

**OPENING STATEMENT**

This appeal deals with the question of whether an assertion for aboriginal consultation (in relation to Crown conduct that stands to interfere with claimed, yet unproven, aboriginal rights) may be brought by individuals suing in a representative capacity by way of a derivative claim on behalf of an aboriginal Collective which lacks Band status and which is defined in terms of descent from distinct historical occupiers of territory that was dissected by the establishment of the international boundary between the U.S.A. and Canada with the result that those living south of that boundary were amalgamated with eleven other tribes into a confederacy which claims to represent the Collective.

## **PART 1- STATEMENT OF FACTS**

1. On the basis of a significant anthropological and ethnographic record, the Court below accepted the existence of a historic rights-bearing community, the Sinixt.<sup>1</sup>
2. Anthropological delineation of traditional Sinixt territory spans from a southern point near Kettle Falls (in present-day Washington) to a northern point near the Arrow Lakes in British Columbia (“the Territory”).<sup>2</sup> Approximately 80% of the Territory falls within present-day Canada and 20% falls within the United States of America.
3. Much of the Sinixt population was decimated by smallpox shortly after contact.<sup>3</sup> Thereafter, the Sinixt Territory was geographically and politically severed by an international boundary, after which the free passage of surviving Sinixt across that boundary was restricted by the Crown.<sup>4</sup>
4. The Sinixt's numbers in Canada were reduced by their displacement and confinement to the United States where, in the absence of their consent<sup>5</sup>, they were amalgamated in 1872 with eleven other tribes into the Confederated Tribes of the Colville Reservation (“the Colville Confederacy”). Many Sinixt settled on their U.S. reserve land at a time when they had not been provided with reserve land in Canada.<sup>6</sup>
5. The said displacement to the South was not voluntary and did not constitute an abandonment of their northern Territory.<sup>7</sup>
6. In 1902, the Crown established an inadequate<sup>8</sup> reserve for the Sinixt in British Columbia, giving rise to a corresponding Band of 22 individuals, the Arrow Lakes Indian

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<sup>1</sup> Chambers Judgment at paragraphs 3, 13, 15, 16, 17, 20 & 22; the Sinixt are also referred to as “Lakes” as indicated in the Petitioners’ Condensed Book at page 18 (AB-V at 692)

<sup>2</sup> Petitioners’ Condensed Book at page 10 (AB-V 684); Aff James 1, paras 10, 12, 14, AB-I 2, 3, & 167

<sup>3</sup> Chambers Judgment paragraph 23

<sup>4</sup> Bouchard, Randy and Dorothy Kennedy. Lakes Indian Ethnography and History. August 1985, Petitioners’ Condensed Book, AB-V 760 to 763; Aff James 1, paras 29-30, AB-I 5; Aff James 2, ex.161, AB-IV 626-630

<sup>5</sup> Aff James 1, ex.97AB-II 300

<sup>6</sup> Chambers Judgment at paragraphs 3, 13, 15, 16, 17, 20 & 22

<sup>7</sup> Chambers Judgment at paragraph 26; Aff Geiger, ex.B, AB-III 348;

<sup>8</sup> Aff Geiger, ex.B, AB-III 337, 349

Band, consisting largely of the occupants of the reserve, a population not exhaustive of the Sinixt community.<sup>9</sup> But that reserve reverted to the Province once its 22 occupants died out or left and the Crown declared the Band to be extinct,<sup>10</sup> notwithstanding the continued existence of the Sinixt as a people.<sup>11</sup> At the time of the extinction, Sinixt individuals were living among and as members of the Osoyoos, Penticton, and Okanagan Bands of the Okanagan Nation Alliance, in Washington State as members of the Lakes Tribe of the Colville Confederacy, and off reservation in Canada and the United States.<sup>12</sup>

7. At all material times, and when they were most vulnerable, Canada failed to protect the Sinixt by providing them with viable reserve land at their traditional burial and hunting grounds<sup>13</sup>, with the result that they could not maintain viable communities in Canada, were declared extinct<sup>14</sup>, became disenfranchised from the Indian Act and lost the opportunity for a statutorily endorsed membership structure (Band list) and leadership structure (Band council).<sup>15</sup>
8. The Petition was filed on November 4, 2010, seeking an order quashing a provincially issued Licence (for timber harvesting on Perry Ridge) on the grounds that the Crown had breached a duty to consult with the Sinixt under s. 35 of the *Constitution Act*.
9. The Petition is brought by the Petitioners by way of derivative claim on behalf of the Sinixt - the s. 35 rights-bearing Collective.
10. The Petitioners assumed their representational roles in the context of a representational vacuum: the absence of any autonomous representation by Sinixt of Sinixt interests in Canada.<sup>16</sup>

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<sup>9</sup> Chambers Judgment at paragraphs 30 & 33; Aff Geiger, ex.B, AB-III 337

<sup>10</sup> Chambers Judgment at paragraph 34; Aff James 1 ex.53, AB-II 244

<sup>11</sup> Letter from Irwin, MP, Aff James 1, ex.54, AB-II 160

<sup>12</sup> Petitioners' Condensed Book at page 42 (AB-V 716); Chambers Judgment at paragraphs 39, 42

<sup>13</sup> Chambers Judgment at paragraph 32; Aff Geiger ex.B, AB-III 337-348

<sup>14</sup> Chambers Judgment at paragraph 34

<sup>15</sup> Aff James 1, para 31, AB-I 5

<sup>16</sup> Chambers Judgment paragraph 37; Aff James 2 paras 4-34, AB-III 393-397

11. In the context of that historical vacuum, a group of Sinixt elders emerged in the late 1980s in an effort to assert their cultural interests through representation in Canada, consisting of the movement to which the Petitioners are the contemporary successors.
12. Since that time, the Petitioners have long laboured to obtain recognition of the rights of their contemporary community.<sup>17</sup> In particular, Marilyn James has been active in advancing the claims of the Sinixt since 1990<sup>18</sup> and was appointed as Sinixt spokesperson in 1991 and reaffirmed in 1995. Robert Watt was appointed about the same time to the traditional role as guardian and caretaker of the Sinixt burial site at Vallican.<sup>19</sup> Revered Sinixt elder, Eva Orr, affirmed the role of Bob Campbell as tribal leader shortly before her death in 1996. He has played a prominent role in seeking to advance the claims of the Sinixt.<sup>20</sup>
13. The Petitioners appear to represent those people who identify themselves as Sinixt, who have been most active since 1990 in attempting to protect their rights and interests in British Columbia.<sup>21</sup>
14. There is a significant history of consultation between the Petitioners (in their capacities both as individuals and as directors of the Sinixt Nation Society) and Crown agencies, including Parks B.C., the Species at Risk Coordination Office of the Minister of Agriculture and Lands, school districts and, most notably, BC Hydro.<sup>22</sup>
15. The record contains a large body of evidence with respect to the 22-year history of the Petitioners vigorously representing the Sinixt and asserting the Sinixt's cultural interests in Canada by:

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<sup>17</sup> Chambers Judgment paragraph 3; Aff Aaron, ex.3, AB-III 384-390

<sup>18</sup> Chambers Judgment paragraph 73 and 77

<sup>19</sup> Chambers Judgment paragraphs 47 - 49; Aff James 1 paras 53-56, AB 9-10

<sup>20</sup> Chambers Judgment paragraph 69

<sup>21</sup> Chambers Judgment at paragraph 57

<sup>22</sup> Chambers Judgment at paragraph 77; 1st Affidavit of Marilyn James, paras 60-74 and 100-110, Exhibits 60 - 74; AB-I 18-21, AB-II 246-283

A. protecting the ancient Sinixt village site and burial ground of Vallican at Perry Ridge and campaigning for and executing the repossession and reburial of human remains of Sinixt ancestors; and

- 1<sup>st</sup> Affidavit of M. James, paragraphs 43 – 56, AB-I 8-10
- 2<sup>nd</sup> Affidavit of M. James, paragraphs 4 – 16, AB-III 393-394
- 2<sup>nd</sup> Affidavit of M. James, Exhibits 1 – 10 and 65 – 91, AB-III 424-449; AB-IV 533-572
- Affidavit of Yvonne Swan, AB-IV 631

B. practising the territorial responsibility to all land, water, plant, animal and cultural resources within the Sinixt Territory pursuant to the cultural law of the *wbuplak'n*.

- 1<sup>st</sup> Affidavit of Marilyn James, paragraphs 37, 79 – 87 and 100 - 110, AB-I 6-21
- 1<sup>st</sup> Affidavit of Marilyn James, Exhibits 15 – 37; 39, 40, 56 – 74, AB-II 170-283
- 2<sup>nd</sup> Affidavit of Marilyn James, paragraph 85, AB-III 404
- 2<sup>nd</sup> Affidavit of Marilyn James, Exhibits 13 – 64, AB-III 452 to AB-IV 532

16. The evidence demonstrates that Marilyn James, acting on behalf of the Sinixt Nation, has purported to discharge a cultural directive of custodianship over the land by way of environmental advocacy in general and, in particular, with respect to Perry Ridge dating back to 1996<sup>23</sup> when Marilyn James first asserted aboriginal rights on Perry Ridge in correspondence to the Province.<sup>24</sup>

17. The impugned Licence permits Sunshine to harvest Crown timber from within four designated cut blocks on Perry Ridge between the Slocan River and the Little Slocan River, in an area entirely within the Territory.<sup>25</sup> The ancient Sinixt village and burial ground of Vallican, at Perry Ridge, has long been at the centre of the Lakes culture and settlement, and Perry Ridge is close to the heart of the territory traditionally occupied by the Sinixt. Perry Ridge appears clearly to have been within the traditional hunting area of the Sinixt.<sup>26</sup>

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<sup>23</sup> Aff James 1 ex.15, AB-II 170

<sup>24</sup> Aff James 1, paras 79-87, AB-I 14-15

<sup>25</sup> Chambers Judgment paragraph 3

<sup>26</sup> Chambers Judgment paragraphs 18, 19 & 21; Aff James 1, paras 43-45, AB-I 8; Aff Aaron, ex.2, AB-III 366

18. The Petitioners decided to incorporate the Sinixt Nation Society in 2006 as an administrative mechanism for representing the Collective<sup>27</sup> and a vehicle to promote Sinixt claims in British Columbia<sup>28</sup>. The directors of the Society are the Petitioners in these proceedings<sup>29</sup>.
19. The Society is merely a tool to administer representation of the collective by the Petitioners. The Society is not the s. 35 rights holder, nor does it claim to have standing to advance the claim for consultation on behalf of the Collective. The Petitioners agree that the statutorily defined membership in the society does not exhaustively correspond with entire membership in the Sinixt s. 35 rights-bearing Collective on whose behalf the Petitioners demand consultation.
20. Society membership application forms require applicants to affirm their identity as “blood members” of the Sinixt Nation and provide for the applicant to describe his or her “Sinixt lineage”.<sup>30</sup> To be a member of the Society, a person must be a blood descendant of the Sinixt people.<sup>31</sup>
21. The Petitioners purport to have standing to represent the Sinixt s. 35 rights-bearing Collective as defined by a primary criterion: individuals descended from or ancestrally related to the Sinixt, the historic occupiers of the Sinixt Territory. The factual basis for definition of that group on the basis of this criterion is self-evident on the face of the Chambers Judgment at the following passages:

2 ...the indigenous group now known as the Sinixt is ancestrally related to a community once known as the Arrow Lakes Indians or the Lakes Indians...<sup>32</sup>

36 An aboriginal community in the United States, ancestrally related to the occupants of the Territory known as the Lakes Tribe is one of the constituent tribes of the Colville Confederacy.

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<sup>27</sup> Chambers Judgment paragraph 50

<sup>28</sup> Chambers Judgment paragraph 57

<sup>29</sup> Chambers Judgment paragraph 65

<sup>30</sup> Chambers Judgment paragraph 59

<sup>31</sup> Aff James 1, paras 8-9, AB-1 2 & 28-159

<sup>32</sup> Chambers Judgment paragraph 2

39 While the Arrow Lakes Band had become extinct, there is evidence of the contemporary presence in Canada and the United States of people who claim to be descended from Sinixt ancestors.

41 A significant number of individuals who are now registered members of the constituent Lakes Tribe of the Colville Confederacy are descendants of those who occupied the Territory from time immemorial to the time of contact. There are likely to be many descendants of the Sinixt who are still resident in the Columbia River Valley and elsewhere in Canada. There are likely to be many, like the deponent Harry Wong, who are, to a greater or lesser degree, descendants of the Sinixt who were never registered or never lived on reserves. There is evidence that the Christian family, for example, was descended from a line of Sinixt, including leaders of the people. They were apparently never registered and one cannot seek or obtain registration as an Indian in Canada by establishing affiliation with that family. There is evidence that many individuals of Lakes ancestry migrated east to join the Kootenays or west to join Okanagan tribes, as Annie Jacobs, for example, appears to have done. There is evidence before me that some Lakes descendants are now living in the Penticton area and belong to the Okanagan Nation Alliance or aboriginal communities that belong to that alliance.

42 The Arrow Lakes Band appears to have been the only Indian band in British Columbia history to have been declared extinct by Canada and have its reserve land revert to the province. However, Sinixt individuals were and are living among and as members of the Osoyoos, Penticton, and Okanagan Bands of the Okanagan Nation Alliance, in Washington State as members of the Lakes Tribe of the Colville Confederacy, and off reservation in Canada and the United States.

22. The Petitioners purport to have standing to represent the Sinixt s. 35 rights-bearing Collective as defined by a secondary criterion: people who identify themselves as Sinixt. The factual basis for definition of that group on the basis of this criterion is self-evident on the face of the Chambers Judgment at the following passage:

57 The petitioners appear to represent those people who identify themselves as Sinixt, who have been most active since 1990 in attempting to protect their rights and interests in British Columbia.

