

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20120919**

**Docket: A-495-11**

**Citation: 2012 FCA 239**

**CORAM: SHARLOW J.A.  
TRUDEL J.A.  
MAINVILLE J.A.**

**BETWEEN:**

**GRAND RIVER ENTERPRISES SIX NATIONS LTD.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on September 11, 2012.

Judgment delivered at Ottawa, Ontario, on September 19, 2012.

**REASONS FOR JUDGMENT BY:**

**MAINVILLE J.A.**

**CONCURRED IN BY:**

**SHARLOW J.A.  
TRUDEL J.A.**

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and

HER MAJESTY THE QUEEN

Respondent

**REASONS FOR JUDGMENT**

**MAINVILLE J.A.**

[1] This is an appeal of a judgment in which Bowie J. of the Tax Court of Canada, for reasons cited as 2011 TCC 554, rejected appeals from 23 assessments made under the *Excise Act, 2001*, S.C. 2002. c. 22 in respect of duties imposed on tobacco products manufactured by the appellant between September 2005 and July 2007 for eventual sale on Indian reserves in Ontario.

[2] The concerned minister was of the view that the appellant, as a tobacco licensee who manufactures tobacco products in Canada, was required to pay duties under the *Excise Act, 2001*, and that the fact that it was an on-reserve manufacturer provided no relief in respect of those duties.

[3] The appellant submits that “unmarked cigarettes” under the meaning of the Ontario *Tobacco Tax Act*, R.S.O. 1990, c.T-10 – and which may only be sold to Indians on reserves in Ontario – are not packaged “for sale to the general public” under the meaning of paragraph 2(b) of the *Stamping and Marking of Tobacco Products Regulations*, SOR/2003-288, and are thus exempt from tobacco duties under the *Excise Act, 2001*.

[4] One of the purposes of the *Excise Act, 2001* is to impose a federal duty on tobacco products manufactured in Canada. That duty is payable by the manufacturer at the time the tobacco products are packaged in the smallest packages in which they are normally offered for sale to the general public. As further set out below, a textual, contextual and purposive interpretation of the applicable legislative and regulatory provisions leads to the conclusion that cigarettes and other tobacco products manufactured in Canada and packaged for eventual sale on Indian reserves are subject to the duty on tobacco set out in the *Excise Act, 2001*. I would therefore dismiss this appeal.

*Background, context and facts*

[5] The appellant is a corporation which manufactures and sells tobacco products at its principal place of business located on the Six Nations of the Grand River Reserve located in Ontario. For this purpose, it holds federal and provincial licences to manufacture and sell tobacco products. Its shareholders, directors and officers are all “Indians” within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5.

[6] The appellant holds a manufacturer's licence for the purposes of the *Excise Act, 2001*, and must pay a duty pursuant to paragraph 42(1)(a) of that act on the tobacco products it manufactures in Canada. That duty is payable when the products are packaged in the smallest package in which they are normally offered for sale to the general public.

[7] For the period from September 2005 to July 2007, the appellant did not pay the *Excise Act, 2001* duty on the manufactured tobacco products it sold to retailers located on reserves within Ontario. These products were sold in packs and bags of cigarettes and in bags of fine cut tobacco that were not marked or stamped under the Ontario *Tobacco Tax Act*. Despite holding a federal tobacco manufacturer license, the appellant submits that it is not required to pay the federal duty on its tobacco products since, as a result of the operation of the Ontario *Tobacco Tax Act*, these products are not packaged for sale to the general public.

[8] The Ontario *Tobacco Tax Act* provides for consumer taxes on tobacco products. It also provides for a system of controlled sales of unmarked cigarettes on reserves located in Ontario, presumably because Indians are exempt from provincial consumer taxes for on-reserve sales as a result of the operation of section 87 of the *Indian Act*. Under the Ontario system, a person wishing to purchase and sell cigarettes which are not in packages marked or stamped with an *indicium* as required under the provincial act and its regulations ("unmarked cigarettes"), may be issued a provincial permit setting out conditions and restrictions to ensure that the unmarked cigarettes it is authorized to trade are dealt with in accordance with the provincial regulatory scheme.

