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Whose Sovereignty is it Anyway? The Borders of Aboriginal Rights along the Sovereign Borders of Canada

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Case Commented On: *R v Desautel*, [2019 BCCA 151 \(CanLII\)](#)

On October 24, 2019, the Supreme Court of Canada [agreed to hear the Crown's appeal](#) from the British Columbia Court of Appeal's decision in *R v Desautel*, [2019 BCCA 151 \(CanLII\)](#) (*Desautel*). The Crown characterized the case as one of national significance, and the country's highest court has decided to hear the case despite *Desautel*'s unanimous three-judge decision. It is difficult to disagree; the case raises issues surrounding the role of Canadian sovereignty in the application of Aboriginal rights and the guarantees of section 35 of *The Constitution Act, 1982*. Sovereignty inherently implicates all Canadians, thus the Court of Appeal's reasoning deserves careful scrutiny on this matter.

In *Desautel*, the Court of Appeal upheld the acquittal of Richard Desautel for hunting without a licence contrary to the *Wildlife Act*, [RSBC 1996, c 488](#). It did so by affirming his section 35 Aboriginal right to hunt in an area in southeastern British Columbia, having satisfied the test for such rights set down by the Supreme Court of Canada in *R v Van der Peet*, [1996 CanLII 216 \(SCC\)](#). Desautel, however, is an American; he has never lived in British Columbia, nor is he a Canadian citizen. He is a member of the Lakes Tribe of the Colville Confederated Tribes (CCT) living on the Colville Indian Reserve in Washington (*Desautel* at paras 4 – 5). The basis for the rights claim was CCT's status as successor to the Sinixt, a people whose traditional territory straddled the Canada-US border and who crossed the border frequently even into the 20th century. The case therefore turned on whether section 35 could apply to non-Canadians and how to reconcile the assertion of sovereignty in the context of modern borders (*Desautel* at para 3).

This post will examine the British Columbia Court of Appeal's analysis of the interplay of Canadian sovereignty and Aboriginal rights that arose in *Desautel*. It will not attempt to predict how the Supreme Court of Canada may approach the Crown's appeal, but will reflect on ambiguities not addressed by British Columbia's top court and how they might play out in Alberta and elsewhere in Canada.

Background

The Sinixt People

The British Columbia Court of Appeal accepted the factual findings first established at trial in the Provincial Court of British Columbia in *R v Desautel*, [2017 BCPC 84](#) (*Desautel* (PC)), including the historical account of the Sinixt people, which is necessary to frame the

“international” character of *Desautel*. The historical record refers to the Sinixt interchangeably as the Sinixt, the Lakes, or the Arrow Lakes people. “Sinixt” generally translates as the “Dolly Varden” people, referring to the fish species for which the Arrow Lakes region was known (*Desautel* (PC) at paras 11 – 22). The group occupied this area in the vicinity of the Columbia River from approximately Big Bend, north of Revelstoke, British Columbia to Kettle Falls, Washington.

Prior to contact in 1811 and for some time after, the Sinixt engaged in a seasonal round in their territory hunting, fishing, and gathering, which included participation in the Chinook salmon fishery at Kettle Falls. Historical sources agree that Sinixt territory extended south at least as far as an island just above Kettle Falls. In June 1811, explorer David Thompson is reported to have met a number of people at Kettle Falls as he ascended the Columbia River. While this meeting has come to signify the time of contact with Europeans, meaningful contact did not occur until the establishment of a Hudson’s Bay Fort and trading post in Colville in 1825 (*Desautel* (PC) at para 33).

