S.C.C. FILE NO. 38734

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

- and -

RICHARD LEE DESAUTEL

RESPONDENT
(Respondent)

- and -

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PART I – CONCISE OVERVIEW OF POSITION AND CONCISE STATEMENT OF FACTS

A. Overview

1. For thousands of years prior to contact, the Sinixt people lived, travelled and hunted in their traditional territory in what is now known as the Arrow Lakes or West Kootenay region of British Columbia. Based on the extensive evidence before her, the Trial Judge made findings of fact that hunting in their traditional territory in Canada remained integral to Sinixt culture from pre-contact times through to the modern day. Applying a purposive interpretation to s. 35(1) of the *Constitution Act, 1982*,[1] and giving due weight to the Indigenous perspective, she held that the Respondent Richard Lee Desautel had established a constitutionally protected right to hunt in Sinixt traditional territory in Canada that exempts him from ss. 11(1) and 47(a) of the *Wildlife Act*, R.S.B.C. 1996, c. 488 [*Wildlife Act*]. Two appellate courts have upheld that finding, despite the Crown's position throughout that Mr. Desautel had no right to hunt in British Columbia. The Crown now asserts that the courts should have considered whether Mr. Desautel has a "common law Aboriginal right." That was not the position taken by the Crown below, and no error can be said to arise from the courts' failure to address it.

2. The foundation of the doctrine of Aboriginal rights is grounded in four key concepts: the prior occupation of Canada by Indigenous people, the assertion of sovereignty, the honour of the Crown, and reconciliation. These are the same principles that animate s. 35(1), and form the basis for the *Van der Peet*[2] framework for determining whether a constitutionally protected Aboriginal right exists. The Crown does not take issue with the Trial Judge's finding that Mr. Desautel met all of the requirements of the *Van der Peet* test, including that hunting in Sinixt traditional territory in Canada continues to be integral to their distinctive society. Nonetheless, the Crown says that s. 35(1) should be interpreted in a way that excludes Mr. Desautel and the Sinixt from the scope of its protection.

3. The three reasons offered by the Crown for suggesting that the Sinixt cannot possess a constitutionally protected right to hunt in Canada do not withstand scrutiny. The argument that

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[1] *Constitution Act, 1982*, Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11
[2] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*]

such a conclusion is consistent with the foundations of the doctrine of aboriginal rights is in substance the sovereign incompatibility argument rejected by the lower courts, which is based on an incidental mobility right that does not arise in this case. The "proper" interpretation of s. 35 offered by the Crown is the "plain reading" textual approach unsuccessfully advanced below, which undermines the core purpose of s. 35 – reconciliation – and gives no weight to the Indigenous perspective. The "legal and practical" difficulties identified by the Crown are not supported by the evidentiary record or the Trial Judge's findings of fact, and the *Van der Peet* test is constructed in such a manner so as to prevent some of those difficulties from arising.

4. Ultimately, the Crown's position that the Sinixt cannot establish a constitutionally protected right to hunt is incoherent, and cannot be reconciled with the foundations of the doctrine of Aboriginal rights and the purpose of s. 35(1). The Sinixt were here in Canada first, long before the assertion of sovereignty and the imposition of an international border which artificially divided their traditional territory in a manner foreign to their Indigenous perspective. The honour of the Crown requires that their prior occupation be reconciled with the assertion of sovereignty through the constitutional protection of their hunting rights in Canada.

B. Facts

5. The Crown's statement of facts does not thoroughly canvas the Trial Judge's findings of fact. A more detailed review of those findings is critical to understanding why a constitutionally protected right to hunt for the Sinixt is consistent with the foundations of the doctrine of Aboriginal rights and the purpose of s. 35.

1. The History of the Sinixt

6. The Sinixt people are well known to have lived, travelled, fished, hunted and gathered in and about the West Kootenay region of British Columbia for thousands of years.[3] Their traditional territory, as illustrated in the appendices to the trial decision, is composed of the Arrow Lakes and the area in and around the Columbia River, reaching from Revelstoke BC to the north, and southwards in Washington State to Kettle Falls.[4]

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[3] *R. v. Desautel*, 2017 BCPC 84 [BCPC Decision], para. 1, Appeal Record ("AR") Vol. I, Tab 1, p. 2

[4] BCPC Decision, paras. 3, 19-21, Appendices 1 and 2, AR Vol. I, Tab 1, pp. 2, 6-7, 63-65

7. The name Sinixt (Sn̓ʕayc̓kstx[5] in the Indigenous language) is translated to the "Dolly Varden" people (Dolly Varden being a fish for which the Arrow Lakes region was noted), which is evidence of the clear and ancient link between the Sinixt and their traditional territory in Canada.[6] The relationship is reciprocal: the Arrow Lakes may have taken their names from a bluff where the Sinixt practiced archery over the millennia.[7]

8. First contact with the Sinixt occurred in 1811; the first meaningful contact occurred in 1825 with the establishment of a Hudson's Bay Fort and trading post in Colville.[8]

9. The Sinixt engaged in a seasonal round that saw them spend time both above and below what is now the 49th parallel after contact.[9] Although many Sinixt showed a preference for remaining in their southern territory for longer periods than in what the Trial Judge referred to as Aboriginal times, the Sinixt continued to assert their rights in the Canadian portion of their territory well after the Oregon Boundary Treaty created the border in 1846.[10] Indeed, the Sinixt largely ignored the border, which was not surveyed until about 1865.[11]

10. By the last decades of the 19th century, the Sinixt had come to feel unwelcome in what is now British Columbia. Disagreements led to gun violence and even death.[12] Due to a constellation of factors, many Sinixt gradually adopted more or less full time residence in the southern part of their territory.[13] Those who left did so because it was the best out of a number of bad choices.[14]

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[5] This is the closest spelling in English of the proper Indigenous name for the Sinixt or Arrow Lakes people: Transcript of Examination of Shelly Boyd In chief by Mark Underhill, Day 8, October 5, 2016, p. 104 l. 42 to p. 105 l. 1, Respondent's Record ("RR"), Vol. II, pp. 6-7. For ease of reference, the term Sinixt will be used throughout this factum.

[6] BCPC Decision, paras. 22-23, AR Vol. I, Tab 1, pp. 7-8
[7] BCPC Decision, para. 29, AR Vol. I, Tab 1, p. 9
[8] BCPC Decision, para. 33, AR Vol. I, Tab 1, p. 11
[9] BCPC Decision, paras. 37, 40, AR Vol. I, Tab 1, pp. 12, 13
[10] BCPC Decision, para. 37, AR Vol. I, Tab 1, p. 12
[11] BCPC Decision, para. 91, AR Vol. I, Tab 1, p. 30
[12] BCPC Decision, para. 101, AR Vol. I, Tab 1, pp. 33-34
[13] BCPC Decision, para. 109, AR Vol. I, Tab 1, p. 36
[14] BCPC Decision, para. 128, AR Vol. I, Tab 1, p. 45

The move was not voluntary, and despite the fact that many were stranded in the south, they had not forgotten their northern territory nor had they given up their claim to it.[15]

11. Some Sinixt remained in Canada. For example, Baptiste Christian and his family remained at their home at the mouth of the Kootenay River, which the family had occupied since time immemorial. Despite his efforts to assert a claim to the area, no land was ever reserved for him, and the ancestral home was taken up and the family graves desecrated. Mr. Christian passed away on the Colville Reservation, where he was granted an allotment.[16]

12. Canada set aside a reserve for the "Arrow Lakes Band" in or about 1902.[17] By 1930, the numbers in the Arrow Lakes Band had dwindled to one member.[18] In 1956, Canada declared the Arrow Lakes Band extinct, and the reserve lands reverted to the Province.[19]

13. Nevertheless, Sinixt people remain in Canada. The respondent's expert, Dr. Andrea Laforet, produced what the Trial Judge described as a "masterful" review of the Oblate and Jesuit sacramental records made between 1838 and 1841 and 1845 to the early 1890s (a review that was unchallenged at trial).[20] From those records, cross-referenced to U.S. and Canadian census data, Dr. Laforet traced the modern day descendants of 21 Sinixt families living in British Columbia prior to 1930. Those descendants live in both Washington State as well as British Columbia, and are ancestrally connected to the Sinixt living in British Columbia likely at the time of contact.[21] In her expert report, Dr. Laforet explained:

> Sinixt families associated with the ancestral names Silimuhlxeltsin, Ntsoxtiken, Kweytshinitse and Kessewilish have descendants living in the United States. Families tracing their descent from Julia and Louis Prévost live in both Canada and the United States, as do families tracing descent through two genealogical lines associated with the name, Kikitemnèus. In addition, a large extended Canadian family traces its descent from a Sinixt man who originated in Nk'Mip.
>
> In Canada people of Sinixt (Lakes) descent live in communities throughout the Okanagan region of British Columbia, including Nk'Mip (Inkameep) Indian Reserve, Okanagan

