SCC File No. 38734

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Appellant)

-and-

RICHARD LEE DESAUTEL

Respondent
(Respondent)

-and-

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PART I – OVERVIEW OF POSITION

1. Neither the common law nor the *Constitutional Act, 1982* prevent Indigenous people from exercising the practices, customs and traditions they have engaged in from time immemorial, notwithstanding the imposition of a colonial international border. Section 35(1) of the *Constitutional Act, 1982* provides the necessary constitutional framework for the protection of distinctive aboriginal societies, so that their prior occupation of North America may be recognized and reconciled with Crown sovereignty.[1]

2. Subject to meeting the stringent requirements of the *Van der Peet* test, there is no sovereign incompatibility with an Indigenous resident of the United States of America exercising a section 35 protected aboriginal right in Canada. A purposive interpretation of section 35 and its twin goals of recognition and reconciliation, consistent with historical context, the honour of the Crown and British Columbia's adoption of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") dictate that the constitutional question be answered in the affirmative.

PART II – ISSUE

3. The central issue raised in this appeal is whether residency in Canada is a requirement to exercise a section 35 Aboriginal right. The Intervener proposes that the language of section 35 which uses the term "Aboriginal peoples of Canada" when given a fair, large and liberal interpretation, protects a much broader class of Aboriginal people than citizens or permanent residents of Canada.

PART III –ARGUMENT

A. Historical Context Should Guide the Court's Decision

4. Prior to settlement of North America by Europeans, the land was held, occupied and possessed by various independent tribes or nations of Indians, whose Nations have rights of self-determination.[2]

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[1] *R. v. Sappier*, [2006] 2 S.C.R. 686 at para. 22; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 ["*Van der Peet*"] at paras. 31, 42-43.
[2] *Johnson v. McIntosh*, 21 U.S. 8 Wheat. 543 (1823) at p. 545.

5. From the time of the *Royal Proclamation, 1763*, the Crown recognized that it had a duty of honourable dealing to protect the inherent rights of the Indigenous inhabitants of North America and interposed itself between Indigenous Nations and those that wished to take away their land and rights.[3]

6. The Treaty of Paris, 1783 (the "Jay Treaty") ended the American Revolutionary War and created the boundary between American colonies and British territories. Recognizing the impact that this new boundary would have on them, Article III provided the Indians with rights of free passage across the newly-established International boundary and confirmed their ability to freely carry on trade and commerce with each other.[4]

7. American courts have held that the right to cross the border is an *inherent aboriginal right*, recognized and confirmed (although not created) by the Jay Treaty. The import of the Jay Treaty was that the British assured the American Indians that political, military and commercial relations with the British would be preserved.[5] While Canadian courts have been reticent to apply the Jay Treaty's trade and commerce clause, they have held that it provides useful historical context of the Crown's treatment of Indigenous Nations.[6]

8. The Oregon Boundary Treaty of 1846 (the "Oregon Treaty") established the international boundary along the 49th Parallel from the Rockies into mainland British Columbia. In *Calder*, this court characterized the Oregon Treaty as a treaty of cession where American claims to virtually all of the present-day Province of British Columbia were ceded to Great Britain. The Treaty and the conventions that preceded it were silent on the treatment of Indigenous Nations.[7] However, given the position of the Crown and the

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[3] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 42
[4] *Treaty of Amity, Commerce, and Navigation* (*Jay Treaty*), 12 Bevans 13 (1794), art. 3. After the War of 1812, the *Treaty of Ghent* (1814) reconfirmed these rights.
[5] *United States v. McCandless*, 18 F.2D 282 (E.D. Pa. 1927); *R. v. Vincent*, [1993] O.J. 149; 1993 CanLII 8630 (ON CA) at para. 58.
[6] *Mitchell v. M.N.R.*, [1997] F.C.J. No. 882; 1997 CanLII 5266 (FC) at para. 282. Importantly, Article III of the Jay Treaty also explicitly exempted pelts from any duties, in recognition of the Aboriginal hunting and trapping rights of the Indigenous Nations.
[7] *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313 ["*Calder*"] at p. 325-326. Judson J. reasons contain a significant historical review of the establishment of British Columbia and subsequent dealings with Indigenous Nations.

