

CANADA / JUDGMENT

Ramsay Painting v. St. Mary's Indian Band

2006 BCSC 976

COURT

Supreme Court of British Columbia

DECIDED

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2006BCSC0976

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ramsay Painting v. St. Mary's Indian Band,

2006 BCSC 976

Date: 20060623

Docket: 03/3686

Registry: Victoria

Between:

Ramsay Painting Ltd.

Plaintiff

And:

St. Mary's Indian Band

Defendant

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Plaintiff:

A. Berns

Counsel for the Defendant:

K. Robertson

Date and Place of Trial/Hearing:

20060518

Victoria, B.C.

- [1] The plaintiff obtained judgment against the defendant on June 15, 2004. On November 23, 2005 the plaintiff obtained a garnishing order after judgment which it served on the defendant's bank in Cranbrook, B.C. On December 9, 2005 the garnishing order attached money on deposit in the Band's account at the bank in the sum of \$41,758.38. That amount was paid into court by the bank on December 21, 2005.
- [2] The plaintiff now applies for payment out of court of the money paid in pursuant to the garnishing order. The defendant applies to set aside the garnishing order, and for an order that the money paid into court under the garnishing order be paid out to the defendant in care of its solicitors. Both parties claim costs.
- [3] The issue here is whether the money deposited in the Band's account at a commercial bank in Cranbrook, B.C., is deemed to be personal property of the Band situated on a reserve pursuant to s. 90(1)(b) of the Indian Act, R.S. 1985, c. I-5, and thus exempt from attachment under s. 89 of that act. The defendant Band argues that it is. Sections 87 to 90 of the Act are as follows:
87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely,
- (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
- (b) the personal property of an Indian or a band situated on a reserve.
- (2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.
- (3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the Dominion Succession Duty Act, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the Estate Tax Act, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.
88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

90. (1) For the purposes of sections 87 and 89, personal property that was

(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty, shall be deemed always to be situated on a reserve.

(2) Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.

[4] An alternative argument advanced, should the garnishing order survive this application, is that the court should set aside the garnishing order on grounds of hardship, order the money returned to the Band, and set a payment schedule, all under s. 5 of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78.

[5] As a preliminary issue the Band argued that I should not decide this matter at this time as the questions to be decided on this application have been argued before the Supreme Court of Canada in *God's Lake First Nation v. McDiarmid Lumber Ltd.* in April of this year and are now on reserve. This appeal is from a decision of the Manitoba Court of Appeal reported at 2005 MBCA 22. The defendant has urged me to defer decision in this matter until the decision of the Supreme Court of Canada is handed down.

[6] The only material difference in the fact pattern giving rise to the case argued in the Supreme Court of Canada and the case before me is that in the former, the Indian Band was signatory to a treaty, whereas here the defendant Band is not, although it is now in the fourth of six stages of the treaty negotiation process.

- [7] I recognize that the decision of the Supreme Court of Canada in *God's Lake* may prove me wrong. In my view however the plaintiff in this case is entitled to a decision and ought not to have to wait until the Supreme Court of Canada has ruled. For the reasons I will set out after considering the authorities cited by counsel, I have concluded that the plaintiff is entitled to have the matters raised in its Motion determined.
- [8] In this case the account from which the money was attached by the garnishing order appears to have been the defendant Band's operating account. Each month Her Majesty the Queen in Right of Canada ("Canada") deposits money into an account in the name of the defendant Band at Peace Hills Trust. The money was paid pursuant to a Comprehensive Funding Agreement between Canada, as represented by the Minister of Indian Affairs and Northern Development, and the defendant Band. Peace Hills Trust deducted a payment owing to it for a mortgage or other pledge, and then the balance, some \$118,000, was transferred to the Band's account at the Bank of Nova Scotia in Cranbrook.
- [9] Those funds were then co-mingled with other funds that were deposited to the same account before and after transfer in of the money paid under the Comprehensive Funding Agreement. When the garnishing order was served there was slightly more than \$60,000 in the account at the Bank of Nova Scotia. Between the transfer of the balance originating with the Comprehensive Funding Agreement payment and the attachment, over \$100,000 had been deposited to and paid out of the Band's account at the Bank of Nova Scotia.
- [10] The Comprehensive Funding Agreement states in its preamble:

WHEREAS the Minister is providing funding for the delivery of programs and services for the benefit of the First Nation Members represented by the Council;

...

