Federal Court of Appeal | Cour d'appel fédérale

Date : 20170811

Docket : A-445-15

Citation : 2017 FCA 168

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
SCOTT J.A.
DE MONTIGNY J.A.

BETWEEN:

ÉDOUARD ROBERTSON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Québec City, Quebec, on March 21, 2017.

Judgment delivered at Ottawa, Ontario, on August 11, 2017.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Mr. Robertson (the appellant), an Indian within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 (the IA), has operated a business that manufactures and sells items made of fur under the name "René Robertson fourrures EDA" since at least 1996. He unsuccessfully challenged, before the Tax Court of Canada, an assessment by the Minister of Revenue of Québec, acting as

an agent for the Minister of National Revenue (on behalf of Her Majesty the Queen, the respondent, represented by the Attorney General of Canada); that assessment resulted from the appellant's failure to collect and remit the goods and services tax (GST) established by Part IX of the *Excise Tax Act*, S.C.R. 1985, c. E-15 (the ETA) for the period from June 1, 1996 to May 31, 2002 (the period in dispute). He is now appealing to this Court against that decision, citing a certain number of constitutional arguments that were all dismissed by the Tax Court of Canada.

I. Background

[2] The appellant is a member of the Montagnais band of Mashteuiatsh in Lac Saint-Jean. Like his father before him and other ancestors over four generations, he operates a business on the Mashteuiatsh reserve that manufactures and sells furs. After purchasing the business from his father in 1996 (except for the purchasing and sale of raw fur, which he did not acquire until 2001), his sales grew continually, from $400,000 in 1996 to $1,264,223.60 for the 2001–2002 fiscal year. The number of employees reflected the growth in sales, rising from 4 to about 20 during the same period. Customers of the company are primarily non-Indians; approximately 80%.

[3] The evidence reveals that the company is fairly diverse. As noted in paragraph 59 of the reasons by the trial judge, the appellant sells hats, mittens, boots, moccasins, handicrafts and new, used and remodelled fur coats, mounted animals and pelts, and sells wholesale, as well as the cleaning, repair and storage of fur coats. Beginning in 2000–2001, the appellant began selling

fleece sweaters and cotton turtlenecks (testimony of Mr. Robertson on May 27, 2014, Appeal Book, Vol. 13, Tab A, at pp. 247–251).

[4] The evidence also reveals that most of the company's sales during the period in dispute stem from a contract with the company Kanuk, under which it creates the fur band to ultimately be attached to the hoods of that company's coats (testimony by Mr. Robertson on May 27, 2014, Appeal Book, Vol. 13, Tab A at pp. 221–226; testimony by Mr. Robertson on May 28, 2014, Appeal Book, Vol. 13, Tab B at pp. 10–12). Mr. Robertson's company used wild coyote pelts, 90% of which came from Canada, and silver fox pelts. The main supplier of the pelts was Roberge Fourrures, a non-Aboriginal company located in Montréal. The appellant also purchased dressed furs from Roberge Fourrures, as well as from Finish and Norwegian suppliers, and had pelts tanned by Vaudry, another non-Aboriginal company.

[5] The manufacture and remodelling of the fur coats was also done by a Montréal company, Fourrures Micheline Inc. (Micheline Inc.), in which Mr. Robertson had acquired 49% of shares in 1998.

[6] The appellant bought raw furs from his father, who purchased them from trappers. Those furs were then sold to Micheline Inc. and other non-Aboriginal manufacturers, who made coats from them. According to the evidence, furs purchased by the appellant from Aboriginal trappers represented 10% of his volume of fur pelts. Of that 10%, only half corresponded to trapping activities carried out by Montagnais. The percentage of annual sales associated with the sale of articles made of fur from Montagnais trappers in Lac Saint-Jean thus represented a very small

percentage of the total sales by the appellant's company (between 0.50% and 0.78% for the period in dispute; see also the financial statements for "René Robertson Fourrures EDA", Appeal Book, Vol. 7, Tab C, Exhibit I-1, Tab 24 at pp. 1, 10, 14 and 19, and Tab 25 at p. 18; testimony by Mr. Robertson on May 28, 2014, Appeal Book, Vol. 13, Tab B at pp. 12–13).

[7] In March 2000, Revenu Québec asked the appellant for the first time to audit his books and records to determine if he owed uncollected amounts for GST. At that time, tripartite negotiations were underway between the governments of Canada and Quebec and the Mamuitun mak Nutakuan tribal council (including the First Nations of Essipit, Mashteuiatsh and Nutakuan) to determine the council's economic and political powers. Those negotiations led to an agreement in principle that was ratified by the parties in 2004, which provided for the preparation and eventual conclusion of a treaty within the meaning of sections 25 and 35 of the *Constitution Act, 1982*, constituting Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 (*Constitution Act, 1982*). Among other things, the agreement includes a chapter on taxation, and a mechanism for the direct taxation of Aboriginal members by their respective legislative assemblies.

