

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)

RESPONDENT'S MEMORANDUM OF ARGUMENT

(Pursuant to Rule 27 of the Rules of the Supreme Court of Canada)

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RESPONDENT'S MEMORANDUM OF ARGUMENT

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This proposed appeal arises out of the prosecution of the respondent, Richard Lee Desautel, who was charged with two violations of the *Wildlife Act*¹ after shooting a cow elk near Castlegar, British Columbia in 2010.² Mr. Desautel is a descendant of the Sinixt, an Indigenous people that the trial judge found had lived, hunted, fished, and gathered in and around the Arrow Lakes region of British Columbia for thousands of years.³ A member of the Lakes Tribe of the Confederated Tribes of the Colville Reservation located in Washington State, which was held by the trial judge to be a successor group to the historic Sinixt collective, Mr. Desautel was directed to hunt the cow elk for the purposes of securing ceremonial meat for the community.⁴

2. The trial judge entered an acquittal on the basis that Mr. Desautel had established an Aboriginal right to hunt for food, social, and ceremonial purposes in the traditional territory of the Sinixt.⁵ Applying the test set out by this Court in *R. v. Van der Peet*⁶, she found that the Sinixt occupied part of what became Canada prior to first contact, and that hunting in their traditional territory in Canada was, and remains, integral to their distinctive culture.⁷ Those factual findings were unchallenged on appeal, and both the summary conviction appeal judge and the Court of Appeal upheld the acquittal, holding that the establishment of the Sinixt right to hunt was entirely consistent with the objective of reconciliation animating s. 35 of the *Constitution Act, 1982*.⁸

¹ *Wildlife Act*, R.S.B.C. 1996, c. 488 (“*Wildlife Act*”)

² *R. v. Desautel*, 2017 BCPC 84 [BCPC Decision], paras. 2, 3, Crown’s Application for Leave to Appeal (“ALA”), Tab 2, p. 5

³ BCPC Decision, paras. 1-2, 4, ALA Tab 2, p. 5

⁴ BCPC Decision, paras. 2, 4, ALA Tab 2, p. 5

⁵ BCPC Decision, paras. 77, 186-187, ALA Tab 2, pp. 26, 64-65

⁶ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*]

⁷ BCPC Decision, paras. 1, 76, 84, 115, 119, 134, ALA Tab 2, pp. 5, 26, 31, 42-43, 50

⁸ *R. v. Desautel*, 2017 BCSC 2389 [BCSC Decision], paras. 88, 90, 124, ALA Tab 5, pp. 95-96, 103; *R. v. Desautel*, 2019 BCCA 151 [BCCA Decision], paras. 54-65, 75 ALA Tab 9, pp. 138-141, 144; *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 35 (“*Constitution Act, 1982*”)

3. On this leave application, the Crown says that the courts below erred in applying the *Van der Peet* test, and ignoring what it terms the “threshold issue” of the interpretation of the phrase “Aboriginal peoples of Canada” for those First Nations not resident in Canada.⁹ The Crown goes further, and argues that a “site-specific component” should be added to the *Van der Peet* test, requiring a modern-day Aboriginal collective to be resident in the same location as the historic collective in order to be entitled to exercise Aboriginal rights under s. 35.¹⁰

4. The Court of Appeal dismissed both of these arguments below. The Court first observed that the *Van der Peet* test could be used to define “Aboriginal Peoples of Canada” given that it directly addresses the connection between modern and historic collectives through the concept of continuity. The Court also held that the Crown’s proposed amendment to the *Van der Peet* test to add a modern-day geographic residency requirement was not grounded in any authority and, moreover, “ignores the Aboriginal perspective, the realities of colonization, and does little to achieve the ultimate goal of reconciliation.”¹¹

5. Pointing to the New Brunswick Court of Appeal’s decision in *Bernard*,¹² the Crown further argues that there is a conflict in the appellate jurisprudence warranting the intervention of this Court.¹³ There is no such conflict. Below, the Court of Appeal distinguished *Bernard* on its facts, which turned on the trial judge’s finding that Mr. Bernard had failed to establish that he was a member of a modern collective with a connection to an original rights-bearing community.¹⁴ Here, the trial judge made a specific factual finding that the Lakes Tribe (of which Mr. Desautel is a member) was descended from the original Sinixt collective present in their traditional territory in what would become Canada at the time of contact.¹⁵

6. Finally, the Crown says that there are “ancillary”¹⁶ issues arising out of this case that are of public and national importance. Specifically, the Crown points to Aboriginal title and other

