SCC 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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Interveners
(Interveners)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. It is Alberta's position that the right asserted by Mr. Desautel has a mobility aspect and is incompatible with Crown sovereignty. Further, s. 35 relates to the relationship between Canada and its Aboriginal peoples. When interpreted properly, in accordance with this Court's jurisprudence, it is clear that it was not intended to provide constitutional recognition of rights for Aboriginal collectives that are not part of Canadian society. Finally, the facts found by the Trial Judge do not meet the test for establishing an Aboriginal right.

2. Alberta accepts the facts as set out in the Appellant's Factum.

PART II – OVERVIEW OF POSITION

3. Alberta will address the following issues that arise on this Appeal:

(1) Is the right claimed by Mr. Desautel incompatible with Crown sovereignty?

(2) Does s. 35 of the *Constitution Act, 1982* extend to Aboriginal collectives that are located outside Canada?

(3) Did the courts below err in the application of the test for Aboriginal rights to the facts found by the Trial Judge?

4. It is Alberta's position that the courts below erred in determining that Mr. Desautel has an Aboriginal right to hunt in British Columbia (BC) which is protected by s. 35 of the *Constitution Act, 1982*.[1]

PART III – ARGUMENT

A. The Right when Properly Characterized is Incompatible with Crown Sovereignty

(i) The Common Law did not Extend to Rights Incompatible with Sovereignty

5. The common law protected Aboriginal interests and laws as Aboriginal rights upon the assertion of Crown sovereignty over the territory that is now Canada. This protection was subject to certain exceptions: (i) where the rights were incompatible with Crown sovereignty; (ii) where the rights had been surrendered under treaty; and (iii) where the rights were extinguished.[2]

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[1] *Constitution Act, 1982*, s. 35(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[2] *Mitchell v MNR*, 2001 SCC 33 (*Mitchell*) at para 10.

6. In this case, the Court must first decide whether the right alleged by Mr. Desautel would have existed under the common law.[3] Alberta submits that the claimed right, properly characterized, was not a common law right. The protection of an Aboriginal right on Canadian territory for a foreign citizen is incompatible with the sovereignty of the Crown. Only those rights that existed when s. 35 of the *Constitution Act, 1982* came into force received constitutional status.[4]

(ii) *Mitchell v MNR*

7. In *Mitchell v MNR*¸ this Court considered a "right to bring goods across the St. Lawrence River for the purposes of trade."[5] Both the majority and Justice Binnie, in his concurring reasons, noted that a trading right would confirm a mobility right.[6] As Chief Mitchell had brought goods across the border into Canada, from the United States, the mobility aspect of the right involved an international border.

8. Justice Binnie (along with Justice Major) discussed why a right to cross an international border and freely trade goods was incompatible with Crown sovereignty. Justice Binnie stated that the common law must be given regard when determining what constitutes an Aboriginal right:

> The common law concept of aboriginal rights is built around the doctrine of sovereign succession in British colonial law. The framers of the *Constitution Act, 1982* undoubtedly expected the courts to have regard in their interpretation of s. 35(1) to the common law concept.[7]

9. Alberta acknowledges that Justice Binnie did caution that the doctrine of sovereign incompatibility must be applied sparingly and with careful reflection. He stated that, for the most part, the protection of practices, traditions and customs that are distinctive to Aboriginal peoples will not "raise legitimate sovereignty issues at the definitional stage."[8]

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[3] *Mitchell* at paras 171-172. Justice Binnie stated that the question of whether a right could have arisen, in the first place, is not about extinguishment.
[4] *Mitchell* at para 11.
[5] *Mitchell* at para 25.
[6] *Mitchell* at paras 22 and 67.
[7] *Mitchell* at paras 114-115 and 150. See also *R v Sparrow*, [1990] 1 SCR 1075 (*Sparrow*) at 1103 where this Court noted that British Policy respected the rights of Aboriginal peoples to occupy their traditional lands; however, there was never a doubt that sovereignty and legislative power vested in the Crown.
[8] *Mitchell* at paras 149, 151 and 154.

10. Justice Binnie characterized the asserted Mohawk right as a trading and mobility right. The source of Chief Mitchell's claim was his citizenship[9] in the Haudenosaunee Confederacy based in New York State.[10] Chief Mitchell claimed that the Mohawks of Akwesasne had a legal right to cross any international border dividing their traditional homelands, as they had in pre-contact times.[11] Justice Binnie held that the existence of such a right is incompatible with the sovereignty of the Crown. Control over the mobility of people and goods into the country is a fundamental attribute of sovereignty, which is exercised in the public interest.[12]

(iii) Decisions in the Courts Below Regarding Sovereign Incompatibility

11. The Trial Judge distinguished *Mitchell* and stated that the characterization of the right was different. The present case involved the right to hunt in Sinixt traditional territory in BC and not a right to enter the province to exercise the right. She contrasted this with the right at issue in *Mitchell* which necessitated the mobility aspect.[13]

12. The Trial Judge noted that members of the Sinixt collective continued to live in BC, well into the early part of the 20th century. Further, the federal government had recognized the Arrow Lakes Band. As such, the Trial Judge could not conclude that the Sinixt right to hunt in BC had not survived the assertion of sovereignty.[14]

