

CANADA

PROVINCE OF QUEBEC
DISTRICT OF QUÉBEC

(CLASS ACTION)

SUPERIOR COURT

N°: 200-06-000088-073

GHISLAIN PICARD

Plaintiff

v.

THE ATTORNEY GENERAL OF QUÉBEC

-and-

AGENCE DU REVENU DU QUÉBEC

Respondents

FONDS D'AIDE AUX RECOURS COLLECTIFS

Third party

MOTION FOR APPROVAL OF A TRANSACTION AND MODIFICATION OF THE GROUP
(Articles 1022, 1025 and 1033.1 C.C.P.)

TO THE HONOURABLE JEAN LEMELIN, SUPERIOR COURT, DISTRICT OF QUEBEC, THE JUDGE APPOINTED TO HEAR THIS CLASS ACTION, THE PLAINTIFF HEREBY STATES AS FOLLOWS:

I. THE MOTION

1. As appears from the record, the Plaintiff was authorized to institute a class action against the Respondents on behalf of members of the following group:

[TRANSLATION]

Any Indian within the meaning of the *Indian Act*, R.S.C. (1985), c.I-5— with the exception of a Cree beneficiary within the meaning of the *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c.18—who, since it came

into force, has paid the tax collected under the *Fuel Tax Act*, R.S.Q., c.T-1, when purchasing gasoline or fuel oil on an Indian reserve within the meaning of the *Indian Act* or on Cree or Naskapi Category 1A or 1A-N land within the meaning of the *Cree-Naskapi (of Quebec) Act*.

2. A settlement agreement (hereinafter “**the Agreement**”) was reached between the parties in this action on June 30, 2011, as appears from a copy of the Agreement, filed in support of the present motion as Exhibit **R-1**.
3. By this motion and with the consent of the Respondents, the Plaintiff asks the Court to approve the Agreement pursuant to article 1025, C.C.P.

II. THE CONDITION PRECEDENT HAS BEEN MET: NOTICES TO THE MEMBERS

4. Pursuant to article 1025, C.C.P., this Honourable Court approved notices of the hearing of this motion as well as the means of publishing or broadcasting them, as appears in the judgment rendered on or around November 14, 2011.
5. Pursuant to the second paragraph of article 1025, C.C.P., the notices approved by the Court informed the members:
 - a) that the transaction would be submitted to the Court for approval on November 29, 2011;
 - b) of the nature of the transaction and the method provided for carrying out the transaction;
 - c) of the procedure to be followed by members in order to prove their claims;
 - d) that the members would have the right to present their arguments to the court concerning the proposed transaction.
6. Pursuant to the order of this Honourable Court, the written notices were published in French and English in the principal newspapers (monthlies and weeklies) published in First Nations communities in Quebec, as well as in one newspaper distributed across Canada (*Windspeaker*), as appears in the published notices filed in a bundle as Exhibit **R-2**.
7. Also pursuant to the order of this Honourable Court, the notices adapted for radio were broadcast in French and English on the most widely-heard community radio stations in First Nations communities in Quebec, as appears from the Affidavit of Mr. Éric Cardinal filed in support of this paragraph as Exhibit **R-3**.

8. As well, pursuant to the order of this Honourable Court, the written notices were made available in French and English on the website of the Assembly of First Nations of Quebec and Labrador (hereinafter “**AFNQL**”), as appears from the Affidavit of Ms. Nadine Gros-Louis filed in support of this paragraph as Exhibit **R-4**.

III. SUMMARY OF THE LITIGATION

A. THE SUBJECT OF THE LITIGATION

9. When purchasing gasoline or diesel in Quebec, a consumer pays three taxes: the federal goods and services tax (GST), the Quebec sales tax (QST) and the fuel tax imposed by the Province.
10. Since the *Fuel Tax Act* came into force on July 1, 1973, retailers situated on reserve have had to collect the fuel tax from all their customers who buy fuel.
11. Since 1987, registered (“status”) Indians could obtain a refund if they applied using the form and within the time-period required by Quebec.

