Court File No. 38734

(APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

AND:

RICHARD LEE DESAUTEL

RESPONDENT
(Respondent)

AND:

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

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Part I – Statement of Facts Relevant to the Issue to Intervene

A. Overview of Position

1. The Assembly of First Nations (AFN) is an organization representing more than 634 First Nations who have Treaties, inherent rights and title in their traditional territories. AFN has a mandate to advance the priorities of First Nations including the implementation of the *Truth and Reconciliation Commission's Calls to Action* and the *United Nations Declaration on the Rights of Indigenous Peoples*.

2. The Appellant's assertion that the interpretation of s. 35(1) of the Constitution includes a presumption that the constitution is intended to apply only to First Nations in Canada, and that nothing within s.35(1) rebuts that position, is incorrect and an inappropriate interpretation, which is not grounded in the law nor the wording of s.35(1). In determining whether s. 35(1) applies to First Nations peoples who are not resident in or citizens of Canada, the Court of Appeal for British Columbia (Court of Appeal) was correct in its analysis of the *Sparrow*[1] decision as formalized in *Van der Peet,* in which this Honourable Court focused on the reconciliation of pre-existence of First Nations societies in North America.[2]

3. In determining the appropriate framework upon which to interpret and apply section 35(1), the Court of Appeal was correct in its finding that the analysis used in *R v. Powley* is inappropriate for the case at bar.[3]

4. The UN Declaration recognizes that First Nations people have the right to self-determination and to freely determine their political status and the right to autonomy or self-government in matters relating to their international and local affairs. This expressly recognizes the right of First Nations to determine their citizenship and pollical representation.

B. Statement of Facts

5. The AFN adopts the Respondent's Statement of Facts and adds the additional facts enumerated below.

6. The AFN is a national organization representing more than 634 First Nations who have Treaties, inherent rights and title in their traditional territories.

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[1] *R. v. Sparrow*, [1990] 1 S.C.R. 1075
[2] *R v. Van der Peet*, [1996] 2 S.C.R. 506 at para 20.
[3] *R v. Powley*, [2003] 2 SCR 207.

7. In the past, this Court has spoken to the long history of the denial of First Nations peoples rights, in the *Sparrow*[4] case, the first decision of this Court after Aboriginal and treaty rights were "recognized and affirmed" in the *Constitution Act, 1982*.[5] This Court noted how British policy was based on respect for the rights of First Nations peoples, as evidenced by the *Royal Proclamation of 1763*.[6] However, in modern times these rights as legal rights have been systematically diminished by federal policy and processes to address this have been notoriously slow. The Statement of the Government of Canada on Indian Policy (1969) ("1969 White Paper"), asserted that "aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community".[7]

8. The government's answer in the 1969 White Paper was to eliminate the legal existence of "Indians", which, of course, was resoundingly rejected by First Nations. This was a turning point in the history of the First Nations peoples' rights movement in Canada, which included a series of important judicial decisions, such as this Court's decision in *Calder*.[8]

9. Following these early landmark decisions, the relationship between First Nations and Canada continued to evolve. In 2008, the Government of Canada acknowledged and apologized for the harms inflicted upon Indigenous peoples by Indian Residential Schools, whose central purpose was assimilation.

10. In November 2010, Canada endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration).[9] Judicially, the doctrine of reconciliation has emerged as a means of breaking with the past approaches of assimilation, non-recognition and denial of rights.

11. International norms including the UN Declaration, affirm First Nations rights to self-determination and set out the obligation placed on States in the creation of administrative measures which affect the rights of First Nations people.

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[4] *Sparrow* supra at 1103-1105.
[5] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1).
[6] *Royal Proclamation* (1763), RSC 1985, App II, No 1.
[7] *Sparrow* at 1103. (Emphasis in the original)
[8] *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313.
[9] Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples (November 12, 2010), online: http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142.

Part II – Statement of Issues

12. This appeal raises the following constitutional question:

a) Are ss. 11(1) and 47(a) of the *Wildlife Act*, RSBC 1996 c. 488 as they read in October 2010, of no force and effect with respect to the Respondent, being a member of the Lakes Tribe of the Confederated Tribes of the Colville Reservation in Washington State, USA, in virtue of s. 52 of the *Constitution Act*, 1982, by reason of an Aboriginal right within the meaning of s. 35 of the *Constitution Act*, 1982 invoked by the Respondent?

