

TOP FIVE 2021

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2021 cases were selected and discussed by Professor Sonia Lawrence of Osgoode Hall Law School in Toronto. Professor Lawrence is a leading scholar in Canadian constitutional law and a prolific champion working at the intersection of law and social justice. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

***R v Desautel*, 2021 SCC 17**

Date released: April 23, 2021

<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18836/index.do>

Companion Case: *R v Williams*

Facts

On October 14, 2010, Richard Lee Desautel (Desautel) shot and killed an elk in British Columbia. Mr. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes, a successor group of the Sinixt people, who were present in British Columbia until they were forced out in the 19th century. He is a citizen of the United States of America and lives in Washington State.

Section 47(a) of the *Wildlife Act* (the "Act") requires a person hunting big game in British Columbia to be a resident of that province. Desautel was charged under the Act for hunting without a license. Desautel argued that he had an Aboriginal right to hunt, protected by section 35(1) of the *Constitution Act, 1982* (the "Constitution"), which recognizes and affirms Aboriginal peoples of Canada's existing treaty rights. He argued that because the Sinixt people have ancestral territory in British Columbia he is entitled to hunt there without a

license, even though he lives in what is now the United States of America.

Procedural History

The trial judge found that Desautel is a member of the Lakes Tribe and successor of the Sinixt. The trial judge used the *R v Van der Peet* test, which determines whether certain practices, established pre-European settler contact and continued today, are integral to the distinctive culture of an Aboriginal group.

The *Van der Peet* test lays out a number of factors for courts to consider when assessing whether an Aboriginal right exists. In applying this test, a court must consider (among other points):

- The perspective of Aboriginal peoples themselves;
- The exact claim being made;



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- The cultural significance of the custom, practice or tradition in question;
- Whether the practice represented a distinctive aspect of cultural practice prior to European contact;
- Whether the activity has been practiced continuously since contact; and
- The relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal Peoples.

The trial court found that Desautel's Aboriginal rights were protected and guaranteed by section 35(1) of the *Constitution* and that the criteria for the *Van der Peet* test were met. Accordingly, the trial judge acquitted Desautel of his charges.

On appeal to the British Columbia Superior Court, the judge affirmed that the phrase "Aboriginal peoples of Canada" in section 35(1) of the *Constitution* must be interpreted in a purposive way. A purposive interpretation relies on the purpose, and intended meaning, of the text. The Superior Court judge held that Aboriginal peoples who occupied Canada before contact, are still considered "Aboriginal peoples of Canada", regardless of where they now reside. The Superior Court upheld the trial judge's application of the *Van der Peet* test.

At the British Columbia Court of Appeal, the Court upheld the Superior Court's interpretation of section 35(1) *Constitution* rights. The Court held that Aboriginal peoples do not need to live in British Columbia to hold treaty rights set out in the laws of that province.

Issue

The issue in this case was whether s. 35(1) of the *Constitution* only protects Aboriginal and treaty rights for Aboriginal people living in Canada.

Decision

The Supreme Court of Canada (SCC) was divided 7-2, deciding that the Crown's appeal should be dismissed as Aboriginal rights according to section 35 of the *Constitution* include Indigenous Peoples who reside outside of Canada.

Ratio

The SCC majority held that "Aboriginal peoples of Canada" refers to tribes who established themselves in Canada before European-settler contact, but either moved or were forced to relocate as a result of historical injustices. The majority agreed that despite the lack of continuity of the Lake Tribes' practices between 1930 and 2010, Desautel's claim to an Aboriginal hunting right met the criteria in the *Van der Peet* test.

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Dissenting, Côté J. held that Aboriginal rights are geographically confined to persons residing within Canadian borders.

Reasons

The SCC considered the purpose of reconciliation when interpreting section 35(1) *Constitution* rights. The court held that one of the objectives of reconciliation is to allow modern-day treaty members to assert s. 35(1) rights, regardless of whether they live in Canada. The Court also considered the reason for the lack of continuity of Aboriginal peoples, which is a required criterion to meet the *Van der Peet* test. The court recognized that historical injustices associated with colonialism often denied Aboriginal peoples access to their traditional lands. As a result, traditional practices could not continue in their traditional territories. The lack of continuity was clearly caused by the colonial displacement of Desautel's ancestors, and so should not be a factor weighing against his claim.



Discussion

1. Which test did all the courts involved in this case use to make their determinations concerning Mr. Desautel?
2. List two of the criteria used in that test and explain them in your own words.
3. Why do you think the SCC ruled that the definition of “Aboriginal peoples of Canada” can include groups whose descendants now reside outside of Canada?
4. How do national borders, such as those that separate Canada from the United States, complicate claims and negotiations between Aboriginal peoples and the governments of these countries?
5. The court relied on the objectives of reconciliation to determine the verdict in this case. How do you think reconciliation will impact future cases surrounding Aboriginal treaty rights?