Court File No. 38734

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

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

RICHARD LEE DESAUTEL

Respondent

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Table of Contents

PART I – OVERVIEW 1

PART II – POSITION WITH RESPECT TO THE APPELLANT'S QUESTION 2

PART III – ARGUMENT 2

A. The phrase "Aboriginal peoples of Canada" must be interpreted in a purposive manner that accommodates Indigenous perspectives and fulfills the promise of s35 2

B. The concept of "residency" and the contemporary place of residence of an Indigenous people has no place in s35 interpretation or in the test for Aboriginal rights 5

C. A flexible approach to continuity is required, both in identification of present-day successors of historical rights-bearing entities and in connection with the land 9

PARTS IV & V – COSTS & ORDER REQUESTED 10

PART VII – TABLE OF AUTHORITIES 11

PART I – OVERVIEW

1. Canadian law and colonial constructs have inflicted serious injustice upon the original peoples of the lands that have become Canada.[1] One of the deepest harms of colonialism to many of these "Aboriginal peoples of Canada" has been their dislocation from lands to which they have a profound connection. The Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government (the "Interveners") view this appeal as an opportunity for the Court to clearly acknowledge that deep, enduring connection by purposively interpreting the phrase "Aboriginal peoples of Canada". As this Court has stated: "perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers" risks undermining "the very purpose of s35".[2]

2. That purpose is to "provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown."[3] Thus, the phrase "Aboriginal peoples of Canada" must refer to the contemporary peoples whose rights derive (through their connection by ancestry and continued practice of those rights) from the historical rights-bearing Indigenous peoples who occupied these lands. This interpretation invokes s35's overarching purpose "to extend constitutional protection to the practices, customs and traditions central to the distinctive culture of aboriginal societies prior to contact with Europeans".[4] As reiterated by the majority in *Innu of Uashat*, "the legal source of Aboriginal rights and title is *not* state recognition, but rather the realities of prior occupation, sovereignty and control".[5]

3. Colonial laws and constructs as well as their contemporary *sequalae* – such as the *Indian Act*, reserves and residency – cannot be allowed to dispossess Indigenous peoples of their inherent rights, including the right to hunt on their ancestral territories, nor can they have any bearing on

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[1] Borrows, John. "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*." Osgoode Hall LJ 37:3 (1999) 537 at 546-547; *R v Sparrow*, [1990] 1 SCR 1075, at 1103-1104.
[2] *R v Côté*, [1996] 3 SCR 139, at para 53.
[3] *R v Van der Peet*, [1996] 2 SCR 507 at para 31; also paras 32, 42; See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 17, 20; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 126, 186; *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 66.
[4] *Van der Peet, supra*, note 3, at para 51.
[5] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, at 49, citing *Delgamuukw, supra*, note 3, at para 114, emphasis in original.

whether these peoples possess Aboriginal rights. Aboriginal rights predate Canada;[6] the rights-bearers were here, occupying the lands that *became* Canada. Section 35 recognizes these historical facts.[7] The interpretation of "Aboriginal peoples of Canada" must flow from these facts.

4. This Court has emphasized that a "static and retrospective interpretation of s. 35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights".[8] Restrictive conceptions of residency, that frequently reflect historical interference in the lives and practices of Indigenous peoples, should not be employed to determine the scope of the *sui generis* rights protected under s35.

5. Given the intergenerational harms inflicted by colonial policies, a flexible approach to identifying the present-day successors of historical Indigenous communities affords an understanding of the multiple causes of dispersal from traditional territory and the ways in which physical absence from a territory will not necessarily constitute a break in continuity for a people profoundly connected to that land.

6. The Interveners adopt the facts as stated by the lower courts in this matter.

PART II – POSITION WITH RESPECT TO THE APPELLANT'S QUESTION

7. The Interveners take no position on the outcome of this appeal but rather confine their submissions to: (i) a principled approach to interpreting s35; (ii) the appropriate role of an Indigenous people's place of residence in determining their exercise of an Aboriginal right in their ancestral territory; and (iii) the proper approach to identifying a rights-bearing group under s35.

