



SUPREME COURT OF CANADA

CITATION: Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam), 2020 SCC 4

APPEAL HEARD: April 24, 2019
JUDGMENT RENDERED: February 21, 2020
DOCKET: 37912

BETWEEN:

Attorney General of Newfoundland and Labrador
Appellant

and

Uashaunnuat (Innu of Uashat and of Mani-Utenam), Innu of Matimekush-Lac John, Chief Georges-Ernest Grégoire, Chief Réal McKenzie, Innu Takuaikan Uashat Mak Mani-Utenam Band, Innu Nation Matimekush-Lac John, Mike McKenzie, Yves Rock, Jonathan McKenzie, Ronald Fontaine, Marie-Marthe Fontaine, Marcelle St-Onge, Évelyne St-Onge, William Fontaine, Adélar Joseph, Caroline Gabriel, Marie-Marthe McKenzie, Marie-Line Ambroise, Paco Vachon, Albert Vollant, Raoul Vollant, Gilbert Michel, Agnès McKenzie, Philippe McKenzie and Auguste Jean-Pierre
Respondents

- and -

Attorney General of Canada, Attorney General of Quebec, Attorney General of British Columbia, Iron Ore Company of Canada, Quebec North Shore and Labrador Railway Company Inc., Kitigan Zibi Anishinabeg, Algonquin Anishinabeg Nation Tribal Council, Amnesty International Canada and Tsawout First Nation
Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of Brown and Rowe JJ.

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

JOINT REASONS FOR JUDGMENT: Wagner C.J. and Abella and Karakatsanis JJ. (Gascon and Martin JJ. concurring)
(paras. 1 to 73)

JOINT DISSENTING REASONS: Brown and Rowe JJ. (Moldaver and Côté JJ. concurring)
(paras. 74 to 297)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

NFLD. AND LABRADOR (A.G.) v. UASHAUNNUAT

Attorney General of Newfoundland and Labrador

Appellant

v.

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Innu of Matimekush-Lac John,
Chief Georges-Ernest Grégoire, Chief Réal McKenzie,
Innu Takuaihan Uashat Mak Mani-Utenam Band,
Innu Nation Matimekush-Lac John, Mike McKenzie, Yves Rock,
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(Innu of Uashat and of Mani-Utenam)**

2020 SCC 4

File No.: 37912.

2019: April 24; 2020: February 21.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Private international law — Jurisdiction of Quebec court — Innu claimants filing suit in Quebec Superior Court against mining companies operating project in parts of both Quebec and Newfoundland and Labrador — Claimants seeking permanent injunction, damages and declaration that mining companies' project violates Aboriginal title and other Aboriginal rights — Mining companies and Newfoundland and Labrador Crown seeking to strike portions of claim concerning property situated in that province — Whether Quebec courts have jurisdiction over entire claim — Civil Code of Québec, arts. 3134, 3148.

In 2013, two Innu First Nations, as well as a number of chiefs and councillors (“Innu”), filed suit in the Superior Court of Quebec against two mining companies responsible for a megaproject consisting of multiple open-pit mines near Schefferville, Quebec and Labrador City, Newfoundland and Labrador, as well as port, railway and industrial facilities in Sept-Îles, Quebec and railway winding through both provinces.

In their originating application, the Innu assert a right to the exclusive use and occupation of the lands affected by the megaproject. They claim to have occupied, since time immemorial, a traditional territory that straddles the border between the provinces of Quebec and Newfoundland and Labrador. They allege that the megaproject was built without their consent, and invoke a host of environmental harms which have impeded their activities, depriving them of the enjoyment of their territory. As remedies against these alleged wrongs, the Innu seek, among other things, a permanent injunction against the mining companies ordering them to cease all work related to the megaproject, \$900 million in damages, and a declaration that the megaproject constitutes a violation of Aboriginal title and other Aboriginal rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*. The mining companies and the Attorney General of Newfoundland and Labrador each filed a motion to strike from the Innu's pleading portions of the claim which, in their view, concern real rights over property situated in Newfoundland and Labrador and, therefore, fall under the jurisdiction of the courts of that province.

The Superior Court of Quebec dismissed the motions to strike. As it declined to characterize the action as a real action, it held that the Quebec courts had jurisdiction to hear the matter. The Quebec Court of Appeal dismissed Newfoundland and Labrador's appeal.

Held (Moldaver, Côté, Brown and Rowe JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Abella, Karakatsanis, Gascon and Martin JJ.: The Superior Court of Quebec has jurisdiction over the entire claim. The action is properly characterized as a non-classical mixed action that involves the recognition of *sui generis* rights and the performance of obligations. Since both mining companies are headquartered in Montréal, Quebec courts have jurisdiction over the personal and the *sui generis* aspects of the claim pursuant to art. 3148 and art. 3134 *C.C.Q.*

Book Ten of the *C.C.Q.* sets out the rules governing private international law in the province. In the spirit of comity, these rules limit the jurisdiction of Quebec authorities to matters closely linked to the province. The *C.C.Q.* is silent with respect to the proper analysis for characterizing an action for the purposes of Chapter II, which establishes specific rules of jurisdiction based on the nature of the action in question. In the absence of legislative direction, when characterizing an action, it is the nature of the rights at stake and the conclusions sought that must be considered. The rules of Book Ten must be interpreted in light of the imperatives of our constitutional order and in a manner consistent with the Constitution. Where s. 35 rights are at stake, Book Ten must be interpreted in a manner that respects constitutionally recognized and affirmed Aboriginal rights and treaty rights, and that takes into account access to justice considerations.

Aboriginal rights, including the sub-category of Aboriginal title, are *sui generis* in nature. A *sui generis* right is a unique one, which it is impossible to fit into any recognized category. Aboriginal title is not to be conflated with traditional civil

or common law property concepts, or described using the classical language of property law, as it has unique characteristics that distinguish it from civil law and common law conceptions of property, including features that are incompatible with property as it is understood in the civil law and common law. For example, Aboriginal title is inherently collective and it restricts both the alienability of land and the uses to which land can be put. Aboriginal title is also firmly grounded in the relationships formed by the confluence of prior occupation and the assertion of sovereignty by the Crown, which give rise to obligations flowing from the honour of the Crown that are clearly more akin to personal rights. Disputes involving Aboriginal title must also be understood with reference to Aboriginal perspectives. Section 35 rights are neither real rights nor personal rights as defined in the civil law, nor a combination of the two, but legally distinct *sui generis* rights.

In the context of s. 35 claims that straddle multiple provinces, access to justice requires that jurisdictional rules be interpreted flexibly so as not to prevent Aboriginal peoples from asserting their constitutional rights, including their traditional rights to land. Moreover, the honour of the Crown requires increased attention to minimizing costs and complexity when litigating s. 35 matters. Where a claim of Aboriginal rights or title straddles multiple provinces, requiring the claimant to litigate the same issues in separate courts multiple times would erect gratuitous barriers to potentially valid claims. This would be particularly unjust when the rights claimed pre-date the imposition of provincial borders on Indigenous peoples. The later 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. Though the provinces have no legislative jurisdiction over s. 35 rights, their courts certainly adjudicate them. Adjudicative jurisdiction over property outside of the province can be conferred in the s. 35 context because it concerns *sui generis* rights, not real rights, and it operates uniformly across Canada. The determination of whether a claimed Aboriginal or treaty right enjoys constitutional protection under s. 35 is a matter of constitutional law. Neither s. 35 nor constitutional law is foreign to Quebec or its courts.

The claim in the instant case falls into the mixed action category. In order for a Quebec court to have jurisdiction over a classical mixed action, it must have jurisdiction over both the personal and real aspects of the matter. However, this claim is not a classical mixed action. It is rather a mixed action that involves seeking the recognition of a *sui generis* right (a declaration of Aboriginal title) and the performance of various obligations related to failures to respect that right (damages in delict and neighbourhood disturbances), that is, a personal aspect. In the context of such a non-classical mixed action, a Quebec court has jurisdiction over both the personal and the *sui generis* aspects of the claim. Actions in delict and neighbourhood disturbances are generally characterized as personal actions and art. 3148 *C.C.Q.* grants Quebec authorities jurisdiction over personal actions of a patrimonial nature where the defendant is domiciled in Quebec. With respect to the aspects of the claim that relate to the recognition of a *sui generis* right, such as a s. 35 right, the *C.C.Q.* does not include any special provision to establish the jurisdiction of Quebec

authorities in such circumstances. Therefore, art. 3134, which states that “[i]n the absence of any special provision, Québec authorities have jurisdiction when the defendant is domiciled in Québec”, applies. Given that the mining companies are both headquartered in Montréal, Quebec authorities have jurisdiction over both aspects of this non-classical mixed action pursuant to arts. 3134 and 3148 *C.C.Q.*, which are sufficient to ground the jurisdiction of Quebec authorities.

Per Moldaver, Côté, **Brown** and **Rowe** JJ. (dissenting): The appeal should be allowed, the judgments of the Superior Court and the Court of Appeal should be set aside, the motion to strike allegations of the Attorney General of Newfoundland and Labrador should be allowed in part, and it should be ordered that the conclusions of the Innu’s motion to institute proceedings that are declaratory or injunctive in nature and that relate to their traditional territory or to the megaproject be amended so that they apply only to acts, activities or rights within Quebec’s territory. Aboriginal rights exist within the limits of Canada’s legal system, and Aboriginal rights claims before the courts must not go beyond what is permitted by Canada’s legal and constitutional structure. Finding that the Quebec Superior Court has jurisdiction to issue a declaration recognizing Aboriginal rights in the part of the traditional territory that is situated in Newfoundland and Labrador would have serious consequences for Canadian federalism. Far from promoting access to justice or reconciliation with Indigenous peoples, it would lead to increased litigation and delays, as well as confusion and loss of confidence in our justice system.

The jurisdiction of provincial superior courts is governed first and foremost by the rules of private international law, which in Quebec are set out in the *C.C.Q.* It is these rules that sometimes authorize provincial superior courts to exercise their powers with respect to persons or property not situated within the province's territory. It is therefore not possible to disregard these rules and rely solely on an inherent jurisdiction that is, in principle, exercisable only within the province. The rules of private international law are of a different, legislative nature and confer authority. Only these rules can authorize the extraterritorial exercise of a power that otherwise is limited to a single territory.

However, the rules of private international law must themselves be consistent with the territorial limits created by the Constitution, which means that they may also be subject to constitutional scrutiny in light of those limits. Canada's constitutional framework limits the external reach of provincial laws and of a province's courts. As the Court has already recognized, the Constitution assigns powers to the provinces but limits the exercise of those powers to each province's territory. These territorial restrictions created by the Constitution are inherent in the Canadian federation.

The general criterion for jurisdiction in private international law is the defendant's domicile, as stated in art. 3134 *C.C.Q.* However, as that provision expressly indicates, the general rule it states is subsidiary in nature: the rule applies only "[i]n the absence of any special provision". The special provisions in the *C.C.Q.*

that displace this subsidiary rule govern the international jurisdiction of Quebec authorities over personal actions of an extrapatrimonial and family nature (arts. 3141 to 3147 *C.C.Q.*), personal actions of a patrimonial nature (arts. 3148 to 3151 *C.C.Q.*) and real or mixed actions (arts. 3152 to 3154 *C.C.Q.*).

It is therefore necessary to characterize the action in question in order to determine the international jurisdiction of Quebec authorities over a case. Private international law must be interpreted on the basis of the *lex fori*, because it is necessary to favour, as a matter of principle, the application of domestic civil law characterizations in private international law. The personal action, real action and mixed action concepts referred to in the special provisions of Title Three of Book Ten of the *C.C.Q.* should therefore be defined on the basis of Quebec law. Because it is inherent in the nature of private international law to be confronted with institutions that are unknown to it, the rules of private international law must be approached with some flexibility so as to include institutions that, although legally distinct, are analogous to the categories recognized by the civil law.

Aboriginal title and other Aboriginal or treaty rights must clearly be considered “real rights” for the purposes of private international law. More specifically, they resemble or are at least analogous to the domestic institution of real rights because they are rights in property, namely the land subject to Aboriginal title, and they are rights enforceable *erga omnes*, that is, against governments and others seeking to use the land. Aboriginal title confers 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 use and manage the land. The fact that Aboriginal title and Aboriginal or treaty rights are *sui generis* in nature does not preclude them from being found to be real rights for the purposes of private international law — their *sui generis* nature relates to their source, content and characteristics, which simply cannot be completely explained by reference to the common law or civil law rules of property law.

A real action is an action through which a person seeks the recognition or protection of a real right. Because Aboriginal title and other Aboriginal or treaty rights are real rights for the purposes of private international law, it necessarily follows that, in this case, the aspect of the Innu's action whose purpose is to have such rights recognized and protected constitutes a real action or, at best, a mixed action falling under Division III of Chapter II of Title Three of Book Ten of the *C.C.Q.*

According to well-established jurisprudence, Quebec authorities lack jurisdiction to hear a real action if the property in dispute is situated outside Quebec. Article 3152 *C.C.Q.* must be read in accordance with the modern approach to statutory interpretation, which applies when interpreting an article of the *C.C.Q.* It must be read in light of the principles of comity, order and fairness, which inspire the interpretation of the various private international law rules. This article affirms a well-established principle, which is that Quebec authorities lack jurisdiction over an

immovable real action where the subject matter of the dispute is situated outside Quebec. It also extends this principle to movable real actions — in real actions, whether immovable or movable, Quebec authorities lack jurisdiction where the subject matter of the dispute is not situated in Quebec. In particular, the defendant’s domicile does not give them jurisdiction over a real action, regardless of whether the subject matter of the dispute is immovable property or movable property, because art. 3134 *C.C.Q.* expressly states that this rule applies only in the absence of any special provision. Moreover, art. 3152 provides for the jurisdiction of Quebec authorities where the property in dispute is situated in Quebec, not where all or part of it is situated in Quebec. A different interpretation would amount to rewriting this provision by adding the words “all or part of”. Finally, for Quebec authorities to have jurisdiction over a mixed action, the property in dispute must be situated entirely in Quebec, since otherwise they will have no jurisdiction over the real aspect of the dispute. Jurisdiction over the personal aspect of the dispute based, for example, on the defendant’s domicile is therefore not sufficient in the case of a mixed action — the property in dispute must also be situated in Quebec, as required by art. 3152.

There is disagreement with the majority in this case as regards the characterization of the Innu’s action as a “non-classical” mixed action with a personal aspect and a *sui generis* aspect and as regards the majority’s conclusion that art. 3134 *C.C.Q.* applies in the absence of any provisions relating specifically to *sui generis* rights. According to that conclusion, Quebec authorities have jurisdiction over both the personal aspect and the *sui generis* aspect of the action because the companies

being sued are domiciled in Montréal. The rights protected by s. 35 of the *Constitution Act, 1982*, and in particular Aboriginal title conferring the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, are a burden first and foremost on the Crown's underlying title. The characteristics of Aboriginal title flow from the special relationship between the Crown and the Indigenous group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. The Crown is the main defendant in an action for the recognition of Aboriginal title. The majority's conclusion that the private companies, rather than the Crown, are the defendants in the action for the recognition of Aboriginal rights is therefore highly problematic and distorts the *sui generis* nature of these rights.

There is a principle in Quebec private international law to the effect that the jurisdiction of the Quebec court is determined on a case-by-case basis. It is therefore necessary in this case to determine whether the Innu's action in fact involves claims that are real or mixed in nature because their purpose is to obtain the recognition or protection of Aboriginal title or other Aboriginal or treaty rights, which are real rights for the purposes of private international law; if the action does involve such claims, Quebec authorities lack jurisdiction to grant the claims if they relate to the part of the traditional territory that is situated in Newfoundland and Labrador.

The purpose of the claims for declaratory remedies in the Innu's motion to institute proceedings is clearly to obtain the recognition of Aboriginal title and

other Aboriginal or treaty rights, which are real rights for the purposes of private international law. A declaration is the primary means by which Aboriginal title can be established. However, under art. 3152 *C.C.Q.*, a court may not grant an application for a declaratory judgment with respect to proprietary or possessory rights in immovable property situated abroad because by doing so it would purport to deal directly with title. In this case, even if the declarations sought by the Innu were binding only on the mining companies, the fact remains that the declarations would relate to the title the Innu claim to hold to the traditional territory, including the parts of that territory that are situated outside Quebec. Because of art. 3152, Quebec authorities lack jurisdiction in this regard. If Quebec authorities were to rule directly on the title that the Innu believe they hold to the parts of the traditional territory that are situated outside Quebec, the declarations would be binding on no one, not even on the mining companies, precisely because Quebec authorities lack jurisdiction in this regard.

The Innu's claims for a permanent injunction to put a stop to the mining companies' operations, facilities and activities are also real in nature, because their purpose is clearly to protect Aboriginal title and other Aboriginal or treaty rights, which are real rights for the purposes of private international law. In Quebec law, an injunction is the appropriate procedural vehicle for enforcing one's right. Therefore, under art. 3152 *C.C.Q.*, a court cannot grant a claim for a permanent injunction relating to immovable property situated outside the province.

The claim for damages against the mining companies — to the extent that it is based on the alleged infringement of the Aboriginal title and other Aboriginal or treaty rights the Innu claim to hold in the traditional territory — can be granted only if the Innu are able to obtain the recognition of that Aboriginal title and those other Aboriginal or treaty rights in that territory. However, Quebec authorities do not in fact have the jurisdiction required to hear an action for the recognition of Aboriginal title or other Aboriginal or treaty rights in land not situated in Quebec. It necessarily follows that, as matters stand at present, Quebec authorities must at least stay the proceedings on this point until a competent authority has recognized the existence of those rights in the parts of the traditional territory that are situated in Newfoundland and Labrador.

The remedy under art. 976 *C.C.Q.* remains first and foremost a claim that a person has, which makes it a personal action. Because the defendants are domiciled in Quebec and injury has been suffered in Quebec (art. 3148 para. 1(1) and (3) *C.C.Q.*), Quebec authorities have jurisdiction over this claim.

Lastly, the Innu are claiming various fiduciary remedies or remedies based on administration of the property of others (art. 1299 *C.C.Q.*) with respect to the mining companies' works and facilities. These claims are real in nature and, having regard to art. 3152 *C.C.Q.*, Quebec authorities cannot grant them if they relate to works or facilities of the mining companies that are situated in Newfoundland and Labrador.

Given that, as a result of art. 3152 *C.C.Q.*, Quebec authorities lack jurisdiction over the claim for declaratory remedies to recognize Aboriginal title and other Aboriginal or treaty rights in land situated in Newfoundland and Labrador, over the claim for a permanent injunction to put a stop to the mining companies' operations, facilities and activities on land situated in Newfoundland and Labrador, and over the fiduciary claim or the claim based on administration of the property of others with respect to the mining companies' works and facilities situated in Newfoundland and Labrador, it should be ordered that the conclusions of the Innu's motion to institute proceedings, and specifically those that are declaratory or injunctive in nature and that relate to the traditional territory or to the megaproject, be amended so that they apply only to acts, activities or rights within Quebec's territory. However, it should not be ordered that the allegations in the motion to institute proceedings be struck, because the allegations concerning the traditional territory as a whole, including the parts of that territory that are situated in Newfoundland and Labrador, as well as the evidence relating thereto, could prove to be relevant during the trial on the merits in order to determine the existence of Aboriginal title and other Aboriginal or treaty rights in Quebec.

While Aboriginal rights are *sui generis*, they exist within the general legal system of Canada, and Aboriginal rights claims before the courts must not go beyond what is permitted by the Canadian legal and constitutional structure. The goal of reconciliation between Indigenous peoples' prior occupation of Canadian territory and Crown sovereignty over that same territory cannot be achieved by recognizing

prior occupation by Indigenous peoples on the one hand while disregarding the constitutional principle of federalism and of the sovereignty of the provincial Crown on the other, thereby contravening the well-established principle that one part of the Constitution cannot abrogate another part of the Constitution. The goal of reconciliation must therefore be achieved by accounting not only for the Indigenous perspective — and thus the prior, borderless occupation of Canadian territory by Indigenous peoples — but also for the constitutional framework that accompanied Crown sovereignty and within which Canadian courts must operate.

Holding that superior courts have jurisdiction to decide the s. 35 rights of an Indigenous party as they affect another province implicitly treats the provinces as if they were (at best) administrative units or (at worst) inconvenient technicalities. This is profoundly disrespectful of the constitutional order under which provinces are sovereign within their own jurisdiction. Provincial boundaries are an essential feature of the system of provincial superior courts just as they are an essential feature of provincial legislative power. In particular, the system of provincial superior courts ensures that claims to a province's land or challenges to a province's laws must be heard before a judge of that province. Thus, the claims that cut deepest at the heart of a province's sovereignty will be resolved by a judge connected to the province's realities. This enhances public confidence in the courts and protects courts' functioning and legitimacy, particularly if the outcome of the litigation is unfavourable to the province. 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.

The declarations sought in this case are contrary to the Canadian federal structure. Before a court can grant a declaration, it must have jurisdiction to hear the issue. It is unclear how the scope of a declaration of Aboriginal title over land in Labrador could be appropriately limited in a way consistent with the imperatives of Canadian federalism. The Crown is a necessary party in Aboriginal title claims — and is necessarily implicated when a declaration of Aboriginal title is made. Furthermore, this approach leads to a strong possibility of conflicting judgments and confusion and would allow a superior court in one province to pronounce on Aboriginal title in relation to land located in another province incidentally to an *in personam* claim. This principle cannot be confined to this case and the provinces implicated in this litigation.

Moreover, this approach is incompatible with the principle of Crown immunity. Any claim that asserts Aboriginal title necessarily involves the Crown. Unlike ordinary property disputes which pit private parties against each other within a framework of private law, an Aboriginal title claim cuts to the very root of the Crown's sovereignty and triggers obligations on the part of the Crown. Not only is the Crown's presence necessary in principle, it also helps ensure that issues are fairly heard. Private parties cannot be assumed to have any knowledge about the facts of occupation at the time the Crown asserted sovereignty.

Finally, this approach also impedes access to justice. If the impact of the order actually received is uncertain, confusing, or narrower than expected, this is a failure of access to justice. Moreover, access to justice is a precondition to the rule of law. Without procedural adaptations, requiring Indigenous people to bring applications, and to have them heard, in several different forums in order to obtain the recognition and protection of Aboriginal rights in different parts of a single traditional territory that straddles provincial borders creates barriers to access to justice and undermines the efficient and timely adjudication of such claims. However, delivery of efficient, timely and cost-effective resolution of transboundary Aboriginal rights claims must occur within the structure of the Canadian legal system as a whole. Principles of federalism and provincial sovereignty do not preclude development by superior courts, in the exercise of their inherent jurisdiction, of innovative yet constitutionally sound solutions that promote access to justice. *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 163, authorizes superior court judges from different provinces to draw on their statutory jurisdiction — or, where necessary, their inherent jurisdiction — to sit together and hold a joint hearing on applications that have been brought in the superior courts of more than one province because they seek the recognition and protection of Aboriginal rights in different parts of a single traditional territory that straddles provincial borders. A transboundary Aboriginal rights claim will stand a better chance of being resolved in an efficient, timely and cost-effective manner if the superior court judges sit together for a single joint hearing arising from the joinder of the applications brought in each of the superior courts concerned. In this case, however, the fact that the Innu have not brought

applications in each of the superior courts concerned still remains a barrier to the constitutional capacity of the superior courts to appropriately adjudicate their transboundary Aboriginal rights claim.

Cases Cited

By Wagner C.J. and Abella and Karakatsanis JJ.

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S.C.R. 322; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *Comité paritaire de l'entretien d'édifices publics de la région de Québec v. Hôtel Forestel Val-d'Or inc.*, 2017 QCCA 250; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *R. v. Côté*, [1996] 3 S.C.R. 139; *Innu of Uashat and Mani-Utenam v. Iron Ore Company of Canada*, 2016 QCCS 1958, [2017] 4 C.N.L.R. 73; *Oppenheim forfait GMBH v. Lexus maritime inc*, 1998 CanLII 13001.

By Brown and Rowe JJ. (dissenting)

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APPEAL from a judgment of the Quebec Court of Appeal (Morissette, Healy and Ruel JJ.A.), 2017 QCCA 1791, [2018] 4 C.N.L.R. 167, [2017] Q.J. No. 15881 (QL), 2017 CarswellQue 11332 (WL Can.), affirming a decision of Davis J., 2016 QCCS 5133, [2017] 4 C.N.L.R. 89, [2016] J.Q. n° 14492 (QL), 2016 CarswellQue 10096 (WL Can.). Appeal dismissed, Moldaver, Côté, Brown and Rowe JJ. dissenting.

Maxime Faille, Guy Régimbald and Justin Mellor, for the appellant.

Jean-François Bertrand, James A. O’Reilly, François Lévesque, Sophia Ladovrechis and Marie-Claude André-Grégoire, for the respondents.

Ian Demers, for the intervener the Attorney General of Canada.

No one appeared for the intervener the Attorney General of Quebec.

Jeff Echols and *Chris Robb*, for the intervener the Attorney General of British Columbia.

François Fontaine and *Andres Garin*, for the interveners the Iron Ore Company of Canada and the Quebec North Shore and Labrador Railway Company Inc.

Eamon Murphy and *Peter W. Jones*, for the interveners Kitigan Zibi Anishinabeg and the Algonquin Anishinabeg Nation Tribal Council.

Perri Ravon, *Ryan Beaton* and *Audrey Mayrand*, for the intervener Amnesty International Canada.

John W. Gailus and *Christopher Devlin*, for the intervener the Tsawout First Nation.

The judgment of Wagner C.J. and Abella, Karakatsanis, Gascon and Martin JJ. was delivered by

THE CHIEF JUSTICE AND ABELLA AND KARAKATSANIS JJ. —

[1] This appeal raises questions of fundamental importance to the way civil proceedings involving Aboriginal rights are carried out in this country. It has implications for access to justice and the ability of Indigenous peoples to

meaningfully assert their constitutional rights in the justice system. A balance must be struck between the different principles at play, keeping in mind the unique history and nature of Aboriginal rights in Canada.

I. Background

A. *The Parties*

[2] The Innu of Uashat and of Mani-Utenam and the Innu of Matimekush-Lac John are two distinct First Nations who claim to have occupied a traditional territory they call the Nitassinan since time immemorial. This territory straddles the border between the provinces of Quebec and Newfoundland and Labrador.

[3] Much of this territory was included as part of Lower Canada in 1791 which, in turn, would become Quebec in 1867. In 1927, the Privy Council clarified the border between Labrador — then part of the British colony of Newfoundland — and Quebec. Newfoundland (which included Labrador) joined Canada as a province in 1949 and changed its name to Newfoundland and Labrador in 2001.

[4] In the early 1950s, the interveners Iron Ore Company of Canada and the Quebec North Shore and Labrador Railway Company Inc. (“mining companies”) undertook the first phase of what came to be known as the “IOC megaproject”. Today, the IOC megaproject includes multiple open-pit mines that were formerly operated near the small town of Schefferville, Quebec; nine open-pit mines and

related facilities near Labrador City, Newfoundland and Labrador; port, railway and industrial facilities in Sept-Îles, Quebec; and more than 600 km of railway winding through both provinces. It continues to expand.

B. *The Claim*

[5] In 2013, the Innu of Uashat and of Mani-Utenam and the Innu of Matimekush-Lac John as well as a number of chiefs and councillors representing their respective families, bands and nations filed suit against the mining companies in the Superior Court of Quebec in Montréal.

