IN THE KAWASKIMHON ABORIGINAL MOOT COURT

2007

UNIVERSITY OF MANITOBA, FACULTY OF LAW

BETWEEN:

MANITOBA PROVINCIAL CROWN, SILVER SWAN OJIBWAY FIRST NATION, ASSEMBLY OF MANITOBA CHEIFS, SASKATCHEWAN PROVINCIAL CROWN, FEDERAL CROWN, ROBERT JENKINSON, INUIT TAPIRIIT KANATAMI, MANITOBA METIS, FEDERATION, CITY OF WINNIPEG, CANADIAN NON SMOKERS RIGHTS ASSOCIATION, MANITOBA CHAMBERS OF COMMERCE, NISGA'A LISIMS GOVERNMENT, WORLD COUNCIL OF INIGENOUS PEOPLE, MANITOBA ASSOCIATION OF MUNICIPALITIES

FACTUM OF THE FEDERAL CROWN

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Table of Contents

Summary Position of the Federal Crown 3

Statement of the Facts 4

Fiduciary Duty 4

Jurisdiction 7

Section 15 9

Comparator Group 10

Pre Existing Disadvantage 10

Correspondence Between Grounds and Claimant's Characteristics 11

Ameliorative Purpose or Effect 11

Nature of the Interest Affected 12

Subjective – Objective Analysis 13

Section 15(2) 14

Section 1 of the Charter 14

Pressing and Substantial Legislative Objective 15

Rational Connection 15

Minimal Impairment 15

Proportional Effects 16

Table of Authorities 18

Legislation 18

Jurisprudence 18

International Materials 19

Secondary Materials 19

Summary Position of The Federal Crown

1. The Federal Crown recognizes that a fiduciary duty exists in respect of all dealings between the varied levels of government and the First Nations citizens of Canada. In the situation at issue, the Federal Crown maintains that the Provincial Legislature of Manitoba has not breached the fiduciary obligation that is owed to the people of the Silver Swan Ojibway First Nation.

2. The Federal Crown submits that the Manitoba's Legislative Assembly's *Non-Smokers Health Protection Act* is a validly enacted law by that is, in all aspects, properly within the jurisdiction of the Province of Manitoba. The impugned legislative exemption is a valid omission that neither exceeds provincial jurisdiction nor violates the Constitutionally protected right to substantive equality.

3. The Federal Crown submits that the decision rendered in *R. v. Jenkinson* by the Manitoba Court of Queens Bench represents an improper application of the required section 15 equality analyses. It is therefore maintained that the impugned legislative exemption does not represent an impermissible violation of the equality rights of business owners operating off-reserve ventures. In the alternative, it is submitted that even if a substantive violation of the equality guarantee is made out, it must be deemed to be justifiable in a free and democratic society. This claim is substantiated through the application of the Oakes test and a proper analysis under section 1 of the *Canadian Charter of Rights and Freedoms*.

4. It is the respectful position of the Federal Crown that the citizens of SSOFN, as well as all other Aboriginal Reserve lands in the Province of Manitoba, have been validly exempted from the application of the *NSHPA*. In the regrettable result, the SSOFN must abide by the current holding of the judiciary and continue to operate on-reserve businesses in full compliance with the *NSHPA*. However, all relevant negotiations may, in the opinion of the Federal Crown, proceed with the assumption that the *Jenkinson* decision will likely not stand up under appellate review

Statement of Facts

5. In 1871, the British Crown signed Treaty #1 that encompassed lands in southern Manitoba, including lands ceded by the Silver Swan Ojibway First Nation (SSOFN). More recently, the SSOFN purchased land near the City of Winnipeg creating an "urban reserve" by way of the Treaty Land Entitlement process. The process provides the lands purchased by the SSOFN as reserve lands and as such, subject to the *Indian Act*.

6. The urban reserve was created in anticipation of a significant economic development initiative. There was construction of a full service hotel, restaurant, lounge complex, gas station and garage. Before these were constructed the SSOFN negotiated with the province of Manitoba for the installation of video lottery terminals in the lounge and restaurant. In the negotiations with the province for the lottery terminals, the SSOFN had the understanding that they would exist a continuing policy that allowed smoking in public buildings on their reserve.

