2007 FC 259, [2007] 2 C.T.C. 191, 2007 G.T.C. 1465 (Eng.), [2007] G.S.T.C. 28,
[2007] 3 C.N.L.R. 1

2007 CarswellNat 495

Acadia Band v. Minister of National Revenue

The Acadia Band, Applicant and The Minister of National Revenue, Respondent

Federal Court

Blanchard J.

Heard: January 9, 2007
Judgment: March 7, 2007
Docket: T-2187-05

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Counsel: D. Bruce Clarke, Brian K. Awad for Applicant

Peter J. Leslie for Respondent

Subject: Goods and Services Tax (GST); Public; Constitutional

Tax --- First Nations taxation -- Liability of aboriginal persons for federal taxes -- Goods and Services Tax

Applicant was band under Indian Act -- Band owned two retail convenience stores located on reserve lands from which sales were made to both Indians and non-Indians -- In 1997, Band established its own commodity-tax regime intended to fulfil communal sharing tradition by meeting community needs -- Band maintained that initiative was exercise of self-government that amounted to modern expression of communal sharing tradition -- Businesses which were required to collect and remit both GST/HST and commodity tax would be rendered non-competitive and economically unviable -- Minister issued notice of reassessment against Band for failure to collect GST/HST as required under Excise Tax Act ("ETA") on sales to non-Indians -- Band filed notice of objection arguing that imposition by Minister of requirement to collect and remit GST/HST prevented Band from being able to exercise self-government to fulfil or continue communal sharing tradition to meet needs of community -- Minister dismissed objection and confirmed assessment -- Band brought appeal to Tax Court of Canada and simultaneously brought application for judicial review in Federal Court -- Issues on application for judicial review were whether there was duty on Crown to consult and accommodate before requiring Band to collect and remit GST/HST pursuant to ETA and, if yes, whether that duty was breached -- Application dismissed -- Commodity tax was not current activity that was modern expression of practice, custom or tradition of "communal sharing" and was consequently not exercise of aboriginal right protected by s. 35 of Constitution Act, 1982 -- Provisions of ETA imposing obligation on vendors to collect and remit GST/HST on sales to non-Indians did not infringe Band's aboriginal rights -- Crown's duty to consult and accommodate was not engaged -- There was practice, custom or tradition at time of contact described as "communal sharing tradition" that was integral to distinctive culture of Band, but there was no evidence to support conclusion that traditional activity of sharing included notion of amassing or accumulating wealth for purpose of

sharing -- There was no evidence that tradition of communal sharing involved participation of non-Indians -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 165(1).

Cases considered by Blanchard J.:

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) -- followed

Marshall v. Canada (1999), (sub nom. R. v. Marshall) 179 D.L.R. (4th) 193, 1999 CarswellNS 349, 1999 CarswellNS 350, (sub nom. R. v. Marshall) [1999] 4 C.N.L.R. 301, (sub nom. R. v. Marshall) 139 C.C.C. (3d) 391, (sub nom. R. v. Marshall) 247 N.R. 306, (sub nom. R. v. Marshall) [1999] 3 S.C.R. 533, (sub nom. R. v. Marshall) 179 N.S.R. (2d) 1, (sub nom. R. v. Marshall) 553 A.P.R. 1 (S.C.C.) -- considered

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21 C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223 (S.C.C.) -- considered

Pictou v. R. (2003), 2003 CAF 9, (sub nom. Pictou v. Minister of National Revenue) 299 N.R. 329, 2003 CarswellNat 854, (sub nom. Pictou v. Her Majesty the Queen) [2003] 2 F.C. 737, 2003 FCA 9, 2003 CarswellNat 39, [2003] 2 C.N.L.R. 213, [2003] G.S.T.C. 13, 2003 G.T.C. 1543 (Fed. C.A.) -- referred to

