COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Desautel*,
2019 BCCA 151

Date: 20190502
Docket: CA45055

Between:

Regina

Appellant

And

Richard Lee Desautel

Respondent

And

Okanagan Nation Alliance

Intervenor

Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated December 28, 2017 (*R. v. Desautel*, 2017 BCSC 2389, Nelson Registry No. 23646).

Counsel for the Appellant:	G.R. Thompson H.E. Cochran
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Place and Date of Hearing:	Vancouver, British Columbia September 12, 2018
Place and Date of Judgment:	Vancouver, British Columbia May 2, 2019

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Fitch

Summary:

The Crown appeals the acquittal of Mr. Desautel for offences under the Wildlife Act. Mr. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes in Washington State and a citizen of the United States of America. He has never resided in British Columbia. He was charged after killing a cow elk in the Arrow Lakes area of British Columbia. At trial, he defended the charges by submitting that he was exercising his lawful Aboriginal right to hunt for ceremonial purposes in the traditional territory of his Sinixt ancestors, pursuant to s. 35(1) of the Constitution Act, 1982. He tendered evidence that: (i) his Sinixt ancestors had occupied territory above and below the 49th parallel, including the area in which he was hunting; (ii) at the time of contact (1811) they had engaged in a seasonal round of hunting, fishing, and gathering throughout their territory; and (iii) the practice of hunting in the area where he had shot the elk had continued with the members of the Lakes Tribe who were a modern-day successor collective of the Sinixt peoples. The trial judge and summary conviction appeal judge agreed. The Crown submitted that Mr. Desautel could not hold a constitutionally protected Aboriginal right to hunt in Canada because he did not belong to a group that was an "Aboriginal peoples of Canada". Even if a non-resident or citizen of Canada could be considered an "Aboriginal peoples of Canada" for the purposes of s. 35, the Crown argued he did not meet the present community criterion of the Van der Peet test. The Crown also submitted the Court must consider the incidental mobility right related to Mr. Desautel's claim and argued that right was incompatible with Canadian sovereignty.

Held: Appeal dismissed. Mr. Desautel was not foreclosed from claiming an Aboriginal right to hunt in British Columbia even though he is not a citizen or resident of Canada. Applying the Van der Peet test, the concept of continuity described therein addresses the necessary connection between the historic collective and the modern-day community. Therefore, claimants who are resident or citizens of the United States can be "Aboriginal peoples of Canada" where they can establish the requirements set out in Van der Peet. Mr. Desautel did so as the trial judge found: (i) Mr. Desautel was a member of a modern-day community, the Lakes Tribe, who were descended from the Sinixt, (ii) and who had continued to the present day the practice of hunting in their traditional territory where Mr. Desautel had hunted the elk. Therefore, there had been no breach of the continuity requirement in Van der Peet. An incidental mobility right does not arise in the circumstances of this appeal.

Reasons for Judgment of the Honourable Madam Justice D. Smith:

Introduction

[1] Section 35 of the *Constitution Act, 1982* provides:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[2] Aboriginal rights under s. 35(1) differ from individual rights under the *Charter of Rights and Freedoms* in that they are held only by Aboriginal peoples.

[3] The central issue in this appeal is the meaning of "the Aboriginal peoples of Canada" in s. 35(1). Does the phrase include only (i) Aboriginal peoples who are resident or citizens of Canada, or also (ii) Aboriginal peoples whose ancestors occupied territory that became Canada?

[4] This issue arose in the context of a regulatory charge against Richard Desautel for hunting without a licence in the Arrow Lakes area of British Columbia. Mr. Desautel is an Indigenous person and a citizen of the United States of America. He is a member of the Lakes Tribe of the Colville Confederated Tribes (the "CCT") and lives on the Colville Indian Reserve in Washington State. He has never been a resident of British Columbia or a citizen of Canada.

[5] On October 14, 2010, Mr. Desautel shot and killed a cow elk near Castlegar, British Columbia. He conducted the hunt on the instructions of the Fish and Wildlife Director of the CCT to secure ceremonial meat. He did not have a permit, licence or authorization from the Government of British Columbia for the hunt. He reported the kill to the local wildlife conservation officers whereupon he was charged with hunting without a licence and hunting big game while not being a resident of British Columbia, contrary to ss. 11(1) and 47(a) of the *Wildlife Act,* R.S.B.C. 1996, c. 488. Mr. Desautel disputed the charges.

The Trial Judgment

[6] At his trial before Judge Mrozinski of the Provincial Court, Mr. Desautel admitted the *actus reus* of the offence. In his defence, he maintained he was exercising his Aboriginal right to hunt for ceremonial purposes in the traditional territory of his Sinixt ancestors, pursuant to s. 35(1) of the *Constitution Act, 1982* (the "Constitution"). The burden of proof was on Mr. Desautel to establish the Aboriginal right claimed and a *prima facie* infringement of that right: *R. v. Sparrow,* [1990] 1 S.C.R. 1075.

[7] The Crown contended that Mr. Desautel could not have been exercising an Aboriginal right to hunt in that area because the Sinixt's rights did not survive the assertion of Canadian sovereignty. The Crown identified three exercises of Canadian sovereignty that it viewed as incompatible with the claimed Aboriginal right: (i) the establishment of the international boundary line between Canada and the USA in 1846; (ii) the 1896 legislative enactment of *An Act to Amend the Game Protection Act, 1895,* S.B.C. 1896, c. 22 [*Game Protection Act*], which made it unlawful for "Indians" not resident in this province to hunt game in British Columbia; and (iii) the coming into force of s. 35(1) of the Constitution.

