SCC File No. 37912

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

ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

APPELLANT

AND:

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

RESPONDENTS

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 de Québec et du Labrador inc.)

INTERVENER

AND:

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

INTERVENERS

FACTUM OF THE INTERVENER TSAWOUT FIRST NATION

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

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PART I – STATEMENT OF FACTS

1. Tsawout First Nation adopts the facts set out in the Appellant's factum.

PART II – POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

2. Tsawout First Nation supports the Appellant's position that an action seeking a declaration of Aboriginal title constitutes a "real" or "*in rem*" action. However, Tsawout First Nation supports the Respondents' position that claims for Aboriginal rights short of title, are best characterized as "mixed" or "*in personam*" claims.

PART III – STATEMENT OF ARGUMENT

A. Principles That Should be Applied in the Disposition of this Appeal

3. In *Sparrow*, the court accepted that section 35(1) of the *Constitution Act*, be construed in a purposive way:

> Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to questions sovereign claims made by the Crown.[1]

4. This appeal raises important issues regarding the promise of section 35, the enforceability of Aboriginal rights and title and treaty rights, and access to justice.

5. The answers to the questions raised in this appeal should be guided by the following principles: 1) While "section 35(1) provides a solid constitutional base on which subsequent negotiations can take place,"[2] courts must be careful not to limit access to the courts when negotiations break down; 2) Aboriginal peoples seeking court remedies for actions that diminish or negatively affect their section 35 rights should, subject to jurisdictional rules, have access to the courts of their home province; 3) Section 35 rights, to have meaning, must be capable of being enforced against private parties, without the necessity of having to first prove the existence of the right(s) and their unjustified infringement.

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[1] *R. v. Sparrow,* [1990] 1 S.C.R. 1075 ["*Sparrow*"] at p. 1106

[2] *Sparrow* at p. 1105.

B. Aboriginal Title Claims are *in Rem*

6. Aboriginal title is an independent pre-existing legal right that does not depend on the *Royal Proclamation*, treaty, executive order or legislative enactment.[3]

7. While the *Delgamuukw* decision did not specifically address the *in rem* nature of Aboriginal title claims, the judgment clearly contemplates a real property right:

> This Court has taken pains to clarify that aboriginal title is only "personal" in this sense [i.e. in the sense of being inalienable], and does not mean that aboriginal title is a non-proprietary interest, which amounts to no more than a licence to use and occupy land and cannot compete on an equal footing with other proprietary interests; see *Canadian Pacific Ltd. v. Paul,* [1988] 2 S.C.R 654 at p. 677.[4]

8. The only definitive statement on the nature of Aboriginal title comes from the *Calder* trial decision, where Gould J. held that the Aboriginal title action brought by the Nisga'a Nation was "*in rem, qua* the state of title to the lands in question."[5] This statement was not questioned by either the Court of Appeal or Supreme Court of Canada.

9. This court has held that Aboriginal title is a *right to land* itself, protected under section 35(1) of the *Constitution Act, 1982*. A declaration of Aboriginal title provides the First Nation with a right to the e*xclusive use and occupation* of land.[6]

10. In *Tsilhqot'in* this court stated that:

> Aboriginal title confers *ownership* rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to *proactively manage* the land. [emphasis added][7]

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[3] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p. 378-379.
[4] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ["*Delgamuukw*"] at para.
[5] *Calder v. British Columbia* (1969), 8 D.L.R. (3d) 59 (B.C.S.C.) ["*Calder*"] at p. 61.
[6] *Delgamuukw* at paras. 140 & 155; *Tsilhqot'in Nation v. British Columbia,* [2014] 2 S.C.R. 257 ["*Tsilhqot'in*"] at paras. 67.
[7] *Tsilhqot'in* at para. 73.

11. These descriptions of Aboriginal title clearly indicate that it is real property right, *sui generis* in nature that goes beyond the incidents of fee simple to include governance rights as well.[8]

12. Lower courts have been grappling with the nature of Aboriginal title claims, usually in the context of applications by the Crown to provide notice to third parties who may have legal interests within areas claimed by First Nations.