Part III – Statement of Argument

A. The Importance of the First Nations Perspective

13. This case raises important questions about the appropriate interpretation and meaning of "Aboriginal Peoples of Canada" for the purposes of s.35(1) of the Constitution. The argument that the interpretation of s. 35(1) of the Constitution includes a presumption that it only applies to First Nations within Canada, is incorrect and not grounded in the law nor the wording of s.35(1).

14. In determining whether s. 35(1) applies to First Nations peoples who are not resident in or citizens of Canada, the Court of Appeal in this case focused its analysis on the *Sparrow*[10] decision as formalized in *Van der Peet*. In *Van der Peet* this Honourable Court determined that reconciliation of pre-existence of Aboriginal societies in North America necessitated an examination of practices, customs and traditions of the historic collective when defining Aboriginal rights.[11]

15. There have been several reports and commissions of inquiry which have examined the complex histories of First Nations as well as First Nations societal structures, beliefs and laws. Most notably, the *Royal Commission on Aboriginal Peoples*, detailed the history of First Nations and recognized the diversity among First Nation beliefs, laws and relationships prior to contact with European settlers. The *Royal Commission on Aboriginal Peoples* found the following:

> Centuries of separate development in the Americas and Europe led to Aboriginal belief systems, cultures and forms of social organization that differed substantially from European patterns. Although this is generally accepted now, there is often less recognition of the fact that there was considerable diversity among Aboriginal nations as well. They were as different from each other

[10] *R. v. Sparrow*, [1990] 1 S.C.R. 1075
[11] *Van der Peet* supra note 2 at para 20.

> as the European countries were from each other. Moreover, they often still are…
>
> These differences remain important to the present day. They are not the dead artifacts of history, of value only to those who choose to study the past. Rather, they speak to the origins of cultural patterns that find (or seek to find) expression in contemporary times, in contemporary forms. These differences are at the heart of the present struggle of Aboriginal peoples to reclaim possession not only of their traditional lands, but also of their traditional cultures and forms of political organization.[12]

16. First Nations perspectives on law as well as social and political organization prior to contact with settlers, is integral to the understanding First Nations and jurisdiction over membership or citizenship. The rights of a nation which existed since time immemorial and prior to contact with a settlor state cannot be subsequently defined or unilaterally infringed upon by another nation. As Professor Burrows states "Courts have always noted that First Nations have their own systems of law and that great care must be exercised when translating this law into the common law."[13]

17. This Court recognized this to be true in several landmark decisions. As Professor Burrows notes, over the years the Court has made several pronouncements with respect to the recognition of the *sui generis* nature of First Nations rights:

> By referring to First Nations rights as sui generis, the Court describes them as "deriv[ing] from the Indian's historic occupation and possession of their tribal lands".' This interpretation accounts for the fact that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries"." Under these formulations, the manner through which First Nations organized themselves, "with a legal as well as just claim to retain possession of [their territory], and to use it according to their own discretion",' "remained unaffected" by conflicting British claims."[14]

18. As Professor Burrows states, First Nations law is the foundation for First Nations rights:

> "This pre-existing organization of First Nations communities is integral to their occupation and possession of land. Since First Nations organization and occupation of land is dependent on the existence of First Nations law, this law is, by extension, the

[12] Royal Commission on Aboriginal Peoples, "Volume 1: Looking Forward Looking Back", (1996) Canada Communications Group – Publishing, Ottawa, Ontario.
[13] John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill LJ 629.
[14] Burrows *supra* at pg. 640.

> foundation for other Aboriginal rights. The fact that the sui generis interest in land has valid roots in Aboriginal law means that this law necessarily forms a part of the contemporary meaning of Aboriginal rights."[15]

19. In *Van der Peet*, this Court held that s. 35(1) must be given a "generous, purposive and liberal" interpretation, highlighting that it constitutes a solemn commitment that must be given meaningful content. This Court referred to the purpose of s. 35(1) in the following way:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), 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 peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status. More specifically, what s. 35(1) does is 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. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.[16]

20. First Nations laws have always been the foundation for our relationships with one and other and with other nations. These rights were practiced throughout history and are still practiced to the present day, regardless of the many ways the Crown has sought to minimize or restrict First Nations rights. First Nations rights are not subject to the discretion of the Crown, they are not granted or permitted by the Crown, they pre-existed the creation of Canadian state and will not be defined, narrowed or unliterally infringed upon to suit the policy objectives of the Crown. The First Nations perspective is only perspective, which is relevant to the determination of who holds First Nations rights.