[15] BCPC Decision, paras. 102-08, AR Vol. I, Tab 1, pp. 34-36
[16] BCPC Decision, paras. 45-46, AR Vol. I, Tab 1, p. 15
[17] BCPC Decision, para. 44, AR Vol. I, Tab 1, p. 15
[18] BCPC Decision, paras. 47-48, AR Vol. I, Tab 1, p. 16
[19] BCPC Decision, para. 48, AR Vol. I, Tab 1, p. 16
[20] BCPC Decision, para. 58, AR Vol. I, Tab 1, pp. 18-19
[21] BCPC Decision, paras. 58-59, 62, AR Vol. I, Tab 1, p. 18-19

> Indian Reserve no. 1, Penticton Indian Reserve, Upper Similkameen, Westbank First Nation and the associated communities of Osoyoos, Oliver, Vernon, Penticton, Westbank and Kelowna. These families have roots in these communities dating back to the early twentieth century. Their ancestors moved to these communities from the Arrow Lakes or from Sinixt communities associated with Colville along lines of kinship and marriage. Collectively, they have a substantial fund of orally transmitted genealogical information that connects them to Sinixt ancestors, and a strong history of ties to the Arrow Lakes, expressed through narratives of migration from the Arrow Lakes to escape oppression, accounts of instruction from parents, uncles, aunts and grandparents concerning important localities in the Arrow Lakes, and accounts of visits to the Arrow Lakes to hunt or gather berries, either as children to accompany older relatives, or as adults. Ties to Sinixt relatives living on the Colville Reservation have been maintained into the twenty-first century through visiting on both sides of the border.
>
> In Washington State, descendants of the Silimuhlxeltsin family, through Louis Pierre Silimuhlxeltsin's son, Christian, are represented by the Boyd family through descendants of Christian's son, Jean-Baptiste (Babtiste) Christian and Baptiste's daughter, Agnes. Descendants of the Silimuhlxeltsin family are also represented by the Lawney Reyes family, Laura Wong- Whitebear and her family, and Harry Wong, who are descendants of Christian's son, Alexander. Through Christian's marriage to Antoinette (Antonia), the Boyd's, Reyes' and Harry Wong are also descended from Ohlolstolix and Konguesimilem. Members of these families continue to be connected to Colville although some live in Seattle.
>
> Descendants of Henricus Ntsoxtiken and his wife, Henrica, are also represented by the Boyd family, through Josephine Harry, the second daughter of Henricus and Henrica. The Fry family are descended from Henricus and Henrica Ntsoxtiken through the marriage of their older daughter, Justine, to Richard Fry. Richard Desautel is a direct descendant of this branch of the Ntsoxtiken family. The Desautel family is closely connected with Colville. Other descendants of Justine and Richard Fry are resident throughout Washington and Idaho, but remain closely affiliated with Colville. [22]

14. Importantly, while Dr. Laforet acknowledged that the genealogical "mapping" of the contemporary Sinixt or Lakes community is incomplete, further work would make it possible to objectively identify the entirety of the collective.[23]

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[22] Trial Exhibit 31, Sinixt (Lakes) Familial Connection to British Columbia, Opinion, Andrea Laforet, Ph.D., February 12, 2015 ("Laforet Report"), pp. 24-25, RR Vol. II, pp. 32-33. See also: Transcript of Examination of Dr. Andrea Laforet In chief by Mark Underhill, Day 6, October 3, 2016 ("Laforet Exam"), p. 32, ll. 20-29, RR Vol. II, pp. 1

[23] Laforet Exam, p. 72, l. 45 to p. 73, l. 21, RR Vol. II, pp. 4-5

15. While the Trial Judge noted that there is little evidence in the historical record of the Sinixt travelling to and hunting in the northern portion of their traditional territory after about 1930,[24] she also observed that the Sinixt would have subsequently lived through the Great Depression and the Second World War, and experienced the perils and effects of the residential school system.[25] In 1972, Charlie Quintasket, described as a Lakes Indian from the Colville Reservation, entered the office of the Crown's expert witness, Dr. Kennedy, and asked why the Sinixt did not have any reserves in Canada.[26]

16. On October 1, 2010, Mr. Desautel, a member of the Lakes tribe of the Confederated Tribes of the Colville Reservation, resident in Washington State, shot one cow-elk near Castlegar, BC, for the purposes of securing some ceremonial meat.[27] Mr. Desautel was hunting within traditional Sinixt territory, and did so in reliance on the Sinixt's long tradition of hunting for game in the northern part of their territory.[28]

17. Mr. Desautel subsequently reported his hunt to BC conservation officers, and was charged with hunting without a license contrary to s. 11(1) of the *Wildlife Act*, and hunting big game while not being a resident contrary to s. 47(a) of the *Wildlife Act*.[29] Mr. Desautel admitted the offence, but maintained he was exercising an Aboriginal right to hunt in his traditional territory as a member of the Sinixt.[30]

2. Sinixt Hunting Practices

18. Mr. Desautel asserted a right to hunt for food, social and ceremonial purposes in Sinixt traditional territory in Canada.[31] The evidence clearly and cogently established that the practice of hunting in what is now British Columbia was a central and significant part of the Sinixt's distinctive culture in pre-contact times.[32] The respondent's expert, Richard Hart, provided

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[24] BCPC Decision, para. 49, AR Vol. I, Tab 1, p. 16
[25] BCPC Decision, para. 133, AR Vol. I, Tab 1, p. 47
[26] BCPC Decision, para. 49, AR Vol. I, Tab 1, p. 16
[27] BCPC Decision, para. 2, AR Vol. I, Tab 1, p. 2
[28] BCPC Decision, paras. 4, 77, AR Vol. I, Tab 1, pp. 2, 23
[29] BCPC Decision, paras. 2-3, AR Vol. I, Tab 1, p. 2
[30] BCPC Decision, para. 3, AR Vol. I, Tab 1, p. 2
[31] BCPC Decision, para. 77, AR Vol. I, Tab 1, p. 23
[32] BCPC Decision, para. 84, AR Vol. I, Tab 1, p. 28

evidence that "the Sinixt people are … profoundly connected to their Aboriginal territory. And hunting is one aspect of that."[33] The Sinixt hunted in the Vallican and Castlegar areas of British Columbia, which was a central part of Sinixt territory.[34] The Crown's expert, Dr. Dorothy Kennedy, agreed that hunting was integral to the Sinixt.[35]

19. Hunting in the traditional Sinixt territory in Canada remains integral to the Sinixt. Despite many Sinixt being physically absent from the land in British Columbia after 1930, the Sinixt have not lost their connection to the land.[36] A number of Sinixt witnesses spoke of their connection to their Canadian territory, and there was no doubt as to the veracity of their beliefs.[37] Shelly Boyd testified as follows:

> A [Nsyilxcen spoken]. This land is so sacred. This is – this is – when I say we come from this land, I mean we come from this land. We come from the animals of this land. We come from the water of this land. We come from this place. And it doesn't matter what people say. This is – the truth is this is where we are from. And I think about Ricky, and, you know, we haven't had a conversation about this, but whatever deer he got here, whatever animals he got here, I know without having a conversation with him that he fed the people with that. And I know without having a conversation with him that they felt so blessed. He told them where that meat came from, and it was sacred to them because of this. And I can't even explain it. I can't even explain it.
>
> It's, like, people talk about, like, never having gone to Ireland, and then they go and it changes their life. And for us, it's like we know. We know. And, like, my friend Nsnklik [phonetic] Virgil would say is, like, we never left this river. We never left this water. Even being part of that Confederation of Tribes. We are Sinixt first. And all I can say is this is sacred, and it hurts... [38]

20. Mr. Desautel also spoke about what it meant to him to hunt in his traditional Canadian territory:

> A Hunting in this area here when I learned that I was a Twin Lakes Indian. When I learned I was a Lakes Indian, and in '88 when I came up here and observed the pit houses and started learning more history of this country here. Back down home I hunted the country that my father hunted and his father hunted and whatnot, and I walk in their footsteps down there and learn the path and the things that they did when they was hunting.