23. The Judgment under appeal allows an application by the Respondent Minister for an order that the petition be dismissed on the grounds that the Petitioners lack the requisite standing to bring the Petition.

24. Other than to attack the Petitioners' standing, the Respondents have not defended the Petition on its merits; i.e. there has been no suggestion by the Respondents that the

Sinixt have been consulted or that a duty to consult is not owed to the Sinixt in the event that the Petitioners were found to have had standing.

## **PART 2 - ERRORS IN JUDGMENT**

The impugned judgment is alleged to be in error in the following respects:

- A. It fails to limit the standing inquiry to “capacity” for clear definition;
- B. It conflates criteria with methods of proof;
- C. It allows the threshold for standing to exceed the threshold for the relief claimed;
- D. It assesses standing in relation to a claim broader than that advanced by the Petitioners;
- E. It conflates the test for standing with the standard applicable on the test for determining the existence of aboriginal rights;
- F. It assesses the Society, rather than the Collective, for clear definition;
- G. It ignores Petitioners’ written argument on criteria for descent;
- H. It requires precision in defining the Collective;
- I. It fails to adopt the correct analytical framework with respect to the relief claimed;
- J. It erroneously treats multiple affiliations, and the representational structures associated with them, as undermining the Sinixt Nation’s capacity for clear definition;
- K. It erroneously treats the Petitioners’ representation of the Sinixt as being undermined by the membership of Sinixt individuals in the ONA and the Colville Confederacy;
- L. It incorrectly takes the claimed ONA and Colville representation of Sinixt s. 35 rights as displacing the Petitioners’ claim for representation;
- M. It confers a preference for statutorily sanctioned entities; and

N. It misconstrues argument with respect to prior BC Hydro consultation.

### **PART 3 - ARGUMENT**

#### **Failure to limit inquiry to “capacity” for clear definition**

25. As correctly set out at paragraph 10 of the Chambers Judgment, in order to address the Petitioners' capacity to bring a representative claim on behalf of the Sinixt, the Court must consider the criteria described by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 48 [WSC].

26. The first criterion established by the SCC requires the Petitioners to prove that the group has a quality to it that renders it capable of clear definition. We refer to this criterion as WCS #1.

27. The learned Chambers Judge holds the Petitioners to the requirement of “determining the composition of the collective” and/or demonstrably defining the collective rather than establishing that the collective is theoretically “capable” of clear definition.

28. The Chamber Judge’s error in raising the WCS #1 bar is apparent at the following excerpts of the judgment:

3 .... The first question before me is whether the petitioners have sufficiently defined the contemporary rights-bearing collective for whom they purport to act.

156 .... The prior dealings in the case at bar do not assist in determining the composition of the collective on whose behalf the petitioners should have standing.

166 I am bound to dismiss representative proceedings where the proposed class or collective for whom the action is brought is not defined in a manner that permits its membership to be determined by objective criteria. I find that the petitioners have not so defined the collective for whom they propose to act as representatives, and for that reason I find that the petition is not properly brought as a representative proceeding and I dismiss the petition.

29. In this case, the group is defined as descendants of distinct historical occupiers of the Territory. The existence of the historical group of occupiers is validated on the face of the Chambers Judgment.<sup>33</sup>

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<sup>33</sup> Chambers Judgment at paragraphs 3, 13, 15, 16, 17, 20 & 22

30. A group consisting of “good looking people” would not be capable of clear definition because “good looking” is not an objectively determinable criteria. But even without an articulated methodology and genealogical evidence of descent, it can still be said that a group consisting of descendants is “capable” of clear definition. The capacity to clearly define the group exists because descent is a characteristic that is intrinsically capable of being objectively determined by way of various methodologies and genealogical / anecdotal evidence. The articulation of those methodologies and the presentation of that genealogical evidence is not necessary to establish that the group is “capable” of clear definition. To require that is to go one step further: it is to require that the Petitioners demonstrably define the membership of the Collective.
31. There is a distinction between the two questions:
- A. Is the group *capable* of being defined?
  - B. Has the group been sufficiently defined?
32. The former tests for a potential quality, whereas the latter tests for an actualized quality.
33. If the purported group is capable of clear definition, then, if there is an issue as to a particular individual's membership in that group, that issue can come before the Court and be determined by inquiring whether the individual is a descendant. There can always be an adjudication into the issue of whether a person is a descendant of the historical group. Descent is a question of fact and is best determined in the context of an evidentiary hearing as the issue arises in relation to a particular dispute in that regard.
34. The Chambers Judge makes the following statement at paragraph 142:
- 142 .... The composition of the group to which ancestry must be traced is not defined and may not be known.
35. This statement is inconsistent with the recitation in the Chambers Judgment of clear evidence with respect to the existence of the historical group and the existence of known descendants from same.

36. The very fact that the existence of a historical group is acknowledged in the Chambers Judgment means that there is the capacity to define the current group by the criteria of descent from the historic group. Obviously, the exercise of tracing an individual's connection to the historic group would depend on the circumstances of that individual, the evidentiary basis for identifying from whom he or she descended, and the evidentiary basis for connecting those particular ancestors to the historic group. The Chambers Judge errs in holding the Petitioners to the burden of having to demonstrate formulaic criteria for general application to that definitional exercise. Such a burden is beyond what is required to render the group "capable" of clear definition, particularly in the context of a claim for consultation where the right to consultation exists even in the absence of having established "a definitive and final self-identification with a specific aboriginal people".<sup>34</sup>

#### **Conflation of criteria with methods of proof**

37. The criterion of descent was clearly before the Court below. What the Chambers Judge identifies as lacking is a methodology for proving or confirming blood descent, as indicated by his comments at paragraphs 64 and 146:

64 When Ms. James was examined for discovery in the Watt action and asked about the criteria for membership, she said, "We know who our people are." The directors of the Society assess eligibility for membership but do not or cannot expressly describe the criteria that they use.

146 In support of the argument that an ancestral connection is the primary criterion for inclusion in the collective described as the Sinixt Nation, the petitioners point to criteria for membership in the Sinixt Nation Society. That, however, is not helpful. The membership criteria are vague. The Society bylaws permit only blood descendants of the Sinixt People to be admitted into membership, but do not define how an applicant's status as a blood descendant is to be established.

38. The Chambers Judge conflates the following two things:

- A. the existence of criteria (for defining the rights-holding Collective or defining membership in the Collective); and

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<sup>34</sup> See Labrador Metis Nation as cited at Chambers Judgment paragraph 82

B. methods of proof for determining an individual's membership in the Collective.

39. Blood descent can be proven or tested by way of a number of methodological / evidentiary means, including genetics, genealogy, anecdotal evidence. But these all go to methods of proof and none are properly required for standing. The only matter for standing, in the context of a Chambers application, is whether the group is of a such nature that it is "capable" of clear definition. This is a determination to be made on a theoretical basis, for reasons which include the fact that a claim can be brought on behalf of persons unknown. As stated in *Western Canadian Shopping*:

38 ... ....It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria ...