21. In determining whether s. 35(1) applies to First Nations peoples who are not resident in or citizens of Canada, the Court of Appeal was correct in its analysis of the *Sparrow*[17] and *Van der*

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[15] *Van der Peet* supra note 2 at para 30-31.
[16] *Haida Nation v. B.C. (Minister of Forests),* [2004] 3 SCR 54.
[17] *R. v. Sparrow,* [1990] 1 S.C.R. 1075

Peet decisions which focused on the reconciliation of pre-existence of First Nations societies in North America.[18]

22. It is therefore the AFN's view, that it is wholly inappropriate to propose a presumption or threshold to be met with regard to s.35(1) based upon concepts of Canadian citizenship and residency. The purpose of s.35(1) is the reconciliation of pre-existing First Nations rights which pre-date contact with European settlers and the imposition of Canadian citizenship and residency requirements. These concepts are not founded in First Nations law nor are they representative of First Nations perspectives on traditional territories, political structures, societal norms, values or kinship.

B. Interpretation and Application of s. 35 (1)

23. Section 35(1) protects potential rights embedded in claims against the asserted sovereignty of the Crown.[19] The honour of the Crown requires that these "potential rights" be determined, recognized and respected.[20] As First Nations were here when Europeans came and were never conquered, it cannot be said that their legal orders are not in force. Just as Canada cannot extinguish American law, Canada cannot extinguish First Nations laws.

24. First Nations rights are held by First Nations people by reason of the fact that they were independent, self-governing entities in possession of most of the lands now making up Canada.[21] First Nations rights are not dependent on acts of government; they are inherent. Some First Nations lands are governed pursuant to custom, title, treaty, or self-government agreements, and are outside the ambit of either federal or provincial legislative jurisdiction. First Nations legal orders continue to be in force on all First Nations lands.[22]

25. In determining the appropriate framework upon which to interpret and apply section 35(1), the AFN submits that the Court of Appeal was correct in its finding that the analysis used in *R v. Powley* is distinguishable from the case at bar.[23] The modification of the *Van der Peet* test in the circumstances of *R v. Powley* is applicable to the history and circumstances of the Métis. It is not applicable to the history and circumstances of First Nations. Any attempt to make a "one size fits

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[18] *R v. Van der Peet*, [1996] 2 S.C.R. 506 at para 20.
[19] *Haida* supra note 15 at para 24.
[20] *Supra*
[21] Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232 at 242.
[22] Royal Proclamation, 1763.
[23] *R v. Powley*, [2003] 2 SCR 207.

all" test for determining or applying Indigenous rights, ignores the uniqueness of First Nations and the truth of what occurred in this country during colonization. The cultural homogenization of Indigenous people, and the denial of their history is a legacy of colonization and it is the antithesis of reconciliation.

26. Similarly, the addition of a geographic location requirement or "present day community" criteria to the test for First Nations rights under *Van der Peet*, is yet another veiled attempt to narrow the application of section 35(1). This is best exemplified by the Attorney General of Alberta's argument that without a present-day community presence, First Nations rights would be "frozen rights".[24] While this Court has stated that continuity of the practice of the right claimed is needed, it has not proclaimed that continuity of geographic location is also required. Such an interpretation would require the Court to adopt a false narrative of the history of Canada.

27. The Court of Appeal in this case correctly determined that such an analysis would ignore the reality that throughout the history of Canada, First Nations were forced from their territories and often displaced by the Crown for a variety of reasons including the promotion of settlement and natural resource extraction. This was done in violation of First Nations law, common law and the treaties which the Crown entered into with First Nations. The Crown should not be permitted to now benefit from the violation of its own laws. For reconciliation to be meaningful, the truth regarding the effects of Canadian laws and policies which forcibly removed and relocated First Nations from their lands must be acknowledged.

28. The Appellant's interpretation as supported by the Attorney General of Canada, is nothing more than an attempt to narrow the scope of s. 35 by creating a threshold, unsupported by the law, which the Court of Appeal rightly concluded, results in "a requirement that Indigenous peoples may only hold Aboriginal rights in Canada if they occupy the same geographical area in which their ancestors exercised those rights, ignores the Aboriginal perspective, the realities of colonization and does little towards achieving the ultimate goal of reconciliation."[25]. This interpretation would only result in yet another legal barrier for First Nations to assert their rights.