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[33] BCPC Decision, para. 80, AR Vol. I, Tab 1, pp. 25-26
[34] BCPC Decision, para. 81, AR Vol. I, Tab 1, p. 26
[35] BCPC Decision, para. 82, AR Vol. I, Tab 1, pp. 26-27
[36] BCPC Decision, para. 123, AR Vol. I, Tab 1, p. 41
[37] BCPC Decision, para. 128, AR Vol. I, Tab 1, p. 45
[38] BCPC Decision, para. 126, AR Vol. I, Tab 1, p. 43-44

> When I come up here, I'm walking with the ancestors, and, god, I just think about times that they was going up this mountain like this here. And they might have the bow and arrow and the different things that they did and whatnot, and I'm following in their footsteps. And it just runs chills up and down me that I can be where my ancestors were at one time and do the things that they did. And it was mostly just -- I just do it, yeah. I can't tell you... [39]

21. For the Sinixt, hunting is important, it is integral, and the practice has continuity with their pre-contact practices.[40] Despite a gap in the Sinixt hunting in the northern part of their traditional territory for much of the 20th century, the Sinixt resident in Washington State continued their tradition of hunting and have remained faithful to their pre-contact traditions.[41]

22. The Sinixt in Washington State continued to hunt in their traditional territory until at least 1930 despite the Province enacting *An Act to Amend the Game Protection Act, 1896*, 1896 S.B.C. c. 22 [the *1896 Game Act*], which made it strictly unlawful for them to do so.[42] It is clear that those Sinixt living in Washington State were not welcome to hunt in their former traditional territory in British Columbia. The border also cannot be discounted as a barrier to Sinixt hunting in Canada.[43]

23. The evidence did not establish that the Sinixt resident in Washington State voluntarily stopped using their traditional territory in British Columbia for hunting,[44] and they have not lost their connection to the land where their ancestors hunted.[45] There is no doubt that the land was not forgotten, that the traditions were not forgotten and that the connection to the land is ever present in the minds of the Sinixt.[46]

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[39] BCPC Decision, para. 124, AR Vol. I, Tab 1, p. 41-42; see also paras. 125 and 127, AR Vol. I, Tab 1, p. 42-45
[40] BCPC Decision, para. 119, AR Vol. I, Tab 1, p. 40
[41] BCPC Decision, paras. 88, 115, AR Vol. I, Tab 1, pp. 29, 39
[42] BCPC Decision, paras. 43, 110, AR Vol. I, Tab 1, pp. 14, 36-37; For the *1896 Game Act*, see Respondent's Book of Authorities ("RBOA"), Tab 3
[43] BCPC Decision, para. 132, AR Vol. I, Tab 1, p. 46
[44] BCPC Decision, para. 108, AR Vol. I, Tab 1, p. 36
[45] BCPC Decision, para. 123, AR Vol. I, Tab 1, p. 41
[46] BCPC Decision, para. 50, AR Vol. I, Tab 1, p. 16

PART II – POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

24. The following constitutional question is at issue:

> Are ss. 11(1) and 47(a) of the *Wildlife Act*, RSBC 1996 c. 488, as they read in October 2010, of no force or effect with respect to the respondent, being a member of the Lakes Tribe of the Confederated Tribes of the Colville Reservation in Washington State, USA, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of an Aboriginal right within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the Respondent?

25. The constitutional question should be answered in the affirmative. Mr. Desautel was exercising a constitutionally protected Aboriginal right to hunt in his traditional territory in Canada which is unjustifiably infringed by ss. 11(1) and 47(a) of the *Wildlife Act*.

PART III - STATEMENT OF ARGUMENT

A. The Doctrine of Aboriginal Rights

26. In order to properly address the Crown's argument, it is necessary to first review the doctrine of Aboriginal rights, both at common law and as the rights are recognized and affirmed by s. 35(1). In the sections that follow, we first examine the foundational principles that lie at the core of the doctrine of Aboriginal rights: the prior occupation of Canada by Indigenous people, the assertion of sovereignty, the honour of the Crown, and reconciliation. We next observe that s. 35 is grounded in these same principles while also taking into account the Indigenous perspective on the nature and scope of those rights, which includes the deep connection between Indigenous identity and land. Finally, we consider how the *Van der Peet* test also embodies those principles, which makes it the appropriate framework to determine whether the Sinixt are an "Aboriginal peoples of Canada" for purposes of s. 35(1).

1. The Foundations of the Doctrine

27. As Chief Justice McLachlin observed in *Mitchell*, common law aboriginal rights arose because of the prior occupation of aboriginal peoples and the distinctive self-governing societies that existed prior to French and British colonization. English law accepted the pre-existing rights and interests flowing from that prior occupation, and absorbed aboriginal interests and customary laws into the common law as rights. The following passage, also cited by the Crown, bears repeating here:

> 9 Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103. At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: *Sparrow*, *supra*. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
>
> 10 Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, and *Mabo v. Queensland* (1992), 175 C.L.R. 1, at p. 57 (*per* Brennan J.), pp. 81-82 (*per* Deane and Gaudron JJ.), and pp. 182-83 (*per* Toohey J.).[47]

28. At common law, legislatures were able to extinguish or regulate aboriginal rights without justification. For example, in its brief reasons in *Derriksan*, this Court concluded that a claimed aboriginal fishing right would be subject to the controls imposed by the *Fisheries Act* and its regulations.[48]

29. As noted in *Sparrow*, the recognition and affirmation of existing Aboriginal common law rights in s. 35(1) brought an end to the authority of *Derriksan*, and prevented the infringement of Aboriginal rights without justification.[49] The enactment of s. 35(1) prevents the Crown from

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[47] *Mitchell v. M.N.R.*, 2001 SCC 33 [*Mitchell*], paras. 9-10
[48] *Regina v. Derriksan*, 1976 CanLII 1270 (SCC) [*Derriksan*], para. 1
[49] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*], p. 1111

extinguishing Aboriginal rights, and allows infringement by regulation only where the state can justify it.[50]

30. Importantly, this Court reaffirmed that prior occupation provides the foundation for constitutionally protected aboriginal rights under s. 35:

> 30 In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status. [Emphasis in original][51]

31. In *Manitoba Métis Federation*, this Court, quoting from *Taku River*, confirmed that the honour of the Crown flows from the assertion of sovereignty and the *de facto* control of land and resources formerly in the control of the Indigenous people. The purpose of the honour of the Crown is to further the reconciliation of prior occupation with the assertion of sovereignty.[52]

32. Thus, the continuation of common law aboriginal rights pursuant to the law of sovereign succession was, as Mr. Justice Binnie observed in *Mitchell*, "intended to reconcile the interests of the local inhabitants across the empire to a change in sovereignty."[53] As the Court observed in *Haida Nation*, the process of reconciliation flows from the assertion of sovereignty and the honour of the Crown:

> 32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto*

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[50] *Van der Peet*, para. 28
[51] *Van der Peet*, para. 30
[52] *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, paras. 66-67. See esp. para. 66, citing both *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, para. 24, and Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R. (2d) 433, at p. 436. See also *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*], para. 32
[53] *Mitchell*, para. 144

> control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, *"[w]ith this assertion [sovereignty]* arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added). [Italic emphasis in original; underlined emphasis added][54]

2. The Purposive Interpretation of Section 35 and the Indigenous Perspective

33. Since *Sparrow*, it is accepted that s. 35(1) must be construed in a purposive, generous and liberal way, with due regard to the honour of the Crown and the Aboriginal perspective.[55] Most recently, in *Innu of Uashat*, Chief Justice Wagner, and Justices Abella and Karakatsanis, writing for the majority of this Court, confirmed that "[t]he honour of the Crown requires a generous and purposive interpretation of this provision in furtherance of the objective of reconciliation".[56] This is consistent with the general approach to the interpretation of constitutional rights, which requires that they "be read purposively, rather than in a technical and legalistic fashion."[57]

34. The core purpose of s. 35(1) is to recognize prior occupation of Indigenous communities in Canada, and to reconcile that prior occupation with the assertion of sovereignty in a manner that is consistent with the honour of the Crown.[58] In this way, the foundational principles discussed above inform and are subsumed within the central purpose of s. 35(1).

35. Additionally, s. 35(1) must be interpreted with regard to the Indigenous perspective. In *Van der Peet*, this Court stressed that the rights recognized and affirmed by s. 35(1) must both be cognizable to the common law legal structure, and also take into account the Indigenous perspective. It is necessary to take account of both perspectives to properly further reconciliation.[59]

36. Likewise, in *Marshall; Bernard*, this Court noted the importance of looking to the Indigenous perspective when translating a historic practice into a modern right. The Court stressed

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[54] *Haida Nation*, para. 32
[55] *Sparrow*, pp. 1106-07
[56] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 [*Innu of Uashat*], para. 27
[57] *R. v. Stillman*, 2019 SCC 40 [*Stillman*], para. 22
[58] *Van der Peet*, para. 43
[59] *Van der Peet*, para. 49. See also *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*], paras. 81-84

that when determining "aboriginal entitlement, one looks to aboriginal practices rather than imposing a European template".[60] Today, the Indigenous perspective "grounds the [s. 35] analysis and imbues its every step."[61]

37. For Indigenous peoples, an essential part of that perspective is connection to an ancestral place. Professor John Borrows has written about the strength of this connection, which is not severed even when Indigenous people have been dispossessed of, or removed from their ancestral territories:

> Indigenous nations who are dispossessed from their lands regularly count the cost of their dispossession – including ecological costs borne by their people and territories…
>
> When a traditional territory is occupied by other people, Indigenous peoples still feel the land is theirs too. When a river, lake or aquifer is polluted, this fact is mourned by the original owners. The clearing of lands for farms or forestry is experienced as a loss of traditional habitat. Opening the earth for mines, oil wells, and other development is usually felt as a desecration of their home by the effected land's original inhabitants.
>
> Thus, Indigenous peoples do not generally feel separated from their traditional territories. As noted, this is true even if they live in a city. This is true even if the Crown secured a so-called surrender of these lands and resources by treaty, and if they relocated Indians to reserves or a city. This is because Indigenous languages, economies and world views are rooted in their homelands, and therefore reject the very idea of surrender. The English treaty language of "cede, surrender and release" does not extinguish the idea that we will always draw our life from the sun, waters, and plants that shine, flow and grow on our traditional territories.
>
> [Emphasis added][62]

38. This Court has likewise recognized that Indigenous identity is fundamentally tied to, and defined by a connection to ancestral territory. In *Gladue*, the Court observed that Aboriginal people living away from their communities continue to be closely attached to their culture and ancestral territory, and are therefore entitled to benefit from the special sentencing provisions in the *Criminal Code*:

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[60] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 [*Marshall; Bernard*], para. 49
[61] *Marshall; Bernard*, para. 50
[62] Borrows, John "Earth Bound: Indigenous Resurgence", in *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings*, Asch, Borrows and Tully, eds. (Toronto: University of Toronto Press, 2018), p. 59, RBOA, Tab 1

> 91 Section 718.2(*e*) applies to all aboriginal offenders wherever they reside, whether on- or off-reserve, in a large city or a rural area. Indeed it has been observed that many aboriginals living in urban areas are closely attached to their culture. See the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities* (1996), at p. 521:
>
> > Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities.
>
> And at p. 525:
>
> > Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable.... Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.[63]

39. Article 36 of the United Nations Declaration on the Rights of Indigenous Peoples, now legislatively implemented in British Columbia[64], enshrines the right of Indigenous peoples, *inter alia*, to maintain relations and carry out cultural activities across international borders. As an international instrument enacted in British Columbia, Article 36 may inform the interpretation of domestic law including s. 35(1),[65] and the consideration of the Aboriginal rights claims of cross-border communities. It is only through the lens of the Indigenous perspective, and in particular the connection between Indigenous identity and land, that the courts can properly consider the impact of borders on those claims. This was recently acknowledged by Justices Brown and Rowe, in their dissenting reasons in *Innu of Uashat*, when considering the impact of the border between Quebec and Newfoundland and Labrador on the aboriginal title claim of the Innu of Uashat and of Mani-Utenam and the Innu of Matimekush-Lac John:

> [246] Canada's federal structure was designed to address the political and social realities of the confederated colonies rather than of Indigenous peoples. Provincial boundaries were imposed on Indigenous peoples without regard for their pre existing social organization.

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[63] *R. v. Gladue*, [1999] 1 SCR 688, para. 91
[64] *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44, Schedule
[65] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, paras. 69-71; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, paras. 351-354; aff'd 2013 FCA 75

> Land that, from an Indigenous perspective, represents a single unified territory is divided, from the non Indigenous perspective, between two separate sovereign legislatures with separate laws and institutions. The courts can respond to this historical reality only within the constitutional framework from which they derive their authority. Near the heart of that constitutional framework are the provincial boundaries that demarcate the jurisdiction of the separate provincial superior courts and which reflect the constitutional principle of federalism. Section 35 calls on courts to do justice to Aboriginal rights claims that cut across provincial boundaries, but it does not provide a warrant to disregard the provincial boundaries themselves. Neither of these considerations can be subordinated to the other; rather; they must be reconciled. [Emphasis added][66]

3. The *Van der Peet* Test and "Aboriginal Peoples of Canada"

40. Today, the Aboriginal rights that are recognized and affirmed by s. 35(1) are established through the *Van der Peet* framework, which requires a rights claimant to prove that an activity is an element of a practice, custom or tradition integral to the distinctive culture of the Indigenous group claiming the right.[67] The claimant must also show that the particular practice has continuity with the practices, customs and traditions of pre-contact times.[68]

41. Where an unextinguished Aboriginal right has been infringed, the honour of the Crown requires the Crown to justify that infringement. In *Sparrow,* this Court confirmed that "[s]uch scrutiny is in keeping with ... the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada".[69]

42. The strength of the *Van der Peet* test is its ability to take into account the past and present connection between the Aboriginal community and the site-specific practices on the land that is now Canada, and thus ground the analysis in the foundations of the doctrine of Aboriginal rights. It incorporates the prior occupation of an Indigenous community in what is now Canada, as well as the Indigenous perspective on the enduring connection between identity and land. It requires the government to justify any infringements, which flows from the honour of the Crown. In that way, it furthers the process of the reconciliation of prior occupation and the assertion of sovereignty.

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[66] *Innu of Uashat*, para. 246
[67] *Van der Peet*, para. 46
[68] *Van der Peet*, para. 63
[69] *Sparrow*, p. 1109

43. Thus, when an Indigenous community establishes a site-specific right pursuant to *Van der Peet*, it will have demonstrated that the community was here first, living on the land with a distinctive culture prior to the arrival of Europeans, which is the very reason for the existence of the doctrine of Aboriginal rights. Further, when that community has demonstrated that it continues to have a site-specific Aboriginal right in Canada which is integral to its distinctive culture, the prior occupation of that community must be reconciled with the assertion of Crown sovereignty to uphold the honour of the Crown.[70]

44. The Crown says that the *Van der Peet* test does not address whether a group is an "Aboriginal Peoples of Canada"[71]. In fact, applying the *Van der Peet* test answers precisely that question. Where it is demonstrated that a claimant is part of an Indigenous community that was in Canada prior to contact, is engaged in a practice in Canada that is integral to the distinctive culture of that community, and which has continuity with pre-contact practices in Canada, then that community has established an Aboriginal right due to their connection to Canada. Having proven that continuous connection to the country, they must be an "Aboriginal peoples of Canada", and it serves no purpose to additionally consider that question as a stand-alone or threshold issue.

45. Further, the Crown argues that the use of the *Van der Peet* framework would result in the term being defined solely in terms of prior occupation, without sufficient recognition of the present-day community.[72] This is incorrect. The *Van der Peet* framework accounts for both prior occupation and continuity with present day practices. The continuity requirement thus requires the existence of a modern-day successor group whose practices have continuity with the pre-contact group.

46. The Crown also says that the *Van der Peet* test gives no meaning to the words "of Canada", and therefore renders those words redundant.[73] The *Van der Peet* framework requires that any site-specific rights be integral to the distinctive culture of the collective, and that there be some continuity between the past and present practices. It thus imbues the words "of Canada" with meaning by requiring Indigenous groups to meet the significant burden of proving an enduring

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[70] *Van der Peet*, paras. 30, 43
[71] Appellant's Factum, paras. 56-59
[72] Appellant's Factum, para. 60
[73] Appellant's Factum, paras. 69-70

connection to their traditional Canadian territory and the continuity of their practices in Canada since contact.

47. Finally, the Crown says that the *Van der Peet* test is inadequate because it does not address Aboriginal title, the rights of the Métis, or treaty rights.[74] That submission ignores the fact that the *Van der Peet* framework is the starting place for both the recognition of the rights of the Métis as well as Aboriginal title. In *Powley*, this Court modified some elements of the pre-contact *Van der Peet* test to reflect the distinctive history and post-contact ethnogenesis of the Métis.[75] The Court confirmed that the Métis had formed distinct cultures that flourished prior to the entrenchment of European control.[76]

48. Similarly, in *Delgamuukw*, this Court adapted the *Van der Peet* test to take account of the fact that a claim to title is a claim to land. The timeframe was set at the date of assertion of sovereignty because that is when the Crown's underlying title crystalized, because the date is easier to pinpoint, and because the issue of influence by Europeans is irrelevant to prior occupation. However, the point remains the same: the concern is to properly account for prior occupation, regardless of the date at which that prior occupation is determined.[77]

49. There is no need to apply the *Van der Peet* framework in the context of treaty rights to determine if a community is an "Aboriginal People of Canada". The signatory community to the treaty is the holder of the treaty rights that are recognized and affirmed by s. 35, and is therefore an Aboriginal Peoples of Canada without need for further analysis.

50. Thus, the courts below properly relied on the *Van der Peet* framework to determine that Mr. Desautel was exercising the Sinixt right to hunt, and that the Sinixt are an "Aboriginal peoples of Canada". The Sinixt perspective is informed by their deep and enduring ties to Canada, ties that the Trial Judge was satisfied were "ever-present" in the minds of those Sinixt who reside south of the border,[78] and were not severed by the involuntary move to what is now the United States.[79]

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[74] Appellant's Factum, para. 60
[75] *R. v. Powley*, 2003 SCC 43 [*Powley*], para. 14; see also: *Van der Peet*, paras. 66-67
[76] *Powley*, para. 10
[77] *Delgamuukw*, paras. 142, 145; see also *Powley*, para. 14
[78] BCPC Decision, para. 50, AR Vol. I, Tab 1, p. 16
[79] BCPC Decision, para. 128, AR Vol. I, Tab 1, p. 45

The Trial Judge was "left with no doubt" that hunting in Canada was important and integral to the Sinixt, and had continuity with the pre-contact Sinixt practices.[80] The conclusion that the Sinixt were therefore an "Aboriginal peoples of Canada" is entirely consistent with the foundational principles of Aboriginal law, a purposive interpetation of s. 35, and the Indigenous perspective.

