Docket: 2006-1838(GST)I

BETWEEN:

VEITCH HOLDINGS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 7, 8 and 10, 2009, at Winnipeg, Manitoba.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Scott Gray
Counsel for the Respondent:	Gérald Chartier Melissa Danish

JUDGMENT

The appeal from the assessment made under the *Excise Tax Act* for the period from February 1, 2002 to January 31, 2004, notice of which is dated March 9, 2005, is dismissed.

Signed at Ottawa, Canada, this 15th day of March 2010.

"Robert J. Hogan"

Hogan J.

Citation: 2010 TCC 98
Date: 20100315
Docket: 2006-1838(GST)I

BETWEEN:

VEITCH HOLDINGS LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

[1] This is an appeal from an assessment by the Minister of National Revenue (the "Minister") of Veitch Holdings Ltd. (the "Appellant") for goods and services tax ("GST"), interest and penalties owing for the period from February 1, 2002 to January 31, 2004 (the "relevant period"). The GST was with respect to sales made to Indians, as defined in the *Indian Act*.[1] The Appellant operated a Home Hardware store (the "Hardware Store") in The Pas, Manitoba. It did not collect GST on sales made to Indians living on The Pas Indian Reserve on the grounds that those sales were exempt from tax under section 87 of the *Indian Act*. The Minister argues that the sales do not qualify for exemption under section 87 because they occurred at the Hardware Store, which is not located on a reserve.

[2] The Appellant's case is largely based on the title information pertaining to the property in the Manitoba land registry system. The land is therein described as being in "Block A The Pas Indian Reserve". This reference on title was added by officials of the federal government when the land was under federal jurisdiction. The

[1] *Indian Act*, R.S.C. 1985, c. I-5, s.2.

description was carried over to the Manitoba title system when the area of The Pas was added to the territory of the province of Manitoba. Two issues are in dispute in this appeal:

1. Is the Hardware Store located on a reserve within the meaning of the *Indian Act* such that sales made to Indians are exempt from tax under section 87 of the *Indian Act*?

2. In the negative, does the legal principle of estoppel "in pais" preclude the Respondent from assessing the Appellant on the grounds that it made a representation of fact to the Appellant that the Hardware Store was located on land forming part of a reserve?

Factual Background

[3] William Veitch, the sole shareholder of the Appellant, testified that he purchased the hardware business from its prior owner in 1998. The building and land were leased by the Appellant from their then owner, Home Hardware Stores Limited ("Home Hardware"). Recently, the Appellant purchased the land and building from its lessor. Mr. Veitch explained that the prior owner of the Hardware Store had agreed to stay on for a transition period lasting six months. During that period, the prior owner instructed Mr. Veitch regarding the procedure to follow for sales to Indians. In brief, a separate electronic file folder is opened for each purchaser who is a status Indian. The sale is made tax-free if the purchaser provides proof that he is a status Indian living on a reserve. Mr. Veitch explained that this practice is followed by all businesses located in the town of The Pas.

[4] Following his testimony, I was left with the impression that Mr. Veitch believes that members of The Pas Band would boycott the Appellant's hardware store if the Appellant chose to collect GST from them when other merchants in the town do not collect the tax.

[5] The witness identified Exhibits A-1 to A-7 as extracts from the Manitoba land title data storage system. These documents were introduced into evidence by the Appellant to show that the land is described as being "at The Pas and being Lot 1, Plan 29595 PLTO in Block A The Pas Indian Reserve" ("Block A"). Home Hardware is described as the registered owner of the land. The witness said that he was aware of the fact that the title deed referred to the land as being part of The Pas Indian Reserve when he chose to adopt the prior owner's practice of not collecting GST on sales made to members of The Pas Band. On cross-examination, Mr. Veitch

admitted that he knew that the legal owner of the land was not the federal Crown in trust, which, generally speaking, it would have been if the Hardware Store was situated on land forming part of a reserve.

