File No. 37912

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

Appellant
(Appellant)

-and-

UASHAUNNUAT (INNU OF UASHAT AND OF MANI-UTENAM), INNU OF MATIMEKUSH-LAC JOHN, CHIEF GEORGES-ERNEST GRÉGOIRE, CHIEF RÉAL MCKENZIE, INNU TAKUAIKAN UASHAT MAK MANI-UTENAM BAND, INNU NATION MATIMEKUSH-LAC JOHN, MIKE MCKENZIE, YVES ROCK, JONATHAN MCKENZIE, RONALD FONTAINE, MARIE-MARTHE FONTAINE, MARCELLE ST-ONGE, ÉVELYNE ST-ONGE, WILLIAM FONTAINE, ADÉLARD JOSEPH, CAROLINE GABRIEL, MARIE-MARTHE MCKENZIE, MARIE-LINE AMBROISE, PACO VACHON, ALBERT VOLLANT, RAOUL VOLLANT, GILBERT MICHEL, AGNÉS MCKENZIE, PHILIPPE MCKENZIE, AUGUSTE JEAN-PIERRE

Respondents
(Respondents)

-and-

IRON ORE COMPANY OF CANADA (Compagnie minière IOC inc.), QUEBEC NORTH SHORE AND LABRADOR RAILWAY COMPANY INC. (Compagnie de chemin de fer littoral nord de Québec et du Labrador inc.)

Intervener
(Mise-en-cause)

-and-

ATTORNEY GENERAL OF QUEBEC

Intervener
(Mise-en-cause)

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PART I – STATEMENT OF FACTS

1. For the purposes of his submissions on this appeal, the Attorney General of British Columbia ("AGBC") accepts the facts as set out in the Appellant's factum.

PART II – BRITISH COLUMBIA'S POSITION ON THE QUESTION IN ISSUE

2. The AGBC's position is that, according to existing case law, a declaration of Aboriginal title will always represent a burden on the Crown's title and, consequently, the courts of a province do not have jurisdiction to grant a declaration of Aboriginal title over provincial Crown land in another province.

3. The AGBC also submits that concerns about access to justice arising in the litigation of transboundary Aboriginal title claims can be effectively addressed through cooperation between provincial superior courts within their broad inherent jurisdiction, and by litigants through cooperative litigation practices.

PART III – STATEMENT OF ARGUMENT

A. A Declaration of Aboriginal Title Is a Burden on Crown Title

4. Current authorities establish that Aboriginal title is always a legally enforceable ownership interest in the land over which it is declared to exist.[1]

5. Traditional property law concepts of *in rem* and *in personam* may be of limited assistance in describing the effect of a declaration of Aboriginal title: the interest is *sui generis* reflecting the uniqueness of reconciling the pre-existing rights of Indigenous groups, with the assertion of Crown sovereignty. It arises from exclusive use and occupation of the land before the assertion of British Sovereignty, and its unique content is informed by the nature of the relationship between the land and the Indigenous group that holds the pre-existing Aboriginal title interest. It

[1] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para. 140 (*Delgamuukw*); *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85 at paras. 37-47; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 37-40 (*Haida*); *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 18, 112 (*Tsilhqot'in*).

is distinguished from other estates in land, such as fee simple, that arise after the assertion of Sovereignty.[2]

6. Still, this Court has been clear that Aboriginal title is "personal" only in the sense that Aboriginal title lands cannot be alienated to any party other than the Crown.[3] This limit on the alienability of Aboriginal title land reflects an understanding that Aboriginal title is inherently historical and held collectively – a concept that requires consideration of the "personal" or group-specific historical facts of collective Indigenous use and occupation of geographically specific land.

7. This Court has explained that, when judicially declared, Aboriginal title is a right to land itself, and a burden on the Crown's underlying or radical title. When burdened by a declaration of Aboriginal title, Crown title is limited to the fiduciary duty owed to the Indigenous collective that holds the Aboriginal title, and to the right to encroach on the Aboriginal title where that encroachment is justified.[4]

8. Consequently, an Aboriginal title declaration is a first instance determination which has a meaningful and immediate legal effect on the land and on the Crown's jurisdiction over the land. It is not a finding of a process right, as is the case in judicial determinations of prima facie claims of Aboriginal title and rights in the consideration of the Crown's legal duty to consult with Indigenous groups.[5] Nor is it akin to a judicial acknowledgement which arises, subsequently, from a right to land previously established by a court within jurisdiction.[6]

9. In respect of land in Newfoundland and Labrador, in the judgment under appeal,[7] the Court of Appeal of Quebec observed that the originating application asks the superior court to establish Aboriginal title and rights, conclusively and in a way that would affect the land:

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[2] *Delgamuukw* at paras. 109-113, 117, 130, 166; *Tsilhqot'in* at paras. 14-17, 112, 116.
[3] *Delgamuukw* at para. 113.
[4] *Delgamuukw* at para. 140; *Tsilhqot'in* at paras. 18, 112.
[5] *Haida.*
[6] *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154 at paras. 48-79.
[7] *Procurer general de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at paras. 30, 90 (unofficial translation).

