Court 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 –

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL FOR SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF THE YUKON TERRITORY, ASSEMBLY OF FIRST NATIONS, CONGRESS OF ABORIGINAL PEOPLES, GRAND COUNCIL OF THE CREES (EEYOU ISTCHEE)/CREE NATION GOVERNMENT, INDIGENOUS BAR ASSOCIATION OF CANADA, LUMMI NATION, MÉTIS NATIONAL COUNCIL AND MANITOBA MÉTIS FEDERATION INC., MOHAWK COUNCIL OF KAHNAWÀ:KE, NUCHATLAHT FIRST NATION, OKANAGAN NATION ALLIANCE, PESKOTOMUHKATI NATION and WHITECAP DAKOTA FIRST NATION,

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PART I – OVERVIEW

1. The central issue in this appeal is whether the Respondent, a U.S. citizen, may hold an Aboriginal right in accordance with section 35 of the *Constitution Act, 1982*.[1] The Appellant, the Attorney General of British Columbia, posed the following constitutional question:

> 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?[2]

2. The Attorney General of New Brunswick [AGNB] intervenes on this appeal to address this question, specifically, the lower courts' misapplication of this Court's judgment in *R v Van der Peet*.[3]

3. Further, the AGNB respectfully submits that this Court should render a decision that has narrow application across Canada, in recognition of the country's varied legal and historic foundations.

4. The AGNB relies on the facts as set out in the various lower court decisions and both the Appellant and Respondent's Records.

PART II – ISSUES

5. This Court must consider whether the Respondent, a member of the Lakes Tribe of the Colville Confederated Tribes in Washington State, has established an Aboriginal right to hunt in the traditional Sinixt territory in British Columbia. The AGNB submits that the British Columbia

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[1] *Constitution Act, 1982*, Being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11
[2] Notice of Constitutional Question of the Appellant, Her Majesty the Queen, filed November 22, 2019, Appellant's Record [AR] Vol I, p 139.
[3] [1996] 2 SCR 507 [*Van der Peet*].

Court of Appeal erred in failing to properly characterize the asserted right by not considering both the communal aspect of the asserted right and the corresponding international mobility necessary to its meaningful exercise. The AGNB submits that the factual and legal matrix before this Court does not permit the conclusion that the Respondent may hold a section 35 right to hunt in British Columbia.

6. Further, the AGNB submits that any determination respecting the Respondent's Aboriginal rights should be limited in scope, in consideration of the significant historical differences between the Aboriginal peoples in western Canada from that of the Maritimes region of Canada.

PART III – ARGUMENT

7. The AGNB will focus its submissions on the first step in the *Van der Peet* framework, the characterization of the Aboriginal right. The AGNB will address the following points at issue in this appeal which are indicative of the fundamental tenets of Aboriginal law as articulated by this Court in past decisions:

i. The characterization of Aboriginal rights is contextual and necessarily specific.
ii. Aboriginal rights are communal rights.
iii. Aboriginal rights incompatible with sovereignty never came into existence.

8. Additionally, the AGNB will submit that in light of the dramatically different history of the Aboriginal peoples of the Maritime region of Canada from that of the Sinixt peoples, a narrow approach to any rights recognition must be observed.

A. Aboriginal Rights Generally

1. Characterization

9. This Court first set out the legal framework for establishing an Aboriginal right in the 1996 case of *Van der Peet. Van der Peet* established that to be afforded constitutional protection, a claimed Aboriginal right must be an element of a custom, practice or tradition integral to the

distinctive culture of an Aboriginal community.[4] This right must have existed as of the relevant historical reference date and must continue to exist in contemporary form.[5]

10. The first step of the two-part *Van der Peet* test is the characterization phase. This requires the court to:

> identify the nature of the right being claimed…The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.[6]

11. The characterization of an Aboriginal right is guided by three factors:[7]

i. The nature of the action purportedly done pursuant to an Aboriginal right;

ii. The nature of the government legislation or action alleged to infringe the right; and

iii. The ancestral traditions and practices relied upon to establish the right.