7. Subsequently, a province wide smoking ban came into effect in Manitoba, which provided a specific exemption for First Nations. However, the Manitoba Court of Queen's Bench in *Jenkinson* held that the exemption was unconstitutional. Post *Jenkinson*, the province declared that the smoking ban exemption for SSOFN would not apply pending further notice from the Manitoba courts. Therefore, currently the smoking ban applies to all persons and businesses within the province of Manitoba; including SSOFN.

Fiduciary Duty

8. *The Royal Proclamation of 1763* created an obligation on behalf of the Crown to act as an intermediary between First Nations and private purchasers of land. Purchases of lands reserved to the Indians must be made in the Crown's name. This requirement prevents the exploitation of the interests of Indians and the lands reserved for Indians. The *Proclamation* inferentially suggests that a fiduciary duty exists that is rooted in Indian title to land and the specific relationship between the Crown and Native citizens. The Crown's fiduciary duty is also an equitable obligation; and the "strict standard of

conduct" of the Crown as a fiduciary is governed by equity. The Supreme Court of Canada held in *Guerin* that if the Crown enters into negotiations with a First Nation, on terms which induce the First Nation to action, and the Crown subsequently ignores the terms of the negotiations, then a breach of the Crown's equitable duty to act in the best interests of their fiduciary has occurred.

Royal Proclamation, 1763 (U.K.), reprinted in R.S.C. 1985, App. II, No.1 [*Proclamation*].

Guerin v. The Queen [1984] 2 S.C.R. 335 at 376, 384, 388. [*Guerin*].

9. The fiduciary duty was devolved, along with the British Crown's powers over First Nations people in the *British North America Act, 1867*, to the Canadian government. The same *Act* entrenched the idea that the powers over Canada formerly held by the British Crown become separate responsibilities of federal and provincial Crowns.

Constitution Act, 1867, 30 & 31 Victoria, c. 3. (U.K.), reprinted in R.S.C. 1985, App. II, No. 5.

10. The idea of a fiduciary relationship is entrenched in the *Constitution Act, 1982*, as s. 35(1) recognizes and affirms the rights of Aboriginal Peoples. This recognition and affirmation of Aboriginal rights is an entrenched aspect of the supreme law of Canada. *R. v. Sparrow*, states that the interpretation of s. 35(1) should be liberal, and any doubt resolved in favour of the Indians. Further, s. 18(1) of the *Indian Act* gives the Crown broad discretion when dealing with Indians.

Constitution Act, 1982, being Schedule B to the Canada Act 1982 c. 11. (U.K.). [*Constitution*].

[1990] 1 S.C.R. 1075 at para. 56-58 [*Sparrow*].

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

11. The low threshold for a First Nation to establish a breach of fiduciary duty is to establish a *prima facie* inference of such a breach. Then the onus shifts to the fiduciary to disprove the allegations. The Crown must then accept that the fiduciary duty exists, and

go on to establish that the duty was properly fulfilled or discharged on a balance of probabilities.

Leonard I. Rotman, *Fiduciary Law*. (Toronto: Carswell, 2006) at p. 616-617.

12. The Federal Crown recognizes the fiduciary duty arising out of the long-standing history between the First Nations and the Crown, and asserts that this duty has been upheld. The Crown's modern fiduciary duty, once a reserve has been created, is to prevent exploitative bargains from being made with the First Nations. A bargain must not be "unconscionable" to the detriment of the First Nations involved or else a breach of the fiduciary duty has occurred. The Federal Crown submits that it has done nothing during the course of negotiations with SSOFN to constitute an "unconscionable" bargain, since the Federal Crown was not directly involved in the negotiations with the province and First Nation.

Blueberry River Indian Band v. Canada, [1995] 4 S.C.R. 344 at para. 45-46.

Guerin, *supra*, at 388.

