Court File No. 38734

IN THE SUPREME COURT OF CANADA
(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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PART I – OVERVIEW

1. The Indigenous Bar Association in Canada ("IBA") intervenes in this appeal to highlight the importance of considering the perspective of Indigenous Peoples when determining Aboriginal rights within the meaning of section 35 of the *Constitution Act, 1982*.[1]

2. The IBA makes three principal submissions. First, requiring an Indigenous group to establish that it is one of the "aboriginal peoples of Canada" within the meaning of the *Constitution Act, 1982* at or prior to the application of the *R. v. Van der Peet*[2] analysis would be contrary to established jurisprudence.

3. Second, this Court should reject the proposed additional requirement that an Indigenous person who resides in the United States demonstrate a connection to and acceptance by a present-day rights-bearing community in Canada in order to advance rights under section 35.

4. Third, the Crown cannot rely on practical difficulties to circumvent its section 35 obligations. To accept this approach would deny Indigenous Peoples' perspective and lived experience, and allow the Crown to capitalize on the historic and ongoing wrongs of colonization.

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[1] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].
[2] *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 SCR 507 [*Van der Peet*].

PART II – THE IBA'S POSITION ON THE ISSUE ON APPEAL

5. The issue before this Court is whether a person of Sinixt ancestry, who is also resident of the United States, is entitled to exercise an Aboriginal right within the meaning of section 35 of the *Constitution Act, 1982* in the ancestral territory of the Sinixt in what is now British Columbia, Canada.

6. The IBA takes no position on this issue or on the facts in this proceeding.

PART III – STATEMENT OF ARGUMENT

Requiring an Indigenous group to establish that it is among the "aboriginal peoples of Canada" is contrary to the purpose of section 35

7. The IBA submits that requiring an Indigenous group to establish that it is among the "aboriginal peoples of Canada" in order to hold rights under section 35 is contrary to established jurisprudence and the underlying purpose of constitutional recognition and protections for Aboriginal rights.

8. Section 35 rests on two pillars: the protection of the rights of Indigenous Peoples that pre-date the arrival of Europeans; and the promise of an honourable process for reconciling these pre-existing rights with the assertion of Crown sovereignty.[3]

[3] *Van der Peet* at para 31, 44.

9. A requirement that an Indigenous group demonstrate it is among the "aboriginal peoples of Canada" (whether based on contextual factors, a textual analysis of the *Constitution Act, 1982* or on a demonstrated connection to and acceptance in present-day rights-holding community in Canada) would undermine the first of these pillars: the protection of the rights of Indigenous Peoples. Adopting this approach would frustrate the purpose of section 35 by denying constitutional protections to the very groups they are intended for – the Indigenous Peoples who used and occupied lands in what is now Canada prior to contact and the assertion of Crown sovereignty.

10. Such a requirement would disregard the perspective of the Indigenous group advancing the right. Requiring an Indigenous group to establish that it is among the "aboriginal peoples of Canada" as a prerequisite to the *Van der Peet* analysis fails to properly consider the group's collective identity and unique experience of colonization, including the group's distinctive relationship to its ancestral lands.[4] It would perpetuate the historic and ongoing wrongs of colonization by preventing Indigenous groups who have been dispossessed of their territories from seeking access to the constitutional protections necessary to maintain a present-day connection to their lands in Canada.

11. This requirement is also contrary to the second pillar of section 35: the promise of an honourable process for reconciling pre-existing rights with the assertion of Crown sovereignty. The process of reconciliation flows from the Crown's duty to act honourably in its dealings

[4] *R. v. Powley*, 2003 SCC 43 (CanLII), [2003] 2 SCR 207 [*Powley*] at para 37, citing *Van der Peet.*

with Indigenous Peoples, which in turn arises from the Crown's assertion of sovereignty and *de facto* control over lands occupied and controlled by Indigenous Peoples.[5]

12. Denying an Indigenous group's ability to hold section 35 rights prior to the application of the *Van der Peet* test would allow the Crown to avoid the obligations which flow from the potential recognition of such rights, including the requirement that infringements be justified under the framework set out by this Court in *R. v. Sparrow.*[6] It further would preclude those groups from the opportunity to engage in the honourable process of reconciliation with the Crown as promised by section 35.

13. Critically, this approach would foreclose the existence of other constitutional obligations on the part of the Crown, including the duty to consult Indigenous Peoples in respect of their asserted but as-yet-unrecognized rights.

14. Section 35 exists to protect both the recognized and potential rights of Indigenous Peoples.[7] To accept the proposed modifications to established jurisprudence would preclude Indigenous groups with ancestral connections to territories in Canada from advancing section 35 rights, and in so doing, allow the Crown to sidestep its obligation to consult with and accommodate Indigenous Peoples prior to the determination of their constitutional rights, contrary to the honour of the Crown and the purpose of section 35.

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[5] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 SCR 511 [*Haida Nation*] at para 32, *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para 9.
[6] *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] [*Sparrow*] 1 S.C.R. 1075.
[7] *Haida Nation* at para 25.

A demonstrated connection to a present-day rights-bearing community in Canada is not required to access section 35 rights

15. This Court should reject a requirement that an Indigenous person who resides outside of Canada demonstrate a connection to or acceptance in a present-day rights-bearing community in Canada before he or she is able to assert a section 35 right. Such a requirement ignores the divisive nature of colonization and dispossession of Indigenous Peoples from their ancestral territories.