R. v. Bernard (2005), 15 C.E.L.R. (3d) 163, (sub nom. R. v. Marshall) 235 N.S.R. (2d) 151, (sub nom. R. v. Marshall) 747 A.P.R. 151, (sub nom. R. v. Marshall) [2005] 2 S.C.R. 220, 255 D.L.R. (4th) 1, [2005] 3 C.N.L.R. 214, 198 C.C.C. (3d) 29, (sub nom. R. v. Marshall) 287 N.B.R. (2d) 206, (sub nom. R. v. Marshall) 750 A.P.R. 206, 2005 CarswellNS 317, 2005 CarswellNS 318, 2005 SCC 43, 336 N.R. 22 (S.C.C.) -- considered

R. v. Sappier (2006), 2006 SCC 54, 2006 CarswellNB 676, 2006 CarswellNB 677, 50 R.P.R. (4th) 1 (S.C.C.) -- considered

R. v. Sparrow (1990), 1990 CarswellBC 105, 1990 CarswellBC 756, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) -- considered

R. v. Vanderpeet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, (sub nom. R. v. Van der Peet) 137 D.L.R. (4th) 289, (sub nom. R. v. Van der Peet) 109 C.C.C. (3d) 1, (sub nom. R. v. Van der Peet) 200 N.R. 1, (sub nom. R. v. Van der Peet) 80 B.C.A.C. 81, (sub nom. R. v. Van der Peet) [1996] 2 S.C.R. 507, (sub nom. R. v. Van der Peet) [1996] 4 C.N.L.R. 177, (sub nom. R. v. Van der Peet) 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) -- followed

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 19 Admin. L.R. (4th) 165, (sub nom. Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)) 327 N.R. 133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403 (S.C.C.) -- considered

Statutes considered:

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Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally -- referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 -- considered

Excise Tax Act, R.S.C. 1985, c. E-15

Pt. IV -- referred to

Pt. IV, Div. VIII -- referred to

s. 277.1(1) "harmonized tax system" [en. 1997, c. 10, s. 234] -- referred to

Indian Act, R.S.C. 1985, c. I-5

Generally -- referred to

s. 87 -- referred to

APPLICATION for judicial review of decision by Minister not to consult and accomodate before enforcing collection from Band for failure to collect GST/HST on sales to non-Indians.

***Blanchard J.*:**

1. Introduction

1 This application for judicial review concerns a decision of the Minister of National Revenue (the Minister) who, on July 28, 2003, denied a notice of objection to an assessment dated December 12, 2001. The Notice of Assessment was issued under provisions of the *Excise Tax Act* (R.S.C. 1985, c. E-15) (the Act) against the Applicant for failure to collect GST/HST as required on sales to non-Indians. The uncollected taxes were attributable retail sales at convenience stores located on reserve lands.

2 In 1997, the Applicant established its own commodity-tax regime to raise revenues which were to be used to "fulfill the communal sharing tradition by meeting community needs". The Applicant maintains that the initiative was an exercise of self-government that amounted to a modern expression of the communal sharing tradition.

3 The Applicant claims that the imposition by the Minister of the requirement to collect and remit GST/HST will prevent, and has prevented, the Applicant from being able to exercise self-government to fulfill or continue the communal sharing tradition to meet the needs of the community.

4 The Applicant further claims that the Respondent has been aware since 1998 of the assertion by the Applicant that the Respondent's actions have the potential to infringe the Applicant's right to self-government and its ability to

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fulfill its obligations pursuant to the communal sharing tradition.

5 The Applicant claims that since its asserted aboriginal right potentially exists, the Minister was required to engage in a process of consultation and accommodation concerning the application and enforcement of the GST/HST provisions of the Act to Band controlled businesses. It is the Applicant's position that the Minister failed to do so. In the result the Applicant claims that the Respondent breached its duty to consult and accommodate the Applicant as contemplated in the decision of *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (S.C.C.). The Applicant seeks an order from this Court which would require the Crown to engage in a process of consultation and accommodation.

2. Background facts

6 The Applicant, the Acadia Band (the Band), is a band under the *Indian Act* (R.S., 1985, c. I-5), and comprises part of the Mi'kmaq Nation. The Band is located on a reserve in south-western Nova Scotia and is governed by a Chief and a Council of elders and councillors, known as the Acadia Band Council.

