respondent, and a party to the lease, the Minister of Indian Affairs and Northern Development leased the lands to the respondent corporation for his benefit pursuant to section 58 (3) of the Indian Act.

6. Under the Indian Act the interest and personal property of an Indian or Band situated on a Reserve is exempt from taxation.

7. Section 13 of the Taxation (Rural Area) Act provides that land and improvements vested in or held by Her Majesty or another person, in trust for, or for the use of a tribe or body of Indians, and either unoccupied or occupied by a person in an official capacity or by the Indians, is exempt from taxation.

8. The Board found that because of the circumstances of the Certificate of Possession issued to Mr. Johnson and his retention of the rights pursuant to the lease, together with the necessity of incorporation for the purposes of obtaining a loan from the Federal Business Development Bank, that the lands were held by the corporation in trust for Mr. Johnson and exempt from taxation under the Assessment Act.

9. The Board found that the lands in question are in fact Indian Reserve land.

It then poses the following questions:

1. Did the Assessment Appeal Board err in law in holding that the land and improvements in question were held by N & V Johnson Services Ltd. in trust for Norman Johnson?

2. Did the Assessment Appeal Board err in law in holding that the lands and improvements in question were exempt from taxation under the Assessment Act?

3. Did the Assessment Appeal Board err in law in finding that N & V Johnson Services Ltd., acquired the identity of its shareholders and could be considered to be an Indian?

4. Is the Assessment Appeal Board required by law to find the actual value of the land and improvements in question and order them entered on the assessment roll in the name of N & V Johnson Services Ltd.?

5. Did the Assessment Appeal Board err in law in finding that on the facts of this case it could and should lift the corporate veil of the respondent?

The relevant, and inter-related, statutory provisions are these:

Indian Act, R.S.C. 1970, c. 1 - 6

20. (2) 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.

58. (3) The Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered.

87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 83, the following property is exempt from taxation, namely:

(a) the interest of an Indian or a band in reserve or surrendered lands; and

(b) the personal property of an Indian or band situated on a reserve;

and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property; . . .

Assessment Act, R.S.B.C. 1979, c. 21, s. 1:

'occupier' means

(a) a person who, if a trespass has occurred, is entitled to maintain an action for trespass;

(b) the person in possession of Crown land that is held under a homestead, entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement or other record from the Crown, or who simply occupies the land;

34. (1) Land, the fee of which is in the Crown, or in some person on behalf of the Crown, that is held or occupied otherwise than by, or on behalf of, the Crown, is, with the improvements on it, liable to assessment in accordance with this section.

34. (4) This section applies, with the necessary changes and so far as it is applicable, where land is held in trust for a tribe or band of Indians and occupied, in other than an official capacity, by a person not an Indian.

Taxation (Rural Area) Act, R.S.B.C. 1979, c. 400

13. The following property is exempt from taxation:

(h) land and improvements vested in or held by Her Majesty or another person in trust for or for the use of a tribe or body of Indians, and either unoccupied, or occupied by a person in an official capacity or by the Indians; . . .

In its reasons the Board said this:

The Board feels that in this case and solely on the facts relating to this case especially with reference to the circumstances of the Certificate of Possession issued to Mr. Johnson and his retention of the rights pursuant to the lease together with the necessity of incorporation purely for the purposes of obtaining a loan from the Federal Business Development Bank, that this is a proper case for lifting of the corporate veil. The Board finds that in fact the lands are held by the corporation in trust for Mr. Johnson and that the lands and improvements are exempt from taxation under the Assessment Act. To hold otherwise would be to tax reserve lands and the Board does not feel that the Company was incorporated as the most efficient manner of obtaining its objectives but was done purely to permit Federal Business Development Bank financing.

The first question is whether the Appeal Board erred in law in holding that the lands were held by the company in trust for Mr. Johnson.

Here the lessor, the Crown, holds the reversion, in effect, in trust for Mr. Johnson the holder of a Certificate of Possession. The Board has held that the lessee, the company, holds the term created by the lease in trust for Mr. Johnson.

The Board described its finding that the company holds the lands in trust for Mr. Johnson as a finding of fact. But a fact can only be found if there is some evidence to support it.

Whether there is a trust is a question of mixed law and fact.

Counsel for the respondent conceded that there was not a shred of written evidence of any trust. I infer that there was no evidence before the Board of any oral declaration of trust. No argument was advanced to me that there can be said on these facts to be any resulting or constructive trust.

In my opinion, the Board confused the concept of "lifting the corporate veil" with the concept of trust and assumed that if one could "lift the corporate veil" one thereupon would find there was a trust.

In my view that is simply not so as a matter of law.

In order to arrive at the conclusion it did, the Board would have to be saying that if this company has creditors the company's interest in the term created by the lease is not available to its creditors because it belongs to Mr. Johnson.