⁹ Crown Argument (“Crown Argument”), paras. 41-42, ALA Tab 11, pp. 159-160

¹⁰ Crown Argument, paras. 52-53, ALA Tab 11, pp. 161-162

¹¹ BCCA Decision, paras. 61-62, ALA Tab 9, p. 140

¹² *R. v. Bernard*, 2017 NBCA 48 [*Bernard*]

¹³ Crown Argument, para. 11, ALA Tab 11, p. 152

¹⁴ BCCA Decision, para. 60, ALA Tab 9, pp. 139-140

¹⁵ BCPC Decision, paras. 1-4, ALA Tab 2, p. 5

¹⁶ Crown Argument, para. 81, ALA Tab 11, p. 169

claims by “foreign nationals”, which it says may not be welcomed by other Indigenous communities in Canada, and will give rise to unexamined consultation and accommodation issues. The Crown also says that this case raises the issue of an incidental mobility right to cross the border, and whether that right is incompatible with Canadian sovereignty.¹⁷

7. These issues, even if they could be said to be of public and national importance, do not directly arise on the facts of this case, and cannot be resolved on the record that would be available to this Court. As noted above, this appeal arises out of a regulatory prosecution under the *Wildlife Act*. No title claim is at issue, and the question of which collective should be consulted and potentially accommodated did not arise. Similarly, the Courts below observed that Mr. Desautel’s ability or right to cross the border was not in issue at trial, and Canada chose not to participate in the case, and therefore presented no evidence relevant to the question of whether any incidental “mobility” right might be inconsistent with Canadian sovereignty.¹⁸ In short, even if these questions could be said to have more far-reaching implications, they are not ripe for consideration, and must be left for a future case.

8. The application for leave to appeal should be dismissed.

B. Statement of Facts

i. The Trial Judge’s Key Findings of Fact

9. For thousands of years, the Sinixt people lived in British Columbia.¹⁹ The traditional territory of the Sinixt is composed of the Arrow Lakes and the area on the Columbia River, reaching from Revelstoke, BC to the north, and south to Kettle Falls in Washington State.²⁰

10. The name Sinixt can be translated to mean the people of the Arrow Lakes region, which is evidence of the clear and ancient link between the Sinixt and their traditional territory in Canada.²¹

¹⁷ Crown Argument, paras. 70-81, ALA Tab 11, pp. 166-169

¹⁸ BCPC Decision, para. 144, ALA Tab 2, p. 53; BCSC Decision, para. 100, ALA Tab 5, p. 97; BCCA Decision, paras. 66-71, ALA Tab 9, pp. 141-143

¹⁹ BCPC Decision, para. 1, ALA Tab 2, p. 5

²⁰ BCPC Decision, paras. 3, 19-21, ALA Tab 2, pp. 5, 9-10

²¹ BCPC Decision, paras. 22-23, ALA Tab 2, pp. 10-11

The relationship is reciprocal: the Arrow Lakes may have taken their names from a bluff where the Sinixt practiced archery over the millennia.²²

11. Following contact, the Sinixt engaged in a seasonal round that saw them spend time both above and below the 49th parallel.²³ However, by the last decades of the 19th century, the Sinixt had come to feel unwelcome in what is now British Columbia. Due to a constellation of factors, many Sinixt gradually adopted more or less full time residence in the southern part of their territory.²⁴ Those who left did so because it was the best out of a number of bad choices.²⁵ The move was not voluntary, and despite the fact that many were stranded in the south, there is no doubt that the land was not forgotten, that the traditions were not forgotten and that the connection to the land is ever present in the minds of the Sinixt.²⁶

12. The evidence clearly and cogently established that the practice of hunting in what is now British Columbia was a central and significant part of the Sinixt's distinctive culture in pre-contact times.²⁷ The respondent's expert, Richard Hart, provided evidence that "the Sinixt people are ... profoundly connected to their Aboriginal territory. And hunting is one aspect of that."²⁸ The Sinixt hunted in the Vallican and Castlegar areas of British Columbia, which was a central part of Sinixt territory.²⁹ The Crown's expert, Dr. Dorothy Kennedy, agreed that hunting was integral to the Sinixt.³⁰

13. The Sinixt who were resident in Washington State continued to hunt in their traditional territory until at least 1930, despite the Province enacting *An Act to Amend the Game Protection Act, 1895*, which made it strictly unlawful for them to do so.³¹ The evidence did not establish that

