Federal Court  Cour fédérale

Date: 20141125

Docket: T-1737-13

Citation: 2014 FC 1126

Ottawa, Ontario, November 25, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

LUC DES ROCHES

Applicant

and

WASAUKSING FIRST NATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr. Des Roches, seeks judicial review with respect to the actions or decisions of the Wasauksing First Nation which imposed a surcharge on each carton of tax exempt and unmarked cigarettes allocated to retailers on the First Nation. Mr. Des Roches seeks: a Declaration that the surcharge imposed in 2012 and 2013 is unlawful; an Injunction to prohibit the First Nation from levying the surcharge in this fiscal year and in future fiscal years; and, an Order that the First Nation refund all of the money collected by the First Nation from him during 2012, 2013 and part of the current fiscal year.

[2] For the more detailed reasons that follow, the application is dismissed. This Court does not have jurisdiction to hear and determine this application for judicial review; the First Nation was not acting as a "federal board, commission or tribunal" within the meaning of section 2 of the *Federal Courts Act*, RSC 1985, c F-7, when it imposed the surcharge on the tax exempt cigarettes which it allocated to reserve retailers pursuant to the Ontario *Tobacco Tax Act*, RSO 1990, c T 10, and the Tobacco Retailer Agreement between the First Nation and the Ontario Ministry of Finance.

Background

[3] Mr. Des Roches is a member of the Wasauksing First Nation and resides on the Wasauksing reserve on Parry Island, Parry Sound, Ontario. He runs the Rezmart convenience store and sells, among other things, tax exempt cigarettes to other members of the First Nation.

[4] The Wasauksing First Nation entered into the Tobacco Retailer Agreement with the Ontario Ministry of Finance in 1999 regarding the sale of tax exempt, unmarked cigarettes. The First Nation receives a quota of the cigarettes which it then allocates among the retailers on the reserve. The quota is 20% greater than what would be available for allocation directly from the Ministry of Finance if the First Nation had not entered into the Tobacco Retailer Agreement.

[5] Mr. Des Roches has received an allocation of the quota since 2007.

[6] Beginning in 2012, the Wasauksing First Nation has imposed a surcharge of $2 on each carton of tax exempt cigarettes allocated to the reserve retailers.

[7] The First Nation did not pass a by-law regarding the imposition of the surcharge. Retailers were advised by letter dated April 10, 2012 that the surcharge would be imposed and payable in instalments. The First Nation passed a motion on June 18, 2013 that the "tobacco surcharge be utilized for Sports & Recreation based requests from the youth (under 30 yrs. old)".

[8] The applicant characterizes this as an unlawful tax.

[9] In this application for judicial review, the applicant seeks:

- A Declaration that, during the years of 2012 and 2013, the First Nation acted without jurisdiction or beyond its jurisdiction and unlawfully levied a tax of $2.00 upon him for each carton of unmarked cigarettes allocated to him pursuant to the Retail Agreement;
- An Injunction prohibiting the First Nation from levying further tax upon allocations of unmarked cigarettes to the applicant in the fiscal year ending March 31, 2015 and years following;
- A Writ of Mandamus or Order that the First Nation refund all of the taxes paid by the applicant for the fiscal years ending March 31, 2013 and 2014 and any part paid by the applicant for the fiscal year ending March 31, 2015 (prior to the date of the hearing of this application); and
- The costs of the application.

Issues

[10] The key issue is whether the Federal Court has jurisdiction to hear and determine this application for judicial review and, if so, to grant the relief requested. This depends on whether the Wasauksing First Nation was acting as a "federal board, commission or tribunal" within the meaning of section 2 of the *Federal Courts Act* when it allocated the tax exempt or unmarked cigarettes among retailers on the First Nation and imposed and collected the surcharge.

[11] The related issue is whether the First Nation was exercising its right to contract when it offered an allocation of the quota of cigarettes to retailers including Mr. Des Roches and the other retailers who applied for their allocation and, in doing so, agreed to pay the surcharge. The Federal Court would not have the jurisdiction to judicially review the actions or decisions of a First Nation based on its right to contract.

[12] If the Court has jurisdiction, the issue is whether the surcharge imposed is a tax, an administrative fee or a fee for the disposition of the Band's property subject to an agreement and whether the First Nation exceeded its authority in imposing the tax or fee.

