



10-19-2021

## Welcome Home: Aboriginal Rights Law after Desautel

Kent McNeil

*Osgoode Hall Law School of York University, [kmcneil@osgoode.yorku.ca](mailto:kmcneil@osgoode.yorku.ca)*

Kerry Wilkins

*University of Toronto, Faculty of Law*

Follow this and additional works at: [https://digitalcommons.osgoode.yorku.ca/all\\_papers](https://digitalcommons.osgoode.yorku.ca/all_papers)



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

---

### Repository Citation

McNeil, Kent and Wilkins, Kerry, "Welcome Home: Aboriginal Rights Law after Desautel" (2021). *All Papers*. 333.

[https://digitalcommons.osgoode.yorku.ca/all\\_papers/333](https://digitalcommons.osgoode.yorku.ca/all_papers/333)

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in All Papers by an authorized administrator of Osgoode Digital Commons.

## Kent McNeil and Kerry Wilkins,\* “Welcome Home: Aboriginal Rights Law after *Desautel*”

**Abstract:** In *R v Desautel*, decided April 23, 2021, a majority of the Supreme Court of Canada held, for the first time, that an Indigenous community located in the United States, whose members are neither citizens nor residents of Canada, can have an existing Aboriginal right, protected by section 35 of the *Constitution Act, 1982*, to hunt a specified area within Canada. This will be so, the Supreme Court majority held, where the community can show that it descends from (is a successor of) an Indigenous community that was present in what is now Canada at the time of the ancestral community’s first contact with Europeans and that hunting in the relevant part of Canada was integral to its way of life at that time. Justices Côté and Moldaver dissented. This article analyzes the majority decision, comments on the dissenting judgments, and delves into some unresolved issues that will need attention in light of the decision. They include the status of common law Aboriginal rights, the notion of sovereign incompatibility, the optimal way of litigating claims of Aboriginal right, and the impact of the decision on Aboriginal title claims and the duty to consult.

Richard Lee Desautel, an American citizen, is a member of the Lakes Tribe, one of the Confederation Colville Tribes (CCT). He resides with other members of the Lakes Tribe on the Colville Indian Reservation in the state of Washington. He has never lived in Canada.

The Lakes Tribe traces its ancestry to an Indigenous group usually called the Sinixt, whose traditional territory straddles the Canada/US border from south-central British Columbia to Kettle Falls in Washington State. In 2010, Mr. Desautel, acting on instructions from the CCT’s Fish and Wildlife Director, entered British Columbia legally and shot an elk within traditional Sinixt territory near Castlegar, B.C., to secure ceremonial meat for his community. He reported the kill to the B.C. wildlife authorities. He was charged with two violations under B.C.’s *Wildlife Act*: hunting without a license and hunting big game without a guide while a non-resident.<sup>1</sup> At trial, he admitted the essential elements of the offences but asserted an existing Sinixt Aboriginal right to hunt for food and ceremonial purposes within traditional Sinixt territory in British Columbia. The two relevant offence provisions, he argued, infringe that right unjustifiably.

The trial judge concluded that hunting within traditional Sinixt territory for those purposes in what is now British Columbia was integral to the distinctive Sinixt way of life at and before their first contact with Europeans in 1811, and that the Lakes Tribe is a successor group to the ancestral Sinixt.<sup>2</sup> Ordinarily, this would suffice to establish an existing Aboriginal right, recognized and affirmed by section 35(1) of the *Constitution Act, 1982*, that would protect Lakes

---

\* Kent McNeil is a distinguished research professor (emeritus) at Osgoode Hall Law School, Toronto. Kerry Wilkins is an adjunct professor at the University of Toronto Faculty of Law. We would like to thank Brian Slattery and Stuart Rush for helpful feedback on a draft of this paper.

<sup>1</sup> RSBC 1996, c 488, ss. 11(1) and 47(a), respectively.

<sup>2</sup> *R v DeSautel*, 2017 BCPC 84.

Tribe members hunting within that territory.<sup>3</sup> However, the Crown had argued that section 35 afforded no constitutional protection to the Lakes Tribe because it guaranteed only “the existing aboriginal and treaty rights of the aboriginal peoples of Canada”<sup>4</sup> and the Lakes Tribe, residing outside Canada, could not qualify as “aboriginal peoples of Canada.” In the alternative, the Crown submitted, no Aboriginal right could protect Sinixt hunting in their traditional territory within B.C. because there was no evidence that any of them had hunted there between 1930 and 2010, the year Mr. Desautel shot the elk. Finally, the Crown argued in the further alternative, any Aboriginal right the Lakes Tribe might have would necessarily include an incidental right to cross the international border for hunting purposes. No such right could exist, the argument ran, because it would be incompatible with Canada’s power to control and defend the international border, an essential attribute of Crown sovereignty.

At trial, Judge Mrozinski rejected these arguments. In her view, an Indigenous group that resided and engaged in integral harvesting practices in what is now B.C. at the time of first contact with Europeans is entitled to the protection of section 35 of the *Constitution Act, 1982*. Sinixt ancestors of the present-day Lakes Tribe had indeed migrated into the southern (American) part of their traditional territory in sufficient numbers to achieve recognition as a tribe under American law by 1872, but their exodus was not voluntary; “it was a matter of making the best choice out of a number of bad choices.”<sup>5</sup> Moreover, the absence of evidence that Lakes Tribe members had hunted in B.C. after 1930 was not fatal to Mr. Desautel’s claim to an Aboriginal right.<sup>6</sup> Finally, she observed, it was not necessary to consider the “sovereign incompatibility” issue because Mr. Desautel had entered Canada legally, without incident, and was not claiming an Aboriginal right to cross the international border.<sup>7</sup> According to Mrozinski J, therefore, Mr. Desautel and the Lakes Tribe have an existing Aboriginal right to hunt for food and ceremony in traditional Sinixt territory in B.C. The offence provisions with which he was charged infringed that right, and the Crown had failed to justify the infringement. Mr. Desautel was acquitted.<sup>8</sup>

On appeal, the B.C. Supreme Court agreed.<sup>9</sup> So, on further appeal, did the B.C. Court of Appeal.<sup>10</sup> On April 23, 2021, the Supreme Court of Canada, in a 7-2 decision (Côté and Moldaver JJ dissenting), dismissed the Crown’s final appeal.<sup>11</sup> According to Justice Rowe, who wrote for the majority, the Crown was correct to insist that only Indigenous groups that qualify as “aboriginal peoples of Canada” are entitled to the protection of section 35 of the *Constitution Act, 1982*.<sup>12</sup> But “Aboriginal peoples of Canada under s. 35(1),” the Court held, “are the modern-day successors of Aboriginal societies that occupied what is now Canada at the time of European

---

<sup>3</sup> See, in particular, *R v Van der Peet*, [1996] 2 SCR 507 at paras 44-46, 55-59 [*Van der Peet*].

<sup>4</sup> Section 35(1) of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>5</sup> *R v Desautel*, *supra* note 2 at para 128.

<sup>6</sup> *Ibid* at paras 128-35.

<sup>7</sup> *Ibid* at paras 136-67.

<sup>8</sup> *Ibid* at paras 168-85.

<sup>9</sup> *R v Desautel*, 2017 BCSC 2389.

<sup>10</sup> *R v Desautel*, 2019 BCCA 151 [*Desautel* (BCCA)].

<sup>11</sup> *R v Desautel*, 2021 SCC 17 at para 22 [*Desautel*].

<sup>12</sup> *Ibid* at para 20.

contact.”<sup>13</sup> On the findings of the trial judge, the Lakes Tribe meets this requirement.<sup>14</sup> This, and the further finding that hunting for food and ceremony within south central B.C. was integral to the ancestral Sinixt way of life at the time of contact, sufficed, in the Court’s view, to establish the Lakes Tribe’s entitlement to an Aboriginal right to do so today.<sup>15</sup> The Court thought the border issue, along with several other issues the Crown and other attorneys general raised in their Supreme Court submissions (the Crown’s duty to consult, the common law status of Aboriginal rights, and provisions in modern treaties about non-resident Indigenous peoples, among others) could await resolution in subsequent cases in which the facts required decisions about them.

In this article, we discuss the Court’s reasons for the conclusions it reached and some of the issues that now will require attention in the wake of *Desautel* – issues that Rowe J identified but deferred.

### **Interpretation of “aboriginal peoples of Canada”**

The main issue in the Supreme Court was the proper interpretation of “aboriginal peoples of Canada” in section 35(1) of the *Constitution Act, 1982*. Section 35(1) provides that “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” The two principal judgments agreed that the framers of section 35 never considered whether Indigenous groups residing outside Canada could be “aboriginal peoples of Canada,”<sup>16</sup> but differed sharply in their approaches to this issue.

Justice Rowe applied the purposive approach to interpretation of section 35(1) articulated in previous cases, especially *R v Van der Peet*:<sup>17</sup>

[T]he two purposes of s. 35(1) 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. These purposes are reflected in the structure of Aboriginal rights and title doctrine, which first looks back to the practices of groups that occupied Canadian territory prior to European contact, sovereignty or effective control, and then expresses those practices as constitutional rights held by modern-day successor groups within the Canadian legal order.<sup>18</sup>

Aboriginal rights (apart from title and Métis rights<sup>19</sup>), including the hunting right in *Desautel*, are based on the practices, customs, and traditions integral to distinctive Indigenous cultures at the time of contact with Europeans.<sup>20</sup> These rights therefore relate back to Indigenous peoples’ pre-

---

<sup>13</sup> *Ibid* at para 47. Rowe J acknowledged expressly that “this criterion will need to be modified in the case of the Métis” but left that modification for another day: *ibid* at para 32.

