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THE SUPREME COURT OF CANADA AND TRANSBOUNDARY INDIGENOUS RIGHTS CLAIMS

Understanding the Implications of the 2021 Decision in *Desautel*

Dwight Newman

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Executive summary

Somewhat below the radar in the midst of the COVID-19 pandemic, major judicial developments are continuing on Indigenous rights. The Supreme Court of Canada's April 2021 decision in *R. v. Desautel* received less attention than it ought to have, perhaps striking many as being about a technical issue of whether a particular Indigenous community located in northern Washington state might have ongoing hunting rights in southern British Columbia.

The case has much wider ramifications than first apparent. It is a precedent-setting case on the potential for Indigenous groups located outside Canada to hold constitutionally protected Aboriginal rights in Canada.

This publication tries to set some of those out, building upon a background discussion of the case that shows how the difference between the majority and the dissent is not just in the result but in the reasoning adopted and in the very methods of constitutional interpretation the justices will apply to Aboriginal rights protected by section 35 of the *Constitution Act, 1982*.

While the case raises many other issues, including some complex issues related to the interpretation of section 35, there are three key practical ramifications of the case that warrant attention:

1. The case indirectly both extends and complicates the duty to consult.
2. While trying to avoid the issue, the case nonetheless expands possible grounds for claims of Indigenous rights to mobility across the Canada-US border and Canada-Greenland border.
3. The case raises the possibility of various cross-border rights claims, including even the possibility of title claims in Canada by Indigenous communities located in the United States

These implications are significant, and they mean the case warrants ongoing attention, as do so many other judicial developments in the area of Indigenous rights. They matter obviously to Indigenous peoples—peoples who have faced many government harms in the context of colonialism—but they have further implications for all Canadians and thus warrant ongoing attention and discussion.

Introduction

Amid the COVID-19 pandemic, Indigenous rights litigation has not always received the same media attention as at other times. Nonetheless, some major legal developments on the section 35 Aboriginal and treaty rights clause in Canada's *Constitution Act, 1982* that continue to emerge from the Canadian courts have broad implications. One important decision from early 2021 that has not received sufficient attention is that in the *R. v. Desautel* case, which saw the majority of the Supreme Court of Canada rule for the first time that the term "Aboriginal peoples of Canada" could include Indigenous communities that are today based entirely outside of Canada.[1] The Supreme Court of Canada's decision in this case has far wider implications than may first be apparent. This publication seeks to analyze some of those implications.

To do so, the study will first set out some more background on the case, noting how the case arose as a test case in the context of colonial borders that divided traditional territories of Indigenous peoples. Then, it will turn to consider how the rules of law expressed in the case have implications for other scenarios that could—and will—arise, with some having particularly extended implications. These include: (1) duty to consult obligations owing to Indigenous communities located outside Canada; (2) Indigenous rights claims concerning mobility across the Canada-US border and Canada-Greenland border; and (3) the potential for other cross-border Indigenous rights claims, including even the possibility of title claims. The issues surrounding the duty to consult bear on numerous resource-development contexts that affect all Canadians, the issues of Indigenous rights to mobility across borders have significant implications for the nature of Canadian state sovereignty, and the possibility of cross-border title claims raises questions about the effectiveness of treaty processes that have operated based on negotiations only with communities located within Canada. The *Desautel* case is ultimately not a simple decision on a simple issue but opens many significant potential implications.

1. *R. v. Desautel*, 2021 SCC 17. <https://canlii.ca/t/jfjqc>, as of February 22, 2022.

Background—the *Desautel* Case

The Desautel case ultimately reached an October 2020 Supreme Court of Canada hearing and April 2021 decision based on facts that occurred in October 2010. Richard Lee Desautel, a citizen and resident of the United States and member of the Lakes Tribe from Washington state, shot an elk in British Columbia. He immediately notified authorities that he had done so contrary to British Columbia wildlife laws and responded to charges by asserting that he held hunting rights as Aboriginal rights under section 35 of Canada's *Constitution Act, 1982*. While those who violate a legal provision do not always turn themselves in, Desautel did so because this was effectively a test case to try to make a transboundary section 35 Aboriginal rights claim. This element of the case was fleshed out within the decision:

> This was a test case brought by the Lakes Tribe of the Colville Confederated Tribes ("CCT") based in Washington State in the United States of America. Acting on the instructions of the Fish and Wildlife Director of the CCT, Mr. Desaute —a United States citizen and resident, and a member of the Lakes Tribe—shot a cow-elk near Castlegar, British Columbia, to secure ceremonial meat. He reported the kill to conservation officers and was subsequently charged with hunting without a licence and hunting big game while not being a resident of British Columbia [...] His sole defence was that he was exercising his Aboriginal right to hunt for ceremonial purposes in the traditional territory of his Sinixt ancestors pursuant to s. 35(1) of the *Constitution Act, 1982*. As such, the trial became, as intended, a test case on whether the Lakes Tribe is part of the "aboriginal peoples of Canada" [the term used in the constitution for who has Aboriginal rights in Canada].[2]

Desautel won at each level of court, with British Columbia ultimately pursuing an appeal to the Supreme Court of Canada for a final decision and to receive greater legal clarification on the implications of the case.

