SCC Court File Nos. 41516 & 41644

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

B E T W E E N:

NISGA'A NATION, as represented by the NISGA'A LISIMS GOVERNMENT

APPELLANT

– and –

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

Tab **Page**

PARTS I & II – OVERVIEW AND POSITION ON APPEAL

1. These companion appeals call upon this Court to provide guidance on the procedural approach to be taken by lower courts when faced with competing or overlapping claims to Aboriginal title arising either from section 35 rights or Treaty rights, whether asserted, established, or modified.

2. Currently, the full legal implications of a declaration of Aboriginal title on other property rights and on competing claims to Aboriginal title and rights are not yet known.[1] Instructive Aboriginal title cases have progressed slowly through the courts, leaving parties to active claims to navigate basic substantive rules that are still in their infancy. While the scope and application of Aboriginal title claims are clearer now than they were when landmark cases such as *Delgamuukw* and *Tsilhqot'in* were first decided by this Court, much remains undetermined.[2]

3. The resulting lack of clarity has added a layer of complexity to an already expensive and time-consuming process. First Nations have suffered and continue to suffer from the practical limitations that pervade Aboriginal rights and title litigation. These appeals offer this Court an opportunity to return to and reinvigorate the doctrinal framework on Aboriginal title so that First Nations do not continue to be disadvantaged by the Crown's historic failures and the systems that have arisen therefrom.

4. Yellowknives Dene First Nation (the "Yellowknives") intervenes as a northern Nation actively asserting governance and title in a region with multiple overlapping claims, both in terms of modern treaties and unresolved claims. The Yellowknives asks the Court to endorse a proportionate approach and advance three positions:

   a. First Nations asserting their Aboriginal rights and title should not be disadvantaged or otherwise prejudiced solely due to the existence of earlier claims that overlap with their asserted territory.

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[1] *Malii v. British Columbia,* 2024 BCCA 406 ["*Malii*"] at para 68
[2] *Kwikwetlem First Nation v. British Columbia (Attorney General),* 2021 BCA 311 at para 26

b. The Crown, as the only universal party to modern treaties and land claims, is bound by the honour of the Crown to participate fully in the adjudication of Aboriginal title claims. Policy directives suggesting otherwise permit the Crown to pre-emptively minimize its liability in such disputes, prejudicing the First Nations parties.

c. Reconciliation should be at the forefront of procedural considerations respecting the adjudication of competing Aboriginal title claims.

5. The Yellowknives takes no position with respect to the facts as advanced by the parties.

PART III – STATEMENT OF ARGUMENT

A. First Nations should not be disadvantaged by the existence of antecedent title claims or modern treaties

6. The existence of overlapping and competing claims to traditional territories naturally complicates the resolution of Aboriginal title. When one Nation's claim is resolved either through litigation or the negotiation of a modern treaty prior to the assertion of a neighbouring Nation's rights, the latter Nation may find its own claims subject to significant procedural and substantive obstacles. The guidance provided by this Court must be sufficiently flexible to ensure that the existence of antecedent declarations or agreements does not operate as an absolute bar to the recognition of the true rights-holding Nation.

7. A principled and fair procedure for resolving overlapping Aboriginal title claims must also account for the fact that these disputes are rooted in colonial policies. For generations, First Nations governed their territories through their own legal orders and traditions, which provided effective means for managing shared and overlapping territories. However, the Crown's failure to engage with Indigenous legal orders, its violations of historic treaties, the imposition of reserve systems, and a modern treaty process that prioritizes early engagement without adequate consultation are but a few of the factors that contributed to the problems now faced with overlapping claims.

8. Just as the problem of overlapping claims was created by colonial policies, so too were the mechanisms through which First Nations could assert and establish their constitutionally protected

rights. Though these mechanisms, particularly Section 35 litigation, have been developed and refined over the years, they remain inaccessible or otherwise undesirable to many First Nations.

9. The assertion of Aboriginal title and rights by First Nations across Canada is characterized by a diversity of processes, timelines, and strategic considerations. First Nations may choose to either litigate or negotiate their constitutionally protected rights for myriad reasons. They may also choose neither, or not be in a position to choose. Nonetheless, each Nation must navigate a complex landscape of legal, historical, and policy factors, which inevitably results in some Nations advancing their claims more rapidly than others. This disparity is not necessarily a reflection of the relative strength or legitimacy of the claims themselves, but rather a consequence of differing priorities and available resources. The Court must remain cognizant of these realities when considering the procedural fairness owed to all First Nations stakeholders in Aboriginal rights and title litigation or negotiations.