PART III – ARGUMENT

A. The phrase "Aboriginal peoples of Canada" must be interpreted in a purposive manner that accommodates Indigenous perspectives and fulfills the promise of s35

8. A purposive interpretation of s35 accords with the honour of the Crown,[9] which "demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation."[10] The Appellant conceptualizes "Aboriginal peoples of Canada" as "Canadian Indigenous groups",

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[6] *Van der Peet*, *supra*, note 3, at paras 28-32.
[7] *Van der Peet*, *supra*, note 3, at para 31.
[8] *Côté*, *supra*, note 2, at para 53; *R v Adams*, [1996] 3 SCR 101, at para 33.
[9] *Innu of Uashat*, *supra*, note 5, at para 22.
[10] *Manitoba Métis Federation*, *supra*, note 3, at para 77; *Innu of Uashat*, *supra*, note 5, at para 24.

which it juxtaposes with "US Indigenous groups" and "foreign groups".[11] However, interpreting s35 from the "Aboriginal perspective"[12] entails understanding the historical fact that Indigenous peoples are the present-day descendants of the "distinctive aboriginal societies"[13] present on these lands before Canada existed. It is these nations' exercise of their rights upon ancestral territories now located within Canada that makes them "of Canada" for the purpose of s35.

9. The rights protected by s35 are *sui generis*, intimately connected to the land and to the prior social organization and distinctive cultures of Indigenous peoples on that land.[14] The arbitrary, unilateral imposition of a border by colonial authorities does not affect Indigenous peoples' ancestries or their distinct identities, inextricably bound to their ancestral territories. To refuse to recognize Indigenous peoples based on their own conception of who they are is an affront to their humanity, contrary to Canada's democratic values[15] and a violation of the right to self-determination at international law.[16] Their ancestry and connection to the land should not be made to fit into colonial boxes. The notion that a *people* who have been split apart from their ancestral territory and dispersed due to a constellation of factors driven by colonialism should now be viewed as a "foreign group" offends the core of reconciliation and the doctrine of Aboriginal rights.

10. The Appellant's originalist approach, which relies upon select views expressed in hearings held at the time of patriation,[17] would prevent s35 interpretation from evolving in light of developments in societal understanding[18] and ensuring that Canada's constitutional protections keep pace with international law obligations.[19] This Court has cautioned that reliance upon debates

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[11] Factum of the Appellant, Her Majesty the Queen ["Appellant's Factum"], paras 87-88.
[12] *Van der Peet, supra*, note 3, at para 49.
[13] *Adams*, *supra*, note 8, at para 33; *Delgamuukw*, *supra*, note 3, at para 141; *Van der Peet*, *supra*, note 3, at para 42.
[14] *Innu of Uashat*, *supra*, note 5, at paras 25, 29, per Wagner CJ, Abella and Karakatsanis JJ, and at paras 133, 207-208, per Brown and Rowe JJ, dissenting.
[15] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 64, citing *R v Oakes*, [1986] 1 SCR 103 at 136.
[16] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) 15 ("UNDRIP"), art 3.
[17] Appellant's Factum, at para 81*ff*.
[18] Truth and Reconciliation Commission, *Calls to Action*, 2015; Canada's adoption of UNDRIP.
[19] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 64, citing *R v Hape*, [2007] 2 SCR 292 at para 55 and *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 23.

and correspondence relating to constitutional amendment adopts an original intent approach, rather than the progressive "living tree" interpretive approach embraced by this Court over the years.[20]

11. The Appellant's idea that only some Aboriginal rights are recognized, affirmed and thus protected by s35, while others remain merely common law rights, must be firmly rejected. The Appellant's interpretation would enable the effects of colonialism – the fact that a people became dispersed and displaced from their ancestral territory due to colonial factors – to deprive some Aboriginal rights of constitutional protection. The Crown would benefit from its unjust actions, an outcome fundamentally inconsistent with the recognition, affirmation and reconciliation that lies at the heart of s35's purpose and with this Court's pronouncement that s35 "constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982 and imposed a fiduciary duty on the Crown with respect to those rights".[21] The *sui generis* rights protected by s35 reflect and embody facts of Indigenous presence and identity that predate Canadian sovereignty and that continue into the present day. Contrary to the Appellant's submission, nothing in the purpose or text of s35 suggests that an imposed international boundary ought to bluntly distort or deny the contemporary recognition and protection of these rights under s35.

