Court File No. 38734

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

AND:

RICHARD LEE DESAUTEL

Respondent

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

Interveners

FACTUM OF THE INTERVENER, THE CONGRESS OF ABORIGINAL PEOPLES
Pursuant to R.42 of the *Rules of the Supreme Court of Canada*

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I N D E X

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PART I. OVERVIEW

1. The Congress of Aboriginal Peoples ("CAP") intervenes in this appeal to provide the Court with its perspective as a national organization representing the interests of off-reserve status and non-status Indians, Métis and Southern Inuit Indigenous Peoples.

A. CAP and its mandate

2. CAP is Canada's second-oldest national Aboriginal organization, and is one of five national Indigenous representative organizations recognized by the Federal Government. CAP also holds consultative status with the United Nations Economic and Social Council. Among other matters, CAP has a mandate to protect the aboriginal, constitutional and treaty rights of off-reserve Indigenous people, including their rights protected by s. 35 of the *Constitution Act, 1982* (the "*Constitution Act*").[1]

B. CAP's position on this appeal

3. CAP asks that the appeal be decided in accordance with the principles set out below, in a manner that does not perpetuate or incorporate the legacy of colonialism.

PART II. ARGUMENT

A. A purposive interpretation of s. 35(1) should follow Van Der Peet*, not an Original Intent approach*

4. The Appellant and government interveners argue that a "purposive" analysis of the phrase "aboriginal peoples of Canada" in s. 35(1) leads to the conclusion that the framers of the *Constitution Act, 1982* did not intend to extend constitutional protection to the Aboriginal rights of persons and communities located outside of Canada's modern-day borders. This assumes that a purposive interpretation of s. 35(1) requires the Court to ascertain the original intent of the framers. With respect, this position is fundamentally at odds with this Court's approach to the interpretation of the *Constitution Act* generally, and s. 35(1) specifically.

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[1] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 2981, c 11, s. 35(1) ["*Constitution Act*"].

5. This Court, in *Sparrow*, held that with respect to s. 35(1), a purposive interpretation is one that considers the "purposes of the affirmation of aboriginal rights" and gives a "generous, liberal interpretation" to the words in the provision.[2] This is not an exercise grounded in the static, decontextualized definitions of individual words, as the Appellant advocates. Such an originalist method of interpretation would have the effect of freezing Aboriginal rights in time, and would depart from the living tree doctrine that is used to interpret other rights in the Constitution. Originalism has been rejected by this Court on several occasions.[3]

6. Instead, a purposive analysis of s. 35 must first identify the purpose of the provision, and then find the interpretation that best accords with that purpose, allowing for adaptation over time. Contrary to the Appellant's submission, that does not turn on the views of any particular actors in 1982, nor on the invitees to the constitutional conferences. Rather, as in *Daniels v Canada*,[4] where the issue was whether "Indians" in s. 91(24) of the *Constitution Act, 1867* included Métis and non-status Indians, the Court's inquiry should be directed at identifying *why* the provision was included in the Constitution, rather than the historical definitions of the words used.

7. This Court found in *Daniels* that the overarching purpose of s. 91(24) was related to the expansionist goals of Confederation. Section 91(24) was intended as a tool to allow the Federal Government to control "Native people and communities where necessary to facilitate development of the Dominion"; building a national railway was a key component. In order to advance these goals, the Crown required a good relationship with the Aboriginal groups that occupied the lands targeted for expansion, which included the Métis.[5] This is why the jurisdiction over "Indians" assigned to Parliament in s.91(24) was required to be read broadly, as including the Métis.

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[2] *R v Sparrow*, [1990] 1 SCR 1075 at p 23
[3] *Reference re Employment Insurance Act (Can), ss. 22 and 23*, 2005 SCC 56 at paras 10, 45-47; *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at p 507-509; *Hunter et al v Southam Inc.*, [1984] 2 SCR 145 at p 155
[4] 2016 SCC 12 ("*Daniels*")
[5] *Daniels* at paras 25-26

8. Applying the purposive approach in this case, the question is not what political actors may have thought the individual words or phrases in s. 35(1) meant at the time, but rather why s. 35 was included in the *Constitution Act*. *Van der Peet* has already answered this question. Aboriginal rights exist, and are protected under s.35, because of "one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal groups from all other minority groups in Canadian society…" Thus, the rights protected by s.35 must be "directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[6]

9. The Appellant and government interveners seek to define away the issue before this Court. They take the U.S.-Canada border, the "imaginary line" that bisects Indigenous groups, as a defining characteristic of Indigenous group identity. They refer to "U.S. Indigenous groups", and frame the question as whether these "foreign" groups should have access to "Canadian" rights. But that ignores the history and circumstances of the Sinixt, and many other Indigenous peoples.