[9] The special scheme for unmarked cigarettes in Ontario is principally set out in the Ontario regulation *Sales of Unmarked Cigarettes on Indian Reserves*, O. Reg. 649/93. The purposes of that scheme are to ensure that a sufficient quantity of unmarked cigarettes are available for non-taxable sales on a reserve to the adult members of the Indian band for their own consumption, while preventing the purchase of excess quantities of unmarked cigarettes that could be resold to non-Indians without payment of the Ontario consumption tax. In order to facilitate these purposes, a maximum annual aggregate quantity of unmarked cigarettes is allocated to each Indian reserve in Ontario under various formulas, and this maximum annual aggregate is itself allocated by the band council for each concerned Indian reserve to all retail dealers located on the reserve and who sell cigarettes to Indian consumers.

[10] Though these on-reserve retailers may choose the suppliers of their unmarked cigarettes, these suppliers must hold a permit under the Ontario *Tobacco Tax Act* to purchase and sell unmarked cigarettes. Moreover, the responsible Ontario Minister informs each supplier of the quantity of unmarked cigarettes which it may sell to the retail dealers based on the allocation system.

[11] During the pertinent period, the appellant held an Ontario manufacturer's registration certificate, an Ontario wholesale dealer's permit, and an Ontario unmarked cigarette dealer's permit issued respectively under sections 7, 3 and 9 of the Ontario *Tobacco Tax Act*. These were made subject to conditions set out in an agreement between the appellant and the government of Ontario. These conditions restricted the appellant's sales of tobacco products to retailers located on reserves,

and required the appellant to comply with the allocation system set out in the Ontario regulation concerning the *Sales of Unmarked Cigarettes on Indian Reserves*.

[12] The appellant takes the position that it is not bound by the terms of its agreement with Ontario as they relate to the Ontario on-reserve allocation system for tobacco products. The appellant further holds that the Ontario regulation concerning the *Sales of Unmarked Cigarettes on Indian Reserves* is constitutionally *ultra vires* as it allegedly impairs the status, capacities and rights of Indians on reserves in Ontario. Consequently, the appellant made all its sales of tobacco products to on-reserve retailers without reference to the Ontario allocation system. In the appellant's view, these sales were only subject to the appellant's capacity to supply the demands of the on-reserve retailers.

[13] Nevertheless, the appellant submits that by the operation of the Ontario *Tobacco Tax Act*, its unmarked cigarettes sold in Ontario are not packaged for sale to the general public, and are consequently exempt from duties on tobacco under the *Excise Act, 2001*. The appellant notes that:

(a) pursuant to the combined operation of subsection 8(1) of the Ontario *Tobacco Tax Act* and of section 23 of the *General Regulation*, R.R.O. 1990, Reg. 1034, adopted under that act, unmarked cigarettes may not be legally sold or possessed in Ontario by anyone other than status Indians who purchased them on-reserve;

(b) pursuant to subsection 9(5) of the Ontario regulation concerning the *Sales of Unmarked Cigarettes on Indian Reserves*, on-reserve tobacco retailers are prohibited from using these cigarettes for anything but their own use and resale to Indian consumers; and

(c) under subsections 29(1), (1.0.1), (2.0.1), (2.0.2) and (4) of the Ontario *Tobacco Tax Act* it is an offence for anyone to possess, purchase, receive or sell unmarked cigarettes to a person in Ontario without a permit for such purposes.

In light of these provisions and the terms of its Ontario permits and certificate, the appellant submits that its tobacco products are not (and cannot be) packaged for sale to the general public, and are thus not subject to the duty on tobacco products payable under paragraph 42(1)(a) of the *Excise Act, 2001*.

