

Federal Court



Cour fédérale

**Date: 20141125**

**Docket: T-1739-13**

**Citation: 2014 FC 1125**

**Ottawa, Ontario, November 25, 2014**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**LUC DES ROCHES**

**Applicant**

**and**

**WASAUKSING FIRST NATION**

**Respondent**

**JUDGMENT AND REASONS**

**Overview**

[1] The applicant, Mr. Des Roches, seeks judicial review with respect to the actions or decisions of the Wasauksing First Nation which allocated tax exempt or unmarked cigarettes to retailers on the First Nation, including to the proprietors of Mystic Loon. The applicant argues that Mystic Loon is not a business operating on the reserve because the lands occupied by the business are Crown lands, previously owned by the Canadian National Railway and its

predecessors. The applicant argues that the allocation of tax exempt cigarettes by the Band to Mystic Loon is unlawful.

[2] The applicant initially sought a Declaration that the First Nation unlawfully allocated cigarettes to Mystic Loon in 2012, 2013 and 2014; an Injunction prohibiting further allocations to Mystic Loon; and, an Order that a reference be held to determine the amount of cigarettes that should have been allocated to the other retailers operating on the reserve and the applicant's proportionate share of the allocations made to Mystic Loon. He now seeks to amend his application to seek only a declaration that Mystic Loon is not on reserve land and that, therefore, the First Nation unlawfully allocated cigarettes to Mystic Loon. He abandons his argument regarding the Injunction and the allocation among other retailers, and proposes to seek this relief in another Court.

[3] The application for judicial review is dismissed. As explained in the more detailed reasons that follow, this Court does not have jurisdiction to consider this application for judicial review. In addition, if this Court had such jurisdiction, the application for judicial review would be dismissed in accordance with subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7, because the applicant did not bring his application within 30 days of the decisions in question, he did not seek an extension, and he has not established that the Court should exercise its discretion to grant such an extension.

## **Background**

[4] 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 he sells, among other things, tax exempt cigarettes to other members of the First Nation.

[5] The Wasauksing First Nation entered into a Tobacco Retailer Agreement with the Ontario Ministry of Finance in 1999 regarding the sale of tax exempt or unmarked cigarettes. The First Nation receives a quota of 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.

[6] Mystic Loon is one of the retailers that receives an allocation as is Rezmart.

[7] Mr. Des Roches contends that Mystic Loon is not located on reserve lands, but rather on Crown land and, therefore, Mystic Loon should not receive any allocation of tax exempt cigarettes.

[8] Mr. Des Roches provides extensive historical information regarding the ownership of the land where the premises occupied by Mystic Loon are located, including the early land agreements dating back to 1895 with the Ottawa Parry Sound [OPS] Railway which purchased the land from the Crown in 1895 after the Crown had negotiated an agreement with the Wasauksing First Nation for that land. The OPS Railway then constructed a rail line on the land

and subsequently merged its railway with the Grand Trunk Railway and ultimately, the Canadian National Railway [CNR]. The CNR conveyed the land back to the Crown in 1987. In 1987, the Crown and the Wasauksing First Nation negotiated an agreement for the transfer of that same land back to First Nation following an environmental clean-up by the Crown. The environmental clean-up has not yet been done and the agreement has not been finalized.

[9] The history of the land is interesting, but it does not resolve whether the strip of land, formerly the rail line, is on the reserve or remains Crown land. If it is Crown land, the related issue is whether it can still be considered as reserve land in accordance with the definition of “reserve” in Ontario Regulation 649/93 to the Ontario *Tobacco Tax Act*, RSO 1990, c T 10. If Mystic Loon is on the reserve, there is no dispute that it is entitled to an allocation of tax exempt cigarettes. However, whether Mystic Loon operates on reserve land and, if not, whether the First Nation unlawfully allocated part of the quota to Mystic Loon raises the more important issue of whether this Court has jurisdiction to consider this application for judicial review.

### **The relevant statutory provisions are set out in Annex A**

#### **The applicant’s position**

##### *Jurisdiction*

[10] The applicant submits that this Court has jurisdiction to consider the application for judicial review pursuant to section 18.1 of the *Federal Courts Act* because the Wasauksing First Nation is a “federal board, commission or tribunal” within the definition of subsection 2(1) of the Act.