The company may be able to declare itself trustee for Mr. Johnson. As to whether that would be a breach of any obligation to any other person, I make no finding. Nor do I make any finding as to what, if it did so, would be the result in law for assessment and taxation purposes.

I simply hold that the Board erred in law in finding that the lessee holds the term in trust for Mr. Johnson because there was no basis upon which it could make that finding.

The second and succeeding questions are really only one question: under the Assessment Act and Taxation (Rural Area) Act, are lands occupied by a corporation whose shareholders are Indians exempt from assessment and taxation?

The decision appealed from holds the answer to be "yes".

An earlier decision of the Assessment Appeal Board, Village Green Mall v. Assessor for Area No. 03 -- Cowichan Valley, 20, 26 December, 1982 founded on language which to my mind is no different in meaning (see the Municipal Act, R.S.B.C. 1979, c. 290, s. 398) held the answer to be "no".

A corporation is an artificial person. By its nature, it can have neither race or religion nor sex.

The question raised here on the meaning of the British Columbia sections may be thought to raise the conflict between two schools of thought on statutory interpretation -- the "purposive" school or the "words in their natural meaning" school.

If one looks at the relevant provisions of the two statutes, one can infer that the purpose of the Legislature was either not to trespass upon the jurisdiction of the Parliament of Canada under the 24th head of s. 91 of the Canada Act -- "Indians, and lands reserved for the Indians" as that jurisdiction is given expression in the Indian Act, s. 87 -- or to benefit Indians, or both.

This exemption in favour of Indian lands goes back to the Land Tax Act 1873, s. 1 (c) which exempted from the Wild Land Tax "land held for the benefit of any tribe or body of Indians".

By the Taxes (Property) Act of 1876 to be found in the Consolidated Laws of British Columbia, 1877, at c. 152, s. 8 (1):

8. All land and personal property and income in the Province of British Columbia shall be liable to taxation, subject to the following exemptions, that is to say: --

(1) . . . and also all property vested in or held by Her Majesty, or any other person or body corporate, in trust or for the use of any tribe or body of Indians, and either unoccupied or occupied by some person in an official capacity:

(2) When any property, mentioned in the preceding clause number one, is occupied by any person otherwise than in an official capacity, the occupant shall be assessed in respect thereof, but the property itself shall not be liable:

Curiously, s. 1 appears to be to make land occupied by Indians taxable. It may be contrasted with s. 24 of the Taxation Act, S.B.C. 1924, c. 75:

24. The following land shall be exempt from taxation: --

(i) Land vested in or held by His Majesty, or held in trust for His Majesty, either in right of the Dominion or of the Province, or held in trust for the public uses of the Province; and land vested in or held by His Majesty or any person in trust for or for the use of any tribe or body of Indians, and either unoccupied, or occupied by some person in an official capacity, or by the Indians:

The earliest provisions in *pari materia* with s. 87 of the Indian Act which I have been able to find are ss. 64 and 65 of the Indians Act 39 Vict., c. 18:

64. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds real estate under lease or in fee simple, or personal property, outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate.

65. All land vested in the Crown, or in any person or body corporate, in trust for or for the use of any Indian or non-treaty Indian, or any band or irregular band of Indians or non-treaty Indians shall be exempt from taxation.

As to s. 87, the Saskatchewan Court of Appeal has held in *Kinookinaw Beach Association v. The Queen in Right of Saskatchewan* [1979] 6 W.W.R. 84, that it does not exempt a corporation whose shareholders are Indians from taxation.

As I understood him, Mr. Grant submitted, on the basis of the judgment of the Supreme Court of Canada in *Nowegijick v. The Queen et al.* [1983] 1 S.C.R. 29 that I should not follow the judgment of the Saskatchewan Court of Appeal on the meaning of that section. It has always been my understanding that on the meaning of a federal statute, a trial judge of one province should generally follow an appellate judgment of another province. I do so. If the judgment of the Saskatchewan Court of Appeal is not to be followed in British Columbia, it is for our Court of Appeal to take that course. For me not to do so, in the absence of a clear indication from the Supreme Court of Canada that it considers the Saskatchewan Court of Appeal in error, would be presumptuous.

On that interpretation of s. 87, I am left with the question of whether the British Columbia sections should fairly be interpreted as conferring an exemption upon such corporations.

Bearing in mind the course of the relationship between the indigenous and non-indigenous population of British Columbia since British Columbia joined Confederation in 1871, I am of the opinion that the legislative purpose in enacting the exemptions was not to benefit Indians but to observe the perceived limits of the Province's legislative authority. To put it another way, I am of the opinion that the Legislature intended to tax to the boundary of the area protected by s. 87 of the Indian Act and its predecessors.

That being so, I see no reason why the words in issue should not be taken in their natural meaning. A corporation is not an Indian although there is nothing to prevent the Legislature from saying if it chooses to do so that corporations wholly owned by Indians are to be considered Indians for the purpose of assessment and taxation.

It follows that, in my opinion, the answer to each of the five questions is "yes".