> [30] The application includes declaratory conclusions according to which the Innu of UM and of MLJ would enjoy Aboriginal title and rights over the Nitassinan…
>
> [90] To prevail in this case, the Innu must establish their Aboriginal rights on the parts of the Nitassinan occupied by the IOC megaproject…

10. Like Newfoundland and Labrador, and other provinces, it is clear that in British Columbia the provincial Crown has an ownership interest in land that would be impacted by the judicial establishment of Aboriginal title.[8] This impact has been judicially recognized in the context of Aboriginal title proceedings. Courts have held that an Aboriginal title declaration would affect the Crown's legal interests, and that Crown participation is necessary for effective adjudication of an Aboriginal title claim -- and for this reason it has been held that such cases should not proceed unless the Crown is a party.[9]

11. An Aboriginal title declaration does not, necessarily, lead to an order of consequential relief. Nor will it necessarily be granted as a matter of law -- it is a discretionary remedy.[10] This does not contradict the fact that, if granted, the declaration impacts Crown title.

12. In the case of third party interests in land which becomes the subject of an Aboriginal title declaration, the actual effect of the declaration is likely to be determined on the facts of each case based upon the application of equitable principles. Consideration of the impacts on third parties is distinct from consideration of the impacts on Crown title.[11]

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[8] The *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, section 109; The British Columbia Terms of Union, 1871 (R.S.C. 1985, App. II, No. 10); *Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 SCR 388 at pp. 391-394, 418-421, 426-427.
[9] *Innu of Uashat Mak Manu-Utenam v. Canada*, 2016 FCA 156 at paras. 8 and 9; *Calliou v. Canada*, 2019 FCA 23 at paras. 3-7, 12; *Thomas v. Rio Tinto Alcan Inc.*, 2016 BCSC 1474 at paras. 16-24 (*Thomas*).
[10] *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2000] O.J. No. 4804; 195 DLR (4th) 135, (ONCA) at paras. 243-312, leave to appeal denied November 8, 2001; *Manitoba Metis Federation Inc. v. Canada (Attorney General) et al*., 2010 MBCA 71 at paras. 246-248, rev'd on other grounds; *Manitoba Metis Federation Inc. v. Canada (Attorney General) et al*. 2013 SCC 14 at para. 143 (*MMF*); *Ewert v. Canada*, 2018 SCC 30 at paras. 81-83 (*Ewert*); *Giesbrecht v. British Columbia*, 2018 BCSC 822 at paras. 54-59.
[11] *Cowichan Tribes v. Canada (Attorney General)*, 2017 BCSC 1575 at paras 17-28; *The Council of the Haida Nation*, 2017 BCSC 1665 at paras 22-52.

13. An additional indicator that an Aboriginal title declaration would affect Crown title is found in jurisprudence regarding the legal effect of declarations generally.[12] The essential point was stated by Mr. Justice Rowe in *Metro Vancouver Housing*:

> [78] …The availability of this relief is premised on the actual or potential infringement of an applicant's rights. (*Kaiser Resources Ltd. v. Western Canada Beverage Corp.* (1992), 71 B.C.L.R. (2d) 236 (S.C.) at para. 32). A court has "no jurisdiction to issue a declaration where there exists no right in jeopardy nor in procedural provision for the relief sought" (L. Sarna, *The Law of Declaratory Judgments*, (4th ed. 2016), at p. 87). Absent a legal entitlement to anchor the declaration…one cannot be granted. …

14. If a declaration of Aboriginal title does not have a meaningful legal impact on land, this would be inconsistent with the AGBC's understanding of the assertions and pleadings of Indigenous groups in British Columbia who have expressed the view that Aboriginal title affects the Crown's legal interests and jurisdiction. This view is reflected in the submission of the Tsawout First Nation intervener.[13]

B. The Doctrine of Crown Immunity Applies

15. The doctrine of Crown immunity,[14] which shields the Crown from suit except as expressly permitted by law, applies to require that an action for a declaration of Aboriginal title may only be brought in the jurisdiction that has constitutional authority over both the land in question and the judicial process in that jurisdiction.

16. As outlined above, a declaration of Aboriginal title would, as a matter of law, have impacts on Crown title to land within provincial boundaries – which is a sufficient basis for Crown immunity from extra-provincial adjudication of Aboriginal title. The Crown immunity doctrine is not avoided if the only relief sought is a declaration, or if the Crown is not a party to the proceeding.