[6] The Appellant called James Morrison as an expert witness to testify concerning the history of the creation of the Pas Reserve and the surrender of Block A. Mr. Morrison's report, produced as Exhibit A-9, describes the circumstances surrounding the 1906 surrender by The Pas Band of Indians (now the Opaskwayak Cree Nation) and hereinafter referred to throughout as ("The Pas Band") of land in a portion of their reserve ("The Pas Reserve") known as Block A. The Pas Reserve was established following the adhesion by The Pas Band to Treaty No. 5 in 1876. The Pas Band was unable to select its reserve in one contiguous tract. Block A is a parcel of approximately 1,500 acres located on the southeast side of the junction of the Saskatchewan and Pasquia Rivers. This parcel of land was chosen because it was the most suitable for a town site for The Pas Band in the region of The Pas. At that time, many of the members of the Pas Band had permanent homes in Block A.

[7] In 1905, the Canadian Northern Railway Company (now CN and hereinafter referred to as "CN") informed the Department of Indian Affairs that it wanted to extend passenger and freight service to The Pas. CN notified the government that it wished to expropriate land in Block A for a right of way and a railway station. The local Inspector of Indian Agencies initially opposed the request. He recommended that CN should locate its station on the north side of the river on land which was not part of The Pas Reserve. Senior officials based in Ottawa did not support this recommendation. Ultimately, the Inspector of Indian Agencies recommended that the northern 500 acres of Block A be surrendered to the federal government. Part of the surrendered land was purchased by CN and used for the purposes noted above. The balance of the land was sold and the proceeds were eventually distributed to members of The Pas Band or used for their benefit.

[8] No historical evidence remains to explain why the local Inspector of Indian Agencies changed his mind and recommended the surrender of 500 acres of Block A. I surmise that he believed it would be unwise to have a railway station situated in the middle of The Pas Reserve. The station brought a flood of new settlers to the area of The Pas.

[9] Mr. Morrison alleges that there were irregularities with regard to the surrender of Block A. He claims that Indian Affairs officials misled The Pas Band by claiming that the surrender was urgent. The surrender took place in 1906 and passenger service

to The Pas commenced only in 1909. In addition, the first payment from the proceeds of land sales was not made until more than two years after the surrender took place.

[10] Mr. Morrison points out that the Justice of the Peace before whom was signed the affidavit certifying the surrender was Mr. Gideon Halcrow, a local Hudson's Bay Company trader. Mr. Halcrow was granted a right of first purchase of a parcel of land included in Block A. There is thus some question as to whether Mr. Halcrow was qualified to act with respect to the surrender because of the appearance of a conflict of interest. In addition, Mr. Morrison testified that the affidavit accompanying the surrender document specifies that a majority of the male members of The Pas Band approved the surrender (a requirement imposed by law). However there is no surviving voters list showing the names of the male members who voted in favour of the surrender, making it impossible to verify whether this requirement was met.

[11] Mr. Dewey Hoplock, a land surveyor, appearing for the Respondent, testified that the words "Block A The Pas Indian Reserve" appearing on the title certificate are a historical reference to the first survey that was conducted to establish the original boundaries of The Pas Reserve. According to this witness, it is common practice in the Manitoba title registry system to refer to the first official survey of the property to enable surveyors to understand how the property was first subdivided or laid out. The description in question does not refer to legal ownership, as the title certificate specifies the current owner of the property.

[12] Eric Angel was qualified as an expert on aboriginal history and culture. He provided on behalf of the Respondent an opinion on the circumstances surrounding the 1906 surrender. Mr. Angel disagrees with Mr. Morrison's view that The Pas Band was pressured into endorsing the land surrender. Mr. Angel characterizes Mr. Morrison's opinion as speculative because there is no evidence in the historical records to support that view. Mr. Angel suggests that The Pas Band did want to surrender the land because the historical records show that the band members were interested in the question of the quantum and the timing of the distribution of the proceeds of the land sales. This shows that they were active participants in the surrender. The only dispute with Crown officials was over the mechanics of the distribution of the proceeds of the land sales. Written correspondence referred to in Mr. Angel's report confirms this point of view, as does the later amendment to the terms of surrender. The amendment raised the percentage of the proceeds of land sales to be distributed to members of The Pas Band from a minimum of 10% to 25%.

Analysis

[13] Subsection 221(1) of the *Excise Tax Act* reads as follows:

> Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.