B. HISTORY OF THE PROCEEDINGS

12. In June 2003, a motion to authorize a class action was filed on behalf of the group described in paragraph 1.
13. On May 7, 2007, the Superior Court of Quebec authorized Mr. Ghislain Picard to institute a class action on behalf of this same group.
14. On June 27, 2007, the Court of Appeal dismissed a motion for leave to appeal the authorization.
15. On or around September 13, 2007, Mr. Picard filed this class action, as appears from the record.
16. In his action, Ghislain Picard asked the Superior Court:
 - a) to declare that the *Fuel Tax Act* violated the tax exemption provided for in the *Indian Act* and the *Cree-Naskapi (of Quebec) Act* and which takes precedence over all provincial legislation;
 - b) to order the restitution of the tax to registered Indians who had paid it since 1973 without applying for a refund;
 - c) to pay damages for trouble and inconvenience suffered by those who obtained a refund, on the grounds that the system they had to comply with was illegal.

17. On March 31, 2008, this Honourable Court agreed to suspend the litigation in order to allow the parties to initiate negotiations towards a settlement, as appears from the record; the parties met at least 20 times.

18. On June 30, 2011, the parties signed the Agreement now before the Court for approval.

IV. THE PRINCIPAL TERMS AND CONDITIONS OF THE AGREEMENT

A. OVERVIEW

19. The Agreement provides for the creation of funds of:

- a) \$24.3 million to be distributed on an individual basis; and
- b) \$2.7 million to be provided to the AFNQL, for the benefit of its members, as a remedial measure.

20. This payment constitutes a full and final settlement of the class action, including capital, interest and additional costs. The agreement covers the period ending June 30, 2011.

21. A Settlement Administrator, Collectiva Inc., has been chosen by the Agence du Revenu du Québec based on a call for tenders and after consultation with the AFNQL. Each registered Indian who wishes to receive compensation must file a claim with the Settlement Administrator within one year after publication of the final notice of settlement, using a form still to be determined.

22. Claimants shall attach supporting documents to their claims confirming:

- a) their status as registered Indians on the date their claims are filed;
- b) their date of birth;
- c) their place of residence on the date their claim is filed.

23. Group members who are not residents of Quebec or Akwesasne, nor members of a Quebec band, shall also attach to their claim proof that they paid the fuel tax on at least one purchase of fuel in Quebec before July 1, 2007.

24. No compensation shall be paid to heirs of group members who pass away before filing a claim.

25. The parties to the agreement may determine new methods or criteria for the distribution of the compensation if they decide that an insufficient number of group members have filed claims. In the event of disagreement on the matter, the parties will bring the issue before the Court.

26. The Agence du Revenu du Québec shall pay the legal fees as well as the professional fees and disbursements of the AFNQL's legal counsel, experts and external consultants as well as the time the AFNQL's staff spent on this matter, up to the date of approval of the Agreement by the Court.
27. The costs of distribution and implementation of the settlement payable to the Settlement Administrator shall also be assumed by the Agence du Revenu du Québec.

B. THE NEW REFUND MECHANISM

28. At the same time as the conclusion of the Agreement, the Government decided to implement a new refund mechanism to collect fuel tax on reserve as of July 1, 2011.
29. Before the coming into force of this mechanism, representatives of the Assembly of First Nation of Quebec and Labrador had provided the Government with the views of First Nations on the best way to respect the tax exemption to which registered Indians are entitled.
30. Since July 1, 2011, registered Indians who have a registration card ("attestation d'inscription") issued by the Agence du Revenu du Québec may buy fuel on reserve without paying the tax if they buy it from a retailer participating in the new mechanism.
31. The agreement covers the period ending June 30, 2011.
32. However, paragraphs 11.1 and 11.2 of the Agreement expressly provide that the Agreement is without prejudice to the respective positions of the parties regarding the legality of the mechanism in place before or after this date.

C. THE CRITERIA FOR THE PAYMENT OF COMPENSATION

1) OVERALL APPROACH

a. SIMPLICITY, SPEED AND ACCESSIBILITY

33. The overall approach to the compensation to be paid under this class action was motivated by a concern for simplicity, speed and accessibility.
34. For the parties, simplicity with respect to the eligibility criteria and the number of factors to be proven would permit the largest number of group members to file a claim and this would allow the cost of processing claims to be reduced and accelerate the distribution of compensation.

35. In particular, a claim that only required confirmation of status as a registered Indian, age and residence would present few obstacles for an individual with little or no formal education or with limited knowledge of French or English.

b. THE DIFFICULTY IN REQUIRING MORE PRECISE PROOF

36. If the proof required to be eligible for compensation had targeted the payment of tax on reserve more precisely, it would have been more difficult to provide.