<sup>14</sup> *Ibid* at para 48.

<sup>15</sup> See *ibid* at para 62.

<sup>16</sup> See *ibid* at paras 41 (Rowe J), 115, 119 (Côté J).

<sup>17</sup> *Van der Peet*, *supra* note 3.

<sup>18</sup> *Desautel*, *supra* note 11 at para 22.

<sup>19</sup> Aboriginal title is based on exclusive occupation of land at the time of Crown assertion of sovereignty: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*]. Métis Aboriginal rights, apart from title (the test for which has not been determined by the Supreme Court), are based on Métis practices, customs, and traditions at the time of effective European control: *R v Powley*, [2003] 2 SCR 207.

<sup>20</sup> *Van der Peet*, *supra* note 3.

colonial use of land and resources in their ancestral territories in accordance with their own practices and laws. From this, Justice Rowe concluded, rightly in our opinion, that “the scope of ‘aboriginal peoples of Canada’ is clear: it must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact. As a result, groups whose members are neither citizens nor residents of Canada can be Aboriginal peoples of Canada.”<sup>21</sup> Members of the Lakes Tribe of Sinixt people living in Washington State, including Mr. Desautel, could therefore have constitutionally-protected rights in their ancestral territory in Canada.

Justice Côté dissented on this issue.<sup>22</sup> She regarded the majority’s understanding of the meaning of “aboriginal peoples of Canada” to be

... contrary to a purposive analysis of s. 35 that examines the linguistic, philosophic, and historical contexts of that provision. This Court’s s. 35(1) jurisprudence has characterized – properly, in my view – reconciliation in terms of the relationship between non-Aboriginal Canadians and Aboriginal peoples as full and equal members of, and participants in, Canadian society.<sup>23</sup>

In her opinion, the drafters of section 35 could not possibly have intended the provision to include non-resident Indigenous groups.<sup>24</sup>

Justice Côté thus considered reconciliation apposite only to the segments of Indigenous nations that happened to end up and stay in Canada after Britain and the United States drew their international border in the 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>25</sup> These colonial actions bifurcated many Indigenous nations, taking no account of their presence on and relationship with their traditional territories. Côté J’s view would perpetuate these adverse effects, leaving the Indigenous members of these nations who reside in the United States separated from their homelands and relatives in Canada. This would hardly serve the interests of reconciliation. Justice Rowe’s approach, on the other hand, does promote reconciliation precisely because it takes account of the disruptive effects of these insensitive and disrespectful colonial initiatives. It is a step towards righting that earlier injustice.

### **The *Van der Peet* Integral to the Distinctive Culture Test and Continuity**

Establishing that the Sinixt are an Aboriginal people of Canada was a threshold requirement for the majority of the Supreme Court. In addition, for Mr. Desautel to have an Aboriginal right to hunt for food, social, and ceremonial purposes in their ancestral territory in Canada, the practice,

---

<sup>21</sup> *Desautel*, *supra* note 11 at para 23.

<sup>22</sup> Justice Moldaver, in a brief separate dissent, was prepared to assume, without deciding, that the majority’s understanding of “aboriginal peoples of Canada” was sound. He dissented on other grounds, discussed below. See *ibid* at para 143.

<sup>23</sup> *Ibid* at para 94.

<sup>24</sup> See *ibid* at paras 115-25.

<sup>25</sup> This was done when neither Britain nor the U.S. actually occupied or exercised authority over most of the territory crossed by these borderlines. On creation of the border by bilateral international treaties in 1783, 1818, and 1846, see Bruce Hutchison, *The Struggle for the Border* (Don Mills, ON: Longman Canada, 1955); Norman L. Nicholson, *The Boundaries of the Canadian Confederation* (Toronto: Macmillan of Canada, 1979); Donald A. Rakestraw, *For Honour or Destiny: The Anglo-American Crisis over the Oregon Territory* (New York: Peter Lang, 1995).

custom, and tradition of hunting had to be integral to pre-contact Sinixt culture, as required by the test created in the *Van der Peet* case in 1996. Justice Rowe said the test for groups outside Canada is the same as for groups within Canada and decided that the trial judge had applied the test correctly in determining that the Sinixt People have a right to hunt in their ancestral territory in Canada. However, he had more to say about the continuity that is required between the historical practice, custom, and tradition and the modern practice that is alleged to be protected as an Aboriginal right, as both Justice Côté and Justice Moldaver dissented on this matter.

Continuity in this sense means only that the modern practice has to be sufficiently like the historical practice to fall within the scope of the right arising from the practice, custom, or tradition at the time of contact.<sup>26</sup> But the dissenting judges thought that the continuity requirement also necessitates a degree of continuation of the practice over the intervening time period. Justice Côté, Moldaver J concurring on this issue, opined that, “while temporal gaps in the actual practice do not necessarily preclude the establishment of an Aboriginal right (*Van der Peet*, at para. 65), failing to tender sufficient evidence that the practice was maintained or, at least, that a connection to the historical practice was maintained during such gaps may be fatal.”<sup>27</sup> She emphasized the absence in the factual record of any evidence that the Lakes Tribe had hunted in Canada between 1930 and 2010, when Mr. Desautel shot the elk. In her view, “[c]ontinuity cannot be established simply because there is evidence that ‘the land was not forgotten’ in the minds of the Lakes Tribe members.... A single shot cannot create the Lakes Tribe’s modern exercise of the right.”<sup>28</sup>

The majority understood continuity differently. In one sense, Justice Rowe said it can have a role in proof. Evidence that

... a practice is integral to the claimant’s culture today, and that it has continuity with pre-contact times, can count as proof that the practice was integral to the claimant’s culture pre-contact.... As Kent McNeil explains, “continuity of this sort has to be shown only when Aboriginal peoples rely on post-sovereignty occupation or post-contact practices, customs, and traditions as evidence of their pre-sovereignty occupation or pre-contact practices, customs, and traditions.”<sup>29</sup>

Another use of the concept of continuity is in the determination of

... whether the modern practice which is claimed to be an exercise of an Aboriginal right is connected to, and reasonably seen as a continuation of, the pre-contact practice. At this stage, continuity with the pre-contact practice is required in order for the claimed activity to fall within the scope of the right. It serves to avoid frozen rights, allowing the practice to evolve into modern forms.... The right claimed “must

---

<sup>26</sup> See *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at para 67 [*Marshall/Bernard*].

<sup>27</sup> *Desautel*, *supra* note 11 at para 130.

<sup>28</sup> *Ibid* at paras 136-37.

<sup>29</sup> *Ibid* at para 53, quoting “Continuity of Aboriginal Rights”, Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004), 127 at 138. The Court relied as well on *Van der Peet*, *supra* note 3 at paras 62-63; *R v Gladstone*, [1996] 2 SCR 723 at para 28 [*Gladstone*]; *Delgamuukw*, *supra* note 19 at para 152; *Tsilhqot’in Nation v British Columbia*, [2014] 2 SCR 257 at para 45 [*Tsilhqot’in Nation*].

be allowed to evolve”, because “[i]f aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless.”<sup>30</sup>

Unlike the dissenting judges, who were concerned about the temporal aspect of continuity, the emphasis of the majority was thus on the use of the concept to determine the scope of the contemporary right and the need to include modern ways to exercise it.

The Crown argued that “continuity requires an ongoing presence in the lands over which an Aboriginal right is asserted.”<sup>31</sup> Justice Rowe responded as follows:

As my discussion of continuity should make clear, this has never been part of the test for an Aboriginal right. Nor is there any basis for adding it to the test, even where the claimant is outside Canada. As Lamer C.J. explained in *Van der Peet*, at para. 65, “an unbroken chain of continuity” is not required. Indeed, as McLachlin J. (dissenting, but not on this point) noted in *Van der Peet*, at para. 249, “it is not unusual for the exercise of a right to lapse for a period of time”.<sup>32</sup>

Justice Rowe’s position on this is consistent with common law principles. Legal rights, once acquired, are not lost through non-user.<sup>33</sup> In *Re Yateley Common*, Justice Foster said this in regard to a customary right to a common:

A right of common is a legal right, and it is exceedingly difficult to prove that a person having such a legal right has abandoned it. Non-user, if the owner of the right has no reason to exercise it, requires something more than an immense length of time of non-user. It is essential that it is proved to the court’s satisfaction that the owner of the legal right has abandoned the right – in the sense that he not only has not used it but intends never to use it again. The onus lies fairly and squarely on those who assert that the right has been abandoned.<sup>34</sup>

Similarly, in *Tehidy Minerals Ltd. v Norman*, Buckley LJ held that “[a]bandonment of an easement or of a profit à prendre can only, we think, be treated as having taken place where the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the

---

<sup>30</sup> *Desautel*, *supra* note 11 at para 54, quoting *R v Sappier; R v Gray* [2006] 2 SCR 686 at paras 48-49 [*Sappier/Gray*]. Cited as well on the evolution of practices into modern forms are *Van der Peet*, *supra* note 3 at para. 64 and *Mitchell v MNR*, [2001] 1 SCR 911 at para 13 [*Mitchell*].

<sup>31</sup> *Desautel*, *supra* note 11 at para 63.

