Court File No. 37912

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

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, AGNÈS 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 du littoral nord de Québec et du Labrador inc.)

INTERVENER
(Mise-en-cause)

- and -

ATTORNEY GENERAL OF QUEBEC

INTERVENER
(Mise-en-cause)

FACTUM
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(Rule 42 of the *Rules of Supreme Court of Canada*)

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TABLE OF CONTENTS

Page

PART I – FACTS

1. Overview

1. This appeal engages the interplay between two fundamental aspects of the *Constitution*: on the one hand, its confederative model and resulting territorial limits on the powers of provincial superior courts and, on the other, its recognition and affirmation of existing Aboriginal inherent and treaty rights and title which may be asserted to exist across provincial boundaries.

2. The Respondents have brought suit in the Superior Court of Québec ("SCQ") naming two private defendants: Iron Ore Canada Inc. ("IOC") and Quebec North Shore and Labrador Railway Company Inc. ("the Defendants"). The Respondents seek, *inter alia*, $900,000,000.00 in damages, as well as injunctive and declaratory relief, in regard to industrial activities located in both Québec and Newfoundland and Labrador ("NL").

3. The asserted basis for the relief sought rests on the allegation that the Defendants' activities infringe the Respondents' Aboriginal and treaty rights and Aboriginal title in regard to lands and natural resources over lands in both Québec and NL.

4. Thus, the Respondents seek a declaration of Aboriginal rights and title over lands located in NL, and, by Notice of Constitutional Question, specifically ask that the SCQ make declarations of constitutional invalidity or inapplicability of 28 NL statutes.

5. The Appellant Attorney General of Newfoundland and Labrador ("AG NL") intervened solely to move to strike *only* those aspects of the claim relating to lands and natural resources in NL. The AG NL submits that the SCQ lacks the necessary jurisdiction, both as a matter of constitutional law and under art. 3152 of the *Civil Code of Québec* ("*C.c.Q.*"),[1] to make determinations as to Aboriginal rights and title in NL.

6. The AG NL submits that the SCQ lacks jurisdiction to issue relief that is (a) in relation to property – particularly real property – situated in another province, or (b) that is in substance against the Crown in right of another province.

7. The AG NL's motion does not challenge the Respondents' ability to pursue claims in regards to lands within the Province of Québec in the SCQ. Nor indeed does the AG NL seek to

[1] *Civil Code of Québec*, CQLR c CCQ-1991 (« *C.c.Q.* »), s. 3152.

preclude the Respondents from pursuing their claims in regards to lands situated within NL; rather, the AG NL asserts that they must do so in proceedings brought in the superior court of that province.

8. Such an approach ensures that two constitutional imperatives – the recognition and affirmation of pre-existing Aboriginal and treaty rights, and respect for our confederative constitutional model – are both respected, and any conflict between them reconciled. Further, such an approach avoids the risk of contradictory and incompatible results that could otherwise arise if the courts of each province has jurisdiction over property within their own province as well as that of another.

2. The Facts

9. The Respondents instituted proceedings on March 18, 2013, seeking, *inter alia*, damages and injunctive and declaratory relief in relation to the use of lands and industrial activities by the Defendants, which the Respondents claim infringe their Aboriginal rights and title over specific, defined territories within both the provinces of Québec and NL.[2]

10. The claim is directed at what the Respondents term the "Megaprojet d'IOC," which is alleged by the Respondents to operate within their claimed traditional territory of "Nitassinan". "Nitassinan" is defined by the Respondents at para 12 of their pleadings as including a significant portion of the Québec-Labrador peninsula, including lands that are situated within NL.[3] The term "Mégaprojet d'IOC" is defined to include mines and a hydroelectric power plant located in NL.[4] Indeed, most of the industrial activities noted in the pleadings, and identified in the exhibits filed in support, consist of mining on lands located in Labrador.[5]

11. The claim seeks damages, injunctive and declaratory relief, which relief is grounded in and dependent upon findings of Aboriginal rights and title over lands situated in both the province of Québec and NL. *Inter alia,* the proceeding claims:

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[2] Motion to institute proceedings in permanent injunction, to obtain declaratory and damages claims, March 18, 2013, Appellant's Record (« AR »), Vol II at p 1.
[3] Exhibit P-1, AR Vol II at p 199.
[4] Motion to institute proceedings in permanent injunction, to obtain declaratory and damages claims, March 18, 2013, AR, Vol II at p 1.
[5] Most of the mines are located within the borders of NL : Exhibit P-8, AR Vol II at p 201; Exhibit RiP-4, AR Vol II at p 202.

(a) Aboriginal title in regard to all IOC mines within "Nitassinan" and the "Mégaprojet d'IOC" including those within NL (para 51);

(b) a right to the exclusive use and occupation of Nitassinan lands affected by the Megaproject, including the constitutional right to hunt, fish and trap, as well as the right to the use and enjoyment of all the natural resources therein (paras 53);

(c) rights in lands in the region of Labrador City (including Carol Lake), and impacts on those asserted rights resulting from IOC activities within the province of NL (paras 87-109, 118-130);

(d) infringements of rights, and a declaration that IOC activities in Nitassinan are "illegal" notwithstanding the laws of Canada, Québec and NL (paras 144-155).

12. The prayers for relief seek, *inter alia* :

(a) a claim for damages caused by the Megaproject on the ground that these were effected without their consent and in violation of their rights (para 156);

(b) an accounting of profits from development on all of Nitassinan (para 159);

(c) injunctive relief, including in regard to activities in NL (para 163, and again at paras 172-173 and 176);

(d) a declaration that the Defendants' installations, including those in NL, are the property of the plaintiffs (para 173);

(e) a constructive trust claim, including in regard to the Defendants' installations situated in NL (para 174);

(f) a declaration that the Megaproject infringes the plaintiffs' Aboriginal title and inherent and treaty rights (para 177);

(g) a declaration of Aboriginal title over those parts of Nitassinan that are affected by the Megaproject, including those in NL;

(h) A declaration of inherent Aboriginal and treaty rights throughout Nitassinan, including a right to all natural resources therein, including minerals;

(i) A declaration of a right to hunt, fish, trap and harvest throughout Nitassinan;

(j) An Aboriginal or treaty right to exercise jurisdiction over all Nitassinan;

(k) A right to use of waterways, to erect camps, to control and manage all of Nitassinan including the flora fauna, environment and natural resources, and to exploit forestry resources;

(l) A declaration that such rights and title are protected by the Constitution;

(m) A declaration that the Megaproject is illegal and violates the plaintiffs' Aboriginal rights and title;

(n) A permanent injunction against mineral extraction, including in Labrador City.

13. The AG NL therefore sought leave to intervene in the matter for the sole purpose of bringing a motion to strike only those claims relating to the territory of NL, for want of jurisdiction of the SCQ. The Defendants also brought a motion to strike on separate grounds, which was ultimately dismissed.[6]

14. The initial case management judge, Blanchard J., of his own motion raised the question as to whether a Notice of Constitutional Question ("NCQ") was required in the matter. In concluding that such Notice was indeed mandated, Blanchard J. noted:

> [5] Il ne fait donc aucun doute que […], les allégations et les conclusions mettent en cause les droits constitutionnels du Canada, de la Province de Québec et de la Province de Terre-Neuve et Labrador (« Terre-Neuve »).[7]

15. The resulting NCQ served and filed by the Respondents on the AG NL reiterates the assertion of Aboriginal title and rights over all of "Nitassinan," including lands located within NL. The Respondents further expressly contest the constitutional validity, effect and applicability of 28 NL statutes and regulations as inconsistent with the Respondents' asserted rights over its claimed territory within the province.[8]

16. The AG NL's motion seeking leave to intervene for the purposes of striking those claims relating to lands in NL proceeded before Davis J. who, in granting leave to intervene, held:

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[6] Motion to Strike Allegations of the Defendants, March 19, 2014, AR Vol II at p 68.
[7] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2014 QCCS 2051 at para 5, AR Vol II at p 108.
[8] Notice of Constitutional Questions, AR Vol II at pp 126-127.

> [67] Le Tribunal ne peut non plus partager la position des Innus à l'effet que le litige est purement privé…. Au risque de se répéter, le Tribunal estime que pour réussir dans cette démarche les Innus devront faire reconnaître leurs droits ancestraux. […]
>
> [69] Ces demandes vont bien au-delà des revendications des Innus contre IOC et QNS&L. Si le Tribunal les accorde, il est évident que les droits, tant du Québec que de Terre-Neuve-et-Labrador, sur le territoire seront affectés.[9] [emphasis added]

17. The AG NL proceeded to move to strike the Respondents' allegations and prayers for relief relating to or dependent on the Respondents' claimed Aboriginal title and/or rights on lands located within NL, for want of jurisdiction of the SCQ, on the following grounds:

(a) art. 3152, of the *C.c.Q.*, which limits the jurisdiction of the SCQ to adjudicate "real" claims where the property claimed is situated in Québec;

(b) the constitutional limits of the SCQ to adjudicate in relation to property and/or Aboriginal rights and title over lands outside the province of Québec;

(c) the constitutional principle of provincial Crown immunity from suit in the courts of other provinces;

(d) the SCQ lacks jurisdiction to render a judgment that would abrogate or impair the rights of ownership or of legislative and executive competence of another province in regard to lands and matters within that province.

18. The AG NL's motion in no way sought to restrain the Respondents from bringing their claim in regard to that portion of the asserted "Nitassinan" territory located in Québec. Indeed, the AG NL's motion was limited to seeking to strike those allegations only "dans la mesure où elles se rapportent à des portions du Nitassinan ou du mégaprojet d'IOC situé en dehors des limites territoriales de la province de Québec".[10]

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[9] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 1958 at paras 67, 69, AR Vol II at p 174-175.
[10] AG NL's Motion to strike allegations, April 23, 2014, AR Vol II at p 104.