[8] In the alternative, the Crown submitted the Lakes Tribe voluntarily drifted away from their traditional practice of hunting in B.C., and therefore, the modern group's claim lacked continuity with the pre-contact group's practices.

[9] The trial judge accepted Mr. Desautel's defence and acquitted him in comprehensive reasons for judgment indexed at 2017 BCPC 84. After reviewing the extensive expert evidence on the pre-contact history of the Sinixt people, the judge found that: (i) the historical records referred to the Sinixt interchangeably with "the Lakes or the Arrow Lakes people" (at para. 22), and there was "a clear and ancient link between the Sinixt and the Arrow Lakes region [of British Columbia]" (at para. 23); (ii) the Sinixt were a mobile people who, before and for some time after contact in 1811, engaged in a seasonal round of hunting, fishing and gathering in their traditional territory north and south of the 49th parallel, including the Arrow Lakes area (at para. 24); (iii) after the 1846 Oregon Boundary Treaty, the Sinixt spent longer periods of time south of the border but continued to assert their rights in the Canadian part of their traditional territory (at para. 38); (iv) by the end of the 19th century only a few members of the Lakes Tribe remained living in the Sinixt territory north of the 49th parallel, but they continued to come north to hunt in their traditional territory (at para. 43); (v) by 1902, only 21 Sinixt remained living in their traditional territory in Canada, when the federal government set aside a reserve for what was called the "Arrow Lakes Band" (at para. 44); (vi) after 1916, almost no one lived on the reserve full time but still occupied it seasonally (at para. 48); (vii) the last living

member of the Arrow Lakes Band died in 1956, and the federal government declared the Band extinct (at para. 48); and (viii) after the 1930s, the Lakes people did not appear to travel or hunt in the northern part of their traditional territory (at para. 49).

[10] Despite the Lakes Tribe's departure from the northern part of their traditional territory, the trial judge found its members remained connected to that geographical area:

> [50] Whether or not the Sinixt, or Lakes Tribe as they are now known, utilized their traditional territory north of the 49th parallel after the 1930s, I am left with no doubt that the land was not forgotten, that the traditions were not forgotten and that the connection to the land is ever present in the minds of the members of the Lakes Tribe of the CCT.

[11] The judge then turned to the test in *R. v. Van der Peet,* [1996] 2 S.C.R. 507, to determine if Mr. Desautel was exercising an Aboriginal right to hunt when he shot the elk and whether that Aboriginal right had been unjustifiably infringed. She found that: (i) the historical evidence overwhelmingly supported a finding that the Lakes Tribe was a successor group to the Sinixt people that lived in British Columbia at the time of contact (at para. 68); (ii) the right being asserted was an Aboriginal right to hunt for food, social and ceremonial purposes in Sinixt traditional territory in Canada (at para. 77); (iii) hunting was a central and significant part of the Sinixt's distinctive culture pre-contact (at paras. 80, 84); (iv) the Sinixt's gradual shift to almost full-time residence in their southern traditional territory was not a voluntary move in the sense that they intended to abandon their claim to their traditional territory in the north (at paras. 85,110, 123); and (v) applying the concept of continuity from *Van der Peet*, the chain of continuity had not been broken (at paras. 88, 119, 128). On this point the judge elaborated:

> [128] … I am convinced on the evidence overall that historical forces led to the drift by the Sinixt to the southern portion of their territory. The Sinixt did not voluntarily and enthusiastically choose allotments and farming over their traditional life; it was a matter of making the best choice out of a number of bad choices. Nothing in the evidence supports a finding that in doing so the Sinixt gave up their claim to their traditional territory. The interval between 1930 and 2010 when hunting in British Columbia either ceased or was

> conducted under the radar, so to speak, does not serve, in my view, when the reasons of *Van der Peet* are taken into account, to sever the continuity between the hunting practices of the pre-contact group and the present day Lakes Tribe or make it any less integral to the Lakes culture.

[12] The judge did not decide the issue of whether other Sinixt regional groups occupied parts of British Columbia because she found it unnecessary to do so for the purposes of determining the regulatory charge against Mr. Desautel (at para. 68).

[13] The judge then addressed the Crown's submission that the Sinixt right to hunt in British Columbia did not survive the Crown's assertion of sovereignty in 1846, 1896 or 1982. The Crown relied on Justice Binnie's concurring reasons in *Mitchell v. M.N.R.*, 2001 SCC 33, which I shall discuss below, in support of its position. The judge noted that the majority reasons of Chief Justice McLachlin in *Mitchell* declined to address the sovereign incompatibility issue. The judge also observed that the Aboriginal right held by Mr. Desautel did not, on its face, include a claim to a right to enter British Columbia to exercise that right, and, in any event, as that issue was not raised by Mr. Desautel it was unnecessary to decide. The judge did, however, offer the following comment:

> [148] Without deciding the point, I am prepared to accept the 1846 Treaty had an impact on the Sinixt's prior practice of moving about their territory at will. The Treaty had the effect of imposing a boundary that the Sinixt had and have to acknowledge and live with. It does not follow that this assertion of sovereignty cannot co-exist with their right to hunt in their traditional territory north of the 49th parallel.