10. The imposition of an arbitrary time constraint that disadvantages groups that are "second in line" to assert their rights through either of these options, or that are unable to choose either, not only runs afoul of the perpetual nature of reconciliation, but will have the effect of resolving some First Nations' self-governance rights and title before others not because their claims are stronger, but simply because they have advanced through the process faster.

11. The jurisprudence of this Court has repeatedly emphasized the necessity of inclusive and participatory processes in the negotiation and adjudication of Aboriginal title disputes[3]. The exclusion of stakeholders from negotiations, or the failure to consider the perspectives of neighbouring Nations in litigation, undermines the legitimacy of the resulting agreements or declarations and perpetuates divisions between First Nations communities. Conversely, an inclusive approach is responsive to the recognized uncertainty about how one title declaration impacts another. The Court is uniquely positioned to promote a broader, more holistic approach to reconciliation, one that recognizes the interconnectedness of First Nations and the shared nature of their interests.

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[3] See: *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010 ["*Delgamuukw*"] at para 185

12. In practical terms, the Court's approach to overlapping claims should facilitate the meaningful participation of all affected Nations, promote the resolution of disputes in a manner consistent with the honour of the Crown, and avoid the perpetuation of historical injustices. The procedural framework must be sufficiently robust to accommodate the complexities of multi-party claims, while remaining sensitive to the unique circumstances of each First Nation and the broader objectives of reconciliation. This said, care must be taken to ensure that First Nations that are invited to provide their perspectives in another Nation's claim are not hamstrung or otherwise prevented from settling their own claims through their own chosen methods.

13. The procedural rights of First Nations are not subordinate to the administrative convenience of the Crown or the desire for finality. While the overarching principle of finality and the credibility of the judicial system are paramount, there are exceptions. This Court has confirmed that there is residual discretion to allow a revisiting of a previously determined matter where it would otherwise be barred by rules prohibiting re-litigation in circumstances where it will achieve a necessary level of fairness.[4] In other words, while finality in litigation is important, it is not more important than justice itself.[5] Where a revisiting of issues previously decided would be inappropriate, there are sufficient common law mechanisms, such as *res judicata*, abuse of process, and collateral attack, that are invoked to safeguard against improper re-litigation of issues.

14. Ultimately, a First Nation's antecedent declaration of title cannot supersede a competing First Nation's assertion if the competing First Nation is the true rights holder of the title. Given the common law mechanisms available to permit or otherwise encourage revisiting of previously determined issues that would otherwise be barred when due process and fairness call for it, and the mechanisms available to prevent re-litigation when it would be inappropriate or unfair, concerns about different findings of fact are overemphasized. As the Ontario Superior Court addressed in *Atikameksheng,* the credibility of the judicial process can be enhanced, rather than undermined, when these mechanisms are properly invoked.[6] In these respects, the existing

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[4] *Penner v. Niagara (Regional Police Services Board),* 2013 SCC 19; *Danylyk v Ainsworth Technologies Inc.,* 2001 SCC 44 at para 63
[5] *Atikameksheng Anishnawbek v. Canada,* 2024 ONSC 4012 ["*Atikameksheng*"] at para 106
[6] *Atikameksheng* at para 93

principles of *res judicata*, collateral attack, and abuse of process by re-litigation provide full answers to the issues at bar.

15. If claims can in fact be revisited, as seen in *Atikameksheng*, then the BCCA's approach in *Malii* strikes an appropriate balance by ensuring that other groups with an interest in overlapping claims can participate to protect their interests. Multiple title claims do not need to be advanced in a single action, so long as a declaration in one action does not extinguish or prejudice a claim in overlapping areas. This can be achieved in part by tailored declarations which recognize outstanding overlapping or competing claims.

B. Crown's role in the adjudication of competing claims should not be understated, nor should it allow the Crown to pre-emptively minimize its own liability

16. The Crown occupies a crucial role in ensuring the evidentiary record in Aboriginal title and rights claims is complete. As a universal defendant in title claims and a universal party to modern treaties, the Crown is uniquely situated as record keeper of documents that are often essential for First Nations to meet the requirements for establishing Aboriginal title, and also as a party uniquely situated to assist the Court with determining the intentions of parties to treaties that may overlap with other Aboriginal title claims.

17. The Crown is not only best suited to assist the Court with the evidentiary record in Aboriginal title proceedings, but it is also duty-bound to do so.

