APL-2017-00029
Appellate Division Docket No. CA 15-01764
Cattaraugus County Clerk's Index No. 82670

Court of Appeals

of the

State of New York

ERIC WHITE and NATIVE OUTLET,

Plaintiffs-Appellants,

– against –

ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, in his official capacity; and THOMAS H. MATTOX, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, in his official capacity,

Defendants-Respondents.

AMICUS CURIAE BRIEF

Lee Alcott, Esq.
Michael E. Nicholson, Esq.
BARCLAY DAMON, LLP
Attorneys for the Cayuga Nation
Barclay Damon Tower
125 East Jefferson Street
Syracuse, New York 13202
Tel.: (315) 425-2700
Fax: (315) 425-2701

Dated: September 29, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

New York State Cases

Statutes

Constitution

Treaties

PRELIMINARY STATEMENT

By its order dated June 10, 2016 (R. 243–245) (the "Order"), the Appellate Division, Fourth Department (the "Appellate Division") created a current of judicial interpretation in New York that, if left unchecked, will serve to erode the centuries-long sovereignty Indian Nations have been afforded in affairs on their own lands. Not only does the Order upholding Tax Law § 471 run afoul of Indian sovereignty that traces back before the American Revolution, but it portends a new era of judicially-sanctioned State intrusion on Indian lands. The effects of this intrusion on *amicus curiae,* the Cayuga Nation, uniquely demonstrate the hardship Tax Law § 471 inflicts on New York's Indian Nations.

The Cayuga Nation's once-profitable cigarette retail economy has been severely compromised. Its two retail outlets now sell, almost exclusively, Indian Nation-brand cigarettes. As a small Nation, the Cayuga Nation and its citizens do not have the prosperity that comes with Class III casinos—the income it had derived from sales of premium brand cigarettes was significant to its economy and its people. Tax Law § 471 thus imposes onerous obligations with which the Cayuga Nation lacks the resources to comply: prepaying the cigarette excise tax, collecting that tax, and collecting data for the State in order to aid in the State's collection of the excise tax. In short, rather than regulating the Cayuga Nation's cigarette economy, it has effectively stamped it out.

Indian Law § 6 was enacted in 1909 to prevent precisely the type of oppressive intrusion on Indian sovereignty that is embodied by Tax Law § 471. When the Appellate Division failed to apply the protections of Indian Law § 6 to bar the application of Tax Law § 471, it erred. The Order should therefore be reversed.

ARGUMENT

POINT I

TAX LAW § 471 IS UNENFORCEABLE BECAUSE IT VIOLATES THE SOVEREIGNTY OF NEW YORK'S INDIAN NATIONS

The Cayuga Nation's sovereignty predates the arrival of Europeans in North America.[1] As the Supreme Court explained nearly two centuries ago, "[t]he Indian nations had always been considered distinct, independent political communities, retaining their natural rights, as undisputed possessors of the soil from time immemorial[.]" *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). Like New York's other Indian tribes, the Cayuga Nation's continued sovereignty is thus derived not from any grant of Congress but, rather, from its sovereign status predating the Constitution. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (describing Indians tribes as "separate sovereigns pre-existing the Constitution[.]").

[1] The Cayuga Nation is one of the Six Nations of the Iroquois Confederacy, also known as the Haudenosaunee Confederacy. The existence of the Haudenosaunee Confederacy predates the American Revolution and United States Constitution.

The Constitution, for its part, affirms the inherent sovereignty and governmental status of Indian Nations. *See* U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have the power to regulate Commerce with foreign Nations, among the several States, and with *Indian tribes*." (emphasis added)); *see also Cherokee Nation v. Georgia*, 30 U.S. 1, 18–19 (1831) (analyzing commerce clause treatment of Indian tribes as distinct political entities). To be sure, the Supreme Court made that Constitutional affirmation of tribal sovereignty clear:

> The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.

Worcester v. Georgia, 31 U.S. at 559.

From its inception, the Supreme Court has continuously acknowledged Indian sovereignty. And the United States has always dealt with Indian tribes accordingly; indeed, it has a long-standing policy of affirmatively encouraging the exercise of that autonomy. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) ("We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." (citations omitted)). Indian tribes thus possess "those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). To be sure, "[t]ribal authority over the

activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997). Accordingly, a "*tribe may regulate, through taxation*, licensing, or other means, the activities of nonmembers who enter into contractual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981) (emphasis added).

Perhaps the most basic hallmark of sovereignty is that persons on sovereign land, such as Appellants herein, are free from the imposition of taxes by anyone but the sovereign authority.[2] The Indian Law codifies just that for New York's Indian tribes, stating: "No taxes shall be assessed, *for any purpose whatever*, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same." N.Y. Indian Law § 6 (emphasis added).

