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

Appellant
(Appellant)

-and-

RICHARD LEE DESAUTEL

Respondent
(Respondent)

FACTUM OF THE APPELLANT, HER MAJESTY THE QUEEN
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*,
SOR /2002-156, as amended)

Ministry of Attorney General
Legal Services Branch
1405 Douglas St., 3rd Floor
Victoria, BC V8W 2G2

Glen R. Thompson
Heather Cochran
Tel: 250.387.0417
Fax: 250.387.0343
Email: glen.r.thompson@gov.bc.ca

Counsel for the Appellant,
Her Majesty the Queen

Borden Ladner Gervais LLP
World Exchange Plaza
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron

Tel: 613.369.4795
Fax: 613.230.8842
Email: kperron@blg.com

Ottawa Agent for the Appellant,
Her Majesty the Queen

ORIGINAL TO:

Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPY TO:

Arvay Finlay LLP
1710 - 401 West Georgia Street
Vancouver, BC V6B 5A1

Mark G. Underhill
Tel: 604.283.2912
Fax: 888.575.3281
Email: munderhill@arvayfinlay.ca

Counsel for the Respondent,
Richard Lee Desautel

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: 613.786.0171
Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for the Respondent,
Richard Lee Desautel

Attorney General of Ontario
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Manizeh Fancy
Kisha Chatterjee
Tel: 416 578.3637
Fax: 416 326.4181
Email: manizeh.fancy@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel: 613.369.4795
Fax: 613.230.8842
Email: kperron@blg.com

Ottawa Agent for Intervener,
Attorney General of Ontario

Department of Justice Canada
Aboriginal Law Section
900 - 840 Howe Street
Vancouver, BC V6Z 2S9

Anne Turley
Tel: 604.666.8524
Fax: 604.666.2710
Email: anne.turley@justice.gc.ca

Counsel for the Intervener,
Attorney General of Canada

Department of Justice Canada
500 - 50 O'Connor Street
Ottawa, ON K1A 0H8

Christopher Rupar
Tel: 613.670.6290
Fax: 613.954.1920
Email: christopher.rupar@justice.gc.ca

Ottawa Agent for the Intervener,
Attorney General of Canada

Ministère de la Justice
1200, route de l'Église, 4e étage
Québec, QC G1V 4M1

Rosemarie Fortier
Tania Clercq
Tel: 418.643.1744
Fax: 418.644.7030
Email: rosemarie.fortier@justice.gouv.qc.ca

Counsel for the Intervener,
Attorney General of Québec

Noël & Associés
111, rue Champlain
Gatineau, QC J8X 3R1

Pierre Landry

Tel: 819.503.2178
Fax: 819.771.5397
Email: p.landry@noelassocies.com

Ottawa Agent for the Intervener,
Attorney General of Québec

Attorney General of the Yukon Territory
Government of Yukon
2130 - 2nd Avenue
Whitehorse, YT Y1A 5H6

Elaine Cairns
Kate Mercier
Tel: 867.456.5586
Fax: 867.393.6928
Email: elaine.cairns@gov.yk.ca

Counsel for the Intervener,
Yukon Territory

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: 613.695.8855 Ext: 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener,
Attorney General of Yukon Territory

Attorney General for Saskatchewan
Constitutional Law Branch, 8th Floor
820, 1874 Scarth Street
Regina, SK S4P 4B3

Richard James Fyfe
Tel: 306.787.7886
Fax: 306.787.9111
Email: james.fyfe@gov.sk.ca

Counsel for the Intervener,
Attorney General of Saskatchewan

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener,
Attorney General of Saskatchewan

Attorney General of New Brunswick
Constitutional Law Group
675 King Street
Fredericton, NB E3B 1E9

Rachelle Standing
Rose Campbell
Tel: 506.453.5217
Fax: 506.453.3275
Email: rose.campbell@gnb.ca

Counsel for the Intervener,
Attorney General of New Brunswick

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt

Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener,
Attorney General of New Brunswick

Attorney General of Alberta
10025 - 102A Avenue, 10th Floor
Edmonton, AB T5J 2Z2

Angela Edgington
Tel: 780.427.1482
Fax: 780.643.0852
Email: angela.edgington@gov.ab.ca

Counsel for the Intervener,
Attorney General of Alberta

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener,
Attorney General of Alberta

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Does the phrase "aboriginal peoples of Canada" in s. 35 of the *Constitution Act, 1982* include Indigenous groups located in the United States? The courts below said yes, but that conclusion is contrary to the text of s. 35 and raises important legal and practical considerations. Prior to Mr. Desautel's claim no Canadian court had recognized that an Indigenous group located outside Canada's borders holds Aboriginal rights in Canada. The courts below were understandably troubled by the prospect of finding that an Indigenous group that is now located south of the Canada-US border no longer has any right to hunt in its traditional territory north of the border. However, the conclusion that the Lakes Tribe holds a constitutionally protected Aboriginal right to hunt in Canada is based on the false dichotomy that the Lakes Tribe either holds a s. 35 right to hunt in Canada, or they have no right to hunt in Canada. The lower courts do not appear to have considered the possibility that a US Indigenous group may continue to hold common law Aboriginal rights in Canada.

2. The facts of this case were largely undisputed and can be summarized briefly: Mr. Desautel is a member of the Lakes Tribe of the Confederated Tribes of the Colville Reservation ("CCT"), and lives on the Colville Indian Reservation in Washington State, in the United States of America. In October 2010, acting on the instructions of the Fish and Wildlife Director of the CCT, Mr. Desautel shot and killed a cow elk near Castlegar, BC. He 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 Act.[1] Mr. Desautel's sole defence was that he was exercising his Aboriginal right to hunt in the traditional territory of his Sinixt ancestors, pursuant to s. 35(1). The trial judge described this as a "test case" for the Lakes Tribe.[2]

3. The trial judge found that the Lakes Tribe, of which Mr. Desautel is a member, represents a part of the Sinixt people; the practice of hunting in what is now BC was a central and

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[1] *Wildlife Act*, RSBC 1996, c 488, ss. 11(1) and 47(a).
[2] *R. v. Desautel*, 2017 BCPC 84, para. 133, Appellant's Record ("AR") Vol. I, p.47 [BCPC Reasons].

significant part of the Sinixt's distinctive culture pre-contact; despite the Lakes Tribe being physically absent from their traditional territory in BC after 1930, the chain of continuity of practice and community was not broken; and the Lakes Tribe continued hunting in the US after 1930 in a manner similar to the pre-contact traditions of the Sinixt.[3]

4. The central issue in the courts below (as in this Court), was the meaning of the phrase "aboriginal peoples of Canada" in s. 35(1). The courts below correctly identified that s. 35 is to be interpreted purposively. However, rather than undertake a purposive analysis, the courts below instead relied on the *Van der Peet*[4] test for identifying whether an activity constitutes a right protected by s. 35. This error led the trial judge to acquit Mr. Desautel on the basis that he was exercising a constitutionally protected Aboriginal right to hunt, which was unjustifiably infringed by the *Wildlife Act*. The summary conviction appeal judge upheld the trial judge's use of the *Van der Peet* test[5] and the Court of Appeal affirmed that a modern-day Indigenous group located in the US is not foreclosed from holding a s. 35 Aboriginal right: "Simply put, if the *Van der Peet* requirements are met, the modern Indigenous community will be an 'Aboriginal peoples of Canada'."[6] This is an error.

5. A purposive analysis of s. 35(1) that has regard to the provision's text, context and history shows that it protects only Indigenous groups located in Canada. Any rights in Canada held by US Indigenous groups today must be common law, not constitutional. This conclusion is consistent with the foundations of the doctrine of Aboriginal rights. This view also avoids several legal and practical difficulties that flow from holding that US Indigenous groups are "aboriginal peoples of Canada" for the purposes of constitutional protection under s. 35(1).

6. This Court need not determine whether the Lakes Tribe holds a common law right to hunt in BC. Mr. Desautel relied solely on s. 35(1) in his defence; this is understandable because a common law Aboriginal right would not exempt him from the provisions of the *Wildlife Act*. However, understanding that there is a foundation in existing Canadian jurisprudence whereby

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[3] *R. v. Desautel*, 2019 BCCA 151, para. 50, AR Vol. I, p. 126 [BCCA Reasons]; BCPC Reasons, paras. 49, 88, AR Vol. I, pp. 16, 29.
[4] *R. v. Van der Peet*, [1996] 2 S.C.R. 507.
[5] *R. v. Desautel*, 2017 BCSC 2389, para. 90, AR Vol. I, p. 90 [BCSC Reasons].
[6] BCCA Reasons, para. 57, AR Vol. I, pp. 129-130.

the Lakes Tribe may hold a common law right clarifies why they cannot hold a constitutional right and addresses the concerns of the courts below that the Lakes Tribe would be unable to establish any rights in the northern portion of their traditional territory.

B. Statement of Facts

1. The trial judge's key findings of fact

7. The trial judge described this matter as a "test case" brought by the Lakes Tribe.[7] In October 2010, acting on the instructions of the Fish and Wildlife Director of the CCT, Mr. Desautel shot a cow elk in the Boulder Creek drainage near Castlegar, BC, in an area where a Limited Entry Hunting authorization was required. He reported the kill to conservation officers and a few days later, he was charged with hunting without a licence and hunting big game while not being a resident of BC, contrary to ss. 11(1) and 47(a) of the *Wildlife Act*.[8]

8. Mr. Desautel admitted the *actus reus* of each offence and an agreed statement of facts was entered at trial. Mr. Desautel's sole defence was that he was exercising his Aboriginal right to hunt in the traditional territory of his Sinixt ancestors, pursuant to s. 35(1).[9]

9. Mr. Desautel was born in Nespelem, Washington State. He has lived his entire life in the US and is a US citizen. He is a member of the Lakes Tribe of the CCT, and lives on the Colville Indian Reservation in Washington State. He has never been a resident of BC, a Canadian citizen, or registered under the *Indian Act*.[10]

10. The trial judge found that the Lakes Tribe was "a successor group to the Sinixt people living in British Columbia at the time of contact".[11] The first recorded European contact with the Sinixt occurred in 1811, when David Thompson ascended the Columbia River.[12]

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[7] BCPC Reasons, para. 133, AR Vol. I, p. 47.
[8] BCPC Reasons, paras. 2-3, AR Vol. I, p. 2; Exhibit 1 – Agreed Statement of Facts, paras. 2-7, AR Vol. IV, p. 1 [ASF].
[9] BCCA Reasons, para. 6, AR Vol. 1, p. 3; ASF, AR Vol. IV, p. 1.
[10] BCPC Reasons, paras. 2, 66, AR Vol. I, p. 2; BCSC Reasons, para. 4, AR Vol. I, p. 69; ASF, para. 1, AR Vol. IV., p.1.
[11] BCPC Reasons, para. 68, AR Vol. I, p. 21.
[12] BCPC Reasons, para. 15, AR Vol. I, pp. 5-6.