37. For example, to confirm having been a driver would require proof one had a driver's licence or owned a vehicle during a period for which the individual would likely no longer have the documents.

38. Similarly, it might be difficult for many members to prove that they had spent time on a reserve where they had to pay tax.

39. There are, in particular, several reserves located in urban or semi-urban areas, such as Wendake near Quebec City, Kahnawake near Montreal, Wôlinak near Trois-Rivières, or Uashat and Mani-Utenam which is surrounded by the City of Sept-Îles.

40. It is reasonable to assume that in these communities, Indians who do not live on reserve nevertheless come to the reserve to purchase fuel.

41. While individuals who could show that they lived on reserve could meet the burden of proving they spent time on reserve relatively easily, this would not be the case for non-residents, even if they lived close to a reserve.

42. For example, individuals employed on reserve would be required to search for evidence of employment sufficient to prove their place of work, evidence that they would likely not have for past employment. Moreover, employees may never have received such evidence of having worked on reserve, since employers do not always comply with their obligation to provide a Statement of Remuneration Paid (T-4 slip) because the income is tax exempt.

43. For non-residents who were on reserve for personal or family reasons, proof would be even more difficult to obtain.

2) DISTINCTIONS BETWEEN RESIDENTS OF QUEBEC AND AKWESASNE, ON THE ONE HAND, AND MEMBERS OF QUEBEC BANDS, ON THE OTHER

44. Compensation in the amount of \$24,000,000 will be paid to the majority of group members without their having to prove that they purchased gasoline or diesel on an Indian reserve or on Cree or Naskapi lands, and without their having to prove that they paid fuel tax.

45. Compensation will be paid based on the following criteria:
- a basic amount for those between the ages of 18 and 24;
 - double the basic amount for those between the ages of 25 and 34;
 - triple the basic amount for those between the ages of 35 and 44;
 - four times the basic amount for those between the ages of 45 and 54;
 - five times the basic amount for those between the ages of 55 and 64;
 - six times the basic amount for those 65 years and older.
46. The amount that each individual receives will depend on the total number of claimants.
47. Compensation calculated using the basic amount shall be paid to all registered Indians who reside in Quebec or Akwesasne without regard to band membership.
48. Quebec residence, therefore, replaces proof of tax paid on reserve, based on the assumption that the vast majority of registered Indians would have paid tax on a reserve in Quebec.
49. For the purpose of the Agreement, residence in Akwesasne is treated as equivalent to residence in Quebec since the Mohawk lands overlap three jurisdictions: Quebec, Ontario and New York State. It is literally possible to move from New York to Quebec in Akwesasne by crossing the street.
50. Compensation based on the same criteria but reduced by 50% will be paid to members of Quebec bands who reside outside of Quebec or Akwesasne.
51. Membership in a Quebec band, therefore, is treated as equivalent to proof of tax paid on a reserve located in the province, though it is given less weight than residence in the province.
52. It is common even for those members who live a great distance away from their communities return to them for family, cultural, social or community reasons.
53. However, it is reasonable to assume that this category of member would have paid less fuel tax over the years, which is why they would receive compensation reduced by 50%.
54. The term “Quebec band” includes the Micmac Nation of Gespeg as well as Wolf Lake First Nation, two bands within the meaning of the *Indian Act* which are not recognized as having a reserve or a settlement (i.e. provincial or federal Crown land occupied by the band without having reserve status).

3) COMPENSATION PROVIDED FOR NON-RESIDENTS WHO ARE NOT MEMBERS OF QUEBEC BANDS

55. Group members who are neither members of a Quebec band, nor residents of Quebec or Akwesasne, shall prove that they paid fuel tax before July 1, 2007.
56. These criteria affect group members who are not residents of Quebec or members of a Quebec band and who can no longer obtain a refund from the Agence du Revenu du Québec.
57. In fact, the Agreement covers the period ending June 30, 2011, while the period within which to file a refund claim for fuel tax paid by an Indian on reserve is four (4) years: *Fuel Tax Act*, R.S.Q., c. T-1, s. 10.2, and the *Tax Administration Act*, R.S.Q., c. A-6.002, s. 21.
58. If these group members produce their claims as required, they will share a total maximum amount of \$300,000 and each will receive a maximum of \$50.
59. If the \$300,000 is not distributed, in whole or in part, the balance will be added to the fund to be distributed to the other group members.