19. In the alternative, the motion sought to amend the claim such that it would extend "que des faits, activités ou droits qui se retrouvent ou qui sont revendiqués à l'intérieur des limites territoriales de la province du Québec".[11]

20. The impugned paragraphs all use the defined term "Nitassinan" or "Mégaprojet IOC" which include lands situated within the province of NL, or clearly make allegations in relation to Aboriginal rights/title over lands located in NL.

3. Decision of the Honourable Thomas M. Davis

21. On October 19, 2016, Davis J. dismissed the AG NL's motion to strike.[12] In so doing, the motions judge did not assess the specific, limited paragraphs and aspects of the claim that were the subject of the motion. Rather, Davis J. held that the action as a whole was of a "mixed" nature, having what he considered both "personal" and "real" elements, given the presence of certain personal/*in personam* claims (such as claims for damages) within the action, alongside certain "real"/*in rem* claims. Davis J. was, incorrectly, of the view on this basis that the SCQ thus had jurisdiction pursuant to art. 3152 of the *C.c.Q.*.

22. Davis J. declined to strike the impugned paragraphs of the pleading despite: the Respondents' admission that any Aboriginal title that they might possess on lands, including those in NL, constituted "real rights"[13]; recognizing that the Respondents' claims were dependent upon proving Aboriginal rights which represented "real rights" (such as a right of use or usufruct)[14]; and recognizing that in adjudicating these claims, the Court will have to rule on the constitutional rights of the Province of Québec and the Province of NL.[15]

23. Moreover, while also accepting the longstanding constitutional principle of provincial Crown immunity from suit in the courts of other provinces, Davis J. held, without citing any authority in support, that this principle should not apply in regard to a claim resting on assertions

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[11] AG NL's Motion to strike allegations, April 23, 2014, AR Vol II at p 104.
[12] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133, AR Vol I at p1.
[13] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133 at para 61, AR Vol I at p 16.
[14] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133 at paras 63-65, AR Vol I at p 16-17.
[15] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133 as para 72, AR Vol I at p 19.

of Aboriginal rights and title that extends over the border of two provinces, on the ground that such rights "pre-existed" provincial boundaries, and as a matter of access to justice.

24. Davis J. supported his conclusion on the need to take into consideration "the Aboriginal perspective," a principle endorsed by this Court in regard to the admissibility of evidence in Aboriginal rights litigation and in the establishment of the appropriate test for proving Aboriginal rights and title, thereby elevating this recognized and important principle into a legal rule capable of overriding the constitutional limits of the courts' jurisdiction.

25. Davis J. also reasoned, incorrectly, that requiring distinct proceedings in Québec and NL could lead to conflicting results.

4. Decision of the Québec Court of Appeal

26. The AG NL sought and obtained leave to appeal to the QCCA. The ensuing appeal was dismissed.[16] In its decision, the QCCA likewise considered the action as a whole rather than addressing the specific, discrete aspects of the claim that were the focused object of the AG NL's motion – namely those relating to lands and property of NL and the authorities of the Crown in right of NL. Writing for the Court, Ruel J.A. opined that the *sui generis* nature of Aboriginal rights precluded their classification as either "personal" or "real" rights. Despite this conclusion – and despite the ineluctable connection between the Aboriginal rights and title asserted and the specific territories which they are alleged to burden – the QCCA ruled that the claim was "primarily" a "personal" action.

27. The QCCA also came to the surprising conclusion that the claim does not seek remedies against, and does not purport to be binding on, any Crown.[17] This determination is difficult to reconcile with the nature of the relief sought, and runs counter to the unambiguous language of the pleading and the Notice of Constitutional Question, as well as to the express holdings of both Blanchard and Davis JJ. as to the clear effect of the claims on the "real" rights and legislative and constitutional jurisdiction of the NL Crown.

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[16] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791, AR Vol I at p 36.
[17] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at paras 91, 103-104, AR Vol I at pp 49-50.

28. Ruel J.A. opined that the AG NL had sought to "rigidly classify" the claim as a "real" action, and that it was not possible to describe Aboriginal rights in accordance with traditional notions of the law of property. Such rights, the QCCA held, have "real" and "personal" aspects, but are "different, unique and non-classifiable" and are qualified as *sui generis*.[18]

29. Despite its view that such claims are "non-classifiable," the QCCA nevertheless went on to classify the claim, concluding that it was "primarily" a "personal" action over which the Québec courts have jurisdiction given that the Defendants are domiciled in Québec.

30. Ruel J.A. supported this novel conclusion on the basis that, unlike title rights at common or civil law, Aboriginal title is inalienable to all but the Crown. He further stated that although Aboriginal title has certain "real" characteristics in that it relates to a specific territory, it also has certain elements that could be qualified as "personal" as between the Aboriginal community and the Crown, given the Crown's fiduciary obligation arising from Aboriginal title.[19]

31. Concluding that the claim was "primarily" "personal" in nature, Ruel J.A. then opined that a favourable result for the Respondent could not constitute a recognition of rights that could be binding on governments, and that the Respondents would then have to seize the courts in NL to have their rights recognized.[20]

32. Ruel J.A. further held that the principle of Crown immunity did not bar the Respondents' claims from continuing in the Superior Court of Québec "at this stage," but that it would be open to the AG NL to participate in the proceedings and to raise Crown immunity as a defence, along with other potential defences, if it deemed fit.[21]

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[18] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at paras 13, 67-69, AR Vol I at pp 39, 46.
[19] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at paras 74-77, AR Vol I at p 47.
[20] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at paras 91, 103-104, AR Vol I at pp 49-50.
[21] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at paras 100, 106-107, AR Vol I at pp 50-51.

33. The QCCA also predicated its conclusion in regard to Crown immunity on the view that the claim did not seek remedies against, and would not be binding upon, the Crown in right of NL.[22]

34. Finally, the QCCA also adopted the concerns expressed by Davis J. as to the implications that requiring cross-border claimants to litigate in two jurisdictions would present access to justice and proportionality concerns.

35. The QCCA's conclusion is difficult to reconcile with the declarations of constitutionally-protected Aboriginal title and rights on lands located in NL sought in the pleading, and the Notice of Constitutional Question served on the AG NL which expressly advises, *inter alia*, the Respondents' intention to seek declarations of inapplicability in connection with 28 named NL statutes. Unusually, these went unmentioned in the Court's reasons.

36. In denying the AG NL's motion to strike, the decision appealed from has the unsettling effect of allowing the exercise of extra-provincial jurisdiction by the Québec courts in relation to Crown lands and natural resources situated within NL, and in regard to the legislative and executive jurisdiction of the NL Crown as to the ownership, regulation and management of lands within that province. Such a result has no precedent in Canadian law, and constitutes a marked derogation from foundational constitutional principles at the heart of our federal system.

PART II – ISSUES

37. The AG NL submits that the following question is at issue:

> Does the Superior Court of Québec have jurisdiction, as a matter of constitutional law and under the *Civil Code of Québec*, to adjudicate and rule upon claims against private defendants that are grounded and dependent on assertions of Aboriginal rights and title over property, lands and natural resources situated within the Province of Newfoundland and Labrador?

38. The AG NL respectfully submits that this question must be answered in the negative.

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[22] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-*

PART III – ARGUMENT

1. The superior courts of a province do not have the constitutional jurisdiction to make real/*in rem* determinations in regard to land and natural resources outside that province

39. The AG NL submits that the courts below erred in dismissing the contention that the impugned paragraphs in the claim constituted "real" claims over which the SCQ has no jurisdiction as regards property, land and natural resources situated outside the Province of Québec.

40. It is well-established that the jurisdiction to determine a right in relation to land or natural resources, regardless of the type of right sought (ownership, use or occupation), lies in the courts where the property is located.

41. In *Duke v. Andler*,[23] this Court held that a decision concerning the title/possession of land could only be determined by a court in the province in which the land is located.

42. Similarly, in *Design Recovery Inc v Schneider*, the Saskatchewan Court of Appeal held :

> The law is clear, the Ontario courts do not have jurisdiction to grant an *in rem* judgment in respect of the Saskatchewan land (*Duke v. Andler*, [1932] S.C.R. 734), only the Saskatchewan courts have that jurisdiction.[24]

43. Canadian courts have consistently abjured jurisdiction over real property located in another jurisdiction. In *Palmer*,[25] the Saskatchewan Court of Appeal held that even where both parties to a matrimonial dispute resided in Manitoba, the Manitoba courts did not have jurisdiction to grant an *in rem* judgment in relation to real property located in Saskatchewan. The Court of Appeal held that:

> […] the only Courts which have jurisdiction to entertain an application to determine the rights which the applicant has in real property in the Province of Saskatchewan are the Courts of this Province. The law of the Province of Saskatchewan governs in respect of the rights of parties to real property in the Province irrespective of what their domicile may be. [emphasis added][26]

Utenam), 2017 QCCA 1791 at paras 103, 105, AR Vol I at p 50.
[23] *Duke v Andler*, [1932] SCR 734.
[24] *Design Recovery Inc v Schneider*, 2003 SKCA 94 at para 2.
[25] *Palmer v Palmer*, [1979] SJ 435 (CA).
[26] *Palmer v Palmer*, [1979] SJ 435 (CA) at para 18. See also *War Eagle Mining Co v Robo Management Co*, [1995] BCJ 2142 at paras 14-15, 26, 29.

