SCC File No. _____

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

BETWEEN:

HER MAJESTY THE QUEEN

(Applicant)
(Appellant)

-and-

RICHARD LEE DESAUTEL

(Respondent)
(Respondent)

MEMORANDUM OF ARGUMENT
OF THE APPLICANT,
HER MAJESTY THE QUEEN
(Pursuant to Rule s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 25 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Since the enactment of the *Constitution Act, 1982*, this Court and courts at all levels across Canada have interpreted Part II: "Rights of the Aboriginal Peoples of Canada", particularly focussing on the content to be assigned to Aboriginal rights under s. 35. Yet no higher level appellate court has explicitly interpreted or provided any clear guidance in interpreting the phrase "aboriginal peoples of Canada" as that phrase is used in s. 35. The applicant asks this court to provide that guidance.

2. This application raises a number of legal issues of national importance, the most significant being: does the definition and scope of the phrase "aboriginal peoples of Canada" extend to Indigenous groups that do not reside in Canada?

3. The issue arose as a result of a regulatory prosecution against the Respondent, Richard Desautel, for hunting without a licence in the Arrow Lakes region of British Columbia. The Respondent is an Indigenous person and a citizen of the United States of America. He is a member of the American Lakes Tribe of the Confederated Tribes of the Colville Reservation ("CCT") and lives on the Colville Indian Reserve in Washington State. He has never been a resident of British Columbia or a citizen of Canada.[1]

4. At the trial, Mr. Desautel admitted the *actus reus* of the offence and in his defence maintained that he was exercising an Aboriginal right to hunt for ceremonial purposes in the traditional territory of his Sinixt ancestors pursuant to s. 35(1) of the *Constitution Act, 1982*.[2] That territory, in pre-contact times, was bounded on both sides by mountains, encompassed the Arrow Lakes, and extended from approximately the Big Bend, north of Revelstoke in south central British Columbia, to Kettle Falls in Washington State.[3]

5. In acquitting the Respondent, the Provincial Court (upheld by the BC Supreme Court (as

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[1] Reasons for Judgment of the British Columbia Court of Appeal, May 2, 2019, 2019 BCCA 151, ("BCCA Reasons"), para. 4.
[2] BCCA Reasons, para. 6.
[3] BCCA Reasons, para. 9; Reasons for Judgment of the Honourable Judge L. Mrozinski dated March 27, 2017 ("BCPC Reasons"), para. 19.

summary conviction appeal court) and the B.C. Court of Appeal ("BCCA")) rejected the Crown's argument that s. 35 limits constitutional protection to Indigenous groups resident in Canada who hold those collective rights. The trial judge invoked the test set out in *R. v. Van der Peet*[4] to determine if the Respondent was exercising an Aboriginal right to hunt and the summary conviction appeal judge used the *Van der Peet* test to define "aboriginal peoples of Canada" as meaning "those peoples who occupied a part of what became Canada prior to first contact", even if they no longer reside in Canada.[5] The BCCA implicitly agreed and in determining that the modern Lakes Tribe fully met the test, stated that "… if the *Van der Peet* requirements are met, the modern indigenous community [the Lakes] will be an "Aboriginal peoples of Canada"".[6]

6. Although the BCCA and the courts below have relied on this Court's judgment in *Van der Peet*, that decision was only directed at defining Aboriginal rights that are recognized and affirmed under s. 35(1), but does not define who are the "aboriginal peoples of Canada". *Van der Peet* is silent regarding a definition of "aboriginal peoples of Canada" as that was not in issue. Mrs. Van der Peet was a member of the Sto:lo, a recognized Indigenous group under s. 35 resident within Canada. *Van der Peet* does not address issues regarding the location of a claimant Indigenous group, and the test established under the decision for defining Aboriginal rights is ill suited for that purpose.

7. In its application of *Van der Peet*, the BCCA decision raises fundamental questions of constitutional interpretation. With no substantive analysis the court dismissed the applicant's arguments on interpretation[7] which were grounded in statements made by this Court in significant decisions such as *R. v. Comeau*[8] and in Aboriginal cases such as *R. v. Sparrow*.[9]

8. The circumstances of Indigenous communities with international transboundary dimensions are not unique to this case but arise in various provinces and locations across Canada

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[4] [1996] 2 S.C.R. 507.
[5] Reasons for Judgment of Mr. Justice Sewell, dated December 28, 2017, 2018 BCSC 2389 ("BCSC Reasons"), para. 89.
[6] BCCA Reasons, para. 57.
[7] BCCA Reasons, paras. 57 and 64.
[8] 2018 SCC 15.
[9] [1990] 1 S.C.R. 1075.

in a wide range of differing transboundary aspects[10]. This case concerns a group that has been found by the courts to be wholly located in the United States in its contemporary form but able to trace its ancestral identity to a historic group with a presence in Canada at the time of European contact. Governments and Indigenous groups across Canada would benefit from clear Supreme Court of Canada guidance on the issues in this case as a foundational basis to address the entire range of potential transboundary claims.

9. For the reasons that follow, this application bears on legal issues inherently of national importance in so far as it seeks an interpretation of the basic scope of the application of s. 35 of the *Constitution Act, 1982*.