[6] In their originating application, the Innu respondents in this case (“Innu”) claim to have occupied, possessed and managed the Nitassinan according to their customs, traditions and practices since time immemorial. They assert a right to the exclusive use and occupation of the lands affected by the IOC megaproject, including rights to hunt, fish and trap. They also claim the right to use and enjoy all the natural resources found on the land. The Innu allege that the IOC megaproject was built without their consent and invoke a host of environmental harms which have impeded their activities, depriving them of the enjoyment of their territory. They advance that the mining companies have implemented discriminatory policies and prevented them from circulating freely throughout the Nitassinan.

[7] As remedies against these alleged wrongs, the Innu seek, among other things:

- a permanent injunction against the mining companies ordering them to cease all work related to the IOC megaproject;
- \$900 million in damages; and
- a declaration that the IOC megaproject constitutes a violation of Aboriginal title and other Aboriginal rights.

[8] Although the pleading refers to the Nitassinan at large, it also makes clear that it is only the territory affected by the IOC megaproject that is relevant for the purposes of this action.

C. *The Motions to Strike*

[9] The mining companies eventually filed a motion to strike allegations from the Innu's pleading. In their view, portions of the claim concern real rights over property situated in Newfoundland and Labrador and, therefore, fall under the jurisdiction of the courts of that province. On the heels of this motion, the Attorney General of Newfoundland and Labrador filed a declaration of voluntary intervention along with its own motion to strike, essentially supporting the mining companies' arguments.

D. *The Judgments Below*

- (1) Superior Court of Quebec, 2016 QCCS 5133, [2017] 4 C.N.L.R. 89 (Davis J.)

[10] Davis J. dismissed the motions to strike. The mining companies pleaded that Aboriginal title is a real right and that, pursuant to art. 3152 of the *Civil Code of Québec* (“*C.C.Q.*”), the Innu’s action was beyond the jurisdiction of Quebec courts insofar as it concerned property located in Newfoundland and Labrador. The Attorney General for Newfoundland and Labrador supported these arguments and also raised the defense of Crown immunity. The Innu, for their part, advanced that the action was personal or mixed and proposed to ground jurisdiction in the authority of Quebec courts to order pecuniary and injunctive relief against the mining companies, under arts. 3134 and 3148, para. 1(1) *C.C.Q.*

[11] For Davis J., the solution to the jurisdictional puzzle lay in properly characterizing the action within the *C.C.Q.* framework. He emphasized the importance of considering the Aboriginal point of view in this exercise, concluding that this required recognizing that the occupation of land by Aboriginal peoples predates the establishment of any provincial borders. Davis J. acknowledged that provinces enjoy reciprocal immunities, but found it awkward to apply those immunities when determining rights which predate both provincial borders and, thus, the justification for those immunities. While admitting that the court seized with the merits of the case would be obliged to draw conclusions regarding the rights of the provinces, he noted that the Innu sought no relief against the Crown in right of Newfoundland and Labrador.

[12] Davis J. agreed that some aspects of Aboriginal title and rights resemble real rights because they attach to specific territories or sites. Nevertheless, he gave several reasons for declining to characterize the action as a real action. First, he noted that rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*, are *sui generis* in nature. Moreover, he wrote, recognition of these rights in the case at bar was ancillary to the two principal remedies sought: injunctive and compensatory relief. To succeed in their action against the defendant mining companies, the Innu would have to prove the violation of personal or mixed obligations under arts. 976 and 1457 *C.C.Q.* By virtue of arts. 3134 and 3148, para. 1(1) *C.C.Q.*, the Quebec courts thus had jurisdiction to hear the case.

[13] Only Newfoundland and Labrador appealed from this judgment.

(2) Quebec Court of Appeal, 2017 QCCA 1791, [2018] 4 C.N.L.R. 167 (Morissette, Healy and Ruel JJ.A.)

[14] Ruel J.A., writing for the Court of Appeal, affirmed the judgment of the Superior Court. Ruel J.A. agreed that recognition of the Aboriginal rights claimed was ancillary to the Innu's primary claim concerning the mining companies' civil liability. He found the motions judge had not erred in characterizing the action as mixed. For Ruel J.A., the action could not be characterized as a territorial claim against the state and did not concern property located in Newfoundland and Labrador for at least three reasons. First, the Innu had historically stewarded the Nitassinan without regard to the provincial borders that exist today. Second, the rights invoked

by the Innu fell at various points along a spectrum of attachment to the territory and could not be characterized as property rights as these are understood in the civilian tradition. Finally, fundamental concerns of proportionality and access to justice militated against splitting the claims along provincial lines and inhibiting the Innu's ability to set out their arguments in full.

II. Analysis

[15] 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.

A. *Interpreting Book Ten of the C.C.Q.*

[16] Book Ten of the *C.C.Q.* sets out the rules governing private international law in the province. In the spirit of comity, these rules limit the jurisdiction of Quebec authorities to matters closely linked to the province: Quebec, National Assembly, Sous-commission des institutions, "Étude détaillée du projet de loi 125 — Code Civil du Québec", *Journal des débats*, No. 28, 1st Sess., 34th Leg., December 3, 1991, at p. SCI-1124. In considering the connection between a given matter and the province, it is important not to conflate the adjudicative competence of provincial superior courts with the legislative competence of the province: G. D. Watson and F. Au,

“Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*” (2000), 23 *Adv. Q.* 167, at pp. 176 and 178; E. Edinger, “Territorial Limitations on Provincial Powers” (1982), 14 *Ottawa L. Rev.* 57, at p. 63.

[17] In order to interpret the rules of Book Ten, we must begin by examining the provisions set out in the *C.C.Q.*, and then inquire into whether a proposed interpretation is consistent with the underlying principles of comity, order and fairness: *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at para. 23. The second step requires interpreting the rules of Book Ten in light of the imperatives of our constitutional order: para. 51; J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), vol. 1, at p. 1-5. As with any statute, the provisions of the *C.C.Q.* in respect of private international law should be interpreted in a manner consistent with the Constitution: *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 33; *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 14, [2005] 1 S.C.R. 201, at para. 36. Where s. 35 rights are at stake, Book Ten must be interpreted in a manner that respects constitutionally recognized and affirmed Aboriginal rights and treaty rights, and that takes into account access to justice considerations, which are protected by s. 96 courts: *Constitution Act, 1982*, s. 35; *Constitution Act, 1867*, s. 96; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 82; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 36-39.

[18] Title Three of Book Ten governs the international jurisdiction of Quebec authorities. It begins by setting out general rules. Article 3134, the first provision of Chapter I, establishes a residual jurisdictional rule, namely that “[i]n the absence of any special provision, Québec authorities have jurisdiction when the defendant is domiciled in Québec.” The special provisions referred to in art. 3134 are set out in Chapter II, which establishes specific rules of jurisdiction based on the nature of the action in question. Divisions I and II address personal and family actions. Division III governs real and mixed actions. Division III contains only three provisions — one of which sets out the general rule that Quebec authorities have jurisdiction to hear a real action if the property in dispute is situated in Quebec (art. 3152), and two exceptions concerning jurisdiction over successions (art. 3153) and matrimonial regimes (art. 3154). In the case of a mixed action, Quebec authorities must have jurisdiction over both the personal and real aspects of the matter: *CGAO v. Groupe Anderson inc.*, 2017 QCCA 923, at para. 10 (CanLII); Civil Code Revision Office, *Report on the Québec Civil Code*, vol. II, t. 2, *Commentaries* (1978), at p. 989. This properly prevents Quebec courts from arrogating jurisdiction over a matter which would otherwise be beyond their reach merely because the parties have amalgamated multiple claims.

[19] The *C.C.Q.* is silent with respect to the proper analysis for characterizing an action for the purposes of Chapter II. According to the legislative debates, each provision was intended to generally correspond with the law applicable to a given subject matter: *Journal des débats*, at p. SCI-1129. However, the parallels between

the rules governing conflicts of law and conflicts of jurisdiction are imperfect and conflicts of law rules should not be directly transposed onto the rules governing jurisdiction: C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at Nos. 150 and 380; G. Goldstein, “La qualification en droit international privé selon la perspective de l’article 3078 C.c.Q.”, in S. Guillemand, ed., *Mélanges en l’honneur du professeur Alain Prujiner: Études de droit international privé et de droit du commerce international* (2011), 195, at pp. 195-96, fn. 1. Where, as here, the dispute involves rights neither defined in nor directly governed by the *C.C.Q.*, particular caution in transposing those rules is warranted.

[20] In the absence of legislative direction, when characterizing an action, it is the nature of the rights at stake and the conclusions sought that must be considered: see, e.g., *Bern v. Bern*, [1995] R.D.J. 510 (C.A.). The courts in this case characterized the action as “mixed”. They properly appreciated the unique nature of s. 35 rights and, with due caution, considered those rights and the conclusions sought through the appropriate *C.C.Q.* analysis. In our view, the result they reached is justified.

B. *Characterizing Section 35 Rights*

[21] Enshrined in Part II of the *Constitution Act, 1982*, s. 35 rights are a central part of the Canadian constitutional order. Section 35 provides the constitutional framework for both acknowledging the historical fact that Aboriginal peoples lived on the land in distinctive societies prior to European settlement and reconciling that fact with Canadian sovereignty: *R. v. Van der Peet*, [1996] 2 S.C.R.

507, at para. 31. This Court has described s. 35 as a commitment that must be given meaningful content, recognizing both the ancient occupation of land by Aboriginal peoples and the contribution of those peoples to the building of Canada: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1108; *Reference re Secession of Quebec*, at para. 82.

[22] Reconciliation, the fundamental objective of the modern law of Aboriginal rights, engages the honour of the Crown: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at paras. 1 and 4. The duties that flow from the honour of the Crown may vary according to the circumstances in which they arise but, whether we are dealing with the assertion of sovereignty or the resolution of rights or title claims, the honour of the Crown is always at stake: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 16; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 74. Indeed, in some circumstances, this doctrine requires the Crown to respect certain obligations even before s. 35 rights have been conclusively established: *Haida Nation*, at para. 27.

[23] To date, reconciliation and the honour of the Crown have most often been relied upon in the context of Aboriginal and treaty rights infringements. This appeal is an opportunity to consider how these doctrines inform the determination of which court has jurisdiction over a s. 35 claim that straddles multiple provinces.

[24] Although s. 35(1) recognizes and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada”, defining those rights is a task that has fallen largely to the courts. The honour of the Crown requires a generous and purposive interpretation of this provision in furtherance of the objective of reconciliation: *Manitoba Metis Federation Inc.*, at paras. 76-77.

[25] As well, this Court has continually stressed the *sui generis* nature of s. 35 rights, namely the fact that a *sui generis* right is a unique one [TRANSLATION] “which it is impossible to fit into any recognized category”: H. Reid, with S. Reid, *Dictionnaire de droit québécois et canadien* (5th ed. 2015), at p. 607; see also D. Dukelow, *The Dictionary of Canadian Law* (4th ed. 2011), at p. 1256. The unique nature of s. 35 rights flows from both their historical and cultural origins as well as their status as constitutional rights.

[26] In *Van der Peet* — one of the first cases to consider the nature of s. 35 rights in depth — Chief Justice Lamer went to great lengths to stress the unique nature of s. 35 rights:

Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. As academic commentators have noted, aboriginal rights “inhere in the very meaning of aboriginality”, Michael Asch and Patrick Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*” (1991), 29 *Alta. L. Rev.* 498, at p. 502; they are the rights held

by “Indians *qua* Indians”, Brian Slattery, “Understanding Aboriginal Rights” (1987), 66 *Can. Bar Rev.* 727, at p. 776.

The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights. [Emphasis in original; paras. 19-20]

[27] The rights protected by s. 35 range from title to tobacco use and touch all aspects of life from the adoption of children to honouring burial sites of community ancestors: K. Wilkins, *Essentials of Canadian Aboriginal Law* (2018), at p. 195. While many of these rights concern the connection between Aboriginal peoples and the land, this Court has cautioned against “focus[ing] so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights”: *Van der Peet*, at para. 74. Instead, it has encouraged viewing s. 35 rights as existing along a spectrum with more or less intimate connections to the land. When both historic occupation and distinctive cultures are acknowledged as sources of Aboriginal rights, courts better accommodate the diverse histories and realities of Aboriginal societies: see, e.g., B. Slattery, “The Metamorphosis of Aboriginal Title” (2006), 85 *Can. Bar Rev.* 255, at p. 270. Aboriginal title is thus a sub-category of Aboriginal rights: *Van der Peet*, at para. 74.

[28] In the context of this case, the Superior Court previously stated that the recognition of Aboriginal rights is not necessarily a prerequisite to the liability of the mining companies: see *Uashaunnuat (Innus de Uashat et de Mani-Utenam) v. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2014 QCCS 4403, at paras. 33 and 45-46, leave to appeal refused, 2015 QCCA 2, leave to appeal refused, [2015] 3 S.C.R. vi. Indeed, the Innu can make a claim under arts. 976 and 1457 *C.C.Q.* even in the absence of a declaration of Aboriginal rights, just as any other person could. However, given the arguments raised by the Newfoundland and Labrador Crown, the nature of Aboriginal title merits particular attention.

[29] Aboriginal title pre-dates all other interests in land in Canada, arising from the historic occupation of territory by distinct cultures: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 328; *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at pp. 376-78; *Roberts v. Canada*, [1989] 1 S.C.R. 322, at p. 340; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 114. Like Aboriginal rights more generally, Aboriginal title is *sui generis*. Even before *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 72, this Court frequently warned against conflating Aboriginal title with traditional civil or common law property concepts, or even describing title using the classical language of property law: *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at p. 54; *Guerin*, at p. 382; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at pp. 677-78; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R.

344, at paras. 6-7; *Van der Peet*, at para. 115 (dissenting reasons of L'Heureux-Dubé J.); *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at paras. 14 et seq.; *Delgamuukw*, at paras. 111 et seq.; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220, at para. 129 (concurring reasons of LeBel J.); *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 21.

[30] Owing to its origins in the special relationship between Indigenous peoples and the Crown, Aboriginal title has unique characteristics that distinguish it from civil law and common law conceptions of property. Aboriginal title is inherently collective and exists not only for the benefit of the present generation, but also for that of all future generations: *Tsilhqot'in Nation*, at para. 74; see also B. Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015), 71 *S.C.L.R.* (2d) 45, at pp. 45-47. With its aim of benefiting both present *and* future generations, Aboriginal title restricts both the alienability of land and the uses to which land can be put: *Tsilhqot'in Nation*, at para. 74. These features are incompatible with property as it is understood in the civil law and common law: see K. Anker, "Translating *Sui Generis* Aboriginal Rights in the Civilian Imagination", in A. Popovici, L. Smith and R. Tremblay, eds., *Les intraduisibles en droit civil* (2014), 1, at pp. 23-28.

[31] Moreover, Aboriginal perspectives shape the very concept of Aboriginal title, the content of which may vary from one group to another. As such, disputes involving title should not be resolved "by strict reference to intractable real property rules" but rather must also be understood with reference to Aboriginal perspectives:

St. Mary's Indian Band, at para. 15; see also *Delgamuukw*, at para. 112; *Marshall*, at paras. 129-30 (concurring reasons of LeBel J.).

[32] In *Tsilhqot'in Nation*, this Court said that

[t]he characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title “is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts”. [para. 72]

[33] At the same time, the Court recognized 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 use and manage the land. [para. 73]

[34] From the civilian perspective, as it is a *sui generis* right, Aboriginal title is properly characterized as neither a personal right nor a real right nor a combination of the two even though it may appear to have characteristics of both real and personal rights. The Quebec Research Centre of Private & Comparative Law defines personal and real rights as follows:

PERSONAL RIGHT

Right of a patrimonial nature that permits its holder, the *creditor*, to claim the performance of a prestation from another person, the *debtor*.

...

REAL RIGHT

Right of a patrimonial nature that is exercised directly upon property. [Emphasis in original; citations omitted; pp. 230 and 254.]

(*Private Law Dictionary and Bilingual Lexicons: Obligations* (2003), “personal right”, “real right”)

[35] There is no doubt that Aboriginal title is fundamentally concerned with land. And it is tempting to conclude that Aboriginal title is a purely real right, as its name suggests. But to do so would ignore the fact that Aboriginal title is also firmly grounded in the relationships formed by the confluence of prior occupation and the assertion of sovereignty by the Crown: *Tsilhqot'in Nation*, at para. 72. Sovereignty assured the Crown underlying title to all land in the provinces, but the content of that title has *always* been burdened by the pre-existing rights of Aboriginal peoples which preceded those of the provinces: paras. 69-70; *Constitution Act, 1867*, s. 109. The nature of the fiduciary relationship arising from the interplay of these rights, steeped as it is in the history of settlement, is what gives rise to the other obligations flowing from the honour of the Crown that are part and parcel of Aboriginal title. Those obligations are clearly more akin to personal rights.

[36] However, no matter the facial similarities, s. 35 rights are not simply an amalgam of real rights and personal rights connected to Aboriginal peoples. As the term *sui generis* makes clear, s. 35 rights are legally distinct and, indeed, [TRANSLATION] “impossible to fit into any recognized category”: Reid, at p. 607. They are neither real rights nor personal rights as defined in the civil law, but *sui generis* rights. Given the foregoing, s. 35 rights should not be pigeonholed into a category of civil law rights, especially not for the purposes of private international law alone. Rights cannot be characterized differently for different areas of law in civil law. A piecemeal approach, which would, for instance, suggest that a different characterization of s. 35 rights could be used in Book Four (Property) of the *C.C.Q.*, would be, in our view, inappropriate.

C. *Nature of the Relief Sought*

[37] Having examined the nature of s. 35 rights, we now turn to the conclusions sought by the claim.

[38] The Innu seek compensatory and injunctive relief, alleging the mining companies are liable under arts. 976 (no-fault liability for neighbourhood disturbances) and 1457 (fault-based liability) *C.C.Q.* for violations of s. 35 rights.

[39] A helpful examination of these two liability regimes can be found in the landmark decision *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392. In that case, residents of a Quebec City neighbourhood brought a class

action against a cement factory, alleging disturbances caused by dust and noise. In so doing, the class members invoked both arts. 976 and 1457. Justices LeBel and Deschamps, writing for the Court, noted that even when it concerns questions of property, art. 1457 gives rise to relief that is compensatory in nature, flowing from the failure of an alleged wrong-doer to adopt the conduct of a reasonable person: paras. 21-22. They explicitly rejected the proposition that actions brought under art. 976 *C.C.Q.*, concerning abnormal annoyances between neighbours, were “real actions”: para. 81. Instead, they wrote, “the remedy under art. 976 *C.C.Q.* remains first and foremost a claim that a person (and not land) has against another person”: para. 82. Given the nature of the relief sought under arts. 976 and 1457 *C.C.Q.*, it is undisputed that Quebec authorities would normally have jurisdiction to hear the claims against the mining companies because they are domiciled in Quebec.

[40] But to succeed in their claims, the Innu must prove they have some relationship to the land that engaged the duty of the mining companies in either delict or neighbourhood disturbances. They *also* seek declaratory relief, namely declarations of unextinguished Aboriginal rights and title over the parts of the Nitassinan affected by the IOC megaproject. It is this relief that is at the heart of the objections of the Newfoundland and Labrador Crown.

[41] In Quebec civil law, declaratory relief is generally non-coercive, concerning only the existence of rights or obligations: D. Grenier and M. Paré, *La requête en jugement déclaratoire en droit public québécois* (2nd ed. 1999), at p. 1.

Declaratory relief is available with respect to real rights and may be sought in conjunction with monetary or injunctive relief: J.-C. Thivierge, “La requête en jugement déclaratoire en droit immobilier”, in Service de la formation permanente — Barreau du Québec, vol. 103, *Développements récents en droit immobilier* (1998), p. 37; M. Paré, *La requête en jugement déclaratoire* (2001). The Quebec Court of Appeal recently reiterated the four criteria for issuing declaratory relief: (1) a genuine problem exists; (2) the party seeking the declaration has an existing legal interest in resolving the problem; (3) the source of the problem is identified as a written instrument or legislation; and (4) the party’s objective is to have a right, power or obligation determined in order to resolve the problem: *Comité paritaire de l’entretien d’édifices publics de la région de Québec v. Hôtel Forestel Val-d’Or inc.*, 2017 QCCA 250, at para. 34 (CanLII).

[42] Declaratory relief is a narrow remedy, available independently of consequential relief, but granted only where it will have practical utility: *Manitoba Metis Federation Inc.*, at para. 143; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11. Fairness requires that the parties affected by declaratory relief be heard, but courts may issue declarations applicable to parties located in another jurisdiction, resolving any problems of extra-territoriality under the doctrine of *forum non conveniens*: L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 91.

[43] It is important to note, however, that neither of the prior judgments in this case consider whether the declaratory relief sought will or ought to be granted — nor should we. These are discretionary determinations to be made by the court seized with the merits of the case. The issue here concerns only the jurisdiction of the Quebec courts to embark on that inquiry which, as stated above, will be determined by examining the nature of the rights alleged and the conclusions sought through the lens of the rules set out in Book Ten of the *C.C.Q.* Before turning to that analysis, we refer to the interests of access to justice.

D. *Access to Justice*

[44] The motions judge asked the question — [TRANSLATION] “[c]an we say that it is in the interest of justice that essentially the same debate should take place in two jurisdictions that must both apply the same law, when the courts that will hear the cases are both federally appointed?”: para. 107. The answer in this case is no.

[45] As to the suggestion that the approach chosen by the Innu is problematic and may not facilitate access to justice, in our respectful view, this Court should not second-guess a litigant’s strategic choice to sue in one jurisdiction rather than in another. The Innu have argued that separating their claim along provincial borders will result in higher — perhaps prohibitive — costs caused by “piecemeal” advocacy, and inconsistent holdings that will require further resolution in the courts. Both the motions judge and the Court of Appeal acknowledged the potential risk of these outcomes derailing the entire proceedings.

[46] These are compelling access to justice considerations, especially when they are coupled with the pre-existing nature of Aboriginal rights.

[47] As Chief Justice McLachlin affirmed in *Trial Lawyers Association of British Columbia*, s. 96 courts, notably, have a special constitutional role to play in terms of access to justice:

The s. 96 judicial function and the rule of law are inextricably intertwined. As Lamer C.J. stated in *MacMillan Bloedel*, “[i]n the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself” (para. 37). The very rationale for the provision is said to be “the maintenance of the rule of law through the protection of the judicial role”: *Provincial Judges Reference*, at para. 88. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice. [para. 39]

[48] In *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, this Court stated that, “[a]bove all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction”: p. 315 (emphasis added). As the Court noted, this concern over fairness was not new, given that the predecessor judgment of *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, was concerned with “tempering . . . unfairness and inconvenience to litigants in conformity with the changing nature of the world community and, in particular, in light of the Canadian constitutional structure”: p. 321.

[49] These holdings apply with greater force to the context of Indigenous claimants generally and the Innu in this case. Where a claim of Aboriginal rights or title straddles multiple provinces, requiring the claimant to litigate the *same issues* in separate courts multiple times erects gratuitous barriers to potentially valid claims. We agree with the intervener the Tsawout First Nation that this is particularly unjust given that the rights claimed pre-date the imposition of provincial borders on Indigenous peoples. We reiterate that the legal source of Aboriginal rights and title is *not* state recognition, but rather the realities of prior occupation, sovereignty and control: see, e.g., *Delgamuukw*, at para. 114. We do not accept that the later establishment of provincial boundaries should be permitted to deprive or impede the right of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights.

[50] In the specific context of s. 35 claims that straddle multiple provinces, access to justice requires that jurisdictional rules be interpreted flexibly so as not to prevent Aboriginal peoples from asserting their constitutional rights, including their traditional rights to land: see, generally, *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at para. 18; *Trial Lawyers Association of British Columbia*, at paras. 39-40; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at pp. 229-230; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 1 and 23 et seq.

[51] Moreover, the honour of the Crown requires increased attention to minimizing costs and complexity when litigating s. 35 matters and courts should approach proceedings involving the Crown practically and pragmatically in order to effectively resolve these disputes.

[52] Requiring the Innu to bifurcate their claim would undermine the twin constitutional imperatives of access to justice and the honour of the Crown.

E. *Applying the C.C.Q. Framework*

[53] We are unaware of any case other than the case at bar in which a Quebec court has been called upon to characterize the nature of an action involving s. 35 rights for the purposes of Book Ten. Since there is no precedent for determining which category of action corresponds to a claim seeking the recognition of s. 35 rights, it is important to examine the rights at issue and the relief sought through the lens of Book Ten. In our view, the motions judge was right to find that, absent a special provision referring specifically to declarations of s. 35 rights, arts. 3134 and 3148, para. 1(1) *C.C.Q.* establish the jurisdiction of Quebec courts. The Court of Appeal came to the same conclusion, finding that the motions judge “did not err with respect to this issue”: para. 61.

[54] “Personal” and “real” actions are defined as follows in G. Cornu, *Dictionary of the Civil Code* (2014):

[*personal action.*] Action 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); a personal action is, in general, of a movable nature, like the right to claim a debt which the creditor wants paid (ex. action to collect a loan of money); however this action can take on an immovable nature whenever the claim itself is immovable in nature. Ex. the action for the transfer of so many acres of land in a subdivision.

...

[*real action.*] Action, remedy, to have a real right, in rem, acknowledged or protected (right of ownership, servitude, usufruct, mortgage); it is of a movable nature if the real right which is exercised bears on a movable thing. Ex. action to claim back a lost or stolen movable thing; the action is of an immovable nature if the right bears on an immovable. Ex. The action to claim back the ownership of an immovable as in a petitory action. [pp. 21-22]

The original French versions of these two definitions can be found in G. Cornu, ed., *Vocabulaire juridique* (12th ed. 2018), at pp. 27-28. As well, the “mixed” action is defined as follows in the *Vocabulaire juridique*:

[TRANSLATION] [*mixed action.*] Action both to have a real right acknowledged and to have an obligation performed. Ex. action for resolution of a sale brought against a buyer for failure to pay the price; action by an acquirer or a donee seeking to be given possession of an immovable of which the acquirer has become the owner by sale or the donee by gift. [Citation omitted; p. 26.]

The Quebec Court of Appeal endorsed the French versions of these three definitions in *Bern*, at p. 516.

[55] The Attorney General of Newfoundland and Labrador argues that this action “fundamentally relate[s] to . . . lan[d]” and that as such it is a purely real action: A.F., at para. 55. This is an argument we cannot accept.

[56] The claim here falls into the “mixed” category, insofar as the Innu seek both the recognition of a *sui generis* right (a declaration of Aboriginal title) and the performance of various obligations related to failures to respect that right (damages in delict and neighbourhood disturbances). However, it is not a classical mixed action. Unlike the definition of mixed action set out in *Bern*, this action does not involve seeking the acknowledgment of a real right and the performance of obligations. It is rather a mixed action that involves seeking the recognition of *sui generis* rights and the performance of obligations. In other words, it is a mixed action because it has a *sui generis* aspect and a personal aspect.

[57] In order for a Quebec court to have jurisdiction over a classical mixed action, it must have jurisdiction over *both* the personal and real aspects of the matter: *CGAO*, at para. 10; *Report on the Québec Civil Code*, at p. 989. This rule should not be applied in narrow and absolute terms in the context of a non-classical mixed action that involves the recognition of *sui generis* rights and the performance of obligations. In such a context, it is logical that a Quebec court have jurisdiction over both the personal and the *sui generis* aspects of the claim.

