

Supreme Court of Canada Finds that Non-Canadians Can Have Constitutionally-Protected Aboriginal Rights Under Canada's Constitution

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On April 23, 2021, the Supreme Court of Canada (SCC) released a decision answering a constitutional question as to whether non-Canadians can exercise Aboriginal rights protected under Section 35(1), *Constitution Act, 1982* (Section 35). In a 7-2 decision, the SCC answered the constitutional question in the affirmative, holding that persons who are not Canadian citizens and who do not reside in Canada can nevertheless hold and exercise Aboriginal rights protected under Section 35 (Decision).

Background

Mr. Desautel, a citizen of the United States residing in the State of Washington, shot and killed an elk near Castlegar, British Columbia and was charged with two offences under the British Columbia *Wildlife Act*. In defending these charges, Mr. Desautel argued that he was a member of the Lakes Tribe of the Colville Confederated Tribes based in the State of Washington (a successor group of the Sinixt people) and that he was exercising an Aboriginal right protected under Section 35 to hunt in the traditional territory of his Sinixt ancestors.

At trial, Mr. Desautel established that: (i) he was a member of the Lakes Tribe; (ii) at the time of first contact between the Sinixt and Europeans, the Sinixt were engaged in hunting, fishing and gathering in their ancestral territory, which extended into lands presently situated in British Columbia; (iii) the Sinixt subsequently and involuntarily relocated in an area of their traditional territory currently located in the State of Washington; (iv) until 1930, members of the Lakes Tribe continued to hunt in British Columbia, despite living in Washington State; and (v) after 1930, despite periods in which no hunting took place, the Lakes Tribe continued to have a connection to the land where their ancestors hunted in British Columbia.

Based on this evidence, the trial judge found that Mr. Desautel had been exercising an Aboriginal right to hunt for food, social and ceremonial purposes in the Sinixt traditional territory in Canada, which was guaranteed by Section 35. The trial judge held that the criminal offences under the *Wildlife Act* infringed Mr. Desautel's constitutionally-protected right and that such infringement was not justified. The Crown appealed this decision to the British Columbia Superior Court and the British Columbia Court of Appeal; both appeals were dismissed.

Decision

The majority of the SCC held that persons who are not Canadian citizens and who do not reside in Canada can hold and exercise Aboriginal rights protected under Section 35, which recognizes and affirms the existing Aboriginal and treaty rights of "the aboriginal peoples of Canada". The SCC stated that there are two purposes to Section 35: to recognize the prior occupation of Canada by organized, autonomous Indigenous societies; and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them. The Court also noted that an interpretation of Section 35 that excludes Aboriginal peoples forced to move out of Canada would risk perpetuating the historical injustice suffered by Aboriginal peoples at the hands of Europeans.

The Decision established a two-stage approach to the determination of asserted rights under Section 35: (i) a threshold question seeking to ascertain if the Aboriginal group asserting the right is part of the "aboriginal peoples of Canada"; and (ii) if the threshold question is answered in the affirmative, application of the test for Aboriginal rights set out in the SCC's 1996 decision in *R v. Van der Peet*. The SCC held that, following a purposive interpretation of Section 35 seeking to advance reconciliation, the expression "aboriginal peoples of Canada" means the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact, which may include Aboriginal groups now residing outside of Canada.

Implications of the Decision

The SCC declined to comment on the ramifications of the Decision on the exercise of rights protected under Section 35 on the

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basis that such an analysis was unnecessary and not well-suited for a case dealing with the prosecution of a provincial regulatory offence. The implications of the Decision, while difficult to predict, are likely to be far-reaching.

The Decision adds a new layer to the reconciliation process, based on recognition of rights and respect. The SCC has set forth a test for the ascertainment of Aboriginal rights that places reconciliation as a primary interpretation principle. Interestingly, the majority decision focused on the SCC's analysis of Section 35 on the historical evidence of the Sinixt and not on the operative date of April 17, 1982 relating to Section 35, i.e. Section 35 only recognizes and affirms the rights of those Aboriginal peoples "of Canada" as of April 17, 1982, and does not reinvigorate rights not existing as of that date or otherwise not held by Aboriginal peoples "of Canada" as of that date.

However, the Decision is also likely to result in a multitude of challenges, including with respect to the Crown's duty to consult Aboriginal peoples and Aboriginal title, as detailed in Justice Côté's dissent. With respect to effects on the Crown's duty to consult, it is possible that the number of Aboriginal groups to consult—and, potentially, accommodate—would increase. Where the interests of non-Canadian Aboriginal groups conflicted with those of Canadian Aboriginal groups, there is no guidance as to how such conflicts should be resolved. With respect to Aboriginal title, in principle, it is possible that non-Canadian Aboriginal groups can claim and may hold constitutionally-protected Aboriginal title to Canadian territory.

Note: Thomas Isaac and Emilie Lahaie represented an intervening party in R. v. Desautel before the SCC.

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