12. The first factor requires the court to ascertain the "true nature of the claim," and does not require an assessment of the merits of the claim or the supporting evidence.[8]

13. The circumstances of the case and the particular factual matrix dictate the precision with which the right must be characterized. Courts have considered the characterization of rights both generally and narrowly, for example, a general right to hunt or fish, or a narrow characterization of a particular species or trade to the extent of a moderate livelihood.[9]

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[4] *Van der Peet*, *supra* note 3 at para 45.
[5] *Van der Peet*, *supra* note 3 at para 132.
[6] *Van der Peet*, *supra* note 3 at para 51.
[7] *Van der Peet*, *supra* note 3 at para 53; *Mitchell v Minister of National Revenue*, 2001 SCC 33 at paras 15-20 [*Mitchell*].
[8] *Mitchell*, *supra* note 7 at para 14.
[9] *R v Powley*, 2003 SCC 43 [*Powley*]; *R v Gladstone*, [1996] 2 SCR 723; *R v Marshall*, [1999] 3 SCR 456 [*Marshall 1*].

14. It is the responsibility of the reviewing court, and not the party asserting the right, to properly characterize the claim, having regard to the purpose of the activity and by reference to the nature of the regulation. Rights are not defined separately from any limit placed on the right.

15. As this Court noted in *Mitchell:* "The right claimed must be characterized in context and not distorted to fit the desired result. It must be neither artificially broadened nor narrowed."[10]

16. On several occasions, this Court has recharacterized on appeal the Aboriginal right that was defined in the courts below.[11] In *R v Sappier,*[12] the accused asserted a broad Aboriginal right to harvest timber for personal uses. This Court rejected this claim as too general and narrowed the asserted right in accordance with the particular practice of the Aboriginal community:[13]

> The goal for courts is, therefore, to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community.[14]

17. The significance of the proper characterization of the Aboriginal right claimed cannot be understated. As noted in *Sappier*, "these practices are the necessary "aboriginal" component in aboriginal rights."[15] Further as Lamer CJ explained in *Van der Peet*:

> The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by aboriginal people because they are *aboriginal*. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.[16]
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> [Emphasis in original.]

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[10] *Mitchell, supra* note 7 at para 15.
[11] *R v NTC Smokehouse Ltd* [1996] 2 SCR 672; *R v Côté* [1996] 23 SCR 139; *Mitchell, supra* note 7; *R v Sappier, infra* note 12; *Van der Peet, supra* note 3.
[12] 2006 SCC 54 [*Sappier*].
[13] *Sappier, supra* note 12 at para 24.
[14] *Sappier, supra* note 12 at para 22.
[15] *Sappier, supra* note 12 at para 22.
[16] *Van der Peet, supra* note 3 at para 20.

18. The third factor to be considered in a characterization analysis is the examination of the evidence of ancestral traditions and practices to determine whether they defined the community's distinctive culture, such to be translated into a modern Aboriginal right.

19. While not all steps are examined in every case, the proper contextual characterization will set the stage for a court to determine if an Aboriginal right has been proven. [17]

2. Communal Rights

20. This Court in *Powley* succinctly stated one of the definitive features of Aboriginal law in Canada: "Aboriginal rights are communal rights. They must be grounded in the existence of a historic and present community and they may be only exercised by virtue of an individual's ancestrally based membership in the present community."[18]

21. The communal nature of Aboriginal rights is derived in part from the importance of social and ceremonial practices in pre-contact societies. While individual members of a community may advance an Aboriginal or treaty right as a defence, the specific nature of the right is grounded in the communal practice.

22. This Court has also made clear that Aboriginal rights are not general and universal to all Aboriginal peoples, but exclusive to the community asserting the right. At paragraph 69 in *Van der Peet*:

> The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

23. Reference to social and ceremonial fishing can first be found in the reasons of this Court in *R v Sparrow*.[19] The right to take fish for "food purposes" was not confined to subsistence

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[17] *R v Marshall, R v Bernard*, 2005 SCC 43 [*Bernard*].
[18] *Powley*, *supra* note 9 at para 24.
[19] (1986), 9 BCLR (2d) 300 (CA), affd [1990] 1 SCR 1075 [*Sparrow*].

"because the Musqueam tradition and culture involves a consumption of salmon on ceremonial occasions and a broader use of fish than mere day to day domestic consumption".[20]

24. Subsequent case law has further articulated the significance of social and ceremonial purposes as they relate to the communal nature of Aboriginal rights:

> In the last two decades, court decisions have confirmed that pre-contact fishing practices integral to the culture of aboriginal people translate into a modern-day right to fish for food, social and ceremonial purposes: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.). The right is a communal right. It inheres in the community, not the individual, and may be exercised by people who are linked to the ancestral aboriginal community.[21]

25. The scope of an asserted communal right is characterized in accordance with the particular custom, practice and tradition of the Aboriginal group. Where the historical evidence supports a right that is grounded in a practice related to food, social and ceremonial purposes, this essential aspect should form a significant part of the court's characterization analysis.