[58] With respect to the personal aspects of the claim, actions in delict and neighbourhood disturbances are generally characterized as personal actions:

St. Lawrence Cement Inc., at para. 82. Article 3148 *C.C.Q.* grants Quebec authorities jurisdiction over personal actions of a patrimonial nature where the defendant is domiciled in Quebec. Given that the mining companies are both headquartered in Montréal, there is no dispute that Quebec authorities would normally have jurisdiction over the proceedings against the mining companies pursuant to art. 3148.

[59] With respect to the aspects of the claim that relate to the recognition of a *sui generis* right, such as a s. 35 right, the *C.C.Q.* does not include any special provision to establish the jurisdiction of Quebec authorities in such circumstances. Article 3134 states that “[i]n the absence of any special provision, Québec authorities have jurisdiction when the defendant is domiciled in Québec”. As such, since both mining companies are headquartered in Montréal, Quebec authorities have jurisdiction over both aspects of this non-classical mixed action.

[60] Yet, the Attorney General of Newfoundland and Labrador is of the view that art. 3152 requires Quebec courts to refrain from assuming jurisdiction over *any* action that concerns property outside of Quebec based on the real aspects of the mixed claim. Article 3152 provides that “Québec authorities have jurisdiction to hear a real action if the property in dispute is situated in Québec.” But here, we are faced with the unique situation of a non-classical mixed action that has simply not been contemplated by the *C.C.Q.* Its provisions therefore must be interpreted by taking into account both the purpose of its private international law rules and the special

character of s. 35 rights. A strict reading and application of art. 3152 *C.C.Q.* to this situation is unwarranted.

[61] It is true that the *C.C.Q.* enumerates only two specific exceptions to art. 3152 — those concerning successions (art. 3153) and matrimonial or civil union regimes (art. 3154), but nothing in the *C.C.Q.* *excludes* the possibility of identifying non-classical mixed actions to which art. 3152 *C.C.Q.* does not apply. In the context of the Innu’s claim, arts. 3134 and 3148 *C.C.Q.* are sufficient to ground the jurisdiction of Quebec authorities.

[62] More importantly, objections to Quebec courts assuming jurisdiction over Aboriginal rights and title outside its borders do not withstand scrutiny in light of the unique constitutional context of these claims.

[63] The first of these objections is based on the fact that the law governing property is generally that of the place where the property is situated. Aligning the applicable law with adjudicative jurisdiction was clearly one of the objectives that art. 3152 sought to achieve. The Minister’s comments explicitly state that art. 3152 is meant to correspond to art. 3097 which provides that [TRANSLATION] “real rights and their publication are governed by the law of the place where the property concerned is situated”: Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. II, *Le Code civil du Québec – Un mouvement de société* (1993), at p. 2012. Because s. 92(13) of the *Constitution Act, 1867*, limits Quebec’s *legislative* jurisdiction to property within the province, it is argued, it cannot have *adjudicative* jurisdiction over

property outside of the province. This argument cannot prevail in the s. 35 context because the latter concerns *sui generis* rights, not real rights as conceived in the civilian imagination (see Anker, at pp. 4 and 35-36).

[64] Section 35 of the *Constitution Act, 1982*, operates uniformly across Canada. The 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. This Court has explicitly rejected a province-by-province approach to Aboriginal title and other Aboriginal rights which would “create an awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncrasies of colonization over particular regions of the country”: *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 53. Neither s. 35 nor constitutional law more generally is foreign to Quebec or its courts.

[65] This 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.

[66] The province of Newfoundland and Labrador undoubtedly has a strong and legitimate interest in participating in these proceedings. The courts in these proceedings recognized this: Sup. Ct. reasons, at para. 14; C.A. reasons, at paras. 104 et seq.; *Innu of Uashat and Mani-Utenam v. Iron Ore Company of Canada*, 2016

QCCS 1958, [2017] 4 C.N.L.R. 73, at paras. 63 et seq. On the basis of the record before us, there is nothing that permits this Court to determine what portions of the claim concern privately held land versus Crown land, or even what proportion of the territory at issue is located in each of the respective provinces. In our view, these are not considerations to be taken into account in determining *whether* Quebec courts have jurisdiction over the claim, although they may be considerations that could affect a decision as to whether or not a Quebec court should decline that jurisdiction. While the motions judge refused to decline jurisdiction in this case on the basis of *forum non conveniens*, that issue was, however, not appealed to the Court of Appeal, nor raised before this Court. Under the *C.C.Q.*, this is not an issue that can be raised by the Court on its own motion.

[67] Indeed, because the parties' focus was whether or not Quebec courts had jurisdiction over all aspects of this matter, the motions judge and the Court of Appeal focused their analysis on answering that question. We have concluded, as they did, that Quebec authorities do have jurisdiction over the entire claim. It is true that art. 3135 *C.C.Q.* provides that even where a Quebec authority has jurisdiction over a matter it may, *exceptionally*, and only on an application by a party, decline jurisdiction if it decides that the authorities of another jurisdiction are in a better position to decide the dispute.

[68] As this Court stated in *Spar Aerospace*:

. . . the doctrine of *forum non conveniens*, as codified at art. 3135, serves as an important counterweight to the broad basis for jurisdiction set out in art. 3148. In this way, it is open to the appellants to demonstrate, pursuant to art. 3135, that although there is a link to the Quebec authorities, another forum is, in the interests of justice, better suited to take jurisdiction. [para. 57]

Some of the factors traditionally considered at the *forum non conveniens* stage are:

- 1) [t]he parties' residence, that of witnesses and experts;
- 2) the location of the material evidence;
- 3) the place where the contract was negotiated and executed;
- 4) the existence of proceedings pending between the parties in another jurisdiction;
- 5) the location of Defendant's assets;
- 6) the applicable law;
- 7) advantages conferred upon Plaintiff by its choice of forum, if any;
- 8) the interest of justice;
- 9) the interest of the parties;
- 10) the need to have the judgment recognized in another jurisdiction.
[para. 71]

(see also *Oppenheim forfait GMBH v. Lexus maritime inc*, 1998 CanLII 13001 (Que. C.A.))

[69] In the unique circumstances of s. 35 claims that straddle multiple provinces, factors 6 to 10 may require heightened attention. As the Attorney General of Canada pointed out in its intervention, considerations that may be relevant at this stage could include, for instance, 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. We would also note that courts in both provinces would likely apply the same law, namely constitutional law, to determine whether the Innu have made out their claim of Aboriginal title and rights.

[70] In this case, the motions judge considered a number of these factors, noting that, overall, the application of these factors did not favour declining jurisdiction and that the doctrine of *forum non conveniens* should not be applied: paras. 104-110. But as indicated above, this conclusion was not appealed to the Court of Appeal or to this Court. As a result, there is no basis upon which to disturb this holding.

F. *Crown Immunity*

[71] As in the courts below, the Attorney General of Newfoundland and Labrador raised Crown immunity as a further reason that the action should not be allowed to proceed to the extent that it affects Newfoundland and Labrador. In the Superior Court, the motions judge concluded that the doctrine of Crown immunity was ill-fitting in the context of proceedings involving a s. 35 claim straddling provincial boundaries: para. 115. The Court of Appeal did not resolve this issue, but instead concluded that “interprovincial jurisdictional immunity cannot, at this stage, be an obstacle to the jurisdiction of the Quebec courts over this dispute”: para. 100.

While the Attorney General of Newfoundland and Labrador has raised a potentially live issue in this regard, we agree that it does not need to be resolved at this stage of the proceedings.

[72] As explained above, Quebec courts have jurisdiction in this case to resolve the dispute between the Innu and the mining companies. The Innu seek no relief against the Crown of Newfoundland and Labrador, and they admit that any conclusions in respect of their s. 35 rights will not bind the Crown of Newfoundland and Labrador. In fact, they recognize that they would need to either “negotiate with the government of Newfoundland and Labrador or seize the courts of that province in the context of a [comprehensive] claim”: C.A. reasons, at para. 104. It is therefore unnecessary to address this issue at this stage. This should not be read, however, as precluding the participation of the Crown of Newfoundland and Labrador in the proceedings, if it wishes, in order to assert its interests, invoke its rights and make submissions about the appropriate scope of any declaratory relief (see paras. 106-7).

III. Conclusion

[73] For these reasons, we find that the Superior Court of Quebec has jurisdiction over the claim and we would dismiss the appeal with costs throughout.

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I. Overview

[74] This appeal raises questions that lie at the boundary between private international law and constitutional law. At issue is whether the superior court of a province (the Quebec Superior Court) has jurisdiction to recognize Aboriginal title and other Aboriginal or treaty rights in land that is situated in part in another province (Newfoundland and Labrador) and to hear claims against private parties that cannot succeed absent such recognition. Also at issue is the source of the legal principles governing the jurisdiction of the provincial superior courts in such a context.

[75] We conclude that the jurisdiction of provincial superior courts is governed first and foremost by the rules of private international law, which in Quebec are set out in the *Civil Code of Québec* (“C.C.Q.” or “*Civil Code*”). In some cases, those rules may also be subject to constitutional scrutiny in light of the territorial limits created by the Constitution.

[76] There is no need in this case to decide whether a provincial legislature would have the constitutional authority to confer on the province’s superior court the

jurisdiction to recognize Aboriginal title and other Aboriginal or treaty rights in land situated outside the province, as the Quebec National Assembly has not conferred such jurisdiction on the Quebec Superior Court. Suffice it to say that the Quebec Superior Court's lack of jurisdiction clearly does not violate the Constitution, since it reflects the requirements of interprovincial comity or mutual respect that are an integral part of Canada's federal structure.

[77] We are aware of the practical difficulties faced by Indigenous peoples of Canada who seek to claim Aboriginal rights in a single traditional territory that straddles provincial borders. However, 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.

[78] Finding that the Quebec Superior Court has jurisdiction to issue a declaration recognizing Aboriginal rights in the part of Nitassinan that is situated in Newfoundland and Labrador would have serious consequences for Canadian federalism. Far from promoting access to justice or reconciliation with Indigenous peoples, it would lead to increased litigation and delays, as well as confusion and loss of confidence in our justice system. In these reasons, we will explore some procedural avenues that would allow Aboriginal title claims to be made *effectively* in territories straddling provincial borders and that would be compatible with our constitutional order. We believe that our solution favours proportionality and access to justice better

than the solutions advanced by our colleagues and the Attorney General of Canada (“AGC”).

II. Background

[79] The appellant, the Attorney General of Newfoundland and Labrador (“AGNL”), appeals the decision of the Quebec Court of Appeal affirming a judgment of the Quebec Superior Court, which dismissed his motion to strike allegations dated April 23, 2014: A.R., vol. II, at pp. 90-93. Through his motion, the AGNL sought to strike certain allegations and conclusions set out in a motion to institute proceedings for a permanent injunction, for declaratory conclusions and for damages (A.R., vol. II, at pp. 1-40) dated March 18, 2013, which the respondents the Innu of Uashat and of Mani-Utenam and the Innu of Matimekush-Lac John (collectively “Innu of UM and MLJ” or simply “Innu”) had filed in the Quebec Superior Court.

[80] The Innu of UM and MLJ are two distinct First Nations. For centuries leading to the mid-20th century, they occupied a vast traditional territory, Nitassinan, which encompasses part of the Quebec-Labrador Peninsula: pp. 3 and 5. The traditional activities that make up the way of life of the Innu of UM and MLJ in Nitassinan include hunting, fishing, trapping and gathering: p. 9.

[81] In their motion to institute proceedings, the Innu of UM and MLJ essentially seek to establish extracontractual civil liability on the part of the defendants, the Iron Ore Company of Canada (“IOC”) and the Quebec North Shore

and Labrador Railway Company Inc. (“QNS&L”), the latter being a corporation owned by IOC.

[82] The defendants, IOC and QNS&L, are domiciled in Montréal, Quebec: pp. 6-7. In the mid-20th century, they built a [TRANSLATION] “mining megaproject” in Nitassinan without the consent of the Innu of UM and MLJ: p. 3. The megaproject included the development and operation of iron mines and associated works near Schefferville and Labrador City, a 578 km railroad between Sept-Îles and Schefferville, port facilities in Sept-Îles, and hydroelectric complexes: pp. 3 and 6-7.

[83] The Innu of UM and MLJ claim to hold Aboriginal title and other Aboriginal or treaty¹ rights in *all* of Nitassinan (pp. 10-11 and 30-31), but in particular in the parts of that territory, in Quebec and in Labrador, that are affected by the IOC megaproject (pp. 5, 10-11 and 30-31). They allege that this title and these rights [TRANSLATION] “include ownership and exclusive use” of these parts of Nitassinan and of the natural resources found there: Notice of Constitutional Questions, A.R., vol. II, at p. 113. In their submission, the operations, facilities and activities of the defendants, IOC and QNS&L, in Nitassinan infringe their Aboriginal title and other Aboriginal or treaty rights, and this constitutes a civil fault under

¹ The treaties, instruments and other documents in question, which are listed in para. 30 of the motion to institute proceedings (A.R., vol. II, at p. 7) (as completed by para. 30(c)(iii) of the particulars dated October 31, 2013 that were provided further to an application by the respondents (A.R., vol. II, at p. 48)), include the 1603 Treaty of Alliance, the 1645 Trois-Rivières Peace Treaty and the 1760 Treaty between the Montagnais and the British Crown.

art. 1457 *C.C.Q.*: Motion to Institute Proceedings, A.R., vol. II, at pp. 24-28.² The Innu also raise an argument based on no-fault liability under art. 976 *C.C.Q.* in respect of neighbourhood disturbances: pp. 28-29.

[84] By way of remedy, the Innu of UM and MLJ seek the following:

- (1) [TRANSLATION] “declaratory . . . remedies against the defendants, including declarations that the defendants’ industrial, port and railway facilities belong to the Innu of UM-MLJ or, at the very least, are subject to [Aboriginal] title and [other] Aboriginal [rights]”, and “a declaration that the IOC megaproject, and in particular the defendants’ operations, facilities and activities, infringe [Aboriginal] title, [other] Aboriginal rights and treaty rights” (p. 30);
- (2) a permanent injunction to put a stop to the defendants’ operations, facilities and activities (pp. 28-30);
- (3) an award against the defendants, solidarily, for the payment of \$900 million in damages (p. 28);
- (4) “an accounting for all profits generated by the defendants’ use of Nitassinan” (p. 28) as well as various fiduciary remedies (“constructive trust”, “[c]ommon law trust” and “[f]iduciary trust”) or remedies based on administration of the property of others (art. 1299 *C.C.Q.*) with respect to the defendants’ income, works, facilities and activities (p. 30).

[85] On April 23, 2014, after filing a motion to intervene in the Quebec Superior Court, the AGNL filed a motion to strike allegations in order to have the allegations and conclusions of the Innu’s motion to institute proceedings struck insofar as they related to the parts of Nitassinan situated in Newfoundland and

² They allege that it also violates various provisions of the *Charter of human rights and freedoms*, CQLR, c. C-12, the *Canadian Charter of Rights and Freedoms* and the *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res., UNGAOR, 61st Sess., Supp. No 49, UN Doc A/RES/61/295 (2007): para. 155.

Labrador. The AGNL contended that the land situated in Newfoundland and Labrador to which the Innu's action applied belonged to the Crown in right of Newfoundland and Labrador: Motion to Strike Allegations, A.R., vol. II, at p. 92; A.F., at paras. 48 and 61; transcript, at pp. 24-25. The AGNL's motion to strike allegations is, in reality, a declinatory exception whose basis is that Quebec authorities lack jurisdiction over the [TRANSLATION] "paragraphs of the pleading that concern the territory of Newfoundland and Labrador": *Procureur général de Terre-Neuve-Labrador v. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2017 QCCA 14, at para. 14 (CanLII). Such a declinatory exception must be disposed of on a preliminary basis: A. Rochon, with the collaboration of F. Le Colleter, *Guide des requêtes devant le juge unique de la Cour d'appel: Procédure et pratique* (2013), at p. 77; *Transax Technologies inc. v. Red Baron Corp. Ltd*, 2016 QCCA 1432, at para. 6 (CanLII).

[86] On April 29, 2014, Blanchard J. ordered the Innu to send a notice of constitutional questions in accordance with art. 95 of the former *Code of Civil Procedure*, CQLR, c. C-25 ("f.C.C.P."), to the attorneys general of Quebec, Canada and Newfoundland and Labrador on the basis that [TRANSLATION] "[t]here is . . . no doubt that . . . the allegations and conclusions [of the Innu's motion to institute proceedings] engage the constitutional rights of Canada, the province of Quebec and the province of Newfoundland and Labrador": *Uashaunnuat (Innus de Uashat et de Mani-Utenam) v. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2014

QCCS 2051, at para. 5 (CanLII) (“Sup. Ct. Judgment Ordering Service of a Notice of Constitutional Questions”).

[87] On April 26, 2016, Davis J. authorized the intervention of the AGNL in the Quebec Superior Court: *Innu of Uashat and Mani-Utenam v. Iron Ore Company of Canada*, 2016 QCCS 1958, [2017] 4 C.N.L.R. 73 (“Sup. Ct. Judgment Authorizing the Intervention of the AGNL”).

III. Judicial History

A. *Quebec Superior Court, 2016 QCCS 5133, [2017] 4 C.N.L.R. 89 (Davis J.)*

[88] The Superior Court judge ruled on the AGNL’s motion to strike allegations. In his opinion, a decision on the motion [TRANSLATION] “require[d] identifying the nature of the action instituted by the Innu”: para. 48. In this respect, the judge noted that “the Innu argue that the Aboriginal title that they may have over Nitassinan is equivalent to a real right”: para. 61. The judge also held that “Aboriginal title involves a number of elements of a real right”: para. 62. In his view, the “same conclusion applies” with respect to “Aboriginal rights[, which] resemble usufruct”: paras. 63-64.

[89] However, the judge stated that he could not agree with the AGNL’s position that [TRANSLATION] “the Innu’s claim is a real action”: para. 66. The aspect of the Innu’s action concerning the recognition of their Aboriginal title and their other

Aboriginal or treaty rights “is ancillary to their claim for damages” against IOC and QNS&L: paras. 67-68. The Innu’s action “is much more than a simple real action”, given their allegation that IOC and QNS&L had breached a duty of care: para. 77. In addition to the extracontractual civil liability action based on art. 1457 *C.C.Q.*, the Innu were seeking an award against the defendants on the basis of no-fault liability for neighbourhood disturbances under art. 976 *C.C.Q.*: para. 78. In the judge’s opinion, a “mixed action” was therefore a “much better” characterization of the Innu’s action than a “real action”: para. 79. Quebec authorities have jurisdiction over such a “mixed action” under arts. 3134 and 3148 para. 1(1) *C.C.Q.*: para. 82.

[90] Regarding the *allegations* in the Innu’s action with respect to the facilities of the defendants, IOC and QNS&L, situated in Newfoundland and Labrador, the judge found them to be relevant, including for the purpose of [TRANSLATION] “establishing their rights and title in Quebec”: para. 90. He added that he would be of the same opinion “even if IOC, QNS&L and Newfoundland and Labrador were correct in their claim that the Court does not have jurisdiction to issue orders affecting the defendants’ facilities in Newfoundland and Labrador or recognizing the Aboriginal title or rights of the Innu in Newfoundland and Labrador”: para. 91. Regarding the *conclusions* sought in the Innu’s action, the judge held that, even though it seemed possible “[a]t the procedural level” to order that a conclusion be struck, there was no reason to do so here given that Quebec authorities “ha[ve] the jurisdiction to render a judgment including the conclusions that are requested”: para. 92.

[91] In this regard, the judge noted that a number of the connecting factors set out in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, including the fact that the defendants, IOC and QNS&L, were domiciled in Quebec and carried on their businesses there, confirmed that Quebec authorities had “*prima facie*” jurisdiction: paras. 93-102, also citing art. 3148 *C.C.Q.* Furthermore, he refused to decline jurisdiction over the dispute on the basis of the doctrine of *forum non conveniens* codified in art. 3135 *C.C.Q.*: paras. 102-10. He expressed the opinion that, among other things, it was not in the interests of justice for “the same debate [to] take place in two jurisdictions that must both apply the same law, when the courts that will hear the cases are both federally appointed”: para. 107.

B. *Quebec Court of Appeal, 2017 QCCA 1791, [2018] 4 C.N.L.R. 167 (Morissette, Healy and Ruel JJ.A.)*

[92] The AGNL appealed the Superior Court’s judgment dismissing his motion to strike allegations to the Quebec Court of Appeal. He argued in particular that [TRANSLATION] “the Innu’s action relates to real rights, specifically in land located in Labrador and, consequently, the courts of Quebec have no jurisdiction over the dispute”: para. 45.

[93] The Court of Appeal dismissed the appeal. In essence, the court concluded that it was inappropriate to [TRANSLATION] “classify the Innu’s action as being a strictly real action, [given that] it is not possible to describe Aboriginal rights in terms of traditional property law concepts” and that “[t]hese are *sui generis* rights”:

para. 13; see also paras. 67-69 and 85. Aboriginal title and other Aboriginal or treaty rights “ha[ve] other elements that may be characterized as ‘personal’ between the Aboriginal community in question and the Crown”, namely the Crown’s “fiduciary duty to Aboriginal people” and its “duty to consult and to accommodate Aboriginal communities, which is personal in nature”: paras. 74-77 and 81-82.

[94] The Court of Appeal added that [TRANSLATION] “the recognition of Aboriginal rights is accessory to the Innu’s claim; they seek to establish the civil liability of private companies”: para. 14; see also para. 86. The Innu “also invoke violations of their guaranteed Charter rights as well as neighbourhood disturbances”: para. 93. In the Court of Appeal’s view, the Innu’s action was “primarily personal”, and Quebec authorities “have jurisdiction because the IOC and the QNS&LR have their head offices in Quebec” and because the Innu were alleging an injury suffered in Quebec: paras. 15, 52 and 95, with reference to arts. 3134 and 3148 *C.C.Q.*

[95] Finally, the Court of Appeal stated that it shared the Superior Court judge’s [TRANSLATION] “concerns regarding access to justice and the proportionality of proceedings”: para. 113. The court found that it was not in the interests of justice “to prematurely sever from the Innu’s action any references to Labrador, to the rights the Innu may claim over this territory, or to the activities of the IOC and the QNS&LR”: para. 117.

IV. Issue

[96] Does the Quebec Superior Court have jurisdiction to consider the aspect of the Innu's action seeking the recognition and protection of Aboriginal title and other Aboriginal or treaty rights in land situated outside Quebec?

V. Analysis

[97] At the outset, we disagree with our colleagues' assertion that "[t]he Innu seek no relief against the Crown of Newfoundland and Labrador": para. 72. We agree with the AGNL that the way the relief has been claimed is not determinative; we must look to the substance of the claim to determine what is really being sought. And what is being sought clearly includes a declaration of Aboriginal title over land situated in Newfoundland and Labrador, regardless of the fact that this relief is framed as being "incidental" to the main relief sought. The decisions below recognized that the claim would have clear effects on Newfoundland and Labrador: Sup. Ct. Judgment Ordering Service of a Notice of Constitutional Questions, at para. 5; *Uashaunnuat (Innus de Uashat et de Mani-Utenam) v. Compagnie minière IOC inc. (Iron Ore Company of Canada)*, 2014 QCCS 4403, at para. 19 (CanLII) ("Sup. Ct. Judgment Dismissing IOC and QNS&L's Motion to Dismiss"); Sup. Ct. Judgment Authorizing the Intervention of the AGNL, at paras. 60-64 and 67; Sup. Ct. reasons, at para. 72; C.A. reasons, at para. 104. But even more fundamentally, and as we discuss further below, the Crown is a necessary party in Aboriginal title litigation, because the Crown retains underlying title and consequently owes fiduciary duties to Aboriginal rights holders in relation to the land. The recognition of Aboriginal title over land in

Labrador is clearly relief with a direct impact on the Crown. This is an undisputable fact which cannot just be wished away.

A. *General Comments on the Applicable Analytical Framework*

[98] Before we embark on our analysis of the Quebec authorities' jurisdiction over the Innu's action, a few general comments should be made regarding the framework to be applied by the court in this case.

[99] The intervener the AGC maintains in his factum that the rules of private international law "are inapposite"³ where the existing rights of the Indigenous peoples of Canada — which are recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* — are at issue. He suggests that the appeal instead be decided on the basis of the superior courts' inherent jurisdiction over actions for the recognition and protection of constitutional rights: para. 13. This approach means that a provincial superior court considering an action for the recognition and protection of the existing rights of an Indigenous people that affect another province would first have to determine whether there is a real and substantial connection between the Indigenous people's action as a whole and the province of the superior court in which the claim has been brought, and would then have to consider all the circumstances in order to determine whether it should exercise jurisdiction over the entire dispute: para. 19.

³ Unlike the AGC, the Innu do not dispute that [TRANSLATION] "[t]he rules of private international law set out in the *C.C.Q.* apply in this case": R.F., at para. 4; see also para. 47.

[100] We will discuss the implications of the approach proposed by the AGC later in these reasons. If accepted, this approach would have serious consequences for Canadian federalism and would also entail a serious risk of conflicting judgments, would be incompatible with the principle of Crown immunity and would impede access to justice. But for now, suffice to say that we disagree with the AGC's position, primarily for the two reasons that follow.

(1) Necessary Application of the Rules of Private International Law

[101] Private international law “is designed to resolve conflicts between different jurisdictions, the legal systems or rules of different jurisdictions and decisions of courts of different jurisdictions”; this area of the law “consists of legal principles that apply in situations in which more than one court might claim jurisdiction, to which the law of more than one jurisdiction might apply or in which a court must determine whether it will recognize and enforce a foreign judgment or, in Canada, a judgment from another province”: *Van Breda*, at para. 15; S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2nd ed. 2016), at p. 1. In other words, private international law is the branch of the law that “is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or country”: *Van Breda*, at para. 21.

[102] In the common law provinces, the rules of private international law are found in the procedural rules for service *ex juris*, in the real and substantial connection test developed in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and in the statutes of those provinces. In Quebec, they are found in the *C.C.Q.*, which contains a complete set of rules and principles on the matter (see Book Ten of the *C.C.Q.*, arts. 3076 to 3168): *Van Breda*, at para. 21; *Barer v. Knight Brothers LLC*, 2019 SCC 13, at paras. 131-32, per Brown J.; G. Saumier, “The Recognition of Foreign Judgments in Quebec — The Mirror Crack’d?” (2002), 81 *Can. Bar Rev.* 677, at p. 693.

[103] It is therefore not the inherent jurisdiction of provincial superior courts that sometimes authorizes them to exercise their powers over extraterritorial or transnational operations (i.e., those involving persons or property not situated within a province’s territory), but rather the rules of private international law, which have been established by legislatures or by the courts. A superior court’s inherent jurisdiction is one aspect of its general jurisdiction, which, in principle, it exercises only within *its* territory:

The term “inherent jurisdiction of the court” does not mean the same thing as “the jurisdiction of the court” used without qualification or description: the two terms are not interchangeable, for the “inherent” jurisdiction of the court is only a part or an aspect of its general jurisdiction. The general jurisdiction of the High Court as a superior court of record is, broadly speaking, unrestricted and unlimited in all matters of substantive law, both civil and criminal, except in so far as that has been taken away in unequivocal terms by statutory enactment. The High Court is not subject to supervisory control by any other court except by due process of appeal, and it exercises the full plenitude of judicial power in

all matters concerning the general administration of justice within its area. Its general jurisdiction thus includes the exercise of an inherent jurisdiction. [Emphasis added; footnote omitted.]

