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Sophie Thériault
Faculty of Law, University of Ottawa

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Indigenous Peoples' Transboundary Claims, Access to Justice, and the Canadian Constitutional Structure: The *Uashaunnuat* Case

Sophie Thériault*

I. Introduction

One of the most tangible expressions of state sovereignty is the territorialization of jurisdiction through the establishment of national and — notably within federal states — of intra-national borders.[1] In settler colonial states such as Canada, these borders have been unilaterally imposed on Indigenous peoples without any regard for their historical land uses, social organizations and legal orders. As illustrated by the recent Supreme Court of Canada decision in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*[2], among the contemporary consequences of state-imposed jurisdictional borders on Indigenous peoples are barriers to access to justice in the context of transboundary land claims.[3]

For thousands of years, the Innu of Uashat Mak Mani-Utenam and of Matimekush-Lac John have occupied, used, and exercised their responsibilities on a vast territory extending across the Quebec-Labrador Peninsula — known in *Innu aimun* as "*Nitassinan*" — ignoring the provincial border eventually drawn by colonial powers across their ancestral lands without their prior consent.[4] It was also without their

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* Full Professor, Faculty of Law, Civil Law Section, University of Ottawa. I am grateful to Erin Dobbelsteyn and Laurie-Anne Mercier for their research assistance. Any remaining mistake is my own.

1 Richard T. Ford, "Law's Territory (A History of Jurisdiction)" (1999) 97:4 Mich. L. Rev. 843.

2 *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020] S.C.J. No. 4, 2020 SCC 4 (S.C.C.) [hereinafter "*Uashaunnuat*"].

3 In this article, the term "transboundary" is used to designate Indigenous land claims straddling provincial borders, rather than Indigenous land claims overlapping an international border. For a recent case involving an Aboriginal right claim across the Canada-United States border, see *R. v. Desautel*, [2021] S.C.J. No. 17, 2021 SCC 17 (S.C.C.). See also *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, [2001] S.C.J. No. 33, [2001] 1 S.C.R. 911 (S.C.C.).

4 John A. Klain & Mario Levesque, "Revisiting the Labrador Boundary Decision to Include Indigenous Interpretations of the Regions" (2019) 53:1 Journal of Canadian Studies 123.

consent that in the early 1950s, the Iron Ore Company ("IOC"), with its partner the Quebec North Shore and Labrador Railway Company Inc. ("QNS&L"), launched its "megaproject" to exploit what the governments considered to be the "subarctic hinterland's dormant mineral assets".[5] The project involved the development and operation of several open-pit mines in the vicinity of the towns of Schefferville in Quebec and of Labrador City in Newfoundland and Labrador, which were linked to a port and to other industrial facilities located in Sept-Iles by "more than 600 km of railway winding through both provinces".[6] In 1982, IOC ceased its activities in the region of Schefferville, leaving behind multiple abandoned mining pits and associated infrastructure in the Innu's traditional territory. Mining operations in the region, including by the IOC (now operating as IOC-Rio Tinto), have since resumed and considerably intensified following an increase in the value of iron ore in global markets during the past decade.

In 2013, after having failed to negotiate an agreement with Rio Tinto (IOC), the Innu communities of Uashat Mak Mani-Utenam and of Matimekush-Lac John filed an action against IOC and QNS&L, alleging that the megaproject had caused severe environmental harms in *Nitassinan*, impeded the exercise of their traditional land-based practices, and deprived them of the enjoyment of their traditional territory. As remedies, the Innu sought a permanent injunction ordering the mining companies to cease all work related to the megaproject, $900 million in damages, and a declaration that the megaproject violated their Aboriginal title and rights.[7] The companies, followed by the Attorney General of Newfoundland and Labrador who intervened in the action, filed a motion to strike allegations from the Innu's pleading, arguing that parts of the claim pertain to real rights over property situated in Newfoundland and Labrador and, therefore, fall under the jurisdiction of that province's courts. The Superior Court of Quebec dismissed the motion to strike,[8] and the Quebec Court of Appeal upheld the lower court's decision.[9]

In a tightly split decision, the majority of the Supreme Court[10] dismissed the appeal and ruled that the Superior Court of Quebec has jurisdiction over the entire

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[5] Sébastien Boutet, "The Revival of Québec's Iron Ore Industry: Perspectives on Mining, Development, and History" in Arn Keeling & John Sandlos, ed., *Mining and Communities in Northern Canada. History, Politics and Memory* (Calgary: University of Calgary Press, 2015) 169, at 173.

[6] *Uashaunnuat*, at para. 4.

[7] As specified by the Innu in their original pleadings, only the portions of *Nitassinan* affected by the IOC's megaproject are subject to this legal action: *Uashaunnuat*, at para. 8.

[8] *Uashaunnuat (Innus de Uashat et de Mani-Utenam) v. Companie minière IOC inc. (Iron Ore Company of Canada)*, [2016] J.Q. No. 14492, 2016 QCCS 5133 (Que. S.C.).

[9] *Procureur général de Terre-Neuve-et-Labrador v. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, [2017] J.Q. No. 15881, 2017 QCCA 1791 (Que. C.A.).

