

***R. v Desautel***  
**2021 SCC 17**  
**CASE SUMMARY**

In a 7-2 decision, the Supreme Court of Canada found in *R. v. Desautel*<sup>1</sup> that in certain circumstances “persons who are not Canadian citizens and who do not reside in Canada can exercise an Aboriginal right that is protected by s. 35(1)”<sup>2</sup> of the *Constitution Act, 1982*. Justice Rowe wrote the majority decision. The legal basis for this ratio is the Court’s interpretation of “aboriginal peoples of Canada” in s. 35(1), which “must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact.”<sup>3</sup>

The Court’s reasons rely in part on the two purposes of s. 35(1) identified by the Court, which are “to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown’s assertion of sovereignty over them.”<sup>4</sup> The Court found that “[w]hether a group is an Aboriginal people of Canada is a threshold question” although this “threshold question is likely to arise only where there is some ground for doubt, such as where the group is located outside of Canada.”<sup>5</sup> The Court also found that the test for establishing Aboriginal rights (*Van der Peet* test) is otherwise the same whether or not the modern-day successor is in Canada.<sup>6</sup>

Justice Rowe clarified several points with respect to how continuity is part of the *Van der Peet* test. First, he rejected British Columbia’s argument that “continuity requires an ongoing presence in the lands over which an Aboriginal right is asserted.”<sup>7</sup> Second, he clarified that the requirement for continuity from the time of contact to the present day is with respect to the practice itself, as opposed to the locations of the pre-contact and present-day communities.<sup>8</sup>

This decision has two central effects in British Columbia. The first is that it upholds the trial decision that Mr. Desautel was exercising a constitutionally protected Aboriginal right to hunt for food, social and ceremonial purposes in British Columbia when he shot a cow-elk near Castlegar, BC in 2010. Mr. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes, which was found at trial to be a modern-day successor group to the Sinixt. There was no finding at trial or on appeal whether the Lakes Tribe is the only modern-day successor group to the Sinixt. The trial judge found that the ancestral territory of the Sinixt “ran as far south as an island just above Kettle Falls,

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<sup>1</sup> *R. v. Desautel*, 2021 SCC 17 [*Desautel*].

<sup>2</sup> *Desautel* at para. 1.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Desautel* at para. 22.

<sup>5</sup> *Desautel* at para. 20.

<sup>6</sup> *Desautel* at paras. 50, 61.

<sup>7</sup> *Desautel* at para. 63.

<sup>8</sup> *Desautel* at paras. 52-55.

in what is now Washington State, and as far north as the Big Bend of the Columbia River, north of Revelstoke in what is now British Columbia.”<sup>9</sup>

The second effect is that it opens up the possibility of other modern-day successor groups located outside of Canada to claim s. 35 Aboriginal rights in Canada if they can meet the threshold question and the *Van der Peet* test in an area that is now part of Canada. The Court specifically rejected the position of the Attorney General of Canada that “non-resident rights claimants ... find a connection with a contemporary Aboriginal collective residing in Canada, and [] obtain recognition and authorization by that collective to exercise the claimed s. 35(1) rights.”<sup>10</sup> The Court found that this “would place a higher burden on Aboriginal communities who seek to claim rights if the group moved, was forced to move, or was divided by the creation of an international border between Canada and the United States”<sup>11</sup> and declined to include such a requirement.

While the test to establish s. 35 Aboriginal rights is the same for modern-day successors outside of Canada, the Court raises several ways in which the rights held by Indigenous groups located outside Canada may not be the same as the rights held by communities within Canada.<sup>12</sup> More specifically, the Court notes that the scope of the duty to consult,<sup>13</sup> the justification analysis<sup>14</sup> and the test for Aboriginal title<sup>15</sup> may be different for communities outside of Canada. With respect to consultation, the Court notes that “[i]ntegrating groups outside Canada into consultations by the Crown with groups inside Canada may involve discussions **within** Aboriginal communities and with the Crown.”<sup>16</sup> The Court leaves these issues unresolved and creates an opening for arguments to be advanced in future cases.

The Court declined to answer a number of other issues as they were not necessary to dispose of this appeal. First, the Court did not set out criteria for successorship of Aboriginal communities from pre-contact societies to modern-day collectives. On that point, the Court noted the challenges in determining modern successorship:

This is a complex issue that should be dealt with on a fuller factual record, with the benefit of legal argument. For example, consideration would have to be given to the possibility that a community may split over time, or, that two communities may merge into one, as well as to the relative significance of factors such as ancestry, language, culture, law, political institutions and territory in connecting a modern community to its historical predecessor.<sup>17</sup>

Second, the Court declined to decide whether an Aboriginal right can be lost or abandoned by non-use.<sup>18</sup> Third, the Court found that it was not necessary to engage issues of sovereign incompatibility

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<sup>9</sup> *Desautel* at para. 4.

<sup>10</sup> *Desautel* at para. 56.

<sup>11</sup> *Desautel* at para. 60.

<sup>12</sup> *Desautel* at para. 71.

<sup>13</sup> *Desautel* at paras. 72-76.

<sup>14</sup> *Desautel* at paras. 77-79.

<sup>15</sup> *Desautel* at paras. 80-81.

<sup>16</sup> *Desautel* at para. 76 [emphasis added].

<sup>17</sup> *Desautel* at para. 49.

<sup>18</sup> *Desautel* at para. 64.

(i.e. whether it would be incompatible with Canada's sovereignty for non-Canadian citizens to have Aboriginal rights in Canada).<sup>19</sup> Fourth, the Court declined to decide whether there are common law Aboriginal rights that may not be constitutionally protected as s. 35(1) Aboriginal rights.<sup>20</sup> Finally, the Court notes that it "would leave for another day the differences that may exist between the test for Aboriginal title claims by Aboriginal peoples within Canada and the test for such claims by peoples outside Canada."<sup>21</sup>

In closing, Justice Rowe makes an important comment recognizing the right of Indigenous peoples to define themselves and determine their own governance structures and practices in accordance with their own laws:

In my view, the authoritative interpretation of s. 35(1) of the *Constitution Act, 1982*, is for the courts. **It is for Aboriginal peoples, however, to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices.**<sup>22</sup>

The Court also emphasized the importance of negotiations. Justice Rowe notes that it is up to the parties to decide how to proceed, but that negotiation can foster reconciliation, and "[b]oth processes [negotiation and litigation] are complementary to each other and must interact with each other within their proper limits."<sup>23</sup>

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<sup>19</sup> *Desautel* at para. 66.

<sup>20</sup> *Desautel* at paras. 67, 70.

<sup>21</sup> *Desautel* at para. 81.

<sup>22</sup> *Desautel* at para 86 [emphasis added].

<sup>23</sup> *Desautel* at paras. 91, 92.