13. The BC Supreme Court (BCSC) and the Court of Appeal (BCCA) also declined to consider the mobility aspect of Mr. Desautel's alleged Aboriginal right. They held that the issue was not squarely before the court as Mr. Desautel was legitimately in Canada, he made no claim to any special right to cross the border, and he was not charged with an offence related to crossing an international border.[15] Further, the record did not permit the issue to be decided.[16]

14. The courts below held that any issues with border crossing could be dealt with in the infringement and justification analysis.[17]

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[9] Chief Mitchell was a Canadian citizen.
[10] *Mitchell* at para 137.
[11] *Mitchell* at para 148.
[12] *Mitchell* at para 160.
[13] *R v Desautel*, 2017 BCPC 84 (*Trial Decision*) at para 144.
[14] *Trial Decision* at para 147.
[15] *R v Desautel*, 2017 BCSC 2389 (*BCSC Decision*) at para 115; *R v Desautel*, 2019 BCCA 151 (*BCCA Decision*) at para 68.
[16] *BCSC Decision* at para 100; *BCCA Decision* at para 67.
[17] *Trial Decision* at para 146; *BCSC Decision* at para 108; *BCCA Decision* at para 70.

(iv) The Courts Below Erred in Finding no Mobility Aspect to the Claimed Right

15. The hunting activity undertaken by Mr. Desautel is alleged to be the exercise of an Aboriginal right; however, the activity does not, on its own, indicate the scope of the right claimed.[18] This Court has identified three factors involved in the characterization of a claimed right: (i) the nature of the action claimed to be done pursuant to an Aboriginal right; (ii) the government action or legislation alleged to infringe the right; and (iii) the ancestral traditions or practices relied on to establish the right.[19]

16. In this case, the nature of the action claimed to be done pursuant to an Aboriginal right was not just hunting - it was hunting in Sinixt traditional territory in BC. The alleged infringing legislation prohibited hunting without a license and hunting big game while not being a resident of BC. The ancestral practice relied on was hunting in the Sinixt traditional territory which included lands in both BC and Washington.[20]

17. The courts below rejected that there is a mobility aspect to the claimed Aboriginal right to hunt. A site-specific right to hunt includes physical access to the territory and the right to travel to the hunting grounds.[21] Mr. Desautel is a citizen and resident of a foreign country. Alberta submits that the right he asserts must include a mobilty aspect for it to be meaningfully exercised. Including a mobility component more accurately reflects the factors set out by this Court to properly characterize the right at issue. The Sinixt were "a mobile people" who exercised a "seasonal round" in their territory to hunt, fish and gather.[22] One of the charges Mr. Desautel was facing included a residency component.

18. In *Mitchell*, Chief Mitchell denied that his claim entailed the right to freely pass the border – a mobility right. As a Canadian citizen, Chief Mitchell did not require a right to cross the border into Canada. However, Chief Justice McLachlin rejected his contention that it was unnecessary to consider mobility. She noted that once an Aboriginal right has been established it encompasses other rights necessary to its meaningful exercise. The evidence had shown that trade involved travel and that finding a trading right would confirm an included mobility right.[23]

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[18] *Mitchell* at para 14.
[19] *Mitchell* at para 15.
[20] *Trial Decision* at paras 20 and 32.
[21] *R v Côté*, [1996] 3 SCR 139 (*Côté*) at para 57; *Simon v The Queen*, [1985] 2 SCR 387 at 403.
[22] *Trial Decision* at para 24.
[23] *Mitchell* at para 22.

(v) The Right at Issue is Incompatible with Crown Sovereignty

19. Alberta is aware of decisions where the court considered or commented upon an Aboriginal right with a cross-border mobility component. None of these prior cases determined the existence of such an Aboriginal right.[24] A majority of this Court has yet to consider whether such a mobility right is compatible with Crown sovereignty. This is an appropriate case to consider that issue.

20. Control of a country's borders, and who may enter and remain in that country, is a fundamental attribute of sovereignty.[25] In 1846, the Oregon Boundary Treaty established the border along the 49th parallel. At that time, the common law right of the Sinixt who resided in Washington to freely travel to and hunt in the area that became BC was no longer compatible with Canadian sovereignty. The common law right of the Sinixt who resided in Washington did not become incorporated into Canadian law and was not an existing right when s. 35 came into force.

21. The fact that some Sinixt who lived south of the 49th parallel still traveled into Canadian territory to hunt in the late 19th and early 20th century[26] is not determinative of whether the alleged right is incompatible with Canadian sovereignty. As stated by Justice Binnie: "This aspect of the debate … is not at the level of *fact* about the effectiveness of border controls in the 18th century."[27] Whether an asserted right is incompatible with Canadian sovereignty is a legal question.

22. As noted above, the Trial Judge expressed concern with the Crown's sovereign incompatibility argument as, in her view, the hunting rights of the Sinixt who remained in BC would not have survived the assertion of sovereignty. Those Sinixt became their own collective – the Arrow Lakes Band. There is no reason why the practice of hunting in their traditional territory north of the 49th parallel would not have survived the imposition of the border and been incorporated into the common law as a right.