[10] The majority opinion was signed by Wagner C.J.C. and Abella, Karakatsanis, Gascon and Martin JJ.

claim, including jurisdiction to issue a declaration recognizing Aboriginal title and other Aboriginal or treaty rights in lands overlapping the provinces of Quebec and of Newfoundland and Labrador. The majority, applying the rules governing private international law provided for in Book Ten of the *Civil Code of Quebec*,[11] characterized the Innu's action as a "non-classical mixed action" involving the recognition of *sui generis* rights (the Aboriginal and treaty rights protected under section 35 of the *Constitution Act, 1982*[12]), and the "performance of various [personal] obligations related to failures to respect that right" (damages in delict and neighbourhood disturbances).[13] In the absence of a specific rule regarding jurisdiction over a "non-classical mixed action", the majority held that Quebec courts have jurisdiction over both the *sui generis* and the personal aspects of the claim pursuant to articles 3134 and 3148 (1) CCQ, since the defendant mining companies are headquartered in that province.[14]

The minority,[15] for its part, held that Aboriginal title and other Aboriginal and treaty rights "must clearly be considered [...] real right[s] for the purposes of private international law".[16] Therefore, pursuant to article 3152 CCQ and in light of the principles of comity, order and fairness, Quebec authorities lack jurisdiction over the portions of the Innu's claim pertaining to Aboriginal title and other Aboriginal and treaty rights respecting land situated in Newfoundland and Labrador.[17]

This article argues, drawing in part on Joshua Nichols and Robert Hamilton's analysis of the Supreme Court decision in *Mikisew Cree Nation*,[18] that underlying

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[11] *Civil Code of Quebec*, CCQ-1991 [hereinafter "CCQ"].

[12] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[13] Based on art. 1457 and on art. 976 CCQ.

[14] Art. 3134 CCQ provides a residual rule for actions that cannot be classified as "real", "personal" or "mixed" (real and personal). The article reads as follow: "In the absence of any special provision, Québec authorities have jurisdiction when the defendant is domiciled in Québec." Art. 3148(1) CCQ provides that Quebec authorities have jurisdiction over "personal actions of a patrimonial nature" where "[t]he defendant has his domicile or his residence in Quebec."

[15] The dissent was signed by Moldaver, Côté, Brown and Rowe JJ.

[16] *Uashaunnuat*, at para. 153.

[17] Art. 3152 CCQ reads as follow: "Quebec authorities have jurisdiction to hear a real action if the property in dispute is situated in Quebec." *A contrario*, and in light of the legislative history of this provision, Quebec authorities do not have jurisdiction to hear a real action if the property in dispute is situated in another province.

[18] Joshua Nichols & Robert Hamilton, "In Search of Honourable Crowns and Legitimate Constitutions: Mikisew Cree First Nation v Canada" (2020) 70 U.T.L.J. 341; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, [2018] 2 S.C.R. 765 (S.C.C.) [hereinafter "*Mikisew Cree First Nation*"]. See also Ainslie Pierrynowski, "When Aboriginal Rights Cross Provincial Borders: Examining Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)", Blogpost, U.T.

the Supreme Court's divergences regarding the interpretation and application of the CCQ's rules pertaining to the jurisdiction of Quebec authorities, reside competing conceptions of the place of Indigenous peoples' rights in relation to the Canadian constitutional order, in particular its federal structure. Part 2 maps out the different sets of constitutional principles that guided the majority and dissenting judges in the adjudication of the jurisdictional issues at stake. Part 3 then shows how the majority and minority judges' constitutional lens infused their respective approaches to the characterization of Aboriginal title and rights under the civil law categories of rights and legal actions. Part 4 argues that the *Uashaunnuat* decision does not offer a comprehensive, predictable and constitutionally sound solution for the adjudication of transboundary Indigenous peoples' land claims. Looking forward, we build on potential solutions advanced by the dissenting judges and Indigenous interveners[19] to propose that there is room in the Canadian constitutional framework to provide for accessible and efficient remedies for the adjudication of Indigenous transboundary claims that would be respectful of Indigenous territorialities "without losing our grasp of basic structural principles of the constitutional order".[20]

II. A MATTER OF PRINCIPLES: HONOUR OF THE CROWN, FEDERALISM, AND THE ADJUDICATION OF INDIGENOUS PEOPLES' TRANSBOUNDARY RIGHTS CLAIMS

At first glance, the *Uashaunnuat* case may appear to focus on narrow legal technicalities pertaining to the interpretation and application of the CCQ's private international law provisions in the context of interprovincial civil proceedings. However, a closer reading of the decision gives rise to fundamental questions regarding the constitutional principles that should underlie the adjudication of jurisdictional disputes pertaining to Indigenous peoples' transboundary claims. Underpinning the Court's sharp division regarding the constitutional principles applicable to the adjudication of the dispute at stake are fundamentally different conceptions of the relationship between section 35 rights and the other components of the Canadian constitutional architecture.[21]

Fac. L. Rev., online: https://www.utflr.ca/forum/uashaunnuat.

[19] In particular the factum filed by the Kitigan Zibi Anishinabeg and the Algonquin Anishinabeg Nation Tribal Council: *Factum of the interveners, Kitigan Zibi Anishinabeg and Algonquin Anishinabeg Nation Tribal Council*, SCC Court File No. 37912, at para. 19 [hereinafter "*Factum Anishinabeg*"].

[20] Joshua Nichols & Robert Hamilton, "In Search of Honourable Crowns and Legitimate Constitutions: Mikisew Cree First Nation v Canada" (2020) 70 U.T.L.J. 341, at 343.

