SUPERIOR COURT
CLASS ACTION

CANADA
PROVINCE OF QUEBEC
DISTRICT OF QUEBEC

No. 200-06-000088-073

DATE: December 9, 2011

BEFORE THE HONOURABLE JEAN LEMELIN, S.C.J.

GHISLAIN PICARD
Plaintiff

v.

THE ATTORNEY GENERAL OF QUÉBEC

and

L'AGENCE DU REVENU DU QUÉBEC
Defendants

and

FONDS D'AIDE AUX RECOURS COLLECTIFS
Third Party

JUDGMENT ON A MOTION FOR APPROVAL OF A TRANSACTION

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[1] The Plaintiff, Ghislain Picard, is an Indian within the meaning of the *Indian Act*,[1] duly registered as such in the Indian Registry at the Department of Indian Affairs and Northern Canada. He is also Grand Chief of the Assembly of First Nations of Quebec and Labrador (AFNQL).

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[1] R.S.C. 1985, c. I-5.

[2] With the authorization of the Court and the support of the AFNQL, Ghislain Picard undertake a class action in 2007 in which the Attorney General of Québec (AGQ) and the Agence du Revenu Québec were named as defendants.

[3] Ghislain Picard's motion asks that the Court approve the agreement reached by the parties on June 30, 2011, as required by article 1025 of the *Code of Civil Procedure*.

The Conduct of the Proceedings

[4] The motion for authorization was filed in the District of Montreal in June 2003, where it was heard.

[5] On May 7, 2007, the undersigned, as the judge designated to hear this case, authorized the filing the class action.

[6] After the Court of Appeal dismissed an appeal filed by the defendants, the action was formally commenced on September 13, 2007.

[7] In the authorization judgment, the Court recommended to the Chief Justice of the Superior Court to order a transfer of the file to the District of Quebec, which he did.

[8] In March 2008, at the request of the parties, the Court agreed to suspend the proceedings to allow the parties to enter into negotiations in order to arrive at a settlement.

[9] No fewer than 20 meetings were held between the parties in the attempt to arrive at a negotiated settlement.

[10] On June 30, 2011, the parties signed the agreement that they now ask the Court to approve.

The Class Action

[11] Before addressing the content of the agreement, it is useful to specify what Ghislain Picard sought by way of his action. Substantively, he asked the Court to declare that the *Fuel Tax Act* violated the general and absolute tax exemption provided for by the *Indian Act* and the *Cree-Naskapi (of Quebec) Act*.

[12] As a result, he asked the Court to order the defendants to pay as restitution to registered Indians the amount of tax they paid when purchasing fuel on reserve in Quebec since 1973, the year that the *Fuel Tax Act* came into effect.

[13] The action also asked the Court to order the defendants to pay damages for the trouble and inconvenience caused to registered Indians who had complied with the refund mechanism implemented in 1987 which, according to Ghislain Picard, was illegal and contravened the *Indian Act*.

The Agreement

[14] By their agreement, the defendants undertake to pay the following amounts:

- The amount of $2,700,000 to the AFNQL in a fund for the benefit of its members;

- The amount of $24,300,000 to members of the group, to be distributed in accordance with articles 1031 to 1036 of the *Civil Code of Procedure*.

[15] These amounts are to be paid as the full and final settlement of the class action, including capital, interest and additional costs.

[16] The reference to the articles of the *Code of Civil Procedure* mentioned above confirms that this is a collective recovery.

[17] The amount of $2,700,000 will be paid to the AFNQL upon the expiry of a 60-day period after the date of approval of the agreement by the Court.

[18] As for the amount of $24,300,000, it will be paid or made available to the settlement administrator upon the expiry of a period of 365 days, following the approval of the agreement by the Court.

[19] It should be noted that the parties have agreed to appoint Collectiva Inc. as settlement administrator. This company was selected by the Agence du Revenu Québec following a call for tenders and after consultation with the AFNQL.

[20] To receive the compensation provided for in the agreement, each group member will have to submit a claim within the period of 365 days, by completing a form provided for this purpose.

[21] Each member will also have to attach proof of Indian status, date of birth and place of residence.

[22] The base amount will vary depending on the age of the claimant according to six well-defined categories, the first concerning people who are 18 to 24 years old and the last, those aged 65 and older.

[23] This approach is based on the premise that younger people would likely have bought less fuel that older people and, therefore, paid less tax.

[24] Compensation will be reduced by 50% in the case of a group member who is a member of a Quebec band, but who resides outside of Quebec or Akwesasne.

[25] From the amount of $24,300,000, an amount of $300,000 will be set aside to pay the claims of group members who are neither members of a Quebec band or Akwesasne; in this case, the maximum compensation will be $50.