United States with regard to the Jay Treaty, it was likely the case that they thought it unnecessary to address this issue.

9. As this court has recognized, the international boundary is a recent construction of newcomers and thus should not operate as a bar to the recognition of a section 35 right.[8] The comments from this court in the recent *Uashaunnuat* case are apposite:

> Where a claim of Aboriginal rights or title straddles multiple provinces, requiring the claimant to litigate the *same issues* in separate courts multiple times erects gratuitous barriers to potentially valid claims. We agree with the intervener the Tsawout First Nation that this is particularly unjust given that the rights claimed pre-date the imposition of provincial borders on Indigenous peoples. We reiterate that the legal source of Aboriginal rights and title is *not* state recognition, but rather the realities of prior occupation, sovereignty and control: see, e.g., *Delgamuukw*, at para. 114. We do not accept that the later establishment of provincial boundaries should be permitted to deprive or impede the right of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights.[9]

10. These same considerations arise in this appeal. While the approach ultimately taken by the federal government in the United States of America differs from Canada, the foundations of Aboriginal rights and title remain the same. These Indigenous Nations were sovereigns of their respective territories and retained their natural rights as absolute owners and proprietors of the soil. These inherent aboriginal rights could be acquired by conquest, extinguished by legislation or surrendered to the sovereign, usually by treaty.[10]

11. Importantly, the establishment of the international boundary did not evidence a clear and plain intention to extinguish these pre-existing rights of members of Indigenous Nations resident in the United States of America to access their traditional territories and exercise their Aboriginal rights in Canada.

12. As this court held in *Manitoba Métis*: [t]he honour of the Crown thus recognizes the impact of the "superimposition of European laws and customs on pre-existing Aboriginal

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[8] *Mitchell* at para. 24.
[9] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 ["*Uashaunnuat*"] at para. 49.
[10] *Worchester v. Georgia*, 31 U.S. 6 Pet. 515 (1832) at p. 559.

societies.[11] With the assertion of sovereignty there arose an obligation to treat aboriginal peoples fairly and honourably.[12]

13. Given the lack of consultation and consideration of the pre-existing rights of the Indigenous Nations and the unintended consequences of bi-furcating their traditional territories and severing community connections, it would be an unjust result and contrary to the Honour of the Crown to read into the Oregon Treaty an intent on the part of the Crown to extinguish these pre-existing rights.

14. The government interveners sovereign incompatibility arguments confuse the extinguishment of a right, which must be clear and plain, with the regulation of the right.[13] The doctrines of infringement and justification provide an appropriate framework to resolve any conflict between an established aboriginal right and Crown sovereignty.[14] This approach is also consistent with the historical context and the honour of the Crown.

B. B.C.'s Common Law Right is a Chimera

15. British Columbia puts forward for the first time an argument that the Respondent may have been able to establish a "common law" Aboriginal right. While this "common law" Aboriginal right may seem to be an attractive option to address the rights at issue, it is an empty box, a chimera, which right, if established, would be vulnerable to unilateral extinguishment by the Crown.[15]

16. More importantly, no such empty box exists. A *non-constitutional* common law Aboriginal right does not exist at law. As this court explained in *Delgammukw*:

> Aboriginal title at common law is protected in its full form by s. 35(1). This conclusion flows from the express language of s. 35(1) itself, which states in full: "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather it accorded constitutional status to those rights

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[11] *Manitoba Metis Federation v. Canada*, [2013] 1 S.C.R. 623 ["*Manitoba Metis*"] at para. 67.
[12] *Mitchell* at para. 9; *Manitoba Metis* at para. 70.
[13] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 ["*Sparrow*"] at p. 1097 & 1099.
[14] *Mitchell* at para. 63.
[15] *Sparrow* at p. 1098; *Mitchell* at para. 11.

