R v Desautel: Who are the "Aboriginal Peoples of Canada"?

"Aboriginal peoples of Canada" have special Aboriginal and treaty rights that are protected under section 35 of the *Constitution Act, 1982*.[1] But who are the "Aboriginal peoples of Canada"?

The Supreme Court of Canada (SCC) considered this question for the first time in *R v Desautel*,[2] a case where an American citizen living in Washington State claimed that he has an Aboriginal right to hunt in his ancestors' traditional territories near Castelgar, British Columbia. In a 7:1 decision,[3] a strong majority of the Court agreed with Mr Desautel and found that:

> ***The Aboriginal peoples of Canada under s. 35(1) are the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact. This may include Aboriginal groups that are now outside Canada.[4]***

This article will review the SCC's decision in *Desautel* and a second article will examine its potential consequences. Specifically, this article will examine: (1) the background of the case; (2) the underlying principles that informed how the Court came to its decision; and (3) the new legal test that the Court specified for identifying the "Aboriginal peoples of Canada."

Background: Does Mr Desautel Have an Aboriginal Right to Hunt?

Mr Desautel is an American citizen living in Washington State and a member of the Lakes Tribe of the Colville Confederated Tribes, a successor group of the Sinixt people. The Sinixt people traditionally occupied the territory from north of Revelstoke, British Columbia to Kettle Falls in Washington State. In the latter half of the nineteenth century, the Sinixt people were forced out of their Canadian territories into the United States. More than a century later, in October of 2010, Mr Desautel shot a cow-elk near Castlegar, British Columbia, which is on traditional Sinixt territory. He was charged with violating the British Columbia *Wildlife Act* for hunting without a license and for hunting big game while not being a resident of British Columbia.[5] Mr Desautel claimed that, as a member of a successor group of the Sinixt people, he has an Aboriginal right to hunt in his traditional territories.

Section 35 of the *Constitution Act, 1982* protects the "existing [A]boriginal and treaty rights" of the "[A]boriginal peoples of Canada."[6] In other words, the question of *who* belongs to an "Aboriginal people … of Canada" is a threshold question in the test for

whether a claimant has a protected Aboriginal right. This question is usually easy to answer, but it was complicated by the fact that Mr Desautel is an American citizen living in Washington State. Therefore, before the Court could determine if Mr Desautel has an Aboriginal right to hunt in what was once Sinixt territory, it first had to decide, for the first time, whether someone who is neither a citizen nor resident of Canada can nonetheless belong to one of the "Aboriginal peoples of Canada."

A Purposive Interpretation of Section 35: Prior Occupation and Reconciliation

The Court stated that the legal definition of "Aboriginal peoples of Canada" is implicit in the "doctrinal structure" of Aboriginal law[7] and the principles upon which it is based.[8]

To start, the Court reaffirmed that section 35(1) must be interpreted purposively[9] with a view to achieving the two purposes of "recogniz[ing] the prior occupation of Canada by organized, autonomous societies and … [reconciling] their modern-day existence with the Crown's assertion of sovereignty over them."[10]

The Court then drew from a long history of previous Supreme Court decisions to show how these dual purposes are grounded in Aboriginal law and the principles that underlie it.[11] It also noted that these same two purposes give rise to the legal tests for Aboriginal rights and title, and the principle of honour of the Crown.[12] Read together, the various elements of this overview[13] provide a rich understanding of what these dual purposes mean and how they are reflected in Canadian constitutional law.

Purpose 1: Prior Occupation

According to the Court, one of the fundamental purposes of section 35 is the recognition of "prior occupation." This means acknowledging that Aboriginal peoples lived on the land we call Canada long before European settlers arrived.[14] They lived in "organized, autonomous societies"[15] under their own systems of law[16] and had strong connections to their traditional territories.[17] The Crown then asserted its sovereignty over what is now Canadian territory,[18] imposing its own laws and customs upon these preexisting Aboriginal societies.[19]

Purpose 2: Reconciliation

The second purpose that the Court attributed to section 35 is "reconciliation," a term which it used in two distinct ways:

- In the context of defining the dual purposes of section 35(1) jurisprudence. Here, "reconciliation" means to make consistent two seemingly incompatible legal realities: (1) the Crown imposed its sovereignty and continues to assert its sovereignty over what is now Canada; and (2) the lands over which sovereignty was asserted were already occupied and remain occupied by Aboriginal societies with their

own laws, cultures, and traditions.[20]

- In the context of explaining the principle of honour of the Crown. Here, "reconciliation" means to "[look] back to this historic impact … [and] also look … forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, mutually respectful long-term relationship."[21]

With these two purposes in mind, the Court looked back at the history of Aboriginal peoples whose ancestral lands were divided by international boundaries, and who moved or were forcibly displaced by European settlers. It then looked forward and found that excluding from the definition of "Aboriginal peoples of Canada" those "Aboriginal peoples who were forced to move out of Canada would risk perpetuating the historical injustice suffered by [A]boriginal peoples at the hands of colonizers."[22]

Defining "Aboriginal peoples of Canada" in Theory and in Practice

> ***The Aboriginal peoples of Canada under s. 35(1) are the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact. This may include Aboriginal groups that are now outside Canada.[23]***

In Theory: Aboriginal Peoples of Canada Needn't Be Canadian

The Court's purposive interpretation of section 35 led it to define "Aboriginal peoples of Canada" as the modern-day successors of the Indigenous peoples who occupied the land we now call Canada "at the time of European contact."[24] Accordingly, the constitutional guarantees provided by section 35 are not limited to residents and citizens of Canada, but may be extended to include peoples whose ancestors were separated from their traditional territories by the establishment of international boundaries or through forcible displacement.

Justice Côté was the only judge to disagree on this point. Writing in dissent, she defined "Aboriginal peoples of Canada" more narrowly as "Aboriginal groups that are members of, and participants in, Canadian society."[25]

In Practice: The "Modern Successors of … Aboriginal Societies"

Who are "the modern successors of … Aboriginal societies"? The Court in *Desautel* set out guidance to help future courts answer this question. It is not a strict test, but rather a contextual analysis based on the facts of each case. Every case will require consideration of different factors which may be weighted differently from one case to the next. However, the Court was clear that all Aboriginal peoples of Canada must have occupied Canadian territory at the time of European contact.

The Court tells us that, when a claimant lives outside of Canada, they must establish a link

between their modern-day community and the historic Aboriginal society that once occupied territory in what is today known as Canada. Legally, this link is called "successorship." Successorship is not a clearly defined concept and the Court did not establish a minimum threshold that section 35 claimants must meet.

In addressing a particular claim, courts may draw from a wide variety of evidence to establish successorship, such as common "ancestry, language, culture, law, political institutions and territory."[26] They must consider the possibility that a community might have split or merged or been forcibly displaced over time. Courts will need to assess the circumstances of each particular case to decide whether one criterion is more significant than the other, and to ultimately establish (or not establish) successorship.

The New Definition Applied to Mr Desautel's Case

The Court found that Mr Desautel was a member of an Aboriginal people of Canada. Their decision was based on the two key criteria discussed above: (1) the Lakes Tribe are the modern-day successors of the Sinixt people and they did not lose this identity or the rights that derive from it after being forced to leave their ancestral lands; and (2) the Sinixt people had occupied the territory around Castlegar, British Columbia at the time of European contact.

Mr Desautel therefore met the threshold test for *who* belongs to an Aboriginal people of Canada. The Court then proceeded with the test for *whether* he had an Aboriginal right under section 35. In this regard, the Court found that Mr Desautel has a right to hunt in the Sinixt people's traditional territories in British Columbia.[27] In other words, the sections of the British Columbia *Wildlife Act* that prohibit hunting without a license and hunting big game while not being a resident of British Columbia do not apply to Mr Desautel.

Conclusion

This decision is significant because the Supreme Court of Canada recognized that Aboriginal rights claimants under section 35 of the *Constitution Act, 1982* do not need to be citizens or residents of Canada. It emphasizes the underlying principles of Aboriginal Law: to "recognize the prior occupation of Canada by organized, autonomous societies and reconcile their modern-day existence with the Crown's assertion of sovereignty over them."[28] It also sets out guidance for future courts to determine whether a person belongs to one of the "Aboriginal peoples of Canada" and therefore has Aboriginal rights under section 35. The impact that this decision could have on other areas of Aboriginal law will be addressed in a second article o

[1] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at ss 35 and 25 .

