File No. 38734

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

RICHARD LEE DESAUTEL

RESPONDENT

- and -

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PARTS I and II – OVERVIEW AND QUESTIONS IN ISSUE

1. Nuchatlaht takes the following positions:

   a. After the date of sovereignty, aboriginal rights cannot be lost by reason of abandonment.

   b. The enactment of section 35(1) of the *Constitution Act, 1982* did not "elevate" Proclamation rights to constitutional status; rather, it affirmed their existing constitutional or quasi-constitutional status.

   c. The Appellant is statute-barred from advancing an argument that an Indigenous group's rights should be recognized merely at common law without receiving constitutional protection, by operation of section 3 of the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44.

PART III – ARGUMENT

A. The Court Should Reject the Doctrine of Abandonment.

i. Alberta's argument concerning continuity amounts to an abandonment argument

2. Nuchatlaht is concerned by an argument advanced by intervener Alberta. Alberta seeks to import a "geographic continuity" requirement into the *Van der Peet* test. Alberta says that because the Lakes Tribe does not have an ongoing presence in BC, it cannot have an aboriginal right to hunt there.[1] Effectively, Alberta is saying that when an Indigenous group departs from its traditional territories, any rights that it may have in that area are abandoned.

3. There has been some judicial commentary on whether aboriginal rights can be abandoned, but this Court has yet to squarely address the topic. In the *Delgamuukw* trial decision, McEachern CJ accepted in principle that aboriginal rights could be abandoned through disuse, though he expressed strong reservations and stressed that courts should be slow to draw that conclusion.[2] On appeal to the BC Court of Appeal, Lambert JA commented in *obiter* that he did not believe that there was any theoretical basis for the view that aboriginal rights could be

[1] Alberta's factum at paras 73 and 76-78.
[2] *Delgamuukw v. British Columbia*, 1991 CanLII 2372 (BCSC), at pages 798-803 and 824-826

abandoned, at least not after the date of Crown sovereignty.[3] Lambert JA restated this view in his dissenting opinion in *Gladstone (BCCA).*[4] The other justices did not address the issue.

4. Nuchatlaht submits that as Alberta has raised abandonment, this Court should now clarify the law. The concept of abandonment of aboriginal rights is contrary to both the common law and Indigenous perspectives, and has no place in modern s. 35(1) jurisprudence.

ii. Alberta's abandonment argument misconstrues the "continuity" component of the *Van der Peet* test

5. At para. 76 of its factum, Alberta characterizes the continuity component of the *Van der Peet* test in the following way: "Both the *Van der Peet* and *Powley* decisions include continuity as a requirement. This acknowledges that, over time, certain practices, customs or traditions may no longer be integral to the collective." [Emphasis added]

6. Alberta's position fundamentally misconstrues the meaning and function of continuity in the *Van der Peet* test. Lamer CJ originally expressed the continuity requirement as follows:

> Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).[5]

7. Lamer CJ also says that a key function of the continuity requirement is to permit a flexible approach that allows for evolution over time, avoiding a "frozen rights" approach.

8. The *Van der Peet* test could be described as "backwards-looking" – it begins with the modern practice that is said to be a protected aboriginal right, and looks backwards to see whether it can be connected to an ancestral (pre-contact) practice, such that it could be said to constitute a modern continuation or evolution of that ancestral practice. Another way of saying this is that the "continuity" requirement in *Van der Peet* means that the modern practice that is said to be an aboriginal right must in some sense be a *continuation* of an ancestral practice. It does *not* mean that the practice must have been carried on *continuously* since contact.

[3] *Delgamuukw v. British Columbia*, 1993 CanLII 4516 (BCCA), at paras. 850-852
[4] *R. v. Gladstone*, 1993 CanLII 4520 (BCCA), at para. 76
[5] *R. v. Van der Peet*, 1996 CanLII 216 (SCC), at para. 64.

9. Abandonment, by contrast, is premised on a "forward-looking" approach whereby one begins with the ancestral practice, and then looks forward in time to see whether continuity was broken at any point by the Indigenous group ceasing the practice or leaving its territory. On this approach, an aboriginal right comes into being at contact and persists up until the "date of discontinuity," whereupon it is "abandoned" and vanishes forever.