After the 1846 Oregon Boundary Treaty, which established the border between the United States and British North America at the 49th parallel, the Sinixt spent longer periods of time south of the border, though continued to assert their rights in the Canadian part of their traditional territory (*Desautel* (PC) at paras 33 – 41). By the end of the 19th century, however, only a few Sinixt lived in the traditional territory north of the border, although southern resident members continued to come north to hunt in their traditional territory until after the 1930s (*Desautel* (PC) at para 43). By 1902, only 21 Sinixt remained in their traditional territory in Canada, when the federal government set aside a reserve for what was called the “Arrow Lakes Band” (*Desautel* (PC) at para 44). After 1916, the reserve was nearly unoccupied on a permanent basis, though still occupied seasonally (*Desautel* (PC) at para 48). The federal government declared the Arrow Lakes Band extinct in 1956, upon the death of the last living Canadian Sinixt. At the same time, the Lakes Tribe in Colville had some 257 enrolled members (*Desautel* (PC) at para 48).

With Sinixt still living outside Canada, however, could their rights over such traditional territory and its use be similarly “extinct”? (*Desautel* (PC) at para 50)

Factual Overview and Judicial History

On October 14, 2010, Desautel shot and killed a cow elk near Castlegar, British Columbia on instruction from the CCT to obtain ceremonial meat. Though he lawfully entered Canada into British Columbia, he did not obtain a permit, licence, or authorization from the province as required by sections 11(1) and 47(a) of the *Wildlife Act*. He was subsequently charged with hunting without a licence and hunting big game while not being a resident of British Columbia (*Desautel* at para 5).

The Provincial Court of British Columbia acquitted Desautel at trial, accepting that he had established an Aboriginal right under the test from *Van der Peet* that was unjustifiably infringed by the application of the *Wildlife Act* (*Desautel* at paras 9 – 11 & 17). In so doing, the Provincial Court rejected the notion that a Sinixt right to hunt in the area was extinguished by any of: the 1846 Oregon Treaty; a historical enactment of the British Columbia legislature (*An Act to Amend*

the Game Protection Act, 1895, SBC 1896, c 22); or the establishment of section 35 of the Constitution. The Crown appealed to the Supreme Court of British Columbia, submitting that the trial judge erred in finding Desautel was a member of a collective that is an “Aboriginal peoples of Canada” per section 35.

The Supreme Court of British Columbia, however, found the proper interpretation of Aboriginal peoples of Canada was Aboriginal peoples who had occupied what became Canada prior to contact. The court specifically noted that “it is the pre-contact occupation of the land that gives rise to the rights protected by s. 35” (*R v Desautel*, [2017 BCSC 2389](#) at paras 25 & 72 [*Desautel* (SC)]), adding that this interpretation was consistent with the objective of “reconciliation” as established in the jurisprudence (*Desautel* (SC) at paras 29, 66 & 72). Thus, non-resident Sinixt were not precluded from being considered an Aboriginal people of Canada merely because they live in the United States. Here, the court rejected the Crown’s argument that such an Aboriginal right to hunt was incompatible with Canadian sovereignty because it necessarily included a right to cross the international border, distinguishing the case from the Supreme Court of Canada’s ruling in *Mitchell v MNR*, [2001 SCC 33 \(CanLII\)](#).

In *Desautel*, the British Columbia Court of Appeal accepted the interpretations of the courts below, affirming Desautel’s acquittal. Again, the Crown’s concerns with respect to the application of Canadian sovereignty in the context of section 35 were dismissed, however, the court’s relatively short decision on these points (just 20 paragraphs; *Desautel* at paras 51 – 71) warrants a closer look.

Canadian Sovereignty and the Application of Section 35

Application of Section 35 to Non-Canadians

The Crown argued that prior to establishing an Aboriginal right under section 35 of the Constitution, a threshold issue exists that asks whether the claimant is a member of an “Aboriginal peoples of Canada”, meaning a contemporary rights-holding Aboriginal community of members who are resident in or citizens of Canada (*Desautel* at paras 32 – 35 & 39). This was based on general principles of constitutional interpretation with respect to the wording of section 35, as well as the presumption against extra-territorial application of the constitution (See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed (Markham, Ontario: LexisNexis Canada, 2014) at 837 – 39). The Crown viewed the absence of an express residency stipulation as a result of section 35 applying to Aboriginal peoples collectively (at para 36), in contradistinction to the general rights of the *Canadian Charter of Rights and Freedoms*.

