Date: 19980608

Docket: S.C. No. 96-A0172

Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

NORMAN STERRIAH, ON BEHALF OF ALL MEMBERS OF THE ROSS RIVER DENA COUNCIL BAND and ROSS RIVER DENA DEVELOPMENT CORPORATION (PETITIONERS)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA and THE GOVERNMENT OF YUKON (RESPONDENTS)

REASONS FOR JUDGMENT OF MR. JUSTICE MADDISON

[1] The genesis of this action is a tobacco tax. The petitioners contend that they are not subject to it because the land where they live and sell tobacco products is an Indian Reserve.

[2] The following facts are not in dispute:

> The Petitioner Ross River Dena Council ("RRDC") is an Indian Band within the meaning of the *Indian Act,* R.S.C. 1985, C. I-5 ("the *Indian Act").* RRDC consists of approximately 393 persons who are Indians as defined in the *Indian Act.*

[Page 2]

> RRDC is located at Ross River, Yukon Territory, on lands in the name of Her Majesty the Queen in Right of Canada which have been set aside by Her Majesty to be used for the Ross River Indian Band Village Site.
>
> The Petitioner Ross River Dena Development Corporation "(the Corporation") is a company incorporated on or about October 28, 1982 by the Chief and Council of RRDC. The purposes of the Corporation are to act as the agent for members of RRDC to carry on business and to provide services for the benefit of the members of RRDC. The sole shareholder of the Corporation is Norman Sterriah, who holds the share in trust for the members of RRDC. The Corporation is the sole shareholder of a company called North Star Trading Post Ltd., which operates the Dena General Store ("the Store"). The Store

is a retail store run by and for the benefit of the members of RRDC; selling, among other things, cigarettes and tobacco products.

On or about September 2, 1992, the Store obtained a Tobacco Retail Dealer's Permit from the Government of Yukon ("YTG") permitting it to sell cigarettes and tobacco products. Cigarettes and tobacco products are purchased for the Store by the Corporation. The products are purchased for retail sale primarily to the members of RRDC. The products are also sold to non-Indians who reside in Ross River. The Corporation purchases the cigarettes and tobacco products as agent for the purchasers of those products. The Corporation obtains the products from a wholesale dealer. As required by s. 3 of the *Tobacco Tax Act,* R.S.Y. 1986, c. 170, the Corporation, as agent for the purchasers of the products

[Page 3]

from the Store, pays to the wholesale dealer a tobacco tax, under protest. The Store records each sale of cigarettes and tobacco products to members of RRDC for the purposes of collecting a refund of the tobacco sales tax from YTG. YTG has refused to provide a refund of the tobacco taxes paid on behalf of the members of RRDC.

[3] The Government of Canada ("Canada") takes the position that the RRDC is located on "lands set aside" for Indians which do not have the status of a "reserve" under the *Indian Act.* YTG contends that the Store is not located on a "reserve" as defined in the *Indian Act,* and is therefore not entitled to the tax exemption set out in s. 87 of the *Indian Act.* YTG did not present argument to the court, content to rely on Canada's representations. RRDC takes the position that the Store is located on a "reserve" as defined in the *Indian Act,* and is therefore entitled to the tax exemption set out in s. 87 of the *Indian Act.* The land in dispute was set aside in 1965.

[4] The Ross River Band of Indians was in existence long before the time when the setting apart of the land was done. At least as early as 1951, the band was recognized by the Minister of Indian Affairs (Document 9, page 1). The significance of this is that, of the three ways in which a band is defined in the *Indian Act,* only the third would apply to the Ross River Band inasmuch as it is common ground that neither lands nor money were involved before 1965. The *Indian Act,* R.S.C. I-6, s. 2.(1) reads:

2.(1) In this Act,

"band" means a body of Indians

[Page 4]

(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(b) for whose use and benefit in common, moneys are held by Her Majesty, or

(c) declared by the Governor in Council to be a band for the purposes of this Act;

