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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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW OF POSITION AND FACTS

A. Overview

1. The intervener, Whitecap Dakota First Nation ("**WDFN**"), is located some 25 km south of the City of Saskatoon. WDFN is part of the greater Dakota-Nakota-Lakota Nation, whose traditional governance structure is called the Seven Council Fires ("*Oceti Sakowin*"). In common with many Indigenous groups, the history of WDFN has been marked by movement, for reasons both benign and hostile, and frequently in dialogue with colonial actions.[1]

2. Also in common with many Indigenous groups, including the Sinixt people of the Respondent, WDFN's ancestral territories straddle the 49th parallel – an imaginary line given legal life by Anglo-American compact, without input from or regard to Indigenous Nations. WDFN's history is, in a broad sense, the mirror of that of the Sinixt: having used and occupied lands on both sides of that imaginary line for millennia, WDFN's ancestors ultimately came to feel unwelcome in their southern territories after they were unilaterally ceded by Britain to American control after the War of 1812. After a period of being largely and involuntarily stranded in a country increasingly hostile to them, they eventually came to return to and settle in their northern territories in what is now Canada.

3. The reality of Indigenous histories of movement and dislocation, including across colonially-imposed borders, militates strongly against the interpretation of the test for Aboriginal rights proposed by the Appellant as requiring geographic continuity between the historic and contemporary rights-bearing Indigenous collectives.

4. Such a novel, reductionist interpretation is inconsistent with the thread of flexibility long woven into the s. 35 jurisprudence and would impair, rather than advance, the goal of reconciliation. Further, it fails to account for the rich diversity of Indigenous histories and connections to land, and corresponding perspectives.

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[1] See judicial recognition of this phenomenon by this Court in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 197 (*per* La Forest J., writing for himself and L'Heureux-Dubé J).

5. Although raised against the spectre of "foreign nationals", the Appellant's proposed interpretation would have implications profoundly harmful to reconciliation for Indigenous groups whose contemporary home communities are in Canada, given the significant Indigenous movement and dislocation that attended the post-contact period.

6. Under the Appellant's approach, a community with a history of movement or dislocation may find itself unable to prove a land-based right. The proposed geographic continuity requirement risks presenting an unsurmountable hurdle for Indigenous groups in regard to any lands, since under the proposed standard they may lack both a sufficient *contemporary* occupation of *ancestral* lands, and a sufficient *ancestral* occupation of *contemporary* lands.

7. Dishonourably, such an approach would visit further harm upon Indigenous groups already dislocated from their ancestral lands at the hand or behest of the Crown.

8. The test for proof of Aboriginal rights must always be measured against the touchstone of reconciliation. In this regard, this Court's jurisprudence has long been animated by two essential features, each necessary to the fulfilment of that promise: flexibility, and regard always for the rich diversity and unique histories, cultures, and patterns of occupation, harvesting, and movement of Indigenous groups.

9. A test steeped in nuance and flexibility, suffused with an appreciation for the unique history of the Indigenous group at issue and its perspective, is consonant with reconciliation and the remedial purpose of s. 35. Our collective project in that regard is not merely to recognize, affirm and protect such rights, but to celebrate and tirelessly encourage their continuity and indeed their flourishing and revitalization. Section 35 was adopted against the backdrop of a dark history of assimilation and enfranchisement that sought to stamp out these practices through the cudgel of law. Fulfilment of s. 35's abiding promise requires that we not only end but also reverse the lasting impacts of those policies.

10. WDFN submits that a flexible, remedial and nuanced approach to geographic continuity would create space for a group's ancestral connection to particular lands, as well as the modern-day exercise of the distinctive practice that the asserted right seeks to protect.

B. Facts

11. WDFN takes no position regarding the facts as set out in the parties' factums.

PART II – POSITION ON QUESTIONS RAISED

12. The notice of constitutional question asks whether certain provisions of the B.C. *Wildlife Act* are of no force or effect with respect to Mr. Desautel by reason of an Aboriginal right pursuant to s. 35 of the *Constitution Act, 1982*. WDFN takes no position on the constitutional question. Rather, WDFN provides submissions to assist the Court in the interpretation of the test for establishing a land-based Aboriginal right pursuant to s. 35.