10. Borders are a colonial construct. Indigenous identity is not formed by national or provincial boundaries. According to the findings of the courts below, the Sinixt (found to be the relevant community for s.35 purposes) were present on both sides of what is now the border at the time of contact. The Respondent is Sinixt. A purposive interpretation of s.35, applying the continuity tests of *Van der Peet*, leads to the conclusion that the Sinixt come within the meaning of the term "Aboriginal peoples of Canada". It should not be necessary to show more than this.

11. As this Court held in *Delgamuukw*, the legal source of aboriginal rights in s. 35 is *not* state recognition, but rather the realities of prior occupation, sovereignty, and

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[6] *R v Van der Peet*, [1996] 2 SCR 507 at paras 30-31 ["*Van der Peet*"]. Likewise, in *Daniels*, this Court affirmed that the "grand purpose" of s. 35 is "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship": at para 34

control.[7] When s. 35 rights are at stake, the Crown cannot ignore the "prior, borderless occupation of [present-day] Canadian territory by Indigenous peoples"[8] and unilaterally impose limits on such rights that fail to take into account the Aboriginal perspective.

12. A true, purposive interpretation of s. 35 must include the perspective of, and reconciliation with, the Aboriginal peoples whose existence predates Crown sovereignty. This is the very reason that the *Van der Peet* test for Aboriginal rights under s. 35 is a pre-contact test: because the purpose of the provision is to constitutionally affirm that Aboriginal communities are entitled to continue those practices, customs, and traditions that were integral to their societies prior to, and *despite*, contact with Europeans.[9]

13. The Court of Appeal held that the continuity requirement in *Van der Peet* provided the necessary link between the Respondent and the pre-contact historic collective. Hunting in the area where the Respondent exercised his right was a central and significant part of the Sinixt's distinctive culture pre-contact and remained an integral part of the Lakes Tribe's culture in the present day.[10] The Respondent demonstrated his and other Tribe members' connection to the area.[11]

14. The *Van der Peet* test, including the continuity requirement, has been carefully constructed by this Court and applied in many subsequent cases. It is highly contextual and nuanced. The test is designed to address both the scope of the right, and the "rights-bearing community" to which the specific right applies,[12] on principles that are

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[7] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 114

[8] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 212 ["*Innu*"]. In *Mitchell v. Minister of National Revenue*, 2001 SCC 33, this Court examined the asserted right from the perspective of the pre-border Haudenosaunee (para. 24), though the right was not established.

[9] *Van der Peet* at paras 60-67, 73

[10] Court of Appeal Reasons at para 56

[11] Court of Appeal Reasons at para 10, citing the Trial Judgment at para 50

[12] See e.g. *R v Powley*, 2003 SCC 43 at paras 24-28; *Newfoundland and Labrador v Labrador Métis Nation*, 2007 NLCA 75 at para 36

designed to further reconciliation. There is no basis to discard it in favour of the "threshold test" advanced by the Appellant and some government interveners.

15. Further, the analogy put forward by the Appellant and some interveners to *Daniels*, *Re Eskimos*,[13] and *R. v. Blais*,[14] as cases that considered the application of other constitutional provisions as a "threshold issue", is misplaced. *Daniels* was only brought forward because there was a real issue created by many decades of jurisdictional wrangling, which met the test for granting a discretionary declaration.[15] Moreover, *Daniels* and *Re Eskimos* addressed a very different issue – the extent of federal power under s.91(24) – than the highly contextual question of who are the beneficiaries of s.35 rights, which will vary according to the circumstances and the right in question. *Blais* involved a constitutional agreement, not the Constitution, as this Court pointed out in *Daniels*.[16]

16. Nor should this Court accept the Attorney General of Canada's invitation to recognize cross-border rights only under the concept of "sheltering"; e.g. with the permission of a Canadian "First Nation" (band recognized by Canada under the *Indian Act*). First, sheltering has not yet been recognized by this Court. Second, and more fundamentally, rights-bearing communities are not necessarily coextensive with *Indian Act* bands or other entities recognized by governments. An Indigenous person can have s.35 aboriginal rights without having status or band membership;[17] conversely, a person

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[13] *In the Matter of a Reference as to Whether the Term "Indians" in Head 24 of Section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province of Quebec*, 1939 CanLII 22 (SCC)

[14] 2003 SCC 44 ["*Blais*"]

[15] *Daniels* at paras 11-15. Even so, *Daniels* left issues as to the extent of federal jurisdiction over specific individuals or communities to be determined later on a case-by-case basis: para 47

[16] *Daniels* at para 44

[17] See e.g. *R v Lavigne*, 2007 NBQB 171, where the court accepted that non-status Indians with significant community links had an aboriginal right to hunt under s.35, even though "not one member from the Pabineau First Nation community testified to the community's acceptance of [them]": para 41

who is nominally a member of a band can be found to have no s.35 rights.[18] Third, and related to the second point, the question of who speaks for the rights-bearing community may depend upon the context, and will often be fraught with difficulty.