D. THE NATURE OF THE RELEASE

60. As a result of the Agreement, the group members grant a full and final release to the Agence du Revenu du Québec and the Government of Quebec with respect to all claims related to the class action.
61. However, the Agence du Revenu du Québec will continue to provide refunds of the fuel tax to registered Indians who apply for a refund of any tax paid before July 1, 2011 (see paragraph 8.1 of the Agreement).
62. The Agreement, therefore, ensures that registered Indians who are able to prove their on-reserve consumption can still obtain a refund on tax paid during the last four years. The refund provided for by statute would be in addition to compensation paid as a result of this class action and serves to protect the interests of all group members.

V. GROUNDS FOR APPROVAL

A. GENERAL CRITERIA

63. The Plaintiff asks the Court to approve the Agreement because he considers it fair and equitable, both for himself and for the group members, considering all the circumstances of this class action and for the other reasons set out in this motion, which shall be explained in greater detail at the hearing.

64. This exercise in judicial discretion is guided by the following:

[TRANSLATION]

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

[14] It is not the role of the Court to modify, in whole or in part, the contract of transaction concluded between the parties. It must 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.

[15] The negotiated settlement of litigation will always be an initiative encouraged and supported by the courts. A settlement represents the will of the parties 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.

[16] 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.

Lemay v. Société immobilière du Québec, Sup.Ct. Chicoutimi, n° 150-06-000002-964, July 6, 2001, Justice Lemelin, p. 5.

65. In addition to the wording of Article 1025 of the *Code of Civil Procedure*, the judge seized of a motion for the approval of a transaction considers the following criteria:

- a) the action's likelihood of success;
- b) the importance and the nature of the evidence heard;
- c) the terms and conditions of the transaction;
- d) legal counsel's recommendations and their experience;
- e) the cost of future expenditures and the probable length of litigation;
- f) the advice of a neutral third party, if any;
- g) the number and nature of any objections to the transaction;
- h) the parties' good faith and the absence of collusion.

Lemay v. Société immobilière du Québec, Sup.Ct. Chicoutimi, n° 150-06-000002-964, July 6, 2001, Justice Lemelin, p. 6-7

B. APPLYING THE CRITERIA

1) THE PROBABILITY OF SUCCESS ON THE MERITS

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.
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 defence.
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."
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.

2) THE ROLE OF THE ASSEMBLY OF CHIEFS

70. The Plaintiff is Chief of the AFNQL, elected to this position by the Chiefs in assembly.
71. The motion to authorize this class action was filed following the adoption by the Chiefs in assembly of a resolution supporting the motion, as appears from the record.
72. Since then, the Plaintiff has continued to report to the Assembly of Chiefs on the important steps in the litigation and the negotiations.
73. More particularly, the Plaintiff has endeavoured to confirm his political mandate with the Chiefs concerning this file, while respecting his legal obligations to the group members as their representative.
74. In particular, an overview of the agreement-in-principle was explained to the Chiefs in assembly on December 15, 2010, prior to the Plaintiff instructing his legal counsel to sign it.

3) THE TERMS AND CONDITIONS OF THE TRANSACTION

75. The Agreement provides group members with undeniable advantages as compared to the situation that would prevail in the event of litigation.

76. Thus, contrary 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.

4) CALCULATING THE AMOUNT

79. On the one hand, the Respondents cannot provide exact figures on the amount of fuel tax paid on reserve because the Agence du Revenu du Québec (hereafter “**ARQ**”) does not deal directly with retailers for tax collection, but rather with wholesalers (known as “collection officers” for the purpose of the statute).
80. On the other hand, the Plaintiff cannot obtain exact figures for the period in dispute from the dozens of service stations operating on various reserves across Quebec. These retailers have various kinds of owners – for some, band councils or their economic development corporations, for others, individuals – and they are not generally able to calculate exactly their sales to registered Indians for each year of operation.
81. It is nonetheless likely that many Indians who paid fuel tax for fuel purchases on reserve did not keep their bills, without which it becomes impossible to determine precisely the amount of tax they actually paid and for which they claimed no refund.
82. In the absence of objective data with respect to these amounts, a formula was developed jointly by the parties to allow the ARQ to estimate the amount in question.
83. In particular, this amount took into account:
 - a) average Canadian fuel consumption, according to Statistics Canada, which is higher than Quebec consumption by about 20% (note that there are no specific data on average consumption by registered Indians);
 - b) all Indians living on a reserve with a service station as well as Indians living near such a reserve, even though it is clear they did not make all their purchases at a service station on reserve;