B. The Crown's Arguments Against Constitutional Protection for the Sinixt Right to Hunt

51. In this Court, the Crown raises the proposition that the Sinixt may hold a common law Aboriginal right, which does not enjoy the constitutional protection of s. 35(1),[81] and says the courts below erred in not considering the "possibility" of such a right existing.[82]

52. The lower courts made no such error because the Crown did not advance that argument before them. To the contrary, at trial, the Crown argued that the right to hunt claimed by Mr. Desautel "did not survive the 1846 imposition of Canadian sovereignty and as such never came into existence".[83] In the summary conviction appeal, the Crown argued that "[w]hen the Sinixt ceased to be present in Canada there was no common law right available for them to exercise."[84] In the Court of Appeal, it raised the issue in a one-paragraph alternative submission.[85] Thus, the courts below cannot be faulted for failing to consider the question of whether the Sinixt hold a common law hunting right.

53. The Crown advances three reasons why it says that the Sinixt can only possess a common law and not a constitutionally protected aboriginal right to hunt, which we address in turn below.[86]

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[80] BCPC Decision, para. 119, AR Vol. I, Tab 1, p. 40
[81] Appellant's Factum, paras. 36, 41, 97
[82] Appellant's Factum, para. 1
[83] Written Submissions of the Crown in the Provincial Court of British Columbia, dated November 27, 2016, para. 264, RR Vol. I, p. 74
[84] Appellant's Statement of Argument in the Supreme Court of British Columbia, dated July 21, 2017, paras. 134-135, RR, Vol. I, pp. 123-124
[85] Appellant's Factum in the Court of Appeal of British Columbia, dated June 4, 2018, para. 93, RR Vol. I, p. 165
[86] Appellant's Factum, para. 35

1. The Crown Ignores the True Foundations of the Doctrine of Aboriginal Rights

54. The Crown first says that the foundation of the doctrine of Aboriginal rights supports the view that the Sinixt hunting right must be a common law right that did not receive constiutional protection in 1982.[87]

55. The Crown's argument all but ignores the foundational principles of prior occupation, the assertion of sovereignty, the honour of the Crown, and reconciliation, and does not explain how those principles preclude Mr. Desautel from holding a constitutionally protected right to hunt in British Columbia.

56. First, aside from a brief reference to the traditional territory of the Sinixt in its review of the background facts, the Crown makes virtually no mention of the Trial Judge's findings of fact regarding the Sinixt's prior occupation of what is now British Columbia for thousands of years, or the enduring connection to their traditional territory in Canada. The Crown instead distances itself from those findings by using terms such as "US Indigenous group",[88] "foreign nationals",[89] or "foreigners" to describe the Sinixt.[90]

57. The Crown likewise makes no reference to the importance of reconciling that prior occupation with the assertion of sovereignty, the latter of which led to the artificial division of an Indigenous territory and people by an international border. The Crown's only discussion of reconcilation consists of a circular argument that reconciliation is not meant to apply to "US Indigenous groups".[91] The honour of the Crown demands that there be an effort to reconcile the prior occupation of the Sinixt with that forced displacement in a manner that accounts for the Indigenous perspective, yet the Crown makes no effort to do so.

58. Instead, the Crown falls back on a more limited version of its argument below that the Sinixt right to hunt is incompatible with Canadian sovereignty. The Crown's thesis appears to be

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[87] Appellant's Factum, para. 32, 38-51
[88] Appellant's Factum, paras. 1, 5, 21, 41, 42, 85, 87, 88, 92, 93, 95, 98, 99
[89] Appellant's Factum, para. 87
[90] Appellant's Factum, para. 48
[91] Appellant's Factum, para. 94, citing *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*], para. 10, and *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12 [*Daniels*], para. 156

that Mr. Desautel cannot be a member of an "Aboriginal peoples of Canada" because the Sinixt hunting right includes an incidental right to cross the international border, which it says would be incompatible with Canadian sovereignty.[92]

59. First and foremost, as the lower courts all held, given that Mr. Desautel had a means of legally entering Canada, a right to cross the border does not arise on the facts of this case such that there is no proper factual matrix to consider the question of compatibility with Canadian sovereignty.

60. Further, the Crown's argument is flawed in that it presupposes that the Sinixt are wholly located in Washington State, such that it is necessary to have a "right" to cross the border, which is contrary to the Trial Judge's findings of fact, as affirmed in both appellate courts. The Crown also fails to explain why the doctrine of sovereign incompatibility could not be addresssed by the justification analysis under s. 35, as a majority of this Court suggested in *Mitchell*. Finally, the Crown provides no reason why the foundations of the doctrine of Aboriginal rights prevent a common law right to hunt, absent an incidental right to cross the border, from being constitutionally protected under s. 35.

61. The lower courts all correctly concluded that an "incidental mobility right" does not arise on the facts of this case. The Trial Judge observed that the right claimed was an Aboriginal right to hunt in Sinixt traditional territory in British Columbia, and therefore was not, on its face, a claim to enter Canada to exercise the right to hunt.[93] She was satisfied that although the border had an impact on the Sinixt moving about their territory, it did not follow that the assertion of sovereignty could not co-exist with the Sinixt right to hunt.[94]

62. The Summary Conviction Appeal Judge agreed with the Trial Judge that a mobility right did not arise, and further concluded that the record did not permit the question of whether an incidental mobility right is consistent with sovereignty to be decided.[95] He found that in those cases where an incidental right has been found to exist, it is the incidental right itself that was

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[92] Appellant's Factum, para. 51
[93] BCPC Decision, paras. 144, 146, AR Vol. I, Tab 1, p. 50
[94] BCPC Decision, para. 148, AR Vol. I, Tab 1 p. 51
[95] *R. v. Desautel*, 2017 BCSC 2389 [BCSC Decision], para. 100, AR Vol. I, Tab 3, p. 91

alleged to have been infringed by a Crown action.[96] Since Mr. Desautel was not charged with unlawful entry to Canada, there was no record as to the nature of the right or the alleged infringement.[97]

63. The Court of Appeal similarly determined that it was unnecessary to address the sovereign incompatibility issue. The Court observed that the lawfulness of Mr. Desautel's entry into Canada was never disputed, such that there was no evidentiary record to assess the nature and extent of any right to cross the border, including questions of infringement and justification.[98] The Court further noted that where an incidental right has been found to arise, the exercise of the incidental right was limited by the state, and Mr. Desautel's right to cross the border was not limited given his legal entry into Canada as a visitor.[99]

64. In this way, the right at issue differs significantly from the right at issue in *Mitchell*, where mobility across the border was at the core of the asserted right. The majority in *Mitchell* found that "all three *Van der Peet* touchstones resonate with considerations of geography."[100] The conduct giving rise to the case was an Indigenous person of Mohawk descent arriving at the Canada-U.S. border from the southern portion of the Mohawk reserve at Akwesasne in New York State, and claiming a right to cross into Canada with goods for trade without having to pay customs duties. The restriction on that activity arose from the provisions of the *Customs Act*, and the ancestral practice relied on was an historic trade route north across the St. Lawrence River. The right asserted was the right to enter Canada from the United States. Absent a border, the case would not have even been before the courts.[101]

65. In dissent, Justice Binnie similarly found the "unusual" aspect of the case before him was "that not only the value but the very *purpose* of the claimed trading/mobility right depends on a boundary that is itself an expression of non-aboriginal sovereignties on the North American continent."[102] He ultimately re-characterized the right being claimed as a right for the Mohawk to

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[96] BCSC Decision, para. 101, AR Vol. I, Tab 3, p. 92
[97] BCSC Decision, para. 106, AR Vol. I, Tab 3, p. 92
[98] *R. v. Desautel*, 2019 BCCA 151, [BCCA Decision], para. 67, AR Vol. I, Tab 7, p. 133
[99] BCCA Decision, para. 68, AR Vol. I, Tab 7, p. 133
[100] *Mitchell*, para. 58
[101] *Mitchell*, para. 58
[102] *Mitchell*, para. 111

come and go across international borders with whatever goods they wished, just as they had in pre-contact times.[103] His conclusion was animated by the idea that the entire purpose of the claim was to assert, expand and grow Mohawk sovereignty in an area where border control has always been contentious.[104] He concluded that the "right claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy is incompatible with the historical attributes of Canadian sovereignty."[105]

66. The impugned state action in this case also differs from the conduct in the cases where an incidental mobility right is said to arise. In those cases, the incidental right typically constitutes the *actus reus* of a regulatory offence, such that the impugned state action limits the incidental right.