44. Similarly, in *War Eagle Mining Co*,[27] the Supreme Court of British Columbia held that it did not have jurisdiction to determine claims relating to mining rights in relation to real property situated in another province. The petitioner was incorporated in British Columbia, while the respondent was incorporated in Saskatchewan. Both parties signed an option agreement over mineral claims in Saskatchewan. A dispute in regard to the mineral claims arose. The agreement provided that it "shall be subject to, governed by, and construed in accordance with the laws of the Province of British Columbia". The British Columbia Superior Court held that it did not have jurisdiction as the mineral claims in dispute raised issues of "title, rights and interest in a foreign immovable".[28] The Court of Appeal further opined that :

> 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 right and title to such lands.[29]
>
> […]
>
> The proposition that mineral claims are part and parcel of land is well grounded in common law. […] [emphasis added, citations omitted][30]

45. As held by this Court in *Club Resorts Ltd v Van Breda*, this principle is not merely one of comity, but is constitutional in nature, and flows from our confederative model of government. Thus, this Court held that the rules of private international law codified by the *C.c.Q*. must conform to the Canadian constitutional regime, which includes territorial limits as to the jurisdiction of the courts of each province:

[21] Conflicts rules must fit within Canada's constitutional structure. Given the nature of private international law, its application inevitably raises constitutional issues. This branch of the law is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or	[21] Les règles du droit international privé doivent être conformes au régime constitutionnel canadien. Compte tenu de la nature du droit international privé, son application soulève inévitablement des questions constitutionnelles. Cette branche du droit traite de la compétence des tribunaux provinciaux canadiens, de l'opportunité d'exercer cette compétence, de la loi applicable dans un litige donné et des conditions de la reconnaissance et de l'exécution d'un jugement

[27] *War Eagle Mining Co v Robo Management Co*, [1995] BCJ 2142.
[28] *War Eagle Mining Co v Robo Management Co*, [1995] BCJ 2142 at paras 15, 26, 29.
[29] *War Eagle Mining Co v Robo Management Co*, [1995] BCJ 2142 at paras 14.
[30] *War Eagle Mining Co v Robo Management Co*, [1995] BCJ 2142 at para 20.

country. […] The interplay between provincial jurisdiction and external legal situations takes place within a constitutional framework which limits the external reach of provincial laws and of a province's courts. The Constitution assigns powers to the provinces. But these powers are subject to the restriction that they be exercised within the province in question [citations omitted], and they must be exercised in a manner consistent with the territorial restrictions created by the Constitution. [emphasis added]	rendu par un tribunal d'une autre province ou d'un tribunal étranger. […] L'interaction de la compétence provinciale et des situations juridiques survenues à l'extérieur de la province se situe à l'intérieur d'un cadre constitutionnel qui limite la portée extraterritoriale des lois provinciales et des tribunaux provinciaux. En effet, la Constitution attribue des pouvoirs aux provinces, mais elle n'en autorise l'exercice que sur leur territoire [citations omises] et dans le respect des restrictions territoriales prévues par la Constitution. [nous soulignons][31]

46. Pursuant to s. 37 of the *Constitution Act, 1949 – Enactment 21* (*Terms of Union)*, "All lands, mines, minerals, and royalties belonging to Newfoundland at the date of Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the Province of Newfoundland, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."[32]

47. Thus, as in the multiple cases in which the Federal Court has declined to hear claims brought by the Innu of Québec and other Indigenous groups in regard to claimed interests in Newfoundland and Labrador, the "main and primary effect of the declaration sought […] would be to affect the property rights of the Province of Newfoundland."[33] As was true in those cases, it is of no moment that the claim is brought against other parties and does not directly name the AG NL as a defendant.

48. In the instant case, the Defendants exercise mineral rights pursuant to authorizations by the underlying title-holder, the Crown in right of NL. Those authorizations, as well as that underlying Crown subsurface and surface title, are indirectly and directly challenged by the Respondents. The Respondents' claim in regard to mining rights relate to "title, rights and

[31] *Club Resorts Ltd. v Van Breda*, [2012] 1 SCR 572 at para 21.
[32] *1949 Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.); *British North America Act*, 1949 (12-13 George VI, c. 22 (U.K.).
[33] *Joe v. Canada*, [1986] 2 S.C.R. 145. See also: *Vollant v. Canada*, 2009 FCA 185, and *Innu of Uashat Mak Manu-Utenam v. Canada*, 2016 FCA 156.

interest in a foreign immovable" as held in *War Eagle* and are thus not within the jurisdiction of the SCQ.

1.1 Article 3152 of the *Civil Code of Québec* upholds the constitutional territorial limits on the jurisdiction of the SCQ

49. The above-noted constitutional principle of territorial jurisdiction is enshrined in the *Civil Code of Québec* "*C.c.Q.*", which provides, at article 3152, as follows:

DIVISION III REAL AND MIXED ACTIONS	SECTION III DES ACTIONS RÉELLES ET MIXTES
3152. A Québec authority has jurisdiction over a real action if the property in dispute is situated in Québec.	3152. Les autorités québécoises sont compétentes pour connaître d'une action réelle si le bien en litige est situé au Québec.

50. Article 3152 *C.c.Q.* codifies the common law and constitutional principle that provincial courts do not have jurisdiction to determine and grant a proprietary interest or possession of an object situated outside of the province. Article 3152 *C.c.Q.* also distinguishes between a "personal" and "real" action.

51. A "real" or *in rem* action is one "that is brought against property (or a thing), rather than against a person (*in personam*). Proceedings *in rem* establish title to or enforce a right in property. The court's ruling binds not only the litigants in the proceedings, but also third parties who may have an interest in the property".[34]

52. In *Komunik*, the Court of Québec also defined the term "real right" for the purposes of art. 3152 *C.c.Q.* :

> [l]es droits réels sont des droits patrimoniaux qui s'exercent directement sur une chose ou un objet. Le plus commun est le droit de propriété. Ils présentent trois caractéristiques principales : une portée universelle (opposable à tous) ; le droit de suite ; et finalement, le droit de préférence. [nous soulignons][35]

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[34] Peter Hogg, Patrick Monahan et Wade Wright, *Liability of the Crown* (Toronto: Carswell, 2011) at p 72.
[35] *Komunik inc c Childs*, 2007 QCCQ 3222 at para 30.

53. Professeur P.H. Glenn also opined that art. 3152 *C.c.Q.* granted jurisdiction to Québec courts in "real" or *in rem* actions, but only where the property at issue is located in Québec.[36]

54. Thus, in *Bern c Elfe Juvenile Products Inc*,[37] the QCCA had to determine whether the action of Ms Bern was a "real" action and whether the "juridical *situs*" of the property in dispute (common shares in a corporation), were situated in Québec. The QCCA held that the Québec courts did not have jurisdiction under art. 3152 *C.c.Q.* because the *situs* of the shares in dispute were in Ontario.[38]

1.2 The claim includes "real" claims in regard to property and lands situate within NL

55. In this regard, the impugned claims that are the specific subject of the AG NL's motion to strike constitute "real"/*in rem* claims which fundamentally relate to property, lands and natural resources situated outside the province of Québec.

56. On this point, the QCCA stated that the AG NL had sought to "rigidly classify" the claim as a ''real'' action, but that Aboriginal rights defy traditional notions of the law of property. In its analysis, such rights have "real" and "personal" aspects but, being *sui generis*, are "different, unique and non-classifiable".[39]

57. Respectfully, the *sui generis* nature Aboriginal rights and title, which is uncontroverted, is not a bar to their classification for the purposes of the *C.c.Q.*. As held by this Court in *Van der Peet*:

[49] […] Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives". The	[49] […] Les tribunaux appelés à statuer sur des revendications de droits ancestraux doivent donc se montrer ouverts au point de vue des autochtones, tout en étant conscients que les droits ancestraux existent dans les limites du système juridique canadien. Pour citer de nouveau Mark Walters, à la p. 413: [TRADUCTION] «une conception moralement et politiquement défendable des droits

[36] P.H. Glen, *Droit international privé*, in *La Réforme du Code civil*, textes réunis par le Barreau du Québec et la Chambre des notaires du Québec, PUL 1993 at p 698.
[37] *Bern v Elfe Juvenile Products inc.*, [1995] R.D.J. 510 (QC C.A.).
[38] *Bern c Elfe Juvenile Products inc.*, [1995] R.D.J. 510 (QC C.A.) at paras 24, 28, 30-32.
[39] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at paras 13, 67-69, AR Vol I at pp 39, 46.

definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.	ancestraux intégrera les deux points de vue juridiques [autochtone et non autochtone]». Pour concilier véritablement l'occupation antérieure du territoire canadien par les peuples autochtones avec l'affirmation par Sa Majesté de sa souveraineté sur celui- ci, un droit ancestral doit être défini d'une manière qui, tout en tenant compte du point de vue des autochtones, soit néanmoins compatible avec le système juridique non autochtone. [40]

58. Indeed, despite and in apparent contradiction to its admonition that such a task was impossible, the QCCA nevertheless proceeded to classify the claim, globally, concluding that it was "principally" a "personal" action.

59. This exercise was, in itself, tainted by error. As had the motions judge, the QCCA assessed the action as a whole, rather than consider the specific relief sought by the AG NL – namely to surgically excise from the action only those claims relating to lands and resources situated within NL.

60. To the extent the action contained claims that were either *in personam* in nature, or were *in rem* but related to property within Québec, such claims should continue, and were expressly not targeted by the AG NL's motion.[41] However, the SCQ having jurisdiction over *some elements* of the action does not, by that fact alone, confer jurisdiction in regard to matters over which it does not independently have jurisdiction.[42]

61. The inclusion of a damages claim in an action does not clothe the SCQ with the jurisdiction to also issue *in rem* remedies over property situated in another province, let alone over public lands and natural resources the title of which vests in the Crown of another province.