10. First, this application addresses a significant gap in the law regarding the interpretation of s. 35. There is no decision of this Court that provides guidance to the interpretation of the words "aboriginal peoples of Canada" in s. 35. *Van der Peet* is not the correct test and its continued application for this purpose will generate unnecessary litigation and potentially lead to contradictory decisions.

11. Second, to the extent that there has been appellate consideration of matters related to the question of the geographic location of a claimant group, there is a division between the Courts of Appeal in different provinces that warrants this Court's consideration. The applicant directed the BCCA's attention to the New Brunswick Court of Appeal ("NBCA") decision in *Bernard v. R.*.[11] in which the NBCA dismissed the claim of an Indigenous claimant from Nova Scotia seeking to exercise an Aboriginal right to hunt in an area of New Brunswick. Mr. Bernard could not prove membership in a contemporary community located in New Brunswick. The NBCA decision is grounded on the principle that individuals must demonstrate a link to a historic and present community in a specific location, whereas the BCCA decision states otherwise[12].

12. Third, this case engages fundamental principles of constitutional interpretation and the application of those principles to s. 35. The BCCA cursorily dismissed the applicant's

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[10] Affidavit #1 of Brad Cope, sworn July 25, 2019 ("Cope Affidavit"), para. 4.
[11] 2017 NBCA 48.
[12] *Bernard*, paras. 60-64; BCCA Reasons, paras. 61-62.

arguments on interpretation[13] although those arguments were grounded in statements from this Court in *R. v. Sparrow* that "… interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation" and in decisions such as *Comeau.* The BCCA's decision risks confounding approaches to constitutional interpretation if this Court does not take this opportunity to clarify these principles in the s. 35 context.

13. Fourth, clarification of the meaning of "aboriginal peoples of Canada" carries significant national implications. Canada shares its entire 3,987 mile southern boundary and its 1,538 mile northwest boundary with the United States and there are Indigenous communities that may claim transboundary dimensions along the entire length of each boundary[14]. Some of these entities have advanced their claims in litigation fora. For example, the New Brunswick Peskotomuhkati Nation at Skutik sought leave to intervene in this case at the BCCA on grounds arising from its claim that the Nation was bifurcated between Canada and the State of Maine[15]. Leave was not granted and its application was dismissed.

14. Fifth, a determination that the phrase "aboriginal peoples of Canada" includes Indigenous groups located in the United States raises significant national issues with respect to the scope of Crown consultation, accommodation and the ultimate objective of reconciliation of Aboriginal and non-Aboriginal Canadians. The BCCA directs no attention to the impact on this issue except to suggest that "…any potential duty to consult and accommodate, cannot be a matter of functionality"[16]. This view is not one that is consistent with the complex issues of interpreting s. 35 when reconciliation inherently has functional dimensions to it.

15. This decision does have direct implications for triggering transboundary s.35 consultation and accommodation obligations, and consideration by this Court and guidance on that issue would be of significant utility so that the Crown is aware of the s.35 obligations it must satisfy.

16. Finally, this case necessarily engages the question of whether an Indigenous person who is neither a resident nor a citizen of Canada has an "incidental mobility right" to enter Canada for the purpose of exercising an Aboriginal right established within Canada. The Crown considers

[13] BCCA Reasons, paras. 57 and 64.
[14] Cope Affidavit, para. 4.
[15] Cope Affidavit, paras. 6, 7, Ex. "A", "B".
[16] BCCA Reasons, para. 63.

such a right incompatible with sovereignty but none of the courts felt compelled to address the issue and it remains a pressing and unanswered question requiring this Court's attention.

B. Statement of Facts

17. On October 14, 2010, Mr. Desautel shot and killed a cow elk near Castlegar, British Columbia. He conducted the hunt on the instructions of the Fish and Wildlife Director of the CCT to secure ceremonial meat. He did not have a permit, licence or authorization from the Government of British Columbia for the hunt. He reported the kill to conservation officers, whereupon he was charged with hunting without a licence and hunting big game while not being a resident of British Columbia contrary to ss. 11(1) and 47(a) of the *Wildlife Act*, R.S.B.C. 1996, c. 488. Mr. Desautel disputed the charges[17].

The Trial Judgment

18. The Crown contended that Mr. Desautel could not have been exercising an Aboriginal right to hunt in the area because the Sinixt rights did not survive the assertion of sovereignty. Alternatively, the Crown submitted that the Sinixt voluntarily abandoned their practice of hunting in what became British Columbia and therefore, the modern group's claim lacked continuity with the pre-contact group's practices.[18]

19. The trial judge found that the Sinixt were a mobile people who, before and sometime after contact in 1811, engaged in a seasonal round of hunting, fishing and gathering in their traditional territory north and south of the 49th parallel, including the Arrow Lakes area.[19]

20. Post-contact, "a constellation of factors" led the Sinixt to gradually shift from moving throughout the whole of their traditional territory to becoming "more or less full time" residents in their southern territory.[20] The portion of Sinixt territory south of the 49th parallel became U.S. territory in 1846 when Great Britain and the U.S. entered into the Oregon Boundary Treaty.[21]

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[17] BCAA Reasons, para. 5..
[18] BCCA Reasons, para. 8
[19] BCCA Reasons, para. 9; BCPC Reasons, paras. 23, 24.
[20] BCPC Reasons, para. 110.
[21] BCPC Reasons, paras. 8, 137.