11. In broad terms, the Sinixt "occupied the Arrow Lakes and utilized the area on the Columbia River from approximately the Big Bend, north of Revelstoke, south to Kettle Falls, Washington".[13] The traditional territory of the Sinixt thus straddled what became the international border between BC and Washington State. The pre-contact population of the Sinixt was not large; the trial judge found "this was a smaller group whose territory was circumscribed on both sides by mountains".[14]

12. In the pre-contact period, hunting (including in the part of their traditional territory that became BC) was a central and significant part of the Sinixt's distinctive culture.[15] The trial judge found that "[p]rior to contact in 1811 and for some time after, the Sinixt engaged in a seasonal round in their territory hunting, fishing and gathering".[16]

13. Post-contact, the trial judge found that "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.[17] The portion of Sinixt territory south of the 49th parallel became US territory in 1846, when the British Crown and the United States entered into the Oregon Boundary Treaty. The courts below accepted 1846 as the date of the Crown's assertion of sovereignty over what is now BC.[18]

14. In 1872, the US federal government set aside reserve lands for the tribes that now make up the CCT, including the Sinixt, who had by then become known as the Lakes.[19] The trial judge found that a majority of the Sinixt people who had been living on both sides of the border took up residence on the "Colville Indian Reservation" around 1880 and 1890.[20] US law recognizes the CCT as holding hunting rights in their traditional territory in the US.[21]

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[13] BCPC Reasons, para. 20, AR Vol. I, p. 7, quoting Expert Report of Dorothy Kennedy, p. 12, AR Vol. III, p. 21.
[14] BCPC Reasons, para. 19, AR Vol. I, p. 6-7.
[15] BCPC Reasons, paras. 80, 84, AR Vol. I, pp. 24-26.
[16] BCPC Reasons, para. 24, AR Vol. I, p. 8.
[17] BCPC Reasons, para. 110, AR Vol. I, p. 36-37.
[18] BCPC Reasons, paras. 8, 137-138, AR Vol. I, pp. 3-4, 48.
[19] BCPC Reasons, para. 42, AR Vol. I, p. 14.
[20] BCPC Reasons, paras. 42-43, AR Vol. I, pp. 14-15.
[21] *Antoine v. Washington* 420 (US) 194 (1975), pp. 195-197, 205-207.

15. The trial judge found that following their move onto the Colville reserve, members of the Lakes Tribe "rarely hunted north of the 49th parallel", and no longer travelled to or hunted north of the border by the 1930s.[22] Citing this Court's decision in *Van der Peet*, the trial judge concluded "that the chain of continuity in this case is not broken even though the Lakes did not exercise a seasonal round in their traditional territory in British Columbia after 1930 as they had in the time before contact".[23] The trial judge elaborated 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 members of the Lakes Tribe".[24]

16. 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.[25] In 1956, the Canadian federal government declared that the Arrow Lakes Band ceased to exist for purposes of the *Indian Act*, after the band's last member died.[26]

17. The federal government's declaration with respect to the Arrow Lakes Band does not foreclose the possibility that there may be a Sinixt rights-holding collective present in BC today. The trial judge did not, and did not need to, make any finding in this regard.[27] The point is an important one, as there are competing claims to represent whatever rights may still be possessed by Sinixt descendants in BC.[28] As the trial judge explained,

> The overwhelming historical evidence is that the Sinixt continue to exist today as a group. As Dr. Kennedy put it at page 132 of her 2015 report, the Sinixt Regional group is located in Washington State. I need not go further for the purpose of this case and decide whether there is a regional group in British Columbia.... The Lakes Tribe of the CCT certainly qualify as a successor group to the Sinixt people living in British Columbia at the time of contact.[29]

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[22] BCPC Reasons, paras. 49, 85, AR Vol. I, p. 16.
[23] BCPC Reasons, para. 134, AR Vol. I, p. 47.
[24] BCPC Reasons, para. 50, AR Vol. I, pp. 16-17.
[25] BCPC Reasons, para. 44, AR Vol. I, p. 15.
[26] BCPC Reasons, para. 48, AR Vol. I, p. 16.
[27] BCPC Reasons, para. 68, AR Vol. I, p. 21.
[28] See: *Campbell v. British Columbia (Forest and Range)*, 2011 BCSC 448 [*Campbell 2011*], para. 51. See also BCSC Reasons, para. 38, AR Vol. I, p. 78.
[29] BCPC Reasons, para. 68 (emphasis added), AR Vol. I, p. 21.

18. The trial judge elaborated that this is not a case about hunting by a member of a BC Sinixt group, or about Mr. Desautel hunting in BC with the permission of a BC Sinixt group.[30]

2. Decisions below

19. At trial, Mr. Desautel's sole defence was that he was exercising his Aboriginal right to hunt in the traditional territory of his Sinixt ancestors, pursuant to s. 35(1). The burden of proof was on Mr. Desautel to establish the Aboriginal right claimed and a *prima facie* infringement of that right.[31] On the basis of her findings of fact, the trial judge concluded that Mr. Desautel had proven an Aboriginal right to hunt in BC pursuant to the test set out in *Van der Peet*.[32]

20. The courts below defined the right claimed by Mr. Desautel as a right to hunt in BC, not including a right to enter BC. The trial judge rejected the Crown's argument that as a US citizen and resident, Mr. Desautel's right to hunt in BC must be considered to include an incidental mobility right to enter BC, which would be incompatible with Canadian sovereignty. The summary conviction appeal judge and Court of Appeal agreed.[33]

21. The trial judge also rejected the Crown's argument that s. 35(1) was not intended to include US Indigenous groups, opining that this was actually an "extinguishment argument" and that,

> to read s. 35(1) as intending to apply only to aboriginal peoples holding Canadian citizenship would work an unintended hardship on those other non-citizen aboriginal peoples like the Lakes Tribe who also had unextinguished aboriginal rights in 1982. There is nothing in s. 35(1) to indicate that Parliament intended to make such a distinction when it promised to reconcile the existence of aboriginal peoples on the land when Europeans arrived with Crown sovereignty.[34]

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[30] BCPC Reasons, para. 65, AR Vol. I, p. 20.
[31] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
[32] BCPC Reasons, para. 135, AR Vol. I, p. 47.
[33] BCPC Reasons, paras. 144-146, AR Vol. I, p. 50; BCSC Reasons, para. 100, AR Vol. I, p. 91; BCCA Reasons, para. 66, AR Vol. I, p. 132-133.
[34] BCPC Reasons, paras. 159, 164, AR Vol. I, p. 55.

22. The trial judge went on to find that the provisions of the *Wildlife Act* under which Mr. Desautel was charged unjustifiably infringe his Aboriginal right, and purported to find them inapplicable pursuant to s. 24(1) of the *Charter*.[35]

23. The Crown's summary conviction appeal was dismissed, except with respect to the trial judge's granting of a remedy pursuant to s. 24(1) of the *Charter*.[36] The summary conviction appeal judge described "[t]he essential questions on this appeal" as being "whether an aboriginal group must reside in Canada to be considered an aboriginal people of Canada, and whether the right asserted by Mr. Desautel is incompatible with Canadian sovereignty".[37]

24. With regard to the former, the summary conviction appeal judge held that "the meaning of s. 35 is not plain and obvious… The section does not expressly limit the constitutional protection of aboriginal rights to persons residing in Canada or to aboriginal peoples who are Canadian citizens, nor does it expressly include aboriginal people who are neither".[38] The summary conviction appeal judge considered there to be,

> … two possible interpretations of the term aboriginal people of Canada as used in s. 35.
>
> The first is that contended for by the Crown, that is, aboriginal peoples living in Canada.
>
> The second is those peoples who occupied what became Canada prior to contact.
>
> Under the second interpretation, aboriginal peoples who had a right at first contact, which has not otherwise been extinguished or abandoned, would be entitled to the protection of s. 35. Such right would of course be limited to a right that was exercised and is sought to be exercised in that part of North America that was eventually incorporated into Canada.[39]

25. While the summary conviction appeal judge correctly stated that s. 35 is to be interpreted purposively,[40] he ultimately concluded that the trial judge was correct to use the *Van der Peet* test to determine whether Mr. Desautel is a member of an "aboriginal people of Canada":

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[35] BCPC Reasons, para. 186, AR Vol. I, pp. 61-62.
[36] BCSC Reasons, paras. 11, 24, 124, AR Vol. I, pp. 70, 73, 97.
[37] BCSC Reasons, para. 10, AR Vol. I, p. 70.
[38] BCSC Reasons, para. 42, AR Vol. I, p. 78.
[39] BCSC Reasons, paras. 67-70, AR Vol. I, p. 84.
[40] BCSC Reasons, para. 63, AR Vol. I, p. 83.

> I conclude 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.
>
> 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.[41]

26. Leave to appeal to the BC Court of Appeal was granted on three questions of law alone:

> 1. 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, and whose member claiming to exercise an Aboriginal right is neither a resident nor citizen of Canada?
>
> 2. 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?
>
> 3. In order to determine whether an Aboriginal person who is not a citizen or resident of Canada has an Aboriginal right to hunt in British Columbia, is it necessary to consider the incidental mobility right of the individual and the compatibility of that right with Canadian sovereignty?[42]

27. The Court of Appeal answered the first question in the affirmative and the last two questions in the negative. Addressing the first two questions together,[43] the Court of Appeal concluded,

> …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*

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[41] BCSC Reasons, paras. 89-90, AR Vol. I, pp. 89-90.
[42] BCCA Reasons, para. 28, AR Vol. I, p. 118; *R. v. Desautel*, 2018 BCCA 131, para. 27, AR Vol. I, pp. 107-108.
[43] BCCA Reasons, para. 54, AR Vol. I, p. 129.

