



## BRIEFING NOTE TO THE EXECUTIVE COMMITTEE FOR INFORMATION

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**SUBJECT:** Decision - R. v. Desautel, 2021 SCC  
**DATE:** May 18, 2021  
**DIRECTOR:** Stuart Wuttke  
**SECTOR:** Legal Affairs

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### SUMMARY

- Mr. Desautel, an Indigenous U.S. citizen, was charged with hunting without a licence in Arrow Lakes, British Columbia (“B.C.”) for killing a cow elk. He defended the action on the basis of s. 35(1) of the Constitution Act, 1982, citing that the hunt was for ceremonial purposes in the traditional territory of his Sinixt ancestors, and therefore a protected Aboriginal right which was being infringed.
- On April 23, 2021, the Supreme Court of Canada (SCC) dismissed the appeal, stating that persons who are not Canadian citizens and who do not reside in Canada can exercise an Aboriginal right that is protected by s. 35(1) of the Constitution Act, 1982.
- This decision means that if Indigenous groups outside of modern-day Canada can prove they descended from a pre-contact society in what is now Canada, they can claim Section 35(1) rights under the Constitution.

### PURPOSE:

- To provide the Executive Committee with a summary of the R. v. Desautel, April 23, 2021, decision from the SCC affirming a decision from the B.C. Supreme Court that non-Canadian Indigenous people can hold Aboriginal rights pursuant to s. 35(1) of the *Constitution Act, 1982*.

### CURRENT STATUS:

- The SCC affirmed the Lakes Tribe, located in Washington state, is a modern collective descended from the Sinixt Nation. As the Lake Tribe maintained its connection to its ancestral land, Mr. Desautel had an Aboriginal right to hunt elk in the Sinixt’s traditional territory in B.C. and the application B.C. *Wildlife Act* relied upon by the Crown were inapplicable.
- As a result of decision, the British Columbia government, Sinixt Nation, and the Okanagan Nation Alliance will negotiate how this decision will impact these nations. Further, the implementation of this decision moving forward between Canada and

those Nations affected will require consultation and a framework to implement this decision administratively.

- This decision does not resolve a number of issues regarding mobility rights for First Nations. There are still problems for Nations located on both sides of the US-Canada border. For example, the citizens in these Nations still require appropriate documents to travel between countries and cannot move freely within their Nation. Moreover, there are some First Nations people who have moved to other countries and had to renounce their Canadian citizenship. If they hold a status card, Canadian citizenship laws still apply when moving back to their Nation.

#### **BACKGROUND:**

- Mr. Desautel was charged with hunting without a licence in Arrow Lakes, B.C. for killing a cow elk without a permit, licence or authorization from the B.C. government under the Wildlife Act. He was not a resident of B.C. nor a citizen of Canada but was Indigenous and a citizen of the U.S. who resided on a reserve in Washington State.
- Mr. Desautel defended the action on the basis of s. 35(1) of the Constitution Act, 1982, citing that the hunt was for ceremonial purposes in the traditional territory of his Sinixt ancestors, and therefore a protected Aboriginal right which was being infringed.
- The Crown contended that Mr. Desautel could not hold a constitutionally protected Aboriginal right as he was not part of a group that was an “Aboriginal peoples of Canada” nor did it meet the test for a modern Aboriginal right per the test established in Van der Peet, which involves establishing “continuity” of the exercise of the argued Aboriginal right from pre-contact to the present.
- Mr. Desautel was acquitted at trial by the Supreme Court of B.C., the trial judge citing the clear and ancient link between his people and the region of B.C. in which the elk was shot. The Lakes Tribe was held to be a successor group to the Sinixt people living in B.C. at the time of contact and therefore was a rights-bearing community capable of holding an Aboriginal right.
- The Crown appealed the trial judge’s decision. It argued that only Indigenous collectives residing in Canada could hold s. 35 rights.

#### **CONSIDERATIONS:**

- This is a positive decision, as it has broadened the scope of Aboriginal rights covered by s. 35(1). It is a useful precedent for arguing other Aboriginal rights, especially with the courts’ emphasis on deferring to First Nations perspective on the nature of the Aboriginal right at question.
- This ruling could have broad implications for other Indigenous groups with ties to Canada asserting their s.35 rights. However, the Indigenous groups in asserting their s. 35 rights would still have to show they maintained a continuous presence in Canada from a pre-contact society.

#### **AFN LINKAGES:**

- Aboriginal and treaty rights, s. 35 of the *Constitution Act, 1982*

#### **ATTACHMENTS:**

- 1) Decision - R. v. Desautel, 2021 SCC 17 – April 23, 2021



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Desautel, 2021 SCC  
17

**APPEAL HEARD:** October 8, 2020  
**JUDGMENT RENDERED:** April 23,  
2021  
**DOCKET:** 38734

**BETWEEN:**

**Her Majesty The Queen**  
Appellant

and

**Richard Lee Desautel**  
Respondent

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General of  
Quebec, Attorney General of New Brunswick, Attorney General of  
Saskatchewan, Attorney General of Alberta, Attorney General of the Yukon  
Territory, Peskotomuhkati Nation, Indigenous Bar Association in Canada,  
Whitecap Dakota First Nation, Grand Council of the Crees (Eeyou Istchee),  
Cree Nation Government, Okanagan Nation Alliance, Mohawk Council of  
Kahnawà:ke, Assembly of First Nations, Métis National Council, Manitoba  
Metis Federation Inc., Nuchatlaht First Nation, Congress of Aboriginal Peoples,  
Lummi Nation and Métis Nation British Columbia**  
Interveners

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,  
Martin and Kasirer JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 93)

Rowe J. (Wagner C.J. and Abella, Karakatsanis, Brown,  
Martin and Kasirer JJ. concurring)

**DISSENTING REASONS:**  
(paras. 94 to 142)

Côté J.

**DISSENTING REASONS:**  
(para. 143)

Moldaver J.

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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R. v. DESAUTEL

**Her Majesty The Queen**

*Appellant*

v.

**Richard Lee Desautel**

*Respondent*

and

**Attorney General of Canada,  
Attorney General of Ontario,  
Attorney General of Quebec,  
Attorney General of New Brunswick,  
Attorney General of Saskatchewan,  
Attorney General of Alberta,  
Attorney General of the Yukon Territory,  
Peskotomuhkati Nation,  
Indigenous Bar Association in Canada,  
Whitecap Dakota First Nation,  
Grand Council of the Crees (Eeyou Istchee),  
Cree Nation Government,  
Okanagan Nation Alliance,  
Mohawk Council of Kahnawà:ke,  
Assembly of First Nations,  
Métis National Council,  
Manitoba Metis Federation Inc.,  
Nuchatlaht First Nation,  
Congress of Aboriginal Peoples,  
Lummi Nation and  
Métis Nation British Columbia**

*Interveners*

**Indexed as: R. v. Desautel**

**2021 SCC 17**

File No.: 38734.

2020: October 8; 2021: April 23.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Constitutional law — Aboriginal peoples — Aboriginal rights — Hunting — Citizen and resident of United States charged under provincial wildlife legislation with hunting in British Columbia without licence and while not being resident of province — Charges defended on basis of constitutionally-protected Aboriginal right to hunt in traditional territory of ancestors — Whether Aboriginal people located outside Canada can assert Aboriginal rights under Canadian Constitution — If so, whether provincial wildlife legislation of no force or effect by reason of Aboriginal right — Constitutional Act, 1982, s. 35(1).*

In October 2010, D, a citizen and resident of the United States of America, shot a cow-elk in British Columbia. He was charged with hunting without a licence contrary to s. 11(1) of British Columbia’s *Wildlife Act* and hunting big game while not being a resident of the province contrary to s. 47(a) of the *Act*. D defended the charges on the basis that he had an Aboriginal right to hunt protected by s. 35(1) of the

*Constitution Act, 1982*, as he is a member of the Lakes Tribe of the Colville Confederated Tribes based in the State of Washington, a successor group of the Sinixt people, and he shot the elk within the ancestral territory of the Sinixt in British Columbia.

At trial, it was accepted that the date of first contact between the Sinixt and Europeans was in 1811. At that time, the Sinixt were engaged in hunting, fishing, and gathering in their ancestral territory, which extended into what is now Washington State to the south, and into what is now British Columbia to the north. Until around 1870, the Sinixt continued their activities in the northern portion of their territory, located in Canada. In the course of time, a constellation of factors made the Sinixt people move to the United States. The trial judge did not find that the move was voluntary. Until 1930, members of the Lakes Tribe continued to hunt in British Columbia, despite living in Washington State. After 1930, despite periods in which no hunting took place, the Lakes Tribe continued to have a connection to the land where their ancestors hunted in British Columbia.

The trial judge held that D was a member of the Lakes Tribe, and that the rights of the Sinixt continued with the Lakes Tribe. She applied the test for Aboriginal rights set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and held that D was exercising an Aboriginal right to hunt for food, social and ceremonial purposes guaranteed by s. 35(1) of the *Constitution Act, 1982*. D's Aboriginal right remained in existence and was protected by s. 35(1), despite the Lakes Tribe's departure from the Canadian part

of their traditional territory and notwithstanding a period of dormancy in the exercise of the right. The trial judge held that the right was infringed by the *Wildlife Act* and the infringement was not justified. D was acquitted. The Crown's two subsequent appeals were dismissed. It now appeals to the Court, raising, as a constitutional question, whether the relevant provisions of the *Wildlife Act* are of no force or effect with respect to D, by reason of an Aboriginal right within the meaning of s. 35(1) of the *Constitution Act, 1982*.

*Held* (Moldaver and Côté JJ. dissenting): The appeal should be dismissed and the constitutional question answered in the affirmative.

*Per* Wagner C.J. and Abella, Karakatsanis, Brown, **Rowe**, Martin and Kasirer JJ.: Persons who are not Canadian citizens and who do not reside in Canada can exercise an Aboriginal right that is protected by s. 35(1) of the *Constitution Act, 1982*. On a purposive interpretation of s. 35(1), the expression "aboriginal peoples of Canada" means the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact, and this may include Aboriginal groups that are now outside Canada. As D is a member of the Lakes Tribe, which is a modern successor of the Sinixt, and as D's claim satisfies the *Van der Peet* test for an Aboriginal right under s. 35(1), ss. 11(1) and 47(a) of the *Wildlife Act* are of no force or effect with respect to him.

In order to assert rights protected under s. 35(1) of the *Constitution Act, 1982*, an Aboriginal group must be part of the "aboriginal peoples of Canada". This is



a threshold question, in the sense that if a group is not an Aboriginal people of Canada, there is no need to proceed to the test for Aboriginal rights set out in *Van der Peet*. Section 35(1) must be interpreted in a purposive way. A review of the jurisprudence shows that s. 35(1) serves to recognize the prior occupation of Canada by Aboriginal societies and to reconcile their contemporary existence with Crown sovereignty. These purposes are expressed in the doctrinal structure of Aboriginal law, which gives effect to rights and relationships that arise from the prior occupation of Canada by Aboriginal societies. Because the doctrine of Aboriginal rights arises from the simple fact of prior occupation, the Aboriginal peoples of Canada under s. 35(1) are the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact, even if they are now outside Canada.

An interpretation of the expression “aboriginal peoples of Canada” in s. 35(1) that includes Aboriginal peoples who were here when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed, reflects the purpose of reconciliation. By contrast, an interpretation that excludes Aboriginal peoples who were forced to move out of Canada would risk perpetuating the historical injustice suffered by Aboriginal peoples at the hands of Europeans. As well, it bears emphasis that s. 35(1) did not create Aboriginal rights. The practices, customs and traditions that underlie these rights existed before 1982. An interpretation of s. 35(1) that limits its scope to those Aboriginal peoples who were located in Canada in 1982 would fail to give effect to this point by treating s. 35(1) as the source of Aboriginal rights.

If the threshold question is met, the analysis then proceeds under *Van der Peet*. The *Van der Peet* test is the same for groups outside Canada as for groups within Canada. That Aboriginal rights must be grounded in the existence of a historic and present-day community, and that modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely, is so for Aboriginal groups inside or outside Canada. There is no additional requirement, for groups outside Canada, of recognition by a related Aboriginal collective residing in Canada. This requirement would place a higher burden on Aboriginal communities who seek to claim rights if the group moved, was forced to move, or was divided by the creation of an international border. It would risk defining Aboriginal rights in a manner that excludes some of those the provision was intended to protect. Moreover, it would raise myriad practical difficulties, such as which group within Canada has a say in the recognition of a claimant located outside Canada, where there are competing groups, which body can represent a collective residing in Canada, and what happens if there is no related modern collective residing in Canada.

Under the *Van der Peet* analysis, courts must characterize the right claimed in light of the pleadings and evidence; determine whether the claimant has proven that a relevant pre-contact practice, tradition or custom existed and was integral to the distinctive culture of the pre-contact society; and determine whether the claimed modern right is demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice. Continuity plays a role both at the second and the third stages of the *Van der Peet* analysis. At the second stage, showing that a practice is

integral to the claimant's culture today, and that it has continuity with pre-contact times, can count as proof that the practice was integral to the claimant's culture pre-contact. At the third stage, the question is whether the modern practice which is claimed to be an exercise of an Aboriginal right is connected to, and reasonably seen as a continuation of, the pre-contact practice. Continuity with the pre-contact practice is required in order for the claimed activity to fall within the scope of the right. However, an unbroken chain of continuity is not required; it is not unusual for the exercise of a right to lapse for a period of time. The assessment of continuity, both at the second and third stages, is a highly fact-specific exercise. The weighing of evidence in Aboriginal claims is generally the domain of the trial judge, who is best situated to assess the evidence, and is consequently accorded significant latitude in this regard.

