

R. v. Desautel, 2021 SCC 17 – Indigenous hunting rights

Facts:

Richard Desautel, an American citizen, entered Canada legally from the United States and shot an elk. He was charged with hunting without a license and hunting big game without being a resident under section 11(1) and 47(a) of British Columbia's *Wildlife Act*.

Desautel admitted the offences, but argued that he was hunting in the traditional territory of his Sinixt ancestors, and was therefore protected under section 35(1) of *The Constitution Act, 1982*. The courts had to decide whether Desautel could claim Indigenous hunting rights under the Canadian constitution as a non-citizen of Canada.

At trial, there was no dispute that the area in which Desautel shot the elk was in the traditional lands of the Sinixt people at the time of European contact in 1811. Desautel was a member of the Lakes Tribe in Washington, and the judge found the Lakes Tribe to be a successor to the Sinixt tribe. The judge found that the Lakes Tribe had a genuine connection to their ancestral lands, and Desautel should benefit from a continuation of their communal rights. He found that Desautel was protected under section 35(1). He acquitted Desautel of the charges.

The B.C. Superior Court and Court of Appeal upheld the trial judge's finding. The Crown appealed to the Supreme Court of Canada.

The Decision:

The Court dismissed the Crown's appeal.

Section 35(1) of Canada's Constitution affirms the existing rights of "the aboriginal peoples of Canada". It does not grant legal rights to Indigenous people; rather, it grants constitutional protection to rights that already existed.

Section 35(1) has two main purposes: to recognize that Indigenous people lived in societies on the land we now call Canada long before Europeans settled in the area, and to reconcile the existence of contemporary Indigenous people and their customs with the sovereignty of the Crown. Under section 35(1), "the aboriginal peoples of Canada" refers to the modern successors of Indigenous societies that occupied Canadian territory at the time of European contact.

Since one of the purposes of section 35(1) is a reconciliation between Indigenous societies and the Crown, it would not make sense to exclude Indigenous societies that had been displaced or had borders imposed upon their traditional lands. For the purposes of 35(1), a modern Indigenous person or group can be considered "of Canada" if they are the successor to an Indigenous society that occupied what is now Canada at the time of European contact.

Discussion Questions:

- 1) Do you agree with the ruling in this case? Why or why not?
- 2) Aside from hunting rights, what other rights does section 35(1) of *The Constitution Act* protect?

Relevant Law:

The Constitution Act, 1982, section 35(1)

Wildlife Act [B.C.], sections 11(1) and 47(a)

Resources:

You can read the entire case at:

<https://canlii.ca/t/jfjqc>

You can read *The Constitution Act, 1982* at:

<https://laws-lois.justice.gc.ca/eng/const/page-12.html#h-39>

You can read B.C.'s *Wildlife Act* at:

https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96488_01

The Court also noted that this definition would likely need to be modified in the case of the Métis, but since that was not an issue before the court here, they left that matter open for a future case.

Relevant Law:

The Constitution Act, 1982

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Wildlife Act, RSBC 1996, c. 488 [British Columbia]

11(1) A person who hunts wildlife commits an offence unless the person holds all of the following:

- (a) a hunting licence issued to the person under this Act;
- (b) any limited entry hunting authorization that is required by regulation;
- (c) any other licence that is required by regulation;
- (d) any other permit that is required by regulation.

47 A person commits an offence if the person hunts big game unless he or she

- (a) is a resident, or
- (b) is accompanied by
 - (i) a guide licensed under this Act,
 - (i.1) an assistant guide issued a written authorization under section 48 (1.2), or
 - (ii) a person who holds a permit under section 70 (1) (a) allowing him or her to accompany the hunter.