[21] The deep division within the Supreme Court regarding the different aspects of this case led the majority to make the following statement at the outset of its reasons: "There are several aspects of the content of the dissent with which we disagree, but it is not the general practice in this Court for the majority to engage in a point by point refutation of dissenting reasons. Consequently, the fact that we do not mention any particular point raised in the dissent should not be taken as our agreeing with it." (*Uashaunnuat*, at para. 15).

From the outset, the majority emphasized the fundamental importance of the appeal "for access to justice and the ability of Indigenous peoples to meaningfully assert their constitutional rights in the justice system".[22] According to the majority, where section 35 rights are at stake, "the imperatives of our constitutional order"[23] that should govern the interpretation of the CCQ are respect for constitutionally protected Aboriginal and treaty rights[24] and access to justice considerations protected under section 96 of the *Constitution Act, 1867*.[25] From this standpoint, the majority held that access to justice and proportionality concerns in the context of disputes involving Aboriginal title and rights are closely tied to section 35's objective of reconciliation and to the honour of the Crown principle[26], which arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people".[27] From the honour of the Crown principle flows duties that vary according to circumstances.[28] In the specific context of a transboundary section 35 claim, while access to justice requires that "jurisdictional rules [must] be interpreted flexibly so as not to prevent Aboriginal peoples from asserting their constitutional rights, including their traditional rights to land"[29], the honour of the Crown principle entails "increased attention to minimizing costs and complexity when litigating s. 35 matters", and requires courts to "approach proceedings involving the Crown practically and pragmatically in order to effectively resolve these disputes."[30]

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[22] *Uashaunnuat*, at para. 1.

[23] *Uashaunnuat*, at para. 17.

[24] The majority described these rights as "a central part of the Canadian constitutional order": *Uashaunnuat*, at para. 21.

[25] *Constitution Act, 1867*, (U.K), 30 & 31 Vict., c. 3 [reprinted in R.C.S. 1985, App. II, No. 5] [hereinafter "*Constitution Act, 1867*"]; *Uashaunnuat*, at para. 17.

[26] *Uashaunnuat*, at paras. 22-23.

[27] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, at para. 32, [2004] 3 S.C.R. 511 (S.C.C.) [hereinafter "*Haida Nation*"]. See also *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, at para. 66, [2013] 1 S.C.R. 623 (S.C.C.) [hereinafter "*Manitoba Metis Federation*"].

[28] *Manitoba Metis Federation*, at paras. 74-76; *Haida Nation*, at para. 39. In *Manitoba Metis Federation*, McLachlin C.J.C. and Karakatsanis J., for the majority, affirmed that "[i]n the constitutional context, this Court has recognized that the honour of the Crown demands that s. 35(1) be interpreted in a generous manner, consistent with its intended purpose." (at para. 76).

[29] *Uashaunnuat*, at para. 50.

[30] *Uashaunnuat*, at para. 51. The Supreme Court has insisted several times on the imperative for the courts and litigants to approach proceedings concerning Indigenous peoples' rights pragmatically, and with flexibility: see *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, at paras. 19-23, [2014] 2 S.C.R. 257 (S.C.C.) [hereinafter "*Tsilhqot'in*"]; *Haida Nation*, at paras. 12-15.

In the majority's opinion, according to the principle of comity,[31] private international law rules must be interpreted to "limit the jurisdiction of Quebec authorities to matters closely linked to the province."[32] Nevertheless, when considering the connection between the matter of the dispute and the province, "it is important not to conflate the adjudicative competence of provincial superior courts with the legislative competence of the province."[33] Citing *R. v. Côté*,[34] the majority insisted that section 35 "operates uniformly across Canada" and that "[t]he determination of whether a claimed Aboriginal or treaty right enjoys constitutional protection under s. 35 is a matter of constitutional law, not of federal law or provincial law."[35] According to the majority, recognizing the "constitutional dimensions"[36] of Aboriginal rights and title:

> [. . .] is particularly significant when paired with the fact that the Innu claim predates the imposition of provincial boundaries, the corresponding provincial legislative competence over property and civil rights, and the systems of property law that flow therefrom. Though the provinces have no *legislative* jurisdiction over s. 35 rights, their courts certainly adjudicate them.[37]

The pre-existence of Aboriginal title and rights to the Canadian federal order and the unilateral imposition of the provincial borders on the Innu played a pivotal role in the majority's adjudication of the dispute. From the majority's perspective, since Aboriginal rights and title do not find their source in state recognition, but in "the realities of prior occupation, sovereignty and control",[38] these rights exist and impose some limits on the exercise of state sovereignty independent of their formal recognition under the state legal system.[39] Hence, as a matter of fairness, "the later

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[31] Regarding this principle in the context of the interpretation of the private international law rules set out in Book Ten of the CCQ, see *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] S.C.J. No. 51, at para. 23, [2002] 4 S.C.R. 205 (S.C.C.) [hereinafter "*Spar Aerospace*"].

[32] *Uashaunnuat*, at para. 16.

[33] *Uashaunnuat*, at para. 16.

[34] *R. v. Côté*, [1996] S.C.J. No. 93, [1996] 3 S.C.R. 139 (S.C.C.).

[35] *Uashaunnuat*, at para. 64.

[36] Brian Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015) 71 Sup. Ct. L. Rev. (2d) 45.

[37] *Uashaunnuat*, at para. 65.

[38] *Uashaunnuat*, at para. 49; *Tsilhqot'in*, at para. 69; *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, at para. 114, [1997] 3 S.C.R. 1010 (S.C.C.) [hereinafter "*Delgamuukw*"].

