R v Desautel: The Court Defined "Aboriginal peoples of Canada" – What Now?

Recently, in *R v Desautel*, the Supreme Court of Canada (SCC) found that "[t]he Aboriginal peoples of Canada under [section] 35(1) are the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact."[1] This was a significant decision because it recognizes, for the first time, that a person does not need to be a citizen or resident of Canada to have Aboriginal rights under section 35 of the *Constitution Act, 1982*.

In a previous article, we reviewed the reasons for the Court's decision and the criteria to establish whether a particular community is one of the "Aboriginal peoples of Canada" under section 35. This article will explore the Court's assessment of how this decision may affect other areas of Aboriginal law[2] in Canada: (1) the Crown's obligations under the duty to consult doctrine; (2) the test for justifying an infringement of Aboriginal rights; and (3) the interpretation of modern treaties. Finally, the article will review some questions that the Court left unanswered and will consider its brief comments about the role of Aboriginal peoples in defining themselves.

Impact on Other Aspects of Aboriginal Law

Duty to Consult: The Crown's Constructive Knowledge of Aboriginal Rights

The Crown's duty to consult Aboriginal peoples arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[3] For example, a proposed development project could affect an Aboriginal people's treaty right to hunt in the potentially impacted area, so the Crown would have a duty to consult that people before pursuing the project. In this example, the Crown would presumably have "real knowledge" of the relevant right because that right was agreed to in treaty. However, as noted above, the Crown is also under a duty to consult when it has "constructive knowledge" that its actions may adversely impact Aboriginal rights. This means that an adverse impact on Aboriginal "rights may reasonably be anticipated"[4] by the Crown.

The Court in *Desautel* acknowledged that real or constructive knowledge typically stems from years of interactions between the Crown and Aboriginal peoples in Canada.[5] When the Aboriginal group is not within Canada, though, the Crown might not have had many, if any, interactions with them and is therefore less likely to have real or constructive knowledge of their Aboriginal rights.[6] This raises the question of whether the Crown must seek out Aboriginal peoples outside of Canada for the purpose of meeting their duty to consult obligations.

The Court decided that the Crown is not obliged to search for these Aboriginal groups, but must "determine whether a duty to consult arises and … what the scope of the duty is"[7] when it is put on notice that such a group exists.[8] "It is for the groups involved to put the Crown on notice of their claims."[9]

Justifying an Infringement on Aboriginal Rights: Is Canadian Citizenship Relevant?

A section 35 Aboriginal right is not absolute. Under the *Sparrow* test, the Crown may limit Aboriginal rights when it is justified by the interests of the broader community.[10] The test for such justification is highly contextual and is based on the facts of each case.[11] This begs the question of whether it is easier to justify limiting the rights of a non-Canadian claimant who resides outside of Canada.

The Court found that "the fact that an Aboriginal group is outside Canada is relevant to the [legal] test for justifying an infringement of an Aboriginal or treaty right."[12] It did not specify how courts must consider this factor, but framed it as a matter of "reconciling the interests of an Aboriginal people with the interests of the broader community *of which it is a part*."[13] This implies that the degree of connection between the Aboriginal group and the Canadian public is relevant to determining whether the Crown is justified in infringing that group's Aboriginal rights. In other words, it may be easier to justify infringing the rights of persons who are not Canadian citizens or residents of Canada.

What if This Definition Conflicts with Modern Treaties?

Modern treaties are agreements between Aboriginal peoples and the Crown that were entered into after 1982, when Aboriginal and treaty rights were recognized and affirmed in the *Constitution Act, 1982*.[14] Some modern treaties grant rights to non-Canadian citizens while others exclude them. This raises the question: does the content of modern treaties affect whether a person is a member of one of the Aboriginal peoples of Canada?

In *Desautel*, the Court reaffirmed previous SCC decisions which found that modern treaties form part of "our constitutional fabric"[15] and should be "considered with great respect."[16] However, the Court noted that the content of modern treaties does not determine whether a person is a member of one of the Aboriginal peoples of Canada under section 35. Further, it noted that a person who does not belong to one of the Aboriginal peoples of Canada under its new definition can still have rights arising from treaties.[17] In other words, the rights belonging to the Aboriginal peoples of Canada are separate and distinct from the rights which arise from treaties.

Some Questions are Better Left for Another Day

After considering the implications of the *Desautel* decision on the three issues described above, the Court identified a number of questions to be left for another day. It is not unusual for courts to remain silent on issues that are not determinative of the main question in the case, and is in fact standard judicial practice. Some of the questions that the Court identified but did not address were:

- How the test for "Aboriginal peoples of Canada" must be amended to accommodate Métis peoples located outside of Canada.[18]
- Whether the scope of the Crown's duty to consult (i.e. the depth of consultation required) might differ when the Aboriginal group is located outside of Canada.[19]
- Whether Aboriginal peoples of Canada located outside of Canada may hold Aboriginal title to land located in what we today call Canada.[20]

Justice Côté's dissent raised further questions that were not addressed in the majority's decision:

- Whether non-Canadian Aboriginal peoples must take part in the constitutional conferences provided for by section 35.1 of the *Constitution Act, 1982*.[21]
- What are the Crown's obligations under the duty to consult doctrine when the interests of Canadian rights holders do not align with the interests of rights holders from outside of Canada?[22]
- Whether individuals from outside of Canada might hold common law Aboriginal rights.[23]

Remarks on Vindicating Aboriginal Rights

The Court also made some important remarks in *obiter* which suggest that it is ultimately for Aboriginal peoples to define themselves. Remarks in *obiter* are comments that do not affect the outcome of the case and are not legally binding, but are still important because they reveal courts' thinking on matters that they consider important.