23. The courts below suggested that any border mobility issues that arise can be dealt with in the infringement and justification analysis.[28] In terms of a hallmark indicia of sovereignty – control of the border – this is an unworkable solution. The Crown should not have the burden of justifying why a

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[24] *Mitchell; R v Campbell*, 2000 BCSC 956; *Watt v Liebelt*, [1999] 2 FC 455 (CA); *R v Shenandoah*, 2015 ONCJ 541 (*Shenandoah*).
[25] *Mitchell* at paras 160-163.
[26] *Trial Decision* at paras 40-50 and 137-138.
[27] *Mitchell* at para 73 [emphasis in original].
[28] *Trial Decision* at para 146; *BCSC Decision* at para 108; *BCCA Decision* at para 70.

person who was denied entry into Canada to exercise an alleged Sinixt right to hunt should continue to be denied entry.[29]

24. Finding that the right asserted by Mr. Desautel is incompatible with Crown sovereignty is not at odds with the purpose of s. 35. That purpose is to reconcile the pre-existence of Aboriginal societies with Canadian sovereignty and the interests of all Canadians, including the Aboriginal peoples who are citizens in this country. This issue is dispositive of the appeal and the Court need not make a determination on the additional issues set out below.

B. Section 35 Does Not Include Aboriginal Collectives Outside Canada

25. It is Alberta's position that the interpretation of s. 35 is a threshold issue which should be considered prior to the Court applying the test for establishing an Aboriginal right. Alberta submits that s. 35 does not apply to Aboriginal collectives outside of Canada.

(i) Interpretation Principles

26. In *R v Sparrow*, the Court stated that: "The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself."[30]

27. When interpreting constitutional rights, the wording of the Constitution should be given a "purposive"[31] interpretation; however, the interpretation must begin with the language of the constitutional provision in question.[32] Interpreting a constitutional provision begins with the ordinary meaning of the language, followed by the historical context and the philosophy and objectives underlying the words and guarantees.[33]

28. A generous and liberal interpretation of s. 35 is required and any ambiguity will be resolved in favour of Aboriginal peoples.[34] However, this does not mean that the Court must adopt an interpretation that is favoured by Aboriginal peoples over competing interpretations. Rather, the Court must reconcile any interpretation with the policies the provision seeks to promote.[35]

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[29] *Mitchell* at para 153.
[30] *Sparrow* at 1106.
[31] *Caron v Alberta*, 2015 SCC 56 (*Caron*) at para 35.
[32] *Caron* at paras 36-37.
[33] *Caron* at para 38.
[34] *Sparrow* at 1106-1107; *R v Van der Peet*, [1996] 2 SCR 507 (*Van der Peet*) at para 25.
[35] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 142-143 (per LaForest J.).

(ii) Language of Section 35

29. To properly interpret s. 35, the Court begins with the wording. The words must be interpreted in their ordinary, grammatical sense, read in their entire context, in light of the historical basis for the constitutional guarantee and the purpose of such a guarantee.[36] Alberta submits that the courts below erred by focusing on the purpose of s. 35 to the exclusion of all else.

30. The BCSC found that the meaning of s. 35 was not "plain and obvious" as it is not expressly limited to "persons residing in Canada or to aboriginal peoples who are Canadian citizens, nor [did] it expressly include aboriginal people who are neither."[37] The BCCA upheld the decision and found that a starting point for the interpretation of s. 35(1) begins with this Court's decision in *Sparrow*.[38]

31. The BCSC's conclusion that "the aboriginal peoples of Canada" was ambiguous ignores the text of s. 35 as a whole. Section 35(2) defines the phrase as including "the Indian, Inuit and Métis peoples of Canada." While the BCSC notes that this definition does not expressly limit the protection to Canadian residents or citizens, this observation disregards the presumption against tautology. A legislative body is presumed not to pointlessly repeat itself and avoids using "superfluous or meaningless words."[39] The interpretation accepted by the courts below disregards the text of s. 35 and the repetition of the phrase "of Canada" in relation to both "aboriginal peoples" (in s. 35(1)) and "Indian, Inuit and Métis peoples" (in s. 35(2)).

32. The interpretation of s. 35 endorsed by the courts below also ignores the presumption that a legislator means exactly what it says and therefore says exactly what it means.[40] If s. 35 was intended to include any Aboriginal person located in Canada, it could have been drafted to apply to "Aboriginal peoples within Canada." If the provision was intended to include any group of Aboriginal peoples who had once been in Canada, it could have been framed as applying to "Aboriginal peoples from Canada." Instead, the wording "of Canada" was chosen, which suggests a relationship between the "Aboriginal peoples" and Canadian society.

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[36] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21.
[37] *BCSC Decision* at para 42.
[38] *BCCA Decision* at para 55.
[39] *Canada (National Revenue) v Thompson*, 2016 SCC 21 at para 32.
[40] *605499 Saskatchewan Ltd v Rifle Shot Oil Corp*, 2019 SKCA 133 at para 75.

(iii) Other Constitutional Provisions

33. Individual sections of the Constitution are linked to the others and must be interpreted by reference to the Constitution as a whole.[41] Parliament and the provinces have ongoing obligations to consult with the "aboriginal peoples of Canada" before amending s. 91(24) of the *Constitution Act, 1867* or ss. 25 or 35 of the *Constitution Act, 1982*. The interpretation of "aboriginal peoples of Canada" accepted in the courts below would require consultation with non-Canadians when amending the Constitution of this country.