40. As in *Oregon Jack, Nemaiah Valley Indian Band, Tsilhqot'in* and *Kwicksutaineuk*, the composition of the Sinixt s. 35 rights-bearing Collective, albeit unknown, is determinable on the basis of descent.

41. In *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 ("*Tsilhqot'in*"), the rights-holding aboriginal community included unnamed persons who were not affiliated with any of the six member bands. In *Nemiah Valley*, at paragraph three, the group was described in the following terms:

3 There are approximately 2,907 members of these six bands. There are an unknown number of persons who are considered to be Tsilhqot'in but who are not members of these six communities.

**Allows the threshold for standing to exceed the low threshold for the relief claimed**

42. The Chambers Judge incorrectly applies the standing test in relation to a different paradigm of aboriginal rights cases where the claimant is under a burden of establishing the merits of an aboriginal rights or title claim. In doing so, His Lordship allows the standing analysis to become infected by the stringent standard applied to a claimant seeking a final declaration or enforcement of aboriginal rights or title. That standard is inapplicable in the case at bar where the claimant is seeking to establish, on

the basis of a low threshold, its entitlement to consultation with respect to claimed, yet unproven, aboriginal rights or title.

43. At the outset of the judgment, the Chambers Judge misconstrues the nature of the relief sought by the Petitioners:

2 The petitioners seek protection of the interests they assert on behalf of an indigenous group of people who have historically identified themselves as Sngaytskstx (the "Sinixt"). ... The petitioners seek through their community activity to revive the group's culture and traditions, and in this and other litigation to establish the status and claims of the Sinixt.

44. The Petitioners are only seeking consultation in relation to unproven claims; they do not, in the proceedings before the lower Court, seek to establish the status of the Sinixt; or establish the rights/title claims of the Sinixt.

45. The merits of the aboriginal title action described at paragraph 4 of the Chambers Judgment is not in issue in these proceedings. The Petitioners did not come to Court asserting aboriginal rights or title, but only the entitlement to be consulted with respect to Crown conduct that stands to interfere with their claimed, but unproven, aboriginal rights or title.

46. It is critical that the standing analysis occur in relation to the relief claimed.<sup>35</sup> It is an error of law to allow the threshold for standing to exceed the low threshold for the relief claimed; i.e. consultation. If it did, the test for standing would undermine the ability of a party to use the Courts to enforce their entitlement to consultation.

47. In raising the threshold to the level that is applied in proof-of-rights case, the Chambers Judge erroneously requires the Petitioners to "sufficiently define the contemporary rights-bearing collective"<sup>36</sup>.

48. Doubt with respect to aboriginal status / group definition does not stand as a bar to consultation, as the duty to consult is triggered by even dubious, weak or disputed

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<sup>35</sup> *Dragonwood Enterprises Ltd. v. Burnaby (City)* [2009] B.C.J. No. 1815, at paragraph 62

<sup>36</sup> Chambers Judgment at paragraph 3

claims. A group can be entitled to consultation without definitive and final self-identification with a specific aboriginal people.

The Newfoundland Court of Appeal noted in the *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, 2007 NLCA 75 at para. 39 as follows:

... definitive and final self-identification with a specific aboriginal people is not needed in the present circumstances before the Crown's obligation to consult arises.

49. It is an error to require for standing what is not required on the merits on the claim for which standing is sought.
50. Vagaries with respect to aboriginal status / group definition should be addressed in the consultation process and should not bar standing to enforce the Crown's duty to consult and to hold the Crown to act honourably in all its dealings with aboriginal people.
51. The Chambers Judge sets the bar for standing higher than the bar for triggering an entitlement to be consulted. His Lordship puts establishment of a core element of strength of claim (sufficient definition of the collective) as a procedural precondition to triggering the duty to consult. The learned Chambers Judge has pre-empted the principal enquiry that ordinarily is raised in the course of consultation by considering and deciding it and, in so doing, has determined the outcome of considerations which ought to occur in the course of consultation.
52. The Petitioners cannot be held to a higher standard of proof on standing than that to which they would be held in establishing their right to be consulted on the merits of the Petition. To do so would be inconsistent with the principle, accepted by the Chambers Judge, that the Court should not dismiss the claim unless it is "plain and obvious" that the Petitioners have no standing to advance the Sinixt's right to consultation.<sup>37</sup>
53. When considering the novelty of aboriginal claims, courts should give heed to the rapidly evolving state of the law. As stated in *Shubenacadie Indian Band v. Canada*

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<sup>37</sup> *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 (QL) at paras 77 & 94 (per Wilson J.)

(*Minister of Fisheries and Oceans*), [2001] F.C.J. 347, affirmed in [2002] F.C.J. 880 (F.C.A.):

**14** Furthermore, the Statement of Claim is to be read generously and with an open mind and it is only in the very clearest of cases that the Court should strike out the Statement of Claim. This, in my view, is especially the case in this field, that is the field of aboriginal law, which in recent years in Canada has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted.

### **Assesses standing in relation to a claim broader than that advanced by the Petitioners**

54. There are various indications, throughout the impugned decision, that the Chambers Judge has assessed standing in relation to a claim broader than that advanced by the Petitioners in these proceedings.

55. The Chambers Judge notes at para 117 that the SCC in *R. v. Powley*, 2003 SCC 43 (“Powley”) established that it would not require a minimum blood quantum to establish membership in the community, but would require some proof of ancestral connection to the community by birth, adoption or other means.<sup>38</sup>

56. The Chambers Judge errs by requiring this kind of “proof” and/or methodology for determining descent in the context of the standing analysis, notwithstanding that this is not a rights claim, as was *Powley*.

57. The Chambers Judge’s erroneous adoption of the *Powley* standard is apparent at paragraph 120 of the judgment:

120 These passages suggest that it is not enough that a contemporary community acknowledge an individual's membership in the community in order to establish that individual's status. The contemporary community itself must be able to establish its continuity with the historic rights-bearing community. Recognition of an individual's status by a newly-formed community is not sufficient to confer status upon that individual to claim s. 35 rights.

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<sup>38</sup> Chambers Judgment at paragraph 117

58. The Chambers Judge goes on to apply this standard in rejecting the validity of the discretionary manner in which the Petitioners determine membership of their society. On this basis, he concludes that the claimant group lacks clear definition by objective criteria. At paragraph 144, the Chambers Judgment reads:

144 The petitioners claim to be able themselves to recognize an adequate Sinixt ancestral connection. They say it is the prerogative of an aboriginal community to determine its own membership, and that the Constitution Act, 1982 protects rights of unrecognized as well as recognized aboriginal communities. That is so, but the rules will only permit a representative proceeding to be brought on behalf of a group that is capable of objective definition. So a claim by an existing aboriginal collective to land rights will only be permitted if the ancestral connection of its members to the members of an aboriginal collective and occupation at the time of the exertion of sovereignty is pleaded with sufficient particularity.

59. The requirement of “pleading the ancestral connection with sufficient particularity” is not part of the standing test. Rather, it is part of the test for establishing aboriginal rights. By error, this requirement has been imported into the standing test by the Chambers Judge as a result of his failure to distinguish the Powley aboriginal rights claim scenario from the present aboriginal consult claim scenario.