The relevant statutory provisions are set out in Annex A

The applicant's position

Jurisdiction

[13] The applicant asserts that the Federal Court has jurisdiction because the First Nation falls within the definition of "federal board, commission or other tribunal" under subsection 2(1) of the *Federal Courts Act*. Accordingly, the exclusive jurisdiction granted to this Court by subsection 18(1) and section 18.1 of the *Federal Courts Act* applies to the actions of the First Nation, including the imposition of the surcharge.

[14] The applicant further argues that the Federal Court has jurisdiction to review the First Nation's decision to impose the surcharge because the surcharge was in fact a tax. In the present

case, the First Nation purports to exercise its power to tax under the *Indian Act*, RSC 1985, c I-5, but has exceeded its authority.

[15] The applicant submits that the provincial legislation, the Ontario *Tobacco Tax Act*, does not authorize the First Nation to tax. Nor does the Tobacco Retailer Agreement, which sets out the responsibilities of the First Nation's Band Council to allocate the quota of tax exempt cigarettes, authorize the First Nation to impose a tax or surcharge.

[16] Therefore, the First Nation has exceeded its authority under the Ontario *Tobacco Tax Act* and the Tobacco Retailer Agreement, and has purported to exercise authority to tax pursuant to the *Indian Act*, but has also exceeded this authority.

There is no contract

[17] The applicant disputes that the imposition of the surcharge is a term of the contract between the reserve retailers and the First Nation. The applicant submits that the First Nation is not exercising its private right to contract in imposing the surcharge. Rather, it is exercising a public power that affects retailers and the Band members who purchase the cigarettes.

[18] The applicant submits that *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536, 424 FTR 125 (Eng) [*Gamblin*], relied on by the respondent, does not stand for the proposition that only where the power exercised affects a large portion of the Band would it be public. Here, any decision that affects any part of the First Nation, i.e., retailers and their customers, would be a public matter.

[19] The applicant argues that the power exercised by the First Nation in allocating the quota is based on the Ontario *Tobacco Tax Act* and the Tobacco Retailer Agreement. The First Nation only has the power to allocate the quota and not to contract with retailers or sell the quota to them.

[20] The applicant argues that based on factors set out in *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 60, 211 ACWS (3d) 254 [*Air Canada*], which guide whether an issue is public or private in character, the imposition of the surcharge is a public matter. The applicant submits that: members of the public, i.e., retailers and their customers, are affected; the First Nation is a public body and its decision to levy the surcharge is purportedly for the public purpose of youth sports and recreation; the surcharge is not authorized by statute or regulation; the First Nation is an agent of the provincial government in allocating the quota; the surcharge is compulsory because retailers cannot obtain their quota unless they pay the surcharge; and, the surcharge has an exceptional effect on the interests of a broad segment because it affects the customers of the retailers.

The surcharge is a tax

[21] The applicant submits that the surcharge is a tax and the First Nation has no authority or exceeds its authority in imposing this tax on the sale of goods (i.e., cigarettes). Paragraph 83(1)(a) of the *Indian Act* only authorizes the Band to tax land or interests in land, and not the sale of goods. Although paragraph 83(1)(f) allows for the raising of money from band members to support band projects, this provision does not permit taxation.

[22] The applicant further submits that, whether or not the Band has the power to tax the sale of goods, it did not pass a by-law or obtain the approval of the Minister of Indian Affairs and Northern Development (now Aboriginal Affairs and Northern Development) to do so in contravention of subsection 83(1) of the *Indian Act*.

[23] The applicant argues that the factors relied on by the respondent set out in *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, [1931] SCR 357, [1931] 2 DLR 193 [*Lawson*], in fact support the applicant's position that the surcharge is a tax.

[24] In *Lawson,* the Court found the levy at issue to be a tax because: the levy was enforceable by law; the failure to pay was an offence; the levy was imposed by a public body; and the levy was for a public purpose.

[25] The applicant argues that, in this case, the surcharge is enforceable because: the retailer cannot get their quota unless they pay the surcharge; the First Nation has imposed its own sanction, i.e., no allocation if the surcharge is not paid; the First Nation Band Council is elected by the Band members and given the powers to regulate the Band members; and, the funds raised are in part for the public purpose of sports and recreation.