7 Part IX of the *Excise Tax Act* was enacted in 1990 and beginning in 1991 the Goods and Services Tax (the GST) became applicable to sales and services. It is a law of general application and contains no provision for the exemption of Indians. The Harmonized Sales Tax (HST) is also a tax of general application defined as the "harmonized tax system" in subsection 277.1(1) of the Act.

8 In 1997 the Band Council passed the Acadia Commodity Tax By-Law (the By-law) which required that all corporations and businesses owned by the Acadia First Nation, that sold goods and provided services on the Acadia First Nation reserve lands, collect a 9% tax on goods sold to customers (the Commodity Tax), and remit the tax to the Acadia Band Council. Section 30 of the By-Law provides that "... the Federal GST and HST and any provincial sales tax shall not apply to transactions covered by this By-law". The rationale behind the provision was that businesses which were required to collect and remit both the GST/HST and the Commodity Tax would be rendered non-competitive and economically unviable. Further, Chief Deborah Robinson of the Band attests that the By-law was passed to continue the Mi'kmaq tradition of sharing and reciprocity.

9 The Applicant owned two retail convenience stores located on reserve lands, "Your Winner's World" and "Gold Reserve" from which sales were made to both Indians and non-Indians.

10 Beginning in early 1998, the Minister began enforcement procedures pursuant to Division VIII of Part IX of the *Excise Tax Act* (R.S. 1985, c. E-15). The Minister notified certain suppliers that they were not to sell to the Band-controlled businesses unless the latter charged GST/HST. On February 23, 1998, Chief Robinson sent a letter to the Minister asserting the Applicant's position that the By-law was an "exercise of the inherent right of self-government" and requested a meeting with the Minister.

11 The Acadia Band Council retained an accounting firm to assist in its attempts to engage the Minister in consultation. The Applicant alleges that it dealt with relatively junior employees of the Minister who only discussed terms for reimbursement of the sums due on a going-forward basis. The discussions took place in the context of threatened enforcement action. The Department of Finance had only been open to discuss its own programs or initiatives concerning First Nations and taxes. The Applicant contends that neither the Minister nor the Department of Finance had been willing to engage in a discussion of rights-based issues.

12 The Respondent contends that the Minister's representatives had indeed been engaged in consultation with the Applicant. As early as May 2002, meetings were held concerning the Applicant's indebtedness. Subsequent meetings were held on July 12, 2002, September 10, 2002, April 8, 2003, August 20, 2003, December 9, 2003, February 16, 2004, July 12, 2004, December 14, 2004, and April 20, 2005. In addition to the meetings, numerous

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letters were exchanged between the Applicant's and the Respondent's representatives. The record shows however, that the exchanges between representatives of the Minister and the Applicant essentially concerned collection of the unpaid assessment.

13 By Notice of Assessment dated December 12, 2001, the Applicant was assessed for failure to collect GST/HST as required under the Act on sales to non-Indians. The Applicant filed a Notice of Objection dated March 27, 2002, and by decision of an Appeals officer dated July 28, 2003, the objection was dismissed and the assessment was confirmed. The Applicant appealed this assessment to the Tax Court of Canada on October 30, 2003.

14 On December 12, 2005, the Applicant filed this application for judicial review of the decision on behalf of the Minister to enforce collection to taxes claimed as HST without meaningful consultation and accommodation on the claims of the Band.

15 Since January 2005, due to pressure from the Minister, and under protest, the Acadia Band Council directed its businesses to collect HST, and not to collect the Band Commodity Tax any longer, since the collection of both taxes would render the businesses uncompetitive.

3. The Appeal Officer's decision

16 In his decision of July 28, 2003, the Appeal Officer denied the objection and confirmed the assessment of December 12, 2001. The Appeals Officer summarized the Applicant's two main arguments. First, that the Act is discriminatory in that it imposes an obligation on Indian-owned businesses to collect and remit GST/HST from non-Indian customers. Second, that the same legislation violates the Charter rights of Band Members and offends section 87 of the *Indian Act*. The Appeals Officer observed that this case is analogous to *Pictou v. R.*, 95-3811(GST)G, [2003] 2 F.C. 737, 2003 FCA 9, [2003] G.S.T.C. 13 (Fed. C.A.)[FN*], wherein Justice Bowie reasoned that modern methods of taxation do not offend 18th century treaties between the British and the Mi'kmaq people because 'taxation' was a non-issue to either party in the conduct of "traditional" trade at the time.

