IN FACT AND IN LAW

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THE SUPREME COURT CONFIRMS THAT NOT ALL ABORIGINAL PRACTICES ARE PROTECTED BY SECTION 35 OF THE *CONSTITUTION ACT, 1982*

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THE SUPREME COURT OF CANADA CONFIRMS THAT ONLY THOSE MODERN PRACTICES THAT MAINTAIN A REASONABLE DEGREE OF CONTINUITY WITH THE PRACTICES, CUSTOMS OR TRADITIONS THAT WERE INTEGRAL TO AN ABORIGINAL GROUP'S PRE-CONTACT DISTINCTIVE CULTURE WILL BE PROTECTED AS AN ABORIGINAL RIGHT UNDER SECTION 35 OF THE *CONSTITUTION ACT, 1982*.

On November 10, 2011, in the case of *Lax Kw'alaams Indian Band* v. *Canada (Attorney General)*,[1] the Supreme Court rendered an important decision pertaining to Aboriginal rights protected under section 35 of the *Constitution Act, 1982*. Justice Binnie, who wrote the Court's unanimous decision, held that to establish a modern Aboriginal right there must be a reasonable degree of continuity between the modern practice and the practices, customs or traditions that were integral to the Aboriginal claimant's pre-contact distinctive culture.

[1] 2011 S.R.C. 56.

THE FACTS

The Lax Kw'alaams and other First Nations (collectively referred to as "the Lax Kw'alaams") of British Columbia claimed an Aboriginal right to the commercial harvesting and sale of all species of fish within their traditional waters. At trial, the evidence demonstrated that the Lax Kw'alaams First Nation are the descendants of an ancient "fishing people" comprising the several Tsimshian tribes or houses of the north-western coast of British Columbia. The Coast Tsimshian were organized into a sophisticated society characterized by complex relationships based on rank and kinship. They had primarily existed within a subsistence economy. The harvesting and consumption, including the creation of a surplus supply for winter consumption, of fish resources and products such as salmon and other fish was an integral part of their distinctive culture prior to contact with Europeans. They also at that time practiced what the trial judge defined as "some form of loosely termed trade." However, except for the grease of one species of fish (eulachon), trade in fish resources and products was limited and sporadic.

JUDGEMENTS OF THE LOWER COURTS

The trial judge dismissed the Lax Kw'alaams' claims. The Court of Appeal dismissed the appeal and affirmed the trial judgment.

JUDGEMENT OF THE SUPREME COURT OF CANADA

The Supreme Court endorsed the facts and conclusions as established by the trial judge and dismissed the Lax Kw'alaams' appeal. The Court essentially relied on its fundamental decision in *Van der Peet*[2] and set out the analysis to be applied and the elements required to prove an Aboriginal right under section 35, namely :

1. First, the precise nature of the First Nation's claim to the Aboriginal right must be identified;
2. Second, it must be determined whether the First Nation has proved each of the following:
   a) the existence of the pre-contact practice, tradition or custom advanced as supporting the claimed right; and
   b) that this practice was integral to the distinctive pre-contact Aboriginal society;
3. Third, it must be determined whether the claimed modern right has a reasonable degree of continuity with the "integral" pre-contract practice;
4. Fourth, in the event that an Aboriginal right to trade commercially is found to exist, the Court, when delineating such a right, should have regard to important objectives such as economic and regional fairness.[3]

In the case at hand, the Lax Kw'alaams established that trade in various fish species and fish products was part of their pre-contact way of life. However, apart from the trade in eulachon grease, such trade was of "low volume", "irregular" and "incidental" to the distinctive culture of the appellants. The Court reiterated that it is not enough for a practice, custom or tradition to have been an element of a pre-contact way of life to establish an Aboriginal right; it must have been "integral" to the distinctive pre-contact culture and have been "a central and significant" part of that culture.

