Do American First Nations have aboriginal rights in Canada?

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On April 23, 2021, the Supreme Court of Canada ruled in *R. v. Desautel*, 2020 SCC 17 that members of the Lakes Tribe, based in Washington State, have an aboriginal right to hunt in their ancestral territory in British Columbia, Canada.

The case began when Richard Lee Desautel, a U.S. citizen and resident, shot and killed a cow-elk in the Arrow Lakes region of British Columbia. Mr. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes (the Lakes Tribe) and lives on reserve in Washington State. This decision has significant implications far beyond who may hunt elk in southwestern British Columbia.

Mr. Desautel was charged with hunting without a licence and hunting big game while not being a resident of the province, contrary to the provincial *Wildlife Act*.

While Mr. Desautel admitted to shooting the elk, he argued that, as a member of the Lakes Tribe, he had an aboriginal right to hunt protected by s. 35(1) of the *Constitution Act, 1982*, since he had shot the elk within the Sinixt ancestral territory in British Columbia. The Sinixt ancestral territory historically spanned what is now the border between British Columbia and Washington, with members initially residing on both sides of the border. The Sinixt were engaged in hunting, fishing and gathering throughout this territory at the time of first contact.

The central question in the case was who qualified as an aboriginal people "of Canada," and whose rights were therefore protected by s. 35(1) of the *Constitution Act, 1982*, which provides that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Justice Rowe, writing for the majority, held that the "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 Indigenous groups that are now outside Canada.

Rowe J. elaborated that s. 35(1) should include Aboriginal peoples who were in Canada when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed; doing so, he ruled, reflects the purpose

of reconciliation and acknowledges the displacement of Aboriginal peoples as a result of colonization.

To exclude Aboriginal peoples who were forced to move out of Canada, he wrote, would risk "perpetuating the historical injustice suffered by Aboriginal peoples at the hands of colonizers" and fail to recognize that aboriginal rights long predated the *Constitution Act, 1982*.

The majority accepted the trial judge's 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. The majority held that 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. As such, they found that the Lakes Tribe were "aboriginal peoples of Canada" whose rights were protected under s. 35(1) of the *Constitution Act, 1982*. The Court also agreed with the lower courts that Mr. Desautel's aboriginal rights were unjustifiably infringed and, accordingly, he should be acquitted of the charges against him.

Could the Lakes Tribe have other aboriginal rights under Section 35?

The aboriginal right claimed by Mr. Desautel was a right to hunt for food, social and ceremonial purposes within the traditional territory of the Sinixt in British Columbia. The Supreme Court of Canada was careful to not rule on what other rights the Lakes Tribe might have and suggested that these could be addressed in future, separate proceedings.

At the risk of projecting ambitions onto the Lakes Tribe, it is important to consider what other aboriginal rights they or other Indigenous groups now based in the United States might assert and the implications this could have on Indigenous relations in Canada.

Mobility across the border

Mr. Desautel was not charged with coming into Canada unlawfully and there was no evidence that he was denied entry. In the course of the summary conviction appeal, the B.C. Supreme Court held that Mr. Desautel's aboriginal right to hunt was compatible with Canadian sovereignty, and that the right of the federal government to control its borders could co-exist with an aboriginal right to hunt in Canada by an Aboriginal group located in the United States.

The BC Court of Appeal and Supreme Court of Canada similarly found it unnecessary to consider whether members of the Lakes Tribe would have any special rights to cross the border and enter Canada, because Mr. Desautel had not been denied entry to Canada. This may be contrasted with *Mitchell v. M.N.R.*, 2001 SCC 33, where the Court considered – and ultimately rejected – a claimed right to bring goods across the Canada-United States boundary.

In 1999, another member of the Lakes Tribe, who was not a Canadian citizen, was unsuccessful in claiming a right to enter and remain in Canada, despite criminal convictions, on the basis of his aboriginal rights.

In *Watt v. Liebelt*, [1999] 2 F.C. 455 (F.C.A.), the Federal Court of Appeal determined that "the sovereign nature of Canada is not a legal barrier *per se* to the existence of the aboriginal rights as claimed," but held that it could not make a determination in that particular case based on the evidence before it. The courts may have reason to reconsider the issues raised in *Watt* following the more recent decisions in *Mitchell* and *Desautel*.

Fishing

The test to establish an aboriginal right to fish for food, social and ceremonial purposes is broadly similar to the test Mr. Desautel met to prove an aboriginal right to hunt for food, social and ceremonial purposes, in that it requires evidence of the aboriginal group's practices at the time of contact. Once an aboriginal right is proven, the Crown needs to justify any infringement of that right, such as requiring a licence or permit or placing restrictions on when, how and what type of hunting may occur. In Mr. Desautel's case, the provincial restrictions on his right to hunt were stark, in that they completely prohibited him from hunting a cow-elk because he was a non-resident.