17 The Appeals Officer, relying on the Tax Court's decision, concluded that the assessment is well-founded and does not offend the treaty rights of Band Members or section 87 of the *Indian Act*. He further found that the Act does not discriminate against the Band because the Band is operating a modern business that is taxed the same way as other modern businesses operating in the same marketplace. That decision is before the Tax Court of Canada and it is not the decision under review in this application. This judicial review application concerns the issues raised below.

4. Issues

A. Was there a duty on the Crown to consult and accommodate before requiring the Applicant to collect and remit the GST-HST pursuant to the provisions of the Act?

B. If yes, was that duty breached in the circumstances of this case?

5. Standard of Review

18 The first issue deals with the existence of the duty to consult or accommodate. This is a question of law reviewable on the standard of correctness. The second question involves an assessment of the facts in particular circumstances to determine whether the legal duty to consult and accommodate has been met. This is a mixed question of fact and law, generally reviewable on the reasonableness standard. The Supreme Court in *Haida* discussed the applicable standard of review of decisions involving the duty to consult and accommodate in circumstances where aboriginal rights are asserted. The following excerpts at paragraphs 61-62 of the Court's

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reasons for decision find application here:

> On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.* , [1997] 1 S.C.R. 748.
>
> The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, supra, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, supra, at para. 110, "in ... information and consultation the concept of reasonableness must come into play.... So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

6. The Law

19 The Supreme Court has recognized since its decision in *R. v. Sparrow* , [1990] 1 S.C.R. 1075 (S.C.C.), that aboriginal people are "entitled to be consulted about limitations on the exercise of treaty and aboriginal rights." The duty to consult was also confirmed in *Marshall v. Canada*, [1999] 3 S.C.R. 533 (S.C.C.) at paragraph 43.

20 In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (S.C.C.), the Supreme Court elaborated on the duty to consult in particular when the duty arises in respect to asserted Aboriginal rights. At paragraph 25, the Chief Justice writing on behalf of the Court found that "[t]he duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them."

21 In *Haida*, the Supreme Court dealt with the scope and content of the duty to consult and accommodate in the context of an asserted right to Aboriginal title. The Court found that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and the seriousness of the potentially adverse effect upon the right or title claimed. In determining the kind of duties that may arise in different situations, the Court adopted, at paragraphs 42-45 of its reasons, the following approach which it deemed helpful to the analysis:

> Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking

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> together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
>
> At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

22 It is also useful to review the applicable legal principles established in the jurisprudence in assessing the strength of the asserted claim. The Supreme Court in *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), sets out a number of general principles for determining whether an aboriginal practice, custom or tradition qualifies as a "right" pursuant to section 35 of the *Constitution Act, 1982*. I summarize below my understanding of certain principles articulated in *Vanderpeet* which are applicable to the instant case.

- Section 35 is to be given a purposive interpretation (para. 21);

- Section 35 is to be given a generous and liberal interpretation in favour of aboriginal peoples (paras. 23-24);

- Since 1982, Parliament has not been capable of extinguishing aboriginal rights (para. 28);

- In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right (para. 46);

- In order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed (para. 51);

- The court must bear in mind that the activities may be the exercise in a modern form of practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly (para. 54);

- The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies (para. 60).