Yet, Tax Law § 471 seeks to reach onto the sovereign Indian land of the Seneca Nation and impose cigarette taxes on sales to non-Indians. N.Y. Tax Law § 471 ("There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale…The tax imposed by this section is imposed on

[2] This axiom is enshrined in the Buffalo Creek Treaty (discussed more fully in Appellants' merits brief) which provides: "The parties to this compact mutually agree and solicit the influence of the Government of the United States to protect such lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession, *from all taxes*, and assessments for roads, highways, *or any other purpose*[.]" Buffalo Creek Compromise Treaty of 1842, US-Seneca Nation, art. IX, May 20, 1842, 7 Stat. 586 (emphasis added).

all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians[.]"). That is proscribed both generally (by well-settled principles of Indian sovereignty) and specifically (by Indian Law § 6), and therefore, Tax Law § 471 unenforceable on its face. Because it infringes on Indian sovereignty, it also constitutes a legislative overreach by New York, rendering it likewise invalid. *See Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."); *see also Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. 2024, 2030 (2014) ("[U]nless and until Congress acts, the tribes retain their historic sovereign authority." (citation omitted) (internal quotation marks omitted)).

By reaching into the Cayuga Nation's economy, and imposing taxes on sales by Indian citizens, Tax Law § 471 determinedly violates the Cayuga Nation's sovereignty. The Appellate Division thus erred when it determined that Tax Law § 471 was lawful, and its Order should be reversed.

POINT II

THE APPELLATE DIVISION ERRED WHEN IT FAILED TO APPLY THE APPROPRIATE CANONS OF STATUTORY CONSTRUCTION TO INDIAN LAW § 6

"The standard principles of statutory construction do not have their usual force in cases involving Indian Law." *Montana v. Blackfeet Tribe of Indians*, 471

U.S. 759, 766 (1985). Instead, "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.*; *see Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (stating "we must be guided by the eminently sound and vital canon that statutes passed for the benefit of Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians." (citations omitted) (internal alterations and quotation marks omitted)). The Appellate Division was thus required to interpret the language of Indian Law § 6, "No taxes shall be assessed, for any purpose whatever, upon an Indian reservation in this state", in a manner most favorable and deferential to the interests of the Indians. Instead, it improperly interpreted the statute in the most limited and prejudicial manner. (R. 243–245). Of course, that presupposes that the Appellate Division's endeavor to add color to the statute beyond its textual pigment was permissible to begin with. It was not.

"[W]hen the words of a statute have a definite and precise meaning, such meaning cannot be extended or restricted by conjecture, or under the guise or pretext of interpretation. It is not allowable to interpret that which has no need of interpretation." *Mushlitt v. Silverman*, 50 N.Y. 360, 361–362 (N.Y. 1872) (citation omitted). Indian Law § 6's plain and unambiguous language evinces an across-the-board tax prohibition; one that cannot be reconciled with Tax Law § 471. But in a strained effort to harmonize the two statutes, the Appellate Division emptied

Indian Law § 6's broad tax proscription of its plain meaning, restricting its application only to taxes upon land. When it did so, it erred.

Because Indian Law § 6 is not ambiguous, the Appellate Division's interpretation was confined to the statute's plain words—it could not look even to those of its title. *Cornell v. Coyne*, 192 U.S. 418, 430 (1904) ("The title of an act is referred to only in cases of doubt or ambiguity."). Yet it did just that, first looking to legislative history and then to the statute's title. (R. 244–245). Both were palpably improper. And even were ambiguity to exist, the Appellate Division was required to resolve it in favor of the Indian Nations. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766. Plainly, it did the opposite.

Rather than read Indian Law § 6 to provide the rights it clearly creates, the Appellate Division interpreted it as a mere statutory double-down on a right of Indian Nations so fundamental from the inception of this Country that it does not require codification by New York's legislature: that Indian lands are not subject to property tax by the State. By identifying ambiguity in a clear-cut statute, and not then interpreting that ambiguity in favor of the Indian Nations, the Appellate Division proceeded to limit Indian Law § 6's meaning to one that its words simply do not impart. When it did so, it erred, and its Order should be reversed.

CONCLUSION

For the reasons set forth herein, Tax Law § 471 runs afoul of both fundamental notions of Indian sovereignty and the statutory protections embodied by Indian Law § 6. In determining that Tax Law § 471 was not unlawful, the Appellate Division erred, and its Order should be reversed.

Dated: September 29, 2017

BARCLAY DAMON LLP

By: _____

Lee Alcott
Michael E. Nicholson

Attorneys for the Cayuga Nation

Barclay Damon Tower
125 East Jefferson Street
Syracuse, New York 13202