²² BCPC Decision, para. 29, ALA Tab 2, pp. 12-13

²³ BCPC Decision, paras. 37, 40, ALA Tab 2, pp. 15-16

²⁴ BCPC Decision, paras. 109-110, ALA Tab 2, pp. 39-40

²⁵ BCPC Decision, para. 128, ALA Tab 2, p. 48

²⁶ BCPC Decision, para. 50, ALA Tab 2, pp. 19-20

²⁷ BCPC Decision, para. 84, ALA Tab 2, p. 31

²⁸ BCPC Decision, para. 80, ALA Tab 2, p. 28

²⁹ BCPC Decision, para. 81, ALA Tab 2, p. 29

³⁰ BCPC Decision, para. 82, ALA Tab 2, p. 29

³¹ *An Act to Amend the Game Protection Act, 1895*, BCPC Decision, paras. 110, 149-52, ALA Tab 2, pp. 40, 54-55

the Sinixt voluntarily stopped using their traditional territory in British Columbia for hunting.³² Hunting remains integral to their distinctive culture.³³

14. The Crown asserts that “this case concerns a group that has been found by the courts to be wholly located in the United States in its contemporary form.”³⁴ However, this is not what the trial judge found. The summary conviction appeal judge considered this issue at length and, based on his review of the trial judge’s decision as a whole, he concluded that the trial judge considered the Sinixt people to be the relevant collective, while the Lakes Tribe (of which Mr. Desautel was clearly a member) are the portion of the collective that resides in Washington State.³⁵ He interpreted the trial judge as having expressly declined to make a finding that the Lakes Tribe represents all of the Sinixt; the question of what other persons, including persons resident in Canada, can also exercise the Sinixt right to hunt did not arise in the regulatory prosecution.³⁶ The Court of Appeal agreed, confirming that the trial judge found that the Lakes Tribe was simply one successor group to the Sinixt.³⁷

15. On October 1, 2010, Mr. Desautel shot one cow elk near Castlegar, British Columbia for the purposes of securing ceremonial meat.³⁸ Mr. Desautel was hunting within the traditional territory of the Sinixt, and did so in reliance on the Sinixt’s long tradition of hunting for game in the northern part of their territory.³⁹ After reporting his hunt to BC conservation officers, Mr. Desautel was charged with hunting without a license contrary to s. 11(1) of the *Wildlife Act*, and hunting big game while not being a resident contrary to s. 47(a) of the *Wildlife Act*.⁴⁰

ii. The Decisions Below

16. The trial judge acquitted Mr. Desautel. Applying the test set out in *Van der Peet*, she determined that Mr. Desautel had an Aboriginal right to hunt for food, social, and ceremonial

³² BCPC Decision, para. 108, ALA Tab 2, p. 39

³³ BCPC Decision, para. 119, ALA Tab 2, p. 43

³⁴ Crown Argument, para. 8, ALA Tab 11, p. 152

³⁵ BCSC Decision, para. 35, ALA Tab 5, p. 83

³⁶ BCSC Decision, para. 39, ALA Tab 5, p. 84

³⁷ BCCA Decision, para. 49, ALA Tab 9, p. 134

³⁸ BCPC Decision, para. 2, ALA Tab 2, p. 5.

³⁹ BCPC Decision, paras. 4, 77, ALA Tab 2, pp. 5, 26

⁴⁰ BCPC Decision, paras. 2-3, ALA Tab 2, p. 5

purposes in the Sinixt traditional territory in Canada.⁴¹ She found that the Sinixt are a modern-day collective capable of holding Aboriginal rights, and Mr. Desautel is a member of that collective.⁴² Hunting in what is now British Columbia was a central and significant part of Sinixt culture in the pre-contact period,⁴³ and this practice has continued in modern times in a manner that is faithful to these traditions.⁴⁴ The trial judge rejected the Crown's arguments based on sovereign incompatibility and extinguishment.⁴⁵ The trial judge then applied the framework set out in *R. v. Sparrow*⁴⁶, and concluded that the impugned provisions of the *Wildlife Act* constituted a *prima facie* infringement of Mr. Desautel's s. 35 rights, and that this infringement was not justified.⁴⁷