18. The characteristics of Aboriginal title are *sui generis* due to the unique relationship between the Crown and First Nations stemming from the Crown's *de facto* assertion of sovereignty over lands that were once occupied and controlled by First Nations.[7] It is from this unilateral assertion of sovereignty that the honour of the Crown, and the duties arising therefrom, was created.[8]

19. The honour of the Crown recognizes the impact of the Crown's "superimposition of European laws and customs" on pre-existing First Nations societies, which were never conquered, and requires the Crown to deal honourably with First Nations in resolving and reconciling these

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[7] *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 at para 72; *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 ["*Haida Nation*"] at para 32

[8] *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 ["*Manitoba Metis*"] at para 66

pre-existing rights and ways of life with Crown sovereignty.[9] The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices."[10] For instance, this Court in *Haida Nation* has stated that the honour of the Crown requires that Aboriginal rights be determined, recognized, and respected, which in turn requires the Crown to participate honourably in the process of negotiation.[11] This premise was further expanded on in *Restoule*[12] and *Shot Both Sides*[13], where this Court suggested that the honour of the Crown mandates a negotiation and reconciliation phase in Aboriginal rights litigation.

20. Despite these concrete practices arising from the honour of the Crown that require honourable participation in the adjudication and negotiation of Aboriginal title and rights, the Crown Respondents in this appeal have refrained from taking a position on the meaning of the treaty at issue pursuant to litigation directives that ostensibly prevent them from doing so.[14] It is of course acknowledged that the Crown's role in Aboriginal title litigation is by necessity *sui generis*, and for these reasons the Crown may not take on a traditionally adversarial role in Aboriginal rights and title litigation.

21. However, the Crown's reluctance to participate fully in the adjudication of overlapping claims so as not to be "traditionally adversarial" is paradoxical. The Crown departs from the traditional dynamic in civil litigation and fulfils its non-adversarial role in matters concerning Aboriginal rights and title when it *assists* First Nations with furnishing the evidentiary record, not by leaving it to the First Nations to shoulder that burden. By pre-emptively discounting its own evidentiary contributions, the Crown usurps the gatekeeping function of the Court in determining the reliability and credibility of evidence. Put another way, the role of the courts in interpreting modern treaties is to "…choose from among the various possible interpretations of common

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[9] *Manitoba Metis* at para 67; *Delgamuukw* at para 186
[10] *Haida Nation* at para 16
[11] *Haida Nation* at para 25
[12] *Ontario (Attorney General) v. Restoule,* 2024 SCC 27 ["*Restoule*"]
[13] *Shot Both Sides v. Canada,* 2024 SCC 12
[14] See: British Columbia, *Directives on Civil Litigation involving Indigenous Peoples*, April 2022, online; Department of Justice Canada, *The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples*, 2018, online

intention the one which best reconciles the interests of both parties at the time the treaty was signed" [*emphasis added*].[15]

22. The result, as the Crown parties would have it, would be that in cases involving modern treaties that overlap territorially with the claims of another First Nation, the Crown would refrain from assisting with the interpretation of a treaty that they negotiated and that equally applies to them. The proper approach to modern treaty interpretation has been articulated by this Court as requiring close attention to be paid to the written text.[16] This does not mean that the interpretive exercise is confined to the four corners of the text. Rather, the provisions at issue must be interpreted in light of the treaty text as a whole and *the treaty objectives*.[17] Removing the Crown as an interpretative aid runs afoul of the modern treaty interpretation principles articulated by this Court and unduly places this burden on First Nations.

23. The Supreme Court of British Columbia in *Saik'uz* recognized the enormous task of producing a complete evidentiary record in Aboriginal title litigation, acknowledging that "[s]ome could argue that the burden of proof imposed upon First Nations title claimants, based as it is on the legitimacy and primacy of asserted colonial sovereignty, is just another insidious example of systemic discrimination."[18]

24. As such, it is incumbent upon the Crown to act in accordance with the honour of the Crown, through fair and transparent dealing, to ensure that its conduct does not perpetuate historical injustices. The Court must recognize that the Crown's participation is not merely procedural, but foundational to the integrity and legitimacy of the process by which competing claims are resolved.

25. Notwithstanding the Crown's role in assisting with treaty interpretation, the Crown's evidentiary contributions to land title litigation, in the context of overlapping claims in particular, are essential. The Crown is a vital source of historical records, correspondence, and documentation relevant to the establishment and exercise of Aboriginal title. Excluding or minimizing the

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[15] *Restoule* at para 79, citing *R. v. Marshall,* 1999 CanLII 665 (SCC) at para 3
[16] *First Nation of Nacho Nyak Dun v. Yukon,* 2017 SCC 58 ["*Nacho Nyak Dun*"] at paras 36-37
[17] *Nacho Nyak Dun* at para 37
[18] *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.* 2022 BCSC 15 ["*Saik'uz*"] at para 287

Crown's role in presenting such evidence would deprive the Court of a comprehensive understanding of the factual matrix underpinning the claim.

