ASSESSOR OF AREA NO. 25 - NORTHWESTI PRINCE RUPERT (Respondent) V. N & V JOHNSON SERVICES LTD. et al. (Appellant)

[Indexed as: **Northwest/Prince Rupert Assessor, Area No.25 v. N & V Johnson Services Ltd.**]

British Columbia Court of Appeal, Hinkson, Macfarlane and Hollinrake JJ.A., September 10, 1990

D. Mossop, for the appellant
C.M. Considine, for the respondent

The appellant company, whose shareholders were members of the Gitwangak Band, operated a restaurant and service station on the reserve. A certificate of possession for the subject lands was issued to Johnson one of the shareholders of the company by the band council pursuant to s.20(1) of the *Indian Act,* R.S.C. 1970, c.I-6 (now R.S.C. 1985, c.I-5) and a certificate of possession was also issued to Johnson by the Ministry of Indian Affairs and Northern Development. At the request of Johnson the Ministry of Indian and Northern Affairs granted a lease of the land to the company in order for it to obtain financing for the operation of the business. The lands were assessed for taxes.

The Assessment Appeal Board (see [1988] 3 C.N.L.R. 7) confirmed the order of the Court of Revision exempting the company from assessment under s.34(4) of the *Assessment Act,* R.S.B.C. 1979, c.21 and held that it was a proper case to lift the corporate veil, that the lands were held in trust for Johnson by the company, and that the lands were being used by Indians for Indians and therefore exempt from taxation by s.87 of the *Indian Act.* On appeal by the assessor the chambers judge found that there was no evidence before the Board of a written or oral declaration of trust, that the Board had confused the concept of "lifting the corporate veil" with the concept of trust, and that s.87 of the *Indian Act* did not exempt the company whose shareholders were Indians from taxation (see [1988] 4 C.N.L.R. 83). The company appealed on the grounds that the Minister of Indian Affairs and Northern Development as trustee for the shareholder Johnson entered into the lease arrangement with the company and therefore a trust relationship existed between Johnson and the company. The company relied on s.58(3) of the *Indian Act* to assert a trust relationship between Johnson and itself and submitted that on the lifting of the corporate veil the lease and the occupation of the land under it was held by Indian shareholders and thus was land exempt from taxation by virtue of s.87 of the *Indian Act* and s.13(h) of the *Taxation (Rural Area) Act,* R.S.B.C. 1979, c.400.

Held: Appeal dismissed.

1. The land itself is held by the appellant company as lessee for its own use and benefit. A company does not hold its assets in trust for its shareholders or any one of them.

2. Section 58(3) of the *Indian Act* does not assist the appellant company because the company holds the lease and occupies the land under the lease for its own use and benefit in the operation of the business.

3. The issue of lifting the corporate veil cannot be resolved by giving a liberal interpretation to s.87 of the *Indian Act.* The corporation is a separate and distinct legal entity and s.87 cannot be read such that the word "Indian" includes a corporate entity whose shareholders are Indians.

4. Absent statutory provisions to the contrary, persons who choose to operate their business through a corporate vehicle must take the disadvantages together with the advantages that accrue from incorporation.

5. There was nothing in the facts or in the relevant statutory provisions to justify lifting the corporate veil for the purpose of exempting the appellant company from taxation.

6. There was no ambiguity in s.87 or the relevant provincial legislation and there was no doubt to resolve in favour of the Indians.

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HOLLINRAKE J.A.: This is an appeal from a judgment of Southin J. (as she then was) allowing an

appeal by the assessor of No.25- Northwest Prince Rupert from a decision of the Assessment Appeal Board [[1988] 4 C.N.L.R. 83, [1988] 5 W.W.R. 438, 25 B.C.L.R. (2d) 322]. The board had confirmed the decision of the Court of Revision granting the appellant company, N & V Johnson Services Ltd., exemption from assessment under s.34(4) of the *Assessment Act,* R.S.B.C. 1979, c.21, on the ground that the shareholders of that corporation were Indians as defined by the *Indian Act,* R.S.C. 1970, c.I-6 [now R.S.C. 1985, c.I-5], and the lands were situate on an Indian reserve. I reproduce here s.34(1) and (4) of the *Assessment Act:*

> 34.(1) Land, the fee of which is in the Crown, or in some person on behalf of the Crown, that is held or occupied otherwise than by, or on behalf of, the Crown, is, with the improvements on it, liable to assessment in accordance with this section.
>
> (4) This section applies, with the necessary changes and so far as it is applicable, where land is held in trust for a tribe or band of Indians and occupied, in other than an official capacity, by a person not an Indian.