The agreement itself goes on to provide at para. 2.1:

2.1 The Minister agrees to provide an amount of up to One million two hundred eighty-one thousand seven hundred five dollars and zero cents (\$1,281,705.00) on the condition that these funds are to be used for the purposes of providing programs and services provided for in this Arrangement in accordance with the terms and conditions of this Arrangement.

The agreement requires the Band to provide programs and services that are provided for in the general terms and conditions attached to the agreement, and as set out in para. 1.1(a):

1.1 The Council shall:

- (a) deliver the funded programs and services set out in PART G - Program Budgets, Authorities and Monthly Expenditure Plan and complete capital projects in accordance with Approved Capital Project submissions;

...

- [11] Part G lists a number of activities which include Band support funding, tuition agreements, educational and school financing, transportation financing, employment and training, special needs, in-home and institutional care, and health and public safety programs including water systems, fire protection and the like.
- [12] An issue in this case, as it was before the Manitoba Court of Appeal in *God's Lake*, is whether money in the Band's account at the Bank of Nova Scotia in Cranbrook, has as its situs the bank branch in Cranbrook, or is it, as the defendant Band argues, deemed to be on the reserve by application of the Indian Act.
- [13] At common law a bank deposit was considered a debt owing by the bank to the depositor. The situs of that debt was the location of the debtor. In the case of the Bank of Nova Scotia, the situs of the debt is fixed by s. 461 (4) of the Bank Act, S. C. 1991, c. 46. In the case of *Peace Hills Trust*, by s. 447, of the Trust and Loan Companies Act, S. C. 1991, c. 45.
- [14] The common law, as codified by statute, was considered by the Supreme Court of Canada in *Williams v. Canada*, [1992] 1 S.C.R. 877, where it was held that the common law rules governing situs of a debt had to be construed under the Indian Act according to the purposes of that Act. While *Williams* dealt with the situs of unemployment insurance benefits and whether they were available to be taxed, it applies with equal force to bank deposits. The Supreme Court of Canada concluded its decision in *Williams* in this way:

Determining the situs of intangible personal property requires a court to evaluate various connecting factors which tie the property to one location or another. (para. 61)

- [15] The court made it clear in *Williams* that its reasons applied equally to an exemption from seizure.
- [16] The situs of funds payable by a provincial Crown to an Indian band in settlement of a dispute, and whether the settlement money could be attached, was considered in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85. There, a lawyer who had successfully negotiated a settlement on behalf of an Indian Band obtained a garnishing order attaching the settlement funds in the hands of the opposing party, the Manitoba Government. The Band moved to set aside the garnishing order and one of the arguments advanced was that the settlement funds were deemed to be situate on the reserve under s. 90(1)(b) of the Indian Act. The issue was whether this section applied equally to money payable to an Indian Band by the Crown provincial as it would if paid by the Crown federal. Speaking for the majority on this point, La Forest J. held that the combined operation of s. 90(1)(b), ss. 87 and 89 of the Indian Act applied to property that Her Majesty the Queen in Right of Canada transferred to Indians pursuant to treaties and their ancillary agreements, and not to property originating with a provincial government.
- [17] In *Mitchell*, the focus in the judgment of La Forest J., with whom five members of the Court agreed, was whether the term "Her Majesty" in s. 90 of the Indian Act included the Provincial Crown. There is this language at para. 95:

95. If, as I believe, the term "Her Majesty" in s. 90(1)(b) is limited to the federal Crown, it follows that the exemptions and privileges of ss. 87 and 89 will apply, regardless of situs, solely in respect of such property as the federal Crown gives to Indians in acquitting itself of its responsibilities pursuant to treaties, and their ancillary agreements. ...