26. While the Crown's status as a litigant in Aboriginal title claims certainly calls for a departure from the traditional adversarial nature of litigation, its role should not be derogated by its fiduciary obligations to First Nations. Rather, the Crown's so-called departure from its traditional adversarial role in litigation is achieved by its full, uninhibited participation in claims concerning overlapping Aboriginal title because it assists the courts with determining the true rights-holder.

27. In the present case, the Province submitted that there should be no presumption that it will call evidence from the Tsetsaut/Skii km Lax Ha Nation if the decision to add Chief Simpson as a party is overturned on appeal.[19] The Court should be wary of procedural approaches that allow the Crown to evade responsibility or to remain passive while First Nations are left to resolve complex disputes in an evidentiary vacuum. Such approaches risk undermining the constitutional imperative of reconciliation and shifting the burden of historical redress onto First Nations themselves.

28. The principles of reconciliation must remain at the forefront of the Court's consideration in cases involving overlapping Aboriginal title claims. Reconciliation is not a static or episodic goal, but an ongoing process that requires the active engagement of all parties, including the Crown.

29. Balance between the Crown's primary fiduciary obligations to First Nations and its status as a litigant or party must be found, as is a balance between the Crown's requirement to engage honourably with First Nations in furtherance of reconciliatory objectives and its duty to assist the court.

30. The Crown's mismanagement of competing claims cannot provide a basis for the Courts to permit the limitation of the Crown's participatory duties as litigants in title claims. The Crown must bear its proportionate share of responsibility in resolving these claims.

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[19] *Malii* at para 34

C. Reconciliation should be at the forefront of procedural considerations respecting the adjudication of competing Aboriginal title claims

31. Reconciliation is not a finite objective but a continuous constitutional imperative that must inform all aspects of the adjudication of Aboriginal title and rights. It is an "…ongoing project that seeks the 'reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship'".[20] In the context of overlapping claims, reconciliation must be understood as a collective endeavour that transcends bilateral negotiations and embraces the broader network of First Nations with interests that are engaged by overlapping claims. The Court's procedural framework must reflect this reality by facilitating inclusive participation and ensuring that First Nations are not excluded from processes that bear directly on their constitutionally protected rights if, for reasons canvassed above, they were not first to make their claim known.

32. The exclusion of neighbouring Nations from negotiations or adjudications concerning shared territories is inconsistent with the guidance provided by this Court in *Delgamuukw*, which emphasized the necessity of including all stakeholders in discussions concerning Aboriginal title. The failure to do so not only compromises the legitimacy of the resulting agreements or declarations but also perpetuates historical patterns of marginalization and dispossession. The Court must reaffirm that reconciliation requires the active and informed participation of all Nations with an interest in the territory at issue.

33. These appeals present an opportunity for the Court to recalibrate its framework for resolving overlapping Aboriginal title claims. Rather than treating reconciliation as a series of discrete engagements, this Court should promote a holistic approach that encourages wider participation in the resolution of Aboriginal title claims. Such a model would better reflect the realities of Indigenous governance and land stewardship, particularly in regions like the Northwest Territories, where Nations are in different stages of self-determination and traditional territories are vast and often intersect.

34. Practically, procedure guided by reconciliation may require, in overlapping claim situations, that:

a. affected Nations can participate with respect to specific issues;

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[20] *Southwind v. Canada,* 2021 SCC 28 at para 55

b. joinder be permitted in a calibrated manner in order to defend interests, while not necessarily allowing third-party claims to be added to the action; and
c. the record is sufficient to ensure that remedies such as declarations expressly preserve neighbouring Nations' claims.

35. What would naturally follow from a broader conception of reconciliation that anticipates and accommodates overlapping claims is a decrease in the proliferation of post-settlement and post-litigation disputes arising from the exclusion of neighbouring Nations.

36. The Crown, as the central actor in treaty negotiations and the universal defendant in title claims, bears a heightened responsibility to ensure that its conduct promotes reconciliation in both substance and process. This includes a duty to engage with all affected Nations, to contribute substantively to the evidentiary record, and to avoid entering into agreements that prejudice the rights of neighbouring communities. The honour of the Crown demands nothing less than a proactive and inclusive approach to the resolution of overlapping claims.

37. The procedural framework adopted by the Court should facilitate the meaningful participation of all affected Nations, promote transparency and accountability on the part of the Crown, and ensure that the resolution of overlapping claims is guided by principles of reconciliation. The Court must be vigilant to avoid procedural shortcuts or expedients that compromise the substantive rights of First Nations or dilute the honour of the Crown.

PARTS IV & V – COSTS & ORDER

38. The Yellowknives seeks no costs and asks that no costs be awarded against it. The Yellowknives takes no position on the proper disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of November, 2025.

Simon Sigler
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Yellowknives Dene First Nation

PART VI – TABLE OF AUTHORITIES

Cases **Para(s)**

Secondary Sources