[14] Section 87 of the *Indian Act* provides that the personal property of an Indian or a band located on a reserve is exempt from taxation. For a sales tax, such as the GST, the case law has established a "point of sale" test to determine whether retail sales are eligible for exemption under section 87. Under that test, goods purchased off-reserve are subject to tax, while goods purchased on-reserve are tax exempt. The parties do not dispute this interpretation or application of the rule in the case at bar. The Appellant is challenging the assessment on the grounds that the certificate of title establishes that the Hardware Store is located on a reserve, or alternatively, that the Crown is estopped from suggesting otherwise because the notation to that effect on title originates from an action of the federal Crown. The Appellant argues that it would be inequitable for the Crown to maintain its assessment because the Crown made representations of fact which misled the Appellant into believing that sales made to individuals of The Pas Band were exempt from GST.

Is the Hardware Store located on a reserve?

[15] The testimony of the land surveyor establishes that the reference to The Pas Indian Reserve is a reference to the first land survey that fixed the boundaries of the reserve. It is not meant to suggest that the land remains part of The Pas Indian Reserve. On this point, I note that the title certificate clearly identifies Home Hardware as the owner of the property. Legal title to the land must be vested in the federal Crown in order for the land to be part of a reserve. In addition, the land must be set aside for the communal benefit of a band. The *Indian Act* makes this clear by defining a reserve as, "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".[2] The Appellant takes issue with this on the grounds that section 36 of the *Indian Act* allows for land not vested in the Crown to be considered as "reserve" land for the purposes of that statute. Section 36 reads as follows:

> 36. Where lands have been set apart for the use and benefit of a band and legal title thereto is not vested in Her Majesty, this Act applies as though the lands were a reserve within the meaning of this Act.

[2] *Ibid.*

[16] The Appellant cites the cases of *A.G. of Canada v. Canadian Pacific Ltd.* (2002), 217 D.L.R. (4th) 83 (B.C.C.A.) and *Osoyoos Indian Band v. Town of Oliver et al.* (2001), 206 D.L.R. (4th) 385 (S.C.C.) as authority for the proposition that land need not be vested in the Crown to be considered as reserve land. The first case deals with land expropriated by Canadian Pacific for a railway right of way. Under the then applicable legislation a railway undertaking's power of expropriation was limited to property that was necessary for the operation of the railway. If reserve land so expropriated is no longer needed for railway purposes, it can revert to reserve status. The second case deals with local government authorities' powers of expropriation. Their powers have been interpreted to be limited in a similar way. The facts of these cases are very different from the facts in the case at bar. In the present case, the evidence shows that Home Hardware was the owner of the land during the relevant period and that the Appellant operated the Hardware Store for its benefit.

[17] What the case law does establish as regards section 36 is that it is essential for the Crown to declare, either implicitly or explicitly, that the land was set aside for the benefit and use of Indians. This point is illustrated in the *Musqueam*[3] case. That is a case in which, the Musqueam Indian Band unilaterally declared certain land owned by Musqueam Holdings to be reserve land. The corporation argued on that basis that the land was exempt from tax pursuant to section 87 of the *Indian Act*. The Court of Appeal in that case ruled that, in order for the land to be considered reserve land under section 36, the Crown must have declared it to have been set apart for the use and benefit of band members. If the Crown has failed to do so, section 36 cannot be invoked to claim exempt tax status under section 87.

[18] From the cases considered above it can be seen that section 36 operates if land that was part of a reserve was expropriated for some limited purpose and that purpose has ended, or if the federal Crown has declared land to be set apart for the use and benefit of a band and for whatever reason title to that land is not specifically vested in the Crown.

[19] The land on which the Hardware Store is situated has not been set apart for the use and benefit of The Pas Band, as it was held in fee simple by Home Hardware during the relevant period. The certificate of title establishes this fact. Today, the Appellant is the owner in fee simple of the property. The Hardware Store is operated exclusively for the economic benefit of the Appellant. The evidence shows that members of The Pas Band purchase goods at the Hardware Store no differently than

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[3] *Musqueam Holdings Ltd. v. British Columbia* (*Assessor of Area No. 9 – Vancouver*), 2000 BCCA 299, [2000] B.C.J. No. 1114 (QL).

other Canadians living in The Pas. The Hardware Store has not been set aside for the communal benefit of The Pas Band.