34. As this Court explained in *Reference re Senate Reform*, amending constitutional documents is not a mere textual change of discrete provisions; constitutional amendments represent a change to the architecture that defines Canada.[42] Section 35.1 gives the Aboriginal peoples of Canada an opportunity to participate in discussions that may change fundamental aspects of Canadian society.

35. Territorial sovereignty is a key part of the principle of sovereign equality – a state is free to exercise sovereignty, within its own territory, free from intrusion by other states.[43] The interpretation adopted by the courts below of "aboriginal peoples of Canada" allows foreign nationals to intrude on the territorial sovereignty of Canada.

36. Section 35 must be also be read together with s. 91(24) of the *Constitution Act, 1867*.[44] Section 91(24) gives Parliament the authority to legislate in relation to Indians, Inuit and Métis.[45] Parliament does not legislate in relation to Aboriginal peoples outside of Canada. A corollary of the principle of territorial sovereignty is that there is a presumption that legislation does not apply to persons or things outside of the territory of the enacting jurisdiction.[46] Neither s. 35 nor s. 91(24) contain the wording necessary to rebut this presumption.

37. After 1982, the power to legislate continues; however, s. 35 requires the justification of any regulation that infringes upon an Aboriginal or treaty right. As stated in *Sparrow*, "[t]he constitutional recognition afforded by the provision therefore gives a measure of control over government conduct

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[41] *Reference re Secession of Quebec*, [1998] 2 SCR 217 (*Reference re Secession*) at para 50.
[42] *Reference re Senate Reform*, 2014 SCC 32 at para 27.
[43] *R v Hape*, 2007 SCC 26 (*Hape*) at paras 45-46.
[44] *Sparrow* at 1109; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (*Daniels*) at para 34.
[45] *Daniels*; *Constitution Act, 1867*, 30 & 31 Vict, c 3.
[46] *Hape* at paras 40-46, 49.

and a strong check on legislative power."[47] Parliament and the provincial Legislatures govern and regulate Canadian society through their respective heads of power. That legislative authority may be limited by rights protected by s. 35. Alberta submits that s. 35 was intended to protect the rights of Aboriginal peoples who are part of Canadian society and governed by the laws of Canada.

(iv) Historical Context

38. The Appellant's factum sets out a summary of the relevant historical context of s. 35. As further context, it is important to consider the fundamental change brought about by the provision. Aboriginal rights existed under the common law; however, as they did not have constitutional status, Parliament could extinguish rights and they could be fully regulated.[48] Section 35 gives constitutional recognition to the existing Aboriginal and treaty rights of the "aboriginal peoples of Canada."[49] After the passage of s. 35, Aboriginal rights cannot be unilaterally extinguished and rights may only be infringed in a justified manner.[50]

39. With the adoption of the *Constitution Act, 1982*, the Canadian system of government changed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds both orders of government, federal and provincial, and ensures that rights receive protection.[51] The Constitution is the expression of the sovereignty of the people of Canada.[52]

40. Section 35 grants "special constitutional protection to one part of Canadian society."[53] The adoption of s. 35 was a significant development in the Crown's relationship with Aboriginal peoples and it holds "the Crown to a substantive promise."[54] The important change brought about by the provision should be considered when determining the scope of s. 35 and to whom the Crown has made such a substantive promise. It is Alberta's position that s. 35 does not extend such a promise to foreign nationals and non-residents.

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[47] *Sparrow* at 1110.
[48] *Van der Peet* at para 28.
[49] *Sparrow* at 1105; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 (*Delgamuukw*) at para 133.
[50] *Van der Peet* at para 28; *Mitchell* at para 11.
[51] *Reference re Secession* at paras 72 and 74.
[52] *Reference re Secession* at para 85.
[53] *Van der Peet* at para 20.
[54] *Sparrow* at 1110.

(v) Purpose of Section 35

41. Section 35 must be understood in light of the interests it was meant to protect.[55] Section 35 recognizes that prior to the arrival of Europeans the land was occupied by distinctive Aboriginal societies. The provision is the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.[56] As stated in *Van der Peet,* "[t]he content of aboriginal rights must be directed at fulfilling both of these purposes."[57]

42. In interpreting s. 35, it is important to not overshoot its actual purpose.[58] A purposive approach will often have the effect of narrowing the scope of the provision.[59] The focus of s. 35 is Aboriginal peoples and their rights in relation to Canadian society as a whole.[60] Rights protected by s. 35 are not absolute and must be balanced with other societal interests.[61] This balancing of interests is reflected in the *Sparrow* infringement test and is taken into account in assessing whether the Crown has discharged its duty to consult.[62]

43. Canada and the provinces govern within their respective spheres for the benefit of all Canadians. The concerns and rights of Aboriginal peoples are balanced with the interests and expectations of other members of Canadian society. Section 35 should not be interpreted to require the balancing process to include the interests of an Aboriginal collective outside of Canada.