17. The summary conviction appeal judge upheld the trial judge's decision. He held as follows:

I find that the trial judge made no error in applying the *Van der Peet* test to determine the issue before her because the Sinixt, of whom Mr. Desautel is a member are an Aboriginal people of Canada. Her findings of fact confirm the deep connection between the Sinixt and their traditional territory in Canada. The right asserted is based entirely on the use and practices carried out by the Sinixt prior to first contact on lands that are now incorporated into Canada, and the continuity of the Lakes Tribe's practices with those of their ancestors.⁴⁸

The summary conviction appeal judge also agreed that no issue of sovereign incompatibility arose in this case.⁴⁹

18. The British Columbia Court of Appeal unanimously dismissed the appeal. The Court stated: "If the *Van der Peet* requirements are met, the modern Indigenous community will be an 'Aboriginal peoples of Canada'"⁵⁰ within the meaning of s. 35". It rejected the Crown's argument that a claimant can only establish an Aboriginal right if the present day community is located in

⁴¹ BCPC Decision, paras. 76-77, 186-187, ALA Tab 2, pp. 26, 64-65

⁴² BCPC Decision, paras. 4, 68, ALA Tab 2, pp. 5, 24

⁴³ BCPC Decision, para. 84, ALA Tab 2, p. 31

⁴⁴ BCPC Decision, paras. 115, 119, 134, ALA Tab 2, pp. 42, 43, 50

⁴⁵ BCPC Decision, paras. 136-167, ALA Tab 2, pp. 50-60

⁴⁶ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*]

⁴⁷ BCPC Decision, paras. 176, 185, ALA Tab 2, pp. 62, 64

⁴⁸ BCSC Decision, para. 90, ALA Tab 5, p. 96

⁴⁹ BCSC Decision, para. 123, ALA Tab 5, p. 103

⁵⁰ BCCA Decision, para. 57, ALA Tab 9, p. 139

the same geographic area where the claimed right was historically exercised.⁵¹ The Court also held that it was not necessary to determine whether there is an incidental mobility right that is incompatible with Canadian sovereignty to resolve this case.⁵²

PART II - QUESTION IN ISSUE

19. The only question at issue in this leave application is whether the Crown's proposed appeal raises issues of public and national importance.⁵³

PART III - STATEMENT OF ARGUMENT

20. The proposed appeal raises no pressing issues of public and national importance that warrant this Court's attention. The test for establishing Aboriginal rights has been settled since *Van der Peet*, and was correctly applied by the courts below. The Court of Appeal properly rejected the Crown's attempt, under the guise of a "threshold" determination of whether a collective is an "Aboriginal peoples of Canada", to modify this test to add a modern-day geographic residency requirement. Contrary to the Crown's claim, there is no jurisprudence at any level of court that conflicts with or casts doubt on the Court of Appeal's rejection of this proposed modification. Lastly, while the Crown asserts that this Court must intervene to address issues that are "ancillary" to this appeal, these issues are not ripe for consideration on the record of this regulatory prosecution, and must await resolution in a future case.

A. This Case Concerns the Application of the *Van der Peet* Test to the Factual Findings of the Trial Judge

21. The proposed appeal does not raise an issue of public or national importance because, at its core, it involves the application of well-settled law - the *Van der Peet* test for establishing Aboriginal rights - to the findings of fact of the trial judge, which were unchallenged on appeal.

22. The *Van der Peet* test is carefully crafted in light of the purpose of s. 35, which is to reconcile the prior occupation of what became Canada by Indigenous peoples with the assertion

⁵¹ BCCA Decision, paras. 54-65, ALA Tab 9, pp. 138-141

⁵² BCCA Decision, paras. 66-71, ALA Tab 9, pp. 141-143

⁵³ *Supreme Court Act*, RSC 1985, c S-26, ss. 40, 43

of Crown sovereignty over Canada.⁵⁴ It requires a rights claimant to prove that an activity is an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming the right. The claimant must also show that the particular practice has continuity with the practices, customs, and traditions of pre-contact times.⁵⁵

23. The strength of the *Van der Peet* test is its ability to take into account the past and present connection between the Aboriginal people and the site-specific practices on the land that is now Canada. More specifically, for a claimant to establish a site-specific right under *Van der Peet*, it must show that its community was here first, living on the land with a distinctive culture prior to the arrival of Europeans, which is the very reason for the existence of s. 35(1). Further, the claimant must show that the community continues to have a site-specific Aboriginal right in Canada which is integral to its distinctive culture.⁵⁶

24. Both appellate courts confirmed the correctness of the trial judge's conclusion that Mr. Desautel had established an Aboriginal right to hunt for food, social, and ceremonial purposes in the traditional territory of the Sinixt in Canada.⁵⁷ The trial judge found that the Sinixt occupied part of what became Canada prior to first contact⁵⁸, that Mr. Desautel was a member of the Sinixt⁵⁹, and that hunting in Sinixt traditional territory in Canada was, and remains, integral to the distinctive culture of the Sinixt.⁶⁰ These findings of fact were not challenged on appeal.