[39] *Tsilhqot'in*, at para. 89; *Haida Nation*, at para. 25. This position is consistent with the reasoning from recent lower courts decisions according to which Indigenous peoples are not required to obtain a formal recognition of their pre-existing Aboriginal title and rights prior to making a claim against third parties whose activities are infringing upon these rights. In the *Uashaunnuat* case, for instance, the IOC and QNS&L filed a previous motion to strike

establishment of provincial boundaries should [not] be permitted to deprive or impede the right of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights."[40] In the specific context of transboundary land claims, forcing Indigenous claimants to litigate "the *same issues* in separate courts multiple times erects gratuitous barriers to potentially valid claims",[41] especially considering the lengthiness and prohibitive costs of such proceedings.

The dissenting judges, while recognizing the importance of other constitutional principles, notably access to justice,[42] stressed primarily that "Aboriginal rights exist within the limits of Canada's legal system, which means that Aboriginal rights claims before the courts must not go beyond what is permitted by Canada's legal and constitutional structure",[43] in particular its federal organization.[44] In their opinion, federalism and provincial sovereignty, rather than the honour of the Crown principle, form the overarching framework within which Indigenous transboundary claims ought to be adjudicated. The dissenting judges' vision is clearly articulated within the section of their opinion entitled "The Reasons for Our Constitutional Structure", in a passage that is worth citing in full:

> Canada's federal structure was designed to address the political and social realities of the confederated colonies rather than of Indigenous peoples. Provincial boundaries were imposed on Indigenous peoples without regard for their pre-existing social organization. Land that, from an Indigenous perspective, represents a single unified territory is divided, from the non-Indigenous perspective, between two separate sovereign legislatures with separate laws and institutions. The courts can respond to this historical reality only within the constitutional framework from which they derive their authority. Near the heart of that constitutional framework are the provincial boundaries that demarcate the jurisdiction of the separate provincial superior courts and which reflect the constitutional principle of federal-

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arguing that the Innu's action should be rejected since their Aboriginal title and rights have yet to be formally recognized by state law. The motion was dismissed: *Uashaunnuat (Innus de Uashat et de Mani-Utenam) v. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, [2014] J.Q. no 10221, 2014 QCCS 4403 (Que. S.C.), leave to appeal refused [2015] J.Q. no 5, 2015 QCCA 2 (Que. C.A.), leave to appeal refused [2015] S.C.C.A. No. 80 (S.C.C.). See also *Saik'uz First Nation v. Rio Tinto Alcan Inc.*, [2015] B.C.J. No. 694, 2015 BCCA 154 (B.C.C.A.), leave to appeal refused [2015] S.C.C.A. No. 235 (S.C.C.).

[40] *Uashaunnuat*, at para. 49.

[41] *Uashaunnuat*, at para. 49.

[42] *Uashaunnuat*, at para. 214.

[43] *Uashaunnuat*, at paras. 77, 213.

[44] *Uashaunnuat*, at paras. 115, 210. See *Club Resorts Ltd. v. Van Breda*, [2012] S.C.J. No. 17, at para. 21, [2012] 1 S.C.R. 572 (S.C.C.) [hereinafter "*Van Breda*"]. On the principle of federalism as "a fundamental and organizing principle of the Constitution", see *R. v. Comeau*, [2018] S.C.J. No. 15, at para. 78, [2018] 1 S.C.R. 342 (S.C.C.); *Caron v. Alberta*, [2015] S.C.J. No. 56, at para. 5, [2015] 3 S.C.R. 511 (S.C.C.); *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, at para. 32, [1998] 2 S.C.R. 217 (S.C.C.).

> ism. Section 35 calls on courts to do justice to Aboriginal rights claims that cut across provincial boundaries, but it does not provide a warrant to disregard the provincial boundaries themselves. Neither of these considerations can be subordinated to the other; rather, they must be reconciled.[45]

Hence, for the dissenting judges, the territorial organization of provincial jurisdiction within the Canadian federal system supersedes Indigenous territorialities in the context of adjudicating Aboriginal title and rights claims that straddle state-imposed provincial borders. From this perspective, rather than contributing to reshaping the contours of the Canadian constitutional framework, Indigenous peoples' rights are confined within, and must be tailored to, its boundaries. In other words, Indigenous peoples' rights and territorialities can only be recognized by settler law in a form and through processes that allow the fundamental structures of the Canadian constitutional order to stay intact and self-reproduce.[46]

In contrast, although unambiguously reaffirming the Crown's asserted sovereignty and *de facto* control over land and resources, the majority's primary focus on access to justice considerations and the honour of the Crown principle led to a more porous conception of Canada's constitutional structure, receptive to the Innu's perspective on the most appropriate strategy for litigating their transboundary land rights claims within the settler legal system.[47] The principle of federalism, at the core of the dissenting opinion, is in fact absent from the majority judges' analysis, which highlights the majority's emphasis on the imperative of approaching the Canadian federal architecture with flexibility in order to account for "the unique constitutional context of [Indigenous] claims".[48] This reasoning is reminiscent of Abella and Martin JJ.'s concurring opinion in *Mikisew Cree First Nation*, which conceived the honour of the Crown as "a limit of Crown sovereignty in relation to Indigenous peoples".[49] As remarked by Nichols and Hamilton:

> [t]his reading of the honour of the Crown allows for the articulation of a conception of Crown sovereignty that limits the attributes or characteristics of that sovereignty. It moves away from a conception of absolute Crown sovereignty over Indigenous peoples, under which the Crown may owe certain legally enforceable obligations but has otherwise unfettered authority, to a more minimal conception of sovereignty

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[45] *Uashaunnuat*, at para. 246.

