SCC Court File No. 37912

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

B E T W E E N:

ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

APPLICANT

(Appellant)

A N D:

UASHAUNNUAT (INNU OF UASHAT 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, PHILLIPE MCKENZIE, AUGUSTE JEAN-PIERRE

RESPONDENTS

(Respondents)

A N D:

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QUEBEC NORTH SHORE AND LABRADOR RAILWAY COMPANY INC.

(Compagnie de chemin de fer du littoral nord de Québec et du Labrador inc.)

INTERVENERS

(Mise-en-cause)

A N D:

ATTORNEY GENERAL OF QUEBEC

INTERVENER

(Mise-en-cause)

A N D:

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF BRITISH COLUMBIA, KITIGAN ZIBI ANISHINABEG AND THE ALGONQUIN ANISHINABEG NATION TRIBAL COUNCIL, AMNESTY INTERNATIONAL CANADA, AND TSAWOUT FIRST NATION

INTERVENERS

FACTUM OF THE INTERVENERS, KITIGAN ZIBI ANISHINABEG AND ALGONQUIN ANISHINABEG NATION TRIBAL COUNCIL

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

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1. The Appellant, the Attorney General of Newfoundland and Labrador, brings this appeal challenging the jurisdiction of the Superior Court of Québec to adjudicate and rule upon claims against private defendants that are grounded and dependent on the assertion of Aboriginal rights and title (hereinafter, "section 35 claims") over property, land, and natural resources situated within the Province of Newfoundland and Labrador ("NL").[1]

2. While the present appeal concerns the assertion of section 35 claims against private parties, it raises broader issues respecting the ability of Aboriginal groups to bring forward and resolve section 35 claims that span more than one jurisdiction. Both the motions judge and the Québec Court of Appeal identified the practical barriers inherent in the advancement of multi-jurisdictional section 35 claims as a fundamental access to justice issue.[2]

3. The Interveners Kitigan Zibi Anishinabeg ("KZA") and the Algonquin Anishinabeg Tribal Council ("AANTC") do not take a position on the disposition of this appeal. Rather, KZA and AANTC's submissions address the practical challenges Aboriginal groups face in reconciling their Aboriginal rights and title in more than one province, underscore the need for this Court to provide judicial guidance to lower courts and the Crown to manage and resolve these claims within Canada's constitutional framework, and offer examples of such solutions in Canadian and international law.

4. The practical barriers inherent in the advancement of multi-jurisdictional section 35 claims also mean there are likely to be few opportunities for this Court to consider these issues and to provide judicial guidance. In KZA and AANTC's submission, this appeal presents a unique and valuable opportunity for this Court to do just that.

[1] Appellant Factum at paras 37-38.
[2] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) c Compagnie manière IOC inc (Iron Ore Company of Canada)*, 2016 QCCS 5133 at para 107, Appellant Record [AR] Vol I at 25 [*Uashaunnuat* Motions Decision]; *Procureur general de Terre-Neuve-et-Labrador c Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791 at paras 112-113, AR Vol I at 51 [*Uashaunnuat* Appeal Decision].

PART II – QUESTION IN ISSUE

5. As noted above, KZA and AANTC do not take a position with respect to the question posed by the Appellant in this appeal, but rather see this appeal as an opportunity to seek guidance on multi-jurisdictional section 35 claims, a formidable issue facing KZA, AANTC, and other Aboriginal groups in Canada.

PART III – ARGUMENT

A. Barriers to multi-jurisdictional Aboriginal rights and title claims

6. Many Aboriginal groups in Canada, including KZA, AANTC, and the Respondents, have traditional territory and, consequently, section 35 rights spanning more than one province. These constitutionally-protected rights predate and survived European settlement.[3] As the motions judge in this appeal noted, these rights were exercised without regard to Canadian borders.[4]

7. From the perspective of Aboriginal groups, colonial (and later Canadian) borders were imposed upon Indigenous peoples without their consent, arbitrarily dividing up their territory. In *Mitchell v Minister of National Revenue*, Binnie, J., (concurring), noted the frustrations of the Mohawks of Akwesasne as a result of the jurisdictional divisions separating their community between Québec, Ontario, and New York State:

[T]he purpose of s. 35(1) of the *Constitution Act, 1982* is to reconcile "the pre-existence of aboriginal societies with the sovereignty of the Crown". In this respect, the respondent argued with some passion in the witness box that the jurisdictional divisions carry deeper meaning for the Mohawks of Akwesasne because they represent the intrusion of non-aboriginal governing institutions in the everyday life of Akwesasne and their relations with other members of the Haudenosaunee (Iroquois Confederacy). The border complexities are a constant reminder to the Mohawks of their frustration and inability to control the destiny	[L]e paragraphe 35(1) de la Loi constitutionnelle de 1982 vise à «concilier la préexistence des sociétés autochtones et la souveraineté de Sa Majesté». À cet égard, l'intimé a soutenu avec une certaine passion à la barre des témoins que la dislocation entre ressorts territoriaux a une signification plus profonde pour les Mohawks d'Akwesasne parce qu'elle représente l'intrusion d'institutions gouvernementales non autochtones dans leur vie de tous les jours à Akwesasne et dans leurs relations avec d'autres membres de Haudenosaunee (Confédération iroquoise). Les complexités frontalières rappellent

[3] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35; *Tsilhqot'in v British Columbia*, 2014 SCC 44 at paras 10 (citing *Calder v British Columbia (Attorney General)*, [1973] SCR 313) and 118.
[4] *Uashaunnuat* Motions Decision, *supra* note 2 at para 106, AR Vol I at 25.

of their own communities.	constamment aux Mohawks leur frustration et leur incapacité à contrôler le destin de leurs propres communautés. [5]

8. Canada's constitutional structure creates significant legal obstacles for Aboriginal claimants with multi-jurisdictional section 35 claims. Each province owns and controls the "lands, mines, minerals, and royalties" situated within its borders,[6] and the principle of Crown immunity precludes the courts of one province from making determinations against the Crown of another province.[7] The combined effect of these factors requires a multi-jurisdictional section 35 claimant, should they wish to pursue the entirety of their claim, to bring separate court actions, even where the lands may be geographically contiguous.

9. There are also regulatory and legislative hurdles to bringing multiple actions on essentially the same subject matter. Both courts and legislatures have indicated that duplicative proceedings are to be avoided,[8] and, in some cases, can amount to an abuse of process.[9] Duplicative proceedings run contrary to the principle of judicial economy,[10] as well as offend the proportionality principle reflected in many provinces' rules of procedure (to secure the just, most expeditious, and least expensive determination of civil proceedings on their merits).[11]

[5] *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 80 [emphasis added].
[6] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 109.
[7] See e.g. *Sauvé v Attorney General of Québec et* al, 2011 ONCA 369 at para 3.
[8] See *British Columbia (Attorney General) v Malik*, 2011 SCC 18 at para 40; *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 18. See e.g. *Courts of Justice Act*, RSO 1990, c C 43, s 138; *Judicature Act*, RSPEI 1988, c J-2.1, s 63; *The Court of Queen's Bench Act*, CCSM c C280, s 94.
[9] See e.g. *Reddy v Oshawa Flying Club* (1992), 11 CPC (3d) 154 (Ont Gen Div).
[10] *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 27.
[11] *Hryniak v Mauldin*, 2014 SCC 7 at para 30 [*Hryniak*]. See e.g. *Supreme Court Civil Rules*, BC Reg 18/2019, R 1-3(1); *Rules of Civil Procedure*, RRO 1990, Reg 194, R 1.04(1); *Code of Civil Procedure*, RSQ, c C-25.01, art 18.

10. In the appeal at bar, the motions judge and the Québec Court of Appeal expressed concerns about the Respondents having to bring multiple actions in Québec and NL:

> Peut-on dire qu'il est dans l'intérêt de la justice qu'essentiellement le même débat ait lieu devant deux juridictions qui doivent toutes les deux appliquer la même loi, et ce, quand les tribunaux qui entendront les causes sont tous les deux de nomination fédérale?[12]

11. The requirement to bring multiple actions also exacerbates an existing problem inherent in section 35 rights litigation, namely the significant cost and time of prosecuting the action. Aboriginal rights and title litigation, by its very nature, is inherently complex and requires years and even decades to resolve in the courts.[13] Adjudicating section 35 claims almost invariably requires extensive documentary and oral evidence, costly expert opinion evidence, and numerous pre-trial motions.[14] With multiple actions, the claimant would also have to navigate the rules of civil procedure in two different jurisdictions, erecting further barriers to advancing their claim.