12. Section 35 did not create the legal doctrine of Aboriginal rights; Aboriginal rights predate the Crown's assertion of sovereignty and the imposition of colonial laws. These inherent rights existed and were recognized under the common law.[22] Nonetheless, the "entrenchment of aboriginal ancestral and treaty rights in s. 35(1) has changed the landscape of aboriginal rights in Canada."[23] As of 1982, the body of common law Aboriginal rights became constitutionally protected in s35.[24] There may be existing – and thus constitutionally protected – Aboriginal rights (for example, under Indigenous law) that were not yet recognized at common law in 1982, and indeed that may not yet be known to Canadian law.[25] However, Aboriginal rights that were not

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[20] *Edwards v Attorney General (Canada)*, [1930] 1 DLR 98 PC at 106-107; *Reference re Same Sex Marriage*, 2004 SCC 79 at paras 22-23; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56 at para 9. See also *Van der Peet*, *supra*, note 3, at paras 21, 49-50; *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 at paras 48, 50, 70.
[21] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 13 [emphasis added].
[22] *Van der Peet*, *supra*, note 3, at para 28, per Lamer CJ.
[23] *Côté*, *supra*, note 2, at para 51.
[24] *Van der Peet*, *supra*, note 3, at para 28, per Lamer CJ.
[25] *Delgamuukw*, *supra*, note 3, at 1093, per Lamer CJ.

extinguished by the time of the adoption of the 1982 *Constitution* are protected by s35. There is no hierarchy of common law and constitutionally protected Aboriginal rights.

B. The concept of "residency" and the contemporary place of residence of an Indigenous people has no place in s35 interpretation or in the test for Aboriginal rights

13. The Appellant's approach to this case relies heavily on the fact that the Respondent resides on a reserve that is "*located* in the United States"[26] for the proposition that the Respondent belongs to a "foreign" Indigenous people. This approach imports a geographic limitation into the *Van der Peet* test,[27] arising from a narrow and unjust interpretation of s35. The Appellant argues that the word "of" within the phrase "Aboriginal peoples of Canada" ought to be interpreted according to its purported "ordinarily" connoted meaning of "dwelling".[28] The Appellant's "static and retrospective interpretation" would obscure and deny the historical and continuing connections between an Indigenous people and their traditional territory whenever this territory is located some (undefined) distance from the location of the people's contemporary place of residence.

14. By attaching an Indigenous people to a particular "location" with an artificially imposed boundary (such as a border or a reserve) – when the traditional activities (such as hunting and trapping) and Indigenous societies (such as the Sinixt) that form the basis for recognition of s35 Aboriginal rights were not restricted by such boundaries – the Appellant reimposes a restrictive, colonial concept of residency used historically to interfere in the lives and practices of Indigenous peoples.[29] This approach perpetuates colonial interference, further entrenches past injustices, and is nonsensical for nomadic peoples who "lived on the land in distinctive societies, with their own practices, traditions and cultures" before the Crown asserted sovereignty.[30]

15. The creation of reserves has nothing to do with whether an Indigenous people possesses

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[26] Appellant's Factum, at paras 1, 5, 33, 51 [emphasis added].
[27] *Van der Peet*, *supra*, note 3, at para 46.
[28] Appellant's Factum, at para 66.
[29] Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: The Commission, 1996), vol 1, ch 11 at 396-397; vol 2, ch 1 at 5, ch 4 at 416, 418; Grammond, S. "La gouvernance territoriale au Québec entre régionalisation et participation des peuples autochtones", (2009) Cdn J Pol Sci, 42(4), at 944-945; Harris, Cole. *Making Native Space Colonialism, Resistance, and Reserves in British Columbia*. Vancouver: UBC Press, 2002, at xviii, 67-68.
[30] *Van der Peet*, *supra*, note 3, at para 31; *Adams*, *supra*, note 8, at para 27.