The parties are agreed that the facts are accurately set out in the decision of the Assessment Appeal Board [[1988] 3 C.N.L.R. 7]. I quote those facts from that decision [p.8]:

> The respondent N & V Johnson Services Ltd. incorporated on the 18th February 1976, operates a service station and restaurant on the subject property situate on the Gitwangak Indian Reserve; at all material times all the shareholders of the Company have been members of the Gitwangak Indian Band.
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> A Certificate of Possession for these lands was issued to Norman Johnson one of the shareholders by the Band Council pursuant to the provisions of s.20(1) of the *Indian Act* and a Certificate of Possession was issued by the Ministry of Indian and Northern Affairs to Norman Percy Johnson of [sic] 7th June 1977.
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> At the request of Mr. Johnson the Ministry of Indian and Northern Affairs granted a lease of the land to the respondent Corporation. The respondent gave evidence that the lease was requested in order to enable the said Norman Percy Johnson and the other shareholders of the Company to obtain financing from the Federal Business Development Bank which required a Corporation in order to provide debenture financing. It was a term of the lease, *inter alia,* that upon the term of the lease expiring or upon the lease being terminated in accordance with the other provisions of the lease at the option of the Minister of Indian Affairs and Northern Development that the fixtures and improvements on the lands shall remain on the lands or may be removed at the option of the Minister. It was a further term that the lease was subject to the *Indian Act* and Regulations and that Norman Percy Johnson, a party to the lease, requested the Minister to lease the lands for his benefit pursuant to s.58(3) of the *Indian Act* authorizing the leasing by the Minister of specific lands without the lands being surrendered.

The appellant company has granted security to creditors based upon its lease and occupation of the subject land.

Before the Assessment Appeal Board, the parties were in agreement that if the appellant company was entitled to an exemption this would be so because of the provisions of s.87 of the *Indian Act.* That section reads:

> 87. Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to section 83, the following property is exempt from taxation, namely:
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> (a) the interest of an Indian or a band in reserve or surrendered lands; and
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> (b) the personal property of an Indian or band situated on a reserve;
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> and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property; and no succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any such property or the succession thereto if the property passes to an Indian, nor shall any such property by taken into account in determining the duty payable under the *Dominion Succession Duty Act,* being chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the

Estate Tax Act, on or in respect of other property passing to an Indian.

It was also contended by the appellant company before the Assessment Appeal Board that the company was exempt from taxation by the provisions of s.13(h) of the *Taxation (Rural Area) Act,* R.S.B.C. 1979, c.400, which reads:

> 13. The following property is exempt from taxation:
>
> (h) land and improvements vested in or held by Her Majesty or another person in trust for or for the use of a tribe or body of Indians, and either unoccupied, or occupied by a person in an official capacity or by the Indians.

The Assessment Appeal Board concluded this was a proper case to lift the corporate veil and, further, that the lands were held in trust for Norman Johnson by the appellant company. The board said this [p.13]:

> The Board feels that in this case and solely on the facts relating to this case especially with reference to the circumstances of the Certificate of Possession issued to Mr. Johnson and his retention of the rights pursuant to the lease together with the necessity of incorporation purely for the purposes of obtaining a loan from the Federal Business Development Bank, that this is a proper case for lifting of the corporate veil. The Board finds that in fact the lands are held by the corporation in trust for Mr. Johnson and that the lands and improvements are exempt from taxation under the *Assessment Act.* To hold otherwise would be to tax reserve lands and the Board does not feel that the Company was incorporated as the most efficient manner of obtaining its objectives but was done purely to permit Federal Business Development Bank financing.