In the present case, the threshold question is met. The trial judge found as a fact that the Sinixt occupied territory in what is now British Columbia at the time of European contact, the Lakes Tribe are a modern successor of the Sinixt. The migration of the Lakes Tribe from British Columbia to a different part of their traditional territory in Washington State did not cause the group to lose its identity or its status as a successor to the Sinixt. Accordingly, the Lakes Tribe is an Aboriginal people of Canada. Then, with respect to the *Van der Peet* test, the trial judge found, based on the evidence, that hunting for food, social and ceremonial purposes within the traditional territory of the Sinixt in British Columbia at the time of contact was integral to the distinctive culture of the Sinixt. The trial judge also found that the modern-day practice of hunting in this territory, as D did, is a continuation of this pre-contact practice.

Setting aside the periods in which no hunting took place, there was no significant dissimilarity between the pre-contact practice and the modern one. As a result, D was exercising an Aboriginal right protected by s. 35(1).

*Per Côté J.* (dissenting): The appeal should be allowed and the constitutional question answered in the negative. The constitutional protection of Aboriginal rights contained in s. 35(1) of the *Constitution Act, 1982*, does not extend to an Aboriginal group located outside of Canada. And even if it did, D cannot establish that he was exercising an Aboriginal right to hunt in the Sinixt traditional territory in British Columbia, as the modern group's claim lacks continuity with the pre-contact group's practices. Accordingly, D's claim must fail and he should not be exempt from the *Wildlife Act* provisions under which he was charged. A verdict of guilty should be entered on both counts of hunting without a licence and hunting big game while not being a resident, and the matter should be remitted to the trial court for sentencing.

To be entitled to the protection of s. 35(1) of the *Constitution Act, 1982*, the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact cannot be located anywhere other than Canada. The majority's conclusion that the constitutional protection of Aboriginal rights in s. 35(1) extends to an Aboriginal group located outside of Canada is contrary to a purposive analysis of s. 35(1), having regard to its relevant linguistic, philosophic, and historical contexts. The framers' intent was to protect the rights of Aboriginal groups that are members of, and participants in, Canadian society.

First, a textual analysis of s. 35(1) reveals the significance of the drafters' choice to include the phrase "of Canada" rather than leaving the term "aboriginal peoples" without any qualifier. On the basis of the presumption against tautology, the words "of Canada" cannot be superfluous. In addition, similar limiting language is used repeatedly in the *Constitution Act, 1982*, as a geographical qualifier. Interpreting "aboriginal peoples of Canada" in a more expansive fashion would be incongruent with the presumption of consistent expression and contrary to the intention of the drafters.

Second, the philosophic context helps explain why residence or citizenship is not referenced in s. 35(1), but is assumed. By framing s. 35(1) as a provision granting special constitutional protection to one part of Canadian society, the Court has consistently understood it to import a residency or citizenship requirement. Section 35(1)'s purpose should be understood in relation to the interests it was meant to protect, that is, Aboriginal peoples as full participants with non-Aboriginal peoples in a shared Canadian sovereignty. The protections, therefore, do not and cannot apply to Aboriginal groups in other countries; it cannot be said that they fully participate with other Canadians in their collective governance, nor do they contribute to Canada's national diversity. Third, the historical record does not show that expanding the protections of s. 35(1) to non-Canadian Aboriginal groups was ever considered. The limited historical sources that provide guidance as to the meaning of the expression "aboriginal peoples of Canada" show an intention to limit the constitutional protection of Aboriginal rights to only those groups located within Canada.

The conclusion that the enactment of s. 35(1) did not constitutionalize Aboriginal rights held by collectives located outside of Canada is further bolstered by the deleterious consequences that would arise from the opposite conclusion. First, s. 35.1 of the *Constitution Act, 1982*, uses the phrase “aboriginal peoples of Canada” in setting out an obligation to invite representatives of these groups to constitutional conferences. It would be contrary to the organizing constitutional principle of democracy and inconsistent with the purpose of patriation to allow Aboriginal groups located outside of Canada to participate in Canadian democracy as required by s. 35.1. Second, a multitude of challenges would arise with respect to the Crown’s duty to consult. The numbers of groups to consult and, where appropriate, accommodate, would dramatically increase, and it can be anticipated that in some cases accommodating the interests of s. 35(1) rights holders outside of Canada would run counter to accommodating the interests of s. 35(1) rights holders within Canada. Third, finding that Aboriginal groups outside of Canada are “aboriginal peoples of Canada” raises the possibility that these groups may, in principle, hold constitutionally protected Aboriginal title to Canadian lands. It would be a remarkable proposition that a foreign group could hold constitutionally protected title to Canadian territory. The drafters of s. 35(1) could not have intended these deleterious consequences to arise.

In the present case, the Lakes Tribe is wholly located in the United States. As D is not a member of a collective that is part of the “aboriginal peoples of Canada”, he cannot exercise a constitutionally-protected Aboriginal right to hunt in British Columbia. And even if there were agreement with the majority’s conclusion that the

phrase “aboriginal peoples of Canada” includes groups located outside of Canada, there is disagreement with its application of the *Van der Peet* test to D’s claim. This test protects only those present-day practices that have a reasonable degree of continuity with practices that existed prior to contact. While the test does not require an unbroken chain of continuity, and while continuity must be interpreted flexibly, such flexibility has its limits. While temporal gaps do not necessarily preclude the establishment of an Aboriginal right, failing to tender sufficient evidence that, at least, a connection to the historical practice was maintained during such gaps may be fatal. There is no direct evidence that the Lakes Tribe engaged in anything that could be considered a modern-day practice of hunting in British Columbia after 1930. There was no basis upon which the trial judge could have drawn an inference of continuity; and given the Lakes Tribe’s lengthy and unaccounted-for absence from British Columbia between 1930 and 2010, continuity is not made out. As there was nothing in existence in 1982 to which s. 35(1) protection could attach, D’s claim must fail.

*Per Moldaver J. (dissenting):* Even assuming that the majority is correct in holding that, as a member of an Aboriginal collective located outside Canada, D is entitled to claim the constitutional protection provided by s. 35(1) of the *Constitution Act, 1982*, there is agreement with Côté J. that in this case, D has not met the onus of establishing the continuity element of his claim, under the test for Aboriginal rights pursuant to *Van der Peet*. The appeal should therefore be allowed on that basis and the remedy set out by Côté J. should be imposed.

## Cases Cited

By Rowe J.

**Applied:** *R. v. Van der Peet*, [1996] 2 S.C.R. 507; **distinguished:** *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207; **referred to:** *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Roberts v. Canada*, [1989] 1 S.C.R. 322; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Badger*, [1996] 1 S.C.R. 771; *Province of Ontario v. Dominion of Canada and Province of Quebec* (1895), 25 S.C.R. 434; *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *R. v. Côté*, [1996] 3 S.C.R. 139; *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *R. v. Poulin*, 2019



SCC 47; *Frank v. The Queen*, [1978] S.C.R. 95; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *R. v. Shipman*, 2007 ONCA 338, 85 O.R. (3d) 585; *R. v. Meshake*, 2007 ONCA 337, 85 O.R. (3d) 575; *R. v. Adams*, [1996] 3 S.C.R. 101; *Hwlitsum First Nation v. Canada (Attorney General)*, 2018 BCCA 276, 15 B.C.L.R. (6th) 91; *Campbell v. British Columbia (Minister of Forests and Range)*, 2011 BCSC 448, [2011] 3 C.N.L.R. 151; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Native Council of Nova Scotia v. Canada (Attorney General)*, 2008 FCA 113, [2008] 3 C.N.L.R. 286; *Mississaugas of Scucog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444*, 2007 ONCA 814, 88 O.R. (3d) 583; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Marshall*, [1999] 3 S.C.R. 533; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069.

By Côté J. (dissenting)

*Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236; *R. v. Marshall*,

[1999] 3 S.C.R. 456; *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765; *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715; *Frank v. The Queen*, [1978] 1 S.C.R. 95; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Poulin*, 2019 SCC 47; *R. v. Stillman*, 2019 SCC 40; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Campbell v. British Columbia (Minister of Forest and Range)*, 2011 BCSC 448, [2011] 3 C.N.L.R. 151; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386.

By Moldaver J. (dissenting)

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

### **Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, s. 25.

*Constitution Act, 1867*, s. 91(24).

*Constitution Act, 1982*, ss. 3, 6, 16, 20, 21, 23, 32, 35, 35.1, 36, 37, 37.1.

*Game Protection Amendment Act, 1896*, S.B.C., c. 22.

*Natural Resources Transfer Agreement (Alberta)* [Schedule 2 of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26], paras. 10 and 12.

*Natural Resources Transfer Agreement (Manitoba)* [Schedule 1 of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26], paras. 11 and 13.

*Natural Resources Transfer Agreement (Saskatchewan)* [Schedule 3 of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26], paras. 10 and 12.

*Royal Proclamation, 1763* (G.B.), 3 Geo. 3 [reproduced in R.S.C. 1985, App. II, No. 1].

*Wildlife Act*, R.S.B.C. 1996, c. 488, ss. 11(1), 47(a).

## **Treaties and Agreements**

Carcross/Tagish First Nation Final Agreement (2005), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

Champagne and Aishihik First Nations Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

First Nation of Nacho Nyak Dun Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

Gwich'in Comprehensive Land Claim Agreement (1992), vol. 1, c. 4.

Kluane First Nation Final Agreement (2003), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

Kwanlin Dun First Nation Final Agreement (2005), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

Little Salmon/Carmacks First Nation Agreement (1997), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

Sahtu Dene and Metis Comprehensive Land Claim Agreement (1993), vol. 1, c. 4.

Selkirk First Nation Final Agreement (1997), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

Ta'an Kwach'an Council Final Agreement (2002), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

Teslin Tlingit Council Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

Tr'ondëk Hwëch'in Final Agreement (1998), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

Vuntut Gwitchin First Nation Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

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APPEAL from a judgment of the British Columbia Court of Appeal (Smith, Willcock and Fitch JJ.A.), 2019 BCCA 151, [2020] 2 W.W.R. 191, [2019] 4 C.N.L.R. 217, 24 B.C.L.R. (6th) 48, 433 D.L.R. (4th) 544, [2019] B.C.J. No. 755 (QL), 2019 CarswellBC 1146 (WL Can.), affirming a decision of Sewell J., 2017 BCSC 2389,

[2018] 1 C.N.L.R. 135, [2017] B.C.J. No. 2665 (QL), 2017 CarswelBC 3648 (WL Can.), affirming the acquittals entered by Mrozinski Prov. Ct. J., 2017 BCPC 84, [2018] 1 C.N.L.R. 97, [2017] B.C.J. No. 558 (QL), 2017 CarswellBC 769 (WL Can.). Appeal dismissed, Moldaver and Côté JJ. dissenting.

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Written submissions only by *Elaine Cairns* and *Katie Mercier*, for the intervener the Attorney General of the Yukon Territory.

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*Bruce McIvor*, for the intervener the Indigenous Bar Association in Canada.

*Maxime Faille*, for the intervener the Whitecap Dakota First Nation.

*Jessica Orkin*, for the interveners the Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government.

*Rosanne Kyle*, for the intervener the Okanagan Nation Alliance.

*Francis Walsh*, for the intervener the Mohawk Council of Kahnawà:ke.

*Julie McGregor*, for the intervener the Assembly of First Nations.

*Kathy L. Hodgson-Smith*, for the interveners the Métis National Council and the Manitoba Metis Federation Inc.

*Jack Woodward, Q.C.*, for the intervener the Nuchatlaht First Nation.

*Andrew Lokan*, for the intervener the Congress of Aboriginal Peoples.

*John W. Gailus*, for the intervener the Lummi Nation.

*Thomas Isaac*, for the intervener the Métis Nation British Columbia.

The judgment of Wagner C.J. and Abella, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ. was delivered by

ROWE J. —

[1] Richard Lee Desautel entered Canada legally from the United States of America. He shot an elk contrary to provincial wildlife rules and advised provincial authorities that he had done so. As he expected, he was charged for this. He defended the charges on the basis that he had an Aboriginal right to hunt the elk, one which is protected by s. 35(1) of the *Constitution Act, 1982*. Thus, this is a test case, the central issue being whether persons who are not Canadian citizens and who do not reside in Canada can exercise an Aboriginal right that is protected by s. 35(1). For the reasons that follow, I would say yes. On a purposive interpretation of s. 35(1), the scope of “aboriginal peoples of Canada” is clear: it must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact.



[2] Beyond agreeing with Mr. Desautel on this central issue, I will say little more about what that means for the exercise of rights protected under s. 35(1). That follows for two reasons. First, questions of law are better resolved in cases where there is a dispute that requires the answering of those questions. And, second, the defence of a prosecution for a provincial regulatory offence, while it may serve as a test case (as here), is not well-suited to deal with such broader issues. Such issues are better dealt with in an action setting out the right claimed, with a full evidentiary record, and seeking declaratory relief. I will return to such matters toward the end of my reasons.