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[12] *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 78 (*Metro Vancouver Housing*); *Ewert* at paras. 81-83; *MMF* at para. 247; *Assiniboine v. Meeches*, 2013 FCA 114 at paras.12-15.
[13] Intervener motion materials: Tsawout First Nation notice of motion at para. 3 and memorandum of argument at para. 14.
[14] As reviewed in *R. v. Medvid*, 2010 SKQB 22 at paras. 22-37, aff'd 202 SKCA 49 (*Medvid*).

17. Only the superior court of a province has jurisdiction to determine land rights in that province.[15] This rule was explained in *Tezcan v. Tezcan*:

> The general rule is that the courts of a country have no jurisdiction to adjudicate on the right and title to lands not situate within its borders. Only the courts of the jurisdiction in which lands are situate, may adjudicate on the rights and title to such lands: *Duke et al. v. Andler* [1932] 4 D.L.R. 529, [1932] S.C.R. 734. The rule is not confined to the formalities of transfer of title, but extends to all disputes touching the land, including debt, trust, or tort: see *Deschamps v. Miller*, [1908] 1 Ch. 856; *Purdom v. A.E. Pavey & Co.* (1896), 26 S.C.R. 412; *British South Africa Co. v. Companhia de Macambique,* [1893] A.C. 602 (H.L.).[16]

18. Though an Indigenous group may hold Aboriginal title to an area of land which straddles provincial or territorial boundaries, the Aboriginal title interest is physically, and constitutionally, bisected by those boundaries. This is not a trite point as it describes the geographic limit on the constitutional exercise of jurisdiction by a court of a province or territory.

19. Though a provincial superior court may properly exercise extraterritorial *in personam* jurisdiction, in consonance with the conflict of laws and constitutional aspects of the "real and substantial connection test",[17] because a declaration of Aboriginal title affects Crown title to land it does not fall within the scope of *in personam* jurisdiction.

20. Crown immunity also applies to judicial process. Just as a province is immune from extra-provincial determination of land rights, it is also immune from extra-provincial dictates of court process.[18]

21. In British Columbia, like other provinces, the exclusive competence of the provincial superior court over litigation of land rights in the province is derived from and defined by s. 92

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[15] *Tezcan v. Tezcan* (1987), 46 DLR (4th) 176 (BCCA) at p. 4 (*Tezcan No. 1*); (1992) 87 DLR (4th) 503 (BCCA) at pp. 24, 27. *Keung v. Wong,* 2000 BCSC 528 at paras. 13-27.
[16] *Tezcan No. 1*.
[17] *Equustek Solutions Inc. v. Google Inc.*, 2015 BCCA 265 at paras. 46-50.
[18] *Athabasca Chipewyan First Nation v. British Columbia*, 2001 ABCA 112 at paras. 12-43 (*Athabasca*); *Medvid*; *Endean v. British Columbia*, 2016 SCC 42 at paras. 42-46, and 88 (*Endean*).

of the *Constitution Act, 1867*.[19] In British Columbia, the superior court's jurisdiction is defined by provincial legislation such as the *Crown Proceeding Act*,[20] the *Supreme Court Act*,[21] the *Supreme Court Civil Rules*,[22] the *Limitation Act*,[23] the *Law and Equity Act*,[24] and the *Interpretation Act*,[25] and by the Court's inherent jurisdiction. If a superior court of another province or territory were to dictate the judicial process in an Aboriginal title action in British Columbia, this would tread upon the constitutional jurisdiction of British Columbia and the jurisdiction of the British Columbia Supreme Court.

22. In British Columbia, the most obvious example of Crown immunity from extra-provincial judicial process is s.4 of the *Crown Proceeding Act*:

> 4 (1) Subject to this Act, all proceedings against the government in the Supreme Court must be instituted and proceeded with under the *Supreme Court Act* and, if applicable, under the *Class Proceedings Act*.

This legislative provision modifies Crown immunity in allowing that a proceeding may be brought against the Crown in British Columbia. The action may only be brought in the superior court of the province, in the manner provided for by provincial legislation, and in no other way.[26]

23. A particularly important basis for recognizing Crown immunity from an extra-provincial declaration of Aboriginal title is that, in effect, a declaration of Aboriginal title would act as a coercive order against the Crown – one which invokes compliance by or consequential relief against the Crown.[27] A court cannot use their coercive powers outside their home province.[28]

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[19] The *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, section 92.
[20] [RSBC 1996] c. 89.
[21] [RSBC 1996] c. 443.
[22] B.C. REG. 168/2009.
[23] [RSBC 2012] c. 13.
[24] [RSBC 1996] c. 253.
[25] [RSBC 1996] c. 238.
[26] As discussed in *Athabasca*.
[27] *Yellowbird v. Samson Cree Nation No. 444*, 2008 ABCA 270 at paras. 44-47; *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 at paras. 122-127; *Daniels v. Daniels*, 2011 MBCA 94 at paras. 74-98; *Joarcam, LLC v Plains Midstream Canada ULC*, 2013 ABCA 118 at