> *Peet*. Simply put, if the *Van der Peet* requirements are met, the modern Indigenous community will be an "Aboriginal peoples of Canada".[44]

28. While the Court of Appeal agreed that "the evidentiary record was limited to Mr. Desautel's claim as a member of the Lakes Tribe",[45] the Court rejected the Crown's submission that *Van der Peet* requires an Aboriginal rights claimant to be a member of a contemporary community in the geographic area where the right was exercised on the basis that "[t]his submission assumes that the Sinixt peoples are restricted to the Lakes Tribe".[46]

29. The Court of Appeal agreed with the trial judge and summary conviction appeal judge that it was not necessary to address the issue of sovereign incompatibility because an incidental mobility right did not necessarily arise in the circumstances of this case.[47]

30. The courts below also engaged in a lengthy discussion regarding the identity of "the relevant aboriginal collective", with the summary conviction appeal judge noting that the trial judge "did not explicitly define the various terms she used" when she referred to the Lakes Tribe and the Sinixt.[48] The Court of Appeal concluded that "the relevant historic collective is the Sinixt", and the Lakes Tribe is "the present-day collective situated in Washington State".[49] The Court of Appeal confirmed that Mr. Desautel's claim to a constitutionally protected Aboriginal right must be assessed based on his membership in the Lakes Tribe, which is wholly located in the US.[50]

PART II – QUESTIONS IN ISSUE

31. The following constitutional question is at issue:

> Are ss. 11(1) and 47(a) of the *Wildlife Act*, RSBC 1996 c. 488, as they read in October 2010, of no force or effect with respect to the respondent, being a member of the Lakes Tribe of the Confederated Tribes of the Colville Reservation in Washington State, USA,

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[44] BCCA Reasons, para. 57, AR Vol. I, pp. 129-130.
[45] BCCA Reasons, para. 49, AR Vol. I, pp. 125-125.
[46] BCCA Reasons, para. 58, AR Vol. I, p. 130.
[47] BCCA Reasons, paras. 66-67, AR Vol. I, pp. 132-133.
[48] BCSC Reasons, para. 35, AR Vol. I, p. 77.
[49] BCCA Reasons, paras. 56, 63 (emphasis added), AR Vol. I, pp. 129, 132.
[50] BCCA Reasons, para. 49, AR Vol. I, pp. 125-126.

> in virtue of s. 52 of the *Constitution Act, 1982*, by reason of an Aboriginal right within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the Respondent?[51]

32. The constitutional question should be answered in the negative. Examining the foundations of the doctrine of Aboriginal rights and undertaking a purposive interpretation of s. 35 leads to the conclusion that while the Lakes Tribe may continue to hold common law Aboriginal rights in BC, any such rights were not elevated to constitutional status by the enactment of s. 35 in 1982.

PART III – STATEMENT OF ARGUMENT

A. Overview

33. Prior to Mr. Desautel's claim no Canadian court had recognized that an Indigenous group located outside Canada's borders holds Aboriginal rights in Canada. Only two cases have previously considered whether Indigenous peoples who are neither status Indians nor resident in Canada come within the scope of s. 35; notably, both cases involved individuals claiming Sinixt ancestry.[52] Neither case made any definite determination of the issue, as the courts below noted,[53] but both expressed doubt on the point.[54]

34. It bears emphasizing that examples of Indigenous peoples and territories that cross modern boundaries can be found along the length of Canada's border with the United States,[55]

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[51] Notice of Constitutional Question of the Appellant, Her Majesty the Queen, filed November 22, 2019, AR Vol. I, p. 139.
[52] *R. v. Campbell*, 2000 BCSC 956, paras. 9-14 [*Campbell 2000*]; *Watt v. Liebelt*, [1999] FC 455 (CA).
[53] BCSC Reasons, paras. 73-79, AR Vol. I, pp. 85-88; BCCA Reasons, para. 24, AR Vol. I, p. 118.
[54] *Campbell 2000*, paras. 13-14; *Watt*, para. 19.
[55] Within BC, a 1996 map entitled "First Nations of British Columbia" depicts the cross-boundary nature of BC's Ktunaxa, Kinbasket, Okanagan, Nl;aka'pamux, Sto:lo, Quwutsun', and Haida nations. This is not a complete list. W. Duff, *The Indian History of British Columbia*, new ed. (Victoria: Royal British Columbia Museum, 1997), p.166. For examples along Canada's southern border outside BC, see the Blood and Blackfeet Nations discussed in D. Evans,

including the Canada-Alaska boundary,[56] and perhaps even in Canada's north.[57] The facts underlying this Court's decision in *Mitchell* illustrate what is perhaps the best-known instance of this: Akwesasne Mohawk territory straddles not only the Ontario/Quebec border, but also the US/Canada border.[58] If the courts below are right that the Lakes Tribe holds a constitutionally protected Aboriginal right to hunt in BC under s. 35, then many other Indigenous groups along the thousands of kilometres of Canada's international borders may potentially come within s. 35, too.

35. There are three reasons why any rights in Canada held by a US Indigenous group today must be common law, not constitutional rights. First, this conclusion is consistent with the foundations of Canada's doctrine of Aboriginal rights, as developed by this Court. Second, it is consistent with a proper interpretation of s. 35, the text, context and drafting history of which show that it protects only Indigenous groups located in Canada. Third, this interpretation avoids several legal and practical difficulties that flow from holding that Indigenous groups located in the US are "aboriginal peoples of Canada" for the purposes of s. 35(1).

36. The conclusion of the courts below that the Lakes Tribe holds a constitutionally protected Aboriginal right appears to be premised on a false dichotomy: Either the Lakes Tribe has a constitutionally protected right to hunt in Canada, or they have no right whatsoever to hunt in Canada. The courts below were understandably troubled by the prospect of finding that an Indigenous group that is now located south of the Canada-US border can no longer establish any

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"Superimposed Nations: The Jay Treaty and Aboriginal Rights" (1995) 4 Dalhousie Journal of Legal Studies 215, pp. 215-6.

[56] A. Smart, "Indigenous woman fights to stay in Canada, saying traditional Tsimshian territory is B.C." *The National Post*, June 30, 2018.

[57] As long ago as 1939 this Court had before it evidence dating from the 1850s that Inuit peoples inhabited "the northern littoral of the continent from Labrador to Russian America": *Reference as to whether "Indians" includes in s. 91 (24) of the B.N.A. Act includes Eskimo in habitants of the Province of Quebec*, [1939] SCR 104, p. 107.

[58] *Mitchell v. MNR*, 2001 SCC 33.

rights in its traditional territory north of the border. The solution to this dilemma lies in understanding the common law doctrine of Aboriginal rights.

37. It is helpful to review the recognition and protection of Aboriginal rights at common law before turning to an examination of s. 35. As Binnie J stated in *Mitchell*, "[t]he framers of the *Constitution Act, 1982* undoubtedly expected the courts to have regard in their interpretation of s. 35(1) to the common law concept".[59]

B. The common law recognizes and protects Aboriginal rights

1. Common law recognition and protection of Aboriginal rights

38. It is well-established that "s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law".[60] The common law's protection of Aboriginal rights has long standing judicial recognition in Canada; it lies at the foundation of the Aboriginal rights doctrine developed by this Court beginning in *Calder*[61] and *Guerin*,[62] and continuing on through *Sparrow*.[63] The Court summarized this jurisprudence in *Mitchell*, confirming that the interests of North America's Indigenous peoples, rooted in their historic use and occupation of the land, survived European settlement and the Crown's assertion of sovereignty. The Court also explained in *Mitchell* how those interests were absorbed into the common law as rights, with limited exceptions:

> Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, and *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990]

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[59] *Mitchell*, para. 114 (per Binnie J).
[60] *Van der Peet*, para. 28 (citations omitted).
[61] *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313, see in particular pp. 322-323, 328 (per Judson J); pp. 376, 390, 402, 416 (per Hall J).
[62] *Guerin v. The Queen*, [1984] 2 S.C.R. 335, pp. 376-377 (per Dickson J).
[63] *Sparrow*, p. 1103.

> 1 S.C.R. 1075, at p. 1103. At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: *Sparrow*, supra. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335.
>
> Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see *Calder v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] S.C.R. 313, and *Mabo v. Queensland* (1992), 175 C.L.R. 1, at p. 57 (per Brennan J.), pp. 81-82 (per Deane and Gaudron JJ.), and pp. 182-83 (per Toohey J.).[64]

39. Accordingly, prior to 1982, the common law recognized and protected Aboriginal rights, subject to the exceptions of sovereign incompatibility, surrender and extinguishment. The enactment of s. 35 elevated to constitutional status the common law rights of the "aboriginal peoples of Canada" that were "existing" in 1982, recognizing that such rights may, within limits, evolve from their pre-contact form.[65] As this Court explained in *Mitchell*,

> [t]he enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status… Henceforward, aboriginal rights falling within the constitutional protection of s. 35(1) could not be unilaterally abrogated by the government. However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives.[66]

40. This Court has not previously considered the effect of s. 35 on the common law rights of Indigenous peoples of countries other than Canada. Until now, there has never been a need to do so; the Court has only ever considered s. 35 in the context of claimants who were indisputably "aboriginal peoples of Canada". For example, there was no suggestion that the claimant in *Van der Peet* (a member of the Sto:lo) was not a member of an "aboriginal peoples of Canada".

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[64] *Mitchell*, paras. 9-10.
[65] *Sparrow*, p. 1093; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, paras. 7-8, 49-51; *Mitchell*, para. 13.
[66] *Mitchell*, para. 11 (citations omitted).

Rather, the question was whether the claimant was exercising an Aboriginal right when she engaged in the sale of fish.

41. The trial judge reasoned that if s. 35(1) did not constitutionally entrench the common law rights of US Indigenous groups because they do not come within that provision's scope, the enactment of s. 35 must have extinguished their rights.[67] The reasoning of the learned judge set up a false dichotomy. The fact that a common law Aboriginal right is not elevated to constitutional status under s. 35 does not necessitate the conclusion that the right is otherwise extinguished; in principle, the right may simply continue to exist as a common law right. The courts do not appear to have considered this possibility.

42. The protection accorded to Aboriginal rights by the common law should not be overlooked. While common law Aboriginal rights are subject to regulation by legislation, they are enforceable by the courts.[68] Moreover, the honour of the Crown would be engaged in the Crown's dealings with US Indigenous groups holding common law Aboriginal rights. It is well established that the honour of the Crown is always at stake in the Crown's dealings with Indigenous peoples.[69] This Court's jurisprudence has consistently made clear that the honour of the Crown arises not from s. 35, but rather "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people".[70]

43. Although "[t]he honour of the Crown is not a cause of action itself",[71] neither is it "a mere incantation".[72] This Court has emphasized that the honour of the Crown is "a core precept that finds its application in concrete practices".[73] The Court has confirmed that when engaged, "[t]he honour of the Crown imposes a heavy obligation" on the Crown.[74] As this Court explained

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[67] BCPC Reasons, para. 159, AR Vol. I, p. 55.
[68] *Van der Peet*, para. 28; *Mitchell*, para. 9, citing *Guerin*; *Sparrow*, p. 1111, citing *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.).
[69] *R. v. Badger*, [1996] 1 SCR 771, para. 41.
[70] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para. 32.
[71] *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, para. 73.
[72] *Haida*, para. 16.
[73] *Haida*, para. 16.
[74] *Manitoba*, para. 68.

in *Haida*, the honour of the Crown may give rise to different, legally enforceable, duties in different circumstances.[75] It is well established that the honour of the Crown prohibits even the appearance of sharp dealing, and assumes that the Crown always intends to fulfil its promises.[76]

44. If the common law continues to protect Aboriginal rights which existed in 1982 but which were not elevated to constitutional status by the enactment of s. 35—as it must do, absent language in a surrender or legislation evidencing a plain and clear intention[77]—the Lakes Tribe is not foreclosed from potentially establishing rights in the northern portion of their traditional territory.

