Docket: 2013-188(IT)G

BETWEEN:

DAVID TUCCARO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on September 9, 2013 at Ottawa, Canada

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Maxime Faille
Counsel for the Respondent:	Darcie Charlton
	Ashleigh Akalehiywot

ORDER

UPON MOTION brought by the Respondent for an Order striking certain paragraphs from the Appellant's Notice of Appeal;

AND UPON reading the materials filed, hearing submissions and argument from respective counsel for the Appellant and Respondent including the draft Amended Notice of Appeal submitted at the hearing of the Motion, but not filed with the Court;

THIS COURT ORDERS THAT:

1. all pleadings referencing Treaty 8 exemption rights are to be struck throughout the draft Amended Notice of Appeal;

2. paragraphs 14 through 32 inclusive are to be struck in the draft Amended Notice of Appeal;

3. paragraph 43 shall be redrafted to better describe the foundational facts which are applicable, relevant and supportive to this appeal and which facts, to the Appellant's information, are causal to the present statement of fact in that paragraph;

4. a final Amended Notice of Appeal shall be filed otherwise reflecting the changes provided for in this Order within 45 days of the date of this Order;

5. the Respondent shall have 60 days after the final Amended Notice of Appeal is filed and served to file a Reply; and

6. there shall be no Order as to costs and no submissions on costs are required by the Court.

Signed at Ottawa, Canada, this 23rd day of September 2013.

"R.S. Bocock"

Bocock J.

Citation: 2013 TCC 300
Date: 20130923
Docket: 2013-188(IT)G

BETWEEN:

DAVID TUCCARO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bocock J.

I. Motion to Strike Pleadings and General Legal Test

[1] This is a motion by the Respondent under Rule 53(*a*) and (*c*) of the *Tax Court of Canada Rules (General Procedure)* to strike certain provisions of the Appellant's Notice of Appeal on the basis that they constitute an abuse of process and/or will delay a fair hearing of the matter.

a) Grounds for Striking

[2] Generally, the impugned sections within the draft Amended Notice of Appeal and the Respondent's (Applicant in the Motion) related grounds for challenge may be described as follows:

1. a claimed exemption from taxation by the Appellant by virtue of Treaty 8 of 1899 and the conjunctive operation of section 35 of the *Constitution Act* ought to be struck on the basis of *res judicata*;

2. the description of various historical facts and events in paragraphs 10 through 34 is challenged on the basis that same either advance the alleged Treaty 8 exemption and/or are irrelevant to the validly pleaded claimed exemption under section 87 of the *Indian Act*, RSC 1985, c. I-5;

3. the inclusion of paragraph 43 which provides "The status Indian employees of Neegan were treated as tax-exempt." is challenged on the basis that such fact relates to the treatment of another taxpayer by the Minister and is therefore irrelevant to this appeal; and

4. paragraphs 84 to 94 and paragraph 111 should be struck on the basis these paragraphs allege that CRA Form TD1-IN(06) "*Determination of Exemption of a Status Indian's Employment Income"* and included guidelines represent, through an Honour of the Crown collateral argument, a pleading of a pre-determination of liability for tax, which, in turn, usurps the jurisdiction of this Court (the "Guidelines Argument").

[3] The Appellant (Respondent in the Motion) filed a draft Amended Notice of Appeal prior to the hearing of this motion. This document is the version of the Notice of Appeal referred to herein.

b) Legal Test to Strike Pleadings

[4] The parties generally agreed on the applicable test for striking any pleading irrespective of whether such pleadings are grounds for appeal, fact, relief or statutory provision. Generally, there is a high threshold for striking pleadings (*Sentinel Hill 1999 Master Limited Partnership v Canada*, 2007 TCC 742, 2008 DTC 2544, at paragraph 4). It must be plain and obvious, after giving the party pleading the highest and best assumption of factual accuracy, that a pleading is rendered to a state of having 'no chance of success.' Simply put, if an argument for striking goes to weight and/or relevance, then the pleading should be sent to the trial judge unless there is no chance of its success. There must be a "radical defect" in the pleading for it to be struck (*Hardtke v Canada,* 2005 TCC 263, 2005 DTC 676, at paragraphs 10 and 16).

[5] Furthermore, and specifically relevant to the matter before the Court, a factual inquiry by the Tax Court under section 87 of the *Indian Act* is a challenging one and requires a careful, nuanced, fact-based inquiry (*Kelly v Canada*, 2013 FCA 171, [2013] 5 CTC 194 (FCA), at paragraph 71).

