

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

-and-

RICHARD LEE DESAUTEL

RESPONDENT
(Respondent)

-and-

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PART I – OVERVIEW

Overview

1. The Attorney General of the Yukon (“Yukon”) intervenes in this case to make limited submissions on the scope of section 35(1) of the *Constitution Act, 1982* and to highlight the arrangements adopted in Yukon that address the issues currently before the Court.
2. In particular, depending on the Court’s ultimate approach, the present case implicates section 35 as a whole. Accordingly, Yukon asks the Court to interpret the provision in a manner that takes into account that section 35 applies to both Aboriginal and treaty rights.
3. Further, Yukon asks the Court to remain mindful of existing modern land claims agreements that provide negotiated solutions to the complex issues before the Court and to adopt an approach to resolving the dispute that respects these arrangements.

Facts

4. Yukon understands that the facts of this matter are not in dispute and, accordingly, adopts the Statements of Facts presented at paragraphs 7 to 30 of the Appellant’s Factum and paragraphs 5 to 23 of the Respondent’s Factum.

PART II – YUKON’S POSITION ON THE ISSUE ON APPEAL

5. The Appellant has identified the following constitutional question:

Are ss. 11(1) and 47(a) of the *Wildlife Act*, RSBC 1996 c. 488, as they read in October 2010, of no force or effect with respect to the respondent, being a member of the Lakes Tribe of the Confederated Tribes of the Colville Reservation in Washington State, USA, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of an Aboriginal right within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the Respondent?
6. Yukon takes no position on the specific constitutional question posed by the Appellant; rather, Yukon intervenes to provide additional context on rights encompassed within the purview of section 35(1) and on the approach to the international border adopted in Yukon’s modern land claims agreements (also referred to as the “Final Agreements”).

PART III – STATEMENT OF ARGUMENT

7. Section 35(1) protects the Aboriginal rights and treaty rights of the Aboriginal peoples of Canada. While Mr. Desautel’s appeal involves Aboriginal rights specifically, the Court’s approach to interpreting section 35(1) may nonetheless impact treaty rights. Accordingly, Yukon seeks to draw the Court’s attention to the treaty context and, in particular, the provisions in the Final Agreements whereby the parties to the Final Agreements achieved negotiated solutions to the issues now in dispute before the Court.

Context Along the Yukon-Alaska Border

8. The entire western edge of the Yukon lies on an international border separating the territory from Alaska. Unlike other parts of the country, neither historic treaties¹ nor the *Van der Peet* framework apply to First Nation rights in much of Yukon.² Instead, modern land claims agreements cover almost 484,000 square kilometres of the territory and govern relationships between the territorial and federal governments and 11 of 14 Yukon First Nations.³

9. Modern land claims agreements in Yukon evolved out of a unique approach to treaty negotiation, where, together, all Yukon First Nations participated in negotiating a framework

¹ *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 8 [*Beckman*].

² There is one First Nation along the border that has not finalized a modern land claim and, accordingly, remains governed by the *Indian Act*, albeit without reserve lands (see *Ross River Dena Council Band v Canada*, 2002 SCC 54); however, the geographic land base asserted by this nation is nonetheless covered by other self-governing First Nations’ land claims.

It is also worth noting that the northern tip of the territory is governed by the Inuvialuit Final Agreement – a settlement of the western arctic claim between Canada and the Inuvialuit (see *Western Arctic (Claims) Settlement Act*, SC 1984, c 24). Though it is also a land claim agreement within the meaning of section 35 of the *Constitution Act, 1982*, Yukon is not a signatory to this agreement and has not addressed its terms in these submissions.

³ *Beckman*, *supra* note 1 at paras 2 & 9.

agreement with the governments of Canada and Yukon.⁴ While the framework itself did not create or affect Yukon First Nations' legal rights, the Final Agreements subsequently entered into by Yukon First Nations established individualized, legally-binding land claims agreements which incorporated all the provisions of the framework.⁵

10. Between 1993 and 2005, eleven individual Yukon First Nations entered into Final Agreements, which are land claims agreements within the meaning of section 35(3) of the *Constitution Act, 1982* and, therefore, are encompassed in the scope of section 35(1).⁶

Treaty Rights are Included in Section 35(1)'s Scope

11. The parties to this appeal have each made substantial submissions, which need not be repeated here, on the underlying purpose of section 35 of the *Constitution Act, 1982*.⁷ The common thread between those submissions is that section 35 provides an avenue to reconcile the fact of Indigenous nations' historic occupation of Canada and the Crown's assertion of sovereignty over the same area.

12. Understandably, the focus of both parties' submissions is on Aboriginal rights, as the questions in dispute go to Sinixt Aboriginal rights. However, the parties' dispute also raises questions about the interpretation of section 35 generally.

13. For this reason, Yukon's submissions are straightforward, as it seeks only to alert the Court to broader considerations to include in any interpretation of section 35. Namely, section 35 addresses both Aboriginal and treaty rights of the Aboriginal peoples of Canada.

14. Yukon asks that the Court be attentive to treaties as unique expressions of section 35's reconciliatory purpose. Whatever interpretive approach the Court chooses to adopt, the diversity

⁴ *Ibid*, para 2.

⁵ *Ibid*, para 2; *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 9 [*Peel*].

⁶ *Peel*, *supra* note 5 at para 8.

⁷ Appellant's Factum, paras 52-85; Respondent's Factum, paras 33-39, 79-93.

of rights protected by section 35 should be borne in mind, all of which have the common goal of promoting reconciliation.⁸

15. Though Yukon's submission applies on the whole to the Final Agreements and section 35, there are particularly salient provisions of the Final Agreements that Yukon asks the Court to safeguard, as these enshrine a negotiated solution to the precise concerns raised by the parties in this proceeding.

