SUPREME COURT OF NOVA SCOTIA
Citation: *Glooscap First Nation v. Howard*, 2025 NSSC 161

Date: 20250505
Docket: *Ken*, No. 538237
Registry: Kentville

Between:

Glooscap First Nation, Glooscap Landing #1 GP Ltd in its capacity as general partner of Glooscap Landing #1 Limited Partnership, and Glooscap First Nation Economic Development Corporation Ltd., doing business as Glooscap Ventures Management

Applicants

v.

Clinton Ray Howard, carrying on business as Glooscap's Finest Herbal Body Care

Respondent

Decision on Standing of Respondent to Raise Aboriginal and Treaty Rights under s. 35 of the *Constitution Act, 1982*

Judge:	The Honourable Justice Gail L. Gatchalian
Heard:	April 29, 2025, in Kentville, Nova Scotia
Counsel:	Derek Simon and Andrew Paul, for the Applicants Michael Curry for the Respondent Lyndsay Scovil for the Attorney General of Nova Scotia, watching brief

By the Court:

Introduction

[1] The Applicants, which include Glooscap First Nation, have brought a claim in trespass against the Respondent, Clinton Ray Howard, carrying on business as Glooscap's Finest Herbal Body Care. Mr. Howard is a Mi'kmaw individual, and a member of the Glooscap First Nation. He has set up a retail business on certain property on Glooscap Landing Reserve No.10209 ("Glooscap Landing"), one of Glooscap First Nation's reserves. Negotiations between the Applicants and Mr. Howard to conclude a commercial sublease for the property failed. The Applicants allege that Mr. Howard is occupying the property and carrying out construction and retail activities on the property without authorization. The Applicants seek an order for vacant possession and a permanent injunction against him. In response, Mr. Howard filed a Notice of Constitutional Question, alleging breaches of Aboriginal and treaty rights under s.35 of the *Constitution Act, 1982*. Section 35(1) of the *Constitution* states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." I must decide whether Mr. Howard has standing to raise breaches of Aboriginal and treaty rights in defence to the Application.

The Applicants

[2] The Applicant Glooscap First Nation is a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. The Glooscap First Nation Chief and Council is the elected governing body of Glooscap First Nation. The Applicant Glooscap Landing #1 GP LTD ("GLGP") is the general partner of Glooscap Landing #1 Limited Partnership ("GLLP"), of which Glooscap First Nation is the limited partner. The Applicant Glooscap First Nation Economic Development Corporation Ltd., doing business as Glooscap Ventures Management, is a wholly owned entity of Glooscap First Nation. Glooscap Ventures manages various businesses that are owned directly or indirectly by Glooscap First Nation, and this includes managing GLLP.

Glooscap Landing

[3] Glooscap Landing is designated for commercial and light industrial leasing purposes. Glooscap Landing, as "designated lands," forms part of Glooscap First Nation's reserve lands within the meaning of s.2(1) of the *Indian Act*. GLGP, as the lessee, entered into a Lease of Designated Lands ("the Head Lease") with Her Majesty the Queen in right of Canada governing Glooscap Landing. Glooscap First Nation is also a party to the Head Lease. Under the Head Lease, GLGP is authorized to sublease portions of Glooscap Landing. However, the Head Lease

requires that a valid sublease be in place in order for a sublessee to operate a commercial business on Glooscap Landing.

Procedural History

[4] On December 3, 2024, I granted the Applicants' request for an interlocutory injunction against Mr. Howard. My decision is reported as *Glooscap First Nation v. Howard*, 2024 NSSC 377. The main Application was scheduled to be heard on February 12, 2025. In their pre-hearing brief, the Applicants challenged Mr. Howard's standing to assert Aboriginal and treaty rights in this proceeding. On the morning of the February 12, 2025 hearing, counsel for Mr. Howard appeared and stated that he had just been retained. Until that time, Mr. Howard had been representing himself. I granted Mr. Howard's request for an adjournment. On the agreement of the parties, I scheduled April 29, 2025 to hear the preliminary issue of Mr. Howard's standing to raise alleged breaches of Aboriginal and treaty rights. I rescheduled the hearing of the main Application to October 6, 2025.