#### *The legislative framework*

[14] The *Excise Act, 2001* is the foundation of the federal taxation system for spirits, wine and tobacco. In the case of tobacco products, it provides for a complex system of licensing, stamping, collecting and enforcement. For the purposes of this appeal, it suffices to note that, under this act, tobacco manufacturers must hold a licence and are subject to a duty on the tobacco products they manufacture in Canada. That duty is payable at the time the tobacco products are packaged for sale to the general public. Stamps are issued to the licensed manufacturers for the purpose of indicating that the duty has been paid on the tobacco product. These stamps must be affixed by the licensed manufacturers in a conspicuous place on the packages, in a manner that seals the packages, and which allows the stamps to remain affixed after the packages are opened.

[15] For the specific purposes of this appeal, the relevant provisions of the *Excise Act, 2001* are as follows:

**2.** The definitions in this section apply in this Act.

**2.** Les définitions qui suivent s'appliquent à la présente loi.

“packaged” means

« emballé »

(a) in respect of raw leaf tobacco or a tobacco product, packaged in a prescribed package;

a) Se dit du tabac en feuilles ou des produits du tabac qui sont présentés dans un emballage réglementaire;

“prescribed” means

*Version anglaise seulement.*

(a) in the case of a form or the manner of filing a form, authorized by the Minister;

(b) in the case of the information to be given on or with a form, specified by the Minister; and

(c) in any other case, prescribed by regulation or determined in accordance with rules prescribed by regulation.

“stamped”, in respect of a tobacco product, means that an excise stamp, and all prescribed information in a prescribed format, are stamped, impressed, printed or marked on, indented into or affixed to the product or its container in the prescribed manner to indicate that duty, other than special duty, has been paid on the product.

« estampillé » Se dit d'un produit du tabac, ou de son contenant, sur lequel un timbre d'accise ainsi que les mentions prévues par règlement et de présentation réglementaire sont apposés, empreints, imprimés, marqués ou poinçonnés selon les modalités réglementaires pour indiquer que les droits afférents autres que le droit spécial ont été acquittés.

**25.3** (1) No person shall possess an excise stamp that has not been affixed

**25.3** (1) Nul ne peut avoir en sa possession un timbre d'accise qui n'a



to a tobacco product or its container in the manner prescribed for the purposes of the definition “stamped” in section 2 to indicate that duty, other than special duty, has been paid on the product.

**42.** (1) Duty is imposed on tobacco products manufactured in Canada or imported and on imported raw leaf tobacco at the rates set out in Schedule 1 and is payable

(a) in the case of tobacco products manufactured in Canada, by the tobacco licensee who manufactured the tobacco products, at the time they are packaged;

**304.** (1) The Governor in Council may make regulations

...

(o) prescribing any matter or thing that by this Act is to be or may be prescribed; and

(p) generally to carry out the purposes and provisions of this Act.

pas été apposé sur un produit du tabac ou sur son contenant selon les modalités réglementaires visées à la définition de « estampillé » à l'article 2 pour indiquer que les droits afférents autres que le droit spécial ont été acquittés.

**42.** (1) Un droit sur les produits du tabac fabriqués au Canada ou importés et sur le tabac en feuilles importé est imposé aux taux figurant à l'annexe 1 et est exigible :

a) dans le cas de produits du tabac fabriqués au Canada, du titulaire de licence de tabac qui les a fabriqués, au moment de leur emballage;

**304.** (1) Le gouverneur en conseil peut, par règlement :

[...]

o) prendre toute mesure d'ordre réglementaire prévue par la présente loi;

p) prendre toute autre mesure d'application de la présente loi.

[16] The relevant provisions of the *Stamping and Marking of Tobacco Products Regulations* read as follows:

**2.** For the purpose of paragraph (a) of the definition “packaged” in section 2 of the Act,

**2.** Pour l'application de l'alinéa a) de la définition de « emballé » à l'article 2 de la Loi, est un emballage réglementaire :

...

[...]