25. The Crown now says all three courts below erred in applying the *Van der Peet* test to determine whether Mr. Desautel had a s. 35 right to hunt, and in not considering what it submits is a "threshold test" to determine whether a collective is an "Aboriginal peoples of Canada". It

⁵⁴ *Van der Peet*, paras. 30, 43; see also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, para. 1; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, para. 58; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, para. 42

⁵⁵ *Van der Peet*, paras. 46, 63

⁵⁶ *Van der Peet*, paras. 30, 43

⁵⁷ BCPC Decision, paras. 77, 186, ALA Tab 2, pp. 26, 64-65; BCSC Decision, paras. 90, 124, ALA Tab 5, pp. 96, 103; BCCA Decision, paras. 54-65, ALA Tab 9, pp. 138-141

⁵⁸ BCPC Decision, para. 1, ALA Tab 2, p. 5

⁵⁹ BCPC Decision, paras. 2, 68, ALA Tab 2, pp. 5, 24

⁶⁰ BCPC Decision, paras. 80, 119, 134, ALA Tab 2, pp. 27-28, 43, 50

says this initial test flows from a “plain reading”⁶¹ of s. 35, and should be applied using “general principles of constitutional interpretation.”⁶²

26. The Crown has unsuccessfully advanced this argument throughout. Leaving aside that it can point to no authority for such a position (see paras. 35-42 below), the Crown’s interpretation all but ignores the purposive approach to s. 35, which requires the courts to take into account the Aboriginal perspective, and the over-arching objective of reconciliation.⁶³ As the Court of Appeal observed, Aboriginal rights are grounded in the historical presence of Indigenous societies in North America⁶⁴, and *Van der Peet*’s focus on that prior occupation makes it well suited to answer the question of whether a collective is an “Aboriginal Peoples of Canada”:

In my view, the *Van der Peet* test addresses the necessary connection between the modern and historic collective through the concept of continuity. The formalistic interpretation of the words “Aboriginal peoples of Canada” proposed by the Crown fails to take into account the Aboriginal perspective and therefore cannot be relied upon to foreclose a modern-day claimant from the opportunity of establishing an Aboriginal right pursuant to *Van der Peet*. Simply put, if the *Van der Peet* requirements are met, the modern indigenous community will be an “Aboriginal peoples of Canada”.⁶⁵

27. The courts below addressed the various arguments advanced by the Crown regarding the application of principles of “constitutional interpretation”. For example, the summary conviction appeal judge exhaustively dealt with the Crown’s submission that s. 35.1, which requires the inclusion of “Aboriginal peoples of Canada” in constitutional conferences if constitutional amendments are contemplated, speaks against the recognition of the Sinixt as an Aboriginal peoples of Canada given that many of them hold U.S. citizenship.⁶⁶ Among other things, Sewell J. observed that:

....this argument fails to take into account the Aboriginal perspective by focusing on Canadian citizenship and residence. The jurisprudence with respect to s. 35 recognizes that a key aspect of nationhood and citizenship in a first nation is its connection to its traditional territory. While the Sinixt people who are also members of the Lakes Tribe are

⁶¹ Crown Argument, para. 44, ALA Tab 11, p. 160

⁶² Crown Argument, para. 42, ALA Tab 11, pp. 159-160

⁶³ *Van der Peet*, paras. 43, 49

⁶⁴ BCCA Decision, para. 55, ALA Tab 9, p. 138

⁶⁵ BCCA Decision, para. 57, ALA Tab 9, pp. 138-139

⁶⁶ Crown Argument, para. 64, ALA Tab 11, p. 165; BCSC Decision, paras. 44-54, ALA Tab 5, pp. 85-87

not citizens or resident in Canada, the trial judge found that they continue to have a deep connection with that part of their traditional territory that is in Canada.⁶⁷

28. The Crown argues that, if, as the Court of Appeal concluded, a modern Indigenous community will qualify as an “Aboriginal peoples of Canada” where the *Van der Peet* requirements are met, this will lead to anomalous outcomes. In particular, it says the *Van der Peet* test fails to account for the Métis (who were not present at contact), and does not apply to Aboriginal title (which is guided by the date of the assertion of sovereignty, rather than the date of contact).⁶⁸