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7. Analysis

23 My first task is to correctly determine what it is that is being claimed. The Applicant characterizes the asserted aboriginal right as the "communal sharing tradition" of the Mi'kmaq, and which is an element of self-government, integral to the distinctive culture of the Mi'kmaq. The Applicant argues that it established its own commodity-tax regime, a self generating revenue source that was intended to be used to fulfill the communal sharing tradition by meeting community needs. The Applicant further contends that the Respondent, by requiring that the Applicant pay the GST/HST pursuant to the provisions of the Act, prevents the Applicant from being able to exercise self-government to fulfill, or continue, the communal sharing tradition to meet the needs of the community. The Applicant states that the Respondent has been aware since 1998, that the Respondent's actions have the potential to infringe the Applicant's right to self-government and its ability to fulfill its obligation pursuant to the communal sharing tradition. In the view of the Respondent, the Applicant is claiming the right to collect its own tax on the sale of goods occurring on reserve lands to non-Indians in lieu of collecting and remitting the GST/HST. Here, the impugned Crown action which allegedly infringes the asserted right is manifested by the enforcement provisions required by the Act, which culminated with the issuance of the Notice of Assessment against the Applicant. Put differently, the impugned action is the actual application by the Crown of Part IX of the Act to the Applicant.

24 The Respondent first contends that a final determination of the Applicant's asserted Aboriginal right is required to resolve the issue before the Court. The Respondent maintains that *Haida*, *Taku* and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 (S.C.C.), were cases that concerned discretionary actions of the Crown. Here, the Crown's actions are dictated by statutory provision and therefore, while the manner in which the Act is administered may be the subject of consultation, whether the Applicant is subject to the legislation in the first place can only be determined with a final determination of the Applicant's aboriginal rights.

25 I am of the view that, for the purposes of this proceeding, I need not make a final determination as to whether the asserted right is established. I am bound by the Supreme Court pronouncements in *Haida* and need only be satisfied that the asserted right potentially exists in order to then engage in an analysis of the scope and content of the duty to consult.

Is the duty to consult and accommodate triggered in this case?

26 The Applicant claims that communal sharing in its community was an expression of aboriginal culture, and that this tradition of the Mi'kmaq at the time of contact forms the basis of an assertion of an aboriginal right, which right is incidental to self governance.

27 While the Supreme Court in *Mikisew* sets a low evidentiary hurdle to establish the existence of an asserted right, which triggers the duty of consult and accommodate, the burden is nonetheless on the Applicant to establish the potential existence of the asserted aboriginal right and the conduct that might adversely affect it. In the context of the instant case, I agree with the Applicant that the following elements must be established to trigger the Crown's duty to consult and accommodate. These requirements are consistent with the teachings of the jurisprudence reviewed above:

> (1) A practice, custom or tradition at the time of contact that was integral to the distinctive culture of the Applicant;
>
> (2) A current activity that is a modern expression of that practice, custom or tradition -- and, therefore, an exercise of an aboriginal right protected by section 35 of the Constitution Act, 1982;
>
> (3) Government action that impacts adversely on that current activity; and

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> (4) Awareness on the part of the Crown of the assertion by the Applicant that the current activity is an exercise of an aboriginal right protected by section 35 of the *Constitution Act, 1982*, and that the government action may infringe upon that right.

28 Part IX of the Act, which provides that a vendor collect and remit the HST/GST to the Receiver General for Canada, came into force in 1991. The parties do not dispute that the first expression to the Crown that a claim of aboriginal rights was being asserted was the letter from Chief Deborah Robinson to the Minister dated February 23, 1998. There is no doubt that the Crown would have been made aware of the asserted right when that letter was received. The evidence also establishes that the Crown would have been aware, at that time, of the allegation by the Applicant that the Crown's act to initiate enforcement proceedings under Part IX of the Act and the issuance of Notice of Assessment, may infringe upon the asserted right. However, the Crown adopts the position that the application of the Act in no way impacts on the Applicant's claim to aboriginal rights of a sharing tradition.

29 I will now turn to the first two above-mentioned requirements.

(1) A practice, custom or tradition at the time of contact that was integral to the distinctive culture of the Applicant.

30 The jurisprudence teaches that the practice or tradition upon which a claim to an Aboriginal right is based, must be assessed in the context of the culture of the Aboriginal community asserting the right. This involves an inquiry into the pre-contact way of life of a particular aboriginal community, including its means of survival, its socialization methods, its legal systems, and potentially, its trading habits. See *R. v. Sappier*, 2006 SCC 54 (S.C.C.), at paragraph 45.