[11] The applicant argues that this Court has jurisdiction to declare that the allocation of tax exempt cigarettes to Mystic Loon is unlawful because the First Nation must first determine whether the land is reserve land in accordance with the *Indian Act*, RSC 1985, c I-5, a federal statute, in order to exercise the power conferred by the Ontario *Tobacco Tax Act* and the Tobacco Retailer Agreement with Ontario to allocate tax exempt cigarettes.

[12] The applicant argues that in *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No 38B (Wauzhushk Onigum Nation)*, 2008 FC 812, [2009] 2 FCR 267 [*Devil's Gap*], the Court determined that it is the character of the power being exercised that determines the jurisdiction of the Court. In this case, the character of the power being exercised is to determine if the lands are reserve lands and this power is derived from the *Indian Act* and not the Ontario *Tobacco Tax Act*.

[13] The applicant argues that the Ontario *Tobacco Tax Act* and the Tobacco Retailer Agreement does not grant the First Nation power to determine that lands are reserve lands because the determination of what is a reserve requires the involvement of the Federal Crown. (The applicant states that he served his application for judicial review on the Department of Aboriginal Affairs and Northern Development, but they declined to appear).

[14] The applicant further argues that although the allocation of the quota is done pursuant to the provincial legislation, the First Nation makes the decision about what is reserve land pursuant to the *Indian Act*.

[15] The applicant relies on *Ermineskin v Ermineskin Band Council* (1995), 96 FTR 181, 55 ACWS (3d) 888, which found that the power being exercised by the Band, regarding Band membership, was derived from the *Indian Act* and was therefore subject to judicial review by the Federal Court.

[16] The applicant also submits that if the First Nation were to seek a declaration that the land is reserve land it would do so in the Federal Court because the *Indian Act* does not permit a First Nation to unilaterally declare lands to be their own. The applicant argues that this bolsters his position that this Court has jurisdiction to consider the application for judicial review of the decision, which is based on a determination of what is reserve land.

[17] The applicant argues that *Anisman v Canada (Border Services Agency)*, 2010 FCA 52, 185 ACWS (3d) 354 [*Anisman*], which established a two-stage analysis to determine whether the decision-maker is a “federal board, commission or tribunal” within the meaning of subsection 2(1) of the *Federal Courts Act*, can be distinguished on its facts. In that case the Canada Border Services Agency, a federal agency, was acting as the agent of the Liquor Control Board of Ontario [LCBO] and it was the LCBO that made the decision. The applicant submits that in the present case, the First Nation made the decision that Mystic Loon occupies reserve land; it did not rely on the Ontario Ministry of Finance to do so.

[18] The applicant submits that the respondent concedes that Mystic Loon operates on Crown land. Therefore, Mystic Loon is not entitled to an allocation of the quota.

[19] The applicant relies on the cross-examination of Chief Tabobondung (at Q 207) where the Chief stated that his understanding was that Mystic Loon has ownership of the structure and “the Band has an interest in the land”. Chief Tabobondung explained that the Band put the structure on the land and the business opportunity was tendered to community members. The applicant argues that the First Nation had no ability to give any interest in the land to Mystic Loon but only the chattels, i.e., the building on that land.

### *Standing*

[20] The applicant submits that, although he is not a party to the Tobacco Retailer Agreement, he is directly affected by the decision that Mystic Loon is on reserve and, therefore, he has standing to bring this application. He argues that he has been directly affected because his allocation would be proportionally higher if Mystic Loon did not receive its unlawful allocation.

### *The definition of “reserve” in Ontario Regulation 649/93*

[21] The applicant argues that even if the definition of “reserve” in Ontario Regulation 649/93 to the *Tobacco Tax Act* is applicable, there is no evidence that the land in question meets that definition as there is no evidence of an Indian settlement on that land.

### *Application for judicial review within 30 days*

[22] In response to the respondent’s submissions that this application was made well beyond the time limits set out in subsection 18.1(2) of the *Federal Courts Act*, the applicant argues that the 30 day time limit must be considered in the context of the respondent’s ongoing conduct rather than from a specific point in time.

[23] The applicant appears to advance three arguments regarding the time limit. First, he argues that the decision of the First Nation that Mystic Loon is on reserve land is a continuing decision because the impact continues until the quota decision is made again the following year.

