Federal Court  Cour fédérale

**Date: 20150511**

**Docket: T-859-12**

**Citation: 2015 FC 611**

**Ottawa, Ontario, May 11, 2015**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**MOHAWK COUNCIL OF AKWESASNE, ON ITS BEHALF AND ON BEHALF OF THE MOHAWKS OF AKWESASNE, INCLUDING SANDRA BOOTS, FREDERICK DAVID JOCK, DOROTHY COLE, CLARISSA COOK, KATSITSIKWAS LAZORE, CHARLES DELORMIER, SHAILEI S. SQUARE, GERALD BRADLEY GEORGE, PAULINE THOMPSON, LORENE H. HERNE, MARK MITCHELL, FELICIA SUNDAY, PAULINE LOIS TERRANCE, LUCILLE ROUNDPOINT, CONNIE HALL, BEVERLY TERRANCE, JOEY TEHORON:IO DAVID, STEVEN THOMAS, BEVERLY THOMPSON, THERESA TERRANCE, HARVEY BOOTS, CHELSEA RAE OAKES, LARRY ARONHIAIES HERNE, STEPHANIE JOHNSON, JASON LEAF, WILFRED DAVID, NELSON LEAF, BARRY CURTIS THOMPSON, ROBERT GILBO, ELIZABETH LAZORE, WAYLON DAVID WHITE, KATHY HERNE, ARLENE THOMAS, PAUL THOMAS, ROSEMARY SQUARE, DAVID HERNE, E. PELLETIER, COREY BOUGH, KRISTIN COOK, RICHARD THOMPSON, KRISTIN RANSOM, DONNA DELORMIER, STEVEN JOHNSON, CARRIE LAZORE, HOLLEY BOOTS, OREN THOMPSON,**

**WARREN THOMPSON, VERONICA JACOBS,
CARL BERO, EDITH MCDONALD,
SUSAN BENEDICT-SQUARE,
DONALD DELORMIER, DONNA JOCKO,
TOBY ROUNDPOINT, ERIN ROURKE,
TAMMY LYNN DAVID,
JAKE AND BRENDA LAFRANCE,
LARRY DAVID, JOEY DAVID,
DONALD DELORMIER,
DONNA MARIE THOMPSON RANSOM,
BRUCE TARBELL,
MICHAEL RANDY MITCHELL,
FREDERICK MITCHELL,
DACY THOMPSON, TIA THOMPSON,
KIMBERLY JACOBS,
RONALD THOMPSON,
CARRIE FRANCIS-SQUARE, MARIA COLON,
ALEXANDER DELORMIER,
THERESA ADAMS, JAKE LAFRANCE,
SUSAN WHITE, STEVEN JOHNSON,
JORDAN MITCHELL, MYRON CLUTE,
MARY FRANCIS, KIMBERLY BURNS,
CECELIA CONNIE FRANCIS,
ROXANNE PETERS,
ORLANDA LAZORE, VICTOR MARTIN,
ABRAHAM GRAY, BARRY BRADLEY,
LEIGHANN NEFF, TIMOTHY KING,
LORRAINE THOMPSON, JOHN PETERS,
RACHEL SQUARE, SEAN LEONARD,
THOMAS JOHNSON, JOHN FRANCIS**

**Plaintiffs**

**and**

**THE HONOURABLE VIC TOEWS, in his capacity as THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND
CANADA BORDER SERVICES AGENCY**

**Defendants**

## JUDGMENT AND REASONS

[1] This is an appeal from a decision of Prothonotary Richard Morneau whereby he declined to strike several paragraphs added by amendment to the Plaintiffs' Statement of Claim. The Defendants assert Prothonotary Morneau erred by failing to properly apply the principles of *res judicata* to the impugned amendments and the issues raised cannot be relitigated in this proceeding.

[2] The underlying action is brought by the Plaintiffs under section 135 of the *Customs Act*, RSC 1985, c.1 (2nd Supp.). They challenge the Defendants' seizure of numerous motor vehicles between September 2009 and April 2010 for alleged failure to report to the Customs facility at the border crossing at Cornwall, Ontario, contrary to section 11 of the *Customs Act*.

[3] At the heart of this dispute are long-standing issues between the members of the Akwesasne Mohawk Band and the Canadian Border Services Agency (CBSA) concerning the enforcement of the *Customs Act* at the Cornwall Port of Entry. The Statement of Claim refers to a history of invasive and prejudicial enforcement techniques employed against members of the Akwesasne Band by the CBSA and to a number of failed attempts over the years to find solutions to the Band's grievances.

