SCC File No.: 38734

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

BETWEEN:

HER MAJESTY THE QUEEN

Applicant
(Appellant)

- and –

RICHARD LEE DESAUTEL

Respondent
(Respondent)

REPLY
OF THE APPLICANT,
HER MAJESTY THE QUEEN

(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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REPLY OF THE APPLICANT

1. The question for this Court is whether an Indigenous group in the United States is capable of constituting an "aboriginal peoples of Canada" for the purposes of protection of Aboriginal rights under s. 35 of the *Constitution Act, 1982.* This question has never been addressed by this Court and is an issue of public or national importance.

2. In his Memorandum of Argument, the Respondent offers only one response to this issue, namely that the test for Aboriginal rights in the 1996 decision of this Court in *R. v. Van Der Peet* effectively determines who are the "aboriginal peoples of Canada". With respect, this solution is inadequate. This Court in *Van Der Peet*[1] did not purport to consider this issue. Further, if the Respondent is correct, it makes the phrase "aboriginal peoples of Canada'' entirely superfluous, with constitutional protection being afforded simply to "existing aboriginal and treaty rights", regardless of whether the rights holding collective is located within Canada's borders.

3. This case can only directly raise the issues circumscribed by its factual parameters, but insofar as the law and the legal principles articulated within it effectively engage potential claims of Aboriginal title, international transboundary consultation and the implications for the control and operation of Canada's borders, it is mistaken to disregard those matters and suggest, as the Respondent does, that the issue is not ripe for consideration[2].

4. The Respondent asserts that the summary conviction appeal judge reviewed the trial judge's findings and concluded that the trial judge found the "relevant collective" was the "Sinixt people" and the Lakes Tribe is a "portion of the collective that resides in Washington State"[3]. However, it is notable that the trial judge made no findings regarding the existence of a Sinixt collective in Canada, and the intervenor Okanagan Nation Alliance explicitly urged the two appeal courts to refrain from expanding the trial judge's findings on that point.[4]

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[1] [1996] 2 S.C.R. 507.
[2] Respondent's Memorandum of Argument ("RMOA"), para. 7.
[3] RMOA, para. 14.
[4] Reasons for Judgment of the British Columbia Court of Appeal, May 2, 2019, 2019 BCCA 151, ("BCCA Reasons"), para. 47; Reasons for Judgment of Mr. Justice Sewell, dated December 29, 2017, 2018 BCSC 2389 ("BCSC Reasons"), paras. 38 and 39.

5. There are no identified collectives of Sinixt people in Canada, and even if certain individuals in Canada have Sinixt ancestry, there is no evidence that a Canadian-based Sinixt collective capable of holding Aboriginal rights exists. Further, even if there was, that would not engage the issue in this case. The only Indigenous collective that has been identified in this matter found to be holding an Aboriginal right is the one of which Mr. Desautel is a member - the Lakes Tribe.

6. The Respondent's claim that "[t]he test for establishing Aboriginal rights has been settled since *Van der Peet*"[5] cannot be correct in respect of more complex circumstances that engage situations where the elements of *Van der Peet* do not directly apply to the facts. An obvious example is *Delgamuukw*[6]where the Court found it necessary to modify the *Van der Peet* test as opposed to simply applying it in order to address claims of Aboriginal title. Similarly, this Court in *Powley*[7] was compelled to depart from *Van der Peet* to consider the definition of Metis communities.

7. If *Van der Peet* and consequently *Delgamuukw* are intended to provide the definition of rights-bearing communities for the purposes of s. 35 but they do so based on different dates, the effect is to potentially identify fundamentally different communities as Aboriginal groups for the purposes of Aboriginal rights generally and for the purposes of Aboriginal title, thereby adding to the complications of the jurisprudence in a manner that could not have been intended by this Court.

8. The Crown's argument does not ignore "the purposive approach to s. 35" including "the Aboriginal perspective" and the "over-arching objective of reconciliation" as contended by the Respondent.[8] The Crown has attempted to take account of all the relevant principles of constitutional interpretation as set out in the jurisprudence of the Supreme Court of Canada. In this respect, the Respondent simply does not address in any substantive way the failure of the courts below to approach the interpretation of s. 35 with reference to "general principles of

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[5] RMOA, para. 20.
[6] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010.
[7] *R. v. Powley,* 2003 SCC 43.
[8] RMOA, para. 26.

constitutional interpretation" as directed by this Court in *R. v. Sparrow*[9] and cited in *Van der Peet*[10]. Similarly, the Respondent does not address the Crown's arguments regarding the application of the principles of purposive interpretation and the courts' failure to offer any suggestions with respect to how to read s. 35 to best promote reconciliation.

9. The Crown's position is that the purpose of reconciliation has more complex implications than the courts below have grappled with, and that there remain significant questions regarding the applicability of the "Aboriginal perspective" as articulated by a claimant group that may not be defined as an "aboriginal peoples of Canada" and thus not eligible to hold an Aboriginal right entitled to constitutional protection under Canadian law.

10. The Respondent suggests that the Crown is seeking to add a "geographic residency requirement" that would potentially exclude "claims by nomadic and semi-nomadic communities, who by definition hold Aboriginal rights in areas where they do not necessarily reside".[11] With respect, those nomadic and semi-nomadic communities maintained established seasonal rounds which provided the needed historical and contemporary geographical connections. Existing jurisprudence indicates that a geographic reference is a component of the identification of a contemporary community. A further example is in the case of *Ahousaht Indian Band v. Canada (Attorney General)*[12] where the court, in assessing the connection between a historic and contemporary group, stated: "[t]hat proof of connection will be primarily based on a geographical identification."[13] The question of national importance that warrants this Court's attention is whether that definition excludes Indigenous collectives wholly based outside Canada.

11. The Respondent argues that there is no conflicting jurisprudence on the issues in this matter[14]. With respect, this assertion is mistaken. It is correct that the facts in *R. v. Bernard* are not identical to the facts in this case but the analytical approach undertaken for identifying the contemporary rights bearing collective differs significantly from the approach utilized by the

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[9] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
[10] RMOA, paras. 25-27; *R. v. Sparrow*, p. 1106; *Van der Peet*, para. 22.
[11] RMOA, para. 33.
[12] 2009 BCSC 1494.
[13] *Ahousaht*, para. 292, see also paras. 287-291.
[14] RMOA, para. 35.