Section 35 was added as part of Canada's 1982 constitutional amendments, with its text specifying in section 35(1) that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Section

2. *R. v. Desautel*, 2021 SCC 17, [97]–[98]. This account is within the dissenting opinion of Justice Côté, but the majority does not disagree with it.

35(2) further specifies that "[i]n this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada". The terms "of Canada" in this text had not previously been interpreted in any court decision, leaving open the question of whether Indigenous groups located outside Canada could ever make use of the section and of whether an individual having foreign citizenship and residence and who was a member of an Indigenous group located outside Canada could ever have section 35 rights in Canada.

The Supreme Court of Canada split in its decision. Justice Rowe wrote the majority opinion, supported by six other justices. His key legal conclusion was that "[o]n a purposive interpretation of s. 35(1), the scope of 'aboriginal peoples of Canada' is clear: it must mean the modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact".[3] Considering facts that were considered to show the Lakes Tribe of Washington state to be a successor group from the Sinixt who had historically had a seasonal pattern between parts of southern British Columbia and northern Washington, the majority decision ultimately sided with Desautel's hunting rights. The Lakes Tribe had not been forced out of Canada at gunpoint, but they had shifted to residence and life in the United States under various pressures for the most part by the 1870s and completely by the 1930s. Desautel now sought, though, to reclaim Sinixt hunting rights in British Columbia, and the majority was ready to conclude that the Lakes Tribe was a successor group that could claim these section 35 rights. Justice Rowe was particularly concerned to set out that displacement by colonial processes should not result in denial of a right, seeing the purpose of section 35 as oriented to reconciliation and as furthering the government acting in a manner consistent with the honour of the Crown.[4]

The case also saw a dissenting opinion from Justice Côté. Rather than focusing on the broader kinds of purposes referenced by Justice Rowe, Justice Côté placed more emphasis on the text of section 35 and what intentions it must have been meant to express. On contemporaneous evidence on what the text would have expressed, Justice Côté concluded that it could not include constitutional protections for Indigenous groups located outside of Canada. In addition, she considered this conclusion to be further strengthened by some of the consequences that a different reading would imply, which would include that the drafters in 1982 meant for Indigenous groups from outside of Canada to have been invited to immediately subsequent constitutional conferences with Indigenous peoples (which were

3. *R. v. Desautel*, 2021 SCC 17, [1].
4. *R. v. Desautel*, 2021 SCC 17, [29]–[34].

mandated by section 35.1, using the same language) and that governments today owe duty to consult obligations to Indigenous groups outside Canada, who might hold even constitutionalized Aboriginal title rights in Canada.[5] She would thus have decided against Desautel's claim.

Although many commentators have described the case as involving a 7-to-2 split, and that is correct in some respects, the one-paragraph separate opinion of Justice Moldaver in the case involves further nuance.[6] Justice Moldaver is prepared to assume that the majority opinion is right on the law, without definitively agreeing, but holds that the claim had to fail on the facts.

This split decision from the Supreme Court of Canada is important to examine further. An understanding that the case involves significant decisions about previously undecided issues concerning the scope of section 35's protections highlights that it has consequences for future issues as the precedent that now bears on those issues.

Most obviously, the reasoning in the case that supports one claim to transboundary rights has implications for other transboundary rights claims. Apart from the particular community in Washington state whose rights were directly implicated in the case, Indigenous communities located elsewhere outside Canada have an increased potential to successfully assert section 35 Aboriginal rights in Canada. On a matter that was previously undecided in Canadian law, the *Desautel* case now serves as an important precedent. Lawyers active in the field have already recognized that importance, so, for example, the annual conference of the Indigenous Bar Association has already featured a panel on increased prospects for other future transboundary rights claims. More litigation can be expected to follow in the wake of the case. Indeed, it sets the stage for it in the three areas this paper addresses, each of which gestures toward some of these implications in practical terms.