10. This approach is inconsistent with – indeed, almost an inversion of – the test as set out in *Van der Peet*. Lamer CJ expressly took no position on how the disappearance of a practice, custom or tradition would affect an aboriginal claim. He expressly stated that an unbroken chain of continuity is not required, and that an Indigenous group could cease to engage in a practice and then resume it at a later date without precluding the establishment of an aboriginal right.[6]

11. The notion that First Nations can cease and then resume the practice that grounds an aboriginal right is entirely consistent with the "backwards-looking" approach to continuity, whereby the court is attempting to determine whether the claimed modern-day right is a *continuation* of the ancestral practice. If, on the other hand, one takes the abandonment view – that the practice must be carried on *continuously* lest it be abandoned – then this becomes, at best, a rather murky and ambiguous exception. How is a court to determine at what point a practice has been abandoned, as opposed to simply suspended? The two situations are apt to look very similar up until the date the practice is resumed.

12. In summary, the continuity requirement does not mean that aboriginal rights begin at contact and persist only until a discontinuity occurs. Rather, it requires that the modern practice which is said to be an aboriginal right can be shown to be a continuation of an ancestral practice. This does not require the demonstration of continuous occupation of the geographic locus of the claimed right – if an Indigenous group leaves (or is displaced from) an area and then later seeks to resume activities in that area, this is entirely consistent with the *Van der Peet* test. Indeed, it would be perverse to suggest that an Indigenous group has abandoned a site-specific aboriginal right, when the very thing that brings it before the court is its attempt to resume the associated practice on that very site. The doctrine of abandonment is premised on a misunderstanding of the role of continuity in the *Van der Peet* test, and should be rejected by this Court.

[6] *R. v. Van der Peet*, 1996 CanLII 216 (SCC), at paras. 63 and 65.

iii. Abandonment raises further issues for aboriginal title claims

13. Although aboriginal title is not in issue in the present case, acceding to a doctrine of abandonment could have serious implications for aboriginal title claims.

14. Once an Indigenous group has established that its ancestors held aboriginal title to land at the date of sovereignty then, subject to any evidence of subsequent surrender or extinguishment, that should end of the inquiry. Endorsing the doctrine of abandonment would put Indigenous groups in the position of proving not only that they had title at the date of sovereignty, but also that they did not subsequently "lose" it at any time between that date and the present. That is not the test for aboriginal title as articulated in *Delgamuukw* and *Tsilhqot'in*, and it would place an unreasonable evidentiary burden on Indigenous groups seeking to have their title recognized.

15. Even if the onus is placed on the Crown to prove abandonment, the Crown would still be in a position to demand disclosure of any and all documents pertaining to the use of the title lands between the date of sovereignty and the present, on the basis that it cannot determine whether there has been abandonment until it sees all evidence of use. This is not a hypothetical concern – in Nuchatlaht's aboriginal title claim before the BC Supreme Court, the Appellant British Columbia has taken precisely this approach. This Court should therefore be live to the potential impacts on aboriginal title claims as it considers Alberta's argument that "there must be some pattern of use and presence in the area – both historically and in the present".

16. In addition to these pragmatic concerns, Nuchatlaht also submits that this Court should firmly reject the doctrine of abandonment in the aboriginal title context as a matter of law.

17. Although aboriginal title is a type of aboriginal right, the legal test is different and is concerned with whether, as of the date of Crown sovereignty (generally taken to be 1846), the Indigenous group exclusively occupied the claimed territory. The focus is therefore on 1846's state of affairs in 1846, not today's. So long as the claimant group exercised the necessary exclusive occupation, their title is said to have "crystallized" at the date of Crown sovereignty.[7]

18. The concept of continuity arises in the test for aboriginal title in at least three different senses. First, there is "continuity of community" – the claimant group must establish that they are the proper rights-bearing descendants of the group said to have exercised exclusive

[7] *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), at para. 145.