[26] The applicant adds that in *Lawson*, the Court found that a levy that had a tendency to affect the price of the product, as in the present case, is in the nature of an indirect tax.

[27] The applicant argues that the surcharge or tax is not an administrative fee because the First Nation collects far more than the administrative costs associated with allocation of the quota, which are approximately $2000 per year as acknowledged by the Chief.

[28] The applicant also submits that, although the Band Council considered a motion to use the surcharge for sports and recreation projects for youth on the reserve, the funds have not been fully used for that purpose.

[29] The applicant argues that the respondent's reliance on *Boniferro Mill Works ULC v Ontario*, 2009 ONCA 75, 308 DLR (4th) 739 [*Boniferro*], is not applicable. In that case, the Court applied *Lawson* to find that Ontario had levied a tax on Boniferro in the course of selling timber. The Ontario Court of Appeal found that the levy was not a tax but part of the sale price.

[30] The applicant submits that the surcharge cannot be characterized as a fee for the sale or disposition of property because the First Nation never had any property rights in the cigarettes. Neither the *Tobacco Tax Act* nor the Tobacco Retailer Agreement gives any property rights to the quota to the Band. The First Nation does not dispose of this property; it only administers the quota as an agent of the province and the cigarettes go directly to the retailers once the quota is allocated.

[31] The applicant also argues that, without the Tobacco Retailer Agreement, the province would allocate the quota directly to the retailers. The First Nation, as agent for the province, has

an obligation to allocate the quota and cannot offer to allocate in exchange for the payment of a surcharge.

The respondent's position

[32] The respondent submits that this Court does not have jurisdiction to consider the application for judicial review; the First Nation derived its authority from the provincial legislation and/or its inherent right to contract. In addition, the surcharge is not a tax and the First Nation did not exceed its authority under the *Indian Act* in imposing the surcharge.

Jurisdiction

[33] The respondent argues that the Federal Court does not have jurisdiction because the Band was not acting as a "federal board, commission or tribunal" as defined by subsection 2(1). As such, subsection 18(1) and section 18.1 would not apply.

[34] To determine whether the First Nation falls within section 2, the two-step analysis set out in *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 at para 29, 185 ACWS (3d) 354 [*Anisman*], must be applied: it must be determined what jurisdiction or power the body or person seeks to exercise; and the source or the origin of the jurisdiction or power which the body or person seeks to exercise must be determined. While the character of the institution is a significant factor in the analysis, the character of the power being exercised is determinative (*Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No 38B (Wauzhushk Onigum Nation)*, 2008 FC 812 at para 33, [2009] 2 FCR 267 [*Devil's Gap*]).

[35] The respondent submits that the First Nation was acting under authority of the Ontario *Tobacco Tax Act*. In order for a federal body or decision-maker to fall within the definition, it is not sufficient that it sometimes be recognized as a "federal board, commission, or other tribunal", as is often the case with Indian Bands (*Gamblin*, above, at para 31). It is also necessary to determine that it is "exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown…." (*Federal Courts Act*, subsection 2(1)) and that does not include powers conferred under a provincial statute.

[36] In this case, the federal body, i.e., the First Nation, was acting under the statutory authority of a provincial statute, the Ontario *Tobacco Tax Act*. Therefore, this Court does not have jurisdiction under section 18.1 to review the Band's actions. The Wasauksing First Nation was, therefore, not acting as a "federal board, commission or other tribunal" within the meaning of subsection 2(1).

The surcharge is a term of a private contract

[37] The respondent submits that the Band was not acting as a "federal board, commission or tribunal" because it was exercising its power to contract. The Band's decision to impose the surcharge is not related to the exercise of statutory authority under the *Indian Act* and does not deal with a matter of public interest and is, therefore, not open to judicial review.