[8] Given the status of the negotiations, the appellant did not follow up on that first request for an audit of his records. He instead invited Revenu Québec to contact his local political representatives directly for any questions regarding his tax obligations. After several talks between the appellant, the Montagnais Council and tax authorities, Revenu Québec sent the appellant a first draft assessment and a notice of assessment for GST and the Quebec sales tax

(QST) on August 5, 2002. That assessment was for the period from June 1, 1993 to May 31, 2002.

[9] Despite repeated requests from the Montagnais Council and Quebec's Minister of Revenue to suspend collection measures against the appellant while waiting for the tripartite agreement in principle to be signed and ratified, the collections division of Revenu Québec sent the appellant a final notice of payment on September 25, 2002, totalling $1,591,519.64 in GST and QST and, on January 31, 2003, sent the appellant's financial institution an order to pay an amount of $783,191.34 (representing only the outstanding amounts for the GST) under section 317 of the ETA. Revenu Québec argued that tax laws apply to everyone until the tripartite agreement was duly ratified (Letter dated October 2, 2002, from Ms. Francine Martel-Vaillancourt, Appeal Book, Vol. 7, Tab C, Exhibit I-1, Tab 13). Following the appellant's refusal to comply with the requirement to pay, Revenu Québec invoked section 316 of the ETA and registered a certificate with the Registry of the Federal Court that had the same effect as a judgment against the appellant, ordering him to pay $783,734 to Revenu Québec for non-payment of the GST.

[10] In April 2003, the appellant offered to cooperate with Revenu Québec for the first time. Following audits of his books and records, Revenu Québec was able to revise the amounts owing and send the appellant a new draft assessment for the period from June 1, 1993 to May 31, 2002. The amount claimed now totalled $514,172.81, which corresponded to $334,438.97 in GST, $102,554.04 in penalties and $77,179.80 in interest. That notice replaced the one that had been

sent to the appellant in August 2002. On May 29, 2003, the appellant filed a notice of objection to the reassessment in the prescribed form and manner.

[11] A new requirement to pay was sent to the appellant's financial institution in July 2003. A few months later, Revenu Québec revoked the registration certificate issued under the *Act respecting the Quebec sales tax* (R.S.Q., c. T-0.1), requiring that he immediately cease operation of his business. The appellant filed a motion with the Superior Court of Quebec for an injunction staying the notice of revocation of his registration certificate. The parties eventually agreed to suspend the interlocutory proceedings while waiting for the issue of the validity of the notices of assessment to be determined by the Tax Court of Canada. The appellant also obtained a GST registration number on October 22, 2003. As he had never applied for one in the past, Revenu Québec issued a registration number to the appellant retroactive to 1993.

[12] In January 2004, Revenu Québec responded to the appellant's notice of objection and revised the company's operating period in the appellant's favour. Contrary to what had been assumed until then, Revenu Québec agreed to have the assessment period begin on June 1, 1996, instead of June 1, 1993. A reassessment was therefore issued in February 2004, for a total amount of $302,690.20, including penalties and interest. It was that notice of assessment that Mr. Robertson appealed from to the Tax Court of Canada. That assessment applies only to sales to non-Indians, and does not deal with raw furs, as those sales were not conducted by the appellant's company, but rather by his father's company (testimony by Céline Rathé on May 29, 2014, Appeal Book, Vol. 13, Tab C, at pp. 65 and 141–142).

II. The challenged decision

[13] After nine days of hearings, the judge dismissed the appeal filed by the appellant. In a 40-page decision, he dismissed all the arguments put forth by the appellant against the validity of his February 2004 assessment, i.e. (1) the existence of his ancestral rights; (2) the incompatibility of the ETA and the IA; (3) the discriminatory application of the ETA under section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (the *Charter*); (4) the lack of procedural fairness; and (5) the fact that the disputed assessment was statute-barred and overestimated. The latter argument was not raised again in the appeal. I will briefly summarize the judge's reasons in the following paragraphs.

[14] First, the judge focussed on the testimonies of the expert witnesses called by both parties. Historian and anthropologist Claude Gélinas testified for the appellant based on an expert report entitled "Les Montagnais du Lac Saint-Jean et leur tradition de commerce des fourrures" [The Montagnais du Lac Saint-Jean and the traditional fur trade]. According to the judge's summary, there is a trading tradition among the Aboriginal people in that area from prehistoric times. That practice took place in a context of complete political and narrative autonomy, and as part of a broad exchange network. The Aboriginal peoples of the area traded with neighbouring populations in order to survive and to improve their quality of life, most often with furs.