> which were "existing" in 1982. The provision, at the very least, constitutionalized those rights which aboriginal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force.[16]

17. In other words, if a common law Aboriginal right was not extinguished prior to 1982, it is now protected by section 35(1). In coming to this conclusion, the court rejected the "frozen rights approach" to Aboriginal rights, finding that section 35(1) did not create the legal doctrine of aboriginal rights but had the effect of elevating a pre-existing legal doctrine to constitutional status.[17]

18. Notably, the constitutionalization of common law Aboriginal rights does not exhaust the content of s. 35(1):

> …none of the decisions of this Court handed down under s. 35(1) in which the existence of an aboriginal right has been demonstrated has relied on the existence of that right at common law. The existence of an aboriginal right at common law is therefore sufficient, but not necessary, for the recognition and affirmation of that right by s. 35(1).[18]

19. Thus, section 35(1) has both retrospective, common law Aboriginal rights that existed in 1982, and prospective, Aboriginal rights that may be established by a court or through negotiations, purposes. This approach is reflected in section 35(3) which provides that "[f]or greater certainty, in subsection (1) "*treaty rights*" includes rights that now exist by way of land claims agreements or may be so acquired."[19] The constitutional conferences that were contemplated by sections 37 and 37.1 (now repealed) were intended to address the definition and identification of the Aboriginal rights but did not occur. Thus, the Constitution recognized and affirmed the *concept* but not the *content* of Aboriginal rights. Instead, it has been left to the courts to define these rights.

20. The Appellant's arguments about some ill-defined common law right seek to overturn well-established principles. The Appellants have created a false dichotomy between common law Aboriginal rights and section 35 Aboriginal rights, where none exists.

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[16] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ["*Delgamuukw*"] at para. 133.
[17] *Van der Peet* at para. 29; *Delgamuukw* at para. 134.
[18] *Delgamuukw* at para. 136.
[19] *Constitution Act, 1982*, s. 35(3)

21. The argument, if accepted, would require resuscitating pre-*Sparrow* case law to define this non-constitutional common law right. Much of this pre-*Sparrow* case law, which relied on the doctrine of interjurisdictional immunity and section 88 of the *Indian Act*,[20] has been rejected by more recent decisions of this court such as *Tsilhqot'in* and *Grassy Narrows* where this court refused to accept division of powers arguments in favour of the "carefully calibrated" section 35 framework.[21] Accepting British Columbia's argument would effectively create two classes of rights-holders.

C. Canada's Test is Unworkable and Unnecessary

22. While the circumstances of this case are unique, contrary to the submissions of the Attorney General of Canada, there is no need for a new analytical framework. The *Van der Peet* test is a full answer to the Crown's submission. Adding aspects of *Powley* test and the sheltering principles only serve to dilute and confuse the Aboriginal right and discriminate on the basis of residency.

23. The issue of the proper rights holder is an important one in the context of defining an Aboriginal right. The *Van der Peet* test adequately accounts for these concerns:

> To satisfy the integral to distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and distinctive part of the society's distinctive culture. He or she must demonstrate, in other words that the practice, custom or tradition was one of the things which made the culture of the society distinctive – that it was one of those things that truly made the society what it was.[22]

24. Thus, *Van der Peet* already requires that the claimant establish membership in the aboriginal community. Unlike sheltering – where an individual from another unrelated community requests to exercise the treaty rights of another community – under *Van der Peet*, the individual must *already* be a member of that community.

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[20] *Dick v. La Reine*, [1985] 2 S.C.R. 309 provides an example of the pre-*Sparrow* approach.
[21] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 139-140 and 150-151; *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 at para. 53.
[22] *Van der Peet* at para. 55

25. Requiring the identification of the contemporary community is fraught with potential problems. The court need only take notice of the ongoing disputes amongst the Wet'suwet'en Nation regarding the question of the proper rights holder.[23] Canada's approach raises numerous practical questions – is the band level sufficient or do we require Nation-level consent? How is such consent provided? Does a letter from the Chief or Band Administrator suffice or must all the member bands consent?