60. In the above-referenced passage, the Chambers Judge reveals that his analysis is in reference to “a claim by an existing aboriginal collective to land rights”. This aboriginal rights test informs his application of the standing analysis, notwithstanding that there is no land rights claim at bar, but only a claim for consultation in relation to Crown conduct that stands to interfere with claimed, but unproven, aboriginal rights or title.

61. The inaccurate characterization by the Chambers Judge of the claim before the Court may have its source in the written submissions advanced on behalf of the Respondent Minister, where it is stated at paragraph 40 [AB VI 960] that:

Because the Petitioners are seeking declarations of s. 35 rights, they must establish an ancestral connection to the aboriginal group that may have existed at the time of contact. They must provide verifiable documentation and perhaps expert genealogical evidence.

62. At the root of the Chambers Judgment is this misapprehension that the Petitioners are seeking declarations of s. 35 rights.

63. The Court below erred by conflating the test for standing with the standard applicable on the test for determining the existence of aboriginal rights. The learned Chambers Judge mistakenly adopts the need to “verify membership in the relevant community<sup>39</sup>” as in *Powley*. There is a distinction between a rights/title claim and the Petitioners’ claim that got lost in the Chambers Judgment, with the result that the Petitioners were required to establish, in a Chambers summary dismissal proceeding, what ordinarily would be established in the type of evidentiary proceeding exemplified in *Ahousaht Indian Band v. Canada (Attorney General)*, 2009 BCSC 1494 (“*Ahousaht*”) as described in the Chambers Judgment:

122 In *Ahousaht*, the Crown argued that it was not possible to determine whether most of the plaintiff First Nations were appropriate aboriginal collectives entitled to a declaration of aboriginal rights and title. Epidemics, migration, and conquest, the Crown argued, made it extremely difficult to establish the legitimate transmission of the rights of the contact era or sovereignty era groupings to the much smaller group of modern plaintiff First Nations. The court examined the anthropological and ethnographic evidence called by each of the plaintiff nations and was satisfied that each nation had demonstrated a sufficient connection between its present-day form and the people who occupied the territories at contact.

64. In order to “sufficiently define the contemporary rights-bearing collective” to the standard required by the Chambers Judge, the Sinixt would need to marshal the kind of evidence that was deemed sufficient in *Ahousaht* -- particularly since the clear definition of the Sinixt is similarly obscured by epidemics, migration and conquest. The Chambers Judgment effectively imposes on the Petitioners the burden of establishing strength of claim as a pre-condition to being able to enforce their consultation entitlement through the Courts. The assessment of the strength of the Sinixt’s claim in that regard is the very assessment that is supposed to happen in the course of the consultation process with the Crown.

### **Varied Misconstruction**

65. The Chambers Judge demonstrates a varied misconstruction of the nature of the Petitioners’ claim at paragraph 154:

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<sup>39</sup> Chambers Judgment at paragraph 115

154 ..... Definition of the contemporary rights-bearing community is also necessary, ultimately, in order to address the merits of the claim and determine the appropriate remedy, if any, to which the collective is entitled. In this case, that would amount to defining the nature of the consultation required to discharge the Crown's constitutional obligations.

66. This characterization is inaccurate. The remedy sought by the Petitioners in this case is not with respect to degree of consultation. Rather, it is with respect to entitlement to consultation. The distinction is material. Assessing degree of consultation entails assessing strength of claim, which may entail an assessment of the status / continuity of the Claimant group; factors which do not properly weigh into the standing analysis: the determination of whether the group is “capable” of clear definition.

**Assesses the Society, rather than the Collective, for clear definition**

67. The Society is a vehicle that the Petitioners use for administering their representation of the Sinixt s. 35 rights-bearing Collective. It is also used as a vehicle for engaging with the Crown in consultations. The Society is not the claimant. It is not the section 35 rights holder. It did not seek standing in the proceedings before the Court below.

68. The correct focus of the standing analysis should be whether the Sinixt s. 35 rights-bearing Collective is capable of clear definition. In the course of the Chambers Judgment, the focus of the analysis erroneously shifts to whether the Sinixt Nation Society is capable of clear definition with respect to the criteria by which it accepts members.

69. Before the Court below, the Petitioners pointed to the membership of the Society as validation of the Petitioners’ authority to represent the Sinixt s. 35 rights-bearing Collective. But the membership of the Society is not the membership of the Collective. The assessment of capacity for clear definition should be in relation to the Sinixt s. 35 rights-bearing Collective and not the Society.

### **Ignores Petitioners' written argument on criteria for descent**

70. The learned Chambers Judge holds the Petitioners as having failed to establish objective criteria for determining descent. In doing so, he overlooks the Petitioners' Written Argument wherein explicit criteria are set out in that regard.

71. The Petitioners articulated their criteria for determining descent in their Written Argument, at page 9 [Appeal Book VI 900 as excerpted:

The referenced Tribal Enrollment forms at Exhibit 2 of the 1st Affidavit of Marilyn James are demonstrative of the criteria used by the Sinixt for determining / defining membership in the Collective. The primary criterion in that regard is an unbroken line of ancestral connection. In the application of that criterion, two additional criteria come into play: self-identification and community recognition. That is, an individual self-identifies as a Sinixt descendant; in doing so, he/she advances particulars regarding his/her lineage; and those particulars are assessed for acceptance by representatives of the community.

72. The Petitioners' application of this criterion for descent ("unbroken line of ancestral connection") is supported by the 2<sup>nd</sup> Affidavit, Marilyn James at paragraphs 74 and 75 and the 1<sup>st</sup> Affidavit, Marilyn James at paragraphs 8 and 9.<sup>40</sup>

73. The Tribal Enrollment forms at Exhibit 2 of the 1<sup>st</sup> Affidavit of Marilyn James are demonstrative of the criteria used by the Sinixt for determining / defining membership in the Society. The primary criterion in that regard is an unbroken line of ancestral connection.

74. The criteria for defining membership in the Collective are also reflected in the Bylaws of the Sinixt Nation Society [Affidavit of John Hajecek, Exhibit B, page 5] which provide that "a person must be a blood descendent of the Sinixt people in order to qualify for and be accepted as a *Mxgxia* Member."<sup>41</sup>

75. The following passages indicate the Chambers Judge's failure to acknowledge the defining criteria advanced by the Petitioners:

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<sup>40</sup> Appeal Book I page 14

<sup>41</sup> Appeal Book IV, page 672

140 .... The petitioners claim to represent the Sinixt Nation, which is not a legal entity and is not defined in a manner that permits its membership to be determined.

148 The application form does not seek any evidence of community recognition; presumably that is recognition granted by the Society board. Because the bylaws do not stipulate what criteria may be considered by the board in exercising its discretion to grant admission, membership in the Society, like recognition as membership of the Sinixt Nation, may depend entirely upon the exercise of the discretion of the directors of the Society who are petitioners in this proceeding.