#### I. Background

[3] On October 14, 2010, Mr. Desautel shot one cow-elk near Castlegar, British Columbia. He was charged with hunting without a licence contrary to s. 11(1) of the *Wildlife Act*, R.S.B.C. 1996, c. 488, and hunting big game while not being a resident contrary to s. 47(a) of the *Act*. He did not have a licence and was not a resident of British Columbia. Mr. Desautel is a citizen of the United States, and a resident of Ichelium in the State of Washington. Mr. Desautel admitted the *actus reus* of the offences, but raised a defence that he was exercising his Aboriginal right to hunt in the traditional territory of his Sinixt ancestors, a right protected under s. 35(1).

[4] Mr. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes based in the State of Washington in the United States, a successor group of the Sinixt people. At trial, the year 1811 was accepted as the date of first contact between the Sinixt and Europeans. At this time, the Sinixt were engaged in a seasonal round of

hunting, fishing, and gathering, travelling largely by canoe in their ancestral territory. This territory ran as far south as an island just above Kettle Falls, in what is now Washington State, and as far north as the Big Bend of the Columbia River, north of Revelstoke in what is now British Columbia. The place where Mr. Desautel shot the elk in October 2010 was within the ancestral territory of the Sinixt.

[5] Over the course of the latter half of the 19th century, the Sinixt gradually moved to occupy the southern portion of their territory full-time, the portion that lies in the United States. Until around the year 1870, the Sinixt continued their seasonal round in the northern portion of their territory, located in Canada. In the course of time, a “constellation of factors” made the Sinixt people move to the United States (2017 BCPC 84, [2018] 1 C.N.L.R. 97, at para. 110). By 1872, a number of members of the Sinixt were living for the most part in Washington State. The trial judge did not find that the Sinixt were forced out of Canada “at gunpoint” (para. 101), but nor did she find that the move was voluntary, as the Lakes Tribe never gave up their claim to their traditional territory in Canada. Until the year 1930, the evidence clearly showed that members of the Lakes Tribe continued to hunt in British Columbia, despite living on the Colville Reserve in Washington State and in the face of the creation of an international border by the 1846 Oregon Boundary Treaty and the outlawing of their hunting by British Columbia through the *Game Protection Amendment Act, 1896*, S.B.C., c. 22. From 1930 until 1972, there may have been a period of dormancy. As was found at trial, the Lakes Tribe continues to have a connection to the land where their ancestors hunted in British Columbia.

[6] Meanwhile, the population of Sinixt who had remained in Canada was small. By 1902, only 21 Sinixt still lived on their traditional territory in Canada, in the Arrow Lakes Band reserve. By 1930, only one person remained on the rolls of the Arrow Lakes Band, and after her death in 1956, the government of Canada declared the Arrow Lakes Band extinct, and the reserve lands reverted to the provincial Crown.

## II. Judicial History

A. *British Columbia Provincial Court, 2017 BCPC 84, [2018] 1 C.N.L.R. 97 (Mrozinski J.)*

[7] The trial judge held that there was no doubt that Mr. Desautel is a member of the Lakes Tribe, and saw the Lakes Tribe as a clear successor group to the Sinixt, such that the communal rights of the Sinixt could continue with the Lakes Tribe. The trial judge applied the test this Court set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507. She held that Mr. Desautel was exercising an Aboriginal right to hunt for food, social and ceremonial purposes guaranteed by s. 35(1) of the *Constitution Act, 1982*.

[8] Despite the Lakes Tribe's departure from the northern part of their traditional territory, its members remained connected to that geographical area. The evidence demonstrated that the land and the traditions were not forgotten, and that the connection to the land was still present in the minds of the members of the Lakes Tribe. The trial judge found that the requirement of continuity was met, notwithstanding a

period of dormancy between 1930 and 1972, because there is no requirement of “an unbroken chain of continuity” (*Van der Peet*, at para. 65).

[9] Moreover, the trial judge decided it was not necessary to define the Aboriginal right as including a mobility right, so no issue of sovereign incompatibility arose. Mr. Desautel’s Aboriginal right remained in existence and was protected by s. 35(1). The trial judge held that the right was infringed by the provisions of the *Wildlife Act* and the infringement was not justified. Mr. Desautel was acquitted.

B. *British Columbia Superior Court, 2017 BCSC 2389, [2018] 1 C.N.L.R. 135 (Sewell J.)*

[10] The appeal was dismissed. The summary conviction appeal judge held that the Sinixt people are the relevant collective and that modern-day Lakes Tribe members are entitled to assert the Aboriginal rights held by the Sinixt, based on practices that were part of their distinctive culture at the time of contact, in their traditional territory in British Columbia. According to the summary conviction appeal judge, the words “aboriginal peoples of Canada” in s. 35(1) must be interpreted in a purposive way, and mean Aboriginal peoples who, prior to contact, occupied what became Canada. Therefore, modern-day members of the Sinixt are not precluded from asserting rights under s. 35(1) merely because they now live in the United States. This interpretation of s. 35(1) is consistent with the objective of reconciliation. To establish an Aboriginal right to hunt, Mr. Desautel had to meet the requirements of the *Van der Peet* test. The

summary conviction appeal judge found that the trial judge made no error in applying the *Van der Peet* test.

[11] The summary conviction appeal judge held that Mr. Desautel's Aboriginal right to hunt is not incompatible with Canadian sovereignty. The fact that the government of Canada has the right to control its borders is not fatal to the assertion of an Aboriginal right to hunt in Canada by an Aboriginal group located in the United States. Mr. Desautel was not charged with coming into Canada unlawfully and there was no evidence that he was denied entry. In contrast with the claimant in *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, Mr. Desautel was not asserting an Aboriginal right to cross the border.

C. *British Columbia Court of Appeal, 2019 BCCA 151, 24 B.C.L.R. (6th) 48 (Smith, Willcock and Fitch J.J.A.)*

[12] The Crown's appeal was dismissed. Under a purposive approach, the Court of Appeal concluded that an Aboriginal group that does not reside in Canada and whose members are neither residents nor citizens of Canada can claim constitutional rights under s. 35(1) of the *Constitution Act, 1982*. It is not a requirement that there be a present-day Aboriginal community in the geographic area where the claimed right is exercised. In this case, the Court of Appeal found that the relevant historic collective is the Sinixt and that the Lakes Tribe is a modern collective descended from the Sinixt. The finding of the trial judge that the chain of continuity had not been broken was entitled to deference. There is no requirement under the *Van der Peet* test, according to

the Court of Appeal, that the claimant must be a member of a contemporary Aboriginal community currently located in the geographic area where the right was historically exercised. Imposing such a requirement would fail to take into account the Aboriginal perspective, the realities of colonization and displacement, and the goal of reconciliation. The Court of Appeal concluded that the rights of Mr. Desautel's community to hunt on their ancestral lands in British Columbia were never voluntarily surrendered, abandoned or extinguished. Therefore, Mr. Desautel has an Aboriginal right to hunt in British Columbia.

[13] It was further held that practical concerns about the expansion of Canada's duty to consult to Aboriginal groups in the United States could not prevent a court from recognizing their inherent rights. Finally, the Court of Appeal determined that it was not necessary to consider Mr. Desautel's incidental mobility right to cross the border and the compatibility of such a right with Canadian sovereignty, because this issue was not addressed at trial and its resolution was not necessary for the determination of the appeal.

### III. Issue

[14] The appellant Her Majesty the Queen in Right of British Columbia (hereinafter "the Crown") raises the following constitutional question:

Are ss. 11(1) and 47(a) of the *Wildlife Act*, R.S.B.C. 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, U.S.A., 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?

(A.R., vol. I, at p. 139)

[15] To answer this question, the Court must determine whether an Aboriginal people located outside Canada can assert rights protected under s. 35(1) of the *Constitution Act, 1982*.

#### IV. Submissions of the Parties

##### A. *Appellant: Her Majesty the Queen in Right of British Columbia*

[16] The Crown's main submission is that Mr. Desautel cannot assert Aboriginal rights under s. 35(1) because the scope of this provision is limited to Aboriginal peoples located in Canada. At best, Mr. Desautel can claim a common law right to hunt, which would not constitute a defence to the regulatory charges against him. In the Crown's submission, the *Van der Peet* test for the recognition of rights under s. 35(1) requires the presence of a present-day collective in the area where the right was exercised historically. In the present case, the relevant modern collective would be the Lakes Tribe, a group located in the State of Washington, not in British Columbia. Moreover, because Mr. Desautel is a resident of the United States, the exercise of the right to hunt in British Columbia necessarily involves an incidental mobility right to cross the border, which is incompatible with Canadian sovereignty,

and the result is that the s. 35(1) Aboriginal right claimed by Mr. Desautel never came into existence.

B. *Respondent: Mr. Desautel*

[17] Mr. Desautel argues that he has an Aboriginal right to hunt in the ancestral territory of the Sinixt, the relevant modern-day collective, in British Columbia. This right is protected under s. 35(1). To assert s. 35(1) rights, he argues, the only test that an Aboriginal people has to pass is the *Van der Peet* test. Therefore, there is no threshold issue distinct from the test elaborated by this Court for the recognition of Aboriginal rights. Moreover, the *Van der Peet* test has never required an additional requirement of geographic continuity. The fact that an Aboriginal people is solely based outside Canada has no impact on the recognition of the right as long as the requirements of the *Van der Peet* test are met. Finally, Mr. Desautel submits that there is no mobility right at issue in this case.

V. Analysis

A. *The Scope of Section 35(1)*

(1) The Threshold Question

[18] Section 35(1) of the *Constitution Act, 1982*, says:



The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

It is clear from the text of s. 35(1) that, to fall within its scope, an Aboriginal group must be an “aboriginal peopl[e] of Canada”. The question raised by this appeal is whether a group whose members are neither Canadian citizens nor Canadian residents can meet this condition. The text of s. 35(1) does not provide a clear answer to this question. The words “of Canada” are capable of different meanings, as “of” can be used to express a range of different relationships.

[19] Whether a group is an Aboriginal people of Canada is, analytically speaking, a different question from whether the group has an Aboriginal right. This Court’s decision in *Van der Peet* was about the latter question. It set out a test for having an Aboriginal right, not for being an Aboriginal people of Canada. The *Van der Peet* test by itself is not, therefore, dispositive of this appeal. That said, evidence that is relevant to the question whether a group has an Aboriginal right may also be relevant to the question whether the group is an Aboriginal people of Canada.

[20] Whether a group is an Aboriginal people of Canada is a threshold question, in the sense that if a group is *not* an Aboriginal people of Canada, there is no need to proceed to the *Van der Peet* test. But this threshold question does not arise in every case. In most cases there is no doubt that the claimant belongs to an Aboriginal people of Canada, so there is no need to address the threshold question. The threshold question

is likely to arise only where there is some ground for doubt, such as where the group is located outside of Canada. It should not be construed as an additional burden on rights claimants that has to be satisfied in every case.

[21] No previous decision of this Court interprets the scope of the words “aboriginal peoples of Canada” in s. 35(1). That is our task here. As this Court has often recognized, s. 35(1) must be interpreted in a purposive way (*R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1106; *Van der Peet*, at paras. 21-22; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 76).

[22] For the reasons that follow, I am of the view that a consistent development of this Court’s s. 35(1) jurisprudence requires that groups located outside Canada can be Aboriginal peoples of Canada. As I will explain, the two purposes of s. 35(1) are to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown’s assertion of sovereignty over them. These purposes are reflected in the structure of Aboriginal rights and title doctrine, which first looks back to the practices of groups that occupied Canadian territory prior to European contact, sovereignty or effective control, and then expresses those practices as constitutional rights held by modern-day successor groups within the Canadian legal order. The same purposes are reflected in the principle of the honour of the Crown, under which the Crown’s historic assertion of sovereignty over Aboriginal societies gives rise to continuing obligations to their successors as part of an ongoing process of reconciliation.

[23] On this interpretation, the scope of “aboriginal peoples of Canada” is clear: it must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact. As a result, groups whose members are neither citizens nor residents of Canada can be Aboriginal peoples of Canada.

(2) A Purposive Interpretation of Section 35(1)

[24] The prior occupation of Canadian territory by organized Aboriginal societies was recognized before s. 35(1) was enacted. In *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, the claimants sought a declaration of Aboriginal title in their traditional territory. While the claim was unsuccessful, Judson J. characterized the source of Aboriginal title in comments that have been repeatedly cited by this Court: “the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means” (*Calder*, at p. 328 (emphasis added)); see also *Roberts v. Canada*, [1989] 1 S.C.R. 322, at p. 340; *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at pp. 377-78). This point was taken up in *Sparrow*, where this Court laid out the analysis for justified infringements of Aboriginal rights. In finding that the Musqueam had an Aboriginal right protected by s. 35(1), Dickson C.J. and La Forest J. observed that they “have lived in the area as an organized society long before the coming of European settlers” (*Sparrow*, at p. 1094 (emphasis added)).

[25] In *R. v. Badger*, [1996] 1 S.C.R. 771, this Court confirmed that the *Sparrow* test applies to infringements of treaty rights. In arriving at this conclusion, Cory J. drew

on a second theme from the pre-1982 jurisprudence. The Crown's assertion of sovereignty over Aboriginal societies, he held, gave rise to a distinctive legal relationship. "[B]oth aboriginal and treaty rights possess in common a unique, *sui generis* nature. In each case, the honour of the Crown is engaged through its relationship with the native people" (*Badger*, at para. 78 (emphasis added; citations omitted)). In the treaty context, this principle can be traced back to the dissenting reasons of Gwynne J. in *Province of Ontario v. Dominion of Canada and Province of Quebec* (1895), 25 S.C.R. 434, at pp. 511-12; and in *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1, at p. 2.