occupation at the date of sovereignty. Second, there is "continuity of occupation" – *optionally*, a claimant group may use evidence of present occupation of the claim area to support an inference that it exclusively occupied that area in 1846. A claimant group relying on this argument must also show continuity between their occupation of the area in 1846 and their occupation today. This is an optional mode of proof, not a requirement, and an Indigenous group may seek to prove exclusive occupation in 1846 directly without invoking continuity of occupation.[8]

19. The third sense in which continuity arises in aboriginal title is the concept of an Indigenous group maintaining a "substantial connection" to the land. Per *Van der Peet*, the practice, custom or tradition that grounds an aboriginal right must be "integral to the distinctive culture of the claimant group". Lamer CJ affirmed in *Delgamuukw* this requirement was also part of the test for aboriginal title. However, he added that in practical terms, this requirement could be presumed to be met in title cases because:

> "it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title."[9]

20. This Court has never imposed a positive obligation on Indigenous groups to demonstrate that they have maintained a substantial connection to claimed title lands after 1846. At para. 142, Lamer CJ states that in the test for aboriginal title, "the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy", which suggests that only exclusive occupancy at the date of sovereignty need be proven, and there is no need to separately demonstrate the maintenance of a substantial connection to the land (unless relying on the optional proof based on present-day occupancy).

21. This issue was noted and commented on by Cromwell JA in *Marshall (NSCA)*:

> I find it difficult to reconcile this statement with the earlier one to the effect that, in title cases, the "integral to the distinctive culture test" is "... subsumed by the requirement of occupancy ..." (para. 142). In one case, occupancy at sovereignty is enough, whereas in the other, occupancy plus ongoing substantial connection is required. Moreover, any requirement for ongoing substantial connection with the land seems at odds with the purpose of s. 35(1) because insisting on post-sovereignty continuity would tend to "...

[8] *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), at paras. 152-153
[9] *Delgamuukw v. British Columbia*, 1997 CanLII 302, at para. 151 [emphasis added].

> perpetuat[e] the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect aboriginal rights to land": para. 153.[10]

22. Cromwell JA then considered the subject at length before finally concluding that "continuity of occupation from sovereignty to the present is not part of the test for aboriginal title if exclusive occupation at sovereignty is established by direct evidence of occupation before and at the time of sovereignty."[11] This reasoning is sound and should be re-affirmed by this Court.

23. In any case, Nuchatlaht submits that once title 'crystallizes' at the date of sovereignty, it is no longer subject to loss or abandonment due to a lack of presence on the land. This is consistent with the common law view of title, which recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically.[12]

iv. Abandonment is contrary to the Indigenous perspective

24. The notion that by leaving its traditional territory, an Indigenous group abandons its site-specific aboriginal rights is also inconsistent with the Indigenous perspective, because it assumes that Indigenous groups can abandon their cultural identities as peoples closely connected to their traditional territories.

25. Connection to traditional territory is central to Indigenous identity. The Royal Commission on Aboriginal Peoples ("RCAP") noted that "[l]and is absolutely fundamental to Aboriginal identity" and "is reflected in the language, culture and spiritual values of all Aboriginal peoples."[13] The Inter-American Court of Human Rights also notes that "the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival."[14]

26. Unlike the immutable connection between traditional territory and Indigenous identity, the location of modern-day residence is often a function of colonialism and unconnected to

[10] *R. v. Marshall*, 2003 NSCA 105, at para. 164
[11] *R. v. Marshall*, 2003 NSCA 105, at paras. 157-181
[12] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, para. 54, citing with approval *Keefer v. Arillotta* (1976), 1976 CanLII 571 (ONCA).
[13] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Volume 2 – Restructuring the Relationship*, (Ottawa: Supply and Services, 1996) Chapter 4, p. 417 [RCAP Report].
[14] *The Mayagna (Suom) Awas Tingni Community v Nicaragua*, Inter-Am Ct. H.R., (Ser. C) No. 79 (2001), para 149.