76. At paragraph 150, the Chambers Judgment refers to an “absence of any objective criteria for membership” and at paragraph 60 it reads:

60 Members of the Society are admitted or accepted into membership by resolution of the board of directors or a designate, and the bylaws do not stipulate what criteria may be considered by the board in exercising that discretion.

77. On one hand the Chambers Judge, at paragraph 60 refers to an absence of criteria for determining membership, but in the previous paragraph (59) the Chambers Judgment reads:

59 In order to be accepted for membership as a mxgxia or blood member, a person must be "a blood descendant" of the Sinixt people. Non-blood members may not serve as directors or vote. The application forms in evidence require applicants to affirm their identity as blood members of the Sinixt Nation.

78. There is no lack of criteria for membership in the Society. The Petitioners, through the Society bylaws, have bound themselves to restricting membership to “blood descendants”. As such, the Chambers Judge errs in his finding, at paragraph 151, that the Petitioners are not required to apply the definitional criteria that they have identified.

**Descent is a valid criterion for defining the Collective for the purposes of standing**

79. The criterion of “blood descendant” may be too vague to satisfy the test for establishing aboriginal rights or title; much more detail of status and continuity is required in that context (as in Powley). However, the criterion of “blood descendant” as advanced by the Petitioners, has been validated by the Court of Appeal as being sufficient for the purposes of establishing standing.

80. In *Oregon Jack Creek Indian Band v. Canadian National Railway* (1989), 56 D.L.R. (4th) 404 (B.C.C.A.), aff'd [1989] 2 S.C.R. 1069 [Oregon Jack], the British Columbia Court of Appeal held:

87 ...in addressing whether the class of plaintiffs was capable of clear and definite definition, that the bands had formal status; the nations had asserted title by descent from the original occupants. The court found at p. 413:

The Indian bands are capable of clear and definite definition as their membership is defined under the Indian Act. As for the nations it is sufficient that the Indians be able to prove that there was an organized society occupying the specific territory over which the Indians, as descendants of the members of that society, now assert aboriginal title based on the title that existed at the date that sovereignty was asserted by the Europeans.

81. The BCCA has endorsed descent as a sufficient criterion for determining whether the nation was a collective capable of clear and definite definition. The other necessary element, as applied in *Oregon Jack* (“that there was an organized society occupying specific territory”) is satisfied on the face of the Chambers Judgment.<sup>42</sup>

82. The Chambers Judge’s rejection of descent as a defining criterion is inconsistent with the multiple references in the Chambers Judgment to the existence of a group of Sinixt Descendants. (See Statement of Facts at paragraph 21.)

83. Further, the rejection by the Chambers Judge of the criteria applied by the Petitioners is inconsistent with the principle of law that membership in an aboriginal community should be identified by the aboriginal community itself.<sup>43</sup>

### **Error to require precision in defining collective**

84. The rejection by the Chambers Judge of the criteria applied by the Petitioners is inconsistent with the principle of law that “it is not necessary to identify with precision the appropriate collective.”<sup>44</sup>

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<sup>42</sup> Chambers Judgment at paragraphs 3, 13, 15, 16, 17, 20 & 22

<sup>43</sup> Tsilhqot’in at paragraph 444

<sup>44</sup> Tsilhqot’in at paragraph 438

85. The rationale for clear definition of the class in *Western Canadian Shopping Centers* is to identify who will be entitled to relief.<sup>45</sup> In considering the degree of precision required in defining the class/collective, the Court should consider the nature of proceedings. To what extent does the Court need to define class for the nature of the present claim and the challenge to standing that arises in relation to that specific claim? In a class action, the Court needs to define the class with some precision to make sure that the right individuals get the relief that the representative claimant is seeking.

86. In the case at bar, the Petitioners are seeking consultation - not a declaration of aboriginal rights or title. Any vagaries in membership of class, to the extent that they exist, would not be a barrier to the Crown consulting and would give rise to an issue with respect to distribution of the remedy – as no individual is entitled to be consulted; rather, the duty to consult is owed to the Collective as a whole. Accordingly, the need for a precise definition of the class does not arise as a practical issue in the sense identified in WCS.

**Failure to adopt the correct analytical framework with respect to the relief claimed**

87. The errors alleged in this section are due in part to the failure of the learned Chambers Judge to approach the standing issue from the proper analytic framework, that being:

1. What are the nature of Aboriginal rights being claimed?
2. Who is the appropriate claimant in relation to those Aboriginal rights being claimed?
3. Who is the appropriate representative of that claimant?

88. The standing analysis must occur in relation to the relief claimed. This orientation is reflected in the Court's framing of the issue in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2004 ABQB 655 ("Papaschase") as excerpted in the Chambers Judgment at paragraph 107:

The issue is therefore what type of Aboriginal rights the present Amended Statement of Claim asserts, and whether the present Plaintiffs can pursue those rights.

89. The nature of the relief claimed must inform the identification of the proper *claimant*.

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<sup>45</sup> *Western Canadian Shopping* at paragraph 38

90. The identification of the proper *claimant* must inform the determination as to who is the appropriate *representative* of that claimant.

### **The Indian Act Band v. the section 35 rights-bearing Collective**

91. The errors alleged in this section are due in part to the failure of the learned Chambers Judge to distinguish between different types of aboriginal claimants.

92. A Band is defined under the Indian Act as a body of Indians in relation to common lands, monies, *inter alia*.

93. The s. 35 rights holder is not the Band, but the aboriginal tribe, nation, or community as connected by the four common threads of language, customs, traditions and a shared history.<sup>46</sup>

94. Membership in a Band and membership in a s. 35 rights-holding Collective are not mutually exclusive and the two memberships need not be with corresponding aboriginal groups. One can be a member of the Sinixt Nation, i.e. the Sinixt s. 35 right-holding collective, while holding membership in an unassociated Band.

95. A claim for collective aboriginal rights under s. 35 of the Constitution Act must be brought on behalf of the section 35 rights-bearing Collective - the aboriginal nation.

96. The assertion of the entitlement to be consulted does not equate to a claim for s. 35 rights. Rather, the entitlement to consultation arises with respect to Crown conduct that stands to interfere with claimed, yet unproven, s. 35 rights. To be entitled to consultation, the claimant does not need to establish the existence of the s. 35 right. The mere existence of an unproven claim is sufficient to trigger the duty to consult. But in all respects, the party that claims the s. 35 right is the same party that is entitled to consultation.

97. As such, the duty to consult is owed not to the Band but to the aboriginal group that is the s. 35 rights holder, as explained by Jack Woodward in *Native Law* at paragraph 5:1520:

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<sup>46</sup> Tsilhqot'in at paragraphs 437 – 472

Technically speaking, the duty to consult with First Nations is not necessarily owed to the Indian band recognized under the Indian Act. Consultation is owed to the aboriginal group that holds the s. 35 rights. While some of the bands operating under the Indian Act correspond to the original aboriginal groups which existed when any aboriginal rights or historic treaty rights crystallized, this is not always the case: some Indian bands are amalgamations of distinct aboriginal groups, and some aboriginal groups have been splintered into two or more Indian bands over time. And in any event, at the conceptual level, it is important to remember that aboriginal rights as well as most historic treaty rights exist independently of the aboriginal group's status under the Indian Act.