[15] In addition, a historian, Alain Beaulieu, testified for the respondent. In his expert report entitled "Commerce, Structure politique et changements sociaux : le cas des Montagnais du Lac Saint-Jean, 1600–1950" [Trade, political structure and social change: the case of the Montagnais

of the Saguenay-Lac-Saint-Jean, 1600–1950], which the judge cited at length in his reasons, he explains the role of the Montagnais in Lac Saint-Jean in the fur trade. He confirmed, to a certain extent, the trade practiced by the Aboriginal nations in northeastern North America before the arrival of the Europeans, but emphasized the fact that their trading activities were part of a subsistence economy focused on satisfying the needs of families and the community rather than a market economy or the accumulation of surplus. Accumulation would be unthinkable in a society like that of the Montagnais, where mobility was essential. The expert also noted that their strategic position at the mouth of the Saguenay River allowed them to position themselves as necessary middlemen between Aboriginal peoples of the interior and European traders, but that hegemony would progressively be replaced over the 17th century with the implementation of a new trade monopoly created by the French government.

[16] After reiterating certain guiding principles of the ETA regarding the GST, particularly the obligation for any person making a taxable supply to collect the tax to be paid by the purchaser of the supply and to remit that amount to the Receiver General in accordance with subsections 221(1), 228(1) and 228(2) of the ETA, the judge examined the ancestral right to the fur trade claimed by the appellant. Applying the criteria approved by the case law regarding the recognition of an ancestral right (particularly *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [*Van der Peet*] and *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535 [*Lax Kw'alaams*]) and based on the evidence submitted, the judge had no difficulty concluding that the appellant had established a pre-contact practice, tradition or custom that was an integral part of the distinctive Aboriginal society before the arrival of Europeans. It was regarding the reasonable continuity between the contemporary right

being claimed and the ancestral practice that the judge rejected the appellant's claims. He instead expressed the opinion that the activities that were part of the appellant's business differed too much from those that were part of the fur trade as practiced by the appellant's ancestors. He stated the following regarding this matter:

> [TRANSLATION]
> [103] […] The appellant did not trap, which the Montagnais du Lac Saint-Jean had to practise to be engaged in the fur trade. The evidence also shows that the main item traded in as part of this trade by the appellant's ancestors was raw furs, while the main items of the appellant's fur trade are remodeled fur coats and coats manufactured from raw animal furs, 90% of which come from non-Aboriginal producers, including many foreign ones. According to the evidence, only 5% of the raw furs used by the appellant come from Montagnais trappers.
>
> [104] On the basis of that information, I find that the claimed right to engage in the fur trade in the manner in which the appellant is doing so was not integral to pre-contact Montagnais society. The recognized Aboriginal right to engage in the fur trade must be limited to the sale of raw furs of trapped animals (as opposed to raw furs from farmed animals). It should be noted here that for the purposes of the impugned assessment, raw fur sales were considered to be non-taxable sales.

[17] Regarding the appellant's claim to an ancestral right to self-government, the judge noted that that claim also had to be assessed in the light of the criteria set out in *Van der Peet*. In other words, the activity must be an element of a custom, practice or tradition that is an integral part of the distinctive Montagnais culture to constitute an ancestral right. Applying that criteria, the judge determined that the exercise of governmental authority over the fur trade prior to contact was limited to the assignment of hunting territories to families, and did not involve an exclusive role to tax business transactions. In the judge's opinion, the recognition of an exclusive right to tax the Montagnais people would violate Crown sovereignty.

[18] In the light of his conclusions that the ancestral rights claimed by the appellant did not exist, the judge was not required to address the issue of whether the obligation to collect GST and remit it to the Receiver General of Canada violated those rights. The judge nonetheless chose to add that the provisions of the ETA represented, at most, a "mere administrative inconvenience" for the appellant (Reasons, at para. 116). Regarding the assessment issued to the appellant for GST amounts not collected, the judge declined to see it as a tax on property situated on a reserve or a tax on him in respect of that property, thus following well-established doctrine of this Court and of several other provincial courts of appeal (see inter alia *Obonsawin v. Canada*, 2011 FCA 152, 423 N.R. 241; *Pictou v. Canada*, 2003 FCA 9, 299 N.R. 329; *R. v. Johnson* (1993), 120 N.S.R. (2^{d}) 414, [1994] 1 C.N.L.R. 129 (C.A.); *Chehalis Indian Band v. B.C.* (1988), 53 D.L.R. (4th) 761, 31 B.C.L.R. (2^{d}) 333 (C.A.)).

[19] The appellant had also submitted that the ETA was inconsistent with the IA, in that the ETA made him an agent or fiduciary of the federal Crown, while he had limited legal capacity under the IA. The judge summarily rejected that argument, stating that the appellant had been operating his business for about 10 years while fulfilling his obligations under the ETA.

[20] The judge also did not accept the appellant's argument either, based on section 15 of the *Charter*, that he was treated unequally compared to non-Indian merchants since he could not obtain the credit needed to repay the GST amounts claimed. Indeed, section 89 of the IA prohibits financial institutions from seizing the property of an Indian located on a reserve, which is likely to limit access to the credit or, at the very least, increase its cost. The judge noted that that provision did not disadvantage Aboriginal persons or create any prejudice, but instead

protected their assets. Therefore, this provision cannot be deemed to be discriminatory within the meaning of subsection 15(1) of the *Charter*. The judge also mentioned that section 89 of the IA could not be applied to operations situated in the commercial mainstream, as the provision was not designed to give a competitive advantage to Aboriginal persons who choose to go into business.