- c) an assumption that all Indians living close to a reserve always purchased their fuel on reserve, even though it is clear that a certain amount would have been purchased off-reserve, in particular due to the travel required to gas up on reserve;
- d) an assumption that, if there is at least one service station on a reserve, it is an eligible reserve.
- e) the exemption in s. 87 of the *Indian Act*, where Indian settlements (such as Kanesatake, Kitcisakik, Pakua Shipi, Rapid Lake – Lac Barrière, et Winneway) are treated as reserves.

VI. MODIFICATION OF THE GROUP

- 84. The group of individuals who will be beneficiaries under the Agreement will be larger than the group defined for the purpose of the authorization of this class action.
- 85. The current definition of the group requires that its members must have paid the fuel tax, but the Agreement does not, except for those group members who are neither members of a Quebec band, nor residents of Quebec or Akwesasne.
- 86. As set out above, the justification for compensating registered Indians without determining whether they paid the tax is to simplify payment of compensation and obtain the greatest possible participation by those who did in fact pay the tax.
- 87. It is therefore necessary to modify the composition of the group as follows, in order for it to conform to the Agreement:

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:

- a) *reside in Quebec or Akwesasne; or*
- b) *do not reside in Quebec or Akwesasne but are members:*
 - 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;*
 - 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.*

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT this motion for approval of the transaction;

DECLARE good and valid the publication and broadcast of the notices publicizing the hearing of this motion for the approval of the transaction;

APPROVE the Agreement R-1 concluded between the parties as a settlement of this class action;

MODIFY the group in accordance with article 1022, C.P.C., 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:

- d) *reside in Quebec or Akwesasne; or*
- e) *do not reside in Quebec or Akwesasne but are members:*
 - 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;*
 - 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*

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.

DECLARE that the aforementioned Agreement R-1 constitutes a transaction within the meaning of article 2631 of the *Civil Code of Quebec*, binding all parties and all group members;

DECLARE that the Agreement R-1, as signed by all the parties, is reasonable, fair, appropriate, in the best interest of the group members and forms part of the judgment granting approval;

ORDER the parties to comply with the Agreement R-1;

DECLARE that each member of the group from Quebec who is bound by the Agreement R-1 is deemed to have released the Respondents in accordance with the terms of the Agreement;

APPOINT Collectiva Inc. as the Settlement Administrator;

PRESERVE the rights of the parties to bring all other motions necessary to implement transaction;

THE WHOLE without costs.

MONTREAL, November 28, 2011

DIONNE SCHULZE, S.E.N.C.
Counsel for the Plaintiff

BELLEAU LAPOINTE, S.E.N.C.R.L.
Counsel for the Plaintiff

NOTICE OF PRESENTATION

To : Mr. Jean-Yves Bernard
BERNARD ROY & ASSOCIÉS (JUSTICE QUÉBEC)
1 Notre-Dame Street East, 8th floor
MONTREAL (Quebec) H2Y 1B6

Mr. Éric Labbé
Larivière Meunier (**REVENU QUÉBEC**)
3800 Marly Street, secteur 5-2-8
Quebec (Quebec) G1X 4A5

Mr. Samy Elnemr
FONDS D'AIDE AUX RECOURS COLLECTIFS
1 Notre-Dame Street East
Suite 10.30
Montreal (Quebec)
H2Y 1B6

TAKE NOTICE that the present *Motion for Approval of a Transaction and Modification of the Group* will be presented for judgment before the Honourable Jean Lemelin, S.C.J., the judge appointed to hear this class action, on **November 29, 2011, at 9:30 A.M. in Room 3.21 of the Quebec City Courthouse located at 300 Jean-Lesage Boulevard in Quebec City, H2K 8K6.**

PLEASE GOVERN YOURSELF ACCORDINGLY.

MONTREAL, November 29, 2011

DIONNE SCHULZE, S.E.N.C.
Counsel for the Plaintiff

BELLEAU LAPOINTE, S.E.N.C.R.L.
Counsel for the Plaintiff