And:

99. In summary, I conclude that an interpretation of s. 90(1)(b), which sees its purpose as limited to preventing non-natives from hampering Indians from benefiting in full from the personal property promised Indians in treaties and ancillary agreements, is perfectly consistent with the tenor of the obligations that the Crown has always assumed vis-à-vis the protection of native property.

[18] That raises an issue argued in this application, that is whether the Comprehensive Funding Agreement under which the money in question is said to have originated, was such an "ancillary agreement" as contemplated by the language in Mitchell.

[19] Here, the plaintiff argued, and I agree, that there is no evidence that the St. Mary's Indian Band is a signatory to a treaty. Indeed, the evidence is that the Band is, as previously stated, engaged in the treaty negotiation process.

[20] The plaintiff argues that because there is no treaty, any payments under the Comprehensive Funding Agreement cannot be said to be ancillary to a treaty, that the existence of a treaty is a prerequisite to the application of s. 90(1)(b).

[21] Two questions are thereby raised:

1. Whether a treaty is necessary in order to protect the funds from attachment; and
2. Whether the payments under the Comprehensive Funding Agreement in this case are payments made under an "... agreement between a band and Her Majesty, ..." as being pursuant to an ancillary agreement.

[22] The authorities on the second question are canvassed in detail by the Manitoba Court of Appeal in *God's Lake First Nation*, commencing at para. 108. The question there was whether the agreement provided for in s. 90(1)(b) referred to any agreement between Her Majesty the Queen in Right of Canada and the Indian Band, or whether it must necessarily be an agreement so closely tied to a treaty as to be a form or method of implementation of that treaty or a means by which treaty obligations of the Crown in Right of Canada were discharged. After canvassing appellate authorities in the Federal Court and British Columbia Court of Appeal (including *Nathanson Schachter & Thompson v. Sarcee Indian Band* (1994), B.C.J. No. 690, Court of Appeal), the Manitoba Court of Appeal concluded at para. 125:

the words "treaty or agreement" in s. 90(1)(b) of the Act refer to a treaty or agreement ancillary thereto.

- [23] In the course of doing so, the Court considered a number of authorities, including an authority from this court, *Fricke and Seaton Timber Ltd. v. Mitchell et al* (1985), 67 B.C.L.R. 227 (S.C.). In that case it was held that funds paid to a band pursuant to a funding agreement with Canada constituted personal property within the meaning of s. 90 of the Indian Act. The Manitoba Court of Appeal distinguished *Fricke* on the basis that there was no consideration of the question whether the money was paid pursuant to an "agreement" within the meaning of s. 90.
- [24] The plaintiff in this case relies on *Fricke*. In *Fricke*, the plaintiff had obtained a garnishing order against funds on deposit to the account of an Indian Band at a bank that was not on a reserve. The Band applied to set aside the garnishing order and to have the money paid out to it. The court, after pointing out that on the application of ordinary principles, the situs of the money attached would be the address of the bank, considered whether the debt represented by the bank deposit was personal property. The court reviewed authority from Manitoba, which held that personal property did not include money, and contrary authority, also from Manitoba, which disagreed and held that the right to payment of money should be held to be personal property within the meaning of s. 90(1). This court expressed its agreement with the latter conclusion. *Errico L.J.S.C.* concluded:
- 17 I am in agreement with the conclusion of *Morse J.* and the reasons therefore. To follow the interpretation of *Ferg L.J.Q.B.* would be to prohibit the attachment of personal property other than money which was a contribution made by the Government of Canada for the benefit of Indians but to allow the attachment of any such contribution when it is in the form of money or an obligation to pay money.
18. I therefore find that the money on deposit at the account of the defendant band in the Bank of Montreal and the obligation of the Bank of Montreal to pay that money to the band except for the sum of \$3,127.60 to be personal property of the band situate on a reserve and thus not liable to attachment.
- [25] It seems to me with respect that the analysis on the part of the Manitoba Court of Appeal is correct. *Fricke*, in its analysis of the authorities out of Manitoba, dealt with whether or not money was personal property, and did not specifically address whether the money was paid under an agreement of the type contemplated by s. 90(1)(b) of the Indian Act.
- [26] Since that is the issue before me and it is an issue that was not addressed in *Fricke*, I am not bound by *Fricke* on that question.
- [27] The authorities agree that the policy underlying ss. 87 to 90 of the Indian Act are meant to ensure that reserves, including personal property of Indians on reserves, are preserved for the benefit of Indians on the reserve. The protection afforded to personal property of Indians on a reserve is extended beyond the boundaries of the reserve when that personal property is temporarily off the reserve. A test of paramount location of personal property has been developed to achieve this goal in cases where personal property ordinarily on a reserve is subject to attempted seizure when it is taken off the reserve temporarily.

