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Welcome Home: Aboriginal Rights Law after Desautel

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Abstract

In *R v Desautel*, decided April 23, 2021, 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, has an existing Aboriginal right on Canadian soil protected by section 35 of the *Constitution Act, 1982*. This is so, the majority held, where a community can show both 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 the practice for which it claims constitutional protection was integral to the ancestral community's way of life at that time. The Lakes Tribe, whose members are American citizens living on a reservation in the state of Washington, was able to show that it descends from the Sinixt, an Indigenous nation whose traditional territory includes (and included at contact) much of south central B.C., and that hunting for food there was integral to the pre-contact Sinixt way of life. 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 Aboriginal rights claims, and the impact of the decision on Aboriginal title claims and the duty to consult.

Keywords

Aboriginal rights; Indigenous peoples; constitutional law; hunting in Canada; Sinixt Nation

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Welcome Home: Aboriginal Rights Law after *Desautel*

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Abstract

In *R. v. Desautel*, decided 23 April 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 in 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 Colville Confederated 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/United States 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, British Columbia, to secure ceremonial meat for his community. He reported the kill to the BC wildlife authorities. He was charged with two violations under BC's *Wildlife Act*: hunting without a licence and hunting big game without a guide while a non-resident.[1] 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.[2] 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 Tribe members hunting within that territory.[3] The Crown had argued, however, that section 35 gave the Lakes Tribe no constitutional protection because it guaranteed only "the existing aboriginal and treaty rights of the aboriginal peoples of Canada" and the Lakes Tribe, residing outside Canada, could not qualify as "aboriginal peoples *of Canada*."[4] In the alternative, the Crown

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[1] RSBC 1996, c 488, ss 11(1), 47(a).

[2] *R v DeSautel*, 2017 BCPC 84 at para 84, 68, respectively [*DeSautel* (BCPC)].

[3] See especially *R v Van der Peet*, [1996] 2 SCR 507 at paras 44-46, 55-59 [*Van der Peet*].

[4] *Constitution Act, 1982*, s 35(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [emphasis added].

submitted, no Aboriginal right could protect Sinixt hunting in their traditional territory within British Columbia 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 that 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.[5]

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 British Columbia 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."[6] Moreover, the absence of evidence that Lakes Tribe members had hunted in British Columbia after 1930 was not fatal to Mr. Desautel's claim to an Aboriginal right.[7] 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.[8] Mr. Desautel and the Lakes Tribe, she held, have, therefore, an existing Aboriginal right to hunt for food and ceremony in traditional Sinixt territory in British Columbia. The offence provisions with which he was charged infringed that right, and the Crown had failed to justify the infringement. Mr. Desautel was acquitted.[9]

On appeal, the Supreme Court of British Columbia agreed.[10] So, on further appeal, did the Court of Appeal for British Columbia.[11] On 23 April 2021, the Supreme Court of Canada (SCC), in a 7-2 decision (Justices Côté and Moldaver dissenting), dismissed the Crown's final appeal.[12] According to Justice Rowe, who wrote for the majority, the Crown was correct to insist that only an Indigenous group that qualifies as an "aboriginal people of Canada" is entitled to the protection of section 35 of the *Constitution Act, 1982*.[13] 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 contact."[14] On the findings of the trial judge, the Lakes Tribe meets this requirement.[15] This, and the further finding that hunting for food and ceremony within south-central British Columbia 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.[16] The Court thought the border issue, along with several other issues that the Crown and other attorneys general had raised in their SCC submissions (the Crown's duty to consult, the

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[5] *DeSautel* (BCPC), *supra* note 2 at para 5-6.
[6] *Ibid* at para 128.
[7] *Ibid* at paras 128-35.
[8] *Ibid* at paras 136-67.
[9] *Ibid* at paras 168-85.
[10] *R v Desautel*, 2017 BCSC 2389 [*Desautel* (BCSC)].
[11] *R v Desautel*, 2019 BCCA 151 [*Desautel* (BCCA)].
[12] *R v Desautel*, 2021 SCC 17 at para 22 [*Desautel*].
[13] *Ibid* at para 20.
[14] *Ibid* at para 47. Justice Rowe 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).
[15] *Ibid* at para 48.
[16] See *ibid* at para 62.

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 Justice Rowe identified but deferred.

I. Interpretation of "aboriginal peoples of Canada"

The main issue at the SCC was the proper interpretation of "aboriginal peoples of Canada" in section 35(1) of the *Constitution Act, 1982*. Section 35(1) provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[17] The majority and dissenting judgments agreed that the framers of section 35 never considered whether Indigenous groups residing outside Canada could be "aboriginal peoples of Canada," but differed sharply in their approaches to this issue.[18]

Justice Rowe applied the purposive approach to interpretation of section 35(1) articulated in previous cases, especially *R. v. Van der Peet* ("*Van Der Peet*"):[19]

> [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.[20]

Aboriginal rights (apart from title and Métis rights),[21] including the hunting right at issue in *Desautel*, are based on the practices, customs, and traditions integral to distinctive Indigenous cultures at the time of contact with Europeans.[22] These rights, therefore, relate back to Indigenous peoples' pre-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."[23] Members of the Lakes Tribe of Sinixt people living in Washington State, including Mr. Desautel, therefore, could have constitutionally-protected rights in their ancestral territory in Canada.