(b) a tobacco product is packaged in a prescribed package when it is packaged in the smallest package — including any outer wrapping that is customarily displayed to the consumer — in which it is normally offered for sale to the general public.

b) dans le cas d'un produit du tabac, le plus petit emballage dans lequel il est normalement offert en vente au public, y compris l'enveloppe extérieure habituellement présentée au consommateur.

**4.2** For the purposes of the definition “stamped” in section 2 of the Act and subsection 25.3(1) of the Act, the prescribed manner of affixing an excise stamp to a package is by affixing the stamp

**4.2** Pour l'application de la définition de « estampillé » à l'article 2 de la Loi et du paragraphe 25.3(1) de la Loi, est apposé selon les modalités réglementaires le timbre d'accise qui est apposé :

(a) in a conspicuous place on the package;

a) dans un endroit bien en vue sur l'emballage;

(b) in a manner that seals the package;

b) de manière à cacheter l'emballage;

(c) in a manner that the stamp remains affixed to the package after the package is opened;

c) de manière à ce qu'il reste fixé à l'emballage après son ouverture;

(d) in a manner that does not interfere with the stamp's security features; and

d) de manière à ne pas nuire à ses propres caractéristiques de sécurité;

(e) in a manner that does not obstruct any information that is required by or under an Act of Parliament to appear on the package.

e) de façon à ne pas obstruer les renseignements devant figurer sur l'emballage en application d'une loi fédérale.

The reasons of the Tax Court judge

[17] The Tax Court judge determined that the purpose of the *Excise Act, 2001* is to raise revenue through the imposition of duties on wine, spirits and tobacco products. He found that section 42 of the act specifically imposes the duty on tobacco, and that duty is made payable when the products are packaged, with the definition of when the product is packaged left to be determined by the Governor in Council. The Tax Court judge further found that the purpose of the definition of the word “packaged” in section 2 of the *Stamping and Marking of Tobacco Products Regulations* is simply to define the point in time at which the duty becomes payable by the tobacco manufacturer, and not to confer an exemption from the duty, something which would in any event be beyond the regulation making authority of the Governor in Council under the *Excise Act, 2001*.

[18] Using a contextual and purposive analysis of the *Excise Act, 2001* and of the *Stamping and Marking of Tobacco Products Regulations*, the Tax Court judge concluded that “[w]hen the Act and the Regulations are considered as a whole, and paragraph 2(b) of the Regulations is considered in light of its purpose, it is evident that the expression ‘offered for sale to the general public’ is intended simply to mean ‘offered for sale to those members of the general public to whom they may be legally offered’, or to put it another way, ‘offered for sale at the retail level’, or, as the parties expressed it in paragraph 15 of their Agreed Statement of Facts, ‘...offered for sale to consumers...’” (Reasons, at para. 19).

[19] The Tax Court judge therefore concluded that the duty on the appellant’s tobacco products became payable pursuant to paragraph 42(1)(a) of the *Excise Act, 2001* when these products were

packaged for sale to Indians, and he consequently dismissed the appeals from the Minister's assessments.

The issue

[20] The only issue in this appeal is whether the Tax Court judge erred in finding that the duty payable under paragraph 42(1)(a) of the *Excise Act, 2001* applied to the unmarked cigarettes and other tobacco products sold by the appellant to retailers on reserves in Ontario, taking into account the concept of a "prescribed package" found in paragraph 2(b) of the *Stamping and Marking of Tobacco Products Regulations*. This is an issue of statutory interpretation which is to be reviewed on appeal on a standard of correctness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at paras. 8-9.

Analysis

[21] The modern approach to statutory interpretation is that the words of a statute (or regulation) are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the legislation, the objects of the legislation and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21, quoting approvingly from Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) at p. 87. As noted by McLachlin C.J. and Major J. in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at paragraph 10:

It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as

a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words plays a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[22] It is necessary to consider not only the ordinary and natural meaning of the words used, but also the context in which they are used and the purpose of the provision considered as a whole within the legislative scheme in which it is found: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 at para. 27. The most significant element of this analysis is the determination of legislative intent: *R. v. Monney*, [1999] 1 S.C.R. 652 at para. 26.