2. Application to the hunting right claimed by Mr. Desautel

45. As set out above, the doctrine of Aboriginal rights developed by this Court presumes that the practices, customs and traditions that defined the various Indigenous societies as distinctive cultures survived the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them. In the case at bar, the Crown did not rely on extinguishment or surrender. The Crown contended, however, that the right claimed by Mr. Desautel did raise an issue as to sovereign incompatibility.

46. Taken in isolation, the Aboriginal right to hunt claimed by Mr. Desautel is not incompatible with the Crown's assertion of sovereignty. That is not the end of the inquiry, however. It is well established that "[a]n aboriginal right, once established, generally encompasses other rights necessary to its meaningful exercise".[78] These are commonly referred to as 'incidental rights'. Typically, the Aboriginal right to hunt is considered to include the necessarily incidental right to access the hunting territory. This view is consistent with this Court's jurisprudence affirming that incidental rights include the right of physical access to a

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[75] *Haida*, para. 18.
[76] *Badger*, para. 41.
[77] *Sparrow*, pp. 1098-1099.
[78] *Mitchell*, para. 22.

territory to fish,[79] the right to construct a hunting shelter,[80] and the right to travel to hunting grounds with a firearm.[81]

47. In the case at bar, the Lakes Tribe's migration to what is now Washington State means that a mobility right to access hunting territory in what is now BC would entail a right to cross the international border. The courts below held that it was unnecessary to consider Mr. Desautel's incidental mobility right to enter Canada because he had not been charged with coming into Canada unlawfully.[82] However, the Lakes Tribe's pre-contact practice of travelling into the portion of their territory that now lies north of the Canada-US border is clearly incompatible with the Crown's assertion of sovereignty.

48. As Binnie J explained in *Mitchell*, "[c]ontrol over the mobility of persons and goods into one country is, and always has been, a fundamental attribute of sovereignty".[83] US citizens have no right to enter Canada. Canadian law confers a right of entry only on Canadian citizens, registered Indians and permanent residents.[84] Mr. Desautel is none of those. It is central to the concept of sovereignty that sovereign states can exclude foreigners. In *Mitchell*, Binnie J looked to Canadian, American, British and international authorities on this point. These made clear that,

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[85]

49. If the incidental mobility right required by Mr. Desautel as a member of the Lakes Tribe is incompatible with Canadian sovereignty, it would not have been recognized and protected by

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[79] *R. v. Côté*, [1996] 3 S.C.R. 139, para. 57.
[80] *R. v. Sundown*, [1999] 1 S.C.R. 393, para. 33.
[81] *Simon v. The Queen*, [1985] 2 SCR 387, p. 403.
[82] BCCA Reasons, paras. 66-67, AR Vol. I, pp. 113-114; BCSC Reasons, paras. 100, 106-107, AR pp. 91, 92-93; BCPC Reasons, para. 146, AR Vol. I, p. 50.
[83] *Mitchell*, para. 160 (per Binnie J, concurring).
[84] *Immigration and Refugee Protection Act*, SC 2001, c 27, s. 19; *Canadian Charter of Rights and Freedoms*, s. 6.
[85] *Mitchell*, para. 162, quoting *Ekiu v. United States*, 142 U.S. 651 (1892), p. 659. See also paras. 160-163.

the common law. If that is the case, there would also be no basis for a constitutionally protected right. As Binnie J explained in *Mitchell*,

> … if the claimed aboriginal right did not survive the transition to non-Mohawk sovereignty, there was nothing in existence in 1982 to which s. 35(1) protection of *existing* aboriginal rights could attach.[86]

50. It would be open to Mr. Desautel to claim a common law right to hunt in BC—excluding a mobility right to cross the border—but that is not what he argued. This is understandable because a common law hunting right would not have exempted Mr. Desautel from the provisions of the *Wildlife Act* under which he was charged. As such, this Court need not determine whether the Lakes Tribe holds a common law right to hunt in BC.

51. While a constitutional right could exempt Mr. Desautel from the provisions of the *Wildlife Act*, s. 35(1) only accords constitutional protection to the rights of the "aboriginal peoples of Canada". The Lakes Tribe is wholly located in Washington State, and its members, like Mr. Desautel, have no right to enter Canada. This fact alone militates against concluding that the Lakes Tribe is an "aboriginal peoples of Canada", and should be accorded constitutional rights within Canada's borders. The view that the Lakes Tribe does not come within the scope of s. 35(1) is also supported by a purposive interpretation of that provision.

C. Section 35, properly interpreted, does not include US Indigenous groups

52. The courts below correctly held that s. 35 is to be interpreted purposively, citing *Van der Peet*.[87] However, rather than undertake a purposive analysis to determine the meaning of the phrase "aboriginal peoples of Canada", the courts below instead relied on the *Van der Peet* test for identifying whether an activity constitutes an Aboriginal right protected by s. 35. The summary conviction appeal judge stated in this regard:

> I conclude 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.

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[86] *Mitchell*, para. 172 (emphasis in original).
[87] BCPC Reasons, para. 163, AR Vol. I, p. 55; BCSC Reasons, paras. 43, 63-66, AR Vol. I, pp. 79, 83-84; BCCA Reasons, paras. 51, 55, AR Vol. I, pp. 126, 129.

> 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.[88]

53. The Court of Appeal affirmed this approach:

> 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".[89]

54. This reasoning is fundamentally at odds with this Court's guidance on purposive interpretation and s. 35. In *Sparrow*, this Court explained that "[t]he 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".[90] In *Van der Peet*, the Court elaborated that a purposive interpretation requires courts to analyze a constitutional provision in light of the interests it was intended to protect. The Court has specified that guidance about a right's purpose can be found in the language in which the right is expressed, the legislative context in which the right is found, and the historical origins of the right, including its legislative history.[91]

55. While this Court has at times emphasized taking a generous approach to s. 35, it has also cautioned that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse".[92] This is consistent with this Court's recent guidance in the *Charter*

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[88] BCSC Reasons, paras. 89-90, AR Vol. I, pp. 89-90.
[89] BCCA Reasons, para. 57, AR Vol. I, pp. 129-130.
[90] *Sparrow*, p. 1106.
[91] *R. v. Poulin*, 2019 SCC 47, para. 57, quoting Hogg, p. 36-30; *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, p. 344; see also *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, para. 19; *R. v. Comeau*, 2018 SCC 15, para. 45.
[92] *R. v. Marshall*, [1999] 3 SCR 456, para. 14.

context that "[g]enerosity is a helpful idea as long as it is subordinate to purpose".[93] Moreover and as Rowe J recently correctly confirmed, "[s.] 35 rights are not absolute. Like other provisions of the *Constitution Act, 1982*, s. 35 is both supported and confined by broader constitutional principles".[94]

56. The *Van der Peet* test has never been applied to determine whether a group is an "aboriginal peoples of Canada" for the purposes of s. 35. None of the courts in *Van der Peet* queried whether Mrs. Van der Peet was a member of a group that fell within the meaning of the phrase "aboriginal peoples of Canada". She was a resident of British Columbia and a member of a group which is clearly located within Canada and an "aboriginal peoples of Canada". The only question to which s. 35 would apply was whether the Sto:lo held an Aboriginal right to sell fish.

57. Chief Justice Lamer, speaking for the majority, framed the issue on appeal this way: "How are the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*, to be defined?"[95] 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 cultures of aboriginal peoples".[96]

58. It is the articulation of the "integral to a distinctive culture test" that comprises the answer to Lamer CJ'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,[97] followed by an application of those factors to Mrs. Van der Peet's claim.[98] The identity of the "aboriginal peoples of Canada" was never addressed.

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[93] *R. v. Stillman*, 2019 SCC 40, para. 21, quoting Professor Hogg; see also *Poulin*, paras. 53-4.
[94] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, para. 153 (per Rowe J). [*Mikisew 2018*]
, para. 153 (per Rowe J).
[95] *Van der Peet*, paras. 1, 15.
[96] *Van der Peet*, para. 13.
[97] *Van der Peet*, paras. 46-75.
[98] *Van der Peet*, paras. 76-91.

59. In other words, the *Van der Peet* test identifies what comes within the scope of s. 35 as a right, not who comes within the scope of s. 35 as a rights holder. The summary conviction appeal judge expressly acknowledged this before going on to misapply the test:

> In *Van der Peet*, there was no dispute that the persons asserting the right in question were aboriginal peoples of Canada. The question before the Court was whether the right in question was an aboriginal right entitled to the protection of s. 35. *Van der Peet* therefore addresses the nature of aboriginal rights protected by s. 35 rather than the identity of the persons asserting the right...[99]

60. Using the *Van der Peet* test to interpret the phrase "aboriginal peoples of Canada" gives rise to several problems. First, the test relates only to Aboriginal rights; it does not address treaty rights, Aboriginal title, or the rights of the Métis, which are also encompassed by s. 35. Using *Van der Pee*t as proposed by the courts below would lead to the anomalous result that the Métis are not "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 this Court's guidance that sovereignty, not contact, is the relevant time for identification of Aboriginal title. Further, defining "aboriginal peoples of Canada" solely in terms of occupation prior to contact is inconsistent with the fact that s. 35 rights "may only be exercised by virtue of an individual's ancestrally based membership in the present community".[100]

61. The location of the present-day rights bearing community must be a factor in the determination of whether an Indigenous group is an "aboriginal peoples of Canada". The Lakes Tribe has been located in the US for at least 100 years and had no presence in Canada when the *Constitution Act, 1982* was enacted. If all a present-day community is required to demonstrate is a historical connection to the historic collective, the current location of the present-day community is of no relevance and leaves open the possibility that an Indigenous group that has been absent from Canada for decades or even centuries has claims to constitutionally protected Aboriginal rights and title. That cannot have been the intention of the drafters of s. 35. It is also

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[99] BCSC Reasons, para. 80, AR Vol. I, p. 88.
[100] *R. v. Powley*, 2003 SCC 43, para. 24 (emphasis added).

inconsistent with the well-established principle that "[a]ncestry alone is insufficient to establish that a modern collective has a claim to the rights of a historic group".[101]

62. In this respect, the Crown argued that there is a geographic component to the present day community requirement, a position rejected by the Court of Appeal.[102] In *Powley*, this Court noted that "the trial judge found that a Métis community had persisted in and around Sault Ste. Marie" and referred to testimony at trial regarding "the continued existence of a Métis community in and around Sault Ste. Marie".[103] The fact that the present-day community could demonstrate continuity of location with the historic community was a significant element in the determination of the Métis hunting right.