13. Further, although the provincial Crown is not held to the same fundamental fiduciary obligation as the Federal Crown; nonetheless, the provincial Crown exercised its honour in their negotiations with the First Nations. The province was within their capacity to legislate about smoking as a province-wide matter of "general application" under s.88 of the *Indian Act*. The health of the First Nations and the rest of Manitobans is a matter of general application. The negotiations leading up to the creation of the smoking ban exemption and the province-wide smoking ban itself are both fair since there is nothing to restrict the First Nation from using tobacco traditionally. By removing the smoking ban exemption, the province upheld its honour in relation to the First Nations.

14. In *Weywakum Indian Band v. Canada*, Binnie J. referred to *Samson Indian Nation and Band v. Canada*, stating that,

> "exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The

> Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting".

The Federal Crown respectfully submits that the enacted legislation falls within the powers of the Provincial Crown. The legislation creates a law of general application, regarding the health and wellness of persons in public establishments. The Provincial Crown has acted within their jurisdiction and within the specialized parameters imposed by their fiduciary duty to their own Aboriginal citizens, in both the enactment of the impugned legislation and their negotiations with the SSOFN.

[2002] S.C.J. No. 79 at para. 96 [*Weywakum*].

[1995] 2 F.C. 762 (C.A.) [*Samson*].

Jurisdiction

15. It is the exclusive jurisdiction of the Federal Crown to negotiate treaties with Aboriginals, and establish Indian reserves according to s. 91(24) of the *BNA*, which indicates that, "Indians and lands reserved for the Indians" are federal jurisdiction. However, s.109 of the *BNA* gives exclusive jurisdiction of "land surrendered by treaty in the province" to the province. With the division of powers between the federal and provincial government came a devolvement of certain responsibilities to the province. In *Sparrow*, La Forest J. stated that s. 35(1), "affords aboriginal peoples constitutional protection against provincial legislative power".

Sparrow, supra, at para. 53.

16. Further, s. 88 of the *Indian Act* confers provincial jurisdiction to enact laws of "general application". The SCC in *Delgamuukw v. British Columbia* suggests that, "valid provincial legislation may apply to Indians, so long as it is a law of general application and not one that affects their Indianness, their status, or their core values". In addition, legislation impugned in *R. v. Badger* was held not to infringe s. 35(1) Aboriginal Rights because it did not disrupt native rights to hunt for food.

[1997] 3 S.C.R. 1010 at para. 37 [*Delgamuukw*].

[1996] 1 S.C.R. 771 [*Badger*].

17. The Manitoba legislature did not touch on “Indianness” in their enactment of a health and wellness law of general application. Section 5.1 of The *Non-Smothers Health Protection Act* provides that Aboriginals can use tobacco for traditional, cultural and ceremonial purposes. Therefore, the province, in legislating a law of general application that did not touch on traditional use of tobacco, and hence “Indianness”, has acted *intra vires* their established jurisdiction as the provincial Crown under s. 109 of the *Constitution* and s. 88 of the *Indian Act*.

S.M. 1989-1990, c. 41, s. 9(4) [*NSHPA*].

18. Wallace J.A. in *Delgamuukw* suggested that aboriginal "jurisdiction" was an “undefined form of government” which conflicts with the Canadian legal regime. He further held that s.35 “could not revive and protect any sovereignty rights”

Delgamuukw, *supra*, at para. 45.

19. The UN Declaration of the Rights of Indigenous People would strongly support the notions of First Nation self-governance and aboriginal jurisdiction to make laws and to be exempt from laws of “general application” enacted by the province. However the aforementioned Declaration has not been ratified by the United Nations. If it were ratified, it would need to be accepted into Canadian law by an act of the federal legislature before it would have any legal bearing on the current fact scenario.

The Draft UN Declaration of the Rights of Indigenous People, Human Rights Counsel, Res. 2006/2, online: <http: //www.gcc.ca/pdf/INT000000021.pdf> at articles 3-5.

20. In the result, the Federal Crown respectfully submits that the Manitoba legislature properly enacted the *NSHPA* and acted, in all regards, within their official jurisdiction.