[5] The hearing of the preliminary issue took place before me on April 29, 2025. The parties filed pre-hearing briefs. Mr. Howard relied on one Affidavit: the Affidavit of Michael Peters, Chief Executive Officer of Glooscap Ventures, previously filed by the Applicants.

The Constitutional Arguments

[6] The constitutional arguments that Mr. Howard wishes to make may be summarized as follows:

- That the Applicants have breached their duty to consult Mr. Howard "and his Indigenous Governing Body, the Micmac Rights Association," under s.35 of the *Constitution*.
- That the Applicants have breached Mr. Howard's treaty rights to trade in anything, contrary to s.35 of the *Constitution*.

Mr. Howard's Position on Standing

[7] Mr. Howard says that he has standing as an individual to raise these arguments in this proceeding because:

1. Glooscap First Nation has a duty to consult under s.35 of the *Constitution*.
2. This Application is a regulatory proceeding, entitling Mr. Howard to raise arguments under s.35 of the *Constitution* as a defence.

The United Nations Declaration on Indigenous Peoples

("UNDRIP"), incorporated into Canadian law by *The United Nations Declaration on Indigenous Peoples Act*, S.C. 2021, c.14, has brought about a change in the law as follows:

- individuals ought to be able to assert Aboriginal and treaty rights,
- a requirement that Mr. Howard have the support of Glooscap First Nation to raise these constitutional arguments would constitute discrimination against him in violation of the *Act*, and
- the support of a collective of Mr. Howard's choosing should be sufficient for Mr. Howard to assert collective rights under s.35 of the *Constitution*.

The Duty to Consult

[8] The Crown has a duty to consult the Indigenous group that holds the s.35 rights when Crown action may impact an Aboriginal or treaty right. The Crown's duty to consult exists to protect the collective rights of Indigenous peoples. See *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para.30.

[9] Mr. Howard's theory is that Glooscap First Nation is equivalent to the Crown because the Band exists by virtue an act of Parliament.

[10] The duty to consult under s.35 of the *Constitution* does not apply to Glooscap First Nation. Glooscap First Nation is not the Crown. This is not really an issue of Mr. Howard's standing to argue a breach of the duty to consult under s.35 of the *Constitution*. It is more appropriately described as a situation in which Mr. Howard's argument has no legal foundation whatsoever.

Aboriginal and Treaty Rights

[11] Aboriginal and treaty rights under s.35 of the *Constitution* are held by Indigenous people in common and can only be asserted by the lawful representatives of the collective to which they belong. See *Commanda v. Canada*, 2018 FC 189 at para.27, citing *Delgamuukw v British Colombia*, [1997] 3 SCR 1010.

[12] Although individual members of Indigenous communities who benefit from and may personally exercise Aboriginal or treaty rights can assert these rights in defence to criminal or regulatory proceedings, an individual member of these communities has no standing to sue for the recognition or enforcement of collective Aboriginal or treaty rights without the support of the community that

holds the rights: *ibid.* See also *Wasoqopa'q First Nation v. Francis*, 2024 NSSC 341 at para.25.

[13] Mr. Howard's argument that this is a regulatory proceeding is without merit. This is a civil claim in trespass.

[14] More fundamentally, Mr. Howard has no standing to assert Aboriginal and treaty rights under s.35 of the *Charter* against the authorized representative of the rights-holding community, to which he belongs.

[15] In this case, Glooscap First Nation is the local Mi'kmaw community that administers and manages the collective's land. The collective authorizes its elected representatives of Chief and Council to administer local affairs, among other matters, and is the body recognized as speaking for the collective members when Aboriginal and treaty rights are engaged. See, for example, *R. v. Marshall*. [1999] 3 S.C.R. 533 at para.17.

UNDRIP

[16] Under the *United Nations Declaration on the Rights of Indigenous Peoples Act*, the Government of Canada has an obligation to take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP, in consultation and

cooperation with Indigenous peoples: s.5 of the *Act*. The designated Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of UNDRIP: s.6(1) of the *Act*.