67. For example, in *Sundown*, park regulations prohibited construction of a dwelling on park land without permission. The claimant was charged for constructing a log cabin in the provincial park. The Court found that the hunting cabin was reasonably incidental to the claimant's right to hunt in their traditional style, and the regulations that prohibited it were therefore contrary to s. 35.[106]

68. Similarly, in *Côté*, regulations prohibited entry to a controlled harvest zone without paying the required fee for vehicle access. The claimants were convicted for entering the zone. The Court found that entry to the area was reasonably incidental to the claimants' fishing right.[107] In *Simon*, regulations prohibited possession of a rifle and shotgun cartridges. The claimant was charged with possession of those items. The Court found that possession of those items was reasonably incidental to the claimant's treaty right to hunt.[108]

69. Thus, the common thread in all of those cases is that the state action in issue limited the exercise of the incidental right. Since the international border is not implicated by either the exercise of the hunting right or the state conduct at issue, there is no factual matrix on which the

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[103] *Mitchell*, para. 148
[104] *Mitchell*, paras. 102, 156-157
[105] *Mitchell*, para. 163
[106] *R. v. Sundown*, [1991] 1 SCR 393
[107] *R. v. Côté*, [1996] 3 SCR 139 [*Côté*]
[108] *Simon v. The Queen*, [1985] 2 SCR 387

sovereign incompatibility argument can be addressed. There may be a future case where the government attempts to limit a Sinixt person's ability to cross the border, but there was no such limit in Mr. Desautel's case.

70. In any event, there are other problems with the Crown's sovereign incompability argument. First, the Crown's argument overlooks the fact that the Lakes Tribe is not co-extensive with the entirety of the modern day Sinixt collective. The Trial Judge concluded that the Sinixt were the proper rights holding collective, and that there are Sinixt individuals living in both Washington State and British Columbia who are ancestrally connected to the Sinixt living in British Columbia at the time of contact.[109] She found Mr. Desautel to be a member of the group of Sinixt people living in Washington State on the Colville Reservation (the Lakes Tribe).[110]

71. Based on his review of the trial decision as a whole, the Summary Conviction Appeal Judge concluded the Trial Judge considered the Sinixt people to be the relevant collective, and the Lakes Tribe (of which Mr. Desautel was clearly a member) to be the portion of the collective that resides in Washington State.[111] He interpreted the Trial Judge as having expressly declined to make a finding that the Lakes Tribe represents all of the Sinixt; the question of what other persons or communities resident in Canada can also exercise the Sinixt right to hunt did not arise.[112]

72. The Court of Appeal confirmed that "the trial judge's central finding of fact … was that the Sinixt people were the relevant Aboriginal collective and the Lakes Tribe, of which Mr. Desautel is a member, represents a part of the Sinixt people that now live in Washington State."[113] The Court of Appeal affirmed the Trial Judge's conclusion that the Lakes Tribe was not co-extensive with the Sinixt, and that other successor groups in Canada may be able to claim rights stemming from their Sinixt ancestry. However, the evidentiary record was limited to Mr. Desautel's claim as a member of the Lakes Tribe because the proceedings involved a regulatory charge under the *Wildlife Act*.[114]

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[109] BCPC Decision, paras. 58-59, 62, AR Vol. I, Tab 1, pp. 18-19
[110] BCPC Decision, para. 4, AR Vol. I, Tab 1, p. 2
[111] BCSC Decision, para. 35, AR Vol. I, Tab 3, p. 77
[112] BCSC Decision, para. 39, AR Vol. I, Tab 3, p. 78
[113] BCCA Decision, para. 49, AR Vol. I, Tab 7, p. 125
[114] BCCA Decision, para. 49, AR Vol. I, Tab 7, p. 125

73. Given the Trial Judge's finding that people with Sinixt ancestry live on both sides of the border, it cannot be said that the Sinixt right to hunt necessarily includes an incidental right to cross the border. The content of an Aboriginal right cannot vary depending on which side of a border members of an Indigenous community reside.

74. Further, even if an incidental mobility right could be said to arise in this case, the sovereign incompatibility doctrine has never been recognized by a majority of this Court. The Court of Appeal observed, without deciding, that the doctrines of extinguishment, infringement and justification would provide a helpful framework for determining the scope of an incidental right of access and the extent to which it might be curtailed by Canadian laws of general application.[115]

75. This observation is consistent with the jurisprudence of this Court to date. The majority in *Mitchell,* which did not find it necessary to address sovereign incompatibility, nevertheless observed that the Court had in the past affirmed that the doctrines of extinguishment, infringement and justification were the appropriate framework for resolving complaints between Aboriginal rights and competing claims such as Crown sovereignty.[116]

76. The Federal Court of Appeal also questioned the doctrine in *Watt*,[117] with which the Summary Conviction Appeal Judge expressly agreed.[118] There, a Sinixt resident on the Colville Reservation claimed an Aboriginal right to remain in Canada. The Court did not decide the question of the existence of the claimed right, but nevertheless went on to reject the idea that any fetters on border control which resulted from the exercise of s. 35 rights would be necessarily incompatible with sovereignty. The Court instead suggested that border control may be a proper justification for the infringement of Aboriginal rights. The Court considered that s. 35(1) is a valid fetter that limits what would otherwise be a sovereign power.[119]

77. The only remaining authority to have considered the issue suggests that sovereign incompatibility should be addressed within the justification analysis of the *Van der Peet* test. In

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[115] BCCA Decision, para. 70, AR Vol. I, Tab 7, pp. 133-34
[116] *Mitchell*, paras. 63-64
[117] *Watt v. Liebelt*, [1999] 2 F.C. 455 [*Watt*]
[118] BCSC Decision, para. 121, AR Vol. I, Tab 3, pp. 96-97
[119] *Watt*, para. 15

Chief Mountain, the BC Court of Appeal considered an argument that the Nisga'a Treaty was incompatible with the sovereign duty to legislate, and pointed to the possibility of legislation justifiably infringing treaty rights being a complete answer to the argument.[120]

78. Finally, the Crown's argument on sovereign incompatibility is entirely premised on the Sinixt hunting right including an incidental mobility right. The Crown appears to accept that Mr. Desautel could claim a common law hunting right absent a mobility right, and that such a right would not be defeated by the doctrine of sovereign incompatibility (and would therefore have been accepted into the common law).[121] If so, on the Crown's own argument, there would be no barrier to that hunting right receiving constitutional protection under s. 35, as the Crown accepts that those rights that existed at common law would become entrenched in s. 35(1).[122] The Crown is therefore left to fall back on its textual interpretation of s. 35, and the argument that the Sinixt are not an "Aboriginal peoples of Canada", to which we now turn.

2. The Crown's Interpretation of Section 35 is Divorced from its Core Purpose

79. The Crown says that a "proper" or "purposive" interpretation of "Aboriginal peoples of Canada" justifies excluding from its ambit "US Indigenous groups" such as the Sinixt. In reality, the Crown's interpretation ignores both the core purpose of s. 35(1) – reconciliation – as well as the Indigenous perspective of the Sinixt. In the main, the Crown advances the "plain language" interpretation of "Aboriginal Peoples of Canada" that was properly rejected by the lower courts, and is seeking to import a modern-day residency requirement into s. 35(1) that is divorced from the purpose of the section.

80. The Crown cites s. 35.1 (and other now repealed sections) of the *Constitution Act, 1982* regarding constitutional conferences, and argues that one can infer from the identity of the attendees and the subject matter of the conferences that the Sinixt are not an Aboriginal peoples of

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[120] *Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)*, 2013 BCCA 49, paras. 21, 80-81, 84
[121] Appellant's Factum, para. 51
[122] Appellant's Factum, para. 49

Canada.[123] As the Summary Conviction Appeal Judge observed, this assumes away what it seeks to disprove: the opportunity for the Sinixt to participate in Canadian democracy.[124]

81. The Crown also relies on the Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (the "Minutes").[125]

82. While admissible, legislative history generally receives very little weight in constitutional interpretation, as it is not possible to be confident of the intention of the framers of the Constitution, and difficult to attribute a particular opinion to a large group of people.[126] While this Court has referred to the Minutes in recent cases, the intention of the Committee was manifestly clear from the Minutes, and there was no need to infer any shared assumptions or beliefs from oblique testimony.[127]

83. Indeed, the suggestion by the Crown that there was a "shared assumption" or "implicit understanding" between Indigenous groups and government representatives is not borne out by the quotes from the Minutes on which the Crown relies. As both the Summary Conviction Appeal Judge and the Court of Appeal observed, the passages are non-specific and do not address the issues raised in this case.[128] The Minutes contain no explicit references to what communities would constitute "Aboriginal peoples of Canada", or how that term would be defined.