<sup>32</sup> *Ibid.* See also *R v Marshall*, 2003 NSCA 105 at paras 157-81, where Cromwell JA (later on the SCC), after detailed discussion of relevant case law, concluded that Aboriginal title, once established at the time of Crown assertion of sovereignty, continues without any need to prove occupation from sovereignty to the present. This decision was overturned on appeal without consideration of this issue because the SCC found, on the facts, that Aboriginal title had not been established: *Marshall/Bernard*, *supra* note 26.

<sup>33</sup> But see the discriminatory and rightly criticized judgment of the High Court of Australia in *Yorta Yorta Aboriginal Community v Victoria* (2002), 194 ALR 538. See Richard Bartlett, “An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*” (2003) 31 *Western Australia L Rev* 35; Kirsten Anker, “Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v Victoria*” (2004) 28 *Melbourne U L Rev* 1; Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Sydney: Federation Press, 2008), especially 317-34, 406-14.

<sup>34</sup> [1977] 1 All ER 505 (Ch) at 510.

right himself or to attempt to transmit it to anyone else.”<sup>35</sup> Lord Denning MR, in *Wyld v Silver*, likewise rejected the notion that a customary right to hold a fair could be lost by non-user:

I know of no way in which the inhabitants of a parish can lose a right of this kind once they have acquired it except by Act of Parliament. Mere disuse will not do. And I do not see how they can waive it or abandon it. No one or more of the inhabitants can waive or abandon it on behalf of the others. Nor can all the present inhabitants waive or abandon it on behalf of future generations.<sup>36</sup>

Lord Denning’s judgment is particularly relevant to Aboriginal rights because, like customary rights in England, they are held by groups rather than individuals for the benefit of future generations as well as current members.<sup>37</sup> What justification, one might ask, could there possibly be for treating the constitutional rights of the Aboriginal peoples of Canada less favourably than customary rights are treated in England by the common law?

In *Desautel*, Justice Rowe observed that, “In effect, we are asked [by the Crown] to hold that an Aboriginal right can be lost or abandoned by non-use: a proposition that Lamer C.J. left undecided in *Van der Peet*, at para. 63. Would accepting this proposition risk ‘undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers’?”<sup>38</sup> He then stated that “It is better not to decide the issue here, as it does not arise in light of the factual findings of the trial judge.”<sup>39</sup> This was an odd thing for him to say, given that the evidence did not reveal any Sinixt hunting in Canada from 1930 to 2010, and that the Crown argued that the right to hunt had been lost as a result. In effect, Justice Rowe did decide that non-user of the right for 80 years did not cause it to be lost.

Justice Rowe’s reference to Chief Justice Lamer’s statement in *R v Côté* that courts should avoid adopting propositions that would perpetuate historical injustice is significant. That statement was made in the context of the Crown’s argument in *Côté* that French law in Canada prior to the transfer of New France to Britain in 1763 did not acknowledge Aboriginal rights. The Supreme Court decided that the Crown’s position, if correct,

... would create an awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncrasies of colonization over particular regions of the country. In my respectful view, such a static and

---

<sup>35</sup> [1971] 2 QB 528 (CA) at 553. See also *Ward v Ward* (1852), 7 Ex 838 at 839; *Gotobed v Pridmore* (1970), 115 Sol Jo 78 (CA).

<sup>36</sup> [1963] 1 Ch 243 (CA) at 255-56. See also *Scales v Key* (1840), 11 Ad & E 819 (QB) at 825-26, where Lord Denman CJ observed that the jury’s finding, “that the custom had existed till 1689, was the same in effect as if they had found that it had existed till last week, unless something appeared to shew that it had been legally abolished.” See also *Heath v Deane*, [1905] 2 Ch 86 at 93-94; *New Windsor Corporation v Mellor*, [1975] 3 All ER 44 (CA) at 50-51 (Lord Denning MR), 53 (Browne LJ).

<sup>37</sup> In *Re Tucktoo and Kitchoalik* (1972), 27 DLR (3d) 225 (NWTTC), affirmed *Re Kitchoalik and Tucktoo* (1972), 28 DLR (3d) 483 (NWTCA), Morrow J held that the rule that customs can be abolished only by statute applies to Inuit customs relating to adoption, and that the legislation would have to be either repugnant to those customs, or directly or by implication intended to abolish them.

<sup>38</sup> *Desautel*, *supra* note 11 at para 64, quoting from *R v Côté*, [1996] 3 SCR 139 at para 53 [*Côté*].

<sup>39</sup> *Desautel*, *supra* note 11 at para 64.



retrospective interpretation of s. 35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in the *Constitution Act, 1982*. Indeed, the respondent's proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies.<sup>40</sup>

For the Sinixt, colonization had a series of negative impacts, starting with smallpox epidemics.<sup>41</sup> In 1846, the creation of the international boundary by the Oregon Boundary Treaty split their ancestral territory in two. In 1896, the *B.C. Game Protection Amendment Act* made it unlawful for them to hunt in British Columbia,<sup>42</sup> so they would have had to do so surreptitiously. Justice Rowe noted, "The trial judge did not find that the Sinixt were forced out of Canada 'at gunpoint' (para. 101), but nor did she find that the move was voluntary, as the Lakes Tribe never gave up their claim to their traditional territory in Canada."<sup>43</sup> The notion that any Indigenous people would have voluntarily abandoned their homeland in the face of colonization strains credulity.<sup>44</sup>

In case there was doubt on the issue before, the correct position on continuity is that sustained use (or occupation in the case of Aboriginal title) is not required to maintain Aboriginal rights based on practices, customs, and traditions at the time of contact (or Aboriginal title based on exclusive occupation at the time of Crown assertion of sovereignty).<sup>45</sup> If the Crown wants to allege the rights have subsequently been lost (other than by voluntary surrender by treaty), it has to prove legislative extinguishment prior to enactment of section 35(1) of the *Constitution Act, 1982*.<sup>46</sup> Extinguishment would require clear and plain legislation,<sup>47</sup> just as extinguishment of customary and other legal rights in England requires unambiguous legislation.<sup>48</sup> If the view of the dissenting judges had prevailed, on the other hand, sufficient informal interference with

---

<sup>40</sup> *Côté*, *supra* note 38 at para 53.

<sup>41</sup> *R v DeSautel*, *supra* note 2 at paras 15-18.

<sup>42</sup> SBC 1896, c 22, s 6: "It shall be unlawful for Indians not resident of this Province to kill game at any time of the year." See *Desautel*, *supra* note 11 at para 5.

<sup>43</sup> *Desautel*, *supra* note 11 at para 5.

<sup>44</sup> See *ibid* at para 33, quoted in text accompanying note 144 *infra*.

<sup>45</sup> Where title generally is concerned, it is not lost by leaving land vacant for long periods of time or even indefinitely, provided an adverse possessor does not dispossess the owner, in which case the owner's title is extinguished by statute. At common law, it was even doubtful that title could be abandoned, because in that case an abeyance of seisin (possession entailing a title) would result, which the common law abhorred. As Pollock and Maitland wrote, "It seems very doubtful whether a man could (or can) get rid of a seisin once acquired, except by delivering seisin to some one else": Sir Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 1898, reissued 1968), II, 54 n 2. See also Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), 63.

<sup>46</sup> In *Van der Peet*, *supra* note 3 at para 28, Lamer C.J. said that "[s]ubsequent to s. 35(1) [of the *Constitution Act, 1982*] aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*." This was affirmed by McLachlin CJ in *Mitchell*, *supra* note 30 at para 11.

<sup>47</sup> See *R v Sparrow*, [1990] 1 SCR 1075 at 1099 [*Sparrow*]; *Gladstone*, *supra* note 29 at paras 31-38; *Delgamuukw*, *supra* note 19 at para 180.

<sup>48</sup> *Halsbury's Laws of England*, 4th ed. reissue (Butterworths: London, 1998), vol 12(1), para 646. For detailed discussion, see Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 *Ottawa L Rev* 301.

integral Indigenous practices “at the hands of colonizers”, though wholly insufficient as evidence of extinguishment, probably would have doomed otherwise meritorious claims of Aboriginal right derived from those practices.

### **Section 35(1) Rights and Common Law Aboriginal Rights**

Section 35(1) of the *Constitution Act, 1982* did not create Aboriginal rights; instead, it provided constitutional protection to pre-existing rights by recognizing and affirming them.<sup>49</sup> As Chief Justice Lamer affirmed in *Van der Peet*, “aboriginal rights existed and were recognized under the common law.”<sup>50</sup> In *Desautel*, the Crown argued that, “while Mr. Desautel cannot have a s. 35(1) Aboriginal right, because he is not a member of an Aboriginal people of Canada, he can still have common law Aboriginal rights, albeit these rights would not constitute a defence to the regulatory charges against him.”<sup>51</sup> Justice Rowe, while not dismissing the possibility that some Indigenous groups could have common law Aboriginal rights,<sup>52</sup> said this would “introduce additional difficulties” because, “[i]n particular, the Crown seems to assume that the test for a common law Aboriginal right would be the same as the test for a s. 35(1) Aboriginal right, that is, the *Van der Peet* test. But this is far from clear.”<sup>53</sup> He went on to explain:

Before 1982, common law Aboriginal rights were recognized in Canada under British imperial law (*Calder*, at pp. 328 and 402; *Mitchell*, at paras. 62-64). Under the imperial doctrine of succession, when Britain took possession of a new territory, the laws in force in that territory were presumed to continue (subject to some exceptions). This doctrine was not limited to practices, traditions or customs that were “integral to the distinctive culture” of the Aboriginal people, as in *Van der Peet*. This suggests, on the one hand, that the test for a common law right may be met even where the *Van der Peet* test is not.<sup>54</sup>

In other words, although pre-existing rights in Indigenous law became enforceable as common law rights after Crown assertion of sovereignty, not all those pre-existing rights would meet the *Van der Peet* test for section 35(1) Aboriginal rights. That test sanctioned only rights based on practices, customs, and traditions integral to distinctive Aboriginal cultures; not all common law rights derived from pre-existing Indigenous law would be “integral” to distinctive Aboriginal cultures in the sense understood by the Supreme Court. Moreover, to give rise to section 35(1) Aboriginal rights, the practices, customs, and traditions must have been integral at the time of

---

<sup>49</sup> *Desautel*, *supra* note 11 at paras 34 (Rowe J) and 139 (Côté J).