[21] The judge did not retain the appellant's submissions regarding any breach of the duty of procedural fairness. He instead attributed the delays in the processing of the notices of objection to the appellant's conduct, while noting that the appellant could have exercised his rights to appeal before the Tax Court of Canada given the lack of a reply from the tax authorities for over 180 days (see ETA, s. 306). Regarding the limitation, the judge determined that the four-year period contained in subparagraph 298(1)(*a*)(i) of the ETA had not expired. He agreed with the respondent's position that the limitation period had never begun because the appellant had not filed an income tax return. Finally, the judge noted that the penalties and interest set out in subsection 280(1) of the ETA automatically applied in cases in which tax returns are not filed, except in cases of due diligence. In this case, he stated that he was unable to conclude that the appellant had shown due diligence. As previously mentioned, the arguments regarding the limitation and the overestimate of the assessment in dispute were not raised again in the appeal, and I will therefore not address them in these reasons.

III. Issues

[22] The parties agree on the issues, which I would rephrase as follows:

a) Did the judge err in determining that the fur trade as carried out by the appellant was not an integral part of the Montagnais society prior to contact with Europeans and that the ancestral right refers only to the sale of raw animal furs from trapping activities?

b) Did the judge err in determining that the appellant did not show the existence of exclusive power to tax business transactions involving furs?

c) Did the judge err in concluding that there was no inconsistency between the ETA and the IA that would result in the obligation to collect and remit the GST not applying to the appellant?

d) Did the judge err in concluding that the application of the ETA was not contrary to section 15 of the *Charter*?

e) Did the judge err in concluding that the tax authorities did not breach the requirements of procedural fairness?

In the light of my conclusion that the obligation to collect and remit the GST in no way breached the right claimed by the appellant to conduct in the fur trade, the answer to the first question cannot affect the outcome of the dispute. However, I feel that it must be addressed in order to clarify certain statements by the trial judge.

IV. Analysis

[23] The law is well settled, that the existence, scope and nature of Aboriginal rights are questions of law that are subject to the correctness standard of review (see *R. v. Lefthand*, 2007

ABCA 206 at para. 18, [2007] 10 W.W.R. 1 [*Lefthand*], citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). The first two issues must therefore be subject to that standard, in the same way as the issue of whether those rights were violated. The third and fourth questions are also legal in nature and are subject to the correctness standard. Finally, the case law uniformly holds that duties of procedural fairness are assessed based on the correctness standard of review (*Mission Institution v. Khela*, 2014 SCC 24, at para. 79, [2014] 1 S.C.R. 502; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para. 43, [2009] 1 S.C.R. 339).

A. *Did the judge err in determining that the fur trade as carried out by the appellant was not an integral part of the Montagnais society prior to contact with Europeans and that the ancestral right refers only to the sale of raw animal furs from trapping activities?*

[24] The appellant submits that the judge erred in concluding that the fur trade that he carried out was not an integral part of the society of the Montagnais du Lac Saint-Jean prior to contact with Europeans, although he first acknowledged that those same Montagnais have an ancestral right to the fur trade. In limiting that right to the sale of raw furs, the judge allegedly did not follow the instructions from the Supreme Court regarding the evolving nature of ancestral rights. What is claimed, according to the appellant, is not the right to trap, but the right to the fur trade. The appellant adds (at para. 73 of his submission):

> [TRANSLATION]
> Similarly, the appellant submits that there is an obvious rational connection between the raw fur trade exercised by his ancestors and the current sale of coats and items made from raw furs. That is an example of the evolution of an ancestral right, according to the appellant.

[25] In short, the appellant submits that the sale of items made from fur is a logical extension of the traditional fur trade, and that how that right is exercised has changed to adapt to the new socioeconomic reality of the community and the rarity of wildlife resources.

[26] The law is well settled, that to determine that there is an ancestral right under subsection 35(1) of the *Constitution Act, 1982*, an Aboriginal claimant must prove that an activity is a custom, practice or tradition that is an integral part of the distinctive culture of the Aboriginal group in question (*Van der Peet*, at para. 46). In that case, and in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, the Supreme Court identified certain factors to be considered in applying the criterion regarding an integral part of a distinctive culture. They were summarized by the Court as follows in *Mitchell v. M.N.R.*, 2001 SCC 33, at para. 12, [2001] 1 S.C.R. 911 [*Mitchell*, 2001]:

> [TRANSLATION]
> […] Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (Van der Peet, supra, at paras. 54-59 (emphasis in original)). This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.

[27] The judge correctly identified the applicable principles based on *Van der Peet* and *Mitchell*, 2001. Based on the evidence submitted by the two experts called by the parties, he first

concluded that there was a practice, tradition or custom related to the fur trade that was an integral part of the distinctive society of the Montagnais prior to contact. The appellant did not challenge that finding of fact, and this Court must obviously show deference in that regard. It certainly would have been better for such an issue to be examined as part of a civil action in a declaratory judgment instead of the more limited context of an appeal from an assessment established under the authority of the ETA, so that more extensive evidence could be submitted not only on the exact nature of the practice, tradition or custom cited, but also on the issue of whether that practice was an integral part of the distinctive society of the Montagnais prior to their contact with Europeans. However, I do not sense a need to discuss further these issues as part of this case.

