SUPREME COURT OF CANADA

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Case in Brief: *R. v. Desautel*

Judgment of April 23, 2021 | On appeal from the Court of Appeal for British Columbia
Neutral citation: 2021 SCC 17

The Supreme Court of Canada rules that non-citizens and non-residents can claim an Aboriginal right under the Constitution.

Mr. Richard Lee Desautel, an American citizen, shot and killed an elk without a hunting license in the Arrow Lakes region in British Columbia in October 2010. He is a member of the Lakes Tribe of the Colville Confederated Tribes and lives on reserve in Washington State.

He was charged with hunting without a license and hunting big game while not being a resident of British Columbia. Mr. Desautel admitted that he shot the elk, but argued that he was exercising his Aboriginal right to hunt in the traditional territory of his Sinixt ancestors under section 35 of the *Constitution Act, 1982* (Canadian Constitution). He claimed that the Lakes Tribe is a successor group to the Sinixt people whose traditional territory included an area in what is now British Columbia. The place where he shot the elk was within this territory.

The central question for the Supreme Court was whether people who are not Canadian citizens, and who do not reside in Canada, can exercise an Aboriginal right that is protected under the Canadian Constitution.

"Aboriginal Peoples of Canada"

The case revolved around the definition of "Aboriginal peoples of Canada" found in Section 35 of the Canadian Constitution, which recognizes and affirms existing Aboriginal and treaty rights.

This was the first time the Court had interpreted the words "Aboriginal peoples of Canada".

The majority of the judges of the Supreme Court said a fundamental purpose of section 35 was to recognize the prior occupation of Canada by organized, autonomous Aboriginal societies.

The majority said that "Aboriginal peoples of Canada" means the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact, even if such societies are now located outside Canada. Excluding Aboriginal peoples who moved or were forced to move, or whose territory was divided by a border, would add to the injustice of colonialism.

They concluded that groups whose members are neither citizens nor residents of Canada can be considered part of the "Aboriginal peoples of Canada" and claim an Aboriginal right under section 35.

Can the group in question be considered part of the "Aboriginal peoples of Canada"?

The majority of the judges then considered whether the specific group that Mr. Desautel belonged to could be considered part of the "Aboriginal peoples of Canada".

They noted that when it comes to Aboriginal claims, the trial judge is typically best suited to assess the evidence as it is presented. The majority accepted the trial judge's finding that that Mr. Desautel's group, the Lakes Tribe, is a successor group of the Sinixt people. At the time of contact between the Sinixt and Europeans, their territory extended into what is now British Columbia (to the north), and into what is now Washington State (to the south).

An international border was created in 1846, and by 1872, a number of members of the Sinixt were living for the most part in Washington State, but continued to travel to British Columbia for hunting purposes.

The majority agreed that moving to live in the American part of their ancestral territory did not prevent the Lakes Tribe from being a successor group to the Sinixt. As such, they found that the Lakes Tribe could be considered part of the "Aboriginal peoples of Canada" under section 35 of the Canadian Constitution.

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Does the group have Aboriginal rights under section 35 of the Constitution?

Having established that the group is part of the "Aboriginal peoples of Canada", the majority then had to determine if the group had Aboriginal rights under section 35. They explained that the test to determine the existence of rights is the same for groups outside Canada as for groups in Canada.

A critical element of the test was whether the claimed modern right, the right to hunt in this case, was a continuation of a historical practice that existed prior to European contact.

The majority agreed with the trial judge that the claimed right was a continuation of a historical practice.

They also agreed that apart from periods in which no hunting took place, there was no significant difference between the pre-contact practice and the modern one.

As a result, the majority agreed that Mr. Desautel was exercising an Aboriginal right and had been properly acquitted of all charges by the trial judge.

Breakdown of the decision: ***Majority:*** Justice Malcolm Rowe said that people who are not Canadian citizens, and who do not reside in Canada, can exercise an Aboriginal right that is protected under the Canadian Constitution (Chief Justice Wagner and Justices Abella, Karakatsanis, Brown, Martin and Kasirer agreed) | ***Dissenting:*** Justice Suzanne Côté found that Aboriginal groups outside of Canada's borders do not fit within the meaning of "Aboriginal peoples of Canada" under section 35 of the Canadian Constitution, and noted that even if they did, Mr. Desautel had not established continuity with the pre-contact group's practices | ***Dissenting:*** Justice Michael J. Moldaver found that even if Justice Rowe was correct in holding that Mr. Desautel is entitled to claim the protection provided by section 35 of the Canadian Constitution, he nevertheless agreed with Justice Côté that Mr. Desautel had not established continuity with the pre-contact group's practices.

More information (case # 38734): Decision | Case information | Webcast of hearing
Lower court rulings: trial (Provincial Court of British Columbia) | 1st appeal (Supreme Court of British Columbia) | 2nd appeal (Court of Appeal for British Columbia)