(I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23, at pp. 23-24)

[104] The provincial superior courts are the ordinary courts of the land and have inherent jurisdiction over all matters, both federal and provincial, except matters for which a different forum has been specified: *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at p. 311; *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206, at pp. 217-18; *Lac d’Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, at para. 30. In Quebec, as this Court explained in *Three Rivers Boatman Ltd. v. Conseil canadien des relations ouvrières*, [1969] S.C.R. 607, at p. 618, art. 33 of the *Code of Civil Procedure*, CQLR, c. C-25.01 (“*C.C.P.*”) (then art. 31 f.*C.C.P.*), codifies this principle of public law based on the common law.

[105] Title III of the *C.C.P.* concerns — as its name indicates — the jurisdiction of courts. In that title, art. 33 *C.C.P.* is located in Chapter I, “Subject-Matter Jurisdiction of Courts”, and not in Chapter II, “Territorial Jurisdiction of Courts”. The Quebec Superior Court’s *inherent jurisdiction* is therefore an aspect of its subject-matter jurisdiction (or jurisdiction *ratione materiae*), not an aspect of its territorial jurisdiction (or jurisdiction *ratione personae vel loci*):

... subject matter competence refers to the ability of the court to hear the type of dispute in question, considering issues such as whether its

jurisdiction was limited by statute. It deals with criteria that are not connected to the territorial reach of the court's authority and rarely raise issues of private international law. [Emphasis added; footnote omitted.]

(Pitel and Rafferty, at pp. 58-59)

[106] Private international law, on the other hand, is concerned with territorial jurisdiction: J.-G. Castel, *Droit international privé québécois* (1980), at p. 660. The rules of subject-matter jurisdiction play a limited role in private international law. By definition, however, the rules of territorial jurisdiction impose territorial limits on the authority of provincial superior courts to exercise their subject-matter jurisdiction, including their inherent powers. In Quebec, for example, although “procedural law recognizes the courts’ inherent powers to deal with situations not provided for in the law or the rules of practice”, the fact remains that “civil procedure is subject to the general principles found in the *Civil Code of Québec*”, including the rules of private international law set out in Book Ten: *Lac d’Amiante*, at paras. 37 and 40; arts. 25 and 49 *C.C.P.*

[107] Provincial superior courts inherited their “inherent jurisdiction” from the English royal courts of justice, of which they are direct descendants: T. A. Cromwell, “Aspects of Constitutional Judicial Review in Canada” (1995), 46 *S.C. L. Rev.* 1027, at pp. 1030-31, quoted in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 32. But those courts do not have any *inherent jurisdiction* to determine proprietary or possessory rights in immovable property situated abroad (as a result of the “foreign immovable rule” in the common law jurisdictions and of art. 3152 *C.C.Q.* in Quebec); in fact, they have no jurisdiction whatsoever to rule on the

existence of such rights (Pitel and Rafferty, at pp. 53 and 330-31; A. Briggs, *The Conflict of Laws* (3rd ed. 2013), at p. 50; Castel, at p. 660).

[108] Nor do those courts have inherent jurisdiction to authorize service of pleadings *ex juris* (i.e., out of their jurisdiction): see, on this point, *Abela v. Baadarani*, [2013] UKSC 44, [2013] 4 All E.R. 119, at para. 45. Rather, the power to do so was conferred on them by statute, that is, by the *Common Law Procedure Act, 1852* (U.K.), 15 & 16 Vict., c. 76: J. Swan, “The Canadian Constitution, Federalism and the Conflict of Laws” (1985), 63 *Can. Bar Rev.* 271, at p. 294; see also Pitel and Rafferty, at p. 54; E. Edinger, “Territorial Limitations on Provincial Powers” (1982), 14 *Ottawa L. Rev.* 57, at p. 66.

[109] There is no reason to think that the situation in Quebec is any different, given that there *too*, legislation is the primary source of the rules of private international law: Castel, at p. 24; *The Scottish Metropolitan Assurance Company Limited v. Graves*, [1955] C.S. 88.

[110] Our comments on this point are consistent with this Court’s decision in *Hunt*. In that case, the Court held that a Quebec statute whose “purpose [was] to impede successful litigation or prosecution in other jurisdictions” than Quebec was constitutionally inapplicable in British Columbia: p. 327. At issue was whether the British Columbia Supreme Court had jurisdiction to rule on the constitutionality of the Quebec statute. In finding that it did have such jurisdiction, this Court relied, not on s. 52(1) of the *Constitution Act, 1982*, which “is silent on the jurisdictional point

per se” (p. 313), but rather on the *inherent jurisdiction* and *general jurisdiction* of the provincial superior courts, that is, their *subject-matter* jurisdiction, and stressed that such jurisdiction “must include a determination of whether the laws sought to be applied are constitutionally valid” (p. 312 (emphasis added); see also p. 313).

[111] *Hunt* therefore did not concern the British Columbia Supreme Court’s *territorial* jurisdiction over the dispute and the parties, which had been definitively confirmed in related legal proceedings: pp. 297 and 315-16. In private international law terms, *Hunt* actually concerned choice of law rather than the jurisdiction of the British Columbia Supreme Court. The dispute was properly before that court, which should normally have applied its *own* rules of procedure regarding discovery (and in particular r. 2(5) of the British Columbia *Supreme Court Rules*, B.C. Reg. 221/90). However, the Quebec defendants had raised, as a “lawful excuse” for failing to comply with the rule in question, a Quebec statute that prohibited the removal from Quebec of documents of business concerns that were required in judicial processes outside that province: p. 296. This Court stressed “the right of any superior court to consider and make findings of fact respecting the law of another jurisdiction for the purposes of litigation before it”: p. 308. The Quebec statute was “a material fact in relation to the public policy of British Columbia”: p. 308.

[112] We note that Quebec’s rules of private international law also exclude the application of “[t]he provisions of the law of a foreign State . . . if their application would be manifestly inconsistent with public order as understood in international

relations”: art. 3081 *C.C.Q.* We would add that it has long been established that a party who argues in the courts of one province for the *direct* application of a law of another province “will invariably be met with refusal, on the ground that if such operation was intended by the legislating province then the statute is to that extent *ultra vires*”, given that “[a] direct application of a foreign rule is, of course, a breach of the territoriality principle and naturally provokes outbursts from courts as to the limits of the legislative jurisdiction of the other province”: Edinger, at p. 67.

[113] In short, it is the rules of private international law — not the inherent jurisdiction of provincial superior courts — that sometimes authorize those courts to exercise their powers with respect to persons or property not situated within the province’s territory. It is therefore not possible to disregard these rules and rely solely on an inherent jurisdiction that is, in principle, exercisable only within the province. The rules of private international law are of a different, legislative nature and confer authority. In other words, only these rules can authorize the extraterritorial exercise of a power that otherwise is limited to a single territory. The rules of private international law must of course themselves be consistent with the territorial limits created by the Constitution: *Van Breda*, at paras. 21 and 34; J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), vol. 1, at p. 1-5; *Dupont v. Taronga Holdings Ltd.*, [1987] R.J.Q. 124 (Sup. Ct.), at p. 127. This is the subject to which we now turn.

(2) Constitutional Territorial Limits

[114] As the AGC points out in his factum, the existing Aboriginal and treaty rights of the Indigenous peoples of Canada are recognized and affirmed by the Constitution. However, Canada also has a “constitutional framework which limits the external reach of provincial laws and of a province’s courts”: *Van Breda*, at para. 21. And as this Court has already recognized, the Constitution assigns powers to the provinces but limits the exercise of those powers to each province’s territory: para. 21. These territorial restrictions created by the Constitution are inherent in the Canadian federation:

. . . in a federal system it is obvious that a province, whose government is elected by and responsible to only those people within its territory, should not have extensive powers outside its territory where other provincial governments have a better claim to govern. It is not surprising to find, therefore, that the Constitution Act, 1867 couches provincial legislative power in terms which rather plainly impose a territorial limitation on the scope of the power. The sections allocating power to the provincial Legislatures, namely, ss. 92, 92A, 93 and 95, open with the words “In each province”; and each class of subjects listed in s. 92 as within provincial legislative power contains the phrase “in the province” or some other indication of a territorial limitation. [Emphasis added; footnote omitted.]

(P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at p. 13-4)

[115] The territorial limits on the jurisdiction of provincial authorities “reflect the requirements of order and fairness underlying Canadian federal arrangements”: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 27. These constitutional limits affect provincial *legislative* jurisdiction, but also, as a consequence, provincial *adjudicative* jurisdiction. As this Court stated in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1065, “the courts would appear to

be limited in exercising their powers to the same extent as the provincial legislatures” (see also Swan, at p. 309). Under s. 92(14) of the *Constitution Act, 1867*, provincial legislative authority is limited to “The Administration of Justice in the Province”. It follows that the jurisdiction of a provincial superior court constituted under this provision is also necessarily limited to the province’s territory: see, in this regard, *McGuire v. McGuire*, [1953] O.R. 328 (C.A.), at p. 334; *Re Vantel Broadcasting Co. Ltd. and Canada Labour Relations Board* (1962), 35 D.L.R. (2d) 620 (B.C.C.A.), at p. 624.

[116] Furthermore, the powers flowing from the rules of private international law are based on the provinces’ legislative jurisdiction under s. 92(13) (“Property and Civil Rights”) and s. 92(14) (“The Administration of Justice”) of the *Constitution Act, 1867*, and are *expressly* limited by the words “in the Province”: G. D. Watson and F. Au, “Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard” (2000), 23 *Adv. Q.* 167, at pp. 175-76.

(3) Conclusion on General Comments

[117] In the above discussion, we have laid down the applicable analytical framework. In deciding the appeal, the first question to be asked is whether the rules of private international law in Book Ten of the *C.C.Q.* give the Quebec Superior Court jurisdiction over an application for the recognition or protection of Aboriginal title or other Aboriginal or treaty rights in land situated outside Quebec. If the answer is no, no further analysis is required, since a provincial superior court does not have

inherent jurisdiction over immovable property situated outside the province. If the answer is yes, however, it must then be asked whether such a rule of private international law that gives the Quebec Superior Court jurisdiction over immovable property situated outside Quebec is consistent with the Constitution: R. E. Sullivan, “Interpreting the Territorial Limitations on the Provinces” (1985), 7 *S.C.L.R.* 511, at p. 512.

[118] This analytical framework is not altered by the fact that Aboriginal rights are a public law concept (B. Slattery, “The Constitutional Dimensions of Aboriginal Title” (2015), 71 *S.C.L.R.* (2d) 45, at p. 47) or that they fall under federal common law (*Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 (“*Calder* (1973)”); *Roberts v. Canada*, [1989] 1 S.C.R. 322, at p. 340; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 28).

[119] First, the *C.C.Q.* is not limited to “private law” rules; rather, it is the “*jus commune*” of Quebec, as is expressly stated in its preliminary provision. Therefore, in the matters to which it relates — including the jurisdiction of Quebec authorities, which is the subject of Title Three of Book Ten — the *C.C.Q.* encompasses certain aspects of public law: *Prud’homme v. Prud’homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at paras. 28-29; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at paras. 15-21; A.-F. Bisson, “La Disposition préliminaire du *Code civil du Québec*” (1999), 44 *McGill L.J.* 539; D. Lemieux, “L’impact du *Code civil du Québec* en droit administratif” (1994), 15 *Admin. L.R.* (2d) 275, at pp. 295-97; J.-M. Brisson, “Le

Code civil, droit commun?”, in *Le nouveau Code civil: interprétation et application* — *Les journées Maximilien-Caron 1992* (1993), 292, at pp. 312-14. Moreover, [TRANSLATION] “[the] boundary between public law and private law . . . is much less clear in Canada and in Quebec than it is in continental Europe”, and “it is quite easy to accept that this type of mixed relationship [at the boundary between public law and private law] is in principle covered by private international law”: G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at No. 6.

[120] Second, contrary to the suggestion of the Superior Court judge in this case (at para. 107) and to that of our colleagues (at para. 63), the jurisdiction of the provincial superior courts cannot be expanded simply because a case raises issues of federal or constitutional law.

[121] In *Vantel*, at issue was whether a provincial superior court could exercise its power to review a decision of a federal board, the Canada Labour Relations Board, which had certified three unions as bargaining agents for the employees of Vantel Broadcasting Co. Ltd. Vantel had applied to the British Columbia Supreme Court for a writ of *certiorari* in order to have the certificates of certification quashed. The application judge had concluded that the British Columbia Supreme Court had no jurisdiction over the Board because its head office was in Ontario and not in British Columbia. However, Vantel and all its employees were residents of British Columbia, and the British Columbia Court of Appeal allowed the appeal on that basis. In support of its conclusion that the British Columbia Supreme Court had jurisdiction over the

dispute and the parties, the Court of Appeal stressed that the Board's decision affected *only* rights that existed in *British Columbia*: pp. 626-28, per Davey J.A., and pp. 634-36, per Sheppard J.A.

[122] In the case at bar, it cannot be argued that the dispute concerns *only* real rights in immovable property situated in *Quebec*, given that the Innu are claiming, by way of a declaratory judgment, Aboriginal title and other Aboriginal or treaty rights in [TRANSLATION] “[the] parts of Nitassinan that are affected by the IOC megaproject”, including the “parts” situated in Newfoundland and Labrador: Notice of Constitutional Questions, A.R., vol. II, at p. 113. The recognition of Aboriginal title by way of a declaratory judgment is binding on governments and therefore necessarily affects the rights and powers of the governments in question, including those of the provincial government:

The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers. The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I Charter rights, are held against government — they operate to prohibit certain types of regulation which governments could otherwise impose. These limits have nothing to do with whether something lies at the core of the federal government's powers. [Emphasis added; emphasis in original deleted.]

(*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 142)

[123] Moreover, Aboriginal title “is a burden on the Crown’s underlying title”: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 145. Section 109 of the *Constitution Act, 1867* vests this underlying title in the provincial Crowns and qualifies provincial ownership by making it subject to “any Interest other than that of the Province”. Aboriginal title is one such interest: see also Sch., s. 37 of the *British North America Act, 1949* (U.K.), 12, 13 & 14 Geo. 6, c. 22 (reprinted as *Newfoundland Act* in R.S.C. 1985, App. II, No. 32); *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 380; *Delgamuukw*, at para. 175; *St. Catherine’s Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 (P.C.); *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 59 (“*Haida Nation*”). The content of the provincial Crown’s underlying title is thus “what is left when Aboriginal title is subtracted from it” (*Tsilhqot’in Nation*, at para. 70) and can be described as consisting of “a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*” (para. 71).

[124] In addition, the notice of constitutional questions sent by the Innu to the attorneys general of Canada, Quebec and Newfoundland and Labrador includes a list of 27 statutes or regulations of the province of Newfoundland and Labrador whose constitutional validity or applicability they are challenging: A.R., vol. II, at pp. 115-16. And it is expressly stated in that notice that the Crown in right of

Newfoundland and Labrador has violated its constitutional and fiduciary duties as well as its duty to consult and accommodate the Innu: p. 125.

[125] In short, this is not a case in which the jurisdiction of the Quebec Superior Court over the entire dispute is self-evident because *only* rights that exist *in Quebec* would be at issue. On the contrary, there is a clear external element. Nor is it a case in which the Quebec Superior Court would have to exercise its inherent jurisdiction in order to determine whether the statutes and regulations of Newfoundland and Labrador being challenged by the Innu are constitutional even though its territorial jurisdiction over the entire dispute has been definitively confirmed. In that respect, none of the conditions from *Hunt* are met in this case: (1) it cannot be said that the issue of the constitutionality of these statutes and regulations of Newfoundland and Labrador has arisen only incidentally in the ordinary course of litigation; (2) these statutes and regulations of Newfoundland and Labrador do not affect any real interest in Quebec that would ground the jurisdiction of the Quebec Superior Court; and (3) the Innu are not arguing that there is no reasonable likelihood of the constitutionality of these statutes and regulations of Newfoundland and Labrador being challenged otherwise (*Hunt*, at pp. 309-10, 313 and 315; *Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, 2017 QCCA 756, at para. 18 (CanLII); Walker, at p. 2-4). For these reasons, the Quebec Superior Court has jurisdiction over the entire dispute — including the issue of the existence of Aboriginal title and other Aboriginal or treaty rights in land situated outside Quebec — only if the rules of

private international law give it that jurisdiction, and only if those rules can survive constitutional scrutiny.

B. *Jurisdiction of Quebec Authorities*

[126] The general criterion for jurisdiction in private international law is the defendant's domicile (art. 3134 *C.C.Q.*). However, as that provision expressly indicates, the general rule it states is subsidiary in nature: the rule applies only "[i]n the absence of any special provision". The "special provisions" in the *Civil Code* that displace this subsidiary rule govern the international jurisdiction of Quebec authorities over personal actions of an extrapatrimonial and family nature (arts. 3141 to 3147 *C.C.Q.*), personal actions of a patrimonial nature (arts. 3148 to 3151 *C.C.Q.*) and real or mixed actions (arts. 3152 to 3154 *C.C.Q.*). It is therefore necessary to characterize the Innu's action in order to determine the international jurisdiction of Quebec authorities in this case. Is it a *personal action of an extrapatrimonial and family nature*, a *personal action of a patrimonial nature*, or a *real or mixed action*?

(1) Characterization of the Innu's Action

(a) "*Personal Action*", "*Real Action*" and "*Mixed Action*" Concepts

[127] Private international law must be interpreted on the basis of the *lex fori*, because it is necessary to [TRANSLATION] "favou[r], as a matter of principle, the application of domestic civil law characterizations in private international law":

C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at No. 412; art. 3078 para. 1 *C.C.Q.*; *Gauthier v. Bergeron*, [1973] C.A. 77, at p. 79; see also G. Goldstein and E. Groffier, *Droit international privé*, vol. II, *Règles spécifiques* (2003), at No. 311; G. Goldstein, *Droit international privé*, vol. 2, *Compétence internationale des autorités québécoises et effets des décisions étrangères (Art. 3134 à 3168 C.C.Q.)* (2012), at p. 273. The personal action, real action and mixed action concepts referred to in the special provisions of Title Three of Book Ten of the *C.C.Q.* should therefore be defined on the basis of Quebec law: Emanuelli, at No. 412.

[128] In civil law, a “real action” is an “[a]ction, remedy, to have a real right, in rem, acknowledged or protected (right of ownership, servitude, usufruct, mortgage); it is of a movable nature if the real right which is exercised bears on a movable thing [and] of an immovable nature if the right bears on an immovable. Ex. The action to claim back the ownership of an immovable as in a petitory action”: see *Bern v. Bern*, [1995] R.D.J. 510 (C.A.), at p. 516 (emphasis added), citing G. Cornu, ed., *Vocabulaire juridique* (4th ed. 1994), at p. 21, “*action réelle*” (real action) (English translation taken from G. Cornu, ed., *Dictionary of the Civil Code* (2014), at p. 22); see also H. Reid, with the collaboration of S. Reid, *Dictionnaire de droit québécois et canadien* (5th ed. 2015), at p. 27, “*action réelle*” (real action); *Private Law Dictionary and Bilingual Lexicons* (2nd ed. 1991), at p. 359, “real action”.

[129] The concept of “real action” can be contrasted with that of “personal action”, which can be defined as follows:

Action 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); a personal action is, in general, of a movable nature, like the right to claim a debt which the creditor wants paid (ex. action to collect a loan of money); however this action can take on an immovable nature whenever the claim itself is immovable in nature. Ex. the action for the transfer of so many acres of land in a subdivision. [Emphasis added.]

(See Bern, at p. 516, citing Cornu, *Vocabulaire juridique*, at p. 21, “*action personnelle*” (personal action) (English translation taken from Cornu, *Dictionary of the Civil Code*, at p. 21); see also Reid, at p. 26, “*action personnelle*” (personal action); *Private Law Dictionary and Bilingual Lexicons*, at p. 319, “personal action”.)

[130] Finally, a “mixed action” is an [TRANSLATION] “[a]ction both to have a real right acknowledged and to have an obligation performed. Ex. action for resolution of a sale brought against a buyer for failure to pay the price; action by an acquirer or a donee seeking to be given possession of an immovable of which the acquirer has become the owner by sale or the donee by gift”: Bern, at p. 516, citing Cornu, *Vocabulaire juridique*, at p. 20, “*action mixte*” (mixed action); see also Reid, at p. 25, “*action mixte*” (mixed action); *Private Law Dictionary and Bilingual Lexicons*, at p. 273, “mixed action”; R. Savoie and L.-P. Taschereau, *Procédure civile*, vol. I, *Introduction, Théorie générale, Organisation judiciaire, Action en justice* (1973), at p. 70. There are two [TRANSLATION] “traditional” categories of mixed actions: “actions for the performance of a juridical act that created or transferred a real right while also giving rise to a claim” and “actions for the

resolution, review or annulment of an act transferring or creating a real right” (Goldstein and Groffier (1998), at No. 151, citing H. Reid, with the collaboration of C. Carrier and L. Fontaine, *Code de procédure civile du Québec: Complément jurisprudence et doctrine* (4th ed. 1988), at p. 85; see also Savoie and Taschereau, at pp. 71-72). Put simply, [TRANSLATION] “[w]hether an action is classified as real or personal depends on the rights sought to be asserted; the action is mixed where both real rights and personal rights are sought to be asserted”: *Domaine de l’Isle aux Oyes Inc. v. D’Aragon*, [1984] R.D.J. 171 (C.A.), at p. 173; see also A.-F. Debruche, *Équité du juge et territoires du droit privé* (2008), at p. 37.

[131] In this case, the AGNL is not challenging the jurisdiction of Quebec authorities over the *entire* dispute; he is challenging *only* their jurisdiction to consider the aspect of the Innu’s action whose purpose, according to him, is to obtain the recognition or protection of Aboriginal title or other Aboriginal or treaty rights in land situated *outside* Quebec: A.F., at para. 60. He argues that this aspect of the Innu’s action is “real” because Aboriginal title and other Aboriginal or treaty rights are “real rights” for the purposes of private international law. Quebec authorities therefore lack jurisdiction under art. 3152 *C.C.Q.*, since the property in dispute is not situated in Quebec: paras. 68-85.

[132] The Innu acknowledge that Aboriginal title is an interest in land, [TRANSLATION] “but not a real right for the purposes of the classification of property according to the rules of private international law”: R.F., at para. 32. They argue that

other Aboriginal or treaty rights are “activity rights” (para. 112) without a “specific connection with the land” (para. 111 (emphasis deleted)). They characterize their action as a personal action because, they submit, it is simply an extracontractual civil liability action brought against private corporations, IOC and QNS&L: paras. 66 and 79. It is therefore not a real action: paras. 120-29. Quebec authorities would therefore have jurisdiction under arts. 3134 and 3148 para. 1(1) and (3) *C.C.Q.*, since the defendants are domiciled in Quebec and injury has been suffered there. The Innu emphasize the *sui generis* nature of Aboriginal rights, which, they argue, are “unclassifiable” on the basis of traditional property law concepts: paras. 101-5.

[133] This Court has in fact recognized the *sui generis* nature of Aboriginal rights: see, for example, *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1112. Aboriginal title is described as “*sui generis*” particularly “in order to distinguish it from ‘normal’ proprietary interests”, but also because “its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems”: *Delgamuukw*, at para. 112 (emphasis added). The law of Aboriginal rights is “neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities”: *Van der Peet*, at para. 42, citing B. Slattery, “The Legal Basis of Aboriginal Title”, in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (1992), 113, at pp. 120-21. It follows that Aboriginal title is a *sui generis* interest that cannot “be described with reference to traditional property law concepts”: *Delgamuukw*, at para. 190, per La Forest J.; see also

Tsilhqot'in Nation, at para. 72. In this area, the terminology drawn from general property law is, in other words, “somewhat inappropriate”: *Guerin*, at p. 382, per Dickson J. (as he then was).

[134] However, classification problems such as this are common in private international law given that this area of the law is an essentially national one yet its purpose is specifically to resolve conflicts of law or of jurisdiction that arise when a dispute transcends different legal systems: Goldstein and Groffier (1998), at No. 58.

[135] In the case at bar, Book Ten of the *C.C.Q.* and its Title Three, which defines the international jurisdiction of Quebec authorities, have their basis in the civil law, but the aspect of the Innu’s action whose purpose, according to the AGNL, is to obtain the recognition and protection of Aboriginal title and other Aboriginal or treaty rights, is grounded in federal common law, as this Court has previously noted: *Calder* (1973); *Roberts*, at p. 340; *Van der Peet*, at para. 28. Aboriginal and treaty rights are thus an institution that is *absent* from the civil law: K. Anker, “Translating *Sui Generis* Aboriginal Rights in the Civilian Imagination”, in A. Popovici, L. Smith and R. Tremblay, eds., *Les intraduisibles en droit civil* (2014), at p. 4.

[136] How is such a classification problem to be resolved? In our view, we must [TRANSLATION] “consider our rules to be the species of a genus that can include other species”: H. Batiffol and P. Lagarde, *Droit international privé* (7th ed. 1981), vol. 1, at No. 297. In other words, [TRANSLATION] “the characterizations that exist in domestic civil law should not necessarily be adopted in private international law”:

H. P. Glenn, “Droit international privé”, in *La réforme du Code civil*, vol. 3, *Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires* (1993), 669, at p. 676. Where a domestic institution is [TRANSLATION] “ill-suited to a foreign law institution, which is too different from the corresponding institution in the forum or even completely unknown” (Goldstein and Groffier (1998), at No. 61), it is sufficient if the *foreign* institution is *analogous* to or *resembles* a domestic one:

[TRANSLATION] Characterizing the legal question therefore means finding, in the claim made in the case (or the “minor” premise of the syllogism), the *abstract* sort of questions making up the connecting category of the conflict rule (or the “major” premise of the syllogism). This abstraction in formulating a category is necessary in order for the category to encompass a large number of claims, based on any legal system but having an analogous “nature” or, more accurately, function, which, for this reason, the maker of the conflict rule believes must be attached to the same connecting factor. This is why the expressions used to define these connecting categories — “matrimonial regime”, “marriage”, “effects of marriage”, etc. — derive from domestic law but only resemble them. In reality, they describe analogous types of domestic relationships to which certain rules of the forum normally apply, but which, in the particular case, could equally be subject to foreign rules. Given the purpose of the conflict rules, it is therefore not necessary to adhere to the domestic definitions of concepts used to define the connecting categories of private international law. [Emphasis added; footnote omitted; No. 59.]