(vi) Implications of Finding Section 35 Includes Collective Outside Canada

44. In the courts below, the Appellant raised some of the consequences that would flow from a finding that Mr. Desautel, a member of an American collective, has a s. 35 right. The Trial Judge considered such issues to be irrelevant and the BCCA stated they were "ancillary questions" and were "not a relevant consideration."[63] The consequences of interpreting s. 35 to include collectives outside

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[55] *Van der Peet* at para 3.
[56] *Van der Peet* at paras 31 and 36.
[57] *Van der Peet* at para 43.
[58] *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 344.
[59] *R v Stillman*, 2019 SCC 40 at para 21; *R v Poulin*, 2019 SCC 47 at para 53.
[60] *Van der Peet* at para 21.
[61] *R v Nikal*, [1996] 1 SCR 1013 (*Nikal*) at paras 91-94.
[62] *Sparrow* at 1113 and 1119; *Nikal* at paras 91-94; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras 34 and 81; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at paras 2 and 42.
[63] *Trial Decision* at para 166; *BCCA Decision* at para 63.

of Canada are relevant to this Court's analysis.[64] Below, Alberta has set out a number of those consequences.

45. **Duty to consult:** If s. 35 extends to an American Aboriginal collective, the Crown (federal or provincial) may be required to consult foreign collectives where a decision could have adverse effects on the exercise of an established or a credibly asserted harvesting right. There would be practical challenges to consulting groups outside Canada given that consultation may involve activities such as meetings, site visits and traditional use studies. Decision-makers would be required to balance the interests of non-Canadians when making public interest decisions about the development of lands and resources for the benefit of all Canadians.

46. **Duty to Negotiate:** Section 35 provides a base upon which negotiations can occur between the Crown and Canada's Aboriginal peoples.[65] This Court has commented upon the duty to negotiate in good faith towards the resolution of First Nations' land claims, where treaties have not been negotiated.[66] To date, this Court has not had occasion to fully consider the existence or scope of a duty to negotiate; however, if the courts below are correct, any such duty to negotiate may extend to an American collective.

47. **Priority Allocation:** Aboriginal peoples with constitutionally protected rights to harvest for food must be given a priority allocation of fish and wildlife resources.[67] In managing resources, the Crown must consider conservation objectives and must also take into account a number of interests and users of the resources. The decisions of the courts below would require the Crown to provide a priority allocation to individuals who are not part of Canadian society.

48. **Uncertainty in Treaty Context:** The Aboriginal rights of an American collective would not necessarily be limited to harvesting rights – it is possible that additional rights would be claimed, including Aboriginal title. Alberta is covered by numbered treaties which provide that the First Nation adherents "cede and surrender" Aboriginal title. Recognizing that an American collective may be a

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[64] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 162-165 (per Rowe J.); *Caron* at para 102; *R v Comeau*, 2018 SCC 15 at para 51.
[65] *Sparrow* at 1105; *Tsilhoqot'in Nation v British Columbia*, 2014 SCC 44 (*Tsilhoqot'in Nation*) at para 118.
[66] *Tsilhoqot'in Nation* at paras 17-18; *Delgamuukw* at para 186; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 20 and 25.
[67] *Sparrow* at 1113 and 1119.

beneficiary of s. 35 rights leads to uncertainty about potential rights and title claims in a jurisdiction where resident First Nations have adhered to treaty.

49. Based on the above, it is Alberta's position that the textual basis of s. 35, along with the history and purpose of the provision, cannot support the interpretation accepted by the courts below.

C. Facts Found by the Trial Judge do not Establish an Aboriginal Right

(i) Test for Establishing an Aboriginal Right

50. In *Van der Peet*, this Court set out the framework for the recognition of an Aboriginal right. The Court stated that Aboriginal rights are those practices, customs or traditions that were integral to the distinctive culture of a particular Aboriginal community prior to European contact.[68] In order to be an Aboriginal right, the practice, custom or tradition must be a central and significant part of the distinctive Aboriginal culture. A court should not recognize aspects of an Aboriginal society that are only incidental or occasional to the society.[69]

51. The Trial Judge found that the *Van der Peet* test was the appropriate one for determining Mr. DeSautel's claim and she declined to apply the test laid out in *R v Powley*.[70] In *Powley*, this Court upheld and applied the basic elements of the *Van der Peet* test in the context of a claimed Métis Aboriginal right to harvest. The Court modified elements of the pre-contact test to "reflect the distinctive history and post-contact ethnogenesis of the Métis."[71] The *Powley* decision considered a Métis right; however, the Court's discussion on the nature of Aboriginal rights and the requirements for establishing such a right are applicable outside the Métis context.[72]

52. Both the *Powley* and *Van der Peet* decisions provide guidance for assessing the harvesting right claimed by Mr. Desautel. Those decisions, in conjunction with other rulings made by this Court, establish a number of key principles that are relevant to this appeal.

