

TOP FIVE 2012

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

LAX KW'ALAAMS INDIAN BAND v CANADA (ATTORNEY GENERAL), 2011 SCC 56

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Facts

The Lax Kw'alaams Indian Band ("Band") has ancestral land along the northwest coast of British Columbia. Before contact with Europeans, they regularly traded fish grease from the eulachon, and occasionally traded other fish products as well. For example, their ancestors also harvested and consumed salmon, halibut, herring spawn, seaweed and shellfish.

Constitution Act, 1982

35 (1). The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. a political position or public office.

The Band claimed the right to the commercial harvesting and sale of "all species of fish" within their waters, under s. 35(1) of the *Constitution Act, 1982*. Under s. 35(1), Aboriginal groups can claim the right to commercial activities that are a logical extension of traditional cultural practices on their ancestral property. The Band argued that the harvesting, consuming and trading

of these fish resources were integral to its distinctive society before European contact. In addition to this claim, the Band argued that the Crown has a "fiduciary duty" (a legal responsibility for the well-being of the Band) with respect to its fisheries, due to promises made in the 1870s and 1880s.

Procedural History

The trial judge did not find that the pre-contact customs, practices, and traditions supported the claimed rights to commercial activities. The Court of Appeal affirmed that judgment.

Issues

Is evidence of commercial activity with respect to a single fish species (the eulachon) a sufficient legal basis on which to grant an Aboriginal right to a modern, industrial, multi-species fishery?

Decision

The Lax Kw'alaams' appeal was dismissed unanimously.

Ratio

The Supreme Court of Canada (SCC) considered the evolution of treaty rights of Canada's Aboriginal Peoples as set out in s. 35(1) of the *Constitution Act*. For a practice, custom, or tradition to be protected as an Aboriginal right, there must be evidence that it was an integral part of that group's society prior to contact with European settlers. The SCC set out a new step for dealing with large-scale commercial claims, and found that the Band's ancestral trade focused almost exclusively on a single species of fish. Thus, the Band had not made the case for a broad Aboriginal right to harvest and sell all fish species within their ancestral waters.

Reasons

The steps a court must take to assess a claim to an Aboriginal right under s. 35(1) are as follows:

1. Characterize the claim (i.e., describe the right being claimed very specifically);
2. Determine whether the claimant group has proved
 - a. The existence of the activity or practice prior to European colonization, and
 - b. That this activity was integral to the distinctive, pre-contact society;
3. Determine whether the modern right being claimed has a reasonable degree of continuity from the ancestral practice (i.e., how likely it is that the ancestral practice would have evolved into the modern right).

Finally, the SCC set out a new step for dealing specifically with claims regarding large scale commercial activity. If, in following the existing steps outlined above, a commercial right is judged to exist, a court must delineate that right by specifying rules about how it should be applied, keeping goals like conservation and fairness to competitors in mind.

The Court ruled that the Lax Kw'alaams' claim to a modern right to fish commercially all fish species in their territory was not a "logical evolution" of their ancestors' pre-contact trade in eulachon grease. The Court found insufficient continuity between the claimed practice and the Band's desire to build a modern commercial fishery. It held that commercial fishing in the Band's territories was not a practice, custom, or tradition that was an integral part of the distinctive society pre-contact. Apart from the eulachon, if there was any trade, it was sporadic, low volume, isolated and for food, social and ceremonial purposes. Aboriginal rights can evolve, but this claim was substantively different than the pre-contact custom.

DISCUSSION

1. In what ways have industry and resource management changed since Aboriginal rights were affirmed in the *Constitution Act, 1982*?
2. Given that Aboriginal groups have a legal right to maintain their traditional practices, should they also have the legal right to transform these into commercial enterprises? Why or why not?
3. When making a claim like the one above, how strong a link should there be between ancestral and modern practices? What kind of evidence should be used to prove that link?
4. Although the Court ruled that the only historical evidence of trade was with regard to the Eulachon, it found that the Lax Kwa'alaams' way of life was deeply linked to fishing many different species for survival. Work in pairs to think of factors that would both encourage AND impede the evolution of a survival activity into a commercial activity.
5. With your partner, create a list of points that argue for and against the argument that the Government of Canada has a duty to protect the interests of Canadian Aboriginal groups. Try to consider the difficulties Aboriginal groups in Canada have faced, conservation of resources and fair market practice.