Justice Côté dissented on this issue. She considered the majority's understanding of the meaning of "aboriginal peoples of Canada"

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[17] *Constitution Act, 1982*, *supra* note 4, s 35(1).
[18] See *Desautel*, *supra* note 12 at para 41, Rowe J; *ibid* at paras 115, 119, Côté J, dissenting.
[19] *Supra* note 3.
[20] *Desautel*, *supra* note 12 at para 22.
[21] Aboriginal title is based on exclusive occupation of land at the time of Crown assertion of sovereignty. See *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 Court), are based on Métis practices, customs, and traditions at the time of effective European control. See *R v Powley*, [2003] 2 SCR 207.
[22] *Van der Peet*, *supra* note 3.
[23] *Desautel*, *supra* note 12 at para 23.

> contrary to a purposive analysis of s. 35(1) 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.[24]

In her opinion, the drafters of section 35 could not possibly have intended the provision to include non-resident Indigenous groups.[25]

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 eighteenth and nineteenth centuries.[26] These colonial actions bifurcated many Indigenous nations, taking no account of their presence on and relationship with their traditional territories. Justice Côté'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.

II. 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 SCC. In addition, for Mr. Desautel to have an Aboriginal right to hunt for food, social, and ceremonial purposes in their ancestral territory in Canada, such hunting had to be integral to pre-contact Sinixt culture, as required by the test created in the *Van der Peet* case in 1996.[27] Justice Rowe said that 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.[28] 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 requires only that the modern practice 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.[29] But the dissenting judges thought that the continuity requirement also necessitates a degree of maintenance of the practice over the intervening time period. Justice Côté, Justice Moldaver 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),

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[24] *Ibid* at para 94.

[25] See *ibid* at paras 115-25. 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.

[26] This was done when neither Britain nor the United States 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* (Longmans, Green & Co, 1955); Norman L Nicholson, *The Boundaries of the Canadian Confederation* (Macmillan of Canada, 1979); Donald A Rakestraw, *For Honour or Destiny: The Anglo-American Crisis over the Oregon Territory* (Peter Lang, 1995).

[27] *Supra* note 3 at paras 44-46.

[28] *Desautel*, *supra* note 12 at paras 50, 61.

[29] See *R v Marshall*; *R v Bernard*, 2005 SCC 43 at para 67 [*Marshall/Bernard*].

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."[30] 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."[31]

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."[32]

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 be allowed to evolve", because "[i]f aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless."[33]

Unlike the dissenting justices, 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 of exercising it.

The Crown argued that "continuity requires an ongoing presence in the lands over which an Aboriginal right is asserted."[34] 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."[35]

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[30] *Desautel*, *supra* note 12 at para 130.
[31] *Ibid* at paras 136-37.
[32] *Ibid* at para 53, citing Kent McNeil, "Continuity of Aboriginal Rights" in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Purich, 2004) 127 at 138. For other authorities relied on by the Court, see *Van der Peet*, *supra* note 3 at paras 62-63; *R v Gladstone*, [1996] 2 SCR 723 at para 28 [*Gladstone*]; *Delgamuukw*, *supra* note 21 at para 152; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 45 [*Tsilhqot'in Nation*].
[33] *Desautel*, *supra* note 12 at para 54, citing *R v Sappier*; *R v Gray*, 2006 SCC 54 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; *Mitchell v MNR*, 2001 SCC 33 at para 13 [*Mitchell*].
[34] *Desautel*, *supra* note 12 at para 63.
[35] *Ibid*. See also *R v Marshall*, 2003 NSCA 105 at paras 157-81. 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. See *Marshall/Bernard*, *supra* note 29.

Justice Rowe's position on this is consistent with common law principles. Legal rights, once acquired, are not lost through non-use.[36] In *Re Yateley Common, Hampshire*, 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.[37]

Similarly, in *Tehidy Minerals Ltd. v. Norman*, Lord Justice Buckley 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 right himself or to attempt to transmit it to anyone else."[38] 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.[39]

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.[40] 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

> [i]n 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'?"[41]

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[36] But see the discriminatory and rightly criticized judgment of the High Court of Australia in *Members of the Yorta Yorta Aboriginal Community v Victoria*, [2002] HCA 58. Additionally, see Richard Bartlett, "An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*" (2003) 31 UWA 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 UL Rev 1; Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) at 317-34, 406-14.

[37] [1977] 1 All ER 505 at 510 (Ch).

