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ABORIGINAL & TREATY RIGHTS PRACTICE

Macaulay

Release No. 1, June 2022

Publisher's Special Release Note 2022

The pages in this work were reissued in June 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the June 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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This release features updates to the case law and commentary in Chapters 1 (Parties) and 2 (Pleadings).

Highlights

- **Chapter 1 Parties – Intervenors – Affected Party Intervention in Aboriginal and Treaty Rights Cases –** An intervention application made by an Indigenous group that was seeking, but had not achieved, recognition as an *Indian Act* band was on grounds of the low threshold for intervention and the applicants' contingent interest in matters at issue. The litigation is focused on the nature of the Crown obligation under the Robinson Superior Treaty. The Court noted that the proposed intervener Namaygoosisagugun Ojibway Nation ("NON") was not recognized as a band under the *Indian Act*, RSC 1985, c. I-5, nor as a Robinson Superior Treaty beneficiary. The evidence was that NON was engaged in a process with Canada with respect to its claim for band status. The Plaintiffs and Gull Bay opposed the intervention on grounds that NON was a prospective entity that did not yet exist and had no current members. In granting the application on terms, Hennessy J. noted that the history of NON's efforts to achieve band status was not contradicted, and observed that NON sought to protect their contingent interest by way of the intervention. Further NON's contingent interest was distinguished from the contingent interest of other involved First Nations in the action: *Restoule v. Canada (Attorney General)* (2022), 2022 ONSC 1294, 2022 CarswellOnt 2635 (Ont. S.C.J.).
- **Chapter 2 Pleadings – Requirements for Declaratory Relief – Infringement of Rights Must be pleaded –** The plaintiffs claimed declaratory relief concerning the existence of Aboriginal rights in respect of eulachon and certain salmon species under s. 35 of the *Constitution Act, 1982* and infringements of those rights . . . In dismissing the application, Ring J. noted that the issue raised had been addressed by the courts in several jurisdictions, including the leading decision by the B.C. Court of Appeal in *Cheslatta Carrier Nation v. British Columbia*. She also noted that, while it appeared that this was the first time the issue had come before the Federal Court, *Cheslatta* was persuasive appellate level authority, it had been cited favourably by the Supreme Court of Canada and by superior courts in several other Canadian jurisdictions, and the plaintiffs had not endeavored to distinguish *Cheslatta* on its facts. She found that, like *Cheslatta*, the proposed amended claim did not allege any violation by the defendants of, or threat to the plaintiffs asserted Aboriginal fishing rights relating to eulachon. In other words, there were no facts alleged in the proposed amendments that supported the existence of a live controversy between the parties on that issue: *Dzawada'enuxw First Nation v. Canada* (2021), 2021 CF 939, 2021 FC 939, 2021 CarswellNat 4392, 2021 CarswellNat 4393 (F.C.).

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