[28] On the other hand, I feel it is useful to make the following clarification. Although the judge seemed to characterize the right in question as the right to exercise the fur trade, it seems to me that the practice or custom established by the evidence is more related to bartering or exchanges than trade as such. Professor Gélinas himself revealed in his expert report that the trade practiced by the Aboriginal peoples of Lac Saint-Jean was for subsistence rather than profits, and the judge echoed that finding in paragraph 96 of his reasons. It is in that perspective that the appellant's argument must be addressed based on the concept of continuity.

[29] According to Mr. Robertson, the error committed by the judge consists of not recognizing that the sale of coats and other items made from raw fur is simply an extension of the raw fur trade carried out by his ancestors. There is no doubt, as acknowledged by the Supreme Court in *Lax Kw'alaams*, that an ancestral right is not frozen in time and that purpose and how it is

exercised can change depending on the facts (at para. 49). Furthermore, as noted by Binnie J. writing for the Court in the same case, it must be evolution, not the creation of an entirely different right (*Lax Kw'alaams*, at paras. 51 and 59).

[30] Based on those principles, the judge found that the fur trade in the manner in which the appellant is doing differs too much from the activities practiced by his ancestors (which he defines as trapping and the sale of raw furs) to constitute an extension or evolution thereof. Although I am not strictly required to express an opinion on this matter, I will nonetheless allow myself the following remarks.

[31] I first note that the judge did not explicitly address the issue of whether a wide-scale fur trade for profit could be considered an evolution of the bartering or exchanges of furs practiced by the Montagnais before the arrival of Europeans to acquire goods for subsistence or luxury. Based on *Van der Peet* and *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686, the Attorney General submitted that there can be no correlation, from a quantitative standpoint, between occasional exchanges for substance purposes and the very large-scale commercial sale of goods. I note, however, that in both cases, the ancestral rite claimed (the right to sell fish and the right to harvest wood for domestic use) had no commercial dimension (other than indirectly in the first case). Conversely, in the case at bar, the judge recognized that the fur trade was of fundamental importance to the Montagnais and was a common practice.

[32] That said, it is true that the appellant's contemporary activities do not involve any trapping, exchanges or sales of raw furs, and less than one percent of his annual sales are based

on the sale of items made from furs purchased from Montagnais trappers. In that context, can it truly be said that the appellant's business is an extension of the ancestral practice of those same Montagnais? The question of whether a practice or custom based on barters and exchanges of a natural resource can constitute the basis of a modern right to a large-scale trade of that same resource remains, and the parties did not cite any authority in that regard. I do not feel that it is appropriate to give an opinion on this matter as part of this case.

[33] On the other hand, limiting the ancestral right to exercise the fur trade to the sale of raw furs from trapped animals (as opposed to raw furs from farmed animals) seems to me to be an oversimplification. In the same way that the ancestral source of fishing rights does not require that the rights holders fish from dugout canoes, as stated by Binnie J. in *Lax Kw'alaams*, it does not seem logical to me that the Montagnais would be limited to trapping (as opposed to other, more modern hunting methods) or not be able to practice farming if they plan to claim their ancestral right to practice the fur trade. The judge's reasons in this regard are not well-explained and, without more substantial submissions by the parties, it is hard for this Court to further explore an issue that is essentially factual in nature.

[34] In any event, even assuming that the Montagnais du Lac Saint-Jean can claim an ancestral right to the fur trade, the appellant did not demonstrate how the requirement under the ETA to collect and remit the GST violates that right. Based on *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow*] and *Lefthand*, the judge ruled that the ETA did not prevent the Montagnais du Lac Saint-Jean from practicing the fur trade, and only imposed a "mere

administrative inconvenience" on the appellant (Reasons, at para. 116). The appellant presented no argument before this Court against such a conclusion.

[35] It is the party challenging the application of a legislative measure who must prove that there has been a prima facie infringement of his or her ancestral right. In *Sparrow* (at p. 1112), the Supreme Court set out three questions for determining whether there has been a prima facie infringement of an ancestral right:

> [TRANSLATION]
> To determine whether the [...] rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.

[36] It is only in the event that a statute or regulation meets the threshold of a prima facie infringement that the Crown must justify its measure. *Lefthand* also makes it clear that regulating an ancestral practice or subjecting it to certain conditions is not, itself, a prima facie infringement.

