Court File No.: 38734

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

B E T W E E N:

**HER MAJESTY THE QUEEN**

Appellant
(Appellant)

- and -

**RICHARD LEE DESAUTEL**

Respondent
(Respondent)

and

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Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156

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## PART I – OVERVIEW

1. The central issue in this appeal is whether the Respondent may exercise an Aboriginal right to hunt in British Columbia that is recognized and affirmed by s. 35 of the *Constitution Act, 1982*,[1] notwithstanding that he is a citizen and resident of the United States and a member of an Indigenous community that is now exclusively located in the United States.

2. The disposition of this issue requires this Honourable Court to consider whether, and if so in what circumstances, the "aboriginal peoples of Canada," as that phrase is used in s. 35 of the *Constitution Act, 1982,* can extend to Indigenous communities and their members presently located outside Canada. This appeal marks the first time in the almost forty years of s. 35 jurisprudence that this Court will address the interpretation of the "aboriginal peoples of Canada".

3. Reference to the "aboriginal peoples of Canada" establishes a threshold requirement that is the gateway to the constitutional recognition and affirmation of rights and corresponding governmental obligations afforded by s. 35 - be they Aboriginal rights, Aboriginal title, treaty rights, or obligations flowing from the honour of the Crown such as the duty to consult and, where appropriate, accommodate. Depending on how the Court chooses to approach the issues on this appeal, the Court's decision could have profound implications on the nature and extent of governmental obligations arising out of s. 35 and how governments in Canada are required to meet these obligations.[2]

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[1] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[2] It may also have broader constitutional implications in the context of s. 91(24) of the *Constitution Act, 1867* and the *Charter of Rights and Freedoms.*

4. The Attorney General of Ontario ("Ontario") intervenes in this case to make two principal submissions. First, Ontario submits that the question of whether an Indigenous community that is presently located outside of Canada is one of the "aboriginal peoples of Canada" for the purposes of s. 35 and the *Constitution Act, 1982* more broadly should be approached as a threshold issue, and not as part of the *Van der Peet*[3] test for proving Aboriginal rights. In the event that this Court is inclined to accept that s. 35 rights can potentially extend to Indigenous communities outside Canada, and Ontario does not concede that they can, Ontario proposes legal principles the Court could employ to define the extraordinary circumstances that might warrant such an exceptional result, based in part on prior approaches of this Court to s. 35.

5. Further, and in any event, Ontario requests that any interpretive approach adopted by this Honourable Court respect the complex variety of s. 35 rights throughout Canada, as well as the varied history in the relationships between the Crown and Indigenous Peoples across the country. A broad, unqualified approach could have unintended consequences, including with respect to the exercise of s. 35 rights in Ontario and the Crown's duty to consult.

## PART II – ONTARIO'S POSITION ON THE ISSUE ON APPEAL

6. The Appellant has identified 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?

7. Ontario takes no position on the constitutional question posed by the Appellant or on the outcome of this appeal. Further, Ontario does not dispute the facts of this matter.

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[3] *R v Van der Peet*, [1996] 2 SCR 507 (SCC).

## PART III – STATEMENT OF ARGUMENT

### i) Whether an Indigenous Nation Located Outside Canada is one of the "aboriginal peoples of Canada" should be Approached as a Threshold Issue and Proposed Legal Framework for the Determination of this Threshold Issue

8. Section 35(1) of the *Constitution Act, 1982* provides that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[4] This Court has consistently confirmed that the fundamental purpose of s. 35 is reconciliation with Indigenous peoples.[5]

***Threshold Question***

9. Ontario submits that whether an Indigenous community that is not located within Canada is one of the "aboriginal peoples of Canada", namely a community that may have rights that are recognized and affirmed by s. 35, should be approached as a threshold question. This question should be separate and distinct from the question of whether the community can meet the specific legal test for the right it is asserting, for instance, the test for establishing an Aboriginal right or the test for Aboriginal title. In the context of an asserted Aboriginal right, this threshold question should be separate from and should precede questions pertaining to the establishment of the right itself. Whether the community can satisfy the *Van der Peet* test to establish the asserted Aboriginal right should follow a determination of the threshold issue.

10. The British Columbia Court of Appeal did not treat the question of who may hold a right recognized and affirmed by s. 35, and the question of whether the right is established on the

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[4] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s. 35(1).
[5] *R v Sparrow*, [1990] 1 SCR 1075 (SCC) at para 73; *R v Van der Peet*, [1996] 2 SCR 507 (SCC) at paras 57 and 61; *R v Gladstone*, [1996] 2 SCR 723 (SCC) at paras 73 and 102; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 (SCC) at paras 141 and 186; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 14; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 34.

facts, as separate legal questions. Instead, the Court held that the answer to the question of who are the "aboriginal peoples of Canada" pursuant to s. 35 is to be determined by applying the *Van der Peet* test, the established test for proving Aboriginal rights under s. 35. The British Columbia Court of Appeal explicitly stated that "…if the *Van der Peet* requirements are met, the modern Indigenous community will be an 'Aboriginal peoples of Canada.'"[6] Those requirements include a consideration of whether a particular right being claimed is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right", and whether sufficient continuity can be demonstrated.[7]

11. In Ontario's submission, this approach conflates the test to prove an Aboriginal right with the question of who is entitled to assert that right. The British Columbia Court of Appeal's approach does not fit together with the purpose and intent of s. 35, particularly when s. 35 is considered as a whole and in the context of the other rights protected by and obligations flowing from s. 35.

12. When an issue about entitlement has been raised in the context of s. 35, courts have dealt with the two aforementioned questions separately and consecutively, an approach that Ontario submits is logical. For instance, where a claimant has been a non-Indigenous person, the courts have held that it is unnecessary to apply the *Van der Peet* test since the claimant could not claim s. 35 rights.[8] There have also been cases where courts have examined whether a collective was an 'aboriginal people' entitled to claim a s. 35 Aboriginal right before proceeding with the *Van*

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[6] *R v Desautel*, 2019 BCCA 151 at para 57.
[7] *R v Van der Peet*, [1996] 2 SCR 507 (SCC) at para 46, 63-65.
[8] See e.g. *R v Muise* (2000), 227 NBR (2d) 95 (NBQB) at paras 23-24; *R v Robertson* (1999), 217 NBR (2d) 151 (NBQB); *R v Fullerton* (1996), 182 NBR (2d) 138 (NBPC) at para 11; *Pike v R* (1993), 1 CNLR 160 (BCSC).

*der Peet* test.[9] Recognizing the entitlement issue as a threshold question is also consistent with *Charter* jurisprudence where the courts consider whether an applicant can possess a *Charter* right before undertaking a full *Charter* analysis.[10] This Court has conceived of threshold questions for other constitutional provisions relating to Indigenous Peoples as well.[11]

13. In *R v Powley*,[12] this Court noted that the claimants needed to establish that they belonged to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific right. In that decision, this Court set out a legal and evidentiary approach to determining whether a Métis community is capable of holding s. 35 Aboriginal rights. The Court did not need to consider the phrase "aboriginal peoples of Canada" squarely and in its totality because the claimants were clearly Canadian and the Métis community to which they belonged was also located in Canada. Therefore, although the Court did not proclaim a definition of

[9] *R v Shenandoah*, 2015 ONCJ 541 at para 18; *Anishinaabeg of Kabapikotawangag Resource Council Inc. v Canada (Attorney General)*, [1998] 4 CNLR 1 (OCJ) at para 14; *Komoyue Heritage Society v British Columbia (Attorney General)*, 2006 BCSC 1517 at para 54; *Maurice v Canada (Minister of Indian Affairs & Northern Development)* (1999), 183 FTR 9 (FC) at paras 6 and 15; *Native Council of Nova Scotia v Canada (Attorney General)*, 2002 FCT 6 at paras 10-13.

[10] See e.g. *Ermineskin Indian Band v Canada*, 2006 FCA 415, aff'd on other grounds, 2009 SCC 9; *Métis National Council of Women v Canada*, 2005 FC 230, aff'd 2006 FCA 77, leave to appeal refused 17 August 2006 (SCC); *Board of School Trustees v Patrick*, 2002 BCSC 19, var'd on other grounds, 2002 BCSC 330; *Canada v Hislop*, 2007 SCC 10; *Canadian Egg Marketing Agency v Richardson* [1998] 3 SCR 157 (SCC); *R v CIP Inc.*, [1992] 1 SCR 843 (SCC); *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154 (SCC); *Dywidag Systems v Zutphen Brothers*, [1990] 1 SCR 705 (SCC); *Irwin Toy Ltd. v Quebec*, [1989] 1 SCR 927 (SCC); *R v Amway Corp.*, [1989] SCR 21 (SCC); *R v Big M Drug Mart*, [1985] 1 SCR 295 (SCC); *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 (SCC).

[11] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12; *Reference re Eskimos*, [1939] SCR 104 (SCC); *R v Blais*, 2003 SCC 44.

[12] *R v Powley*, 2003 SCC 43.

"aboriginal peoples", the Court nonetheless took the opportunity to consider the meaning of "aboriginal peoples" in s. 35 and treat it as a threshold issue.[13]

***Applicable Legal Principles***

14. Ontario does not concede that "aboriginal peoples of Canada" can include Indigenous Nations outside Canada's borders. However, in the event that this Honourable Court is of the view that this is a possibility, Ontario submits that whether an Indigenous community that is not located within Canada is included within "the aboriginal peoples of Canada" should be approached as a threshold question that must be answered before applying the relevant test(s) for Aboriginal rights and/or title, consistent with the jurisprudence discussed above, and that the relevant test(s) should be rigorous, principled and clear. If it is possible for Indigenous communities outside Canada to hold rights that are recognized and affirmed by s. 35, such a situation should be exceptional. Although the international boundary may have been formed in the past with little or no regard to the perspectives of Indigenous Peoples, courts have recognized that international boundaries hold profound legal and constitutional significance, which should not be ignored.[14]

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[13] In considering claims of individuals and communities asserting Métis rights, courts have reinforced the use of *Powley* in approaching threshold questions of who is and is not an "aboriginal peoples of Canada" capable of asserting s. 35 rights. See e.g. *Ontario (Ministry of Natural Resources) v Fortin,* [2006] OJ No. 1166 (OCJ) at para 45; *Ontario (Ministry of Natural Resources) v Guay*, [2006] OJ No. 1165 (OCJ) at paras 11-22; *R v Gagnon*, [2006] OJ No. 4738 (OCJ); *R v Paquette*, 2012 ONCJ 606 at paras 8-10; *Ontario (Natural Resources) v Blais*, [2015] 4 CNLR 282 (OCJ) at paras 42-44.

[14] *Mitchell v Canada (Minister of National Revenue)*, 2001 SCC 33; *Francis v the Queen*, [1956] SCR 618 (SCC); *Watt v Liebert*, [1999] 2 FC 455 (CA); *R v Campbell*, 2000 BCSC 956; *R v Shenandoah*, 2015 ONCJ 541; *Newfoundland and Labrador (Attorney General) v Uashaunnut*

15. In answering the question of whether an Indigenous Nation residing outside Canada can be considered one of the "aboriginal peoples of Canada" for constitutional purposes, Ontario proposes that the Court employ a contextual analysis, and consider a range of factors to make this determination. This represents a principled and focused approach that can be applied in a manner that respects the rights and perspectives of Indigenous communities within Canada. The factors assessed should allow for flexibility and responsiveness, to address the varying and unique circumstances that may arise across the country, such as the unique context in Ontario that is described below. The weighing of these factors will assist in determining the exceptional circumstances when an Indigenous Nation from outside Canada could potentially be considered one of the "aboriginal peoples of Canada" for the purposes of the *Constitution Act, 1982*.

16. Factors that could be considered in determining whether an Indigenous community located outside of Canada is included within "the aboriginal peoples of Canada" could include factors drawn from *R v Powley* as well as factors that are specifically geared towards consideration of and respect for the circumstances of Indigenous Nations outside Canada.[15] The following is a non-exhaustive list of factors that may assist the Court in determining the threshold question:

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*(Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at paras 114-115, 210-212, and 239-246 per Brown and Rowe JJ.

[15] See also *Watt v Liebert*, [1999] 2 FC 455 (CA) at para 19 which says: "Without attempting to list these exhaustively, they will include findings such as the following. Is the appellant a member of an "aboriginal people of Canada" in order to be entitled to assert a right under section 35 of the Constitution Act, 1982? There may be mixed questions of law and fact here as to the indicia for identifying an "aboriginal people of Canada". Does the fact that the appellant's ancestors once occupied land here entitle them indefinitely to a claim to be an Aboriginal people of Canada? What continuing nexus may be required if such "people" are no longer resident in Canada?"

- Whether the claimant community had a demonstrable, significant and persistent historic presence in the relevant territory in Canada;[16]
- Whether the claimant community can demonstrate significant continuity of connection to the relevant territory in Canada over time;[17]
- Whether the claimant community has maintained a significant modern-day connection to Canada;
- The length of time over which the claimant community has been based outside Canada;
- The relationship between the claimant community and Indigenous communities within Canada;[18]
- The relationships between the claimant community and other Indigenous, federal (United States and Canada), provincial and territorial governments, including whether there are existing treaties, alliances and/or legal arrangements;[19]
- The perspective of Indigenous Peoples, including the perspective of the present-day representatives of the members of the Indigenous community who are seeking constitutional recognition of rights,[20] and those whose territories and treaty geographies in Canada may overlap; and
- The reasons for the claimant community's relocation to its present location outside Canada, including for instance whether the claimant relocated due to forced displacement,

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[16] *R v Powley*, 2003 SCC 43 at paras 21-23; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 48; *Lovelace v Ontario*, 2000 SCC 37 at para 12.

[17] *R v Powley*, 2003 SCC 43 at paras 21-23. This Court has recognized that an unbroken chain of continuity is not necessary to meet the continuity requirement; see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 (SCC) at para 153; *R v Marshall*, *R v Bernard*, [2005] 2 SCR 220 (SCC) at para 67; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 46.

[18] *R v Powley*, 2003 SCC 43 at para 33; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras 48-49.

[19] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras 24-32; *Lovelace v Ontario*, 2000 SCC 37 at paras 14 and 28-31; *Mitchell v Canada (Minister of National Revenue)*, 2001 SCC 33 at paras 44-45 and 89.

[20] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 (SCC); *R v NTC Smokehouse Ltd.*, [1996] 2 SCR 672 (SCC) at para 44; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 (SCC) at paras 81-84; *R v Marshall*, *R v Bernard*, [2005] 2 SCR 220 (SCC) at para 45.

other imposed colonial laws and/or policies, and/or the community's preference for lands and opportunities available outside Canada.[21]

17. In Ontario's submission, such a contextual analysis would permit flexibility and responsiveness to different, unique and exceptional circumstances of relationships between the Crown and Indigenous Peoples across Canada. The factors described above incorporate and allow for the perspectives and circumstances of Indigenous Peoples to be considered, should a court be asked to determine whether an Indigenous community located outside Canada is nonetheless an "aboriginal peoples of Canada". Such an approach ensures that this inquiry is consistent with the purpose of s. 35 and established jurisprudence on Aboriginal rights and title. In this regard, such a contextual analysis seeks to promote the ultimate goal of reconciliation between the Crown and the Aboriginal Peoples of Canada.

**ii) An Interpretive Approach Should Respect the Complex Variety of s. 35 Rights and the Varied History of Relationships between the Crown and Indigenous Peoples**

18. Whether the Court approaches the analysis of whether an Indigenous Nation located outside of Canada can hold s. 35 rights as a threshold question or otherwise, Ontario requests that any interpretive approach adopted by this Honourable Court respect the complex variety of s. 35 rights throughout Canada, as well as the differences in the history of relationships between the Crown and Indigenous Peoples, particularly in relation to treaty-making, between British Columbia and much of the rest of Canada, including in Ontario. A broad, unqualified approach to the very specific and unique facts of this case could result in unintended consequences

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[21] *Watson v Canada*, 2020 FC 129 at paras 145 and 152; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at paras 1 and 16; *Ross River Dena Council Band v Canada*, 2002 SCC 54 at para 14; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 1; *R v Bernard*, 2003 NBCA 55 at paras 134-135; *Grand River Enterprises Six Nations Ltd. v Canada (Attorney General)*, 2015 ONSC 5256 at para 100; *Maurice v Canada (Minister of Indian Affairs and Northern Development)* (2000), 183 FTR 45 (FC) at para 2.

elsewhere in the country, including with respect to the exercise of s. 35 rights in Ontario and the Crown's duty to consult and accommodate. In the balance of these submissions, Ontario sets out an overview of the complex variety of s. 35 rights in the province, followed by potential implications of a decision in this case.

***Overarching Context of Section 35 rights in Ontario***

19. Ontario has the largest Indigenous population of any of Canada's provinces. There are over 130 First Nations in Ontario. There are Inuit and Métis Peoples within Ontario, and many non-status Indigenous communities and individuals.[22] At least one First Nation community in Ontario, the Mohawks of Akwesasne, straddles the international border.[23] Other member nations of the Haudenosaunee Confederacy also reside on both sides of the border.[24]

20. Ontario is not aware of any Indigenous communities with a history in the Province analogous to that of the Lakes Tribe - a community that claims its move away from Canada and into the United States was not voluntary, was declared extinct by the federal government decades ago, and has consistently sought a reversal of this declaration.[25]

21. The historical and treaty context in Ontario differs significantly from that in British Columbia, as Ontario is for the most part covered by treaties, while British Columbia is largely

[22] "Non-status" generally refers to people and/or bands who identify themselves as Indigenous but who are not entitled to registration pursuant to the *Indian Act.* See *Lovelace v Ontario*, 2000 SCC 37 at para 16.

[23] *Mitchell v Canada (Minister of National Revenue)*, 2001 SCC 33 at para 77; *R v Shenandoah*, 2015 ONCJ 541 at para 7.

[24] *Grand River Enterprises Six Nations Ltd. v Canada (Attorney General)*, 2015 ONSC 5256 at para 100; *Lazore v CIR*, 11 F.3d 1180 (United States Court of Appeals); *Poodry v Tonawanda Band of Seneca Indians*, 85 F.3d 874 (United States Court of Appeals).

[25] Factum of the Respondent, Richard Lee Desautel, at paras 9-10, 12, and 23; *R v Desautel*, 2017 BCPC 84 at paras 41-43, 48, 50.

not.[26] There are over 45 treaties with Indigenous Peoples that cover lands in Ontario, including three of the 'numbered treaties' negotiated by Canada with Indigenous Nations, and many treaties that pre-date Confederation.[27] Many of the treaties in Ontario provide for hunting and harvesting rights protected under s. 35, and also provide that the Crown can take up lands for mining, forestry and other purposes (subject to the duty to consult and accommodate).[28]

22. As in the rest of the country, lands within Ontario are also subject to recognized and/or asserted s. 35 Aboriginal rights, which stem from historic and continuing Indigenous customs, practices and traditions, rather than from a treaty. Examples of such rights include Métis rights to hunt and fish,[29] claims for Aboriginal title by Indigenous communities currently located within Ontario,[30] and asserted Aboriginal rights with respect to the protection of sacred burial grounds.[31] Section 35 Aboriginal rights and/or assertions of rights are not limited to customs, practices and traditions about use of land.[32]

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[26] *West Moberly First Nations v British Columbia*, 2017 BCSC 1700 at paras 25-28; *Enbridge Pipelines Inc. (Re),* 2008 LNCNEB 2 at para 120. See also *Nishnawbe-Aski Police Services Board v Public Service Alliance of Canada*, 2013 CIRB 701 at para 3, which recognized that Treaties 5 and 9 alone cover approximately two-thirds of Ontario.

[27] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69; *Lac La Ronge Indian Band v Canada*, 1999 SKQB 218 at paras 4-22; 2001 SKCA 109 at paras 13-19.

[28] See e.g. *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 11; *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 CNLR 181 (OSCJ) at para 102; *Michipicoten First Nation v Ontario (Minister of Natural Resources and Forests)*, 2016 ONSC 6899 (Div Ct) at para 102.

[29] *R v Powley*, 2003 SCC 43 at paras 1 and 53.

[30] *Crees (Eeyou Istchee) v Canada (Attorney General)*, 2017 ONSC 3729 at para 5. See Government of Ontario, *Current Land Claims* (April 30, 2020) for full list of current land claims.

[31] *Wahgoshig First Nation v Ontario*, 2011 ONSC 7708 at para 19.

[32] For instance, rights have been asserted and/or recognized with respect to Indigenous medicines, to practicing one's own culture and customs including language and religion, and to child and family services. See e.g. *An Act Respecting First Nation, Inuit, and Métis Children,*

23. In addition, there are extant claims for Aboriginal rights and title with respect to lands within Ontario brought by Indigenous communities currently located in other provinces. These claims have generally been brought on the basis of assertions that these communities historically lived or harvested in what is now Ontario, but for a variety of reasons have either been displaced or had their traditional territories limited through the creation of provincial borders.[33]

24. In addition, principles around the ability to engage in harvesting activities based on relationships and "sheltering" have been recognized in Ontario in the context of treaty rights. Sheltering recognizes that an Indigenous person may partake in the exercise of another First Nation's rights under a treaty to which they are not a signatory, by invitation and with the permission from a host First Nation, or due to kinship arrangements. The Ontario Court of Appeal has held that for a claimant to shelter under the rights of a host First Nation, the host First Nation must demonstrate that it had a historic custom of inviting and accepting others to share in its harvesting resources. In clarifying a treaty custom, the Court found it may be useful to consider factors such as the circumstances in which sharing would take place; how consent or permission should be given; the nature and scope of consent or permission typically given; who would have authority to give it, such as a Chief or others designated by the Chief and Council of the First Nation; and to whom it was given. Permission may be negated if it does not account for protection and conservation of harvesting resources, which is paramount in Indigenous custom.[34]

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*Youth, and Families*, SC 2019, c 24; *Neshkiwe v Hare*, 2020 ONCJ 149; *Beaver v Hill*, 2018 ONCA 816; *Hamilton Health Sciences Corp. v DH*, 2014 ONCJ 603.

[33] Affidavit of Bill Namagoose of the Grand Council of the Crees (Eeyou Istchee) / Cree Nation Government affirmed February 18, 2020 at paras 29-30; *R v Ireland* (1990), 1 OR (3d) 577 (OSCJ); *R v Sioui*, [1990] 1 SCR 1025 (SCC) at para 6.

[34] See *R v Shipman*, 2007 ONCA 338, which stated that "Aboriginal persons can, in the right circumstances, shelter under another First Nation's treaty rights. Thus, it is an error to conclude

25. Treaty rights overlap geographically with Aboriginal rights, including assertions of Aboriginal title, as the existence of a treaty right does not in and of itself displace the existence of an overlapping claim to Aboriginal rights or title from Indigenous communities who are not parties to the treaty. For example, Sault Ste. Marie and its environs are subject to both the treaty harvesting rights provided for in the Robinson Huron Treaty and the Métis s. 35 harvesting rights recognized by this Court in *R v Powley.*

26. The context of overlapping rights can create significant and complex on-the-ground implications including in relation to regulating harvesting activities and the use of Crown lands, assessing and fulfilling the duty to consult and accommodate, and addressing land claims.[35]

27. In addition to the harvesting customs of Indigenous Peoples within Canada, there are also cross-border harvesting customs undertaken in Ontario by Indigenous individuals from the United States, reflecting the reality that the historical presence of Indigenous Peoples in the vicinity of what is now the United States-Canada border has been fluid, both before and since

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that in all cases, an Aboriginal person must be party to the treaty in question or that permission alone cannot provide a right under the treaty." See also *R v Meshake*, 2007 ONCA 337, where a member of a Treaty 9 nation was acquitted for hunting in Treaty 3 lands, as he was hunting in accordance with "Ojibway custom whereby Treaty 3 right-holders had invited and accepted him into their community and to share in their treaty harvest."

[35] *Crees (Eeyou Istchee) v Canada (Attorney General)*, 2017 ONSC 3729; *Hiawatha First Nation v Ontario (Minister of Environment)*, [2007] 2 CNLR 186 (Div Ct). This is common in other Provinces as well; see e.g. *Huron-Wendat Nation of Wendake c Canada*, 2014 FC 1154; *Sambaa K'e Dene Band v Canada (Minister of Indian Affairs & Northern Development)*, 2012 FC 204; *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 440; *Gitanyow First Nation v Canada*, [1998] 4 CNLR 47, additional reasons in 1998 CarswellBC 1583 (BCSC).

contact.[36] For instance, from time to time, conservation officers in Ontario encounter individuals belonging to the Haudenosaunee Confederacy who live in the United States and are harvesting in Ontario in reliance on the Nanfan Treaty,[37] or members of Akwesasne from New York State who are fishing in the St. Lawrence River and in Lake St. Francis. In northern Ontario, conservation officers have encountered Indigenous individuals from the United States hunting moose pursuant to asserted Aboriginal rights. Conservation officers are also aware of members of Indigenous communities from northern Minnesota harvesting in the Fort Frances area within what would have historically been their traditional territories.

28. Ontario currently takes a flexible policy approach to enforcement and prosecution with respect to non-Canadian individuals belonging to Indigenous communities that do not presently reside in Ontario and who purport to exercise harvesting rights in their asserted ancestral lands in the Province. Ontario approaches these cases with flexibility because often there is a balance that needs to be struck to address the specific cross-border activity, for instance in the context of overlapping rights and pressures on existing and what may sometimes be scarce and limited resources. Ontario makes decisions pertaining to the laying and prosecution of charges under its Interim Enforcement Policy on a case-by-case basis, based on evidence, law, and policy.[38] Depending on the circumstances, individuals may not be subject to enforcement action in the absence of an Ontario permit, license authorization, or the like, and each situation is different.

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[36] Contact occurred much earlier in Ontario than in British Columbia and elsewhere in Canada. Contrast *Hiawatha First Nation v Ontario (Minister of Environment)*, [2007] 2 CNLR 186 (Div Ct) at paras 45-46 and *R v Desautel*, 2017 BCPC 84 at para 15.

[37] *R v Ireland* (1990), 1 OR (3d) 577 (OSCJ).

[38] *Ontario Federation of Anglers and Hunters v Ontario (Natural Resources and Forestry),* 2017 ONSC 518 (Div Ct) at para 2.

29. This Honourable Court's approach to the case before it could have direct implications to how Ontario approaches the exercise of cross-border harvesting, which represents an important contextual factor that Ontario submits this Court should account for in its decision.

***The Duty to Consult and Accommodate***

30. The Crown has a constitutional duty to consult and where appropriate accommodate Aboriginal peoples when the Crown has real or constructive knowledge of an existing or asserted Aboriginal right or treaty right, and the Crown contemplates conduct that may adversely affect that right.[39] The scope of the consultation and accommodation that is required pursuant to that duty depends upon the nature of the proposed Crown decision or action, and the extent of the potential adverse impacts to the Aboriginal or treaty rights at issue.[40] The threshold giving rise to the duty is low, although the right being asserted must be credible.[41]

31. A recognition by this Court that Indigenous communities outside Canada can hold and assert rights that are recognized and affirmed by s. 35 may give rise to obligations on governments that flow from those rights, including the duty to consult and potentially accommodate. While the issue of the potential impact of the decision on the duty to consult and accommodate was raised before the British Columbia Court of Appeal in this case, the Court of Appeal did not offer any guidance on this subject, finding the duty to consult to be an ancillary question that was not material to the central issue.[42] While Ontario does not submit that potential obligations that flow from the recognition that Indigenous Nations in the United States may be "aboriginal peoples of Canada" are a reason alone to hold that such communities cannot hold s. 35 rights, the cross-border realities may create uncertainty for governments as to how to fulfill

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[39] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35.
[40] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 39.
[41] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 37.
[42] *R v Desautel*, 2019 BCCA 151 at para 63.

their obligations. These additional uncertainties are underscored by recent decisions by this Court that have expanded the Crown's constitutional obligations.[43] The need for clarity and certainty in the law is especially important given that this Court is now faced with potentially extending who may be included in the definition of Aboriginal peoples for the purposes of s. 35.

32. In addition to development activity throughout the Province, Ontario has mining projects, energy transmission lines, hydro generation stations, roadways, bridges and other forms of development that straddle or are very close to the Canada-United States border, including those situated on border waters. Should this Court acknowledge that Indigenous Nations outside Canada may hold rights that are recognized and affirmed by s. 35, such rights may give rise to existing and potentially future obligations that would create further liability for the Crown,[44] and would almost certainly overlap with the rights and activities of Indigenous Peoples within Ontario. This could lead to challenging on-the-ground implications for government and industry with respect to consultation obligations, including accommodation, and with respect to impact benefit agreements between Indigenous communities and proponents, in which United States-based communities would likely wish to be included. In addition to the uncertainties about how governments and proponents would be able to undertake consultation in a cross-border, international context, other complex issues will no doubt arise, as they arise within Canada.

33. In light of the foregoing, Ontario submits that any interpretive approach adopted by this Honourable Court must respect the complex variety of s. 35 rights throughout Canada, as well as the varied history in the relationships between the Crown and Indigenous Peoples, particularly in

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[43] *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14; *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 at paras 1-53 per Karakatsanis J.
[44] *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43.

relation to treaty-making, between British Columbia and much of the rest of Canada, including in Ontario.

## PART IV – COSTS

34. Ontario does not seek costs on this intervention and respectfully requests that no costs be ordered against it.

## PART V – ORDER SOUGHT

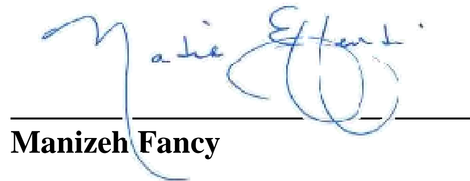
35. Ontario requests that it be permitted to present oral argument at the hearing of this appeal.

## PART VI – SUBMISSIONS ON PUBLICATION

N/A

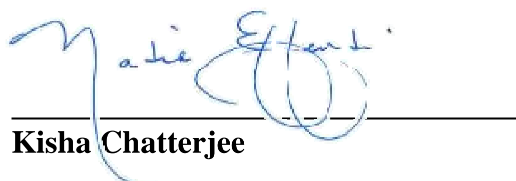
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of May 2020.

Per:



**Manizeh Fancy**

Per:



**Kisha Chatterjee**

## PART VII – AUTHORITIES

**Caselaw**

| No. | Authority | Paragraph Reference |
| --- | --- | --- |
| 1. | *Anishinaabeg of Kabapikotawangag Resource Council Inc. v Canada (Attorney General)*, [1998] 4 CNLR 1 (OCJ) | 13 |
| 2. | *Beaver v Hill*, 2018 ONCA 816 | 22 |
| 3. | *Board of School Trustees v Patrick*, 2002 BCSC 19, var'd on other grounds, 2002 BCSC 330 | 12 |
| 4. | *Canada v Hislop*, 2007 SCC 10 | 12 |
| 5. | *Canadian Egg Marketing Agency v Richardson* [1998] 3 SCR 157 (SCC) | 12 |
| 6. | *Crees (Eeyou Istchee) v Canada (Attorney General)*, 2017 ONSC 3729 | 22, 23, 26 |
| 7. | *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 | 12, 16 |
| 8. | *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 (SCC) | 8, 16 |
| 9. | *Dywidag Systems v Zutphen Brothers*, [1990] 1 SCR 705 (SCC) | 12 |
| 10. | *Enbridge Pipelines Inc. (Re),* 2008 LNCNEB 2 | 21 |
| 11. | *Ermineskin Indian Band v Canada*, 2006 FCA 415, aff'd on other grounds, 2009 SCC 9 | 12 |
| 12. | *Francis v the Queen*, [1956] SCR 618 (SCC) | 14 |
| 13. | *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 440 | 26 |
| 14. | *Gitanyow First Nation v Canada*, [1998] 4 CNLR 47, additional reasons in 1998 CarswellBC 1583 (BCSC) | 26 |
| 15. | *Grand River Enterprises Six Nations Ltd. v Canada (Attorney General)*, 2015 ONSC 5256 | 16, 19 |

| No. | Authority | Paragraph Reference |
|---|---|---|
| 16. | *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 | 21 |
| 17. | *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 | 8, 30 |
| 18. | *Hamilton Health Sciences Corp. v DH*, 2014 ONCJ 603 | 22 |
| 19. | *Hiawatha First Nation v Ontario (Minister of Environment)*, [2007] 2 CNLR 186 (Div Ct) | 26, 27 |
| 20. | *Huron-Wendat Nation of Wendake c Canada*, 2014 FC 1154 | 26 |
| 21. | *Irwin Toy Ltd. v Quebec*, [1989] 1 SCR 927 (SCC) | 12 |
| 22. | *Komoyue Heritage Society v British Columbia (Attorney General)*, 2006 BCSC 1517 | 12 |
| 23. | *Lac La Ronge Indian Band v Canada*, 1999 SKQB 218 at paras 4-22; 2001 SKCA 109 | 21 |
| 24. | *Lazore v CIR*, 11 F.3d 1180 (United States Court of Appeals) | 19 |
| 25. | *Lovelace v Ontario*, 2000 SCC 37 | 16, 19 |
| 26. | *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 | 31 |
| 27. | *Maurice v Canada (Minister of Indian Affairs & Northern Development)* (1999), 183 FTR 9 (FC) | 12 |
| 28. | *Maurice v Canada (Minister of Indian Affairs and Northern Development)* (2000), 183 FTR 45 (FC) | 16 |
| 29. | *Métis National Council of Women v Canada*, 2005 FC 230, aff'd 2006 FCA 77, leave to appeal refused 17 August 2006 (SCC) | 12 |
| 30. | *Michipicoten First Nation v Ontario (Minister of Natural Resources and Forests)*, 2016 ONSC 6899 (Div Ct) | 21 |
| 31. | *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 | 8, 21 |

| No. | Authority | Paragraph Reference |
|---|---|---|
| 32. | *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 | 31 |
| 33. | *Mitchell v Canada (Minister of National Revenue)*, 2001 SCC 33 | 14, 16, 19 |
| 34. | *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 (SCC) | 16 |
| 35. | *Native Council of Nova Scotia v Canada (Attorney General)*, 2002 FCT 6 | 12 |
| 36. | *Neshkiwe v Hare*, 2020 ONCJ 149 | 22 |
| 37. | *Newfoundland and Labrador (Attorney General) v Uashaunnut (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 | 14 |
| 38. | *Nishnawbe-Aski Police Services Board v Public Service Alliance of Canada*, 2013 CIRB 701 | 21 |
| 39. | *Ontario (Ministry of Natural Resources) v Fortin,* [2006] OJ No. 1166 (OCJ) | 13 |
| 40. | *Ontario (Ministry of Natural Resources) v Guay*, [2006] OJ No. 1165 (OCJ) | 13 |
| 41. | *Ontario (Natural Resources) v Blais*, [2015] 4 CNLR 282 (OCJ) | 13 |
| 42. | *Ontario Federation of Anglers and Hunters v Ontario (Natural Resources and Forestry),* 2017 ONSC 518 (Div Ct) | 28 |
| 43. | *Pike v R*, (1993), 1 CNLR 160 (BCSC) | 12 |
| 44. | *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 CNLR 181 (OSCJ) | 21 |
| 45. | *Poodry v Tonawanda Band of Seneca Indians*, 85 F.3d 874 (United States Court of Appeals) | 19 |
| 46. | *R v Amway Corp.*, [1989] SCR 21 (SCC) | 12 |
| 47. | *R v Bernard*, 2003 NBCA 55 | 16 |

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| 48. | *R v Big M Drug Mart*, [1985] 1 SCR 295 (SCC) | 12 |
| 49. | *R v Blais*, 2003 SCC 44 | 12 |
| 50. | *R v Campbell*, 2000 BCSC 956 | 14 |
| 51. | *R v CIP Inc.*, [1992] 1 SCR 843 (SCC) | 12 |
| 52. | *R v Desautel*, 2017 BCPC 84 | 20, 27 |
| 53. | *R v Desautel*, 2019 BCCA 151 | 10, 31 |
| 54. | *R v Fullerton* (1996), 182 NBR (2d) 138 (NBPC) | 12 |
| 55. | *R v Gagnon*, [2006] OJ No. 4738 (OCJ) | 13 |
| 56. | *R v Gladstone*, [1996] 2 SCR 723 (SCC) | 8 |
| 57. | *R v Ireland* (1990), 1 OR (3d) 577 (OSCJ) | 23, 27 |
| 58. | *R v Marshall*, *R v Bernard*, [2005] 2 SCR 220 (SCC) | 16 |
| 59. | *R v Meshake*, 2007 ONCA 337 | 24 |
| 60. | *R v Muise* (2000), 227 NBR (2d) 95 (NBQB) | 12 |
| 61. | *R v NTC Smokehouse Ltd.*, [1996] 2 SCR 672 (SCC) | 16 |
| 62. | *R v Paquette*, 2012 ONCJ 606 | 13 |
| 63. | *R v Powley*, 2003 SCC 43 | 13, 16, 22, 25 |
| 64. | *R v Robertson* (1999), 217 NBR (2d) 151 (NBQB) | 12 |
| 65. | *R v Shenandoah*, 2015 ONCJ 541 | 12, 14, 19 |
| 66. | *R v Shipman*, 2007 ONCA 338 | 24 |
| 67. | *R v Sioui*, [1990] 1 SCR 1025 (SCC) | 23 |
| 68. | *R v Sparrow*, [1990] 1 SCR 1075 (SCC) | 8 |
| 69. | *R v Van der Peet*, [1996] 2 SCR 507 (SCC) | 4, 8, 9, 10, 12 |
| 70. | *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154 (SCC) | 12 |

| No. | Authority | Paragraph Reference |
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| 71. | *Reference re Eskimos*, [1939] SCR 104 (SCC) | 12 |
| 72. | *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 | 8, 32 |
| 73. | *Ross River Dena Council Band v Canada*, 2002 SCC 54 | 16 |
| 74. | *Sambaa K'e Dene Band v Canada (Minister of Indian Affairs & Northern Development)*, 2012 FC 204 | 26 |
| 75. | *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 (SCC) | 12 |
| 76. | *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 | 16 |
| 77. | *Wahgoshig First Nation v Ontario*, 2011 ONSC 7708 | 22 |
| 78. | *Watson v Canada*, 2020 FC 129 | 16 |
| 79. | *Watt v Liebert*, [1999] 2 FC 455 (CA) | 14, 16 |
| 80. | *West Moberly First Nations v British Columbia*, 2017 BCSC 1700 | 21 |
| 81. | *Wewaykum Indian Band v Canada*, 2002 SCC 79 | 16 |
| 82. | *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 | 16 |

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|---|---|---|
| 1. | Affidavit of Bill Namagoose of the Grand Council of the Crees (Eeyou Istchee) / Cree Nation Government affirmed February 18, 2020 | 23 |
| 2. | Government of Ontario, *Current Land Claims* (April 30, 2020) | 22 |

**Statutes, Regulations, Rules, etc.:**

| **No.** | **Statute, Regulation, Rule, etc.** | **Section, Rule, Etc.** |
|---|---|---|
| 1. | *An Act Respecting First Nation, Inuit, and Métis Children, Youth, and Families*, SC 2019, c 24 | Generally |
| | *Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis* L.C. 2019, ch. 24 | Généralement |
| 2. | *Constitution Act, 1867* and the *Charter of Rights and Freedoms.* | s. 91(24) |
| | *Lois constitutionnelles* de 1867 à 1982 | s. 91(24) |
| 3. | *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. | s. 35(1) |
| | *Loi constitutionnelle de 1982,* Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11 | s. 35(1) |
| 4. | *Indian Act* R.S.C., 1985, c. I-5 | Generally |
| | *Lois codifies*, R.R.C. (1985), ch. I-5 | Généralement |