Indigenous Claims to Foreign Land: Update from Canada

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In 2013 two Innu First Nations sued, in the Superior Court of Quebec, two mining companies responsible for a mega-project consisting of multiple open-pit mines near Schefferville, Quebec and Labrador City, Newfoundland and Labrador. The Innu asserted a right to the exclusive use and occupation of the lands affected by the mega-project. They claimed to have occupied, since time immemorial, a traditional territory that straddles the border between the provinces of Quebec and Newfoundland and Labrador. They claimed a constitutional right to the land under s. 35 of the *Constitution Act, 1982*.

The mining companies and the Attorney General of Newfoundland and Labrador each moved to strike from the Innu's pleading portions of the claim which, in their view, concerned real rights over property situated in Newfoundland and Labrador and, therefore, fell under the jurisdiction of the courts of that province.

In *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, the Supreme Court of Canada held (by 5-4 majority) that the motion to strike failed and that the Quebec court had jurisdiction over the entire claim advanced by the Innu.

Quebec's private international law is contained in Book Ten of the Civil Code of Quebec. Jurisdiction over the mining companies was based on their being domiciled in Quebec. However, as a special rule of jurisdiction, Division III governs what are called real and mixed actions (para. 18). The general rule is that Quebec has jurisdiction to hear a real action only if the property in dispute is situated in Quebec (art. 3152). In the case of a mixed action, Quebec must have jurisdiction over both the personal and real aspects of the matter: see *CGAO v Groupe Anderson Inc.*, 2017 QCCA 923 at para. 10 (para. 57). These rules required the court to properly characterize the Innu's action.

The majority held that the claim was a mixed action (para. 56). This was because the Innu sought 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. However, the claim was not a "classical" mixed action, which would require the court to have jurisdiction over both the personal and real aspects of the matter. Rather, this was a "non-classical" mixed action that involved the recognition of *sui generis* rights and the performance of obligations (para. 57). Put another way, the nature of the indigenous land claims made them different from traditional claims to land. Accordingly, the claim did not fall within the special jurisdiction provisions in Division III and jurisdiction could simply be based on the defendants' Quebec domicile.

The majority was influenced by access to justice considerations, being concerned about requiring the Innu to litigate in both Quebec and Newfoundland and Labrador. It noted that "[t]he 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. … These are compelling access to justice considerations, especially when they are coupled with the pre-existing nature of Aboriginal rights" (paras. 46-47).

The dissenting reasons are lengthy (quite a bit longer than those of the majority). Critically, it held that "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" (emphasis in original) (para. 140). Labeling them as *sui generis* was not sufficient to avoid the jurisdictional requirement for a mixed action that the land had to be in Quebec: "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" (para. 155).

In the view of the dissent, " 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 … , precisely because Quebec authorities lack jurisdiction in this regard" (emphasis in original) (para. 189).

On the issue of access to justice, the dissent stated that "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" (emphasis in original) (para. 217). It went on to proffer the interesting procedural option that both a Quebec judge and a Newfoundland and Labrador judge could sit in the same courtroom at the same time, so that the proceedings were heard by both courts without duplication (para. 222).

There are many other issues in the tension between the majority and the dissent, including the role of Newfoundland and Labrador as a party to the dispute. It was not sued by the Innu and became involved as a voluntary intervenor (para. 9).

The decision is very much rooted in the private international law of Quebec but it has implications for any Indigenous claims affecting land in any legal system. Those systems would also need to determine whether their courts had jurisdiction to hear such claims in respect of land outside their territory. Indeed, the decision offers a basis to speculate as to how the courts would handle an Indigenous land claim brought in British Columbia in respect of land that straddled the border with the state of Washington. Is the court's decision limited to cases that cross only internal federation borders or does it extend to the international realm? And does there have to be a straddling of the border at all, or could a court hear such a claim entirely in respect of land in another jurisdiction? The court's decision leaves much open to interesting debate.