The Court also concluded that there was no continuity between the pre-contact practice and the claimed modern right. The appellants maintained that the limited pre-contact trade practices had evolved to include all other fish species and fish products. On this issue, the Court reminds us that although Aboriginal rights do not remain "frozen" in time and their subject matter as well as the method of their exercise may evolve over time, such evolution has both quantitative as well as qualitative limits.[4] The Court concluded that only the trade in one species, eulachon grease, was integral to the appellants' pre-contact culture and that such trade is qualitatively different from a general commercial fishery. The Court also concluded that the trade in eulachon grease was very small relative to the overall pre-contact fishing activity and, therefore, lacked proportionality in quantitative terms.

COMMENTS

This decision by the Supreme Court is very important as it circumscribes the ancestral and modern practices protected under section 35 of the *Constitution Act, 1982*. The decision dispels any doubts that may have lingered regarding the degree of importance of a pre-contact practice, custom or tradition necessary to support an Aboriginal right. It is henceforth clear that such practices, customs or traditions must have been integral to the distinctive culture of the pre-contact society. In other words, not all pre-contact practices will be recognized and protected as an Aboriginal right.

[2] [1996] 2 S.C.R. 507.

[3] *Supra*, note 1 at paragraphe 46.

[4] *Ibid.* at paragraph 49 and 51.

The Court also established the "logical limits" of the evolution a pre-contact practice can undergo as compared to the claimed modern right. The question to be asked is whether, logically speaking, the ancestral practice bears a reasonable resemblance to the modern right being claimed. In practice, each case will be judged on its own merits and the Court's decision will have to be applied to the specific circumstances. Though not conclusive, the Court here provided some concrete examples which could guide the analysis :

- if a group harvested all fish species and traded all the fish it caught, and if this practice was a defining characteristic of its distinctive culture, it may establish a commercial fishing right which, other than for compelling reasons, will take into account the evolution of the fisheries resources and would not be restricted to the species that populated the water prior to contact;
- a gathering right to berries based on pre-contact times would not evolve into a right to gather natural gas within the traditional territory;
- the surface gathering of copper from the Coppermine River in the Northwest Territories in pre-contact times would not support an Aboriginal right to exploit deep shaft diamond mining in the same territory.

The significance of the fourth step in Justice Binnie's analysis is less clear. The principle of reconciling Aboriginal rights with other interests derives from the Court's case law regarding the analysis required at the infringement and justification stage, not at the stage of proving an Aboriginal right, which Justice Binnie himself recognizes. It is debatable whether he intended to modify the *Van der Peet* test or whether he simply combined the two steps. In the former case, one could query whether a possible result may be a watering down of Aboriginal rights, or at least commercial Aboriginal rights, if a balancing is to occur both at the level of establishing the right as well as at the justification stage.

Finally, the Court also made some significant remarks regarding the practice of litigation in Aboriginal law matters. The Court noted that Aboriginal rights litigation is of crucial importance to Aboriginal and non-Aboriginal communities alike and reminds us that the ultimate objective of Aboriginal law is the reconciliation of these communities. Therefore, flexibility and a generous interpretation of procedural rules are called for in such cases. However, the Court makes it clear that the general rules of civil procedure still apply and Aboriginal claimants will be held to these. The Court reinforces this position by noting that Aboriginal claimants are now "generally well resourced and represented by experienced counsel".[5] Future Aboriginal rights litigation will, therefore, need to continue to demonstrate a certain amount of rigor. Of equal significance is what this may mean in the context of cases where the Crown's duty to consult is at issue. The Court has already indicated in a previous decision that Aboriginal groups must also be diligent and "carry their end of the consultation".[6] It is easy to foresee the Court's decision in Lax Kw'alaams being relied upon by analogy in order to underscore that principle or even raise the bar in relation to the standard to which Aboriginal groups will be held in those cases.

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[5] *Ibid.* at paragraph 12.

[6] See *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at paragraph 65.

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