16. This Court's decision in *R. v. Powley* does not support the proposed new requirement. *Powley* arose in the specific context of a Métis community asserting Aboriginal rights. In *Powley* this Court confirmed, consistent with the purpose of section 35, that the prior occupation of lands by Indigenous Peoples was the primary justification for constitutional protections for Aboriginal rights.[8] The Court then proceeded to modify elements of the *Van der Peet* test in respect of Métis claims to "reflect the distinctive history and post-contact ethnogenesis of the Métis…."[9]

17. Where *Powley* was consistent with and built on the *Van der Peet* analysis, the proposed new requirement contradicts and undermines *Van der Peet*. Unlike the Métis, the Sinixt are not the product of ethnogenesis. Their rights did not emerge post-contact. The right asserted by the Respondent pre-dates the arrival of Europeans and the assertion of Crown sovereignty and falls squarely within the group of rights section 35 promises to protect. To introduce a new

[8] *Powley* at para 16.
[9] *Powley* at para 14.

requirement that non-residents establish a connection to or acceptance within a present-day rights-bearing community in Canada would break the promise of section 35.

18. This requirement would also be contrary to the repeated confirmation by this Court that Aboriginal rights must be determined with regard to the perspective of the Indigenous group advancing the right, including the laws, practices, customs and traditions of the claimant group.[10] An approach which imports aspects of the *Powley* test which were designed to address the issue of individual acceptance in the context of the unique history of the Métis would effectively erase the specific history, culture and perspective of Indigenous groups whose ties to lands in Canada pre-date the arrival of Europeans, the assertion of Crown sovereignty and the imposition of the international border through the territories of Indigenous Peoples.

Practical challenges cannot justify the denial of section 35 rights

19. This Court has been clear that logistical challenges do not provide a basis for the Crown to circumvent its obligations to deal honourably with Indigenous Peoples.[11] Practical difficulties should not be exaggerated for the purpose of defeating Indigenous Peoples' rights under section 35.[12]

20. The process of colonization was undertaken without regard for the rights and perspectives of Indigenous Peoples whose territories include lands on both sides of the Canada-United States

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[10] *R. v. N.T.C. Smokehouse Ltd.*, 1996 CanLII 159 (SCC), [1996] 2 SCR 672 at para 44; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (CanLII), [2014] 2 SCR 257 at para 3.
[11] *Haida Nation* at para 30-31; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 at para 25.
[12] *Powley* at para 49.

border. The fact that these events, and the rights and obligations which flow from them, raise complex and nuanced questions does not justify denying the possibility that non-resident Indigenous people may be entitled to hold section 35 rights.

21. Similarly, the possibility that Aboriginal rights held by non-resident Indigenous groups could affect the exercise of rights held by groups located in Canada should not be used as the basis to deny constitutional protections to Indigenous groups outside of Canada at the outset, prior to the application of *Van der Peet*.

22. The overarching goal of reconciliation demands that the issues arising as a result of colonization be addressed in a manner consistent with the honour of the Crown, regardless of their complexity. Section 35 provides the vehicle to advance reconciliation through the protection of asserted and established rights, taking into account the specific perspective of the Indigenous group which occupied and used territories in what is now Canada prior to contact and the assertion of Crown sovereignty.

23. Workable solutions have already been developed by this Court to address the unique and complex challenges which arise in respect of the Crown's obligations to Indigenous Peoples.[13] There is no principled reason why the existing processes set out by this Court, including the duty to honourably negotiate, the duty to consult and the *Sparrow* infringement/ justification analysis—all of which exist to advance the dual purposes of section 35—cannot support a

[13] ***Haida Nation*** at para 39; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*., 2017 SCC 40 (CanLII), [2017] 1 SCR 1069 at para 20; ***Mikisew Cree First Nation v. Canada (Governor General in Council***), 2018 SCC 40 (CanLII), [2018] 2 SCR 765 at para 92.

process of honourable reconciliation between the Crown and Indigenous groups with ancestral territories in Canada, regardless of where the present-day group now resides.

Conclusion

24. The IBA respectfully submits that the issue of whether an Indigenous group which resides outside of Canada in whole or in part may hold Aboriginal rights must be determined in a manner consistent with the underlying purpose of section 35: the recognition and protection of the rights of Indigenous Peoples which pre-date the arrival of Europeans and the ongoing process of reconciling those rights with the assertion of Crown sovereignty.

25. This Court should reject any modification of the well-established jurisprudence which would effectively foreclose non-resident Indigenous groups with ties to lands in Canada that pre-date contact and the assertion of Crown sovereignty from advancing section 35 rights. To accept such a modification would allow the Crown to circumvent its constitutional obligations to Indigenous Peoples, would be contrary to the Indigenous perspective on colonization and would defeat the purpose of section 35.

PART IV – COSTS

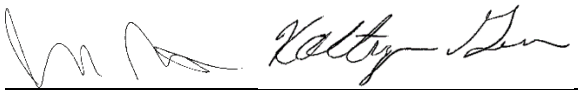
26. The IBA seeks no order as to costs and asks that no order for costs be made against it.

PART V – ORDERS SOUGHT

27. The IBA confirms its intention to present oral argument at the hearing of the appeal, as provided for in the Order of this Court dated March 9, 2020

All of which is respectfully submitted this 18th day of June, 2020.

Per:



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PART VI – TABLE OF AUTHORITIES

		Para #
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