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[40] *R. v. Van der Peet*, [1996] 2 SCR 507 at para 49.
[41] See *Lynch Suder Logan c Logan*, 2014 QCCS 4765 at para 34; *Behaviour Communications inc. c Virtual Image Productions*, 1999 CanLII 10658 (QC C.Q.) at paras 21-23; *CGAO c. Groupe Anderson inc.*, 2017 QCCA 923; *War Eagle Mining Co v Robo Management Co*, [1995] BCJ 2142 at paras 14, 15, 20, 26, 29.
[42] *CGAO c Groupe Anderson inc.*, 2017 QCCA 923 at para 10; *War Eagle Mining Co v Robo Management Co*, [1995] BCJ 2142 at paras 14, 15, 20, 26, 29.

62. Contrary to the conclustion of Davis J., to have jurisdiction over ‘‘mixed’’ actions, the SCQ must *prima facie* have jurisdiction over both the *in personam* and *in rem* aspects of the claim.[43]

63. Nor does the exercise properly consist of weighing the relative importance or quantity of *in personam* versus *in rem* claims; any *in rem* aspect of a claim relating to property in another province should be struck as outside the jurisdiction of the courts of that province.

64. Moreover, in globally assessing the *in personam* or *in rem* nature of claims predicated on Aboriginal rights and title, the QCCA relied on novel reasoning that is, respectfully, strained at best, and that runs counter to the jurisprudence. In this regard, the QCCA reasoned that unlike title rights at common law or under civil law, Aboriginal title is inalienable to all but the Crown. While of course correct, it is most unclear, with respect, how this principle operates to drain Aboriginal title of its fundamental “real” and *in rem* character.

65. While acknowledging that Aboriginal title has certain “real” characteristics in that it relates to a specific territory, Ruel J.A. reasoned that it also has certain elements that could be qualified as “personal” as between the Aboriginal community and the Crown, given the Crown’s fiduciary obligation arising from and relating to Aboriginal title.[44]

66. Aboriginal title undoubtedly has many legal incidents, including the possible engagement of Crown fiduciary obligations. How this deprives Aboriginal title of its ‘‘real’’, *in rem* nature, however, is not explained and, respectfully, is far from obvious.

67. The primary incident of Aboriginal title, of course, was left unmentioned by the Court below: as held by this Court in its landmark *Delgamuukw* and *Tsilhqot’in* decisions: “ ‘the right to exclusive use and occupation of the land […] for a variety of purposes’, not confined to traditional or ‘distinctive’ uses [...]. In other words, Aboriginal title is a beneficial interest in the land [...]. In simple terms, the title holders have the right to the benefits associated with the land

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[43] *CGAO c Groupe Anderson inc.*, 2017 QCCA 923 at para 10; *War Eagle Mining Co v Robo Management Co*, [1995] BCJ 2142 at paras 14, 15, 20, 26, 29.
[44] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at paras 74-77, AR Vol I at p 47.

— to use it, enjoy it and profit from its economic development."[45] A claim asserting such a right is, it is submitted, the very definition of an *in rem* claim.

1.3 *Aboriginal title and harvesting rights are "usufructuary" rights and rights to "use" and therefore "real" rights under art. 1119 and 3152 of the Civil Code of Québec*

68. Contrary to the conclusions of the courts below, Aboriginal title and the specific Aboriginal rights asserted here – including hunting, trapping, fishing and harvesting rights – are by definition site-specific, inextricably tied to identified lands, and are thus "real"/*in rem* rights.

69. Davis J. noted the Respondents' own admission that "le titre ancestral qu'ils pourraient posséder dans le Nitassinan équivaudrait à un droit réel,"[46] and recognized that Aboriginal rights and title in relation to land have the attributes of a "real right."[47]

70. In this regard, Book Four *C.c.Q.* provides for the applicable rules concerning "property", and how such rights should be characterized. Title four of Book four deals with dismemberments of the right of ownership. Article 1119 *C.c.Q.* provides:

TITLE FOUR DISMEMBERMENTS OF THE RIGHT OF OWNERSHIP	TITRE QUATRIÈME DES DÉMEMBREMENTS DU DROIT DE PROPRIÉTÉ
GENERAL PROVISION	DISPOSITION GÉNÉRALE
1119. Usufruct, use, servitude and emphyteusis are dismemberments of the right of ownership and are real rights. [emphasis added]	1119. L'usufruit, l'usage, la servitude et l'emphytéose sont des démembrements du droit de propriété et constituent des droits réels. [nous soulignons]

71. Pursuant to art. 1119 of the *C.c.Q.*, usufructuary rights or rights to use property constitute a dismemberment of a right of ownership and are, therefore, "real rights". Any dismemberment of ownership, including a usufructuary right or a right to use, may thus only be adjudicated before Québec courts if the property at issue is located in Québec, under art. 3152 *C.c.Q.*

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[45] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256 at para 70.
[46] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133 at para 61, AR Vol I at p 16.
[47] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133 at paras 61-65, AR Vol I at pp 16-17.

72. In this respect the *C.c.Q.* is again consistant with the common law and constitutional law of Aboriginal rights and title. The jurisprudence has long held that such rights are usufructuary in nature and a dismemberment of ownership (and therefore, under the *C.c.Q.*, are "real" in nature).

73. In *St Catherine's Milling and Lumber Co v The Queen*, the Judicial Committee of the Privy Council described Aboriginal title as a "usufructuary right" :

> It was suggested […] that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. [emphasis added][48]

74. Similarly, in *Delgamuukw*, this Court affirmed that Aboriginal title was a right in land in the nature of a usufruct, and held that it included the right to exclusive use and occupation of the lands subject to those rights :

[111] […] Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use […]. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. […]	[111] […] Le titre aborigène est un droit foncier et, en tant que tel, il est quelque chose de plus que le droit d'exercer certaines activités précises, qui peuvent elles- mêmes être des droits ancestraux. Il confère plutôt le droit d'utiliser des terres […] Ces activités ne constituent pas le droit en soi; elles sont plutôt des parasites du titre sous- jacent. […]
[113] […] This Court has taken pains to clarify that aboriginal title is only "personal" in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests […]	[113] […] Notre Cour s'est efforcée de préciser que c'est uniquement dans ce sens que le titre aborigène est un droit «personnel», et que cela ne veut pas dire qu'il ne s'agit pas d'un intérêt de propriété, qui ne représente rien de plus qu'une autorisation d'utiliser et d'occuper les terres visées et qui ne peut pas concurrencer sur un pied d'égalité d'autres droits de propriété […]
[115] […] Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.	[115] Le titre aborigène ne peut pas être détenu par un autochtone en particulier; il est un droit foncier collectif, détenu par tous les membres d'une nation autochtone. Les décisions relatives aux terres visées sont

[48] *St Catherine's Milling and Lumber Co v The Queen* (1888), 14 AC 46 at para 6; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 112.

This is another feature of aboriginal title which is sui generis and distinguishes it from normal property interests. […] [117] […] first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes […]; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land. […] [145] […] Aboriginal title is a burden on the Crown's underlying title. […] [emphasis added]	également prises par cette collectivité. Il s'agit d'une autre caractéristique sui generis du titre aborigène, qui le différencie des intérêts de propriété ordinaires. […] [117] […] Premièrement, le titre aborigène comprend le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour diverses fins […]; deuxièmement, ces utilisations protégées ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour ces terres. […] [145] […] Le titre aborigène grève le titre sous-jacent de la Couronne. […][49]

75. In *R. v. Marshall; R. v. Bernard*, Lebel J. affirmed that Aboriginal title had been qualified as a usufruct and was premised on the principle of dismemberment of the right of ownership :

[135] This qualification or burden on the Crown's title has been characterized as a usufructuary right. […] The usufruct concept is useful because it is premised on a right of property that is divided between an owner and a usufructuary. A usufructuary title to all unsurrendered lands is understood to protect aboriginal peoples in the absolute use and enjoyment of their lands. [emphasis added]	[135] Cette réserve ou charge grevant le titre de la Couronne a été qualifiée d'usufruit. […] La notion d'usufruit est utile en ce qu'elle s'appuie sur un démembrement du droit de propriété entre un propriétaire et un usufruitier. Un titre usufructuaire sur toutes les terres non cédées est considéré comme une protection de l'utilisation et de la jouissance absolue de leur territoire par les peuples autochtones. [nous soulignons][50]

76. In *Première Nation de Pessamit*, the SCQ explicitly equated Aboriginal title with a dismemberment of right of ownership:

> [17] Ainsi pour résumer les droits ancestraux se situent sur un spectre qui va du titre aborigène qui peut être assimilé à un démembrement de propriété à une extrémité à des droits ancestraux qui sont des coutumes, pratiques et traditions

[49] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 111, 113, 115, 117, 145. See also *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 at paras 69-72.
[50] *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at para 135, per Lebel J. (with Fish J.) concurring.