[14] The judge rejected the Crown's submission that the *Game Protection Act* constituted an exercise of Canadian sovereignty. She described the act "as an attempt by the provincial government of the day to specifically regulate Indians *qua* Indians to the exclusion of any other persons" and "clearly *ultra vires* the provincial legislature" (at para. 150). She added that, even if the act was valid provincial legislation, it did not amount to an act of sovereignty capable of extinguishing Aboriginal rights (at paras. 151–52).

[15] As to the Crown's submission that s. 35(1) was an act of sovereignty, which extinguished the Aboriginal right at issue, the judge held that s. 35(1) was not sufficiently plain and clear to extinguish any Aboriginal rights (at paras. 159–160). She underscored that s. 35(1) did not create Aboriginal rights but merely affirmed and protected them, citing *Calder v. Attorney General of British Columbia,* [1973] S.C.R. 313; *Van der Peet* at para. 28; and *Mitchell* at paras. 9–11.

[16] The Crown also raised several practical issues that might result if Mr. Desautel's defence was accepted, including the imposition on the Crown of the duty to consult and accommodate the claims of non-citizens. The judge found that the practical issues raised by the Crown could not foreclose the recognition of proven Aboriginal rights (at para. 166).

[17] Last, having found the impugned provisions of the *Wildlife Act* constituted *prima facie* infringement of Mr. Desautel's Aboriginal right, the judge applied the test for justification from *Sparrow,* as summarized in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 77: (i) did the government discharge its procedural duty to consult and accommodate; (ii) was the government acting in accordance with a valid legislative purpose; and (iii) were its actions consistent with the Crown's fiduciary obligation to Aboriginal peoples. Without deciding whether there was a valid legislative objective, the judge held the Crown did not meet the *Sparrow* test because it failed to make any allocation for the Lakes people's Aboriginal right to hunt in their traditional territory in Canada (at para. 184).

[18] In sum, the judge found the Lakes Tribe was a successor group to the Sinixt people living in British Columbia at the time of contact and was a modern day rights-bearing community capable of holding an Aboriginal right.

[19] The Crown appealed Mr. Desautel's acquittal to the Supreme Court of British Columbia submitting that the trial judge erred in finding Mr. Desautel was a member of a collective that is an "Aboriginal peoples of Canada".

The Summary Conviction Appeal Judgment

[20] Justice Sewell presided over the summary conviction appeal. He framed the issues on appeal as: (i) whether an Aboriginal group that does not reside in Canada is entitled to the constitutional protections provided by s. 35 of the Constitution; and (ii) whether the right asserted by Mr. Desautel is incompatible with Canadian sovereignty. His reasons for judgment are indexed at 2017 BCSC 2389.

[21] As a preliminary matter, Sewell J. clarified the trial judge's finding with respect to the nature of the modern collective. He concluded that, despite the judge's use of various terms to describe the pre-contact Aboriginal collective, when her reasons were read as a whole, it was clear the judge considered the Sinixt people to be the relevant collective. He added that the trial judge found the Lakes Tribe members were Sinixt people and were entitled to assert the Aboriginal rights held by the Sinixt at the time of contact in their traditional territory in British Columbia.

[22] Justice Sewell considered two possible interpretations of the words "Aboriginal peoples of Canada": Aboriginal peoples living in Canada and Aboriginal peoples who occupied what became Canada prior to contact. He identified two authorities that considered the application of s. 35 to non-resident Aboriginal peoples, *R. v. Campbell*, 2000 BCSC 956, and *Watt v. Liebelt*, [1999] 2 F.C. 455 (C.A.), but found that neither case definitively determined the issue.

[23] In *Campbell*, the trial judge found Aboriginal peoples who traditionally occupied territory on both sides of an international boundary could be an Aboriginal peoples of Canada and another jurisdiction. However, the summary conviction appeal judge, in *dicta*, appeared to reject this conclusion. In *Watt v. Liebelt*, Mr. Watt, an American Indigenous person and member of the CCT, was ordered removed from Canada. At his immigration hearing, Mr. Watt argued he could not be ordered to leave the country because he had an Aboriginal right to remain in Canada. The adjudicator held there was no jurisdiction to determine whether Mr. Watt was an Aboriginal person of Canada and ordered a departure notice. On appeal to the Federal Court of Appeal, Strayer J.A. found the adjudicator had the

necessary powers to decide the issue and sent the matter back for determination in accordance with his reasons. In his reasons, he found the sovereign nature of Canada was not a legal barrier *per se* to the Aboriginal right claimed by Mr. Watt.

[24] I agree with Sewell J. that neither *Campbell* nor *Watt* are determinative of the issue in this appeal although each provides informative comments in the passages relied upon by the respective parties.

[25] Interpreting s. 35 in light of the interests it was meant to protect, Sewell J. found the proper interpretation of Aboriginal peoples of Canada was Aboriginal peoples who had occupied what became Canada prior to contact. He emphasized that s. 35 did not create Aboriginal rights, rather "it is the pre-contact occupation of the land that gives rise to the rights protected by s. 35" (at paras. 25, 72). He added that this interpretation was consistent with the objective of reconciliation as established in the jurisprudence. Therefore, he found, non-resident members of the Sinixt collective were not precluded from being considered an Aboriginal people of Canada merely because they now live in the United States.