63. Relying on the *Van der Peet* test to determine the identity of the holders of s. 35 rights led the courts below to overshoot the provision's purpose, and give too little weight to the text, legislative context and legislative history of s. 35. A purposive analysis of s. 35 that has regard to that provision's text, legislative context and legislative history demonstrates that Indigenous groups located outside Canada are not "aboriginal peoples of Canada".

1. Language of s. 35

64. As Sullivan notes, "[m]ost often the purpose of legislation is established simply by reading the words of the legislation".[104] This is consonant with this Court's guidance that principles of purposive interpretation "do not undermine the primacy of the written text of the Constitution", and that constitutional interpretation must begin with the language of the provision.[105]

65. The summary conviction appeal judge held that "the meaning of s. 35 is not plain and obvious" with respect to the meaning of the term "aboriginal peoples of Canada" ("*peuples*

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[101] *Hwlitsum First Nation v. Canada (Attorney General)*, 2017 BCSC 475, para. 105, citing *Campbell 2011*, para. 103 (affirmed 2018 BCCA 276, leave to appeal refused, 2019 CanLII 23868 (SCC)).
[102] BCCA Reasons, paras. 61, 62, AR Vol. I, p. 131.
[103] *Powley*, paras. 24 and 25.
[104] Ruth Sullivan, Statutory Interpretation, 3rd ed., (Toronto: Irwin Law, 2016), p. 193.
[105] *Caron v. Alberta*, 2015 SCC 56, paras. 36-37 (citations omitted).

autochtones du Canada")[106] because it does not expressly refer to residence or citizenship.[107] While s. 35(2) defines other terms used in s. 35(1), it simply repeats the phrase "of Canada" / "du Canada". There are several reasons why the drafters may have considered that "of Canada" ("du Canada") did not require further definition.

66. First, the use of the word "of" in relation to a place has a specific meaning. Stroud's Judicial Dictionary of Words and Phrases states that "'[o]f' a place, imports dwelling; and is ordinarily taken to mean that the person spoken of dwells at the place named".[108] This Court considered the meaning of similar language in *Frank v. The Queen*. At issue in that case was the interpretation of the phrase "Indians of the Province" in the *Alberta Natural Resources Transfer Agreement 1930*. The Court distinguished the phrase "Indians of the Province" from "Indians within the boundaries thereof", a term which the Agreement also used. The Court held that "Indians of the Province" had a narrower meaning than "Indians within the boundaries thereof", which would capture "Indians" who happen to be found within Alberta's boundaries at any particular moment, irrespective of normal residence.[109] The courts below dismissed *Frank* as unhelpful on the basis that unlike the Agreement, s. 35 uses only one term.[110] However, this overlooks the significance of the drafters' choice to use the phrase "aboriginal peoples of Canada" / "peuples autochtones du Canada" rather than a broader phrase; as discussed further below, it also overlooks the significance of the drafters' choice to include the phrase "of Canada" / "du Canada", rather than leave the description of "aboriginal peoples" / "peuples autochtones" without any geographical qualifier. Had the drafters intended that s. 35 elevate to constitutional status the rights of all the Indigenous peoples of North America, they would have omitted the words "of Canada" / "du Canada".

67. The use of the word "includes" in the English text of s. 35(2), and the phrase "s'entend nottament" in the French, is also instructive. While the use of these expressions admits of the

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[106] "The English and French versions of this Act are equally authoritative": *Constitution Act, 1982*, s. 57.
[107] BCSC Reasons, para. 42, AR Vol. I, p. 78.
[108] *Stroud's Judicial Dictionary of Words and Phrases*, 5th ed. (London: Sweet & Maxwell Ltd., 1986), p. 1743.
[109] *Frank v. The Queen*, [1978] 1 S.C.R. 95, pp. 101-102.
[110] BCSC Reasons, para. 61, AR Vol. I, p. 83.

possibility that "aboriginal peoples of Canada" extends beyond Indians, Inuit and Métis, the repetition of the qualification "of Canada" / "du Canada" at the end of s. 35(2) reiterates that the ambit of s. 35 does not extend to Aboriginal peoples who are not of Canada. The text's insistence on s. 35 applying only to Aboriginal peoples of Canada is inconsistent with the conclusion of the courts below that it suffices, to come within the scope of s. 35, that an Aboriginal right be exercised in Canada.[111]

68. Second, there is a presumption of statutory, and constitutional, interpretation that legislation does not apply to persons or things outside the territory of the enacting jurisdiction. This Court has confirmed that the presumption, grounded in international law, is rebutted only by clear language or necessary implication.[112] Rather than ask whether s. 35 contains language "expressly limit[ing] the constitutional protection of aboriginal rights to persons residing in Canada or to aboriginal peoples who are Canadian citizens",[113] the summary conviction appeal judge should have started from the presumption that the constitution is intended to apply only to persons (or here, groups) in Canada, and asked whether that presumption was rebutted. Nothing in s. 35 expressly or impliedly rebuts the presumption; indeed, the words "of Canada" / "du Canada" suggest just the opposite. Those words, in the phrase "aboriginal peoples of Canada" / "peuples autochtones du Canada", are repeated in ss. 25 and 35.1.

69. Third, it is a well-established presumption of statutory, and constitutional, interpretation that each and every word of the text must be given meaning. As Sullivan explains,

> It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; it does not use words solely for rhetorical or aesthetic effect…"[114]

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[111] BCSC Reasons, paras. 51, 70, AR Vol. I, pp. 80, 84; BCCA Reasons, para. 63, AR Vol. I, p. 132.

[112] 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. 54-55.

[113] BCSC Reasons, para. 42, AR Vol. I, p. 78.

[114] Sullivan, pp. 43, see also pp. 136-138, citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, para. 38; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, para. 36; *R. v. Kelly*, [1992] 2 SCR 170, p. 188; see also *R. v. Carson*, 2018 SCC 12, para. 26.

70. In the constitutional context, this Court has emphasized that interpretation should avoid "dispens[ing] with the written text of the Constitution"; in particular, the Court has cautioned against interpretations which would render written constitutional guarantees redundant "and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers".[115] The Court of Appeal's approach would do just that. The Court of Appeal rejected the Crown's interpretation of the words "Aboriginal peoples of Canada" as "formalistic" and as "fail[ing] to take into account the Aboriginal perspective".[116] However, the Court of Appeal's approach would give "of Canada" no meaning. Those words cannot be treated as merely rhetorical; their inclusion is not necessary in order for s. 35(1) (or s. 35(2)) to make logical or grammatical sense. Their only purpose can be to narrow the scope of the rights that the provision elevates to constitutional status.

71. The Court of Appeal's approach also does not explain which Aboriginal perspectives are to be taken into account, why those perspectives come within the scope of s. 35, or what those perspectives are. The question is an important one as the perspectives of US and Canadian Indigenous groups on the scope of s. 35 may well differ. Ultimately, as the Court had cause to say in *Marshall*, "[t]aking the aboriginal perspective into account does not mean that a particular right… is established".[117]

2. Context of s. 35

72. The philosophic and legislative context of s. 35(1) supports an interpretation of the phrase "aboriginal peoples of Canada" that does not include the Lakes Tribe.

73. Regarding philosophic context, the courts below held that the meaning of s. 35 is not plain and obvious because s. 35 does not expressly refer to residence or citizenship.[118] The lack of reference to residence and citizenship in s. 35 is explained by the provision's philosophic

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[115] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 53; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, para. 65.
[116] BCCA Reasons, para. 57, AR Vol. I, pp. 129-130; see also BCSC Reasons, para. 52, AR Vol. I, pp. 80-81.
[117] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, para. 52.
[118] BCSC Reasons, para. 42, AR Vol. I, p. 78.

context. This Court explained in *Van der Peet* that whereas *Charter* rights are "general and universal" in the liberal enlightenment view,

> Aboriginal rights cannot… be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society.[119]

74. This philosophic context helps explain why residence and citizenship are not referenced in s. 35. Aboriginal rights are by their nature held by only one segment of Canadian society, whereas *Charter* rights are "general and universal". It is for this reason that *Charter* provisions must expressly indicate whether they are applicable to citizens (e.g., s. 3), permanent residents (e.g., s. 6(2)), or everyone (e.g., s. 7).[120]

75. Moreover, Aboriginal rights are collective in nature.[121] It is for this reason that s. 35 refers to "aboriginal peoples" (emphasis added). In contrast, only individuals may qualify for citizenship. As such, it is inappropriate to speak of citizenship in relation to the holders of s. 35 rights not because citizenship is a "European concept", as the summary conviction appeal judge suggested,[122] but rather because Aboriginal rights are communal.

76. Regarding legislative context, s. 35 is found in Part II of the *Constitution Act, 1982*, entitled "RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA". As noted above, it is significant that s. 35 is located outside the *Charter*. It is also significant that s. 35 is followed by s. 35.1, which sets out a commitment to convene a constitutional conference before any amendment is made to Part II of the *Constitution Act, 1982*, or s. 91(24) of the *Constitution Act, 1867*. Section 35.1 remains in force.

77. Section 35 is also followed by ss. 37 and 37.1 (both now repealed), which established obligations to hold specific first ministers conferences: the conference held in 1983 pursuant to s. 37 resulted in s. 37.1, which mandated two further conferences, held in 1985 and 1987. Sections

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[119] *Van der Peet*, paras. 18-19.
[120] *Van der Peet*, paras. 18-19; *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, pp. 201-202.
[121] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, paras. 30, 33.
[122] BCSC Reasons, para. 48, AR Vol. I, p. 80.

35.1, 37 and 37.1 all use the phrase "aboriginal peoples of Canada" in setting out an obligation to invite representatives of these groups to the conferences.[123] Representatives of the Lakes Tribe, or any US based Indigenous group, were not invited.

78. In *Native Women's Assn. of Canada*, this Court described the four organizations invited—the Assembly of First Nations, Native Council of Canada, Métis National Council and the Inuit Tapirisat of Canada—as "*bona fide* national representatives of the Aboriginal peoples in Canada", supporting an interpretation that excludes groups located outside Canada's borders.[124] The subject matter of the conferences also supports a narrower interpretation of the phrase "aboriginal peoples of Canada". For example, the 1985 and 1987 conferences attempted to agree on language that would expressly recognize a right of aboriginal self-government.[125] Clearly, as a matter of international comity, the Canadian government could not constitutionalize such a right for Indigenous groups located in the US.

79. The Court of Appeal held that "s. 35.1 is not… helpful in deciding the intention of the drafters of s. 35(1). While s. 35.1 requires 'representatives of the aboriginal peoples of Canada to participate in discussions' on a proposed constitutional amendment, the manner and scope of those 'discussions' remain undefined".[126] However, discussions have taken place and the identity of the attendees sheds light on how the phrase "aboriginal peoples of Canada" is intended to be interpreted. To ignore s. 35.1 when interpreting the phrase "aboriginal peoples of Canada" in s. 35 is to neglect the context of the constitutional text the court is interpreting.