[38] [1971] 2 QB 528 at 553 (CA). See also *Ward v Ward* (1852), 7 Ex 838 at 839; *Gotobed v Pridmore* (1970), [1971] 115 Sol Jo 78 (CA).

[39] [1963] 1 Ch 243 at 255-56 (CA). See also *Scales v Key* (1840), 11 Ad & E 819 at 825-26 (QB) (where Lord Chief Justice Denman 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 at 50-51 (Lord Denning MR), 53 (Browne LJ).

[40] In *Re Tucktoo and Kitchooalik* (1972), 27 DLR (3d) 225 (NWT TC), aff'd (1972), 28 DLR (3d) 483 (NWT CA), Territorial Court Justice Morrow 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.

[41] *Supra* note 12 at para 64, citing *R v Côté*, [1996] 3 SCR 139 at para 53 [*Côté*].

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."[42] 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-use 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* ("*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 SCC 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 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.[43]

For the Sinixt, colonization had a series of negative impacts, starting with smallpox epidemics.[44] In 1846, the creation of the international boundary by the Oregon Boundary Treaty split their ancestral territory in two. In 1896, the BC *Game Protection Amendment Act* made it unlawful for them to hunt in British Columbia,[45] 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."[46] The notion that any Indigenous people would have voluntarily abandoned their homeland in the face of colonization strains credulity.[47]

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).[48] Neither does it matter whether the candidate practice is integral to the claimant community's distinctive culture today, as long as the courts conclude that it was integral at the time of contact. If the Crown wants to allege that the rights have subsequently been lost (other than by voluntary surrender by treaty), it has to

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[42] *Desautel*, *supra* note 12 at para 64.
[43] *Côté*, *supra* note 41 at para 53.
[44] *DeSautel* (BCPC), *supra* note 2 at paras 15-18.
[45] 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 also *Desautel*, *supra* note 12 at para 5.
[46] *Desautel*, *supra* note 12 at para 5.
[47] See the quotation in note 159 below, citing *ibid* at para 33.
[48] 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 Sir Frederick Pollock and Frederic William 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." See *The History of English Law Before the Time of Edward I*, 2nd ed (Cambridge University Press, 1898, reissued 1968) II at 54, n 2. See also Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press, 1989) 63.

prove legislative extinguishment prior to the enactment of section 35(1) of the *Constitution Act, 1982*.[49] Extinguishment would require legislation displaying a clear and plain intention to extinguish,[50] just as extinguishment of customary and other legal rights in England requires unambiguous legislation.[51] If the view of the dissenting justices had prevailed, on the other hand, sufficient informal interference with 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.

III. 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.[52] As Chief Justice Lamer affirmed in *Van der Peet*, "aboriginal rights existed and were recognized under the common law."[53] 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."[54] Justice Rowe, while not dismissing the possibility that some Indigenous groups could have common law Aboriginal rights,[55] 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."[56] 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.[57]

In other words, although pre-existing rights in Indigenous law became enforceable as common law rights after Crown assertion of sovereignty, not all of 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

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[49] See generally *Van der Peet*, *supra* note 3 at para 28, Lamer CJ (stating 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 33 at para 11.

[50] See *R v Sparrow*, [1990] 1 SCR 1075 at 1099 [*Sparrow*]; *Gladstone*, *supra* note 32 at paras 31-38; *Delgamuukw*, *supra* note 21 at para 180.

[51] *Halsbury's Laws of England*, vol 12(1), *Custom and Usage*, "Extinguishment of Custom" at para 646 (4th ed reissue). For detailed discussion, see Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2002) 33 Ottawa L Rev 301.

[52] *Desautel*, *supra* note 12 at para 34, Rowe J; *ibid* at para 139, Côté J, dissenting.

[53] *Supra* note 3 at para 28, citing *Calder v British Columbia (AG)*, [1973] SCR 313.

[54] *Supra* note 12 at para 67.

[55] *Ibid* at paras 67-70. See also paras 139-40, Côté J, dissenting.

[56] *Ibid* at para 67.

[57] *Ibid* at para 68. See also *ibid* at para 34, Rowe J (relying on an article by Mark Walters discussing the continuation of Indigenous laws and rights after British assertion of sovereignty). See Mark Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44 McGill LJ 711.

derived from pre-existing Indigenous law would be "integral" to distinctive Aboriginal cultures in the sense understood by the SCC. Moreover, to give rise to section 35(1) Aboriginal rights, the practices, customs, and traditions must have been integral at the time of 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.[58]

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.[59]

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.[60]

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 v. British Columbia* ("*Delgamuukw*"), a year after *Van der Peet*, Chief Justice Lamer stated, in a passage Justice Rowe cites in *Desautel*,[61] 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)."[62] This 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

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[58] These time periods can differ greatly in the same geographical area. For example, 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 by the Treaty of Paris, 1763. See *R v Adams*, [1996] 3 SCR 101 at paras 4, 42-45.

[59] *Supra* note 3 at para 20 [Lamer CJ's underlining, other emphasis added].