29. These arguments were raised before the courts below and rejected. They ignore the fact that the *Van der Peet* framework is the starting place for both the recognition of the rights of the Métis and Aboriginal title. In *Powley*⁶⁹, this Court modified some elements of the pre-contact *Van der Peet* test to reflect the distinctive history and post-contact ethnogenesis of the Métis. The Court allowed that the Métis had formed distinct cultures that flourished prior to the entrenchment of European control.⁷⁰

30. Similarly, in *Delgamuukw*⁷¹, this Court adapted the *Van der Peet* test to take account of the fact that a claim to title is a claim to land. The timeframe was set at the date of assertion of sovereignty because that is when the Crown’s underlying title crystalized, because the date is easier to pinpoint, and because the issue of influence by Europeans is irrelevant to prior occupation. However, the point remains the same: the issue is prior occupation, regardless of the date at which that prior occupation is determined.⁷²

31. Ultimately, the Court of Appeal reframed the Crown’s threshold issue as an argument that, for claimants who are not residents or citizens of Canada, the *Van der Peet* test should be modified to include a requirement that the claimant must be a member of a modern-day community in the same geographical area where the claimed right was historically exercised⁷³. In fact, the Crown

⁶⁷ BCSC Decision, para. 52, ALA Tab 5, pp. 86-87

⁶⁸ Crown Argument, para. 51, ALA Tab 11, p. 161

⁶⁹ *R. v. Powley*, 2003 SCC 43 [*Powley*]

⁷⁰ *Powley*, para. 14; see also *Van de Peet*, paras. 66-67

⁷¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*]

⁷² *Delgamuukw*, paras. 142, 145

⁷³ BCCA Decision, para. 61, ALA Tab 9, p. 140

goes further, and, relying on *Powley* and *Bernard*, argues that this geographic residency requirement should be imposed on *all* Indigenous claimants, including those who are Canadian residents and citizens.⁷⁴

32. After noting that they had no foundation in the jurisprudence, the Court of Appeal rejected both of these arguments in these terms:

Imposing 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. In this case, such a requirement would extinguish Mr. Desautel's right to hunt in the traditional territory of his ancestors even though the rights of his community were never voluntarily surrendered, abandoned or extinguished. I would not modify the *Van der Peet* test to add a geographic requirement that would prevent members of Indigenous communities, who may have been displaced, from the opportunity of establishing their Aboriginal rights in areas their ancestors had occupied pre-contact.⁷⁵

33. Indeed, the Crown's proposed addition of a geographic residency requirement has troubling implications. For example, adding such a requirement would potentially preclude claims by nomadic and semi-nomadic Aboriginal communities, who by definition hold Aboriginal rights in areas where they do not necessarily reside. This Court has cautioned against interpreting s. 35(1) in a way that excludes protection for such communities.⁷⁶

34. The Crown's proposed modifications to the *Van der Peet* test are without merit and do not give rise to any issue of public or national importance.

B. There is No Conflicting Jurisprudence

35. The Crown argues that the intervention of this Court is warranted because the decision below conflicts with other appellate authority. In particular, the Crown asserts that the Court of Appeal's decision is inconsistent with *Bernard*.

36. This argument is unfounded. *Bernard* does not address the issues that arise in this appeal. The Crown says that *Bernard* shows that an applicant must be a member of a modern-day

⁷⁴ Crown Argument, paras. 53-56, ALA Tab 11, pp. 162-163

⁷⁵ BCCA Decision, para. 62, ALA Tab 9, p. 140

⁷⁶ *R v. Adams*, [1996] 3 S.C.R. 101, para. 27; see also *R. v. Hirsekorn*, 2011 ABQB 682, para. 134

community that is located in the same geographical area where the claimed right was historically exercised in order to establish a s. 35 right.⁷⁷ With respect, this is a mischaracterization of *Bernard*. *Bernard* simply shows that the applicant must be a member of a modern-day collective that has continuity with the historic collective that exercised the claimed right.⁷⁸ This continuity requirement is explicitly addressed in *Van der Peet*,⁷⁹ and the trial judge concluded that it was met on the facts of Mr. Desautel's case.⁸⁰ As the BC Court of Appeal explained:

In *Bernard*, a Mi'kmaq member of the Sipekne'katik First Nation in New Brunswick was charged with contravening the *Fish and Wildlife Act*, S.N.B. 1980, c F-14.1, for hunting deer near the mouth of the St. John River. In response, Mr. Bernard claimed he had an Aboriginal right to hunt at that location. The Court dismissed the claim. The evidence in *Bernard* was that the Mi'kmaq communities in that region historically organized themselves into separate bands each with their own traditional hunting territory. The trial judge found there was a Mi'kmaq community that hunted at the mouth of the St. John River pre-contact. However, the evidence also suggested that that specific community had left the area 250–300 years earlier. The trial judge found Mr. Bernard had failed to establish that he was a member of a modern collective descended from the original rights-bearing Mi'kmaq community that hunted at the mouth of the St. John River. Unlike Bernard, Mr. Desautel has established a connection to the historic community that hunted in the traditional territory where the claimed Aboriginal right was exercised.⁸¹

37. The Crown also asserts that the Court of Appeal failed to fully consider two other cases that are germane to the issues in this case: *Regina v. Campbell*⁸² and *Watt v. Liebelt*.⁸³ Once again, neither of these cases contradict the decisions below.

38. In *Campbell*, the BC Provincial Court judge expressly considered the meaning of “Aboriginal peoples of Canada”, and found that it included people whose territory exists on both sides of the international boundary. On appeal, the judge commented that he should not be taken as agreeing with that conclusion, but did so in *obiter* and without the benefit of argument and submissions on the question. He was not ultimately required to address the meaning of “Aboriginal

⁷⁷ Crown Argument, para. 11, ALA Tab 11, p. 152

⁷⁸ *Bernard*, paras. 2, 35

⁷⁹ *Van der Peet*, paras. 60-67

⁸⁰ BCPC Decision, paras. 4, 67-68, 116, ALA Tab 2, pp. 5, 23-24, 42

⁸¹ BCCA Decision, para. 60, ALA Tab 9, pp. 139-40 [emphasis added]

⁸² *Regina v. Campbell*, 2000 BCSC 956 [*Campbell*]

⁸³ *Watt v. Liebelt*, [1999] 2 FC 455 [*Watt*]; Crown Argument, para. 43, ALA Tab 11, p. 160

peoples of Canada”, given his conclusion that the right asserted by the appellant did not meet the *Van der Peet* test because it was not integral to the appellant’s distinctive culture.⁸⁴

39. In *Watt*, the Federal Court of Appeal did not determine whether the appellant, an American Indigenous person who was ordered to be removed from Canada, could exercise s. 35 rights. Rather, the Court simply held that the adjudicator had jurisdiction to decide this issue and sent the matter back for redetermination. The Court also held that the sovereign nature of Canada was not a barrier *per se* to the asserted s. 35 rights.⁸⁵

40. The Crown also refers to *R. v. Shenandoah*.⁸⁶ However, this case also did not address the questions at issue here. In *Shenandoah*, the Court determined that the applicants had failed to establish the s. 35 right claimed, that is, a right to mobility within Akwesasne territory for community or family purposes without the requirement of reporting at the Port of Entry. The Court held that the claimed right was too vague. It did not consider whether individuals who were not residents or citizens of Canada could exercise s. 35 rights.⁸⁷

41. Lastly, the Crown cites *Powley*.⁸⁸ As it does here, the Crown argued in the court below that *Powley* requires an Aboriginal rights claimant to be a member of a contemporary community in the geographic area where the right was historically exercised. As the Court of Appeal held, *Powley* does not import any such requirement.⁸⁹ After modifying the *Van der Peet* test to take into account the unique history of the Métis, and shifting the focus of the time period analysis from pre-contact to pre-control⁹⁰, this Court found that the Métis claimants in that case had an Aboriginal right to hunt for food under s. 35.⁹¹ While this Court certainly emphasized the importance of the claimant’s membership in a contemporary rights-bearing community⁹², the

⁸⁴ *Campbell*, paras. 12-13, 25, 32

⁸⁵ *Watt*, para. 19

⁸⁶ *R. v. Shenandoah*, 2015 ONCJ 541 [*Shenandoah*]

⁸⁷ *Shenandoah*, paras. 2, 39, 40

⁸⁸ Crown Argument, para. 53, ALA Tab 11, p. 162

⁸⁹ BCCA Decision, para. 60, ALA Tab 9, p. 139

⁹⁰ *Powley*, paras. 14, 18, 36-40

⁹¹ *Powley*, para. 53

⁹² *Powley*, paras. 24-28

decision did not impose a requirement for modern-day occupation of the same territory as the pre-control community

42. Accordingly, there is no conflicting case law on the issues raised in this appeal at any level, and guidance from this Court is not required.