II. Issue by Issue Arguments and Decisions

a) Treaty 8 Exemption

[6] The Appellant states that the Federal Court of Appeal decisions in *Benoit v Canada*, 2003 FCA 236, 2003 DTC 5366 (FCA), and *Dumont v Canada*, 2008 FCA 32, 2008 DTC 6091 (FCA), were wrongly decided and included the following legal errors:

1) The reasons of the Federal Court of Appeal failed to include the fact that additional documents were adduced at trial identifying the intention of Treaty 8 to create an exemption from tax;

2) The Federal Court of Appeal wrongfully determined that agents of the Crown could not legally bind the Crown to a financial undertaking not to tax; and

3) Lastly, the failure of the decision to acknowledge that the ongoing acquiescence on the part of the federal Crown by not disavowing Treaty 8's plain wording is legally determinative of a continuing agreement not to tax under the *Income Tax Act*.

[7] Furthermore, the Appellant argues that any willingness by this Court to be bound by the precedential weight of *Benoit* and *Dumont* by striking the pleadings is unfair and stymies the law from evolving in respect of the alleged Treaty 8 Exemption.

[8] For the reasons stated below these submissions of the Appellant against striking the Treaty 8 exemption pleadings must fail.

[9] *Benoit* and *Dumont* are definitive findings of the Federal Court of Appeal. The Tax Court of Canada is bound by such established law regarding the lack of legal effect of Treaty 8 in granting tax exempt status to its signatories. In the words of Justice Sheridan at paragraph 4 in the trial decision of *Dumont* (2005 TCC 790 at paragraph 4) for these very reasons the "argument that Treaty 8 shelters … income from taxation is without merit."

[10] If the Federal Court of Appeal is wrong, as submitted by the Appellant, it is not for the Tax Court of Canada to determine. Given the unambiguous finding of the Federal Court of Appeal regarding Treaty 8, it is plain and obvious there is presently no chance of success on that basis for a legal claim of exemption from tax. Therefore, paragraphs or portions thereof referencing Treaty 8 exemption rights or facts supporting same are struck from the draft Amended Notice of Appeal.

b) Paragraph 43 – Treatment of Another Taxpayer

[11] The Appellant's argument for retaining paragraph 43 relates to its relevance to circumstances surrounding the "connecting factors test" provided for in *Williams v Canada* [1992] 1 SCR 877. This is notwithstanding that the fact pleaded relates to the treatment of other taxpayers. The Court agrees with the Appellant that it is premature to strike this provision, but only if the preceding factual foundation is pleaded whereby the pleaded factual allegation becomes relevant to the connecting factors test. This proximate circumstances argument goes to the weight of relevancy to be assigned by a trial judge. For example, a foundational preceding fact such as "all employees resided and the local offices of Neegan were situate on the reserve" is possibly relevant to the facts supporting the Appellant's section 87 exemption claim. Possibly, there may be other foundational facts related to the Minister's determination of tax exemption for these employees. Such foundational facts are possibly relevant to the connecting factors test to be applied in this instance, but the pleadings should contain them in order that a trial judge sees them. This paragraph may stay, but must be amended to include the prior foundational facts likely relevant to such an inquiry.

c) Guidelines and Honour of the Crown

[12] In reply to the motion to strike these provisions, the Appellant stated this matter is not a standard case. The Appellant stated that while the Guidelines do not legally bind the Minister to the assessment, they are nonetheless a relevant consideration buttressed by the Honour of the Crown arguments because factually the Crown publishes these Guidelines and related forms exclusively for use by native taxpayers applying for exemption. It was argued by the Appellant that recent case law suggests that the Honour of the Crown argument has a higher and possibly more notable meaning by virtue of the historical trust role played by the federal Crown in native matters (*Manitoba Métis Federation Inc. v Canada*, 2013 SCC 14, [2013] SCJ No. 14 (QL), at paragraph 90 and *Mohawks of the Bay of Quinte v Canada*, 2013 FC 669, [2013] FCJ No. 741 (QL), at paragraph 48).

[13] The Respondent acknowledged, in reply to the argument to retain these sections, that the Guidelines are merely a concise statement of the Minister's view of the law and may be used in Court solely for that purpose and strictly to that extent. However, in this case, Respondent's counsel maintains that the inclusion of the Guidelines is intended to be a form of legal estoppel from taxation and therefore eviscerates the Court's exclusive jurisdiction to determine tax liability and therefore

should be struck from the pleadings (*Hawkes v Canada*, 97 DTC 5060 (FCA), [1996], FCJ No. 1694 (QL)).