[26] Justice Sewell also rejected the Crown's submission that Mr. Desautel's Aboriginal right to hunt was incompatible with Canadian sovereignty because it necessarily included a right to cross the international border. The Crown relied principally on Binnie J.'s concurring reasons in *Mitchell* at paras. 76, 125–26, 148, and 163 to argue that the government's right to control its borders was fatal to Mr. Desautel's claimed Aboriginal right to hunt in Canada. However, Sewell J. found that: (i) the factual basis for Binnie J.'s conclusion was distinguishable from the facts of this case; (ii) both the majority and the concurring reasons in *Mitchell* recognized that sovereign incompatibility would only arise in rare cases and did not arise in the *Mitchell* case; and (iii) in any event, the evidentiary record was insufficient to permit that issue to be decided. Mr. Desautel had not been charged with coming into Canada unlawfully and there was no evidence that he had been denied entry. Citing Strayer J.A.'s comments in *Watt v. Liebelt* at para. 15, Sewell J. held the jurisprudence did not support the Crown's submission that the doctrine of sovereign

incompatibility erected a complete bar to the existence of the Aboriginal right identified by the trial judge.

[27] In the result, he dismissed the appeal except on the s. 24(1) issue, which is not material to this appeal.

Leave to Appeal and Intervenor Status

[28] On April 4, 2018, Mr. Justice Hunter, sitting in chambers, granted leave to appeal the following three questions of law alone:

> 1. Does the constitutional protection of Aboriginal rights contained in s. 35 of the *Constitution Act, 1982* extend to an Aboriginal group that does not reside in Canada, and whose member claiming to exercise an Aboriginal right is neither a resident nor citizen of Canada?
>
> 2. Is it a requirement of the test for proving an Aboriginal right protected by s. 35 of the *Constitution Act, 1982* that there be a present day community in the geographic area where the claimed right was exercised?
>
> 3. In order to determine whether an Aboriginal person who is not a citizen or resident of Canada has an Aboriginal right to hunt in British Columbia, is it necessary to consider the incidental mobility right of the individual and the compatibility of that right with Canadian sovereignty?

[29] On July 5, 2018, Mr. Justice Groberman, sitting in chambers, granted Okanagan Nation Alliance ("ONA") leave to intervene in the appeal.

[30] The Attorney General of Canada, although served with a Notice of Constitutional Question, declined to appear or make any submissions.

On Appeal

Position of the Crown

[31] The Crown submits the summary conviction appeal judge erred in law in finding that Mr. Desautel holds a constitutionally protected Aboriginal right to hunt in British Columbia.

The approach to interpreting s. 35

[32] The Crown's position is that, properly interpreted, s. 35(1) does not apply to non-resident Aboriginal groups. It cautions that an expanded interpretation of s. 35(1) would "significantly extend the ambit of the Crown's duty to consult (and where appropriate, accommodate), to Aboriginal groups wholly resident in the US, in a manner which may be incompatible with US law."

[33] The Crown submits that *Van der Peet* is not the correct legal test for determining whether Mr. Desautel is a member of an "Aboriginal peoples of Canada" for the purposes of s. 35(1). Instead, the Crown argues, the Court must use general principles of constitutional interpretation to determine the "threshold issue" of who is entitled to s. 35 rights. The Crown says those general principles of constitutional interpretation include the modern approach to statutory interpretation and placing constitutional terminology in its "proper linguistic, philosophical and historical context", citing Ruth Sullivan, *Statutory Interpretation*, 3rd ed., (Toronto: Irwin Law, 2016); *Sparrow* at 1106; *R. v. Comeau,* 2018 SCC 15 at para. 52; and *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12 at para. 19. The Crown also emphasizes the primacy of the written text of the Constitution, citing *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217 at para. 53; *Caron v. Alberta,* 2015 SCC 56 at paras. 6, 35–38; and Sullivan at p. 193.

[34] The Crown contends the analysis must begin with the presumption that the Constitution is intended to apply only to persons in Canada and that nothing in s. 35 rebuts that presumption. The Crown says that while s. 35 contains no limiting language that might restrict its application only to those Aboriginal peoples residing in or citizens of Canada, more significantly it contains no language that expressly or impliedly rebuts the presumption that a constitution is intended to apply only to those in the territory of the enacting jurisdiction, citing Sullivan at p. 371; *R. v. Hape,* 2007 SCC 26 at para. 69; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers,* 2004 SCC 45 at paras. 54–55, and

Peter Hogg, *Constitutional Law of Canada,* 5th ed., (Toronto: Thomson Reuters, 2016), vol, 1, & 28.10 m.

[35] The Crown adds that the "threshold issue" is identifying "who" are "Aboriginal peoples of Canada". This issue, it submits, is readily determined by a plain reading of the words "Aboriginal peoples of Canada" and the grammatical arrangement of the words in s. 35(1), which includes two possessives: "existing and treaty rights of [i.e., being held or belonging to] the Aboriginal peoples of [who must be of] Canada" (emphasis added). Extending the analysis to s. 35(2) of the Constitution, which provides that Aboriginal peoples of Canada includes "the Indian, Inuit and Métis peoples of Canada", it says, further supports a narrow interpretation of s. 35(1) to Aboriginal peoples resident in Canada. It contends that the Supreme Court of Canada jurisprudence suggests the purpose of s. 35 is limited to protecting Aboriginal groups resident within Canada because it typically refers to Aboriginal peoples in the same sentence as the word Canadian (i.e., "Aboriginal members of Canadian society"): *Van der Peet* at para. 19; *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53 at para. 33.