98. On the other hand, a claim for rights accorded to a Band under the Indian Act (e.g. rights to reserve land) must be brought by a representative of the Indian Act entity, i.e. the Band, which is properly represented by the Band Council.
99. Sometimes -but not always- a Band will correspond with the section 35 rights-bearing collective, so that the Band may bring a claim for collective aboriginal rights under s. 35 of the Constitution Act on behalf of the section 35 rights-bearing Collective. Where no Band corresponds with the s. 35 rights-bearer, the claim for s. 35 rights (or for consultation pending proof of same) will have to be brought by individuals suing in a representative capacity by way of a derivative claim on behalf of the Collective.<sup>47</sup>
100. The Chambers Judge acknowledges that non-Bands are protected by s. 35 and that the courts must be prepared to address standing issues in a manner that permits aboriginal people who are not registered under the Indian Act to assert their rights.<sup>48</sup>
101. The individuals who constitute the Sinixt s. 35 rights-bearing Collective also have varying memberships in various Bands and confederacies, to which rights attach other than the Sinixt's s. 35 rights.<sup>49</sup>
102. The Colville Confederacy may hold all sorts of rights, particularly as against the USA in relation to its reserve there. However, the Colville Confederacy consists of (and acts on behalf of) 12 tribes, 11 of which are not the Sinixt. It is not a group that meets the criteria for being a holder of s. 35 rights claimed by the Sinixt.

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<sup>47</sup> Papaschase at paragraph 177 and, more generally, paragraphs 176 - 179

<sup>48</sup> Chambers Judgment paragraphs 96 & 97

<sup>49</sup> Chambers Judgment paragraph 42

### **Erroneous treatment of multiple affiliations**

103. The learned Chambers Judge erroneously treats these multiple affiliations, and the representational structures associated with them, as undermining the Sinixt Nation's capacity for clear definition. This is initially apparent from his treatment of the facts:

146 ....Ms. James denies that the Society has any intention of making applicants choose a primary affiliation. She acknowledges that many people she, and presumably the board, would recognize as Sinixt are registered members of other aboriginal collectives.

104. The learned Chambers Judge makes his ultimate conclusion at paragraph 161 on the basis of competing claims to representation:

161 There is, in my view, an inadequate basis to say [the Petitioners] can properly represent that broad group. The Okanagan Nation Alliance and the Colville Confederacy deny that they do so.

105. The Chambers Judge comes to this conclusion on the basis of erroneous reasoning that the Petitioners' representation of the Sinixt is undermined by the membership of some Sinixt individuals in the ONA and the Colville Confederacy. The learned Chambers Judge fails to realize that individual Sinixt memberships in these other organizations (and representation by these other organizations) are with respect to different bundles of rights: the Colville Confederacy in relation to U.S. reserve land allocated to 12 tribes on a collective basis; and the ONA in relation to reserve land allocated to the various Indian Act Bands that constitute the ONA. Neither the ONA nor the Colville Confederacy correspond to the Sinixt s. 35 rights-bearing Collective and neither can properly represent the Sinixt with respect to those s. 35 rights.

106. The Chambers Judge erroneously treats the membership of Sinixt individuals in the ONA or Colville Confederacy as the basis for representation by the ONA and Colville of Sinixt s. 35 rights. Further, His Lordship incorrectly takes the claimed ONA and Colville representation of Sinixt s. 35 rights as displacing the Petitioners' claim for representation. It is an error of law to treat a leadership competition as undermining standing to bring a representative action. As stated by Vickers J. in *Nemaiah Valley Indian Band v. Riverside Forest Products* (1999), 37 C.P.C. (4th) 101:

**14** Finally, there is no requirement that the representative plaintiff be a chief. He or she need only be a member of the class. Even in the face of active opposition by other members of the group, the plaintiff asserting membership is entitled to bring the representative action.

107.Paragraph 160 of the Chambers Judgment reads:

160 The petitioners represent only one segment of the Sinixt in particular; those who have determined that their interests cannot and should not be represented by the aboriginal collectives into which the Lakes People merged in the period from the late 1800s to 1956. There is sufficient evidence on this application to establish that they are authorized to speak for those who have been active in seeking a separate voice to speak for the Sinixt, but they do not purport to speak only for those disaffected members of other recognized communities. They purport to speak for all Sinixt.

108.Underlying the Chambers Judge’s reasoning at paragraph 160 is the false assumption that an individual’s membership in the ONA or Colville Confederacy constitutes acceptance by that individual of representation by the ONA/Colville of his/her Sinixt s. 35 rights and rejection of the autonomous representation of those rights by the Petitioners on behalf of the Sinixt Nation itself.

109.The Sinixt, by being forcibly amalgamated into the Colville Confederacy, did not somehow forego their unique cultural, ethnic, or national identity and their inherent right to autonomous self-representation.<sup>50</sup>

110.Further, the Colville Confederacy has no mandate<sup>51</sup> to represent the Sinixt people with respect to matters extraneous to the Colville Reservation and has no structure in place for taking account of (or giving expression to) the discrete majoritarian interests of its Sinixt constituents. The leadership of the Colville Confederacy is elected by, and acts on behalf of, the confederacy as a whole.<sup>52</sup>

111.At paragraph 162, the Chambers Judgment reads:

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<sup>50</sup> UN General Assembly’s Declaration of Rights of Indigenous People endorsed by Canada on November 12, 2010

<sup>51</sup> Aff James 2 ex.98, AB-II 305

<sup>52</sup> Aff James 2 paras 53-63, AB-III 399-401

162 The petitioners ask: Who speaks for the Sinixt? The answer is that both the Colville Confederacy and the Okanagan Nation Alliance have purported to speak for the Sinixt.

112. When individual Sinixt, through the course of history, developed associations with other aboriginal organizations, such as the Colville Confederacy and the ONA, those other entities did not become the successor to the Sinixt's section s. 35 rights, nor did the leaders of those other entities become the representatives of the Sinixt with respect to the Sinixt's s. 35 rights. Section 35 rights are not transferrable<sup>53</sup>. They remain vested in the Sinixt, and the representative of the Sinixt with respect to those rights remains the Sinixt s. 35 rights-bearing Collective - not the Confederacy or statutory Band entity with which many of their members have become associated.

113. In relation to s. 35 rights, shifting political identities and statutory groupings cannot alter the true identity of the s. 35 rights-bearing entity. As stated in Tsilhqot'in:

457 The recognition by the Supreme Court of Canada in Powley at para. 23 that "different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification" applies equally to Tsilhqot'in people. The political structures may change from time to time. Self identification may shift from band identification to cultural identification depending on the circumstances. What remains constant are the common threads of language, customs, traditions and a shared history that form the central "self" of a Tsilhqot'in person. The Tsilhqot'in Nation is the community with whom Tsilhqot'in people are connected by those four threads.