<sup>50</sup> *Van der Peet*, *supra* note 3 at para 28, citing *Calder v Attorney-General of British Columbia*, [1973] SCR 313.

<sup>51</sup> *Desautel*, *supra* note 11 at para 67.

<sup>52</sup> *Ibid* at paras 67-70. See also paras 139-40 (Côté J).

<sup>53</sup> *Ibid.* at para 67.

<sup>54</sup> *Ibid* at para 68. See also para 34, where Rowe J relied on an article by Mark Walters, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*” (1999) 44 *McGill LJ* 711, discussing the continuation of Indigenous laws and rights after British assertion of sovereignty.

European contact, not at the time of Crown assertion of sovereignty, which would be the time when Indigenous law rights became enforceable at common law.<sup>55</sup>

In *Van der Peet*, Chief Justice Lamer offered this explanation for limiting section 35(1) Aboriginal rights to integral practices, customs, and traditions:

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.<sup>56</sup>

Later in the judgment, the Chief Justice used reconciliation as a justification for limiting the scope of constitutionally-protected Aboriginal rights:

In order to fulfil the purpose underlying s. 35(1) – i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions – the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the *crucial elements* of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs *central* to the aboriginal societies that existed in North America prior to contact with the Europeans.<sup>57</sup>

Under the *Van der Peet* test, section 35(1) protects only “crucial” or “central” aspects of Indigenous societies. Common law Aboriginal rights based on pre-existing Indigenous law that are not regarded by the Court as sufficiently integral to Indigenous cultures would not meet the test.

And yet in *Delgamuukw*, a year after *Van der Peet*, Chief Justice Lamer stated, in a passage Justice Rowe cites in *Desautel*,<sup>58</sup> that “[t]he existence of an aboriginal right at common law is ... sufficient, but not necessary, for the recognition and affirmation of that right by s. 35(1).”<sup>59</sup> This

---

<sup>55</sup> These time periods can differ greatly in the same geographical area. For example, in *R v Adams*, [1996] 3 SCR 101, French contact with the Mohawks at a location on the St. Lawrence River was held to have occurred in 1603 with the arrival of Champlain, whereas the British acquired sovereignty via the Treaty of Paris, 1763.

<sup>56</sup> *Van der Peet*, *supra* note 3 at para 20 (Lamer CJ’s underlining, our italics).

<sup>57</sup> *Ibid* at para 44 (our italics). See also paras 55-57. In *Gladstone*, *supra* note 29, delivered the same day as *Van der Peet*, Lamer CJ used reconciliation as an explanation for why constitutional Aboriginal rights can be infringed when that is justifiable: “Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation” (para 73, Lamer CJ’s underlining). Note that in *Sappier/Gray*, *supra* note 30, the Court acknowledged that the integral test was being applied too rigidly in some cases and should be interpreted more flexibly.

<sup>58</sup> *Desautel*, *supra* note 11 at para 69.

<sup>59</sup> *Delgamuukw*, *supra* note 19 at para 136.

suggests two things. First, section 35(1) probably includes Aboriginal rights that are not common law Aboriginal rights (this is “not necessary”), because section 35(1) rights can arise from practices, whereas common law Aboriginal rights would need to be based on Indigenous law.<sup>60</sup> Lamer CJ acknowledged as much in *Delgamuukw*: “the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by either *de facto* practice or by the aboriginal system of governance.”<sup>61</sup> Second, because the existence of a common law Aboriginal right is “sufficient” for section 35(1) recognition, rights established by proof of their pre-existence in Indigenous law should not need to meet the *Van der Peet* integral requirement.<sup>62</sup>

In *Desautel*, Justice Rowe acknowledged that there is “apparent tension” between common law Aboriginal rights and the *Van der Peet* integral to the distinctive culture test, but, given his conclusion that Mr. Desautel has a section 35(1) Aboriginal right under the *Van der Peet* test, he found it unnecessary to say more about it.<sup>63</sup> This leaves open the hopeful possibility that, in a future case, the Court might accept that there are two sources of section 35(1) Aboriginal rights, namely, (1) practices, customs, and traditions integral to distinctive Aboriginal cultures at the time of European contact (or exclusive occupation of land where Aboriginal title is concerned), and (2) common law recognition of rights based on Indigenous law at the time of Crown assertion of sovereignty. Acknowledging the second source would provide constitutional protection to Indigenous law rights that do not meet the *Van der Peet* integral test.<sup>64</sup> As far as we are aware, none of the section 35(1) cases decided by the Court so far precludes this possibility.<sup>65</sup>

### **Aboriginal Title**

Justices Rowe and Côté both acknowledged that interpreting “aboriginal peoples of Canada” in section 35(1) to include groups not resident in Canada could have consequences for Aboriginal title claims. Justice Rowe decided that, given the differences between Aboriginal title and other Aboriginal rights and the fact that title was not at issue in *Desautel*, this matter could be left for another day.<sup>66</sup> For Justice Côté, however, the matter raised serious concerns: “It would be a

---

<sup>60</sup> See Kent McNeil & David Yarrow, “Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?” (2007) 37 *Supreme Court L Rev* (2<sup>nd</sup>) 177 at 210; Richard Ogden, “‘Existing’ Aboriginal Rights in Section 35 of the *Constitution Act, 1982*” (2009) 88 *Can Bar Rev* 51.

<sup>61</sup> *Delgamuukw*, *supra* note 19 at para 159.

<sup>62</sup> See McNeil & Yarrow, *supra* note 60 at 211.

<sup>63</sup> *Desautel*, *supra* note 11 at paras 68-70.

<sup>64</sup> Recognition of common law Aboriginal rights and title could prove crucial in cases where Indigenous communities seek to prove and enforce such rights against private, non-governmental parties. See, e.g., *Saik’uz First Nation and Stellat’en First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154 (allowing the claim to proceed even without the Crown as a party), leave to appeal dismissed 15 October 2015, SCC File No 36480 (SCC); *Newfoundland and Labrador (AG) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (confirming Quebec courts’ jurisdiction to hear and determine an Aboriginal title claim against a private company that also involves land in Labrador). The latter proceeding has been terminated by agreement without going to trial: see online: <<https://www.riotinto.com/news/releases/2020/Uashat-mak-Mani-utenam-and-Matimekush-Lac-John-communities-sign-reconciliation-and-collaboration-agreement-with-IOC>>.

<sup>65</sup> In *Delgamuukw*, *supra* note 19 para 136, Lamer CJ said “none of the decisions of this Court handed down under s. 35(1) in which the existence of an aboriginal right has been demonstrated has relied on the existence of that right at common law”, but that was in 1997.

<sup>66</sup> *Desautel*, *supra* note 11 at paras 80-81.

remarkable proposition that a foreign group could hold constitutionally protected title to Canadian territory, as the required incidental mobility right would be fundamentally incompatible with Canadian sovereignty.”<sup>67</sup> These concerns were another reason for her to conclude that the drafters of section 35(1) could not have intended “aboriginal peoples of Canada” to include groups not resident in Canada, such as Lakes Tribe of the Sinixt.<sup>68</sup>

Justice Côté’s observation that Aboriginal title claims could potentially be brought by Indigenous groups outside Canada is correct. As she pointed out, the Sinixt themselves have a title claim to their traditional territory in the Kootenay region of south central British Columbia. In *Campbell v British Columbia (Minister of Forests and Range)*,<sup>69</sup> the directors of the Sinixt Nation Society, a representative body of the Sinixt Nation, sought an interim injunction to stop logging in a portion of the Sinixt traditional territory in B.C., pending judicial review of a licence issued by the province to a logging company. In 2008, two years before the licence was issued, representatives of the Sinixt Nation had commenced legal action against British Columbia and Canada in which they claim Aboriginal title to their traditional territory in B.C. In *Campbell*, the petitioners alleged breach of the Crown’s duty to consult the Sinixt Nation before issuing the logging licence. The injunction petition was dismissed, mainly on the ground that the directors of the Sinixt Nation Society lacked standing to bring it,<sup>70</sup> but the case confirms that a Sinixt Aboriginal title claim is at least in contemplation. No doubt other Indigenous groups now resident in the United States whose traditional territories extend into Canada will also be considering whether to initiate Aboriginal title claims in light of the *Desautel* decision.

The question of the rights-bearing entity, an issue in *Campbell* that is present in Aboriginal rights as well as title cases,<sup>71</sup> did not arise in *Desautel* because Justice Rowe accepted the trial judge’s factual findings that “the Sinixt had occupied territory in what is now British Columbia at the time of European contact” and that “the Lakes Tribe were a modern successor of the Sinixt – leaving open the possibility that there may be others.... The migration of the Lakes Tribe from British Columbia to a different part of their traditional territory in Washington did not cause the group to lose its identity or its status as a successor to the Sinixt.”<sup>72</sup> Consequently, Justice Rowe concluded:

This case does not require the Court to set out criteria for successorship of Aboriginal communities. 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

---

<sup>67</sup> *Ibid* at para 124, citing *Mitchell*, *supra* note 30, per Binnie J at paras 159-64. On Indigenous mobility rights more generally, see John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 19-49.