[46] This idea is loosely inspired by Margarida Garcia, "Le concept de 'droit de la personne' et son observation théorique et empirique" (2015) 89:1 Dr. et Soc. 171.

[47] *Uashaunnuat*, at para. 45.

[48] *Uashaunnuat*, at para. 62. To the argument that the adjudicative jurisdiction of the provincial courts over property cannot exceed Quebec's legislative jurisdiction on property *within* the province, as provided by s. 92(13) of the *Constitution Act 1867*, the majority responds that "[t]his argument cannot prevail in the s. 35 context because the latter concerns *sui generis* rights, not real rights as conceived in the civilian imagination." (at para. 63).

[49] *Mikisew Cree First Nation*, at paras. 70, 88 (Wagner C.J.C. and Abella and Martin JJ.). See also *Tsilhqot'in*, at para. 141.

(what we have elsewhere referred to as a *thin* version of Crown sovereignty.)[50]

Below, it will be argued that these competing constitutional visions largely shaped the exercise of characterizing the nature of section 35 rights for the purpose of applying Book Ten of the CCQ, and therefore the outcome of the dispute.

III. INSIDE OR OUTSIDE THE BOX: *SUI GENERIS* RIGHTS AND THE DETERMINATION OF ADJUDICATIVE JURISDICTION IN THE CONTEXT OF INDIGENOUS TRANSBOUNDARY CLAIMS

While deeply divided over the constitutional principles and approach applicable to the dispute at stake, the majority and minority judges unanimously agreed that the rules of private international law, rather than those regarding the inherent jurisdiction of provincial superior courts, should govern the determination of the Quebec Superior Court's jurisdiction in this case, for which more than one provincial court might claim jurisdiction.[51] In Quebec, these rules are set out in Title Three of Book Ten of the CCQ.[52] According to these rules, where the matter of a dispute is not explicitly covered by an existing rule in the CCQ, the first step for determining whether Quebec's authorities have jurisdiction to adjudicate a specific dispute is to characterize the action as either "personal", "real" or "mixed", as these notions are understood within domestic civil law.[53] Actions that do not fall into one of these

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[50] Joshua Nichols & Robert Hamilton, "In Search of Honourable Crowns and Legitimate Constitutions: Mikisew Cree First Nation v Canada" (2020) 70 U.T.L.J. 341, at 347-348, referring to Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta. L. Rev. 729.

[51] *Uashaunnuat*, at para. 16 (Wagner C.J.C. and Abella and Martin JJ.) and para. 75 (Brown and Rowe JJ.). See also *Van Breda*, at para. 15. While the majority does not specifically justify the application of these rules, which were applied in the lower courts' judgments, and recognized as the rules applicable to the dispute by the Innu, the dissenting judges, in reaction to the Attorney General of Canada's argument that the appeal should be decided on the basis of superior courts' inherent jurisdiction over actions for the recognition and protection of constitutional rights, justified at length the applicability of private international law rules by emphasizing the distinction between the inherent subject-matter jurisdiction of superior courts (jurisdiction *rationae materiae*) from their territorial jurisdiction (jurisdiction *rationae personae vel loci*), the latter being necessarily limited to a province's territory (see *Uashaunnuat*, at paras. 98-113). An analysis of the respective value of the inherent jurisdiction approach proposed by the Attorney General of Canada and the private international law approach applied by the Supreme Court in *Uashaunnuat* is beyond the scope of this short article.

[52] Art. 3134-3154 CCQ.

[53] Art. 3141-3151 CCQ set out specific rules pertaining to the jurisdiction of Quebec authorities in relation to "Personal actions of an extrapatrimonial and family nature" and "Personal actions of a patrimonial nature", whereas art. 3152-3154 CCQ apply to "Real and mixed actions". In civil law, a "personal action" is an "[a]ction for the purpose of acknowledging the existence or the protection of a personal right (a claim), whatever its source or origin (a contract, a quasi-contract, a delict, a quasi-delict) [. . .]", while a "real

categories are governed by a residual jurisdictional rule providing that "Québec authorities have jurisdiction when the defendant is domiciled in Québec."[54] Since the Aboriginal rights claimed in the *Uashaunnuat* case are "neither defined in nor directly governed by the *C.C.Q.*"[55] , the Supreme Court had to characterize these rights in relation to the existing civil law categories in order to apply the CCQ's jurisdictional rules.[56] The majority and minority's diverging visions regarding the relationship between section 35 rights and the other components of the Canadian legal order infused their respective approaches to the characterization of Aboriginal title and rights for the purpose of applying the CCQ's jurisdictional rules.