[37] In his reasons, the judge did not discuss in detail the issue of the possible prima facie infringement by the ETA of the ancestral right raised by the applicant, undoubtedly because the appellant did not even try to explain how the obligation to collect and remit the GST applicable to sales to non-Indians would significantly prevent him from exercising his right. In *Lefthand*, the Alberta Court of Appeal stated that the concept of prima facie infringement requires sufficient evidence of interference:

> [TRANSLATION]
> [124] […] The words "prima facie" infringement do not denote a level of incomplete or preliminary proof of the infringement (admittedly their more common meaning), but rather mean there has been actual proof on a balance of probabilities of a sufficiently material infringement "unless it can be justified" […]

[38] Given this burden of proof and the appellant's total lack of any explanation to demonstrate that the obligation to collect and remit the GST is unreasonable or constitutes an undue hardship or significant violation of his ancestral right to exercise the fur trade (even in its broadest sense), I am of the opinion that there is no need to intervene. The judge did not err in fact or in law by concluding that the appellant's ancestral right to the fur trade had not been violated by the ETA.

B. *Did the judge err in determining that the appellant did not show the existence of exclusive power to tax business transactions involving furs?*

[39] The appellant submits that the judge erred in concluding that the Montagnais right to self-government in the fur trade was limited to assigning and managing the hunting, fishing and trapping territories in which they could exercise their jurisdiction. He submits, as he did at trial, that the Montagnais du Lac Saint-Jean have a constitutional right to trade freely, openly and without any restriction or regulation. In short, what the appellant is seeking is the recognition for the Montagnais of an exclusive authority to tax business transactions involving furs, with both Indians and non-Indians.

[40] It is clear from *R. v. Pamajewon*, [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 204 [*Pamajewon*] that any claim of an ancestral right to self-government must be examined in the light of the

underlying purposes of subsection 35(1) of the *Constitution Act, 1982* and thus be considered against the criteria set out in *Van der Peet*. Consequently, the appellant's assertion of self-government, and more specifically the assertion of an exclusive right to impose duties on business transactions involving furs, would only constitute an ancestral right if it can be established that it was "an element of a practice, custom or tradition integral to the distinctive culture" of the Montagnais du Lac Saint-Jean (*Van der Peet* at para. 46).

[41] After citing the relevant passages of *Pamajewon* and examining the evidence submitted by the parties, the judge concluded that there was no evidence in the record to suggest that the fur trade was ever regulated by an Aboriginal regulation during the period in question. The appellant has not convinced me that the judge erred in so concluding. The appellant cannot circumvent the demonstration required by *Van der Peet* by arguing that the Montagnais du Lac Saint-Jean were never subject to the British Crown or the governments of Canada and Quebec. On the one hand, an ancestral right must be based on an "activity" and, on the other hand, that activity must constitute an element of a custom, practice or tradition that is an integral part of the distinctive culture of the Aboriginal group prior to contact with Europeans.

[42] That being said, there is a second obstacle to the appellant's submission that the Montagnais have the exclusive authority to tax the sale of goods that include fur: an ancestral right must be compatible with the sovereignty of the Crown. Indeed, we must not lose sight of the fact that the purpose of subsection 35(1) of the *Constitution Act, 1982* is to reconcile the past occupation of Canada by Aboriginal societies and the affirmation of Crown sovereignty, not to ignore that sovereignty. Were the appellant's submission accepted, there would be an

inconsistency with the intent of the framers of the Constitution and, without any agreements with the federal and provincial governments, would amount to creating a statute-free zone or enclave in Canada in which only tax measures decreed by the Montagnais would apply.

[43] Finally, it must be recalled that the obligation for the appellant to collect and remit taxes under the ETA in no way violates the tax exemption set out in section 87 of the IA. The appellant is only acting as a Crown agent and is not personally paying any taxes. His only duty is to remit to the Crown the taxes collected from his non-Indian customers. Nor does the assessment issued to the appellant based on the GST that he failed to collect from his non-Indian customers on goods and services that he provided constitute a tax on goods and services on a reserve. The judge cited a considerable amount of jurisprudence in that respect at paragraph 119 of his reasons, and only one more recent case to the same effect decided by the Court of Appeal of Quebec should be added (see *Rice v. Québec (Agence du revenu)*, 2016 QCCA 666, at para. 78, 267 A.C.W.S. (3^{d}) 501).

[44] In short, I am of the opinion that the appellant's argument based on ancestral rights does not hold water, in that he was unable to demonstrate the right that he is asserting or the violation caused by the duty to collect and remit to the Minister of National Revenue the GST to which his customers who are not covered by the exemption provided for in section 87 of the IA are subject. Therefore, the judge did not err in fact or in law in so concluding.