5. Her key reasoning appears at *R. v. Desautel*, 2021 SCC 17, [106]-[125].
6. *R. v. Desautel*, 2021 SCC 17, [143].

The Duty to Consult Indigenous Communities outside Canada

Recent years have seen significant public attention on the duty to consult doctrine, which has had significant implications for many resource projects. The duty to consult is of enormous significance in Canadian law and now affects hundreds of thousands of government decisions each year.[7] Developed in judicial decisions starting in 2004, it has established a legal obligation on governments to proactively consult potentially affected Indigenous communities in advance of decisions that might have negative impacts on those communities' section 35 Aboriginal or treaty rights when governments know or ought to know of the claimed rights—that sentence contains the elements of what has been called the "triggering test" for the duty to consult. What the government must do in relation to consultation and potential accommodation is defined by the so-called "spectrum analysis" that sees the legally required depth of consultation determined by the *prima facie* strength of the rights claim at issue (how strong it appears based on a preliminary strength-of-claim analysis) combined with the potential degree of impact on the claimed right from the government decision.[8]

Considering this succinct statement of the contours of the duty to consult analysis makes clear that the *Desautel* case has significant implications for the duty to consult. Prior to *Desautel*, governments might not have perceived Indigenous groups located outside Canada as having any potential rights claims in Canada. Now, the Supreme Court of Canada majority has made clear that they do potentially have such rights claims. In situations where there are such rights claims, the triggering test for the duty to consult will now suggest that consultation obligations arise in situations where they previously had not appeared to arise. By the very structure of the duty to consult test, Justice Côté's dissenting opinion is correct on the fact that there will now be consultation obligations owed to Indigenous groups located outside Canada.

7. See Dwight Newman (2017), The Section 35 Duty to Consult, in Peter Oliver, Patrick Macklem, and Nathalie des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (Oxford University Press) : 349–366.

8. This approach to the case law is in some ways that contained in two books on the duty to consult, which have themselves been cited in much of the subsequent case law: Dwight Newman (2009), *The Duty to Consult: New Relationships with Aboriginal Peoples* (Purich); Dwight Newman (2014), *Revisiting the Duty to Consult Aboriginal Peoples* (Purich).

In parts of his opinion going on to respond to aspects of Justice Côté's opinion, Justice Rowe's majority opinion accepted that this was true. However, he suggested that such consultation obligations would not arise as frequently as one might speculate that they would. In particular, he wrote that one of the elements of the triggering test would not necessarily be met in the transboundary context. He wrote: "There is no freestanding duty on the Crown to seek out Aboriginal groups, including those outside Canada, in the absence of actual or constructive knowledge of a potential impact on their rights. In the absence of such knowledge, the Crown is free to act. It is for the groups involved to put the Crown on notice of their claims".[9]

Justice Rowe also suggested that the foreign location of some Indigenous groups might affect what it was necessary to do in respect of consultation, thus suggesting that the spectrum analysis could be affected. Here, he wrote as follows: "[C]onsultation is part of a 'process of fair dealing and reconciliation' which 'arises ... from the Crown's assertion of sovereignty' (*Haida*, at para. 32). Because groups outside Canada are not implicated in this process to the same degree, the scope of the Crown's duty to consult with them, and the manner in which it is given effect, may differ".[10]

The idea that governments might need to consult with Indigenous groups located in foreign countries has arisen in some international law discussions and, indeed, follows logically from the framing of international instruments on Indigenous rights like the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*.[11] However, Canada's case law on the duty to consult has not previously integrated that idea. The majority's idea that the triggering test will not be met with Indigenous groups located outside Canada is theoretically correct, but it assumes that such groups will not become aware of Canada's developing law and make governments aware of claims. It assumes ignorance and inaction by Indigenous groups and should not be given weight. The assumption needs to be that many consultation obligations will now arise to Indigenous groups located outside Canada. The second suggestion in the majority judgment, that the spectrum analysis might be reshaped by the context, is interesting and implies some adaptation of the duty to consult doctrine to the new needs presented. But what it means is not entirely clear. The majority decision has significantly expanded duty to consult obligations, and it has at least temporarily added new uncertainties into how the duty to consult is meant to work.

9. *R. v. Desautel*, 2021 SCC 17, [75].
10. *R. v. Desautel*, 2021 SCC 17, [76].
11. See Dwight Newman and Maruska Giacchetto (2019), Recent Developments on Transboundary Indigenous Consultation Issues, 7 *Current Developments in Arctic Law* 39.

