Rice v. L'Agence du Revenu du Québec, 2016 QCCA 666, Court of Appeal of Québec (Hesler C.J.Q., Chamberland, Thibault, Hilton and Bouchard JJ.A.)

April 21, 2016

The Québec Court of Appeal dismissed an appeal brought by on-reserve gasoline merchants who claimed that they were exempt from the obligation to collect and remit taxes from the sale of gasoline. The Court of Appeal upheld a trial judgment that there was no "right to trade freely" based upon either section 35 of the *Constitution Act, 1982* or the *Royal Proclamation of 1763*. The Court of Appeal also agreed with the trial judge that section 87 of the *Indian Act* had no application, since the taxes were imposed on the customers, not merchants such as the appellants. The budget measures of the Québec government to administer these fuel taxes were not in relation to "Indians", and therefore were not *ultra vires* the provincial government, but were valid provincial laws. The doctrine of interjurisdictional immunity also had no application.

The appellants were status Indians who operated gasoline stations on the Kahnawake Reserve near Montréal. The vast majority of their customers were non-Indian. This dispute involved the collection of the applicable taxes for the sale of gasoline by the Agence du revenue du Québec (ARQ). Pursuant to a federal-provincial agreement, Québec administered and collected the federal GST. In addition, there had been a provincial fuel tax since 1924.

The Court of Appeal observed that Status Indian consumers who reside on the Reserve are exempt from paying the applicable taxes. Other customers are obliged to pay such taxes, and merchants, including Status Indian merchants like the appellants are required to collect and then remit these taxes to the Minister of Revenue.

In 1994, the Minister of Revenue served a Notice of Assessment on the merchants to recover the taxes that should have been collected, and then revoked their registration certificates when they refused to comply. The merchants applied to the Court for a judgment declaring that, as status Indians, they have no obligation to act as collection agents. They also sought a declaration that provisions of various taxing statutes were inapplicable to them on the basis of their ancestral rights. The Court granted an order in June 1994 staying the operation of the notices of assessment, but on the condition that the merchants comply with the requirements of collecting taxes imposed on non-Indian

customers. Subsequently, many of the merchants failed to comply with those conditions, and either did not collect and remit taxes from non-Indian customers or remitted only symbolic amounts.

The matter remained dormant for years, until non-Indian gasoline merchants made complaints of unfair competition. The ARQ assessed the appellants in 2009 and 2010, and the appellants applied for a declaratory judgment from the Court. The ARQ had also filed a motion for directions. In response, the appellants raised new grounds for their position, including a "right to trade freely" based upon the *Royal Proclamation of 1763* and section 35 of the *Constitution Act, 1982*. They also relied upon the same arguments from the 1994 proceeding concerning their exemption from taxes based upon interjurisdictional immunity and section 87 of the *Indian Act*.

In the meantime, the Québec government introduced and refined measures to assist Indians in obtaining the benefit of the exemption to pay fuel taxes when purchasing gasoline on a reserve. A government program introduced in July 2011 allowed for Indians to register with the ARQ for an exemption at the pump, with the requirement that the customer show the merchant proof of such registration and proof of Indian status. If those steps were not taken, the Indian customer was required to apply for reimbursement. The 2011 program imposed some obligations on the merchants such as maintaining a register of retail sales made to Indians, a requirement to verify the customer's identity at the time of payment, and producing a monthly declaration of tax-exempt purchases and sales. An alternative measure allowed the merchant to purchase from a wholesale distributor a certain percentage of its fuel free of the fuel tax — an amount representing the quantity of fuel likely sold to individual Indians or band councils.

Aboriginal Right to Trade Freely

The trial judge found that trading between Iroquois nations was not commercial in nature, and concerned objects of spiritual value exchanged for ritual, social or diplomatic purposes. The commercial right asserted by the appellants in this case was not an integral part of the distinctive culture of the Mohawk people before Contact.

The Court of Appeal agreed that there was no rational connection between the pre-Contact trading of the appellants' ancestors and the modern commercial activities of the appellants. The law of Aboriginal rights allows for "evolving" rights but, as discussed in the *Lax Kw'alaams* case, such evolution cannot create a qualitatively and quantitatively different modern right. An ancestral practice cannot be so radically changed. There must be a reasonable degree of continuity between the ancestral practice being invoked and the modern right being asserted. In this case, the pre-Contact practice of trading Orenda (rare and precious objects) cannot be transformed into the modern right that is being claimed. The Court of Appeal agreed with the comment of the trial judge that this would constitute a "quantum leap", and rejected the appellants' argument that there was a section 35 right to "trade freely".

Trade Rights Based Upon the Royal Proclamation of 1763

The trial judge held that the historical context of the Royal Proclamation, and its interpretation, did not allow for a conclusion that it gave the appellants the right to trade freely. Further, the Royal Proclamation had no binding constitutional status and did not amount to an independent source of Aboriginal rights.

The Court of Appeal dismissed the appellants' appeal on this point. The Court agreed that the Royal Proclamation granted significant rights to Aboriginal peoples, and its importance is confirmed by reference to it in section 25 of the *Constitution Act, 1982*. However, section 25 does not create new rights, and is interpretative in nature. It is aimed at preventing contestation of Aboriginal rights based upon other provisions of the *Charter.* For that reason, the trial judge did not err in finding that the right to trade freely, as contained in the Royal Proclamation, does not have constitutional status.