Aboriginal rights. The colonial history of dispossessing Indigenous peoples of their land and restricting nomadic Indigenous peoples to reserves should not become the basis for interpreting s35[31] or for analysing Indigenous peoples' entitlement to exercise their inherent rights in their traditional territories.[32] This Court rejected this notion in *Tsilhqot'in*:

> [T]he court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights.[33]

Adding a geographical limitation requirement to the *Van der Peet* test would ignore the Aboriginal perspective as well as the realities of colonization and do little to achieve reconciliation.[34] When Indigenous peoples have been displaced from their ancestral homelands as a consequence of colonialism, this injustice should not be further entrenched by a refusal to acknowledge their rights in those ancestral territories. The Respondent, as a Sinixt descendant, hunting in Sinixt territory located in what is now Canada, thus comes within the definition of the phrase "Aboriginal peoples of Canada" for the purposes of exercising a s35 right.

16. The Respondent is charged with violations of provincial hunting laws, not federal immigration laws. In his defence, he asserts his Aboriginal right to hunt in the ancestral territory of his people. That is the right at issue in this appeal. Applying the *Van der Peet* test for identifying an Aboriginal right protected by s35, there is no question that hunting is a central, integral activity at "the core of the peoples' identity".[35] Hunting is not simply an activity; it is an expression of the profound connection between an Indigenous people and the land.

17. In *Mitchell*, the fact of the international boundary was inextricably connected with the asserted north/south trading right.[36] In that unusual situation, the crossing of the border was arguably integral to the definition of the right. The right in question here is not the ability to travel from a colonially created reserve across a colonially imposed border. Here, the crossing of the border is not material to the definition of the right. The site-specific aspect of this case is the location of the hunting right being exercised, not how the Respondent accessed that location.

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[31] *Delgamuukw*, *supra*, note 3, at paras 127, 153.
[32] See *Delgamuukw*, *supra*, note 3, at para 197, per La Forest J.
[33] *Tsilhqot'in*, *supra*, note 21, at para 32.
[34] *R v Desautel*, 2019 BCCA 151 at para 62.
[35] *Mitchell v MNR*, 2001 SCC 33 at para 12.
[36] *Ibid*, at para 60.

18. The fact that the Sinixt people were dispersed for colonial reasons means that some Sinixt people are now resident on the south side of a border they had no part in creating. Their present place of residence and their right to hunt should not be conflated. The right to hunt in ancestral territory is an existing Aboriginal right protected by s35. This right has not been extinguished by legislation, cession or the doctrine of sovereign incompatibility. As this Court has determined:

> [T]he purpose of s. 35(1) was to extend constitutional protection to the practices, customs and traditions central to the distinctive culture of aboriginal societies prior to contact with Europeans. If such practices, customs and traditions continued following contact in the absence of specific extinguishment, such practices, customs and traditions are entitled to constitutional recognition subject to the infringement and justification tests[37].

19. If the *exercise* of this right were to raise sovereign incompatibility concerns – for example, when the right to cross a border[38] is also engaged – then negotiated agreements can functionally address issues of residency and borders without compromising Canadian sovereignty. An Indigenous person's ancient ties to their traditional territory can be recognized regardless of a border.[39] The sovereign nature of Canada is not a legal barrier *per se* to the existence of Aboriginal rights involving international borders,[40] and a qualified mobility right may well be compatible with Canada's sovereign right to control access at the border.[41] Further, it is not consistent with the honour of the Crown to say that a right to hunt in their ancestral territory should be denied to an Indigenous people who were dispersed from that territory across a border imposed upon them. This Court has directed Canadian governments to negotiate in good faith with Indigenous peoples as a matter of morality and reconciliation, as well as legal duty.[42] In keeping with the negotiated agreements already in place that provide practical responses to border questions, the Interveners urge the Court to continue to encourage negotiated solutions and to address any incidental border crossing issues within the *Sparrow* infringement/justification analysis.[43]