[4] The underlying problem leading to the seizures of the Plaintiffs' motor vehicles stems from the relocation of the CBSA Customs facility from Cornwall Island to the City of Cornwall. Historically this facility had been located at the first point of entry to Canada on Cornwall Island.

When the Customs facility was moved to the Canadian mainland in 2009, the residents of the Akwesasne Band living on Cornwall Island and their visitors were required to travel off the island to report their trips from the United States. There was considerable inconvenience associated with this change magnified by the fact the Mohawks of Akwesasne occupy reserve lands straddling both sides the St. Lawrence River and including Cornwall Island. Needless to say this unique geographical arrangement creates a considerable volume of cross-border travel as band members move around within their reserve lands to visit friends and family and to access services.

[5] The record discloses that, for a time, a significant number of Akwesasne band members who travelled from the United States to Cornwall Island failed to report to the CBSA at the Cornwall Port of Entry. The history of CBSA enforcement action against those persons is described in an earlier interlocutory decision rendered by Justice David Near in this proceeding:

> [15] Between July 13, 2009, when the POE in the City of Cornwall was opened, and September 16, 2009, the CBSA did not actively enforce the *Customs Act* requirement that individuals report to the POE in Cornwall. Instead, it carried out an evaluation process to measure the rate of compliance with the requirements. In the period from July 13, 2009, to August 31, 2009, the CBSA determined that an average of 42% of vehicles traveling north from New York State across the International Bridge onto Cornwall Island failed to report to the Cornwall POE.
>
> [16] On September 18, 2009, the CBSA began its active enforcement of the reporting requirement. This enforcement involved seizing vehicles that had allegedly been used to transport persons into Canada, who then failed to report to the POE. Between September 18, 2009, and April 30, 2010, a vehicle owned by each of the 115 individual plaintiffs was seized for failing to report to the POE, as required by the *Customs Act*.
>
> [17] In most cases, the contravention of the reporting requirement was determined on the basis of a date- and time-stamped photograph of the vehicle taken by CBSA-owned cameras

> as it passed through United States Customs in Rooseveltown. The photographs captured the rear and driver's side of the vehicles, including the licence plates, without detecting the identity of the driver or clearly discerning the passengers or contents of the vehicles.
>
> [18] When the same vehicle passed from Cornwall Island to the City of Cornwall through the POE, often hours or days later, the CBSA seized it as forfeit in accordance with sections 110 and 122 of the *Customs Act*. The agency released the vehicle when the driver or, more frequently, the MCA, paid a specified amount for its release. In most cases, this amount was set at $1,000. Again in most cases, the vehicle owner, or the MCA on his or her behalf, pursued the statutory appeal mechanisms foreseen by the *Customs Act*.
>
> [see Mohawk Council of Akwesasne v Canada (Minister of Public Safety and Emergency Preparedness), 2012 FC 1442, 422 FTR 272 (Eng)]

[6] At the joint request of the parties, Justice Near was asked to make a preliminary determination of a number of issues of law bearing on the legality of the CBSA seizures. He resolved all of those issues in favour of the Minister. He also declared the Plaintiffs' claims to relief should be dismissed insofar as they were dependant on the issues before him.

[7] As a consequence of Justice Near's decision the Plaintiffs made significant amendments to their Statement of Claim. The Minister then moved to strike some of the amendments on the ground they raised questions of law that had been conclusively determined in favour of the Crown by the Supreme Court of Canada decision in *Mitchell v Canada*, 2001 SCC 33, [2001] 1 SCR 91 . In particular, the Minister argued the *Mitchell* decision had determined for all purposes that there is no extant Aboriginal trans-border mobility right in and around the St. Lawrence River. Absent such a mobility right, the Statement of Claim amendments asserting a duty to accommodate could not be legally sustained and should be struck as an abuse of process.

## I. **The Decision Under Review**

[8] Prothonotary Morneau struck a number of paragraphs from the Statement of Claim concerning various claims to declaratory relief. According to the Prothonotary those claims exceeded the scope of section 135 of the *Customs Act* which is concerned only with the legality of a seizure of property. According to the Prothonotary, section 135 is not a platform to obtain a broad range of declaratory relief in the advancement of Aboriginal rights or interests.