PART III – STATEMENT OF ARGUMENT

13. WDFN makes the following submissions:

(a) The geographic continuity requirement proposed by the Appellant for proving the existence of a s. 35-protected land-based right is contrary to this Court's jurisprudence, inimical to reconciliation, and would have profoundly deleterious effects for Indigenous groups whose home communities are in Canada. It risks rendering proof of such a right impossible for the large number of groups with a history of movement or dislocation; and

(b) Consistent with this Court's longstanding jurisprudence, the test for proving an Aboriginal right should exhibit the following hallmarks:

(i) flexibility, with a view to protecting, encouraging and revitalizing *both* Indigenous groups' sacred connection to their ancestral lands *and* the specific practices that are essential to the group's distinctive culture; and

(ii) regard for the rich diversity and unique histories, cultures, and patterns of occupation, harvesting, and movement, of Indigenous groups.

Such an approach would be consistent with the advancement of reconciliation and s. 35's remedial nature.

A. A strict geographical continuity requirement is inimical to reconciliation

14. At paras. 60-63 of its factum, the Appellant reiterates its submission – so far rejected at every level of court – that the present-day collective must be geographically contiguous with the historic collective to be able to exercise rights under s. 35.

15. As did the courts below, the Court of Appeal sagely rejected this submission, holding that "[t]he *Van der Peet* test has never included a requirement that the modern collective must occupy the same territory the historic collective occupied pre-contact," and that to do so would "ignore the Aboriginal perspective, the realities of colonization and [do] little towards achieving the ultimate goal of reconciliation."[2]

16. Indeed, such an approach fails to account for the diversity of Indigenous histories that must be reconciled under s. 35. For many Indigenous groups, the immediate post-contact period and the decades that followed were marked by profound changes, including the decimating impacts of disease, mounting competition for land and resources, changes to migratory patterns of fur-bearing animals and their subsequent extirpation, and colonial policies determined to force the settlement of nomadic and semi-nomadic groups.[3]

17. So too were many Indigenous groups caught in the middle of the confrontations between European powers within the North American theatre and, thereafter, between Britain and the United States. In their quest for colonial supremacy, the newcomers to the continent jockeyed to secure Indigenous allegiance, with momentous territorial implications. When the dust of Anglo-American confrontation settled following the War of 1812 and the subsequent establishment of the Western border at the 49th parallel, many Indigenous allies of the British Crown, including the Dakota, found themselves arbitrarily situated on one side or another of a divide established without consultation or their consent. Commonly, such groups were cut off from the full expanse of their traditional territories.[4]

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[2] *R. v. Desautel*, 2019 BCCA 151 at paras. 61-62, appellant's record Vol. 1 at 131.

[3] Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back,* Vol. 1 (Ottawa: Canada Communication Group, 1996) ("**RCAP Vol. 1**") at 21, 95, 103, 130-131.

[4] RCAP Vol. 1 at 42, 96, 131-132, 395.

18. Given this complex history, one can readily recognize the dangers and extreme unfairness posed by the test for proof of land-based Aboriginal rights propounded by the Appellant. A geographic continuity requirement ignores, rather than reconciles, Indigenous sovereignties underpinned by unique Indigenous histories.

19. Indeed, the Appellant's proposed test could preclude many wholly "Canadian" Indigenous groups with histories of displacement, including involuntary displacement, from vindicating their s. 35 rights. If by the vagaries of history an Indigenous group's present-day community is geographically dislocated from the primary territories of the historic collective from which it is descended, it may be incapable of asserting harvesting rights even if it has met all of the judicially-settled requirements of the *Van der Peet* test. Under the proposed standard, such a group may be incapable of asserting rights to <u>any</u> lands: they may lack a sufficient *contemporary* occupation of their primary *ancestral* lands, and a sufficient *ancestral* occupation of their primary *contemporary* lands.

20. This would yield the very result this Court warned against in *Van der Peet*: "[it] would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right."[5]

21. Such an outcome is inimical to the central, organizing principle of Aboriginal law since the *Royal Proclamation of 1763*[6] that relinquishing lands requires the consent of the Indigenous group, as well as compensation. This Court has traced the influence of the *Royal Proclamation* through the centuries and concluded that such principles are inherent in Aboriginal rights as protected under s. 35.[7] Allowing involuntary, uncompensated geographical displacement and resulting nullification of pre-existing rights – an inevitable result of the Appellant's proposed test – does not achieve even those bare standards.