[26] These two themes were brought out explicitly in *Van der Peet*, where Lamer C.J. set out the test for Aboriginal rights. Lamer C.J. first observed, at para. 30, that "when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries" (emphasis in original). Second, he wrote at para. 31, s. 35(1) is "the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown". In short,

the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. [para. 43]

[27] The two purposes of s. 35(1) underlie the test for Aboriginal rights set out in *Van der Peet*. The court first looks back to the historic practices of Aboriginal societies in Canada prior to contact, and second, recognizes those practices as Aboriginal rights held by their modern-day successors within the Canadian legal order: *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 73; *Mitchell*, at para. 12. In *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 45, Bastarache J. explained that the doctrine of Aboriginal rights “arises from the simple fact of prior occupation of the lands now forming Canada”. He added that “[t]he ‘distinctive aboriginal culture’ must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands” (para. 45, quoting the dissenting reasons of L’Heureux-Dubé J. in *Van der Peet*, at para. 159 (emphasis added)).

[28] The test for Aboriginal title, a variation of the *Van der Peet* test, reflects the same two purposes. In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, this Court explained that Aboriginal title has two sources: first, Aboriginal possession of the land before the assertion of Crown sovereignty, and second, “the relationship between common law and pre-existing systems of aboriginal law” (para. 114). As LeBel J., concurring in *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220, at para. 129, explained:

As with all aboriginal rights protected by s. 35(1) of the *Constitution Act, 1982*, aboriginal title arises from the prior possession of land and the prior social organization and distinctive cultures of aboriginal peoples on that land. It originates from “the prior occupation of Canada by aboriginal

peoples” and from “the relationship between common law and pre-existing systems of aboriginal law”. [Citations omitted.]

The test for title looks back to the historic occupation of Canadian territory by Aboriginal societies at the date of Crown sovereignty and recognizes this occupation as Aboriginal title, “a burden on the Crown’s underlying title” (*Delgamuukw*, at para. 145), within the Canadian legal order.

[29] The two purposes of s. 35(1) were reiterated in *Mitchell* by McLachlin C.J., who said:

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. . . . [T]he Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown. 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*. [Emphasis added; citations omitted; para 9.]

[30] In this Court’s recent jurisprudence, the special relationship between Aboriginal peoples and the Crown has been articulated in terms of the honour of the Crown. As was explained by McLachlin C.J. and Karakatsanis J. in *Manitoba Metis*, at para. 67:

The honour of the Crown [...] recognizes the impact of the “superimposition of European laws and customs” on pre-existing Aboriginal societies. Aboriginal peoples were here first, and they were never conquered; yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system,

and negotiated and drafted in a foreign language. The honour of the Crown characterizes the “special relationship” that arises out of this colonial practice. [Emphasis added; citations omitted.]

While the honour of the Crown looks back to this historic impact, it also looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, “mutually respectful long-term relationship” (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10; see also *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 21, per Karakatsanis J.; and *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, at paras. 21 and 28, per Wagner C.J. and Abella and Karakatsanis JJ.; and at paras. 207-8, per Brown and Rowe JJ., dissenting). The honour of the Crown requires that Aboriginal rights be determined and respected, and may require the Crown to consult and accommodate while the negotiation process continues (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 25; see also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24). It also requires that the Crown act diligently to fulfill its constitutional obligations to Aboriginal peoples (*Manitoba Metis*, at para. 75).

[31] As this review of the jurisprudence shows, s. 35(1) serves to recognize the prior occupation of Canada by Aboriginal societies and to reconcile their contemporary existence with Crown sovereignty. These purposes are expressed in the doctrinal

structure of Aboriginal law, which gives effect to rights and relationships that arise from the prior occupation of Canada by Aboriginal societies. Implicit in this doctrinal structure, and the purposes that underlie it, is the answer to our question. The Aboriginal peoples of Canada under s. 35(1) are the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact. This may include Aboriginal groups that are now outside Canada.

[32] I hasten to add that this criterion will need to be modified in the case of the Métis. Because Métis communities arose after contact between other Aboriginal peoples and Europeans, “the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined” (*Van der Peet*, at para. 67). Given that the present case is not about Métis s. 35(1) rights, I leave for another day precisely what criterion should be applied to determine whether a Métis community is an “aboriginal peopl[e] of Canada”, in cases where there is doubt.

[33] I would add that an interpretation of “aboriginal peoples of Canada” in s. 35(1) that includes Aboriginal peoples who were here when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed, reflects the purpose of reconciliation. The displacement of Aboriginal peoples as a result of colonization is well acknowledged:

Aboriginal peoples were displaced physically — they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also



displaced socially and culturally, subject to intensive missionary activity and the establishment of schools — which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.

*(Report of the Royal Commission on Aboriginal Peoples, vol. 1, Looking Forward, Looking Back (1996), at pp. 139-40)*

By contrast, an interpretation that excludes Aboriginal peoples who were forced to move out of Canada would risk “perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers” (*R. v. Côté*, [1996] 3 S.C.R. 139, at para. 53).

[34] Moreover, it bears emphasis that s. 35(1) did not create Aboriginal rights. As *Calder* and indeed the *Royal Proclamation, 1763* (G.B.), 3 Geo. 3 (reproduced in R.S.C. 1985, App. II, No. 1), show, Aboriginal rights long predated 1982 (see M. D. Walters, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*” (1999), 44 *McGill L.J.* 711). What s. 35(1) did was to give Aboriginal and treaty rights — which it explicitly recognizes as already “existing” — constitutional protection (*Van der Peet*, at paras. 28-29). Even though some s. 35(1) Aboriginal rights would not have been recognized under pre-1982 Canadian law (*Côté*, at para. 52), the practices, customs and traditions that underlie these rights existed before 1982. An interpretation of s. 35(1) that limits its scope to

those Aboriginal peoples who were located in Canada in 1982 would fail to give effect to this point by treating s. 35(1) as the source of Aboriginal rights.

(3) Additional Arguments

[35] The parties and interveners made a range of additional arguments about the scope of s. 35(1). I do not take any of these arguments to be determinative, but will explain how they are consistent with the interpretation set out above.

(a) *Alternative Wording for Section 35(1)*

[36] Several parties made submissions on what the words “of Canada” in s. 35(1) must mean. Both the Crown and Mr. Desautel suggested alternative wording that might have been used instead, had the drafters of the *Constitution Act, 1982*, wished to exclude their favoured interpretations. I give these arguments no weight. As I explained earlier, the words used in s. 35(1) are capable of different meanings when considered in isolation.

[37] However, the phrase “aboriginal peoples” does perhaps suggest those who were here originally — before the Europeans — in line with the interpretation I have set out. As Lord Denning once wrote, “[t]he Indian peoples of Canada have been there from the beginning of time. So they are called the ‘aboriginal peoples’”: *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 C.N.L.R. 86 (E.W.C.A.).

(b) *Context Within the Constitution Act, 1982*

[38] The phrase “aboriginal peoples of Canada” is used elsewhere in the *Constitution Act, 1982*. It is used in ss. 25 (“The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada”), 35(2) (“In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada”), 35.1(b) (“the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on [certain amendments to the Constitution]”), and the now-spent and repealed ss. 37(2) (“[The planned constitutional conference] shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item”) and 37.1(2) (“[Each other planned constitutional conference] shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters”).

[39] While there may be reason to interpret the phrase “aboriginal peoples of Canada” in the same way across the *Constitution Act, 1982*, this provides little assistance in the present appeal. Section 25 shields the rights and freedoms that pertain

to Aboriginal peoples of Canada from being abrogated by the *Canadian Charter of Rights and Freedoms*, but it does not tell us who those peoples are. While the text of s. 35(2) defines Aboriginal peoples to include the Indian, Inuit and Métis peoples of Canada, this does not specify whether they must be citizens or residents of Canada.

[40] Nor do I take anything from the requirement under s. 35.1 and the repealed ss. 37 and 37.1 that the Aboriginal peoples of Canada be represented at constitutional conferences. The Crown points out that representatives of the Lakes Tribe have not been invited to the constitutional conferences held so far. But the practice at these conferences was for Aboriginal peoples to be represented by umbrella organizations (see *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, and R. Romanow, "Aboriginal Rights in the Constitutional Process", in M. Boldt and J. A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (1985), 73). It is not clear that there would be any obstacle to Aboriginal peoples outside of Canada being represented in such processes. The requirement of representation at constitutional conferences thus offers no guidance here.

(c) *Legislative History*

[41] The Crown suggested that insight into the scope of s. 35(1) can be drawn from the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*. I agree that drafting history can be relevant to constitutional interpretation (see *R. v. Poulin*, 2019 SCC 47, at para. 78). But in this case it sheds no light. There is nothing in the record to

show that the members of the Committee turned their minds at all to the question of non-citizen or non-resident Aboriginal peoples of Canada.

(d) *The 1930 Natural Resources Transfer Agreements*

[42] The Crown and the Attorney General of Saskatchewan submit that s. 35(1) should be interpreted similarly to the Natural Resources Transfer Agreements (“NRTAs”), which were entered into between Canada and each of the Prairie provinces using nearly identical language, and added as schedules to the Constitution. The NRTAs use both the phrases “Indians of the Province” and “Indians within the boundaries thereof”.<sup>1</sup> In *Frank v. The Queen*, [1978] S.C.R. 95, at pp. 101-2, this Court explained that the former was narrower than the latter, in that the latter included “Indians” who were passing through the province, not just those ordinarily resident in the province. Respectfully, there is no reason why “aboriginal peoples of Canada” in s. 35(1) of the *Constitution Act, 1982*, should be interpreted the same way as “Indians of the Province” in the NRTAs. In *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, this Court held that s. 91(24) of the *Constitution Act, 1867*, was broader than the NRTAs: the Métis are “Indians” under s. 91(24), but not under the NRTAs. The NRTAs, this Court explained, are

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<sup>1</sup> *Natural Resources Transfer Agreement (Manitoba)* (Schedule 1 of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26), at paras. 11 and 13; *Natural Resources Transfer Agreement (Alberta)* (Schedule 2 of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26), at paras. 10 and 12; *Natural Resources Transfer Agreement (Saskatchewan)* (Schedule 3 of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26), at paras. 10 and 12.

“constitutional agreement[s], not the Constitution”, which requires “a completely different interpretive exercise” (para. 44).

(e) *The Presumption of Territoriality*

[43] The Crown notes that there is a presumption, rebuttable only by clear words or necessary implication, that legislation does not apply extraterritorially (*Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427, at paras. 54-55). As a result, it argues, s. 35(1) should be presumed to apply only to groups within Canada, and nothing in the text rebuts that presumption. But the presumption has no effect here. Section 35(1) applies to groups outside of Canada only when claiming or exercising their rights within Canada. The presumption of territoriality does not preclude such application, any more than it precludes the application of Canadian land laws to foreign owners of Canadian property.

(f) *Principles of Construction and the Aboriginal Perspective*

[44] Several interveners suggest that interpretive principles in favour of Aboriginal peoples are relevant here. Relatedly, Mr. Desautel and some interveners also suggest that Aboriginal perspectives should be taken into account in interpreting s. 35(1).

[45] The relevant interpretive principle is that, in interpreting s. 35(1), any doubt or ambiguity should be resolved in favour of Aboriginal peoples (*Van der Peet*, at para. 25; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36). In my view, this principle does not help settle the question at issue here. A principle that ambiguities should be resolved in favour of Aboriginal peoples does not determine who those very Aboriginal peoples are. To attempt to use the principle in this way would be circular.

[46] That said, Mr. Desautel and several interveners explain that Aboriginal perspectives involve a strong connection to ancestral territory, even where the Aboriginal group has been dispossessed of that territory, or where the territory is now divided by international borders. As this Court held in *Sparrow*, at p. 1112, it is “crucia[l] to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake”. Therefore, “a morally and politically defensible conception of aboriginal rights will incorporate both [Aboriginal and non-Aboriginal] legal perspectives” (*Van der Peet*, at para. 49, citing M. Walters, “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*”, (1992) 17 *Queen’s L.J.* 350, at p. 413; see also J. Borrows, “Creating an Indigenous Legal Community” (2005), 50 *McGill L.J.* 153, at p. 173). This perspective confirms the interpretation of s. 35(1) which I set out above.

#### (4) Application

[47] I have concluded that the Aboriginal peoples of Canada under s. 35(1) are the modern-day successors of Aboriginal societies that occupied what is now Canada

at the time of European contact (subject to modifications that may be necessary in the case of the Métis). Where this is shown, the threshold question is met and the court ascertains the claimants' rights using the *Van der Peet* test. The threshold question remains relevant in future cases where the claimant group is outside Canada, as *Van der Peet* does not address the required link between the modern-day collective (outside Canada) and the historic collective (that was inside what is now Canada).

[48] In the present case, the trial judge found as a fact that the Sinixt had occupied territory in what is now British Columbia at the time of European contact. She also found that the Lakes Tribe were a modern successor of the Sinixt — leaving open the possibility that there may be others. I would defer to this factual finding. The migration of the Lakes Tribe from British Columbia to a different part of their traditional territory in Washington did not cause the group to lose its identity or its status as a successor to the Sinixt.

