

CASE LAW UPDATE

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Lax Kw'alaams Indian Band v Canada (Attorney General)

2011 SCC 56 (Released November 10, 2011)

Constitution Act, 1982 – Aboriginal Rights – Proof

This Supreme Court of Canada decision rejected a claim by several First Nations to possession under s. 35 of the *Constitution Act, 1982*, of an Aboriginal right to fish commercially all species in the claimants' traditional territories. In doing so the Court (1) considered how a modern right can evolve from an historical practice; (2) confirmed the importance of the pleadings and of the characterization of Aboriginal rights; and (3) restated the steps for proof of an Aboriginal right while adding a further restriction in the case of commercial rights.

The Lax Kw'alaams Indian Band ("**Lax Kw'alaams**") and its ancestors have lived in and fished off the northwest coast of British Columbia for thousands of years. Before contact with Europeans, they regularly traded fish-grease extracted from the eulachon but traded other fish products only occasionally. In the present proceeding the Lax Kw'alaams sought a declaration as to their Aboriginal rights. In contrast, in previous Supreme Court decisions concerning the test for s. 35 Aboriginal rights, Aboriginal communities had claimed rights in response to a regulatory prosecution. The trial judge and a panel of the British Columbia Court of Appeal rejected the Lax Kw'alaams claim.

Justice Binnie, writing for a seven-judge panel, agreed. He held that the claimed modern right to fish commercially all fish species in the claimants' territory was not a "logical evolution" of the pre-contact trade in eulachon grease. That trade did not provide a "sufficient historical basis" for the broad commercial right. More specifically, the earlier activity and the present claim were "qualitatively different" in the sense that the Lax Kw'alaams did not trade other species "in any significant way". They were also "quantitatively different" because the relative importance to the modern Lax Kw'alaams economy of a commercial right would "lack proportionality" to the relative pre-contact importance of trade in eulachon grease.

The Court also rejected the Lax Kw'alaams' assertion that the trial judge wrongly failed to characterize the claim only *after* she had heard the evidence at trial. Binnie J. held that a trial judge was not required "to put together a report" on what Aboriginal rights might exist had the claimants properly pleaded their rights. Instead, judges must characterize a claim to Aboriginal rights on the basis of the pleadings. That approach is consistent with the logic that the relevance

of evidence follows the pleadings, with Aboriginal rights law authority, and with rules of civil procedure. This approach meant that in past (regulatory) cases, the characterization re-defined – and limited – the claimed right to one that was simply adequate to defend against the relevant prosecution.

Finally, in setting out the steps for establishment of an Aboriginal right, Binnie J. added a new stage for commercial rights. At this stage a court must delineate the right while considering objectives which are in the interest of all Canadians, such as the pursuit of economic and regional fairness and the reconciliation of non-Aboriginal groups' historical reliance on the resource. It appears that in adding this step, the Court has brought forward from the infringement and justification stage the consideration of necessary societal limitations on Aboriginal rights. In the author's view, this makes sense to the extent that courts hearing claims for declaratory relief must be mindful of non-Aboriginal interests when formulating declarations. However, insofar as it permits courts to restrict otherwise proven constitutional rights without a proper evidentiary record for doing so, it is "unjustified".