The Court of Appeal found this approach overly formalistic, failing to account for reconciling the pre-existence of Aboriginal societies with the sovereignty of the Crown and the Aboriginal perspective (*Desautel* at para 55 citing *Van der Peet* at paras 32 & 62). The court concluded that the *Van der Peet* test actually addresses the issue of identifying the necessary connection between the modern and historic collective through the concept of continuity. In other words, satisfying the *Van der Peet* test qualifies the relevant indigenous community as an “Aboriginal peoples of Canada” (*Desautel* at para 57).

The Crown's point is not, however, altogether unassailable. The Supreme Court of Canada in *Van der Peet* is not itself as clear on this point as the Court of Appeal suggests. Rather, the Supreme Court stated that section 35 rights "are rights held only by aboriginal members of Canadian society" and that "[section 35] grant[s] special constitutional protection to one part of Canadian society" (*Van der Peet* at paras 19 – 20). The *Van der Peet* court also described section 35's "intended focus" as "aboriginal people and their rights in relation to Canadian society as a whole" (*Van der Peet* at para 21). Thus, a read of these passages suggests the highest court contemplated Aboriginal peoples of Canada to be a subset of the Canadian public. This seemed to be taken up again by the Supreme Court of Canada in the 2010 decision of *Beckman v Little Salmon/Carmacks First Nation*, [2010 SCC 53 \(CanLII\)](#), where it spoke of "duality" wherein "Aboriginal people do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance" (*Beckman* at para 33 cited in *Desautel* at para 35). Once again, the court saw section 35's Aboriginal people as a part of the broader Canadian public, this time invoking the institution of citizenship.

Section 35, however, is not generally concerned with Aboriginal people of Canada as people per se, but with Aboriginal people as the *possessors of rights* in Canada (*Desautel* (SC) at para 72). Indeed, the goal of section 35 has been "the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory" (*Van der Peet* at para 36). Thus, section 35 merely recognizes (Aboriginal) rights domiciled in what is now Canada; it is essentially agnostic to the identity of the rightsholder. Held in this light, an interpretation of section 35 recognizing Aboriginal rights of non-Canadians does not offend the presumption against extra-territorial application at all (See e.g. H M Kindred et al, *International Law Chiefly as Interpreted and Applied in Canada*, 5th Ed (Toronto, Ontario: Emond Montgomery, 1993) at 325). Not only is this approach consistent with constitutional and international law, it is consistent with the Aboriginal perspective (which may not find communion with Western notions of borders or citizenship) and the realities of colonization (*Desautel* at para 62). Restricting section 35's application to Canadian resident Aboriginal peoples would, in effect, extinguish rights claimed in Canada but held by groups that were displaced in the post-contact, or even post-sovereignty era. On its own, this would be contrary to the animating purpose of section 35 (See *R v Sparrow*, [1990 CanLII 104 \(SCC\)](#), [1990] 1 SCR 1075 at 1091 – 93), and was the very circumstance of *Desautel*.

Thus, more accurately put, while resident Canadian Aboriginal people are included within the category of "Aboriginal peoples of Canada" they are not its only element. Ultimately, this issue represents reconciliation of the prior occupation of Aboriginal peoples with the assertion of Crown sovereignty in a very literal sense: the geographical boundary of the assertion.

Incidental Mobility Rights and the Doctrine of Sovereign Incompatibility

The Crown also submitted that in order to determine whether a non-resident has an Aboriginal right within Canada, courts must consider an incidental mobility right or right of access. In particular, the Crown argued that *Desautel*'s claimed right *necessarily* implied a right to cross the international border, which is incompatible with Canadian sovereignty (*Desautel* at paras 41). The Court of Appeal, however, declined to take up this argument in a substantive way. The court emphasized that *Desautel*'s entry into Canada was lawful, and that incidental rights had only

been taken up by courts when they were implicated by regulation (*Desautel* at paras 67 – 71). The court was confident, however, that in cases where such an “incidental” right arises, it could be sufficiently dealt with by the doctrines of extinguishment, infringement, and justification (*Desautel* at para 70).