[26] The agreement contains standard clauses concerning waiver, absence of prejudice and release. It is important to note that the release provided by Ghislain Picard on behalf of group members does not apply to any tax paid after June 30, 2011, which is the term of the agreement.

[27] It is also useful to point out that group members may, in certain cases, obtain double indemnity: the base amount for which no proof of the purchase of fuel is required and compensation in the form of the amount of tax actually paid, as established by receipts for the purchase of fuel for the same period up to June 30, 2011.

[28] It is necessary to cite in full paragraph 4.1, which is the release provided by Ghislain Picard on behalf of the group members, because the clause has upset certain group members who opposed approval of the agreement.

> 4.1. Group Members provide a full and final release to the Defendants with respect to all claims, petitions, actions, suits, causes of action and damages, including punitive and exemplary damages, whenever and however they may have been incurred, debts, obligations and liabilities of any nature whatsoever, known or unknown, including capital, interest, fees and penalties that the Group Members or all other persons have, have had or could have had directly, indirectly, for another or in a derivative manner or in any other capacity, personally or in subrogation, related to or flowing from, in any manner whatsoever, the facts and points at issue which were relied upon or which could be relied upon in the Class Action or any other related proceeding.
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> This release is effective as soon as the amounts set out in paragraph 3.2 are distributed.

[29] These opponents worry that the text as drafted compromises their future rights or an eventual action to recover taxes paid after June 30, 2011.

[30] We also note that the defendants undertake to pay the legal fees and professional fees of the plaintiff's legal counsel, experts, consultants and AFNQL staff, upon presentation of supporting documents.

[31] It should be specified that this agreement was concluded without any admissions. Paragraphs 11.1 and 11.2 provide that:

> 11.1. The Parties make no admission as to the extinctive prescription applicable to this litigation, nor as to their respective liability, nor as to the legality of the mechanism to refund fuel tax that was implemented in 1987 and they agree that the only purpose of the settlement agreement is to arrive at a negotiated resolution and thereby avoid long and expensive litigation.
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> 11.2. Whether or not the Settlement Agreement is approved, the Parties agree that the Settlement Agreement and its contents, the negotiations as a whole, the documents and discussions related to the Settlement Agreement as well as the actions or measures taken in order to reach the Settlement Agreement cannot be deemed or interpreted as being an admission of the violation or validity of any statute or regulation, nor of fault or liability on the part of the Parties, nor the veracity of one or more claims made in the Class Action or any other proceeding.

Applicable law

[32] Article 1025 of the *Code of Civil Procedure* requires that the Court approve all negotiated agreements in a class action, unless, in the case of acquiescence, it is not with respect to the entire demand.

[33] Essentially, the Court must decide whether the proposed agreement is fair and equitable, whether it is in the best interests, not only of the representative plaintiff, but also of all group members, who will be bound by the agreement once approved.

[34] It is not the Court's role to modify, in whole or in part, the contract of transaction concluded between the parties. It must either approve it as submitted or refuse to ratify it. At most, it could suggest modifications to the parties in order to correct any gaps, so as to ensure approval.

[35] The negotiated settlement of litigation will always be an initiative encouraged and supported by the courts. A settlement implements the parties' desire to avoid the costs and delays of a trial. As well, the judicial system benefits from settlements before trial because they free up court dockets. It is, therefore, in the public interest that the courts favour these settlements.

[36] It follows that the courts will only refuse to ratify a transaction for very serious reasons. However, the obligation to ratify a transaction does not allow the Court to substitute its judgment for the agreement between the parties.

[37] Generally, a transaction, once concluded, has the authority of a final judgment as between the parties (art. 2633 C.C.Q.).

[38] In this case, the parties concluded their transaction subject to approval by the Court. As a result, it does not bind them unless approved by the Court. It will thereby become enforceable and will bind all members of the group involved in class action. If the Court does not approve it, it is annulled and binds no one, not even those parties who agreed to it.

[39] The judgment that approves a transaction is a final judgment and not subject to appeal by the parties or the members.[2] One that does not approve the transaction may be appealed with leave.[3]

Criteria for approval

[40] The *Code of Civil Procedure* does not identify the criteria or factors that must guide the Court seized of motion for approval.

[41] A transaction that provided no measure of redress to members or that unduly favoured the defendants being sued would likely not be approved.[4]

[42] Inspired by the long American experience with respect to class actions, Canadian courts have identified criteria that can guide the Court in exercising its discretion. One frequently-cited judgment is that of Justice Sharpe of the Superior Court of Ontario in the case of *Dabbs v. Sun Life*.[5] The criteria developed by Justice Sharpe in that case can serve as a guide for Quebec courts due, in particular, to the great similarity between Quebec law and that of Ontario with respect to class actions.[6]

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[2] *Fortier c. P.G. du Quebec,* Sup.Ct. Quebec 200-06-000001-894, March 19, 1991.