[5] Canada accepted in 1940 (Document 4) that there were 15 parcels set aside as Indian Reserves in the Yukon Territory. Of these, seven had been confirmed by Orders-in-Council, seven were recorded in the files of the Yukon-Northwest Territories Division as approved and recorded as reserves, and one "had been purchased". None of the 15 were at Ross River. The document goes on to say:

> The position of these reserves should be carefully noted in our records, but the Authority of Council, should not. I think. be obtained until the Department of Indian Affairs asks for it. Many of these reserves will no doubt, in time, be relinquished, as some have already been, so that it might be better for the present to simply note them.
>
> (Underlining in original)

[6] Then in September, 1953, as a result of obtaining a departmental legal opinion on the status of the Indian Reserves in the Yukon, the position of Canada changed. Canada took the position at that time that there were no reserves in the Yukon. There were only lands reserved from disposal for any other purpose, Orders-in-Council which would seem to have indicated the contrary, notwithstanding.

[7] On October 21, 1953, the Superintendent of the Yukon Indian Agency stated, in a letter to his apparent superior, the Indian Commissioner for British Columbia, (Document 14, page 1) that a reserve for the Ross River and Pelly Indians was required, and asked permission to stake an approximate area of 200 acres at the

confluence of the Pelly and Ross Rivers. On November 10, 1953, the Indian Commissioner for British Columbia recommended to Ottawa the establishment of a common reserve for the Ross River and Pelly Bands (Document 15). On April 1, 1954, the Superintendent of the Yukon Indian Agency told the Dominion Lands Agent in the Department of Northern Affairs and Natural Resources in Whitehorse that he had made "tentative arrangements to apply for a tract of land for an Indian Reserve ..." (Document 18). He mentions in the letter the proposed location, which is also at the confluence of the Pelly and Ross Rivers. Nothing came of this.

[8] In June, 1954, Canada's Superintendent of Reserves and Trusts of the Department of Indian Affairs wrote that the nine Yukon Indian Reserves listed in the letter are *designated* as Indian Reserves and numbered but that none of them were Indian Reserves within the

meaning of the *Indian Act* (Document 24, page 1). He describes two ways that lands in the Yukon are held for Indians:

> (a) Some of the areas are merely reserved in the records of the Department of Northern Affairs and National Resources for the use of the Indians for so long as required for that purpose.
>
> (b) Some of the areas such as Teslin Post, Burwash Landing and Whitehorse were transferred to this department by Order-in-Council but have not been confirmed as Indian Reserves by further Order-in-Council.

Ross River-Pelly was not in the "designated" status, but acknowledged by the writer as being in a category with six other bands which had had recommendations made by the Yukon Superintendent and the B.C. Commissioner "for the acquisition of reserves for their use".

[Page 6]

[9] From 1953 to 1973, Canada's position was that it was necessary to have two Orders-in-Council to create an Indian reserve. One to "reserve" it in the records of one department of Canada; another to "confirm" it as an Indian reserve, even though it may have been transferred to the Indian Affairs Branch of another department of Canada as "reserved" land by a previous Order-in-Council. One of these reserves was recognized in an Order-in-Council which "set apart" the land, another which "set aside" the land, another which "reserved" the land, and three others were "confirmed" as Indian Reserves by Orders-in-Council. The dates of the Orders-in-Council range from 1900 to 1941. On this issue, Canada changed its position in 1973. It recognized within the meaning of the *Indian* Act, as Indian reserves, six earlier "reserved" lands which had not had a second, confirming, Order-in-Council.

[10] The petitioner contends it is Canada's policy between 1953 and 1973 which resulted in lands being set aside for the Ross River Indians without Canada recognizing those lands as having the status of Indian Reserves. That policy was one of integration (Documents 33, 38, 45, 47).