84. The Crown also relies on extracts from case law, taken out of context, in support of its argument that the protections of s. 35(1) should be granted only to "Indigenous groups within Canada's borders". For example, the Crown relies on a passage from *Van der Peet* where Chief Justice Lamer refers to Aboriginal rights being held only by Aboriginal members of "Canadian

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[123] Appellant's Factum, paras. 76-79
[124] BCSC Decision, paras. 46-47 AR Vol. I, Tab 3, pp. 79-80
[125] Appellant's Factum, paras. 81-84
[126] Hogg, Peter W., *Constitutional Law of Canada*, 5th Ed. Supplemented, Vol. 2, (Toronto: Thomson Reuters, 2007), ch. 60.1(e), RBOA Tab 2; *Re B.C. Motor Vehicles Act* , [1985] 2 SCR 486, pp. 507-509
[127] *R. v. Poulin*, 2019 SCC 47, para. 78; *Stillman*, para. 77
[128] BCSC Decision, para. 54, AR Vol. I, Tab 3, p. 81; BCCA Decision, para. 64, AR Vol. I, Tab 7, p. 132

society".[129] The Crown likewise refers to instances where the Court referred to reconciliation with Aboriginal "Canadians".[130] The questions before the Court in those cases concerned the exercise of Aboriginal rights, and the question of whether non-Canadians might exercise s. 35(1) rights did not arise. Thus, these passages have nothing to do with the scope of the term "Aboriginal peoples of Canada" or the persons with whom Canada should reconcile.

85. The Crown also cites the presumption of territoriality.[131] As the Court of Appeal held, that doctrine has no application in this case.[132] The presumption of territoriality provides that Canadian law cannot be enforced in another state's territory without that state's consent.[133] Here, Mr. Desautel does not seek the protection of s. 35(1) outside of Canada; he seeks the right to hunt within Canada's borders.

86. Ultimately, the Crown's position appears to be that s. 35(1) requires modern-day residence in Canada for a community to claim Aboriginal rights in Canada. Focusing on the phrase "of Canada", the Crown argues that residency or dwelling is so plainly equated with "of Canada" that the framers of the Constitution must have considered that no further definition was necessary.[134] The Crown likewise says that it would have been unnecessary for the framers of the Constitution to refer to residence or citizenship because s. 35 rights have a different philosophical underpinning than *Charter* rights, and are only held by Aboriginal people, such that the references to citizens or residents in s. 35 is unnecessary.[135] However, if the framers of the Constitution intended to invoke residency, they could have chosen that language – "Aboriginal peoples resident in Canada", or "Aboriginal peoples in Canada".

87. In support of its argument, the Crown cites this Court's decision in *Powley*, arguing that the persistence of a community in and around Sault Ste. Marie, and continuity of location, was a

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[129] Appellant's Factum, para. 93, citing *Van der Peet*, para. 19
[130] Appellant's Factum, para. 94, citing *Beckman*, para. 10 and *Daniels*, para. 156
[131] Appellant's Factum, para. 68
[132] BCCA Decision, para. 63, AR Vol. I, Tab 7, p. 132
[133] *R. v. Hape*, 2007 SCC 26, para 69; *Society of Composers, Authors, and Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45, paras. 54-55
[134] Appellant's Factum, para. 66
[135] Appellant's Factum, paras. 73-75

significant element in the determination of the Métis hunting right.[136] In fact, the Court in *Powley* did not consider whether there was any requirement for the present-day community to reside in the same geographic area as it had previously. The Court merely commented that the rights holders were located in the same region. Notably, the Court made it clear it was not commenting on the extent of the Métis community in issue, as it was "not necessary for us to decide, and we did not receive submissions on, whether [the community in and around Sault Ste. Marie] is also a Métis "people", or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes."[137] The Court of Appeal properly concluded that *Powley* did not impose a requirement that the modern community must occupy the same territory as the pre-contact community.[138]

88. The Crown says that the location of the present-day rights bearning community must be a factor in the determination of whether an Indigenous group is an "Aboriginal peoples of Canada" because otherwise, an Indigenous group that has been absent from Canada for decades, or even centuries, could claim constitutionally protected rights or title.[139]

89. The Court of Appeal held that imposing a modern day residency requirement "ignores the Aboriginal perspective, the realities of colonization and does little towards achieving the ultimate goal of reconciliation."[140] The Crown has not advanced any reason why the Court of Appeal was incorrect in reaching this conclusion. Focusing on modern-day residence is inconsistent with the Indigenous perspective, and the relationship between Aboriginal identity and connection to the land. Aboriginal identity lies in the "common threads" of shared language, customs, traditions, and historical experiences.[141] Limiting "of Canada" to residency would have the very real effect of severing those threads of identity, and would directly undermine the purpose of s. 35(1).

90. The Crown takes issue with the Court of Appeal for not identifying which Indigenous perspective is relevant to the s. 35 analysis (suggesting that Canadian and US Indigenous

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[136] Appellant's Factum, paras. 61-62
[137] *Powley*, paras. 12, 24
[138] BCCA Decision, para. 59, AR Vol. I, Tab 7, p. 130
[139] Appellant's Factum, para. 61
[140] BCCA Decision, para. 62, AR Vol. I, Tab 7, p. 131
[141] *Powley*, para. 12; *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, paras. 469, 457

perspectives may differ),[142] but it is plainly the Sinixt Indigenous perspective that is at issue. As above, that perspective is informed by a deep connection to their traditional territory in Canada. Simply put, to be a Sinixt person is to be from the Arrow Lakes region of British Columbia. That identity has been maintained despite a multitude of forces that pulled at its fabric, including the imposition of an international border, the involuntary move south of that border, and the *1896 Game Act* that made it illegal for the Sinxt residing in the United States to continue hunting in Canada.

91. A residency requirement would also be inconsistent with the foundation and purpose of s. 35(1). The purpose and goal of s. 35(1) is to account for the fact that Indigenous communities were already here, and to reconcile that prior occupation with the assertion of sovereignty to further the honour of the Crown. Modern-day residence does not necessarily have any connection to prior occupation, nor does it relate to the assertion of sovereignty or the honour of the Crown. Given that residence is disconnected from the foundations of the doctrine of Aboriginal rights, there is no principled reason why it should be relevant to the s. 35(1) analysis.

92. Any requirement for residency in the location where the right is exercised would potentially preclude claims by nomadic and semi-nomadic Aboriginal communities, who by definition hold Aboriginal rights in areas where they do not necessarily reside. This Court has cautioned against interpreting s. 35(1) in a way that excludes protection for such communities.[143]

93. In any event, even if s. 35(1) included a residency requirement, the Sinixt would meet it. As the Court of Appeal held, the Crown "assumes that the Sinixt peoples are restricted to the Lakes Tribe, which the trial judge declined to determine within the limited scope" of the regulatory proceedings.[144] In this case, the uncontested evidence is that the Sinixt continue to reside in their traditional territory, albeit mostly south of the international border that has artificially divided that territory. Moreover, the evidence established that those Sinixt who reside in Washington State have a deep and enduring connection to the significant portion of their traditional territory in

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[142] Appellant's Factum, para. 71
[143] *R. v. Adams*, [1996] 3 SCR 101, para. 27
[144] BCCA Decision, para. 58 AR Vol. I, Tab 7, p. 130

Canada. Thus, if there were any requirement that the group remain in the same area as where the right is exercised, the Sinixt would satisfy it.

3. The Crown's Legal and Practical Difficulties do Not Preclude the Protection of the Sinixt Right to Hunt

94. The Crown alleges that there are a number of "legal and practical difficulties" with recognizing a Sinixt right to hunt.[145] These practical problems are not borne out by the evidence at trial or the findings of fact of the Trial Judge, and, in any event can be addressed by the *Van der Peet* framework, which is constructed to prevent the advancement of unfounded claims.

95. The Crown says that if the Sinixt are found to be an Aboriginal peoples of Canada, they would have been permitted to attend constitutional conferences on the amendment of the Constitution. It suggests that the framers of the Constitution would not have contemplated the spectre of "foreign nationals" participating in those conferences, as that would be inconsistent with the objective of patriating the Constitution.[146] However, as the Trial Judge found, the Sinixt have deep and enduring ties to Canada that would make them particularly concerned with s. 35(1), and willing and interested participants in discussions with respect to how their rights would be recognized and affirmed, or how Canada's jurisdiction with respect to Indians and Lands Reserved for Indians would be defined and exercised.[147] The Crown has not pointed to any legal impediment to them doing so.

96. The Crown also argues that recognizing a right in this case "undermines government's capacity to effectively manage wildlife resources", as the Province would be required to allocate priority to the rights of "US Indigenous groups".[148] The Crown refers to the trial evidence of the Acting Manager of BC's Wildlife Management Section that the residency requirement ensures that the economic benefit of hunting flows to residents or guide outfitters instead of non-residents.[149]

97. This concern is not supported by the findings of fact at trial. The Crown conceded, and the Trial Judge found, that "there were no conservation concerns regarding elk" at the relevant time,

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[145] Appellant's Factum, para. 86
[146] Appellant's Factum, para. 87
[147] BCPC Decision, para. 166, AR Vol. I, Tab 1, pp. 56-57
[148] Appellant's Factum, para. 89
[149] Appellant's Factum, para. 91

and the Sinixt knew there were no conservation concerns.[150] Additionally, the right in this case is sufficiently tailored to assuage the Crown's concerns. The *Van der Peet* framework affords the Crown an opportunity to justify reasonable restrictions on the right to hunt and access into the country to do so – for example, if *bona fide* concerns with public safety or conservation were to arise.