[17] Mr. Howard asserts that Articles 1, 2, 5, 17 and 18 of UNDRIP have changed the law such that he now has an individual right to assert s.35 Aboriginal and treaty rights, that requiring him to have the support of Glooscap First Nation to assert these rights constitutes discrimination against him on the basis of his identity as an Indigenous person, and that support from the collective of his choosing is sufficient to ground his standing to assert Aboriginal and treaty rights.

[18] Articles 1, 2, 5, 17 and 18 of UNDRIP read as follows:

> ***Article 1***
>
> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
>
> ***Article 2***
>
> Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.
>
> ***Article 5***

> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
>
> ***Article 17***
>
> 1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
>
> …
>
> ***Article 18***
>
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

[19] Essentially, Mr. Howard is asking this Court to ignore decisions of the Supreme Court of Canada based on the above-noted generally-worded articles of UNDRIP. I decline to do so.

[20] First, Mr. Howard did not cite or apply the test for departing from binding decisions of a higher court.

[21] Second, Mr. Howard did not cite any court decision standing for the proposition that the *United Nations Declaration on the Rights of Indigenous Peoples Act* has changed the law in the way he suggests.

[22] Third, Mr. Howard's position is completely inconsistent with the rights of Indigenous peoples under s.35 of the *Constitution*, as interpreted by the Supreme Court of Canada and other courts. Mr. Howard cannot assert Aboriginal and treaty

rights against the authorized representative of the community that holds the very rights he is asserting, a community to which he belongs. Article 45 of UNDRIP states that "[n]othing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future." Accepting Mr. Howard's position would diminish the s.35 constitutional rights of Indigenous people and result in a governance breakdown.

Adjournment Request

[23] During oral argument on the standing issue, when I asked counsel for Mr. Howard to describe specifically the Aboriginal and treaty rights being asserted by his client, Mr. Howard requested an adjournment in order to file an amended Notice of Constitutional Question to further clarify the rights he is asserting. Mr. Howard's argument was that it was necessary to identify the rights being claimed with a degree of certainty for purposes of the standing hearing.

[24] I denied the adjournment request, with reasons to follow. I provide herein my reasons for denying the adjournment request.

[25] First, I am not persuaded that Mr. Howard would suffer prejudice if I denied the adjournment request. A refinement of his constitutional arguments would not change the collective nature of the claims being advanced, nor would it change the

fact that he is asserting the right to raise Aboriginal and treaty arguments *against* the lawful representative of the collective to whom those rights belong.

[26] Second, the Applicants would likely suffer prejudice in the form of: (a) further delay of the final adjudication of this dispute, as an adjournment would risk the merits hearing in October; and (b) the wasted time and expense of preparing for and attending the hearing. The latter prejudice could be compensated for by an award of costs against Mr. Howard.

[27] Third, in my view, an adjournment would significantly impact the public interest because of: (a) the waste of judicial and court resources that would result and (b) the impact on public confidence in the administration of justice. Counsel agreed to this hearing date. Counsel for Mr. Howard acknowledged that Mr. Howard had ample time to amend the Notice of Constitutional Question before the hearing. This would have been the second adjournment in this proceeding. Finally, there is an expectation, reflected in the Rules, that the hearing of the merits be determined without delay. Civil Procedure Rule 41.06(1) requires a party making a motion for an interlocutory injunction to file an undertaking to bring the party's claim to a final determination without delay. The Applicants filed such an undertaking. Under Rule 41.06(3), a failure to proceed without delay may be dealt with as an abuse of process.

[28] Considering and balancing the interests of Mr. Howard, the Applicants, and the public, I concluded that an adjournment would not be in the interests of justice.

Conclusion

[29] Mr. Howard has no standing in this proceeding to raise alleged breaches of Aboriginal and treaty rights under s.35 of the *Constitution*.

[30] If the parties cannot agree on the costs of the hearing of the preliminary issue of Mr. Howard's standing, I will receive written submissions from the Applicants within two weeks of this decision, and from Mr. Howard within one month of this decision.

Gatchalian, J.