[20] The Appellant also argues that Section 58 of Manitoba's *The Real Property Act*, C.C.S.M. c. R30, requires the federal Crown to respect the land's designation as "Block A The Pas Indian Reserve" on the certificate of title. Section 58 reads as follows:

> **Restrictions on certificate**
>
> 58(1) The land, mentioned in a certificate of title, shall, by implication and without special mention in the certificate, unless the contrary be expressly declared, be deemed to be subject to
>
> (a) any subsisting reservation contained in the original grant of the land from the Crown.

[21] This provision applies to certificates of title that are part of a provincial property registry system. Reserve land is defined under federal law. It would follow that any reference, in a provincial certificate of title, to land being reserve land, such as is found here, has no effect on the land's status.

[22] The Appellant also suggests that the 1906 surrender of the land at issue by The Pas Band was invalid (see paragraph 10 of these reasons). The members of The Pas Band only ever took issue with the timing and quantum of the distribution of the proceeds from the sale of the land surrendered. Even if the surrender was found to be invalid, which I do not find here, the transaction would at best be voidable, and that would have no impact on whether or not the land was reserve land during the taxation years under appeal. The transaction would not be void *ab initio* because that would have a detrimental impact on the interests of innocent third parties who subsequently purchased the land in good faith (see *Chippewas of Sarnia Band v. Attorney General of Canada et al.* (2000), 51 O.R. (3d) 641 (C.A.), at paragraph 292).

Does estoppel apply?

[23] The Appellant argues that the Minister is estopped from assessing GST against the Appellant because the federal Crown failed to change the misleading reference to The Pas Reserve on title between 1906 and 1912 when the land was part of the Northwest Territories and subject to exclusive federal administration. This error on title was carried over into the provincial title registry system because the

federal Crown did not take action to correct the title before the land became part of the province of Manitoba. According to the Appellant, the actions or conduct of the federal Crown constitute a misleading and erroneous representation of fact relied on by the Appellant in deciding not to collect GST on the sales at issue in this case.

[24] The leading case on estoppel by representation is the Supreme Court of Canada's decision in *Canadian Superior Oil v. Hambly*, [1970] S.C.R. 932, in which Martland J. summarized the essential elements of estoppel by representation as follows at pages 939 and 940:

> The essential factors giving rise to an estoppel are I think:
>
> (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
>
> (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
>
> (3) Detriment to such person as a consequence of the act or omission.

[25] In the Tax Court case of *Alameda Holdings Inc. v. Canada*, [1999] T.C.J. No. 839 (QL), Judge Dussault discussed the "intention" element of the doctrine of estoppel by representation as follows:

> 74 As may be seen, the intention to induce a course of conduct constitutes an essential element of the doctrine of "estoppel by representation". On this point, in The Law Relating to Estoppel by Representation, 3rd ed. (London: Butterworth, 1977), Bower and Turner emphasize the essential nature of this factor as follows, at page 93:
>
> > It is clear that for the purposes of estoppel, no less than for those of an action for misrepresentation, inducement in fact is established by proof that the representation was made both with the object, and with the result, of inducing the representee to alter his position. Neither element suffices without the other. To prove the representor's intention to produce the effect comes to nothing, unless the effect itself be proved; and it is equally idle to establish the result, unless it be also shown that the representor, actually or presumptively, intended to bring it about.
> >
> > [Emphasis added.]

[26] In *Alameda Holdings*, intent was not proved, or alleged for that matter, so the argument of estoppel by representation failed.

[27] In *Goldstein v. Canada*, [1995] T.C.J. No. 170 (QL), [1995] 2 C.T.C. 2036 at paragraph 23 (QL), Judge Bowman (as he then was) discusses estoppel *in pais*:

> It is sometimes said that estoppel does not lie against the Crown. The statement is not accurate and seems to stem from a misapplication of the term estoppel. The principle of estoppel binds the Crown, as do other principles of law. Estoppel *in pais*, as it applies to the Crown, involves representations of fact made by officials of the Crown an relied and acted on by the subject to his or her detriment. The doctrine has no application where a particular interpretation of a statute has been communicated to a subject by an official of the government, relied upon by that subject to his or her detriment and then withdrawn or changed by the government. In such a case a taxpayer sometimes seeks to invoke the doctrine of estoppel. It is inappropriate to do so not because such representations give rise to an estoppel that does not bind the Crown, but rather, because no estoppel can arise where such representations are not in accordance with the law. Although estoppel is now a principle of substantive law it had its origins in the law of evidence and as such relates to representations of fact. It has no role to play where questions of interpretation of the law are involved, because estoppels cannot override the law.