12. A related problem of pursuing multiple actions for multi-jurisdictional section 35 claims is the risk of the inconsistent interpretation of evidence and, consequently, the potential for inconsistent outcomes. The motions judge below emphasized this issue.[15] Aboriginal rights and title claims require proof of historical and pre-historical facts, which in turn requires both oral historical evidence, as well as expert opinion evidence.[16] As the courts below noted, most, if not all, of this historical evidence is likely to apply equally to a claim in both jurisdictions; yet, instead of one unified action, an Aboriginal group must pursue a separate claim in each jurisdiction using the same historical evidence.[17]

[12] *Uashaunnuat* Appeal Decision, *supra* note 2 at paras 112-113, AR Vol I at 51; *Uashaunnuat* Motions Decision, *supra* note 2 at para 107, AR Vol I at 25.
[13] *Haida Nation v British Columbia* (*Minister of Forests)*, 2004 SCC 73 at para 14.
[14] Jack Woodward, *Native Law*, (Toronto: Thomson Reuters, 1994) (loose-leaf updated 2019, Release 1), ch 20 at 402.24(ii).
[15] *Uashaunnuat* Motions Decision, *supra* note 2 at paras 106-110, 116, 118, AR Vol I at 25-26, 28.
[16] See e.g., *Tsilhqot'in Nation v British Columbia*, 2004 BCSC 1237 at para 12.
[17] *Uashaunnuat* Motions Decision, *supra* note 2 at para 107, AR Vol I at 25; *Uashaunnuat* Appeal Decision, *supra* note 2 at para 116, AR Vol I at 52.

13. With multiple claims where the same or very similar evidence is considered, there exists a risk of courts interpreting the same evidence differently. This could lead to inconsistent findings of fact, which is contrary to the interests of justice and could erode public confidence in the judicial process itself, thereby diminishing the judiciary's authority, the credibility of the process, and the aim of finality.[18] This risk is particularly acute in the context of section 35 claims, as much of the evidence concerns historical documents, the interpretation of which informs the foundation of Aboriginal rights and title claims.

14. In KZA and AANTC's submission, the foregoing problems amount to a serious access to justice and proportionality issue for Aboriginal claimants with multi-jurisdictional section 35 claims. These problems form a practical barrier to the bringing and adjudication of these claims on their merits in the Canadian court system.[19] As this Court noted in *Hryniak v Mauldin*: "[W]ithout an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined" ("en l'absence d'un forum public accessible pour faire trancher les litiges, la primauté du droit est compromise et l'évolution de la common law, freinée").[20]

15. These practical challenges for advancing multi-jurisdictional section 35 claims also act as a barrier to reconciliation. A key purpose of the constitutional entrenchment of Aboriginal rights in section 35 is to recognize and reconcile these rights with the assertion of Crown sovereignty over Canadian territory.[21] Without a practical and reasonable way to bring and manage multi-jurisdictional claims, the goal of reconciliation cannot be achieved.[22]

[18] *Hryniak*, *supra* note 11 at para 60; *Toronto (City) v CUPE, Local* 79, 2003 SCC 63 at para 51.
[19] *BCGEU v British Columbia (Attorney General),* [1988] 2 SCR 214 at 230.
[20] *Hryniak*, *supra* note 11 at para 26. See also *Trial Lawyers Assn of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 38.
[21] *R v Van der Peet*, [1996] 2 SCR 507 at para 28; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1.
[22] See Truth and Reconciliation Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) volume 1 ("[a] commitment to truth and reconciliation demands that Canada's legal system be transformed" at 205).

16. The combination of the above-noted barriers effectively prohibits Aboriginal claimants from bringing multi-jurisdictional section 35 claims.

B. The need for judicial guidance and creative solutions

17. The need for guidance with respect to multi-jurisdictional section 35 claims is imperative, to further access to justice, achieve proportionality, and bolster reconciliation. This is especially important given that section 35 rights are constitutionally enshrined.

18. KZA and AANTC do not suggest that the solution to these problems lies in disregarding longstanding constitutional principles of federalism or Crown immunity, but rather that the principles of access to justice, proportionality, and reconciliation require courts and parties to prioritize finding solutions to the jurisdictional and procedural problems inherent in these claims. Without judicial guidance from this Court to do so, both courts and parties alike may be reluctant to engage to develop these solutions.