[60] *Ibid* at para 44 [emphasis added]. See also *ibid* paras 55-57. Chief Justice Lamer, in a decision delivered the same day as *Van der Peet*, used reconciliation as an explanation for why constitutional Aboriginal rights can be infringed when that is justifiable. He noted that:

> 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 (*Gladstone*, *supra* note 32 at para 73, Lamer CJ [emphasis in original]).

Note that the Court has acknowledged that the integral test was being applied too rigidly in some cases and should be interpreted more flexibly (*Sappier/Gray*, *supra* note 33).

[61] *Supra* note 12 at para 69.

[62] *Delgamuukw*, *supra* note 21 at para 136.

would need to be based on Indigenous law.[63] Chief Justice Lamer acknowledged as much in *Delgamuukw*: "[T]he 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."[64] 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.[65]

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.[66] 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: (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.[67] As far as we are aware, none of the section 35(1) cases decided by the Court so far precludes this possibility.[68]

IV. 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. The majority held 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

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[63] See Kent McNeil & David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?" (2007) 37 SCLR (2d) 177 at 210; Richard Ogden, "'Existing' Aboriginal Rights in Section 35 of the *Constitution Act, 1982*" (2009) 88 Can Bar Rev 51.

[64] *Supra* note 21 at para 159.

[65] See McNeil & Yarrow, *supra* note 63 at 211. See also *Delgamuukw*, *supra* note 21 at para 142 ("under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy").

[66] *Supra* note 12 at paras 68-70.

[67] 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 to SCC refused, 36480 (15 October 2015); *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 (but for its valid defence of statutory authority, the private company would be liable to the First Nation in private nuisance for having interfered with its Aboriginal rights); *Kwikwetlem First Nation v British Columbia (AG)*, 2021 BCCA 311 (federal Crown not a necessary party to an Aboriginal title proceeding if no relief sought against federal Crown); *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 "Uashat mak Mani-utenam and Matimekush-Lac John Communities Sign Reconciliation and Collaboration Agreement with IOC" (3 December 2020), online (blog): <www.riotinto.com/news/releases/2020/Uashat-mak-Mani-utenam-and-Matimekush-Lac-John-communities-sign-reconciliation-and-collaboration-agreement-with-IOC> [perma.cc/DF7A-QZCA].

[68] *Delgamuukw*, *supra* note 21 at para 136, Lamer CJ (saying "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).

another day.[69] For Justice Côté, however, the matter raised serious concerns: "It would be a 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."[70] 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.[71]

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)* ("*Campbell*"),[72] 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 British Columbia, pending judicial review of a licence issued by the province to a logging company. In 2008, two years before the licence was issued, the directors of the Society had commenced legal action against British Columbia and Canada in which they claimed that the Sinixt Nation has Aboriginal title to its traditional territory in British Columbia. 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,[73] 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,[74] 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.[75]

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 be given to the possibility that a community may split over time, or, that two communities may merge

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[69] *Supra* note 12 at paras 80-81.

[70] *Ibid* at para 124, citing *Mitchell*, *supra* note 33 at paras 159-64. On Indigenous mobility rights more generally, see John Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press, 2016) at 19-49.

[71] *Desautel*, *supra* note 12 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. See *supra* note 18 and accompanying text.

[72] 2011 BCSC 448 [*Campbell*].

[73] An appeal to the Court of Appeal for British Columbia was dismissed without considering the substantive issues. As the logging had already taken place, the court decided the injunction would serve no purpose. See *Campbell v British Columbia (Forest and Range)*, 2012 BCCA 274.

[74] See Kent McNeil, "Aboriginal Rights and Indigenous Governance: Identifying the Holders of Rights and Authority" (2020) 57 Osgoode Hall LJ 127 [McNeil, "Aboriginal Rights and Indigenous Governance"].

[75] *Supra* note 12 at para 48.

> 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.[76]

In *Tsilhqot'in Nation v. British Columbia* ("*Tsilhqot'in*"),[77] 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.[78] 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."[79] 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,[80] title might be vested in the Sinixt Nation as a whole, but again, that would depend on Sinixt law.[81]

So what would an Indigenous group residing in the United States have to prove to have Aboriginal title in Canada? As with 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 British Columbia, 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.[82]

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."[83] But why would Aboriginal title necessitate an incidental right to enter Canada if the Aboriginal hunting right at issue in *Desautel* does not? Mr. Desautel claimed no such right.[84] Subject to 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,[85] Aboriginal title includes governance authority, a declaration

