S.C.C. 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* and Order of Côté J. made June 30, 2020)

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A. "Aboriginal Peoples of Canada"

1. Canada and Ontario each propose their own "threshold" test for determining whether an Indigenous collective is an "Aboriginal peoples of Canada" under s. 35(1). Many aspects of these proposed tests are duplicative of the *Van der Peet*[1] framework utilized by the Court of Appeal, and add little to the analysis. To the extent the tests depart from *Van der Peet*, it is largely on the basis of factors related to modern day political relationships or recognition, which are not grounded in the underlying foundation of s. 35(1)[2], and further the legacy of colonialism.

2. For its part, Canada would require a rights claimant to prove that their community has "maintained a substantial connection with" an Indigenous rights-bearing or rights-asserting collective in Canada. To prove that connection, the person must self-identify with, show an ancestral connection to, and have been accepted by an Indigenous collective in Canada.[3]

3. Canada draws these factors from *Powley*, and says that the courts below erred by failing to consider them.[4] Leaving aside the fact that British Columbia did not raise these factors in the courts below, it is unnecessary to have regard to them in cases involving First Nations, and particularly here in light of the trial judge's findings of fact.

4. The considerations articulated in *Powley* were designed to respond to the unique ethnogenesis of the Métis post-contact, where the existence of and membership in a specific community were at issue. The trial judge in *Powley* explained that the issue arose because there was no formal administrative procedure for identifying a rights-holding group and membership within it:[5]

> **58** How does the court determine whether or not the Powleys are Metis for the purposes of s.35(2) of the Constitution Act, 1982? The "Who is a Metis?" question looms large. Unlike cases involving Indian rights, an identifying tribe or band is not available to those claiming Metis status. The generic term Metis forces individuals to not only self identify but they must also piece together the existence of a definable Metis existence from location to location.

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[1] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*]
[2] *Constitution Act, 1982*, Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11
[3] Factum of the Intervener, Attorney General of Canada ("Canada Factum"), para. 2
[4] Canada Factum, para. 29
[5] *R. v. Powley*, [1999] 1 C.N.L.R. 153 (On Crt. Prov. Div.) [*Powley*], paras. 58-59

> **59** Indian tribes have been identified over time as to region and governments have developed registration lists, to identify Indians for purposes of benefits and claims. A similar procedure has not been put in place for those of Metis descent.

5. This Court accordingly modified the *Van der Peet* test to allow courts to perform a case-by-case assessment of an individual's community membership pending the development of standardized means of ascertaining community membership.[6]

6. In this case, there is no issue as to the existence of the Sinixt or Mr. Desautel's membership within it. The trial judge's uncontroverted findings of fact were that "the Sinixt continue to exist today as a group", and Mr. Desautel is a member of that group.[7] Thus, it is unnecessary to have regard to the *Powley SCC* framework in this case or in First Nations cases more generally, where modern-day community membership should properly be left for the community itself.

7. Drawing from the law of sheltering, Canada goes further and places particular emphasis on adding a "permission" requirement to the *Powley SCC* test. In other words, Canada would have Indigenous collectives resident in Canada make a determination about which non-domiciled individuals may exercise s. 35 rights, which renders those rights effectively meaningless – they would only be exercisable by the political goodwill of another community.[8]

8. Importantly, non-resident groups may lack political relationships precisely because of the displacement caused by colonialism, and the failure of governments to recognize them. Thus, taking into account these relationships (or lack of relationships, as the case may be) could reward governments for a policy of non-recognition. The Crown should not be absolved of its duty to pursue reconciliation by reason of its failure to do so in the past.

9. Ontario urges a "contextual" threshold analysis, and raises a "non-exhaustive" list of factors a court may consider. Those factors are, however, predominantly addressed by the existing *Van der Peet* framework. Ontario suggests that courts should take into account the modern day and historic presence of a community in an area, the continuity of the community's connection to Canada (including gaps in continuity and the reasons for those gaps), and the Indigenous

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[6] *R. v. Powley*, 2003 SCC 43 [*Powley SCC*], para. 29
[7] *R. v. Desautel*, 2017 BCPC 84 [BCPC Decision], paras. 66-68, Appellant's Appeal Record ("AR") Vol. I, Tab 1, pp. 20-21
[8] Canada Factum, paras. 33, 38, 41-42, 48-49

perspective.[9] These factors are all addressed by *Van der Peet*, and in particular the core requirement to establish continuity. The Trial Judge made specific findings of fact on all these elements in the course of applying *Van der Peet*.[10]

10. However, Ontario also says the courts should take into account the relationship between the "claimant community" and other Indigenous communities and governments (both Indigenous and non-Indigenous) within Canada.[11] Similar to Canada, this improperly puts the focus on modern-day political relationships or recognition that may not exist precisely because of the history of colonialism and displacement. Section 35(1) rights cannot be dependent on the vagaries of political goodwill.