[38] The respondent submits that First Nation Band Councils do not gain all their powers from Parliament. They possess the express and implied power to contract, without the need for

authority under the *Indian Act*, and this is not subject to judicial review (*Devil's Gap*, above, at paras 46 and 60). The respondent notes several examples of cases where the Federal Court and the Federal Court of Appeal have refused to review actions and decisions made by Band Councils acting under their private power to contract (*Peace Hills Trust Co v Moccasin*, 2005 FC 1364 at paras 60-62, 281 FTR 201 (Eng); *Cottrell v Chippewas of Rama Mnjikaning First Nation*, 2009 FC 261 at paras 82 and 95, 342 FTR 295 (Eng); and *Devil's Gap*, above).

[39] The agreement between the retailers and the First Nation is a contract. In exchange for the allocation of cigarettes, the retailers agree to pay $2 per carton to the First Nation. By submitting his application for an allocation, the applicant agreed to be bound by the terms offered by the Band, of which the applicant was fully aware, and which included paying the surcharge. The contract was formed when the Band accepted the application.

[40] The respondent notes that the allocation of cigarettes by the Ontario Ministry of Finance to the Band is 20% greater when there is a Tobacco Retailer Agreement in place. Although the retailers could get an allocation directly from the Ministry of Finance pursuant to section 5 of Ontario Regulation 649/93, if there is no Tobacco Retailer Agreement between the First Nation and the Ministry of Finance, the retailers would receive a lesser amount. The Tobacco Retailer Agreement provides a commercial benefit, which is passed on to the retailers who apply for an allocation and share in the greater quota.

[41] The respondent notes that the retailers receive their allocation and are expected to pay the surcharge in quarterly instalments during the year. If they do not pay the surcharge, they may be

refused an allocation in the next year or the First Nation could pursue a remedy in contract Band, but the quota for the current year remains intact.

[42] The applicant received a benefit of the 20% increase in the annual quota based on the agreement between the First Nation and Ontario. The respondent argues that the applicant applied for his allocation knowing of the surcharge. He received a benefit – a greater amount of cigarettes and the profits from the sale of the cigarettes. This is a contractual matter; there is no element of public interest.

[43] The respondent submits that to determine whether a power is private in nature, without any public element, flavour or character (*Gamblin*, above, at paras 53 and 54), the factors identified by the Federal Court of Appeal in *Air Canada* (above, at para 60) must be considered.

[44] The respondent argues that applying the *Air Canada* factors supports the respondent's position that this is a private matter, without any element of public interest. The respondent submits that the contract, including the surcharge attached to the allocation of the quota, does not fall within the definition of "federal board, commission or tribunal" under subsection 2(1) of the *Federal Courts Act* and would not be subject to judicial review.

The surcharge is not a tax

[45] The respondent submits that the surcharge imposed on each carton of cigarettes allocated to reserve retailers is not a tax.

[46] The respondent relies on *Lawson*, which established that a tax necessarily consists of four elements (above, at p 363): enforceable by law; imposed under the authority of the legislature; imposed by a public body; and, imposed for a public purpose. The respondent submits that three of the factors are not met. The respondent acknowledges, however, that First Nation Band Council may sometimes be considered a public body and that a charge may be considered to be imposed for a public purpose if the money goes to a purpose other than defraying the costs of administering the program that imposes the charge (*Westbank First Nation v British Columbia Hydro Power Authority*, [1999] 3 SCR 134 at para 37, 176 DLR (4th) 276; *Eurig Estate (Re)*, [1998] 2 SCR 565 at para 20, 165 DLR (4th) 1).

[47] The respondent submits that the surcharge is not enforceable by law. If a retailer applies for a quota of cigarettes for retail, the retailer agrees to pay the surcharge. There are no legal consequences for retailers who do not apply for their quota or pay the surcharge (other than perhaps not receiving their next allocation of cigarettes). The Band's only recourse for non payment is to sue for breach of contract. The respondent also notes that the Chief indicated in cross-examination that, although Mr. Des Roches had outstanding amounts for the surcharge owing, no efforts had been made to collect it.

[48] The surcharge is not a tax because a tax must be imposed by statute, regulation or by-law, which is not the case here.

[49] The respondent also argues that, even if all the criteria of *Lawson* were met, the surcharge would not be a tax because it is a fee charged by a public body for disposition of property and such fees are not considered to be taxes (*Boniferro*, above, at para 38). The First Nation should be able to impose a fee for the disposition or allocation of the quota since the fee is payable only by those who agree to do so by applying for an allocation.