<sup>68</sup> *Desautel*, *supra* note 11 at para 125. In reality, it is highly unlikely that the drafters and legislators gave any thought to the potential rights of Indigenous peoples whose territories extend into Canada but who were not resident in Canada when section 35(1) was enacted in 1982.

<sup>69</sup> 2011 BCSC 448.

<sup>70</sup> An appeal to the B.C. Court of Appeal was dismissed without considering the substantive issues. As the logging had already taken place, the court decided the injunction would serve no purpose: 2012 BCCA 274.

<sup>71</sup> See Kent McNeil, “Aboriginal Rights and Indigenous Governance: Identifying the Holders of Rights and Authority” (2020) 57(1) *Osgoode Hall LJ* 127 [McNeil, “Aboriginal Rights and Indigenous Governance”].

<sup>72</sup> *Desautel*, *supra* note 11 at para 48.

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>73</sup>

In *Tsilhqot'in Nation v British Columbia*,<sup>74</sup> the whole nation rather than individual bands was held to have Aboriginal title, but that was based on evidence of the Tsilhqot'in government structure and laws.<sup>75</sup> In *Desautel*, Justice Rowe stated, "It is for Aboriginal peoples ... to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices."<sup>76</sup> Accordingly, the title-holding entity for the Sinixt would depend on their own laws. As not all Sinixt appear to be members of the Lakes Tribe,<sup>77</sup> title might be vested in the Sinixt Nation as a whole, but again, that would depend on Sinixt law.<sup>78</sup>

So what would an Indigenous group residing in the United States have to prove to have Aboriginal title in Canada? As with regard to the Aboriginal hunting right at issue in *Desautel*, they would have to show they are the successors (or a successor) of an Indigenous group that occupied territory in Canada. However, the time frame would be different: instead of proving their presence somewhere in Canada at the time of first contact with Europeans, they would have to show they were there at the time of the British Crown's assertion of sovereignty (in B.C., 1846 instead of 1811 for the Sinixt hunting right). The test for title is also different: instead of being based on a practice, custom, or tradition integral to their distinctive culture, it would be based on exclusive occupation of land at the time of Crown sovereignty.<sup>79</sup>

As mentioned previously, in her dissent Justice Côté expressed concern over the possibility that Indigenous groups in the United States could have Aboriginal title in Canada, in particular because she thought that would require an "incidental mobility right [that] would be fundamentally incompatible with Canadian sovereignty."<sup>80</sup> But why would Aboriginal title necessitate an incidental right to enter Canada any more than the Aboriginal hunting right at issue in *Desautel* would require a right of entry, which Mr. Desautel did not claim?<sup>81</sup> Subject to

---

<sup>73</sup> *Ibid* at para 49.

<sup>74</sup> *Tsilhqot'in Nation*, *supra* note 29.

<sup>75</sup> See *William v British Columbia*, 2012 BCCA 285 at paras 132-57. At para 149, Justice Groberman stated: "I agree with the trial judge's conclusion that the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself." On appeal to the SCC, the holding of the trial judge and the BCCA that title is vested in the Tsilhqot'in Nation as a whole was not challenged: see McNeil, "Aboriginal Rights and Indigenous Governance", *supra* note 71 at 136-41.

<sup>76</sup> *Desautel*, *supra* note 11 at para 86.

<sup>77</sup> See *R v DeSautel*, *supra* note 2 at paras 59-62. See also *Desautel*, *supra* note 11 at para 48, quoted in text accompanying note 72 above.

<sup>78</sup> The fact that the Lakes Tribe have an Aboriginal right to hunt in the traditional territory of the Sinixt Nation in B.C. would not prevent members of the Sinixt Nation who do not belong to that tribe from also having hunting rights there: see *Delgamuukw*, *supra* note 19 at para 159. However, because Aboriginal title is exclusive, unlike other Aboriginal rights such as hunting rights, a declaration of title in favour of the Lakes Tribe rather than the Sinixt Nation could exclude members of that nation who do not belong to the Lakes Tribe.

<sup>79</sup> *Delgamuukw*, *supra* note 19; *Tsilhqot'in Nation*, *supra* note 29; *Desautel*, *supra* note 11 at para 80.

<sup>80</sup> *Desautel*, *supra* note 11 at para 124.

<sup>81</sup> See further discussion *infra* under the heading "Sovereign Incompatibility".

Canadian law, individuals who are not Canadian citizens can own land in Canada without this necessitating a right of entry. However, if, as many have argued and we accept,<sup>82</sup> Aboriginal title includes governance authority, a declaration of title in favour of an Indigenous group resident in the United States could present complex jurisdictional issues. But comparable issues, such as the extent of Indigenous governance authority and the application of federal and provincial laws on Aboriginal title lands, also arise where Aboriginal title is held by groups resident in Canada.<sup>83</sup> Moreover, Aboriginal rights apart from title, such as the Sinixt hunting right, could entail governance rights, given their communal nature.<sup>84</sup> These matters can and should be dealt with politically through the negotiation of treaties.<sup>85</sup>

### **Duty to Consult**

The Crown has an enforceable obligation to consult a given Indigenous community when it contemplates conduct, or faces a decision, that, to its knowledge, might have an appreciable adverse effect on a constitutionally protected treaty or Aboriginal right that the community has or credibly claims.<sup>86</sup> Throughout the proceedings, and in its written submissions to the Supreme Court of Canada, the Crown called attention to practical challenges it would face if Indigenous groups located outside Canada were eligible to have or to claim such rights. “From a strictly quantitative perspective,” the Crown argued, conferring such eligibility on “US Indigenous groups” “would dramatically increase the number of groups with whom the Crown may need to

---

<sup>82</sup> E.g. Jeremy Webber, “The Public Law Dimension of Indigenous Property Rights”, in Nigel Bankes & Timo Koivurova, eds., *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Oxford: Hart Publishing, 2013), 79; Kent McNeil, “Indigenous Land Rights and Self-Government: Inseparable Entitlements” in Lisa Ford and Tim Rowse, eds., *Between Indigenous and Settler Governance* (Abingdon, UK: Routledge, 2013), 135; Brian Slattery, “The Constitutional Dimensions of Aboriginal Title” (2015) 71 *Supreme Court L Rev* (2d) 45; Sari Graben & Christian Morey, “Aboriginal Title and Controlling Liberalization: Use It Like the Crown” (2019) 52:2 *UBC L Rev* 435. For judicial acknowledgement of Indigenous nations’ governance authority over their Aboriginal title lands, see *Campbell v British Columbia*, [2000] 4 CNLR 1 (BCSC).  
<sup>83</sup> See Kerry Wilkins, “Of Provinces and Section 35 Rights” (1999) 22(1) *Dalhousie LJ* 185, and “Life Among the Ruins: Section 91(24) After *Tsilhqot’in* and *Grassy Narrows*” (2017) 55(1) *Alta L Rev* 91; Kent McNeil, “The Jurisdiction of Inherent Right Aboriginal Governments” (West Vancouver: National Centre for First Nations Governance, 2007), online: [https://wp74066.wpdns.ca/wp-content/uploads/2020/05/kent\\_mcneil.pdf](https://wp74066.wpdns.ca/wp-content/uploads/2020/05/kent_mcneil.pdf). One potential difference is that tribes in the United States have presumptive sovereign immunity from suit: see, e.g., *Santa Clara Pueblo v Martinez*, 436 US 49, 98 S.Ct 1670 at 58-59. Indigenous communities in Canada, even those with Aboriginal rights or title, do not.

<sup>84</sup> In *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s 18(1), the Parliament of Canada acknowledged that “The inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority.” *A fortiori*, judicially authenticated Aboriginal rights under section 35(1) should also entail governance authority over those rights. Such rights, after all, belong at first instance to Indigenous collectives, not to individuals: see *Sappier/Gray*, *supra* note 30 at para 26.

<sup>85</sup> See James (Sa’ke’j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007); Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 2012); Joshua Ben David Nichols, *A Reconciliation without Reflection: An Investigation into the Foundations of Aboriginal Law* (Toronto: University of Toronto Press, 2020).

<sup>86</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43.

consult and, where appropriate[,] accommodate.”<sup>87</sup> “From a qualitative perspective,” it added, “requiring the Crown to consult, and where appropriate accommodate, US Indigenous groups is likely to come with difficulties unforeseen by the Court in *Haida*, and unforeseeable even now.”<sup>88</sup> One such difficulty that received attention during oral argument was the challenge of identifying Indigenous groups located outside Canada that might have Aboriginal rights in Canada.

The majority in *Desautel* addressed this last issue squarely. “Given the long history of Crown-Aboriginal relations in Canada,” Justice Rowe said,

... the Crown will often be aware of the existence of Aboriginal groups within Canada and may have some sense of their claims. The situation is different when it comes to Aboriginal groups outside of Canada. In the absence of some historical interaction with them, the Crown may not know, or have any reason to know, that they exist, let alone that they have potential rights within Canadian territory.

There is no freestanding duty on the Crown to seek out Aboriginal groups, including those outside Canada, in the absence of actual or constructive knowledge of a potential impact on their rights. In the absence of such knowledge, the Crown is free to act. It is for the groups involved to put the Crown on notice of their claims.<sup>89</sup>

This is the clearest statement to date from the Court that the onus is on an Indigenous group to acquaint the Crown with its Aboriginal rights claims. In practice, it means that the Crown need not concern itself with Indigenous groups residing outside Canada (or, arguably, even within Canada) unless they have identified themselves and their claims to the Crown.