<u>Section 15</u>

21. The test for determining whether a claimant's right to equality has been infringed by a state action or law was set down by the Supreme Court of Canada in *Law v. Canada* and is composed of three stages:

> i) Whether a law imposes differential treatment between the claimant and others, by drawing a formal distinction based on personal characteristics, or through adverse discrimination effects resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics;
>
> ii) Whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment;
>
> iii) Whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

[1999] 1 S.C.R. 497 at para. 88 [*Law*].

22. Manitoba's *Non-Smokers Health Protection Act* contains a legislative exemption for places and premises located on lands reserved for Indians. The operation of this exemption, in effect, creates differential treatment between a group of potential claimants – entrepreneurs operating valid businesses on non-reserve lands – and those individuals operating businesses on reserve lands. The legislation therefore creates a *prima facie* infringement of the potential claimants' equality rights under section 15 (1) of the *Canadian Charter of Rights and Freedoms*.

S.M. 1989-1990, c. 41, s. 9(4).

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11[*Charter*].

23. The Supreme Court of Canada determined that a distinction based upon aboriginality-residence would be considered as an analogous ground for the purposes of section 15 analyses in the case of *Corbiere v. Canada*. The impugned legislative provision creates differential treatment based on an analogous ground and thus passes the first two stages of the section 15 analysis.

[1999] 2 S.C.R. 203 [*Corbiere*].

24. The third stage requires a determination of whether the effect of the impugned government action is "perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society".

Law, supra, at para. 51.

25. In *Law*, Iacobucci J. laid out a non-exhaustive list of contextual factors to aid in the determination of whether a *prima facie* violation of the equality provision constitutes a substantive violation of essential human dignity. The four factors are:

i) Pre-existing disadvantage;

ii) Correspondence between grounds and the claimant's characteristics or circumstances;

iii) Ameliorative purpose or effect;

iv) The nature of the interest affected.

Law, *supra,* at paras. 63-74.

Comparator Group

26. The equality guarantee is a comparative concept and "ultimately, a court must identify differential treatment *as compared* to one or more other persons or groups". (Emphasis in original) The appropriate comparator group for this analysis is that of entrepreneurs operating businesses on Native reserve lands who are therefore exempted from the smoking ban by the impugned legislation. These two groups are alike in all relevant ways except for their aboriginality-residence, which is the potential ground of alleged discrimination.

Law, supra at para. 56.

Pre Existing Disadvantage

27. There are no grounds to suggest that the claimant group has experienced <u>any</u> pre-existing disadvantage in relation to the appropriate comparator group.

28. There are grounds upon which to assert that the claimant group has experienced an historical advantage over the comparator group. Native reserves have, historically, suffered from widespread poverty in a manner that non-reserve based economies have not. This economic reality has created a significant disadvantage for on-reserve businesses trying to remain profitable in comparison to off-reserve businesses.

Corbiere, *supra*, at para. 66.

Correspondence Between Grounds and Claimant's Characteristics

29. Correspondence exists between the grounds of alleged discrimination and the claimants' characteristics. The claimants are being denied the equal benefit of the law on the basis of an analogous ground of alleged discrimination. However, this type of facial correspondence – where adverse effects discrimination is founded on a legislative exemption – does not address the substantive aspect of equality analysis.

30. The impugned provision ameliorates a historical economic inequity. In this light, there is correspondence between the historical ground of discrimination, aboriginality-residence, and the comparators' historical economic disadvantage.

Ameliorative Purpose or Effect

31. The purpose of the law is not to ameliorate the claimant of any historical disadvantages, nor does it have this effect. The claimant has not suffered from any such historical disadvantage.

32. The effect of the impugned provision causes adverse effect discrimination, in that it unintentionally confers a benefit to one group of Canadian citizens while denying the same benefit to another group of citizens based solely on an enumerated or analogous ground. It may also be said that the impugned provision causes adverse effects amelioration in that it unintentionally ameliorates the historically disadvantaged position of those Canadian citizens trying to sustain viable business ventures on Native reserves.