Indigenous identity. RCAP described how colonialism had a profound impact on Indigenous populations by displacing them physically from their lands. It noted that the *Indian Act* likewise resulted in legislated dispossession of traditional territories whereby Indigenous peoples lost control of their own lands and resources.[15] RCAP also observed that "Aboriginal peoples have had great difficulty preserving a home in what has always been their country" and in "maintaining their lands and livelihoods in the face of massive encroachment."[16]

27. Acceding to an argument that site-specific rights are abandoned through a change in residence presumes that displaced Indigenous groups have entirely lost their connection to their traditional territories, and thus fundamentally altered their identities. This is contrary to the Indigenous perspective and, especially where displacement was partly or wholly involuntary, "perpetuat[es] the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect aboriginal rights to land",[17] as this Court cautioned against in *Delgamuukw*.

B. Section 35(1) Did Not "Elevate" Proclamation Rights to Constitutional Status; It Affirmed Their Constitutional Status.

28. The Appellant, at paragraph 39 of its factum, argues that prior to 1982, aboriginal rights existed as common law rights, but were elevated to constitutional status by the enactment of s. 35 of the *Constitution Act, 1982*. At paragraphs 82-84 of its factum, the Appellant refers extensively to the 1980 hearings of the Joint Committee of the Senate and House of Commons. Nuchatlaht disagrees with the Appellant's characterization of what transpired at, and subsequent to, those meetings, and with its view that aboriginal rights, at least those deriving from the Royal Proclamation of 1763, were not constitutionally protected prior to 1982.

29. Nuchatlaht, through its umbrella organization the Nuu-chah-nulth Tribal Council, appeared, gave evidence, and made representations at the Joint Committee hearings. At those hearings, the Nuu-chah-nulth people argued that the entire purpose of the new Constitution's proposed aboriginal rights clause was to preserve the *existing* constitutional status of aboriginal rights, particularly those rights derived from the Royal Proclamation of 1763. The Nuu-chah-nulth people argued that Proclamation rights were already constitutionally protected, advancing

[15] RCAP Report, Volume 1, Chapter 6, p. 132
[16] RCAP Report, Volume 2, Chapter 4, pp. 417-418
[17] *Delgamuukw v. British Columbia,* 1997 CanLII 302 (SCC), at para. 153

the need for a clause such as s. 35 to ensure that existing rights would not be *demoted* from constitutional status due to the new Constitution's failure to mention them.

30. On December 16, 1980, legal counsel for the Nuu-chah-nulth Tribal Council made the following comments to the Joint Committee:

> At the heart of the natives' submissions is the idea that native rights are already a part of the constitution of Canada and that this *status quo* will be upset by the introduction of a new document which makes no explicit entrenchment of those rights. That is the point, the fundamental point we wish to make.[18]

31. At the Joint Committee hearings the Nuu-chah-nulth were responding to early drafts of the Constitution that included a Schedule, similar to what eventually became "Schedule to the *Constitution Act, 1982* Modernization of the Constitution." Then, as now, the Schedule did not include the Royal Proclamation of 1763.[19] The Nuu-chah-nulth submissions to the Joint Committee were directed at the principle of *inclusio unius est exclusio alterius*. The concern was that by not including the Royal Proclamation in the Schedule, the constitutional status of Proclamation rights would be lost - in effect, demoted to being merely common law rights.

32. The problem the Nuu-chah-nulth addressed at the Joint Committee was solved in three ways: Firstly, the word "includes" is found in s. 52(2) of the *Constitution Act, 1982*, indicating that the Schedule is not exhaustive. Secondly, s. 35 was added, making it crystal clear that the existing constitutional protections for aboriginal rights and title would be continued – "affirmed". Thirdly, the Royal Proclamation of 1763 was explicitly mentioned in s. 25(a).