Consider, for example, the realities of the *Desautel* case itself. The fact that the case was put as a test case illustrates the seriousness of Indigenous communities in thinking about transboundary claims. Governments should not assume ignorance and inaction by Indigenous groups. Indigenous groups and lawyers have complex, deep connections amongst them, and the assumption should be that they will gradually make effective use of each development in case law in support of Indigenous claims. On the facts of *Desautel* itself, there is now an established section 35 hunting right in Canada held by members of Desautel's community within certain parameters as set out in the case. A fairly straightforward inference is that there may be other rights claims by that community applying within Canadian territory on which consultation obligations could now arise. Governments can face a duty to consult that involves Indigenous communities located entirely outside Canada if those communities have a rights claim within Canada.

Now, while Justice Rowe suggests that reconciliation does not apply in entirely the same way with groups located outside Canada, governments would nonetheless be well advised not to simply ignore the prospects for consultation claims by communities outside Canada. Rather, they must now adapt their consultation practices to take account of this case law development. Similarly, industry proponents involved in resource-sector activity affected by government decisions subject to the duty to consult need to consider the possibility of rights claims in Canada that could be asserted by communities located outside Canada—the background analysis has just become more complicated.

Indigenous Rights Claims Concerning Mobility across the Canada-US Border and the Canada-Greenland Border

A number of First Nations assert traditional mobility in various forms across the Canada-US border, whether in terms of personal mobility or in terms of ability to trade across that border. Some of those claims have been litigated in past cases, with courts shying away from rendering definitive decisions on them.[12] And, considering another context, while their claims are perhaps less on the mind of those in southern Canada, Inuit communities in Nunavut and Greenland have also historically been mobile across what is now an international border, and they have made occasional calls for unrestricted access across the waters between Greenland and Nunavut.[13]

The *Desautel* case follows a pattern of trying to postpone issues on Indigenous transboundary mobility rights, with Justice Rowe's majority judgment trying to assert that the case does not make any direct determination on legal issues concerning transboundary mobility but decides only the issues concerning transboundary rights-holding.

Such a claim is technically true. However, such statements also mask the underlying reality that the reasons for accepting transboundary rights-holding also have implications for transboundary mobility. Aside from transboundary mobility being necessary to the exercise of transboundary rights and thus arguably implicitly evoked, reasoning that the underlying purposes of section 35 imply reconciliation obligations that extend beyond Canadian borders surely also implies that section 35 can apply to transboundary mobility across those same borders. While not well defined by a case that specifically dodges these issues, transboundary mobility rights are further supported by the case, and there are implications down the road from that implication.

12. Particularly notable is *Mitchell v. Minister of National Revenue*, [2001] 1 SCR 911, 2001 SCC 33.
13. See, for example, the report of the Inuit Circumpolar Council's Pikialasorsuaq Commission (2017), *People of the Ice Bridge: The Future of Pikialasorsuaq*.

Consider a claim like that in the 2001 Supreme Court of Canada decision in *Mitchell v. Minister of National Revenue*.[14] In that case, there was a claim related to historic Mohawk trade practices, with a suggestion that these trade practices included a right to transport goods across the Canadian-American border, which involved a challenge both to the application of customs duties and a challenge to restrictions on individuals crossing the border for purposes of such trade. The majority opinion of Chief Justice McLachlin held that the claim failed based on the evidence in the case, which she suggested supported mostly claims as to east-west trade rather than north-south trade. While Justice Binnie wrote a separate opinion in which he engaged with some of the implications for Canadian sovereignty of any suggestion that Indigenous rights could involve such a transboundary claim, Chief Justice McLachlin's opinion effectively left open the possibility of such claims in future if a community came with the right evidence. The Mohawk at Akwesasne are in some ways a single community or historic Indigenous nation located on both sides of the Canadian-American border, and it would be difficult to refute future evidence of their having engaged in practices internally within their nation that involved territory on both sides of the modern border. On the understandings in the majority opinion in the *Desautel* decision, it would now presumably be possible for there to be rights claims in Canada that could be exercised by members of the legal entity located on the American side. To the extent those rights claims involve entering into Canada, a direct implication of holding and being able to exercise section 35 rights could involve an ability to enter into Canada. These issues have been controversial at Akwesasne previously, and the *Desautel* case undoubtedly has implications for them there and elsewhere in analogous circumstances. While the precise implications will need further legal analysis and, indeed, further litigation, the *Desautel* case has now effectively invited that.

14. *Mitchell v. Minister of National Revenue*, [2001] 1 SCR 911, 2001 SCC 33.