But “[o]nce the Crown is put on notice, ... it has to determine whether a duty to consult arises and, if so, what the scope of the duty is.”<sup>90</sup> Ordinarily, “the scope of the duty [to consult] is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.”<sup>91</sup> In practice, the latter of these criteria – the seriousness of the potentially adverse effect – has been the more important. In *Desautel*, the Court allowed that “the duty to consult may well operate differently as regards those outside Canada,”<sup>92</sup> because “groups outside Canada are not implicated ... to the same degree” in the “process of fair dealing and reconciliation” which ‘arises ... from the Crown’s assertion of sovereignty’.<sup>93</sup> By way of example, it suggested that “[i]ntegrating groups outside Canada into consultations by the Crown with groups inside

---

<sup>87</sup> Factum of the Appellant, Her Majesty the Queen, 22 November 2019, [https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM010\\_Appellant\\_Her-Majesty-the-Queen.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM010_Appellant_Her-Majesty-the-Queen.pdf) [Appellant’s Factum], at para 92.

<sup>88</sup> *Ibid* at para 93. See also Factum of the Intervener, Attorney General of Ontario, 12 May 2020, [https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM070\\_Intervener\\_Attorney-General-of-Ontario.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM070_Intervener_Attorney-General-of-Ontario.pdf), at para 31: “the cross-border realities may create uncertainty for governments as to how to fulfill their [consultation] obligations”.

<sup>89</sup> *Desautel*, *supra* note 11 at paras 74-75.

<sup>90</sup> *Ibid* at para 76.

<sup>91</sup> *Haida*, *supra* note 86 at para 39.

<sup>92</sup> *Desautel*, *supra* note 11 at para 73.

<sup>93</sup> *Ibid* at para 76, citing with approval *Haida*, *supra* note 86 at para 32.



Canada may involve discussions within Aboriginal communities and with the Crown.”<sup>94</sup> But such challenges, Rowe J insisted, are not sufficient reason for defeating or denying claims of Aboriginal right that are otherwise meritorious.<sup>95</sup> Here too, we must await a subsequent case for elaboration.

### **Sovereign Incompatibility**

As mentioned above, the Crown (in right of B.C.), throughout the *Desautel* litigation, argued that the Lakes Tribe couldn’t possibly have Aboriginal rights in B.C., because any such rights would be incompatible with the (federal) Crown’s power, as sovereign, to control its international borders. No pre-existing practices, customs, and traditions deemed incompatible with the Crown’s assertion of sovereignty, the Crown argued, could have survived post-sovereignty to anchor present-day Aboriginal rights.<sup>96</sup> “Taken in isolation,” the Crown acknowledged, “the Aboriginal right to hunt claimed by Mr. Desautel is not incompatible with the Crown’s assertion of sovereignty.”<sup>97</sup> But any meaningful exercise of such a right, it argued, would require Lakes Tribe members to cross the international border. And “[a]n aboriginal right, once established, generally encompasses other rights necessary to its meaningful exercise.”<sup>98</sup> An Aboriginal right to cross the international border is, in the Crown’s submission, incompatible with the (federal) Crown’s sovereignty, because “[c]ontrol over the mobility of persons and goods into one country is, and always has been, a fundamental attribute of sovereignty.”<sup>99</sup> As the majority judgment in *Desautel* notes,<sup>100</sup> this submission received support from the attorneys general of Quebec, New Brunswick, and Alberta. Justice Côté, dissenting in *Desautel*, appears to have accepted it.<sup>101</sup>

There is, at first blush, something disconcerting about this argument. The notion that nominate rights encompass incidental rights arose in response to Indigenous parties’ (successful) efforts to broaden the constitutionally protected scope of the treaty<sup>102</sup> or Aboriginal<sup>103</sup> rights they had or were asserting. Here, on the other hand, the Crown was attempting to embed a poison pill within a claim of right that did not purport to include it. But the Supreme Court has taken liberties before when characterizing communities’ claims of Aboriginal right;<sup>104</sup> in *Mitchell*, most particularly, it had insisted, over Grand Chief Mitchell’s objections, that the right he claimed – an Aboriginal right to bring goods for trade across what by then had become an international border – entailed a (redundant) incidental right to cross that border.<sup>105</sup> This was the precedent the Crown sought to invoke in *Desautel*.

---

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> Appellant’s Factum, *supra* note 87 at para 45; see also *Mitchell*, *supra* note 30 at para 10.

<sup>97</sup> Appellant’s Factum, *ibid* at para. 46.

<sup>98</sup> *Ibid.*, quoting with approval *Mitchell*, *supra* note 30 at para 22.

<sup>99</sup> *Ibid* at para 48, quoting with approval *Mitchell*, *supra* note 30 at para 160, Binnie J (concurring in the result).

<sup>100</sup> *Desautel*, *supra* note 11 at para 65.

<sup>101</sup> *Ibid* at para 124.

<sup>102</sup> See *Simon v The Queen*, [1985] 2 SCR 387 at 403; *R v Sundown*, [1999] 1 SCR 393 at para 33.

<sup>103</sup> Côté, *supra* note 38 at para 57.

<sup>104</sup> For discussion, see Kerry Wilkins, “Whose Claim Is It, Anyway? *Lax Kw’alaams Indian Band v Canada (AG)*” (2013) 11 *Indigenous LJ* 73.

<sup>105</sup> See *Mitchell*, *supra* note 30 at para 22. The Court considered and rejected (*ibid*) Grand Chief Mitchell’s argument that he had no need for any such right because section 6 of the *Canadian Charter of Rights and Freedoms*, Part I of

The majority in *Desautel* declined this invitation. “I am of the view,” Justice Rowe said,

... that, *unlike* the right claimed in *Mitchell*, the very purpose of the right claimed by Mr. Desautel is not to cross the border. The mobility right, if it exists, is incidental in this case. Sovereign incompatibility would relate solely to the issue of whether there can be an Aboriginal right to enter Canada – an issue that is not raised here, because Mr. Desautel was not denied entry into Canada. Moreover, this issue was not fully addressed by the courts below. Therefore, the question of whether the appropriate framework is sovereign incompatibility or infringement/justification under *Sparrow* should be left for another day, when the Court has a proper set of facts to answer the question.<sup>106</sup>

In retrospect, it would have been easy to establish, one way or the other, whether the Aboriginal right Mr. Desautel claimed on behalf of the Lakes Tribe includes an incidental right to cross the international border. All it would have taken was to ask Mr. Desautel or his counsel whether refusing him entry into Canada would infringe the Aboriginal right he was claiming. If the answer were yes, then the Lakes Tribe’s claim of right would have included, necessarily, a claim to an incidental right to cross the border. To all appearances, no one posed that question.

Suppose for now, then, that the Crown (in right of B.C.) is correct in its assertion that any Aboriginal right the Lakes Tribe members have to hunt in B.C. includes an Aboriginal right to cross the international border. What consequences ensue from that supposition?

To answer that question, we shall need criteria for use in deciding whether any given interest, right or legal arrangement is compatible with the sovereignty of the Crown. That inquiry is beyond the scope of the present discussion. Relevant surely to it, though, is the view of the (federal) Crown, whose sovereignty the Lakes Tribe’s claim is said to have put at risk. Can something be incompatible with the sovereignty of the Crown if the (federal) Crown itself perceives no incompatibility?

As it happened, that was the situation in *Desautel*. In his written argument to the Supreme Court of Canada, the Attorney General of Canada did not oppose Mr. Desautel’s claim on the basis of sovereign incompatibility; he was content to defer the issue for consideration in a case where someone was refused entry at the border.<sup>107</sup> Were such a case to arise, Canada continued, the analysis should acknowledge that “Canada has, by its Constitution, limited the exercise of government powers which may be inherent as a sovereign state. Section 35 [of the *Constitution Act, 1982*] is one such limit; the *Charter* is another. Canadian authorities are subject to these self-imposed limitations on what would otherwise be an incident of sovereign power.”<sup>108</sup> Where imposition of federal border control precludes someone from exercising her community’s

---

the *Constitution Act, 1982*, *supra* note 4, guaranteed independently his constitutional right, as a citizen of Canada, to enter and leave Canada.

<sup>106</sup> *Desautel*, *supra* note 11 at para 66 (emphasis in original).

<sup>107</sup> Factum of the Attorney General of Canada, 27 May 2020, [https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM080\\_Intervener\\_Attorney-General-of-Canada.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM080_Intervener_Attorney-General-of-Canada.pdf) [Federal Factum], at para 50. See generally *ibid* at paras 50-53.

<sup>108</sup> *Ibid* at para 51, citing with approval *Watt v Liebelt*, [1999] 2 FC 455 (CA) at para 15.

Aboriginal right, “the framework to determine such matters generally lies in the law of infringement and justification under the *Sparrow* framework.”<sup>109</sup> Where infringement results, “such infringement should be reviewed pursuant to the *Sparrow* framework. The outcome will depend on the evidence in each case.”<sup>110</sup> In Canada’s view, therefore, Mr. Desautel’s claim of Aboriginal right, even if successful, posed no challenges that the ordinary Canadian constitutional framework could not address in the ordinary way.

