

TO: **BCAFN**  
FROM: MILLER TITERLE LAW CORPORATION  
SUBJECT: *R v. DESAUTEL*, 2021 SCC 17 AND IMPLICATIONS ON MÉTIS RIGHTS  
DATE: MAY 10, 2021

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### 1. INTRODUCTION

You have asked us to provide a summary of *R v. Desautel*, 2021 SCC 17 ("**Desautel**"), released by the Supreme Court of Canada ("**SCC**") on April 23, 2021, and analyze its impact on Métis claims to any Aboriginal rights in British Columbia ("**Province**").

#### *i. Statement of the Facts*

The Sinixt are an Indigenous group who at the time of contact occupied unceded traditional territories in the Kootenay region, across what is now the BC-Washington border. The Sinixt eventually relocated to the United States, leading the Canadian government to erroneously declare them extinct in 1956.

In October 2010, Sinixt leaders now residing in Washington State, decided to reassert their Aboriginal rights within Canada. They sent Mr. Richard Lee Desautel, an American citizen and member of the Lakes Tribe of the Colville Confederated Tribes ("**Lakes Tribe**"), to hunt an elk in the Arrow Lakes area of BC, a part of the traditional territory of the Sinixt people. Following the hunt, Mr. Desautel turned himself into authorities and was charged with hunting without a license and for hunting big game while not a BC resident, in violation of sections 11(1) and 47(a) of the BC *Wildlife Act* ("**Act**").

Mr. Desautel argued that his actions were an exercise of his Aboriginal rights under Section 35 of the *Constitution Act*, 1982 ("**Section 35**"), because the Lakes Tribe was a successor group of the Sinixt people. As such, he was hunting in the territory of his ancestors and his rights were infringed by the *Act*.

#### *ii. Issue*

The central issue in this case was whether Mr. Desautel, as an American citizen and non-resident of Canada, could claim Aboriginal rights under Section 35.

The SCC's decision turned on the definition of "Aboriginal peoples of Canada" in Section 35, and whether this term includes Indigenous persons and groups that now reside outside of Canada.

iii. *Brief Answer*

The Court held that the expression “Aboriginal peoples of Canada” contained in Section 35 refers not only to Indigenous peoples who are Canadian citizens, but more specifically to the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact, including Indigenous persons and groups that now reside outside of Canada.

The SCC clarified the interpretation, stating that the criterion for this definition will need to be modified in the case of the Métis, because their communities arose after contact. *Desautel* suggests there could be added difficulty for Métis groups hoping to establish a historic connection to a particular area for the purposes of establishing rights under Section 35.

## 2. SUMMARY OF THE DECISION

i. *Interpretation of “Aboriginal peoples of Canada”*

Prior to the decision, the SCC had not interpreted the term “Aboriginal peoples of Canada” in Section 35 in relation to non-Canadian-resident Aboriginal groups. The SCC stated that the two purposes of Section 35 were to “recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown’s assertion of sovereignty over them.”<sup>1</sup> As such, the interpretation the SCC settled on in *Desautel* is broad and intended to reflect the larger purposes of reconciliation.<sup>2</sup> The Court stated:

On this interpretation, the scope of “aboriginal peoples of Canada” is clear: it must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact. As a result, groups whose members are neither citizens nor residents of Canada can be Aboriginal peoples of Canada.<sup>3</sup>

The SCC explained that this interpretation acknowledges the involuntary displacement of Indigenous peoples caused by colonialism.<sup>4</sup> An alternative definition, excluding groups forced from Canada, “would risk perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers.”<sup>5</sup> The Court concluded that as the modern-day successors of the Sinixt people, the Lakes Tribe, and by extension, Mr. Desautel, were Aboriginal peoples of Canada.

ii. *Application of the Van der Peet test*

Once the SCC established that the Lakes Tribe was an Aboriginal people of Canada, the Court applied the *Van der Peet*<sup>6</sup> test to determine if there was a right that could be recognized. The test analyzes whether a modern practice is the continuation of a historic tradition that was part of the distinct culture of the pre-contact society. The Court explained that the test does not require a continuous presence in the area where the right is being asserted, and that the test is the same for groups outside and inside Canada.<sup>7</sup> Whether a group is an Aboriginal people of Canada is a “threshold question” that only requires analysis in situations where there is doubt.<sup>8</sup>

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<sup>1</sup> *R. v. Desautel*, 2021 SCC 17, at para. 22 (“*Desautel*”).