19. In the Aboriginal context, courts have underscored the importance of finding creative solutions to deal with the unique problems inherent in Aboriginal rights litigation. For example, in *Hereditary Chiefs Tony Hunt et al v Attorney General of Canada et al*, Satanove J. of the British Columbia Supreme Court commented:

> I think it must be recognized that just as aboriginal rights are *sui generis*, aboriginal rights litigation is also unique. It involves hundreds of years of history and sometimes unconventional techniques of fact finding. It involves lofty, often elusive concepts of law such as the fiduciary duty and honour of the Crown. We cannot simply view aboriginal claims in the same light as other civil litigation. I believe effective case management of aboriginal litigation requires an effort on behalf of all parties and the court to find a creative way to try the issues without invoking oppressive conduct that deters the plaintiffs or prejudices the defendants.[23]

20. For its part, this Court has given similar judicial guidance to address multi-jurisdictional problems raised in class action litigation. In *Canada Post Corp v Lépine*, this Court drew attention to the issue of the lack of cooperation between jurisdictions with respect to managing multi-jurisdictional class actions:

[23] *Hereditary Chiefs Tony Hunt et al v Attorney General of Canada et al*, 2006 BCSC 1368 at para 26 [emphasis added].

[T]he creation of national classes also raises the issue of relations between equal but different superior courts in a federal system in which civil procedure and the administration of justice are under provincial jurisdiction. This case shows that the decisions made may sometimes cause friction between courts in different provinces. This of course often involves problems with communications or contacts between the courts and between the lawyers involved in such proceedings. However, the provincial legislatures should pay more attention to the framework for national class actions and the problems they present. More effective methods for managing jurisdictional disputes should be established in the spirit of mutual comity that is required between the courts of different provinces in the Canadian legal space. It is not this Court's role to define the necessary solutions. However, it is important to note the problems that sometimes seem to arise in conducting such actions.	[L]a création des groupes nationaux pose aussi le problème des rapports entre tribunaux supérieurs égaux, mais différents, dans un système fédéral où la procédure civile et l'administration de la justice relèvent des provinces. Le présent dossier montre que les décisions rendues peuvent parfois provoquer des frictions entre les tribunaux de différentes provinces. Il s'agit sans doute souvent de problèmes de communication ou de contact entre les tribunaux et entre les avocats engagés dans ces procédures. Cependant, les législatures provinciales devraient porter plus d'attention au cadre des recours collectifs nationaux et aux problèmes posés par ceux-ci. Des méthodes plus efficaces de gestion des conflits de compétence devraient être établies dans l'esprit de courtoisie mutuelle qui s'impose entre les tribunaux des différentes provinces dans l'espace juridique canadien. Il ne nous appartient pas de définir les solutions nécessaires. Il importe cependant de relever les difficultés qui semblent parfois se poser dans la conduite de ces recours.[24]

21. For all the practical difficulties described herein regarding the advancement of multi-jurisdictional section 35 claims, this appeal presents this Court with a rare opportunity to provide much needed judicial guidance on a pervasive national issue.

C. Examples of creative and practical solutions to multi-jurisdictional issues

22. While there is little, if any, jurisprudence on multi-jurisdictional section 35 claims in Canadian law aside from this appeal, Canadian class action litigation and Canadian and international Aboriginal law provide examples of solutions for managing multi-jurisdictional claims.

[24] *Lépine v Société Canadienne des postes*, 2009 SCC 16 at para 57 [emphasis added].

i. Multi-jurisdictional hearings and communication between courts

23. In *Endean v British Columbia*,[25] class counsel brought three separate motions in the superior courts of British Columbia, Québec, and Ontario to approve a protocol extending the deadline for filing claims under a national settlement agreement. They proposed that the three supervising judges of each province hear the motions concurrently, sitting together in one location.[26] In restoring the order of the motions judge, this Court held that superior court judges have the jurisdiction to sit extra-provincially and hear motions in a different province, permitting the three judges to hear the motion in one location simultaneously.[27]

24. Similarly, in three parallel class action claims involving allegations of price fixing of dynamic random-access memory devices (the "DRAM Actions"), judges of the superior courts of British Columbia, Ontario, and Québec concurrently heard motions to approve a settlement by videoconference.[28] Following the motion, each justice rendered his or her own separate decision.[29]

25. In the United States, the Wisconsin *Teague v Bad River Band* line of cases is an example of courts working together in novel ways to address jurisdictional challenges involving Aboriginal claims.[30] The cases involved questions of whether a tribal court or a Wisconsin state court had jurisdiction over the claims at issue and led to the creation of "jurisdiction allocation conferences", colloquially termed "*Teague* conferences", and the creation of a list of factors for courts to consider to resolve jurisdictional issues between state and tribal courts.[31]

ii. Cooperation between counsel and the courts to efficiently and cooperatively manage claims