As they undertook to characterize section 35 rights under the CCQ, the majority judges stressed the *sui generis* character of Aboriginal title and rights, rather than the similarities between these rights and civil law property concepts.[57] Analyzing the case from the lens of the honour of the Crown principle, the majority insisted on the importance of taking into account Indigenous perspectives regarding "the very concept of Aboriginal title" and the resolution of disputes involving such title.[58] Hence, instead of reasoning by analogy in order to draw-out the resemblance of Aboriginal title and rights to civil law's concept of property, the judges highlighted the unique characteristics of Aboriginal rights, such as the inherent collective nature of Aboriginal title as well as its intergenerational dimension — the fact that it "exists not only for the benefit of the present generation, but also for that of all future generations",[59] implying restrictions on "both the alienability of land and the uses to which land can be put".[60] The majority also emphasized the distinctive origins of Aboriginal title which, being "firmly grounded in the relationships formed by the confluence of prior occupation and the assertion of sovereignty by the Crown",[61]

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action" is an "[a]ction, remedy, to have a real right, in rem, acknowledged or protected (right of ownership, servitude, usufruct, mortgage). [. . .]". A "mixed action" is an "[a]ction both to have a real right acknowledged and to have an obligation performed. [. . .]". See *Uashaunnuat*, at para. 58 (Abella and Karakatsanis JJ.), citing Gérard Cornu, ed., *Vocabulaire juridique*, 12th ed. (Paris: PUF, 2018), at 26-28.

[54] Art. 3134 CCQ.

[55] *Uashaunnuat*, at para. 19. See also Kirsten Anker, "Translating *Sui Generis* Aboriginal Rights in the Civilian Imagination" in Alexandra Popovici, Lionel Smith & Régine Tremblay, eds., *Les intraduisibles en droit civil* (Montreal: Thémis, 2014), at 4.

[56] *Uashaunnuat*, at para. 20 (Wagner C.J.C. and Abella and Martin JJ.) and at para. 126 (Brown and Rowe JJ.).

[57] *Uashaunnuat*, at para. 29.

[58] *Uashaunnuat*, at paras. 29-31.

[59] *Uashaunnuat*, at para. 30.

[60] *Uashaunnuat*, at para. 30. See also *Tsilhqot'in*, at para. 72; *Delgamuukw*, at paras. 112-115.

[61] *Uashaunnuat*, at para. 35. See also *Tsilhqot'in*, at para. 72: "It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is – the unique product

give rise to obligations that in their view "are clearly more akin to personal rights".[62] According to this analysis, since *sui generis* section 35 rights cannot be "pigeon-holed into a category of civil law rights"[63] — and considering the personal nature of the remedies sought by the Innu against the mining companies — the majority created a new category of legal action termed "non-classical mixed action", to which the residual jurisdictional rule provided by article 3134 CCQ applied.[64]

In contrast, while noting that the Supreme Court has "recognized the *sui generis* nature of Aboriginal rights",[65] the dissenting judges, remarking that "classification problems such as this are common in private international law",[66] located the methods applicable for resolving the characterization challenge at stake within this field of law. In their view, where a "foreign law institution" is substantially different from domestic legal concepts and categories, "it is sufficient if the *foreign* institution is *analogous* to or *resembles* a domestic one".[67] From this perspective, classification problems in private international law should be resolved by considering "our rules to be the species of a genus that can include other species".[68] In other words, domestic legal categories and concepts are able to absorb "foreign institutions" by focusing on their common features, rather than on their unique characteristics. Hence, instead of emphasizing the *sui generis* nature and the unique characteristics of Aboriginal title and rights, the minority stressed the proprietary characteristics of

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of the historic relationship between the Crown and the Aboriginal group in question."

[62] *Uashaunnuat*, at para. 35.

[63] See *Uashaunnuat*, at para. 36. The majority analysis regarding the *sui generis* nature of Aboriginal rights and title relies significantly on Kirsten Anker, "Translating *Sui Generis* Aboriginal Rights in the Civilian Imagination" in Alexandra Popovici, Lionel Smith & Régine Tremblay, eds., *Les intraduisibles en droit civil* (Montreal: Thémis, 2014). For another perspective, see Sylvio Normand, "La qualification du titre ancestral des peuples autochtones au regard du droit civil" (2019) 53:2 R.J.T.U.M. 221, which analogizes Aboriginal title to the institution of "innomate property rights" in civil law.

[64] *Uashaunnuat*, at paras. 59-61. It is worth noting that while favourable to the Innu in this case, the majority's refusal to characterize Aboriginal title and rights as "real rights" under the CCQ could have significant implications for Indigenous peoples in future litigation, by depriving them of potential private law remedies for the violation of their land rights by private parties: See Ghislain Otis, "La revendication d'un titre ancestral sur le domaine privé au Québec" (2021) 62:1 Les Cahiers de Droit 277, at 300. The author argues, however, that art. 6 of the Quebec *Charter of Human Rights and Freedoms*, CQLR, c. C-12, which provides that "Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law", in conjunction with art. 49(1) remedies, could offer a protection to Indigenous peoples' land rights.

[65] *Uashaunnuat*, at para. 133.

[66] *Uashaunnuat*, at para. 134.

[67] *Uashaunnuat*, at para. 136.

[68] *Uashaunnuat*, at para. 136, citing and translating Henri Battifol & Paul Lagarde, *Droit international privé*, 7th ed., vol. 1 (Paris: LGDJ, 1981), at No. 297.

Aboriginal title and rights to find that they "*resemble* or are at least *analogous* to the domestic institution of real rights",[69] therefore leading them to conclude under article 3152 CCQ that the Quebec Superior Court lacks jurisdiction over the portion of the Innu's claim that pertains to lands situated in Newfoundland and Labrador.[70] Furthermore, since "real rights" in the civilian legal tradition are, by essence, enforceable *erga omnes* ("against the whole world"),[71] a declaratory judgment recognizing Aboriginal title and rights, according to the dissenting judges, would invariably be enforceable against third parties seeking to use the land, as well as the provincial government, which would trigger the application of the Crown immunity principle.[72]

Overall, the different approaches applied by the majority and the minority in *Uashaunnuat* to characterize Aboriginal title and rights for the purposes of applying the CCQ's rules of jurisdiction rest on fundamentally different visions regarding the extent to which the Canadian legal system, including its most fundamental features, ought to be adapted to foster the recognition of the rights protected under section 35 and the objective of reconciliation. Drawing on innovative solutions advanced by an Indigenous intervener and the dissenting judges, we propose below how institutional adjustments to the exercise of provincial superior courts' jurisdiction could provide Indigenous peoples with accessible and efficient remedies for their transboundary claims without disregarding the fundamental principles of the Canadian constitutional order.