...

469 The setting aside of reserves and the establishment of bands was a convenience to government at both levels. The creation of bands did not alter the true identity of the people. Their true identity lies in their Tsilhqot'in lineage....

114. The Sinixt do not become non-Sinixt, nor do they become represented by non-Sinixt, simply because the Crown or the U.S. Government unilaterally regroups them or identifies them by some other affiliation in relation to a bundle of rights other than those under s. 35 of the Constitution.

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<sup>53</sup> See Papaschase at paragraph 174

115. The Chambers Judge erroneously treats these multiple affiliations as undermining the coherency of the Sinixt s. 35 rights-bearing Collective which the Petitioners claim to represent. The impugned judgment reads:

159 Members of the Okanagan Nation Alliance, members of the Lakes Tribe of the Colville Confederacy, and non-registered individuals may all claim Sinixt ancestry. As the court noted in Papaschase, the choice to leave one band and join another may entail a loss of the ability to claim the benefit of the former's collective rights and the acquisition of new collective rights. If the group for whom the petitioners purport to act includes those who have become assimilated in other communities, and in particular communities asserting conflicting claims, success for some in litigation commenced by the petitioners may not be success for all they claim to represent.

116. Overlapping affiliations do not mean that the individual has made “the choice to leave one band and join another” or has assimilated into “another” community with the result that their membership in the Sinixt s. 35 rights-bearing Collective is abandoned. As stated in Tsilhqot'in:

**446** Aboriginal people, like people in societies everywhere, typically belong to more than one group that helps to define their identities. In both historical and contemporary times, an individual can simultaneously be a member of a family, a clan or descent group, a hunting party, a band, and a nation.

117. Membership in the Sinixt s. 35 rights-bearing Collective and the Colville Confederacy are not mutually exclusive. And autonomous representation of Sinixt by Sinixt is not mutually exclusive with representation of Sinixt by the Colville Confederacy, as long as the respective representations are with respect to separate bundles of rights.

118. The learned Chambers Judge erroneously construes membership in the Colville Confederacy as a choice to “leave” the Sinixt s. 35 rights bearing Collective or disavow autonomous self-representation by that Collective.

### **Inconsistency in the Chambers Judgment**

119. The above-cited errors with respect to multiple affiliations are inconsistent with the Chambers Judgment's affirmation of the Petitioners' representational authority in other contexts:

57 ... The petitioners appear to represent those people who identify themselves as Sinixt, who have been most active since 1990 in attempting to protect their rights and interests in British Columbia.

120. The “people” described above, whom the Petitioners appear to represent, would include Sinixt individuals who are members of the Colville Confederacy and the ONA.

### **Erroneous preference for statutorily sanctioned entities**

121. Underlying the Chambers Judgment reasoning, at paragraph 162 in particular, is a preference for representation by statutorily sanctioned administrative Aboriginal entities.

122. The Colville Confederacy and the Okanagan Nation Alliance have memberships whose identities are determinable by objective criteria because these organizations have Band lists or the U.S. equivalent of same. The Chambers Judgment’s preference for these groups on the basis of their statutorily established and sanctioned membership lists has a discriminatory effect against non-Band entities who don’t have a Band list or a Band council. This effect is inconsistent with the principle that s. 35 rights are not limited to Bands and the imperative that there must be a means for unrecognized (non-Band) collectives to seek recognition of collective aboriginal rights under section 35 of the Constitution.<sup>54</sup>

123. Statutory entities, such as Indian Act Bands and U.S. Confederacies, do not have the problem of vagaries regarding the composition of their collectives because they are pre-defined by statutory / administrative parameters, such as Band lists and the Register of persons registered under the Indian Act. But s. 35 rights are not limited to these statutory entities. It would be a failure of justice if access to the Courts were limited to these statutory entities by virtue of the fact that the non-Band entities lack sufficiently clear definition with respect to their composition.

124. Excluding non-Band s. 35 rights-bearing collectives from accessing the Courts on this basis is inconsistent with the honour of the Crown, the SCC’s emphasis on the reconciliation process and the SCC’s prescription that aboriginal claims be determined.

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<sup>54</sup> CJ at paragraph 106 referring to Papaschase.

As stated by the SCC in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73:

25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

125.If association with an Indian Band is not necessary to an aboriginal rights claim, then it would be unfair to restrict representational modalities to leaders whose authority flows from the Indian Act.

126.The potential injustice at stake lies in the broader colonial outcome whereby the unprecedented administrative extinction of an aboriginal Band is compounded by the refusal of the Court to recognize the corresponding First Nation as a group capable of autonomously and independently advancing a claim for consultation.

### **Misconstrues argument with respect to prior BC Hydro consultation**

127.At proceedings before the Court below, the Petitioners argued that the Crown's consultation of the Petitioners on BC Hydro projects vindicates the representational status of the Petitioners and demonstrates past practices of endorsing that representational status. It is not honourable for the Crown to use the Petitioners as points of contact for consultation where it is administering a transaction (i.e., where the Crown seeks the BC Utilities Commission's approval of a transaction) and then disavow the representative capacity of those same individuals in other circumstances.

128.BC Hydro and other Crown agencies have previously engaged with the Petitioners as if they were representatives of the s.35 rights-bearers, as in *Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, 2006 NLTD 119:

68 It seems to me therefore that for the Crown to have been engaged in complex negotiations on a Constitutional level concerning aboriginal rights issues with a corporate person representing the Inuit people on the one hand and now take the position that it is improper to do so when dealing with the Labrador MÉtis people on the other hand is simply confusing and not in keeping with the high principled honour of the Crown.

129. The Chambers Judge, at paragraph 156, misapplies the Petitioners' argument as going to the composition of the collective, where the argument was advanced with respect to the honour of the Crown and in support of the adequacy of the Petitioners as representatives of the Collective.

### **130. PART 4 - NATURE OF ORDER SOUGHT**

131. The Appellants seek:

- A. an Order reversing the Chambers Judgment;
- B. a Declaration that the Petitioners have standing to bring a representative claim for consultation on behalf of the Sinixt;
- C. a Declaration that the Crown owes the Sinixt a duty to consult;
- D. a Declaration that the Crown breached its duty to Consult the Sinixt by failing to consult with them before issuing the impugned Licence; and
- E. an Order of costs, as against each Respondent on a joint and several basis, with respect to both the appeal and the proceedings before the Court below.

Dated: August 26, 2011

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David M. Aaron  
Counsel for the Appellants

**APPENDIX A**

**SCHEDULE B  
CONSTITUTION ACT, 1982**

Part II  
Rights of the Aboriginal Peoples of Canada

Recognition of existing aboriginal and treaty rights

35.

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

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Metis peoples of Canada.

**APPENDIX B**

**INDIAN ACT  
R.S.C., 1985, c. I-5**

2. (1) In this Act,

“band” means a body of Indians

(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(b) for whose use and benefit in common, moneys are held by Her Majesty,  
or

(c) declared by the Governor in Council to be a band for the purposes of this Act;

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