THE QUEEN V. DANIEL ASHINI et al.

[Indexed as: **R. V. Ashini**]

Newfoundland Provincial Court, Igloliorte P.C.3., April 18, 1989

Mr. Olthuis and Mr. Preston, for the accused
Mr. Stevenson and Mr. Gill's, for the Crown

Four Innu persons entered the runway area of the Goose Bay Canadian Forces Base in Labrador. They were charged with having "wilfully interfered with the lawful operation of property under ss.387(1)(c) and 387(4)(b) of the *Criminal Code.* In defence they argued a right to occupy the land based on the aboriginal title of the Innu which had never been extinguished.

Held: Accused acquitted.

1. Based on their knowledge of ancestry and kinship the accused held an honest belief that their people never gave up their right to the land.

2. This belief is a reasonable one even though based on the accuseds' subjective understanding of aboriginal title rather than on Canadian concepts of land ownership. The court must not assume that a "reasonable" belief be founded on English Canadian law standards.

3. The accused therefore had a "color of right" to occupy the Canadian Forces Base land.

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IGLOLIORTE P.C.J: The four accused, Daniel Ashini, Elizabeth Penashue, Penote Benedict Michel and Peter Penashue appeared for trial last week on separate informations, all charged with an offence alleging that:

> On or about the 15th day of September 1988, A.D., at or near Happy Valley *I* Goose Bay, Labrador, Province of Newfoundland, did wilfully interfere with the lawful operation of property, to wit: the Canadian Forces Base Goose Bay, contrary to Section 387(1)(c) of the Criminal Code of Canada, thereby committing an offence contrary to s.387(4)(b) of the Criminal Code of Canada.

Thirty-four Informations, both under the *Criminal Code of Canada* for adults, and under the *Young Offenders Act* for young people, have been laid against more than sixty people over a dozen different dates.

On one charge alone from September 22, 1988, forty-nine people appear on an Informafion.

Today, we are dealing with four charges. I will leave it to the Crown upon hearing my judgment whether they will proceed with the mass of other charges. I will not be deciding in this judgment whether to summarily dismiss or continue with any charges beyond these four.

The evidence shows that on September 15, 1988 the four people here were part of a larger group who collectively walked beyond a checkpoint gate leading unto the part of the Goose Bay Runway called an "apron". Since they hadn't been given permission by any airport or military authorities, they were arrested, charged and removed by the R.C.M.P.

The issued to be decided is whether the Crown has proved the constituent elements of the offence. In coming to a decision I must consider any defence allowed by Canadian law for the accused which might negate criminality.

I will, as well, refer to relevant issues raised by Crown or defence in reaching my conclusions about this criminal charge.

Since we know the present users and occupiers of the land at the Base, Crown had little difficulty presenting a *prima facie* case.

From precedent given to me to consider, the immediate question in whether the "color of right" defence put forward by Mr. Olthuis will be sufficient to be considered as satisfying the definition of

"an honest belief in a state of facts, which if it existed, would be a legal justification or excuse." Creaghan, p.453.

In my opinion, Mr. Olthuis has presented a valid defence and also a successful one. We are not dealing with any land which has been the subject of divestiture through treaties, as under the *Indian Act,* R.S.C. 1970, c.I-6. Each of these four persons based their belief of ownership on an honest belief on reasonable grounds. Through their knowledge of ancestry and kinship they have showed that none of their people ever gave away rights to the land to Canada, and this is an honest belief each person holds. The provincial and federal statutes do not include as third parties or signatories any Innu people. I am satisfied that the four believe their ancestors predate any Canadian claims to ancestry on this land.

Since the concept of land as property is a concept foreign to original people the Court must not assume that a "reasonable" belief be founded on English and hence Canadian law standards. The Innu must be allowed to express their understanding of a foreign concept on their terms, or simply express what they believe.

The Crown has presented to me recent cases such as *Baker Lake [Hamlet of Baker Lake et al.* v. *Mm. of Indian Affairs and Nor. Dev. et al.,* [1979] 3 C.N.L.R.17, [1980] 1 F.C. 518 (F.C.T.D.)] and *Calder* [*Calder v. A.G.B.C.* (1973), 34 D.L.R. (3d) 145 (S.C.C.)] which only emphasize the concept of land as property from an English law viewpoint. Like the I.Q. tests administered to school children some years ago which simply reflects the understanding of the maker of the test, not the person being tested, there is an inherent bias. For example, in *Calder,* the reference to "properly constituted authorities" is a justification of a Proclamation. It assumes that original inhabitants accepted this Proclamation and agreed that it extinguished their interests as users from a time which predated the appearance of Europeans.

These four people have shown me their belief in owner's rights is unshaken by the present occupation.

All of the legal reasonings are based on the premise that somehow the Crown acquired magically by its own declaration of title to the fee a consequent fiduciary obligation to the original people. It is time this premise based on 17th century reasoning be questioned in the light of 21St century reality.

Canada is a vital part of the global village and must show its maturity not only to the segment of Canadian society that wields great power and authority to summarily affect the lives of minority groups with the flourish of a pen to yet another "agreement" or "memorandum of understanding" resulting in great social and economic benefit; but also to its most desperate people.

The forty year history of these Innu people is a glaring reminder that integration or assimilation alone will not make them a healthy community.

By declaring these Innu as criminals for crying enough the Court will be have been unable to recognize the fundamental right to all persons to be treated equally before the law.

Both sets of the foregoing reasons are sufficient, in my mind, to have these four acquitted of any wrongdoing under s.387 of the *Criminal Code of Canada.*

Finally, the parties will have to negotiate answers to their problems, since the Court is unable to answer these problems for them.