98. The Crown also suggests that recognizing a right in this case could open the door to Aboriginal rights and title claims by "foreign groups", and that it would "dramatically" increase the scope of the Crown's duty to consult to include US Indigenous groups "anywhere along the length of Canada's borders with the US".[151]

99. As the Court of Appeal held, the Crown's issues concerning the potential extension of the duty to consult and accommodate and the Sinixt's legal status in the United States cannot be a matter of functionality.[152] Further, the Crown's suggestion that countless Americans will assert Aboriginal rights and title in Canada, and that it will theoretically have to consult with all those groups, is speculative. There was no evidence in the record at trial of other Indigenous communities that might be wholly located in the United States asserting rights in Canada. The only jurisprudence that the Crown is able to cite to support that American residents may attempt to establish rights in Canada concerns the Sinixt.[153]

100. With respect to the duty to consult, the Crown takes the position that it would be contrary to American law for the Sinixt to enter into direct commercial or governmental relations with Canada unless the United States government were at the table.[154] This ignores that any future consultations between the Crown and Sinixt would concern the Sinixt's legal rights <u>in Canada</u> (as opposed to in the United States). Thus, their legal status in the United States, or even the fact that some of them may be resident in the United States, is irrelevant, and does not add any complexity to the Crown's consultation obligations.

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[150] BCPC Decision, para. 180, AR Vol. I, Tab 1, p. 60
[151] Appellant's Factum, para. 92
[152] BCCA Decision, para. 63, AR Vol. I, Tab 7, p. 132
[153] Appellant's Factum, para. 33
[154] Appellant's Factum, paras. 95-96

101. The onerous burden placed on claimants under the *Van der Peet* test would in any event prevent a multitude of groundless claims from "US Indigenous Groups". Only those groups that can meet the *Van der Peet* requirements of a continuing connection to their traditional territory in Canada, and the exercise of site-specific rights in Canada, will be able to establish a s. 35(1) right. Where title is claimed, *Delgamuukw* additionally requires a community to prove exclusive occupation at sovereignty, which may include shared exclusive possession,[155] making it fair to prefer that claim over those advanced by "Canadian Indigenous groups".[156] Where a cross-border Indigenous community can satisfy those requirements, their claim is meritorious and is precisely the type of right or interest that warrants constitutional protection.

C. The Crown's Position on a Common Law Aboriginal Right is Incoherent and not Consistent with the Honour of the Crown

102. After having expressly argued in the courts below that no common law hunting right existed, the Crown now appears to allow for the potential existence of such a right, apparently to assuage concerns that the Sinixt, despite being involuntarily displaced, would have no rights of any kind in their traditional territory in Canada. However, the implications of the Crown's position are that it will in reality avoid the duty of honourable dealing that it admits ought to apply to its relationship with the Sinixt. Rather than allowing the Sinixt a meaningful way of reconciling their prior occupation of Canada with the assertion of sovereignty through the constitutional protection of their right to hunt, the Crown advances a right that it would be free to limit or infringe as it saw fit.

103. The Crown's theory of common law Aboriginal rights is incoherent. On the one hand, the Crown accepts that the honour of the Crown should apply to its dealings with the Sinixt.[157] Yet it then argues that it would not have a duty to consult with the Sinixt.[158] The duty to consult is grounded in the honour of the Crown, which flows from the assertion of sovereignty.[159] Likewise, the honour of the Crown is the source of the requirement that the Crown must justify all

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[155] *Delgamuukw,* para. 158
[156] Appellant's Factum, para. 88
[157] Appellant's Factum, paras. 42-43
[158] Appellant's Factum, paras. 98-99
[159] *Haida Nation,* paras. 35, 27

infringements of Aboriginal rights.[160] If the Sinixt hunting right were not constitutionally protected, then the justification framework would obviously not apply. The Crown's suggestion that it has an obligation to act honourably as regards the Sinixt cannot be reconciled with its abandonment of two of the core duties that flow from the honour of the Crown.

104. The real effect of recognizing only a common law, and not a constitutionally protected Aboriginal hunting right, would be to revive the *Derriksan* line of cases that allowed the Crown to unilaterally dispense with Aboriginal rights by way of regulation, without any requirement for it to justify that regulation. This would set the law back some 40 years.

105. The Crown's approach would also create a hierarchy of Aboriginal rights. If the Crown's theory were accepted, the rights of those groups "resident" within Canada would be protected from unjustified infringement and extinguishment. On the other hand, the rights of transborder groups, despite satisfying the *Van der Peet* requirements of prior occupation and continuity, could be effectively regulated away or extinguished. For groups like the Sinixt, who have potential members on both sides of the border, members in Canada would have constitutionally protected rights, while those residing on the other side of the border would not. In *Côté*, this Court specifically cautioned against an approach that would result in a patchwork of constitutional protections, as it would be contrary to the purpose of the entrenchment of constitutional rights in s. 35(1):

> 53 The respondent's view, if adopted, would create an awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncrasies of colonization over particular regions of the country. In my respectful view, such a static and retrospective interpretation of s. 35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in the *Constitution Act, 1982*. Indeed, the respondent's proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies. To quote the words of Brennan J. in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (H.C.), at p. 42:
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> > Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. [161]

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[160] *Sparrow*, p. 1109
[161] *Côté*, para. 53

106. The foundations of the doctrine of Aboriginal rights do not provide any basis for the patchwork of rights that the Crown advances. Aboriginal rights exist and continued into the common law because Indigenous communities were here first. With the assertion of sovereignty, the Crown became subject to a duty of honourable dealing with all those Indigenous communities who were here, regardless of whether their territory traversed an international boundary. That duty is the basis for the process of reconciling their prior occupation with the assertion of sovereignty through the recognition and affirmation of Aboriginal rights. In *Innu of Uashat,* the majority held that the existence of a border that post-dates the rights should not impede the right of Aboriginal peoples to pursue claims for rights violations:

> [49] …We agree with the intervener the Tsawout First Nation that this is particularly unjust given that the rights claimed pre-date the imposition of provincial borders on Indigenous peoples. We reiterate that the legal source of Aboriginal rights and title is *not* state recognition, but rather the realities of prior occupation, sovereignty and control: see, e.g., *Delgamuukw*, at para. 114. We do not accept that the later establishment of provincial boundaries should be permitted to deprive or impede the right of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights.[162]

107. The honour of the Crown requires reconciliation with transborder groups, who have been exceptionally impacted by the ultimate assertion of sovereignty: the imposition of an international border artificially dividing their people and ancestral homelands. As the Trial Judge found, the Sinixt occupied what is now Canada for thousands of years before contact. She also found that the Sinixt maintain a deep and abiding connection to their traditional territory in Canada that is bound up with their Indigenous identity and perspective, despite the assertion of sovereignty and the imposition of the border. Their hunting practices in Canada continued past the assertion of sovereignty and into the present day, and would have been recognized as common law rights. If the doctrine of Aboriginal rights is to remain true to its foundations, and the purpose of s. 35(1) fulfilled, the Sinixt right to hunt must receive constitutional protection.

PARTS IV AND V – SUBMISSIONS CONCERNING COSTS AND ORDER(S) SOUGHT

108. The respondent requests that this Court dismiss the appeal and answer the constitutional question in the affirmative. The respondent asks that no costs be awarded either for or against it.

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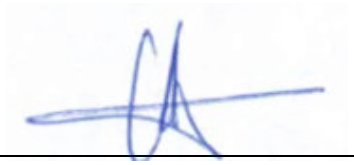
[162] *Innu of Uashat*, para. 49

PART VI – SUBMISSIONS ON CASE SENSITIVITY

109. There is no sealing or confidentiality order, publication ban, classification of information that is confidential under legislation, or restriction on public access to information in the file that could have an impact on the Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: March 24, 2020



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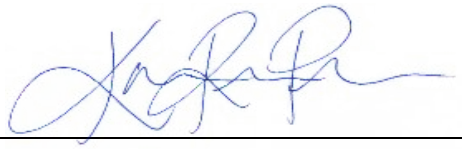

Kate R. Phipps
Counsel for the Respondent,
Richard Lee Desautel

PART VII - TABLE OF AUTHORITIES

	Paragraph(s)
Constitution Act, 1982, Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 35, 52 (French ss. 35, 52)	1, 2, 3, 4, 5, 26, 29, 30, 33, 34, 35, 36, 39, 40, 49, 50, 51, 60, 67, 76, 78, 79, 80, 84, 85, 86, 89, 90, 91, 92, 93, 95, 101, 105, 107
Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c. 44, Schedule	39
Wildlife Act, R.S.B.C. 1996, c. 488, ss. 11(1), 47(a)	1, 17, 25, 72