However, a general stance of not considering a mobility right, whether incidental or integral, may be at odds with the assertion of an Aboriginal right in similar or analogous contexts (*Desautel* at para 41). Dissenting in *Van der Peet*, Justice Beverly McLachlin (as she then was) warned of the dichotomy of incidental versus integral aspects when characterizing an Aboriginal right (*Van der Peet* at paras 255 – 257). In her view, excluding aspects of an Aboriginal right on this basis placed on it artificial limitations, contrary to the right’s exercise. Her preferred approach seems relevant and even prescient in this case: “[r]ather than attempting to describe *a priori* what an aboriginal right is, we should look to history to see what sort of practices have been identified as aboriginal rights in the past” (*Van der Peet* at para 261). By this logic, the Court of Appeal framed *Desautel*’s right on a limited basis (i.e., a right to hunt *once in British Columbia*) rather than a general one (i.e., a right to hunt *in British Columbia*).

Rather than detracting from it, McLachlin’s approach enriches the analysis in circumstances like these, especially in consideration of the Aboriginal perspective (*Sparrow* at 1112). Much of the evidence adduced at trial concerned not simply establishing the traditional territory of the Sinixt writ large, but also of how the various subgroups of Sinixt exercised rights over this territory by traversing it—including the international border even after 1846 (*Desautel* (PC) at para 23). Held in this light then, mobility across an international border may arise as an aspect of the general right, implicating the principle of sovereign incompatibility.

The doctrine of continuity confirms that European settlement did not terminate Aboriginal interests arising from historical occupation and use of the land. Aboriginal interests and customary laws are therefore presumed to survive the assertion of sovereignty, absorbed into the common law as rights unless incompatible with the Crown’s assertion of sovereignty, surrendered voluntarily by treaty, or extinguished (*Mitchell* at para 10; see also Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can Bar Rev 727). The essence of sovereign incompatibility is to preclude recognition of a section 35 right where it implicates a sovereign interest, even if otherwise made out on the evidence (*Mitchell* at para 61). In *Mitchell*, the Supreme Court of Canada considered whether the Mohawks of Akwesasne, an indigenous community on the Quebec-New York border, had a cross-border trade right. In his concurring reasons rejecting the Mohawks’ claim, Justice Ian Binnie held that the “mobility of persons and goods into one country is, and always has been, a fundamental attribute of sovereignty” (*Mitchell* at para 160). Because Chief Justice McLachlin did not invoke this principle in her majority opinion (*Mitchell* at paras 61 – 63), the law is not clear if sovereign incompatibility must be addressed in establishing an Aboriginal right (see Peter W Hogg, *Constitutional Law of Canada*, 5th Ed (Toronto: Carswell, 2007) (loose-leaf updated 2013, release 1) at 28.5(b)), either separately or as part of the *Van der Peet* test (*Mitchell* at para 64).

As noted, the Crown did not extinguish any Sinixt rights or interests upon the conclusion of the 1846 Oregon Treaty, nor have they ever been the subject of treaty with the Crown that surrenders any rights. Thus, a Sinixt interest in traversing their traditional territory as part of the exercise of

a right to hunt should be presumed to remain, subject its encroachment on a fundamental attribute of sovereignty. It bears mentioning that in his submissions, Desautel considered any cross-border aspect of the right unnecessary to Aboriginal right claimed (*Desautel* at para 45). When determining the scope of Aboriginal claims, however, the Supreme Court of Canada has urged courts to take a more functional approach to the parties' submissions and the evidence on offer:

[In an Aboriginal claim]...the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude...Through the course of the trial, the historic practices of the Aboriginal group in question will be expounded, tested and clarified...cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation...be achieved. (*Tsilhqot'in Nation v British Columbia*, [2014 SCC 44 \(CanLII\)](#)) (emphasis added)