[14] As properly referenced in *Hawkes*, actions, pronouncements or rulings of the Minister or her agents on matters of law cannot legally usurp of the Court's ultimate role. However, there is no direct pronouncement by the Supreme Court of Canada or the Federal Court of Appeal on the application of the Guidelines, as a fact, to the analysis of a section 87 exemption. That issue therefore differs from the claimed, now struck, Treaty 8 exemption. The Guidelines, as pleaded, are something that should be before the watchful eye of the trial judge in the factual context of a section 87 exemption claim. Such Guidelines in the context of section 87 represent new facts which invite the consideration of the Court. Their inclusion as a fact to be considered will not bind a trial judge of this Court. Their inclusion as part of the factual analysis undertaken by the Court is not beyond "any chance of success", where it may be reasonably concluded that, even to the smallest extent, an argument may be marshalled that the Guidelines comprise a component of the factual circumstances to be reviewed.

[15] This motions Court is not suggesting that paragraphs 84 to 94 and paragraph 111 will contribute to a successful finding by a trial judge that a section 87 exemption exists. However, the Guidelines Argument, even in the context of the Honour of the Crown argument, cannot be said to have "no chance of success" when considered in the context of the Appellant's factual history, the sequence of events in his claim for a section 87 exemption and the fact that a trial judge has not previously weighed the probative value and weight of the Guidelines Argument in such a factual context. That opportunity shall now be afforded.

d) Specific Paragraphs to be Struck or Retained

[16] Consistent with the above determinations regarding the Treaty 8 exemption and the Guidelines Argument, I now turn to specific paragraphs in the draft Amended Notice of Appeal to be struck or retained in order to provide clarity to the parties.

[17] I am mindful in my determination of two overriding issues. Firstly, the determination of a section 87 exemption claim must be, on the basis of commentary by the Supreme Court of Canada (*Dubé v Canada*, 2011 SCC 39, [2011] 2 SCR 764), a broadly based factual inquiry of the trial judge with an eye and ear to the context of any historical activity in applying the connecting factors test. Secondly, to the extent any statement of fact in the impugned paragraphs relates exclusively to the Treaty 8 exemption and does not relate to a section 87 exemption claim, such factual

allegations must be struck. The Court should err on the side of the slightest shade of relevance to the section 87 factual inquiry. Therefore, the following chart summaries each contested paragraph and the Court's finding of relevance to any remaining issues to be presented to a trial judge.

Paragraphs in Draft Amended Notice of Appeal	Nature of Facts Asserted	Conclusion of Relevance	Decision
11, 12 and 13	These paragraphs describe the customary "on reserve" activities and how same have changed over the years.	These facts are possibly relevant to customary native activities and dealings on the reserve.	Retained
14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32	These paragraphs exclusively describe the background, negotiations, history, conclusion and effect of Treaty 8 and subsequent interpretation and actions regarding same.	These facts are not relevant to a section 87 exemption claim, but are offered to support a Treaty 8 claim, which has been struck because it confers no legal basis for exemption from tax.	Struck
33, 34, 35 and 36	These paragraphs describe the present and evolving life and activity within the region in which the reserve is situate.	While these statements are not necessarily succinct, they do describe the impact of the modern oil sands industry on the region and the reserves within it. Arguably, these facts are relevant as to the activity, undertaking and income generated from such activities of natives.	Retained

[18] To reiterate, references anywhere in the draft Amended Notice of Appeal relating to Treaty 8 exemption rights are to be deleted as are paragraphs 14 through 32 inclusive in the draft Amended Notice of Appeal.

[19] Paragraph 43 shall be redrafted in order to enumerate the succinct foundational facts known to the Appellant which relate to the legal exemption afforded to the employees of Neegan Development Corporation Ltd, but only to the extent such facts are applicable and relevant in the present appeal.

[20] Subject to such foregoing paragraphs being struck and/or amended, the final Amended Notice of Appeal shall be served and filed within 45 days. The Respondent shall have 60 days from that date of service to file an Amended Reply, if any.

III. Costs

[21] At the conclusion of hearing the motion, I reserved on the issue of whether to hear submissions from the parties on the issue of costs in order that they might know the outcome prior to making such representations. Given the mixed results, there shall be no order as to costs and therefore no submissions on costs are now necessary.

Signed at Ottawa, Canada, this 23rd day of September 2013.

"R.S. Bocock"

Bocock J.

CITATION:	2013 TCC 300
COURT FILE NO.:	2013-188(IT)G
STYLE OF CAUSE:	DAVID TUCCARO AND THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	September 9, 2013
REASONS FOR ORDER BY:	The Honourable Mr. Justice Randall S. Bocock
DATE OF ORDER:	September 23, 2013

APPEARANCES:

Counsel for the Appellant:	Maxime Faille
Counsel for the Respondent:	Darcie Charlton Ashleigh Akalehiywot

COUNSEL OF RECORD:

For the Appellant:

Name:	Maxime Faille
Firm:	Gowling Lafleur Henderson LLP Ottawa, Canada

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada