Court File No. 38734

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

AND:

RICHARD LEE DESAUTEL

RESPONDENT
(Respondent)

AND:

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

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TABLE OF CONTENTS

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Okanagan Nation Alliance ("ONA"), and its governing body the Chiefs Executive Council ("CEC"), represent the *Syilx* Okanagan Nation, which is a present day collective whose Territory includes the geographical area at issue in this appeal. The ONA sought and obtained leave to appeal in the Courts below and in this Court. The ONA sought leave to try to ensure that findings are not made that could prejudice the *Syilx* Okanagan Nation's Aboriginal rights and interests.

2. The ONA respectfully submits that there is no "present-day community" criterion in the test for Aboriginal rights, as suggested by the Appellant and some of the Attorney General interveners. To add such a criterion would deny the impacts of colonialism on Aboriginal peoples, including attempts to remove Aboriginal peoples from their territories.

3. It is critically important in regulatory prosecutions of this nature that Courts refrain from attempting to delineate the entire collective or Indigenous Nation at issue or the Nation's membership or political representatives. No findings should be made that would suggest there is no present-day community in British Columbia representing individuals with Sinixt ancestry or that the Lakes Tribe represents all people with Sinixt ancestry. Evidence on these issues was not before the Trial Judge so they cannot be determined in this case. These issues need to be determined in an appropriate case in the future, when relevant evidence with respect to *Syilx* Okanagan Nation membership, the exercise of their members' Aboriginal rights and *Syilx* laws and governance can be heard.

B. Statement of Facts

4. The ONA and the CEC constitute an alliance of *Syilx* Okanagan member communities that represent the collective interests of the *Syilx* Okanagan Nation and its members. The *Syilx* Okanagan Nation includes descendants of Aboriginal people from the Arrow Lakes region.[1]

5. Expert evidence was led at trial and accepted by the Trial Judge about Sinixt descendants living in *Syilx* Okanagan Nation communities in British Columbia.[2] In addition, two members of

[1] Trial Exhibit 31, Sinixt (Lakes) Familial Connection to British Columbia, Opinion, Andrea Laforet, PhD, February 12, 2015 [Laforet Report], pp 6-7, 24-25, RR Vol II, pp 14-15, 32-33.
[2] *R v Desautel*, 2017 BCPC 84 [*BCPC Decision*], paras 58-62, AR Vol I, Tab 1, p 18-19; Laforet Report, pp 6-7, RR Vol II, pp 14-15.

Syilx Okanagan Nation communities in Canada, Hazel Sqaukin and Richard Armstrong, testified that they had ancestral connections to Sinixt and considered themselves to be *Syilx*.[3]

6. The Trial Judge found that Sinixt continue to exist today and that a Sinixt regional group is located in Washington State. In making that finding, she expressly noted that she did not need to decide whether there is also a regional group in British Columbia representing Sinixt people.[4]

7. The ONA was granted intervener status in the appellate Courts below.[5] However, it could not participate in or lead evidence at trial as this case is a regulatory prosecution that was tried in the Provincial Court of British Columbia.[6]

PART II - POSITION ON ISSUES

8. The ONA will address two inter-related issues that arise in this appeal:

- the *Van der Peet* test for Aboriginal rights does not include a "present-day community" criterion requiring a presence in the geographic area where the right was exercised; and
- Courts should not try to exhaustively define the relevant Aboriginal collective or "Nation" or identify the collective's entire membership when an Aboriginal rights defence is advanced in a regulatory prosecution.

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[3] Testimony of Hazel Squakin, Day 8 (October 5, 2016), p 40, lines 3-5, p 48, lines 9-21, quoted in the Written Submissions of the Crown in the Provincial Court of British Columbia, RR Vol I, pp 57-58; Testimony of Richard Armstrong, Day 8 (October 5, 2016) p 23, lines 24-27, p 27, lines 1-21, quoted in the Written Submissions of the Crown in the Provincial Court of British Columbia, RR Vol I, pp 58-59. See also *BCPC Decision*, paras 62-63, AR Vol 1, Tab 1, p 19. Historic and modern day connections between Sinixt and the *Syilx* Okanagan Nation were also identified by the British Columbia Supreme Court in *R v Campbell*, 2000 BCSC 956, para 12, quoted by Justice Sewell in *R v Desautel*, 2017 BCSC 2389 [*BCSC Decision*], paras 73-76, AR Vol 1, Tab 3, p 85-87.

[4] *BCPC Decision*, para 68, AR Vol 1, Tab 1, p 21.

[5] Order of Mr. Justice Bowden, July 27, 2017, AR Vol II, Tab 13, pp 4-5; Order of Mr. Justice Groberman, July 5, 2018, AR Vol II, Tab 14, pp 7-8; *BCSC Decision*, para 38, AR Vol 1, Tab 3, p 78; *R v Desautel*, 2019 BCCA 151 [*BCCA Decision*], para 29, AR Vol 1, Tab 7, p 119.

[6] *Duncan v Canada*, 130 DLR (4th) 99, 1995 CanLII 1077 (BCCA), paras 3-4, 17. See also *R v Nichols*, 2017 BCPC 240, para 8.

PART III - STATEMENT OF ARGUMENT

A. Proper Application of the *Van der Peet* Test

9. The *Van der Peet* test for proof of Aboriginal rights does not include a requirement that the modern collective must reside in or occupy the same geographic area as the historic collective, as the British Columbia Court of Appeal ("BCCA") correctly determined below.[7]

10. Although continuity is part of the test for Aboriginal rights as set out in *Van der Peet*, it relates to continuity of practice, not continuity of community in a specific geographic area. The test requires that a claimant demonstrate the historic and ongoing exercise of the right by the group in question, notwithstanding periodic lapses in practice.[8] *Van der Peet* does not require a claimant to demonstrate the existence of a present-day community in a specific geographic area as the Appellant, the Attorney General of Alberta ("Alberta") and the Attorney General of New Brunswick ("New Brunswick") assert.[9]

11. Purporting to rely on this Court's decisions in *R v Adams* and *R v Côté*,[10] Alberta argues that the BCCA failed to acknowledge that harvesting rights are site-specific in determining that there is no requirement that the modern collective must reside in or occupy the same geographic area as the historic collective.[11] However, this Court did not find in either *Adams* or *Côté* that a modern collective must reside in or occupy the same geographic area as the historic collective to prove an Aboriginal right.

12. In fact, in *Adams*, this Court specifically noted that Aboriginal peoples moved their settlements both before and after contact. This Court emphasized that wherever they settled, what is necessary to prove an Aboriginal right is that, prior to contact, the Aboriginal people engaged in practices, customs and traditions on the land which were integral to their distinctive culture.[12]

13. Adding a requirement that a present-day community must reside in or occupy the same geographic area as the historic community improperly conflates the requirement for continuity of

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[7] *BCCA Decision*, paras 58-59, AR Vol 1, Tab 7, p 130.
[8] *R v Van der Peet*, [1996] 2 SCR 507, para 63 [*Van der Peet*].
[9] Appellant's Factum, paras 61-62; Alberta's Factum, paras 64-71; New Brunswick's Factum, paras 34, 38-47; Ontario's Factum, paras 16-17.
[10] *R v Adams*, [1996] 3 SCR 101 [*Adams*]; *R v Côté*, [1996] 3 SCR 139 [*Côté*].
[11] Alberta's Factum, paras 64-69.
[12] *Adams*, paras 27-28.

occupation in the test for Aboriginal title (where present day occupation is relied upon)[13] with the elements of the test for Aboriginal rights. Additionally, a requirement that a present-day community must reside in or occupy the same geographic area as the historic community to prove Aboriginal rights would essentially result in a "small spots" approach to the exercise of Aboriginal rights. Such an approach was soundly rejected by this Court in relation to Aboriginal title.[14] It should not be adopted in relation to Aboriginal rights.

14. The *Powley*[15] decision relied upon by the Appellant, Alberta, the Attorney General of Canada ("Canada") and the Attorney General of Ontario ("Ontario") also has limited application to the issues raised on this appeal.[16] In that case, this Court established a new test specific to the exercise of Métis section 35 rights based on "important differences between Indian and Métis claims" and "the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights."[17] It did not modify the *Van der Peet* test as it applies to non-Métis claimants, and should not be relied upon in this case, given that this is not a situation of an Indigenous group emerging post-contact.

15. In any event, there is no requirement in *Powley* that there be a contemporary community in the geographic area where the right in question is being exercised. The fact that an Aboriginal right must be "grounded in the existence of a historic and present community"[18] does not mean the community must continue to exist in the specific area of the claimed right today. *R v Hirsekorn*, a case addressing Métis rights to hunt relied on by Alberta, is also not relevant to the issues on this appeal for the same reasons set out above.[19]

16. To require a present-day community in the geographic area where a right is exercised in order to make out an Aboriginal right would also ignore the reality that the process of colonization displaced Aboriginal people from their ancestral lands, moving them to reserves. As stated by Professor Cole Harris:

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[13] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*], paras 25, 45, 50.
[14] *Tsilhqot'in*, paras 29, 42, 56.
[15] *R v Powley*, 2003 SCC 43 [*Powley*].
[16] Appellant's Factum, paras 60-62; Alberta's Factum, paras 70-71; Canada's Factum, paras 24-31; Ontario's Factum, paras 16-17.
[17] *Powley*, para 18.
[18] *Powley*, para 24.
[19] *R v Hirsekorn*, 2013 ABCA 242; Alberta's Factum, para 74.

> Whatever else it may also be, colonialism-particularly in its settler form-is about the displacement of people from their land and its repossession by others. This is its geographical core...The Indian reserve in British Columbia was the compartment into which whites relegated Aboriginal people…[T]his was a forced dispossession that drew on the nexus of powers at the colonizers' disposal.[20]

17. Restricting the exercise of Aboriginal harvesting rights to the area of an Aboriginal person's present-day community would result in further injustice and would be inconsistent with the goal of reconciliation. It would be equivalent to a finding that the Crown can extinguish Aboriginal rights through policies and practices that displaced Aboriginal people who lived in the area where the right was historically exercised.

18. To construe the test for proof of Aboriginal rights in the manner advocated by the Appellant, Alberta and New Brunswick would perpetuate the effects of colonialism and ignore the fact that, despite all of the influences of colonialism, Aboriginal people maintain connections to their lands and resources. It would also ignore the Indigenous perspective, which this Court has underlined as important in the determination of section 35 rights.[21]

19. Understanding the Indigenous perspective means acknowledging that the legal source of Aboriginal rights and title is not state recognition, but rather the realities of prior occupation, sovereignty and control.[22] As noted by this Court, long before Europeans explored and settled North America, Aboriginal peoples were occupying and using their lands in organized, distinctive societies with their own social and political structures, with pre-existing laws and interests.[23]

20. New Brunswick's argument that "the consequence of an Aboriginal right whose exercise requires its manifestation to cross an international border is that the aboriginal right never came into existence"[24] must be rejected. Arguments made by the Attorney General of Saskatchewan ("Saskatchewan") that ignore the fact that prior Indigenous occupation, sovereignty and control

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[20] Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002), xxiv.
[21] *Van der Peet*, para 49; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*], para 84.
[22] *Delgamuukw*, para 114; *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, para 49.
[23] *Mitchell v MNR*, 2001 SCC 33, para 9.
[24] New Brunswick's Factum, para 31.

are the source of Aboriginal rights should also be rejected.[25] These types of arguments deny the foundation and purpose of section 35, which are to reconcile the pre-existence of Indigenous societies with the assertion of Crown sovereignty.[26]

21. Canada asserts that although there is no requirement for a modern Aboriginal collective to be situated in the same geographic area where the claimant exercised the Aboriginal right, there is a requirement for the claimant to establish a substantial connection to a contemporary rights-bearing collective in Canada through self-identification and community acceptance.[27] The ONA agrees with Canada that if there is such a requirement, a proper contextual interpretation would require consideration of whether the collective in Canada recognizes that the individual holds section 35 rights.[28]

22. However, if this Court finds that there is a requirement that there be a contemporary Aboriginal collective in Canada, it is important to note that the Trial Judge did not make a finding that there is no such collective in British Columbia, as Alberta, New Brunswick, Ontario and the Attorney General of Quebec ("Quebec") suggest in their Factums.[29] Evidence regarding the existence of a present-day community representing Sinixt in British Columbia and the hunting practices of people of Sinixt descent residing in British Columbia was not before the Trial Judge, given the constraints regarding the addition of parties to a regulatory prosecution. Accordingly, the Trial Judge correctly declined to make any findings in relation to a present-day community representing people of Sinixt descent in British Columbia.[30]

B. Determining the Relevant Aboriginal Collective

23. ONA respectfully submits that Courts must take care when considering issues relating to Aboriginal collectives, particularly in regulatory prosecutions.

24. As noted by Justice Garson (as she then was) in *Ahousaht*, multiple modern day groups can be connected to the pre-contact group, and "it is generally not necessary for the Court to

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[25] Saskatchewan's Factum, paras 5, 22, 40.
[26] *Delgamuukw*, para 141.
[27] Canada's Factum, paras 2, 23, 31, 36, 37, 43-49.
[28] Canada's Factum, paras 23, 44, 48-49.
[29] Alberta's Factum, para 62; New Brunswick's Factum, paras 33, 39, 47; Ontario's Factum, paras 16, 20; Quebec's Factum, paras 15-17.
[30] *BCPC Decision*, para 68, AR Vol 1, Tab 1, p 21; affirmed in *BCSC Decision*, para 39, AR Vol 1, Tab 3, p 78 and *BCCA Decision*, paras 49, 58, AR Vol 1, Tab 7, pp 125-126, 130.

identify the whole of the appropriate collective with any precision."[31] Where a modern Aboriginal collective seeks a declaration of Aboriginal rights or title in a civil action, the determination of the collective that is the proper rights holder must be done "primarily from the viewpoint of the Aboriginal collective itself."[32]

25. The questions of membership in, and political representation of, Aboriginal collectives, are matters of self-governance,[33] as are issues relating to Indigenous management of resources including protocols relating to hunting.[34] Courts have recognized that Indigenous laws and legal traditions are among Canada's legal traditions and are presumed to survive the assertion of sovereignty.[35] Indigenous laws may encompass Aboriginal peoples' relationship with one another as well as with the world around them,[36] and can include laws related to citizenship and political representation.[37] Recognition of, and respect for, Indigenous laws is critical to the Crown-Indigenous relationship.

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[31] *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2009 BCSC 1494, paras 288, 323, 336, 344, 354, 365.

[32] *William v. British Columbia*, 2012 BCCA 285, para 149.

[33] The ONA agrees with the Attorney General of the Yukon ("Yukon") at paragraph 20 of its Factum, that the question of who is a citizen of an Aboriginal collective is a matter of that collective's internal governance.

[34] In John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill LJ 629, Borrows argues that "the Aboriginal right to hunt is made effective by associated First Nations laws and customs" (at page 643), and that "First Nations laws are integral to the exercise of all Aboriginal rights [and] they must be part of the courts' interpretation of those rights" (at 645). At note 80 (on page 645), Borrows explains that "it is only through the operation of pre-existing First Nations laws that Aboriginal people occupied and possessed land, exercised rights to hunt and fish, or entered into treaties … These laws continued upon contact with non-Native people, and the fruits of these laws have been recognized by Canadian courts as, among other things … hunting and fishing rights …".

[35] *Pastion v Dene Tha' First Nation*, 2018 FC 648, para 8; see also former Chief Justice McLachlin's reasons in *Van der Peet*, para 230 (dissenting in the result).

[36] *Alexander v Roseau River Anishinabe First Nation Custom Council*, 2019 FC 124, para 18.

[37] Article 33 of the *United Nations Declaration on the Rights of Indigenous Peoples* [UNDRIP] affirms Indigenous peoples' right to determine their own identity or membership in accordance

26. In a regulatory prosecution, where the question is whether an individual was exercising a collective right, as required under the *Van der Peet* test, determining who is the proper rights holder (the delineation of the modern collective or Nation) is not central to the analysis. Not only is this question not central to the analysis, but it would be difficult and, in some circumstances, impossible to delineate the Aboriginal collective that is the proper rights holder because the Aboriginal collective itself cannot be a party to the proceeding.

27. These are the types of challenges associated with litigating Aboriginal rights claims in summary conviction proceedings that were noted by Mr. Justice LeBel in *R. v Marshall; R. v Bernard*:

> Although many of the aboriginal rights cases that have made their way to this Court began by way of summary conviction proceedings, it is clear to me that we should re-think the appropriateness of litigating aboriginal treaty, rights and title issues in the context of criminal trials. The issues that are determined in the context of these cases have little to do with the criminality of the accused's conduct; rather, the claims would properly be the subject of civil actions for declarations. Procedural and evidentiary difficulties inherent in adjudicating aboriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge's findings of fact. These claims may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process. In addition, special difficulties come up when dealing with broad title and treaty rights claims that involve geographic areas extending beyond the specific sites relating to the criminal charges.[38]

28. Given these challenges, Aboriginal defendants in regulatory prosecutions should not have the additional burden of exhaustively defining or delineating the proper rights holder or collective to prove an Aboriginal rights defence.

29. In this appeal, the Appellant, New Brunswick and Ontario all suggest that the Lakes Tribe is synonymous with Sinixt, which suggests it is the entire collective.[39] This misconstrues the trial judgment. The Trial Judge's factual finding was that the Lakes Tribe is "a" successor

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with their customs and traditions. UNDRIP is now enacted in British Columbia through the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, Schedule.

[38] *R v Marshall; R v Bernard*, 2005 SCC 43, para 142.

[39] Appellant's Factum, paras 3, 14, 30; New Brunswick's Factum, paras 33, 47, Ontario's Factum, paras 16, 20.

group to Sinixt living in British Columbia at contact, as opposed to the only successor group.[40] Her finding was sufficient to address the question of whether Mr. Desautel was a member of a modern-day group holding an Aboriginal right, and should not be conflated with a determination of the entire collective or rights holder.

30. The Trial Judge was correct in not identifying the entire collective, and in expressly finding that she did not need to decide whether there is a regional group of Sinixt in British Columbia.[41] This approach was upheld and endorsed by the appellate Courts below.[42] The Trial Judge also did not determine that the hunting rights of people of Sinixt ancestry in British Columbia did not survive the assertion of sovereignty, or that the relevant collective was the former Arrow Lakes Band, as suggested by Alberta.[43]

31. As in the Courts below, the ONA urges this Court not to make any ruling that would have unintended adverse effects to the Aboriginal rights of the *Syilx* Okanagan Nation or its representation of people in British Columbia. As noted by Ontario, a "broad, unqualified approach could have unintended consequences."[44] Issues concerning: the present-day collective representing people of Sinixt ancestry in British Columbia; whether people living in British Columbia with Sinixt ancestry hold Aboriginal rights; or whether people who are United States residents who are part of the *Syilx* Okanagan Nation are Aboriginal peoples of Canada, were not before the Court in this case. By leaving these issues to be determined in a case where they squarely arise, relevant evidence with respect to the *Syilx* Okanagan Nation's Aboriginal rights, *Syilx* laws and governance and the *Syilx* perspective can be heard.

32. If this Court adopts Canada's submission that, where the claimant resides in the United States, there must be a present-day Aboriginal collective in Canada of which the claimant is a member, the ONA agrees with Canada that the "Indigenous collective should have a pivotal role in determining the scope and duration of the s. 35 right that it permits the non-domiciled claimant to exercise..."[45] However, this should not be determined on the basis of "sheltering" as

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[40] *BCPC Decision*, paras 67, 68, AR Vol I, Tab 1, pp 21-22.
[41] *BCPC Decision*, para 68, AR Vol I, Tab 1, p 22.
[42] *BCSC Decision*, paras 36, 38-39, AR Vol I, Tab 4, pp 77-78; *BCCA Decision*, paras 47-49, 58, AR Vol I, Tab 7, pp 125-126, 130.
[43] Alberta's Factum, para 22.
[44] Ontario's Factum, paras 5 and 18.
[45] Canada's Factum, para 34.

suggested by Canada,[46] but rather be based on the laws, practices and governance of the Aboriginal group, including laws related to citizenship and how rights are exercised.[47]

PART IV - SUBMISSIONS CONCERNING COSTS

33. The ONA seeks no order as to costs and asks that no order for costs be made against it.

PART V - ORDER SOUGHT

34. The ONA confirms its intention to present oral argument at the hearing of the appeal, as provided for in the Order of this Court dated March 9, 2020.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, in the Province of British Columbia, the 19th day of June, 2020.

ROSANNE KYLE

CRYSTAL REEVES

[46] See Canada's Factum, paras 2, 33, 34, 38, 41, 42. The term "sheltering" refers to a host First Nation giving permission to an Aboriginal person who is not a member of that host First Nation to carry out harvesting or other activities in the host First Nation's territory. See *R v. Morris et al*, 2010 BCPC 270, paras 314-322; *R. v. Jack*, 1995 CanLII 3450 (BCCA), para 22; *R. v. Meshake*, 2007 ONCA 337, para 19, 21, 31-34. As such, the legal concept of sheltering should not be used to determine the collective rights of Aboriginal people who belong to transboundary First Nations whose territories have been divided by the imposition of an international border.

[47] This could include the factors of self-identification, continuous ancestral connection, community acceptance and permission as outlined at para 44 of Canada's Factum, but may also include other Indigenous laws, practices and customs.

PART VI - TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

Paragraph

CASES

Paragraph

STATUTES

OTHER AUTHORITIES