21. In 1872, the U.S. federal government set aside reserve lands for the tribes that now make up the CCT, including the Sinixt, who had become known as the Lakes. A majority of the Sinixt people who had been living on both sides of the border took up residence on the Colville Reserve, around 1880 and 1890.[22] By 1902, only 21 Sinixt remained living in their traditional territory in Canada when the Canadian federal government set aside a reserve at Oatscott for the "Arrow Lakes Band" which included Sinixt, Ktunaxa and Secwepemc members.[23]

22. Members of the Lakes Tribe "rarely hunted north of the 49th parallel" following their move onto the Colville Reserve, and by the 1930s, members of the Lakes Tribe no longer travelled to or hunted north of the border.[24] In 1956, the last living member of the Arrow Lakes Band died and the federal government declared the Arrow Lakes Band extinct (for the purposes of the *Indian Act*).[25]

23. In her application of the *Van der Peet* test, the trial judge found that the Lakes Tribe is "a successor group to the Sinixt people living in British Columbia at the time of contact" and that hunting in what is now British Columbia was "a central and significant part of the Sinixt's distinctive culture in pre-contact times".[26] The trial judge went on to apply the concept of continuity and stated that the "interval between 1930 and 2010 when hunting in British Columbia either ceased or was conducted under the radar, so to speak, does not serve… to sever the continuity of the hunting practices of the pre-contact group and the present day Lakes Tribe".[27]

24. With respect to the incidental mobility right, the Crown argued that such a right was incompatible with the sovereignty of the Crown. The trial judge found that on the facts of this case an incidental mobility right did not arise, thus distinguishing it from *Mitchell v. M.N.R.*[28], as relied on by the Crown. The trial judge declined to define the Aboriginal right as including a mobility right.

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[22] BCPC Reasons, paras. 42-43.
[23] BCPC Reasons, para. 44; BCCA Reasons, para. 9.
[24] BCPC Reasons, paras. 49, 85; BCCA Reasons, para. 10.
[25] BCPC Reasons, para.48; BCCA Reasons, para. 9.
[26] BCPC Reasons, para. 84; BCCA Reasons, para. 11.
[27] BCPC Reasons, para.128; BCCA Reasons, para. 11.
[28] *Mitchell v. Canada (Minister of National Revenue)*, 2001 SCC 33.

The BC Supreme Court Summary Conviction Appeal

25. In Reasons for Judgment delivered December 28, 2017, Sewell J., sitting as summary conviction appeal judge in BC Supreme Court, dismissed the Crown's appeal, which he described as essentially raising two points: (1) whether an Aboriginal group that does not reside in Canada is entitled to the constitutional protections provided by s. 35, and (2) whether the right asserted by Mr. Desautel is incompatible with the sovereignty of Canada.[29]

26. On the first point, Sewell J. concluded that the term "aboriginal peoples of Canada" as used in s. 35 means "those peoples who occupied a part of what became Canada prior to first contact, and the rights referred to are those that are established in accordance with the *Van der Peet* test and sought to be exercised in Canada".[30]

27. On the second point, Sewell J. concluded that the record before the trial judge was insufficient to permit her to decide the issue of Mr. Desautel's mobility right, sovereign incompatibility is not a complete bar to the existence of the right, and it would be unnecessary and inappropriate to consider the nature and extent of an Aboriginal right to cross the international boundary in the absence of the Attorney General of Canada, who had been served with a Notice of Constitutional Question.[31]

The BC Court of Appeal Judgment

28. The BCCA dismissed the Crown's appeal and upheld Mr. Desautel's acquittal, agreeing with the courts below that the Lakes Tribe was a modern day collective successor to the Sinixt peoples. The BCCA also agreed with the courts below that hunting had been a central and significant part of the Sinixt's culture pre-contact and remained integral to the Lakes (although they had not hunted in British Columbia between 1930 and 2010) as they had continued to hunt in the United States. [32]

29. The BCCA implicitly accepted the trial judge's findings regarding continuity; namely that she was "not convinced" that it required "an actual physical presence on the land" or

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[29] BCCA Reasons, para. 21.
[30] BCSC Reasons, para.89.
[31] BCSC Reasons, paras. 120, 122.
[32] BCCA Reasons, paras. 50, 56, 73, 74.

alternatively, an "unbroken chain of continuity" between current and historic practices.[33] In support of the first proposition the trial judge found that the Lakes "had not lost their connection to the land" as "[a]ll of the Lakes members who testified spoke of their connection to the land their ancestors hunted here in British Columbia." [34]

30. The BCCA wholly endorsed the use of the *Van der Peet* test to determine the definition of "aboriginal peoples of Canada", stating: "[s]imply put, if the *Van der Peet* requirements are met, the modern Indigenous community will be an "Aboriginal peoples of Canada".