17. Aboriginal title was held to inhere in the Tsilquot'in people collectively in *Tsilhqot'in Nation v British Columbia*, rather than in any particular *Indian Act* band.[19] Canada appears to have accepted that the hereditary chiefs of the Tsilquot'in Nation, chosen according to Tsilhquot'in customary law, rather than elected chiefs of *Indian Act* bands, speak for this collectivity in matters pertaining to Aboriginal title. Given the more than 150-year history of government interference in status, membership, self-definition and governance of Indigenous collectives, it is not safe to assume that *Indian Act* bands speak for anyone but their members. Indeed, for Canada to define whose s.35 rights will be recognized in terms of whether they "shelter" under permission from entities that Canada itself has largely defined, constitutes an impermissible attempt by Canada to determine the scope of s.35.

B. Aboriginal and treaty rights doctrine under s. 35 should be aligned

18. The interpretive principles used to delineate aboriginal and treaty rights are similar. In *Badger*, this Court held that treaties should be "liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians."[20] The words in treaties must not be interpreted in their "strict technical sense nor subjected to rigid modern rules of construction."[21] When considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded, and committed to writing.[22]

19. In historical treaty cases, this Court has been careful not to limit or define treaty beneficiaries by their relationship to purely modern attempts by settler societies to define Aboriginality or Indianness. As a result, treaty rights are not held exclusively by

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[18] *R v Lamb*, 2020 NBCA 22 at para 10
[19] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, at para 470, aff'd 2012 BCCA 285, rev'd on other grounds 2014 SCC 44
[20] *R v Badger*, [1996] 1 SCR 771 at para 52 ["*Badger*"]
[21] *Badger* at para 52
[22] *Badger* at para 52

persons recognized as status Indians under the *Indian Act*, or only those who reside on-reserve. Rather, as set out in *Simon v The Queen*, treaty rights are held by those who can demonstrate a "sufficient connection" to the *historical* Aboriginal nation that signed the relevant treaty.[23]

20. Treaty-making long predates the system of registration under the *Indian Act*, and in much of Canada predates confederation. Many significant treaties were concluded with Indigenous nations prior to the American Revolution, some on what is now U.S. soil.[24] Canada has inherited Britain's obligations under these treaties. Historical treaties describe the Indigenous collectives that entered into them in terms that do not necessarily coincide with modern *Indian Act* bands and their registered members.

21. In *Simon*, this Court found that the appellant had enforceable s. 35 treaty rights as a beneficiary of the Treaty of 1752, based on his demonstrating a "sufficient connection" to the Mi'kmaq tribe that signed the treaty, in that particular case through his membership in a Mi'kmaq band living in the same area.[25] Lower courts have found that non-status Indians have treaty rights to hunt under the "Peace and Friendship"

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[23] [1985] 2 SCR 387 (SCC) at p 407 ["*Simon*"]

[24] E.g. the 1701 Treaty of Albany, or "Nanfan Treaty", recognized in *R v Ireland*, 1990 CanLII 6945 (Ont Gen Div), the 1760 Swegatchie Treaty recognized by the Quebec Court of Appeal in *R v Coté*, 1993 CanLII 3913 (on further appeal this Court "assumed without deciding" that the treaty applied: 1996 CanLII 170 (SCC) at para 88); the 1764 Treaty of Niagara, recognized in *Chippewas of Sarnia Band v Canada (AG)*, 2000 CanLII 16991 (ONCA); various Treaties of Peace and Friendship from 1725 to 1760 applying to the Maritime provinces, including Dummer's Treaty, signed at Boston in 1725. The first Superintendent General of Indian Affairs, Sir William Johnson, reputed to be an ancestor of many Haudenosaunee at the Six Nations of Grand River, was based in the Mohawk Valley in present-day New York.