[49] This case does not require the Court to set out criteria for successorship of Aboriginal communities. This is a complex issue that should be dealt with on a fuller factual record, with the benefit of legal argument. For example, consideration would have to be given to the possibility that a community may split over time, or, that two communities may merge into one, as well as to the relative significance of factors such as ancestry, language, culture, law, political institutions and territory in connecting a modern community to its historical predecessor. Some of the difficulties here are brought out in the academic literature (see P. L. A. H. Chartrand, “Background”, in



P. L. A. H. Chartrand, ed., *Who are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction* (2002), 27; R. K. Groves, "The Curious Instance of the Irregular Band: A Case Study of Canada's Missing Recognition Policy" (2007), 70 *Sask. L.R.* 153; and B. Olthuis, "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the *Constitution Act, 1982*" (2009), 54 *McGill L.J.* 1).

B. *The Test for Aboriginal Rights*

[50] Having found that the Lakes Tribe is an Aboriginal people of Canada, the next question is whether Mr. Desautel's claim satisfies the *Van der Peet* test for an Aboriginal right under s. 35(1). As I will explain, the test for Aboriginal rights for groups outside Canada is the same as the test for groups within Canada, and the trial judge did not err in finding that the test was satisfied here.

(1) The *Van der Peet* Test

[51] The analysis under *Van der Peet* was restated by this Court in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 46:

- (a) Characterize the right claimed in light of the pleadings and evidence (*Van der Peet*, at para. 53; *Gladstone*, at para. 24; *Mitchell* at paras. 14-19).

- (b) Determine whether the claimant has proven that a relevant pre-contact practice, tradition or custom existed and was integral to the distinctive culture of the pre-contact society (*Van der Peet*, at para. 46; *Mitchell*, at para. 12; *Sappier*, at paras. 40-45).
- (c) Determine whether the claimed modern right is “demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice” (*Lax Kw’alaams*, at para. 46).

[52] This analysis has been elaborated in detail in this Court’s jurisprudence. For present purposes, it will suffice to comment on the role of continuity in the analysis. Continuity is about whether a modern practice is a continuation of a historic practice. It is different from the threshold question discussed earlier, about whether a modern group is a successor of a historic group. It plays a role both at the second and the third stages of the *Van der Peet* analysis.

[53] At the second stage of the *Van der Peet* analysis, continuity can play a role in proof. Showing that a practice is integral to the claimant’s culture today, and that it has continuity with pre-contact times, can count as proof that the practice was integral to the claimant’s culture pre-contact (*Van der Peet*, at paras. 62-63; *Gladstone*, at para. 28; *Delgamuukw*, at para. 152; *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 45). As Kent McNeil explains, “continuity of this sort has to be shown only when Aboriginal peoples rely on post-sovereignty occupation or

post-contact practices, customs, and traditions as evidence of their pre-sovereignty occupation or pre-contact practices, customs, and traditions” (“Continuity of Aboriginal Rights”, in K. Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (2004), 127, at p. 138).

[54] At the third stage, the question is whether the modern practice which is claimed to be an exercise of an Aboriginal right is connected to, and reasonably seen as a continuation of, the pre-contact practice. At this stage, continuity with the pre-contact practice is required in order for the claimed activity to fall within the scope of the right. It serves to avoid frozen rights, allowing the practice to evolve into modern forms (*Van der Peet*, at para. 64; *Mitchell*, at para. 13). The right claimed “must be allowed to evolve”, because “[i]f aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless” (*Sappier*, at paras. 48-49).

[55] I would emphasize that the assessment of continuity, both at the second and third stages, is a highly fact-specific exercise. As McLachlin C.J. wrote in *Mitchell*, at para. 36, the weighing of evidence in Aboriginal claims “is generally the domain of the trial judge, who is best situated to assess the evidence as it is presented, and is consequently accorded significant latitude in this regard” (see also *Côté*, at para. 59).

(2) The Attorney General of Canada’s Proposed Framework

[56] The intervener Attorney General of Canada submits that the proper approach to determine under what circumstances an Aboriginal claimant located

outside Canada can claim rights under s. 35(1) is a contextual one. In particular, it would require non-resident rights claimants to find a connection with a contemporary Aboriginal collective residing in Canada, and to obtain recognition and authorization by that collective to exercise the claimed s. 35(1) rights. The proposed test draws on *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, and on the jurisprudence on sheltering rights. As I will explain, I would not give effect to this proposal.

[57] In *Powley*, the Court modified, though it did not overrule, the *Van der Peet* test to accommodate the particular situation of the Métis (see paras. 14 and 18). It also offered some comments on how courts can determine membership in the Métis community in the absence of formalized procedures (para. 29). Importantly, these comments were not about *who* is an “aboriginal peopl[e] of Canada” under s. 35(1), but rather about *how* courts can identify Métis individuals. The Court noted that “groups of Métis have often lacked political structures and have experienced shifts in their members’ self-identification” (para. 23), such that “determining membership in the Métis community might not be as simple as verifying membership in . . . an Indian band” (para. 29). The Court in *Powley* suggested that an individual who self-identified as Métis also needed to show a link to a historic Métis community and acceptance by a modern successor of that community. This reflected the fact that not all people with both First Nations and European ancestry are Métis.

[58] The idea of “sheltering” emerges from case law concerning “whether an Aboriginal person can lawfully ‘shelter’ under a treaty he is not a signatory to” (*R. v.*

*Shipman*, 2007 ONCA 338, 85 O.R. (3d) 585, at para. 2; *R. v. Meshake*, 2007 ONCA 337, 85 O.R. (3d) 575, at paras. 1-2). In these cases, the Ontario Court of Appeal held that Aboriginal people from other communities can exercise treaty rights only if they have the permission or consent of the community that is a signatory to the treaty (*Shipman*, at paras. 41-46), or as a result of marriage and acceptance in that community (*Meshake*, at paras. 31-33). As this makes clear, the idea of sheltering arises from the specific context of treaty rights.

[59] The Attorney General of Canada proposes that we adapt the *Powley* and sheltering frameworks to govern the situation of Aboriginal rights claimants outside Canada. In my view, there is no need to do so in this case. I certainly accept that Aboriginal rights must be grounded in the existence of a historic and present-day community (*Powley*, at para. 24). As this Court wrote in *Marshall*, at para. 67, “[m]odern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely”. But this is so for Aboriginal groups inside or outside Canada. It does not support an additional requirement, for groups outside Canada, of recognition by a related Aboriginal collective residing in Canada.

[60] This requirement would place a higher burden on Aboriginal communities who seek to claim rights if the group moved, was forced to move, or was divided by the creation of an international border between Canada and the United States. It would risk defining Aboriginal rights “in a manner which excludes some of those the provision was intended to protect” (*R. v. Adams*, [1996] 3 S.C.R. 101, at para. 27).

Moreover, it would raise myriad practical difficulties, such as which group within Canada has a say in the recognition of a claimant located outside Canada, where there are competing groups (*Hwlitsum First Nation v. Canada (Attorney General)*, 2018 BCCA 276, 15 B.C.L.R. (6th) 91), which body can represent a collective residing in Canada (*Campbell v. British Columbia (Minister of Forests and Range)*, 2011 BCSC 448, [2011] 3 C.N.L.R. 151), and what happens if there is no related modern collective residing in Canada.

[61] For these reasons, the test for an Aboriginal right is the same whether the claimant is inside or outside Canada.

(3) Application

[62] In the present case, the Aboriginal right claimed is a right to hunt for food, social and ceremonial purposes within the traditional territory of the Sinixt in British Columbia. The trial judge found, based on the evidence before her, that at the time of contact this practice was integral to the distinctive culture of the Sinixt. She also found that the modern-day practice of hunting in this territory, as Mr. Desautel did, is a continuation of this pre-contact practice. Indeed, setting aside the periods in which no hunting took place, there was no significant dissimilarity between the pre-contact practice and the modern one (as there was, for example, in *Lax Kw'alaams*). As a result, she found that Mr. Desautel was exercising an Aboriginal right.

[63] The Crown and the intervener Attorney General of Alberta submit that this was an error, because continuity requires an ongoing presence in the lands over which an Aboriginal right is asserted. As my discussion of continuity should make clear, this has never been part of the test for an Aboriginal right. Nor is there any basis for adding it to the test, even where the claimant is outside Canada. As Lamer C.J. explained in *Van der Peet*, at para. 65, “an unbroken chain of continuity” is not required. Indeed, as McLachlin J. (dissenting, but not on this point) noted in *Van der Peet*, at para. 249, “it is not unusual for the exercise of a right to lapse for a period of time”.

[64] In effect, we are asked to hold that an Aboriginal right can be lost or abandoned by non-use: a proposition that Lamer C.J. left undecided in *Van der Peet*, at para. 63. Would accepting this proposition risk “undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers” (*Côté*, at para. 53; see also McNeil, at pp. 133-35)? It is better not to decide the issue here, as it does not arise in light of the factual findings of the trial judge. The law should be developed through cases where determination of such issues is required, where there is an adequate evidentiary basis, and where the issues are the subject of full submissions and thorough consideration at trial and at the appellate level.

### C. *Sovereign Incompatibility*

[65] The Crown submits that even if Mr. Desautel’s claim would otherwise meet the test for an Aboriginal right, this right is incompatible with Canadian sovereignty because the right encompasses other rights necessary for its meaningful

exercise, which means a right to cross the Canada-U.S. border. This submission is supported by the Attorney General of Quebec, the Attorney General of New Brunswick and the Attorney General of Alberta. As a result, the Crown argues, Mr. Desautel's right to hunt never came into existence.

[66] I am of the view that, *unlike* the right claimed in *Mitchell*, the very purpose of the right claimed by Mr. Desautel is not to cross the border. The mobility right, if it exists, is incidental in this case. Sovereign incompatibility would relate solely to the issue of whether there can be an Aboriginal right to enter Canada — an issue that is not raised here, because Mr. Desautel was not denied entry to Canada. Moreover, this issue was not fully addressed by the courts below. Therefore, the question of whether the appropriate framework is sovereign incompatibility or infringement/justification under *Sparrow* should be left for another day, when the Court has a proper set of facts to answer the question.

#### D. *Common Law Aboriginal Rights*

[67] The Crown contends that while Mr. Desautel cannot have a s. 35(1) Aboriginal right, because he is not a member of an Aboriginal people of Canada, he can still have common law Aboriginal rights, albeit these rights would not constitute a defence to the regulatory charges against him. Recognizing common law Aboriginal rights alongside s. 35(1) Aboriginal rights would introduce additional difficulties. In particular, the Crown seems to assume that the test for a common law Aboriginal right



would be the same as the test for a s. 35(1) Aboriginal right, that is, the *Van der Peet* test. But this is far from clear.

[68] Before 1982, common law Aboriginal rights were recognized in Canada under British imperial law (*Calder*, at pp. 328 and 402; *Mitchell*, at paras. 62-64). Under the imperial doctrine of succession, when Britain took possession of a new territory, the laws in force in that territory were presumed to continue (subject to some exceptions). This doctrine was not limited to practices, traditions or customs that were “integral to the distinctive culture” of the Aboriginal people, as in *Van der Peet*. This suggests, on the one hand, that the test for a common law right may be met even where the *Van der Peet* test is not.

[69] On the other hand, this Court has held that the existence of a common law Aboriginal right is sufficient to ground a s. 35(1) right (*Delgamuukw*, at para. 136). Recognizing common law Aboriginal rights alongside s. 35(1) rights would require the Court to resolve this apparent tension. As Richard Ogden writes,

while a legal historian might one day accept that the effect of the *Van der Peet* trilogy was to create a new test, and a new doctrine, the Supreme Court has stated that the doctrine which gives rise to section 35 rights is the same doctrine that gave rise to common law Aboriginal rights.

(“Existing’ Aboriginal Rights in Section 35 of the *Constitution Act, 1982*” (2009), 88 *Can. Bar Rev.* 51, at p. 84; see also G. Otis, “Le titre aborigène: émergence d’une figure nouvelle et durable du foncier autochtone?” (2005), 46 *C. de D.* 795, at p. 800.)

[70] However, in light of my conclusion that Mr. Desautel has a s. 35(1) Aboriginal right to hunt in the ancestral territory of the Sinixt in British Columbia, it is not necessary to address this matter here.

E. *The Consequences of This Decision*

[71] The Crown and several attorneys general raised concerns about the possible consequences of groups like the Lakes Tribe being held to be Aboriginal peoples of Canada. In this section, I explain why these concerns do not justify any change to the law as set out in these reasons. While Aboriginal communities outside Canada can assert and hold s. 35(1) rights, it does not follow that their rights are the same as those of communities within Canada. While the test for an Aboriginal right is the same, the different circumstances of communities outside Canada may lead to different results.

(1) The Duty to Consult

[72] The duty to consult “arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it” (*Haida*, at para. 35). In other words, three conditions must exist for the duty to arise: actual or constructive knowledge, contemplated Crown conduct and a potential adverse effect on an Aboriginal or treaty right. The requirement of actual or constructive knowledge was clarified in *Rio Tinto*

*Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 40:

Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. [Citations omitted.]

[73] As I will explain, given the requirement of actual or constructive knowledge, the duty to consult may well operate differently as regards those outside Canada.

[74] Given the long history of Crown-Aboriginal relations in Canada, the Crown will often be aware of the existence of Aboriginal groups within Canada and may have some sense of their claims. The situation is different when it comes to Aboriginal groups outside of Canada. In the absence of some historical interaction with them, the Crown may not know, or have any reason to know, that they exist, let alone that they have potential rights within Canadian territory.