31. Regarding the Crown's appeal on the mobility right, Smith JA stated that she "did not agree that this issue must be addressed in this appeal or that an incidental mobility right to cross the border would necessarily follow" for two reasons: (1) the trial judge did not address the issue because "the lawfulness of Mr. Desautel's entry into Canada was never disputed" and (2) in cases where an incidental right has arisen, "the state action in issue limited the exercise of the incidental right" and in this matter, "the state action in question infringes Mr. Desautel's right to hunt, not his right to cross the Canada-U.S. border"[35].

32. The decision of the BCCA, together with the language of the decisions of the courts below, is precedent setting. These judgments arguably trigger constitutional obligations on the Crown to consult and, where appropriate, accommodate Indigenous groups outside Canada who may have a historical connection to groups within British Columbia, and arguable claims of Aboriginal rights within Canada. No other court in Canada has given such a broad interpretation of s. 35. Indeed, the jurisprudence of the SCC is replete with references that would seem to limit s. 35 to Aboriginal peoples who are "Canadian" in the sense of citizenship or residency.[36]

PART II – STATEMENT OF ISSUES

33. Does the constitutional protection of Aboriginal rights contained in s.35 of the *Constitution Act, 1982* extend to an Aboriginal group that does not reside in Canada?

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[33] BCPC Reasons, para. 129.
[34] BCPC Reasons, para. 123; BCCA Reasons, paras. 73, 74.
[35] BCCA Reasons, para. 66, 67, 68.
[36] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, paras. 10, 33; *Van der Peet*, para. 19; *Clyde River (Hamlet v. Petroleum Geo-Services Inc.*, 2017 SCC 40, para. 1.

34. Is it a requirement of the test for proving an Aboriginal right protected by s.35 of the *Constitution Act, 1982* that there be a present day community in the geographic area where the claimed right was exercised?

35. In order to determine whether an Aboriginal person who is not a citizen or resident of Canada has an Aboriginal right to hunt in Canada, is it necessary to consider the incidental mobility right of the individual and the compatibility of that right with sovereignty?

PART III – STATEMENT OF ARGUMENT

The Van der Peet Test

36. All of the courts below have accepted and applied the test in *Van der Peet* to determine the content and meaning of the phrase "aboriginal peoples of Canada". The error the *Desautel* courts have committed in using the *Van der Peet* test is allowing it to absorb a legal construct that is textually and conceptually separate from the concept of "Aboriginal rights" which is the focus of this Court in *Van der Peet.*

37. *Van der Peet* was never intended to address the question of who is an "aboriginal peoples of Canada" and that question did not arise in that case. None of the *Van der Peet* courts queried whether Mrs. Van der Peet was a member of a group that fell within the definition of "aboriginal peoples of Canada". She was a resident of British Columbia and a member of the Sto:lo Tribe which is clearly located within Canada and an "aboriginal peoples of Canada". There was never any question that s. 35 would apply; it was simply a presumption or precondition underpinning the inquiry as to whether the claimant, or more specifically, the Sto:lo Tribe, possessed an Aboriginal right to sell fish.

38. Chief Justice Lamer, speaking for the majority, framed the issue on appeal this way: that it "… raises the question left unresolved by this court in *R. v. Sparrow*, [1990] 1 S.C.R. 1075: How are the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*, to be defined?".[37] Mrs. Van der Peet appealed "… on the basis that the Court of Appeal erred in defining the aboriginal rights protected in s. 35(1) as those practices integral to the distinctive

[37] *Van der Peet*, para. 1 (see also para. 15).

cultures of aboriginal peoples".

39. It is the articulation of the "Integral to a Distinctive Culture Test" that comprises the answer to Lamer C.J.'s question and lies at the core of *Van der Peet.* The balance of the majority's judgment is directed at the description and analysis of the factors to be considered in the Integral to a Distinctive Culture Test[38] followed by an application of those factors to Mrs. Van der Peet's claim[39]. The question of who or what might comprise an "aboriginal peoples of Canada" was never posed and it was never discussed. In fact, the summary conviction appeal judge himself acknowledged that the *Van der Peet* test "…addresses the nature of aboriginal rights protected by s. 35 rather than the identity of the persons asserting the right".[40]

40. Consequently the assertion of the BCCA that "… if the *Van der Peet* requirements are met, the modern Indigenous community will be an "Aboriginal peoples of Canada"[41] is not based on any precedent and is unsupported at law. The BCCA judgment is premised on an incorrect assumption that *Van der Peet* defines or describes a basis for a determination of the meaning of the phrase "aboriginal peoples of Canada" but *Van der Peet* only defines the practices, customs or traditions that could form the basis for a defined Aboriginal right.

The Threshold Test

41. The question that must be addressed in this case is: what is the test to determine if an Indigenous group may come within the definition of "aboriginal peoples of Canada" for the purposes of s. 35? This question remains open and unanswered and the BCCA decision highlights the fact that this absence of an appropriate test reveals a gap in the law on this issue. Clarification of this test is a question of national importance.

42. The BCAA rejected the Crown's argument that the court was required to approach the determination of who is entitled to hold Aboriginal rights as a threshold issue by applying general principles of constitutional interpretation including statutory interpretation and placing

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[38] *Van der Peet*, paras. 46-75.
[39] *Van der Peet*, paras. 76-91.
[40] BCSC Reasons, para.80.
[41] BCCA Reasons, para. 57.

constitutional terminology in its "proper linguistic, philosophical and historical context"[42].