[36] The Crown further submits that the lack of any reference to residency or citizenship in s. 35(1), is explained by the philosophical context of the provision, which distinguishes Aboriginal rights from *Charter* rights. Aboriginal rights are collective rights that are held only by Aboriginal peoples. *Charter* rights, in the liberal enlightenment view, are "general and universal" and held by "all people in society because each person is entitled to dignity and respect" (*Van der Peet* at para. 18). As the Court in *Van der Peet* stated:

> [19] Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, aboriginal rights must be viewed differently from Charter rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. As Academic commentators have noted, aboriginal rights "inhere in the very meaning of aboriginality" …
>
> [20] The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they

> are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.
>
> [Emphasis added.]

[37] The Crown also contends that the historical context of Canada's evolution from colony to an independent state supports a narrow interpretation of s. 35(1) as reflected in the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada,* (1980), Issue No. 3, November 12, 1980, pg. 3:84, Issue No. 4, November 13, 1980, pg. 4:13, Issue No. 12, November 25, 1980, pg. 12:60; and Issue No. 16, December 1, 1908, pp. 16:13, 16:24, 16:25 (the "*Minutes*"). The *Minutes*, the Crown says, reflect an implicit shared understanding among the committee participants, which included the government and Aboriginal representatives of the time, that s. 35 was intended to protect the Aboriginal rights of Aboriginal communities in Canada; they do not refer to the Aboriginal rights of foreign collectives, which the Crown submits would, in any event, be contrary to the presumption against the extraterritorial application of the Constitution. While the purpose of s. 35 is reconciliation, the Crown says, it is reconciliation only with Aboriginal peoples who are resident or citizens of Canada. It maintains that only Canadian Aboriginal peoples are cognizable rights-holding communities under Canadian law.

[38] Last, the Crown contends that the legislative context of s. 35, which includes s. 35.1 (a commitment to convene a constitutional conference that includes "Aboriginal peoples of Canada" before any amendment is made to the constitution) and the now-repealed ss. 37 and 37.1 (which provided for additional constitutional conferences in 1983 and 1987 that included "Aboriginal peoples of Canada") indicate an intention to include only Aboriginal peoples who are resident in or citizens of Canada as foreign Aboriginal groups cannot participate in discussions regarding amendments to our constitution.

[39] In sum, the Crown submits that the phrase "Aboriginal peoples of Canada" can only mean a contemporary rights-holding Aboriginal community of members who are resident in or citizens of Canada. If the Court accepts this submission, the Crown says it need not address the applicability of the *Van der Peet* test.

Application of the Van der Peet test

[40] In the alternative, if Mr. Desautel is a member of an "Aboriginal peoples of Canada", the Crown submits that his defence still must fail absent a finding by the trial judge that Mr. Desautel is a member of a present day community in the geographic area where he exercised his claimed Aboriginal right to hunt. The Crown relies primarily on *R. v. Powley,* 2003 SCC 43, and *R. v. Bernard,* 2017 NBCA 48, to establish this additional geographic requirement to the *Van der Peet* test. The Crown argues that as a member of the Lakes Tribe, which is wholly located in Washington State, Mr. Desautel does not meet the present day community criterion.

Incidental mobility right

[41] The Crown further submits that in order to determine whether an Indigenous person who is not a citizen or resident of Canada has an Aboriginal right to hunt in British Columbia, the Court must consider any incidental right of access (i.e., mobility right). The Crown argues that Mr. Desautel's claimed right necessarily implies a right to cross the international border, which is incompatible with Canadian sovereignty. In support of this submission, the Crown relies on *Mitchell,* where Chief Justice McLachlin, for the majority, described the doctrine of sovereign incompatibility as follows:

> [10] Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada. [Footnotes omitted.]

Position of the Respondent

[42] Mr. Desautel views the threshold issue as the identity of the collective. He submits that the trial judge, as summarized by the summary conviction appeal judge, found that the traditional territory of the Sinixt people, who were the relevant collective, included lands in the south that became the United States and lands in the north that became Canada, and that the Lakes Tribe was part of the collective that resided in the United States. He submits that based on these findings, it is not open to the Crown to argue that the contemporary rights-holding collective is limited to the Lakes Tribe or that the modern-day collective is wholly located in the United States.

[43] In the alternative, Mr. Desautel submits that the existing *Van der Peet* test determines who is an "Aboriginal peoples of Canada" for the purposes of s. 35, and *Van der Peet* requires a claimant to establish both a past and present connection between the Aboriginal people and the site-specific practices on the land that is now Canada.

Application of the Van der Peet test

[44] Mr. Desautel rejects the Crown's submission that *Van der Peet* requires a modern-day collective in the same geographical place as the historic collective. He submits there is no principled reason to add such a requirement to the *Van der Peet* test. He does not dispute the proposition that a modern-day collective must exist; rather, he disputes the Crown's submission that the modern-day collective must be located in the same geographic area as the pre-contact collective.