This Court has no jurisdiction

[50] In the related case *Luc Des Roches v Wasauksing First Nation*, 2014 FC 1125, I found that this Court does not have jurisdiction to consider the application for judicial review of an allocation of tax exempt cigarettes to a retailer that the applicant alleged did not operate on reserve lands. For similar reasons, I find that the Federal Court does not have jurisdiction to consider this application for judicial review.

[51] While decisions made by a First Nations Band Council often come within the meaning of subsection 2(1) of the *Federal Courts Act*, this is not always the case (*Ermineskin First Nation v Minde*, 2008 FCA 52, 168 ACWS (3d) 225). As I noted in 2014 FC 1125, the two-stage analysis established by the Federal Court of Appeal in *Anisman* is necessary and the source of the power or authority being exercised is the determinative consideration.

[52] In *Anisman* the Court of Appeal noted:

> [29] The operative words of the s. 2 definition of "federal board, commission or other tribunal" state that such a body or person has, exercises or purports to exercise jurisdiction or powers "conferred by or under an Act of Parliament or by or under an Order made pursuant to a prerogative of the Crown…". Thus, a two-step enquiry must be made in order to determine whether a body or person is a "federal board, commission or other tribunal". First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise.
>
> [30] In *Judicial Review of Administrative Action in Canada*, Vol. 1, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 2:4310, the learned authors, D.J.M. Brown and J.M. Evans, state that in determining whether a body or person is a "federal board, commission or other tribunal", one must look at "the source of a tribunal's authority". They write as follows:
>
> > In the result, the *source* of a tribunal's authority, and not the *nature* of either the power exercised or the body exercising it, is the primary determinant of whether it falls in the definition. The test is simply whether the body is empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown. […]

[53] The applicant pointed to the decision of the Ontario Superior Court of Justice in *Kozeyah v Serpent River First Nation*, [2007] 2 CNLR 226 (available on CanLII), in support of his argument that the Federal Court does have jurisdiction. That case also raised the issue of the allocation of tax exempt cigarettes. However, that case dealt with a motion to strike the claim for lack of a proper cause of action. The judge's brief comment that the Federal Court would otherwise have jurisdiction is clearly *obiter* and did not follow from any analysis of the jurisdictional issue. Moreover, the decision of the Federal Court of Appeal in *Anisman* is authoritative and has been relied on by this and other Courts.

[54] In the present circumstances, the First Nation was not empowered by any federal legislation; rather, it made the decision to allocate the quota of tax exempt cigarettes based on the authority provided by the *Tobacco Tax Act* of Ontario, the Regulation 649/93 to that Act and the Tobacco Retailer Agreement with the Ontario Ministry of Finance.

[55] The First Nation's imposition of the surcharge is directly related to and arises from its authority to administer and allocate the quota of tax exempt cigarettes in accordance with the Ontario *Tobacco Tax Act* and the Tobacco Retailer Agreement between the First Nation and the Ontario Ministry of Finance. The imposition of the surcharge has nothing to do with the *Indian Act*. If the First Nation had no cigarettes to allocate, the surcharge issue would not arise.

[56] The First Nation's decision to impose a surcharge on each carton of cigarettes allocated pursuant to the Tobacco Retailer Agreement and Ontario *Tobacco Tax Act* would not fall within the definition of "federal board, commission or tribunal" in subsection 2(1) of the *Federal Courts Act*. The decision would, therefore, not be subject to the Court's jurisdiction.

[57] If I am wrong in my conclusion, that this Court does not have jurisdiction, because the source of the authority being exercised by the First Nation is the provincial statute and Tobacco Retailer Agreement, I would also find that the imposition of the surcharge was a contractual matter. The First Nation was not acting as a "federal board, tribunal or commission" when exercising its right to contract and the Court would not have jurisdiction under subsection 18(1) or section 18.1 to consider this application for judicial review or grant the relief requested.

[58] The reserve retailers benefit from the Tobacco Retailer Agreement between the First Nation and the province because those who apply for and receive an allocation share in the greater quota the First Nation receives from the province. Although the respondent is correct that, if there were no Tobacco Retailer Agreement in place, the retailers would still receive an allocation, that allocation would be less.