Therefore, the Court of Appeal may have had reason to provide comment on the operation of sovereign incompatibility. This does not suggest that the outcome in *Desautel* might have been different, only that the cross-border aspect, whether an inherent or incidental aspect, ought to have been considered with sovereign incompatibility in mind. Clarification of the interplay between sovereign incompatibility and the *Van der Peet* test, however, may be a priority for the Supreme Court of Canada when it hears the Crown appeal of *Desautel*. Cross-border issues have been a growing concern for indigenous communities along the Canada-US border, and judicial guidance on the ambiguities left by *Mitchell* might be necessary.

***Desautel* and Outstanding Issues in Cross-Border Aboriginal Rights**

The Road Not Taken: The Jay Treaty and UNDRIP

As *Desautel* has been making its way through the judicial system, there has been growing interest in cross-border issues pertaining to border indigenous communities. Thus, the case represents an opportunity for some of these issues to be resolved, or at least clarified for Canada's political leadership, both indigenous and non-indigenous.

In addition to the inherent rights to cross the Canada-US border claimed by indigenous communities whose territory straddles the two countries, it has also been asserted that these [rights were recognized](#) in the 1794 Treaty of Amity, Commerce, and Navigation, known as the Jay Treaty, between Great Britain and the United States. Article III of the Jay Treaty provides:

It is agreed that at all Times be free to His Majesty's Subjects, and to the Citizens of the United States, and also to the Indians dwelling on either side of said Boundary Line freely to pass and re-pass by Land, or Inland Navigation, into the respective Territories and Countries of the Two Parties on the Continent of America (the

Country within the Limits of the Hudson's Bay Company only excepted) and to navigate all the Lakes, Rivers and waters thereof, and freely to carry on trade and commerce with each other...

No Duty of Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or re-passing with their own proper Goods and Effects of whatever nature, pay for the same any Import or Duty whatever. But Goods in Bales, or other large Packages unusual among the Indians shall not be considered as Goods belonging bona fide to Indians. (Senate, *Border Crossing Issues and the Jay Treaty: Standing Senate Committee on Aboriginal Peoples* (June 2016) (Chair: Lillian Dyck) at 7 – 8)

Thus, the Jay Treaty, as an act of sovereign authority would seem to cut against applications of sovereign incompatibility over section 35 rights, providing an additional shield for claimants like those in *Desautel* or *Mitchell*, where cross-border rights form a central or peripheral part of the claim. Canada's position, however, is that the Jay Treaty was abrogated with the outbreak of the War of 1812 (Senate *Border Crossing* at 8; see also *Karnuth v United States*, [279 US 231](#)), and was never sanctioned by legislation (*Francis v The Queen*, [1956 CanLII 79 \(SCC\)](#), [1956] SCR 618 at 621). The Supreme Court of Canada has suggested that principles of international law, such as on treaty termination, may not be determinative when considering "Indian treaties", which are *sui generis* (*Simon v The Queen*, [1985 CanLII 11 \(SCC\)](#) at paras 32 – 33). The court has also signaled that an overly formalistic view of these issues is to be avoided: "reconciliation and not rigid formalism should drive the development of Aboriginal law" (*Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018 SCC 40 \(CanLII\)](#) at paras 22 & 44). Together, this may lend to the notion that the Jay Treaty has some lasting influence in the Crown-indigenous relationship.

Another factor in in cross-border calculations is the potential impact of adoption of the [United Nations Declaration on the Rights of Indigenous Peoples](#) by Canada [into law](#). Of particular interest in application to *Desautel* and *Mitchell* is Article 36:

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

A more detailed review of how both the Jay Treaty and UNDRIP Article 36 would impact the exercise and assertion of cross-border rights by Aboriginal peoples under section 35 is beyond the scope of this post. It is enough to say that there has been [growing interest in the application of the Jay Treaty and UNDRIP](#) by Canada. Thus, there may be cause for the Supreme Court of Canada to provide direction in *Desautel* as to how cross-border rights may be implicated through section 35, the *Van der Peet* test, and Canadian sovereignty.