> sans égard à un rapport précis au territoire. Au centre du spectre se trouvent des activités rattachées au territoire visé par la revendication. [emphasis added][51]

77. Equally, Aboriginal harvesting rights of the nature claimed by the Respondents in their pleadings that they assert having over lands in both Québec and NL, while distinct from title, are also "real rights." Such Aboriginal rights (including hunting and fishing) can confer rights to the *use* and *occupation*, but are limited to specific sites of land.[52] In *R v Côté*, this Court affirmed that constitutional protection to ancestral harvesting rights was in relation to "use" of specific tracts of lands, and can only be exercised on those specific sites :

[39] [A] protected aboriginal right falling short of aboriginal title may nonetheless have an important link to the land. An aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land. [emphasis added]	[39] […I]l est néanmoins possible qu'un droit ancestral protégé, même s'il ne s'agit pas d'un titre aborigène, ait un lien important avec le territoire où il est exercé. Une coutume, pratique ou tradition autochtone valant d'être protégée en tant que droit ancestral se limitera fréquemment à un endroit ou territoire spécifique, compte tenu de la façon dont elle était concrètement exercée avant le contact avec les Européens. En conséquence, un droit ancestral sera souvent défini en fonction d'un site spécifique, avec pour conséquence qu'il ne peut être exercé qu'à cet endroit. [nous soulignons][53]

78. Such rights are not freestanding and do not exist in a vacuum; they relate to specific, defined tracts of land and, where proven, operate as a burden on the Crown's underlying title in relation to land. The existence of such rights benefit from constitutional protection, and act as a significant impediment to governmental and legislative authority to regulate and develop such lands. Governmental or legislative action over those lands, if incompatible with harvesting rights of the nature claimed here, may be limited or barred, subject to government meeting a stringent justification test.[54]

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[51] *Première Nation de Pessamit c Québec (Procureur général)*, 2007 QCCS 794 at para 17.
[52] *R v Sappier; R v Gray*, [2006] 2 SCR 686 at para 50.
[53] *R v Côté*, [1996] 3 SCR 139 at paras 38-39. See also *R v Sappier; R v Gray*, [2006] 2 SCR 686 at para 50.
[54] *R v Sparrow*, [1990] 1 SCR 1075.

79. While it is true that *certain* Aboriginal rights may exist independent of territory, such is not the case in regard to those *specific* Aboriginal rights that are asserted in this case. Those rights are, to the contrary, by definition inextricably tied to specific territories and are "real" in nature. Indeed, the Respondents' entire claim is dependent on their asserted Aboriginal rights being tied to specific lands and resources – namely those under the industrial use and exploitation of the Defendants.[55]

80. The Respondents expressly allege that these rights are closely linked ("ont un lien étroit") with the territory as well as specific sites where the Defendants are exercising their industrial activity.[56] Only by proving the existence of Aboriginal rights and/or title in relation to those specific territories, and the alleged harms to those rights caused by the Defendants' activities on those territories, can the Respondents hope to make out their claim against the Defendants.

81. This was recognized by Davis J. in granting the AG NL leave to intervene in order to bring the motion to strike:

> [67] Le Tribunal ne peut non plus partager la position des Innus à l'effet que le litige est purement privé, même si son objet principal, soit obtenir des dommages d'IOC et de QNS&L, l'est. **Au risque de se répéter, le Tribunal estime que pour réussir dans cette démarche les Innus devront faire reconnaître leurs droits ancestraux.**[57] [emphasis added]

82. The Defendants' activities are not of themselves capable of infringing Aboriginal rights or title. It is the very fact of the Defendants' industrial activities occurring **on the lands claimed by the Respondents to be subject to their Aboriginal title and rights** that gives rise to their claim. Further, the Respondents repeatedly assert, in the impugned claims, rights to the exclusive use and management of the claimed territories as well as to the natural resources contained therein.

83. Therefore, while the action as a whole also contains claims that may be characterized as "personal" in nature, the allegations that are the specific subject of the AG NL's motion to strike

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[55] Motion to institute proceedings in permanent injunction, to obtain declaratory and damages claims, March 18, 2013, AR Vol II at p 1.
[56] See, notably, Motion to institute proceedings in permanent injunction, to obtain declaratory and damages claims, March 18, 2013 at paras 39, 46, 48-53, AR Vol II at pp 8, 11.
[57] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 1958 at para 67, AR Vol II at p 174.

constitute rights to ownership of land, exclusive use of land and "usufructuary rights". Under art. 1119 *C.c.Q.*, such rights constitute "real rights" and, *per* art. 3152 *C.c.Q.*, fall outside the jurisdiction of the SCQ to the extent they relate to land outside the province of Québec.

84. Consequently, the courts bellow erred in law in ruling that the Respondents' claim was *in personam* rather than *in rem*. Even if some of the claims are indeed *in personam*, the SCQ still could not adjudicate the rights in property or land claimed by the Respondents. As stated, claims in relation to property are *in rem* and can only be adjudicated before the court where the property is located, notwithstanding that other potential *in personam* claims exist in the same pleading. Indeed, as held by the Saskatchewan Court of Appeal in *War Eagle* :

> The petitioner contends that it seeks only to exercise this court's *in personam* jurisdiction. Setting aside the fact that the respondent is not within this court's *in personam* jurisdiction, it is clear that the petitioner seeks more than *in personam* jurisdiction. In asking for a declaration that the respondent has no interest in the claims arising from the agreement, a question which may appear as a question of contract interpretation, the petitioner asks whether the respondent has or has not an interest in mineral claims. […W]hether the claim at first instance was presented as a declaration of entitlement to possession and occupation of land, the declaration sought by the petitioner speaks directly to ownership of a foreign immovable.[58]

85. The Respondents have elected to frame their claim in this manner. Had the claim been limited to seeking damages arising from alleged harms caused to the Respondents' asserted rights over territories situated in Québec, the SCQ would *a priori* have jurisdiction, even if such harms arose from activities emanating outside the Province of Québec.

2. Crown immunity precludes the courts of one province from making determinations as to Aboriginal rights and title in another province

2.1 General Principles

86. The AG NL's motion also relied upon the well-established principle that the Crown of a province is immune from suit in the courts of another province. This principle also flows from the constitutional limits of the courts of each province, as discussed by this Court in *Van Breda.*[59]

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[58] *War Eagle Mining Co v Robo Management Co*, [1995] BCJ 2142 at para 27.
[59] *Club Resorts Ltd. v Van Breda*, [2012] 1 SCR 572 at para 21.

87. The Courts of Appeal and superior courts across Canada have affirmed that the Crown is immune from suit, except as unequivocally authorized by the legislature,[60] and that a legislature of one province cannot authorize suits to be brought against the Crown of another,[61] article 3152 C.c.Q. reflects this principle. Professor Hogg explained the principle as follows:

> The Crown proceedings statute of each province grants jurisdiction to the courts of that province to hear and determine claims against the Crown in right of that province. […] It follows that the Crown in right of Ontario (for example) can be sued in the courts of Ontario. But can the Crown in right of Ontario be sued in the courts of another province? The conventional answer to that question is no, the Crown in right of one province cannot be sued in the courts of another province. The reasoning that leads to that answer is that the Crown proceedings statute of each province renders the Crown in right of that province liable to be sued in the courts of that province, but not in the courts of the other provinces. Nor does the Crown proceedings statute of any province purport to confer jurisdiction on the province's courts over the Crown in right of any province other than enacting province. Indeed, there is even a basis for suggesting that such a grant of jurisdiction would be unconstitutional: "no province can compel another to submit to a particular forum". These premises lead to the conclusion that the common law of Crown immunity from suit survives when (for example) the Crown in right of Ontario is sued in the province of British Columbia. The traditional view accordingly holds that a person with a claim against the Crown in right of Ontario must go to the courts of Ontario to proceed with the claim, unless Ontario voluntarily submits to jurisdiction elsewhere.[62]

88. In common with similar enactments throughout the federation, s. 20 of the Newfoundland and Labrador *Proceedings Against the Crown Act* does not allow a claim for title or other constitutional rights on lands located in NL to be brought before a court of another jurisdiction. It provides:

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[60] *Canada (Attorney General) v. Thouin*, [2017] 2 SCR 184, 2017 SCC 46 at para 20.
[61] *Sauvé v Attorney General of Quebec et al*, 2011 ONCA 369 at para 3. See also *Medvid v Alberta (Minister of Health)*, 2010 SKQB 22 at paras 25-27, affr'd 2012 SKCA 49; *Ontario v Mar-Dive Corp* (1996), 141 DLR (4e) 577 (Div Gen Ont); *Kaman v British Columbia*, 1999 ABQB 216 at paras 16, 23; G*odin v New Brunswick Power Comm* (1993) 16 CPC (3d) 388; *Les constructions Beauce-Atlas Inc.* c *Pomerleau Inc.*, 2013 QCCS 4077 at para 16; Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 73, 485. For a NL decision applying the principle, see *Young v The SS Scotia*, [1903] AC 501 (Nfld PC).
[62] Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 485.

PROOCEEDINGS AGAINST THE WORLD AT LARGE

> 20. Nothing in this Act authorizes proceedings in respect of a claim against the property of the Crown or the seizure, attachment, arrest, detention or sale of property of the Crown.[63]

89. Consequently, a provincial court has no jurisdiction with respect to the interests of another provincial Crown because of the Crown's immunity from suit.[64] This principle was recently affirmed by the Ontario Court of Appeal in *Sauvé*:

> The Crown is immune against suit except as expressly provided by statute or by necessary implication. While the provincial legislation permits suits against the Crown, it provides the manner in which those suits may be brought. The Quebec Civil Code provides specific rules governing actions against the Province of Quebec. Those rules apply only to Quebec actions. Thus, the legislation permitting proceedings against the Crown in right of the province renders Quebec liable to be sued in the courts of its own province but not in the courts of other provinces.[65]

90. Similarly, in *Medvid*, the Saskatchewan Court of Appeal struck a claim against Alberta for want of jurisdiction. In that case, the plaintiffs resided in Saskatchewan, but obtained health care services in Alberta. In their claim, the plaintiffs alleged that the Alberta government had been negligent in the provision of services. The Court of Appeal held that it did not have jurisdiction over the claim on the basis of Alberta's Crown immunity from suits brought in another province.[66]

91. In *Kaman*,[67] the Court of Queen's Bench of Alberta held that the British Columbia Crown could not be compelled to accept the jurisdiction of the Alberta courts:

> […] I accept the proposition that constitutionally the Province of Alberta cannot usurp Crown immunity normally enjoyed by the Province of British Columbia, or any other province in Canada for that matter.