53. **Collective Nature of Rights**: Aboriginal rights recognized by s. 35 of the *Constitution Act, 1982* are communal or collective rights. Aboriginal ancestry is not sufficient, on its own, to establish

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[68] *Van der Peet* at paras 46 and 60.
[69] *Van der Peet* at paras 46, 55-56 and 70-71.
[70] *Trial Decision* at para 76.
[71] *R v Powley*, 2003 SCC 43 (*Powley*) at para 14.
[72] *Bernard v R*, 2017 NBCA 48 (*Bernard*) at paras 48 and 63.

entitlement to an Aboriginal right. Rather, individuals exercise Aboriginal rights by virtue of their membership in a rights bearing collective.[73]

54. **Continuity is a Requirement:** The continuity requirement applies to two aspects of a claimed Aboriginal right. First, there must be continuity between the historic and the modern community.[74] Second, in order to prove an Aboriginal right, the claimant must establish continuity between the practice of today with a historic practice that existed prior to contact.[75] The continuity test is applied with flexibility as an evolution of rights is allowed and the frozen rights approach is rejected.[76]

55. **Site-Specific Nature of Rights:** Aboriginal rights are determined on a case by case basis and this Court has confirmed that hunting and fishing rights are site-specific.[77] The facts must demonstrate the integrality of the practice in the specific geographical region in which it is alleged to have been exercised, rather than in the abstract.[78]

(ii) Findings of Fact Made by the Trial Judge

56. The role of this Court is to rely upon the findings of fact made by the Trial Judge and assess whether those findings support the claim that an activity is an aspect of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group in question.[79]

57. It is Alberta's position that the findings of fact made by the Trial Judge do not meet the requirements necessary to establish an Aboriginal right. The Trial Judge found the following:

- Prior to contact, the Sinixt traditional territory extended north into the Kootenay region near Revelstoke and as far south in Washington State as Kettle Falls.[80]

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[73] *Sparrow*; *Powley* at para 24.
[74] *Powley* at paras 12 and 27; *Bernard* at para 63.
[75] *Powley* at para 45; *Van der Peet* at para 63.
[76] *Van der Peet* at paras 54 and 65.
[77] *Powley* at paras 12, 19 and 23; *R v Sappier*; *R v Gray*, 2006 SCC 54 (*Sappier*) at paras 50-51; *Côté* at paras 39 and 56-57; *R v Adams*, [1996] 3 SCR 101 (*Adams*) at para 30; *Delgamuukw* at para 138; *Mitchell* at paras 55-56.
[78] *Mitchell* at para 55.
[79] *Adams* at para 38; *Côté* at para 59.
[80] *Trial Decision* at paras 3 and 20-21.

- From the time of contact (1811) to around 1879, the Sinixt gradually lingered in the southern portion of their territory; however, they did continue their seasonal harvesting round in the northern portion of their territory.[81]

- By the end of the 19th century, only a few members of the Lakes Tribe remained living in the traditional territory north of the 49th parallel. They did continue to come north to hunt.[82]

- Around 1880-1890, the majority of the Lakes people moved to the Colville reserve in Washington State.[83]

- In 1902, only 21 Sinixt remained living in their traditional territory located in Canada.[84]

- A constellation of factors led to the Sinixt's gradual shift from moving throughout their traditional territory to more or less full-time residence in or near their southern territory.[85]

- After the 1930s, the Lakes people do not appear to have travelled to or hunted in the northern part of their traditional territory.[86]

- For much of the 20th century, after most of its members moved onto the Colville reserve, the Lakes Tribe of the Colville Confederated Tribes (CCT) rarely hunted north of the 49th parallel.[87]

- Today, the Lakes Tribe do not, as their ancestors did, "exercise a robust seasonal round in all of their traditional territory including those lands now in British Columbia."[88]

58. Despite these findings of fact, the Trial Judge concluded that the chain of continuity had not been broken and Mr. Desautel had established an Aboriginal right to hunt in British Columbia."[89]

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[81] *Trial Decision* at paras 24, 37 and 39-40.
[82] *Trial Decision* at para 43.
[83] *Trial Decision* at para 43.
[84] *Trial Decision* at para 44.
[85] *Trial Decision* at paras 110 and 128.
[86] *Trial Decision* at paras 49 and 131.
[87] *Trial Decision* at paras 85 and 88.
[88] *Trial Decision* at para 119.
[89] *Trial Decision* at paras 134-135.

(iii) The Lakes Tribe is the Relevant Collective for Analysis

59. Mr. Desautel is a member of the Lakes Tribe of the CCT and was acting on the instructions of the Fish and Wildlife Director of the CCT to secure ceremonial meat.[90] As Aboriginal rights are collective, the Court must inquire whether the Lakes Tribe has Aboriginal harvesting rights in BC. The Trial Judge found that the Lakes Tribe of the CCT was a successor group to the Sinixt people living in BC at the time of contact.[91]

60. The Trial Judge noted that, historically, some of the Sinixt had remained in Canada. A reserve was set aside by Canada for the Arrow Lakes Band, which included some Sinixt members.[92] In 1903, the Arrow Lakes Band recorded a population of twenty-three. By 1920, the Band had three members.[93] By 1930, only one member was on the rolls of the Arrow Lakes Band. Upon her death in 1956, Canada declared the Band extinct.[94] The Trial Judge noted that there were descendants of the Sinixt who currently reside in BC primarily, but not exclusively, in the Okanagan First Nation communities.[95] However, the Trial Judge was not required to determine whether there is currently a regional Sinixt group in BC.[96]

61. In its decision, the BCCA did not agree with the Appellant's submissions on the proper application of the *Van der Peet* test. In its decision, the BCCA stated:

> The Crown contends that *Powley* requires an Aboriginal rights claimant to be a member of a contemporary community in the geographic area where the right was exercised. This submission assumes that the Sinixt peoples are restricted to the Lakes Tribe, which the trial judge declined to determine within the limited scope of a trial on a regulatory charge under the *Wildlife Act*.[97]

62. Alberta submits that the existence of individuals in BC with Sinixt ancestry is not relevant to whether Mr. Desautel has an Aboriginal right to harvest. Mr. Desautel is a member of the Lakes Tribe.

