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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I – Overview

1. The Appellant's reply submissions address several common themes running through the submissions of the interveners representing Indigenous Nations or organizations.

II – No dishonourable Crown conduct

2. Several interveners contend that the Appellant's approach "[d]ishonourably… would visit further harm upon Indigenous groups already dislocated from their ancestral lands at the hand or behest of the Crown".[1] This serious allegation is not borne out on the facts: The trial judge specifically declined to find that the Lakes Tribe was forced out of Canada; rather, she found that "it was a constellation of factors that led to the Sinixt's gradual shift from moving continuously throughout the whole of their traditional territory with the seasons to more or less full time residence in or near their southern traditional territory".[2]

III – Reconciliation considers both Aboriginal and common law perspectives

3. Several interveners make submissions regarding the importance of the "Aboriginal perspective", with one going so far as to suggest that the Aboriginal perspective is the only one relevant to determining who holds Aboriginal rights.[3] Contrary to that submission, this Court has consistently emphasized that both the Indigenous and common law perspectives must be considered when determining Aboriginal rights.[4] Taking both perspectives into account is central to the concept of reconciliation carefully cultivated by this Court: As the Court emphasized in *Van der Peet*, "the only fair and just reconciliation is… one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each".[5]

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[1] See for example Factum of White Cap Dakota First Nation, para. 7; Factum of the Congress of Aboriginal Peoples, para. 28.
[2] BCPC Reasons, paras. 101, 110, 128.
[3] Factum of the Assembly of First Nations, para. 20.
[4] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, paras. 34-36, 81-82; *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, paras. 47-48; *Ross River Dena Council Band v. Canada*, 2002 SCC 54, para. 64; *Mitchell v. M.N.R.*, 2001 SCC 33, para. 39; *R. v. Marshall*, [1999] 3 SCR 456, para. 19; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, paras. 112, 147-149, 156; *R. v. Van der Peet*, [1996] 2 SCR 507 (*Van der Peet*), paras. 49-50.
[5] *Van der Peet*, para. 50.

4. Furthermore, and with specific regard to the role of the Aboriginal perspective in statutory interpretation, this Court has stated that the "salutary rule that statutory ambiguities must be resolved in favour of the Indians" does not imply "automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation". As the Court explained, "[i]t is also necessary to reconcile any given interpretation with the policies the Act seeks to promote".[6]

IV – The *United Nations Declaration on the Rights of Indigenous Peoples* does not assist with resolving the issues raised on this appeal

5. Several interveners make submissions regarding the applicability of the *United Nations Declaration on the Rights of Indigenous Peoples* (the "UN Declaration") and the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019 c. 44 ("the Act") to the issues arising on this appeal. Enacted in 2019, the Act creates a framework for BC to bring its laws into alignment with the UN Declaration over time and in consultation and cooperation with Indigenous peoples, through the mechanism of an action plan and annual reporting, to ensure transparency and accountability.[7] BC released its first annual report on June 30, 2020.[8] The Act has not yet been substantively considered by any court.[9]

6. While the Act affirms the application of the UN Declaration to the laws of BC,[10] contrary to the assertion of some interveners,[11] the Act does not give the UN Declaration the force of law in BC or create new substantive rights.[12] Significantly, and in any event, the UN Declaration does

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[6] *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85, pp. 142-143.
[7] *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019] c. 44, ss. 3-5. British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl, 4th Sess, No 280 (24 October 2019) at 10222 (Hon S Fraser); No 286 (30 October 2019) at 10373 (Hon S Fraser).
[8] British Columbia, *Declaration on the Rights of Indigenous Peoples Act 2019/2020 Annual Report*.
[9] The Act was briefly referenced in *Servatius v Alberni School District No. 70*, 2020 BCSC 15, para. 37. The hearing in that matter was completed before the Act received royal assent.
[10] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019 c. 44, s. 2(a).
[11] See for example Factum of Lummi Nation, para. 33.
[12] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl, 4th Sess, No 297 (25 November 2019) at 10753 (Hon S Fraser).

not include a substantive right to cross international borders. The rights set out in Art. 36 fall short of that and thus do not aid in resolving the interpretive issue before the Court.