3. History of s. 35

80. The proclamation of the *Constitution Act, 1982* constituted the culmination of Canada's evolution from colony to fully independent state, "remov[ing] the last vestige of British authority over the Canadian Constitution and re-affirm[ing] Canada's commitment to the protection of its

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[123] Peter Hogg, *Constitutional Law of Canada*, 5th ed., (Toronto: Thomson Reuters, 2019) (loose-leaf updated 2019, release 1), vol. 1, §28.10, see in particular footnote 288.
[124] *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, p. 664.
[125] Hogg, §28.10, footnote 288.
[126] BCCA Reasons, para. 64, AR Vol. I, p. 1332.

minority, aboriginal, equality, legal and language rights, and fundamental freedoms as set out in the *Canadian Charter of Rights and Freedoms*".[127]

81. The Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada constitute one of the few historical sources of guidance as to the meaning of the phrase "aboriginal peoples of Canada". The Court of Appeal dismissed the Minutes on the basis that they are "non-specific in their application, [and] do not inform the constitutional interpretation of s. 35(1)".[128]

82. This approach is inconsistent with the reliance that this Court has placed on the *Minutes*, including in two recent cases.[129] Moreover, some of the remarks recorded in the *Minutes* are specific with respect to the meaning of "Aboriginal peoples of Canada". In response to a question about the definition of Aboriginal peoples, Mrs. Nellie Carlson, (Western Vice President, Indian Rights for Indian Women) responded:

> My definition of an Indian across Canada is that an Indian who had been born and raised in this country, who had never come from across the ocean to immigrate into this country, but was born and raised, had lived through the hardships…[130]

83. Dismissing the *Minutes* as "non-specific" also overlooks the assumption shared by committee participants (both Indigenous and government representatives), that any constitutional provisions protecting Aboriginal rights were intended to apply only to Indigenous communities located in Canada at that time. That assumption is reflected in the following remarks recorded in the *Minutes*:

- "That is exactly as I see the situation, the rights of all the native Canadians, either flowing from Treaties or the Royal Proclamation, are assured to remain as they are, and not being changed by the adoption of this Charter of Rights, its clause 24."[131]

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[127] *Secession Reference*, para. 46.
[128] BCCA Reasons, para. 64, AR Vol. I, p. 132.
[129] *Poulin*, para. 78; *Stillman*, para. 77.
[130] Canada, Senate and House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 1st Sess., 32nd Parl., December 2, 1980 (Issue 17) 17:97. [*SJC Minutes*]
[131] Minister Chrétien, *SJC Minutes*, November 12, 1980 (Issue 3) 3:84 (emphasis added).

- "What we wanted to do is make sure that this charter of rights does not affect the rights that exist under either the treaties or the Royal Proclamation. I do think that these are the two sources of rights that exist for the natives in Canada. These remain."[132]

- "Native people in Canada have enjoyed a special status which must be clearly recognized in the constitution of Canada."[133]

- "Subsection (1) of section 23A merely provides for the obvious, namely, that the aboriginal peoples of Canada include Canada's three groups of Indigenous peoples. … Subsection (2) unequivocally provides that the right of aboriginal peoples to self-determination is solely within the Canadian federation. The intention here is to recognize the rights of aboriginal peoples to achieve greater control over matters affecting our lives while reaffirming our desire to contribute to a united Canada. ."[134]

- "I think all we are asking for is recognition that we are a distinct people, we live in Canada, and we are here to stay."[135]

- What aboriginal rights "means to us is the right to live as a distinct society within Canada, with the right to go within Canada … [w]e are only asking the right to be able to exist in dignity and as an organized society with the opportunity to grow with other societies in Canada."[136]

84. The fact that this implicit understanding was shared by both government and Indigenous representatives is compelling evidence of the intended scope of s. 35. Furthermore, committee participants would have been mindful of potential cross-boundary claims. As noted above, examples of Indigenous peoples and territories that cross international boundaries can be found along the thousands of kilometres of Canada's borders, and even its north. Professor Slattery notes, "from the earliest days of colonization, Europeans were aware that boundaries between native tribes and bands shifted over time", and that "the map of Aboriginal North America was not completely static".[137] This fact is reflected in the 1794 Treaty of Amity, Commerce, and

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[132] Minister Chrétien, *SJC Minutes*, November 13, 1980 (Issue 4) 4:13 (emphasis added).
[133] Mary Simon, Inuit Committee on National Issues, *SJC Minutes*, December 1, 1980 (Issue 16) 16:13 (emphasis added).
[134] Mary Simon, Inuit Committee on National Issues, *SJC Minutes*, December 1, 1980 (Issue 16) 16:13 (emphasis added).
[135] Charlie Watt, Inuit Committee on National Issues, *SJC Minutes*, December 1, 1980 (Issue 16) 16:25 (emphasis added).
[136] Mark R. Gordon, Inuit Committee on National Issues, *SJC Minutes*, December 1, 1980 (Issue 16) 16:24 (emphasis added).
[137] Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 *The Canadian Bar Review* 727, pp. 741, 760.

Navigation (the "Jay Treaty") between Great Britain and the United States, which expressly states that Great Britain and the US would allow Indigenous peoples to live on either side of the newly established Canada-US border and freely cross the border.[138] The framers were undoubtedly alive to this context when they opted to limit constitutional protection of Aboriginal rights to the "aboriginal peoples of Canada".

85. In sum, a purposive interpretation of s. 35(1) that has regard to the provision's text, legislative context and history demonstrates that the Lakes Tribe, and Mr. Desautel as a member of that US Indigenous group, does not come within the provision's scope and protection.

D. Constitutionalizing the rights of US Indigenous groups has deleterious consequences

86. Understanding the common law foundations of Canada's Aboriginal rights doctrine and properly interpreting the language of s. 35 leads to the conclusion that the enactment of s. 35 did not elevate to constitutional status Aboriginal rights held by Indigenous groups located outside Canada's borders. This conclusion is bolstered by the fact that it avoids several legal and practical difficulties that come from the opposite conclusion.

87. First, to hold that Indigenous groups wholly located in the US are "aboriginal peoples of Canada" for purposes of s. 35(1) would mean that such groups must be invited to the constitutional conferences mandated by s. 35.1. As noted above, s. 35 must be read together with s. 35.1, which sets out a commitment to "invite representatives of the aboriginal peoples of Canada to participate" in a constitutional conference before any amendment is made to ss. 25, 35 or 35.1 of the *Constitution Act, 1982*, or s. 91(24) of the *Constitution Act, 1867*. As both provisions rely on the definition of "aboriginal peoples of Canada" set out in s. 35(2), there is no reason in principle why US Indigenous groups would be excluded from s. 35.1 if they are included in s. 35(1). While the courts below were unperturbed by this prospect,[139] it is unlikely

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[138] *Treaty of Amity, Commerce, and Navigation (Jay Treaty)*, 12 Bevans 13 (1794), art. 3. The Jay Treaty has not been relied upon by Mr. Desautel. It is well established that the Jay Treaty has not been implemented in Canada: *Francis v. The Queen*, [1956] SCR 618.

[139] BCSC Reasons, paras. 46, 50-51, AR Vol. I, pp. 79, 80; BCCA Reasons, para. 64, AR Vol. I, p. 132.

to have been in the contemplation of anyone when the *Constitution Act, 1982* was adopted that s. 35.1 mandated the participation of foreign nationals in subsequent constitutional amendments. Mandating that foreign groups participate in discussions on the amendment of the constitution is entirely inconsistent with the objective of turning Canada into a fully independent state, free from foreign involvement in our constitutional affairs, by patriating the constitution.

88. Second, affirming that Indigenous groups located in the US are "aboriginal peoples of Canada" enjoying a constitutionally protected Aboriginal right to hunt in Canada would mean that such groups may, in principle, hold constitutionally protected Aboriginal title to Canadian soil, too. The Aboriginal rights recognized and affirmed by s. 35(1) include not only site-specific rights like the right to hunt, but also rights to the land itself—Aboriginal title. It is an unprecedented and remarkable proposition that a foreign group could hold constitutionally protected title to Canadian territory. It bears emphasizing that Aboriginal title is an exclusive right: it "confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses".[140] Accordingly, an Aboriginal title claim by a US Indigenous group would undermine the rights of Canadian Indigenous groups where they overlap (a likely prospect in BC). Title claims in Canada by US Indigenous groups are by no means hypothetical: Two title claims have already been filed on behalf of the CCT in the BC courts,[141] and the chairman of the CCT publicly stated the CCT's intention to pursue such a claim following release of the trial judgment in this case.[142]

89. Third, in the case of rights pertaining to limited resources, like hunting, extending constitutional protection where those rights are held by US Indigenous groups necessarily decreases the availability of these resources to Canadian Indigenous groups. It also undermines government's capacity to effectively manage wildlife resources. The Crown should not be required to justify infringement under the *Sparrow* framework in order to regulate hunting in the province by members of US Indigenous groups; nor should the Crown be required to allocate priority to the rights of US Indigenous groups to hunt in the province.

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[140] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 88.
[141] See *Campbell 2011*, paras. 53-54.
[142] "Local hunter acquitted of hunting charges", *The Star*, April 12, 2017.

90. There are good reasons for the Province to prefer the rights of its own residents—especially Indigenous groups—to hunt in BC. Nor is BC alone in restricting hunting by non-residents.[143] Governments are expected to act in the interests of their residents. BC law vests ownership in all wildlife in the province in the government[144] and recognizes that hunting is "an important part of British Columbia's heritage and form[s] an important part of the fabric of present-day life in British Columbia", and that hunters contribute to the conservation and management of wildlife in BC.[145] In allocating wildlife resources after conservation concerns have been met, the Crown must give top priority to constitutionally protected Aboriginal rights.[146] Those who are indisputably holders of constitutionally entrenched Aboriginal rights are entitled to expect their rights will not be inappropriately diminished. As the Alberta Court of Appeal has opined,

> there is nothing ironic or improper about jealously guarding entrenched constitutional rights, and ensuring that only those truly entitled are allowed to assert those rights. Those who do enjoy such rights are entitled to expect that their rights will not be watered down by the recognition of unentitled claimants.[147]

91. In the case at bar, there was evidence at trial of the impact of hunting by members of the Lakes Tribe in the Arrow Lakes region on hunting in that area by members of domestic Indigenous groups (Shuswap (or Secwepemc) and Ktunaxa (or Kutenai)),[148] as well as on the general management of wildlife resources in BC for the benefit of all British Columbians. The trial judge accepted the evidence of the Acting Manager of BC's Wildlife Management Section that in addition to addressing conservation concerns, the *Wildlife Act* "residency requirement

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[143] In the Northwest Territories, Nunavut and Yukon, non-residents cannot hunt prescribed big game unless accompanied by a guide: *Wildlife Act*, S.N.W.T. 2013, c. 30, ss. 31(3), 42; *Wildlife Act*, S.Nu. 2003, c. 26, s. 111(1); *Wildlife Act*, R.S.Y. 2002, c. 229, s. 40. In Nova Scotia, non-residents must be supervised by a guide while hunting: *Wildlife Act*, R.S.N.S. 1989, c. 504, s. 57(2).