[75] There is no freestanding duty on the Crown to seek out Aboriginal groups, including those outside Canada, in the absence of actual or constructive knowledge of a potential impact on their rights. In the absence of such knowledge, the Crown is free to act. It is for the groups involved to put the Crown on notice of their claims (*Native Council of Nova Scotia v. Canada (Attorney General)*, 2008 FCA 113, [2008] 3 C.N.L.R. 286; *Mississaugas of Scucog Island First Nation v. National Automobile*,

*Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 444*, 2007 ONCA 814, 88 O.R. (3d) 583, at para. 59).

[76] Once the Crown is put on notice, however, it has to determine whether a duty to consult arises and, if so, what the scope of the duty is. As I mentioned earlier, consultation is part of a “process of fair dealing and reconciliation” which “arises . . . from the Crown’s assertion of sovereignty” (*Haida*, at para. 32). Because groups outside Canada are not implicated in this process to the same degree, the scope of the Crown’s duty to consult with them, and the manner in which it is given effect, may differ. Integrating groups outside Canada into consultations by the Crown with groups inside Canada may involve discussions within Aboriginal communities and with the Crown. While the consultation process may be more challenging when it involves groups outside Canada, as this Court said in *Powley*, at para. 49, “the difficulty of identifying members of the [Aboriginal] community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada”.

(2) Justifying Infringements of Aboriginal Rights

[77] The fact that an Aboriginal group is outside Canada is relevant to the *Sparrow* test for justifying an infringement of an Aboriginal or treaty right.

[78] This Court has emphasized the role of context in determining whether an infringement of an Aboriginal right is justified. In *Sparrow*, at p. 1111, the Court noted “the importance of context and a case-by-case approach to s. 35(1)”, writing that “in

light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.” This point was applied in *Gladstone*, at para. 56, where Lamer C.J. wrote that

the framework for analysing aboriginal rights laid out in *Sparrow* depends to a considerable extent on the legal and factual context of that appeal. In this case, where . . . the context varies significantly from that in *Sparrow*, it will be necessary to revisit the *Sparrow* test and to adapt the justification test it lays out . . . .

[79] The fact that the holder of an Aboriginal right is located outside of Canada is a feature of the context that may be taken into account in the justification analysis. The government’s power to infringe Aboriginal rights reflects the fact that “rights do not exist in a vacuum” (*R. v. Nikal*, [1996] 1 S.C.R. 1013, at para. 92). Rather, Aboriginal peoples are part of “a broader social, political and economic community” whose interests may, where sufficiently important, justify infringement of Aboriginal rights (*Gladstone*, at para. 73). In sum, justifying an infringement involves reconciling the interests of an Aboriginal people with the interests of the broader community of which it is a part (*Tsilhqot’in*, at para. 118). The extent to which the fact that the holder of the Aboriginal right is an Aboriginal people located outside this broader community makes a difference in the justification analysis is another issue better determined where on the facts this is required, where there is an adequate evidentiary basis, and where the issues are the subject of full submissions and thorough consideration at trial and at the appellate level.

### (3) Aboriginal Title

[80] The present case involves an Aboriginal right to hunt for food, social and ceremonial purposes. It does not involve a claim for Aboriginal title. Aboriginal title is not a right to carry out an activity, but a right to the land itself (*Delgamuukw*, at paras. 137-41). While the test for Aboriginal title has the same basic structure as the test for other Aboriginal rights, it also has some important differences (paras. 144-45 and 150-51). First, unlike other Aboriginal rights, the historic date for proof of Aboriginal title is the date of Crown sovereignty, not the date of contact. Second, while other Aboriginal rights require proving that a practice was integral to the distinctive culture of the Aboriginal society, Aboriginal title requires proof of exclusive occupation of territory, without any additional need to show that this occupation was culturally integral.

[81] Given these special features of the test for Aboriginal title, and given that the present case does not involve a title claim, I would leave for another day the differences that may exist between the test for Aboriginal title claims by Aboriginal peoples within Canada and the test for such claims by peoples outside Canada.

(4) Modern Treaties

[82] Some modern treaties make provision for Aboriginal individuals who are not Canadian citizens to have treaty rights.<sup>2</sup> Other treaties exclude this possibility.<sup>3</sup> The intervener Attorney General of the Yukon Territory asks us to be mindful of these treaties in deciding the present case. I agree that modern treaties, being the result of lengthy negotiations, should be considered with great respect (*Beckman*, at paras. 9-10 and 12, per Binnie J.; at paras. 111-12 and 203, per Deschamps J. (concurring); *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, at paras. 1, 33 and 38). However, the content of these treaties does not determine the proper interpretation of “aboriginal peoples of Canada” under s. 35(1). Nor does the proper interpretation of “aboriginal peoples of Canada” under s. 35(1) undermine the rights set out in these modern treaties.

#### F. *The Vindication of Aboriginal Rights*

[83] As I mentioned at the outset of these reasons, beyond agreeing with Mr. Desautel on the central issue, I have said little more about what this means for the

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<sup>2</sup> See for example: Carcross/Tagish First Nation Final Agreement (2005), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Champagne and Aishihik First Nations Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Kluane First Nation Final Agreement (2003), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Kwanlin Dun First Nation Final Agreement (2005), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Little Salmon/Carmacks First Nation Agreement (1997), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; First Nation of Nacho Nyak Dun Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Selkirk First Nation Final Agreement (1997), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Ta’an Kwach’an Council Final Agreement (2002), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Teslin Tlingit Council Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Tr’ondëk Hwëch’in Final Agreement (1998), vol. 1, c. 3, ss. 3.2.2 to 3.2.3; Vuntut Gwitchin First Nation Final Agreement (1993), vol. 1, c. 3, ss. 3.2.2 to 3.2.3.

<sup>3</sup> See for example: Gwich’in Comprehensive Land Claim Agreement (1992), vol. 1, c. 4; Sahtu Dene and Metis Comprehensive Land Claim Agreement (1993), vol. 1, c. 4.

exercise of s. 35(1) Aboriginal rights. I end with some comments on the means available for the vindication of Aboriginal rights.

(1) It Is for the Courts to Interpret Section 35(1)

[84] This Court has to be mindful of its proper role in the vindication of Aboriginal rights. As this Court held in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169, “the courts are guardians of the Constitution and of individuals’ rights under it”. The role of giving an authoritative interpretation of laws and of the Constitution belongs to the courts (H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at pp. 808-9, no. X.11 and X.13).

[85] When the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada were recognized and affirmed by the enactment of the *Constitution Act, 1982*, this gave rise to an obligation for the courts to “give effect to that national commitment” (*R. v. Marshall*, [1999] 3 S.C.R. 533 (“*Marshall No. 2*”), at para. 45). As the majority of this Court recently confirmed in *Uashaunnuat*, at para. 24:

Although s. 35(1) recognizes and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada”, defining those rights is a task that has fallen largely to the courts. The honour of the Crown requires a generous and purposive interpretation of this provision in furtherance of the objective of reconciliation. [Emphasis added, citation omitted.]



[86] In my view, the authoritative interpretation of s. 35(1) of the *Constitution Act, 1982*, is for the courts. It is for Aboriginal peoples, however, to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices.

(2) Negotiation Can Foster Reconciliation

[87] Negotiation has significant advantages for both the Crown and Aboriginal peoples as a way to obtain clarity about Aboriginal rights:

Negotiation . . . has the potential of producing outcomes that are better suited to the parties' interests, while the range of remedies available to a court is narrower. . . . The settlement of indigenous claims [has] an inescapable political dimension that is best handled through direct negotiation.

(S. Grammond, *Terms of Coexistence, Indigenous Peoples and Canadian Law* (2013), at p. 139)

Negotiation also provides certainty for both parties (*Beckman*, at para. 109, per Deschamps J., concurring). As the Court said in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24, “[t]rue reconciliation is rarely, if ever, achieved in courtrooms”.

[88] Good faith from both parties is required. As the Court said in *Haida*, at para. 25, the honour of the Crown “requires the Crown . . . to participate in processes of negotiation” (see also B. Slattery, “Aboriginal Rights and the Honour of the Crown”

(2005), 29 *S.C.L.R.* (2d) 434, at pp. 436-37). Reconciliation requires the Crown and Aboriginal people to “work together to reconcile their interests” (*Rio Tinto*, at para. 34; see also *Nacho Nyak Dun*, at para. 1).

[89] As this Court has held on many occasions, the Crown has an “obligation to achieve the just settlement of Aboriginal claims through the treaty process” (*Rio Tinto*, at para. 32; see also *Haida*, at para. 20) because other remedies “have proven time-consuming, expensive, and are often ineffective” (*Rio Tinto*, at para. 33). Nonetheless, a test case or a claim for declaratory relief are also appropriate means to ask courts to determine rights under s. 35(1).

[90] When parties are considering possible courses of action, it is useful to bear in mind that criminal and regulatory proceedings have inherent limits proper to their nature. In these types of cases, the evidence administered at trial is generally less extensive and the rules are different than in a reference or a declaratory action (see *Sparrow*, at p. 1095; *Marshall No. 2*, at para. 13). As LeBel J. stressed in his concurring reasons in *Marshall*, at para. 142:

Although many of the aboriginal rights cases that have made their way to this Court began by way of summary conviction proceedings, it is clear to me that we should re-think the appropriateness of litigating aboriginal treaty, rights and title issues in the context of criminal trials. The issues that are determined in the context of these cases have little to do with the criminality of the accused’s conduct; rather, the claims would properly be the subject of civil actions for declarations. Procedural and evidentiary difficulties inherent in adjudicating aboriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge’s findings of fact. These claims may also impact on the

competing rights and interests of a number of parties who may have a right to be heard at all stages of the process. In addition, special difficulties come up when dealing with broad title and treaty rights claims that involve geographic areas extending beyond the specific sites relating to the criminal charges. [Emphasis added.]

[91] Therefore, [TRANSLATION] “[t]he negotiating table should not be seen as a substitute for the courtroom, nor the courtroom as an alternative to the negotiating table” (P. Dionne, “La reconnaissance et la définition contemporaines des droits ancestraux: négocier ou s’adresser au juge?”, in G. Otis, ed., *Droit, territoire et gouvernance des peuples autochtones* (2005), 71, at p. 78). Both processes are complementary to each other and must interact with each other within their proper limits.

[92] All this said, it is for the parties themselves to decide how they wish to proceed.

## VI. Disposition

[93] The appeal is dismissed. The constitutional question is answered in the affirmative.

The following are the reasons delivered by

CÔTÉ J. —

[94] Does the constitutional protection of Aboriginal rights contained in s. 35(1) of the *Constitution Act, 1982*, extend to an Aboriginal group located outside of Canada, and whose member claiming to exercise an Aboriginal right is neither a resident nor a citizen of Canada? The courts below, and my colleague Rowe J., say that it does, but in my view, and with respect, that conclusion is contrary to a purposive analysis of s. 35(1) that examines the linguistic, philosophic, and historical contexts of that provision. This Court’s s. 35(1) jurisprudence has characterized — properly, in my view — reconciliation in terms of the relationship between non-Aboriginal Canadians and Aboriginal peoples as full and equal members of, and participants in, Canadian society. In addition, s. 35(1) elevated to constitutional status the common law rights of the “aboriginal peoples of Canada” that were “existing” in 1982 (*Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 11). Aboriginal groups located outside of Canada’s borders do not fit within this understanding.

[95] Further, even if I would agree with my colleague’s conclusion that the scope of the phrase “aboriginal peoples of Canada” includes groups located outside of Canada, I would disagree with his application of the test set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, to the claim brought in this case by the respondent, Richard Lee Desautel. In my view, Mr. Desautel, as a member of the Lakes Tribe, cannot establish that he was exercising an Aboriginal right to hunt in the Sinixt traditional territory in British Columbia, as the modern group’s claim lacks continuity with the pre-contact group’s practices. Given that there was nothing in existence in 1982 to which s. 35(1) protection could attach, Mr. Desautel’s claim must fail.

[96] Therefore, I would answer the constitutional question in the negative and allow the appeal.

## I. Background

[97] This was a test case brought by the Lakes Tribe of the Colville Confederated Tribes (“CCT”) based in Washington State in the United States of America. Acting on the instructions of the Fish and Wildlife Director of the CCT, Mr. Desautel — a United States citizen and resident, and a member of the Lakes Tribe — shot a cow-elk near Castlegar, British Columbia, to secure ceremonial meat. He reported the kill to conservation officers and was subsequently charged with hunting without a licence and hunting big game while not being a resident of British Columbia, contrary to ss. 11(1) and 47(a) of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

[98] An agreed statement of facts was entered at trial. Mr. Desautel admitted the *actus reus* of each offence. His sole defence was that he was exercising his Aboriginal right to hunt for ceremonial purposes in the traditional territory of his Sinixt ancestors pursuant to s. 35(1) of the *Constitution Act, 1982*. As such, the trial became, as intended, a test case on whether the Lakes Tribe is part of the “aboriginal peoples of Canada”.

## II. Issue

[99] The following constitutional question is raised by this appeal:

Are ss. 11(1) and 47(a) of the *Wildlife Act*, R.S.B.C. 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, U.S.A., 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?

(A.R., vol. I, at p. 139)

### III. Analysis

#### A. *A Purposive Interpretation of Section 35 Establishes That It Protects Only Aboriginal Peoples Located in Canada*

[100] Constitutional provisions conferring rights ought to be interpreted generously, but must also be placed in their proper contexts in order to avoid overshooting their actual purposes. As noted in *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, “this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision” (para. 40). Such judicial caution is entirely appropriate and in line with Binnie J.’s emphasis on the fact that “[g]enerous’ rules of interpretation should not be confused with a vague sense of after-the-fact largesse” (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14).