43. The BCCA also did not fully consider two lower court cases where courts indicated that determining whether a claimant is part of the "aboriginal peoples of Canada" should be done prior to considering the rights claim at issue[43]. Instead, the BCCA chose to "reframe the Crown's "threshold issue" as whether the *Van der Peet* test should be modified where the Aboriginal right claimant is not a citizen or resident of Canada"[44]

44. A plain reading of s. 35 reveals that there are two tests inherent in the provision. Section 35(1) provides that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".

45. The phrase "aboriginal peoples of Canada (also used in ss. 25, 37 and 37.1) is defined as follows in s. 35(2): "In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada".

46. Section 35(1) indicates that "existing aboriginal and treaty rights" are held by or belong to "the aboriginal peoples of Canada". Aboriginal or treaty rights that may be held by peoples who are not "aboriginal peoples of Canada" will not be subject to constitutional protection. Therefore two questions must be asked and answered regarding any inquiry into whether an Indigenous group holds constitutionally protected Aboriginal rights:

1. Is the claimant Indigenous group an "aboriginal peoples of Canada" and thereby eligible to be recognized under s. 35 of the *Constitution Act, 1982*;
2. If yes, does the claim meet the test in *Van der Peet* to be considered an aboriginal right protected by s. 35.

47. Question 1 must be answered before moving on to Question 2. The courts below did not adopt this approach.

48. The BCCA focussed on a "purposive" analysis directed at the reconciliation of pre-

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[42] BCCA Reasons, para. 33, 51, 57 and 64.
[43] *R. v. Campbell,* 2000 BCSC 956, esp. paras. 8, 13; *Watt v. Liebelt,* [1999] F.C. 455, para. 19; (see also *R. v. Shenandoah,* 2015 ONCJ 541).
[44] BCCA Reasons, para. 61.

existing Aboriginal societies with the sovereignty of the Crown.[45] However, such an approach presupposes that the Aboriginal people in question fall within s. 35(1), the very question that is to be answered.

49. The BCCA went on to comment on how *Sparrow* and *Van der Peet* "root the concept of Aboriginal rights in the historical presence of Indigenous societies in North America", which is why "courts must look to the practices, customs and traditions of the historic collective when defining Aboriginal rights".[46] This leads to use of the concept of "continuity" to determine if a present day collective can demonstrate a historic connection to the collective in existence at the time of contact with Europeans.[47] However, this approach creates a test that overlooks the location, national affiliation and internal composition of the modern collective.

50. Reliance on continuity and the time of contact as the "relevant time" for the determination of who may be an "aboriginal peoples of Canada" could also lead to other erroneous results.

51. The *Van der Peet* test applies only to Aboriginal rights. It does not address treaty rights, Aboriginal title or the rights of the Metis, which are also encompassed by s. 35. Using *Van der Peet* as directed by the BCCA would lead to the anomalous result that the Metis are not an "aboriginal peoples of Canada" because they did not occupy what became Canada prior to contact despite the fact that they are expressly referenced in s. 35(2). Using *Van der Peet* for this purpose would also be inconsistent with the SCC's guidance that sovereignty, not contact, is the relevant time for the identification of Aboriginal title. The test for Aboriginal title as set out in *Tsilhqot'in Nation v. British Columbia* does not require an applicant to demonstrate continuity if the applicant is not relying on present occupation.[48]

The Modern Day Community

52. "Continuity" as applied by the trial judge is an inappropriate test to determine the identity and composition of the modern rights bearing community. If all a modern community is

[45] BCCA Reasons, para. 55.
[46] BCCA Reasons, para. 55.
[47] BCCA Reasons, para. 56, 57.
[48] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, paras. 45, 46.

required to demonstrate is a historical connection to the historic collective, the current location of the modern community is of no relevance and leaves open, as an extreme example, the possibility that an Indigenous group that has been absent from Canada for hundreds of years has claims to Aboriginal rights and title. That cannot have been the intention of the drafters of s. 35.

53. The Crown argued that there is a site-specific component to the issue of the contemporary community, a position rejected by the BCCA with minimal analysis[49]. In *R. v. Powley* this Court noted that "the trial judge found that a Metis community had persisted in and around Sault Ste. Marie" and referred to testimony at trial regarding "the continued existence of a Metis community in and around Sault Ste. Marie"[50]. The fact that the modern community could demonstrate continuity of location with the historic community was a significant element in the determination of the Metis hunting right.

54. In *Bernard v. R.*, a Mi'kmaq member of the Sipekne'katik First Nation located in Shubenacadie, Nova Scotia, claimed an Aboriginal right to hunt deer near the mouth of the St. John River in New Brunswick. The trial judge found that a historic community of Mi'kmaq hunted in that area pre-contact but the evidence showed that the specific community left the area 250-300 years earlier.[51] The New Brunswick Court of Appeal dismissed Mr. Bernard's appeal but noted that Mr. Bernard argued that the trial judge erred in holding that if a community did not remain in the vicinity of a site-specific right, the community would be taken to have abandoned the right.[52] Thus the issue is not whether there is continuity of practice, but rather whether there is continuity of community.