[24] Second, or alternatively, the applicant argues that the decision to allocate the quota is made annually in March and the 30 day time period for bringing an application for judicial review begins again each time this decision is made. The applicant submits that if his application for judicial review, which was made in October 2013, is out of time with respect to the allocation decisions made by the First Nation in March 2012 and March 2013, he will focus on the March 2014 allocation decision which should not be barred by the time limitation.

[25] Third, and alternatively, the applicant argues that this Court has discretion pursuant to subsection 18.1(2) to extend the time limits and should do so in this case in order to prevent further encroachments on Crown lands by the First Nation.

*Amended application for relief*

[26] The applicant now requests only a declaration that during the fiscal years ending 2013, 2014 and 2015, the First Nation unlawfully determined that the Mystic Lands are reserve lands and allocated a portion of unmarked tax exempt cigarettes to a retailer who is not a reserve retailer (i.e., Mystic Loon) contrary to agreements made by First Nation and the Ontario Ministry of Finance, pursuant to the *Tobacco Tax Act*. In addition, the applicant continues to seek costs of this application.



[27] The applicant now proposes that, if the Federal Court determines that it has jurisdiction and makes the declaration that Mystic Loon does not occupy reserve lands, the Ontario Courts can rule on whether the Band erred in granting Mystic Loon a quota of tax exempt cigarettes.

### **The respondent's position**

[28] The respondent submits that the Federal Court does not have jurisdiction to consider this application for judicial review, the applicant does not have standing to bring this application, the application is beyond the statutory time limits, and there is no merit in the application because Mystic Loon operates on reserve land as that term is defined in Ontario Regulation 649/93 to the *Tobacco Tax Act*, which is the source of the authority of the First Nation to allocate the quota of tax exempt cigarettes.

[29] The respondent also submits that the current strategy of the applicant to seek a declaration from this Court about the status of the land and then pursue an action in the Ontario Courts is duplicative. The proper and more expeditious approach would be to await a response from Ontario to his inquiry and then pursue judicial review if dissatisfied with the response. Moreover, the applicant cannot split the definition of "reserve" from the powers being exercised. The Ontario Court should address this issue entirely.

### *Jurisdiction*

[30] The respondent submits that the Federal Court has no jurisdiction to consider this application for judicial review because the First Nation is exercising powers derived from provincial law and private contract when it allocates the quota of cigarettes.

[31] The respondent acknowledges that the First Nation would meet the definition of subsection 2(1) of the *Federal Courts Act* if the decision-making power being exercised was derived from the *Indian Act* or custom. However, in this case, the First Nation is exercising power or authority based on the Ontario *Tobacco Tax Act* and the Tobacco Retailer Agreement with Ontario. Therefore, the Federal Court does not have jurisdiction because the First Nation was not acting as a “federal board, commission or tribunal” as defined by subsection 2(1) and subsection 18(1) would not, therefore, apply.

[32] In order to fall within the subsection 2(1) definition, it is not sufficient that the decision-maker be sometimes recognized as a “federal board, commission, or other tribunal”, as is often the case with Indian Bands (*Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 31, 424 FTR 125 (Eng)). It is also necessary to determine whether the decision-maker 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...” which does not include powers conferred under a provincial statute.

[33] The respondent submits that to determine whether the First Nation falls within the definition, the two-step analysis established in *Anisman* must be considered: it must be determined what jurisdiction or power the body or person seeks to exercise; and then the source or the origin of the jurisdiction or power which the body or person seeks to exercise must be determined (*Anisman*, above, at para 29). 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*, above, at para 33).

[34] The respondent also notes that the *Indian Act* does not permit the Band to declare or determine what is or is not on reserve land. This requires an Order in Council.

[35] The power exercised by the Band is to allocate the quota of tax exempt cigarettes. The source of this power is the provincial legislation. The Band is not deciding the issue of what is or is not reserve land for any other purpose except the allocation of the quota and the Ontario Regulation provides the definition of “reserve” for this purpose.

[36] In the present case, the First Nation was acting under authority granted by the Ontario *Tobacco Tax Act* when it allocated the unmarked cigarette quota. In accordance with *Devil’s Gap* and *Ansiman*, the Federal Court does not have jurisdiction.