Incidental mobility right

[45] Mr. Desautel further submits that it is unnecessary to consider if his claimed Aboriginal right necessarily includes an incidental mobility right because the Sinixt right to hunt in the Arrow Lakes region did not require an incidental right to cross a border that did not exist. He further contends that, in most cases where an incidental right has arisen, it is because the exercise of that incidental right constitutes the

actus reus of the regulatory offence, that is the state action in issue limited the exercise of the incidental right: see *R. v. Cote,* [1996] 3 S.C.R. 139; *R. v. Sundown,* [1991] 1 S.C.R. 393; and *R. v. Simon,* [1985] 2 S.C.R. 387. Those are not the circumstances in this case. In any event, the issue of an incidental right did not arise in his case.

[46] Mr. Desautel submits the trial judge and summary conviction appeal judge were correct in adopting the analytical framework from *Van der Peet* to determine whether his claimed right to hunt is entitled to constitutional protection under s. 35.

Position of Intervenor

[47] The ONA was granted intervenor status in the appeal. The ONA's principal submission is that the Court should not identify or define the entire collective representing the Sinixt in these proceedings. They submit the contemporary rights-holding entity is larger than the Lakes Tribe and includes other rights-holdings groups in British Columbia who have yet to be expressly identified.

[48] The ONA further submits that the *Van der Peet* test does not require a claimant to prove there is a modern-day community in the geographic area where the Aboriginal right was exercised. The approach to s. 35(1), it submits, should focus on the historic connection to the site-specific area, which is consistent with the Aboriginal perspective.

The Trial Judge's Findings of Fact

[49] The trial judge's central finding of fact, as summarized by Sewell J., was that the Sinixt people were the relevant Aboriginal collective and the Lakes Tribe, of which Mr. Desautel is a member, represents a part of the Sinixt people that now live in Washington State. Both the trial judge and the summary conviction appeal judge were careful not to exclude any potential claim by Sinixt peoples resident in Canada. The trial judge acknowledged that the Lakes Tribe was probably not the exclusive rights-holding modern collective of the Sinixt, and that other successor groups north of the border, particularly in the Arrow Lakes region, also had potential Aboriginal

rights claims that stem from their Sinixt ancestry (at paras. 4, 55). However, as the proceedings in this case involved only a regulatory charge under the *Wildlife Act* against Mr. Desautel, the evidentiary record was limited to Mr. Desautel's claim as a member of the Lakes Tribe.

[50] Other significant findings of fact by the trial judge include that: (i) the practice of hunting in what is now B.C. was a central and significant part of the Sinixt's distinctive culture pre-contact; (ii) despite being physically absent from their traditional territory in B.C. after 1930, the chain of continuity of practice and community was not broken; and (iii) the Lakes Tribe continued hunting in a manner similar to the traditions of the Sinixt in the pre-contact era.

Analysis

General Principles Applicable to Section 35(1)

[51] The meaning and scope of s. 35(1) "is derived from the general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself": *Sparrow* at 1106. *Sparrow* also requires that s. 35(1) be construed in a purposive way and that the words in s. 35(1) be afforded a generous, liberal interpretation.

[52] *Van der Peet* expanded on the purposive approach to be taken in determining the scope of s. 35(1) given the fiduciary relationship between the Crown and Aboriginal peoples. In *Van der Peet,* the Court instructed courts to take into account the perspective of the Aboriginal peoples claiming the right and stated that any doubt or ambiguity as to what falls within the scope of s. 35 must be resolved in favour of the Aboriginal peoples (at paras. 25, 49). The Court explained:

> [30] ... the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.

[31] More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and culture, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

...

[36] ... It is ... the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory, to which the recognition and affirmation of aboriginal rights in s. 35(1) is directed.

...

[49] In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. ... Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but must also be aware that aboriginal rights exist within the general legal system of Canada. ...The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

...

[60] The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between the aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of the Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

...

[63] ... in order for an aboriginal group to succeed in its claim for aboriginal title it must demonstrate that the connection with the land in its customs and laws has continued to present day. ...The relevance of this observation for identifying the rights in s. 35(1) lies not in its assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim ...but rather in its suggestion of the importance of considering the continuity in the practices, customs and traditions of aboriginal communities in assessing claims to aboriginal rights. It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition has continuity with the practices, customs and traditions of pre-

> contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).
>
> [64] The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow, supra,* at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. ...
>
> [65] ...the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact.
>
> ...
>
> [69] ... aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.
>
> [Emphasis added.]

[53] The importance of reconciling the prior occupation of Canadian territory by Aboriginal peoples with the assertion of Crown sovereignty is echoed in several subsequent decisions. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 1, the Court confirmed that "[t]he fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions". See also *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 at para. 12. More recently, in *Mikisew Cree First Nation v. Canada (Governor General in Council),* 2018 SCC 40, Karakatsanis J. identified reconciliation as a first principle of Aboriginal law and said "reconciliation and not rigid formalism should drive the development of Aboriginal law" (at paras. 22, 44).

Purposive Analysis of Section 35(1)

Does s. 35(1) apply to Aboriginal peoples who are not resident in or citizens of Canada?

Does s. 35(1) require that there be a present day community in the geographic area where the claimed right was exercised?

[54] As both questions are interrelated, I propose to address them together.