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[90] *Trial Decision* at paras 2 and 66.
[91] *Trial Decision* at paras 4 and 68.
[92] *Trial Decision* at para 44.
[93] *Trial Decision* at para 47.
[94] *Trial Decision* at para 48.
[95] *Trial Decision* at paras 59 and 62.
[96] *Trial Decision* at para 68. Prior case law has noted competing claims to represent whatever rights may be possessed by the Sinixt: *Campbell v British Columbia (Minister of Forests and Range)*, 2011 BCSC 448 at paras 51, 53 and 158-162; aff'd 2012 BCCA 274.
[97] *BCCA Decision* at para 58.

He is not a member of an Aboriginal collective in BC. Further, the fact that individuals in BC have Sinixt ancestry does not, on its own, lead to the conclusion that there is an identifiable present-day Sinixt community in the province. Aboriginal rights are held by collectives - not individuals.[98]

(iv) Harvesting Rights are Linked to Land Use

63. It is Alberta's position that, in the context of harvesting rights, the continuity requirement necessitates an ongoing presence on the lands over which an Aboriginal right is asserted. In the present case, a sufficient modern connection to the lands in BC was not demonstrated. Mr. Desautel did not establish that hunting in the area is currently a practice integral to the distinctive culture of the Lakes Tribe.

64. The Trial Judge was not convinced that continuity "requires in all circumstances an actual physical presence on the land."[99] The BCCA stated that there was no requirement that the modern collective must reside in or occupy the same geographic area as the historic collective.[100] In Alberta's view, the lower courts failed to acknowledge decisions of this Court, which provide that a right to harvest is site-specific. In those cases, the Aboriginal collective demonstrated both a historic and a modern presence in the relevant geographic area.

65. In *Adams*, this Court stated that some Aboriginal rights are linked to land use or occupation. If an Aboriginal group demonstrates that hunting on specific land was integral to its distinctive culture, the Aboriginal right to hunt is defined as, and limited to, the right to hunt on that land. The right to hunt or fish is not an abstract right exercisable anywhere.[101]

66. George Adams was a Mohawk and lived on the Akwesasne reserve. Mr. Adams was charged in relation to fishing in Lake St. Francis, which was fifteen kilometers from a current Akwesasne village.[102] In his defence, Mr. Adams asserted an Aboriginal right to fish.

67. Historically, the Mohawks relied on fish for food as a necessary part of their war campaigns or because the lands of the area were part of the Mohawk hunting and fishing grounds. Fishing for food in the area was a "significant part of the life of the Mohawks."[103] In *Adams*, there was continuity

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[98] *Powley* at para 24.
[99] *Trial Decision* at para 129.
[100] *BCCA Decision* at paras 58-59.
[101] *Adams* at para 30.
[102] *Adams* at paras 5-6.
[103] *Adams* at para 46.

between the pre-contact practice and the contemporary practice. The Court noted that fishing by the Mohawks in the relevant area had been going on for years in an uninterrupted manner. The Mohawks had always exercised a right to fish in Lake St. Francis.[104]

68. In *Côté*, this Court restated that an Aboriginal right will often be defined in site-specific terms and will only be exercisable on specific lands. The case related to a right to fish for food in a controlled harvest zone of Bras-Coupe-Desert (ZEC).[105] A number of Algonquin individuals entered the ZEC to teach students traditional hunting and fishing practices and were charged in relation to those activities. In defence to the charges, the individuals asserted an Aboriginal right to fish on their ancestral lands.

69. In *Côté*, the Court concluded that at the time of contact the Algonquin people frequented the ZEC as part of their traditional lands and relied upon fish as an important source of sustenance.[106] In relation to the continuity requirement, the evidence established that fishing continued to be important to the Algonquin people. An anthropologist and ethnohistorian testified in relation to his work on the ZEC and he stated that fishing activities continued.[107]

70. In *Powley*, the Court considered an asserted Métis Aboriginal right to harvest in the Sault Ste. Marie area. Steve Powley and his son were charged with offences related to the harvest of a moose. In assessing the constitutional defence raised by the Powleys, the Court was required to determine if they belonged "to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right."[108]

71. A distinctive Métis community emerged in the Sault Ste. Marie area prior to effective European control. That community did go "underground" but it continued and there was a contemporary community in the area.[109] The practice of hunting and fishing for food was a constant in the Sault Ste. Marie Métis community and a defining feature of their special relationship to the land. The practice was continuous to the present.[110]

72. In the present case, the Trial Judge found that *circa* 1880-1890 the majority of the Sinixt people moved to the Colville reserve. Around 1930, the Lakes Tribe stopped practicing its seasonal hunting

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[104] *Adams* at para 47.
[105] *Côté* at paras 39 and 57.
[106] *Côté* at paras 60-61, 63 and 67.
[107] *Côté* at paras 69-70.
[108] *Powley* at paras 12 and 23.
[109] *Powley* at paras 21-28.
[110] *Powley* at paras 41 and 44-45.

round. For much of the 20th century, the Lakes Tribe rarely hunted north of the 49th parallel. Presently, the Lakes Tribe does **not** exercise a robust seasonal round in all of its territory, including those lands now in BC.[111] Although the Lakes Tribe has been absent from the land, the Trial Judge found that its members had not lost their connection to the land as it was not forgotten.[112]

73. Alberta submits that to establish a right there must be some pattern of use and presence in the area – both historically and in the present. The collective must continue to frequent the territory and must engage in practices on the land. The necessary connection to the land requires more than a memory or recollection that ancestors had a connection to the area. The ongoing "exercise" or "practice" of a harvesting right requires activity on the lands.