[101] Section 35(1) accords constitutional protection only to the rights of the “aboriginal peoples of Canada”. The courts below correctly held that s. 35(1) is to be interpreted purposively, but rather than undertaking a purposive analysis to determine the meaning of the phrase “aboriginal peoples of Canada”, they relied on the *Van der*

*Peet* test to conceptualize the rights referred to in s. 35(1). As stated by the Court of Appeal (2019 BCCA 151, 24 B.C.L.R. (6th) 48, at para. 57): “Simply put, if the *Van der Peet* requirements are met, the modern Indigenous community will be an ‘[a]boriginal peoples of Canada’.”

[102] I am in agreement with my colleague Rowe J. on the following point: the question of whether a claimant falls within the meaning of “aboriginal peoples of Canada” in s. 35 is a threshold question; this question should be answered separately from the *Van der Peet* analysis for determining whether a group has an Aboriginal right; and the trial judge was required to address this threshold question to determine whether the Lakes Tribe fell within s. 35’s purview. As noted by the appellant, Her Majesty the Queen in Right of British Columbia (the “Crown”), “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” (A.F., at para. 59 (emphasis in original)). The *Van der Peet* test addresses the scope of Aboriginal rights but does not speak to treaty rights, Aboriginal title, or the rights of the Métis, which are also encompassed within s. 35(1). Using the test as proposed by the courts below defines “aboriginal peoples of Canada” solely in terms of occupation prior to contact, which is inconsistent with this Court’s acknowledgment that s. 35(1) rights “may only be exercised by virtue of an individual’s ancestrally based membership in the present community” (*R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, at para. 24).

[103] However, I disagree with my colleague’s conclusion that the scope of “aboriginal peoples of Canada” for the purposes of s. 35(1) must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact and that, as a result, groups that are not located in Canada or whose members are not and never have been citizens or residents of Canada can be “aboriginal peoples of Canada”.

[104] In my view, to be entitled to the protection of s. 35(1), the modern-day successor groups cannot be located anywhere other than in Canada. A purposive analysis of s. 35(1) that has regard to the relevant linguistic, philosophic, and historical contexts of that provision establishes that it protects only Aboriginal peoples located within Canada. This approach, while dismissed by the Court of Appeal as “formalistic”, is entirely consistent with this Court’s guidance that s. 35(1) must be interpreted in a generous manner consistent with its intended purpose (*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 76; see also *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1106; *Van der Peet*, at para. 23).

[105] As Rowe J. recently 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” (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 153). As I will outline below, the framers’ intent was to protect the rights of Aboriginal groups that are



members of, and participants in, Canadian society. It has no interest in protecting groups that, plainly, have no connection to it.

(1) Linguistic Context

[106] It is a well-established presumption of statutory and constitutional interpretation that each and every word of a text must be given meaning. This follows from the assumption that the legislature avoids tautology: “it does not use words solely for rhetorical or aesthetic effect” (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 43). As Sullivan explains, “[i]t is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design” (p. 43). This is consonant with this Court’s direction in *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, that the guiding principles of purposive interpretation “do not undermine the primacy of the written text of the Constitution” (para. 36, citing *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 53), and that “constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question” (para. 37, quoting *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, at p. 88).

[107] The summary conviction appeal judge held that “the meaning of s. 35 is not plain and obvious” with respect to the term “aboriginal peoples of Canada”, because the section does not expressly limit the protection of rights to Aboriginal peoples who reside in Canada or whose members are Canadian citizens (2017 BCSC 2389, [2018] 1 C.N.L.R. 135, at para. 42). However, a textual analysis reveals the significance of the

drafters' choice to include the phrase "of Canada" and "*du Canada*" rather than leaving the term "aboriginal peoples" and "*peuples autochtones*" without any qualifier. For one, the use of the word "of" with reference to a place imports dwelling "and is ordinarily taken to mean that the person spoken of dwells at the place named" (*Stroud's Judicial Dictionary of Words and Phrases* (10th ed. 2020), vol. 2, at p. 889). The presumption against tautology carries considerable weight (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 46). It follows that the inclusion of the words "of Canada" cannot be seen as superfluous. This is particularly true when the word "of", which is ordinarily taken to import dwelling, is used in combination with a clear geographical location such as "Canada".

[108] The presumption of consistent expression also sheds light on how the phrase "of Canada" in s. 35 ought to be interpreted. As Sullivan notes:

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. Another way of understanding this presumption is to say that the legislature is presumed to avoid stylistic variation. Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended.

(*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217)

Similar limiting language is used repeatedly in the *Constitution Act, 1982*, as a geographical qualifier: for example, "citizen of Canada" (ss. 3, 6 and 23), "official languages of Canada" (s. 16), "government of Canada" (ss. 20, 32 and 36), and "Constitution of Canada" (s. 21). Interpreting "aboriginal peoples of Canada" in a more

expansive fashion would be incongruent with this presumption and contrary to the intention of the drafters.

[109] This Court considered the meaning of similar language in *Blais* and in *Frank v. The Queen*, [1978] 1 S.C.R. 95. In *Blais*, the Court did not accept that Métis peoples fell within the meaning of “Indians” in the harvesting clause of the Manitoba *Natural Resources Transfer Agreement* (“*NRTA*”), in part because of how that term was used elsewhere in the agreement:

The placement of para. 13 in the part of the *NRTA* entitled “Indian Reserves”, along with two other provisions that clearly do not apply to the Métis, supports the view that the term “Indian” as used throughout this part was not seen as including the Métis. This placement weighs against the argument that we should construe the term “Indians” more broadly than otherwise suggested by the historical context of the *NRTA* and the common usage of the term at the time of the *NRTA*’s enactment. [Emphasis added; para. 30.]

In *Frank*, this Court interpreted the phrase “Indians of the Province” in Alberta’s *NRTA* as having a narrower meaning than “Indians within the boundaries thereof”, a phrase also used in the agreement. In finding that “Indians of the Province” meant Alberta Indians, this Court read the phrase in its ordinary grammatical sense and appropriately imposed a geographical qualifier.

[110] In *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 65, this Court cautioned against an interpretation that would “render . . . constitutional rights redundant and, in doing so, undermine the

delimitation of those rights chosen by our constitutional framers”. In my view, the majority’s approach would do just that. An interpretation of “aboriginal peoples of Canada” that includes groups not located in Canada or whose members are not and never were citizens or residents of Canada gives the words “of Canada” no meaning. The words are not necessary for logic or for grammatical purposes, in opposition to the presumption against tautology. The explicit inclusion of the Métis peoples in s. 35(2) is a further indication that the intent of the framers was not to constitutionalize, as my colleague notes, “rights and relationships that arise from the prior occupation of Canada by Aboriginal societies” (para. 31), but instead to elevate all existing Aboriginal rights held by Aboriginal peoples who were in Canada in 1982 to constitutional status, regardless of whether their societies existed pre-contact or pre-control. The use of the words “of Canada” in the rest of the *Constitution Act, 1982*, is clearly meant to narrow the scope of the rights being constitutionalized through geographical qualifier. It would be incongruent to interpret “aboriginal peoples of Canada” differently.

(2) Philosophic Context

[111] The philosophic context helps explain why residence or citizenship is not referenced in s. 35, but is assumed. As this Court noted in *Van der Peet*, at paras. 18-19, whereas *Charter* rights are, in the liberal enlightenment view, “general and universal”,

[a]boriginal 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.  
[Emphasis added; emphasis in original deleted.]

[112] This characterization has been reflected in this Court's view of reconciliation between the Aboriginal peoples of Canada and the Crown. Writing for the majority in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10, Binnie J. described s. 35's "grand purpose" as being the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship" (emphasis added). Later in *Beckman*, Binnie J. expanded on s. 35's purpose, implicitly signalling the centrality of residency in the formulation of s. 35:

The decision to entrench in s. 35 of the *Constitution Act, 1982* the recognition and affirmation of existing Aboriginal and treaty rights, signalled a commitment by Canada's political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal. At the same time, Aboriginal people do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance. [para. 33]

[113] By framing s. 35(1) as a provision "granting special constitutional protection to one part of Canadian society" (*Van der Peet*, at para. 20), this Court has consistently understood s. 35(1) to import a residency or citizenship requirement. As Binnie J. stated in *Mitchell*, Aboriginal rights, as defined by this Court, "find their source in an earlier age, but they have not been frozen in time . . . . They are projected into modern Canada where they are exercised as group rights in the 21st century by modern Canadians who wish . . . to protect their aboriginal identity" (para. 132).

[114] As Lamer C.J. held in *Van der Peet*, at para. 21, s. 35(1)'s purpose should be understood in relation to "the interests it was meant to protect" (citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). Section 35 protects Aboriginal peoples "as full participants with non-aboriginal peoples in a shared Canadian sovereignty" (*Mitchell*, at para. 135). The protections, therefore, do not and cannot apply to Aboriginal groups in other countries. It cannot be said that these groups "fully participate with other Canadians in their collective governance" (*Beckman*, at para. 33), nor do they "live and contribute as part of our national diversity" (*Mitchell*, at para. 132). It is this reality which must colour the scope and content of the expression "aboriginal peoples of Canada".

(3) Historical Context

[115] Additionally, the historical record does not show that expanding the protections of s. 35(1) to non-Canadian Aboriginal groups was ever considered. In fact, the limited historical sources that could provide guidance as to the meaning of the expression "aboriginal peoples of Canada" show an intention to limit the constitutional protection of Aboriginal rights to only those groups located within Canada.

[116] The *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* ("Minutes"), at the time of discussions around the patriation of Canada's Constitution, reflect an implicit shared understanding among committee participants, including governmental and Aboriginal representatives, that s. 35(1) was intended to protect the rights of

Aboriginal communities located in Canada at that time. For instance, the Honourable Jean Chrétien, then the Minister of Justice and Attorney General of Canada, described how the *Constitution Act, 1982*, would protect “the rights of all the native Canadians” that exist under the treaties or the Royal Proclamation, “the two sources of rights that exist for the natives in Canada” (*Minutes*, No. 3, 1st Sess., 32nd Parl., November 12, 1980, at p. 84; *Minutes*, No. 4, 1st Sess., 32nd Parl., November 13, 1980, at p. 13). George Braden, representing the Northwest Territories government, noted that “Native people in Canada have enjoyed a special status which must be clearly recognized in the constitution of Canada” (*Minutes*, No. 12, 1st Sess., 32nd Parl., November 25, 1980, at p. 60). The statements made by Aboriginal representatives before the committee similarly assumed the existence of a geographical limitation. When discussing proposed amendments, Mary Simon, a representative of the Inuit Committee on National Issues, stated the following:

Subsection (1) of section 23A [a proposed Aboriginal rights and freedoms provision] merely provides for the obvious, namely, that the aboriginal peoples of Canada include Canada’s three groups of indigenous peoples. Presently, there exist other artificial distinctions under Canadian law which have posed considerable problems for a great number of aboriginal people in Canada and for which we must seek alternative solutions.

(*Minutes*, No. 16, 1st Sess., 32nd Parl., December 1, 1980, at p. 13)

Logically, Ms. Simon’s reference to “Canada’s three groups” could only refer to present-day Aboriginal groups residing and present in Canada, thus implying a geographical component.

[117] There are also some remarks in the *Minutes* that explicitly reference a geographical limitation on the meaning of “aboriginal peoples of Canada”. For example, in response to a question about defining the word “Indian”, Nellie Carlson, the Western Vice President of Indian Rights for Indian Women, stated that “[m]y definition of an Indian across Canada is . . . 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” (*Minutes*, No. 17, 1st Sess., 32nd Parl., December 2, 1980, at p. 97).

[118] The Court of Appeal dismissed the *Minutes* as “non-specific in their application” and as not informing the constitutional interpretation of s. 35(1) (para. 64). My colleague concurs, finding that the *Minutes* “she[d] no light” (Rowe J.’s reasons, at para. 41). Respectfully, this view overlooks the compelling evidence outlined above of a shared assumption amongst committee participants that the constitutional protections accorded by s. 35(1) were intended to apply only to Aboriginal groups located in Canada, as reflected in their use of “in Canada” and “Canadian” synonymously with “of Canada”. Drafting history is relevant to constitutional interpretation (*R. v. Poulin*, 2019 SCC 47, at para. 78; *R. v. Stillman*, 2019 SCC 40, at para. 77), and I see no reason to depart from this Court’s prior reliance on the *Minutes* in the instant case.

[119] This Court cannot impose an intention to broaden the constitutional protections under s. 35(1) beyond what was contemplated. If s. 35(1) was intended to



include within its purview Aboriginal groups located outside of Canada, then one would expect there to have been significant discussion and consideration of these broader issues of recognition and jurisdiction, including hearing from the communities outside of Canada about their interests. There is no evidence that any drafters or participants contemplated this novel constitutional measure, which belies any intention to include Aboriginal groups outside of Canada within s. 35(1)'s purview.

[120] As a result, I would find that “aboriginal peoples of Canada” under s. 35(1) are Aboriginal peoples who are located in Canada. In the present case, the Lakes Tribe is wholly located in Washington State in the United States of America, and therefore cannot be considered to be part of the “aboriginal peoples of Canada” under s. 35(1). As Mr. Desautel is not a member of a collective that is part of the “aboriginal peoples of Canada”, he cannot exercise a constitutionally-protected Aboriginal right to hunt for ceremonial purposes in the traditional territory of the Sinixt in British Columbia.