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[69] *Uashaunnuat*, at para. 140. In particular, the minority insisted that Aboriginal title – a "site-specific right" — is "a beneficial interest in the land", including "the right to use it, enjoy it and profit from its economic development". The minority also refers to the passages in *Tsilhqot'in*, at paras. 73-75, where the Court compares the incidents of Aboriginal title to the ownership rights associated with fee simple.

[70] *Uashaunnuat*, at para. 203.

[71] *Uashaunnuat*, at para. 139. In previous decisions, the Supreme Court, in the context of litigation brought against a province rather than private parties, suggested that a declaratory judgement recognizing Aboriginal title, considering the "proprietary nature" of this right, would be enforceable against both the government and third parties seeking to use the land: see *Tsilhqot'in*, at paras. 76, 97; *Delgamuukw*, at para. 185.

[72] *Uashaunnuat*, at paras. 274-280. Regarding the question of Crown immunity, the majority held that "While the Attorney General of Newfoundland and Labrador has raised a potentially live issue in this regard, we agree [with the Quebec Court of Appeal] that it does not need to be resolved at this stage of the proceedings." (at para. 71). For his part, the motions judge held that the doctrine of Crown immunity was ill-fitting in the context of a s. 35 transboundary claim (*Uashaunnuat (Innus de Uashat et de Mani-Utenam) v. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, [2016] J.Q. No. 14492, at para. 125, 2016 QCCS 5133 (Que. S.C.). The question of the applicability of the Crown immunity principle in the context of this case lies beyond the scope of this article.

IV. PATHS FORWARD: RETHINKING THE TERRITORIALITIES OF ADJUDICATION FOR INDIGENOUS TRANSBOUNDARY CLAIMS

On December 3, 2020, the Innu of Uashat Mak Mani-Utenam and of Matimekush-Lac John entered into the "*Ussiniun*" ("Renewal") agreement with IOC-RioTinto, which, among other provisions, put an end to the Innu's legal action against the mining companies.[73] Therefore, we can only speculate how the dispute would have unfolded in the Quebec Superior Court and beyond. We argue here that the *Uashaunnuat* decision, while favourable to the Innu in this specific case, does not provide a comprehensive, predictable or constitutionally sound solution for addressing the different access to justice issues that may arise in future Indigenous transboundary land claims.

Despite the majority decision in *Uashaunnuat*, the application of private international law rules to the determination of a provincial superior court's jurisdiction in the context of Indigenous transboundary land claims could lead to very different results depending on whether the dispute involves private actors as defendants or rather consists of a comprehensive land claim against two or more provinces.[74] However, the same obstacles to access to justice, especially the duplication of the heavy evidentiary burden Indigenous claimants must discharge in order to establish their Aboriginal title and rights, would exist in both cases.[75]

Moreover, as mentioned by the majority, a court, although exceptionally and on an application by a party, could always decline to exercise jurisdiction on the basis of *forum non conveniens* if it finds that another jurisdiction is in a better position to adjudicate a dispute.[76] At the *forum non conveniens* stage, in the context of section 35 claims that straddle multiple provinces, a court may consider, among other factors:

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[73] See online: https://www.riotinto.com/news/releases/2020/Uashat-mak-Mani-utenam-and-Matimekush-Lac-John-communities-sign-reconciliation-and-collaboration-agreement-with-IOC.

[74] *Uashaunnuat*, at para. 59. In this case, it was determined that the Quebec Superior Court had jurisdiction to hear the case since the defendant mining companies are headquartered in Montreal, Quebec (art. 3134 CCQ). In its reasons, the majority stressed that the Innu "seek no relief against the Crown of Newfoundland and Labrador" and "admit that any conclusions in respect of their s. 35 rights will not bind" the province: *Uashaunnuat*, at para. 72. The outcome of the dispute would also have differed if the defendant mining companies were headquartered in different provinces.

[75] *Tsilhqot'in*, at paras. 7, 12; *Haida Nation*, at para. 14.

[76] *Uashaunnuat*, at paras. 66-67. In Quebec, the doctrine of *forum non conveniens* is governed under art. 3135 CCQ, which reads as follow: "Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute." It is worth noting that the motion judge, in the *Uashaunnuat* case, refused to decline its jurisdiction on the basis of this doctrine: *Uashaunnuat (Innus de Uashat et de Mani-Utenam) v. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, [2016] J.Q.

> [. . .] whether or not the claimed Aboriginal rights are site-specific, and, if so, whether the bulk of the site is within the province's territorial boundaries; the scope of any Aboriginal title claims; and the interest of the Crown of another province in participating in litigation in order to present evidence and argument as to the scope of s. 35 rights.[77]

Although a court's discretion to decline jurisdiction should be exercised only on an "exceptional" basis, such a decision would have the effect of forcing Indigenous claimants to split their claims into multiple actions thereby thwarting the ability of Indigenous peoples to resolve their transboundary land claims in a timely and cost-effective manner, and consequently undermining the goal of reconciliation.