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[63] *Proceedings Against the Crown Act*, RSNL 1990, c P-26 s 20.
[64] *Athabasca Chipewyan First Nation v Canada (Minister of Indian Affairs and Northern Development)*, 2001 ABCA 112, 199 DLR (4th) 425 at paras 45-55.
[65] *Sauvé v Attorney General of Quebec et al*, 2011 ONCA 369 at para 3.
[66] *R. v Medvid*, 2010 SKQB 22 ("*Medvid*") at paras 25-27, affr'd 2012 SKCA 49. See also *Ontario v Mar-Dive Corp* (1996), 141 DLR (4e) 577 (Di v Gen Ont).
[67] *Kaman v British Columbia*, 1999 ABQB 216 at paras 16, 23. See also G*odin v New Brunswick Power Comm* (1993) 16 CPC (3d) 388.

> […]
>
> [T]he Government of British Columbia cannot be compelled to submit to the jurisdiction of the Court of Queen's Bench of Alberta where there is no statutory authority enabling the Government of British Columbia to be sued in relation to the complaints [...] which fall within the operations of the Government of British Columbia or its Crown Agents. […]

92. And in *Les constructions Beace-Atlas Inc. c. Pomerleau Inc*, SCQ also upheld the principle :

> [16] Si les lois traitant de la responsabilité de l'État des provinces canadiennes soumettent chacune de ces dernières à la juridiction des tribunaux de son propre ressort, la tendance jurisprudentielle et doctrinale veut toutefois que le gouvernement d'une province jouisse d'une immunité de juridiction qui l'empêche d'être poursuivi devant les tribunaux d'une autre province, à moins qu'il n'ait volontairement renoncé à son immunité.[68]

93. Therefore, as for NL, the *Proceedings Against the Crown Act* cited above clearly does not allow a claim for title or other constitutional rights on lands located in NL to be brought before a court of another jurisdiction.

2.2 The courts below erred in failing to strike the impugned paragraphs of the pleadings under the principle of Crown immunity

94. While acknowledging the principle of Crown immunity, the QCCA came to the conclusion that it should not apply "at this stage" ("<u>à ce stade</u>") (emphasis in original) of the proceedings to bar any of the Respondents' claims.[69]

95. Respectfully, it is most unclear why that issue could not and should not be determined at this stage. The QCCA states that the AG NL can simply partake in the proceedings before the SCQ and, in so doing, advance Crown immunity as a defence in the course of those proceedings, along with any other defence it may deem appropriate.[70] Crown immunity, however, is immunity from <u>suit</u> – not merely from judgment – and to require the AG NL to participate in the trial of the matter would rather seem to defeat the purpose of this important constitutional principle. It is

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[68] *Les constructions Beauce-Atlas Inc.* c *Pomerleau Inc.*, 2013 QCCS 4077 at para 16.
[69] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at para 100, AR Vol I at p 50.
[70] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at para 107, AR Vol I at p 50-51.

well-established that determinations as to the jurisdiction of the court must be made *in limine litis*.[71]

96. Further, and in stark opposition to the conclusions of Justices Davis and Blanchard, the QCCA appeared to ground its reasoning in the view that the claim the Crown was not a named defendant, that no remedies were sought against it, and that any ruling would not be binding on the Crown in right of NL.[72]

97. As noted above, it is of no moment that the AG NL is not formally named as a defendant if, as is the case, the "main and primary effect of the declaration sought […] would be to affect the property rights of the Province of Newfoundland."[73]

98. The conclusion of QCCA is surprising, in the face of three prior determinations of the SCQ in this matter to the contrary, and the unambiguous language of both the claim and the NCQ as framed by the Respondents themselves – none of which were referenced at all by the QCCA.

99. The pleading itself could hardly be more explicit in asserting allegations and seeking relief that engage the prerogatives of the Crown in right of NL, the powers of the House of Assembly, rightful ownership of Crown lands, natural resources and minerals, and prior Crown authorizations, leases and permits.

100. As noted, the pleading claims, *inter alia*, the following:

(a) injunctive relief, including in regard to activities in NL (para 163, and again at paras 172-173 and 176);

(b) a declaration that the Defendants' installations, including those in NL, are the property of the plaintiffs (para 173);

(c) a constructive trust claim, including in regard to the Defendants' installations situated in NL (para 174);

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[71] *Transax Technologies inc. c Red Baron Corp. Ltd*, 2016 QCCA 1432 at paras 6, 7.
[72] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at paras 91, 100, 103-105, AR Vol II at pp 49-50.
[73] *Joe v. Canada*, [1986] 2 S.C.R. 145. See also: *Vollant v. Canada*, 2009 FCA 185, and *Innu of Uashat Mak Manu-Utenam v. Canada*, 2016 FCA 156.

(d) a declaration that the Megaproject infringes the plaintiffs' Aboriginal title and inherent and treaty rights (para 177);

(e) a declaration of Aboriginal title over those parts of Nitassinan that are affected by the Megaproject, including those in NL;

(f) A declaration of inherent Aboriginal and treaty rights throughout Nitassinan, including a right to all natural resources therein, including minerals;

(g) A declaration of a right to hunt, fish, trap and harvest throughout Nitassinan;

(h) An Aboriginal or treaty right to exercise jurisdiction over all Nitassinan;

(i) A right to use of waterways, to erect camps, to control and manage all of Nitassinan including the flora fauna, environment and natural resources, and to exploit forestry resources;

(j) A declaration that such rights and title are protected by the Constitution;

(k) A declaration that the Megaproject is illegal and violates the plaintiffs' Aboriginal rights and title;

(l) A permanent injunction against mineral extraction, including in Labrador City.[74]

101. The Respondents expressly ask that all such rights be declared to be constitutionally-protected.[75]

102. These claims, by their plain wording, would directly and indirectly constitute relief against the Crown, and if granted purport to bind the Crown.

103. Subject to justification, Aboriginal rights and title by definition operate as a limitation on Crown executive and legislative action. To deny this fundamental attribute would be to drain s. 35 of the *Constitution Act, 1982*,[76] of its essential content and to belie its historic promise.

104. Respectfully, the Court below trivializes the effect of a court decision that would ensue from the claim as framed. As held by the Federal Court of Appeal in *Assiniboine v. Meeches*[77]:

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[74] Motion to institute proceedings in permanent injunction, to obtain declaratory and damages claims, March 18, 2013, AR Vol II at p 29-31.
[75] Notice of Constitutional Questions, AR Vol II at p 122.
[76] *The Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 35.

> [12] [A] declaratory judgment is binding and has legal effect. A declaration differs from other judicial orders in that it declares what the law is without ordering any specific action or sanction against a party. Ordinarily, such declarations are not enforceable through traditional means. However, since the issues which are determined by a declaration set out in a judgment become *res judicata* between the parties, compliance with the declaration is nevertheless expected, and it is required in appropriate circumstances.
>
> [13] Declaratory relief is particularly useful when the subject of the relief is a public body or public official entrusted with public responsibilities, because it can be assumed that such bodies and officials will, without coercion, comply with the law as declared by the judiciary. Hence the inability of a declaration to sustain, without more, an execution process should not be seen as an inadequacy of declaratory orders against public bodies and public officials.
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> [14] As aptly noted by MacGuigan J.A. in *LeBar v. Canada* (F.C.A.), [1989] 1 F.C. 603, 90 N.R. 5, the proposition that public bodies and their officials must obey the law is a fundamental aspect of the principle of the rule of law, which is enshrined in the Constitution of Canada by the preamble to the *Canadian Charter of Rights and Freedoms*. Thus, a public body or public official subject to a declaratory order is bound by that order and has a duty to comply with it. If the public body or official has doubts concerning a judicial declaration, the rule of law requires that body or official to pursue the matter through the legal system. The rule of law can mean no less.
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> [15] As further noted in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, ("*Doucet-Boudreau*") at par. 62, the assumption underlying the choice of a declaratory order as a remedy is that governments and public bodies subject to that order will comply with the declaration promptly and fully. However, should this not be the case, the Supreme Court of Canada has laid to rest any doubt about the availability of contempt proceedings in appropriate cases in the event that public bodies or officials do not comply with such an order.

105. The underlying supposition that an order of the nature sought by the Respondents could be ignored by third parties, including the Crown in Right of NL, is unfounded and, if followed, would scarcely burnish the repute of the administration of justice or the authority of the courts.

106. As discussed above, in concluding that the Respondents' claims were "principally" personal in nature, the QCCA, as noted, cited the fact that Aboriginal title engages the Crown's fiduciary obligations. While it is unclear how this supports a conclusion that an Aboriginal title claim is *in personam*, the incidents of Aboriginal title on the Crown – including the engagement of its fiduciary obligation – only reinforce the conclusion that such a claim necessarily implicates

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[77] *Assiniboine v. Meeches*, 2013 FCA 114 at paras 12-15.

the Crown in right of NL and hence the principle of Crown immunity. As held in *Tsilhqot'in*, the Crown does not retain a beneficial interest in land that is found to be subject to Aboriginal title.[78] What remains of the Crown's radical or underlying title to lands held under Aboriginal title is "a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*."[79]

107. The engagement of the Crown's fiduciary obligation operates as a clear limitation on Crown authority in relation title lands. The relevant "Crown" in that regard is (or, at minimum, includes) the Crown in rights of NL.