[59] I disagree with the applicant that this contract is public in nature and, therefore, subject to judicial review. The applicant points to the factors set out in *Air Canada* that support his position, as does the respondent.

[60] The *Air Canada* factors at para 60 include: the character of the matter for which review is sought, whether it is a private, commercial matter or is of broader import to members of the public; the nature of the decision-maker and its responsibilities; whether the decision-maker is public in nature, such as a Crown agent or a statutorily-recognized administrative body, and charged with public responsibilities; the extent to which a decision is founded in and shaped by law as opposed to private discretion (noting that matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review: *Irving Shipbuilding Inc v Canada (Attorney General),* 2009 FCA 116, [2010] 2 FCR 488; *Devil's Gap*, above, at paras 45-46); the decision-makers relationship to other statutory schemes or other parts of government; the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity; the suitability of public law remedies;

the existence of compulsory power; and an "exceptional" category of cases where the conduct has attained a serious public dimension.

[61] In my view, the application of the factors set out in *Air Canada* tips the analysis toward the determination that this was a private matter, including that: it is a commercial matter, with little or no broader impact to other members of the public except the four retailers who receive an allocation of the quota; although the Band does exercise other decision-making powers more in the public interest of its members, the allocation of the quota is of a different nature; the Band is not acting as an agent of the Government in imposing the surcharge, although it does act as middleman or agent for the province in allocating the tax exempt cigarettes pursuant to an agreement with the provincial government; public law remedies, although desired by the applicant, are not appropriate; and, there is no serious or exceptional effect on the rights or interests of the broader public. There is no evidence that the imposition of the surcharge is a cost passed on to the customers on the reserve and that the surcharge impacts the "public" who purchase cigarettes on the reserve in any way.

[62] Although not raised by either of the parties, I would distinguish the recent decision of my colleague, Justice Gleason, in *Maloney v Council of the Shubenacadie Indian Band* 2014 FC 129, 237 ACWS (3d) 829 [*Maloney*]. In *Maloney*, Justice Gleason, following the factors set out in *Air Canada*, found that the distribution by the Shubenacadie Indian Band Council of an allocated quota for fishing licenses was *public* rather than private in nature. However, unlike the present case, that quota was allocated pursuant to a federal statute (the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332) and the allocation process involved a close

relationship between the Band and the Federal Minister. As such, a majority of the *Air Canada* factors pointed strongly to the decision being of a public nature, which is not be the case here.

The surcharge does not have the hallmarks of a tax

[63] If the Court had jurisdiction, which it does not, the applicant's argument that the First Nation exceeded its authority under the *Indian Act* and imposed a tax would require consideration.

[64] As noted above, the First Nation imposed the surcharge as part of its allocation of tax exempt cigarettes pursuant to the Ontario *Tobacco Tax Act* and the Tobacco Retailer Agreement and/or as a matter of contract. I have found that it did not rely on the *Indian Act* to impose the surcharge.

[65] More generally, I disagree with the applicant that the *Lawson* factors support his contention that the surcharge is a tax.

[66] The surcharge is not enforceable by law and failure to pay is not an offence. The First Nation could choose to withhold the quota in future years to retailers who had not paid the amounts owing or it could pursue remedies for breach of contract. The evidence of the Chief is that no efforts have been made to collect unpaid surcharge amounts.

[67] Although a First Nation can be considered a public body, in these circumstances, its actions are only directed at the four reserve retailers who apply for an allocation of the quota and

agree to the terms and conditions associated with that allocation. There is no evidence that the imposition of the surcharge has any impact on the cost of the cigarettes to the customer. Even Mr. Des Roches indicated that he had not passed on this cost to his customers.

Conclusion

[68] The application for judicial review is dismissed with nominal costs to the respondent.

[69] Although the applicant has pursued judicial review to show his disfavour with the surcharge, no doubt there are other ways for him to voice his concerns within his community.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

The respondent shall have costs in the amount of $1000.