Given these obstacles, it is essential to develop and implement innovative solutions that provide Indigenous peoples with accessible, effective and predictable mechanisms to assert their transboundary section 35 claims. Such solutions are further required by the *United Nations Declaration on the rights of Indigenous peoples*,[78] which Canada has committed to implement in the domestic legal system, and which recognizes the right of Indigenous peoples "to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights".[79] In our view, the Canadian constitutional order is sufficiently flexible to incorporate the necessary changes in the adjudication process for transboundary claims to be approached as a "proceeding of respect and an exercise in reconciliation",[80] while also respecting Canada's federal structure and the principle of comity between provincial courts. In the words of Satanove J. from the British Columbia Supreme Court:

> I think it must be recognized that just as aboriginal rights are *sui generis*, aboriginal rights litigation is also unique. [. . .] 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

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No. 14492, at paras. 104-110, 2016 QCCS 5133 (Que. S.C.). This conclusion was not challenged in appeal.

[77] *Uashaunnuat*, at para. 69. These considerations are based on the list of factors set out in *Spar Aerospace*, at para. 71.

[78] *United Nations on the Rights of Indigenous Peoples*, A/RES/61/295, art. 40. See also art. 32.

[79] On June 21, 2021, Bill C-15, *An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples*, received royal assent. According to art. 5 of the Act, "The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."

[80] *Restoule v. Canada (Attorney General)*, [2018] O.J. No. 6879, at para. 603, 2018 ONSC 7701 (Ont. S.C.J.) [hereinafter "*Restoule*"].

plaintiffs or prejudices the defendants.[81]

One potential solution for creating accessible adjudication processes for Indigenous transboundary claims, which was advanced by the interveners Kitigan Zibi Anishinabeg and Algonquin Anishinabeg Nation Tribal Council in the *Uashaunnuat* case (and identified by the dissenting judges as a potential solution for future litigation), is for provincial superior courts to hold multi-jurisdictional hearings. This solution is inspired in part by the decision in *Endean v. British Columbia*,[82] in which the Supreme Court found that superior court judges could use their discretionary power to sit together outside their home provinces to hear motions brought before three distinct provincial superior courts in the context of the implementation of a pan-national class action settlement.[83] This discretionary power stems either from a court's statutory powers, or, alternatively, from the inherent power of superior courts.[84] It is beyond the scope of this article to analyze in detail the conditions under which such multi-jurisdiction hearings could or should be held. Nevertheless, we propose that future legislative or judicial guidance, with a view to promoting access to justice for Indigenous peoples and upholding the honour of the Crown should, among other things, provide for the authority to hold a single trial in order "to avoid a multiplicity of proceedings, unnecessary duplication, and unnecessary time and expense".[85] This guidance could set out the conditions and procedure for holding a full or partial multi-jurisdictional hearing, including a unified court procedure, the use of communication technologies and instructions for promoting cooperation between government lawyers.[86] Moreover, such guidance could set out the parameters for holding hearings in concerned Indigenous communities in order to facilitate the participation of Elders and other community members, and to provide judges with a land-based understanding of the Indigenous claimants' relationships to their traditional territories.[87]

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[81] *Kwakiutl Nation v. Canada (Attorney General)*, [2006] B.C.J. No. 2106, at para. 26, 2006 BCSC 1368 (B.C.S.C.).

[82] *Endean v. British Columbia*, [2016] S.C.J. No. 42, [2016] 2 S.C.R. 162 (S.C.C.) [hereinafter "*Endean*"].

[83] *Endean*, at paras. 5-10.

[84] *Endean*, at paras. 24, 59-62.

[85] *Factum Anishinabeg*, at 10.

[86] *Factum Anishinabeg*, at 10. The interveners also suggest specific guidance on "a consolidated disclosure process", in addition to "hearings in one or more jurisdictions by one judge". We would add that where an Indigenous group, like the Innu, has French as a colonial language, guidance regarding the language of the proceedings as well as translation costs would also be warranted. Regarding the ethical obligations of government lawyers in the context of s. 35 proceedings, see Andrew Flavelle Martin & Candice Telfer, "The Impact of the Honour of the Crown on the Ethical Obligations of Government Lawyers: A Duty of Honourable Dealing" (2018) 41:2 Dal. L.J. 443.

[87] *Factum Anishinabeg*, at 10. For precedents in that regard, see *Restoule*, at paras. 7-9;

As a final note, it is important to recognize that, beyond procedural obstacles in the colonial legal system, access to justice issues faced by Indigenous peoples advancing land claims are deeply rooted in the problematic assumption of Crown sovereignty and underlying title, which imposes on Indigenous peoples the daunting task of proving the existence of their Aboriginal title and rights in colonial courts, according to criteria imposed by colonial law.[88] Accordingly, beyond procedural flexibility and "honourable" processes, justice for Indigenous peoples ultimately requires deep foundational changes aimed at decolonizing the constitutional relationships between Indigenous peoples and Canada.

Tsilhqot'in Nation v. British Columbia, [2007] B.C.J. No. 2465, at para. 11, 2007 BCSC 1700 (B.C.S.C.).

[88] See *Tsilhqot'in*, at paras. 10-18, 25, 69; *Delgamuukw*, at para. 144; *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1103 (S.C.C.). See also John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: U of T Press, 2016), at 14-142; Shiri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014) 29:2 C.J.L.S. 145.