[144] *Wildlife Act*, s. 2(1).
[145] *The Hunting and Fishing Heritage Act*, [SBC 2002] c 79.
[146] *Sparrow*, p. 1116; see also *R. v. Gladstone*, [1996] 2 S.C.R. 723, pp. 762-766, 770-771.
[147] *L'Hirondelle v Alberta (Sustainable Resource Development)*, 2013 ABCA 12, para. 13, (leave to appeal refused, 2013 CanLII 35703 (SCC)).
[148] Expert Report of Dorothy Kennedy, pp. 191-192, AR Vol. IV, pp.200-201.

ensures there is sufficient game to sustain the resident aboriginal hunt, non-aboriginal resident hunting and guide [sic] outfitter hunting". As the Acting Manager frankly stated, "…the gist there is that the pie is only so big. Any animal that would be taken by a non-licensed, non-resident alien would come off the share that would go to a resident or a hunter or guide outfitter. A net loss in economy essentially for each animal that was taken". The Acting Manager also explained that the residency requirement assists with the revenue stream for wildlife management and helps ensure the viability of a guide outfitting industry in BC that provides employment for British Columbians.[149]

92. Fourth, extending the constitutional protection of s. 35 to include the rights of US (or other foreign) Indigenous groups would enlarge the scope of the Crown's duty to consult, and where appropriate accommodate, in potentially problematic ways. From a strictly quantitative perspective, to hold that US Indigenous groups are "aboriginal peoples of Canada" for purposes of s. 35(1) would dramatically increase the number of groups with whom the Crown may need to consult and, where appropriate accommodate. On the reasoning of the courts below, US Indigenous groups may, in principle, claim constitutionally protected rights in Canada anywhere along the length of Canada's borders with the US. Moreover, it can be anticipated that in some cases, accommodating the interests of US Indigenous groups may run counter to accommodating the rights of Canadian Indigenous groups.

93. From a qualitative perspective, requiring the Crown to consult, and where appropriate accommodate, US Indigenous groups is likely to come with difficulties unforeseen by the Court in *Haida*, and unforeseeable even now. It is apparent from the case law that this Court has never considered the possibility that s. 35 rights may be held by foreign Indigenous groups. The jurisprudence is replete with statements that presume the purpose of s. 35 is limited to the protection of Indigenous groups within Canada's borders:

- "Aboriginal rights… are rights held only by Aboriginal members of Canadian society"[150]

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[149] BCPC Reasons, paras. 181-183, AR Vol. I, pp. 60-61; Testimony: Stephen MacIver, Day 12 (October 12, 2016), pp. 107-109, Day 13 (October 13, 2016), pp. 1-3, 26-27, AR Vol. II, pp. 14-16 and pp. 18-20.
[150] *Van der Peet*, para. 19.

- "Aboriginal people do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance…";[151]
- "Aboriginals are Canadian";[152]
- "Aboriginal and non-Aboriginal people are partners in Confederation";[153] and
- "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign".[154]

94. This Court's recent statements on reconciliation also militate against extending the constitutional protection of s. 35 to include the rights of US (or other foreign) Indigenous groups. In *Beckman*, the Court stated unequivocally that "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*."[155] As Abella J recently explained in *Daniels*,

> The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal.[156]

95. Moreover, US Supreme Court authority seems to indicate that a US Indigenous group cannot "enter into direct commercial or governmental relations with foreign nations".[157] If so, a Canadian government would not be able to engage in consultation and accommodation with a US Indigenous group unless the US government were also at the table. This would turn what is already a complex process into a matter of foreign affairs. Extending the duty to consult in this way may also bring into tension the role that *Haida* mandates courts play in reviewing challenges to the adequacy of consultation, and the "limited power of the courts to review exercises of the prerogative power [over foreign affairs] for constitutionality".[158]

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[151] *Beckman*, para. 33.
[152] *R. v. Kapp*, 2008 SCC 41, para. 99 (per Bastarache J, concurring).
[153] *Daniels*, para. 37.
[154] *Gladstone*, p. 774.
[155] *Beckman*, para. 10 (emphasis added).
[156] *Daniels*, para. 37 (italics in original, underlining added).
[157] *United States v. Wheeler*, 435 U.S. 313 (1978), p. 326.
[158] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, paras. 36-37.

96. The trial judge dismissed these concerns on the basis that "without underestimating the challenges involved, such practical difficulties cannot be allowed to preclude recognition of aboriginal rights that are proven".[159] Similarly, the summary conviction appeal judge dismissed the Crown's concerns about accommodation on the basis that "recognizing the rights of any group might adversely affect another group. That is, however, not a valid reason to deny a right to the group found to be entitled to it".[160] The Court of Appeal held that the Crown's concern about US law "is not a relevant consideration" and affirmed that "the extent of any potential duty to consult and accommodate, cannot be a matter of functionality".[161]

97. The reasoning of the courts below is premised on a false dichotomy. It is not necessary to choose between accepting these potentially significant difficulties and foreclosing the Lakes Tribe from establishing any rights in Canada. The common law doctrine of Aboriginal rights provides an answer.

98. The common law may recognize and protect Aboriginal rights held by US Indigenous groups, as discussed above, without inappropriately extending the duty to consult. To date this Court has not recognized a duty to consult outside the framework of s. 35. Rather, this Court has described the duty to consult as "an essential corollary to the honourable process of reconciliation that s. 35 demands",[162] and as a "constitutional process",[163] a "constitutional duty",[164] or a "s. 35 right".[165] The Court recently confirmed that the purpose of the duty to consult is firmly rooted in s. 35:

> The duty to consult ensures that the Crown acts honourably by preventing it from acting unilaterally in ways that undermine s. 35 rights. This promotes reconciliation between the Crown and Aboriginal peoples first, by providing procedural protections to s. 35 rights, and second, by encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims.[166]

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[159] BCPC Reasons, para. 166, AR Vol. I, pp. 56-57.
[160] BCSC Reasons, para. 58, AR Vol. I, p. 82.
[161] BCCA Reasons, para. 63, AR Vol. I, p. 132.
[162] *Haida*, para. 38.
[163] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, paras. 60, 74.
[164] *Kapp*, para. 6.
[165] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, para. 114; but see also *Beckman*, paras. 43-44, 71.
[166] *Mikisew 2018*, para. 26 (per Karakatsanis J; emphasis added, citations omitted).

99. This does not leave the holders of common law Aboriginal rights without recourse where Crown conduct may threaten their interests. As this Court explained in *Beckman*, "the impact of an administrative decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a s. 35 right, would be relevant as a matter of procedural fairness, just as the impact of a decision on any other community or individual… may be relevant".[167] Declaratory relief may also be available.[168] Moreover, the inapplicability of the duty to consult to a particular context "does not mean the Crown *qua* sovereign is absolved of its obligation to conduct itself honourably".[169] There is no reason why that obligation ought not to apply when dealing with US Indigenous groups claiming credible common law Aboriginal rights.

E. Conclusion

100. The constitutional question should be answered in the negative. Mr. Desautel, as a member of the Lakes Tribe, does not hold a constitutionally protected right to hunt in Canada. The Lakes Tribe may be able to establish common law Aboriginal rights in BC, but this would not include an incidental mobility right to cross the international border into Canada. The *Wildlife Act* is valid provincial legislation of general application and Mr. Desautel is not exempt from its provisions under which he was charged.[170]

PART IV – SUBMISSIONS ON COSTS

101. The Crown asks that no costs be awarded either for or against it.

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[167] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 47 (emphasis added). The content of the requirements of procedural fairness is subject to any applicable statutory regime: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, paras. 19-22.

[168] *Manitoba*, para. 143.

[169] *Mikisew 2018*, para. 52 (per Karakatsanis J).

[170] *Kruger et al. v. The Queen*, [1978] 1 SCR 104, pp. 110, 116.

PART V – ORDER SOUGHT

102. The Crown requests that this Court allow the appeal, answer the constitutional question in the negative, enter a verdict of guilty for each offence and remit the matter to the trial court for sentencing.[171]

PART VI – SUBMISSIONS ON PUBLICATION

103. Not applicable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of January 2020.

Per: _____
Glen Thompson

Per: _____
Heather Cochran

[171] *Supreme Court Act*, RSC 1985, c. S-26, ss. 45, 46.1.

PART VII –AUTHORITIES

Caselaw:

No.	Authority	Paragraph Reference
1.	*Antoine v. Washington* 420 (US) 194 (1975)	14
2.	*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53	94, 98, 99
3.	*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26	75
4.	*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49	70
5.	*Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313	38
6.	*Campbell v. British Columbia (Forest and Range)*, 2011 BCSC 448	17, 61
7.	*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53	69
8.	*Canada (Prime Minister) v. Khadr*, 2010 SCC 3	95
9.	*Caron v. Alberta*, 2015 SCC 56	64
10.	*Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12	93, 94
11.	*Ekiu v. United States*, 142 U.S. 651 (1892)	48
12.	*Frank v. The Queen*, [1978] 1 S.C.R. 95	66, 91
13.	*Guerin v. The Queen*, [1984] 2 S.C.R. 335	38, 42
14.	*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73	34, 38, 42, 93, 95, 98
15.	*Hwlitsum First Nation v. Canada (Attorney General)*, 2017 BCSC 475 (affirmed 2018 BCCA 276, leave to appeal refused, 2019 CanLII 23868 (SCC))	61

No.	Authority	Paragraph Reference
16.	*Kruger et al. v. The Queen*, [1978] 1 SCR 104	100
17.	*Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54	35, 98
18.	*Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56	39
19.	*L'Hirondelle v Alberta (Sustainable Resource Development)*, 2013 ABCA 12 (leave to appeal refused, 2013 CanLII 35703 (SCC))	90
20.	*Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14	43, 99
21.	*McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58	69
22.	*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40	55, 98, 99
23.	*Mitchell v. MNR*, 2001 SCC 33	34, 37, 38, 39, 42, 46, 48, 49
24.	*Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627	78
25.	*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52	99
26.	*R. v. Badger*, [1996] 1 SCR 771	42, 43
27.	*R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295	54
28.	*R. v. Campbell*, 2000 BCSC 956	53
29.	*R. v. Carson*, 2018 SCC 12	69
30.	*R. v. Comeau*, 2018 SCC 15	54
31.	*R. v. Côté*, [1996] 3 S.C.R. 139	46
32.	*R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.)	42

No.	Authority	Paragraph Reference
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9.	*Wildlife Act*, S.Nu. 2003, c. 26	s. 111(1)
	Loi sur la faune, LNun 2003, c 260	s. 111(1)

***Wildlife Act*, R.S.N.S. 1989, c. 504, s. 57(2)**
Supervision of non-resident 57 (2) A non-resident who hunts or fishes Atlantic salmon on rivers prescribed by the Governor in Council while not supervised by a guide is guilty of an offence.

