MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION V NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA

Court of Appeal for Ontario (Sharpe, Gillese and Blair JJA)
27 November 2007
2007 ONCA 814

Canada – Aboriginal right of self-government – enactment of labour relations code on First Nations reserve – whether labour relations code satisfies test for activity-related claims to Aboriginal rights under *R v Van der Peet* [1996] 2 SCR 507 – whether there is a power or right to enact labour relations code under *First Nations Land Management Act*, SC 1999, c 24 – whether appellants possess a treaty right relating to the regulation of activity between employees and employers – Crown duty to consult – whether Crown breached a duty to consult appellants regarding Aboriginal and treaty rights

Facts:

The Great Blue Heron Gaming Company ('GBHGC') operates a casino on a reserve occupied by and belonging to the appellant, the Mississaugas of Scugog Island First Nation, a registered Indian Band. The National Automobile and Transport Workers' Union of Canada ('CAW') was certified by the Ontario Labour Relations Board ('OLRB') under the *Labour Relations Act*, SO 1995, c 1, Schedule A ('LRA') as the casino employees' bargaining agent.

The appellant's Band Council enacted its own *Labour Relations Code* (the '*Code*') on June 6 2003 at an informal Band meeting, in relation to which no public notice was given; no minutes kept; and no notification given to the OLRB, CAW, GBHGC and federal and provincial governments of the intention to enact it. The appellant claims that, under its constitutionally-recognised Aboriginal and treaty rights, it has the right to enact the *Code* and displace the LRA.

The main issue on appeal was whether the appellant had the legal right to enact its own code of labour laws to govern collective bargaining in relation to a commercial undertaking operating on reserve lands. It also had to be determined whether the Crown had breached its duty to consult and to accommodate regarding the Aboriginal and treaty rights claimed by the appellant.

Held, that the appellant did not have the legal right to enact its own code of labour laws to govern collective bargaining in relation to a commercial undertaking operating on reserve lands:

1. The test in *R v Van der Peet* [1996] 2 SCR 507 ('*Van der Peet*') is the proper test for determining whether there is an Aboriginal right in relation to activity-related claims, such as the present claim of self-government. This test has not been modified by the test in *Delgamuukw v British Columbia* [1997] 3 SCR 1010, which properly applies only to claims for Aboriginal title: [17], [22]–[24]; *Van der Peet* [1996] 2 SCR 507 cited, *Delgamuukw v British Columbia* [1997] 3 SCR 1010 distinguished.

2. Pursuant to *Van der Peet*, the claimed right must first be characterised in context and with specificity. Characterisation of the right is determined by the nature of the action that is claimed to have been carried out pursuant to an Aboriginal right; the nature of the government regulation, statute or action being impugned; and the practice, custom or tradition relied upon to establish the right: [18]–[20]; *Van der Peet* [1996] 2 SCR 507 cited, *R v Sappier* [2006] 2 SCR 686 cited.

3. Once the claimed right has been characterised, it is for the claimant to establish that the Aboriginal right exists, by proving (1) the existence of an Aboriginal practice, custom or tradition that supports the right; (2) that this practice, custom or tradition was integral to the distinctive culture of the claimant group's pre-contact society; and (3) reasonable

continuity between the pre-contact practice, custom or tradition and the contemporary claim: [21]; *Van der Peet* [1996] 2 SCR 507 cited, *Mitchell v MNR* [2001] 1 SCR 911 cited.

4. The correct characterisation of the right claimed by the appellant is as a right to regulate labour relations on Aboriginal lands; rather than, as the appellant had claimed, a right to regulate work activities and control access to Aboriginal lands. This is because the subject matter and content of the *Code* and the content of the provisions of the LRA with which the claim conflicts concern labour relations; and because the appellant is unable to identify any ancestral practice, custom or tradition that bears any relationship to a modern labour relations code: [25], [27]–[31]; *Van der Peet* [1996] 2 SCR 507 applied, *R v Pamajewon* [1996] 2 SCR 821 followed.

5. Additionally, the appellant cannot satisfy the three elements required to support an Aboriginal right to enact a labour relations code that applies to Aboriginal lands. There is no evidence of an Aboriginal practice, custom or tradition that supports the right to enact a labour relations code; and indeed the *Code* conflicts with the evidence of the appellants' customs and practices. Even if the appellant's characterisation of the right were accepted, it could not be said to be integral to the appellant's distinctive culture. Finally, the *Code* exhibits no meaningful relationship or connection with the pre-contact communal, non-hierarchical practices of decision-making in relation to the organisation of work activities and access to territory, and arose solely as a response to European influences: [30], [34]–[41]; *Van der Peet* [1996] 2 SCR 507 cited, *R v Sappier* [2006] 2 SCR 686 cited.

6. There is nothing in the *First Nations Land Management Act*, SC 1999, c 24 that would support plenary powers to legislate in relation to all manner of activities taking place on First Nations land or a general right of self-government. The *Federal Policy Guide: Aboriginal Self Government* (1995), the 1991 Ontario *Statement of Political Relationship* (1991) or the United Nations *Draft Declaration on the Rights of Indigenous People* (1993/4) do not support the existence of a legal right of self-government: [42]–[46].

7. As to treaty rights, there is no right within the Covenant Chain, as confirmed by the 1764 Treaty of Niagara, relating to the regulation of activity between employees and employers. To find such a right would entail the acceptance of an Aboriginal right of self-government on reserve lands of virtually unlimited breadth [49]–[52].

Held, that the Crown had not breached its duty to consult and to accommodate regarding the claimed Aboriginal and treaty rights:

8. The duty to consult arises when there is: a credible claim for an Aboriginal right or title, whether established or not; actual or constructive government knowledge of this Aboriginal right or title; and conduct that would infringe or interfere with the claimed right: [55], [57]; *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 cited.

9. There was no Crown duty to consult in the present claim. Firstly, the claimed right was not sufficiently credible. Secondly, the first time the Crown knew or ought to have known of the claim was when the appellant enacted the *Code*, by which time no meaningful consultation could have taken place. Thirdly, it was the appellant, not the Crown, who took action that initiated the dispute or conflict implicating a claim of Aboriginal rights: [56]–[60]; *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 distinguished, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 distinguished.

10. If, contrary to this, there was a duty to consult, its scope was minimal and it would not have been inappropriate for the Crown to refer the matter to the OLRB: [61].

Note: an application by the appellant for special leave to appeal to the Supreme Court of Canada was dismissed. See Transcript of Proceedings, Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada *(Supreme Court of Canada, Binnie, LeBel and Deschamps JJ, 24 April 2008).*