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[76] *Ibid* at para 49.
[77] *Supra* note 32.
[78] See *William v British Columbia*, 2012 BCCA 285 at paras 132-57. 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" (*ibid* at para 149). 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 74 at 136-41.
[79] *Supra* note 12 at para 86.
[80] See *DeSautel* (BCPC), *supra* note 2 at paras 59-62. See also *Desautel*, *supra* note 12 at para 48.
[81] See *Delgamuukw*, *supra* note 21 at para 159. The fact that the Lakes Tribe have an Aboriginal right to hunt in the traditional territory of the Sinixt Nation in British Columbia would not prevent members of the Sinixt Nation who do not belong to that tribe from also having hunting rights there. 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.
[82] *Desautel*, *supra* note 12 at para 80. See also *Delgamuukw*, *supra* note 21; *Tsilhqot'in Nation*, *supra* note 32.
[83] *Desautel*, *supra* note 12 at para 124.
[84] See further discussion *infra* under the heading "Sovereign Incompatibility."
[85] See *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* (Hart, 2013) 79; Kent McNeil, "Indigenous Land Rights and Self-Government: Inseparable Entitlements" in Lisa Ford & Tim Rowse, eds, *Between Indigenous and Settler Governance* (Routledge, 2013) 135;

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.[86] Moreover, Aboriginal rights apart from title, such as the Sinixt hunting right, could entail governance rights, given their communal nature.[87] These matters can and should be dealt with politically through the negotiation of treaties.[88]

V. 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.[89] Throughout the proceedings, and in its written submissions to the SCC, 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 consult and, where appropriate[,] accommodate."[90] "From a qualitative perspective," it added, "requiring the Crown to consult, and where appropriate accommodate, US Indigenous groups is likely to come with

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Brian Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015) 71 SCLR (2d) 45; Sari Graben & Christian Morey, "Aboriginal Title and Controlling Liberalization: Use it Like the Crown" (2019) 52 UBC L Rev 435. For judicial acknowledgement of Indigenous nations' governance authority over their Aboriginal title lands, see *Campbell v British Columbia*, 2000 BCSC 1123.

[86] See Kerry Wilkins, "Negative Capability: Of Provinces and Lands Reserved for the Indians" (2002) 1 Indigenous LJ 57; Kerry Wilkins, "Life Among the Ruins: Section 91(24) After *Tsilhqot'in and Grassy Narrows*" (2017) 55 Alta L Rev 91; Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (National Centre for First Nations Governance, 2007), online (pdf): <wp74066.wpdns.ca/wp-content/uploads/2020/05/kent_mcneil.pdf> [perma.cc/2XVH-F63C]. 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 at 58-59 (1978). Indigenous communities in Canada, even those with Aboriginal rights or title, do not.

[87] The Parliament of Canada acknowledged that "[t]he 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" (*An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s 18(1)). See Renvoi à la Cour d'appel du Québec relatif à la *Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 (upholding the constitutional validity of the affirmation of the right of self-government in the Act), on appeal to the SCC, online (English summary): <courdappelduquebec.ca/en/judgments/details/reference-to-the-court-of-appeal-of-quebec-in-relation-with-the-act-respecting-first-nations-inuit> [perma.cc/C6SV-S83L]. *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 33 at para 26.

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

[89] *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.

[90] *Desautel*, *supra* note 12 (Factum of the Appellant, Her Majesty the Queen at para 92), online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM010_Appellant_Her-Majesty-the-Queen.pdf> [perma.cc/PK3R-L6DM] [Appellant's Factum].

difficulties unforeseen by the Court in *Haida*, and unforeseeable even now."[91] 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, 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.[92]

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."[93] 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."[94] 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,"[95] 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.'"[96] By way of example, it suggested that "[i]ntegrating groups outside Canada into consultations by the Crown with groups inside Canada may involve discussions within Aboriginal communities and with the Crown."[97] But such challenges, Justice Rowe insisted, are not sufficient reason for defeating or denying claims of Aboriginal right that are otherwise meritorious.[98] Here too, we must await a subsequent case for elaboration.

VI. Sovereign Incompatibility

As mentioned above, the Crown (in right of British Columbia), throughout the *Desautel* litigation, argued that the Lakes Tribe could not possibly have Aboriginal rights in British Columbia, 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

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[91] *Ibid* at para 93. See also *Desautel*, *supra* note 12 (Factum of the Intervener, Attorney General of Ontario at para 31), online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM070_Intervener_Attorney-General-of-Ontario.pdf> [perma.cc/8269-TJ2D] ("the cross-border realities may create uncertainty for governments as to how to fulfill their [consultation] obligations").
[92] *Supra* note 12 at paras 74-75.
[93] *Ibid* at para 76.
[94] *Haida*, *supra* note 89 at para 39.
[95] S*upra* note 12 at para 73.
[96] *Ibid* at para 76, citing *Haida*, *supra* note 89 at para 32.
[97] *Desautel*, *supra* note 12 at para 76.
[98] *Ibid.*

with the Crown's assertion of sovereignty, the Crown argued, could have survived post-sovereignty to anchor present-day Aboriginal rights.[99] "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."[100] 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."[101] 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."[102] As the majority judgment in *Desautel* notes,[103] this submission received support from the attorneys general of Quebec, New Brunswick, and Alberta. Justice Côté, dissenting in *Desautel*, appears to have accepted it.[104]

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[105] or Aboriginal[106] 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 SCC has taken liberties before when characterizing communities' claims of Aboriginal right;[107] in *Mitchell v. MNR* ("*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.[108] This was the precedent the Crown sought to invoke in *Desautel*.