3. Sovereign Incompatibility

26. Although Aboriginal peoples were occupying the land now known as Canada in organized distinctive societies, when Europeans settled in Canada they claimed sovereignty over the land. The pre-existing laws and interests of Aboriginal peoples were absorbed into English common law, the exception being those laws and interests that were not surrendered, extinguished or inconsistent with Crown sovereignty.[22]

27. In *Mitchell*, the majority decision refrained from invoking the question of sovereign incompatibility.[23] But in the concurring reasons of Justice Binnie he reflects that "[b]ecause not all customs and traditions of aboriginal First Nations are incompatible with Canadian sovereignty, however, does not mean that none of them can be in such conflict."[24]

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[20] *Sparrow*, *supra* note 19 at para 93; quoted in *R v Sparrow*, [1990] 1 SCR 1075 at para 10.
[21] *R v Kapp*, 2008 SCC 41 at para 4.
[22] *Mitchell*, *supra* note 7 at paras 9-10.
[23] *Mitchell*, *supra* note 7 at para 63.
[24] *Mitchell*, *supra* note 7 at para 67.

28. Geographic or site-specific considerations for the exercise of Aboriginal rights have been recognized in numerous cases. If an Aboriginal right is properly characterized under the *Van der Peet* framework, the relevant geographic aspects would be included and should frame the evidence required to establish the right. While not all geographic considerations necessarily involve mobility rights, a purposive analysis of the characterized right will be informative.

29. In *Mitchell*, this Court considered whether the Mohawk Canadians of Akwesasne held an Aboriginal right to bring goods into Canada from the United States for collective use and trade with other First Nations without paying custom duties.[25] Both the majority and minority decisions recognized that any trading right held by the Mohawk would also confirm a mobility right.[26]

30. As this court noted in *R v Simmons*[27] and as articulated in *Mitchell*, "[c]ontrol over the mobility of persons and goods into one country is, and always has been, a fundamental attribute of sovereignty."[28] In light of this recognition, Justice Binnie noted that sovereign incompatibility continues to be an element of consideration in any Aboriginal rights analysis, albeit a limitation that should be applied sparingly. Binnie J. concluded that the Aboriginal right, properly characterized, was incompatible with sovereignty:

> …the respondent's claim relates to national interests that all of us have in common rather than to distinctive interests that for some purposes differentiate an aboriginal community. In my view, reconciliation of these interests in this particular case favours an affirmation of our collective sovereignty. [29]

31. The consequence of an Aboriginal right whose exercise requires its manifestation to cross an international border is that "the aboriginal right never came into existence,"[30] and therefore, no justification is needed for legislation which conflicts such a right.

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[25] *Mitchell*, *supra* note 7 at para 1.
[26] *Mitchell*, *supra* note 7 at paras 22 and 67.
[27] *R v Simmons*, [1988] 2 SCR 495, at 528.
[28] *Mitchell*, *supra* note 7 at para 160.
[29] *Mitchell*, *supra* note 7 at para 164.
[30] *Mitchell*, *supra* note 7 at para 173.

B. The Characterization of the Right Claimed in this Appeal

1. The Court of Appeal's characterization of the Respondent's right was neither contextual nor specific

32. The Respondent offered a broad characterization for his asserted right and maintained he was "exercising his aboriginal right to hunt in the traditional territory of his Sinixt ancestors."[31] However, the hunt alone was not the Respondent's sole activity. He confirmed he was acting on the directions of the Fish and Wildlife Director of the Lakes tribe to procure "ceremonial meat". Adhering to these instructions, the Respondent shot one cow-elk in British Columbia and subsequently cut, packed and stored the meat at a campsite, with the intention of utilizing the ceremonial meat with the Lakes tribe.[32]

33. The Respondent's evidence was that he provided ceremonial meat for funerals, celebrations and weddings.[33] The cow-elk was not killed for subsistence, but as part of a custom, practice, or tradition of the Lakes peoples. It was not meant to be consumed or used in any way locally. The funerals, celebrations and weddings would all occur outside of Canada. The Lakes tribe, of which he is a member, is located wholly in Washington state and does not have any established community membership in Canada.[34]

34. The trial judge ultimately held that the Respondent had an "aboriginal right to hunt in British Columbia"[35] and specifically characterized the right as "aboriginal right to hunt for food, social and ceremonial purposes."[36] However, although the judge references "social and ceremonial" purposes, there is no consideration of the Respondent's inability to actually engage in the social or ceremonial functions of the hunt, absent a local community in the area where the hunt occurs. The pre and post hunt communal aspects are essential to the meaningful exercise of the Respondent's asserted right, yet formed no part of the trial judge's characterization analysis.