33. In *Delgamuukw* and later in *Mitchell*, this Court appeared to accept that s. 35(1) "constitutionalized" or "elevated to constitutional status" aboriginal rights which had not previously enjoyed that protection.[20] Respectfully, this was not the shared understanding of the parties at the Joint Committee in 1980, and is in fact an incorrect understanding of the nature of Proclamation rights prior to 1982, and of the reasons why s. 35 was added. Nuchatlaht says now,

[18] Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada,* 32nd Parl, 1st Sess, No 27 (16 December 1980) at 129 (Submissions by Jack Woodward).
[19] *Constitution Act, 1982,* Schedule B to the Canada Act 1982 (UK), 1982, c 11, Schedule to the Constitution Act 1982: Modernization of the Constitution.
[20] *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), at para. 136; *Mitchell v. MNR*, 2001 SCC 33, at para. 11

as it did then, that Proclamation rights, at least, were already a part of the Constitution prior to 1982, and did not suddenly become constitutional rights as of that date. Nor were any aboriginal rights excluded and thereby "demoted" to mere common law rights as of 1982.

34. Nuchatlaht is concerned that the doctrine the Appellant advances will set a dangerous precedent. If only some, but not all, of the pre-1982 aboriginal rights were "promoted" to constitutional status in 1982, then perhaps there are other such categories. It was precisely to prevent that possibility that the Nuu-chah-nulth Tribal Council appeared at the Joint Committee and argued for a clause confirming that Proclamation rights enjoy constitutional status.

35. Finding that there exist both constitutional and "merely" common law aboriginal rights risks the inappropriate erosion of s. 35 rights. This is not an academic concern. Nuchatlaht is currently advancing an aboriginal title claim before the BC Supreme Court. In that case, British Columbia, the Appellant in this appeal, argues that Aboriginal title was at some point in time voluntarily abandoned. Such an argument would have been inconsistent with rights derived from the Royal Proclamation of 1763 prior to 1982.

C. British Columbia is Statute-Barred From Advancing its Argument Concerning "Merely" Common Law Aboriginal Rights

36. On November 28, 2019, the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44, came into force. Pursuant to section 3, the BC government "must take all measures necessary to ensure the laws of British Columbia are consistent with [the United Nations Declaration on the Rights of Indigenous Peoples]".

37. Nuchatlaht takes the position that a Crown pleading in a s. 35 rights case is a government "measure" within the meaning of the *Act*. The Appellant is therefore statute-barred from advancing any argument in this court which would be inconsistent with UNDRIP.

38. Article 26 of UNDRIP confirms Indigenous peoples' rights to their lands and resources, specifically stipulating: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired", and requiring States to "give legal recognition and protection to these lands, territories and resources."[21]:

[21] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess (2007).

39. In its factum, the Appellant acknowledges that the Lakes Tribe may hold aboriginal rights in Canada, but submits that these rights should be treated as common law rights only, with no constitutional protection. This would create a class of aboriginal rights that are recognized but still subject to statutory abrogation. The Appellant acknowledges at paras. 6 and 50 of its factum that a "mere" common law hunting right would not be exempt from the provisions of the *Wildlife Act*. The scheme proposed by the Appellant amounts to "legal recognition without protection" – the right is acknowledged, but is unprotected from statutory abrogation. This pleading is inconsistent with Article 26 of UNDRIP, which requires that states give both "legal recognition and protection" to the lands, territories and resources traditionally owned, occupied or used by Indigenous peoples, "with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." Accordingly, the Appellant is statute-barred from pleading this argument by operation of section 3 of the *Declaration on the Rights of Indigenous Peoples Act.*

40. This Court must be informed when governments make promises to Indigenous peoples, such as the promise contained in the *Declaration on the Rights of Indigenous Peoples Act*, and to vigorously enforce such promises. The alternative is to allow governments to be hypocritical, leading to disillusionment, and running counter to the project of reconciliation. As Greckol JA recently wrote in her concurring decision in *Fort McKay (ABCA)*, "The honour of the Crown may not mandate that the parties agree to any one particular settlement, but it does require that the Crown keep promises made during negotiations designed to protect treaty rights."[22] The *Act* is a promise to uphold UNDRIP's principles, and the Appellant breaks that promise in its factum.

PART IV – COSTS

41. Nuchatlaht seeks no order as to costs, and asks that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on June 19, 2020

FOR: Jack Woodward, Q.C.
Ethan Krindle
Counsel for the Intervener Nuchatlaht First Nation

[22] *Fort McKay First Nation v. Prosper Petroleum Ltd*, 2020 ABCA 163, at para. 83.

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