The Court of Appeal also agreed with the trial judge's interpretation of the Royal Proclamation. This document is not a treaty, but a unilateral declaration of the Imperial Crown. It granted British subjects the right to trade freely with Aboriginal peoples, subject to obtaining a licence. According to the expert evidence in this case, the Royal Proclamation must be seen in the historical context of the need for the British to ally themselves with various Aboriginal groups, and satisfying the ideological objective of ending the monopolistic fur trade regime that existed under French rule. Free trade would gain the confidence of the Aboriginal peoples, and be consistent with the economic policy of mercantilism. Trading would be subject to regulation in order to avoid exploitation of Aboriginal groups. The Court of Appeal concluded:

The evidence shows that the clause providing for the right to trade freely did not contemplate giving Aboriginals the right to trade without hindrance. Its objective was to protect them from the abuses of certain unscrupulous merchants, by obliging the latter to obtain a licence. Nothing in the text of the *Royal Proclamation* or its historical context gives rise to the conclusion that British Crown promised Aboriginals an unrestricted right to trade that was exempt from regulation of any kind.

Section 87 of the *Indian Act*

The trial judge concluded that the impugned tax laws did not impose any obligation on the appellants in their capacity as consumers. They are merchants, and act as agents of the tax authorities to collect consumption taxes imposed on non-Indian customers. As such, they did not benefit from the exemptions provided in section 87 of the *Indian Act*.

The Court of Appeal noted in regards to sections 87, 89 and 90 of the *Indian Act*:

… these provisions should not be interpreted over-broadly, as they were conceived not to give Indians a general economic advantage, but rather to preserve their rights on the lands they occupied and to ensure that governments' taxation powers or those of their creditors to seize property would not impair the use of their property on the Reserves.

In regards to the GST and the Québec sales tax, the appellants' arguments were contrary to Supreme Court of Canada decisions. These are direct taxes paid by the ultimate purchaser of the product, not by the merchant. The merchant is not personally responsible for the payment of the taxes, but only for the remittance of the taxes that have been paid. The Court held:

The taxes appearing on the notices of assessment remain taxes payable by the ultimate consumer at the end of the chain of the product's commercialisation. When the appellants act in this manner, they cannot claim the tax exemption contemplated in s. 87 of the *Indian Act* and thus, by ricochet, protect their customers who are not Indians from the application of the GST and the QST.

Likewise, collection of the Québec fuel tax (which has been present since 1924) does not offend ss. 87 or 89 of the *Indian Act*. Certain measures are imposed on merchants, such as keeping a register of retail sales to Indians and Band Councils. Nevertheless, the fuel tax is a consumption tax paid by the ultimate consumer, and not by the merchant. The trial judge did not err in his findings.

Federalism Arguments

The trial judge found that the "pump exemption" program implemented by Québec in 2011 did not offend section 91(24) of the *Constitution Act, 1867*, as it did not affect "Indianness".

The Court of Appeal rejected the appellants' submissions that the Province's budget measures and programs offended Parliament's exclusive jurisdiction over Indians. The Supreme Court of Canada has taken a restrictive view of the concept of the "unassailable" core of a federal power. The pith and substance of the impugned budget measures are of a general tax nature, and they are valid provincial matters. They do not constitute legislation in relation to Indians. The appellants are impacted not because they are Indians, but because they are retailers who sell fuel to Indian and non-Indian consumers. Indians are not being singled out for payment of a special tax. These measures are aimed at ensuring that the right to purchase tax-exempt fuel is not being abused.

The Court of Appeal also referred to the Supreme Court of Canada's decision in *Tsilhqot'in Nation* and held that the doctrine of interjurisdictional immunity is inapplicable. The appropriate test for analysing the infringement of an Aboriginal right is the *Sparrow* test. In this case, the appellants have failed to prove either an Aboriginal right or an unjustified hardship. They could only point to losing a competitive advantage in regards to other fuel merchants. Intervention in such matters is not the role of the courts.

Standing Issue

The Kahnawake Band Council did not want to get involved in this proceeding. The trial judge held that the appellants do not represent their community, and that they were not authorized to represent them in regards to a claim for Aboriginal rights. On appeal, the Court of Appeal found that the appellants had the necessary standing to claim the declaratory relief asserted. An analogy was made with an Aboriginal person invoking collective rights as a ground of defence to a criminal charge. The appellants would be subject to the financial consequences of non-compliance with the fuel tax laws. The Québec Code of Civil Procedure also supports the right of the appellants to bring this action. The Supreme Court of Canada in *Behn v. Moulton Contracting* noted that collective rights may have some individual aspects to them and that, in appropriate circumstances; individual members can assert certain Aboriginal or treaty rights. In this

case, the rights asserted by the appellants have the necessary "individual aspect" to them.

The appeal was dismissed with costs.

https://www.canlii.org/en/qc/qcca/doc/2016/2016qcca666/2016qcca666.html

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