13. In *Willson*, the Plaintiffs sought a declaration that the western boundary of the land encompassed by Treaty No. 8 is the Arctic-Pacific Watershed. An issue arose as to whether the judgment sought by the Plaintiffs was *in rem* or *in personam* and whether notice was required to be provided to other Treaty No. 8 beneficiaries. After reviewing the authorities, the court held that:

> I conclude that the declaration sought in this case, if granted, would result in a decision *in rem*, good against all persons, whether or not parties to the action. This makes it important, as a matter of fairness, that those signatories and adherents to Treaty 8, whose interests will be affected by the declarations sought, be given an opportunity to be heard.[9]

14. While *Willson* was decided in the Treaty context, subsequent cases that have considered the issue of notice to third parties have raised concerns regarding the potential unwieldiness of inviting private landowners, whose interests may be affected, to participate in the litigation.[10]

15. The courts are well-equipped to address situations when Aboriginal title and fee simple collide. In *William*, the court addressed how private interests ought to be dealt with:

> Any tenure holder's interest derives from the interest of British Columbia. If the plaintiff's aboriginal rights and title affect the title and interest of British Columbia, then the interests of tenure holders are also affected. If they have something less than they bargained for, their remedy does not lie in joining this action to attack the interests of the plaintiff. All parties defending specific claims

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[8] Kent McNeil, "Aboriginal Title as a Constitutionally Protected Property Right", Lippert, Owen, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: Fraser Institute, 2000), p. 55-75.
[9] *Willson v. British Columbia,* 2007 BCSC 1324 ["*Willson*"] at para. 43.
[10] *William v. Riverside Forest Products,* 2002 BCSC 1199 ["*William*"] at paras. 14-15.

> will make arguments against the interests of the plaintiff. Those arguments do not improve with repetition by others against whom no claim is advanced.[11]

16. While each case must be dealt with based on its specific facts, in *William*, the court held that the Crown was capable of defending the interests of private landowners, given their interest in avoiding liability for granting defective titles.

17. However, in recent cases, the Supreme Court of British Columbia has taken a more nuanced approach. In *Haida*, the court stated that:

> The law is unsettled as to whether a declaration of aboriginal title is equivalent to a judgment *in rem*, but the principles in these cases support the proposition that such a declaration made in this action would only be binding on non-parties with an interest in the lands affected if they had received formal notice of the claim. In the absence of such notice, third parties would be free to raise all defences should the plaintiffs later elect to make claims against them. Moreover, if a declaration of aboriginal title is equivalent to a declaration of ownership as against the named defendants only, as suggested by the plaintiffs, it would follow that its scope would be limited.[12]

18. Rather than squarely addressing the nature of an Aboriginal title declaration, the courts have been content to "kick the can down the road."[13] This approach does not further the objective of reconciliation.

19. Characterizing Aboriginal Title as *in personam* or simply *sui generis,* raises the potential for uncertainty in the law, particularly in situations where claims are brought that impact not simply on "Crown lands" but fee simple and other tenures. As the courts have noted, allowing multiple third parties to be joined as defendants may make Aboriginal title claims non-justiciable. Other the other hand, the First Nation may invest millions of dollars to prove its Aboriginal title, yet be faced with the possibility that it may have to bring further claims against third party tenure holders to vindicate their declaration of Aboriginal title.[14]

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[11] *William* at para. 16.
[12] *Council of the Haida Nation v British Columbia*, 2017 BCSC 1665 ["Haida"] at para. 29
[13] *Cowichan Tribes v. Canada (Attorney General)*, 2017 BCSC 1575 ["*Cowichan Tribes*"] at para. 24; *Haida* at para. 50.
[14] For example, *Cowichan Tribes* at para. 24; *Haida* at para. 50.

20. The co-existence of Aboriginal title and private ownership need not be a zero-sum game. As Professor Borrows suggests there are several possibilities as to how fee simple and Aboriginal title might co-exist.[15]

21. While Aboriginal title is *in rem*, it is not absolute. This court has acknowledged the Crown's role in balancing Aboriginal title interests with public interest under the *Tsilhqot'in* test for justification, if that interest is compelling and substantial.[16]

22. Aboriginal title claims constitute "real" / *in rem* claims. Not only are Aboriginal title claims "real," they are constitutional in nature by virtue of section 35(1). Characterizing such claims as *in personam* is inconsistent with the source of Aboriginal title, this court's jurisprudence, and, rather than furthering reconciliation, has the potential to create uncertainty and further litigation.