[137] The question that arises here is therefore the following: which domestic civil law institution do Aboriginal title and other Aboriginal or treaty rights *resemble*, or are they *analogous* to? To answer this question and to [TRANSLATION] “determine whether the subject to be classified fits into a particular category”, “[i]t remains necessary . . . to analyze its elements [and] to understand its structure in order to

reach a conclusion”: Batiffol and Lagarde, at No. 294. In other words, in order to characterize the aspect of the Innu’s action in respect of which the AGNL is challenging the Quebec authorities’ jurisdiction — that is, the aspect whose purpose is to obtain the recognition and protection of Aboriginal title and other Aboriginal or treaty rights — it is necessary to consider the nature of Aboriginal title and other Aboriginal or treaty rights in greater detail. For this purpose, federal common law may, of course, be taken into account: art. 3078 para. 2 *C.C.Q.*

[138] With all due respect, our colleagues are mistaken in characterizing this approach as “piecemeal”: para. 36. The goal is not to change the nature of the rights of Indigenous peoples; quite the contrary, like our colleagues, we recognize the *sui generis* nature of Aboriginal rights, and we do not, as they imply, maintain that such rights are an “amalgam of real rights and personal rights”: para. 35. Rather, we recognize that it is inherent in the nature of private international law to be confronted with institutions that are unknown to it. That is why these rules must be approached with some flexibility so as to include institutions that, although legally distinct, are analogous to the categories recognized by the civil law.

(b) *Characterization of Aboriginal Title and Other Aboriginal or Treaty Rights for the Purposes of Private International Law*

[139] In the civil law, real rights are (1) rights *in* property, and (2) as a result, enforceable *erga omnes* — that is, against the whole world: [TRANSLATION] “[r]eal rights are those which, because of the very fact that they create an immediate and

direct relationship between a thing and the person who has more or less complete power over it, are exercisable not only against a specific person, but in relation to and against the whole world” (*Domaine de l’Isle aux Oyes Inc.*, at p. 173, citing C. Aubry and C. Rau, *Cours de droit civil français: D’après la méthode de Zachariae* (5th ed. 1897), vol. 2, at p. 72; see also Cornu, *Dictionary of the Civil Code*, at p. 483, “*droit réel*” (real right); Reid, at p. 233, “*droit réel*” (real right); *Private Law Dictionary and Bilingual Lexicons: Property* (2012), at pp. 158-59, “real right”; P.-C. Lafond, *Précis de droit des biens* (2nd ed. 2007), at p. 173; D.-C. Lamontagne, *Biens et propriété* (8th ed. 2018), at p. 65; S. Normand, *Introduction au droit des biens* (2nd ed. 2014), at p. 38. A. Montpetit and G. Taillefer define a real right as [TRANSLATION] “a right enforceable against the whole world that gives a person a direct and immediate legal power over a specific thing”: *Traité de droit civil du Québec*, vol. 3, *Les biens, la propriété, l’usufruit, l’usage, l’habitation, les servitudes réelles, l’emphytéose* (1945), at p. 17. The main real rights are the right of ownership and its dismemberments: arts. 947 and 1119 *C.C.Q.*

[140] In our opinion, Aboriginal title and other Aboriginal or treaty rights are “real rights” for the purposes of private international law, which is to say that they *resemble* or are at least *analogous* to the domestic institution of real rights.

(i) Aboriginal Title

[141] Aboriginal title confers “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 pro-actively use and manage the land”: *Tsilhqot’in Nation*, at para. 73 (emphasis added); see also *Delgamuukw*, at para. 117 (“aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures” (emphasis added)). In other words, “aboriginal title confers . . . the right to the land itself”: *Delgamuukw*, at para. 138 (emphasis added). It is “a beneficial interest in the land”, and “the title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development”: *Tsilhqot’in Nation*, at para. 70 (emphasis added).

[142] In the instant case, the Innu’s action is based in large part on the allegation of an infringement by the defendants, IOC and QNS&L, of the Aboriginal title that the Innu believe they hold in all of Nitassinan, but in particular in the parts of Nitassinan that are affected by the IOC megaproject:

[TRANSLATION] The Innu of UM-MLJ are asserting Aboriginal rights, including Indian title, and existing treaty rights in and to all of Nitassinan, including with respect to the iron ore and other natural resources found there and with respect to everything owned or used there by the defendants. The Innu of UM-MLJ have never surrendered or otherwise lost these rights. Their Aboriginal rights, which predate contact with the Europeans, still exist and are recognized by the common law. These Aboriginal rights and their treaty rights are also constitutionally protected. In addition, all of these rights cannot be prescribed, are not objects of commerce, are non-transferable and are inappropriable without the consent of the Innu of UM-MLJ.

The Innu of UM-MLJ are asserting, in particular, Indian title with respect to all sites affected by IOC’s mining projects, including those

situated in the part of Nitassinan covered by the areas of Schefferville and Labrador City referred to in paragraphs 40, 41, 59 to 64, 87, 88, 92, 95 and 96, with respect to the bed of the defendants' rail network described in paragraphs 33, 42, 59, 68 and 73, with respect to the land affected by the Menihek and Sainte-Marguerite 2 hydroelectric complexes described in paragraphs 59, 62, 63, 85 and 86, and with respect to the land situated in the Sept-Îles region on which the defendants have built their port, railway and industrial facilities described in paragraphs 59 and 78 to 84 over an area of more than 11 square kilometres. This Sept-Îles region is also called the "Baie des Sept-Îles region". [Emphasis added.]

(Motion to Institute Proceedings, A.R., vol. II, at pp. 10-11)

[143] The terms "Aboriginal title" and "Indian title" are synonyms; both refer to the concept of a "[s]ui generis right in land that originates from the exclusive occupation and use of a specified territory by an aboriginal group over which the group has a native historic attachment": *Private Law Dictionary and Bilingual Lexicons: Property*, at p. 2, "aboriginal title" (emphasis added).

[144] The Canadian jurisprudence on Aboriginal title began with the Privy Council's decision in *St. Catherine's Milling*, in which Aboriginal title was described as a "personal and usufructuary right": p. 54. The term "usufructuary" was undoubtedly not used in reference to the usufruct of the civil law, which *is* a real right (and not a personal one): arts. 1119 and 1120 *C.C.Q.*; see, in this regard, M. Morin, "La coexistence des systèmes de droit autochtones, de droit civil et de common law au Canada", in L. Perret and A.-F. Bisson, eds., *Évolution des systèmes juridiques, bijuridisme et commerce international* (2003), 159, at p. 167; see also, however, *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220, at para. 135, per LeBel J.; Anker, at pp. 10-11.

[145] In 1984, Dickson J., in his concurring reasons in *Guerin*, [TRANSLATION] “stated that there was some truth to the proposition that Aboriginal title is an *interest in land* rather than a *personal* and usufructuary *right*, as the term ‘personal right’ simply refers to the fact that Aboriginal title is inalienable”: Y. Emerich, *Droit commun des biens: perspective transsystémique* (2017), at p. 50. The Court later described Dickson J.’s concurring judgment in *Guerin* as “[t]he starting point in characterizing the legal nature of Aboriginal title”: *Tsilhqot’in Nation*, at para. 69.

[146] It was ultimately in *Delgamuukw* that the Court, per Lamer C.J., unequivocally recognized the proprietary (and not merely personal) nature of Aboriginal title, which it described as a “*sui generis* interest in land”: paras. 111-12; see especially para. 113:

The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its inalienability. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only “personal” in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the 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. [Emphasis added; emphasis in original deleted.]

[147] Authors correctly interpret these remarks by Lamer C.J. in *Delgamuukw* as confirming that Aboriginal title is proprietary and not merely personal in nature:

[TRANSLATION] Where Aboriginal title is recognized, Aboriginal people can exclusively use and occupy the land in question for purposes that need not be integral to their distinctive culture prior to the arrival of the Europeans. They hold an interest in land in the nature of a right of ownership that “is a burden on the Crown's underlying title”; surrender can be made only to the Crown. [Emphasis added; footnote omitted.]

(Morin, at p. 175)

[TRANSLATION] In characterizing Aboriginal title as a “*sui generis* interest in land”, the Court recognized Aboriginal title as a proprietary right and not a personal right, despite its inherent limits. [Emphasis added.]

(Emerich, at pp. 50-51)

So Aboriginal title, while unlike other common law real property interests, is nonetheless “an interest in land.” Moreover, it is “a right to the land itself,” which “encompasses the right to exclusive use and occupation of land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures.” These descriptions of Aboriginal title clearly indicate that it is a real property right, though *sui generis* in nature. . . . It is therefore clear from the *Delgamuukw* decision that Aboriginal title is a proprietary interest in land, though differing from what the Chief Justice called “normal” common law property interests, like the fee simple. Moreover, it includes a right to exclusive use and occupation. The proprietary nature and exclusivity of Aboriginal title are not affected by its *sui generis* aspects, which include its source in occupation of land prior to Crown sovereignty, its inalienability other than by surrender to the Crown, its communal nature, and restrictions on use arising from its inherent limit. [Underlining added; footnotes omitted; italics deleted.]

(K. McNeil, “Aboriginal Title as a Constitutionally Protected Property Right”, in O. Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (2000), 55, at pp. 58 and 61)

[148] In *Tsilhqot'in Nation*, this Court reiterated that “Aboriginal title confers ownership rights similar to those associated with fee simple” (para. 73 (emphasis added)); therefore, “[a]nalogies to other forms of property ownership — for example,

fee simple — may help us to understand aspects of Aboriginal title” (para. 72 (emphasis added)), and “like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice” (para. 75 (emphasis added)).

[149] Moreover, Quebec courts have treated Aboriginal title as a dismemberment of the right of ownership, that is, as a real right: *Première nation de Betsiamites v. Canada (Procureur général)*, 2006 QCCS 2111, at para. 18 (CanLII) ([TRANSLATION] “Aboriginal title . . . in the language of the civil law, amounts to a dismemberment of the right of ownership”); see also, to the same effect, *Première Nation de Pessamit v. Québec (Procureur général)*, 2007 QCCS 794, at para. 17 (CanLII).

[150] That being said, the case law of the common law provinces is more ambiguous on this question: *Xeni Gwet’in First Nations v. Riverside Forest Products Ltd.*, 2002 BCSC 1199, 4 B.C.L.R. (4th) 379; *Ahousaht Indian Band v. Attorney General of Canada*, 2006 BCSC 646; *West Moberley First Nations v. British Columbia*, 2007 BCSC 1324, 78 B.C.L.R. (4th) 83; *Cowichan Tribes v. Canada (Attorney General)*, 2017 BCSC 1575, 1 B.C.L.R. (6th) 214; *Council of the Haida Nation v. British Columbia*, 2017 BCSC 1665, 3 B.C.L.R. (6th) 346 (“*Council of the Haida Nation*”). However, in *Calder v. Attorney-General of British Columbia* (1969), 8 D.L.R. (3d) 59 (B.C.S.C.), Gould J. clearly said that an action seeking a declaratory judgment recognizing Aboriginal title was “*in rem, qua* the state of the title to the

lands in question” (p. 61); that finding was not questioned on appeal either by the British Columbia Court of Appeal ((1970), 13 D.L.R. (3d) 64) or by this Court (*Calder* (1973)).

[151] Furthermore, Lamer C.J. specifically stated in *Delgamuukw* that a declaratory judgment recognizing Aboriginal title to land would necessarily affect the rights or interests of third parties in relation to the same land, at para. 185:

. . . many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitksan and Wet’suwet’en will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-aboriginals and members of other aboriginal nations. It may, therefore, be advisable if those aboriginal nations intervened in any new litigation. [Emphasis added; emphasis in original deleted.]

[152] Certain passages in *Tsilhqot’in Nation* suggest just as strongly that a declaratory judgment recognizing Aboriginal title would be enforceable against the whole world, that is, against “governments” but also “others seeking to use the land”: para. 76; see also para. 97. Authors also recognize that the proprietary, and not merely personal, nature of Aboriginal title makes it a right enforceable against the whole world:

Aboriginal title is a true property right that may be maintained against the whole world, including the Crown. It is not held at the Crown’s pleasure and it cannot be extinguished by a unilateral Crown act under the royal prerogative. Where aboriginal title has been extinguished by

valid legislation, it benefits from the common law rule requiring just compensation. [Emphasis added; footnote omitted.]

(B. Slattery, “The Nature of Aboriginal Title”, in O. Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision* (2000), 11, at p. 22; see also K. McNeil, “Aboriginal Title and the Provinces after *Tsilhqot’in Nation*” (2015), 71 *S.C.L.R.* (2d) 67, at p. 86.)

[153] In short, and in light of the relevant case law and academic literature, we conclude that Aboriginal title must clearly be considered a real right for the purposes of private international law. More specifically, Aboriginal title *resembles* or is at least *analogous* to the domestic institution of real rights because (1) it is a right in property, namely the land subject to Aboriginal title, and (2) it is a right enforceable *erga omnes*, that is, against “governments” and “others seeking to use the land”. As K. McNeil notes, “the very term ‘title’ would be a misnomer if Aboriginal land rights were not proprietary”: *The Post-Delgamuukw Nature and Content of Aboriginal Title* (May 2000) (online), at p. 10, referring to B. Rudden, “The Terminology of Title” (1964), 80 *L.Q.R.* 63.

[154] Contrary to what the Court of Appeal suggested in the case at bar, at paras. 13, 67-69, 74-77, 81-82 and 85 of its reasons, the fact that Aboriginal title is *sui generis* in nature does not preclude it from being found to be a proprietary interest (or, more specifically, a real right) for the purposes of private international law. The Court of Appeal concluded that the Innu’s action was a [TRANSLATION] “primarily personal” action over which Quebec authorities “have jurisdiction because the IOC and the QNS&LR have their head offices in Quebec” and because the Innu were

alleging an injury suffered in Quebec: paras. 15, 52 and 95, with reference to arts. 3134 and 3148 para. 1(1) and (3) *C.C.Q.* However, this Court made it abundantly clear in *Delgamuukw* that “aboriginal title is only ‘personal’ [because of its inalienability], and does not mean that aboriginal title is a non-proprietary interest”: para. 113.

[155] Indeed, at the risk of repeating ourselves, the fact that Aboriginal title is *sui generis* in nature does not mean that it cannot be a proprietary interest or a real right strictly for the purposes of private international law; its *sui generis* nature relates to its source — the prior occupation of Canada by Indigenous peoples — as well as its content and some of its characteristics. Aboriginal title is collective; it cannot be surrendered, except to the Crown; and it has an inherent limit, because the land subject to it cannot be developed or misused in a way that would substantially deprive future generations of the benefit of the land: *Delgamuukw*, at paras. 112-15, 117 and 125-32; *Tsilhqot’in Nation*, at paras. 15, 72-75 and 121. The source, content and characteristics of Aboriginal title simply cannot be completely explained by reference to the common law or civil law rules of property law. This, and *nothing more*, is what is meant when it is said that Aboriginal title is “*sui generis*”: on this point, see McNeil, “Aboriginal Title as a Constitutionally Protected Property Right”, at p. 61. Therefore, the fact that Aboriginal title is *sui generis* in nature does not prevent it from being given a civil law characterization for the purposes of private international law.

(ii) Other Aboriginal or Treaty Rights

[156] What we have just explained about the *sui generis* nature of Aboriginal title applies *mutatis mutandis* to other Aboriginal or treaty rights, which this Court has also described as *sui generis*: *Sparrow*, at p. 1112; *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 35. As Lamer C.J. noted in *Delgamuukw*, Aboriginal rights “fall along a spectrum with respect to their degree of connection with the land”: para. 138.

[157] This Court also stated in *Delgamuukw* that “[b]ecause aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities”: para. 139. While it is possible — as the AGNL in fact acknowledges in his factum (at para. 79) — that some Indigenous practices, customs or traditions will be connected to *no* specific territory or location, this Court has nonetheless pointed out that “[a]n aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location”; as such, “an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land” (*R. v. Côté*, [1996] 3 S.C.R. 139, at para. 39 (emphasis added); see also *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 50; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at paras. 55-56). In our view, this is the case here because — based on the Innu’s own allegations in their action and on their admission

to this effect in the notice of constitutional questions — the Aboriginal or treaty rights they are claiming *are connected* to Nitassinan; for example:

[TRANSLATION] Well before contact with the Europeans and up to the present time, the plaintiffs the Innu of UM-MLJ and their ancestors have used and frequented Nitassinan in Quebec and in Labrador while pursuing their unique way of life, which includes hunting, fishing, trapping and gathering.

Prior to contact with the Europeans and since that time, the plaintiffs the Innu of UM-MLJ and their ancestors have, in Nitassinan, carried on practices, customs and traditions that are central to the distinctive culture of their Indigenous Innu society.

The plaintiffs the Innu of UM-MLJ and their ancestors have continuously, in their Nitassinan:

- (a) lived in Nitassinan, given birth and raised their children, watched over their dead and taken care of their burial, in accordance with their specific way of life;
- (b) hunted, trapped, fished and gathered;
- (c) exploited, used and enjoyed natural resources and made use of its fruits and products;
- (d) obtained their means of sustenance from and lived off the natural resources found there;
- (e) benefitted economically from their land;

...

The carrying on of these practices, customs and traditions and this way of life based on hunting, fishing, trapping and gathering continued well after contact with the Europeans and has continued up to the present time without extinction or voluntary surrender.

The activities, acts and relationships described in paragraphs 44 to 47 are practices, customs and traditions that are integral to the plaintiffs' distinctive culture, have a close connection with the land and were and are at the core of their identity as Innu.

...

RIGHTS ASSERTED BY THE INNU OF UM-MLJ

...

The Indian title, existing Aboriginal rights and treaty rights of the plaintiffs the Innu of UM-MLJ in and to the part of their Nitassinan that is affected by the IOC megaproject include the right to the exclusive use and occupation of the land in this part of their Nitassinan, the right to hunt, fish and trap in this part of their Nitassinan and the right to enjoy and use all of the natural resources in this part of their Nitassinan.

...

Before IOC came to Nitassinan, and even before the Europeans arrived in the Schefferville area, the Innu of UM-MLJ, including their ancestors, frequented and used this traditional territory, in the manner of owners, on a regular basis. They engaged there in their traditional activities, including hunting, trapping, fishing and gathering, in accordance with the Innu way of life, and particularly for sustenance purposes.

...

Among other things, the IOC megaproject, and in particular the defendants' operations, facilities and activities, have infringed and are infringing the plaintiffs' constitutional rights and rights under the general law, that is, their Indian title and their Aboriginal and treaty rights. [Emphasis added.]

(Motion to Institute Proceedings, A.R., vol. II, at pp. 9-11, 19-20 and 24)

[158] In our view, the right to hunt, trap, fish and gather, the right to enjoy all natural resources (including iron ore) and the right to use the watercourses of Nitassinan amount to real rights for the purposes of private international law. More specifically, they *resemble* or are at least *analogous* to innominate real rights of enjoyment: see Anker, at pp. 20-22. An Aboriginal right to hunt, trap, fish or gather is certainly a burden on the land and, under certain conditions, could even be exercised on private property: see, for example, *R. v. Badger*, [1996] 1 S.C.R. 771; see also, on

this point, K. McNeil, “Co-Existence of Indigenous Rights and Other Interests in Land in Australia and Canada” (1997), 3 *C.N.L.R.* 1.

[159] Indeed, Quebec judges and authors now generally acknowledge the existence of innominate real rights of enjoyment, that is, dismemberments of ownership that are not expressly provided for by statute: Emerich, at p. 306; Lafond, at p. 758; M. Cantin Cumyn, “De l’existence et du régime juridique des droits réels de jouissance innommés: Essai sur l’énumération limitative des droits réels” (1986), 46 *R. du B.* 3; *Matamajaw Salmon Club v. Duchaine*, [1921] 2 A.C. 426 (P.C.); *Procureur général du Québec v. Club Appalaches inc.*, [1999] R.J.Q. 2260 (C.A.); *Anglo Pacific Group PLC v. Ernst & Young inc.*, 2013 QCCA 1323, [2013] R.J.Q. 1264. Article 1119 *C.C.Q.* states that “[u]sufruct, use, servitude and emphyteusis are dismemberments [*“des démembrements”* in French] of the right of ownership and are real rights”. The choice of words in the French version seems to suggest that the legislature did not intend to enact an exhaustive, closed list of real rights in Quebec law. As Professor Emerich explains, at p. 307:

[TRANSLATION] A number of innominate real rights have been recognized in Quebec civil law, including the right to cut wood and the rights to hunt and fish. Rights to extract minerals or plant materials from the ground, to use the water power of a river or to operate a sugar bush may also be found. [Emphasis added; footnotes omitted.]

[160] Professor B. Ziff notes in this regard that some Aboriginal rights are analogous to *profits à prendre*: *Principles of Property Law* (7th ed. 2018), at p. 443; see, to the same effect, *Bolton v. Forest Pest Management Institute* (1985), 66

B.C.L.R. 126 (C.A.). *Profits à prendre* in the common law are similar to innominate real rights of enjoyment in the civil law: Emerich, at p. 304.

[161] The intervener Tsawout First Nation argues in its factum that Aboriginal rights short of Aboriginal title do not constitute proprietary interests or real rights because they are not *exclusive*: para. 27. It notes that an Indigenous group with an Aboriginal right to fish or hunt in a specific territory may have to exercise this right in common with other Indigenous or non-Indigenous groups: para. 28. This characteristic of Aboriginal rights does not preclude a finding that they amount to proprietary interests or real rights for the purposes of private international law. In French law, for instance, Professor W. Dross states that the utility conferred on the holder of a dismembered real right is not necessarily *withdrawn* from the owner of the thing, [TRANSLATION] “who may continue to exercise it, but now concurrently with another”. Thus, for example, an owner who grants a neighbour a servitude of right of way on his or her property does not abstain from using the right of way: the situation simply becomes one of “plural appropriation” of the utility in question or, in other words, indivision (*Droit des biens* (4th ed. 2019), at p. 108; see also Emerich, at pp. 278-79).

(c) *Conclusion Regarding the Characterization of the Innu’s Action*

[162] As indicated above, a real action can be defined as an action through which a person seeks the *recognition* or *protection* of a *real right*. Because Aboriginal title and other Aboriginal or treaty rights are real rights for the purposes of private

international law, it necessarily follows that the aspect of the Innu's action whose purpose, according to the AGNL, is to have such rights recognized and protected constitutes a real action or, at best, a mixed action falling under Division III of Chapter II of Title Three of Book Ten of the *C.C.Q.* Below we will consider in detail whether there is *in fact* an aspect of the Innu's action whose purpose is to obtain the *recognition or protection* of Aboriginal title or other Aboriginal or treaty rights.

(2) Article 3152 C.C.Q.

[163] Article 3152 *C.C.Q.* is the first provision in Division III, which is entitled "Real and Mixed Actions". It reads as follows:

3152. Québec authorities have jurisdiction to hear a real action if the property in dispute is situated in Québec.

According to well-established jurisprudence, Quebec authorities lack jurisdiction to hear a real action if the property in dispute is situated *outside* Quebec: Glenn, at pp. 757-58; *Bern*, at p. 516; *Mazur v. Sugarman & Vir* (1938), 42 R.P.Q. 150 (Sup. Ct.); *Senauer v. Porter* (1862), 7 L.C. Jur. 42 (Sup. Ct.); *Equity Accounts Buyers Limited v. Jacob*, [1972] C.S. 676; *Union Acceptance Corporation Ltd. v. Guay*, [1960] B.R. 827; Goldstein and Groffier (1998), at No. 151; E. Groffier, *Précis de droit international privé québécois* (4th ed. 1990), at p. 276. The courts have treated this as an imperative rule of territorial jurisdiction that amounts to a rule of subject-matter jurisdiction, the violation of which [TRANSLATION] "results in an

absolute lack of jurisdiction that may be raised at any point in the proceedings”: Castel, at p. 689.

[164] Article 3152 *C.C.Q.* must be read in accordance with the “modern approach” to statutory interpretation, which applies when interpreting an article of the *C.C.Q.*: *Montréal (Ville) v. Lonardi*, 2018 SCC 29, [2018] 2 S.C.R. 103, at para. 22. Private international law is codified in Quebec. As a result, “the general principles of interpretation of the *Civil Code* apply to the determination of the scope of the relevant provisions’, and ‘[t]he courts must therefore interpret the rules as a coherent whole” in light of the principles of comity, order and fairness, which inspire the interpretation of the various private international law rules: *Barer*, at para. 108, per Brown J., citing *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 19; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at para. 23. In the case at bar, the legislative history of art. 3152 *C.C.Q.* warrants particular attention.

[165] Article 3152 *C.C.Q.* replaced, for private international law, art. 73 f.*C.C.P.* (now arts. 41 para. 1 and 42(3) *C.C.P.*): see, in this regard, Goldstein and Groffier (2003), at No. 311. Article 73 f.*C.C.P.* read as follows:

73. A real action or a mixed action may be taken either before the court of the domicile of the defendant or before the court of the district where the property in dispute is situated in whole or in part.

[166] Before the *C.C.Q.* came into force in 1994, the international jurisdiction of Quebec authorities was in fact governed by the *f.C.C.P.*: see, on this point, Castel, at pp. 21 and 665; *Trower and Sons, Ld. v. Ripstein*, [1944] A.C. 254 (P.C.); *Alimport (Empresa Cubana Importadora de Alimentos) v. Victoria Transport Ltd.*, [1977] 2 S.C.R. 858, at p. 868. Article 73 *f.C.C.P.* was therefore applied to international situations, even though such an interpretation of the article [TRANSLATION] “was questionable because it refers to a district”: Goldstein and Groffier (1998), at No. 151; see also Castel, at pp. 690-91.

[167] Despite the wording of art. 73 *f.C.C.P.*, which gave Quebec authorities jurisdiction where the defendant was domiciled in Quebec, these authorities did not consider themselves to have jurisdiction over a real action where the subject matter of the dispute was immovable property situated outside Quebec:

[TRANSLATION] Quebec courts have exclusive jurisdiction to decide matters involving immovable property situated in the province. They never have jurisdiction to render a decision concerning immovable property situated abroad, whether the dispute concerns *inter vivos* transactions or successions of immovable property.

This jurisprudence seems to run counter to articles 73 and 74 of the Code of Civil Procedure, which recognize the jurisdiction of courts other than those of the place where the property in dispute is situated. This is why reference is made to international subject-matter jurisdiction. It would be preferable to acknowledge that the rules of domestic territorial jurisdiction set out in articles 73 and 74 *C.C.P.* have been adapted to the international nature of the situation [Emphasis added; footnote omitted.]

(Castel, at p. 691)

Quebec courts will not adjudicate as to foreign lands: Our courts have no jurisdiction to adjudicate upon the title or the right to the possession of any immovable not situate in Quebec. [Emphasis in original.]

(W. S. Johnson, *Conflict of Laws* (2nd ed. 1962), at p. 485)

[168] In our view, Professor Emanuelli provides a good summary of the state of the law before the *Civil Code* was reformed:

[TRANSLATION] Prior to the reform of the Civil Code, the courts determined the jurisdiction of Quebec authorities over real and mixed actions by applying articles 73 and 74 C.C.P., as they had adapted the rules in those articles to international disputes by reference to the distinction between movable property and immovable property. The courts had thus extended the *lex rae sitae* rule of jurisdiction to conflicts of jurisdiction. As a result, in real actions relating to immovable property, Quebec courts had jurisdiction only if the property was situated in Quebec. On the other hand, they had jurisdiction over a real action relating to movable property if the defendant was domiciled in Quebec or if the property in question was situated in Quebec. Because different rules applied depending on whether the action concerned movable property or immovable property, it was necessary to characterize the property to which the action related. Under the former article 6 para. 2 C.C.L.C., the property at issue in a real action was characterized on the basis of Quebec law, even if it was situated abroad. [Emphasis added; footnotes omitted; No. 205.]

[169] We note that in 1977, the Civil Code Revision Office (“CCRO”) proposed the enactment of the following article:

50. In matters involving real rights, the courts of Québec have general jurisdiction if all or part of the property in dispute is situated in Québec. [Emphasis added.]