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 one of 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.[109] In retrospect, it would have been easy to establish, one way or the other, whether the Aboriginal right that Mr. Desautel claimed on behalf of the

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[99] Appellant's Factum, *supra* note 90 at para 45. See also *Mitchell*, *supra* note 33 at para 10.
[100] Appellant's Factum, *supra* note 90 at para 46.
[101] *Ibid*, citing *Mitchell*, *supra* note 33 at para 22.
[102] Appellant's Factum, *supra* note 90 at para 48, citing *Mitchell*, *supra* note 33 at para 160, Binnie J, concurring (in the result).
[103] *Supra* note 12 at para 65.
[104] *Ibid* at para 124.
[105] See *Simon v The Queen*, [1985] 2 SCR 387 at 403; *R v Sundown*, [1999] 1 SCR 393 at para 33.
[106] *Côté*, *supra* note 41 at para 57.
[107] For discussion, see Kerry Wilkins, "Whose Claim Is It, Anyway? *Lax Kw'alaams Indian Band v. Canada (A.G.)*, 2011 SCC 56, [2011] 3 SCR 535" (2012) 11 Indigenous LJ 73.
[108] *Supra* note 33 at para 22. The Court considered and rejected 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* guaranteed independently his constitutional right, as a citizen of Canada, to enter and leave Canada (*ibid*). See also *Canadian Charter of Rights and Freedoms*, s 6, Part I of the *Constitution Act, 1982*, *supra* note 4.
[109] *Supra* note 12 at para 66 [emphasis in original].

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 had been 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 British Columbia) is correct in its assertion that any Aboriginal right the Lakes Tribe members have to hunt in British Columbia includes an Aboriginal right to cross the international border. What consequences ensue from that supposition?

To answer that question, we 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 SCC, 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.[110] 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.[111]

Where imposition of federal border control precludes someone from exercising her community's Aboriginal right, "the framework to determine such matters generally lies in the law of infringement and justification under the *Sparrow* framework."[112] Where infringement results, "such infringement should be reviewed pursuant to the *Sparrow* framework. The outcome will depend on the evidence in the particular case."[113] 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 British Columbia) 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, British Columbia 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

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[110] See generally *Desautel*, *supra* note 12 (Factum of the Attorney General of Canada at paras 50-53), online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM080_Intervener_Attorney-General-of-Canada.pdf> [perma.cc/28BE-PFVN] [Federal Factum].

[111] *Ibid* at para 51, citing *Watt v Liebelt*, [1999] 2 FC 455 (CA) at para 15.

[112] Federal Factum, *supra* note 110 at para 54, citing *Mitchell*, *supra* note 33 at para 63.

[113] Federal Factum, *supra* note 110 at para 55.

purposes of section 35;[114] it was because hunting *in traditional Sinixt territory in what is now British Columbia* 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.[115] At the time the Crown asserted sovereignty over what is now British Columbia 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 British Columbia 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.

VII. 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 British Columbia), seeking enforcement of the offence provisions, and Mr. Desautel, claiming in defence the benefit of the Aboriginal right.[116] Others with potential interests in the fate of the Aboriginal right claim Mr. Desautel asserted—in particular, Indigenous communities resident in British Columbia that included Sinixt descendants[117] and the BC Métis[118]—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 SCC in the *Desautel* appeal and asked specifically that the court reach no conclusions that could prejudice claims of Aboriginal right that they might assert.[119]

The majority judgment in *Desautel* obliged,[120] but took the opportunity to comment critically on the constraints 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 section 35(1)]. Such issues are

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[114] *Desautel*, *supra* note 12 at para 48. See also Federal Factum, *supra* note 110 at para 47.

[115] *Desautel*, *supra* note 12 at para 62.

[116] 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 BC appellate courts, about it. The Attorney General of Canada chose not to take part in the litigation until it reached the SCC.

[117] *Desautel*, *supra* note 12 (Factum of the Intervener, Okanagan Nation Alliance at paras 1-7), online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM120_Intervener_Okanagan-Nation-Alliance.pdf> [perma.cc/YD96-EHED] [ONA Factum].

[118] See *Desautel*, *supra* note 12 (Factum of the Intervener, Métis Nation British Columbia at paras 7-8), online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/38734/FM230_Intervener_Métis-Nation-British-Columbia.pdf> [https://perma.cc/2TQA-LV9V] [MNBC Factum].

[119] See ONA Factum, *supra* note 117 at paras 3, 22-28, 31; MNBC Factum, *supra* note 118 at paras 10-27.

