

Date: 20080402

Docket: A-180-07

Citation: 2008 FCA 119

**CORAM: LÉTOURNEAU J.A.
EVANS J.A.
RYER J.A.**

BETWEEN:

ACADIA BAND

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Halifax, Nova Scotia, on April 2, 2008.

Judgment delivered from the Bench at Halifax, Nova Scotia, on April 2, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

RYER J.A.

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REASONS FOR JUDGMENT OF THE COURT
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[1] This is an appeal from a decision of Blanchard J. of the Federal Court (2007 FC 259) dismissing the application for judicial review by the Acadia Band of a decision of the Minister of National Revenue (the “Minister”) in a letter dated November 10, 2005, declining to meet with the

Chief of the Acadia Band with respect to a GST/HST assessment that was made against the Acadia Band, pursuant to Part XI of the *Excise Tax Act*, R.S., 1985, c. E-15 (the “GST/HST Legislation”).

[2] The appellant passed a By-law which provided for the imposition of a tax (the “Acadia Commodity Tax”) of 9% of the total sale of goods and services provided by a vendor on reserve lands. The By-law provided that “the Federal GST and HST and any provincial sales tax shall not apply to transactions covered by this By-law”. Subsequent to the enactment of the By-law, the appellant stopped collecting and remitting GST/HST on transactions undertaken by it through two on-reserve businesses. Instead, those businesses charged the Acadia Commodity Tax on transactions undertaken on the reserve with non-Aboriginals. Revenues generated by the Acadia Commodity Tax were to be used to fulfil the Mi’kmaq tradition of sharing and reciprocity (the “Communal Sharing Tradition”).

[3] The Minister assessed approximately \$1.8 million of GST/HST, interest and penalties (the “Assessment”) against the appellant for failing to collect and remit GST/HST during the period from January 1, 1999 to March 31, 2001. An appeal against the Assessment is scheduled to be heard by the Tax Court of Canada. The period from the date that the appeal was filed by the Acadia Band to the present date is referred to by the appellant as the Interim Period.

[4] The appellant contends that the Minister had a duty to consult with the appellant in the Interim Period prior to undertaking any collection activities with respect to the Assessment. Some

dialogue occurred between the appellant and the Minister before the end of 2005, mostly having to do with the Minister's objective of collecting the amount specified in the Assessment.

[5] By correspondence dated March 11, 2005, the appellant formally sought to engage the Minister's constitutional obligations, referring to the decision in *Haida Nation. v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, and section 35 of the *Constitution Act, 1982*, 1982, c. 11, Schedule B (U.K.), 1982, c. 11 (the "*Constitution Act*") and requesting a meeting with the Minister to "consult, reconcile and accommodate their exercise of Aboriginal Self Government (i.e. the Acadia Commodity Tax)".

[6] By correspondence dated November 10, 2005, the Minister formally declined to meet with the appellant and to engage in consultations of the type requested by the appellant.

[7] On December 12, 2005, the appellant made an application for judicial review of the Minister's refusal to engage in the consultations that had been requested. In that application, the appellant sought declarations that the Minister had a duty to consult and accommodate the appellant in connection with its Communal Sharing Tradition and in particular, in regard to the purposes and operation of the Commodity Tax and the impact on the appellant's Aboriginal rights of decisions taken by the Minister under the GST/HST Legislation. In addition, the appellant sought orders in the nature of *mandamus* to require the Minister to comply with the declaratory relief that was requested.

[8] In the grounds supporting the application for judicial review, the appellant stated that the Minister has neither provided meaningful consultation to the appellant nor accommodated the Communal Sharing Tradition in taking decisions under the GST/HST Legislation. In addition, the appellant stated that the refusal of the Minister to so consult or to accommodate was contrary to the principles of fundamental justice and procedural fairness, and, as well, constituted a breach of the Aboriginal procedural right to be consulted and accommodated, and to have substantive rights reconciled with the actions of the Minister.

[9] In reaching its decision, the Federal Court referred to *Haida and Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550 and determined that the duty to consult arises when the Crown has actual or constructive knowledge of the potential existence of a credibly asserted Aboriginal right and contemplates conduct that might adversely affect that right. The Federal Court then referred to *R. v. Van der Peet*, [1996] 2 S.C.R. 507, as relevant jurisprudence in relation to the question of whether an Aboriginal practice, custom or tradition qualifies as a “right” of the type contemplated by section 35 of the *Constitution Act*. The Federal Court further held that such a right would consist of a current activity that is a modern expression of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.

[10] The Federal Court stated that the Acadia Band characterized the asserted right as the Communal Sharing Tradition and that the Acadia Commodity Tax was intended to be used to fulfil that tradition. The Federal Court found that the Acadia Band had a low evidentiary burden to meet

to establish that it had asserted the existence of a credible Aboriginal right. The Federal Court concluded that the Acadia Band had adduced enough evidence to establish the existence of the Communal Sharing Tradition at the time of the contract, but that there was no evidence that the tradition extended to or encompassed revenue raising or wealth accumulation or activities involving non-Aboriginals. As a consequence, the Federal Court held that the Acadia Band had failed to establish that the Acadia Commodity Tax is a modern expression of the Communal Sharing Tradition and accordingly, that the Acadia Band had not established the potential existence of a credible Aboriginal right protected by section 35 of the *Constitution Act*.

[11] Notwithstanding the appellant's argument to the contrary, we are in agreement with the conclusion of the Federal Court that there was no evidence the Acadia Commodity Tax was a modern expression of the Communal Sharing Tradition and accordingly, that the appellant failed to establish the potential existence of a credible Aboriginal right protected by section 35 of the *Constitution Act*.

[12] The appellant further argues that the Federal Court erred by failing to restrict itself to the consultation issue in relation to the Interim Period. The appellant contends that by considering the imposition of the Acadia Commodity Tax to sales to non-Aboriginals, the Federal Court was addressing the issue that is to be decided by the Tax Court of Canada, namely whether the Assessment violates the appellant's substantive Aboriginal rights. We are of the view that this argument cannot succeed. The Federal Court considered sales to non-Aboriginals in the course of determining whether the Acadia Commodity Tax is a modern expression of the Communal Sharing

Tradition and made no reviewable error in so doing. The validity of the Assessment remains to be dealt with by the Tax Court of Canada.

[13] Accordingly, for the foregoing reasons, the appeal will be dismissed with costs.

“C. Michael Ryer”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-180-07

**APPEAL FROM A DECISION OF THE FEDERAL COURT DATED MARCH 7, 2007
DOCKET NO. T-2187-05**

STYLE OF CAUSE: ACADIA BAND v. MINISTER OF
NATIONAL DEFENCE

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: April 2, 2008

**REASONS FOR JUDGMENT
OF THE COURT BY:** LÉTOURNEAU J.A.
EVANS J.A.
RYER J.A.

DELIVERED FROM THE BENCH BY: LÉTOURNEAU J.A.

APPEARANCES:

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