[9] Prothonotary Morneau went on to reject the Minister's argument that the *Mitchell* decision, above, conclusively resolved the mobility rights issues raised by the Plaintiffs' amendments. In coming to that conclusion he found it was not plain and obvious the Plaintiffs' allegations were necessarily hopeless. That aspect of the decision is challenged on this appeal.

## II. **Analysis**

[10] The pleadings the Minister seeks to strike from the Statement of Claim are all based on the underlying allegation that the Plaintiffs have an Aboriginal mobility right to move about their traditional territory including a traverse of the St. Lawrence River. The impugned passages are the following:

> 125. The decisions at issue uphold seizures which must be declared illegal as they are based on the offence of not reporting to the temporary port of entry, however the mechanism that was provided for reporting imposed such a burden and more than mere inconvenience that it was and continues to be, an unjustifiable infringement on the Plaintiffs' Aboriginal mobility rights to move freely about their traditional territory.
>
> 126. Long before there was an international border, Mohawks travelled across their traditional territory freely and without

> harassment. To this day, Akwesasne residents move back and forth across their traditional territory for employment, schooling, and daily life as they have always done. In the minds of Akwesasne members, there is no distinction between sections of their territory since all of Akwesasne is their home.
>
> 127. As a result of jurisdictional complexity, however, it is often the members of Akwesasne going about their legitimate everyday activities who are disadvantaged, inconvenienced and by onerous requirements to report subjected to harsher penalties than should be expected by users of customs facilities.
>
> ...
>
> 139. The Plaintiffs enjoy an Aboriginal right to move freely about their traditional territory.
>
> 140. Before the international border existed, the Plaintiffs' ancestors moved freely in their territory and the Plaintiffs continue to move about their territory today, for community purposes and more simply for everyday living requirements such as employment, schooling, medical appointments and childcare, despite the difficulties created by the border and now the placement of the temporary port of entry.
>
> 141. The manner in which the Defendants, and their officers, agents and mandatories, enforced their legislation, made their decisions and upheld the seizures constituted an unjustified infringement of the Plaintiffs' Aboriginal right to move freely throughout their traditional territory.
>
> 142. The decisions at issue in this Action perpetuate an unjust infringement on the Plaintiffs' Aboriginal mobility rights because they uphold seizures which are illegal infringements on the Plaintiffs' mobility rights.
>
> [Emphasis in original]

[11] Before me, counsel for the Plaintiffs did not argue that the proposed amendments asserted a right of unfettered passage across the Canada/United States border. The intended argument is only that the Aboriginal residents of Akwesasne have qualified mobility rights which must be respected by the Government of Canada. According to this argument there is a reasonable duty

to accommodate by reducing needlessly inconvenient or onerous barriers to passage across the border: also see paras 67, 79 and 89 of the Plaintiffs' Amended Memorandum.

[12] Counsel for the Minister says the Prothonotary erred by failing to fully consider the principles for applying *res judicata*. He also argues the Prothonotary erred in his analysis of the *Mitchell* decision, above.

[13] Although both parties expended considerable effort dealing with the applicable standard of review on this motion, nothing material turns on that debate. Whether or not this matter raises an issue vital to the outcome of the case, I am satisfied that no appealable error has been established.

[14] The Defendants' Memorandum frames the issue on appeal in the following way:

> 27. The Learned Prothonotary's decision not to strike the mobility rights pleadings was clearly wrong. It is settled law that the plaintiffs do not have an aboriginal right to free mobility across the international border. In the absence of such right, there is also no basis for their claims to a remedy for any allegedly "unjustified" inconvenience to their cross-border travel.
>
> 28. Part of the plaintiffs' Amended Statement of Claim asserts directly and indirectly aboriginal or treaty rights to challenge the Minister's determination of contravention of s. 11 of the *Customs Act*. To that extent the pleading raises matters which *res judicata* or estopped.
>
> 29. These claims to a right of free mobility through and over the border within the Mohawks' reserve lands have or could have been argued fully and completely by the same parties in the *Mitchell v M.N.R.* case, which culminated in a final and binding decision of the Supreme Court of Canada in 2001. That case involved the same underlying assertion of collective rights attaching to the membership of the Mohawks of Akwesasne as in this case; i.e., the right to travel to and from parts of their

> traditional lands south of St. Lawrence River to Cornwall Island/Canada. Moreover, that case involved the same parties: the Mohawks of Akwesasne and the Crown in Right of Canada.
>
> [Footnotes omitted]