B. *Failing to Adopt a Purposive Interpretation of Section 35 Leads to Implausible and Problematic Results*

[121] The conclusion that the enactment of s. 35(1) did not constitutionalize Aboriginal rights held by collectives located outside of Canada is further bolstered by the deleterious consequences that would arise from the opposite conclusion. My colleague is of the view that these concerns do not justify any change to the law because “[w]hile Aboriginal communities outside Canada can assert and hold s. 35(1) rights, it does not follow that their rights are the same as those of communities within Canada”

(para. 71). With the greatest of respect, I cannot agree. If an Aboriginal group outside of Canada is entitled to exercise s. 35(1) Aboriginal rights in Canada, then it must have equal protection under the Constitution and be able to access and exercise a full panoply of rights in the same fashion as Aboriginal right holders within Canada. Nothing less would uphold the honour of the Crown and further Canada's ongoing process of reconciliation with its first peoples.

[122] As such, extending the constitutional protection of s. 35(1) to include Aboriginal groups located outside of Canada leads to some concerning outcomes. First, s. 35.1 of the *Constitution Act, 1982*, uses the phrase "aboriginal peoples of Canada" in setting out an obligation to invite representatives of these groups to constitutional conferences, as did ss. 37 and 37.1 prior to their repeal (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf), vol. 1, at pp. 28-65 to 28-66). There is no reason in principle why Aboriginal groups holding s. 35(1) rights would be denied a constitutional right to democratic participation under s. 35.1 simply by virtue of their geographical location. While the lower courts were seemingly unconcerned by this prospect, in my view, it is contrary to the organizing constitutional principle of democracy and inconsistent with the purpose of patriation to allow Aboriginal groups located outside of Canada to participate in Canadian democracy as required by s. 35.1 (*Reference re Secession of Quebec*).

[123] Additionally, a multitude of challenges would arise with respect to the Crown's duty to consult. The numbers of groups to consult and, where appropriate,

accommodate would dramatically increase, and it can be anticipated that in some cases accommodating the interests of s. 35(1) rights holders outside of Canada would run counter to accommodating the interests of s. 35(1) rights holders within Canada. Once an Aboriginal group outside of Canada has established a s. 35(1) right, one would assume that the Crown would be put on notice. As such, I cannot agree with my colleague's view that "[b]ecause groups outside Canada are not implicated in this process to the same degree, the scope of the Crown's duty to consult with them, and the manner in which it is given effect, may differ" (para. 76). Aboriginal groups outside of Canada would in fact be implicated to the same degree, and thus the Crown's duty to consult could not differ unless a two-tiered consultation process were established, which would run afoul of its obligation to engage in a "process of fair dealing and reconciliation" (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32) with all Aboriginal rights holders.

[124] Given that the Aboriginal rights recognized and affirmed by s. 35(1) include not only site-specific rights but also rights to the land itself, finding that Aboriginal groups outside of Canada are "aboriginal peoples of Canada" raises the possibility that these groups may, in principle, hold constitutionally protected Aboriginal title to Canadian lands. Aboriginal title confers on the group holding it "the exclusive right to decide how the land is used and the right to benefit from those uses" (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 88). While this is not an issue raised directly in this case, it is by no means hypothetical. The CCT — of which the Lakes Tribe is a member — have already filed

two title claims in British Columbia courts (see *Campbell v. British Columbia (Minister of Forest and Range)*, 2011 BCSC 448, [2011] 3 C.N.L.R. 151). It would be a remarkable proposition that a foreign group could hold constitutionally protected title to Canadian territory, as the required incidental mobility right would be fundamentally incompatible with Canadian sovereignty (see *Mitchell*, at paras. 159-64, per Binnie J.).

[125] The drafters of s. 35(1) could not have intended these deleterious consequences to arise. As such, these concerns militate against the conclusion that the Lakes Tribe is part of the “aboriginal peoples of Canada”. I would therefore allow the appeal on that basis.

C. *Even If the Lakes Tribe Is Part of the “Aboriginal Peoples of Canada”, Mr. Desautel Cannot Claim an Aboriginal Right to Hunt for Ceremonial Purposes*

[126] Even assuming that the Lakes Tribe is part of the “aboriginal peoples of Canada”, as the majority concludes, I would nevertheless allow the appeal on the basis that Mr. Desautel, as a member of the Lakes Tribe, cannot claim an Aboriginal right to hunt for ceremonial purposes within the traditional territory of the Sinixt in British Columbia. In my view, the *Van der Peet* test for an Aboriginal right under s. 35(1) is not satisfied in this case.

[127] I agree with my colleague that the test for Aboriginal rights for groups outside of Canada is the same as the test for groups within Canada. In accordance with the *Van der Peet* analysis, if an Aboriginal group outside of Canada can show that the

pre-contact practice, tradition or custom supporting the claimed modern right is integral to its distinctive pre-contact Aboriginal society, and that the right has a reasonable degree of continuity with the “integral” pre-contact practice, tradition or custom, then the Aboriginal group must receive full recognition of its s. 35(1) rights (*Lax Kw’alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 46).

[128] However, in my view, the trial judge committed a reviewable error in her application of the *Van der Peet* test. In particular, she erred in finding that the continuity requirement of the test was met.

(1) Continuity

[129] Section 35(1) protects only those present-day practices that have a reasonable degree of continuity with the practices that existed prior to contact (*Van der Peet*, at paras. 63-65). Granted, as the Court stated in *Van der Peet*, the concept of continuity does not require an “unbroken chain of continuity” (para. 65, per Lamer C.J.) or a “year-by-year chronicle of how the event has been exercised since time immemorial” (para. 249, per McLachlin J., dissenting on other grounds). Continuity must be interpreted flexibly. Such flexibility, however, has its limits.

[130] As I see it, while temporal gaps in the actual practice do not necessarily preclude the establishment of an Aboriginal right (*Van der Peet*, at para. 65), failing to tender sufficient evidence that the practice was maintained or, at least, that a connection

to the historical practice was maintained during such gaps may be fatal. Aboriginal rights claims require that proper and sufficient evidence be gathered and adduced to meet the legal requirements for such rights (*Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 84).

(2) Application

[131] Turning to the appeal before us, it is important to review the findings of fact made by the trial judge. The trial judge found that the Sinixt had continued their seasonal harvesting round in the northern part of their territory from the time of contact (1811) until around 1870. Around 1880 and 1890, the majority of the Lakes peoples moved to the Colville Reservation in Washington State. By 1902, only 21 Sinixt remained living in their traditional territory in Canada when the federal government set aside a reserve for the “Arrow Lakes Band”, including Sinixt, Ktunaxa, and Secwepemc members. In 1956, after the last member of the Arrow Lakes Band died, the federal government declared the Band extinct.

[132] The record clearly shows that after 1930, the Lakes Tribe did not travel to or hunt in British Columbia. Today, the Lakes Tribe does not, as their ancestors did, “exercise a robust seasonal round in all of their traditional territory including those lands now in British Columbia” (para. 119). The only evidence proffered at trial about the Lakes Tribe’s presence in British Columbia at all before 2010 was a singular event in November 1972, when Charlie Quintasket, “a Lakes Indian from the Colville

reservation”, walked into the office of Aboriginal scholar Dr. Dorothy Kennedy and asked why the Lakes people had no Indian reserves in Canada (para. 49). The only evidence that the Lakes Tribe *maintained a connection* to the claimed right was the fact that “the land was not forgotten” (para. 50) in the minds of the Lakes Tribe members and that the Lakes Tribe engaged in the practice of hunting in Washington State at the time of contact.

[133] Mr. Desautel pointed to the creation of the international border by the 1846 Oregon Boundary Treaty and the outlawing of hunting by British Columbia through the *Game Protection Amendment Act, 1896*, S.B.C., c. 22 (“*1896 Act*”), to explain why the Lakes Tribe had gradually ceased hunting in the Sinixt traditional territory. The trial judge held that the Sinixt had continued to hunt in British Columbia up to the 1930s despite the passing of the *1896 Act*. Therefore, it cannot be said that the *1896 Act* prevented the Sinixt from hunting. But even if this is accepted to be so, it does not explain the Lakes Tribe’s absence from the province for a period of almost 30 years — from 1982, when existing Aboriginal rights were elevated to constitutional status by the *Constitution Act, 1982*, to 2010, when Mr. Desautel travelled to British Columbia for the purpose of shooting a cow-elk to launch this test case.

[134] Quite simply, there is no direct evidence between 1930 and 1982 and between 1982 and 2010 that the Lakes Tribe engaged in anything that could be considered a modern-day practice of hunting in this territory. This was not a case whereby the Lakes Tribe could not provide a “year-by-year chronicle of how the event

has been exercised since time immemorial”; rather, the Lakes Tribe did not hunt, let alone exercise a seasonal round, in British Columbia after 1930.

[135] I am of the view that the trial judge made a legal error in concluding that the chain of continuity had not been broken and that Mr. Desautel had established an Aboriginal right to hunt in British Columbia. While the trial judge’s findings of fact are owed deference because the weighing of evidence in an Aboriginal rights claim is “generally the domain of the trial judge, who is best situated to assess the evidence as it is presented” (*Mitchell*, at para. 36), the facts as she found them do not meet the continuity requirement necessary to establish an Aboriginal right.

[136] Continuity cannot be established simply because there is evidence that “the land was not forgotten” in the minds of the Lakes Tribe members. This is not, and cannot be, the standard. Even if the fact that the Lakes Tribe engaged in some hunting practices in Washington State is considered, the evidence is inconclusive. Further, without an explanation as to its meaning, the evidence that Mr. Quintasket asked Dr. Kennedy about Lakes Tribe reserves in Canada simply has no legal significance or relevance. Given that the evidence of continuity is amorphous and imprecise in many respects, there was no basis upon which the trial judge could have drawn an inference of continuity. As the Court explained in *Mitchell*, at para. 39:

There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, “[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse” (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14). In particular,



the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing “due weight” on the aboriginal perspective, or ensuring its supporting evidence an “equal footing” with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued “simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case” (*Van der Peet, supra*, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated. [Emphasis in original; text in brackets in original.]

[137] Given the Lakes Tribe’s lengthy and unaccounted-for absence from British Columbia between 1930 and 2010, continuity is not made out. A single shot cannot create the Lakes Tribe’s modern exercise of the right. In the absence of even minimally cogent evidence, this conclusion seems inescapable.

[138] Therefore, even if the Lakes Tribe were found to be part of the “aboriginal peoples of Canada”, the lack of continuity would be fatal to Mr. Desautel’s claim for a constitutionally-protected s. 35(1) Aboriginal right to hunt for ceremonial purposes in the Lakes Tribe’s traditional territory in British Columbia. I would allow the appeal on this alternative basis as well.

#### D. *Common Law Aboriginal Rights*

[139] 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” (*Van der Peet*, at para. 28), subject to the exceptions of sovereign incompatibility, surrender, and extinguishment (*Mitchell*, at para. 10). However, this Court has not previously considered the effect of s. 35(1) on the common law rights of an Aboriginal group located outside of Canada. Until now, this Court has only ever considered s. 35(1) in relation to claimants who were indisputably “aboriginal peoples of Canada”.

[140] The above reasons should not be taken as meaning that an Aboriginal collective located outside of Canada that is found not to be part of the “aboriginal peoples of Canada”, such as the Lakes Tribe, is foreclosed from establishing common law Aboriginal rights in Canada. However, I find it unnecessary to decide this issue in this case. Mr. Desautel did not assert that he had a common law Aboriginal right to hunt. Indeed, he resisted this notion for a number of reasons, one being that a common law right would not have exempted him from the *Wildlife Act* provisions at issue. Therefore, I consider it unnecessary to determine whether Mr. Desautel holds a common law Aboriginal right to hunt in British Columbia, and I leave the question of whether the common law continues to protect Aboriginal rights not constitutionalized by the enactment of s. 35(1) for another day.

#### IV. Conclusion

[141] In summary, I would find that the expression “aboriginal peoples of Canada” in s. 35(1) means present-day Aboriginal peoples who are located in Canada,

and I would allow the appeal for that reason. But even if this was not the case, Mr. Desautel cannot establish that he was exercising a s. 35(1) Aboriginal right to hunt in the Sinixt traditional territory in British Columbia, as he has failed to establish reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim. I would therefore allow the appeal on this alternative basis as well.

[142] I would allow the Crown's appeal and answer the constitutional question in the negative. As a result, Mr. Desautel should not be exempt from the *Wildlife Act* provisions under which he was charged. I would enter a verdict of guilty on both counts of hunting without a licence contrary to s. 11(1) of the *Act* and hunting big game while not being a resident contrary to s. 47(a) of the *Act*, and remit the matter to the trial court for sentencing.

The following are the reasons delivered by

MOLDAVER J. —

[143] I have had the benefit of reading the reasons of my colleagues Rowe and Côté JJ. For the purposes of this appeal, I am prepared to assume, without finally deciding, that Rowe J. is correct in holding that, as a member of an Aboriginal collective located outside Canada, Mr. Desautel is entitled to claim the constitutional protection provided by s. 35(1) of the *Constitution Act, 1982*. I nevertheless agree with Côté J., for the reasons she has expressed, that Mr. Desautel has not met his onus of

establishing the continuity element of his claim, under the test for Aboriginal rights pursuant to *R. v. Van der Peet*, [1996] 2 S.C.R. 507. Accordingly, I would allow the appeal on that basis and impose the same remedy as Côté J.

*Appeal dismissed, MOLDAVER and CÔTÉ JJ. dissenting.*

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