C. *Did the judge err in concluding that there was no inconsistency between the ETA and the IA that would result in the obligation to collect and remit the GST not applying to the appellant?*

[45] The appellant submits that the ETA is inconsistent with the IA, not factually but legally. This argument is expressed most clearly in paragraph 118 of his submissions:

> [TRANSLATION]
> The statutory inconsistency arises from the fact that, under the ETA, Aboriginal merchants are required to act as agents and trustees of the federal Crown for the collection and remittance of taxes, while under the Indian Act, they enjoy only limited legal capacity, equivalent to that of a minor or a ward of the state. (references omitted)

[46] The judge correctly dismissed that argument, and the appellant himself hardly addressed it at the hearing. The concept of implicit conflict is or conflict based on intent is not supported by Canadian jurisprudence, which instead requires operational conflict between two legal provisions to conclude that they cannot be concurrently applied. That strict interpretation of the concept of conflict stems from the premise that the legislator cannot intend to adopt conflicting measures:

> [TRANSLATION]
> [93] Courts presume that "the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed 2008) at p. 325; *R. v. Ulybel Enterprises Ltd.*, 2001 CSC 56, [2001] 2 S.C.R. 867, at para. 30. This is sometimes expressed as a presumption of coherence, based on the common sense idea that the legislature does not intend to make contradictory enactments: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 38. ŋThis is why courts take a very restrictive approach to defining what constitutes a conflict: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2009), at p. 405.
>
> [94] What then is a conflict in this context? The provisions must be "so inconsistent with ... or repugnant" to each other that they are "incapable of

> standing together" […]. Application of one provision "must implicitly or explicitly preclude application of the other" […]
>
> *Thibodeau v. Air Canada*, 2014 SCC 67 at paras. 93 and 94, [2014] 3 S.C.R. 340.

[47] It is clear that the two statutes in question here are not inconsistent, at least according to the logic of the passage cited above. The duty to act as an agent of the government and to collect and remit GST on sales conducted with non-Indians does not violate the letter, or even the spirit, of the IA, and it is entirely possible to comply with both statutes at the same time.

[48] Apart from the spirit in which the IA was enacted, the only provision cited by the appellant in support of his argument that the two statutes are inconsistent is section 89 of the IA, under which an Indian cannot give his or her property as security or transfer the property, subject to certain conditions. Although that provision can illustrate the paternalistic approach of Parliament when the statute was enacted, it is not enough to establish the inconsistency of the two statutes.

[49] As the judge correctly noted, the IA does not impose any financial obligations on merchants. Only if merchants fail to collect or remit GST do they become personally liable for the unremitted amounts. Far from inconsistent with that duty, the sole purpose of section 89 is to protect Indian merchants who take a loan to fulfill the obligation arising from the notice of assessment issued to them. Even supposing that that protection results in difficulties or additional costs for the merchant to obtain funding, of which there is no mention in the evidence in this case, that would not necessarily give rise to a conflict between the two statutes, a notion strictly defined by the case law.

[50] I therefore conclude that the judge correctly concluded that there was no inconsistency between the ETA and the IA that would exempt the appellant from his duty to collect and remit the GST applicable to sales to non-Indians.

D. *Did the judge err in concluding that the application of the ETA was not contrary to section 15 of the Charter?*

[51] The appellant also submitted that he was subject to discrimination compared to non-Indian merchants because section 89 of the IA makes it more difficult for him to access the credit he needs to remit the GST amounts he owes. That argument not only applies to the appellant, but also to all non-Indian merchants, in that the timelines set forth in the ETA are such that the GST must often be remitted before the sale of the goods and services on which it is to be collected have been completed.

[52] Once again, the judge correctly dismissed this argument. On the one hand, as noted previously, the appellant did not submit any evidence regarding his difficulties in obtaining funding. In his testimony, Mr. Robertson also stated that he had obtained funding for his business from a bank (see Testimony by Mr. Robertson on May 27, 2014, Appeal Book, Vol. 13, Tab A, at p. 101). Nor is there any evidence in the record concerning the timelines for remitting the GST to the Minister of National Revenue and the need for merchants to remit amounts that they have not yet collected.

[53] More fundamentally, the appellant did not discharge his burden of demonstrating that the duty to collect and remit the GST was contrary to equality under section 15 of the *Charter*. There

is certainly no doubt that section 89 of the IA creates a distinction between Indians and non-Indians. That said, not all distinctions are discriminatory. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 174, 56 D.L.R. (4th) 1 [*Andrews*], the Supreme Court defined discrimination as follows:

> [TRANSLATION]
> A distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[54] *Andrews* thus imposes a two-fold burden on people who claim to be a victim of discrimination: they must first establish that the statute creates a distinction based on one of the reasons listed or a similar reason, and show how that distinction creates a disadvantage by perpetuating a prejudice or applying stereotypes (see inter alia *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at paras. 27–34, [2015] 2 S.C.R. 548; *Quebec (Attorney General) v. A*, 2013 SCC 5, at paras. 324 and 418, [2013] 1 S.C.R. 61; *Withler v. Canada (Attorney General)*, 2011 SCC 12, at paras. 30–31, [2011] 1 S.C.R. 396; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, at para. 188, [2009] 1 S.C.R. 222 [*Ermineskin*]; *R. v. Kapp*, 2008 SCC 41, at para. 17, [2008] 2 S.C.R. 483).

[55] In the case at bar, the appellant did not discharge his burden of showing that the distinction under section 89 of the IA creates an arbitrary or discriminatory disadvantage for Indians. Quite the contrary, that provision aims to protect them by exempting their real and personal property situated on a reserve from the application of the ordinary rules of civil law. As

recognized by the Supreme Court in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 131, 71 D.L.R. (4th) 193:

> [TRANSLATION]
> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians, i.e., their land base and the chattels on that land base.