Nature of the Interest Affected

33. While it is possible to ground section 15 claims in economic interests, the Supreme Court of Canada has suggested that economic disadvantage will not create a violation of essential human dignity *per se*. In the case of *Egan v. Canada*, L'Hereux Dube J. wrote, in a dissenting opinion that, "Economic benefits or prejudices are relevant to s. 15, but are more accurately regarded as symptomatic of the types of distinctions that are at the heart of s. 15: those that offend inherent human dignity." This view was further substantiated in a separate dissenting judgment written by Cory J, and concurred – on this specific point – by three other Justices, "the concept of equal benefit of the law should not be restricted to a simple calculation of economic profit or loss."

[1995] 2 S.C.R. 513 at paras. 37, 167 [*Egan*].

34. Section 15 aims to guarantee substantive equality relative to the position of each individual within a historical and socio-economic context. The Charter does not guarantee absolute equality, nor does it prize formal equality over substantive. As Professor Hogg states: "It cannot mean that the law must treat everyone equally . . . The Income Tax Act imposes a higher rate of tax on those with high incomes than on those with low incomes. Indeed, every statute or regulation employs classifications of one kind or another for the imposition of burdens or the grant of benefits."

Peter W. Hogg, *Constitutional Law of Canada*, *Student Edition*. (Scarborough: Carswell, 2006) at p. 1153-1154.

35. The claimants may legitimately incur the denial of an economic benefit based upon an analogous ground under s. 15(1). However, this does not create a violation of their essential human dignity in and of itself. That denial does not reinforce any existing stereotypes, nor does it single the claimants out as a small, marginalized group within the larger context of Manitoba's society. The claimants are a part of the overwhelming majority of Manitobans that are subject to the impugned legislation. The equality rights of the claimants are only infringed in comparison to the situation of a relatively small number of historically disadvantaged individuals. The potential violation of the equality rights of the claimants is a formal distinction, not a substantive one.

<u>Subjective – Objective Analysis</u>

36. The Supreme Court of Canada has held that the section 15 analyses of alleged discrimination must take into account both the subjective viewpoint of the claimant and the objective viewpoint of the reasonable person assessing the situation from the claimant's perspective.

> *Canadian Foundation for Children, Youth and the Law v. Canada,* [2004] 1 S.C.R. 76 at para. 53 [*CFC*].

37. All claimants asserting rights under the *Charter* will subjectively believe that there has been a violation of their essential human dignity. In order to qualify as a violation of the substantive principle of equality that animates s. 15, the claim must be evaluated from the perspective of an objective reasonable person that views the situation from the claimant's perspective. The Federal Crown respectfully submits that through the objective-perspective analysis of the effects of the impugned legislation, there can be no violation of essential human dignity made out.

38. The claimants do not belong to an identifiable marginalized or vulnerable group. They are denied a benefit by the impugned legislation such that an identified vulnerable group may have their historically unequal economic position ameliorated. In addition, the claimants derive the immediate intended benefit of the legislation; they now live and work in healthier smoke-free environments. It must also be noted that the economic burden that is imposed on the claimants through the legislation is not one that is ending their economic ventures, merely limiting them. It is limiting them in a way experienced by thousands of other business owners across the country. In light of all of these relevant factors, it is impossible for a reasonable person, fully apprised of the circumstances of the claimants, to find that the legislative exemption for Indian reserve land creates a violation of the essential human dignity of the claimants.

Section 15(2)

39. The Supreme Court of Canada noted, in *Lovelace v. Ontario* that, "s. 15(2) provides a basis for the firm recognition that the equality right is to be understood in substantive rather than formalistic terms." Section 15(2), in this sense, acts as an interpretive guide to s. 15(1) and affirms the view that the relative historic disadvantage of both the comparator group and the claimant group are relevant to a determination of whether the substantive equality rights of the claimant group have been violated.

[2000] 1 S.C.R. 950 [*Lovelace*].

40. The ameliorative effect of the impugned legislation, when viewed in relation to the historical disadvantage experienced by the comparator group, supports the view that no substantive discrimination has taken place. The adverse effect discrimination imposed by the impugned legislation, when viewed in relation to the historical advantage enjoyed by the claimant group, substantiates the view that the discrimination is only formal and that any potential equality rights claim under the *Charter* must fail under a subjective-objective analysis.