In response, the Crown (in right of B.C.) might challenge the relevance here of the “self-imposed limitation” on Crown sovereignty that Canada says section 35 represents. Pre-existing rights deemed incompatible with Crown sovereignty, B.C. might argue, did not survive the Crown’s assertion of sovereignty and so cannot exist as rights cognizable in Canadian law. Consequently, no such putative Aboriginal rights can qualify as “existing” Aboriginal rights eligible for protection under section 35.

Regardless of the merits of such an argument more generally, it has no application on the facts of *Desautel*. It was, after all, precisely because “the Sinixt had occupied territory in what is now British Columbia at the time of European contact” and “the Lakes Tribe were a modern successor of the Sinixt” that the Lakes Tribe qualified as “aboriginal peoples of Canada” for purposes of section 35;<sup>111</sup> it was because hunting *in traditional Sinixt territory in what is now B.C.* was integral to the ancestral Sinixt way of life at the moment of contact that the Lakes Tribe could establish a contemporary Aboriginal right to resume hunting there.<sup>112</sup> At the time the Crown asserted sovereignty over what is now B.C. and agreed on the international border with the United States in 1846, Sinixt were still there in significant numbers, engaging in the practice that constituted the Aboriginal right. Those Sinixt had no need to cross an international border to exercise their hunting right. Only those of their descendants who became the Lakes Tribe found it necessary subsequently to do so. Whatever else we say about sovereign incompatibility, therefore, the Aboriginal right to hunt in the part of traditional Sinixt territory that became B.C. survived the Crown’s assertion of sovereignty because, at the time the Crown asserted sovereignty there, neither the right nor its exercise implicated the international border. These are conclusions the *Desautel* majority could have reached on the facts as found by the trial judge.

### **Choice of Proceedings**

*Desautel* was a prosecution about regulatory offences. As a result, the only parties with standing to give evidence at the trial were the Crown (in right of B.C.), seeking enforcement of the offence provisions, and Mr. Desautel, claiming in defence the benefit of the Aboriginal right.<sup>113</sup> Others with potential interests in the fate of the Aboriginal right claim Mr. Desautel asserted – in

---

<sup>109</sup> Federal Factum, *supra* note 107 at para 54, citing with approval *Mitchell*, *supra* note 30 at para 63.

<sup>110</sup> Federal Factum, *ibid* at para 55.

<sup>111</sup> *Desautel*, *supra* note 11 at para 48; see also *ibid* at para 47.

<sup>112</sup> *Ibid* at para 62.

<sup>113</sup> Because Mr. Desautel challenged the constitutional applicability of the offence provisions, section 8 of the *Constitutional Question Act*, RSBC 1996, c 68, entitled the Attorney General of Canada to receive notice of the constitutional question and to make submissions to the trial court, and to any subsequent B.C. appellate courts, about it. The Attorney General of Canada chose not to take part in the litigation until it reached the Supreme Court of Canada.

particular, Indigenous communities resident in B.C. that included Sinixt descendants<sup>114</sup> and the B.C. Métis<sup>115</sup> – had no opportunity to lead evidence they considered relevant to the issue of Aboriginal rights in respect of traditional Sinixt territory in southern British Columbia. Groups representing those interests intervened at the Supreme Court of Canada in the *Desautel* appeal and asked specifically that the court reach no conclusions that could prejudice claims of Aboriginal right that they might assert.<sup>116</sup>

The majority judgment in *Desautel* obliged,<sup>117</sup> but took the opportunity to comment critically on the limitations endemic to regulatory prosecutions. “[T]he defence of a prosecution for a provincial regulatory offence,” Justice Rowe said at the outset of his judgment, “while it may serve as a test case (as here), is not well suited to deal with such broader issues [as what Mr. Desautel’s success means for the exercise of rights protected under s 35(1)]. Such issues are better dealt with in an action setting out the right claimed, with a full evidentiary record, and seeking declaratory relief.”<sup>118</sup> Subsequently, he added this:

When parties are considering possible courses of action, it is useful to bear in mind that criminal and regulatory proceedings have inherent limits proper to their nature. In these types of cases, the evidence administered at trial is generally less extensive and the rules are different than in a reference or a declaratory action.... As LeBel J. stressed in his concurring reasons in *Marshall*,<sup>119</sup> at para. 142:

Although many of the aboriginal rights cases that have made their way to this Court began by way of summary conviction proceedings, it is clear to me that we should re-think the appropriateness of litigating aboriginal treaty, rights and title issues in the context of criminal trials. The issues that are determined in the context of these cases have little to do with the criminality of the accused’s conduct; rather, the claims would properly be the subject of civil actions for declarations. Procedural and evidentiary difficulties, inherent in adjudicating aboriginal claims arise not only out of the rules of evidence, the interpretation of evidence and the impact of the relevant evidentiary burdens, but also out of the scope of appellate review of the trial judge’s findings of fact. These claims may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process. In addition, special difficulties

---

<sup>114</sup> See Factum of the Intervener, Okanagan Nation Alliance, 19 June 2020, [https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM120\\_Intervener\\_Okanagan-Nation-Alliance.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM120_Intervener_Okanagan-Nation-Alliance.pdf) [ONA Factum], paras 1-7.

<sup>115</sup> See Factum of the Intervener, Métis Nation British Columbia, 28 July 2020, [https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM230\\_Intervener\\_Métis-Nation-British-Columbia.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM230_Intervener_Métis-Nation-British-Columbia.pdf) [MNBC Factum], especially at paras 7-8.

<sup>116</sup> See ONA Factum, *supra* note 114, paras 3, 22-28, 31; MNBC Factum, *supra* note 115, paras 10-27.

<sup>117</sup> See *Desautel*, *supra* note 11 at paras 32 and 47 (deferring consideration of implications for Métis), 49 (declining to “set out criteria for succession of Aboriginal communities”), 56-60 (rejecting Canada’s submission that only those non-resident Indigenous individuals eligible to “shelter” under the section 35 rights of Indigenous communities resident in Canada could benefit from such rights), 80-82 (deferring discussion of Aboriginal title and modern treaty issues).

<sup>118</sup> *Ibid* at para 2.

<sup>119</sup> *Marshall/Bernard*, *supra* note 26.

come up when dealing with broad title and treaty rights claims that involve geographic areas extending beyond the specific sites relating to the criminal charges.<sup>120</sup>

This is not the first time (even apart from *Marshall/Bernard*) that the Court has preferred civil proceedings to regulatory prosecutions for the purpose of resolving claims of Aboriginal right or title. It did so first in *Sparrow*,<sup>121</sup> then again by implication in *Marshall 2*,<sup>122</sup> then again, more explicitly, in *Lax Kw'alaams*.<sup>123</sup> Why is it, then, that regulatory prosecutions continue so often to be the vehicle of choice for Indigenous individuals or communities seeking authentication of treaty or Aboriginal rights? Two reasons come to mind.

In the first place, the courts have restricted litigants' access to civil proceedings as a means of proving claims of Aboriginal right. The Supreme Court itself has precluded outright consideration on the merits of such claims in judicial review proceedings,<sup>124</sup> and the BC Court of Appeal has held that actions for declarations of Aboriginal right or title are not justiciable in the absence of some allegation of "violation of or threat to" the right being claimed.<sup>125</sup> (Never mind that we all have some interest in knowing what Aboriginal rights there are, and to whom they pertain.) On this view, a claim of infringement is the price of admission if an Indigenous group wants to use civil proceedings to prove its claim of Aboriginal right, so the Indigenous claimant had better come up with one.<sup>126</sup> Contravening an offence provision believed to infringe the asserted right is one of the surer ways to equip oneself with a claim of infringement.

The second reason is the one Mark Underhill, lead counsel for Mr. Desautel, gave when asked about this question a few weeks before the *Desautel* decision came out, at a panel discussion about the case organized for students at the University of Toronto Faculty of Law. His answer is revealing. Civil proceedings involving claims of Aboriginal right, he suggested, take much too long and cost much too much to be practicable options for Indigenous communities that have limited means and urgent needs. In an imperfect world, test case prosecutions are often the most

---

<sup>120</sup> *Desautel*, *supra* note 11 at para 90. Emphasis in embedded quotation added in *Desautel*. For discussion of this issue in *Marshall/Bernard*, *supra* note 26, see Shin Imai, "The Adjudication of Historical Evidence: A Comment and an Elaboration on a Proposal by Justice Lebel" (2006) 55 *UNBLJ* 146.

<sup>121</sup> See *Sparrow*, *supra* note 47 at 1095: "the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right".

<sup>122</sup> *R v Marshall*, [1999] 3 SCR 533 [*Marshall 2*] at para 13.

<sup>123</sup> *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 [*Lax Kw'alaams*] at para 11: "The courts (including this Court) have long urged the negotiation of Aboriginal and treaty claims. If litigation becomes necessary, however, we have also said that such complex issues would be better sorted out in civil actions for declaratory relief rather than within the confines of regulatory proceedings. In a fisheries prosecution, for example, there are no pleadings, no pre-trial discovery, and few of the procedural advantages afforded by the civil rules of practice to facilitate a full hearing of all relevant issues."

<sup>124</sup> *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 84.

<sup>125</sup> *Cheslatta Carrier Nation v British Columbia*, 2000 BCCA 539 [*Cheslatta Carrier*] at para 15, leave to appeal refused [2000] SCCA No 625; see generally *ibid* at paras 13-19; *Kaska Dena Council v British Columbia (Attorney General)*, 2008 BCCA 455 at paras 11-15.

<sup>126</sup> See *Cheslatta Carrier*, *supra* note 125 at para 19: "the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself."

cost-effective means of obtaining timely, authoritative determinations of controversial claims of Aboriginal right.