[55] The starting point in determining the meaning of "Aboriginal peoples of Canada" in s. 35(1) necessarily begins with *Sparrow. Sparrow*, as formalized in *Van der Peet*, requires a purposive analysis focused on reconciling the pre-existence of Aboriginal societies with the sovereignty of the Crown (at 1106). These foundational decisions root the concept of Aboriginal rights in the historical presence of Indigenous societies in North America (*Van der Peet* at paras. 32, 62). This is why courts must look to the practices, customs and traditions of the historic collective when defining Aboriginal rights (*Van der Peet* at para. 61).

[56] In this case, the relevant historic collective is the Sinixt. The trial judge found "clear and cogent proof" that hunting near Castlegar, the area where Mr. Desautel shot the elk, was a central and significant part of the Sinixt's distinctive culture pre-contact and remained an integral part of the Lakes Tribe's culture in the present day (at paras. 84, 119). She also found the Lakes Tribe "certainly qualify as a successor group to the Sinixt people living in British Columbia at the time of contact" (at para. 68). Whether a member of the Lakes Tribe, a modern collective descended from the Sinixt, can exercise Aboriginal hunting rights in the Sinixt traditional territory in British Columbia depends on the right claimant's ability to establish continuity according to *Van der Peet*. Even though the Lakes Tribe did not hunt in British Columbia after 1930, the trial judge considered all of the evidence, including the perspective of the Lakes Tribe, and found the chain of continuity had not been broken. This finding is entitled to deference on appeal.

[57] In my view, the *Van der Peet* test addresses the necessary connection between the modern and historic collective through the concept of continuity. The

formalistic interpretation of the words "Aboriginal peoples of Canada" proposed by the Crown fails to take into account the Aboriginal perspective and therefore cannot be relied upon to foreclose a modern-day claimant from the opportunity of establishing an Aboriginal right pursuant to *Van der Peet.* Simply put, if the *Van der Peet* requirements are met, the modern Indigenous community will be an "Aboriginal peoples of Canada".

[58] I also reject the Crown's submissions on the proper application of *Van der Peet.* The Crown contends that *Powley* requires an Aboriginal rights claimant to be a member of a contemporary community in the geographic area where the right was exercised. This submission assumes that the Sinixt peoples are restricted to the Lakes Tribe, which the trial judge declined to determine within the limited scope of a trial on a regulatory charge under the *Wildlife Act.* In any event, *Powley* does not in my view import a requirement that the modern collective must reside in the same geographic area as the historic collective.

[59] In *Powley,* the Court held the Métis claimants had an Aboriginal right to hunt for food under s. 35(1). The Court found that Métis communities evolved post-contact but prior to the entrenchment of European control. To accommodate the unique history of the Métis, the Court shifted the focus of the time period analysis in *Van der Peet* from pre-contact to pre-control. The Court also emphasized the importance of the claimant's membership in a contemporary rights-bearing community; it did not impose a requirement that the modern community must occupy the same territory as the pre-contact community.

[60] The Crown also relies on *Bernard*. However, that case is distinguishable. In *Bernard*, a Mi'kmaq member of the Sipekne'katik First Nation in New Brunswick was charged with contravening the *Fish and Wildlife Act*, S.N.B. 1980, c F-14.1, for hunting deer near the mouth of the St. John River. In response, Mr. Bernard claimed he had an Aboriginal right to hunt at that location. The Court dismissed the claim. The evidence in *Bernard* was that the Mi'kmaq communities in that region historically organized themselves into separate bands each with their own traditional hunting

territory. The trial judge found there was a Mi'kmaq community that hunted at the mouth of the St. John River pre-contact. However, the evidence also suggested that that specific community had left the area 250–300 years earlier. The trial judge found Mr. Bernard had failed to establish that he was a member of a modern collective descended from the original rights-bearing Mi'kmaq community that hunted at the mouth of the St. John River. Unlike *Bernard*, Mr. Desautel has established a connection to the historic community that hunted in the traditional territory where the claimed Aboriginal right was exercised.

[61] The *Van der Peet* test has never included a requirement that the modern collective must occupy the same territory the historic collective occupied pre-contact, although the Supreme Court of Canada has modified the test in a few limited circumstances. *Powley* modified elements of the pre-contact test to account for the "distinctive history and post-contact ethnogenesis" of the Métis (at para. 14). *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, adapted the *Van der Peet* test to better reflect the context surrounding Aboriginal title claims (at paras. 141–142). No decision has been brought to our attention that has recognized such a requirement. I would therefore reframe the Crown's "threshold issue" as whether the *Van der Peet* test should be modified where the Aboriginal right claimant is not a resident or citizen of Canada.

[62] Imposing a requirement that Indigenous peoples may only hold Aboriginal rights in Canada if they occupy the same geographical area in which their ancestors exercised those rights, ignores the Aboriginal perspective, the realities of colonization and does little towards achieving the ultimate goal of reconciliation. In this case, such a requirement would extinguish Mr. Desautel's right to hunt in the traditional territory of his ancestors even though the rights of his community in that geographical area were never voluntarily surrendered, abandoned or extinguished. I would not modify the *Van der Peet* test to add a geographic requirement that would prevent members of Indigenous communities, who may have been displaced, from the opportunity of establishing their Aboriginal rights in areas their ancestors had occupied pre-contact.