C. Aboriginal Rights Claims are *in Personam*

23. Aboriginal rights claims, short of title, are properly classified as "mixed" or *in personam* in nature.

24. This court has cautioned applying traditional common law concepts of property when defining Aboriginal rights:

> Aboriginal and treaty rights cannot be defined in a manner which would accord with common law concepts of title to land or the right to use another's land. Rather, they are the right of aboriginal people in common with other aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories.[17]

25. The *Adams* case sets out a spectrum of Aboriginal rights, short of title, that may still be connected to specific tracts of land. While this court recognized that Aboriginal rights, in particular rights to hunt and fish, can be site-specific, that does not mean that such rights are necessarily *in rem*.[18]

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[15] John Borrows, "Aboriginal Title and Private Property." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71. (2015) at p. 130.

[16] *Tsilhqot'in* at paras. 81-87.

[17] *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 35. Importantly, these comments were made in the context of Aboriginal and Treaty rights short of Title.

[18] *R. v. Adams,* [1996] 3 S.C.R. 101 ["*Adams*"] at para. 30.

26. Numerous Aboriginal cases have held that Aboriginal rights will frequently be limited to a specific geographical area.[19] Harvesting rights are often, by their nature, site-specific. In *Adams*, the site-specific Aboriginal right was a right to fish in Lake St. Francis. In *Sparrow*, the appellant was fishing in Canoe Passage on the Fraser River, "in the ancient tribal territory where his ancestors had fished from time immemorial."[20]

27. The key point is that Aboriginal and Treaty rights, while often tied to specific sites, generally do not rise to an *exclusive* property right.

28. While the First Nation may have section 35 rights to fish or hunt in a particular location, they may have to do so in common with other First Nations as well as non-Indigenous hunters and fishers. What makes Aboriginal rights different is that, *inter alia*, they are constitutionally protected and, in the event of conflict amongst users, the doctrine of priority as set out in *Sparrow* applies.[21]

29. The fact that Aboriginal and Treaty rights may be exercised in a different jurisdiction from the First Nations' domicile should not require the First Nation to bring such claims in multiple court proceedings.

30. As this court has noted, borders are the construction of "newcomers" and Aboriginal rights, which are based on aboriginal practices, customs and traditions preceded contact.[22] Similarly, many treaties preceded the establishment of provincial boundaries, for example Treaty No. 8, such that First Nations may exercise their rights across provincial and territorial boundaries.

D. **Access to Justice Considerations**

31. As the courts below noted, this appeal raises important access to justice issues. If the appeal is allowed, First Nations will be forced to bring multiple claims in multiple

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[19] *R. v. Coté*, [1996] 3 S.C.R. 771 at para. 39; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 [*"Mitchell"*] at para. 55.
[20] *Sparrow* at p. 1080.
[21] *Saanichton Marina Ltd. v. Claxton* [1989] 3 CNLR 46 (BCCA) at para. 34; *Adams* at paras. 26 & 30; *Sparrow* at p. 1116.
[22] *Mitchell* at para. 24.

jurisdictions, in circumstances where the underlying facts and issues are identical, save that the activities cross jurisdictional boundaries.[23]

32. In *Adams*, the court set out an approach to be taken when considering limitations on section 35 rights:

> As with limitations of the rights enshrined in the *Charter*, limits on the aboriginal rights protected by s. 35(1) must be informed by the same purposes which underlie the decision to entrench those rights in the Constitution to be justifiable...Those purposes are the recognition of the prior occupation of North America by aboriginal peoples, and the reconciliation of prior occupation by aboriginal peoples with the assertion of Crown sovereignty.[24]

33. While these comments were made in the context of justification for infringement of Aboriginal rights, the overarching purposes of section 35(1) - *recognition and reconciliation* - have broad application to this appeal.

34. In *Telezone*, this court cautioned that meaningful access to justice requires that:

> People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.
> ……
> Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.[25]

35. Although *Telezone* and its companion cases dealt with issues arising from the concurrent jurisdiction of the Federal Court and the provincial superior courts, their concern about access to justice applies equally when resolving issues relating to concurrent jurisdiction among the superior courts. Fundamentally, where a plaintiff's pleading in a provincial superior court alleges the elements of a private cause of action for damages, that plaintiff is normally entitled to pursue it.[26]

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[23] *Procureur général de Terre-Neuve-et-Labrador c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 1791, at paras 112-113.
[24] *Adams* at para. 57.
[25] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 ["*Telezone*"] at paras. 18-19.
[26] *Telezone* at para 76.