[37] The respondent further submits that the First Nation was not acting as a “federal board, commission or tribunal” because it was exercising its power to contract. The allocation of the quota is a matter of contract, as set out in the agreement between the Minister of Finance and the Wasauksing First Nation. The Tobacco Retailer Agreement sets out the responsibilities of the Band Council. The agreement uses the term “reserve retailer” which is the term defined in the Ontario Regulation. The agreement does not confer any rights or powers on third parties, such as the applicant, to review the decisions made by the respondent. The *Tobacco Tax Act* and the Ontario Regulation set out the remedies that the Minister of Finance may rely on to enforce compliance by parties to the agreement. The applicant does not have the right to enforce compliance. Complaints about the agreement should be directed to the Ontario Ministry of Finance.

[38] The respondent points out that section 5 of the Tobacco Retailer Agreement provides that the Minister of Finance can allocate the cigarettes if the First Nation does not do so. Therefore, if the First Nation had not entered into a Tobacco Retailer Agreement with the province, the Minister of Finance would do so in accordance with the provincial legislation and Regulation.

*Standing*

[39] The respondent submits that Mr. Des Roches does not have standing to bring this application as he is not directly affected by the decision to allocate a quota to Mystic Loon. He would not be automatically entitled to a greater allocation of the quota even if Mystic Loon did not receive an allocation. The applicant has no right to the quota or a part of the quota allocated to Mystic Loon.

[40] Additionally, the respondent submits that Mr. Des Roches does not have standing to bring this application because he is not a party to the contract or agreement between the First Nation and the Ontario Ministry of Finance.

[41] The respondent notes that in July 2013, Mr. Des Roches wrote to the Ontario Ministry of Finance asserting that Mystic Loon was not on reserve lands and not a reserve retailer and that it should not receive a quota from the First Nation. The Ministry acknowledged the complaint and advised it would inquire. The respondent submits that Mr. Des Roches should await a decision and then seek judicial review of the Ontario Ministry's decision or its failure to make a decision instead of seeking judicial review in the Federal Court.

*The definition of “reserve” in Ontario Regulation 649/93*

[42] The respondent agrees with the chronology provided by the applicant regarding the history of the land transactions dating back to 1895.

[43] The respondent notes that the 1987 Memorandum of Understanding [MOU] between Wasauksing First Nation and the Crown included terms and conditions for annexing the lands in question to the reserve. However, the environmental clean-up has not yet been resolved and the Wasauksing First Nation has refused to take the lands into its reserve until this issue is addressed, although the intention is for the land to revert to the First Nation.

[44] The respondent submits, however, that the Crown holds the lands for the sole use and enjoyment of the Band and, as a result, the lands meet the definition of “reserve” in Ontario Regulation 649/93. That definition is broad and includes lands treated by the Department of Indian Affairs and Northern Development (now Aboriginal Affairs and Northern Development) in the same manner as reserve lands.

[45] The respondent points to the 1987 MOU that states that the Crown shall set aside the lands as part of the reserve, and submits that the MOU conveys a clear intention that the purpose was to confer a benefit of that land to the reserve.

[46] The respondent also points to the 1997 Band Council Resolution where the Wasauksing First Nation asserts its rightful authority to make use of the land within their boundaries however it sees fit, be it for residential, commercial, recreational, and/or road way purposes.

[47] The respondent, therefore, submits that the definition of “reserve” in the Ontario Regulation is met; the lands are Crown lands that are held for the Indian inhabitants on the settlement on that land and the inhabitants are treated in the same manner as those on the reserve by the Department of Indian Affairs and Northern Development.

*Application for judicial review within 30 days*

[48] The respondent notes that the applicant has now abandoned his request for other relief regarding the allocation of the tax exempt cigarettes and seeks only a declaration that Mystic Loon is on reserve land. The respondent submits that the decision that Mystic Loon is not on reserve land was made in 2004, long before the applicant challenged the allocation of the quota to Mystic Loon. The respondent argues that if the issue is, as the applicant submits, the determination of what is reserve land, he is very much out of time in bringing an application for judicial review of that decision.

[49] The respondent suggests that the applicant is being disingenuous in asserting that he seeks to challenge the decisions made in March 2012, 2013 and 2014 regarding the allocation of the quota of cigarettes and, alternatively, that while he may be out of time to challenge the March 2012 and 2013 decisions, he should be able to pursue the latest decision. The respondent argues that this approach confirms that the applicant’s concern is the allocation of the quota and not the decision that Mystic Loon operates on reserve land.