55. The NBCA affirmed this Court's determination in *Powley* that continuity must be established between a historic and contemporary rights-bearing within the geographic area where the right was claimed:

> There would seem to be no rational basis for the claim the Metis people only get to exercise aboriginal rights that are grounded in the presence of a historic and present community, whereas other aboriginal peoples get to exercise the right regardless of whether it is so grounded. If that is to be the law, that is for the Supreme Court to

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[49] BCCA Reasons, paras. 61, 62.
[50] *R. v. Powley,* 2003 SCC 43, paras. 24 and 25.
[51] *Bernard,* paras. 4, 5, 15-17, 19, 21-27, 43, 60.
[52] *Bernard,* para. 43.

> determine. At present, *Powley* establishes that aboriginal rights, as communal rights, may only be exercised by virtue of an individual's ancestrally based membership in a present community that is linked to the historic community.[53]

56. The NBCA suggests that individuals must demonstrate a link to both a historic and a contemporary community in a place or location whereas the BCCA states otherwise.[54] This creates a significant tension in the law of Aboriginal rights that arguably undermines the answer to Lamer C.J.'s question in *Van der Peet*; namely, what defines Aboriginal rights? Is it based only on where a historical collective carried out its activities or does a definition include where the contemporary community carries out its activities? This conflict in appellate law can only be resolved by guidance from the SCC and as such, resolution is a matter of national importance.

Constitutional Interpretation

57. The BCCA rejected the Crown's interpretation of the words "aboriginal peoples of Canada" as "formalistic" and stated that the Crown's position failed to account for the "Aboriginal perspective"; therefore the Crown's interpretation "cannot be relied upon to foreclose a modern day claimant from the opportunity of establishing an Aboriginal right pursuant to *Van der Peet*". [55]

58. With respect, the BCCA's dismissal of the Crown's analysis ignores and contradicts this Court's direction in *Sparrow* and cited in *Van der Peet*, that:

> The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. [Emphasis added.][56]

59. In accordance with *Sparrow*, the Crown argued that a proper interpretation of s. 35 is guided by general principles of constitutional interpretation, which the SCC has confirmed include the modern approach to statutory interpretation and placing constitutional terminology, including that related to Aboriginal peoples, in its "historical, philosophical and linguistic

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[53] *Bernard*, para. 63.
[54] BCCA Reasons, paras. 61-62.
[55] BCCA Reasons, para. 57.
[56] *Sparrow*, p. 1106; *Van der Peet*, para. 22.

contexts"[57].

60. The BCCA dismissed these submissions without examination or analysis, stating only that they were not "helpful"[58]. The BCCA cited *Sparrow* but restricted its application to a "purposive analysis focused on reconciling the pre-existence of Aboriginal societies with the sovereignty of the Crown (at 1106)."[59]

61. Although s. 35 is intended to be interpreted "purposively", this Court has stressed that principles of purposive interpretation "do not undermine the primacy of the written Constitution", and has cautioned against interpretations which "dispense with the written text of the Constitution", "resor[t] to broad and uncontroversial generalities, or… infus[e] vague phrases with improbable meanings".[60] Insistence upon the written text of a constitutional provision is not inconsistent with a purposive interpretation. As Ruth Sullivan notes, "[m]ost often the purpose of legislation is established simply by reading the words of the legislation".[61]

62. The BCCA found that this aspect of legislative context would be subject to a "justification analysis" but provides no basis for that conclusion.[62] It is not clear why any justification analysis would be applicable to the consideration of the context of a constitutional section when interpreting it.

63. Similarly, the Crown introduced the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada* (the "*Minutes*").[63] In rejecting the *Minutes* as a means to assist in the interpretation of s. 35, the BCCA stated that they are "non-specific in their application"[64], offering no explanation. It is incorrect to assume that the *Minutes* cannot provide perspective on an interpretation of the section. They evidence that all parties involved in drafting the section operated on certain

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[57] BCCA Reasons, para. 33; *Sparrow*, p. 1106*; R. v. Comeau,* 2015 SCC 15, para. 52; *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12, para. 19.
[58] BCCA Reasons, para. 64.
[59] BCCA Reasons, para. 55.
[60] *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217, para. 53; *Caron v. Alberta,* 2015 SCC 56, paras. 35-38.
[61] Ruth Sullivan, *Statutory Interpretation,* 3rd ed., (Toronto: Irwin Law, 2016) p. 193.
[62] BCCA Reasons, para. 64.
[63] BCCA Reasons, para. 37.
[64] BCCA Reasons, para. 64.

assumptions as to its meaning and they are of relevance to the history of Canada's constitution. The Crown provided specific arguments regarding their relevance (including that the *Minutes* do not refer to the Aboriginal rights of foreign collectives). The BCCA did not address these arguments.[65]

64. The legislative context of s. 35 also includes s. 35.1. Section 35.1 is a commitment to convene a constitutional conference that includes "the aboriginal peoples of Canada" before any amendment is made to Part II of the *Constitution Act, 1982*, or s. 91(24) of the (*Constitution Act, 1867*) and the now-repealed ss. 37 and 37.1 (which provided for additional constitutional conferences in 1983 and 1987 that included "aboriginal peoples of Canada").[66]

65. The Crown maintains that the construction of the provision is grounded in a constitutional presumption that the section can only include Indigenous peoples who are resident in Canada as foreign Indigenous groups cannot participate in discussions regarding amendments to the Canadian constitution.