[28] In my opinion, the evidence presented in this case does not favour the Appellant's estoppel argument. The description on title that is alleged to be the proof of the Respondent's intention does not identify the federal Crown as the owner of the land in trust for The Pas Band. The reference on title is simply a historical reference to the first survey conducted for the purpose of establishing the reserve. The title certificate clearly shows Home Hardware as the owner of the land. Moreover, Mr. Veitch, the sole shareholder of the Appellant, acting on behalf of the Appellant, entered into a lease transaction with Home Hardware for the rental of the Hardware Store. The Appellant subsequently purchased the property from Home Hardware. This behaviour does not seem consistent with the allegation that the description on title caused Mr. Veitch to believe that the property was situated on The Pas Reserve and that The Pas Band would have some claim to the property. The case law establishes that there must be an element of intention behind the misleading representation of fact that causes the other party to alter his conduct in some way that causes him prejudice. In other words, there must be evidence to show that the federal Crown wanted to represent the land as being part of a reserve with the object and result of causing the Appellant not to collect GST on sales made to Indians.

[29] I do not believe that the reference to The Pas Indian Reserve, which is meant to refer to the first survey, shows such intent. Moreover, the title information relied on by the Appellant originated from the province of Manitoba and not the federal

Crown. Neither party herein cited a case that dealt with a situation of alleged consecutive actions of misleading representation of fact.

[30] Mr. Veitch testified as follows regarding the information he would gather for the Appellant's records to justify not collecting GST on sales made to Indians living on reserves:

> So the procedure was that when Native people came to the store to purchase that we would first of all record their name, their individual band number or Treaty number, whatever is the right term now, their reserve address, and then we would process the sale and have them sign the invoice that the information was -- that they were who they said they were.

[31] What is odd in this statement is Mr. Veitch's reference to the practice of noting the purchaser's reserve address. That information would not be required if, as alleged by Mr. Veitch, the reason the Appellant did not collect the GST was its mistaken belief that the Hardware Store was located on a reserve. I suspect that there may be some confusion on the part of Mr. Veitch and other merchants of The Pas concerning the CRA's administrative practice of exempting sales if the goods are delivered by the merchant to Indians living on a reserve. That administrative practice does not extend to goods delivered at the store and brought on reserve by status Indians.

[32] The Appellant's position also runs counter to the principle that there can be no estoppel with respect to a point of law. The question whether the Hardware Store is part of a reserve is a mixed question of law and fact. Save for the narrow exception set out in section 36 of the *Indian Act*, the law requires that reserve land be held in trust by the federal Crown for the benefit of a band. The law on this point cannot be represented to be otherwise. The title certificate does not say that the land was held in trust by the Crown or that it was set aside for the benefit of The Pas Band. Mr. Veitch knew that the Hardware Store was being operated exclusively for his own indirect economic benefit.

[33] I have sympathy for the hardship caused to the Appellant by the application of the point of sale test. According to his evidence, if he charges the tax he runs the risk of losing 30% to 40% of his annual sales. The CRA's administrative policy of exempting sales of goods delivered on reserve is not a practical solution in the present case. The merchants of The Pas cannot afford to deliver goods to the reserve when small purchases are involved. I suspect that their clients would also be unwilling to wait to take possession of the goods in such circumstances. It appears to me that the CRA administrative practice favours those merchants that are fortunate enough to sell goods in larger quantities or at higher prices over those that must rely

on a greater volume of smaller sales for their revenue. The former can offer delivery services while the latter cannot. I leave it to the CRA to consider whether it is time for it to reconsider the scope of its administrative policy or, for that matter, to recommend legislative action in this regard.

[34] For all of these reasons, the appeal in this matter is dismissed.

Signed at Ottawa, Canada, this 15th day of March 2010.

"Robert J. Hogan"

Hogan J.

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