C. Reconciliation and the UN Declaration

29. Reconciliation between the Crown and First Nations peoples requires a purposive interpretation of all constitutional provisions affecting the rights, jurisdictions and powers of First Nations, and must be informed by international law. The onus of the Crown to act honourably in

[24] Alberta's Factum, para 62-78.
[25] *R v. Desautel*, 2019 BCCA 151 at para 62.

all dealings with First Nations, is sourced in the treaties and the agreements First Nations peoples entered into with the Crown prior to Canada's confederation.[26]

30. For decades federal, provincial and territorial governments have sought to limit as much as possible the interpretation of First Nations and treaty rights under section 35(1). Instead of striving for genuine reconciliation, the Crown has sought to narrow the scope of s. 35(1) while making it increasingly difficult for First Nations to prove their rights. Former Chief Justice Dickson of the Supreme Court stressed: "The various sources of international human rights law – declarations, covenants, conventions … customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions."[27] The same rule necessarily applies to the "guarantee of Aboriginal rights" in s. 35.

31. Canadian domestic law is not the singular authority on First Nations' rights; international law and First Nations legal orders are equally relevant, although unequally applied in Canadian courts. Both the federal and provincial Canadian governments have explicitly endorsed international legal instruments that recognize the authority of First Nations over their lands. Self-determination and self-government are all highly relevant and foundational aspects of First Nations rights.

32. The UN Declaration recognizes the legal rights of First Nations peoples and the threats that they have experienced to these rights. Article 25 of the UN Declaration states that Indigenous peoples have the right to maintain and strengthen their distinctive and cultural spiritual relationships with their traditionally owned or otherwise occupied and used lands, territories.[28] In addition, Articles 3 and 4 state that Indigenous peoples have the right to self-determination and to freely determine their political status and the right to autonomy or self-government in matters relating to their international and local affairs. This expressly recognizes the right of First Nations to determine their citizenship and pollical representation. The UN Declaration helps to define the responsibilities of governments, including the use of international law as a "relevant and persuasive source of interpretation" of domestic law, including the Canadian Constitution. [29]

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[26] *Haida* supra note 15.
[27] *Reference re Public Service Employee Relations Act* (Alberta), [1987] 1 S.C.R. 313, at 348 (Dickson C.J. dissenting).
[28] *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.
[29] *Reference re Public Service Employee Relations Act (Alberta)*, 1 S.C.R. 313, 1987, para 348.

33. As the ultimate goal of the honour of the Crown has been recognized as paving the way to reconciliation between levels of government and First Nations, the AFN would submit that the courts must recognize the role of the UN Declaration, as a guide on the path of reconciliation with First Nations. This would include giving due effect to First Nations inherent right to self-government and recognizing First Nations laws and jurisdiction to determine their citizenship.

Part VI – Costs

34. The AFN does not seek costs and asks that it not be subject to any costs orders.

Part V – Nature of Order Sought

35. The AFN takes no position on the specific outcome of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: June 24, 2020

Julie McGregor
Stuart Wuttke
Assembly of First Nations

Part VI – Table of Authorities

A. Primary Sources

Jurisprudence	Paragraphs
Calder et al v Attorney-General of British Columbia, [1973] SCR 313, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1362/index.do	8
Haida Nation v. B.C. (Minister of Forests), [2004] 3 SCR 54, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do	19, 23
Reference Re Public Service Employees Relations Act (Alta.) [1987] 1 SCR 313 at 348-350, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/205/index.do	30, 32
R v. Desautel, 2019 BCCA 151, https://www.canlii.org/en/bc/bcca/doc/2019/2019bcca151/2019bcca151.html	28
R v. Powley, [2003] 2 SCR 207, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2076/index.do	3, 22
R v Sparrow, [1990] 1 SCR 1075 at 1103-1105, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/609/index.do	2, 7, 14, 21
R v. Van der Peet, [1996] 2 S.C.R. 506, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1407/index.do	2, 14, 19, 21, 25, 26

2. Secondary Sources

Source	Paragraphs
Article 3, 4, and 25, *United Nations Declaration of the Rights of Indigenous Peoples* (A/RES/61/296), found online at: http://www.un.org	1, 2, 10, 11, 32, 33
Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232 at 242, https://digitalcommons.osgoode.yorku.ca/scholarly_works/1177/	24
Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples (November 12, 2010), online: http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142.	10
John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill LJ 629, https://www.aboriginallegal.ca/assets/withorwithoutyou.pdf	17, 18
Royal Commission on Aboriginal Peoples, "Volume 1: Looking Forward Looking Back", (1996) Canada Communications Group – Publishing, Ottawa, Ontario, https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx	15

3. Statute

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Royal Proclamation (1763), RSC 1985, App II, No 1.