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[31] *R v Desautel*, 2017 BCPC 84 at para 3 [*Desautel Trial Decision*].
[32] *Desautel Trial Decision*, *supra* note 31 at para 2.
[33] *Desautel Trial Decision*, *supra* note 31 at para 117.
[34] *Desautel Trial Decision*, *supra* note 31 at para 68.
[35] *Desautel Trial Decision*, *supra* note 31 at para 135.
[36] *Desautel Trial Decision*, *supra* note 31 at para 77.

35. Neither the British Columbia Superior Court nor the BCCA considered a re-characterization of the Respondent's asserted right, satisfied with the trial judge's characterization, noting the Respondent "… has an Aboriginal right to hunt elk in the Sinixt's traditional hunting territory in British Columbia."[37]

36. In *Sappier*, the critical issue for the Court to determine was whether the cutting or possession of Crown timber was unlawful or if the Defendants benefited from a treaty or Aboriginal right to harvest timber for domestic use protected under section 35 of the *Constitution Act, 1982*. The Court did not dismiss the proposed use of the wood product as inconsequential to the true nature of the right. To the contrary, the Court noted that a communal right must be based on pre-contact culture and its particular purpose to the society.[38] Thus, how the defendant intended to make use of the resource was relevant to how the asserted right should be characterized and what evidence is necessary to prove the right.

37. The AGNB submits that the trial court's mis-characterization of the Respondent's right constitutes an error in law, as it fails to take into account the important cultural context inherent in the practice of the right. This error was compounded by the appellate courts' failure to properly recharacterize the right. The court's characterization fails to heed this Court's caution that "…an overly broad characterization risks distorting the right by neglecting the specific culture and history of the claimant's society".[39]

38. As Aboriginal rights are founded upon customs, practices and traditions which were integral to the distinctive pre-contact Aboriginal community, courts must incorporate an understanding of a right holder's pre and post-hunt conduct and subsequent use of the resource in their characterization analyses. The food, social and ceremonial practice of hunting requires a community with whom the hunt, game and pre and post hunt rituals are shared. The Respondent is a part of such a community, but the court failed to consider how its location outside of Canada impacts the claimed right.

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[37] *R v Desautel*, 2019 BCCA 151 at para 74 [*Desautel CA Decision*].
[38] *Sappier, supra* note 12 at para 40.
[39] *Mitchell, supra* note 7 at para 15.

2. The social and ceremonial purposes to the Aboriginal right must have meaning.

39. Although the evidence at trial demonstrates the importance of community inherent in the "traditions and practices of the pre contact society"[40], the trial court's focus is centred on the post-contact era. This approach is understandable, in light of the Appellant's emphasis on the continuity doctrine. The AGNB submits that the non-existence of a modern Aboriginal community in British Columbia should have been considered at the characterization phase, before any questions of continuity arose.

40. The experts largely agree on the pre-contact record—the bulk of disagreement is with respect to the post contact evidence.[41] The evidence at trial demonstrated that hunting was a social practice. Reference is made to a report by "famed anthropologist" Dr. Ray, which stressed that hunting was a group activity, wherein the hunters were accompanied by women during an extended hunt of more than 2 or 3 days.[42] Dr. Ray notes that various ceremonies were attached to the hunt including bathing and sweats, and that "certain taboos" were observed.[43]

41. The Appellant's Expert Report details the roles of the "Salmon Chief" and the "Hunting Chief".[44] These community-based roles were achieved by merit, as opposed to inheritance. The Salmon Chief, for example, presided over the handling of the communal basketry trip at Kettle Falls, and possessed the "special spiritual knowledge necessary to perform the rituals to thank the salmon for its arrival and to induce the run when it failed."[45] Interestingly, the ceremony associated with the salmon run was revived at Kettle Falls in the 1980s in Washington state as apart of "Knkannnawa days." This ceremony was described as a general community gathering and was subsequently revived in 2006.[46]