26. The Vioxx litigation is an example of class counsel cooperating to coordinate multiple class action proceedings in different provinces. In *Setterington v Merck Frosst Canada Ltd*, eight

[25] *Endean v British Columbia*, 2016 SCC 42 [*Endean*].
[26] *Endean*, *ibid* at paras 5, 10.
[27] *Endean*, *ibid* at para 4.
[28] *Eidoo v Infineon Technologies AG*, 2013 ONSC 853 at para 3 [*Eidoo*]; *Pro-Sys Consultants Ltd. v Infineon Technologies AG*, 2013 BCSC 316 at para 4 [*Pro-Sys*].
[29] *Eidoo*, *ibid*; *Pro-Sys*, *ibid*; *Option Consummateurs c Infineon Technologies, a.g.*, 2013 QCCS 1191.
[30] See e.g. *Teague v Bad River Band*, 665 NW2d 899 (Wis 2003) [*Teague*].
[31] *Teague*, *ibid* at para 71.

class actions were commenced in Ontario with respect to the painkiller Vioxx.[32] Six of these actions were consolidated and proceeded as a single action with an amalgamated counsel team from nineteen law firms based in nine provinces across Canada (the "Setterington Group").

27. The DRAM Actions involved similar collaboration among class counsel. In those actions, class counsel from British Columbia, Ontario, and Québec cooperated to advance proceedings in each province.[33]

28. Aboriginal law has great potential for collaborative counsel work in managing complex claims and maximizing access to justice. *Restoule v Canada (Attorney General)*, a 2018 decision of the Ontario Superior Court of Justice, illustrates this potential.[34] In that case, the parties, including two different Crowns (Canada and Ontario), addressed the voluminous amount of documentary evidence by filing a joint book of documents, including approximately 30,000 pages of primary sources and a similar volume of secondary source material.[35] Ontario Crown counsel collected and digitized this joint documentary record, complete with digital search features.[36] The Court also held two weeks of hearings in Anishinaabe First Nation territories to allow Elders to testify in their communities, pursuant to a protocol the parties developed.[37] The court noted that "the ways in which counsel and the parties cooperated [made] this trial a proceeding of respect and an exercise in reconciliation."[38]

D. Potential areas of guidance this Court could provide

29. Given the unresolved status of many Aboriginal rights and title claims, the fact that we are well into the 21st century, and in keeping with the aims of reconciliation, the need for a coordinated approach to multi-jurisdictional section 35 claims is long overdue. Based on the foregoing examples from class action and Aboriginal law, KZA and AANTC respectfully

[32] *Setterington v Merck Frosst Canada Ltd*, [2006] OJ No 376 (Sup Ct).
[33] *Eidoo*, *supra* note 28 at para 13.
[34] *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 [*Restoule*].
[35] *Restoule*, *ibid* at para 11.
[37] *Restoule v Canada (Attorney General)*, 2018 ONSC 114 at paras 7-9; *Restoule*, *ibid* at paras 8, 10, 12 – 13, 602, 604, 607 – 610.
[37] *Restoule v Canada (Attorney General)*, 2018 ONSC 114 at paras 7-9; *Restoule*, *ibid* at paras 8, 10, 12 – 13, 602, 604, 607 – 610.
[38] *Restoule*, *ibid* at para 603.

suggest this Court could provide guidance to lower courts and to parties alike in multi-jurisdictional section 35 litigation on the following matters:

a. The facilitation of communication between judges in each province;

b. Judges could sit with judges of other provinces, either in person or by videoconference;

c. Coordination and cooperation between Crown parties in each province; and

d. Case management of multi-jurisdictional section 35 claims to avoid a multiplicity of proceedings, unnecessary duplication, and unnecessary time and expense, including:

   i. A consolidated disclosure process;

   ii. A singular court procedure;

   iii. Hearings in one or more jurisdictions by one judge; and

   iv. A process for a single trial in one jurisdiction, where appropriate.

PART IV – COSTS AND ORDER SOUGHT

30. The Interveners KZA and AANTC seek no costs and ask that no costs be awarded against them.

31. As Interveners KZA and AANTC take no position on the orders sought in this appeal.

Respectfully submitted this 8th day of April, 2019.

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