[11] Even although Ministers of the Crown wanted reserves confirmed in the Yukon to remove the uncertainty about the status of the various parcels set aside, the public servants who were bent on integration, prevailed. In early November, 1957, just prior to a federal by-election in the Yukon, there was a flurry of activity to prepare a recommendation to the Governor-in-Council to obtain an Order-in-Council confirming 10 reserves in the Yukon (not including a

reserve for the Ross River Band). By December 4, 1957, after a memorandum' from, and a meeting with, Deputy Minister Fortier, the

[Page 7]

two Ministers, Mr. Fulton and Mr. Hamilton, agreed not to apply for the Order-in-Council (Documents 48 and 49).

[12] During the period 1953 to 1973, Canada's civil servants continued to hold the view that there were no reserves in the Yukon because: unlike Northwest Territories Indians, Yukon Indians were not under treaty (Document 55, 1958); the Yukon Indians had no stipulated land entitlement ("land being provided as required to meet their needs" Document 55); it would be acceptable to take some of the "reserved" land for a prison (Document 51 and 52, 1958); and the likelihood of Yukon Indians demanding that they be treated in the same manner as Indians elsewhere in Canada, including the ability to build up Band funds as an adjunct to reserves, could be taken care of through welfare appropriation (Document 56, 1958).

[13] At the time the Superintendent of the Yukon Indian Agency was expressing concern to the Indian Commissioner for British Columbia, that there would be no desirable land left for Yukon Indians (Document 61, May 31, 1961) and requesting confirmation once again that none of the land set aside in the Yukon was Indian Reserve (out of a concern that land which should not have been released from set-aside land had been released), he was apparently unaware of the report of the Royal Commission of Inquiry into unfulfilled provisions of Treaties 8 and 11 in the McKenzie District of the Northwest Territories. (Document 67). The Commission had been established by Order-in-Council on the 25th of June, 1959, and had reported on the 10th of December, 1959. The Superintendent of the Yukon Indian Agency had apparently not been made aware of the contents of the Commission's report until at

[Page 8]

least June 20, 1961. That was understandable; the report was not distributed generally and was treated by the Chief of Reserves and Trusts in Ottawa as a "branch document" (Document 67). The Commission recommended *inter a/ia* against the establishment of any reserves, notwithstanding the obligation of Canada under the treaties to provide

one square mile of reserve for each family of five Indians. This followed from the members of the Commission having arrived at the unanimous opinion that integration of the Indians,

economically and socially, was inevitable and that reserves would not assist this process (Document 67, page 11).

[14] Perhaps not surprisingly, considering that the Commission's views on reserves coincided with the philosophy of the public servants, there is nothing in the way of policy statements from public servants from 1959 to 1968". Then this statement from Canada's Assistant Director of Operations, Economic Development, Department of Indian Affairs and Northern Development, appears (Document 120, page 2, November 25, 1968):

> The department's policy is not to extend the Indian Reserve system to the Yukon and Northwest Territories.

[15]. In the same document, the Ross River Band land, comprising 60 acres, is listed as having been "reserved by notation in departmental records". That land had been asked for by the Superintendent of the Yukon Indian Agency on November 27, 1962, and was granted on January 26, 1965. The Superintendent applied for the land to "be used for the Ross River Indian Band village site." By 1969 the land reserved had been reduced to 47.11 acres (Documents 121). The remaining 47.11 acres is the land which the petitioners claim is a reserve.

[Page 9]

[16] Up to 1972, Canada said there were no Indian Reserves in the Yukon'. Then on October 27, 1972, it was acknowledged by Canada that Carcross Indian Reserve No. 4 was the only Indian Reserve in the Yukon set apart for a particular band of Indians and was an Indian Reserve within the meaning of the *Indian Act.* The Carcross Reserve was comprised of five separate "setting asides" dating from 1905. The first "setting aside" had been "confirmed as an Indian Reserve" by Order-in-Council No. 1940, dated October 17, 1905. That apparently qualified the other Carcross "settings aside" as Indian Reserves even although none of them were confirmed by Order-in-Council, but only reserved in the name of the Indian Affairs Branch.