C. The “Ancillary Issues” Cannot Be Resolved In This Appeal

43. Finally, the Crown argues that the intervention of this Court is required to address two issues, which, while acknowledged to be “ancillary”⁹³ to this appeal, are nonetheless said to be of public and national importance.

44. The Crown first raises the spectre of transboundary Aboriginal title and other claims by “foreign Indigenous groups”, which it says may not be welcomed by other Aboriginal groups in Canada, and, moreover, pose significant functional problems for Crown consultation and accommodation with “foreign nationals”.⁹⁴

45. Leaving aside the Crown’s continued use of self-serving labels, which ignores the trial judge’s findings of fact regarding the historic and enduring connection of the Sinixt to their traditional territory in Canada, these issues simply do not arise in this case. Given that this was a regulatory prosecution under the *Wildlife Act*, the issue of what entity represents the Sinixt, and would in turn need to be consulted and potentially accommodated by the Crown, did not arise below. There is no title or other claim being advanced that would allow this Court to consider, with a proper record, what functional concerns or problems might arise from “transboundary consultation” with a group resident in the United States.

46. Regardless of whether there is merit to the Crown’s submission that the “impact of the interests of foreign nationals on internal Canadian policy and governance” is an “unexamined” issue of national importance⁹⁵, the issue of transboundary consultation and accommodation will have to be adjudicated in a future case. Indeed, the Crown itself points to one such vehicle, being the case commenced by the Colville Confederated Tribes (not Mr. Desautel, as the Crown

⁹³ Crown Argument, para. 81, ALA Tab 11, p. 169

⁹⁴ Crown Argument, paras. 14-15, 73, 75-78, ALA Tab 11, pp. 153, 167-168

⁹⁵ Crown Argument, para. 78, ALA Tab 11, p. 168.

suggests⁹⁶), in which the Tribes are requesting consultation with respect to the proposed reserve of the Westbank First Nation in Fauquier, British Columbia, located in the heart of Sinixt traditional territory.

47. Second, the Crown continues to argue that this case raises the question of whether Mr. Desautel's right to hunt includes an incidental right to cross the border (the "mobility right"), and whether that right is incompatible with Canadian sovereignty. The Crown says this is an issue of national importance requiring this Court's guidance.⁹⁷

48. All three courts below held that this issue does not arise in this case, and that it would be inappropriate to address it.⁹⁸ As the Court of Appeal explained, given that "the lawfulness of Mr. Desautel's entry into Canada was never disputed ... the evidentiary record necessary to assess the nature and extent of Mr. Desautel's right to cross the border does not exist."⁹⁹ Further, as the summary conviction appeal judge observed, it would be inappropriate to consider this issue without Canada's participation because border control falls within federal jurisdiction. The Attorney General of Canada elected not to appear, make submissions, or adduce evidence in the courts below, although it was served with a notice of constitutional question at the outset of the litigation.¹⁰⁰ Like the transboundary consultation issue, this Court's consideration of the import of an incidental right to cross the border must await a future case where the actual act of crossing the border is in issue.¹⁰¹

PARTS IV AND V - SUBMISSIONS CONCERNING COSTS AND ORDER SOUGHT

49. The respondent asks that the application for leave to appeal be dismissed without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: September 3, 2019



Mark G. Underhill
Counsel for the Respondent

⁹⁶ Crown Argument, para. 77, ALA Tab 11, p. 168

⁹⁷ Crown Argument, paras. 16, 79-80, ALA Tab 11, pp. 153-54, 168-16

⁹⁸ BCPC Decision, para. 144, ALA Tab 2, p. 53; BCSC Decision, para. 100, ALA Tab 5, p. 97; BCCA Decision, paras. 66-71, ALA Tab 9, pp. 141-143

⁹⁹ BCCA Decision, para. 67, ALA Tab 9, p. 142

¹⁰⁰ BCSC Decision, para. 122, ALA Tab 5, p. 103

¹⁰¹ See BCCA Decision, paras. 45, 68, ALA Tab 9, pp. 133-34, 142

PART VI - TABLE OF AUTHORITIES

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<i>R. v. Adams</i>, [1996] 3 S.C.R. 101	33
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