Potential Application: The Buffalo Treaty

Desautel may also hold some particular interest for First Nations on the Canadian prairies and their American counterparts. Initially signed by [10 indigenous groups in Alberta and Montana](#) in 2014, the so-called “[Buffalo Treaty](#)” is an agreement meant to “honor, recognize, and revitalize the time immemorial relationship” that signatory groups have with the buffalo, or American Bison, that once roamed vast tracts of North America (See e.g. Dean Lueck, “The Extermination and Conservation of the American Bison” (2002) 31 J Leg Stud 609 at 616). The goals of the Buffalo Treaty are to promote buffalo conservation efforts as well as preserve the interrelationships these groups have with the buffalo that are foundational to their culture, including “customs, practices, harvesting, beliefs, songs, and ceremonies” (Buffalo Treaty, Art II). The Buffalo Treaty now boasts over 25 signatories across Canada and United States.

The cultural significance of the buffalo to indigenous groups in the region in both countries is well documented (See e.g. William Holland, “The Spirit of the Buffalo: The Past and Future of an American Plains Icon” (2014) 21:1 Animal L 151 at 158). Regarding the Fort Belknap and Fort Peck Tribes, the Montana Supreme Court recently remarked in *Citizens for Balanced Use v Maurier*, [303 P 3d 794, 370 Mont 410 \(2013\)](#), that a conservationist interest in the buffalo “is long-held and deeply rooted in the history, beliefs and traditions of the Tribes. Recovery of and reconnection to the wild genetic strain of Yellowstone bison represent important goals for the Tribes” (at 800). Both the Fort Belknap and Fort Peck Tribes are original signatories to the Buffalo Treaty. Moreover, cooperation amongst related groups in both countries to manage the buffalo as a cultural resource is not new, with tens of thousands of these animals under the [management of dozens of groups in Canada](#) and the United States (See Ken Zontek, *Buffalo Nation: American Indian Efforts to Restore the Bison* (Lincoln, Neb: University of Nebraska Press, 2007) at 1 & 150).

While indigenous groups have the requisite capacity to conclude treaties with the Sovereign (See e.g. *R v Sioui*, [1990 CanLII 103 \(SCC\)](#) (Canada); and *Jones v Meehan*, [175 US 1 \(1899\)](#) (United States); see also Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 SCLR 595), the legal status of treaties among groups—let alone cross-border groups—is somewhat more ambiguous. In light of *Desautel*, however, this ambiguity may not need to be resolved. Indeed, to the extent that agreements like the Buffalo Treaty may seek to define the existence of rights *in* Canada—such as protective or cultural interests in buffalo—*Desautel* may provide a doctrinal framework for recognizing them under section 35 of the *Constitution*. In this way, claiming rights under the Buffalo Treaty could be rationalized as a specific application of the general rule affirmed by the British Columbia Court of Appeal. Thus, the test from *Van der Peet* may be a way of giving meaningful expression to agreements like the Buffalo Treaty, which would potentially implicate the international border. Such an interpretation would promote indigenous autonomy and arguably advance the objectives of UNDRIP Article 36, all within the existing legal architecture of section 35.

Conclusions

The Supreme Court of Canada may be called upon to answer more fundamental questions about the application of the Constitution in *Desautel* than simply an Aboriginal rights claim. The

British Columbia Court of Appeal’s decision applied the present doctrinal framework to answer the underlying question of Desautel’s right to hunt, but may have sidestepped the opportunity to clarify elements of Canadian sovereignty that *Desautel* implicates. Clarity on sovereignty with respect to Canada’s borders is fundamental to all Canadians, but also represents an opportunity to enhance reconciliation of sovereignty with the integrity of the interests of all Aboriginal peoples of Canada.

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