[120] *Supra* note 12 at paras 32, 47 (deferring consideration of implications for Métis), 49 (declining to "set out criteria for successorship 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).

better dealt with in an action setting out the right claimed, with a full evidentiary record, and seeking declaratory relief."[121] 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*, at para. 142:
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> > 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* [*sic*]*, 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 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.[122]

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*,[123] then again by implication in *R. v. Marshall*,[124] then again, more explicitly, in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*.[125] 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 SCC itself has precluded outright consideration on the merits of such claims in judicial review proceedings,[126] and the Court of Appeal for British Columbia 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.[127] (Never mind that we all have some interest in knowing what Aboriginal rights there are, and to whom they

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[121] *Ibid* at para 2.

[122] *Desautel*, *supra* note 12 at para 90 [emphasis in original], citing *Marshall/Bernard*, *supra* note 29 at para 142 [emphasis added in *Desautel*]. For further discussion of the issue, see Shin Imai, "The Adjudication of Historical Evidence: A Comment and an Elaboration on a Proposal by Justice Lebel" (2006) 55 UNBLJ 146.

[123] *Supra* note 50 at 1095 ("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").

[124] [1999] 3 SCR 533 at para 13.

[125] 2011 SCC 56 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.

[126] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 84.

[127] *Cheslatta Carrier Nation v British Columbia*, 2000 BCCA 539 at para 15 [*Cheslatta Carrier*], leave to appeal refused [2000] SCCA No 625. See generally *ibid* at paras 13-19; *Kaska Dena Council v British Columbia (AG)*, 2008 BCCA 455 at paras 11-15. See also *Dzawada'enuxw First Nation v. Canada (AG)*, 2021 FC 939.

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.[128] 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 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 SCC 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";[129] "[t]rue resolution is rarely, if ever, achieved in courtrooms."[130] 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 is not 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.[131] Private litigants, against whom Indigenous communities seek to establish and enforce Aboriginal rights,[132] 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 SCC 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.[133] Indigenous parties using civil proceedings to advance their claims have benefited

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[128] See *Cheslatta Carrier*, *supra* note 127 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").

[129] *Supra* note 12 at para 87.

[130] *Ibid*, citing *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 24.

[131] See *Haida*, *supra* note 89 at para 25; *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 73; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paras 54, 56; *Desautel*, *supra* note 12 at paras 88-89. For discussion, see Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020) 83 Sask L Rev 1.

[132] See generally *supra* note 67.

[133] See *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 35 [*Okanagan*]:

> 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.

from interim costs orders in the *British Columbia (Minister of Forests) v. Okanagan Indian Band* ("*Okanagan*")[134] and *Tsilhqot'in*[135] actions, both of which have involved assertions of Aboriginal title, and in *Grassy Narrows First Nation v. Ontario (Natural Resources)*,[136] a case about treaty interpretation.

But there are, to put it very conservatively, no guarantees. The SCC 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 interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial."[137] Interim costs awards are, by design, a "last resort,"[138] for use only where refusing them would mean "participating in an injustice."[139] Accordingly, an applicant for interim costs must

> 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.[140]

And unless it is obvious that a First Nation lacks the wherewithal to meet the estimated costs of its litigation,[141] it bears the onus of demonstrating in detail its impecuniosity. Having access to resources that seem sufficient to fund the litigation is not necessarily fatal to a First Nation's application for interim costs; the First Nation may have "pressing needs"[142] that leave it with too few resources, after meeting those needs, to continue participating in the proceedings.[143] When this is so, however, "it must demonstrate that those resources are in fact being devoted to addressing those pressing needs."[144] To satisfy itself more generally that such a First Nation meets this first requirement, "[t]he court must be able to (1) identify the applicant's pressing needs; (2) determine what resources are required to meet those needs; (3) assess the applicant's financial resources; and (4) identify the estimated costs of funding the litigation."[145] The applicant First Nation, therefore, must share with the court its litigation plan[146] and provide extensive disclosure of its financial and socioeconomic circumstances.[147] Finally, 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

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[134] *Ibid* at paras 45-47.
[135] *William v British Columbia*, 2013 BCCA 1.
[136] SCC 48 at para 55 [*Grassy Narrows*].
[137] *Okanagan*, *supra* note 133 at para 40.
[138] *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at paras 36, 41, 71, 73 [*Little Sisters*]; *Anderson v Alberta*, 2022 SCC 6 at paras 23, 37, 38, 50 [*Anderson*].
[139] *Little Sisters*, *supra* note 138 at para 5; *Anderson*, *supra* note 138 at paras 21, 23.
[140] *Little Sisters*, *supra* note 138 at para 40. See also *Anderson*, *supra* note 138 at para 50.
[141] See *Anderson*, *supra* note 138 at paras 47-48.
[142] *Ibid* at paras 4, 43-44.
[143] *Ibid* at paras 4, 40.
[144] *Ibid* at para 46.
[145] *Ibid* at para 5. See also *ibid* at para 41.
[146] *Ibid* at paras 29, 68.
[147] See *ibid* at para 41: "Detailed proof of an applicant's pressing needs and the extent to which they are unfunded, and estimated litigation costs, may be required to ensure accountability over the expenditure of public funds. At the same time, it must not be prohibitively expensive to establish impecuniosity."