New Possibilities for Transboundary Indigenous Rights Claims

As elsewhere in colonial history, the development of Canada's borders crossed the traditional territories of historically present Indigenous nations. Emerging scholarship is now suggesting that there needs to be more attention to these sorts of transboundary rights issues at a global level.[15] So, it is no surprise that such issues are arising in the Canadian context. But saying that section 35 constitutional rights can include such claims has some further, profound implications that arguably complicate ongoing treaty processes that have sought to pursue resolution of outstanding Indigenous rights claims.

To take just one example, the Indigenous nations of the Great Plains in the centre of the Continent traditionally operated not just in the American Great Plains states but also in what would become the Canadian Prairies. In the grand scope of history, the imaginary line of the 49th parallel has had only relatively recent effects on historically mobile nations. That reality has already occasioned complex discussions in the context of outstanding Aboriginal title claims in the Prairie provinces by Dakota communities that had come to be settled in Canada but had not been part of the historic treaties because the Canadian government had long regarded them as American communities that had moved north. There have been recent moves towards settlement of the claims of these communities, potentially with self-government agreements. But the theoretical implication of American-located entities being able to claim section 35 rights in Canada is that there could be some other level of entity within historic nations that could yet have claims overlapping with these claims as well as with historic treaty areas more generally.

The possibility of section 35 claims in Canada by Indigenous nations and rights-bearing communities today located outside Canada is precisely the key point of law that the Supreme Court of Canada resolved for the first time in *Desautel*. That this resolution of a previously undecided point of law could have significant implications should be no surprise. Governments across Canada who have

15. See, for example, Harum Mukhayer (2022), Transboundary Rights and Indigenous Peoples between Two or More States, in Dwight Newman, ed., *Research Handbook to the International Law of Indigenous Rights* (Edward Elgar, forthcoming April 2022).

thought they had resolved Indigenous land rights claims or, at least, were on the way to doing so may have a new layer of complexity to consider. Those new complexities may not be advantageous for Indigenous communities in Canada who now face the possibility of new overlapping claimants to land, though complex processes of Indigenous diplomacy could yet find ways past some of those challenges. Nonetheless, the *Desautel* case has the inherent possibility of opening up new claims that would not previously have been thought on solid legal ground in Canada.

Conclusions

The *Desautel* case decided at the Supreme Court of Canada last year has many more potential implications than have been widely noted. It significantly complicates the duty to consult in ways that may just be starting to be comprehended, it opens new prospects for Indigenous rights claims to mobility across the Canadian border, and it opens generally the prospects for Indigenous rights claims in Canada by Indigenous nations and communities located outside Canada. All of these possibilities add new layers of complexity to the Indigenous rights field. They have implications for Indigenous governments and communities themselves, for Canadian federal and provincial governments, for those involved in the resource sector, and for Canadians generally. This case, which warrants more attention than it has received, illustrates the need for close ongoing attention to legal developments in Indigenous rights law and for engagement with that body of law by various groups affected by it. It is vital for respect of Canada's deepest values that Canada face up to injustices, but it is also important to find legal parameters that work effectively in helping us move forward together constructively. Ongoing scholarship and think-tank work engaged constructively with these challenges is important to support, and it is essential to think about creative ways of getting the Canadian courts engaged closely with all of the implications of their decisions in this area of law in the hope that they can bring legal clarity sooner rather than later on various important issues, and can be appropriately responsive to the wide variety of interests affected even while offering sound adjudication of rights infringements.

About the author

Dwight Newman

Dwight Newman, Q.C., holds a B.A. (Economics), J.D., B.C.L., M.Phil., and D.Phil. (Legal Philosophy), and has also recently completed an M.A.T.S. in History of Christianity and an M.Sc. in Finance and Financial Law (graduations pending). He is a Professor of Law and Canada Research Chair in Indigenous Rights in Constitutional and International Law at the University of Saskatchewan. He is also a Munk Senior Fellow (Constitutional Law) of the Macdonald-Laurier Institute. He has published over a hundred articles or chapters and fifteen books, and his writing has been cited at all levels of courts. Prior to his faculty role, he clerked for Chief Justice Lamer and Justice LeBel at the Supreme Court of Canada, worked for NGOs in South Africa and Hong Kong and for the Canadian Department of Justice, and completed his graduate studies at Oxford University, where he studied as a Rhodes Scholar. He has been a visiting fellow in recent years at Cambridge, Oxford, and Princeton, the Property and Environment Research Center (PERC), the Université de Montréal, and the University of Western Australia. He is a member of the Ontario and Saskatchewan bars (and was designated a QC in 2018) and carries on some practice work, mainly on constitutional issues.

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