[25] *Simon* at p 407

treaties based on the sufficient connection test, treating the modern invention of status as a relevant factor but not a necessity.[26]

22. The sufficient connection test of *Simon* and cases that follow it is similar to the continuity requirement under *Van der Peet*. The Respondent showed his connection to the historical collective (the Sinixt) and to the land where he exercised his right to hunt. Particularly in the context of a regulatory prosecution, he should not have to meet additional requirements such as status as a Canadian resident, membership in an *Indian Act* band, or permission from a Canadian government-recognized entity to exercise his right to hunt.

23. It is undisputed that the Sinixt were an Aboriginal community, occupying lands that traversed what is now the international border between BC and Washington State, prior to contact with Europeans. It is also undisputed that hunting was a central and distinctive part of the Sinixt's culture, and that the Sinixt continued this practice, post-contact. The Appellant's argument would fundamentally alter this frame of reference to the present, defining who is entitled to aboriginal rights with reference only to modern concepts of sovereignty and international borders that post-date the asserted right.

C. Geographical displacement should not be a bar to s.35 rights

24. The Appellant asks this Court to find that the "location of the present-day rights bearing community" is a factor in the interpretation of whether an Indigenous group is an "aboriginal peoples of Canada" under s. 35.[27] The Appellant contends that a connection to the historical collective and the land is insufficient; the present-day group must also demonstrate continuity of location in order to qualify for s. 35 rights.

25. This interpretation of s. 35 could disentitle a significant portion of the aboriginal peoples of Canada from constitutional protection, and would run counter to this Court's

[26] *R v Fowler* [1993] NBJ No 85 (NBPC); *R v Harquail* (1993) 144 NBR (2d) 146 (NBPC)
[27] Appellant's Factum at para 61

decision in *Corbière v. Canada,* holding that aboriginality-residence is an analogous ground under s.15 of the *Charter*.[28]

26. A large majority of Canada's aboriginal population now lives off-reserve. Even among status Indians, a majority now reside off-reserve.[29] This displacement is the direct legacy of colonial policies. The history of the Aboriginal peoples of Canada is rife with displacement – peoples pressured, legislated, or even physically forced to leave their original communities by the Crown, or by conditions created by the Crown.

27. Examples include the residential school system, which involved the systematic removal of Aboriginal children from their homes with the central goal of eliminating Aboriginal identity and culture, and which effectively severed generations of children from their historic collective; the Federal Government's physical relocation of the Inuit to the High Arctic in the 1950s; the involuntary loss of status by Aboriginal women who married non-Aboriginal men, which began as early as 1857;[30] and the systemic displacement that resulted from the status rules of the *Indian Act*, which was explicitly designed to encourage Aboriginal people to renounce their heritage and identity.[31] The unequal rights afforded to on and off-reserve Indians under the *Indian Act*, such as the exclusion of off-reserve band members from voting on band governance, splintered relations between those groups, in many cases permanently alienating the off-reserve members from their community.

28. The Crown should not now be permitted to rely on the historical displacement of Aboriginal peoples, in which the Crown was at least complicit, to argue that descendants of a historic collective are disentitled from recognition of their s.35 rights.

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[28] *Corbière v Canada (Min. Indian and Northern Affairs)*, [1999] 2 SCR 203 ["*Corbière*"]
[29] Statistics Canada, "Aboriginal Peoples in Canada: Key Results from the 2016 Census", *The Daily,* 25 Oct. 2017, https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm
[30] *Corbière* at para 86
[31] *Corbière* at para 88

29. This Court recently held in *Innu* that Aboriginal rights claims that straddle multiple provinces should not be made more complex by the erection of "multiple gratuitous barriers" to the claim. The Court held to do so would be…

> …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. 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.[32]

30. This reasoning applies equally in the present case. The Canada-US border was established long after the Sinixt occupied their traditional territories as a historical collective sufficient to ground Aboriginal rights in the present day. This boundary, in which the Sinixt had no say and which bisected their traditional territories, should not now bar the recognition of their rights. Nor should the physical distance of the Lakes Tribe from the area in which the Respondent hunted, as long as the *Van der Peet* test of continuity and ongoing connection to the land is met. To allow these factors to defeat the Respondent's rights would be fundamentally incompatible with the reconciliation of Canada's non-Aboriginal peoples and its pre-existing Aboriginal societies.

PART III. COSTS

31. CAP does not seek costs, and asks that it not be liable for costs.

PART IV. ORDER SOUGHT

32. CAP respectfully requests that the appeal be decided in a manner consistent with its submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

June 19, 2020

Andrew Lokan / Glynnis Hawe
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Lawyers for the Intervener, Congress of Aboriginal Peoples

[32] *Innu* at para 49 [citations omitted]

PART V. TABLE OF AUTHORITIES

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