[50] The decision that the premises occupied by Mystic Loon are on reserve land dates back to 2004. In his cross-examination, Mr. Des Roches acknowledged that he was aware of the status of

the land and raised the issue in 2004, but did not pursue an application for judicial review then because Mystic Loon had not yet opened for business and he was holding off until it did. The respondent submits that once Mystic Loon opened for business, Mr. Des Roches's complaint focused on the allocation of the quota. The respondent argues that, if Mr. Des Roches intended to challenge the decision that the premises occupied by Mystic Loon were on reserve land, he could have done so in 2004. The respondent submits that he had no continuing interest to seek judicial review of the actions of the First Nation until his commercial interests were, in his view, compromised.

[51] The respondent also notes that Mr. Des Roches did not seek an extension of time to bring this application for judicial review and submits that, if he had, he would not satisfy the test for the Court to grant such an extension.

### **Issues**

[52] This application raises several issues: whether this Court has jurisdiction; whether the applicant has brought his application for judicial review within the time limits prescribed by the *Federal Courts Act*; and, if this Court has jurisdiction, whether there is any merit to the applicant's submissions that the First Nation exceeded its powers in determining that Mystic Loon operates on reserve land because such a determination is derived from the *Indian Act* and a First Nation cannot determine what is or is not reserve land.

### **The Federal Court does not have jurisdiction**

[53] The law is well established that First Nation Band Council decisions may and frequently do come within the meaning of the definition of “federal board” in subsection 2(1) of the *Federal Courts Act* (*Ermineskin Cree Nation v Minde*, 2008 FCA 52, 168 ACWS (3d) 225). However, this is not always the case. The two-stage analysis established by the Federal Court of Appeal in *Anisman* is necessary.

[54] In *Anisman* the Court of Appeal noted at paras 29 and 30:

[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. [...]



[55] The applicant pointed to the decision of the Ontario Superior Court of Justice in *Kozeyah v Serpent First River 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. The comments of the Court relied on by the applicant must be put in context. In that case, the Court granted the respondent's motion to strike the claim as there was no proper cause of action. The judge suggested that the jurisdiction to determine the action would have been in the Federal Court, but this brief comment is clearly *obiter*. The judge did not analyze 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.

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

[57] In accordance with the principles established in *Anisman*, the Band's actions or decisions to allocate the cigarettes would not fall under subsection 2(1) of the *Federal Courts Act*. These decisions would, therefore, not be subject to the Court's jurisdiction.

[58] I do not agree with the applicant's argument that the First Nation derived its authority to decide what is or is not reserve land from the *Indian Act* and had to first make this determination before exercising its authority pursuant to the provincial statute, Regulation and Tobacco Retailer Agreement to allocate the cigarettes. The applicant's arguments have been, to some

extent, circuitous and inconsistent. The applicant acknowledged that a First Nation has no authority to determine what is or is not reserve land pursuant to the *Indian Act*. The *Indian Act* makes it clear that the Governor in Council determines what lands are for reserves. The applicant then relies on this to assert that the First Nation exceeded its jurisdiction in deciding that the premises occupied by Mystic Loon are on reserve land. This argument ignores the fact that the source of the power to allocate the tax exempt cigarettes is the *Tobacco Tax Act* and the Tobacco Retailer Agreement. The First Nation is not deciding what is or is not reserve land for any purpose other than the allocation of tax exempt cigarettes pursuant to the Agreement.

[59] The applicant submits that the First Nation has no power to determine what is or is not reserve land, yet he still argues in support of his position that this Court has jurisdiction, that the First Nation derived its power from the *Indian Act* in administering the *Tobacco Tax Act* and the Tobacco Retailer Agreement, and in allocating cigarettes to reserve retailers. This is an inconsistent position.

[60] The applicant also argues that, if the First Nation sought a declaration that the land is reserve land, it would do so in the Federal Court because the *Indian Act* does not permit a First Nation to declare lands to be their own. The applicant suggests that this bolsters his position that this Court has jurisdiction to consider the application for judicial review of the decision because it is based on a determination of what is reserve land. I do not agree. This argument does not acknowledge that, if the First Nation sought to resolve whether certain land was on its reserve for purposes other than the administration of the *Tobacco Tax Act* and the Tobacco Retailer Agreement, it would engage the Crown first. It is possible that a First Nation would later seek

judicial review of the Crown's decision regarding the land and would do so in the Federal Court, but this is a very different set of facts and the power being exercised by the Crown would be a federal power.