(Civil Code Revision Office, *Report on the Québec Civil Code*, vol. I, *Draft Civil Code* (1978), at p. 604)

This article is consistent with Québec practice. It is based in part on Article 73 of the Code of Civil Procedure.

It was not considered necessary to adopt any special rule with respect to mixed actions, since it was felt that no such action could be instituted in Québec unless the courts had jurisdiction over both the personal and the real nature of the dispute. [Emphasis added.]

(Civil Code Revision Office, *Report on the Québec Civil Code*, vol. II, t. 2, *Commentaries* (1978), at p. 989)

[170] A 1988 draft bill entitled *An Act to add the reformed law of evidence and of prescription and the reformed private international law to the Civil Code of Québec*, 2nd Sess., 33rd Leg., contained a general provision, art. 3514, that read as follows:

3514. A Québec court has jurisdiction over a real action if the property in dispute is situated in Québec; it also has jurisdiction where the action concerns movable property and the defendant is domiciled in Québec.

[171] As noted by Groffier, at p. 276, [TRANSLATION] “[t]his wording prevents any hesitation as regards the Quebec court’s lack of jurisdiction where the immovable property is not situated in Quebec”. Nevertheless, the draft bill gave a court jurisdiction “where the action concern[ed] movable property and the defendant is domiciled in Québec”: art. 3514. In the brief it submitted to the Committee on Institutions in March 1989, the Barreau du Québec suggested, however, that this last portion of the sentence be removed:

[TRANSLATION] The second part of this article is problematic, particularly where the property is situated abroad; the seizure of such

property is then beyond the control of the Quebec court. The focus must be first and foremost on the property, not on the defendant. [Emphasis added.]

(*Mémoire du Barreau du Québec sur l'avant-projet de loi portant réforme au Code civil du Québec du droit international privé*, at p. 49; see also, in this regard, Goldstein and Groffier (2003), at No. 311; E. Groffier, *La réforme du droit international privé québécois: Supplément au Précis de droit international privé québécois* (1993), at p. 144; Emanuelli, at No. 163.)

The Barreau's suggestion clearly bore fruit, because in the end, art. 3130 of the *Civil Code of Québec*, Bill 125, 1st Sess., 34th Leg., 1990, had the *same* wording in French as the current art. 3152 *C.C.Q.* and read as follows in English:

3130. A Québec judicial or administrative authority has jurisdiction over a real action if the property in dispute is situated in Québec.

This was also what was indicated in the detailed comments in *Projet de loi 125: Code civil du Québec, Commentaires détaillés sur les dispositions du projet, Livre X: Du droit international privé et disposition finale (Art. 3053 à 3144)* (1991), at p. 110:

[TRANSLATION] The article, which is new law, adopts the C.C.R.O.'s proposal. In the case of real actions, it confers jurisdiction on the Quebec authorities in the place where the property is situated, thereby aligning the applicable law (art. 3073) and adjudicative jurisdiction. Unlike article 73 C.C.P., which deals with the jurisdiction of Quebec courts over real and mixed actions, the proposed article does not base jurisdiction on the defendant's domicile. This criterion is more relevant to mixed actions than it is to real actions. [Emphasis added.]

[172] For its part, the commentary of the Minister of Justice on art. 3152 *C.C.Q.* was as follows:

[TRANSLATION] This article, which is new law, confers jurisdiction over real actions on the Quebec authorities in the place where the property is situated, thereby aligning the applicable law (art. 3097) and adjudicative jurisdiction. Unlike article 73 C.C.P., which deals with the jurisdiction of Quebec courts over real and mixed actions, article 3152 does not base jurisdiction on the defendant's domicile. This criterion is more relevant to mixed actions than it is to real actions.

(Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. II, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 2012)

[173] In short, [TRANSLATION] “[t]he position of movable property is in line with that of immovable property” and “[i]t is the court of the place where the property is situated that has jurisdiction over a real action, regardless of the nature of the property to which the action relates”: Goldstein and Groffier (1998), at No. 151; see also Emanuelli, at No. 206.

[174] The legislative history of art. 3152 C.C.Q. leads to three conclusions, all of which are of great importance in the case at bar. First, art. 3152 C.C.Q. affirms a well-established principle, which is that Quebec authorities lack jurisdiction over an immovable real action where the subject matter of the dispute is situated outside Quebec. In fact, art. 3152 C.C.Q. not only affirms this principle but also extends it to movable real actions. In real actions, whether immovable or movable, Quebec authorities now lack jurisdiction where the subject matter of the dispute is not situated in Quebec. In particular, the defendant's domicile does not give them jurisdiction over a real action, regardless of whether the subject matter of the dispute is immovable property or movable property, because art. 3134 C.C.Q. expressly states

that this rule applies only in the absence of any special provision: Goldstein, at pp. 271 and 275.

[175] This principle is important in the instant case, because the defendants, IOC and QNS&L, are domiciled in Quebec and because the courts below assumed jurisdiction over the entire dispute on the basis of this head of jurisdiction: Sup. Ct. reasons, at paras. 82 and 93-102; C.A. reasons, at paras. 15, 52 and 95.

[176] Second, and contrary to the wording of art. 73 f.C.C.P. (now art. 42(3) C.C.P.), which used to apply in private international law in the case of real and mixed actions, and to the wording of art. 50 of the CCRO's *Report on the Québec Civil Code*, vol. I, art. 3152 C.C.Q. does not provide for the jurisdiction of Quebec authorities where the property in dispute is situated "in whole or in part" in Quebec or where "all or part" of it is situated in Quebec. Here, part of Nitassinan is certainly situated in Quebec, but the fact that Quebec authorities have jurisdiction over that part of the territory cannot give them jurisdiction over the part not situated in Quebec. A different interpretation would amount to *rewriting* art. 3152 C.C.Q. by adding the words "all or part of", which, as we have seen, were deliberately removed from the wording of this article by the legislature. Moreover, our interpretation of art. 3152 C.C.Q. on this point is consistent with the presumption against extraterritoriality, whereby "[t]he legislature is presumed to intend the territorial limits of its jurisdiction to coincide with that of the statute's operation", and "[u]nless implicitly or explicitly provided otherwise, the legislature is presumed to enact for persons, property,

juridical acts and events within the territorial boundaries of its jurisdiction”: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 212.

[177] Third, it is quite clear from the CCRO’s *Report on the Québec Civil Code*, the *Commentaires détaillés sur les dispositions du projet* discussing art. 3130 of Bill 125 and the *Commentaires du ministre de la Justice* concerning art. 3152 *C.C.Q.* that a mixed action may not be instituted in Quebec unless Quebec authorities have jurisdiction over *both* the personal aspect *and* the real aspect of the dispute. In other words, for Quebec authorities to have jurisdiction over a mixed action, the property in dispute must be situated entirely in Quebec, since otherwise they will have no jurisdiction over the real aspect of the dispute. Jurisdiction over the personal aspect of the dispute based, for example, on the defendant’s domicile is therefore not sufficient in the case of a mixed action. The Quebec Court of Appeal recently adopted this same interpretation of art. 3152 *C.C.Q.*: *CGAO v. Groupe Anderson inc.*, 2017 QCCA 923, at paras. 10-11 (CanLII). We also note that this interpretation of art. 3152 *C.C.Q.* is not disputed by the Innu, the AGC or our colleagues.

[178] One conclusion must be reached in this regard: the *C.C.Q.* departs from the law as it existed before the *C.C.Q.* came into force. Article 73 *f.C.C.P.* provided that a mixed action could be taken “either before the court of the domicile of the defendant or before the court of the district where the property in dispute [was] situated in whole or in part”. Judges and authors also recognized the jurisdiction of

Quebec authorities over a dispute where the action could be characterized as personal or mixed and where a head of jurisdiction other than the property being situated in Quebec (for example, the defendant's domicile) was established: Glenn, at pp. 757-58; *Babineau v. Railway Centre Park Company Limited* (1914), 47 C.S. 161; *Lamothe v. Hébert* (1916), 24 R.L. 182 (Sup. Ct.). Contemporary authors — who in this respect continue to rely on cases decided before the *C.C.Q.* came into force — have not always identified this change made to the law when the *C.C.Q.* came into force: see, for example, Goldstein and Groffier (2003), at No. 311.

[179] In the present case, the Superior Court judge expressly recognized — in accordance with the admission made before him by the Innu (at para. 61) — that Aboriginal title and other Aboriginal or treaty rights [TRANSLATION] “involv[e] a number of elements of a real right” (paras. 62-64). He nevertheless rejected the characterization of the Innu’s action as a “real action” and preferred to characterize it as a “mixed action” because, in his view, the real aspect of the action, whose purpose is to obtain the recognition and protection of Aboriginal title and other Aboriginal or treaty rights, is “ancillary” to the personal aspect of the action, whose purpose is to obtain an award of damages against the defendants, IOC and QNS&L: paras. 66-68 and 77-79. Because the defendants are domiciled in Quebec, the judge concluded that Quebec authorities have jurisdiction over such a “mixed action”: paras. 82 and 93-102.

[180] However, it is in the case of a *personal* action — not a *mixed* action — that Quebec authorities have jurisdiction where the defendant is domiciled in Quebec: art. 3148 para. 1(1) *C.C.Q.* In a mixed action, the defendant’s domicile is not enough; the property in dispute must *also* be situated *in Quebec*, as required by art. 3152 *C.C.Q.*

[181] Our colleagues are of the view that the Innu’s action is a “non-classical” mixed action with a personal aspect and a *sui generis* aspect: para. 56. Relying on the absence of any provisions relating specifically to *sui generis* rights, they conclude that art. 3134 *C.C.Q.* is applicable and that, because the companies being sued are domiciled in Montréal, Quebec authorities have jurisdiction over both the personal aspect and the *sui generis* aspect of the action.

[182] The rights protected by s. 35 of the *Constitution Act, 1982*, and in particular Aboriginal title conferring “the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes” (*Delgamuukw*, at para. 117), are a burden first and foremost on the Crown’s underlying title (*Tsilhqot’in Nation*, at para. 69). As this Court noted, “[t]he characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique”: *Tsilhqot’in Nation*, at para. 72 (emphasis added). The Crown is the main defendant in an action for the recognition of Aboriginal title, as we will show below.

[183] Our colleagues' conclusion (at para. 58) that the private companies, rather than the Crown, are the defendants in the action for the recognition of Aboriginal rights is therefore highly problematic. We want to emphasize that, even under our colleagues' interpretation of Quebec private international law, their conclusion that a third party, rather than the Crown, is the defendant in the action for the recognition of title is one that distorts the *sui generis* nature of Aboriginal rights.

(3) Consideration of Jurisdiction on a Case-by-Case Basis

[184] There is a principle in Quebec private international law to the effect that “the jurisdiction of the Quebec court is determined on a case-by-case basis”: *GreCon*, at para. 29. This is the exercise we will now undertake in order to ascertain whether, as the AGNL argues, the Innu's action in fact involves claims that are real or mixed in nature because their purpose is to obtain the recognition or protection of Aboriginal title or other Aboriginal or treaty rights, which are real rights for the purposes of private international law. If the action does involve such claims, Quebec authorities lack jurisdiction to grant the claims if they relate to the part of Nitassinan that is situated in Newfoundland and Labrador.

(a) *Claim for “Declaratory Remedies”*

[185] In their motion to institute proceedings, the Innu seek a number of [TRANSLATION] “declaratory remedies”: A.R., vol. II, at p. 30. The relevant conclusions of that motion read as follows:

[TRANSLATION] **TO DECLARE** that the plaintiffs the Innu of UM-MLJ have unextinguished Indian title to the parts of Nitassinan that are affected by the IOC megaproject (including each of its components), and in particular by the facilities, operations and activities of IOC and QNS&L, which are described herein, especially their industrial and port facilities and activities;

TO DECLARE that the plaintiffs the Innu of UM-MLJ have existing Aboriginal and treaty rights in all of Nitassinan, including rights:

- (a) in and with respect to all natural resources, including iron ore, in Nitassinan, and in particular in the area where the defendants have their mining, railway and port facilities;
- (b) to hunt, trap, fish and gather for food, social, ceremonial and commercial purposes;
- (c) to exercise jurisdiction over Nitassinan;
- (d) to use the watercourses and bodies of water, including the seas, rivers, lakes and ponds;
- (e) to erect and use camps, lodges, caches and dwellings;
- (f) to control and manage the above-described Nitassinan, including its fauna, flora, environment and resources;
- (g) to practise or conduct spiritual and cultural traditions and ceremonies;
- (h) to exploit forest resources;
- (i) to use their distinctive language and culture and to pass them down from generation to generation;
- (j) to use Nitassinan for religious and spiritual purposes, including for burial and for specific rites and traditions connected with death;
- (k) to exploit and enjoy the natural resources of Nitassinan and to use its fruits, products and resources; and
- (l) to move freely in their Nitassinan.

TO DECLARE that the said Indian title and Aboriginal and treaty rights of the plaintiffs the Innu of UM-MLJ are protected by the Canadian Constitution and that they take precedence over and constitute a condition attached to and a burden on any right held by the defendants in, to, over and under Nitassinan, including the natural resources found there;

TO DECLARE that the IOC megaproject and the defendants' operations, facilities and activities were and are subject to the consent of the plaintiffs the Innu of UM-MLJ;

TO DECLARE that the IOC megaproject, and in particular the defendants' operations, facilities and activities and all work associated therewith, including the so-called preliminary work, and the performance of that work, are unlawful and constitute an infringement of the plaintiffs' Indian title and Aboriginal and treaty rights; [pp. 31-32]

[186] Because their purpose is clearly to obtain the *recognition* of Aboriginal title and other Aboriginal or treaty rights, which are real rights for the purposes of private international law, these claims are real in nature. In fact, a declaration is the primary means by which Aboriginal title can be established: *Tsilhqot'in Nation*, at paras. 89-90. A declaratory judgment is also, generally speaking, one of the preferred procedural vehicles in property law: L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 249. It is true that “[t]he court of one geographic jurisdiction, in limited circumstances, may issue a declaration applicable to a party located in another jurisdiction if it is of use and whether or not it is enforceable” (Sarna, at p. 91 (emphasis added)), but under art. 3152 *C.C.Q.*, a court may not grant an application for a declaratory judgment *with respect to proprietary or possessory rights* in immovable property situated abroad because by doing so it would purport to deal *directly* with title: see, for example, *Khan Resources Inc. v. WM Mining Co., LLC* (2006), 79 O.R. (3d) 411 (Ont. C.A.), at paras. 19 and 24; *War Eagle Mining Co. v. Robo Management Co.* (1995), 13 B.C.L.R. (3d) 362 (S.C.), at para. 27.

[187] The Innu argue that the declarations they seek would be binding *only* on the defendants, IOC and QNS&L, and not on the Crown in right of Newfoundland

and Labrador. The Court of Appeal accepted this argument (at para. 91), which is more relevant to the AGNL's second ground of appeal, that is, to the issue of whether the Innu's action is *in substance* against the Crown in right of Newfoundland and Labrador, in which case, the AGNL submits, the doctrine of interprovincial jurisdictional immunity would be engaged.

[188] Even if the Innu were correct in arguing that the declarations they seek would be binding *only* on the defendants, IOC and QNS&L, the fact remains that the declarations would relate *to the title* the Innu claim to hold to Nitassinan, including the parts of that territory that are situated outside Quebec. Because of art. 3152 *C.C.Q.*, Quebec authorities lack jurisdiction in this regard.

[189] To be clear, we are of the view that if Quebec authorities were to rule directly *on the title* that the Innu believe they hold to the parts of Nitassinan that are situated outside Quebec, the declarations would be binding on *no one*, not even on the defendants, IOC and QNS&L, precisely because Quebec authorities lack jurisdiction in this regard: *Medicine Hat (City) v. Wilson*, 2000 ABCA 247, 271 A.R. 96, at para. 96, citing G. Spencer Bower, A. Kingcome Turner and K. R. Handley, *The Doctrine of Res Judicata* (3rd ed. 1996), at para. 235.

[190] In principle, “findings [that are] essentially of a factual nature . . . are not binding on the courts of other provinces”: *Hunt*, at p. 310; on this point, see transcript, at p. 9. *A fortiori*, the findings of law or of mixed fact and law that would hypothetically be made by the Quebec Superior Court — which lacks jurisdiction to

do so — concerning the existence of Aboriginal title or other Aboriginal or treaty rights in land situated outside Quebec would not be binding on the courts of other provinces, regardless of whether such declarations were set out in the reasons or in the formal judgment: see also, in this regard, transcript, at pp. 10-11 and 46.

[191] We would note here that the strategy chosen by the Innu does not necessarily favour the proportionality of proceedings. The fact is that they are seeking authorization to engage, in Quebec, in long and costly proceedings that would, by their own admission, result in declarations that would have *no value* against the Crown in right of Newfoundland and Labrador. If they wished to embark on a “comprehensive land claim”, they would then, by their own logic, have to recommence the same proceedings before the competent authorities in Newfoundland and Labrador: transcript, at p. 88. This emerges clearly from the exchanges between this Court and counsel for the Innu during the hearing:

[TRANSLATION] [Mr. Bertrand:] In fact, this is why the Court of Appeal invited them [the AGNL] to come and participate in the proceedings. And it was the same thing at trial. But they chose to appear only to challenge jurisdiction, that’s all. But yes, in answer to your question, it . . .

Mr. Justice Gascon: But if they participate . . . Excuse me, but this is what I don’t understand. If they participate . . . if the Court of Appeal invites them to participate in the proceedings, what would the reason be? Because you’re telling me that they will participate in the proceedings, yes, but it won’t be binding on them. Would you like to tell me what they’ll be doing?

Mr. Bertrand: Well, they may be called in warranty too. They may be called in warranty too. They may choose to come to . . .

Mr. Justice Gascon: Yes, but the Court of Appeal's invitation to participate was extended in its judgment. It was not based on a call in warranty or . . .

Mr. Bertrand: Yes.

Mr. Justice Gascon: . . . forced impleading. And you say: "Even if we continue — and this is what the Court of Appeal is inviting them to do — they can come and participate in the proceedings." But why then . . .

Mr. Bertrand: Well, but when . . .

Mr. Justice Gascon: . . . if this ultimately . . . if this ultimately doesn't make it binding and . . . which suggests to me that even in your scenario, other proceedings will be required, no doubt somewhere in Newfoundland, if only to ensure that these rights have an impact . . .

Mr. Bertrand: Yes.

Mr. Justice Gascon: . . . on that province.

Mr. Bertrand: Yes, but we can choose, as you know . . . Of course, even the court encouraged us in this regard. We can opt for discussions or negotiations, just as we can opt for court proceedings. But in the context of a comprehensive land claim, which is obviously very different from this case, which is really an action for damages . . .

But listen, Newfoundland may also not come and participate in the proceedings if it doesn't want to participate in them.

. . .

Mr. Justice Gascon: If I . . . just so I understand.

Mr. O'Reilly, Ad. E.: Yes.

Mr. Justice Gascon: You say that you're bringing an action for damages against IOC, against QNS, based on infringements of Aboriginal rights, of Aboriginal title. If you bring an action five years from now, this time against the Government of Quebec, the Government of Canada and the Government of Newfoundland, to have your Aboriginal rights and title recognized, how will the evidence differ from one case to the other?

Mr. O'Reilly, Ad. E.: Well, it's because there is . . . it will be necessary at that point to go into the constitutional sphere and the justification test to see whether there has really been an infringement.

And that's when the constitutional debate will become very, very important, in my view. So it will be very different.

But here, all we're trying to do, we're saying: we have identified a group. That group is IOC, it's QNS&L. We are asserting the right against them only. So we can't go against, for example, Labrador City or Nalcor. We can't tell the forestry companies or all companies operating or all citizens working in Labrador . . .

(transcript, at pp. 86-88 and 107-8)

(b) *Claim for a Permanent Injunction*

[192] In their motion to institute proceedings, the Innu also seek a permanent injunction to put a stop to the operations, facilities and activities of the defendants, IOC and QNS&L: A.R., vol. II, at pp. 28-30. The relevant conclusions of that motion read as follows:

[TRANSLATION] **TO ISSUE** an order for a permanent injunction requiring the defendants, their officers, directors, employees, agents and subordinates and those acting in concert with the defendants to cease any activity related to the IOC megaproject, and in particular mining operations in Nitassinan, including in the Labrador City area, and requiring the defendants to cease their activities related to the Sept-Îles project at the port of Sept-Îles and in the Sept-Îles region;

TO ISSUE an order for a permanent injunction requiring the defendants, their officers, directors, employees, agents and subordinates and those acting in concert with the defendants not to build or operate mining, industrial, railway or port facilities, preventing them from carrying out or operating the mining, industrial, railway and port facilities in Nitassinan, and requiring them to immediately cease and to desist and refrain from carrying out all work, operations or activities associated with those facilities and all other work related thereto in Nitassinan, except with respect to the transportation and handling by the defendants of iron ore and other products from Cliffs Natural Resources (Cliffs Quebec), Labrador Iron Mines, Tata Steel Minerals Canada and, where applicable, ArcelorMittal;

TO ISSUE an order for a permanent injunction requiring the defendants not to interfere in any manner with the plaintiffs' exercise of their rights and preventing them from causing damage to the environment and to the natural resources of Nitassinan; [pp. 32-33]

[193] These claims are also real in nature, because their purpose is clearly to “protect” Aboriginal title and other Aboriginal or treaty rights, which are real rights for the purposes of private international law. In Quebec law, an injunction is the [TRANSLATION] “appropriate procedural vehicle for enforcing [one’s] right”: *Oerlikon Aerospatiale inc. v. Ouellette*, [1989] R.J.Q. 2680 (C.A.), at p. 2686; see also, to the same effect, P.-A. Gendreau et al., *L’injonction* (1998), at p. 295; C. Belleau et al., *Précis de procédure civile du Québec* (4th ed. 2003), vol. 2, by D. Ferland and B. Emery, eds., at p. 444; *Crawford v. Fitch*, [1980] C.A. 583, at p. 585; *Société minière Louvem inc. v. Aur Resources Inc.*, [1990] R.J.Q. 772 (Sup. Ct.); *Plouffe v. Dufour*, [1992] R.J.Q. 47 (Sup. Ct.); 2848-2883 *Québec inc. v. Tomiuk*, [1993] R.D.J. 400 (C.A.). In fact, [TRANSLATION] “in Quebec law, a variety of real actions (actions in revendication and confessory, negatory and even possessory actions) are [often] accompanied by a motion [for an injunction to end the unlawful encroachment]”: Debruche, at p. 514.

[194] Therefore, under art. 3152 *C.C.Q.*, a court cannot grant a claim for a permanent injunction relating to immovable property situated outside the province: see, for example, *CGAO*, at paras. 8 and 11; *Khan Resources Inc.*, at paras. 19 and 24; see also, on this point, Pitel and Rafferty, at pp. 91-92.

(c) *Claim for Damages*

[195] In their motion to institute proceedings, the Innu also seek an award against the defendants, IOC and QNS&L, solidarily, for the payment of \$900 million in damages: A.R., vol. II, at pp. 28 and 30-31. First, the Innu submit that the defendants' infringement of the Aboriginal title and other Aboriginal or treaty rights they believe they hold in Nitassinan constitutes a civil fault under art. 1457 *C.C.Q.*: pp. 24-28. Second, they raise an argument based on no-fault liability under art. 976 *C.C.Q.* in respect of neighbourhood disturbances: pp. 28-29.

- (i) Claim for Damages Based on the Allegation of an Infringement by the Defendants, IOC and QNS&L, of Aboriginal Title and Other Aboriginal or Treaty Rights Relating to Land Situated in Newfoundland and Labrador (Article 1457 *C.C.Q.*)

[196] The AGNL challenges the jurisdiction of Quebec authorities over the claim for damages based on the allegation of an infringement of Aboriginal title and other Aboriginal or treaty rights relating to the part of Nitassinan that is situated outside Quebec: transcript, at pp. 11-13.

[197] In the case at bar, the claim for damages against the defendants, IOC and QNS&L — to the extent that it is based on the alleged infringement of the Aboriginal title and other Aboriginal or treaty rights the Innu claim to hold in Nitassinan — can be granted *only if* the Innu are able to obtain the recognition of that Aboriginal title and those other Aboriginal or treaty rights in Nitassinan. This was noted by the courts

below, *and the Innu* have quite properly admitted it: Sup. Ct. reasons, at para. 77; C.A. reasons, at para. 90; Sup. Ct. Judgment Authorizing the Intervention of the AGNL, at para. 67; R.F., at paras. 73 and 82.

[198] A civil liability action is, in principle, a personal action. In the instant case, the personal aspect of the Innu's action is closely connected with its real aspect, since the success of the former *depends* on the success of the latter.

[199] Even though the personal aspect of the Innu's action [TRANSLATION] "remains governed by the traditional rules of civil liability" (*Laflamme v. Groupe Norplex inc.*, 2017 QCCA 1459 (CanLII), at para. 48), it can succeed *only if* the Innu are able to obtain the recognition of Aboriginal title or other Aboriginal or treaty rights in Nitassinan, including in the parts of that territory that are situated in Newfoundland and Labrador. However, Quebec authorities do not in fact have the jurisdiction required to hear an action for the recognition of Aboriginal title or other Aboriginal or treaty rights in land not situated in Quebec. It necessarily follows that, as matters stand at present, Quebec authorities must at least stay the proceedings on this point until a competent authority has recognized the existence of those rights in the parts of Nitassinan that are situated in Newfoundland and Labrador: art. 3152 C.C.Q.; Walker, at p. 23-1, citing *Montagne Laramee Developments Inc. v. Creit Properties Inc.* (2000), 47 O.R. (3d) 729 (S.C.J.), and *Design Recovery Inc. v. Schneider*, 2003 SKCA 94, 238 Sask. R. 212.

(ii) Claim for Damages for Neighbourhood Disturbances Suffered in Quebec but Caused by Acts Committed in Newfoundland and Labrador (Article 976 C.C.Q.)

[200] The AGNL correctly does not challenge the jurisdiction of Quebec authorities over the claim for damages for the neighbourhood disturbances allegedly suffered by the Innu *in Quebec* as a result of acts committed by the defendants, IOC and QNS&L, *in Newfoundland and Labrador*: transcript, at pp. 15-17 and 44-45; see also A.F., at para. 85:

Had the claim been limited to seeking damages arising from alleged harms caused to the Respondents' asserted rights over territories situated in Québec, the SCQ would *a priori* have jurisdiction, even if such harms arose from activities emanating outside the Province of Québec. [Emphasis added.]

[201] As this Court held in *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, the remedy under art. 976 C.C.Q. remains first and foremost a claim that a person has, which makes it a personal action. Because the defendants are domiciled in Quebec and injury has been suffered in Quebec (art. 3148 para. 1(1) and (3) C.C.Q.), Quebec authorities have jurisdiction over this claim.