74. In *R v Hirsekorn*, the Alberta Court of Appeal (ABCA) assessed a claimed Métis Aboriginal right to hunt. The ABCA considered whether the historic Métis collective frequented the relevant area to carry out a practice integral to its way of life. The ABCA set out factors relevant to evaluating the intensity and duration of the collective's use of the area. Some of those factors included: the frequency within which the collective traveled into or used the area; the temporal duration of the presence; and the number of people who used the area.[113] Alberta submits that similar considerations are useful in determining whether a modern collective has a presence in a geographic area. In the present case, the findings of fact do not demonstrate that the Lakes Tribe has a sufficient contemporary use of lands in BC.

(v) Rights are not Frozen in Time

75. Aboriginal rights are not frozen in their pre-contact form and such rights may find modern expression.[114] In *Sappier*, the Court stated: "[a]lthough the nature of the *practice* which founds the aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular aboriginal community, the nature of the *right* must be determined in light of present day circumstances."[115]

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[111] *Trial Decision* at paras 43, 48-49, 85, 88, 119 and 131.
[112] *Trial Decision* at paras 50 and 122-123.
[113] *R v Hirsekorn*, 2013 ABCA 242 at paras 95 and 97; leave to SCC refused, 35558 (23 Jan 2014).
[114] *Sparrow* at 1093; *Sappier* at paras 23 and 48-49.
[115] *Sappier* at para 48 [emphasis in original].

76. Both the *Van der Peet* and *Powley* decisions include continuity as a requirement. This acknowledges that, over time, certain practices, customs or traditions may no longer be integral to the collective. Both before and after contact, Aboriginal groups had shifting territories and the test for Aboriginal rights should not ignore this historical reality.[116] An Aboriginal collective may leave an area[117] or may cease to exist for a variety of reasons.[118] Rights of an Aboriginal group do not become frozen at the time of contact with Europeans; rather, the Court must consider both the historic and present-day circumstances.

77. In this case, the lower courts relied upon the Lake Tribe's historic use of its traditional lands to find a right to harvest in BC despite the fact that it does not have an ongoing presence in the area. This incorrectly suggests that the rights of the Lakes Tribe were "frozen" at a point in time.

78. Based on the above, the lower courts erred in concluding Mr. Desautel had established an Aboriginal right to harvest. The Lakes Tribe does not have an on-going presence in BC and, as such, it cannot be said that hunting in the area continues to be integral to its distinctive culture.

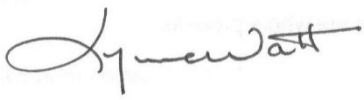
PART IV - COSTS

79. Alberta does not seek costs and asks that costs not be awarded against Alberta.

PART V – ORDER SOUGHT

80. Alberta requests that it be permitted to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9 day of April, 2020.



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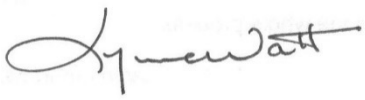

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[116] B. Slattery, "Understanding Aboriginal Rights" (1987) 66:4 Can Bar Rev 727 at p. 741-42 at TAB 8 of the Appellant's Book of Authorities.
[117] *Bernard* at para 60.
[118] *Shenandoah* at paras 20-24. In that case, the Court discussed the Laurentian Iroquois who ceased to exist in the area of the St Lawrence River. See also: *R v Dickson*, 2017 ABPC 315 at paras 106 and 214. In the decision, the Court similarly discussed the "St. Lawrence Iroquoians" and noted that the group had disappeared.

PART VII – TABLE OF AUTHORITIES & STATUTES

CASE LAW

Cases	**Paragraph Reference**
605499 Saskatchewan Ltd v Rifle Shot Oil Corp, 2019 SKCA 133.	32
Beckman v Little Salmon/Carmacks First Nation, 2010 SCC 53.	42
Bernard v R, 2017 NBCA 48.	51, 54, 76
Campbell v British Columbia (Minister of Forests and Range), 2011 BCSC 448.	59
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Caron v Alberta, 2015 SCC 56.	27, 44
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Delgamuukw v British Columbia, [1997] 3 SCR 1010.	38, 46, 55
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73.	46
Mikisew Cree First Nation v Canada (Governor General in Council), 2018 SCC 40.	44
Mitchell v MNR, 2001 SCC 33.	5-11, 15-16, 18-21, 23, 38, 55
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R v Adams, [1996] 3 SCR 101.	55, 56, 65-67
R v Big M Drug Mart Ltd., [1985] 1 SCR 295.	42
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