[23] It cannot be disputed that the purpose and intent of paragraph 42(1)(a) of the *Excise Act, 2001*, read with paragraph 2(b) of *Stamping and Marking of Tobacco Products Regulations*, is to impose a duty on tobacco products, which duty is payable by the tobacco manufacturer at the time the products are packaged in the smallest package in which they are normally offered for sale to the general public. It is usually at that time that the manufacturer must affix a duty-paid stamp to the package.

[24] The appellant does not dispute this, but rather submits that the expression “offered for sale to the general public” in the federal regulation cannot extend to sales of unmarked cigarettes and other tobacco products made in Ontario to First Nation retailers on reserves. In the appellant’s view, Indians are a limited class which distinguishes them from the general public, and since the scheme

of the Ontario *Tobacco Tax Act* prohibits the sale of its tobacco products except on reserve to Indians, the tobacco duty of the *Excise Act, 2001* does not apply to these products.

[25] I do not agree with the appellant.

*The Excise Act, 2001 does not provide for an exemption from duties on tobacco products destined for sale on Indian reserves*

[26] The enactment of the *Excise Act, 2001* was part of a major overhaul of the statutory regime governing the taxation of tobacco made with the goal of increasing the tax on tobacco by bringing a uniform rate for the federal excise tax on cigarettes in all provinces and territories: *Excise Act, 2001 Explanatory Notes and Draft Regulations*, Department of Finance, December 2001, at p. 166.

[27] It is particularly noteworthy that the prior provisions of the *Excise Tax Act*, R.S.C. 1985, c. E-15 allowed unmarked cigarettes (referred to therein as “black stock” cigarettes) to be sold on-reserve to Indians at a different federal duty rate. In particular, subparagraph 1(a)(ii) of the *Excise Tax Act*, as it read prior to the coming into force of the *Excise Act, 2001*, set a reduced federal excise duty on black stock cigarettes delivered after March 25, 1994 by a manufacturer to a supplier who had a permit under section 9 of the Ontario *Tobacco Tax Act* to sell unmarked cigarettes and who certified that the cigarettes were intended for resale in accordance with the Ontario *Tobacco Tax Act* to on-reserve retailers. However, these provisions of the *Excise Tax Act* were repealed by sections 413, 417, 418 and 419 of the *Excise Act, 2001*. The “Explanatory Notes” issued by the responsible ministers regarding the *Excise Act, 2001* notably stated the following regarding this matter:

### **Section 413 – Definitions**

Subsection 2(1) of the *Excise Tax Act* contains, among other things, definitions relevant to the excise tax imposed under Part III of the Act on tobacco products. This subsection is amended to delete the definitions “black stock”, “black stock cigarettes” and “Indians”. These definitions were used only in sections relating to the different rates of excise tax on cigarettes for sale in Ontario, Quebec and the rest of Canada. The definitions are no longer required with the return to a uniform rate of excise tax on cigarettes for sale in all provinces and territories.

*Excise Act, 2001 Explanatory Notes and Draft Regulations*, Department of Finance, December 2001, at p. 167.

[28] Though the concept of “black stock” cigarettes remains in the *Excise Act, 2001*, its use is now limited to cigarettes destined for delivery to duty free shops, customs bonded warehouses, and ship stores: *Excise Act, 2001* s. 2 “black stock”, s. 180.1, s. 236, and Schedule I paras. 1(a), 2(a) and 3(a).

[29] The *Excise Act, 2001* consequently does not provide for special duties, nor does it set out an exemption from duties, for a manufacturer’s tobacco products destined for delivery to an Indian reserve or to Indians.

*The concept of “general public” in the Stamping and Marking of Tobacco Products Regulations includes Indians*

[30] When used in legislation, the concept of “the public” or “the general public” is usually context-specific. The jurisprudence of the Supreme Court of Canada supports the notion that these concepts are capable of conveying different meanings depending of the legislative context in which they are used.