31 Here, there is sufficient evidence before the Court to establish that there existed a practice, custom or tradition at the time of contact that can be described as the "communal sharing tradition" that was integral to the distinctive culture of the Mi'kmaq and by extension of the Applicant.

32 Dr. Maura Hanrahan is a social anthropologist with extensive experience in the field of Aboriginal studies, with Aboriginal groups in Eastern and Central Canada. Her expertise is not disputed by the Respondent. Her evidence before the Court consists of two studies, one entitled "Mi'Kmaq Leadership, Governance and Social Structure in the Early Contact Period". At page 11 of this report she writes:

> There is a strong consensus in the literature that Mi'kmaq Chiefs used a co-operative, rather than competitive system, to ensure that the material needs of all were taken care of. Prior to and for some time after contact, Mi'kmaq provided for themselves through a seasonal round of economic activities, including hunting, fishing, and foraging; in this way, they maximized efficient exploitation of the ecological diversity of Nova Scotia and beyond.
>
> The allocation of hunting territories, explained previously, was not the only way in which Mi'kmaq, led by their Chiefs, demonstrated sharing and reciprocity. LeClercq reported that responsibility for widows and orphans was one of the duties of Chiefs. The practice was to assign these vulnerable people to "the wigwams of the best hunters, in order that they may be supported and brought up as if they were the children of the latter..."
>
> Redistribution was, then, one of things Chiefs were charged with. According to Abbé Pierre Biard, it was the Chief's "duty to provide dogs for the chase, canoes for transportation, provisions, and reserves for bad weather and expedition". (Footnotes omitted.)

33 The Respondent does not dispute that such a tradition existed among the band members, but takes the position that the communal sharing tradition as described by the Applicant does not give rise to rights of wealth acquisition

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or revenue generation.

34 For the purposes of the first requirement, I find that there existed a practice, custom or tradition at the time of contact now described as the "communal sharing tradition" that was integral to the distinctive culture of the Applicant.

(2) A current activity that is a modern expression of that practice, custom or tradition -- and, therefore, an exercise of an aboriginal right protected by section 35 of the Constitution Act, 1982;

35 The Applicant argues that the "communal sharing tradition" manifests itself in a modern way by the establishment, in 1997, of its own commodity-tax regime, a revenue source intended to meet community needs. The Applicant argues that the Commodity Tax is a modern expression of the tradition of "sharing and reciprocity". The Applicant submits that the Band-controlled businesses are operated solely to assist the people of the Band and for the purpose of community development. The Acadia Band Council viewed the tax as fulfilling its responsibilities and obligations as leaders of the community in accordance with their community sharing tradition. The uses of the tax revenues include payment of the following band expenditures:

- Electricity bills and other utilities
- Home repairs
- Non-insured health care and dental care
- Nursing services
- Funerals
- Providing housing, property taxes and mortgage payments
- Economic development grant program

36 The evidence shows that Elders and disabled Band Members have their electricity bills paid for by the Band Council, are provided food vouchers, and in some cases, medical care. The Band Council also funds programs for special-needs education and the youth, allowing younger members to participate in sports. Chief Robinson also attests that Band members on fixed incomes depend on the Band Council for financial assistance to meet their basic needs. This evidence, regarding the support offered by Band Council to its members, is essentially not challenged by the Respondent.

37 The Applicant contends that as a matter of aboriginal right, the Commodity Tax is paramount to the GST/HST. The tax specifically excludes the operation of the GST/HST because the Band-controlled businesses would be rendered uncompetitive and economically unviable were they required to collect both the Commodity Tax and the GST/HST.

38 The Respondent argues that there is no logical connection between the communal sharing tradition and the Commodity Tax. The Respondent contends that the tradition is one that exists between Band Members and does not give rise to rights of wealth acquisition or revenue generation. Further, it states that the Applicant is effectively claiming that it has an aboriginal right to trade with non-Indians free of any Crown regulation. Finally, the Respondent contends that the application of the *Excise Tax Act* to the Applicant in no way impacts on the Applicant's claim to aboriginal right of a tradition of sharing and reciprocity.