There's a paradox here. The very features of civil proceedings that make them more attractive to the Supreme Court for adjudication of complex Aboriginal rights claims make such proceedings less attractive to many of the Indigenous communities in a position to assert such claims credibly. That in itself might give one pause, but it has potential, as well, to affect the prospects for negotiated resolution of the meritorious claims.

“Negotiation,” the majority judgment reiterated in *Desautel*, “has significant advantages for both the Crown and Aboriginal peoples as a way to obtain clarity about Aboriginal rights”;<sup>127</sup> “[t]rue resolution is rarely, if ever, achieved in courtrooms.”<sup>128</sup> But channeling Aboriginal rights litigation into forms of proceedings typically beyond the means of the Indigenous claimants reduces their bargaining power in any negotiations. Where litigation isn't a meaningful option if negotiations go poorly, the Indigenous parties may well feel they have little choice but to accept what the Crown may offer them. The Crown, perceiving all this, may have little, if any, incentive to take part in negotiations, except perhaps as required by the honour of the Crown and the still undefined, unenforced, inchoate duty to negotiate that the honour of the Crown is said to impose.<sup>129</sup> Private litigants, against whom Indigenous communities seek to establish and enforce Aboriginal rights,<sup>130</sup> of course, have no such obligation to negotiate.

Indigenous communities of limited means do have at least one option under current law when contemplating civil proceedings to establish and enforce Aboriginal rights. Superior courts, the Supreme Court of Canada has held, have the option in some circumstances of awarding interim costs to a party, irrespective of the eventual outcome, to facilitate the party's full participation in the proceedings.<sup>131</sup> Indigenous parties using civil proceedings to advance their claims have benefited from interim costs orders in the *Okanagan*<sup>132</sup> and *Tsilhqot'in*<sup>133</sup> actions, both of which have involved assertions of Aboriginal title, and in *Grassy Narrows*,<sup>134</sup> a case about treaty interpretation.

---

<sup>127</sup> *Desautel*, *supra* note 11 at para 87.

<sup>128</sup> *Ibid*, quoting with approval *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 24.

<sup>129</sup> See *Haida*, *supra* note 86 at para 25; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 73; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras 54, 56; *Desautel*, *supra* note 11 at paras 88-89. For discussion, see Felix Hoehn, “The Duty to Negotiate and the Ethos of Reconciliation” (2020) 83(1) *Sask L Rev* 1.

<sup>130</sup> See *supra* note 64.

<sup>131</sup> See *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [*Okanagan*] at para 35: “The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. This broad discretion may be expressly referred to in a statute.... Indeed, the power to order interim costs may be specifically stipulated.... Even absent explicit statutory authorization, however, the power to award interim costs is implicit in courts' jurisdiction over costs as it is set out in statutes”.

<sup>132</sup> *Ibid* at paras 45-47.

<sup>133</sup> *William v British Columbia*, 2013 BCCA 1 [*William*].

<sup>134</sup> See *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy Narrows*] at para 55.

But there are, to put it very conservatively, no guarantees. The Supreme Court in *Okanagan* set out three conditions a litigant must meet even to be *eligible* for an interim costs order. They are not meant to be easy to satisfy.

The first requirement is that “[t]he party seeking costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial.”<sup>135</sup> This, according to the majority in *Little Sisters*, requires that the applicant for interim costs

... explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options.<sup>136</sup>

In the view of the Alberta Court of Appeal, a First Nation applicant must, in addition, devote such resources as it has to funding the litigation, even if that means leaving unaddressed “legitimate and reasonable ‘pressing infrastructural and social needs’” within the community.<sup>137</sup> Other lower court jurisprudence suggests that litigants who initiate proceedings (including, for instance, Indigenous plaintiffs seeking declarations of Aboriginal right) may find it more difficult to satisfy this requirement than those “thrust into a situation requiring litigation”<sup>138</sup> (individuals facing, for instance, prosecution).

The second requirement is that the claim be “*prima facie* meritorious; that is, the claim [be] at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.”<sup>139</sup> According to *Little Sisters*, this test

... requires something more than mere proof that one’s case has sufficient merit not to be dismissed summarily. Rather, an applicant must prove that the interests of justice would not be served if a lack of resources made it necessary to abort the litigation. The very wording of the requirement confirms that the interests of justice will not be jeopardized every time a litigant is forced to withdraw from litigation for

---

<sup>135</sup> *Okanagan*, *supra* note 131 at para 40.

<sup>136</sup> *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 [*Little Sisters*] at para 40.

<sup>137</sup> *Anderson v Alberta (Attorney General)*, 2020 ABCA 238 at para 26. “The test is not met,” the court added *ibid*, “if the applicant has funds, but chooses or prefers to spend the funds on other priorities, regardless of how reasonable those other priorities may be.” See also *ibid* at paras 27-28 (distinguishing such reasonable expenditures from “basic necessities”). On January 21, 2021, the Supreme Court of Canada granted leave to appeal this decision (Docket No 39323). The hearing is scheduled for November 4, 2021: see <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=39323>.

<sup>138</sup> See *Pasqua First Nation v Canada*, 2017 FC 655 [*Pasqua*] at para 29, citing with approval *Little Sisters*, *supra* note 136 at para 59.

<sup>139</sup> *Okanagan*, *supra* note 131 at para 40.

financial reasons. The reason for this is that the context in which merit is considered is conditioned by the need to show that the case is exceptional.<sup>140</sup>

Finally, “the issues raised” in the litigation must “transcend the individual interests of the particular litigant, [be] of public importance, and [not have] been resolved in previous cases.”<sup>141</sup> To satisfy this expectation, the applicant for interim costs must meet each of its three component requirements.<sup>142</sup> “This means that a litigant whose case, however compelling it might be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test.”<sup>143</sup>

As mentioned, some Indigenous communities have met these criteria and obtained orders of interim costs to help finance litigation of their section 35 claims in civil courts. But few Indigenous communities contemplating civil proceedings can have confidence that courts will find their circumstances satisfy these requirements. And to be clear,

[t]hese are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are satisfied, courts have a narrow jurisdiction to order that the impecunious party’s costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation.<sup>144</sup>

Put differently, the Indigenous claimant may well be unsuccessful in obtaining interim costs even if it has satisfied all three of the eligibility conditions. “It is only a ‘rare and exceptional’ case that is special enough to warrant an advance costs award.”<sup>145</sup> And even then, it will be prospective only; it will not cover those costs the Indigenous litigant has already incurred prior to the interim costs award.<sup>146</sup>

In brief, both the doctrinal impediments and the financial risks of civil litigation are substantial, and the prospects of relief from the latter by means of interim costs awards guarded, for Indigenous communities with limited means but potentially meritorious claims of Aboriginal right.<sup>147</sup> While this remains so, such communities have reason to continue provoking regulatory prosecutions to test their claims of Aboriginal or treaty right, despite the evident disadvantages such proceedings have for that purpose when compared with full-dress civil proceedings. If the Supreme Court of Canada is serious about preferring civil proceedings to prosecutions for this

---

<sup>140</sup> *Little Sisters*, *supra* note 136 at para. 51.

<sup>141</sup> *Okanagan*, *supra* note 131 at para 40.

<sup>142</sup> See *R v Caron*, 2011 SCC 5 at para 44.

<sup>143</sup> *Little Sisters*, *supra* note 136 at para 39.

<sup>144</sup> *Okanagan*, *supra* note 131 at para 41.

<sup>145</sup> *Little Sisters*, *supra* note 136 at para 38, quoting with approval *Okanagan*, *supra* note 131 at para 1.

<sup>146</sup> *Pasqua*, *supra* note 138 at para 28, quoting with approval *Joseph v Canada*, 2008 FC 574 at para 27. See also quotation *supra* at note 144.

<sup>147</sup> Not to mention the risk all civil litigants face of having to pay the other parties’ costs if they are unsuccessful.



purpose, it is going to have to acknowledge and address this predicament. It will have a chance to do so late in 2021 in a First Nation's advance costs appeal.<sup>148</sup>

### **Conclusion**

The *Desautel* case decided a major issue: that Indigenous groups who are not resident in Canada can have constitutionally-protected Aboriginal rights if they had traditional territory here prior to contact with Europeans. The decision also reaffirmed that Aboriginal rights are not lost as a result of long periods of non-user, especially if that was a result of colonial displacement, as it almost always would be. Britain and the United States drew boundaries in North America that disregarded entirely the existence of Indigenous nations such as the Sinixt, whose territories were severed in the process. Indigenous peoples were absorbed into the nation-states of Canada and the United States and made unwelcome in their traditional territories on the other side of the border, causing them to be separated from some of their lands and relations. Justice Smith, in her unanimous decision for the British Columbia Court of Appeal, saw the injustice in this:

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.<sup>149</sup>

In his majority Supreme Court decision, Justice Rowe likewise took account of the fact that the "displacement of Aboriginal peoples as a result of colonization is well acknowledged" by quoting the Royal Commission on Aboriginal Peoples:

Aboriginal peoples were displaced physically – they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools – which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.<sup>150</sup>

Acknowledgement of these realities by the courts is a significant step towards reconciliation.

---

<sup>148</sup> See *supra* note 137.

<sup>149</sup> *Desautel* (BCCA), *supra* note 10 at para 62.

<sup>150</sup> *Desautel*, *supra* note 11 at para 33, quoting *Report of the Royal Commission on Aboriginal Peoples*, vol 1, *Looking Forward, Looking Back* (Ottawa: Canada Communication Group, 1996),139-40.