(d) *Fiduciary Claim or Claim Based on Administration of the Property of Others With Respect to the Works and Facilities of the Defendants, IOC and QNS&L*

[202] Lastly, the Innu are claiming various fiduciary remedies (“constructive trust”, “[c]ommon law trust” and “[f]iduciary trust”) or remedies based on

administration of the property of others (art. 1299 *C.C.Q.*) with respect to the works and facilities of the defendants, IOC and QNS&L: Motion to Institute Proceedings, A.R., vol. II, at p. 30. These claims are real in nature and, having regard to art. 3152 *C.C.Q.*, Quebec authorities cannot grant them if they relate to works or facilities of the defendants that are situated in Newfoundland and Labrador: J. Wass, “The Court’s *In Personam* Jurisdiction in Cases Involving Foreign Land” (2014), 63 *I.C.L.Q.* 103, at p. 110 (“a claim asserting the existence of a constructive or resulting trust over foreign immovable property should usually be characterized as proprietary”); see also Walker, at p. 23-3; Goldstein and Groffier (2003), at No. 338.

(4) Conclusion Regarding the Jurisdiction of Quebec Authorities

[203] In summary, and as a result of art. 3152 *C.C.Q.*, Quebec authorities lack jurisdiction over: (1) the claim for “declaratory remedies” to recognize Aboriginal title and other Aboriginal or treaty rights in land situated in Newfoundland and Labrador; (2) the claim for a permanent injunction to put a stop to the operations, facilities and activities of the defendants, IOC and QNS&L, on land situated in Newfoundland and Labrador; and (3) the fiduciary claim or the claim based on administration of the property of others with respect to the defendants’ works and facilities situated in Newfoundland and Labrador.

[204] In our view, it should therefore be ordered that the conclusions of the Innu’s motion to institute proceedings, and specifically those that are declaratory or

injunctive in nature and that relate to Nitassinan or to the IOC megaproject, be amended so that they apply only to acts, activities or rights within Quebec's territory.

[205] That being said, it should not be ordered that the allegations in the motion to institute proceedings be struck, because, as the Superior Court judge properly explained in his reasons, the allegations concerning Nitassinan as a whole, including the parts of that territory that are situated in Newfoundland and Labrador, as well as the evidence relating thereto, could prove to be relevant during the trial on the merits in order to determine the existence of Aboriginal title and other Aboriginal or treaty rights *in Quebec*:

[TRANSLATION] The Court finds that the nature of the action before it requires it to be extremely prudent. As has already been discussed, Aboriginal rights were exercised and are still exercised today without regard to provincial borders. We know from *Delgamuukw* that, with respect to recognition of Aboriginal title, oral narratives are allowed in the evidence stage of a trial. When such evidence is given, will only narratives concerning the situation in Québec be allowed even though, historically, the Innu paid no attention to the border? Can we conclude at this stage that evidence concerning the activities of the Innu in Newfoundland and Labrador is not relevant to establishing their rights and title in Québec? It seems obvious that the answer to these questions is no. At this point, the Court cannot set aside the relevance of evidence of the Innu's activities in Newfoundland and Labrador.

(Sup. Ct. reasons, at para. 90)

[206] We note that, during the hearing in this Court, the AGNL acknowledged that the allegations in the Innu's motion to institute proceedings must be left intact so that evidence concerning their entire way of life can be heard at the trial in the Quebec Superior Court, as long as it is clearly recognized that Quebec authorities lack

jurisdiction to grant any kind of remedy with respect to land situated outside Quebec: transcript, at pp. 7-9.

C. *Some Potential Solutions*

(1) Transboundary Nature of Aboriginal Rights

[207] As we noted above, the existing Aboriginal and treaty rights of the Indigenous peoples of Canada are recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. Although these rights are undoubtedly equal in importance and significance to the other constitutional rights, including the rights enshrined in the *Canadian Charter of Rights and Freedoms*, they differ — in several respects — from the other rights protected by our Constitution. They are, first of all, held *only* by the Indigenous peoples of Canada, precisely “because they are [Indigenous]”: *Van der Peet*, at paras. 19-20; Hogg, at p. 28-22; T. Isaac, *Aboriginal Law* (5th ed. 2016), at p. 14. Second, constitutional rights are generally either *negative* (in the sense that they protect individuals from unjustified state intrusion) or *positive* (in the sense that they confer certain benefits, such as language rights or voting rights). In contrast, Aboriginal rights are special or *sui generis* rights with a special legal and constitutional status: *Van der Peet*, at paras. 27 and 30; Hogg, at p. 28-22. In particular, the existence of Aboriginal rights predates the Canadian constitutional order. Hence this Court’s recognition of s. 35(1)’s purpose as being to reconcile the prior presence of Indigenous peoples on Canadian territory with the assertion of

Crown sovereignty over that same territory: *Van der Peet*, at paras. 31, 36 and 43; *Delgamuukw*, at para. 186.

[208] Another respect in which Aboriginal rights are distinct from other constitutional rights is the fact that they are connected — to varying degrees — with the land. Aboriginal rights arise *both* from the prior occupation of land *and* from the prior social organization and distinctive cultures of Indigenous peoples on that land: *Van der Peet*, at para. 74; *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 29. This aspect of Aboriginal rights is of particular significance here, because in seeking a declaratory judgment, among other remedies, the Innu are claiming Aboriginal *title*, which — as we explained above — denotes an interest *in land*, that is, an “Aboriginal interest in land that burdens the Crown’s underlying title”: *Tsilhqot’in Nation*, at para. 69.

[209] This particular quality of the right asserted here — an interest *in land* — looms large, since the historical Indigenous presence in and occupation of North America *predate* the colonial and later constitutional imposition of provincial boundaries in Canada. It follows logically that, as here, Indigenous peoples will occasionally assert Aboriginal rights — including Aboriginal title — over a traditional territory that extends across provincial boundaries. And it follows just as logically that, if reconciliation is to be achieved between Indigenous peoples’ prior occupation of Canadian territory and Crown sovereignty over that same territory, we must account for the reality that a transboundary claim for Aboriginal rights —

including Aboriginal title — may cross the provincial borders established by the Crown.

[210] However, prior occupation by Indigenous peoples is only one of the *two* elements of our constitutional order and our history that must be reconciled, the second being federalism, a “fundamental and organizing principl[e] of the Constitution”, and its concomitant recognition of the sovereignty of the provincial Crown on matters falling within provincial jurisdiction: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32 (“*Secession Reference*”); see also *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 5; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 78. And, in our constitutional order, as we mentioned above, provincial jurisdiction is *territorially limited*, in recognition of two related principles. The first — the equality of the provinces within the Canadian federation — has been stated as follows by Ruth Sullivan:

The provinces of Canada . . . are of equal dignity and each is vested with identical exclusive jurisdiction over the subjects listed in section 92. This jurisdiction is necessarily confined to matters “in the Province” because any other arrangement would permit one province to violate the internal sovereignty of its fellow provinces.

(Sullivan, at p. 528, cited with approval in *1068754 Alberta Ltd. v. Québec (Agence du revenu)*, 2019 SCC 37, at para. 83 (“*Bitton Trust*”))

[211] The second principle — respect for the sovereignty of other provinces within their respective legislative spheres — was enunciated by this Court in *Unifund*

Assurance Co. v. Insurance Corp. of British Columbia, 2003 SCC 40, [2003] 2 S.C.R. 63, at para. 51:

This territorial restriction is fundamental to our system of federalism in which each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres, and expects the same respect in return. It flows from the opening words of s. 92 of the *Constitution Act, 1867*, which limit the territorial reach of provincial legislation: “In each Province the Legislature may exclusively make Laws in relation to” the enumerated heads of power. The authority to legislate in respect of insurance is founded in s. 92(13), which confers on each legislature the power to make laws in relation to “Property and Civil Rights in the Province”.

[212] Therefore, the goal of reconciliation cannot be achieved by recognizing prior occupation by Indigenous peoples on the one hand while disregarding the constitutional principle of federalism and of the sovereignty of the provincial Crown on the other, thereby contravening the well-established principle that one part of the Constitution cannot abrogate another part of the Constitution: *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 390. Just as this Court has said that the only fair and just reconciliation is one that is achieved by “tak[ing] into account the aboriginal perspective while at the same time taking into account the perspective of the common law”, the goal of reconciliation must similarly be achieved in this appeal by accounting *not only* for “the aboriginal perspective” — and thus the prior, borderless occupation of Canadian territory by Indigenous peoples — *but also* for the constitutional framework that accompanied Crown sovereignty and within which Canadian courts must operate: *Van der Peet*, at para. 50 (emphasis added); see also

M. Walters, “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*” (1992), 17 *Queen’s L.J.* 350, at p. 413. As this Court stated in *Van der Peet*, at para. 49:

The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system. [Emphasis added.]

[213] In short, while Aboriginal rights are certainly *sui generis*, they exist “within the general legal system of Canada”: *Van der Peet*, at para. 49. Indeed, the recognition and affirmation of Aboriginal rights by s. 35(1) of the *Constitution Act, 1982* — which is part of *the Constitution of Canada* — made that clear. Aboriginal rights claims before the courts must therefore not go beyond what is permitted by “the Canadian legal and constitutional structure”: *Van der Peet*, at para. 49; *Delgamuukw*, at para. 82; see also *Mitchell*, at para. 38.

(2) Access to Justice

[214] We are, however, mindful of another quality that is “fundamental to our constitutional arrangements”, namely access to justice: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 41. Indeed, access to justice was described by this Court as a precondition to the rule of law: “[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who

shall and who shall not have access to justice” (*B.C.G.E.U. v. British Columbia (Attorney General)*), [1988] 2 S.C.R. 214, at p. 230). If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect: *Trial Lawyers*, at para. 40.

[215] In *Trial Lawyers*, this Court explained that “[m]easures that prevent people from coming to the courts” to resolve disputes between individuals and decide questions of private and public law “are at odds with this basic judicial function”: para. 32. “To prevent this business being done”, the Court stated, “strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*”: para. 32. It follows from this that the inherent jurisdiction of the superior courts under s. 96 provides “some degree of constitutional protection for access to justice”: para. 39; see also W. J. Newman, “The Rule of Law, the Separation of Powers and Judicial Independence in Canada”, in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (2017), 1031, at p. 1037.

[216] We acknowledge that, without procedural adaptations, requiring Indigenous people to bring applications, and to have them heard, in several different forums in order to obtain the recognition and protection of Aboriginal rights in different parts of a single traditional territory that straddles provincial borders creates barriers to access to justice and undermines the efficient and timely adjudication of such claims. In such circumstances, bringing applications in several different forums

in order to have them heard separately would require Indigenous people to expend significant cost and time advancing the same claim and would force the duplication of extensive documentary, oral and expert evidence: factum of the interveners Kitigan Zibi Anishinabeg and Algonquin Anishinabeg Nation Tribal Council, at para. 11. Such practical challenges amount to barriers that limit the ability of Indigenous people to advance cross-border claims.

[217] At the same time, access to justice must be furnished within the confines of our constitutional order. Delivery of efficient, timely and cost-effective resolution of transboundary Aboriginal rights claims must occur within the structure of the Canadian legal system as a whole. But this is not to suggest that principles of federalism and provincial sovereignty preclude development by superior courts, in the exercise of their inherent jurisdiction, of innovative *yet* constitutionally sound solutions that promote access to justice. As this Court stated in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 2, “[t]he balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just”.

(3) Inherent Jurisdiction

[218] In *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 163, this Court relied on the inherent jurisdiction of the provincial superior courts to facilitate access to justice in the context of multijurisdictional proceedings. In *Endean*, the superior courts of British Columbia, Quebec and Ontario had certified concurrent

class action proceedings on behalf of individuals infected with hepatitis C by the Canadian blood supply. The parties had reached a pan-Canadian settlement agreement, and motions relating to that agreement had been brought before the three superior court judges supervising it. As the Court noted, “[c]lass counsel proposed that the most efficient and effective procedure for adjudicating the motions would be to have them heard by the three supervisory superior court judges sitting together in one location so that they would hear the same submissions and be better positioned to issue orders without ‘material differences’. The supervisory judges were to adjudicate on a paper record”: para. 10. The issue before this Court was the source of the superior court judges’ discretionary power to sit together outside their respective home provinces.

[219] The Court found that the relevant class action legislation gave the superior court judges the discretionary power to sit together outside their home provinces. The courts should exercise their statutory powers before drawing on their inherent jurisdiction, as the broad and loosely defined nature of the courts’ inherent jurisdiction means that it should be exercised “sparingly and with caution”: *Endean*, at para. 24. That said, where such statutory discretion has not been conferred, the superior courts’ inherent jurisdiction provides a “residual source of power” that authorizes superior court judges to hold hearings outside the territorial limits of their home provinces: *Endean*, at paras. 23 and 60. In short, “inherent jurisdiction, among other things, empowers a superior court to regulate its proceedings in a way that

secures convenience, expeditiousness and efficiency in the administration of justice”:
para. 60.

[220] The inherent jurisdiction of the superior courts is, however, subject to the “constraints of the Constitution”, which may limit the courts’ ability to exercise their inherent powers: paras. 62 and 79. When faced with the issue of whether to hold a hearing outside his or her home province in conjunction with other superior court judges hearing related applications, a superior court judge should keep in mind the following broad considerations: (1) whether sitting in a province other than his or her own will impinge on the sovereignty of another province; (2) the benefits and costs associated with the proposed out-of-province proceeding; and (3) any terms that should be imposed as a result of the proceeding: paras. 73-75.

[221] This list is not exhaustive; other factors and concerns may arise in the circumstances of a particular case: para. 76. But, significantly in our view, the assumption underlying all of these considerations is that each superior court judge would have subject-matter and personal jurisdiction over the parties and the issues if the hearing were held within his or her home jurisdiction: para. 72.

[222] In our view, this Court’s decision in *Endean* authorizes superior court judges from different provinces to draw on their statutory jurisdiction — or, where necessary, their inherent jurisdiction — to sit together and hold a joint hearing on applications that have been brought in the superior courts of more than one province

because they seek the recognition and protection of Aboriginal rights in different parts of a single traditional territory that straddles provincial borders.

[223] One thing is certain: in *Endean*, this Court *in no way* limited its conclusions to multijurisdictional class actions. As Professor Hogg notes, “the ruling on inherent jurisdiction [in *Endean*] made clear that the power of a superior-court judge to sit out of province would exist even in a proceeding that was not a class action”: p. 13-30.2. Where applications for the recognition and protection of Aboriginal rights are based on activities that have taken place in a single traditional territory that straddles provincial borders, the evidence before the superior courts of each province will often be the same, resulting in the same record. In such cases, and subject to other considerations, a transboundary Aboriginal rights claim will stand a better chance of being resolved in an efficient, timely and cost-effective manner if the superior court judges sit together for a single joint hearing arising from the joinder of the applications brought in each of the superior courts concerned.

[224] Each judge must, of course, remain free to arrive at his or her own decision on the merits. Aboriginal rights claims “must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities”; therefore, “[s]parse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim”: *Mitchell*, at para. 51; see also *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 46. “In considering whether a claim to an aboriginal right has been made

out, courts must look at both the relationship of an aboriginal claimant to the land *and* at the practices, customs and traditions arising from the claimant's distinctive culture and society": *Van der Peet*, at para. 74. The evidence supporting an Aboriginal rights claim may be stronger respecting the territory of one province than that of another. Although each superior court judge will hear the same evidence, each judge will make factual and legal findings in light of the circumstances specific to his or her home province. In short, each judge retains the authority to decide the case on the merits on the basis of the evidence adduced.

[225] The three general considerations set out in *Endean* (the sovereignty of the other provinces, the benefits and costs of the proposed out-of-province proceeding, and any terms that should be imposed) might also guide a superior court judge faced with the issue of whether to hear related applications concerning Aboriginal rights in conjunction with other superior court judges. The unique nature of Aboriginal rights claims, however, means that the second consideration set out in *Endean* — the benefits and costs of the proposed out-of-province proceeding — will generally weigh in favour of holding a single joint hearing so that such related applications can be heard at the same time and decided on the same evidence.

[226] Section 35 of the *Constitution Act, 1982* constitutionalizes the right of Indigenous peoples to claim Aboriginal rights and title in Canada. Aboriginal rights claims are complex, lengthy, and involve prodigious amounts of evidence: see, for example, *Delgamuukw*, at para. 89. Such evidence may include oral histories and

other testimony based on the personal knowledge of witnesses. As aptly summarized by Satanove J. in *Hereditary Chiefs Tony Hunt v. Attorney General of Canada*, 2006 BCSC 1368, at para. 26 (CanLII):

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

[227] Absent exceptional circumstances, the broader interests of the administration of justice would also generally favour holding a single joint hearing so that related applications for the recognition and protection of Aboriginal rights in different parts of a single traditional territory that straddles provincial borders can be heard at the same time and decided on the same evidence. Indeed, it is the responsibility of superior court judges to “actively manage the legal process in line with the principle of proportionality”: *Hryniak*, at para. 32.

[228] The statutory authority allowing for a superior court judge to participate in such a joint hearing may well be found in the relevant provincial Judicature Acts, other provincial civil proceedings legislation or the rules of court. As the source of such authority, if it exists, varies between provinces and was not argued in this case,

we make no comment as to the particular provisions which might *authorize* such proceedings.

[229] Nor did the parties refer us to specific provisions that would *preclude* holding such a hearing: see, in this regard, *Endean*, at para. 62 (“absent some clear limitation . . . the inherent jurisdiction of the superior courts extends to permitting the court to hold the sort of hearing in issue here”). We will therefore also refrain from expressing any view on whether such a *clear limitation* would be constitutionally valid or would apply to a transboundary Aboriginal rights claim in light of s. 35 of the *Constitution Act, 1982* or s. 96 of the *Constitutional Act, 1867* and of the *degree of constitutional protection* that the latter provides for access to justice, but also for the inherent jurisdiction of the superior courts.

[230] In any event, the power of superior court judges to hold the kind of hearing in issue here need not have been conferred by statute, even though courts ought to look first to their statutory powers before considering their inherent jurisdiction: *Endean*, at para. 19. Absent such legislative authorization, superior court judges may draw on their inherent jurisdiction, which includes the power to regulate their process and proceedings: *Jacob*, at p. 32. As this Court stated in *Endean*, at para. 60:

[T]he superior courts’ inherent jurisdiction is a residual source of power which a superior court may draw on in order to ensure due process, prevent vexation and to do justice according to law between the parties. One aspect of these inherent powers is the power to regulate the court’s process and proceedings: *Jacob*, at pp. 25 and 32-40. As Master

Jacob put it, “it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice”: p. 33. In short, inherent jurisdiction, among other things, empowers a superior court to regulate its proceedings in a way that secures convenience, expeditiousness and efficiency in the administration of justice.

[231] In short, and broadly speaking, superior court judges may sit together and hear the same evidence at a single joint hearing arising from the joinder of the applications brought in each of the superior courts concerned. The practical conduct of extra-provincial proceedings for cross-border Aboriginal rights claims is, of course, a matter best left to the discretion of the judges involved. Whether such a hearing proceeds with all the judges physically present, by video link or through other technological means will depend on the nature of the claims, the availability of judicial resources and the circumstances of the parties. A precondition to holding a joint extra-provincial hearing is, however, that the appropriate proceedings are commenced in each of the relevant superior courts. In this case, the fact that, to date, the Innu have not brought applications in Quebec *and* in Newfoundland and Labrador remains a barrier to the constitutional capacity of the superior courts to appropriately adjudicate their transboundary Aboriginal rights claim.

[232] We are aware that there are significant challenges involved in holding the sort of hearing in issue here. *Endean* was concerned with the hearing of a motion without “oral evidence” and without “resort to the court’s coercive powers”, such as “the power to direct a witness to appear, to answer questions and to make orders

controlling behaviour during a court hearing”: paras. 17, 58 and 78. In the instant case, on the other hand, we envision a hearing at which extensive evidence would be adduced, which could, of course, make managing the hearing difficult. With respect, we urge the superior court judges to make every possible effort to carefully address such difficulties by collaborating with one another and by exercising their inherent jurisdiction and their discretionary powers. Our goal here is not to regulate the type of hearing envisioned in great detail, but simply to provide some general guidance along with an exhortation to promote access to justice and the efficient, timely and cost-effective resolution of transboundary Aboriginal rights claims.

[233] A final note. While it would certainly be preferable for the attorneys general of the provinces concerned to consent to combined proceedings for multijurisdictional transboundary Aboriginal claims, such consent is not required in order for the courts to exercise their inherent jurisdiction to control their own process. Indeed, during the hearing in this Court, the AGNL admitted that he was not aware of any authority in support of the proposition that the parties’ consent is needed for this purpose: transcript, at pp. 48-49.

[234] As this Court stated in *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, however, lawyers play an important role in ensuring access to justice and upholding the rule of law: para. 22; see also Newman, at p. 1036. More to the point, they “must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice”:

Hryniak, at para. 32. It follows that they should be mindful of this role when considering the possibility of combined hearings for multijurisdictional Aboriginal rights claims.

[235] Moreover, while the decision to hold this type of hearing remains a discretionary one, judges must also be mindful of *their* role, and of the role of their courts, in achieving access to justice. They must therefore exercise their discretionary powers — inherent or statutory — in a generous manner, with the clear intention of favouring any procedural adaptation that would promote access to justice and with due regard for the constitutional rights at stake.

D. *Approach Proposed by the Attorney General of Canada*

[236] Although well-meaning, the AGC's approach we described earlier (at para. 99), like that of our colleagues, will not in fact facilitate access to justice or the vindication of s. 35 rights, but rather will create more problems than it will resolve.

(1) The Effects on Canada's Constitutional Structure

[237] At the risk of repeating ourselves, we emphasize again that we share the concerns of the AGC and our colleagues of arriving at a solution in this matter that promotes access to justice and gives proper effect to s. 35 rights. Indigenous claimants need practical means to assert their rights. Litigation in this field can be costly and lengthy and require significant amounts of evidence. In our view, the

solution proposed above of holding joint hearings provides a more practical and efficient avenue of asserting Aboriginal rights than the AGC's approach.

[238] In addition to these important access-to-justice concerns, the effects of the AGC's approach on our constitutional structure must also be considered. Reconciliation entails reconciling Indigenous interests *and* the structure of our modern Canadian state: one cannot be subverted to the other. This Court has repeatedly emphasized that the purpose of s. 35(1) is to reconcile Indigenous peoples' prior occupation with the assertion of Canadian sovereignty; it requires accounting for both of these realities: *Van der Peet*, at paras. 36 and 43; *Adams*, at para. 57; *Delgamuukw*, at para. 148; *Tsilhqot'in Nation*, at para. 14. In assessing claims of Aboriginal rights, courts must therefore consider the perspective of Indigenous peoples "in terms cognizable to the Canadian legal and constitutional structure" (*Van der Peet*, at para. 49); "[t]rue reconciliation will, equally, place weight on [the aboriginal and common law perspectives]" (para. 50).

(a) *The Reasons for Our Constitutional Structure*

[239] We have already touched on the territorial limits that the Constitution imposes on superior courts. It is useful to consider in more detail why this is so. These territorial limits stem from a simple reality: Canada is not a unitary state, and its institutions are divided according to provincial boundaries that do not conform to patterns of historic land use. This does not mean that Aboriginal title claims straddling provincial borders cannot be litigated efficiently; it means only that courts,

in adjudicating such claims, have inherent limitations due to the constitutional framework from which they derive their authority.

[240] There are important reasons why our Constitution divided powers between the federal and provincial governments, and this historical background cannot be ignored. This division was not a formality or a matter of administrative convenience. Rather, “[f]ederalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today”: *Secession Reference*, at para. 43. Without federalism, Canada could not have formed or endured. Federalism “has from the beginning been the lodestar by which the courts have been guided” in interpreting the Constitution: para. 56; see also *Comeau*, at para. 82.

[241] The AGC’s submissions, and notably that “superior courts have jurisdiction to decide section 35 rights of an Indigenous party as they affect another province” (p. 4), implicitly treat the provinces as if they were (at best) administrative units or (at worst) inconvenient technicalities. This is profoundly disrespectful of the constitutional order under which provinces are sovereign within their own jurisdiction. In 1867, it was not the Canadian state that created the provinces; rather, it was the provinces’ colonial predecessors who created Canada.

[242] The system of provincial courts is “one of the important compromises of the Fathers of Confederation”: *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, at p. 728. A key component of that compromise is the requirement that the

judges of the superior courts be appointed from within the province. The judges of the Quebec superior courts “shall be selected from the Bar of that Province”: *Constitution Act, 1867*, s. 98. Until the laws and procedures of the other provinces are made uniform, the judges of the other provinces “shall be selected from the respective Bars of those Provinces”: *Constitution Act, 1867*, s. 97. Implicit in this is that, while superior court judges may be federally appointed, they are not *federal* judges, as the Superior Court judge seems to suggest.

[243] This Court explained in *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, that the purpose of appointing judges from within a province is broader than mere legal competence. The issue was the interpretation of s. 6 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, which requires that three judges of this Court “shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province”. McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. wrote:

The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec’s distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the *functioning* and the *legitimacy* of the Supreme Court [Emphasis in original; para. 49.]

These concerns are material to every province. The Constitution ensures that each province's judges are not just technically competent, but also connected with the province's distinct political and cultural realities.

[244] Provincial boundaries are an essential feature of the system of provincial superior courts just as they are an essential feature of provincial legislative power. As LeBel J. said in *Van Breda*, at para. 21:

The interplay between provincial jurisdiction and external legal situations takes place within a constitutional framework which limits the external reach of provincial laws and of a province's courts. The Constitution assigns powers to the provinces. But these powers are subject to the restriction that they be exercised within the province in question . . . , and they must be exercised in a manner consistent with the territorial restrictions created by the Constitution

[245] In particular, the system of provincial superior courts ensures that claims to a province's land or challenges to a province's laws must be heard before a judge of that province. As we have explained, this limitation is consistent with *Hunt*, as that decision did not address the *territorial* competence of superior courts. Thus, the claims that cut deepest at the heart of a province's sovereignty will be resolved by a judge connected to the province's realities. This enhances public confidence in the courts and protects courts' functioning and legitimacy, particularly if the outcome of the litigation is unfavourable to the province.

[246] 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 federalism. 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.

(b) *The Declarations Sought Are Contrary to Our Federal Structure*

[247] It has been argued before us that any declarations of Aboriginal title obtained in this case would not be enforceable against the Crown but would rather be used only to establish civil liability of private entities. We are not persuaded that declarations of Aboriginal title can function in this way, nor do we consider this to be a desirable result.

[248] A declaratory judgment is a “judicial statement confirming or denying a legal right of the applicant”: Sarna, at p. 1. Importantly, before a court can grant a declaration, it must have jurisdiction to hear the issue: *Ewert v. Canada*, 2018 SCC

30, [2018] 2 S.C.R. 165, at para. 81; *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, at para. 60. Although a declaration is technically non-coercive, it is a powerful tool in litigation involving governments, as it is assumed that they will comply with both the letter and the spirit of the declaration: K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at pp. 15-63 to 15-64; *Assiniboine v. Meeches*, 2013 FCA 114, 444 N.R. 285, at paras. 13-15. Indeed, as the Court in *Meeches* stated:

the proposition that public bodies and their officials must obey the law is a fundamental aspect of the principle of the rule of law, which is enshrined in the Constitution of Canada by the preamble to the *Canadian Charter of Rights and Freedoms*. Thus, a public body or public official subject to a declaratory order is bound by that order and has a duty to comply with it. [Emphasis added; para. 14.]

[249] For this reason, judicial declarations of existing Aboriginal rights have become the primary remedy for securing those rights: Roach, at p. 15-63. Section 35(1) establishes that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” A judicial declaration is the means by which Indigenous peoples can establish that these rights, including Aboriginal title, exist.