[63] The presumption against extraterritorial application of legislation does not apply in these circumstances as Mr. Desautel is exercising his Aboriginal right in Canada. Similarly, the Crown's submission that the Lakes Tribe are a domestic dependent nation in the United States and therefore giving their members rights in Canada, which could extend to the duty to consult and where appropriate to accommodate, might contravene American law, is not a relevant consideration. The issues raised by the Crown regarding the Lakes Tribe's legal status in the United States, or the extent of any potential duty to consult and accommodate, cannot be a matter of functionality. Aboriginal rights are inherent rights that existed at the time of contact. What flows from those rights continues to evolve. However, these are ancillary questions that in my view are not material to the central issue: whether members of a present-day collective situated in Washington State, are entitled to exercise the inherent rights of their Sinixt ancestors, if those rights have been continuously exercised to the present day in the geographic area of the claimed right in Canada.

[64] Nor, in my view, are the Crown's submissions on the legislative context and legislative history helpful. The former would be subject to a justification analysis, which has yet to be undertaken, and the *Minutes*, which are non-specific in their application, do not inform the constitutional interpretation of s. 35(1). Similarly, s. 35.1 is not in my view helpful in deciding the intention of the drafters of s. 35 (1). While s. 35.1 requires "representatives of the aboriginal peoples of Canada to participate in discussions" on a proposed constitutional amendment, the manner and scope of those "discussions" remain undefined.

[65] I would therefore answer the first question in the affirmative and the second question in the negative.

Is it necessary to consider the incidental mobility right of the individual and the compatibility of that right with Canadian sovereignty?

[66] The Crown submits that to find Mr. Desautel has an Aboriginal right to hunt in Sinixt traditional territory in Canada, the Court must also consider his incidental

mobility right (e.g., a right to enter B.C.) and the compatibility of that right with Canadian sovereignty. I do not agree that this issue must be addressed in this appeal or that an incidental right to cross the international border would necessarily follow.

[67] First, this issue was not addressed by the trial judge because the lawfulness of Mr. Desautel's entry into Canada was never disputed, and she found a mobility right did not necessarily arise in the circumstances of the case. Therefore, the evidentiary record necessary to assess the nature and extent of Mr. Desautel's right to cross the border does not exist.

[68] Second, in the cases previously noted (at para. 45) where the issue of an incidental right has arisen, the exercise of the incidental right constituted the *actus reus* of the regulatory offence, that is the state action in issue limited the exercise of the incidental right. It was in that narrow context that incidental rights have been considered. In this case, the state action in question infringes Mr. Desautel's right to hunt, not his right to cross the Canada-US border.

[69] Third, I would recall the Chief Justice's comments in *Mitchell* where, writing for the majority, she declined to address the incidental mobility right because it was unnecessary to the determination of the appeal. However, she offered the following comments:

> [63] This Court has not expressly invoked the doctrine of "sovereign incompatibility" in defining the rights protected under s. 35(1). In the *Van der Peet* trilogy, this Court identified the aboriginal rights protected under s. 35(1) as those practices, customs and traditions integral to the distinctive cultures of aboriginal societies: *Van der Peet, supra,* at para. 46. Subsequent cases affirmed this approach to identifying aboriginal rights falling within the ageis of s. 35(1) (*Pamajewon, supra* at paras. 23-25; *Adams, supra,* at para. 33; *Cote, supra,* at para. 54; see also: *Woodward, supra,* at p. 75) and have affirmed the doctrines of extinguishment, infringement and justification as the appropriate framework for resolving conflicts between aboriginal rights and competing claims, including claims based on Crown sovereignty.

[70] Without deciding the issue, it seems to me that the doctrines of extinguishment, infringement and justification provide a helpful analytical framework

in which to determine the scope of an incidental right of access to the geographical area where an Aboriginal right is to be exercised, and the extent to which that incidental right of access might be curtailed by Canadian laws of general application, including entry into Canada and reasonable conservation measures.

[71] I would therefore answer the third question in the negative in the circumstances of this case.

Summary

[72] Section 35 is directed towards the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty. This requires recognizing Indigenous perspectives on pre-contact and present-day practices, customs and traditions in conjunction with the Crown's interests in meeting the needs of the modern-day Canadian society.

[73] A practice, custom, or tradition that is central and significant to the distinctive culture of an Indigenous society pre-contact and has not been voluntarily surrendered, abandoned, or extinguished, may be exercised by Indigenous members of modern collectives if they can establish that: (i) the modern collective is descended from the historic collective that exercised the practice, custom or tradition in that territory; and (ii) there has been continuity between the practice of the modern collective with the practice of the historic collective pre-contract.

[74] The right claimed by Mr. Desautel falls squarely within the pre-contact practice grounding the right. Hunting in what is now British Columbia was a central and significant part of the Sinixt's distinctive culture pre-contact and remains integral to the Lakes Tribe. The Lakes Tribe is a modern collective descended from the Sinixt that has continued to hunt and maintained its connection to its ancestral lands in British Columbia. Mr. Desautel is a member of the Lakes Tribe. Therefore, he has an Aboriginal right to hunt elk in the Sinixt's traditional hunting territory in British Columbia.

Disposition

[75] I would dismiss the appeal.

"D. Smith J.A." per M.J.

The Honourable Madam Justice D. Smith

I AGREE:

The Honourable Mr. Justice Willcock

I AGREE:

The Honourable Mr. Justice Fitch