[31] Thus, Lamer C.J. in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 adopted the “relational” approach to defining the “public” in the expression “service ... customarily available to the public” found in section 3 of the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22. In *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, the expression “to the public” in paragraph 3(1)(f) of the *Copyright Act*, R.S.C. 1985, c. C-42, was found not to comprise fax transmissions to a single individual. While in the recent decision of *Rogers Communication Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, 347 D.L.R. (4<sup>th</sup>) 235, that same expression was found to include the point-to-point online stream transmission of a musical work to numerous different recipients. These findings were the result of an analysis of the concept of the “public” which took into account the overall legislative context.

[32] In this matter, the words of Lord Wright written over 75 years ago in *Jennings v. Stephens*, [1936] 1 Ch. 469 (C.A.) at p. 476, are still apposite today:

Such authorities as there are do not seem very precise in defining the meaning of the words “in the public”; it is certainly difficult and perhaps impossible to define the precise borders of the territory which they cover. “The public” is a term of uncertain import; it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of this country. In any specific context it may mean for practical purposes only the inhabitants of a village or such members of the community as particular advertisements would reach, or who would be interested in any particular matter, professional, political, social, artistic, or local.

[33] Aboriginal peoples hold a special legal position in Canada as a result, notably, of the *Royal Proclamation, 1763*, subsection 91(24) and section 109 of the *Constitution Act, 1867*, sections 25 and 35 of the *Constitution Act, 1982*, the federal common law of aboriginal rights, and the *Indian*



*Act*. However, this does not necessarily entail that Indians and other aboriginal peoples are not to be included in the “public” or the “general public” when these expressions are used in legislation.

Rather, the particular legislative purpose and context must be analysed in each case.

[34] The appellant erroneously relies on *R. v. Bigeagle*, [1978] 6 W.W.R. 65, 9 C.N.L.C. 446 for the proposition that Indians never form part of the general public. In that case, the Saskatchewan Court of Appeal found that a road on an Indian reserve which was not open for use to the general public, but only to residents of the Indian reserve, was not a “public highway” under the definition of that term in the *Vehicles Act*, R.S.S. 1965, c. 377, *i.e.* “a road...designed and intended for or used by the general public for the passage of vehicles”. This approach was followed by the Alberta Court of Appeal in *R. v. Fox*, 11 Alta. L.R. (2d) 221, [1981] C.N.L.R. 128 and by other courts, notably in *R. v. Canute*, [1983] 5 W.W.R. 566, [1984] 1 C.N.L.R. 123; *Gallinos et al. v. Louis et al.* (1984), 15 D.L.R. (4<sup>th</sup>) 458; and *R. v. Youngpine* (2001), 283 A.R. 143.

[35] On the other hand, the Saskatchewan Court of Queen’s bench held in *R. v. Sandfly*, [1984] 1 C.N.L.R. 182, that an offence of driving a motor vehicle on a reserve in a careless manner contrary to section 5 of the *Indian Reserve Traffic Regulations*, C.R.C., c. 959, need not be restricted to a road open to all the public, notwithstanding the definition of “road” found in section 2 of that regulation, *i.e.* “any roadway...open to the public for the passage of vehicles”. That Court also found in *R. v. Gordon*, 35 Sask. R. 269, [1985] 2 C.N.L.R. 138 that the offence under then paragraph 233(4) of the *Criminal Code* (now substantially redrafted as paragraph 249(1)(a) and subsection 249(2) of the *Code*) of driving a motor vehicle on a “street, road, highway or other public

place in a manner that is dangerous to the public” may occur on a road located on a reserve even in the absence of evidence of the use of that road by the general public.

[36] These decisions simply emphasise the contextual and purposive approaches which have been used to determine whether or not Indians are included within the ambit of legislative expressions such as the “public” or the “general public”. A textual, contextual and purposive interpretation of the expression, which takes into account the legislative scheme as a whole, must be used in each case.