[250] We are sceptical of the position urged upon us to the effect that the resulting declaration of Aboriginal title could be issued without binding the Crown in right of Newfoundland and Labrador for the parts of Nitassinan located in that province. Courts do not make declarations in vain; such a declaration should be

considered *only* if it will bind the Crown, as the declaration confirms that the s. 35 right exists, which in turn trigger important responsibilities by the Crown.

[251] Aboriginal title is a burden on the Crown's underlying title; this burden arose when the Crown declared sovereignty: *Delgamuukw*, at para. 145. An incident of this underlying title is a fiduciary duty owed to Indigenous peoples when dealing with the lands and a right to encroach on the title if the justification test under s. 35(1) is satisfied: *Tsilhqot'in Nation*, at para. 71.

[252] All litigation respecting Aboriginal title affects the Crown: *William v. British Columbia*, 2002 BCSC 1904, at para. 30 (CanLII). The Crown is a necessary party even if an explicit declaration of title is not sought: *Thomas v. RioTinto Alcan Inc.*, 2016 BCSC 1474, 92 C.P.C. (7th) 122, at paras. 21 and 25. Even asserting a claim of Aboriginal title has a fundamental effect on the Crown's interests: *Haida Nation*, at paras. 26-51. The recognition of Aboriginal title further develops the fiduciary-like relationship: *Guerin*, at p. 349. Once Aboriginal title is established, governments and others seeking to use the land must obtain the title holders' consent: *Tsilhqot'in Nation*, at para. 76.

[253] We are also sceptical of the following proposition in our colleagues' reasons:

This should not be read, however, as precluding the participation of the Crown of Newfoundland and Labrador in the proceedings, if it wishes, in order to assert its interests, invoke its rights and make submissions about

the appropriate scope of any declaratory relief. [Citation omitted; para. 72.]

We do not understand how the scope of a declaration of Aboriginal title over land in Labrador could be appropriately limited. The AGNL's objection here is that Quebec courts cannot make such a declaration to begin with. We question how, when our colleagues have held that Quebec courts *do* have such jurisdiction, the scope of any such declaration could be limited in a way consistent with the imperatives of Canadian federalism. Moreover, the AGNL's participation in proceedings before the Quebec Superior Court could be seen as tacitly endorsing that court's jurisdiction, despite its objections to that court having jurisdiction to begin with.

[254] The courts below were well aware of the impact on Newfoundland and Labrador in this case. In an initial motion to strike, Blanchard J. recognized that the courts would be required [TRANSLATION] “to rule on the constitutional rights that may exist in relation to the Crown, both in right of Canada and in right of Quebec and of Newfoundland and Labrador”: Sup. Ct. Judgment Dismissing IOC and QNS&L's Motion to Dismiss, at para. 19 (emphasis added). Similarly, in the decision granting Newfoundland and Labrador intervener status, Davis J. explained that although Aboriginal rights pre-existed s. 35, [TRANSLATION] “this does not mean that when a First Nation seeks recognition of its aboriginal rights, the Crown of a province has no interest in the issue”, given the fiduciary obligations and limitations on use of the land that would result: Sup. Ct. Judgment Authorizing the Intervention of the AGNL, at para. 63. Even the Court of Appeal in the decision under review recognized that

[TRANSLATION] “[i]f the Innu wish to have their [comprehensive] Aboriginal claims to Labrador recognized, they will have to negotiate with the government of Newfoundland and Labrador or seize the courts of that province in the context of a [comprehensive] claim”: C.A. reasons, at para. 104.

[255] Another reason the Crown is a necessary party to any Aboriginal title claims is found in one of the key features of Aboriginal title: in order to ensure future generations benefit from the land, it may be alienated only to the Crown (*Delgamuukw*, at para. 129; *Tsilhqot’in Nation*, at paras. 15 and 74). If Indigenous peoples can settle the extent of their rights in private litigation against third parties, they can effectively alienate their land without dealing with the Crown. This undermines the nature of Aboriginal title.

[256] It is therefore clear that the Crown is a necessary party in Aboriginal title claims — and is necessarily implicated when a declaration of Aboriginal title is made. It follows that a declaration of Aboriginal title cannot be sought “only” against a third party. It *also* follows that a declaration over land in another province implicates the Crown in right of that province. Yet, it is also clear that the Crown in right of Newfoundland and Labrador would not be bound by a declaration that purported only to apply against a third party: as Sarna notes, “[t]here is no power to grant a declaration determining the rights of parties not present in the proceeding or not ascertained in the circumstances, although such power has been treated as a matter of discretion rather than jurisdiction” (p. 87).

[257] Not only would the Crown in right of Newfoundland and Labrador not be bound by such a declaration, but as we have also explained, a declaration purporting to apply to land located in another province is beyond the jurisdiction of the issuing court. The result of the approach advocated by the AGC is therefore that the Innu could spend years trying to obtain a declaration as part of their relief that would not in fact confer what it seems to.

[258] Our colleagues note that the courts below did not consider whether the declaratory relief will or ought to be granted. In their view, this Court should not do so either, as these are discretionary decisions to be made by the court seized with the merits of the case. They further state that the issue here “concerns only the jurisdiction of the Quebec courts to embark on that inquiry”: para. 43 (emphasis added). With respect, this position grossly minimizes the issue at stake. Again, the AGNL’s very objection is that Quebec courts cannot pronounce on rights to land situated in Newfoundland and Labrador. Moreover, our colleagues’ decision to leave the question of whether a declaration can be granted to another day is, while well-motivated, also gravely ill-advised. If a court cannot give the Innu the remedy they seek, then access to justice requires identifying the appropriate forum at the earliest possible opportunity.

(c) *The AGC’s Use of “Inherent Jurisdiction”*

[259] The AGC’s inherent jurisdiction approach is also of dubious legality due to its broad reach. If a superior court can adjudicate Aboriginal rights in a

neighbouring (or, for that matter, remote) jurisdiction based on the inherent jurisdiction of superior courts, that principle cannot be confined to this case. Clearly, if the Quebec courts are found to have inherent jurisdiction to adjudicate matters relating to land in Newfoundland and Labrador, then courts in Newfoundland and Labrador also have the inherent jurisdiction to declare rights in land in Quebec. Ontario courts have jurisdiction over disputes in Manitoba, and Alberta courts over disputes in British Columbia. Further, by raising this approach as an intervener at the final court of appeal for the first time, the AGC has deprived the provinces of the opportunity to meaningfully respond to it.

(d) *Effects on Provincial Boundaries*

[260] The Innu's claims raise the location of the Labrador boundary. In their statement of claim, they refer to the border between Quebec and Labrador as the [TRANSLATION] "unofficial Quebec-Labrador boundary": A.R., vol. II, at pp. 188-89. In subsequent proceedings, the Innu have explicitly indicated that they intend to argue that the decision in *Re Labrador Boundary*, [1927] 2 D.L.R. 401 (P.C.) — the decision that settled the boundary between Quebec and Labrador — was *per incuriam*: Sup. Ct. Judgment Authorizing the Intervention of the AGNL, at para. 35.

[261] We would note, as well, that the Innu seek declarations of Aboriginal title to and the right to benefit from the natural resources of the Churchill Falls Power Station and many of its associated reservoirs and transmission lines: A.R., vol. II, at pp. 188-89.

[262] The boundary between Quebec and Labrador became a contentious issue in the late 19th century. In 1927, the Privy Council settled the border in *Re Labrador Boundary*. Twenty years later, when Newfoundland and Canada first negotiated a draft terms of union in anticipation of a Confederation referendum, s. 2 specifically recognized this boundary: “Report of the Ottawa Delegation: Proposed Arrangement for the Entry of Newfoundland into Confederation”, in J. K. Hiller and M. F. Harrington, eds., *The Newfoundland National Convention, 1946-1948: Reports and Papers*, vol. 2 (1995), 510. After the referendum narrowly passed, this provision was carried forward into the 1949 *Newfoundland Act*, Sch., s. 2: the Labrador boundary would be “as delimited in the report delivered by the Judicial Committee of His Majesty’s Privy Council on the first day of March, 1927”. This provision is part of our Constitution: *Constitution Act, 1982*, Sch., s. 21. Continued recognition of the boundary was an essential component of Newfoundland’s Confederation bargain.

[263] The *Constitution Act, 1982* recognizes that the *Newfoundland Act*, including the 1927 border, forms part of the Constitution: s. 52(2)(b); Sch., s. 21. It also notes that “any alteration to boundaries between provinces” requires the authorization of “the legislative assembly of each province to which the amendment applies”: s. 43(a). Modifying this amending formula would require unanimous consent of the provinces, the House of Commons and the Senate: s. 41(e). The AGC does not appear to have reckoned with the implications of the Quebec courts hearing a challenge to the Labrador boundary itself.

[264] The AGC's position that claims such as this may be entertained may also have implications for future challenges to other provincial borders.

[265] Most of Canada's current territory was transferred to it by two Imperial Orders-in-Council: *Rupert's Land and North-Western Territory Order* in R.S.C. 1985, App. II, No. 9, transferring the Hudson's Bay Company lands, and *Adjacent Territories Order* in R.S.C. 1985, App. II, No. 14, transferring the Arctic Archipelago. Together, these orders transferred all of modern Alberta, Saskatchewan, Yukon, Northwest Territories and Nunavut, together with most of modern Manitoba, Ontario and Quebec.

[266] When the provinces of Alberta and Saskatchewan were formed out of this transferred territory, their borders were set by *The Alberta Act* (U.K.), 1905, 4-5 Edw. 7, c. 3 (reprinted as *Alberta Act* in R.S.C. 1985, App. II, No. 20) and *The Saskatchewan Act* (U.K.), 1905, 4-5 Edw. 7, c. 42 (reprinted as *Saskatchewan Act* in R.S.C. 1985, App. II, No. 21), which also form part of Canada's constitution: *Constitution Act, 1982*, s. 52(2)(b); Sch., ss. 12 and 13. Further, the boundaries of Quebec, Manitoba and Ontario were expanded by federal statutes under *The British North America Act, 1871* (U.K.), 34 & 35 Vict., c. 28 (reprinted as *Constitution Act, 1871* in R.S.C. 1985, App. II, No. 11), notably *The Quebec Boundaries Extension Act, 1912* (U.K.), 2 Geo. 5, c. 45; *The Manitoba Boundaries Extension Act, 1912* (U.K.), 2 Geo. 5, c. 32; and *The Ontario Boundaries Extension Act* (U.K.), 1912, 2 Geo. 5, c. 40. (While these latter statutes do not have constitutional force and are not

immune to constitutional challenge, they cannot otherwise be amended without the affected province's consent.) The stability of all these arrangements, whether constitutional or merely statutory, is now cast into uncertainty by necessary implication of our colleagues' reasons.

(2) The AGC's Approach Leads to a Strong Possibility of Conflicting Judgments and Confusion

[267] The AGC's approach, if accepted, would allow a superior court in one province to pronounce on Aboriginal title in relation to land located in another province incidentally to an *in personam* claim. Such a consequence is deeply pernicious to the orderly and expeditious resolution of s. 35 claims, because it creates a strong possibility of conflicting judgments and repeated litigation.

[268] As we have explained, such a declaration would be invalid and would not bind the Crown of the relevant province. Yet, this would likely not be obvious to anyone lacking specific legal training. This would sow confusion for everyone involved and would undermine the efficacy of adjudication by the courts. From the standpoint of members of the Indigenous claimant community in particular, a declaration that appears to grant them title but in fact does not is especially harmful and would, justifiably, undermine their trust in the courts.

[269] Even were such a declaration valid, the AGC's proposed approach creates the risk of patchwork recognition of Indigenous interests in land that can be asserted

against some parties but not others. Recognizing Aboriginal title for the purpose only of *in personam* litigation means that only the named defendants would be bound by that declaration. The effect of any declaration over land in Labrador will be defined by the doctrine of *res judicata*. However, *res judicata* applies only between the parties to the original dispute or their privies: D. J. Lange, *The Doctrine of Res Judicata in Canada* (4th ed. 2015), at p. 1; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at p. 254; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, at paras. 36 and 92. As a result, if another alleged violation of the Innu's land were to arise in a subsequent case with different parties, the Innu would not be able to invoke *res judicata* and would instead have to litigate the matter anew and obtain *yet another* narrow *in personam* declaration. A declaration is meant to provide certainty about parties' rights; making findings of Aboriginal title on a piecemeal basis against one defendant or another provides no certainty as to who has rights over a given piece of land at any given time.

[270] Even more significantly, a declaration from a Quebec court would not preclude a Newfoundland and Labrador court from finding that *no* Aboriginal title had been established over the very same land in Labrador. Such a result would certainly — and rightly — leave Indigenous claimants with the impression that the courts cannot give them the remedies they seek.

[271] This approach is also not desirable from a practical perspective. Aboriginal title requires significant time and evidence to prove. As aptly noted by

Lamer C.J. in *Delgamuukw*, establishing Aboriginal title is not an easy feat; it can be “long and expensive, not only in economic but in human terms as well”: para. 186. Indeed, in that case, the trial had involved 318 days of testimony and resulted in a judgment of over 400 pages: para. 89. Although the Aboriginal title sought in this case is framed as a means to an end, the claimants will still have to establish such title in order to obtain the declaration being used to ground the civil liability claim. The result is that the Innu could spend years attempting to establish title for the purposes of this litigation only to end up with a declaration that purports to declare that they have Aboriginal title but in reality rings hollow. This is not access to justice. It is, rather, a significant burden to place on an Indigenous group, all the more so when it does not actually confer what it purports to.

[272] Finally, this *in personam* approach would also hinder any prospect of ongoing negotiations with the governments of Quebec and Newfoundland and Labrador over the Innu’s claimed title. As this Court has noted, “[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests”: *Haida Nation*, at para. 14; see also *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at paras. 22 and 26. Any such negotiations would await the lengthy process of establishing a “limited” declaration of Aboriginal title. This process would create strong expectations without addressing any of the real issues at play.

[273] The Superior Court judge asked, [TRANSLATION] “Can we say that it is in the interest of justice that essentially the same debate should take place in two jurisdictions that must both apply the same law, when the courts that will hear the cases are both federally appointed?” Sup. Ct. reasons, at para. 107. We, in turn, ask: Can it be said that it is in the interests of justice to permit a court to issue a declaration of Aboriginal title whose reach is unclear and whose validity is questionable, thus sowing confusion and uncertainty for all involved? The answer is unequivocally no. We do not share the Superior Court judge’s unitary conception of the Canadian federation.

(3) Incompatibility With the Principle of Crown Immunity

[274] The constitutional principle of Crown immunity means that the Crown can be sued only with its permission. This principle is “deeply entrenched in our law” and can only be modified by “clear and unequivocal legislative language”: *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184, at para. 1. All provincial legislatures have introduced legislation allowing the Crown to be sued, but only in their own courts: see, for example, *Proceedings Against the Crown Act*, R.S.N.L. 1990, c. P-26, ss. 4 and 7.

[275] It is this simple. The Crown of one province cannot be sued in another province’s court: *Athabasca Chipewyan First Nation v. Canada (Minister of Indian Affairs and Northern Development)*, 2001 ABCA 112, 199 D.L.R. (4th) 452, at paras. 23-43; *Sauve v. Quebec (Attorney General)*, 2011 ONCA 369, at para. 3

(CanLII); *Medvid v. Saskatchewan (Minister of Health)*, 2012 SKCA 49, 349 D.L.R. (4th) 72, at paras. 26-31; *Constructions Beauce-Atlas inc. v. Pomerleau inc.*, 2013 QCCS 4077, at paras. 16-32 (CanLII). In addition to being an incident of the constitutional principle of federalism, this is a statutory rule (*Proceedings Against the Crown Act*, s. 7) that can only be set aside if constitutionally challenged.

[276] Our colleagues say that the Crown immunity issue need not be dealt with (at paras. 71-72) because the Crown is not named in the Innu's suit. But, as noted, any claim that asserts Aboriginal title *necessarily* involves the Crown. Unlike ordinary property disputes which pit private parties against each other within a framework of private law, an Aboriginal title claim cuts to the very root of the Crown's sovereignty and triggers obligations on the part of the Crown.

[277] Not only is the Crown's presence necessary in principle, it also helps ensure that issues are fairly heard. Private parties cannot be assumed to have any knowledge about the facts of occupation at the time the Crown asserted sovereignty: *Thomas*, at para. 23. Moreover, they may not have the resources to respond to a complex Aboriginal title proceeding effectively. As Binnie J. said in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535:

... Aboriginal rights litigation is of great importance to non-Aboriginal communities as well as to Aboriginal communities, and to the economic well-being of both. The existence and scope of Aboriginal rights protected as they are under s. 35(1) of the *Constitution Act, 1982*, must be determined after a full hearing that is fair to all the stakeholders.
[para. 12]

[278] The AGC's approach completely disregards this important role. It also fails to account for the interests of other Indigenous groups with overlapping claims to a territory, a difficulty which, as we discuss below, arises in this case. This reinforces the necessity of joining the Crown as a party, given its role as a fiduciary to those other Indigenous stakeholders.

[279] The Superior Court judge held that the doctrine of Crown immunity should be modified so as not to apply to multijurisdictional s. 35 claims: Sup. Ct. reasons, at paras. 115-18. This argument is rooted in the concept that one province's courts can hear a case as fairly as another's. He did not explain on what basis s. 7 of the *Proceedings Against the Crown Act* was constitutionally inapplicable, particularly in the absence of a notice of constitutional question.

[280] As Hunt J.A. of the Alberta Court of Appeal held in *Athabasca*, "[i]t is contrary to our basic notion of federalism that the decision of one provincial Crown about the extent to and the manner in which it waives its immunity could be declared constitutionally inapplicable by courts established by the Crown in another province": para. 39. But even were that question properly before the Superior Court judge in this case, and with great respect to the AGC, the reason for confining litigation against the Crown to the province's own superior court is not because other provinces' judges are unable to hear cases fairly or competently; rather, it reflects the elementary principle of federalism and the importance of resolving fundamental questions about a province's sovereignty within the province's own legal system.

(4) The AGC’s Approach Ultimately Impedes Access to Justice

[281] Access to justice requires access to a court that can lawfully and finally adjudicate claims. As Karakatsanis J. explained in *Hryniak*, “[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today Without an effective and accessible means of enforcing rights, the rule of law is threatened”: para. 1 (emphasis added). We agree with our colleagues that there are significant access-to-justice concerns at play in this case. We emphasize, however, that access to justice requires *effective* means of enforcing rights. In our view, the AGC’s approach fails to offer an *effective* solution.

[282] As this Court has explained, access to justice has two interconnected dimensions:

One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance — the results to be obtained — and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

(*AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 24)

[283] Similarly, the Honourable Frank Iacobucci, writing extra-judicially, has described these two dimensions as requiring, first, that claimants have an opportunity to pursue their claims in court, and second, that they are able to obtain “an appropriate restorative result”: F. Iacobucci, “What Is Access to Justice in the Context

of Class Actions?”, in J. Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 17, at p. 20.

[284] This focus on the substantive part of access to justice — the remedy — is critical here. As Professor Macdonald has explained, access to justice encompasses a number of features: “(1) just results, (2) fair treatment, (3) reasonable cost, (4) reasonable speed, (5) understandable to users, (6) responsive to needs, (7) certain, and (8) effective, adequately resourced and well organized”: R. A. Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions”, in J. Bass, W. A. Bogart and F. H. Zemans, eds., *Access to Justice for a New Century □ The Way Forward* (2005), 19, at pp. 23-24. The final four features in that list are particularly relevant: if the impact of the order actually received is uncertain, confusing, or narrower than expected, this is not the *triumph* that the AGC and our colleagues proclaim, but a *failure* of access to justice.

[285] This uncertainty and lack of clarity is particularly concerning where Indigenous peoples are involved, given the “shadow of a long history of grievances and misunderstanding” that characterizes the reconciliation process: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 1. As we have explained, if a court issues a declaration of Aboriginal title that proves not to have the effect that was hoped for or appeared to have been conferred, this undermines the legitimacy and efficacy of the courts and

leaves Indigenous claimants with the impression that they cannot trust the courts to resolve their s. 35 claims.

[286] We share our colleagues' concerns about "piecemeal" advocacy" (at para. 45) and the potential for inconsistent holdings. But with respect, this will be the very result of *their* approach, given that any "limited declaration" of Aboriginal title — even if such a thing were possible — would have no impact beyond this litigation, in particular against the Crown in right of Newfoundland and Labrador, nor any binding direction to a court in Newfoundland and Labrador. The result is uncertainty all-round and great potential for inconsistent judgments. This is contrary to the guidance from this Court that a "culture shift" is necessary towards "proportional procedures": *Hryniak*, at para. 2. The AGC's approach may appear simple and efficient, but the necessary consequences of it show that it will ultimately generate confusion and more litigation. Our approach avoids these concerns by addressing the crucial question of courts' jurisdiction up-front.

[287] We add that it would not necessarily be an "inconsistent" result for a court in Newfoundland and Labrador to come to a different conclusion on Aboriginal title than a Quebec court, so long as their respective conclusions are each confined to territory within their own provinces. For example, a Newfoundland and Labrador court could find that title has been established over the portion of Nitassinan in Labrador, while a Quebec court might find the Innu have not established title over the portion of land in Quebec. As noted by the AGNL, Aboriginal title is tied to

particular territory and requires proof, *inter alia*, of continuous occupation of a site: *Delgamuukw*, at para. 143; *Tsilhqot'in Nation*, at para. 25. It is therefore possible that there would be *differing* (but not *inconsistent*) findings relating to different parts of Nitassinan depending on the evidence. This is not a denial of access to justice but rather a reality of proving Aboriginal title.

[288] While different results in Quebec and Labrador are not necessarily inconsistent, individual *in personam* suits against private landowners would likely create results irreconcilable with any conception of historic land use. Each plot of land could have a different result, with some houses in a neighbourhood subject to one group's Aboriginal title, other houses to another group's, and others subject to no Aboriginal title at all. The resulting patchwork could leave Indigenous groups without a contiguous territory. Rather than being shaped by an understanding of the evidence of prior occupation, the boundaries of Indigenous territory would be defined by which plots of land happened to be occupied by the third-party defendants in each suit, and by the technicalities of *res judicata*. It is difficult to see how this result is desirable either from an Indigenous or a non-Indigenous perspective.

[289] Moreover, and howsoever worthy our colleagues' goal of simplifying procedures, it does not follow that courts can or should dispense with federalism or provincial boundaries. It bears repeating that reconciliation must reconcile *both* prior Indigenous occupation *and* Crown sovereignty.

[290] As a final note on access to justice, we observe that our colleagues have not addressed our proposed solution of joint hearings, except perhaps obliquely when they state that the Innu should not be made to “bifurcate” their claim: para. 52. We acknowledge that our solution requires commencing a claim in Newfoundland and Labrador. However, as we make clear in our reasons, using an *Endean*-style approach means that the bulk of the hearings could be conducted together and in a way that minimizes inconvenience and cost as much as possible. With respect, it is not “bifurcating” a claim to require that it be brought in a way that respects our constitutional structure while making every effort to consolidate proceedings. Indeed, the term “bifurcate” better describes our colleagues’ approach, which results in declarations of questionable meaning and reach, and very likely more litigation in the future.

(5) This Case Exemplifies the Serious Problems That Can Arise Under the AGC’s Approach

[291] The serious problems created by the AGC’s proposed approach are not theoretical or faraway. In fact, they plainly arise on the facts of this case.

(a) *Third-party Claims to the Land*

[292] The plaintiffs seek declarations of Aboriginal title and Aboriginal rights over a large portion of Labrador: A.R., vol. II, at pp. 188-89. Much of that land is occupied by non-Indigenous third parties, including residents and businesses of the

communities of Labrador City, Wabush, and Churchill Falls; the Churchill Falls (Labrador) Corporation Limited; Nalcor Energy; and the operators of the Wabush Mines.

[293] The interaction between Aboriginal title claims and third parties' property rights remains unsettled: see, for example, *Council of the Haida Nation; Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.); K. McNeil, "Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v. British Columbia*" (2010), 8 *Indigenous L.J.* 7; R. Hamilton, "Private Property and Aboriginal Title: What is the Role of Equity in Mediating Conflicting Claims?" (2018), 51 *U.B.C. L. Rev.* 347; J. Borrows, "Aboriginal Title and Private Property" (2015), 71 *S.C.L.R.* (2d) 91. It is clear that none of the non-Indigenous third parties are parties in this litigation and, one must therefore assume, none will be bound by the relief sought here, forcing the Innu to face the very challenges discussed above.

(b) *Other Aboriginal Title Claims*

[294] In addition to the existence of substantial non-Indigenous claims, some of the land over which the plaintiffs are seeking declarations is subject to Aboriginal rights claims by at least two other groups. The Labrador Innu have negotiated and approved an Agreement in Principle that includes an Economic Major Development Impact and Benefit Agreement Area overlapping much of the territory over which the

plaintiffs seek a declaration.⁴ Moreover, the NunatuKavut Community Council has signed a memorandum of understanding with Canada to discuss its claim to Aboriginal rights.⁵ This claim overlaps with all the territory in Labrador claimed by the Innu.⁶

[295] This Court has, in the past, said that it is not desirable to make findings of Aboriginal rights when other affected Indigenous groups are not involved. In *Delgamuukw*, Lamer C.J. noted that many other Indigenous groups with territorial claims overlapping with those of the appellants did not intervene in the appeal or at trial. This was “unfortunate, because [the] determinations of aboriginal title [for the appellants] will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-aboriginals and members of other aboriginal nations”: *Delgamuukw*, at para. 185 (emphasis in original). This logic extends not only to the declarations the plaintiffs seek, but also to the damages claim, which could affect the economic value of other Indigenous groups’ rights.

⁴ Compare Map 5-E-1: Western Labrador Economic Major Development Impact and Benefit Agreement Area (Crown-Indigenous Relations and Northern Affairs Canada, *Labrador Innu Land Claims Agreement-in-Principle*, last updated March 13, 2012 (online), at para. 91) with the map of Nitassinan of the Innu of Uashat Mak Mani-Utenam and of Matimekush-Lac John and the map of the Saguenay Beaver Reserve (Sept-Îles division) (A.R., vol. II, at pp. 188-89).

⁵ NunatuKavut Community Council, *Memorandum of Understanding on Advancing Reconciliation*, September 5, 2019 (online).

⁶ Compare NunatuKavut Community Council’s traditional territory map (NunatuKavut Community Council, *Traditional Territory Map*, last updated November 15, 2019 (online)) with the map of Nitassinan of the Innu of Uashat Mak Mani-Utenam and of Matimekush-Lac John and the map of the Saguenay Beaver Reserve (Sept-Îles division) (A.R., vol. II, at pp. 188-89).

[296] Overlapping land claims raise real procedural and substantive challenges that have yet to be resolved by this Court. In the meantime, courts should not stretch procedural rules to enable decisions that will appear to affect the rights of Indigenous groups that are neither present nor (presumably) bound by the result.

VI. Conclusion

[297] We would allow the appeal with costs, set aside the judgments of the Quebec Superior Court and the Quebec Court of Appeal, allow in part the AGNL's motion to strike allegations and order that the conclusions of the Innu's motion to institute proceedings that are declaratory or injunctive in nature and that relate to Nitassinan or to the IOC megaproject be amended so that they apply only to acts, activities or rights within Quebec's territory.

Appeal dismissed with costs throughout, MOLDAVER, CÔTÉ, BROWN and ROWE JJ. dissenting.

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