24. Although coercion might not be intended, whether by a plaintiff or a court, an Aboriginal title declaration invokes the honour of the Crown[29] and cannot be treated as an inconclusive or inconsequential finding.[30]

25. It is also important to recognize that Aboriginal title must be established through a trial which allows for essential trial procedures and the presentation and consideration of evidence which is relevant to the legal test established by this court.[31] If Aboriginal title can be declared extra-provincially, a provincial Crown will be faced with the dilemma of accepting extra-provincial determination of rights regarding land within its borders, in its absence, or seeking to join a proceeding before the court of another province or territory. In either case, the proceeding will be governed by the law and procedural rules of the other province or territory. This is not only coercive, but also contrary to the constitutional framework which provides for provincial administration of justice.

C. Access to Justice Concerns Can Be Addressed Through Cooperative Practices

26. In cases of transboundary Aboriginal title claims, the AGBC recognizes that legitimate concerns about access to justice may arise, due to the possibility of duplicative proceedings. However, there are ways in which these concerns can be effectively addressed while avoiding unconstitutional intrusion of one superior court into the jurisdiction of another.

27. There are a variety of ways that litigants, including Crown litigants, may work cooperatively to reduce litigation barriers and inefficiencies. The AGBC submits that parties must consider each case on its own facts and circumstances, and any approach must preserve the

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paras. 5-8; *Athabasca Chipewyan First Nation v. Alberta (Minister of Energy)*, 2009 ABQB 576 at paras. 25-46.

[28] *Endean* at paras 42, 45-48, 51, 58.

[29] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para. 24.

[30] *Tsilhqot'in* at para. 115.

[31] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at paras. 84-86; *Thomas* at paras. 21-23; *Nuchatlaht v. British Columbia*, 2018 BCSC 796 at paras. 15-19.

discretion and rights of parties to advance or defend litigation as they choose within statutory and constitutional parameters. However, cooperative litigation practices offer some solutions to the concern about access to justice.

28. Between parties, cooperative practices could include, where allowed by law, case-by-case attornment to jurisdiction on some or all issues, and admissions in parallel or subsequent actions based on evidence or findings from proceedings in another jurisdiction. Informal cooperative arrangements could include coordinated discovery, evidence, and procedural steps in parallel proceedings.

29. As well, some of the approaches to cooperation in multi-jurisdictional class action proceedings may translate to transboundary Aboriginal title litigation. For example, the 2018 Canadian Bar Association *Canadian Judicial Protocol for the Management of MultiJurisdictional Class Actions*[32] recommends that parties to an action:

- advise case management judges of any other related actions;
- agree that case management judges in related actions may communicate with each other;
- agree that joint case management conferences may be held; and
- share motion materials with all parties and case management judges in related proceedings.

30. There are also options for cooperation and coordination between courts. Apart from legislation which may permit specific judicial actions which extend beyond provincial and territorial boundaries, the inherent jurisdiction of superior courts allows for wide discretion to address access to justice concerns in ways that are constitutionally permitted. The topic of court jurisdiction to sit outside home jurisdiction and to coordinate with other courts, in the context of pan-national class action proceedings, was addressed by this Court in *Endean*. This was found to be constitutionally permissible, provided that the exercise of coercive powers would not be necessary and there is no extra-provincial legal prohibition on such actions:

[32] Canadian Bar Association, Resolution 18-03-A Class Action Judicial Protocols (2018) Annex 1.

> [23] The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law…
>
> [24] The courts have recognized that, given the broad and loosely defined nature of these powers, they should be "exercised sparingly and with caution": *Caron* at para. 30. …
>
> [42] …There is no claim that the judges sitting outside their home jurisdiction have any authority to use their coercive powers outside their province. …
>
> [60] …In short, inherent jurisdiction, among other things, empowers a superior court to regulate its proceedings in a way that secures convenience, expeditiousness and efficiency in the administration of justice.

31. Lastly, British Columbia's *Supreme Court Civil Rules* provide robust case management authority.[33] These *Rules* provide judges the latitude necessary to cooperate and coordinate with other courts in the management of transboundary Aboriginal title litigation, within their respective constitutional jurisdictions.

PART IV – SUBMISSIONS ON COSTS

32. AGBC seeks no order concerning costs and asks that no further costs be ordered against him.

PART V – ORDER SOUGHT

33. AGBC seeks no order from the Court but invites it to consider his submission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 4, 2019

Jeff Echols Counsel for the Attorney General of British Columbia	**Chris Robb** Counsel for the Attorney General of British Columbia

[33] Rules 5-2 and 5-3

PART VI – TABLE OF AUTHORITIES

Authorities	**Paragraphs**
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