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

- and -

RICHARD LEE DESAUTEL

Respondent

- and -

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(Title of proceedings continued on next page)

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PART I – STATEMENT OF FACTS

I. Overview

1. A purposive interpretation of the term "aboriginal peoples of Canada" in s. 35 of the *Constitution Act, 1982* must balance two important considerations. The first is the disruptive impact of the creation of the international border that divided many traditional Indigenous territories in North America. The second is the potentially significant effect in Canada of extending constitutionally protected rights to some non-domiciled Indigenous individuals, i.e. Indigenous individuals who are not affiliated with an Indigenous collective (First Nation, Métis or Inuit) resident in Canada.[1] An appropriate balance, with a view towards reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful, long-term relationship must be achieved.

2. This balance requires that non-domiciled Indigenous individuals may only exercise s. 35 rights if they have maintained a substantial connection with, are accepted by, and granted permission by an Indigenous rights-bearing or rights-asserting collective in Canada. Drawing on *Powley* and informed by the practice of sheltering, an assessment of whether that substantial connection exists should be considered on a case by case basis, taking into account certain criteria – self-identification, ancestral connection and community acceptance and permission by an Indigenous collective in Canada. Otherwise, Indigenous collectives in the United States could assert the full range of aboriginal rights in Canada, including any corresponding sharing of resources or Crown obligations.

3. Non-domiciled Indigenous individuals should not be presumptively excluded from exercising constitutionally protected rights under s. 35(1) of the *Constitution Act, 1982*. Negotiated agreements between the relevant parties and governments are the preferred route to achieve their potential inclusion. Negotiated agreements provide distinct legal recognition of these rights and a clear framework for how they can be exercised. However, absent a negotiated

[1] Affiliation with an Indigenous collective resident in Canada may be formalized, for those groups that maintain their own membership lists and criteria, or informal through other forms of traditional recognition determined by a particular group.

solution, more is required than a finding of "continuity" between an historic Indigenous collective that existed in what is now Canada and a contemporary collective now located outside of Canada. A flexible approach to s. 35 should require that the individual claimant demonstrate continuity through the Indigenous collective in Canada.

4. In order to determine whether a sufficient connection exists such that a non-domiciled individual may exercise s. 35 aboriginal rights, one should look to both historical and modern ties between the non-domiciled individual and the Indigenous collective in Canada. The non-domiciled individual should demonstrate a significant modern-day connection to the rights-bearing collective residing in Canada, as well as community acceptance by and permission from that resident collective. This ensures that the non-domiciled individual is exercising s. 35 aboriginal rights held or asserted by the Indigenous collective in Canada. The scope of the individual's ability to exercise the s. 35 right will depend on the context of each case, including the impact of exercising the right on limited or shared resources. The scope may also be restricted to specifically delineated rights at the discretion of the Indigenous collective in Canada, or by federal or provincial legislation, regulation or policy that can be justified pursuant to the framework set out in *R v Sparrow*.

5. The issue of Canadian territorial sovereignty does not squarely arise in this case because Mr. Desautel has not asserted a right to enter Canada. However, should the Court decide to consider the issue, it should be presumed that non-domiciled Indigenous individuals who seek to exercise a s. 35 right may not be permitted to enter Canada in all circumstances. Control over borders is a crucial aspect of national sovereignty. Parliament must maintain the ability to make reasonable choices for the general welfare of the nation and therefore must be able to pursue pressing objectives such as maintaining national security and preserving public health. Any alleged infringement of the exercise of a presumptively established s. 35 right by a non-domiciled Indigenous person should generally be reviewed pursuant to the justification framework set out in *R v Sparrow.* Although, in general, a mobility right may not necessarily be incompatible with Canada's sovereignty, the manner in which the right interacts with Canadian sovereignty should be determined on the specific facts of each case.

II. General Background

A. Decisions of the British Columbia Courts

British Columbia Provincial Court

6. Mr. Desautel, a member of the Lakes Tribe of the Colville Confederated Tribes in Washington State, shot one cow-elk in British Columbia for ceremonial meat in 2010. Mr. Desautel reported the hunt to British Columbia conservation officers and was subsequently charged with hunting without a license and hunting big game while not being a resident, contrary to ss. 11(1) and 47(a) of the *Wildlife Act*, RSBC 1996, c 488. Mr. Desautel's defence was that he was exercising his aboriginal right to hunt in the traditional territory of his Sinixt ancestors.[2]

7. The British Columbia Provincial Court (trial judge) framed the issues before her as requiring Mr. Desautel to prove that he had an aboriginal right to hunt in British Columbia and that there is *prima facie* infringement of that right.[3] She noted that the right to hunt must be in relation to the traditional territory of the Sinixt and must be integral to the distinctive culture of the Sinixt.[4] The trial judge held that Mr. Desautel is a member of the Lakes Tribe of the Confederated Tribes of the Colville reservation in Washington State, but that the Lakes Tribe was a successor group of the Sinixt people living in British Columbia at the time of contact.[5]

8. The trial judge specifically noted there was no evidence that the Sinixt gave up a claim to their traditional territory. The period between 1930 and 2010 when hunting in that territory had ceased, or was "under the radar", did not sever continuity in the way set out in the decision of this Court in *R v Van der Peet*.[6] Citing paragraphs 63-65 of the *Van der Peet* decision, she held that continuity did not require physical presence on the land and that flexibility was required with respect to the establishment of pre-contact practices.[7] The trial judge held there was insufficient

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[2] *R v Desautel*, 2017 BCPC 84, paras 2-3 [BCPC] (Appellant's Record, Part I, Vol I, Tab 1, p 2)
[3] BCPC, para 52 (Appellant's Record, Part I, Vol I, Tab 1, p 17)
[4] BCPC, para 53 (Appellant's Record, Part I, Vol I, Tab 1, p 17)
[5] BCPC, paras 2 and 68 (Appellant's Record, Part I, Vol I, Tab 1, pp 2 and 21)
[6] BCPC, para 128 (Appellant's Record, Part I, Vol I, Tab 1, p 45); *R v Van der Peet,* [1996] 2 SCR 507 [*Van der Peet*]
[7] BCPC, paras 129-130 (Appellant's Record, Part I, Vol I, Tab 1, pp 45-46)

evidence that the Lakes Tribe voluntarily stopped using their traditional territory in British Columbia and that the chain of continuity was not broken. Therefore, Mr. Desautel had an aboriginal right to hunt in British Columbia "pursuant to the test in *R v Van der Peet*".[8]

9. The issue of sovereign incompatibility was addressed over three distinct time periods by the trial judge.[9] She held there was no need to determine a mobility right in the context of this case, which effectively meant she was of the view that sovereign incompatibility did not arise in this case.[10] That said, she rejected the application of the concurring judgment in *Mitchell v Minister of National Revenue*[11] because this case was not inevitably seen as a mobility claim and the right at issue was not incompatible with sovereignty.[12]

10. Specifically, she held that "it does not follow" that the 1846 Oregon boundary treaty and the related assertion of sovereignty "…cannot co-exist with their [the Sinixt] right to hunt in their traditional territory north of the 49th parallel".[13] Similarly, the trial judge concluded that an 1896 act from British Columbia making it illegal for "…Indians not resident in the province to kill game at any time of the year"[14] was not an exercise of Canadian sovereignty as it was "so clearly" *ultra vires* the provincial legislature.[15]

11. The trial judge also rejected the argument that the Sinixt's aboriginal right to hunt in its traditional territory in British Columbia did not survive the coming into force of s. 35(1) of the *Constitution Act, 1982*. She rejected this argument not on the basis of sovereign incompatibility, but because it was an existing aboriginal right that had not been extinguished by s. 35(1).[16] To that end, she commented that " …I find that to read s. 35(1) as intending to apply only to aboriginal peoples holding Canadian citizenship would work an unintended hardship on those other non-

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[8] BCPC, paras 131-134 and quote from para 135 (Appellant's Record, Part I, Vol I, Tab 1, pp 46-47)
[9] BCPC, para 136 (Appellant's Record, Part I, Vol I, Tab 1, p 47)
[10] BCPC, para 146 (Appellant's Record, Part I, Vol I, Tab 1, p 50)
[11] *Mitchell v Minister of National Revenue,* 2001 SCC 33 [*Mitchell*]
[12] BCPC, para 144 and 146 (Appellant's Record, Part I, Vol I, Tab 1, p 50)
[13] BCPC, para 148 (Appellant's Record, Part I, Vol I, Tab 1, p 51)
[14] BCPC, para 149 (Appellant's Record, Part I, Vol I, Tab 1, p 51)
[15] BCPC, para 150 (Appellant's Record, Part I, Vol I, Tab 1, pp 51-52)
[16] BCPC, paras 158-159 (Appellant's Record, Part I, Vol I, Tab 1, pp 54-55)

citizen aboriginal peoples like the Lakes Tribe who also had unextinguished aboriginal rights in 1982".[17]

British Columbia Supreme Court

12. The summary conviction appeal judge largely upheld the decision of the trial judge with the exception being that he overturned the granting of a remedy pursuant to s. 24(1) of the *Charter*.[18] He framed the questions on appeal as "whether an aboriginal group must reside in Canada to be considered an aboriginal people of Canada" and whether the right asserted by Mr. Desautel is "incompatible with Canadian sovereignty".[19]

13. He concluded, therefore, the fact that the Sinixt people in this case were now situated in the United States "…does not preclude them from being considered to be an aboriginal people of Canada".[20] He also held that the term "aboriginal peoples of Canada" as found in s. 35 means peoples who occupied what is now Canada prior to first contact, and that their rights are as established by application of the *Van der Peet* test.[21]

14. The judge concluded that he need not decide the issue of sovereign incompatibility and that the trial judge did not err in finding that the issue did not arise before her.[22] In reaching this conclusion, the summary appeal conviction judge noted that Mr. Desautel had not been charged with coming into Canada illegally, there was no evidence that he was denied entry and his right to enter Canada had not been challenged.[23]

British Columbia Court of Appeal

15. The British Columbia Court of Appeal started its analysis by quoting at length from the *Van der Peet* decision in support of the view that s. 35(1) must be afforded a generous, liberal

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[17] BCPC, para 165 (Appellant's Record, Part I, Vol I, Tab 1, p 56)
[18] *R v Desautel*, 2017 BCSC 2389, para 11 [BCSC] (Appellant's Record, Part I, Vol I, Tab 3, p 70)
[19] BCSC, para 10 (Appellant's Record, Part I, Vol I, Tab 3, p 70)
[20] BCSC, para 87 (Appellant's Record, Part I, Vol I, Tab 3, p 89)
[21] BCSC, para 89 (Appellant's Record, Part I, Vol I, Tab 3, pp 89-90)
[22] BCSC, paras 122-123 (Appellant's Record, Part I, Vol I, Tab 3, p 97)
[23] BCSC, paras 106-107 (Appellant's Record, Part I, Vol I, Tab 3, pp 92-93)

interpretation and any doubt or ambiguity as to the meaning of that provision must be resolved in favour of the Aboriginal peoples.[24] It held that the trial judge's finding that the Lakes Tribe was a modern collective, descended from the Sinixt, was subject to deference on appeal.[25] Specifically, the Court of Appeal found that the *Van der Peet* test addressed the connection between the modern and historic collective through the concept of continuity. In sum, it found that "if the *Van der Peet* requirements are met, the modern Indigenous community will be an 'Aboriginal peoples of Canada'".[26]

16. In reaching this conclusion, the Court of Appeal rejected any application of this Court's decision in *R v Powley*, which refers to a s. 35(1) rights claimant being required to demonstrate they are part of a contemporary community in the geographic area where the right was exercised.[27] It concluded that *Powley* did not import such a modern residence requirement and that the difference in *Powley* could be attributed to the need to accommodate the unique history of the Métis, which required a shift in "…the time period analysis in *Van der Peet* from pre-contact to pre-control".[28] The Court of Appeal determined that imposing a geographic requirement that modern rights holders occupy the same geographic area as their ancestors who exercised those rights "ignores the Aboriginal perspective, the realities of colonization and does little towards achieving the ultimate goal of reconciliation". Consequently, it rejected the need to modify the *Van der Peet* test to include a geographic requirement.[29]

17. The Court of Appeal found it was not necessary to decide the issue of a possible incidental mobility right and such a right's compatibility with Canadian sovereignty.[30] It nevertheless added that the doctrines of extinguishment, infringement and justification would provide a "helpful analytical framework" for deciding that issue.[31]

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[24] *R v Desautel*, 2019 BCCA 151, paras 51-52 [BCCA] (Appellant's Record, Part I, Vol I, Tab 7, pp 126-128)
[25] BCCA, para 56 (Appellant's Record, Part I, Vol I, Tab 7, p 129)
[26] BCCA, para 57 (Appellant's Record, Part I, Vol I, Tab 7, pp 129-130)
[27] BCCA, para 58 (Appellant's Record, Part I, Vol I, Tab 7, p 130)
[28] BCCA, para 59 (Appellant's Record, Part I, Vol I, Tab 7, p 130)
[29] BCCA, para 62 (Appellant's Record, Part I, Vol I, Tab 7, p 131)
[30] BCCA, para 66 (Appellant's Record, Part I, Vol I, Tab 7, pp 132-133)
[31] BCCA, para 70 (Appellant's Record, Part I, Vol I, Tab 7, pp 133-134)

PART II – POINTS IN ISSUE

18. The below constitutional question is at issue:

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

PART III – ARGUMENT

I. Principles to Take into Account in the Interpretation of the Constitution

i) A Generous and Purposive Interpretation of s. 35 is Required

19. Constitutional interpretation often focuses on the text. It must "…begin with the language of the constitutional law or provision in question".[32] More particularly, "the question is not what may be supposed to have been intended, but what has been said".[33] As set out by this Court, "[t]he primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework".[34]

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[32] *British Columbia (Attorney General) v Canada (Attorney General)*, [1994] 2 SCR 41, p 88 [*BC (AG) v Can (AG)*]; see also *Yellowknife Public Denominational District Education Authority v Northwest Territories (Local Authorities Election Act, Returning Officer)*, 2008 NWTCA 13, para 63 [*Yellowknife*]

[33] *BC (AG) v Can (AG)*, page 88, quoting *Edwards v Attorney General for Canada*, [1930] 1 DLR 98, page 107

[34] *Quebec (Attorney General) v Canada (Attorney General),* 2015 SCC 14, para 18

20. The honour of the Crown requires a generous and purposive interpretation of s. 35 to further the objective of reconciliation.[35] This Court has rejected a formalistic or narrow interpretation of s. 35 rights.[36] In that vein, the interpretation of s. 35(1) - particularly the phrase "aboriginal peoples of Canada" - should not be limited solely to the wording of the provision.

21. The approach taken in the *Blais* decision is instructive in the present appeal: "The starting point in this endeavour is that a statute - and this includes statutes of constitutional force - must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve".[37] The task is to interpret the language actually used in the document, having regard to the historical realities and context surrounding the creation of the document in question.[38] The analysis must be anchored in the historical context of the provision.[39] However, it is important not to "overshoot" the objective of the provision at issue.[40]

22. A context-informed interpretation of s. 35 should be utilized in answering the constitutional question in this appeal. In *Beckman,* the Court stated that the "grand purpose" of s. 35 is "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship…".[41] This is achieved by reconciling Indigenous interests with the modern Canadian state.[42]

23. This Court has encouraged viewing s. 35 rights along a spectrum, with more or less intimate connections to land. Acknowledging both historic occupation and distinctive cultures as sources of aboriginal rights better accommodates the diverse histories and realities of Aboriginal

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[35] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, para 24 [*Newfoundland and Labrador (AG)*]; *R v Sparrow* [1990] 1 SCR 1075, p 1106; *Van der Peet*, para 31
[36] *R v Marshall; R v Bernard*, 2005 SCC 43, para 48 [*Marshall/Bernard*]; *Mikisew Cree First Nation v Canada*, 2018 SCC 40, paras 22 and 44
[37] *R v Blais,* 2003 SCC 44, para 16 [*Blais*]
[38] *Blais*, para 40; see also *Yellowknife*, para 63
[39] *Blais*, para 40
[40] *Blais*, paras 17-18 and 40; see also *R v Stillman*, 2019 SCC 40, para 21 [*Stillman*] in the *Charter* context
[41] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, para 10 [*Beckman*]; see also *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, para 34
[42] *Newfoundland and Labrador (AG)*, para 238 (in dissent)

societies.[43] To be given meaningful content, s. 35 must recognize and affirm not only the ancient occupation of land by Indigenous peoples, but also the contribution of those peoples to the building of Canada.[44] When determining which non-domiciled individuals can exercise aboriginal rights under s. 35(1), a proper contextual interpretation will take into account not only the Indigenous collective's history, but also whether the claimant has a present day connection with a contemporary Indigenous collective in Canada, and recognition by that collective of the s. 35 right that the individual purports to exercise.

II. The Framework to Use when Interpreting and Applying s. 35(1)

24. The courts below erred in simply applying the *Van der Peet* test to the facts of this case and not applying *Powley*. As recognized by the Court of Appeal, *Van der Peet* mandates looking at the practices, customs and traditions integral to the distinctive culture of the historic collective when defining aboriginal rights.[45] But the *Van der Peet* principles do not resolve the issues in this case. *Van der Peet* centered on the scope of aboriginal rights protected by s. 35 (not including aboriginal title),[46] whereas the issues raised in this appeal concern how to identify the rights holders, and how an individual can exercise collectively-held rights.

25. The Court of Appeal framed the threshold issue before it as "…whether the *Van der Peet* test should be modified where the Aboriginal right claimant is not a resident or citizen of Canada".[47] It answered the question in the negative because, in its view, modifying *Van der Peet* to include a specific geographic requirement would prevent members of Indigenous communities that were displaced from establishing aboriginal rights in areas their ancestors had occupied pre-contact.[48]

26. This analysis fails to correctly identify the issues. The first issue here is which collective(s) holds the s. 35 right that Mr. Desautel claimed to exercise. The Court of Appeal dismissed any

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[43] *Newfoundland and Labrador (AG)*, para 27
[44] *Newfoundland and Labrador (AG)*, para 21
[45] BCCA, para 55 (Appellant's Record, Part I, Vol I, Tab 7, p 129)
[46] *Van der Peet*, paras 61-65
[47] BCCA, para 61 (Appellant's Record, Part I, Vol I, Tab 7, p 131)
[48] BCCA, para 62 (Appellant's Record, Part I, Vol I, Tab 7, p 131)

reliance on *R v Powley* because it found that this Court had refined the test in *Powley* to deal solely with the unique history of the Métis.[49] The Court of Appeal also commented that *Powley* could not be used to require the modern Indigenous collective to reside in the same geographic area as the historic collective,[50] as that would not take into account the perspective of the Indigenous community.[51]

27. The Court of Appeal's approach was that "…if the *Van der Peet* requirements are met, the modern Indigenous community will be an 'aboriginal peoples of Canada'".[52] In applying the *Van der Peet* criteria, the courts below found that the Lakes Tribe in Washington State is a modern successor group to the Sinixt people living in British Columbia at the time of contact[53] and although the Lakes Tribe did not hunt in British Columbia after 1930, the chain of continuity between the hunting practices of the historical Sinixt collective and the contemporary Lakes Tribe had not been broken.[54]

28. This approach leads to an overly broad interpretation of the term "aboriginal peoples of Canada," and does not distinguish between who can *hold* aboriginal rights and who can *exercise* aboriginal rights. *Van der Peet* focused on identifying the s. 35 aboriginal right at issue. In that case there was no issue as to whether Ms. Van der Peet could exercise a s. 35 right. In the present appeal, the issues include which collective(s) (resident or non-resident) holds a s. 35 right and whether Mr. Desautel can exercise that right. The *Van der Peet* framework alone does not answer these questions.

29. The Court of Appeal focused almost exclusively on the "geographic requirement" that it says should not be added to *Van der Peet.* It did not take into account certain aspects of *Powley*[55] that would assist in determining the issues before the Court. *Powley* provides a more focused

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[49] BCCA, paras 58-59 (Appellant's Record, Part I, Vol I, Tab 7, p 130)
[50] BCCA, para 58 (Appellant's Record, Part I, Vol I, Tab 7, p 130)
[51] BCCA, para 62 (Appellant's Record, Part I, Vol I, Tab 7, p 131)
[52] BCCA, para 57 (Appellant's Record, Part I, Vol I, Tab 7, p 129-130)
[53] BCPC, para 68 (Appellant's Record, Part I, Vol I, Tab 1, p 21); BCCA, para 56 (Appellant's Record, Part I, Vol I, Tab 7, p 129)
[54] BCCA, para 56 (Appellant's Record, Part I, Vol I, Tab 7, p 129)
[55] *R v Powley*, 2003 SCC 43 [*Powley*]

approach for determining who can exercise s. 35 rights and has been applied in this way by other appellate and superior courts.[56] The issue in *Powley* was whether members of the Métis community of Sault Ste. Marie enjoy a right to hunt for food that is protected under s. 35 of the *Constitution Act, 1982*.[57] Specifically, the question was whether ss. 46 and 47(1) of the *Game and Fish Act* of Ontario, which prohibited moose hunting without a licence, infringed the Powleys' constitutional right to hunt for food.[58]

30. In deciding whether the Powleys could exercise s. 35 rights, this Court declined to offer a comprehensive definition of 'who is Métis'.[59] The Court found it was only necessary to verify that the claimants belong "…to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right".[60] To verify each claimant's membership in the relevant contemporary community, this Court considered three broad factors as *indicia* of Métis identity: (1) the claimant must self-identify as a member of a Métis community; (2) the claimant must present evidence of an ancestral connection to a historic Métis community; and (3) the claimant must demonstrate that they are accepted by the modern community, whose continuity with the historic community provides the legal foundation for the right claimed.[61]

31. A similar framework should be applied in this case, with no need to comprehensively define "aboriginal peoples of Canada". This proposed framework does not replace the test for determining the scope of s. 35(1) rights where the location, or domicile of the claimant is not at issue. Drawing on this Court's jurisprudence, particularly *Van der Peet* and *Powley,* the following analytical framework is proposed to determine whether a non-domiciled Indigenous individual can establish that they may exercise a s. 35(1) right:

A. Identification of the precise nature of the right to be exercised;

B. Identification of the historic rights-bearing collective;

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[56] *Hopper v R*, 2008 NBCA 42, para 14; *R v Vienneau*, 2014 NBQB 92, para 40, leave to appeal refused *Vienneau v R*, 2017 NBCA 20; *Bernard v R*, 2017 NBCA 48, para 48; *R v Lamb*, 2020 NBCA 22, paras 11-13 and 23
[57] *Powley*, para 1
[58] *Powley*, para 8
[59] *Powley*, paras 11-12 and 30
[60] *Powley*, para 12
[61] *Powley*, paras 30-34

> C. Identification of the contemporary rights-bearing Indigenous collective resident in Canada; and
>
> D. Establishment of the claimant's substantial connection to the contemporary rights-bearing Indigenous collective in Canada through self-identification with that collective, a demonstration of ancestral connection to that collective, and acceptance by and permission from that collective.

32. The courts below applied the first two criteria, which are required by both *Van der Peet* and *Powley.* They identified that the precise nature of the right being exercised was the right to hunt for food, social, and ceremonial purposes in Sinixt traditional territory in Canada.[62] They found that the relevant historic collective is the Sinixt, and the present-day rights-holding community is the Lakes Tribe, located in the United States.[63]

33. The courts below did not consider the last two criteria. Their importance is demonstrated in the practice of sheltering. As noted by the Ontario Court of Appeal, sheltering is a practice in which a treaty collective permits an individual to exercise that collective's treaty rights, even though the individual is not a member of the collective or a treaty beneficiary. In addition to historical connections, sheltering focuses on acceptance by and permission from the Indigenous collective that holds the treaty right.[64] The sheltering approach, though in a different context from and not specifically applicable to the present case, can generally inform the framework to apply in the context of this appeal. However, recognition of individuals from outside of the relevant collective for the purpose of exercising s. 35 rights does not mean that those individuals are entitled to receive other benefits and programs available to the collective in Canada.

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[62] BCCA, para 11 (Appellant's Record, Part I, Vol I, Tab 7, p 114)
[63] BCCA, paras 9 and 56 (Appellant's Record, Part I, Vol I, Tab 7, pp 113-114 and 129)
[64] *R v Shipman*, 2007 ONCA 338, paras 1-3 and 41- 46 [*Shipman*]; *R* v *Meshake*, 2007 ONCA 337, paras 26 and 31-33 [*Meshake*]

III. Analytical Framework to Determine Rights-Holder

A. Identification of the Precise Nature of the Right to be Exercised

34. As properly recognized by the courts below, and as emphasized in *Van der Peet*, *Powley* and *Mitchell*, the first step in considering an asserted s. 35 Aboriginal right is to characterize the precise nature of the right being exercised.[65] As the Court noted in *Van der Peet*, the claimed Aboriginal right must be an element of a practice, custom or tradition integral to the distinctive nature of the Indigenous group claiming the right.[66] Though not determinative, this Court has noted that Aboriginal rights are generally site-specific in nature.[67] What can be added at this stage is the Indigenous collective in Canada, once identified, should have a pivotal role in determining the scope and the duration of the s. 35 right that it permits the non-domiciled claimant to exercise, as guided by the principles of sheltering.

B. Identification of the historic rights-bearing community

35. The second step is to identify the historic rights-bearing community upon which the aboriginal right is based. Although it focused on the identification of Métis collectives, the decision in *Powley* discussed how that determination could be achieved.[68] Factors such as demographic evidence, proof of shared customs and traditions and a collective identity can be taken into account to identify the historic rights based community.[69] In this appeal, there seems to be no disagreement that the relevant historic rights-bearing community is the Sinixt.[70] What is not clear is which modern day Indigenous collectives in Canada are the successor rights-holding collectives of the Sinixt.

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[65] *Powley*, para 19; *Van der Peet*, para 76; *Mitchell*, para 14
[66] *Van der Peet*, para 46
[67] *R v Coté*, [1996] 3 SCR 139, para 39; *Powley*, para 19; *R v Sappier*, 2006 SCC 54, paras 50-51; *Newfoundland and Labrador (AG)*, para 157 (in dissent)
[68] *Powley*, paras 21-23
[69] *Powley,* para 23; see also *Shipman,* paras 41 - 46
[70] BCPC, para 14 (Appellant's Record, Part I, Vol 1, Tab 1, p 5); BCCA, para 56 (Appellant's Record, Part I, Vol I, Tab 7, p 129)

C. Identification of and Continuity with the Contemporary Rights-Bearing Indigenous Collective Resident in Canada

36. Aboriginal rights are communal in nature. In general, they must be grounded in the existence of both a historic and present community, and may only be exercised by virtue of an individual's ancestrally-based membership in the modern-day community.[71] In circumstances such as this appeal, this step should require that the asserted aboriginal right be held by a successor collective resident in Canada. This mirrors the wording of s. 35 which refers to "aboriginal peoples of Canada" and reflects the reality of the assertion of the international border that is accounted for in modern treaties, such as those described by the Attorney General of the Yukon.[72] Further, the individual asserting the right must demonstrate a substantial connection to the resident successor collective. It should only be through the contemporary Indigenous collective in Canada that an individual claimant who is a non-domiciled Indigenous individual might be authorized and entitled to exercise a s. 35(1) right.

37. In addition, the claimant must establish a connection with the pre-sovereignty collective whose practices they rely on to assert the claim of an aboriginal right.[73] Continuity is closely tied to the identification of a contemporary rights-bearing collective in Canada and the need for community acceptance of those claiming rights and permission from the resident collective. Continuity is satisfied by a clear demonstration of identifiable linkages between the non-resident individual claiming the rights and the contemporary rights-bearing Indigenous collective in Canada. It does not, however, confer all benefits held by the collective in Canada on the individual.

38. The notion of "continuity" is well-established in the jurisprudence of this Court. In *Van der Peet*, the establishment of the aboriginal right was premised, partially, on the ability to demonstrate the pre-contact practice, custom or tradition continued to the present.[74] Continuity

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[71] *Powley*, para 24
[72] Factum of the Attorney General of the Yukon, paras 18-20; see also Factum of the Attorney General of Saskatchewan, paras 42-43
[73] *Marshall/Bernard*, para 67
[74] *Van der Peet*, paras 63-65; see also *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, paras 7-8 and 49-51 [*Lax Kw'alaams*]

must be demonstrated through acceptance by the contemporary collective in Canada and such acceptance may take many forms. For example, in *R v Shipman*, the appellants were members of Walpole Island First Nation but were not beneficiaries to the Robinson-Superior Treaty, within whose territory they were hunting. While the Michipicoten First Nation, a treaty beneficiary, could have given the appellants permission to hunt in the treaty area and had given such permission on other occasions, no such permission had been sought or granted in respect of the hunt at issue. Accordingly, the Ontario Court of Appeal found that the appellants did not have a 'sheltering' right to hunt in the Robinson-Superior Treaty area, as the required invitation and/or permissions to hunt by a First Nation with treaty rights to hunt in the area had not been granted. Permission is important, as it would give the treaty beneficiaries an opportunity to consider the implications on their treaty rights and any conservation issues.[75] It also emphasizes that the non-domiciled individual cannot exercise s. 35 aboriginal rights independently. Such exercise must be through a s. 35 rights holding Indigenous collective in Canada.

39. The courts below found it was sufficient to identify a historic collective in what was to become Canada, a present-day successor collective (regardless of location) and some degree of continuity between the practice of the modern collective and the historic collective pre-contact.[76] This approach is too broad. It overshoots the objective of s. 35(1), which is to reconcile the interests of Aboriginal and non-Aboriginal Canadians in a mutually respectful, long-term relationship.[77] If followed, this approach would result in an Indigenous collective, resident entirely in the United States, being entitled to assert the full range of aboriginal rights in Canada, including the right to limited and scarce resources. As set out by the appellant British Columbia, such an outcome is generally inconsistent with the phrase "aboriginal peoples of Canada" found in s. 35.[78]

40. The approach of the courts below would also create corresponding obligations on the Crown (such as the duty to consult and where appropriate accommodate) towards Indigenous collectives in the United States, before those rights have been established. It would do so without any consideration of the perspective of modern Indigenous peoples in Canada, or the potential

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[75] *Shipman*, paras 50–53; *Meshake,* paras 18, 21, 31, and 37-39
[76] BCCA, para 73 (Appellant's Record, Part I, Vol I, Tab 7, p 134)
[77] *Beckman*, para 10; *Blais*, paras 17-18 and 40; *Stillman*, para 21
[78] Factum of the Attorney General of British Columbia, paras 59-63

impacts that non-domiciled individuals exercising s. 35(1) rights may have on scarce resources. This strains the Canadian constitutional and legal structure in that the Indigenous perspective must be viewed within the general legal system of Canada.[79] The obligation of governments to manage resources for the benefit of all Canadians must be maintained.[80]

41. Viewed from that perspective, the primary determination of which non-domiciled individuals may exercise s. 35 rights would be in the hands of the relevant Indigenous collective in Canada (through a framework informed by the practice of sheltering). However, the ability of the non-domiciled individuals to exercise s. 35 rights in Canada is not absolute. The recognition of s. 35 rights, guided by a sheltering-based framework, would need to specifically delineate the aboriginal right that the non-domiciled individuals may exercise. Though it was recognized in the context of commercial rights, this Court in *Lax Kw'alaams Indian Band v Canada (Attorney General),* accepted the need to determine the scope of aboriginal rights for the benefit of Indigenous and non-Indigenous people.[81]

42. As such, there is still a role for the federal and provincial governments. Through legislation, regulation or policy, governments may place restrictions on how such s. 35 rights are exercised by the non-domiciled individuals (most likely dealing with resource management), or delineate the manner in which sheltered individuals may exercise s. 35 rights. Such restrictions would be subject to the infringement and justification analysis set out in *R v Sparrow*. However, the required justification may vary depending on the context of the restriction at issue.

43. Finally, the modern Indigenous collective in Canada need not be presently situated in the exact same geographic area as the historic claim. As set out by the Court of Appeal, imposing such a geographical requirement would ignore "…the Aboriginal perspective, the realities of colonization and does little towards achieving the ultimate goal of reconciliation".[82] The determination of why geographic continuity was not maintained and what, if any, that

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[79] *Van der Peet*, para 49; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, para 82
[80] *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12, para 37; *Doug Kimoto v Canada (Attorney General),* 2011 FCA 291, para 13
[81] *Lax Kw'alaams,* para 46
[82] BCCA, para 62 (Appellant's Record, Part I, Vol I, Tab 7, p 131)

determination may have on the s. 35(1) claim, should be determined upon a consideration of the facts of each particular case.

D. Determination of the claimant's substantial connection to the contemporary rights-bearing Indigenous collective in Canada through self-identification, ancestral connection, community acceptance and permission

44. Substantial connection to the modern Indigenous collective in Canada is demonstrated in three ways: a) self-identification; b) continuous ancestral connection; and c) community acceptance and permission.

45. Self-identification is a straight-forward concept that in most cases will not be an onerous hurdle. In the context of claims like this, it requires that the individual self-identify with the contemporary rights-holding or rights-asserting Indigenous collective resident in Canada. Self-identification does not require that the individual be formally recognized as a member of the contemporary Canadian collective, but it should reflect the individual's ancestral connection to the historic collective.

46. As noted in *Powley*, the self-identification must not be of a recent vintage.[83] Drawing on the notion of continuity, an ongoing ancestral connection would require each non-domiciled claimant to demonstrate that they have both ancestral and present linkages to an Indigenous collective in Canada which holds or asserts the s. 35 rights sought to be exercised.

47. The courts should take a flexible approach to the specific context of each case,[84] as the individual circumstances of each claimant are important. For example, two non-domiciled claimants may both be members of the same Indigenous collective in the United States. The first individual may be able to demonstrate the necessary ancestral and present linkages to an Indigenous collective in Canada, while the second individual's ancestry may be such that their lineage is completely on the American side of the international border. The second individual would be unable to satisfy the ancestral connection criterion, even though that person is a member of the same Indigenous collective in the United States as the first individual.

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[83] *Powley*, para 31
[84] *Van der Peet*, para 65

48. Finally, although not fully determinative, community acceptance, recognition and permission are important. Requiring the establishment of the claimant's connection with, acceptance by and permission from the contemporary Indigenous collective in Canada will ensure that respect is given to the Aboriginal perspective, as required by *Van der Peet*.[85] This perspective is grounded in their traditional protocols and their system of law, and may include arrangements the contemporary community has had with neighbouring Indigenous Nations with respect to traditional territories. In particular, it will promote reconciliation by providing the Indigenous collective in Canada with a pivotal role in determining who can exercise that community's collective s. 35 rights and how they can be exercised. Continuity, when coupled with community acceptance and permission, will also provide Indigenous collectives in Canada with some control over how their established or asserted s. 35(1) rights can be exercised. An indication of community acceptance and permission through a letter or other means of expressing acceptance would allow contemporary rights-bearing Indigenous collectives in Canada to set out specifically, and with parameters, the scope of the right that can be exercised. However, any acceptance by an Indigenous collective in Canada (through the framework informed by the process of sheltering), or the conferring of membership by a contemporary Indigenous collective in Canada to a non-domiciled Indigenous person/peoples, would not confer or deny any rights of entry into Canada or Canadian citizenship.

49. This approach is consistent with the recognition of Indigenous peoples' right to self-determination in Canada and the United Nations' *Declaration on the Rights of Indigenous Peoples.*[86] The *Declaration*, for example, provides that Indigenous peoples have the right to maintain and develop contacts, relations and cooperation across borders.[87] Community acceptance also avoids the possibility of a non-domiciled Indigenous person exercising a s. 35(1) right in a manner that runs contrary to the views or wishes of the Indigenous collective in Canada. This acknowledges the important role that Indigenous collectives in Canada have in managing the

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[85] *Van der Peet*, paras 49-50
[86] United Nations' *Declaration on the Rights of Indigenous Peoples* (UN GA Res 61/295, 61st Sess, Supp No 53 (2007)), articles 3, 4 and 36 [UNDRIP]
[87] UNDRIP, article 36

impacts that a broader interpretation of s. 35 rights holders may have on their own ability to exercise their s. 35 rights, including impacts on resources and practices like hunting and fishing.