V – The *Van der Peet* test includes a community continuity requirement

7. Contrary to the submission of several interveners, the test for Aboriginal rights set out in *Van der Peet* requires a claimant to demonstrate not only continuity of practice but continuity of community.[13] It is essential that a court identify a rights-holding group in order to find that an Aboriginal right is proven, due to their collective nature.[14] As Garson J (as she then was) explained in *Ahousaht*, citing *Powley* and *Marshall and Bernard*, "proof of connection will be primarily based on a geographical identification but it is not necessary to prove the geographic connection in the same way that proof of aboriginal title would require".[15]

8. Madam Justice Garson's reasoning in *Ahousaht* accords with that of the New Brunswick Court of Appeal in *Bernard v. R.*,[16] and supports the Crown's position that the *Van der Peet* test includes a requirement that there be a present day community in the geographic area where the claimed right was exercised. The contention that the contemporary community requirement is specific to Métis rights claims must be rejected.[17] As the New Brunswick Court of Appeal stated in *Bernard*, in *Powley* this Court "was elaborating principles applicable to Aboriginal rights in general".[18] In the case at bar, this Court is simply being asked whether the present day rights-holding community must at least be in Canada.

VI – Distinguishing between different types of Aboriginal rights is appropriate

9. Several interveners raise a concern that recognizing that the Lakes Tribe may hold a common law Aboriginal right would effectively create "classes" of Aboriginal rights holders.[19] This does not create classes of Aboriginal rights, but rather recognizes the variety of rights that

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[13] See for example Factum of the Okanagan Nation Alliance, para. 10; Factum of the Assembly of First Nations, para. 26; Factum of Mohawk Council of Kahnawà:ke, para. 10.
[14] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, paras. 30, 33; *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, para. 67.
[15] *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494, para. 292.
[16] 2017 NBCA 48, paras. 48.
[17] Factum of Metis Nation British Columbia, paras. 20, 22.
[18] *Bernard*, para. 48. See also *R. v. Lamb*, 2020 NBCA 22, para. 11.
[19] See for example Factum of Lummi Nation, para. 21; Factum of Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government, paras. 11-12.

exist as a consequence of the entrenchment of s. 35. Moreover, it is well established that Aboriginal rights, unlike *Charter* rights, are not general and universal.[20] For example, as this Court explained in *Gladstone* in the context of Aboriginal fishing rights, because "the nature and existence of aboriginal rights vary in accordance with the variety of aboriginal cultures and traditions which exist in this country", governments must make decisions about how to allocate fish between Canadians who hold Aboriginal rights to fish and those who do not, and between Aboriginal peoples who hold an Aboriginal right to fish for food, social and ceremonial purposes and those who have an Aboriginal right to sell fish commercially.[21]

VII –The international boundary cannot be disregarded

10. In BC, the Canada-US border was determined by the Oregon Boundary Treaty (not the Treaty of Paris, contrary to the submission of one intervener).[22] This international boundary must be distinguished from the interprovincial border at issue in *Uashaunnuat*,[23] a case several interveners cite as a reason for disregarding the international boundary. As this Court explained in *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas,*

> The Oregon Treaty… is more than simply a border delineation. It is the resolution of the competing British and American claims to ownership over the entire "Oregon Territory". The demarcation of the 49th parallel and the mid-channel point in the Straits as the international boundary constitutes a recognition by each signatory of the claims of the other to proprietorship over all "the territories" up to that boundary.[24]

11. Section 35 provides a constitutional framework for reconciling the Crown sovereignty recognized by the Oregon Boundary Treaty with the pre-existence of Aboriginal societies.[25] The fact that both Canada and the US are colonial states does not render the border between them inherently "colonial" or provide a reason to disregard it. All states have borders.