[3] *Quebec (P.G.) c. Delaunais*, C.A. Quebec 200-09-000313-921, May 21, 1992.

[4] *Delaunais c. Québec (P.G.)*, [1992] R.J.Q. 1578.

[5] [1998] O.J. 1598.

[6] *Comite d'environnement de La Bale inc c. Societe d'electrolvse et de chimie Alcan Wee* [1990] R.J.Q. 655;

[43] The criteria now recognized are as follows:

- the action's likelihood of success;
- the significance and the nature of the evidence heard;
- the terms and conditions of the transaction;
- legal counsel's recommendations and their experience;
- the cost of future expenses and the probable length of litigation;
- the advice of a neutral third party, if any;
- the number and nature of any objections to the transaction;
- the parties' good faith;
- the absence of collusion.

The Motion's allegations

[44] The Court is of the opinion that it is useful to cite the allegations with respect to the "Probability of Success on the Merits" and the "Terms and Conditions of the Transaction."

> 66. The action's chances of success are uncertain: the parties are divided on fundamental questions of law, many of a constitutional nature, which would require a long and complex debate that could easily be the subject of an appeal.
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> 67. In particular, there is a gap of 27 years between the period relied upon by the Plaintiff in his action and the one alleged by the defense.
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> 68. However, paragraph 11.1 of the Agreement provides that "[t]he Parties make no admission as to the extinctive prescription applicable to this litigation."
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> 69. Also, the importance and nature of the evidence to be lead would have an important impact on the probable cost and length of the proceeding on the merits: calculating tens of thousands of transactions on dozens of Indian reserves over decades would be required.
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> […]
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> 75. The Agreement provides group members with undeniable advantages as compared to the situation that would prevail in the event of litigation.
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> 76. Thus, contrary to the situation that would occur in Court in a proceeding on the merits of the class action, the group members will have access to a simple and efficient means to determine their claim, paid for by the Defendants.

77. The determination of compensation will be based on information that is simple to prove: Indian status, age and place of residence. This provides an undeniable advantage as compared to holding individual trials so that each group member could prove on a balance of probabilities the amount he or she claimed.

78. Finally, consideration must be given to the risks inherent in a hearing on the merits of a class action. There is no certainty that an action would result in a favourable judgment, either with respect to common or individual issues. In this context, the settlement is just and equitable.

[45] All legal counsel who participated in negotiating the transaction strongly recommend that it be approved because of its content, but also to avoid a long and costly trial.

[46] The application before the Court is to approve the transaction as submitted, with its terms and conditions and exclusions. If the Court is of the opinion that it is not fair and equitable, it must not approve it.

Analysis and decision

[47] To begin, it should be noted that the Fonds d'aide au recours collectif confirmed in writing that it provided no financial assistance for the action, that it deferred to the decision of the Court and that it would not appear at the hearing on the motion for approval.

[48] It should also be noted that there were opponents to the application for approval. By letter sent to the judge on November 25, 2011, Mr. Timothé R. Huot opposed approval of the agreement on behalf of his clients, 12 Indians who are group members and are all owners of 16 gas stations in Kahnawake. We will return to the issue of their representations.

[49] There was also a person named Sherry Condo, who was also a group member and lived on the Listuguj reserve.

[50] Ms. Condo vigorously opposed approval because she was of the opinion that the agreement violated her constitutional rights with respect to the absolute exemption from paying taxes. She also complained that she had not been informed about the conclusion of this agreement before publication of the legal notices and had not been consulted before the conclusion of the agreement.

[51] It must be said that the motion for approval specifies that the plaintiff Picard and his legal counsel chose to follow the structure and hierarchy of the Assembly of First Nations when informing group members. Chiefs of bands were kept informed of the negotiations and they were to transmit the information to the members of their community.

[52] The Court is of the opinion that this way of proceeding was completely appropriate in the circumstances, given the widely-dispersed group which, incidentally, includes between 45,000 and 50,000 affected members.

[53] If Ms. Condo's complaint is not having been informed of the ongoing negotiations, she must direct this to the chief of her band.

[54] Furthermore, the issue of the alleged violation of Ms. Condo's constitutional rights is presently before the Superior Court in another proceeding.

[55] On the issue central to this case, yes or no to approval, the Court is of the opinion that this agreement should be approved.