108. Indeed, the motions judge below previously and correctly concluded that the Respondents' demands "vont bien au-delà des revendications des Innus contre IOC et QNS&L" and that, if granted, "il est évident que les droits, tant du Québec que de Terre-Neuve-et-Labrador, sur le territoire seront affectés."[80] Davis J.'s further held : "Bien sûr, comme l'a déjà reconnu le juge Blanchard, lors de l'audition au fond le Tribunal aura à se prononcer sur des droits constitutionnels du Québec et de Terre-Neuve-et-Labrador".[81]

109. Blanchard J. had also made prior rulings as case management judge in this matter and held that the claim asks the court to pronounce upon the federal and two provincial Crowns' constitutional rights, including in right of NL. Blanchard J., in ordering on his own motion the service of the NCQ on Canada, Québec and NL, opined that:

> [5] Il ne fait donc aucun doute que, tenus pour avérés […] les allégations et les conclusions mettent en cause les droits constitutionnels du Canada, de la Province de Québec et de la Province de Terre-Neuve et Labrador […][82]

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[78] *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 at para 70.
[79] *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 at para 71.
[80] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 1958, at para 69, AR Vol II at p 175.
[81] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133 at para 72, AR Vol I at p 19.
[82] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2014 QCCS 2051 at para 5, AR Vol II at p 108.

110. He further held, on a prior motion by the Defendants :

> [19] Ici, il ne fait aucun doute qu'on demande au Tribunal … de se prononcer sur les droits constitutionnels qui existeraient à l'égard de la Couronne, tant du Chef du Canada, que du Québec et de Terre-Neuve-et-Labrador. […][83]

111. Also inexplicably left unmentioned by the QCCA is the NCQ which, as noted, was ordered as required by Justice Blanchard precisely because the pleading on its face alleges constitutional limits on the legislative powers of the federal, Québec and NL legislators. The NCQ expressly states, *inter alia*, that the Respondents "seek declarations of Aboriginal title, inherent rights and treaty rights […] which title and rights prevail over any inconsistent law, including all federal and provincial legislation."[84] [our translation]

112. The NCQ goes on to advise of the Respondents' intention to challenge the validity or applicability of 28 NL statutes and regulation.[85] The NCQ further states that the Honour of the Crown and the Crown's fiduciary obligations, and the duty to consult and accommodate are engaged, and were breached by the Crowns in right of Canada, Québec and NL.[86]

113. While it may be tempting for the Appellant to take comfort in the QCCA's bald assertion that the claim does not seek remedies against and would not be binding upon the Crown in right of NL, this somewhat casual conclusion is impossible to reconcile with the black-on-white language of the pleadings and NCQ, and the law of Aboriginal rights and title.

114. The Respondents' claims go well beyond a private nuisance claim (as essentially asserted by the Respondents and endorsed by the QCCA), and speak directly to and require adjudication of underlying NL Crown ownership of land, minerals and natural resources, as well legislative and regulatory authority over the claimed territory.

115. If indeed the Respondents do not seek such remedies, or have abandoned those cited above, they should have no cause to object to the pleading being clarified accordingly. All parties, and the courts, would certainly greatly benefit from such clarity.

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[83] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2014 QCCS 4403 at para 19, AR Vol II at p 152.
[84] Notice of Constitutional Questions, AR Vol II at p 124.
[85] Notice of Constitutional Questions, AR Vol II at pp 126-127.
[86] Notice of Constitutional Questions, AR Vol II at p 136.

2.3 Other grounds relied upon for declining to apply Crown Immunity

116. Contrary to the QCCA, the motions' judge had no hesitation in correctly concluding that many of the asserted claims are indeed directed at, and seek to be binding upon, the Crown. Rather, Davis J. opined that the ordinary constitutional limits on provincial superior courts' jurisdiction should not apply in the context of a claim asserting cross-boundary Aboriginal title and rights.[87] No authority was cited in support of this conclusion.

117. The motions judge drew on the proposition that the Respondents did not seek a recognition of rights against the Crown in right of NL as a "defendant" but rather sought the recognition of "existing" rights.[88]

118. The AG NL admits to some confusion in regards to this pronouncement. Aboriginal rights, to be proven, must by definition be "existing" (indeed, as must rights generally that are subject to court process). This does not remove the need for those rights to be proven by a court of competent jurisdiction. It is unclear to the AG NL how the "existing" nature of such rights, if proven, confers jurisdiction on a court that otherwise would lack it. The very issue here is what courts have the necessary jurisdiction to determine whether such rights are proven or not.

119. In this regard, the "existing rights" sought to be established here relate to lands in part situated within NL and would, if proven, displace or impair the rights, authorities and jurisdiction of the Crown in Right of NL. Only the courts of NL have the jurisdiction to so hold.

120. It is precisely *because* a finding of Aboriginal rights and/or title to the claimed lands within NL, if made, would substantially displace the NL Crown's existing interests in those lands that the constitutional principle of Crown immunity is so clearly and necessarily engaged here. It would be an astonishing result if the rights of the Crown in right of NL could be eroded by the courts of a province other than the Supreme Court of Newfoundland and Labrador. Here, such a determination would be made by courts of another province, operating under a distinct legal system. It seems unlikely that such a contingency was contemplated by the *Terms of Union*.

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[87] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133 at paras 112-115, AR Vol I at pp 26-28.
[88] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133 at para 114, AR Vol I at p 27.

121. Further, even a finding of Aboriginal title and rights and of their infringement would not end the enquiry, since such infringements are, pursuant to the jurisprudence of this Court, capable of justification.[89] The onus of justification, however, rests with the Crown[90] – here, the Crown in right of NL.

122. The notion that the Crown in right of Newfoundland and Labrador would be called upon in the Superior Court of Québec to justify an infringement of Aboriginal rights and title over lands occurring in Newfoundland and Labrador cannot be reconciled with Crown immunity from suit in the courts of another province.

123. In summarily dispensing with the principle of Crown immunity, the QCCA and the motions judge also cite the need to take into account the Aboriginal perspective. This undoubtedly important principle cannot, it is submitted, oust our confederative constitutional order. As noted, this Court has cautioned that courts adjudicating Aboriginal rights claims must "be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada" and "take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system."[91]

124. In reaching the surprising and novel conclusion that Crown immunity does not apply to cross-border claims for Aboriginal rights and title, the courts below neither cited nor relied upon any doctrinal or precedential support. Indeed, the AG NL is not aware of any prior decision of any Canadian court to have espoused such a view.

125. To the contrary, in *Athabasca Chipewyan First Nation v. British Columbia*, the Alberta Court of Appeal quoted from the *Reference re Secession of Quebec*[92] to the effect that "[o]ur constitutional regime recognizes the diversity of the component parts of Confederation, autonomy of provincial governments to develop their societies within their respective spheres of

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[89] *R v Sparrow*, [1990] 1 SCR 1075.
[90] *R v Sparrow*, [1990] 1 SCR 1075.
[91] *R. v. Van der Peet*, [1996] 2 SCR 507 at para 49.
[92] *Reference re Secession of Quebec*, [1998] 2 SCR 217.

jurisdiction" and ruled that it would be "contrary to our basic notion of federalism" for the courts of one province to pronounce upon the constitutionality of the law of another province.[93]

126. Provincial borders in no way limit Aboriginal rights to one side of that border or another. They do, however, under our Constitution, limit the reach of provincial courts' jurisdiction to pronounce upon those rights.

127. The courts below erred in failing to properly assess the substance of the pleadings and determine that the claim sought remedies against the Crown of NL. The fact that the Respondents omitted to name the AG NL as a defendant does not change the substance of the prayers for relief sought, which necessarily engage the rights and authorities of the Crown in right of NL, and does not bring the claim within the jurisdiction of the SCQ.

2.4 Risk of inconsistent judgments

128. By way of further justification for dispensing with Crown immunity principles Davis J. reasoned that there would be a risk of inconsistent judgments if the Respondents were required to advance their claims relating to the Québec territory in the courts of Québec and those relating to NL territory in the courts of that province, that the rights claimed and the law are not different in Québec than in NL, and that the Québec court's decision on these rights should not be different from those of a NL court.[94]

129. Respectfully, this reasoning does not withstand scrutiny. No such risk arises; a claim relating and conficed to Québec lands brought in Québec and a claim relating and confined to NL lands brought in NL, properly pled to be limited to and addressing distinct territories, could not yield contradictory results. As set out above, Aboriginal title as well as Aboriginal rights of the nature asserted here, are territory and site-specific[95] and dependent, *inter alia*, on proof of pre-contact occupation and use of specific sites and/or territories.

130. As such, it would be entirely possible, legally and factually, that the Respondents could prove the existence of Aboriginal title and/or rights in relation to sites or territories within Québec but not in NL, or the converse, or differing rights in differing sites and territories. The

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[93] *Athabasca Chipewyan First Nation v Canada (Minister of Indian Affairs and Northern Development)*, 2001 ABCA 112, 199 DLR (4th) 425 at para 39.
[94] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133 at paras 106-110, 116, 118, AR Vol I at pp 25-26, 28.

possibility of *differing* (as opposed to contradictory) results presents neither legal, factual nor logical incongruity.

131. The potential result that Davis J. decries is one that the AG NL's motion would have foreclosed, but that his judgment, to the contrary, leaves open. The motion to strike, if granted, would have ensured that the Québec courts' determinations of the matter would be confined to territories within the borders of Québec, leaving open a further and separate determination by NL courts in relation to territories within the borders of that province. Regardless of result, such rulings could not be incompatible, since they would relate to distinct and separate sites and territories.