66. The BCCA rejected the use of this section as unhelpful. However, that determination is only based on "my [Smith JA, the writing justice's] view" and an explanation that "the manner and scope" of such discussions are undefined.[67]

67. The Crown offered the further proposition that the inclusion of foreign Indigenous groups within the application of s. 35 is inconsistent with the "presumption that legislation does not apply to persons or things outside the territory of the enacting jurisdiction", which the SCC has confirmed is equally applicable to the constitution. As Sullivan explains, the presumption is "grounded in the international law doctrine of territorial sovereignty" and is rebutted only by clear language of necessary implication.[68]

68. The BCCA declined to apply the presumption against extraterritorial application of legislation and constitutional provisions to the Lakes Tribe "as Mr. Desautel is exercising his

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[65] BCCA Reasons, paras. 37 and 64.
[66] BCCA Reasons, para. 38; s. 35.1, *Constitution Act, 1982.*
[67] BCCA Reasons, para. 64.
[68] BCCA Reasons, para. 37; Sullivan, p. 371; *R. v. Hape,* 2007 SCC 26, para.69; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, paras. 454-455.

Aboriginal right in Canada".[69] However, what is at issue is constitutional interpretation, not the extraterritorial application of the constitution. The fact that British Columbia has territorial jurisdiction to enforce its hunting laws against Mr. Desautel on the facts of this case cannot displace the presumption.

69. The approach of the BCCA to the interpretation of s.35 is a significant departure from well-established jurisprudence on the issue of constitutional interpretation. Permitting the BCCA judgment to function as a precedent could lead to a patchwork of appellate decisions across Canada invoking variations on the existing directions of the SCC's jurisprudence. This is an issue of national importance that requires this Court's attention.

Transboundary Claims

70. The status of Indigenous nations with transboundary claims is not unique to this case where the group in question is wholly located in the U.S. The application of the New Brunswick Peskotomuhkati Nation at Skutik seeking leave to intervene in this case before the BCCA is a recent example. In British Columbia, another one of the CCT's constituent tribes, the Okanogan Tribe, filed a Writ of Summons in BC Supreme Court in 2003 claiming Aboriginal title to the Okanagan region of British Columbia, including the cities of Kelowna, Vernon and Penticton.[70]

Reconciliation and Consultation

71. The BCCA held that "[s]ection 35 is directed towards the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty" which "requires recognizing Indigenous perspectives". The court found that the Crown's position ignored "the Aboriginal perspective, the realities of colonization and does little towards achieving the ultimate goal of reconciliation".[71]

72. The BCCA appears to uncritically follow *Van der Peet* in the face of complex tensions exposed by cases like *Powley* and *Bernard* without any suggestion as to what reading of s. 35 on the issue would best promote reconciliation. The brief statement in paragraph 72 regarding

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[69] BCCA Reasons, para. 63.
[70] Cope Affidavit, para. 8, Ex. "C".
[71] BCCA Reasons, paras. 62,72.

reconciliation drawn from *Van der Peet* is circular insofar as it presumes which perspectives are Aboriginal perspectives for the purposes of the legal principle of considering Aboriginal perspectives. Moreover, if a foreign Indigenous group is not recognized as an "aboriginal peoples of Canada" it is not obvious that its perspectives are encompassed by the principle.

73. The granting of s.35 Aboriginal rights to foreign Indigenous groups could have the effect of undermining the Aboriginal rights of the "aboriginal peoples of Canada", namely those groups resident and established in Canada. The summary conviction appeal judge rejected this position, stating that "recognizing the rights of any group might adversely affect another group"[72], and the BCCA does not challenge this determination.

74. However, Indigenous groups may not be fully open to groups from outside Canada securing the protection of s.35 over rights asserted or held by groups within Canada (for example, the claim filed by the Okanogan Tribe of the CCT.)[73].

75. Similarly, if Indigenous communities located wholly in the United States can be designated "aboriginal peoples of Canada" they can presumably seek the entire range of Aboriginal rights, including title. The CCT filed an Aboriginal title claim in December 2003[74] to the Arrow Lakes region, a claim that crystallizes another distinct problem. It is well established that Aboriginal title is an exclusive interest and permits the title holder to exclude all others from its lands[75]. If an Indigenous community located outside Canada should succeed in obtaining a judgment awarding it Aboriginal title to lands within Canada, foreign nationals would have a constitutionally protected right to determine the uses to which the land should be put and to exclude Canadian nationals from entering that portion of sovereign Canadian territory. It is notable that the BCCA determination that the Lakes are an "aboriginal peoples of Canada" will now support the Lakes' ability to advance that title claim.