[56] The judge therefore did not err in concluding that the application of section 89 of the IA did not result in a disadvantage for the appellant or create any prejudice for him. The Supreme Court of Canada reached the same conclusion regarding sections 61 to 68 of the IA, which prevents the Crown from investing Indian money. Indeed, in *Ermineskin*, it was stated that the distinction between Indians and non-Indians was not discriminatory in that the Crown can transfer funds that it holds to bands or their fiduciaries after being exempt from any future liability for them. The same is true in the context of section 89, as Indian merchants can decide to waive the protection of that provision or avoid its application by incorporating their business (see inter alia *Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson*, 2009 MBCA 72, at para. 5, [2010] 1 W.W.R. 107; *R. v. Bernard* (1991), 118 N.B.R. (2d) 361, at para. 21, [1992] 3 C.N.L.R. 33) (B.R.); *Reference re: Constitutional Questions Act*, 1981 ABCA 316, at para. 54, 130 D.L.R. (3d) 636; *Kinookimaw Beach Association v. Saskatchewan* (1979), 6 W.W.R. 84, at p. 88, 102 D.L.R. (3d) 333 (Sask. C.A.). See also Jack Woodward, *Native Law*, loose leaf, Toronto: Thomson Reuters, 1989, at para. 11-2(i)).

E. *Did the judge err in concluding that the tax authorities did not breach the requirements of procedural fairness?*

[57] The appellant argues that the judge erred in concluding that the respondent and its agent did not commit a breach of procedural fairness in processing his file. Essentially reiterating the case that he presented at trial, he submits that the rules of procedural fairness and the theory and the doctrine of the legitimate expectation of the citizen were violated because the respondent allegedly took an unreasonable time to respond to one of his notices of objection and allegedly did not provide sufficient details in its response. The appellant also seems to accuse the respondent of taking collection action while he was still challenging the validity of the assessment.

[58] Those arguments are completely without merit. It is important to first make it clear that the only rights created by procedural fairness are participative rights (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 28, 174 D.L.R. (4^{d}) 193. The case law is clear and does not allow for the substantive remedies (i.e. the reduction of penalties and interest) sought by the appellant for a violation of such rights.

[59] It is also clear that the Tax Court of Canada does not have the jurisdiction to cancel an established assessment based on improper conduct by the Minister. The sole purpose of an appeal before the Tax Court of Canada is to examine the validity of the assessment itself, not the process that led to the raising of the assessment. This was noted by this Court in *Main Rehabilitation Co. v. Canada,* 2004 FCA 403, at paras. 6 to 8, 247 D.L.R. (4th) 597:

> [TRANSLATION]
> [6] In any event, it is also plain and obvious that the Tax Court does not have the jurisdiction to set aside an assessment on the basis of an abuse of process at common law or in breach of section 7 of the Charter.
>
> [7] As the Tax Court Judge properly notes in her reasons, although the Tax Court has authority to stay proceedings that are an abuse of its own process […], Courts have consistently held that the actions of the CCRA cannot be taken into account in an appeal against assessments.
>
> [8] This is because what is in issue in an appeal pursuant to section 169 is the validity of the assessment and not the process by which it is established […]. Put another way, the question is not whether the CCRA officials exercised their powers properly, but whether the amounts assessed can be shown to be properly owing under the Act […] (references omitted) (emphasis added)

[60] Finally, I would add that it is quite inappropriate for the appellant to accuse the respondent of breaching procedural fairness. In his reasons, the judge noted that the appellant refused to provide the tax authorities with the documents that they required to audit his books and records for over two years. Moreover, it was only after collection measures were initiated by Revenu Québec that the appellant finally agreed to open his books. The judge also noted that the appellant was largely responsible for the delay in processing his notices of objection dated October 4, 2002, because he did not file them in the prescribed form and did not send them to the right directorate. Those findings of fact are supported by the evidence, and the appellant did not convince me that the judge made a palpable and overriding error in his assessment of the case. Not to mention that the appellant could have filed an appeal before the Tax Court of Canada 180 days after filing his notice of assessment if he felt prejudiced by the delay in processing it (see ETA, s. 306).

V. Conclusion

[61] For all of these reasons, I am of the opinion that the appeal should be dismissed, with costs.

"Yves de Montigny"

J.A.

"I agree
Johanne Gauthier, J.A."

"I agree
A.F. Scott J.A."

Certified true translation

François Brunet, revisor

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

Appeal from a decision by the Honourable Réal Favreau of the Tax Court of Canada, on September 10, 2015, number 2004-2266(GST)G.

DOCKET:	A-445-15
STYLE OF CAUSE:	ÉDOUARD ROBERTSON v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	QUÉBEC CITY, QUEBEC
DATE OF HEARING:	MARCH 21, 2017
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. SCOTT J.A
DATED:	AUGUST 11, 2017

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