26. It is common that in claims of Aboriginal rights and title, the question of the proper rights holder was a central question that the British Columbia Court of Appeal grappled with in the *William* case.[24] The issue was whether the proper rights holder was the Xeni Gwet'in *Indian Act* band or a broader collective, the *Tsilhqot'in* Nation. The court held that the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself, based upon the evidence. The court held that the evidence established that it is the Tsilhqot'in Nation, a collective of six *Indian Act* bands, that was the proper rights holder.[25]

27. In the context of any proceeding in which section 35 rights are raised – whether it be a civil action, judicial review or regulatory offence – the question of the proper rights holder may be a necessary question. In fact, *Van der Peet* dictates that question be answered. Claimants resident in the United States of America would need to show a sufficient nexus to Canada – to both the traditional territory that they claim and the historic Indigenous collective. As always in Indigenous cases, the answers to these questions will depend primarily on the evidence. Erecting further procedural hurdles does not advance reconciliation and is inconsistent with the honour of the Crown.

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[23] See for example, *Coastal Gas Link Pipeline Ltd. v. Huson*, 2019 BCSC 2264 at paras. 53-81.
[24] *William v. British Columbia*, 2012 BCCA 285 ["*William*"] at para. 148.
[25] *William* at paras. 149 – 152. This aspect of the judgment was not appealed to SCC.

D. UNDRIP is Consistent with Section 35 and the Decisions Below

28. International instruments such as the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") inform the contextual approach to statutory interpretation and should also inform the approach to section 35 of the *Constitution Act*.[26] This Court has sought to ensure consistency between its interpretation of the *Charter* and Canada's international obligations and the relevant principles of international law.[27] A similar approach ought to be taken to the interpretation of section 35 raised in this appeal.

29. When it comes to interpreting Canadian law, there is a presumption, albeit refutable, that Canadian legislation is enacted in conformity to Canada's international obligations. Parliament (and legislatures) will also be presumed to respect the values and principles enshrined in international law, both customary and conventional.[28] Consequently, when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured.[29]

30. Within the legal hierarchy of sources of law in Canada, domestic law prevails over international law.[30] However, when interpreting domestic legislation to implement international law or a convention:

> In interpreting harmonizing legislation, the court still looks to international law materials and interpretations but it relies on domestic principles and techniques of interpretation.[31]

31. The *Declaration on the Rights of Indigenous Peoples Act* ("DRIPA") with the status and force of domestic legislation, affirms the application of UNDRIP to all laws of British

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[26] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-71. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) ["UNDRIP"]
[27] *R. v. Hape*, 2007 SCC 26, [2007] 2 SCR 292 ["*Hape*"]at para. 55.
[28] *Canada (Human Rights Commission) v. Canada (Attorney General)* 2012 FC 445 at para. 351.
[29] *Hape* at paras. 53-54.
[30] Sullivan, Ruth, *Sullivan on the Construction of Statutes, 6th Ed.* Markham, Ont.: Lexis Nexis, 2014 at para. §11.73.
[31] Sullivan, Ruth, *Sullivan on the Construction of Statutes, 6th Ed.* Markham, Ont.: Lexis Nexis, 2014 at para. §18.38.

Columbia and obliges the provincial government to take all measures necessary to ensure that its laws are consistent with UNDRIP.[32]

32. UNDRIP does not just inform the presumption that legislatures intend to comply with international law – DRIPA explicitly requires that all provincial laws are consistent with UNDRIP. As a result, UNDRIP is no longer a non-binding international instrument but has the status and force of domestic legislation. As such, it is the text of UNDRIP that is a primary source of meaning or interpretation.[33]

33. While several UNDRIP Articles are engaged in this appeal,[34] Article 36 is particularly relevant. Article 36 addresses Indigenous peoples divided by international borders:

> 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political and economic and social purposes, with their own members as well as other peoples across borders.
>
> 2. States, in consultation and cooperation with Indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right. [35] [emphasis added]

34. The UNDRIP Articles impose positive obligations on the state to recognize Indigenous rights and take measures to protect and facilitate the exercise of those rights. In contrast, the *Wildlife Act* makes no effort to accommodate the section 35 rights of non-resident hunters. In addition to being an unjustifiable infringement of the established section 35 right, the *Wildlife Act* is inconsistent with DRIPA.