- [28] The authorities are clear that property of Indians off a reserve, which does not have the reserve as its paramount location, is not so protected.
- [29] I recognize that the Indian Act must be liberally construed in favour of the Indians. I recognize another fact of life in British Columbia and that is that there are few treaties between Indians and Her Majesty the Queen in Right of Canada.
- [30] The requirement that, in order to be protected under s. 90(1)(b), money must be paid pursuant to an agreement that is ancillary to a treaty has existed since Mitchell.
- [31] Again, there is no treaty in this case. It is not possible therefore to conclude that the Comprehensive Funding Agreement is ancillary to a treaty.
- [32] I do not agree that money paid by Canada under an agreement between an Indian Band and Her Majesty the Queen in Right of Canada, absent a treaty, where that money is on deposit in a bank outside a reserve, is personal property given to Indians or to a band under a treaty or agreement between the band and Her Majesty. While the money on deposit in the bank is personal property as a debt owing by the bank to the band, it is not protected by the deeming provisions of s. 90(1)(b) in my view.
- [33] I therefore grant the plaintiff's application and dismiss the application of the defendant in this case.
- [34] In recognition however of the fact of the appeal currently on reserve in the Supreme Court of Canada, I stay my order for 30 days within which the defendant can consider its alternatives.
- [35] The defendant has sought an order in the alternative, that I exercise discretion under s. 5 of the Court Order Enforcement Act to set aside the garnishing order, order the funds released to the defendant, and, in lieu of the funds garnished, that I set a payment schedule that will allow the Band to pay the judgment to the plaintiff. The defendant argues that the funds were intended to pay ordinary operating expenses of the Band, and that under the Comprehensive Funding Agreement, the services for which the funds were intended, are required by the agreement to be provided, and are for the general welfare and well-being of the members of the Band.
- [36] The defendant argues that the Band has been able to continue to operate without the attached money on sufferance of its bankers or creditors, but that the loss of the funds to the plaintiff if the garnishing order is allowed to stand will cause great hardship to the members of the Band.
- [37] The plaintiff argues that it is not a large contractor, and it needs the money every bit as much as the Band needs the money.

- [38] I bear in mind that the claim on which the judgment was granted in this case arose out of a commercial venture in which the Band was a party, perhaps by joint venture with other Bands, that it involved an attempt to develop or improve a property outside a reserve, and that the judgment in question flows from what was in all respects a straightforward commercial agreement.
- [39] I understand that when the venture failed, other creditors were obliged to deal with a receiver or a trustee in bankruptcy appointed to wind up the venture, and this plaintiff managed to avoid the same fate because the Band carelessly contracted directly with the plaintiff, rather than through the entity that floundered.
- [40] I have some sympathy for this Band, and regret that its members may have to do without as a result of what may have been an error when the contract with the plaintiff was entered into. I do not, however, think that the plaintiff should be denied its recovery because it will make matters uncomfortable for the defendant. The loss of this money to the plaintiff will not cause the members of the Band such hardship that life or health or well-being will be threatened. The amount involved is just under one third of the Band's monthly payment from Canada, and a bit more than 3% of the amount payable by Canada under the agreement for the year.
- [41] The debt has been found owing, and the plaintiff has waited long enough for its payment. I decline the application that I exercise discretion as sought.
- [42] The plaintiff shall be entitled to payment out of the money paid in pursuant to the garnishing order, with any interest that has accrued. The plaintiff is entitled to its costs.

"R.T.C. Johnston, J."

The Honourable Mr. Justice R.T.C. Johnston

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