Final Agreements Reconcile the Border and Sovereignty

16. In the context of the Yukon-Alaska border, the Final Agreements address the complex and real issues raised by both parties in this proceeding and Yukon wishes to ensure that the Court's consideration of section 35 in this matter leaves the Final Agreements' negotiated solutions undisturbed.⁹

17. Both parties to this matter have raised concerns with the international border. For the Appellant's part, significant concerns include Canadian sovereignty, practical issues arising out of managing Canada as a country, and giving meaning to the border that separates Canada from the United States.¹⁰ For the Respondent's part, concerns include mitigating the disruption that the international border unilaterally imposed on Indigenous nations' societies.¹¹ Each of these concerns is pressing and legitimate, with the widespread intervention in this appeal demonstrating that these concerns arise along the entire Canadian border.

18. With modern land claims agreements, Yukon First Nations, Canada and Yukon have already grappled with and achieved negotiated resolutions to these significant issues: the Final Agreements contemplate the realities of the border's imposition on First Nation people and seek to reconcile this situation with concerns about maintaining the integrity of the international border as a critical component of Canadian sovereignty.

⁸ *Beckman*, *supra* note 1 at para 10; *Peel*, *supra* note 5 at para 1.

⁹ *Beckman*, *supra* note 1 at para 12; *Peel*, *supra* note 5 at para 36.

¹⁰ Appellant's Factum, paras 86-99.

¹¹ See e.g., Respondent's Factum, paras 89-92.

19. Specifically, the Final Agreements address this reality in the eligibility and enrollment chapter. The Final Agreements are clear - a person need not be a Canadian citizen in order to enroll under a Final Agreement; however, enrollment under a Final Agreement by non-Canadians does not in itself give rise to an entitlement to Canadian citizenship, rights of entry, or *Indian Act* benefits:

3.2.2 A Person is eligible for enrollment as a Yukon Indian Person under one of the Yukon First Nation Final Agreements if that Person is a Canadian citizen, and:

3.2.2.1 establishes that he is of 25 percent or more Indian ancestry and was Ordinarily Resident in the Yukon between January 1, 1800 and January 1, 1940;

3.2.2.2 establishes that he is a Descendant of a Person living or deceased eligible under 3.2.2.1;

3.2.2.3 establishes that he is an Adopted Child of a Person living or deceased eligible under 3.2.2.1 or 3.2.2.2; or

3.2.2.4 upon application within two years of the Effective Date of a Yukon First Nation Final Agreement to the Enrollment Commission by that Yukon First Nation, is determined by the Enrollment Commission in its discretion, and upon consideration of all relevant circumstances, to have a sufficient affiliation with that Yukon First Nation so as to justify enrollment.

3.2.3 Notwithstanding the requirement for Canadian citizenship in 3.2.2, a Person who is not a Canadian citizen is eligible for enrollment as a Yukon Indian Person under one of the Yukon First Nation Final Agreements if that Person meets one of the criteria set out in 3.2.2.1 to 3.2.2.4.

3.2.4 Enrollment of a Person under 3.2.3 shall not confer on that Person any rights or benefits under the *Indian Act*, R.S.C. 1985, c. I-5, rights of entry into Canada or of Canadian citizenship.¹² [emphasis added]

20. The provisions set out above appear in each Yukon First Nation Final Agreement, including those that govern rights along the Alaska border. As self-governing nations, each Yukon First Nation administers its own enrollment, based on the established criteria.¹³

¹² Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of Yukon, 3.2.2-3.2.4.

¹³ Though initially carried out by an enrollment commission, these authorities transfer to each First Nation two years after its Final Agreement takes effect. See, *ibid*, 3.9.0 & 3.10.0.

21. Striking an important balance, these provisions ensure that the distinct interests of the signatories to the Final Agreements are reconciled. To that end, the citizenship or residence of an individual enrolled in a Final Agreement does not disturb the overall rights of the collective; however, neither can a non-Canadian beneficiary claim rights that go to fundamental aspects of Canada's sovereignty.

22. Of course, the negotiated solution that works in Yukon need not be the solution adopted to resolve the current dispute or to address other situations across the country. Yukon asks only that the Court be alert to this solution as the issues raised in this dispute are considered and, finally, that the Court takes care to leave the provisions in Yukon's Final Agreements intact as it embarks on a consideration of the meaning and purpose of section 35.

Conclusion

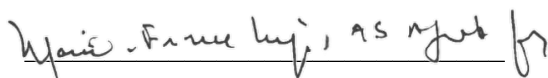
23. The matters currently before the Court are issues that have been addressed in the land claims agreements in Yukon – agreements which benefit from section 35's constitutional protection for the Aboriginal and treaty rights of the Aboriginal peoples of Canada.

24. Without detracting from the essence of the current matter, which is indisputably an Aboriginal rights case, Yukon asks the Court to be mindful of section 35's broader aim and to consider any inadvertent impacts that its determination may have on treaty rights.

PART IV – COSTS

25. Yukon seeks no order as to cost and asks that no order for cost be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 7th day of April 2020



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	Authority	Paragraph(s)
1	<i>Beckman v Little Salmon/Carmacks First Nation</i> , <u>2010 SCC 53</u>	8, 9, 14, 16
2	<i>First Nation of Nacho Nyak Dun v Yukon</i> , <u>2017 SCC 58</u>	9, 10, 14, 16
3	Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of Yukon – <u>Chapter 3</u>	19, 20

Statutory Provisions

Constitution Act, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 35(1)

Loi constitutionnelle de 1982, Annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11, s. 35(1)