42. The importance of the ceremonial aspect was further described as follows:

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[40] *Desautel Trial Decision*, *supra* note 31 at para 11.
[41] *Desautel Trial Decision*, *supra* note 31 at para 14.
[42] *Desautel Trial Decision*, *supra* note 31 at para 30.
[43] *Desautel Trial Decision*, *supra* note 31 at para 30.
[44] Expert Report of Dr. Dorothy Kennedy, AR Vol. III, p 118.
[45] Expert Report of Dr. Dorothy Kennedy, AR Vol. III, p 119.
[46] Expert Report of Dr. Dorothy Kennedy, AR Vol. III, pp 118-119.

> The nature of the First Salmon Ceremony held to welcome the first run varied slightly from group to group. Among the Lakes Indians, the first salmon caught was cooked and eaten by all the men present at the fishery (Elmendorf 1935-36:1:7). Other forms of the ceremony as practiced among the Colville have also been recorded (see Bouchard and Kennedy 1985a). One of our Colville consultants described how the first male and female salmon taken in the trap were prepared by two women and served to all the people present at the fishery site, beginning with the village leaders. The bones were disposed of ceremoniously (Kennedy and Bouchard 1975). Ray (1975b:133) described the ceremony held for the first salmon that the Salmon Chief performed alone as he sat by the river, watching, singing and praying. The first salmon caught in the trap was eviscerated and boiled or roasted and then served to those who were present at the trap. Common to all groups was the act of thanking the salmon on behalf of the production group and affirming the bond between humans and salmon to perpetuate the relationship.[47]

43. The evidence describes various hunting techniques, nearly all involving multiple hunters.[48] Specifically deer hunting drives are referenced as requiring the cooperation of a large number of men.[49] What is also described is the hunting camps and seasonal villages that would accommodate the nomadic peoples.[50] In the trial decision reference is made to the expert testimony of Richard Hart wherein he describes the Sinixt culture: "There is a sacred social relationship that accompanies virtually all of their traditional lives."[51]

44. Post hunt ceremonial use of meat was an important element of the pre-contact society. For example, post hunt bear ceremonialism was intended to bring further good fortune in bear hunting. The ritual is described at page 195 of the Appellant's Record, where following the hunt, ceremonial songs would be sung as a means of ensuring their continued good luck in the hunt.

45. The above evidence highlights the necessity of the presence of a community in order to engage in the social and ceremonial features of the asserted right. Proper consideration of the communal aspects of the exercise of an asserted right recognizes one of the definitive features of Aboriginal law, and is one of the necessary "aboriginal" components in Aboriginal rights.

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[47] Expert Report of Dr. Dorothy Kennedy, AR Vol. III, pp 119-120.
[48] Expert Report of Dr. Dorothy Kennedy, AR Vol. III, p 192.
[49] Expert Report of Dr. Dorothy Kennedy, AR Vol. III, p 192; *Desautel Trial Decision*, *supra* note 31 at para 30.
[50] Expert Report of Dr. Dorothy Kennedy, AR Vol. III, p 192.
[51] *Desautel Trial Decision*, *supra* note 31 at para 80.

46. Contrast the above historical evidence with the Respondent's expression of his asserted right: a hunter travelling approximately 230km[52], shooting an animal, cutting, packing and storing the meat, and then returning to his community across an international border for it to be used for ceremonial purposes. There was no evidence that the Respondent intended to utilize the meat for social or ceremonial functions in Canada.

47. While the communal aspect is a central element of the Respondent's hunt when it is practiced within his own community,[53] the lack of a modern community situated within the Sinixt ancestral British Columbian territory is problematic for the Respondent's exercise of his ancestral rights. Absent a local community with whom he can exercise the communal aspect of the right, there can be no meaningful expression of his asserted right in Canada.

48. The Respondent's factum focuses upon the Aboriginal perspective as it relates to their connection to their traditional lands in Canada.[54] While this is an important perspective, it fails to attribute sufficient weight to the significance of the social and ceremonial attributes of the Sinixt traditional practice.

49. The AGNB acknowledges that rights are not frozen in time and that this Court has recognized on multiple occasions the logical evolution of practices.[55] However, the essence or purpose of the right that makes it distinctive to the particular community cannot be lost in the characterization.[56] While, for example, a pre-contact practice of hunting with a bow and arrow, may logically evolve into a modern practice of hunting with a gun, the subject matter cannot be wholly transformed.[57] The AGNB submits that a pre-contact hunting practice that involved the social, ceremonial and collective nature of the practice is "the necessary "aboriginal" component" in the Aboriginal right. Any characterization that fails to consider the communal elements is not simply a logical evolution of the practice.