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[5] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 62, *per* Lamer C.J., writing for the majority.

[6] *The Constitution Act, 1982*, s. 25(a), Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[7] See *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1063-65 (regarding the bundle of protections included in the *Royal Proclamation*) and *Delgamuukw* at para. 203 (regarding the principle of compensation under the *Royal Proclamation*); see also *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103.

22. To the contrary, it is incompatible to the promise of s. 35 and its "grand purpose" of reconciliation.[8] Indeed, a geographic continuity requirement would allow the Crown to benefit from its own historical turpitude in pushing an Indigenous group off of its pre-contact harvesting grounds, for which the historical record is sadly replete with examples.

B. The proper approach to s. 35-protected land-based rights

23. Land-based harvesting rights protected by s. 35 such as hunting, fishing, and trapping embrace multiple components, including in particular both: (a) the practice itself that is essential to an Indigenous group's distinctive culture, and (b) the land on which the practice is exercised. The case law has at times struggled with the emphasis to be placed on each. As noted in *Van der Peet*:

> Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society.[9]

24. Similarly, in *Adams*, this Court noted:

> The *Van der Peet* test protects *activities* which were integral to the distinctive culture of the aboriginal group claiming the right, it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land.[10]

25. In wrestling with the relationship between a distinctive practice and the land components of the right, the answer is not to arbitrarily prioritize one over the other. The law should not sever a displaced Indigenous group from either of these components, particularly when that group has been involuntary displaced from its ancestral lands. Rather, the law should recognize and strive to uphold the fundamental importance of both components, separately and as a unitary whole. This recognition is achieved through: (a) flexibility and (b) regard

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[8] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 10.

[9] *Van der Peet* at para. 74.

[10] *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 26.

for the rich diversity and unique histories, cultures, and patterns of occupation, harvesting, and movement, of Indigenous groups.

26. In some cases, it will be important to give primacy to an Indigenous group's unique relationship with specific territories that play a key role in their distinctive culture. In other cases, greater emphasis must lie in the practice itself, to allow for and encourage the continued exercise of that practice. As noted by the Alberta Court of Appeal, "the requirement that a claimant establish the historical use of or connection with the site is not to be raised to the point where it renders the [A]boriginal right meaningless."[11]

27. At the same time, as held by this Court in *Adams*, "[a] hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere."[12]

28. Clearly, there must be a nexus between the land at issue and the group's own unique history. However, in the case of a dislocated group, the law should not deny the existence of the right as a result of that dislocation. Nor should it force a false choice between permitting the exercise of the right only on ancestral lands that may now be distantly removed from the modern group (thereby potentially impeding the meaningful exercise of the right), or only in proximity to the modern-day community (thereby arbitrarily severing the group's connection with its ancestral lands, the use and occupation of which over millennia constitute the very moorings of Aboriginal law and s. 35).

29. The path to reconciling Indigenous and Crown sovereignties will necessarily be different for every Indigenous group in the context of its own history. This was stressed in *Van der Peet*, in which Chief Justice Lamer stated:

> I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an

[11] *R. v. Hirsekorn*, 2013 ABCA 242 at para. 81.

[12] *Adams* at para. 30.

> interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity [that] they are to adopt with regard to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.[13]

30. Brent Olthuis has similarly written that it would be inconsistent with the purpose of s. 35 to allow assimilationist colonial policies to work to the detriment of an Indigenous group attempting to revive its rights:

> Again, it has been in large part owing to wrong-headed assimilatory policies of the Canadian government that some Aboriginal societies were weakened, and it does not accord with the constitutionalization of Aboriginal rights to deny the reach of section 35 to groups that are only now rebuilding a dignified sense of community. Where the record indicates that the modern group has a close connection to the dormant group and that the modern group represents to its members roughly what the dormant group represented to its members, we ought to recognize this as sufficient continuity for the purposes of section 35.[14]

31. A community returning to the practice of a right, or reviving that practice, should be celebrated as a hallmark of reconciliation. Judicially-created rules should facilitate those goals. Space ought to be made within the s. 35 tests to accommodate, rather than foreclose, such phenomena. To decline to do so would be discordant with the jurisprudence, and would inhibit access to justice for Indigenous groups seeking to vindicate their constitutional rights.[15]

32. Surely, if an interruption or even the dormancy in the *exercise* of a pre-contact practice does not defeat proof of an Aboriginal right, nor should geographic dislocation. Both represent instances of history, by accident or by design, having carved gaps in continuity – one chronological, one physical.