Southin J., in the court below, said this in dealing with the board's finding that the appellant company held the land in trust for Norman Johnson [pp.87-88 C.N.L.R.]:

> Here the lessor, the Crown, holds the reversion, in effect, in trust for Mr. Johnson the holder of a certificate of possession. The board has held that the lessee, the company, holds the term created by the lease in trust for Mr. Johnson.
>
> The board described its finding that the company holds the lands in trust for Mr. Johnson as a finding of fact. But a fact can only be found if there is some evidence to support it.
>
> Whether there is a trust is a question of mixed law and fact.
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> Counsel for the respondent conceded that there was not a shred of written evidence of any trust. I infer that there was no evidence before the board of any oral declaration of trust. No argument was advanced to me that there can be said on these facts to be any resulting or constructive trust.
>
> In my opinion, the board confused the concept of "lifting the corporate veil" with the concept of trust and assumed that if one could "lift the corporate veil" one thereupon would find there was a trust.
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> In my view that is simply not so as a matter of law.
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> I simply hold that the board erred in law in finding that the lessee holds the term in trust for Mr. Johnson because there was no basis upon which it could make that finding.

I agree with everything her Ladyship said on this issue.

Before this court, the appellant company submitted that the minister as trustee for Norman Johnson entered into this lease arrangement with the appellant company and, therefore, a trust relationship exists between Norman Johnson and the company. It may well be that the rental payments made by the appellant company to the minister are held in trust by Her Majesty for Norman Johnson but, in my opinion, this does not mean that the land itself is held in trust for Norman Johnson and that is what is critical here. The land itself is held by the appellant company as lessee for its own use and benefit. A company does not hold its assets in trust for its shareholders or any one of them. I interject here to add that the shareholders at the relevant time were Norman Johnson and Vina Johnson.

The appellant company relies on s.58(3) of the *Indian Act* to assert a trust relationship between Norman Johnson and itself. That section reads:

> 58 …
>
> (3) The Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered.

In my opinion, that section does not assist the appellant company because the company holds the lease and occupies the land under the lease for its own use and benefit in the operation of its service station and restaurant business.

With respect, as with Southin J. in the court below, I am unable to see any acts or statutory provisions which could lead to the conclusion that the land which is the subject matter of this lease is or ever was held for the benefit of Norman Johnson or any Indians be they a tribe, a band or an individual.

This leads me to the submission that this is a proper case for the court to lift the corporate veil to conclude that this lease and the occupation of the land under it is held by Norman Johnson and thus land exempt from taxation by s.87 of the *Indian Act.*

On this aspect of the case, Southin J. said this [pp.89-90 C.N.L.R.]:

> As to s.87, the Saskatchewan Court of Appeal has held in *Kinookimaw Beach Assn.* v. *R. in Right of Sask.,* [1979] 6 W.W.R. 84, [1979] 4 C.N.L.R. 101, 102 D.L.R. (3d) 333 (Sask.C.A.), that it does not exempt a corporation whose shareholders are Indians from taxation.
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> As I understood him, Mr. Grant submitted, on the basis of the judgment of the Supreme Court of Canada in *Nowegijick* v. *R.,* [1983] 1 S.C.R. 29, [1983] C.T.C. (N.S.) 20, 83 D.T.C. 5041, [1983] 2 C.N.L.R. 89, 144 D.L.R. (3d) 193, 46 N.R. 41, that I should not follow the judgment of the Saskatchewan Court of Appeal on the meaning of that section. It has always been my understanding that on the meaning of a federal statute, a trial judge of one province should generally follow an appellate judgment of another province. I do so. If the judgment of the Saskatchewan Court of Appeal is not to be followed in British Columbia, it is for our Court of Appeal to take that course. For me not to do so, in the absence of a clear indication from the Supreme Court of Canada that it considers the Saskatchewan Court of Appeal in error, would be presumptuous.
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> On that interpretation of s.87, I am left with the question of whether the British Columbia sections should fairly be interpreted as conferring an exemption upon such corporations.
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> Bearing in mind the course of the relationship between the indigenous and non-indigenous population of British Columbia since British Columbia joined Confederation in 1871, I am of the opinion that the legislative purpose in enacting the exemptions was not to benefit Indians but to observe the perceived limits of the province's legislative authority. To put it another way, I am of the opinion that the legislature intended to tax to the boundary of the area protected by s.87 of the *Indian Act* and its predecessors.
>
> That being so, I see no reason why the words in issue should not be taken in their natural meaning. A corporation is not an Indian although there is nothing to prevent the legislature from saying if it chooses to do so that corporations wholly owned by Indians are to be considered Indians for the purpose of assessment and taxation.