VIII – "Originalism" allegations are not helpful for interpreting s. 35

12. Several of the interveners supporting the Respondent accuse the Appellant of adopting an "originalist" interpretation of s. 35. These interveners caution against reliance upon constitutional

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[20] *R. v. Van der Peet*, [1996] 2 SCR 507, paras. 18-19, 69.
[21] *R. v. Gladstone*, [1996] 2 SCR 723, paras. 65, 68.
[22] BCPC Reasons, para. 137; Factum of the Peskotomuhkati Nation, para. 24.
[23] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4.
[24] [1984] 1 SCR 388, pp. 405-406.
[25] *R. v. Van der Peet*, [1996] 2 SCR 507, para. 31.

debates, juxtaposing originalism to a purposive or 'living tree' approach.[26] This is a false dichotomy. This Court has consistently adopted a purposive approach to the interpretation of *Charter* and s. 35 rights, and judicial consideration of legislative history—including the *Minutes*—is a key part of that approach.[27] While stressing the primacy of the text, this Court has also made it clear that constitutional interpretation must be informed by "[t]he assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another".[28] The *Minutes* shed valuable light on these critical questions. This Court has never expressly accepted or rejected "originalism" as an approach to constitutional interpretation, and it is unnecessary to do so here.

IX – Nuchatlaht First Nation

13. The factum of the intervener Nuchatlaht First Nation refers to the Province's position in Aboriginal rights and title litigation brought by Nuchatlaht, which is currently before the BC Supreme Court. Nuchatlaht mischaracterizes the Province's position and procedural issues in dispute in that proceeding; Nuchatlaht also mischaracterizes the issues in dispute in the case at bar. Contrary to Nuchatlaht's submission, it is not necessary for this Court to comment on the doctrine of abandonment here, as it is not relied on by the Crown. Nor would it be appropriate for the Court to comment on Nuchatlaht's title claim, which is not before this Court. Contrary to Nuchatlaht's submission that Aboriginal rights were constitutionally protected before 1982, it is widely accepted that "[t]he enactment of s. 35 accorded constitutional status to existing aboriginal and treaty rights recognized at common law".[29]

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[26] See for example Factum of Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government, para. 10; See also Factum of Mohawk Council of Kahnawà:ke, para. 21.
[27] *R. v. Sparrow*, [1990] 1 SCR 1075, p. 1106; *Reference re Senate Reform*, 2014 SCC 32, paras. 25, 52, 76-77; *R. v. Poulin*, 2019 SCC 47, paras. 32, 53-57, 78; *R. v. Stillman*, 2019 SCC 40, paras. 21-22, 77.
[28] *Caron v. Alberta*, 2015 SCC 56, paras. 36-37; *Reference re Senate Reform*, 2014 SCC 32, para. 26; see also *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General*, 2014 SCC 59, para. 27.
[29] Jack Woodward, *Native Law*, (Toronto: Thomson Reuters Canada, 2019), (loose-leaf updated 2020, release 3), 5§60.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of August, 2020.

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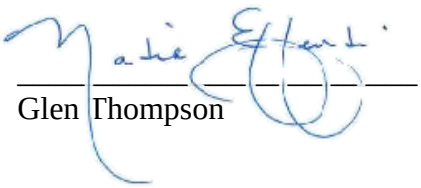

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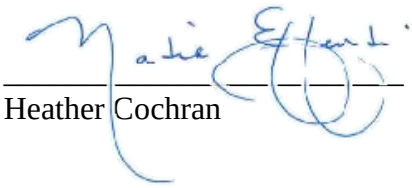

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Caselaw:

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12.	*R. v. Poulin*, 2019 SCC 47	12
13.	*R. v. Sparrow*, [1990] 1 SCR 1075	12
14.	*R. v. Stillman*, 2019 SCC 40	12
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16.	*Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*, 1984 CanLII 138 (SCC) [1984] 1 SCR 388	10
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Secondary Sources:

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2.	British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl, 4th Sess, No 280 (24 October 2019) at 10222 (Hon S Fraser)	5
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Statutes, Regulations, Rules, etc.:

No.	Statute, Regulation, Rule, etc.	Section, Rule, Etc.
1.	*Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019] c. 44	s. 2 s. 3 s. 4 s. 5