11. The focus of both Canada and Ontario on modern-day political relationships is unconnected to the foundation of the law of Aboriginal rights: the prior occupation of Indigenous communities in Canada. Like the Appellant, neither Canada nor Ontario provide any principled reason why a group that has met the onerous *Van der Peet* requirements cannot hold Aboriginal rights in Canada, and instead fall back on concerns about the impact of, and alleged practical difficulties associated with, consultation and accommodation with cross-border Indigenous communities.[12] Such concerns, however, cannot stand in the way of the recognition of s. 35 rights, as the courts below acknowledged.

12. Ontario and Saskatchewan suggest that the question of whether a group is an "Aboriginal peoples of Canada" is addressed as a threshold issue in other contexts, including with respect to the *Natural Resources Transfer Agreement*[13]. It is entirely appropriate to take a different approach with respect to s. 35(1) because it recognizes and affirms pre-existing rights: those practices that continued into the common law as rights following the assertion of sovereignty. In other words, the source of the rights is the prior occupation of Indigenous communities in Canada, which should also define who is an "Aboriginal peoples of Canada". By contrast, the rights granted by the

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[9] Factum of the Intervener, Attorney General of Ontario ("Ontario Factum"), para. 16
[10] BCPC Decision, paras. 84-135, AR Vol. I, Tab 1, pp. 28-47
[11] Ontario Factum, para. 16
[12] Canada, paras. 2, 40; Ontario, paras 30-32. See also Quebec, paras. 56-60 and Alberta, para. 45
[13] Ontario Factum, paras. 12-13; Factum of the Intervener, Attorney General of Saskatchewan, paras. 2, 9-20

Natural Resources Transfer Agreement have their source in that instrument, and so it is appropriate to look to the document itself to determine who has rights under it.

13. Ontario also refers to cases where the court has not proceeded through the *Van der Peet* framework because a claimant is a non-Indigenous person, or otherwise does not have standing.[14] Those cases stand for the proposition that where it is clear that the *Van der Peet* test cannot be met, a court may dismiss a matter summarily. None of those cases rely on tests other than those set out in *Van der Peet* and *Sparrow*[15] for determining if a person may exercise s. 35(1) rights.

14. Lastly, it should be noted that a regulatory prosecution does not provide an appropriate forum for the adjudication of the existence and extent of a rights-holding group. As noted by Madam Justice Garson (as she then was) in *Ahousaht,* when dealing with an Aboriginal rights defence, "it is generally not necessary for the Court to identify the whole of the appropriate collective with any precision."[16] Notably, in *Powley SCC,* the court did not define the entire Métis collective, or make any determination about the status of the community. It focused on the individual subject to the regulatory prosecution.

B. New Issues of Fact or Mixed Fact and Law

15. Quebec argues that the Trial Judge "committed a palpable and overriding error" by finding that a "single hunting expedition" by Mr. Desautel brought to an end the break in the chain of continuity.[17] New Brunswick, referring extensively to the exhibits at trial, argues that this Court should recharacterize the right found by the Trial Judge as one that involves food, social and ceremonial functions that they say will occur outside Canada.[18]

16. It is inappropriate for the Attorneys General to raise these arguments. An intervener is not entitled to widen or add to the points in issue by raising issues that were not addressed in the court below, particularly when doing so would expand the grounds of appeal.[19] The question of whether

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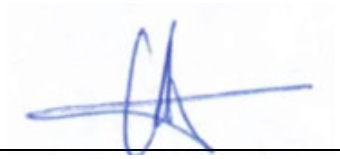
[14] Ontario Factum, para. 12, FN 8-9
[15] *R. v. Sparrow*, [1990] 1 S.C.R. 1075
[16] *Ahousaht Indian Band and Nation v. Canada (Attorney General),* 2009 BCSC 1494, paras. 288, 323, 336, 344, 354 and 365
[17] Factum of the Intervener, Attorney General of Quebéc, paras. 28-32
[18] Factum of the Intervener, Attorney General of New Brunswick, paras. 32-49
[19] *R. v. Barton*, 2019 SCC 33, paras. 52-53; *R. v. Morgentaler*, [1993] 1 S.C.R. 462

the facts are sufficient to meet the *Van der Peet* test and support the Trial Judge's characterization of the right did not arise in either of the appellate courts below, is not raised in the Notice of Constitutional Question, and is not properly before this Court.

17. Moreover, these arguments raise questions of fact, or mixed fact and law, which this Court has no jurisdiction to consider. Section 839 of the *Criminal Code* permits summary conviction appeals to be brought "on any ground that involves a question of law alone", and further appeal to this Court is likewise limited to questions of law.[20]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 5, 2020



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[20] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 839, 676, 693(1)(b)

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