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39 For the purpose of this application, I accept that the "communal sharing tradition" is a practice or tradition at the time of contact that was integral to the distinctive culture of the Applicant, as found above. The Applicant argues that the Commodity Tax, which allows the Band Council to raise revenues to allow it to fulfill and continue the "communal sharing tradition", is a modern expression of the tradition or practice and therefore, an exercise of an aboriginal right. For the following reasons, I disagree with the Applicant's argument.

40 The jurisprudence of the Supreme Court teaches that while the nature of the practice or tradition which founds the Aboriginal right claim must considered in the context of the pre-contact distinctive culture of the particular Aboriginal community, the nature of the right must be determined in light of present day circumstances. See *Sapier*, above at paragraph 48. The practice or tradition, along with its associated uses, must be allowed to evolve. Chief Justice McLachlin explained in *R. v. Bernard*, [2005] 2 S.C.R. 220 (S.C.C.) at paragraph 25, that "logical evolution means the *same sort of activity*, carried on in the modern economy by modern means." (Emphasis added.) Here the tradition or practice which founds the claim is an activity which involves the concept of giving or receiving from a common account. The impugned legislation which is said to have the effect of infringing the tradition or practice of "communal sharing" provides only for the collection by vendors of a sales tax, the GST/HST, on sales affected to non-Indians. The Act in no way prevents the Applicant from sharing its resources with Band members. For there to be infringement, the practice or tradition would also have to involve the concept of revenue raising or wealth accumulation, then arguably the Applicant's ability to raise revenues through the Commidity Tax would be negatively affected. The evidence before the Court does not support the conclusion that the practice or tradition of "communal sharing" involved the concept of revenue raising or wealth accumulation. Dr. Hanrahan's evidence found again at page 11 of the above cited report appears to confirm this view:

> Chiefs amassed surpluses through gifts and debt payments, but wealth accumulation was not part of the Mi'kmaq ethos. Accordingly, academics agree that "(the Chief) redistributed this surplus by helping those in need, by providing food for social occasions such as feasts, ceremonies, and by supporting group-wide activities..."
>
> (Footnotes omitted.)

41 The evidence supports a tradition or practice which involved surpluses, and gifts to be redistributed amongst needy Band members and used for other Band activities. There is simply no evidence to indicate that the tradition or practice of "communal sharing" is in any way related to the concept of amassing food or raising revenues of any kind for the purpose of distribution and communal sharing. The evidence speaks of the sharing of surpluses and gifts. While Counsel for the Applicant submits that there is evidence of trade with non-Indians at the time of contact, no evidence was brought to my attention which would support a conclusion that the traditional activity of sharing included the notion of amassing or accumulating wealth for the purpose of sharing. Further, there is no evidence that the tradition or practice of "communal sharing" involved the participation of non-Indians even as sources of surplus or gifts. Therefore, it cannot be said that applicable provisions of the By-law requiring vendors to collect and remit the Commodity Tax can equate to a modern means of expressing the "communal sharing tradition". In this context, one activity deals with distribution of surpluses and gifts, the other activity involves collection of taxes or revenue raising. Put differently the modern provisions of the By-law cannot be said to be a logical evolution of the same sort of activity involved in the "communal sharing" tradition. There is simply no logical connection between the two activities.

42 In conclusion, I find that the Commodity Tax is not a current activity that is a modern expression of the practice, custom or tradition of "communal sharing" and is consequently not an exercise of an aboriginal right protected by section 35 of the Constitution Act, 1982. It follows, therefore, that the provisions of the Act imposing an obligation on vendors to collect and remit GST/HST from sale to non-Indians do not infringe the Applicant's aboriginal rights. In the result, the Crown's duty to consult and accommodate is not engaged in the circumstances.

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43 Given my above conclusion it is unnecessary to consider the second issue raised in this application.

44 For the above reasons the application for judicial review will be dismissed with costs.

Application dismissed.

FN*. Leave to appeal refused by the Supreme Court of Canada reported at [2004] G.S.T.C. 33 -- ed.

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