[17] On June 21, 1973, after a review of the status of reserved land in the Yukon, the then legal advisor to Canada's Indian and Northern Affairs Department declared that there were six Indian reserves in the Yukon within the meaning of the *Indian Act* (Documents 130 and 131). Ross River was not one of them. No reasons were given and no material was unearthed

during the exhaustive search of Canada's files, made by Canada, which would help the Court understand why the successive changes of legal opinion occurred in 1972 and 1973.

[18] By November 1974, the Regional Director of the Yukon region of Indian and Northern Affairs, still reluctant to accept the legal opinion, said (Document 136):

> In fact there is no basis for Reserves in the Yukon; it is only because of fortunate (or unfortunate) wording of the respective Orders-in-Council that they can now be considered as proper Indian Reserves.

[19] It is interesting to note the pertinent wording extracted from the Orders of the Privy Council for those of the Yukon reserves which Canada admits:

[Page 10]

> PC 1900-716 Moosehide Creek, dated March 27, 1900:
>
> "... be reserved for the use of the Indians residing in that locality." PC 1900-1722 Lake La Barge, dated July 13, 1900:
>
> "... set apart as a Reserve for the use of the Indians in that vicinity." PC 1904-1101 McQueston, dated June 4, 1904:
>
> "[certain lands] be reserved for the use of the Indians of the
>
> eneighbourhood (sic) ... and the same are hereby set aside as an Indian Reserve."
>
> PC 1905-1940 Carcross, dated October 17, 1905:
>
> "... lands above described be confirmed as an Indian Reserve for the use of the Indians in the locality mentioned." (Carcross)

The wording of the Orders-in-Council for the other two admitted Yukon Reserves (Nisutlin and Teslin, both issued in 1941) was not provided to the court.

[20] As can be seen, the wording of none of the above four Orders-in-Council complies with the relevant part of the *Indian Act* definition of reserve found in s. 2 of the *Act:*

> "reserve"
>
> (a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band,"

[21] There is no mention in any of the above Orders-in-Council of a band, and yet similar wording has been in the *Act* since 1876. And, among the four "recognized" reserves above, only the Privy Council Order for the Lake La Barge Reserve uses the term "set apart" set out in the legislation. Moreover, the definition of reserve says nothing of a requirement for any particular form of proclamation, conveyance, notification, transfer, order or grant. It relies on the act of "setting apart".

[Page 11]

[22] The current version of Chapter 9 of the policy manual used by the Funding, Lands & Trust Services ("FLTS") Unit of the Indian Affairs Program of the Department of Indian and Northern Development ("DIAND") came into effect in 1991, approximately 25 years after the Ross River Indian Band had established their village site on the land claimed to be a reserve. The policy manual states in section 9.1.3:

> **Department officials must not take any action which could reasonably be perceived as committing the department to an addition to reserve or the creation of a new reserve without the prior written approval of either the Regional Director General or the Deputy Minister (RDG or DM Approval In Principle), as the case may be**.
>
> Subject to the following limitations, RDG's have been delegated the authority to approve in principle requests for an addition to reserve or the creation of a new reserve without prior written concurrence from the Deputy Minister**. Proposals which cannot be funded from within existing, approved, regional budget allocations or which fall outside the policy justifications and criteria outlined in this chapter are beyond RDG authority and must receive DM Approval in Principle in order to proceed. While proposals affecting provinces and municipalities may generally be approved at the RDG level, see section 9.3.2 "Provincial/Municipal Considerations" for specific circumstances requiring HQ review and/or DM approval.**
>
> It should be noted that *both the Yukon and Northwest Territories have a few reserves and their system of land tenure for Indian communities is generally based on lands "reserved by notation". Additions to reserve proposals within these regions are subject to the terms of the policy set out in this chapter, including the policy related to delegated regional authority.* However, all land acquisition proposals which are *outside* the scope of this chapter should continue to be submitted to Headquarters for consideration.
>
> **Note: The approval of either the RDG or the Deputy Minister constitutes a recommendation to the Minister and it is only the Governor in Council (by Order in Council) which can grant reserve status to land.**

(Bolding in original)

(Italics are mine)

The italicized portion of the above demonstrates the frailty of the Crown's contention that there is only one way to create a reserve: an Order-in-Council.