36. Further, in *Strickland*, this court affirmed *Telezone* and applied its principles to find that a provincial superior court could determine the validity of a federal regulation, an issue intended to be within the exclusive original jurisdiction of the Federal Court, where such determination is a necessary step in disposing of proceedings properly before it.[27] This kind of pragmatic solution can further access to justice by enabling complex multi-jurisdictional disputes to be resolved without a multiplicity of proceedings.

37. Aboriginal rights exist within the general legal system of Canada,[28] and often by their geographic nature give rise to disputes spanning multiple jurisdictions. Recognizing Aboriginal rights under section 35(1) requires that a First Nation have access to the courts when necessary, to reconcile those rights with Canadian society. Creating artificial barriers to justice does nothing to further to reconciliation process at the heart of section 35(1).

38. In this appeal, access to justice requires that a claimant with Aboriginal rights located across two jurisdictions be permitted to pursue claims for declaratory relief and damages in respect of their Aboriginal and Treaty rights directly, rather than be forced to suffer the delay, expense and uncertainty of an "awkward and duplicative two-court procedure."[29]

39. Aboriginal rights short of Aboriginal title are *sui generis* or *in personam* in nature. Subject to the particular rules of court and conflict of laws considerations, eg. *forum non conveniens*, First Nations should be able to bring an action in the superior court of the province in which they reside, even in circumstances where their claims may be based on activities that take place in another jurisdiction.

40. As the courts below held, First Nations should be able to seek remedies from third parties for private law torts, such as nuisance, trespass and negligence, without having to first seek a court declaration of their rights. Tsawout agrees that the approach taken by the Quebec Court of Appeal and the Court of Appeal for British Columbia to such claims is correct and consistent with providing access to justice.[30]

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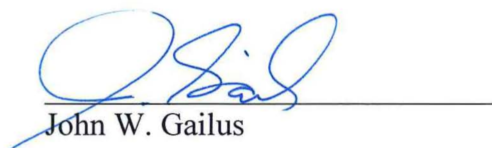
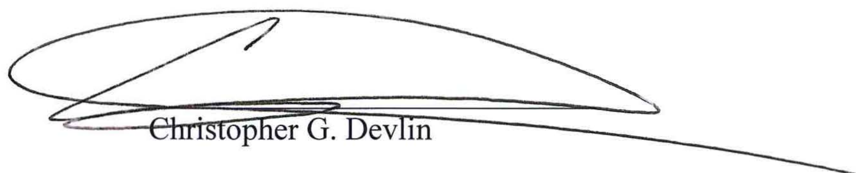
[27] *Strickland v Canada (Attorney General)*, 2015 SCC 37, at paras 15, 24.
[28] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 49.
[29] *TeleZone*, at para 23.
[30] *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.* 2015 BCCA 154;

PART IV – COSTS

41. Tsawout makes no claim to costs and asks that no order be made against Tsawout in respect of other parties' costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9 day of April, 2019.





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Compagnie miniére IOC inc. (Iron Ore Company of Canada) v. Uashaunnuat (Innus de Uashat et de Mani-Utenam), 2015 QCCA 2.

PART V – TABLE OF AUTHORITIES

Authorities	Paragraph
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PART VI – STATUTES

Constitution Act, 1982, s. 35

Recognition of existing aboriginal and treaty rights
35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of “aboriginal peoples of Canada”

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

Marginal note: Land claims agreements
(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

Marginal note: Aboriginal and treaty rights are guaranteed equally to both sexes
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. (96)

Loi constitutionelle, 1982, s. 35

Confirmation des droits existants des peuples autochtones
35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Définition de « peuples autochtones du Canada »

(2) Dans la présente loi, « peuples autochtones du Canada » s’entend notamment des Indiens, des Inuit et des Métis du Canada.

Note marginale :Accords sur des revendications territoriales
(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d’accords sur des revendications territoriales ou ceux susceptibles d’être ainsi acquis.

Note marginale :Égalité de garantie des droits pour les deux sexes
(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.