

*Case Name:*

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

**Lax Kw'alaams Indian Band, represented by Chief Councillor  
Garry Reece on his own behalf and on behalf of the members of  
the Lax Kw'alaams Indian Band, Others**

v.

**Attorney General of Canada and Her Majesty the Queen in Right  
of the Province of British Columbia**

[2010] S.C.C.A. No. 59

[2010] C.S.C.R. no 59

File No.: 33581

Supreme Court of Canada

Record created: February 19, 2010.

Record updated: February 17, 2011.

**Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

**Status:**

Appeal heard and reserved February 17, 2011.

**Catchwords:**

*Aboriginal law -- Constitutional law -- Constitution Act, 1982, s. 35 -- Aboriginal rights -- Indian band -- Fishing -- Claims dismissed in lower courts -- Whether the lower courts erred in defining pre-contact practices and characterizing aboriginal rights in the context of this civil proceeding -- Whether this case raises the role of pleadings in characterizing claimed aboriginal rights and, more broadly, how the aboriginal rights analysis applies in the civil context -- Whether the Court of Appeal's approach in this case will have an impact on aboriginal rights litigation and if it may be determinative of whether a regulatory prosecution is the preferred proceeding for the determination of aboriginal rights -- Whether in this case the honour of the Crown gives rise to an implied*

*promise in the allocation of "fishing station" reserves and whether the nature of the allotment of fishing station reserves implies a promise of access to fishing for the Lax Kw'alaams.*

**Case Summary:**

The applicants comprise several tribes or houses known prior to European contact as the Coast Tsimshian who inhabited territories and fishing sites along the northwest coast of British Columbia. The applicants commenced proceedings in 2002, seeking *inter alia* declarations that they have existing Aboriginal rights under s. 35(1) of the Constitution Act, 1982 to harvest all species of "Fisheries Resources" (defined to mean all species of fish, shellfish and aquatic plants) in their "Tribal Territories" (as shown on a map attached to the Statement of Claim) and to "sell [them] on a commercial scale" in Canada.

This case arises not as a result of an alleged regulatory offence, but in an action brought by the Aboriginal group for declaratory relief against the federal and provincial governments.

Before trial, an order was made that severed from the proceeding the question of Aboriginal title: 2006 BCSC 1463. At trial, all of the applicants' claims not severed pursuant to the Severance Order were dismissed. The Court of Appeal dismissed the appeal.

**Counsel:**

John R. Rich (Ratcliff & Company), for the motion.

James M. Mackenzie (A.G. of Canada), contra.

At hearing of appeal:

John R. Rich, F. Matthew Kirchner and Lisa C. Glowacki, for the appellant.

Maria Morellato, Q.C. and Cheryl Sharvit, for the intervener Metlakatla Band.

David M. Robbins and Jay Nelson, for the intervener Gitxaala Nation.

Robert J.M. Janes and Sarah E. Sharp, for the intervener Te'Mexw Treaty Association.

Cheryl J. Tobias, Q.C., Sharlene Telles-Langdon and James M. Mackenzie for the respondent Attorney General of Canada.

Patrick G. Foy, Q.C., for the respondent Her Majesty the Queen in Right of the Province of British Columbia.

Mallika Wilson and Michael E. Burke, for the intervener Attorney General of Ontario.

J. Keith Lowes, for the intervener B.C. Wildlife Federation and B.C. Seafood Alliance.

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**Chronology:**

1. Application for leave to appeal:

FILED: February 19, 2010. S.C.C. Bulletin, 2010, p. 260.

SUBMITTED TO THE COURT: April 19, 2010. S.C.C. Bulletin, 2010, p. 522.

GRANTED WITH COSTS: June 10, 2010 (without reasons).

S.C.C. Bulletin, 2010, p. 818.

Before: Binnie, Fish and Rothstein JJ.

2. Notice of appeal filed August 10, 2010. Appeal not yet inscribed for hearing.
3. S.C.C. Bulletin, 2010, p. 1083.
- Motions for leave to intervene

BY: Attorney General of Ontario;  
Metlakatla Band;  
B.C. Wildlife Federation and B.C. Seafood Alliance;  
Gitxaala Nation

Granted December 15, 2010. Before: Cromwell J. S.C.C. Bulletin, 2010, p. 1715.

UPON APPLICATIONS by the Attorney General of Ontario, the Metlakatla Band, the B.C. Wildlife Federation and B.C. Seafood Alliance and the Gitxaala Nation for leave to intervene in the above appeal;

AND UPON APPLICATION by the Te'Mexw Treaty Association for an extension of time to apply for leave to intervene and for leave to intervene in the above appeal;

AND THE MATERIAL FILED having been read;

IT IS HEREBY ORDERED THAT:

The motions for leave to intervene of the Attorney General of Ontario, the Metlakatla Band, the B.C. Wildlife Federation and B.C. Seafood Alliance and the Gitxaala Nation are granted and the said four interveners shall be entitled to each serve and file a factum not to exceed 10 pages in length on or before February 1, 2011.

The motion for an extension of time to apply for leave to intervene and for leave to intervene of the Te'Mexw Treaty Association is granted and the said intervenor shall be entitled to serve and file a factum not to exceed 10 pages in length on or before February 1, 2011.

The requests to present oral argument are deferred to a date following receipt and consideration of the written arguments of the parties and the interveners.

The interveners shall not be entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties.

Pursuant to Rule 59(1)(a) of the Rules of the Supreme Court of Canada, the interveners shall pay to the appellants and respondents any additional disbursements occasioned to the appellants and respondents by their intervention.

4. Order on interventions with respect to oral argument

RE : Attorney General of Ontario;  
Metlakatla Band;  
B.C. Wildlife Federation and B.C. Seafood Alliance;  
Te'Mexw Treaty Association;  
Gitxaala Nation, represented by Chief Elmer Moody,  
on his own behalf and on behalf of the members of

the Gitxaala Nation

Filed February 2, 2011. Before; Cromwell J. S.C.C. Bulletin, 2011, p. 211.

FURTHER TO THE ORDER dated December 15, 2010, granting leave to intervene to the Attorney General of Ontario, the Metlakatla Band, the B.C. Wildlife Federation and B.C. Seafood Alliance, the Te'Mexw Treaty Association and the Gitxaala Nation for leave to intervene in the above appeal;

IT IS HEREBY FURTHER ORDERED THAT the interveners are granted permission to present oral argument not exceeding ten (10) minutes at the hearing of this appeal.

5. Appeal:

HEARD AND RESERVED: February 17, 2011. S.C.C. Bulletin, 2011, p. 247.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron, and Rothstein JJ.

**Procedural History:**

Judgment at first instance: Claims in respect of those matters not severed pursuant to the Severance Order, dismissed. Supreme Court of British Columbia, Satanove J., April 16, 2008. Neutral citation: 2008 BCSC 447.

Judgment on appeal: Appeal dismissed.  
Court of Appeal for British Columbia (Vancouver),  
Newbury, Chiasson and Bennett JJ.A., December 23, 2009.  
Neutral citation: 2009 BCCA 593; [2009] B.C.J. No. 2556.

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----- End of Request -----

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Time Of Request: Thursday, March 03, 2011 10:53:37