[Page 12]

[23] The contention of Canada that Cabinet Circular No. 27 in 1955, which sets out the procedure for reserving land in the Yukon and Northwest Territories in full, refers to a "reservation from disposition" rather than an Indian Reserve may be correct. The difficulty

with the contention is that the directive deals only with land required by a department or agency, not with land set apart for an Indian Band.

[24] In *The Town of Hay River v. The Queen,* [1980] 1 F.C. 262 (T.D.), Mahoney J., in concluding that the Town did not have *locus standi* to challenge a setting aside for a reserve made by Canada under s. 19(d) of the *Territorial Lands Act,* R.S.C. 1970, c. T6, stated at page 264:

> The authority of the Governor in Council under paragraph 19(d) of the *Territorial Lands Act* to "set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians" is not the source of authority to set apart Crown lands as a reserve in that part of Canada to which the Act applies, i.e. the Yukon and Northwest Territories. It is, rather, the authority to create a land bank for that purpose. The *Indian Act* defines "reserve" but nowhere deals with the creation of a reserve.
>
> Notwithstanding the words "pursuant to the Indian Act" in paragraph (2) of the Order in Council, the authority to set apart Crown lands for an Indian reserve in the Northwest Territories appears to remain based entirely on the Royal Prerogative, not subject to any statutory limitation.

[25] The petitioner contends that this decision, made on a motion for *locus standi* did not canvass the issue in depth and its conclusion that the sole authority to set apart Crown lands for an Indian Reserve is the Royal Prerogative is not in accord with the *Indian Act* nor the leading academic writing on the subject.

[26] The *Indian Act* never has provided a method of creating a reserve. It follows that reserves have been "established in many different ways and several methods now appear to be recognized as having validly set apart land for the use and benefit of

Indians.": Jack Woodward, Woodward, *Native Law,* 1996, p. 231. And as LaForest, G.V. said in *Natural Resources and Public Property under the Canadian Constitution,* University of Toronto Press, at p. 121:

> In the areas not reserved by the proclamation [of 1763], reserves were established under many different types of authorities and instruments.

[27] Peter W. Hogg, at page 1 - 11 of his *Constitutional Law in Canada,* Third Edition, Volume 7 states:

> The term prerogative should be confined to powers or privileges that are unique to the Crown. Powers or privileges enjoyed equally with private persons are not, strictly

> speaking, part of the prerogative. For example, the Crown has the power to acquire and dispose of property, and to enter into contracts, but these are not prerogative powers because they are possessed by everyone.

And at p. 1-13 Hogg explains that the Crown prerogative has been narrowed down to a very narrow compass, such as the appointment of Prime Minister and other Ministers and the conferring of honours such as Queen's Counsel. I decline to follow *Hay River.*

[28] As stated previously, the *Indian Act* definition of reserve (in relevant part) is as follows:

> "reserve"
>
> (a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band,

The area reserved on January 26, 1965, was a tract of land that was (and is) vested in her Majesty. It had been applied for, for the use and benefit of a band: the Ross River Band. It was applied for, for a permanent use: a village site. That constitutes "use and benefit of a band" as in the *Indian Act* definition of "reserve". The active words of the document reserving the land are as close to the wording of the

[Page 14]

statute as all but one of the four admitted Yukon Reserves for which the Court has been provided the wording. The public servants who put the setting-aside in process were Her Majesty's agents. The only thing in the way of the land being accepted as a reserve is the public servants' philosophy of integration which resulted in bureaucratic pigeonholing. That erects an unwarranted obstacle to the establishment of reserves which is not required by the statutory definition, is unfair and unjust to the Indian Band.

[30] I am reinforced by the interpretation made by the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen* (1889), 14 App. Cas. p. 46 (P.C.) on the meaning of the following words of s. 91(24) of the *Constitution Act, 1867:*

> Indians, and lands reserved for the Indians.