76. Claims by Indigenous communities outside Canada raise markedly different issues than claims made by communities located within Canada. This manifests itself in consultation issues. The BCCA's comment that "the extent of any potential duty to consult and accommodate, cannot

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[72] BCSC Reasons, para. 58.
[73] Cope Affidavit, para. 8, Ex. "C".
[74] Cope Affidavit, para. 9, Ex. "D".
[75] *Tsilhqot'in*, paras. 67, 72, 76.

be a matter of functionality"[76] is a principled view but not one consistent with the complex issues of the interpretation of s. 35 when reconciliation and consultation both demonstrate inherently functional dimensions.

77. On March 6, 2018, Mr. Desautel filed an application in Federal Court in Vancouver seeking a declaration that the federal "Minister of Crown, Indigenous Relations" is required to consult with the CCT prior to any decision in respect of an application by the Westbank First Nation to establish a reserve in Fauquier, British Columbia.[77] The proposed *Indian Act* reserve is located on a 4.6 acre parcel within the area designated by the trial judge as subject to the Lakes' Aboriginal right (also within the area of the CCT Aboriginal title claim raising an overlap issue).

78. The issue of transboundary consultation is a matter of national importance that has not been subject to commentary from this Court. The CCT judicial review application crystallizes the type of distinct problem arising in such a consultative process: the extent of involvement and potential accommodative measures that may be owed to foreign nationals. The SCC has stated that where "the effect of good faith consultation suggests amendment of Crown policy, we arrive at the stage of accommodation"[78]. As *Haida Nation* establishes, consultation and accommodation are part of the reconciliation process[79]. The impact of the interests of foreign nationals on internal Canadian policy and governance is a serious and unexamined issue. That is an issue of national importance that requires this Court's attention.

The Incidental Mobility Right and Sovereign Incompatibility

79. The Crown argued that an Aboriginal right exercisable in British Columbia held by a foreign Indigenous community necessarily implies an incidental right to enter BC which would have become incompatible with Canadian sovereignty when the historic collective migrated south of what became the international boundary. Although Mr. Desautel claimed no special right to enter Canada and had not been charged with illegal entry, he nevertheless cannot exercise a right without access.

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[76] BCCA Reasons, para. 63.
[77] Cope Affidavit, para. 10, Ex. "E".
[78] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73, para. 47.
[79] *Haida Nation*, para. 32.

80. Citing *Mitchell*[80], the BCCA concluded that an analytical framework for addressing the scope of a mobility right would be "the doctrines of extinguishment, infringement and justification". This presumes that the hunting right includes a mobility right or that a foreign Indigenous community claiming rights in Canada can claim an independent right of entry. This internally contradictory analysis also warrants this Court's consideration.

81. The guidance of this Court in addressing whether Indigenous communities outside Canada may hold Aboriginal rights within Canada and ancillary issues arising therefrom is of national importance and raises issues that have never been wholly addressed by this Court.

PART IV – SUBMISSIONS ON COSTS

82. The applicant does not seek its costs.

PART V – ORDER

83. The applicant requests that the application for leave to appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of July 2019.

Per:

Glen R. Thompson
Counsel for the Applicant,
Her Majesty the Queen

Per:

Karen Perron
Ottawa Agent for the Applicant,
Her Majesty the Queen

[80] *Mitchell,* paras. 69, 70, 71.

PART VI – TABLE OF AUTHORITIES

Case Law

	Case Law	Paragraph Referenced
1.	*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53	32
2.	*R v. Bernard*, 2017 NBCA 48	11, 54, 55, 72
3.	*Caron v. Alberta*, 2015 SCC 56	61
4.	*Clyde River (Hamlet v. Petroleum Geo-Services Inc.*, 2017 SCC 40	32
5.	*Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12	59
6.	*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73	78
7.	*Mitchell v. Canada (Minister of National Revenue)*, 2001 SCC 33	24, 80
8.	*R. v. Campbell*, 2000 BCSC 956	43
9.	*R v. Comeau*, 2018 SCC 15	7, 12
10.	*R. v. Hape*, 2007 SCC 26	67
11.	*R. v. Powley*, 2003 SCC 43	53, 55, 72
12.	*R. v. Shenandoah*, 2015 ONCJ 541	43
13.	*R v. Sparrow*, [1990] 1 S.C.R. 1075	7, 12, 38, 49, 58, 59, 60
14.	*R v. Van der Peet*, [1996] 2 S.C.R. 507	5,6,7, 10, 22, 26, 30, 32, 36, 37, 39, 40, 43, 46, 49, 51, 56, 57, 58, 72
15.	*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217	61
16.	*Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45	67

	Case Law	Paragraph Referenced
17.	*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44	51, 75
18.	*Watt v. Liebelt*, [1999] F.C. 455	43

Secondary Sources

	Document	Paragraph Referenced
19.	*Ruth Sullivan, Statutory Interpretation*, 3rd ed., (Toronto: Irwin Law, 2016)	61, 67

PART VII – LEGISLATION

	Legislation	**Section, Rule, etc.**
1.	*Constitutions Acts, 1867 to 1982*	s. 35 s. 35.1 s. 91(24)
	Lois constitutionnelles de 1867 à 1982	s. 35 s. 35.1https://laws-lois.justice.gc.ca/fra/const/page-4.html s. 91(24)
2.	*Wildlife Act*, R.S.B.C. 1996, c. 488	s. 11(1) s. 47(a)