First, the Court reaffirmed the courts' role as the "guardians of the Constitution and of individuals' rights under it."[24] This means that the authority to interpret section 35(1), including the phrase "Aboriginal peoples of Canada," rests with the courts. However, the Court then stated that "[i]t 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."[25] This suggests that the question of who belongs to one of the "Aboriginal peoples of Canada" has two aspects: (1) whether a community is an Aboriginal people under section 35(1) of the *Constitution Act, 1982*; and (2) whether that community will regard a particular section 35 claimant as one of its members. The first is a question for the Canadian courts, and the second is a question for Aboriginal communities themselves. In other words, the Court recognizes that Aboriginal peoples — not courts — have the authority to determine who is a member of their own communities.

Conclusion: A New Branch on the "Living Tree" of Canadian Constitutionalism

Although this decision answered the important question of who are the "Aboriginal peoples

of Canada" under section 35(1) of the *Constitution Act, 1982*, it raised a new set of questions. The Court provided guidance on only three of these questions and decided to leave the bulk to be decided another day.

Lord Sankey, a 20th century British jurist famously compared the Canadian Constitution to "a living tree capable of growth and expansion within its natural limits."[26] This "living tree" metaphor has been interpreted to mean that the Constitution is capable of growing and changing over time while still remaining true to its original purpose.[27] The Court's decision in *Desautel* signals that a new branch of the constitutional tree is emerging. By defining the term "Aboriginal peoples of Canada" in a way that opens up more questions than it answers, the Court is giving future courts the task of nurturing and developing the new bud it has created. In this way, a new branch of constitutional law will emerge and the Constitution of Canada will continue to grow and change like a living tree.

[1] *R v Desautel*, 2021 SCC 17 (CanLII) at para 31 .

[2] Aboriginal law governs the constitutional relationship between the Crown and the Aboriginal peoples of Canada through colonial laws such as the *Royal Proclamation* of 1763, the *Indian Act*, the *Constitution Act, 1867,* and the *Constitution Act, 1982*. It is distinct from Indigenous law, which refers to the legal traditions of Indigenous peoples themselves.

[3] *Desautel*, *supra* note 1 at para 72 (citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) at para 35).

[4] *Ibid* at para 72 (quoting *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 40).

[5] *Ibid* at para 75.

[6] *Ibid* at para 74.

[7] *Ibid* at para 76.

[8] *Ibid* at paras 74-75.

[9] *Ibid* at para 75.

[10] See *R v Sparrow*, 1990 CanLII 104 (SCC) ; and *Desautel*, *supra* note 1 at para 79 (citing *R v Gladstone*, 1996 CanLII 160 (SCC) at para 73 ; and *R v Nikal*, 1996 CanLII 245 (SCC) at para 92).

[11] See *Desautel*, *supra* note 1 at para 78 (citing *Sparrow*, *supra* note 11 at 1111; and *Gladstone*, *supra* note 11 at para 56).

[12] *Ibid* at para 77.

[13] *Ibid* at para 79 (emphasis added).

[14] See *Quebec (Attorney General) v Moses*, 2010 SCC 17 (CanLII) at para 82.

[15] *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 (CanLII) at para 1 (cited by *Desautel*, *supra* note 1 at para 82) .

[16] *Desautel*, *supra* note 1 at para 82 (citing *Nacho Nyak Dun*, *supra* note 16 at paras 1, 33 and 38).

[17] *Ibid*.

[18] *Ibid* at para 32. Under section 35(2) of the *Constitution Act, 1982*, the "'[A]boriginal peoples of Canada' includes the … Métis peoples of Canada." In a 2003 decision, the Supreme Court of Canada defined "Métis" as "distinctive peoples who, in addition to their mixed [Aboriginal and European] ancestry, developed their own customs, way of life, and recognizable group identity" (*R v Powley*, 2003 SCC 42 (CanLII) at para 10). Métis peoples would fail to meet the definition of "Aboriginal peoples of Canada" in *Desautel* because in this decision, the ancestral peoples must have occupied Canadian territory "at the time of European contact."

[19] *Ibid* at para 76. The scope and content of the Crown's duty to consult is proportionate to a preliminary assessment of the strength of the case for an Aboriginal or treaty right and the seriousness of the potential adverse effects on that right (see *Haida*, *supra* note 3 at para 39). The scope of the Crown's duty to consult will vary according to the circumstances. "Deep" consultation might require formal participation by Aboriginal peoples in the decision-making process and the provision of written reasons for the Crown's decision explaining how Aboriginal concerns were considered. "Lower" consultation may be achieved through written notice, disclosure, and the discussion of any issues raised in response (see *Haida*, *supra* note 3 at paras 43-44).

[20] *Desautel*, *supra* note 1 at paras 80-81 (Justice Côté's dissent considers this question at para 124).

[21] *Ibid* at para 122 (citing *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at ss 35 and 25). Article 35.1 obliges the Prime Minister to "invite representatives of the [A]boriginal peoples of Canada to participate in the discussions on [any amendment made to section 91(24) of the *Constitution Act, 1867*, section 25 of the *Constitution Act, 1982*, or Part II of the *Constitution Act, 1982* on the Rights of the Aboriginal Peoples of Canada]."

[22] *Ibid* at para 123.

[23] *Ibid* at para 140.

[24] *Ibid* at para 84 (citing *Hunter v Southam Inc*, 1984 CanLII 33 (SCC) at 169).

[25] *Ibid*.

[26] *Edwards v Canada (Attorney General)*, 1929 CanLII 438 (UK JCPC) at 106-107.

[27] Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Scarborough: Thomson, 2007) at 36.8(a).