"Catherine M. Kane"

Judge

ANNEX A

Relevant statutory provisions

Federal Courts Act, RSC 1985, c F-7:

2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

Indian Act, RSC 1985, c I-5:

83. (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,	83. (1) Sans préjudice des pouvoirs que confère l'article 81, le conseil de la bande peut, sous réserve de l'approbation du ministre, prendre des règlements administratifs dans les domaines suivants :
(a) subject to subsections (2) and (3), taxation for local	a) sous réserve des paragraphes (2) et (3), l'imposition de taxes

purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

à des fins locales, sur les immeubles situés dans la réserve, ainsi que sur les droits sur ceux-ci, et notamment sur les droits d'occupation, de possession et d'usage;

[…]

[…]

(f) the raising of money from band members to support band projects; and

f) la réunion de fonds provenant des membres de la bande et destinés à supporter des entreprises de la bande;

(g) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

g) toute question qui découle de l'exercice des pouvoirs prévus par le présent article, ou qui y est accessoire.

83. (2) An expenditure made out of moneys raised pursuant to subsection (1) must be so made under the authority of a by-law of the council of the band

83. (2) Toute dépense à faire sur les fonds prélevés en application du paragraphe (1) doit l'être sous l'autorité d'un règlement administratif pris par le conseil de la bande.

83. (3) A by-law made under paragraph (1)(a) must provide an appeal procedure in respect of assessments made for the purposes of taxation under that paragraph.

83. (3) Les règlements administratifs pris en application de l'alinéa (1)a) doivent prévoir la procédure de contestation de l'évaluation en matière de taxation.

83. (4) The Minister may approve the whole or a part only of a by-law made under subsection (1).

83. (4) Le ministre peut approuver la totalité d'un règlement administratif visé au paragraphe (1) ou une partie seulement de celui-ci.

83. (5) The Governor in Council may make regulations respecting the exercise of the by-law making powers of bands under this section.

83. (5) Le gouverneur en conseil peut, par règlement, régir l'exercice du pouvoir réglementaire de la bande prévu au présent article.

83. (6) A by-law made under

83. (6) Les règlements

this section remains in force only to the extent that it is consistent with the regulations made under subsection (5).	administratifs pris en application du présent article ne demeurent en vigueur que dans la mesure de leur compatibilité avec les règlements pris en application du paragraphe (5).

Tobacco Tax Act, RSO 1990, c T 10:

13.5 (1) Subject to the approval of the Lieutenant Governor in Council, the Minister, on behalf of the Crown, may enter into arrangements and agreements with a council of the band with respect to tobacco. 2011, c. 15, s. 25 (1).	13.5 (1) Sous réserve de l'approbation du lieutenant-gouverneur en conseil, le ministre peut conclure avec le conseil d'une bande, au nom de la Couronne, des arrangements et des accords à l'égard du tabac. 2011, chap. 15, par. 25 (1).
(2) The Minister, on behalf of the Crown, may enter into such arrangements and agreements with a council of the band as the Minister considers necessary for the purposes of the administration and enforcement of this Act on a reserve. 2011, c. 15, s. 25 (1).	(2) Le ministre peut conclure avec le conseil d'une bande, au nom de la Couronne, les arrangements et les accords qu'il estime nécessaires aux fins de l'application et de l'exécution de la présente loi dans une réserve. 2011, chap. 15, par. 25 (1).
(3) An arrangement or agreement entered into under subsection (2) may authorize a system for the sale of tobacco products and unmarked tobacco products to Indians who are exempt from the payment of the tax imposed by this Act, and the arrangement or agreement may provide for limits on the quantity of tobacco products and unmarked tobacco products to be sold to retail dealers for	(3) Tout arrangement ou accord conclu en vertu du paragraphe (2) peut autoriser un mécanisme de vente des produits du tabac et des produits du tabac non marqués aux Indiens qui sont exonérés du paiement de la taxe prévue par la présente loi. L'arrangement ou l'accord peut prévoir des limites sur la quantité de produits du tabac et de produits du tabac non marqués qui peuvent être

resale to consumers who are Indians. 2011, c. 15, s. 25.	vendus à des détaillants en vue d'être revendus à des consommateurs qui sont des Indiens. 2011, chap. 15, art. 25.
(4) If a council of the band enters into an arrangement or agreement that provides for a system described in subsection (3) with respect to a reserve, a regulation made under clause 41 (1) (p) does not apply with respect to the reserve. 2011, c. 15, s. 25 (1).	(4) Si un conseil de bande conclut un arrangement ou un accord qui prévoit un mécanisme visé au paragraphe (3) à l'égard d'une réserve, un règlement pris en vertu de l'alinéa 41 (1) p) ne s'applique pas à cette réserve. 2011, chap. 15, par. 25 (1).