"thrust into a situation requiring litigation"[148] (such as 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."[149] According to *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)* ("*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 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.[150]

The third and final requirement comprises three independent criteria: "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."[151] An application for interim costs will meet this third requirement only if the litigation satisfies all three of its component criteria.[152] "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."[153]

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.[154] But few Indigenous communities contemplating civil proceedings can have confidence that courts will find that their circumstances satisfy these requirements. And to be clear,

> these 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.[155]

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."[156] And even then, it will be prospective

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[148] See *Pasqua First Nation v Canada*, 2017 FC 655 at para 29 [*Pasqua*], citing *Little Sisters*, *supra* note 138 at para 59.
[149] *Okanagan*, *supra* note 133 at para 40.
[150] *Little Sisters*, *supra* note 138 at para 51.
[151] *Okanagan*, *supra* note 133 at para 40. See also *Anderson*, *supra* note 138 at para 20 (where the Court substitutes the phrase "exceptional importance").
[152] See *R v Caron*, 2011 SCC 5 at para 44 [*Caron*].
[153] *Little Sisters*, *supra* note 138 at para 39.
[154] See *supra* notes 134-136 and accompanying text.
[155] *Okanagan*, *supra* note 133 at para 41. See also *Caron*, *supra* note 152 at para 39; *Anderson*, *supra* note 138 at paras 19, 24, 26.
[156] *Little Sisters*, *supra* note 138 at para 38, citing *Okanagan*, *supra* note 133 at para 1.

only; it will not cover those costs the Indigenous litigant has already incurred prior to the interim costs award.[157]

In brief, civil litigation poses both doctrinal impediments and substantial financial risks[158] for Indigenous communities of limited means who assert potentially meritorious claims of Aboriginal right; any prospects of relief from the latter by means of interim costs awards are guarded. 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 SCC is serious about preferring civil proceedings to prosecutions for this purpose, it is going to have to acknowledge and address this predicament.

VIII. Conclusion

Desautel is a landmark decision about Indigenous peoples' rights in Canada. Its principal contribution, of course, was to construe the phrase "aboriginal peoples *of Canada*" in the *Constitution Act, 1982* in a way that takes proper account of some of the more serious consequences of colonial dispossession, despite the evident inconvenience of such an approach for the Crown. Judicial acknowledgement of the realities of colonization[159] is itself a significant step towards reconciliation. But *Desautel* is important for other reasons as well. It confirms that what really matters for purposes of the *Van der Peet* test is what was integral to the ancestral community's pre-contact way of life, not, or only derivatively, what is integral to the claimant community's way of life today. It rejects the contention that the viability of an Aboriginal right today depends on continuity in the right's exercise. Continuity requires, in essence, only that the claimant group be a successor of the ancestral community and that the contemporary practice be recognizable as a version of the integral ancestral practice. It opens the door to further discussion of the existence and constitutional status of common law Aboriginal rights (whatever those turn out to be), irrespective, perhaps, of whether such rights can meet the *Van der Peet* test. And it demonstrates the SCC's disinclination, despite several provinces' entreaties that it do so, to look for occasions to invoke the doctrine of sovereign incompatibility to foreclose altogether certain credible but inconvenient claims of Aboriginal right.

The *Desautel* court left unresolved a number of issues that it acknowledged were bound to arise in the wake of this decision. These include, among others: the eligibility of non-resident Métis groups to claim Aboriginal rights in Canada; the availability, or not, of Aboriginal title to

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[157] *Pasqua*, *supra* note 148 at para 28, citing *Joseph v Canada*, 2008 FC 574 at para 27. See also quotation (*Okanagan*, *supra* note 155).

[158] Not to mention the risk all civil litigants face of having to pay the other parties' costs if they are unsuccessful.

[159] See in particular, *Desautel*, *supra* note 12 at para 33. There, Justice Rowe, after observing that the "displacement of Aboriginal peoples as a result of colonization is well acknowledged," quoted with approval this passage from 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.

Canada, *Looking Forward, Looking Back*, vol 1 (Ottawa: Canada Communication Group, 1996) at 132. See also *Desautel* (BCCA), *supra* note 11 at para 62.

Indigenous groups no longer resident in Canada; and the nature and scope of the Crown's constitutional consultation obligations to non-resident Indigenous communities that have, or credibly claim, Aboriginal rights in Canada. The existence of so many unresolved issues in a single case reveals how much work is left to be done as the SCC continues to grapple with the complex matters involved in determining the constitutional rights of the Indigenous peoples and in seeking to clarify the relationship between the Canadian state and the original inhabitants of this country.