The submission of the appellant company is that on lifting the corporate veil, the leased land is then seen to be occupied by the company's shareholders, Norman Johnson and Vina Johnson, and thus exempt from taxation by s.87 of the *Indian Act* as well as s.13(h) of the *Taxation (Rural Area) Act.*

The appellant company submits that the principle which should govern here is that enunciated by the Supreme Court of Canada in *Nowegijick* v. *R.,* [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 83 D.T.C. 5041, 144 D.L.R. (3d) 193, 46 N.R. 41. In that case the issue was whether the income earned by an Indian was exempt from taxation under the *Income Tax Act* by reason of s.87(b) of the *Indian Act.* There, the Indian was an employee of a company having its head office and administrative office on the reserve but his work for the company was done off the reserve.

The officers and employees of the company were all Indians living on the reserve. In his judgment, Dickson J. (as he then was) distilled the relevant essentials of s.87(a) and (b) and said [p.91 C.N.L.R.]:

> . . . the section provides that (i) the personal property of an Indian situated on a reserve is exempt from taxation; (ii) no Indian is subject to taxation "in respect of *any"* such property.

The question to be answered by the court was whether the income of Mr. Nowegijick could be said to be "in respect of any" personal property situated upon a reserve.

On the construction of s.87 of the *Indian Act,* Dickson J. said at [p.93-94 C.N.L.R.]:

> Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act,* they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.
>
> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption.

And again at [p.96 C.N.L.R.]:

> A tax on income is in reality a tax on property itself. If income can be said to be property I cannot think that taxable income is any less so. Taxable income is by definition, s.2(2) of the *Income Tax Act,* "his income for the year minus the deductions permitted by Division C". Although the Crown in para. 14 of its factum recognizes that "salaries" and "wages" can be classified as "personal property" it submits that the basis of taxation is a person's "taxable" income and that such taxable income is not "personal property" but rather a "concept", that results from a number of operations. This is too fine a distinction for my liking. If wages are personal property it seems to me difficult to say that a person taxed "in respect of' wages is not being taxed in respect of personal property. It is true that certain calculations are needed in order to determine the quantum of tax but I do not think this in any way invalidates the basic proposition.
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> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to[11] or "in connection with". The phrase "in respect of' is probably the widest of any expression intended to convey some connection between two related subject-matters.

In the case before us, the appellant company emphasizes the words "in respect of' in s.87 and says that on the basis of the interpretation of those words this court should not hesitate to lift the corporate veil and conclude that these leased lands are occupied by an Indian or Indians and thus exempt from taxation. *Nowegijick* was a case where the Supreme Court of Canada opted for a liberal construction of the provisions of s.87 and adopted the principle that doubtful expressions should be resolved in favour of the Indian. In my respectful opinion, the issue of whether the corporate veil should be lifted cannot be resolved by giving a liberal interpretation to s.87 of the *Indian Act.* The corporation is a separate and distinct legal entity. As Southin J. said in the court below, it is an artificial person and "by its nature, it can have neither race nor religion or sex". As counsel for the respondent assessor points out, the words "directly or indirectly" could have been inserted in s.87 to show a legislative intent to look behind the corporate veil. I agree with the submission of counsel for the respondent assessor that s.87 cannot be read such that the word "Indian" includes a corporate entity whose shareholders are Indians. I repeat the words of Southin J. in the court below when she said [p.90 C.N.L.R.]:

> A corporation is not an Indian although there is nothing to prevent the Legislature from saying if it chooses to do so that corporations wholly owned by Indians are to be considered Indians for the purpose of assessment and taxation.

With respect, I think the principles enunciated by the Saskatchewan Court of Appeal in *Kinookimaw Beach Assn.* v. *Sask. (Bd. of Revenue Commr.),* [1979] 6 W.W.R. 84, [1979] 4 C.N.L.R. 101, 102 D.L.R. (3d) 333, are applicable to the case before us. In that case several Indian bands had incorporated a company under the provincial *Companies Act* for the purpose of operating a resort on reserve lands. The Saskatchewan Revenue Branch assessed the company

for education and hospitalization tax on the purchase price of capital assets on the grounds that it was a corporate entity and not entitled to the s.87 exemption provisions. The Court of Queen's Bench lifted the corporate veil and gave the company the exemption. In allowing the appeal, Culliton C.J.S., speaking for the court said at pp.88-89 [pp.104-105 C.N.L.R.]:

> It was common ground that unless it was proper to pierce the corporate veil the association was liable for the tax imposed pursuant to the *Education and Health Tax Act.* The question then is: Was the learned chambers judge right when he concluded that in the circumstances of this case it was right to do so?
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> This court in *Nedco Ltd.* v. *Clark,* [1973] 6 W.W.R. 425, 43 D.L.R. (3d) 741, reviewed the law relative to the right to lift or pierce the corporate veil. At pp.430 and 433, speaking for the court I said:
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> > Notwithstanding that, since the judgment of the House of Lords in *Salomon* v. *Salomon & Co. Ltd.,* [1897] A.C. 22, the autonomous and independent existence of the corporate entity has generally been accepted as a fundamental feature of both English and Canadian law, there have been occasions when the courts have found it both possible and necessary to pierce the corporate veil. The court has done so when one company is in fact the agent of the other; or, where one company is being used as a cloak for the actions of the other; or, for the just and equitable enforcement of a tax law. The court has also done so when it has concluded that, while the corporations are separate in law, one may be under the control of the other to such an extent that together they constitute one common unit
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> > After reviewing the foregoing, and many other cases, the only conclusion I can reach is this: while the principle laid down in *Salomon* v. *Salomon & Co. Ltd., supra,* is and continues to be a fundamental feature of Canadian law, there are instances in which the court can and should lift the corporate veil, but whether it does so depends upon the facts in each particular case. Moreover, the fact that the court does lift the corporate veil for a specific purpose in no way destroys the recognition of the corporation as an independent and autonomous entity for all other purposes.
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> I think the principle to be drawn from the *Nedco* case is that the autonomous and independent existence of the corporate structure must be accepted and respected unless it can be shown that such structure is being deliberately used to defeat the intent and purpose of a particular law or is intended to or does convey a false picture of independence between one or more corporate entities which, if recognized, would result in the defeat of a just and equitable right.
>
> With all respect, I do not think the principle to be drawn from *Nedco* applies in the present case. In this case no attempt has been made to evade the intent and purpose of the taxing statute through the corporate structure, nor is there any doubt as to the true legal position of the association as related to the Indian bands. Here the Indian bands decided that the most efficient manner of attaining their objectives was through a corporate structure. In the purchase of tangible personal property in the furtherance of its further objectives it was the corporation which was the user or consumer of such tangible personal property. As well, under the law it was liable for the tax imposed.
>
> To grant to the association the exemption from taxation provided for in s.87 of the *Indian Act* would be to destroy the legal obligations of the association as an independent corporate entity and to determine its obligations by the character of its shareholders.

The *Kinookimaw* case was considered with approval in 1981 by the Alberta Court of Appeal in *Re Stony Plain Indian Reserve No. Z35,* [1982] 1 C.N.L.R. 133, [1982] 1 W.W.R. 302, 130 D.L.R. (3d) 636, 35 A.R. 412.

In my opinion, absent statutory provisions to the contrary, persons who choose to operate their business through a corporate vehicle must take the disadvantages that belong together with the advantages that accrue from incorporation.

In 1987 the Supreme Court of Canada was asked to lift the corporate veil in a case involving insurable interest. That case was *Kosmopoulos* v. *Constitution Ins. Co.,* [1987] 1 S.C.R. 2, 36 B.L.R. 233, 22 C.C.L.I. 296, [1987] I L.R. 1-2147, 34 D.L.R. (4th) 208, 21 O.A.C. 4, 74 N.R. 360.

Dealing with the issue of lifting the corporate veil, Wilson J. said at pp.213-14:

> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon* v. *Salomon & Co., Ltd.,* [1987] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, *Modern Company Law,* 4th ed. (1979), at p.112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in *American Indemnity Co.* v. *Southern Missionary College, supra,* cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.
>
> There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice": Gower, *supra,* at p.138. Mr. Kosmopoulos was advised by a competent solicitor to incorporate his business in order to protect his personal assets and there is nothing in the evidence to indicate that his decision to secure the benefits of incorporation was not a genuine one. Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. Re should not be permitted to “blow hot and cold” at the same time.

In my opinion, this is nothing on the facts in the case before us or the relevant statutory provisions to justify this court lifting the corporate veil for the purpose of exempting the appellant company from taxation. I do not think the principle enunciated in *Nowegijick* advances the appellant's case. On the facts before us there is no ambiguity in s.87 or in the relevant provincial legislation. The fact of occupation by non-Indians is clear as is use by non-Indians. There is no doubt to resolve in favour of the Indians.

I would dismiss the appeal.