132. Conversely, a determination by Québec courts regarding rights and title in NL could not preclude a contrary and contradictory determination by NL courts in regard to those same lands. As such, the possibility of contradictory, incompatible *in rem* judgments arises only as a result of the dismissal of the AG NL's motion. The possibility of such conflicting results would do violence to the "integrity and the coherence of the administration of justice," to use the words of this Court in *Toronto (City) v. C.U.P.E.*.[96]

133. Granting the AG NL's motion would preclude such a result.

134. Davis J. further relied on *Morguard Investments Ltd.*[97] and held that because the law of Aboriginal title and rights was the same across Canada, because the evidence would be the same before the Québec or the NL courts, because both courts are populated by s. 96 judges (and therefore of the same quality of justice), and because any decision of the Court was ultimately subject to review by this Court, the SCQ had jurisdiction to adjudicate the action.[98]

135. This Court's decision in *Morguard* dealt with the recognition of judgments and the principle of comity between provinces' court decisions. As held by this Court, the principle of comity requires the recognition of judgments, but only "so long as that court has properly, or appropriately, exercised jurisdiction in the action".[99] Moreover, the action in *Morguard* was a

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[95] See *R v Côté*, [1996] 3 SCR 139 at paras 38-39.
[96] *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at para. 29.
[97] *Morguard Investments Ltd. v De Savoye*, [1990] 3 SCR 1077.
[98] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2016 QCCS 5133 at paras 106-110, AR Vol I at p 25-26.
[99] *Morguard Investments Ltd. v De Savoye*, [1990] 3 SCR 1077 at 1102.

"personal" one, not *in rem*; and to the extent that a property right was implicated, the action was brought in the province where the property was located (foreclosure actions in Alberta over mortgaged properties in Alberta).

136. Only once the court correctly determined that it had jurisdiction can its decision be recognized in other jurisdictions. In this case, only NL courts have jurisdiction to grant the remedies claimed by the Respondents against lands belonging to Her Majesty the Crown in Right of NL. Thus, Davis J. erred in relying on the principle of comity to justify the SCQ's jurisdiction. Indeed, in *Athabaska Chipewyan First Nation*, the Alberta Court of Appeal expressly held that the principle in *Morguard* does not apply in the context of, and does not displace, Crown immunity.[100]

137. While it is of course true that the superior courts of both Québec and NL are, pursuant to s. 96 *Constitution Act, 1867,*[101] both populated by judges appointed by the Governor-in-Council, this fact in no way confers cross-boundary, nation-wide jurisdiction on such judges, who sit in courts established under the laws of each province. To the contrary, s. 97 of the *Constitution Act, 1867*[102] specifically provides that "until the Law relative to Property and Civil Rights […] are made uniform, the Judges of the Courts […] shall be selected from the respective Bars of those provinces", recognizing a constitutional compromise.[103] As those laws were never made uniform, judges of superior courts remain drawn, exclusively, from members of the bar of that province – recognizing the compromise, but also the experience and understanding such barristers and solicitors will have of provincial law, procedure, custom and history.

3. Convenience does not override the *Constitution*

138. Finally, the QCCA and the motions judge cited concerns in regard to access to justice and proportionality as further grounds for recognizing the jurisdiction of the SCQ in regard to the claim.

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[100] *Athabasca Chipewyan First Nation v Canada (Minister of Indian Affairs and Northern Development)*, 2001 ABCA 112, 199 DLR (4th) 425 at paras 41-42.
[101] *The Constitution Act*, 1867, 30 & 31 Vict, c 3, s. 96.
[102] *The Constitution Act*, 1867, 30 & 31 Vict, c 3, s. 97.
[103] *Renvoi sur l'article 98 de la Loi constitutionnelle de 1867 (Dans l'affaire du)*, 2014 QCCA 2365 aux paras 42-43, 51-54; aff'd *Québec (Procureure générale) c. Canada (Procureur général)*, [2015] 2 RCS 179, 2015 CSC 22.

139. The significant convenience of bringing a single claim in a single court and avoiding its bifurcation is undeniable.

140. However, convenience, without more, is not invested with the power to shunt aside our federal constitutional model. As held by this Court in *Comeau*, "the question for a court is squarely constitutional compliance, not policy desirability"[104]

141. Similarly, in the *Securities Act Reference*, this Court reminded that "one should not confuse what is optimum as a matter of policy and what is constitutionally permissible."[105]

142. The courts below, it is submitted, improperly proposed to introduce an unprecedented and jarring course alteration to the law of Crown immunity and our confederative juridical model that is its loadstar. As noted by the Alberta Court of Appeal in *Athabasca Chipewyan First Nation,* issues of Crown immunity "concern fundamental questions about the relationship between the courts and government" and that "attempts on the part of the judiciary to reformulate the law on Crown immunity … raise delicate constitutional issues" upon which the courts are ill-equipped to embark.[106]

143. Rather, such matters are best left to the legislator. Thus, in Australia, the *Native Title Act* of 1993[107] establishes a national process for adjudicating Aboriginal claims within a federal juridical system.

4. Conclusion

144. For the foregoing reasons, the AG NL submits that the SCQ does not have the necessary jurisdiction, both as a matter of constitutional law and under the *Civil Code of Québec,* to make determinations as to Aboriginal rights and title over lands in the province of NL asserted by Indigenous groups whose claims straddle Québec and NL.

PART IV- COSTS

145. The AG NL requests that this appeal be allowed with costs.

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[104] *R. v. Comeau*, [2018] 1 SCR 342, 2018 SCC 15 at para 83.
[105] *Reference re Securities Act*, [2011] 3 SCR 837, 2011 SCC 66 at para. 90.
[106] *Athabasca Chipewyan First Nation v Canada (Minister of Indian Affairs and Northern Development)*, 2001 ABCA 112, 199 DLR (4th) 425 at para 40.
[107] *Native Title Act* 1993, No. 110, 1993 (Aus.).

PART V – ORDER SOUGHT

146. The AG NL respectfully requests that this Court allow the appeal, with costs.

DATED at Ottawa, Ontario, this 11th day of February, 2019.

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PART VI – SUBMISSIONS REGARDING THE IMPACT OF ANY SEALING ORDER OR PUBLICATION BAN

N/A

PART VII – TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

Jurisprudence	**Paragraphs**
Assiniboine v. Meeches, 2013 FCA 114.	104
Athabasca Chipewyan First Nation v Canada (Minister of Indian Affairs and Northern Development), 2001 ABCA 112, 199 DLR (4th) 425.	89, 125, 136, 142
Behaviour Communications inc. c Virtual Image Productions, 1999 CanLII 10658 (QCCQ).	60
Bern v Elfe Juvenile Products Inc, [1995] RDJ 510 (QCCA).	54
Canada (Attorney General) v. Thouin, [2017] 2 SCR 184, 2017 SCC 46.	87
CGAO c. Groupe Anderson inc., 2017 QCCA 923.	60, 62
Club Resorts Ltd. v Van Breda, [2012] 1 SCR 572.	45, 86
Delgamuukw v British Columbia, [1997] 3 SCR 1010.	73-74
Design Recovery Inc v Schneider, 2003 SKCA 94.	42
Duke v Andler, [1932] SCR 734.	41
Godin v New Brunswick Power Comm (1993) 16 CPC (3d) 388.	87, 91
Innu of Uashat Mak Manu-Utenam v. Canada, 2016 FCA 156.	47, 97
Joe v. Canada, [1986] 2 S.C.R. 145.	47, 97
Kaman v British Columbia, 1999 ABQB 216.	87, 91
Komunik inc c Childs, 2007 QCCQ 3222 at para 30.	52
Les constructions Beauce-Atlas Inc. c. Pomerleau Inc., 2013 QCCS 4077.	87, 92
Lynch Suder Logan c Logan, 2014 QCCS 4765.	60
Morguard Investments Ltd. v De Savoye, [1990] 3 SCR 1077.	134, 135
Ontario v Mar-Dive Corp (1996), 141 DLR (4e) 577.	87, 90
Palmer v Palmer, [1979] SJ 435 (CA).	43
Première Nation de Pessamit c Québec (Procureur général), 2007 QCCS 794.	76
Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam), 2017 QCCA 1791.	26-28, 30-33, 56, 65, 94-96
R. v. Comeau, [2018] 1 SCR 342, 2018 SCC 15.	140
R v Côté, [1996] 3 SCR 139.	77, 129
R v Marshall; R v Bernard, [2005] 2 SCR 220.	75
R v Medvid, [1990] 2 SCR 85.	87, 90

Native Title Act 1993, No. 110, 1993 (Aus.).	143
Proceedings Against the Crown Act, RSNL 1990, c P-26 s 20.	88
The Constitution Act, 1982, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s. 35.	103, 137
1949 Newfoundland Act, 12-13 Geo. VI, c. 22 (U.K.).	46

Civil Code of Québec, CQLR c CCQ-1991

TITLE FOUR DISMEMBERMENTS OF THE RIGHT OF OWNERSHIP GENERAL PROVISION 1119. Usufruct, use, servitude and emphyteusis are dismemberments of the right of ownership and are real rights. [emphasis added]	TITRE QUATRIÈME DES DÉMEMBREMENTS DU DROIT DE PROPRIÉTÉ DISPOSITION GÉNÉRALE 1119. L'usufruit, l'usage, la servitude et l'emphytéose sont des démembrements du droit de propriété et constituent des droits réels. [nous soulignons]
DIVISION III REAL AND MIXED ACTIONS 3152. A Québec authority has jurisdiction over a real action if the property in dispute is situated in Québec.	SECTION III DES ACTIONS RÉELLES ET MIXTES 3152. Les autorités québécoises sont compétentes pour connaître d'une action réelle si le bien en litige est situé au Québec.

Proceedings Against the Crown Act, RSNL 1990, c P-26

Proceedings against the world at large

20. Nothing in this Act authorizes proceedings in respect of a claim against the property of the Crown or the seizure, attachment, arrest, detention or sale of property of the Crown.