Section 1 of the Charter

41. The Federal Crown respectfully submits that there can be no violation of substantive equality found as an adverse effect of the impugned legislation. In the alternative, the following analysis of the application of section 1 of the Charter is offered.

42. In *R*. v. *Oakes*, Dickson C.J.C. summed up the proper analysis of whether the infringement of a *Charter* right is reasonably justified under s. 1. At the first stage, the court will determine whether the legislative objective is pressing and substantial enough to justify infringing a *Charter* right. The second stage, known as the proportionality test, involves three separate branches:

i) Are the means chosen rationally connected to the objectives?

ii) Do the means chosen impair the right as minimally as possible?

iii) Do the means chosen have effects proportional to their objectives?

[1986] 1 S.C.R. 103 [*Oakes*].

Pressing and Substantial Legislative Objective

43. The purpose of the impugned legislation is the protection of non-smokers in the province of Manitoba. This laudable purpose is not centrally relevant to the analysis. It is an unintentional effect of the legislation that is at issue. This unintended effect is argued to be discriminatory. The impugned legislative effect also ameliorates the historical disadvantage experienced by on-reserve Aboriginal communities in the Province of Manitoba. Having regard to the widespread experience of disadvantage by Canadian Aboriginal citizens and the fiduciary duty that is owed to Aboriginal citizens by all levels of government, the objective of ameliorating the disparate economic conditions of Aboriginals is a pressing and substantial legislative objective.

Rational Connection

44. The amelioration of economic disadvantage experienced by Aboriginal citizens is rationally connected to the means chosen of exempting reserve land businesses from the operation of Provincial anti-smoking legislation. Chief Justice Dickson, writing for the majority in *Canada (Human Rights Commission) v. Taylor*, stated, "as long as the challenged provision can be said to further in a general way an important government aim it cannot be seen as irrational." In the current situation, an important governmental aim is achieved through the establishment of a formal legislative distinction that differentiates the rights of two competing groups in society.

[1990] 3 S.C.R. 892 at para. 56 [*Taylor*].

Minimal Impairment

45. When evaluating the application of s.1 to a violation of Charter rights, the Supreme Court of Canada has suggested a number of factors that militate the judiciary towards a more deferential approach to the minimal impairment evaluation of a legislative initiative. There are two factors present in the current scenario that suggest that a deferential approach is appropriate:

i) The group receiving the benefit is an identified vulnerable group

ii) The law seeks to reconcile the interests of competing groups

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at paras. 79-89 [*Irwin Toy*].

46. The Federal Crown respectfully submits that the equality rights of non-reserve business owners have been impaired minimally, if at all, by the impugned legislative provision. The impairment of the equality rights may be characterized as minimal for the following reasons:

i) The prohibition is aimed at smoking, not the actual video gaming terminals that represent a source of revenue to the affected businesses.

ii) The video gaming terminal revenue represents a small proportion of the revenue stream for the affected businesses.

iii) Patrons that smoke represent a small percentage of the patrons of the affected businesses.

Proportional Effects

47. In the case of *Dagenais v. Canadian Broadcasting Co*. the Supreme Court of Canada re-articulated the final branch of the proportionality analysis as a balancing exercise. The judiciary must weigh the salutary effects of the impugned measure against the deleterious effects of that measure.

[1994] 3 S.C.R. 835 [*Dagenais*].

48. In the situation under analysis, the salutary effect of the legislative provision is the amelioration of the historical marginalization of Canadian Native reserve economies. This must be balanced against the deleterious effect of creating a formal equality distinction that creates a negative financial effect for non-reserve business owners that have on-site recreational activities that appeal to cigarette smokers. The Federal Crown submits that, in this scenario, the deleterious effect of the legislative exemption is outweighed by the salutary effect.

49. For all of the foregoing reasons, it is respectfully submitted that if the impugned legislative provision is found to be a substantive violation of the s. 15 rights of non-

reserve entrepreneurs, then this limitation of equality rights is justified in a free and democratic society under s. 1 of the *Charter*.

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