[2] 2021 SCC 17 (CanLII) .

[3] Justice Moldaver was prepared to "assume, without finally deciding," that Mr Desautel is a member of one of the Aboriginal peoples of Canada (ibid at para 143). Justice Côté wrote a

dissenting opinion contesting the majority's ruling that Mr Desautel belongs to one of the Aboriginal peoples of Canada.

[4] *Desautel*, *supra* note 2 at para 31.

[5] *Ibid* at paras 3-6 (citing *Wildlife Act*, RSBC 1996, c 488).

[6] *Constitution Act, 1982*, *supra* note 1.

[7] Aboriginal law is the body of law which governs the constitutional relationship between the Crown and the Aboriginal peoples of Canada through colonial laws such as the *Royal Proclamation* of 1763, the *Indian Act*, the *Constitution Act, 1867,* and the *Constitution Act, 1982* (see e.g. Bora Laskin Law Library, "Welcome to Aboriginal Law Research" (last updated 19 May 2021), online: *Bora Laskin Law Library* <https://guides.library.utoronto.ca/aboriginallaw>; and JFK Law, "Making Space for Indigenous Law" (12 Jan 2016), online (blog): *JFK Law Corporation* < https://jfklaw.ca/making-space-for-indigenous-law/>). Aboriginal law is separate and distinct from "Indigenous law", even if the two are sometimes interconnected. Indigenous law refers to the legal traditions of the Indigenous peoples themselves. Indigenous legal traditions have ancient roots, flow from many sources, and are expressed in a multitude of ways, including oral traditions, story, song, wampum belts, etc. (see John Borrows, *Canada's Indigenous Constitution*, Toronto: University of Toronto Press, 2010) at ch 1-3. See also JFK Law, *supra*).

[8] *Desautel*, *supra* note 2 at para 31.

[9] *Ibid* at para 21 (citing *R v Sparrow*, 1990 CanLII 104 (SCC) at 1106 ; and *R v Van der Peet*, 1996 CanLII 216 (SCC) at paras 21-22 . A purposive interpretation means that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" — *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC) at para 21, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87. In other words, when interpreting a law purposively, the courts do not analyze it based on its text alone, but with an eye towards achieving its underlying purpose).

[10] *Ibid* at para 22.

[11] *Ibid* at para 31.

[12] *Ibid* at para 23.

[13] *Ibid* at paras 24-30.

[14] *Ibid* at para 24 (citing *Calder v Attorney-General of British Columbia*, 1973 CanLII 4 (SCC) at 328).

[15] *Ibid* at paras 24 (citing *Sparrow* at 1094) and 26 (citing *Van der Peet*, *supra* note 10 at para 43).

[16] *Ibid* at para 28 (citing *R v Marshall*, 2005 SCC 43 at para 129).

[17] *Ibid* at para 46.

[18] *Ibid* at para 26 (citing *Van der Peet*, *supra* note 10 at para 43).

[19] *Ibid* at para 30 (citing *Manitoba Metis*, *supra* note 2 at para 67).

[20] *Ibid* at paras 22 and 26.

[21] *Ibid* at para 30 (citing *Little Salmon/Carmacks* at para 10, internal quotations removed). "Reconciliation" in this context is similar to the Truth and Reconciliation Commission's use of the term, which means "coming to terms with events of the past in a manner that overcomes conflict and establishes a respectful and healthy relationship among people, going forward". However, since the Court did not cite this reference, we should not conflate the two. *Canada's residential schools: the final report of the Truth and Reconciliation Commission of Canada*, vol 6 (Montreal: McGill-Queen's University Press, 2015) at 3. See generally *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Ottawa: Library and Archives Canada).

[22] *Ibid* at para 33.

[23] *Ibid* at para 31.

[24] *Ibid*.

[25] *Ibid* at para 105.

[26] *Ibid* at para 49.

[27] *Ibid* at para 62.

[28] *Ibid* at para 22.