***Wildlife Act*, R.S.Y. 2002, c. 229, s. 40**	**Loi sur la faune, LRY 2002, c 229, s. 40**
Non-residents and big game 40(1) A non-resident shall not hunt a big game animal unless the non-resident (a) is accompanied by a guide provided by an outfitter; (b) (b) is accompanied by a guide provided by the holder of a big game guiding permit; or (c) is a Canadian citizen or permanent resident and is accompanied by a person holding a special guide licence. (2) The prohibition in subsection (1) does not apply to an Inuvialuk who is hunting or trapping wildlife on the Yukon North Slope and whose hunting or trapping is governed by Part 13. S.Y. 2002, c.229, s.40	**Chasseur non-résident de gros gibier** 40(1) Il est interdit à quiconque n'est pas un résident du Yukon de chasser le gros gibier à moins de remplir l'une des conditions suivantes : a) être accompagné d'un guide fourni par un pourvoyeur; b) être accompagné d'un guide fourni par le titulaire d'un permis de chasse pour le gros gibier; c) être citoyen canadien ou un résident permanent et être accompagné d'une personne titulaire d'une licence spéciale de guide. (2) L'interdiction du paragraphe (1) ne s'applique pas à un Inuvialuk qui chasse ou qui piège dans les limites de la région du versant nord du Yukon, et dont les activités sont régies par la partie 13. L.Y. 2002, ch. 229, art. 40

***Wildlife Act*, S.N.W.T. 2013, c. 30, s. 31(3)**	**Loi sur la faune, LTN-O 2013, c30, s. 31(3)**
31 (3) Subject to the regulations, it is a condition of a non-resident hunting licence and a non-resident alien hunting licence that the licence holder, while hunting big game, be accompanied by a licenced guide	31 (3) Sous réserve des règlements, le permis de chasse pour non-résident et le permis de chasse pour étranger non résident est subordonné à la condition que le titulaire soit accompagné d'un guide titulaire d'un permis lorsqu'il chasse du gros gibier

***Wildlife Act*, S.N.W.T. 2013, c. 30, s. 42**	**Loi sur la faune, LTN-O 2013, c 30, s. 42**
2. Subject to the regulations, no person who requires non-resident hunting licence or a non-resident alien hunting licence shall hunt big game unless he or she (a) obtains the services of a licenced outfitter in respect of the hunt; and (b) is accompanied while hunting by a licenced	42. Sous réserve des règlements, il est interdit à celui qui est tenu d'avoir un permis de chasse pour non-résident ou un permis de chasse pour étranger non résident de chasser du gros gibier à moins : a) d'une part, de retenir pour la chasse les services d'un pourvoyeur titulaire d'un permis; b) d'autre part, d'être accompagné d'un guide titulaire d'un permis pendant la chasse.

***Wildlife Act*, S.Nu. 2003, c. 26, s. 111(1)**	**Loi sur la faune, LNun 2003, c 260, s. 111(1)**
Requirements for non-residents 111. (1) Subject to the regulations, no person who is not a resident of Nunavut shall harvest big game unless he or she (a) uses the services of a big game outfitter licensed under this Act; and (b) uses the services of, and is closely accompanied by, a licensed big game guide at all times while harvesting.	Exigences applicables aux non-résidents 111. (1) Sous réserve des règlements, les personnes qui ne sont pas des résidents du Nunavut ne peuvent récolter du gros gibier, sauf si elles respectent les conditions suivantes: a) elles obtiennent les services d'un pourvoyeur pour le gros gibier titulaire d'un permis délivré sous le régime de la présente loi; b) elles obtiennent les services d'un guide pour le gros gibier qui est titulaire d'un permis et qui les accompagne étroitement durant l'activité de récolte.

NOTICE OF CONSTITUTIONAL QUESTION

Court File No.: 38734

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Appellant)

- and -

RICHARD LEE DESAUTEL

Respondent
(Respondent)

NOTICE OF CONSTITUTIONAL QUESTION
OF THE APPELLANT, HER MAJESTY THE QUEEN
(Pursuant to Rule 33(2) of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

TAKE NOTICE that I, Glen R. Thompson, counsel for the Appellant, Her Majesty the Queen assert that the appeal raises the following constitutional question:

> Are ss. 11(1) and 47(a) of the *Wildlife Act*, RSBC 1996 c. 488, as they read in October 2010, of no force or effect with respect to the respondent, being a member of the Lakes Tribe of the Confederated Tribes of the Colville Reservation in Washington State, USA, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of an Aboriginal right within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the Respondent?

AND TAKE NOTICE that an attorney general who intends to intervene with respect to this constitutional question may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

DATED at Ottawa, Ontario this 22nd day of November 2019.

SIGNED BY

FOR Glen R. Thompson

FOR Karen Perron

Ministry of Attorney General
Legal Services Branch
1405 Douglas St., 3rd Floor
Victoria, BC V8W 2G2

Glen R. Thompson
Heather E. Cochran
Tel: 250.387-0417
Fax: 250.387-0343
Email: Glen.R.Thompson@gov.bc.ca
Heather.Cochran@gov.bc.ca

Counsel for the Appellant,
Her Majesty the Queen

Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron

Tel: 613.369.4795
Fax: 613.230.8842
Email: kperron@blg.com

Agent for the Appellant,
Her Majesty the Queen

ORIGINAL TO: **Registrar**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPY TO:

Arvay Finlay LLP
1512 – 808 Nelson Street
Box 12149, Nelson Square
Vancouver, BC V6Z 2H2

Mark G. Underhill
Tel: 604.696.9828
Fax: 888.575. 3281
Email: munderhill@arvayfinlay.ca

Counsel for the Respondent,
Richard Lee Desautel

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: 613.786.0171
Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

Ottawa agent for the Respondent,
Richard Lee Desautel

COPY TO ATTORNEY GENERALS:

Attorney General of Canada
Department of Justice
284 Wellington Street
Ottawa, ON K1A 0H8

Fax: 613.954.0811
Email: mcu@justice.gc.ca

Department of Justice
500 - 50 O'Connor Street, Room 556
Ottawa, Ontario K2P

Christopher Rupar
Tel: 613) 670-6290
Fax: 613) 954-1920
Email: christopher.rupar@justice.gc.ca

Ottawa Agent for the Attorney General of Canada

Attorney General of Newfoundland & Labrador
Department of Justice and Public Safety
4th Floor, East Block
Confederation Building
P.O. Box 8700
St. John's, NL A1B 4J6

Fax: 709.729.0469
Email: justice@gov.nl.ca

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3

Robert E. Houston, Q.C.
Tel: 613.783.8817
Fax: 613.563.9869
Email: robert.houston@gowlingwlg.com

Ottawa Agent for the Attorney General of Newfoundland & Labrador

Attorney General of Alberta
Director, Constitutional and Aboriginal Law Section
4th Floor, Bowker Building
9833-109 Street
Edmonton, AB T5K 2E8

Fax: 780.425.0307
Email: ministryofjustice@gov.ab.ca

Attorney General of Saskatchewan
Department of Justice
820-1874 Scarth Street
Regina, SK S4P 4B3

Fax: 306.787.9111
Email: jus.minister@gov.sk.ca

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the:
Attorneys General of Alberta;
Attorneys General of Saskatchewan;
Attorneys General of Manitoba;
Attorneys General of New Brunswick; and
Attorneys General of Nova Scotia and P.E.I.

Attorney General of Manitoba
Director, Constitutional Law Branch
1205-405 Broadway
Winnipeg, MB R3C 3L6

Fax: 204.94.0053
Email: minjus@leg.gov.mb.ca

The Attorney General of New Brunswick
Department of Justice and Office of the
Attorney General
PO Box 6000
Fredericton, NB E3B 5H1

Fax: 506.453.3561
Email: jo.frank@gnb.ca

Attorney General of Nova Scotia
Department of Justice, Legal Services Division
5151 Terminal Road, PO Box 7
Halifax, NS B3J 2L6

Fax: 902-424-4556
Email: jusmin@novascotia.ca

Attorney General of Prince Edward Island
Department of Justice and Public Safety
Shaw Building, South 4th Floor, PO Box 2000
95 Rochford Street
Charlottetown, PEI C1A 7N8

Fax: 902.368.4910
Email: cclow@gov.pe.ca

Ministry of the Attorney General of Ontario
Crown Law Office
Constitutional Law Branch
Ministry of the Attorney General
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Fax: 416.326.2220
Email: joshua.hunter@ontario.ca

Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron

Tel: 613.369.4795
Fax: 613.230.8842
Email: kperron@blg.com

Ottawa Agent for the Attorney General for Ontario

Attorney General of Nunavut
Director, Legal & Constitutional Division
Department of Justice
PO Box 1000, Station 540
Iqaluit, NU X0A 0H0

Fax: 867.975.9349
Email: justice@gov.nu.ca

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa ON K1P 1C3

Guy Régimbald
Tel: 613.786.0197
Fax: 613.563.9869
Email: guy.regimbald@gowling.wlg.com

Ottawa Agent for the
Attorney General of Nunavut and
Attorney General of Northwest Territories

Attorney General of the Northwest Territories
Director, Legal Division
Department of Justice, Government of the Northwest Territories
Yellowknife Courthouse, PO Box 1320
Yellowknife, NT X1A 2L9

Fax: 867.873.0234
Email: Mark_Aitken@gov.nt.ca

Procureure générale du Québec
1200, Route de l'Église, 3rd Floor
Québec, QC G1V 4M1

Fax: 418-646-0027
Email: ministre@justice.gouv.qc.ca

Noël & Associés
111 Champlain Street
Gatineau, QC J8X 3R1

Pierre Landry
Tel: 819.771.7393
Fax: 819.771.5397
Email: p.landry@noelassocies.com

Ottawa Agent for the Attorney General of Québec

Attorney General of the Yukon Territories
Attn: Assistant Deputy Minister
Andrew A. Philipsen Law Centre, 4th Floor
Box 2703 (J-1)
2130 Second Avenue
Whitehorse, YK Y1A 2C6

Fax: 867.667.5790
Email: justice@gov.yk.ca

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel: 613.695.8855
Fax: 613.695.8580
Email: emeehan@supremeadvocacy.ca

Ottawa Agent for the Attorney General of the Yukon Territories