[15] Nothing turns on the Prothonotary's failure to list all of the required elements of a plea of *res judicata*. Because the Prothonotary did not find the decision in *Mitchell*, above, to be determinative on the merits, it was unnecessary for him to address the other requirements for applying *res judicata* or issue estoppel. The decision in *Tuccaro v Canada*, 2014 FCA 184, 243 ACWS (3d) 257, does not stand for the proposition that a decision-maker must routinely identify and consider all of the elements of *res judicata* when one of its required elements has been determined not to be present. The error in *Tuccaro*, above, was the failure by the trial judge to apply *any* of the elements of *res judicata* and, in its place, to wrongly substitute the doctrine of *stare decisis*.

[16] It was appropriate for the Prothonotary to consider only one of the elements of *res judicata* if that was sufficient to determine its application. The Prothonotary found it was not plain and obvious from a reading of the *Mitchell* decision, above, that the Plaintiffs' assertion of a qualified mobility right to cross the St. Lawrence River was bound to fail. It was on that issue the Defendants' motion to strike foundered. It is sufficient for the purposes of this appeal to consider the correctness of that finding.

[17] As a starting point it is useful to be mindful of the need for sensitivity and nuance in the treatment of pleadings in Aboriginal cases. This point was made by Justice James Hugessen in *Shubenacadia Indian Band v Canada*, [2001] FCJ No 347 at paras 5-6, 104 ACWS (3d) 62:

> **5** I turn now to the second aspect of the motion which is to strike out the Statement of Claim as disclosing no reasonable cause of action. The principle is well established that a party bringing a motion of this sort has a heavy burden and must show that indeed it is beyond doubt that the case could not succeed at trial. Furthermore, the Statement of Claim is to be generously and with an open mind and it is only in the very clearest of cases that the Court should strike out the Statement of Claim. This, in my view, is especially the case in this field, that is the field of aboriginal law, which in recent years in Canada has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted.
>
> **6** If there is in a pleading a glimmer of a cause of action, even though vaguely or imperfectly stated, it should, in my view, be allowed to go forward. In this respect the motion to strike varies dramatically from the situation where a party brings a motion for summary judgment, where the Court must grapple with the issue of law in limine. Here, the Court must read the Statement of Claim, as I say, with a generous eye and with a view to allowing the plaintiff, if he can, to make his case.

Also see *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 20 and 21.

[18] The *Mitchell* case, above, involved a claim by the Mohawks of Akwesasne to an exemption from the payment of customs duties arising from the importation to Canada of trading goods. As in this case, a conflict arose between the provisions of the *Customs Act* and an asserted Aboriginal right. The question before the Prothonotary was whether the decision in *Mitchell* plainly and obviously rejected the existence of an Aboriginal claim to mobility across the border for all purposes or whether it was limited to a right to mobility incidental to trade.

[19] The majority in *Mitchell* characterized the claim as "the right to bring goods across the Canada-United States boundary at the St. Lawrence River for purposes of trade" [see para 19] or

alternatively "as a right to trade simpliciter" [see paras 21 and 23]. The majority also acknowledged a claim to trade necessarily involved travel such that "any finding of a trading right would also confirm a mobility right" [see para 22].

[20] The Court went on to consider the claim in light of the evidentiary record. The question posed was the following:

> While the ancestral home of the Mohawks lay in the Mohawk Valley of present-day New York State, the evidence establishes that, before the arrival of the Europeans, they travelled north on occasion across the St. Lawrence River. We may assume they travelled with goods to sustain themselves. There was also ample evidence before McKeown J. to support his finding that trade was a central, distinguishing feature of the Iroquois in general and the Mohawks in particular. This evidence indicates the Mohawks were well situated for trade, and engaged in small-scale exchange with other First Nations. A critical question in this case, however, is whether these trading practices and northerly travel coincided prior to the arrival of Europeans; that is, does the evidence establish an ancestral Mohawk practice of transporting goods across the St. Lawrence River for the purposes of trade? Only if this ancestral practice is established does it become necessary to determine whether it is an integral feature of Mohawk culture with continuity to the present day.
>
> [Emphasis in original]

[21] After an extensive review of the evidence bearing on the historical trading practices of the Mohawks the majority found the Plaintiff had "not established an ancestral practice of transporting goods across the St. Lawrence River for the purposes of trade". As to whether such trade was integral to Mohawk culture, the Court found it was not [see para 60]. Rather, the evidence disclosed if "the Mohawks did transport trade goods across the St. Lawrence River for trade, such occasions were few and far between" [see para 60].