[37] In this case, there is no inconsistency between the expression “general public” set out in paragraph 2(b) of the *Stamping and Marking of Tobacco Products Regulations* and the marketing and sale of tobacco products to Indians on reserve. The *Excise Act, 2001* does not exempt manufacturers from paying the duty on tobacco products when these products are sold on a reserve to Indians. Moreover, as noted above, the *Excise Act, 2001* specifically repealed the prior provisions of the *Excise Tax Act* concerning “black stock” cigarettes destined to Indians in Ontario. Taking a contextual and purposive approach to interpreting the *Excise Act, 2001*, and the regulations adopted pursuant thereto, there is no reason to find that sales of tobacco products made on reserves to Indians are not sales made to the general public. In the specific circumstances of the appellant, Indians are the “general public” for which it is authorized to manufacture cigarettes.

*Ontario cannot provide for exemptions from federal duties*

[38] Moreover, there exists a fundamental flaw in the appellant's argument. Simply put, the appellant submits that the regulatory scheme for unmarked cigarettes adopted by Ontario in order to take into account the tax exemption under section 87 of the *Indian Act*, would have resulted in exempting manufacturers of unmarked cigarettes from federal duties under the *Excise Act, 2001*.

[39] In the absence of clear and unambiguous language in the *Excise Act, 2001*, I do not accept that a provincial authority can exempt manufacturers from federal duties simply by restricting certain manufacturers or certain tobacco products to specific market segments. Consequently, though Ontario may have restricted the appellant from selling tobacco products to anyone but on-reserve retailers, that restriction cannot have the effect of exempting the appellant from the tobacco duties otherwise payable under the *Excise Act, 2001*.

[40] If Ontario (or any other province) restricted the market to which a tobacco manufacturer may distribute its products to a given city, community or to a specific group (e.g. private clubs), that would not entail that the tobacco duty under the *Excise Tax, 2001* would no longer be payable by the manufacturer on those products. The manufacturer's market would be the group to which it is authorized to distribute, and that group would become that manufacturer's "general public" for the purposes of determining when the products are "packaged", i.e. for determining when the duty is owed and the duty-paid stamps must be affixed.

*The regulations cannot provide for the exemption*

[41] As found by the Tax Court judge, the Governor in Council is not empowered under the *Excise Act, 2001* to provide exemptions from tobacco duties for unmarked cigarettes destined for sale on Indian reserves.

[42] Paragraph 2(b) of the *Stamping and Marking of Tobacco Products Regulations* was adopted under paragraphs 304(1)(o) and (p) of the *Excise Act, 2001* in order to prescribe a package for the purposes of the definition of the term “package” set out in section 2 of that act. Nothing in the act suggests that Parliament intended to exempt a manufacturer of “unmarked cigarettes” from paying the duty under paragraph 42(1)(a). In fact, as already noted, quite the contrary can be concluded from the overall scheme of the act. Consequently, I cannot accept that Parliament would have somehow delegated to the Governor in Council the authority to provide for such an exemption simply by empowering it to prescribe a package.

[43] Finally, I note that, for the purposes of this appeal, the appellant places no reliance on section 87 of the *Indian Act* or on any aboriginal or treaty right contemplated by section 35 of the *Constitution Act, 1982* to support an exemption from the tobacco duty which it must pay pursuant to paragraph 42(1)(a) of the *Excise Act, 2001*.

[44] I would consequently dismiss this appeal, with costs in favour of the respondent.

"Robert M. Mainville"

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J.A.

"I agree.  
K. Sharlow J.A."

"I agree.  
Johanne Trudel J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-495

**APPEAL FROM THE JUDGMENT OF THE TAX COURT OF CANADA DATED  
DECEMBER 8, 2011.**

**STYLE OF CAUSE:** Grand River Enterprises Six  
Nations Ltd. v. Her Majesty the  
Queen

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 11, 2012

**REASONS FOR JUDGMENT BY:** MAINVILLE J.A.

**CONCURRED IN BY:** SHARLOW J.A.  
TRUDEL J.A.

**DATED:** September 19, 2012

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