35. Rather than constituting a radical departure from the section 35 jurisprudence, these Articles build upon it. This court has recognized that section 35(1) and the honour of the Crown perform similar functions:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia,

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[32] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44 at ss. 2(a) & 3.
[33] *National Corn Growers v. Canadian Import Tribunal*, [1990] 2 S.C.R. 1324 at p. 1372.
[34] UNDRIP Articles 8, 9, 11, 18, 20, 25, 26-28, 33, 36 & 37 have relevance to this appeal.
[35] UNDRIP Article 36

> have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[36] [emphasis added]

36. While the reconciliation of these pre-existing Aboriginal rights with Crown sovereignty may be challenging, the section 35 framework developed by this court in *Van der Peet* and *Haida Nation* provides the parties with a roadmap for reconciling their respective interests.[37]

E. Conclusion

37. The establishment of the international boundary led to the unintended consequence of members of some Indigenous Nations being denied access to their traditional territories. Section 35, the honour of the Crown and UNDRIP all point to the need for a just resolution of this long-outstanding issue.

38. This court should prefer an interpretation of "Aboriginal Peoples of Canada" that is consistent with the purposes of section 35(1) – *recognition and reconciliation* - that underlie the entrenchment of Aboriginal rights in the Constitution.

PART IV – COSTS

39. Lummi does not seek costs and requests that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of June, 2020.

John W. Gailus
Counsel for Intervener, Tsawout First Nation

Christopher G. Devlin

[36] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 ["*Haida Nation*"] at para. 25.
[37] *Haida Nation* at paras. 37-38.

PART V – TABLE OF AUTHORITIES

PART VI – STATUTES

Constitution Act, 1982, s. 35	**Loi constitutionelle, 1982, s. 35**
Recognition of existing aboriginal and treaty rights 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	Confirmation des droits existants des peuples autochtones 35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.
Definition of “aboriginal peoples of Canada”	Définition de « peuples autochtones du Canada »
(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.	(2) Dans la présente loi, « peuples autochtones du Canada » s’entend notamment des Indiens, des Inuit et des Métis du Canada.
Marginal note: Land claims agreements (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.	Note marginale :Accords sur des revendications territoriales (3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d’accords sur des revendications territoriales ou ceux susceptibles d’être ainsi acquis.
Marginal note: Aboriginal and treaty rights are guaranteed equally to both sexes (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. (96)	Note marginale :Égalité de garantie des droits pour les deux sexes (4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou

issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

Declaration of Rights of Indigenous Peoples Act ss 2 & 3

Purposes of Act
2 The purposes of this Act are as follows:
(a) To affirm the application of the Declaration to the laws of British Columbia;

(b) to contribute to the implementation of the Declaration;

(c) To support the affirmation of, and develop relationships with, Indigenous governing bodies.

Measures to align laws with Declaration
3 In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

Declaration sur les Droits des Peuples Autochtones ss 2 & 3

Buts de la loi
2 Les objets de la présente loi sont les suivants :
(a) d'affirmer l'application de la Déclaration aux lois de la Colombie-Britannique;

(b) contribuer a la mise en œuvre de la Déclaration;

(c) soutenir l'affirmation et le développement de relations avec les organes directeurs autochtones.

Mesures pour aligner les lois sur la Déclaration
3 En consultation et en coopération avec les peuples autochtones de la Colombie-Britannique, le gouvernement doit prendre toutes les mesures nécessaires pout s'assurer que les lois de la Colombie-Britannique sont conformes à la Déclaration .