At p. 59 of *St. Catherine's,* the Law Lords said:

> ... the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation.

[31] This Court is bound by the *Interpretation Act,* R.S. c. I-23, s. 12, to give a fair, large and liberal interpretation of the words of the definition of reserve, as ensures the attainment of its objects: the welfare of Indians.

[32] Moreover, this Court must heed the approval by Dickson C.J.C. and LaForest J. in *R. v. Sparrow,* [1990] 1 S.C.R. 1075 at 1107, of the words of the Supreme Court in *Nowegijick v. R.,* [1983] 1 S.C.R. 29 at 36:

> ...treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

[Page 15]

In addition, in *Sparrow,* the Supreme Court of Canada stressed the fiduciary relationship of Canada to the Indians and affirmed what it said about holding Canada to a high standard of honourable dealing with respect to the aboriginal peoples of Canada which it had suggested in *Guerin v. The Queen,* [1984] 2 S.C.R. 335.

[33] The tract of land in this case meets the definition of Reserve in the *Indian Act.* I declare the land to be an Indian Reserve within the meaning of the *Indian Act.*

[34] Costs to the petitioners.

[S]

Maddison J.

Counsel for the Petitioners	Ronald S. Veale and Scott Niblock
Counsel for the Respondents	Malcolm Florence and Jeffery Hutchinson

[Page 16]

Endnotes:

i : Mr. Fortier's memorandum left no doubt about his view on reservations:

> I must say immediately that in my opinion we should establish new Indian Reserves only when there are specific needs for such reserves.
>
> I personally believe that the reservation system is not one which should be developed and increased at this time. In fact, it seems that the reservation system has been one of the factors which have delayed the integration of the Indian and his economic

> development. It is generally agreed that an Indian, to earn his living, must seek work outside the Indian Reserve.

ii : The bias against Reserves is continued throughout in the way the public servant, record-keepers chose to characterize the Reserve lands. A document entitled *Revised Schedule of Indian Reserves and Settlements,* issued by the Indian Affairs Branch of the Department of Citizenship & Immigration on January 31, 1964 (Document 93) covering all of Canada, except British Columbia, contains an alphabetical list of Indian reserves and Indian settlements. The preface explains, *inter alga:*

> The Indian Settlements listed in the "RESERVE" column are marked "I.S." These lands are not Indian Reserves within the meaning of the *Indian Act.* The occupation of these settlements Is not restricted to a particular Band.

There are 174 "reserves" listed, 25 are in the Yukon. All of the Yukon "reserves" are listed as "I.S", except the Marsh Lake Cemetery. There are no Bands named in the column headed "Band" for the Yukon "reserves". The previously mentioned six reserves which had been created by P.C. Orders: Moosehide Creek (1900); Lake LaBerge (1900); McQueston (1904); Carcross (1905); Nisutlin (1941) and Teslin (1941), were all designated "I.S." in this inventory. Further denying the statement in the preface that the designation "I.S." indicates that the settlement is not restricted to a particular Band, are three of the Quebec "Reserves" labeled "I.S" in the column headed "Band", notwithstanding that a particular Band name appears in the "Band" column.

Iii: The 1972 version of the *Schedule of Reserves and Settlements of Canada* once again notes all the Yukon Territory "Indian Settlements" with the reinforcing notation "I.S" in place of, or in addition, to a number. The preface reiterates that Indian Settlements are not Indian Reserves within the meaning of the *Indian Act* "and occupation of settlements is not restricted to a particular Band." It leaves the name of the Band out in all but one of the 33 "settlements" listed, notwithstanding that at least six reserves were Order-in-Council Reserves and notwithstanding that the Ross River land was reserved for the Ross River Band. Then the first page of the list for the Yukon Territory underlines the non-reserve philosophy by this statement:

> There are no reserves in the Yukon Territory within the meaning of the *Indian Act.* Lands for the use of Indian bands are reserved under the *Territorial Lands Act* which is administered by Northern Economic Development Branch, Indian Affairs and Northern Development, Ottawa.