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[52] The driving distance between the Lakes' Reserve and Castlegar, British Columbia.
[53] *Desautel Trial Decision*, *supra* note 31 at paras 116-118.
[54] Factum of the Respondent at paras 37, 39, 42, 50.
[55] *Bernard*, *supra* note 17 at para 25; *Van der Peet*, *supra* note 3 at paras 63-64.
[56] *Sappier, supra* note 12.
[57] *Marshall 1*, *supra* note 9 at paras 19-20.

50. This Court might consider recharacterizing the Respondent's asserted right, as a right to hunt in the Sinixt traditional territory situated in British Columbia and transport the meat across the international border to his community for food, social and ceremonial purposes. However, this characterization is problematic because it is incompatible with sovereignty.

3. The Court of Appeal erred in characterizing the mobility aspect of the Aboriginal right as incidental

51. The AGNB submits that the BCCA erred in its determination that a mobility rights issue does not arise in this case.[58] It is the AGNB's position that the mobility rights issue is not, as the court framed, with respect to accessing the area where the right is sought to be exercised, but is in respect of the characterization of the Aboriginal right itself.

52. In several cases, this Court has characterized an Aboriginal right as being site-specific.[59] While the BCCA applied the site-specific requirement to the Respondent's act of hunting, it did not turn its mind to the geographical consideration relevant to the expression of the right itself.

53. The lower courts considered whether the exercise of the Respondent's right necessitated access to Canada via an international border. In dismissing this argument, both the trial judge and the summary conviction appeal judge noted that the Respondent was charged with hunting without a licence and not with coming into Canada unlawfully and therefore, a mobility right did not necessarily arise in the case. This was upheld on appeal.[60] However, the necessary mobility was not considered as part of the initial characterization—namely, that the meaningful exercise of the right to hunt involves the transportation and sharing of its by-product with an American Aboriginal community. The AGNB submits that had the lower courts properly characterized the Aboriginal right, they would have concluded that a section 35 right cannot exist.

54. The Respondent did not assert a right to bring the meat across the border. At paragraph 69 of the Respondent's factum, they submit that "the international border is not implicated by the exercise of the hunting right." But, in the absence of bringing the meat to his community, how is

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[58] *Desautel CA Decision*, *supra* note 37 at para 66.
[59] *R v Adams*, [1996] 3 SCR 101; *Powley*, *supra* note 9; *Sappier*, *supra* note 12.
[60] *Desautel CA Decision*, *supra* note 37 at para 67.

the Respondent practicing an Aboriginal right for food, social and ceremonial purposes? And if the meaningful exercise of the Aboriginal right necessitates the Respondent and the ceremonial meat's trans-border travel, how is the border crossing incidental?

55. Much as in *Sappier*, where this Court did not dismiss the proposed use of the wood product as insignificant to the asserted right, this Court should not dismiss the necessary transportation of the meat across an international border as incidental or inconsequential to the asserted right. It is an essential aspect of an Aboriginal right to hunt for food, social and ceremonial purposes, and in the absence of the Respondent intending to fulfill the exercise of his Aboriginal right in Canada, such a geographic consideration should have formed part of the characterization.

56. The AGNB does not suggest that an Aboriginal right is not capable of being classified as a right if some incidental travel is required. However, a distinction must be drawn when the expression of the right necessitates international travel. There is little distinction between an Aboriginal community claiming a right to transport whatever goods they wish across a border, as the Mohawks did in *Mitchell*, and the Respondent's right to transport whatever meat he wishes across the border. Simply because the Respondent did not frame his right in the same way, does not mean this Court should not do so.

57. The AGNB submits that the lower courts erred in their characterization of the Aboriginal right, in failing to understand the international mobility aspect of the Aboriginal right and its incapability with sovereignty.

58. The AGNB submits that the present case represents one of the sparing applications of sovereign incompatibility. If, as posited, the Respondent's Aboriginal right to hunt in British Columbia necessitates mobility across an international border to exercise the communal nature of the right, then the AGNB submits that such a right is incompatible with sovereignty. The control of our borders and a determination of what goods may be transported across them are fundamental attributes of sovereignty. As a consequence, in accordance with our law, the Aboriginal right never came into existence and the Respondent may not hold a s.35 right.