[61] The applicant's jurisdictional arguments also ignore that, if the First Nation did not enter into the Tobacco Retailer Agreement with the Ontario Ministry of Finance, the allocation, albeit of a lesser quantity of cigarettes, would be done directly by the Ministry of Finance in accordance with section 5 of Ontario Regulation 649/93. If that were the case, the Ministry would apply the *Tobacco Tax Act* and the Regulation and the definitions of "reserve" and "reserve retailer" in the Regulation. The applicable legislation and the source of the power or authority does not change when the Tobacco Retailer Agreement is in place. There is no logic in the argument that the First Nation, when acting as middle man to allocate the quota of tax exempt cigarettes, would apply, rely on, or derive its power from the *Indian Act*.

[62] The applicant submitted, for several of its arguments, that the First Nation was an agent of the Ontario government. If so, then the applicant should also agree (and cannot argue inconsistently) that the First Nation was not relying on any federal statute.

[63] The applicant's current approach to seek only a declaration from the Federal Court and then to seek other relief in the Ontario Court regarding the allocation of the quota also conveys an inconsistent approach.

[64] If the applicant agrees that the allocation is governed by the Ontario *Tobacco Tax Act* and the Tobacco Retailer Agreement and he now proposes that his relief against the allegedly “unlawful” allocation will be sought in the Ontario Courts, then he should also agree that the province would rely on its own statute and its own definitions. If the applicant concedes that the allocation of the quota is a provincial matter, how can he argue that the definition of “reserve” in the Ontario Regulation is not applicable to the decisions made by the First Nation?

[65] I also note that the applicant’s more recent request to amend his application refers to the allocation being contrary to the Tobacco Retailer Agreement and the *Tobacco Tax Act*, which appears to be an acknowledgement that these are the sources of the power exercised by the First Nation.

[66] If the Court had jurisdiction to consider the application for judicial review, the issue of the applicant’s standing would require scrutiny. The applicant asserts he is directly affected by the decision based on his assertion that if Mystic Loon did not receive its allocations, he would receive a greater allocation of tax exempt cigarettes. However, there is no evidence about how the allocation would be made. In addition, because the applicant has abandoned his request for relief to reallocate the quota and garner a greater share, the basis for the applicant’s argument that he has standing has changed.

[67] I also agree with the respondent that the Tobacco Retailer Agreement is between the Ontario Ministry of Finance and the First Nation. The applicant has made a complaint to the

Ministry of Finance, which is responsible for administering the agreement in accordance with its terms and the *Tobacco Tax Act*, and he should await a response.

[68] With respect to the definition of “reserve” in Ontario Regulation 649/93, in my view, this definition governs, given that the First Nation is acting pursuant to the *Tobacco Tax Act* and the Tobacco Retailer Agreement. However, it is not for this Court to determine whether the definition has been met.

[69] Although, the applicant argues that the respondent did not establish that the land upon which Mystic Loon operates meets the definition of “reserve” in the Ontario Regulation, the onus is not on the respondent to do so. The applicant bears the onus to establish his grounds for judicial review and that the lands in question do not meet the definition, if the applicant pursues this line of argument.

[70] With respect to the applicant’s reliance on the evidence of Chief Tabobondung where he stated that Mystic Loon owns or has a proprietary rights in the structure and “the Band has an interest in the land”, in my view, this supports the respondent’s position that the First Nation considers the land to be reserve land.

**The application for judicial review was not filed within 30 days**

[71] In the event that I am wrong in my determination that the Federal Court does not have jurisdiction to consider this application for judicial review, I would still find that the application

is barred due to the applicant's failure to bring his application for judicial review in the 30 day time period required by the *Federal Courts Rules*, SOR/98-106.

[72] I agree with the respondent that the decision contested by the applicant, i.e., that Mystic Loon is located on the reserve, was made in 2004 and the applicant was aware of the decision at that time but did not seek to challenge that decision. The applicant's real concern is about the quota allocations to Mystic Loon based on decisions made in March 2012, March 2013 and March 2014.

[73] The applicant appears to accept that he is out of time with respect to the decisions made in March 2012 and March 2013, but suggests that his application for judicial review made in October 2013 would be timely with respect to the allocation decision made in March 2014. I do not agree. It is not possible to bring an application for judicial review in anticipation of a decision or in respect of a decision that has not yet been made. The applicant is, therefore, beyond the time period in respect of the March 2012 and March 2013 decisions, and his October 2013 application for judicial review of the decision made after that application, in March 2014, would be premature.