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[37] *Côté*, *supra*, note 2, at para 51, citing *Sparrow*, *supra*, note 1, and *R. v. Gladstone*, [1996] 2 SCR 723.
[38] UNDRIP, art. 36.
[39] Factum of the Intervener, Attorney General of the Yukon, at paras 15, 18-19.
[40] *Watt v Liebelt*, [1999] 2 FC 455 at para 18.
[41] *Mohawk Council of Akwesasne v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 611 at para 23, applying *Mitchell*, *supra*, note 35.
[42] *Sparrow*, *supra*, note 1, at 1105; *Delgamuukw*, *supra*, note 3, at para 186, per Lamer CJ, and at para 207, per LaForest J.
[43] *R v Desautel*, 2017 BCPC 84, para 146; 2017 BCSC 2389, para 108; BCCA, *supra*, note 34, para 70.

20. The Appellant does not rely upon extinguishment or surrender to deny s35's protection for the Respondent's asserted right; rather, it relies on the doctrine of sovereign incompatibility.[44] The Appellant states: "Taken in isolation, the Aboriginal right to hunt claimed by Mr. Desautel is not incompatible with the Crown's assertion of sovereignty".[45] It then argues that the right to access the hunting territory is a necessarily incidental right, incompatible with Canadian sovereignty and thus not recognized at common law. Indeed, the Appellant says a claimed Aboriginal right that did not survive the assertion of Crown sovereignty would not exist in 1982 for s35 to protect it.[46] It is unclear how a residual common law right arises if the claimed right ceased to exist.

21. In *Mitchell*, the Chief Justice declined to invoke the sovereign incompatibility doctrine, affirming instead "the doctrines of extinguishment, infringement and justification as the appropriate framework for resolving conflicts between aboriginal rights and competing claims, including claims based on Crown sovereignty".[47] The Interveners submit that the Court should dispense with the anachronistic sovereign incompatibility doctrine, given its origins in a time when Indigenous consent to Imperial actions was often neither sought nor obtained. Aboriginal rights may be infringed further to the *Sparrow* framework, however, they should not be considered void *ab initio* pursuant to a doctrine that pre-dates the era of reconciliation ushered in by s35.[48] The extinguishment of Aboriginal rights requires clear and plain intention.[49] The sovereign incompatibility doctrine surely does not meet this high standard,[50] in light of the purpose of s35:

> Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers….[51]

22. Unilateral actions by the Crown are failures to respect what s35 has now recognized and affirmed: that Indigenous peoples, their rights and their sovereignty pre-existed the assertion of Crown sovereignty. The honour of the Crown requires more than imposing unilateral decisions.

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[44] Appellant's Factum, at para 45.
[45] Appellant's Factum, at para 46.
[46] Appellant's Factum, para 49; citing Binnie J in *Mitchell*, *supra*, note 35, at para 172.
[47] *Mitchell*, *supra*, note 35, at paras 63-64.
[48] *Adams*, *supra*, note 8, at para 33; *Beaver v Hill*, 2017 ONSC 7245 at para 112.
[49] *Sparrow*, *supra*, note 1, at 1099; *Côté*, *supra*, note 2, at para 52.
[50] Borrows, John. "Unextinguished: Rights and the *Indian Act*" (2016) 67 UNBLJ 3-35 at 22.
[51] *Côté*, *supra*, note 2, at para 52.

Reconciliation demands acknowledgement of mutuality.

C. A flexible approach to continuity is required, both in identification of present-day successors of historical rights-bearing entities and in connection with the land

23. This Court has not directly addressed the issue of how one identifies a modern-day collectivity that may claim the rights of the historical people present in a particular area of precolonial Canada. The lower courts held that the Respondent was entitled to exercise Aboriginal rights derived from his Sinixt ancestors.[52] The lower courts declined to make a finding as to whether persons or communities other than the Respondent and his community are also descendants of the Sinixt who lived in what is now British Columbia prior to contact (and who thus would have a similar right to that claimed by the Respondent). The Interveners respectfully urge the Court to similarly refrain from pronouncing on this issue, leaving room to develop a broad and flexible approach to this question of succession as required on the facts of a future case.