C. The History of the Maritime Provinces

59. As the sole Attorney General intervener from the Maritime provinces of Canada, it is incumbent upon the AGNB to highlight the varied legal and historic foundations of Aboriginal law across Canada, and reiterate the importance of integrating these distinctions in whatever legal test articulated by this Honourable Court.

60. The Maritimes' Aboriginal history varies dramatically from that of British Columbia. This is due in part to our different dates of European contact. In the case at bar, the date of European contact was 1811.[61] Contrast this date with the date of contact in what would become New Brunswick, which has been found to be around 1500.[62] The intervening 300 years between the date of contact in New Brunswick and that of British Columbia has resulted in a dramatically different historical landscape across the country, in terms of the historical significance to contemporary legal analysis.

61. Three hundred additional years results in extensive Aboriginal exposure to a number of European cultures, which may, if demonstrated, influence the recognition of asserted rights.[63] Further, when considering continuity between historical practices and modern customs, the Maritimes' history is eclipsed with countless significant historical events, including colonization by the French and later the English, the spread of Christianity, wars between England and France (1627, 1654, 1666, 1697, 1702, 1722, 1740, 1754, 1778), major conflicts between the British and Indigenous peoples (1675, 1699, 1749, 1752, 1754), uncertainty of boundaries, the American Revolutionary War and political structures which included the establishment of reservations.[64] The thirty years between contact and the assertion of sovereignty under the 1846 Oregon Boundary Treaty are so incomparable to the Maritime historical landscape that no corollaries may be drawn, no authority may be established.

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[61] *Desautel Trial Decision*, *supra* note 31 at para 15.
[62] *R v Sappier* 2004 NBCA 56 at para 75.
[63] *Van der Peet*, *supra* note 3 at para 73.
[64] *R v Bernard*, [2000] 3 CNLR 184, 2000 CarswellNB 539 at paras 28-70.

62. These historical differences are particularly evident in the historical context of treaties. The earliest Peace and Friendship treaties date back to the early 1700s, over 100 years before contact occurred in the western part of the country. The legal impact of these early treaties continues to have great significance in terms of how Aboriginal rights, in addition to treaty rights are interpreted in the Maritime region of Canada. Following this Court's decision in *R v Marshall*, governments have engaged in negotiation with Aboriginal groups with a view to recognizing both treaty rights and Aboriginal rights. This creates a special situation unlike anywhere in Canada and must be considered in the context of any decision involving the application of section 35 rights across Canada.

PART IV – COSTS

63. The AGNB does not seek costs on this intervention and respectfully requests that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of April, 2020.

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PART V – AUTHORITIES

Case Law		Cited at paragraphs
1	*Mitchell v. Minister of National Revenue,* 2001 SCC 33	11, 12, 15, 16, 26, 27, 29, 30, 31, 37, 56
2	*R v Adams,* [1996] 3 SCR 101	52
3	*R v Bernard,* [2000] 3 CNLR 184, 2000 CarswellNB 539	61
4	*R v Côté,* [1996] 23 SCR 139	16
5	*R v Desautel,* 2017 BCPC 84	32, 33, 34, 39, 40, 43, 47, 60
6	*R v Desautel,* 2019 BCCA 151	35, 51, 53
7	*R v Gladstone,* [1996] 2 SCR 723	13
18	*R v Kapp,* 2008 SCC 41	24
8	*R v Marshall,* [1999] 3 SCR 456	13, 49, 62
9	*R v Marshall; R v Bernard,* 2005 SCC 43	19, 49
10	*R v NTC Smokehouse Ltd,* [1996] 2 SCR 672	16
11	*R v Powley,* 2003 SCC 43	13, 20, 52
12	*R v Sappier,* 2004 NBCA 56	60
13	*R v Sappier,* 2006 SCC 54	16, 17, 36, 49, 52, 55
14	*R v Simmons,* [1988] 2 SCR 495	30
15	*R v Sparrow,* (1986), 9 BCLR (2d) 300 (CA)	23
16	*R v Sparrow,* [1990] 1 SCR 1075	23
17	*R v Van der Peet,* [1996] 2 SCR 507	2, 7, 9, 10, 11, 16, 17, 22, 28, 49, 61

Legislation		
1	*Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982 c 11	*Loi constitutionnelle de 1982,* Annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11