In a fisheries context, the test for whether federal regulations under the *Fisheries Act* justifiably infringe aboriginal rights is more complex for species such as salmon that are heavily regulated and fully allocated amongst Aboriginal, recreational and commercial fishers. The question is not just whether the Department of Fisheries and Oceans may need to offer an allocation to an Aboriginal group that was previously not considered; the greater challenge is how to balance any such allocation with competing interests, some of whom may have their own constitutionally-protected rights to fish as well.

Were the Lakes Tribe to assert an aboriginal right to fish for salmon, how might the Department of Fisheries and Oceans balance this with the aboriginal rights of other Indigenous groups who seek to fish the same species? Although the geography of the Sinixt suggests this is unlikely, might the Lakes Tribe also establish an aboriginal right to a commercial fishery, as several coastal First Nations have established in recent years?

Aboriginal title

The claim advanced by Mr. Desautel and the Lakes Tribe in *Desautel* did not involve a claim for aboriginal title. However, in media coverage following Mr. Desautel's initial acquittal, the then-chairman of the Colville Confederated Tribe stated that, "[w]ith their existence now acknowledged in Canada, the Sinixt can also look toward more issues, such as a land claim in Canada." Representatives of the Lakes Tribe also indicated in other litigation that they were considering advancing a claim of aboriginal title in Canada.

To prove aboriginal title, a First Nation must demonstrate that:

1. the land was occupied prior to the assertion of European sovereignty;
2. if present occupation is relied on as proof of occupation pre-sovereignty, there is continuity between present and pre-sovereignty occupation; and
3. occupation was exclusive at sovereignty.

Should the Lakes Tribe make a claim of aboriginal title in the future, the courts will need to consider their continued connection to any claimed lands within Canada and whether to attach any significance to Canada's decision to declare the Arrow Lakes Band extinct. The Court in *Desautel* noted that while there were several decades in which no Sinixt lived in British Columbia, the members of the Lakes Tribe remained connected to that geographical area, although largely that appears to have been "in the minds of its members." Whether that is sufficient to sustain a claim of aboriginal title remains to be seen, as Cote J. (dissenting) wrote that such evidence could not be the standard for establishing continuity.

Consultation and accommodation

Having established a constitutionally-protected aboriginal right to hunt in the Sinixt territory in British Columbia, the Lakes Tribe are now entitled to be consulted and, where appropriate, accommodated on any Crown decision that could have an adverse impact on their aboriginal hunting right. Any proposed infringement of their now recognized right to hunt will similarly need to be justified according to principles articulated in cases like *R v. Sparrow*.

Were the Lakes Tribe to pursue claims of other aboriginal rights in Canada, the basis for consultation would accordingly broaden, although federal and provincial governments may yet require the Lakes Tribe to make out a *prima facie* case for such rights as a condition for deep consultation, much less accommodation.

The participation of the Lakes Tribe in consultation on projects in Sinixt territory may have significant effects on regional dynamics, where recent consultation and accommodation engagement has focussed exclusively on First Nations based entirely in Canada, such as the Okanagan Nation Alliance (or Silyx), Secwepemc and Ktunaxa.

Broader implications

There are dozens of other Indigenous groups who historically used and occupied territories on both sides of what is now the international border, many of whom continued to do so for decades after the border was established.

Given that context, there may be many other Indigenous groups currently based entirely in the United States who can make equally compelling arguments that they too used and occupied territory in Canada before contact with Europeans and have retained some form of connection to their territory in Canada after the border was established. The details of this use and occupation will vary across the Maritimes, St. Lawrence Seaway, Great Lakes, Prairies, Pacific coast, or Alaska, but the key takeaway is stark: Canadian governments, industry and Indigenous groups based in Canada need to prepare for the prospect of new and competing claims of Aboriginal rights.

Desautel opens the door for Indigenous groups now based in the United States to assert aboriginal rights to fish inside Canadian domestic boundaries. On the Atlantic and Pacific coasts, such assertions may extend to lucrative, but heavily subscribed, commercial fisheries, adding to already tense and conflict-ridden decisions on how the fishery should be allocated.

The Supreme Court of Canada in *Desautel* considered some of the broader implications of its decision on the duty to consult, but ultimately deferred clarifying the basis on which indigenous groups now based in the United States must be consulted.

While the basis of engagement is yet to be determined, consultation processes nationwide likely now need to include Indigenous groups based entirely in the United States who assert aboriginal rights in Canada and can adduce evidence of historic use and occupation at the time of sovereignty and some form of continuing connection to their Canadian territory. There will be ripple effects to this, as the Crown and project proponents may also need to reconsider the basis of their engagement with Indigenous groups based in Canada who – up to now – have asserted exclusive territories, title or rights in areas adjacent to the Canada-U.S. border.

The decision of the Supreme Court of Canada in *Desautel* clarifies who are the "aboriginal peoples of Canada," but opens avenues of inquiry, negotiation and likely litigation that may take decades to address.

Reach out to any of the key contacts below if you have further questions regarding the *Desautel* decision.

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