24. This Court has stated that "the 'continuity' requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself".[53] Under the British Columbia Court of Appeal's approach, proof of ancestral connection and continuity of practice will suffice to connect a contemporary collectivity to a historical rights-bearing group.[54] This accords with the conclusion that a historical collectivity need not have the same political organization as the modern-day successor[55] and provides appropriate flexibility in light of the significant challenges faced by contemporary Indigenous peoples seeking recognition of their Aboriginal rights.[56] These challenges include the amassing of historical evidence across long time periods, the reality of intertwining genealogical connections within neighbouring communities, and the divisions and dispersal that many Indigenous peoples experienced as a result of colonial forces such as the imposition of boundaries, reserve creation, and residential schools.

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[52] *Desautel*, BCPC, *supra*, note 43, at para 68, aff'd BCSC, *supra*, note 43, at para 39, aff'd BCCA, *supra*, note 34, without express finding on this point.
[53] *R v Powley*, 2003 SCC 43, at para 27.
[54] *Desautel*, BCCA , *supra*, note 34,at paras 57, 73. See also *Marshall, Bernard*, *supra*, note 20, at para 67.
[55] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 457 (citing *Powley*, *supra*, note 53, at para 23), aff'd 2012 BCCA 285 at paras 139-152, aff'd without specific comment on this point 2014 SCC 44.
[56] See *Delgamuukw*, *supra*, note 3, at para 83, per Lamer CJ; *Van der Peet*, *supra*, note 3, per McLachlin J, dissenting, at para 274.

25. The flexible approach of the British Columbia Court of Appeal appropriately respects the many ways that ancestral ties to the land may remain for peoples involuntarily displaced by the forces of colonialism. Physical absence from a territory will not necessarily constitute a break in continuity for a people with a collective memory of territory to which they hold a profound cultural, ancestral and spiritual connection.[57] This approach accords with the reconciliation purpose of s35 in the modern era of constitutional Aboriginal rights.

26. The Interveners recall the significance of s35 as described by this Court in *Sparrow*:

> [Section 35] is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[58]

Recognizing the profound connection of Indigenous peoples to their ancestral territories is a fundamental precept of reconciliation. Recognition and affirmation of their Aboriginal right to hunt in those territories fulfills some of the "promise" offered by s35: "a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities."[59] "The "promise" of s. 35 … recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments."[60]

PARTS IV & V – COSTS & ORDER REQUESTED

27. The Interveners respectfully request that the appeal be decided in accordance with the above principles. They seek no costs and ask that none be ordered against them.

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

for
James O'Reilly Ad. E.
O'REILLY & ASSOCIÉS

for
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[57] An unbroken line of continuity is not required: *Delgamuukw*, *supra*, note 3, at paras 153, 198.

[58] *Sparrow*, *supra*, note 1, at 1106 citing Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall LJ 95 at 100. See also *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at 393, at paras 22, 44.

[59] *R v Powley*, *supra*, note 53, at para 45.

[60] *Reference re Secession of Quebec*, *supra*, note 15, at para 82.

PART VII – TABLE OF AUTHORITIES

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R v Adams, [1996] 3 SCR 101	4, 8, 14, 21
R v Côté, [1996] 3 SCR 139	1, 4, 12, 18, 21
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R v Marshall; R v Bernard, 2005 SCC 43	10, 24

R v Oakes, [1986] 1 SCR 103	9
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Tsilhqot'in Nation v British Columbia, 2014 SCC 44	11, 15, 24
Watt v Liebelt, [1999] 2 FC 455	19
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Harris, Cole. *Making Native Space Colonialism, Resistance, and Reserves in British Columbia*. Vancouver: UBC Press, 2002	14
Lyon, Noel, “An Essay on Constitutional Interpretation” (1988) 26 Osgoode Hall LJ 95	26
Report of the Royal Commission on Aboriginal Peoples. Ottawa, (Ottawa: The Commission, 1996)	14
Truth and Reconciliation Commission of Canada, *Calls to Action*, 2015	10