

Federal Court of Appeal



Cour d'appel fédérale

Date: 20151028

Docket: A-573-14

Citation: 2015 FCA 234

**CORAM: DAWSON J.A.
STRATAS J.A.
DE MONTIGNY J.A.**

BETWEEN:

LUC DES ROCHES

Appellant

and

WASAUKSING FIRST NATION

Respondent

Heard at Toronto, Ontario, on October 28, 2015.

Judgment delivered from the Bench at Toronto, Ontario, on October 28, 2015.

REASONS FOR JUDGMENT OF THE COURT BY:

DE MONTIGNY J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20151028

Docket: A-573-14

Citation: 2015 FCA 234

CORAM: DAWSON J.A.
STRATAS J.A.
DE MONTIGNY J.A.

BETWEEN:

LUC DES ROCHES

Appellant

and

WASAUKSING FIRST NATION

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on October 28, 2015).

DE MONTIGNY J.A.

[1] The Wasauksing First Nation (the First Nation) concluded an agreement with the province of Ontario in 1999 under the *Tobacco Tax Act*, R.S.O. 1990, c. T-10 and the *Sales of Unmarked Cigarettes on Indian Reserves*, O.Reg. 649/93, whereby the First Nation agreed to manage the allocation of the tax exempt cigarettes quota to retailers and monitor compliance

with the regulations on its reserve. In return, the province increased by 20% the quota that would have been available for allocation directly from the Ministry of Finance if the First Nation had not entered into the Tobacco Retailer Agreement.

[2] On April 10th, 2012, on-reserve retailers were advised by the First Nation that a “surcharge” of \$2 on each carton of tax exempt cigarettes would be imposed and payable in instalments. Mr. Des Roches filed an application for judicial review in the Federal Court seeking a declaration that the surcharge imposed in 2012 and 2013 was an unlawful tax, as well as an injunction prohibiting the First Nation from levying the surcharge in the future and an order compelling the First Nation to refund the money collected from him previously.

[3] For reasons cited as 2014 FC 1126, a Judge of the Federal Court dismissed the application for a number of reasons, including that the Court did not have jurisdiction since the First Nation was not acting as a “federal board, commission or tribunal” within the meaning of subsection 2(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, when it imposed the surcharge on the tax exempt cigarettes.

[4] We are all in agreement that this appeal must be dismissed, for the following reason.

[5] There is no dispute between the parties that a First Nation Band Council often acts as a “federal board, commission or other tribunal” pursuant to subsection 2(1) of the *Federal Courts Act*; this is not to say, however, that they come within the purview of that definition for all intents and purposes.

[6] In the end, we are not persuaded that the Federal Court committed any reviewable error on this factual record in construing the relationship between tobacco retailers and the First Nation as one governed by private contract made under the authority of an agreement between the First Nation and Her Majesty the Queen in right of Ontario.

[7] As such, the First Nation was not acting by or under federal law. Accordingly under subsection 2(1) of the *Federal Courts Act*, the First Nation was not a “federal board, commission or other tribunal”. Thus, the Federal Court correctly found it did not have jurisdiction to entertain the appellant’s application for judicial review.

[8] This is sufficient to dispose of this appeal. We express no comment on the remainder of the Federal Court’s reasons for its conclusion.

[9] For this reason, the appeal will be dismissed with costs to the respondent.

"Yves de Montigny"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-573-14

STYLE OF CAUSE: LUC DES ROCHES v.
WASAUKSING FIRST NATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: OCTOBER 28, 2015

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.
STRATAS J.A.
DE MONTIGNY J.A.

DELIVERED FROM THE BENCH BY: DE MONTIGNY J.A.

APPEARANCES:

Christopher James Sparling FOR THE APPELLANT

Michael Strickland FOR THE RESPONDENT

SOLICITORS OF RECORD:

Christopher James Sparling FOR THE APPELLANT
Barrister and Solicitor
Toronto, Ontario

Buset & Partners LLP FOR THE RESPONDENT
Barristers and Solicitors
Thunder Bay, Ontario