<sup>2</sup> *Desautel* at para. 33.

<sup>3</sup> *Desautel* at para. 23.

<sup>4</sup> *Desautel* at para. 33.

<sup>5</sup> *Desautel* at para. 33, citing *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 5

<sup>6</sup> *R. v. Van der Peet*, [1996] 2 SCR 507.

<sup>7</sup> *Desautel* at paras. 48, 50.

<sup>8</sup> *Desautel* at para. 20.

In these instances, if a negative determination is made, then the *Van der Peet* test is not applicable.<sup>9</sup>

Hunting was and remains an important part of the cultural practices of the Sinixt peoples. The SCC held that the *Van der Peet* test was met and that Mr. Desautel's actions were a legitimate exercise of his Aboriginal rights. He was acquitted of the charges against him.

### 3. POTENTIAL IMPLICATIONS ON MÉTIS RIGHTS

#### *i. Interpretation of "Aboriginal peoples of Canada"*

The SCC set out that "Aboriginal peoples of Canada" are the modern-day successors of groups that occupied Canadian territory at contact [emphasis added].<sup>10</sup> However, the SCC noted that this definition is complicated when applied to Métis peoples, because their communities were not present at contact.<sup>11</sup> Citing *Van der Peet* at para. 67 with approval, the Court stated:

...the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined.<sup>12</sup>

The post-contact development of Métis communities means that the criterion for determining whether a Métis community is an "aboriginal people of Canada" will need to be modified.<sup>13</sup> The SCC declined to set out the precise criterion to be applied, as the case did not address Métis rights. However, the Court confirmed that:

...Aboriginal peoples of Canada under s. 35(1) are the modern-day successors of Aboriginal societies that occupied what is now Canada at the time of European contact (subject to modifications that may be necessary in the case of the Métis).<sup>14</sup>

Further analysis will be required as the case law develops in this area and a potential test or criterion for the Métis emerges. It should be noted that the definition in Section 35 includes Métis peoples for the purposes of the Constitution.

#### *ii. The Métis and the Van der Peet test*

This is not the first time the SCC has differentiated between Métis and First Nations rights. The necessity for this distinction was clearly set out in *Van der Peet* and was confirmed in the case of *R. v. Powley*, 2003 SCC 43 ("**Powley**").

In *Powley*, the SCC created a modified version of the *Van der Peet* test ("**Powley Test**") to address the unique situation of the Métis. *Powley* set criteria for how Métis peoples can be identified for the purposes of Section 35, and if Métis peoples possess and may exercise Aboriginal rights in a given situation. The *Powley* Test requires a Métis group to prove a historic

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<sup>9</sup> *Desautel* at para. 20.

<sup>10</sup> *Desautel* at para. 31.

<sup>11</sup> *Desautel* at para. 32.

<sup>12</sup> *Desautel* at para. 32.

<sup>13</sup> *Desautel* at paras. 32, 47.

<sup>14</sup> *Desautel* at para. 47.

Métis community with a distinctive collective identity who lived together in the area and shared a common way of life, and proof of a contemporary Métis community in the area.

To date, Courts have rejected that such a right exists for Métis peoples on the basis that there is no evidence of a historic or modern-day Métis community in BC. On this basis, the provincial government has consistently refused to recognize site-specific Métis Aboriginal rights (e.g. hunting rights) as existing within the Province. *Desautel* takes *Powley* one-step further, requiring not only a historic connection but a pre-contact connection with an Aboriginal group in a specific area [emphasis added]. In conjunction, *Powley* and *Desautel* make it unlikely that Métis groups residing outside of Canada would be able to assert a claim for Aboriginal rights in BC. *Desautel* places renewed emphasis on the distinction between First Nations and Métis rights, and may serve to further weaken the Métis claim to any Aboriginal rights in the Province. At present the impact of *Desautel* on Métis rights, if any, is uncertain and will require re-evaluation as jurisprudence emerges from this decision.

#### **4. CONCLUSION**

*Desautel* expanded the definition of “Aboriginal peoples of Canada” under Section 35, allowing Indigenous groups now residing outside of Canada to assert their Aboriginal rights, if they can demonstrate a connection to a pre-contact society that would have been within modern Canadian boundaries. The SCC stated that this definition will need modification if a Métis group asserts its rights, as these communities developed post-contact. How this will impact Métis claims for Aboriginal rights in BC remains to be seen, but *Desautel* suggests there could be added difficulty for Métis groups hoping to establish a historic connection to a particular area.