Tobacco Tax Act, O Reg 649/93:

2. (2) This Regulation applies to all reserves unless a specific regulation is passed that exempts a reserve from this Regulation and sets out an alternative method for the distribution of unmarked cigarettes to reserve retailers by incorporating the terms of an agreement that may be entered into between the Minister and a council of the band. O. Reg. 649/93, s. 2 (2).

4. (1) To facilitate the availability of unmarked cigarettes for purchase by Indian consumers, a council of the band may allocate the annual quantity of unmarked cigarettes as determined under section 3 among each reserve retailer based on the volume of the retailer's sales to the reserve community and the off-reserve community for their own consumption. O. Reg. 649/93, s. 4 (1).

(2) The council of the band shall advise the Minister of any allocation it makes. O. Reg. 649/93, s. 4 (2).

(3) So long as the council of the band complies with this Regulation, the Minister shall provide to each reserve retailer to whom the council of the band has made an allocation an authorization to purchase the allocated amount of unmarked cigarettes from the supplier chosen by the reserve retailer. O. Reg. 649/93, s. 4 (3).

5. (1) If a council of the band has not made allocations as described in subsection 4 (1), the Minister may do so instead, in accordance with section 3. O. Reg. 649/93, s. 5 (1).

(2) If the Minister makes allocations under subsection (1), the Minister shall make such inquiries as the Minister considers appropriate to determine who are reserve retailers and what is the volume of their business, and the Minister shall make the allocations based on that information. O. Reg. 649/93, s. 5 (2).

(3) The Minister shall provide to each reserve retailer, as determined under subsection (2), an authorization to purchase an allocated amount of unmarked cigarettes from the supplier chosen by the reserve retailer. O. Reg. 649/93, s. 5 (3).

Tobacco Retailer Agreement between the Queen in right of Ontario, represented by the Minister of Finance and the Wasauksing First Nation, 1999

THE COUNCIL and THE MINISTER agree as follows:

The COUNCIL will assign the annual quantity of unmarked cigarettes, available up to March 31, 1999 (the initial period) and the annual quantity available for the following 12 month periods April 1 to March 31, among the retailers doing business on Parry Island I.R. No.16 and will monitor their sales of unmarked cigarettes and tobacco to ensure that they are not resold to non-First Nations people.

[…]

Responsibilities of the COUNCIL are as follows:

1. To specify the quantity of unmarked cigarettes and tobacco that each reserve retailer may purchase during the initial period and following years, based on the volume of the reserve retailer's sales to the reserve community and off-reserve community for their own consumption.

2. The total amount of unmarked cigarettes and tobacco assigned among all reserve retailers shall not exceed the **total amount** of unmarked cigarettes and tobacco specified for the initial period, or as the Minister may advise for the following years. One cigarette is equal to one gram of tobacco.

3. The quantity of unmarked cigarettes and tobacco given to a retailer for a year continues in each following year until altered or cancelled by the COUNCIL.

4. Should the COUNCIL wish to increase the quantity of unmarked cigarettes and tobacco that a retailer may purchase

during a year, there must be a corresponding reduction in the quantity of unmarked cigarettes and tobacco that another retailer or retailers may purchase during the year. COUNCIL will permit these changes only at the beginning of the month.

5. Where the COUNCIL suspends or cancels a reserve retailer's right to purchase unmarked cigarettes and tobacco and wishes to transfer the right to another reserve retailer, the COUNCIL may transfer only the unpurchased portion for that year.

[…]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1737-13
STYLE OF CAUSE:	LUC DES ROCHES v WASAUKSING FIRST NATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 18, 2014
JUDGMENT AND REASONS:	KANE J.
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APPEARANCES:

Christopher James Sparling	FOR THE APPLICANT
T. Michael Strickland	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Christopher James Sparling Barrister at Law Toronto, Ontario	FOR THE APPLICANT
Buset & Partners Barristers & Solicitors Thunder Bay, Ontario	FOR THE RESPONDENT