IV. Sovereignty and Section 35(1)

50. The courts below determined that the issue of sovereign incompatibility did not arise on the facts of this case, primarily because there was no assertion that Mr. Desautel entered Canada illegally. Consequently, the issue of sovereign incompatibility and section 35(1) aboriginal rights (including the possibility of incidental mobility rights) should be determined in a case where the issue is squarely raised and a full evidentiary record is before the courts.[88]

51. However, should this Court determine the issue must be addressed in this case, the following factors should guide the analysis. First, the exercise of government power is not absolute, just as s. 35 and *Charter* rights are not absolute. Canada has, by its Constitution, limited the exercise of government powers which may be inherent as a sovereign state. Section 35 is one such limit; the *Charter* is another. Canadian authorities are subject to these self-imposed limitations on what would otherwise be an incident of sovereign power.[89] Even if this limitation is accepted, individuals who are non-domiciled Indigenous persons, but who may exercise s. 35 rights, may not be permitted to enter Canada in every circumstance.

52. Parliament must maintain the ability to make reasonable choices for the general welfare of the nation[90] and pursue pressing objectives. This may include maintaining national security and public health, which makes control over borders a crucial aspect of sovereignty. The *Immigration and Refugee Protection Act* (*IRPA*)[91] sets out broad objectives and principles that are applied to a full spectrum of unique immigration situations. Under the existing *IRPA* framework, whether a

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[88] *Mackay v Manitoba*, [1989] 2 SCR 357, pp 361-363; *Danson v Ontario (AG)*, [1990] 2 SCR 1086, pp 1099-1102
[89] *Watt v Liebelt*, [1999] 2 FC 455 (Appeal Division), para 15 [*Watt*]
[90] *R v Simmons*, [1988] 2 SCR 495, p 528
[91] SC 2001, c 27 [*IRPA*]

non-domiciled Indigenous individual can exercise a s. 35 right in Canada is a relevant (but not determinative) consideration in deciding whether to allow entry into Canada.[92]

53. Second, assuming no extinguishment of the asserted right prior to 1982, the question arises as to whether an incidental mobility right exists. This will depend entirely on whether the incidental mobility right is required to meaningfully exercise the claimed aboriginal right.[93] The scope of such a right should be defined based on the particular evidence in each case and would almost always need to be limited to mobility through a particular territory for particular purposes.

54. Third, if a claimant has established the ability to exercise a s. 35(1) right, an incidental mobility right to access certain territory in Canada may also need to be determined. The manner in which such a right interacts with Canadian sovereignty should be determined on the specific facts of each case. The majority of this Court in *Mitchell* has suggested that the framework to determine such matters generally lies in the law of infringement and justification under the *Sparrow* framework.[94]

55. The imposition of a border control, including the denial of entry to an individual who claims a mobility right, may infringe that individual's ability to exercise s. 35 rights. Any such infringement should be reviewed pursuant to the *Sparrow* framework. The outcome will depend on the evidence in the particular case.[95] In this case, there is no evidence that Mr. Desautel was denied entry to Canada, so there is no need to consider whether an incidental mobility right exists or was justifiably infringed.

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[92] See for example *IRPA*, ss 20-22, 24-25 and 25.2
[93] *Mitchell,* para 22
[94] *Mitchell*, para 63
[95] *Watt*, paras 17 and 20

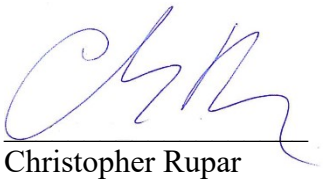
PART IV-SUBMISSIONS ON COSTS

56. The Attorney General of Canada does not seek costs and submits that no costs should be awarded against him.

PART V- ORDER SOUGHT

57. The Attorney General of Canada takes no position on the outcome of this appeal and asks for 10 minutes for his oral argument before the Court.

DATED at Ottawa, Ontario, this 27th day of May, 2020.



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PART VI – LIST OF AUTHORITIES

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4.	*Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12	40
5.	*Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12	22

27.	*R v Simmons*, [1988] 2 SCR 495	52
28.	*R v Sparrow*, [1990] 1 SCR 1075	4-5, 20, 42, 54-55
29.	*R v Stillman*, 2019 SCC 40	21, 39
30.	*R v Van der Peet,* [1996] 2 SCR 507	8, 13, 15-16, 20, 24-25, 27-29, 31-32, 34, 38, 40, 47-48
31.	*R v Vienneau*, 2014 NBQB 92	29
32.	*Vienneau v R*, 2017 NBCA 20	29
33.	*Watt v Liebelt*, [1999] 2 FC 455 (no paragraph numbers), or on Westlaw	51, 55
34.	*Yellowknife Public Denominational District Education Authority v Northwest Territories (Local Authorities Election Act, Returning Officer)*, 2008 NWTCA 13	19, 21

International Documents	**Cited at para.**
United Nations' *Declaration on the Rights of Indigenous Peoples*, (UN GA Res 61/295, 61st Sess, Supp No 53 (2007)), Art. 3, 4, 36	49