[56] The monetary damages are very significant and compensate group members in an acceptable way. The amount of $27,000,000 in public funds is considerable, whatever the views of Mr. Huot and his clients, who characterize the amount as "nominal"! But this declaration by counsel is not supported by any evidence or study. It must, therefore, be disregarded.

[57] According to the representations by counsel for the parties, a large part of their discussions was spent, with the assistance of experts, estimating the amount of tax paid over the years. The amount agreed upon was therefore not established casually.

[58] The action's chances of success were good from the perspective of the exemption from paying tax as provided for by the *Indian Act*. But the plaintiff Picard and his legal counsel confronted the great difficulty of providing convincing evidence of tax paid by group members over such a long period of time.

[59] The other difficulty, which was just as constraining, was the question of whether a prescription period applied to the members' claim and how should such a period be calculated?

[60] Finally, the issue of whether the refund scheme implemented in 1987 was legal and respected the group members' constitutional rights was central to the debate and vigorously contested.

[61] The preceding comments address favourably the criteria regarding the terms and conditions of the transaction, the likelihood of the action's success, its importance and the nature of the evidence heard.

[62] Legal counsel for the two parties recommend approval of the agreement which they negotiated over 20 meetings, spent in particular on the very difficult calculation of the taxes paid and not refunded.

[63] There is no doubt that the cost of future expenditures and the probable length of litigation favour approval of the agreement.

[64] There is no favourable recommendation from a third party in this case.

[65] However, the fact that the Attorney General of Québec and the Agence du Revenu du Québec are parties to the agreement provides significant reassurance that the terms and conditions of the agreement correctly reflect reality and are justified in the circumstances.

[66] As there is no doubt as to the good faith of the parties and the absence of collusion in this case, the criterion with respect to the number and nature of objections to the transaction remains.

[67] The Court summarily rejects as unfounded and unproven the declaration of Mr. Huot and his clients that the reparatory measure of $27,000,000 is “nominal.”

[68] Moreover, the Court understands Mr. Huot’s clients’ concerns. But those concerns are essentially with respect to the legality of the new exemption mechanism put in place by the Agence du Revenu du Québec as of July 1, 2011.

[69] That issue, however, is not before the Court and it is already the subject of legal proceedings that have been before the Superior Court since 1994 and which should be heard soon.

[70] The opposition by Mr. Huot’s clients must, therefore, be set aside, not because it is not serious, but because it concerns measures put into place since July 1, 2011 that are not addressed by the agreement.

[71] Finally, we note that the claimants ask the Court to modify the group’s description to include more members. The request is well-founded and the Court will allow it.

FOR THESE REASONS, THE COURT:

[72] **GRANTS** this motion for approval of the transaction;

[73] **DECLARES** good and valid the publication and broadcast of the notices of the hearing of this motion for the approval of the transaction;

[74] **APPROVES** the agreement concluded between the parties as a settlement of this class action on June 30, 2011;

[75] **MODIFIES** the group in accordance with article 1022, C.C.P., as follows:

> All registered Indians within the meaning of the *Indian Act*, R.S.C., c. I-5 – except for a Cree beneficiary within the meaning of the *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18 – who are adults and who:
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> a) reside in Quebec or Akwesasne; or
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> b) do not reside in Quebec or Akwesasne but are members:
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> i. of a band within the meaning of s. 2 of the *Indian Act* (R.S.C. 1985, c. I-5) of which the reserve or the settlement is situated in Quebec, in whole or in part;
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> ii. in all cases, the bands of the Micmac Nation of Gespeg and Wolf Lake First Nation;

iii. the Naskapi Nation of Kawawachikamach, the Naskapi band within the meaning of the *Cree-Naskapi (of Quebec) Act*, (S.C. 1984, c. 18); or

c) do not reside in Quebec or Akwesasne and are not members of a Quebec band, but have paid the tax collected in accordance with the *Fuel Tax Act*, R.S.Q., c. T-1, since its coming into force, when purchasing gasoline or diesel on an Indian reserve in Quebec, within the meaning of the *Indian Act*, or on Cree or Naskapi Category I or IA lands within the meaning of the *Cree-Naskapi (of Quebec) Act*.

[76] **DECLARES** that the aforementioned agreement constitutes a transaction within the meaning of article 2631 of the *Civil Code of Québec*, binding all parties and all group members;

[77] **ORDERS** the parties to comply with the agreement;

[78] **DECLARES** that each member of the group from Quebec who is bound by the agreement is deemed to have released the defendants in accordance with the terms of the agreement;

[79] **APPOINTS** Collectiva Inc. as the Settlement Administrator;

[80] **PRESERVES** the rights of the parties to bring all other motions necessary to implement transaction;

THE WHOLE WITHOUT COSTS.

Original signed
JEAN LEMELIN, S.C.J.

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