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[13] *Van der Peet* at para. 65.

[14] Brent Olthuis, "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the Constitution Act, 1982", (2009) 54 McGill L.J. 1 at 37-38.

[15] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at paras. 50-52 (*per* Wagner C.J. and Abella and Karakatsanis JJ., writing for themselves and Gascon and Martin JJ.).

33. Admitting nuance in this context is hardly novel. Flexibility is a hallmark of the test for both Aboriginal title and Aboriginal rights. In the context of sufficiency of occupation for title purposes, the decision in *Tsilhqot'in* directs a "culturally sensitive approach," taking into account a particular group's "laws, practices, size, technology, and the character of the land claimed."[16] A stricter approach would foreclose proof of title even where a nomadic or semi-nomadic group demonstrates sufficient physical possession in accordance with the manner in which it, as a people acting under its own laws and practices, uses the land.[17]

34. Similarly, in regard to the test for Aboriginal rights, the *Morris* Court confirmed that the manner and means in which a right is exercised may change over time for the straightforward reason that "[m]odern peoples do traditional things in modern ways," and that Aboriginal rights cannot be "unfairly confined simply by changes in the economy and technology."[18]

35. The Court in *Powley* articulated further that "[a] certain margin of flexibility might be required to ensure that [A]boriginal practices can evolve and develop over time", even where colonial interference has caused the practice of a right to "go underground."[19]

36. Rather than forcing Indigenous histories into a prescribed template which must be met to vindicate rights under s. 35, this Court has responded at each turn to allow unique facts to drive the analysis. The law should not now deviate from that well-worn path.

C. A flexible, fact-sensitive approach advances reconciliation and is appropriately remedial

37. It must always be recalled that s. 35 was enacted against the sinister historical backdrop of generation-spanning, now-discredited policies of assimilation, enfranchisement, and the suppression of rights.[20] That provision "represents the culmination of a long and difficult

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[16] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 41-42.

[17] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 at para. 66.

[18] *R. v. Morris*, 2006 SCC 69 at para. 30, citing *Marshall* at para. 25.

[19] *R. v. Powley*, 2003 SCC 43 at paras. 26-27, 45.

[20] See, i.e., the history of enfranchisement set out in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at paras. 83-90.

struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights."[21]

38. In that sense, there are conceptual parallels between s. 35 and s. 23 of the *Constitution Act, 1982*, which is also intended to turn back the tide of historic policies bent on assimilation. This Court recently re-affirmed s. 23's purpose to not merely protect minority languages but to "redress past injustices and promote the development of [minority language] communities," ensuring that they "flourish."[22] Likewise designed to counter historical wrongs of assimilation, a similar approach is mandated in regard to s. 35 rights.

39. The law must do more than guard s. 35 rights in an idealized state where an Indigenous group has resisted colonialism's displacing effects to remain geographically contiguous with its pre-contact collective, *and* overcome the existing evidentiary demands of the *Van der Peet* test. Rather, guided by the constitutional goal of reconciliation, the law must afford particular protection – and show particular flexibility – where the practice of Aboriginal rights may have gone into decline or be endangered due to displacement.

40. Indeed, where history has conspired, abetted by nefarious Crown conduct, to block Indigenous groups from their ancestral lands and practices, s. 35 fulfills its noble purpose not by building a bigger wall, but by setting a larger table.

PART IV – COSTS

41. WDFN does not seek costs and respectfully asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, June 19, 2020.

Maxime Faille
Keith Brown

Counsel for the Intervener, Whitecap Dakota First Nation

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[21] *Sparrow* at 1105.

[22] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13 at paras. 15 (*per* Wagner C.J., writing for the majority), 218, 239 (*per* Brown and Rowe JJ.).

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