[22] The majority declined to determine whether the asserted claim was displaced by the doctrine of sovereign incompatibility, preferring, instead, to leave that issue for another day.

[23] It seems to me, the majority decision in *Mitchell*, above, leaves open for consideration the mobility issue advanced in this proceeding. *Mitchell* was concerned with precontact trading practices and not with mobility rights *per se*. The Court recognized a right to trade across the St. Lawrence River incidentally raised a mobility issue. However, it did not decide that such a mobility right was necessarily subsumed by the trading issue. Although a right to trade necessarily includes a right to travel, the absence of a right to trade does not necessarily exclude a right to travel for other purposes. A different evidentiary record, focussed on the historical mobility practices of the Mohawks, might support a qualified mobility right compatible with Canada's sovereign right to control access at the border. I therefore agree with Prothonotary Morneau it is not plain and obvious from the *Mitchell* decision, above, that the Aboriginal interest framed by the impugned amendments cannot possibly be recognized. For these reasons, the motion is dismissed with costs payable to the Plaintiffs.

**JUDGMENT**

**THE COURT ORDERS this** motion is dismissed with costs payable to the Plaintiffs.

"R.L. Barnes"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-859-12 |
| **STYLE OF CAUSE:** | MOHAWK COUNCIL OF AKWESASNE, ON ITS BEHALF AND ON BEHALF OF THE MOHAWKS OF AKWESASNE, INCLUDING SANDRA BOOTS, FREDERICK DAVID JOCK, DOROTHY COLE, CLARISSA COOK, KATSITSIKWAS LAZORE, CHARLES DELORMIER, SHAILEI S. SQUARE, GERALD BRADLEY GEORGE, PAULINE THOMPSON, LORENE H. HERNE, MARK MITCHELL, FELICIA SUNDAY, PAULINE LOIS TERRANCE, LUCILLE ROUNDPOINT, CONNIE HALL, BEVERLY TERRANCE, JOEY TEHORON:IO DAVID, STEVEN THOMAS, BEVERLY THOMPSON, THERESA TERRANCE, HARVEY BOOTS, CHELSEA RAE OAKES, LARRY ARONHIAIES HERNE, STEPHANIE JOHNSON, JASON LEAF, WILFRED DAVID, NELSON LEAF, BARRY CURTIS THOMPSON, ROBERT GILBO, ELIZABETH LAZORE, WAYLON DAVID WHITE, KATHY HERNE, ARLENE THOMAS, PAUL THOMAS, ROSEMARY SQUARE, DAVID HERNE, E. PELLETIER, COREY BOUGH, KRISTIN COOK, RICHARD THOMPSON, KRISTIN RANSOM, DONNA DELORMIER, STEVEN JOHNSON, CARRIE LAZORE, HOLLEY BOOTS, OREN THOMPSON, WARREN THOMPSON, VERONICA JACOBS, CARL BERO, EDITH MCDONALD, SUSAN BENEDICT-SQUARE, DONALD DELORMIER, DONNA JOCKO, TOBY ROUNDPOINT, ERIN ROURKE, TAMMY LYNN DAVID, JAKE AND BRENDA LAFRANCE, LARRY DAVID, JOEY DAVID, DONALD DELORMIER, DONNA MARIE THOMPSON RANSOM, BRUCE TARBELL, MICHAEL RANDY MITCHELL, FREDERICK MITCHELL, DACY THOMPSON, TIA THOMPSON, KIMBERLY JACOBS, RONALD THOMPSON, CARRIE FRANCIS-SQUARE, MARIA COLON, ALEXANDER DELORMIER, THERESA ADAMS, JAKE LAFRANCE, SUSAN WHITE, |

STEVEN JOHNSON, JORDAN MITCHELL,
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VICTOR MARTIN, ABRAHAM GRAY,
BARRY BRADLEY, LEIGHANN NEFF,
TIMOTHY KING, LORRAINE THOMPSON,
JOHN PETERS, RACHEL SQUARE, SEAN LEONARD,
THOMAS JOHNSON, JOHN FRANCIS

v

THE HONOURABLE VIC TOEWS, in his capacity as
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS AND
CANADA BORDER SERVICES AGENCY

| | |
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| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | MARCH 17, 2015 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | BARNES J. |
| **DATED:** | MAY 11, 2015 |

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