[74] The applicant also suggests that the Court should exercise its jurisdiction to grant an extension, but he does not acknowledge that an application for such an extension would be the norm and that he would have to satisfy the Court that it should exercise its discretion to do so. As noted by the Court of Appeal in *Canada (Attorney General) v Larkman*, 2012 FCA 204, 219 ACWS (3d) 490, in considering whether to grant an extension of time, several factors are

relevant, including whether the applicant has shown a continuing intention to pursue the application, whether there is a reasonable explanation for the delay, whether the respondent has been prejudiced by the delay and whether there is some potential merit to the application. The applicant has not provided any evidence to justify an extension of time. In the event that the Court had jurisdiction to consider this application, the applicant has not offered a sufficient basis for the Court to grant an extension.

[75] The applicant's request that the Court address the merits of his argument even if the Court finds that it has no jurisdiction is impossible and would have no effect. Similarly, the applicant's submission that the Court could excise the part of the decision regarding whether the land is "reserve" land in accordance with the *Indian Act* from the related decision regarding the allocation of the quota to Mystic Loon is impossible because I have found that the First Nation is not exercising any authority – or exceeding any authority – under the *Indian Act*, but is acting under the authority of the provincial statute and the related agreement.

**JUDGMENT**

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

The respondent shall have its costs of this application fixed at \$1000.

"Catherine M. Kane"

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Judge



## ANNEX A

**Relevant statutory provisions**

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

<p>2. (1) In this Act,</p> <p>“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 <i>Constitution Act, 1867</i>.</p> <p>[...]</p> <p>18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction</p> <p>(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal;</p>	<p>2. (1) Les définitions qui suivent s’appliquent à la présente loi.</p> <p>« 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 <i>Loi constitutionnelle de 1867</i>.</p> <p>[...]</p> <p>18. (1) Sous réserve de l’article 28, la Cour fédérale a compétence exclusive, en première instance, pour :</p> <p>a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral;</p>
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and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[...]

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

[...]

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

[...]

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[...]

*Indian Act*, RSC 1985, c I-5:

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.

18. (1) Sous réserve des autres dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; sous réserve des autres dispositions de la présente loi et des stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

(2) Le ministre peut autoriser l'utilisation de terres dans une réserve aux fins des écoles indiennes, de l'administration d'affaires indiennes, de cimetières indiens, de projets relatifs à la santé des Indiens, ou, avec le consentement du conseil de la bande, pour tout autre objet concernant le bien-être général de la bande, et il peut prendre toutes terres dans une réserve, nécessaires à ces fins, mais lorsque, immédiatement avant cette prise, un Indien particulier avait droit à la possession de ces terres, il doit être versé à cet Indien, pour un semblable usage, une indemnité d'un montant dont peuvent convenir l'Indien et le ministre, ou, à défaut d'accord, qui peut être fixé de la manière que détermine ce dernier.

***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).

(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).

(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 resale to consumers who are Indians. 2011, c. 15, s. 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).

***Tobacco Tax Act***, O Reg 649/93:

1. In this Regulation,

[...]

“reserve” means a reserve as defined in the *Indian Act* (Canada) or an Indian settlement located on Crown land, the Indian inhabitants of which are treated by the Department of Indian Affairs and Northern Development in the same manner as Indians residing on a reserve;

[...]

“reserve retailer” means a retail dealer located on a reserve and who, in the ordinary course of his or her business, sells cigarettes to Indian consumers;

“retail agreement” means an agreement entered into between the Minister and a council of the band by which the council of the

band agrees to allocate unmarked cigarettes to reserve retailers and to monitor the sales of those cigarettes to ensure that sales are not made to non-Indians;

2. (1) The purpose of this Regulation is,

(a) to ensure that there is a sufficient quantity of unmarked cigarettes available for purchase on a reserve by adult members of a band for their own consumption; and

(b) to prevent the purchase of excess quantities of unmarked cigarettes that could be resold to non-Indians. O. Reg. 649/93, s. 2 (1).

(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-1739-13

**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.

**DATED:** NOVEMBER 25, 2014

**APPEARANCES:**

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T. Michael Strickland FOR THE RESPONDENT

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