IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Desautel,* 2017 BCSC 2389

Date: 20171228
Docket: 23646
Registry: Nelson

Between:

Regina

Appellant

And

Richard Lee Desautel

Respondent

And

Okanagan Nation Alliance

Intervenor

On appeal from: Provincial Court of British Columbia, March 27, 2017
R. v. DeSautel, 2017 BCPC 84, Nelson Registry No. 23646

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for the Appellant:	G. Thompson H. Cochran
Counsel for the Respondent:	M. Underhill K. Phipps
Counsel for the Intervenor:	R. Kyle
Place and Date of Trial/Hearing:	Nelson, B.C. September 6-8, 2017
Place and Date of Judgment:	Nelson, B.C. December 28, 2017

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Introduction

[1] On October 1, 2010, the respondent Richard Desautel shot and killed a cow elk near Castlegar, British Columbia. Mr. Desautel reported the kill to wildlife conservation officers, who a few days later charged him with hunting without a licence and hunting big game while not being a resident of British Columbia, contrary to ss. 11(1) and 47(a) of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

[2] On March 27, 2017, a judge of the British Columbia Provincial Court acquitted Mr. Desautel on both charges. She accepted his defence that he was exercising an aboriginal right to hunt for ceremonial purposes guaranteed by s. 35 of the *Constitution Act, 1982* (s. 35), when he shot the elk, and that the application of the relevant sections of the *Wildlife Act* to him constituted an unjustifiable infringement of that right.

[3] To make out his defence, it was necessary for Mr. Desautel to establish that he belonged to a rights-bearing aboriginal collective that possessed the right in question: *R. v. Powley*, 2003 SCC 43 at para. 24.

[4] Mr. Desautel is a member of what has been designated as the Lakes Tribe (the "Lakes Tribe") of the Colville Confederated Tribes ("CCT") and lives on the Colville Indian Reserve in Washington State in the United States of America. He is a citizen of the United States.

[5] The trial judge identified the Lakes Tribe as a successor group to the Sinixt people, in whose traditional territory Mr. Desautel hunted. She then applied the test set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, to determine whether Mr. Desautel was exercising an aboriginal right and whether that right had been unjustifiably infringed. After applying the test she concluded that its requirements had been met notwithstanding the fact neither Mr. Desautel nor the collective to which he belonged were resident in Canada.

[6] The trial judge accordingly held that the sections of the *Wildlife Act* did not apply to Mr. Desautel. She purported to do so pursuant to s. 24(1) of the *Canadian*

Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*).

Position of the Parties

[7] The Crown appeals on the ground that the trial judge erred in finding that Mr. Desautel was an aboriginal person of Canada. The Crown's position is that because Mr. Desautel was a citizen of the United States of America and a member of an aboriginal group that was not resident in Canada, he cannot be an aboriginal person of Canada. The Crown submits that as a result, Mr. Desautel is not entitled to the protection of s. 35 and should therefore have been convicted of the offences with which he was charged.

[8] The Crown also says that the right asserted by Mr. Desautel is incompatible with the sovereignty of Canada, and in particular, its right to control its borders.

[9] Mr. Desautel submits that the trial judge correctly determined that he was an aboriginal person of Canada by applying the test set out in *Van der Peet.* His position is that if he would otherwise be found to be exercising an aboriginal right to hunt pursuant to that test, the fact that he is not a citizen or resident of Canada does not deprive him of that right.

[10] The essential questions on this appeal therefore are whether an aboriginal group must reside in Canada to be considered an aboriginal people of Canada, and whether the right asserted by Mr. Desautel is incompatible with Canadian sovereignty.

[11] For the reasons that follow, I have decided that the appeal must be dismissed except with respect to the trial judge's granting of a remedy pursuant to s. 24(1) of the *Charter*.

Background

[12] I have attached a brief chronology of dates relating to this litigation as Schedule A to these reasons.

[13] The trial judge found that the Lakes Tribe is a successor group to the Sinixt people, whose traditional territory included an area surrounding the Arrow Lakes in British Columbia. She found that that traditional territory was accurately depicted on the map attached as Appendix 1 to her reasons. This map shows that by far the larger part of the traditional territory of the Sinixt is located in what is now Canada.

[14] The Sinixt lived, travelled, fished, hunted and gathered in and about the Kootenay region of British Columbia for a long period prior to contact with Europeans. They occupied a territory that was circumscribed on both sides by mountains, and which included the Arrow Lakes and the area on the Columbia River from what is now Revelstoke, British Columbia, to the north, and as far south as Kettle Falls, in what is now Washington State.

[15] The name Sinixt can be translated to mean the people of the Arrow Lakes region.

[16] First contact between the Sinixt and Europeans occurred in 1811 when David Thompson ascended the Columbia River. The first such meaningful contact occurred in 1825 with the establishment of a Hudson's Bay Fort and trading post in Colville.

[17] The Sinixt are referred to in the historical literature interchangeably as the Sinixt or the Lakes or Arrow Lakes people. At para. 23 of her reasons the trial judge made what I take to be a finding that the members of the Lakes Tribe are Sinixt people:

> [23] The Sinixt also became known to explorers and fur traders as the people around the lakes, particularly the Arrow Lakes. Thus, the Sinixt are known as the Sinixt people or the Lakes people or the Arrow Lakes people (the Band declared extinct by the federal government), and now the Lakes Tribe of the CCT. <u>Each of the names by which the Sinixt either identified themselves or were identified by others serve as evidence of a clear and ancient link between the Sinixt and the Arrow Lakes region.</u>
> [Emphasis added.]

[18] Prior to 1846, Great Britain and the United States disputed the right to exercise sovereignty over what was then called the Oregon territory. In 1846, these

powers entered into the Oregon Boundary Treaty, which established the 49th parallel as the boundary between British and American territory. It goes without saying that the Sinixt played no part in the discussions leading up to this treaty.

[19] The trial judge found that a constellation of factors led to the Sinixt's gradual shift from moving throughout the whole of their traditional territory with the seasons to more or less full-time residence in its southern part. However, she also found that they did not thereby give up their claim to their traditional territory, and up to the 1930s continued to hunt in British Columbia despite the passing of *An Act to Amend the Game Protection Act*, *1895,* S.B.C. 1896, Vict. 59, c. 22, which purported to make it unlawful for them to do so.

[20] At trial, the Crown argued that there was a lack of continuity between the hunting practices of the pre-contact Sinixt and the Lakes Tribe of today. In addition, the Crown argued that the Sinixt's practice of pursuing a seasonal round in their northern territory did not survive the Crown's assertion of sovereignty in 1846, 1896 (the year in which *An Act to Amend the Game Protection Act* was passed) or 1982.

[21] The trial judge rejected the Crown's lack of continuity argument. The Crown does not appeal from that finding. Nor does the Crown rely on extinguishment or abandonment of any Sinixt right to hunt.

Grounds of Appeal

[22] The Crown's grounds of appeal are that the trial judge erred;

(a) by determining that the Respondent could exercise an aboriginal right to hunt in British Columbia further to section 35 of the *Constitution Act, 1982;*

(b) in her approach to identifying a modern rights bearing collective for the purposes of s. 35 by failing to consider whether an aboriginal collective or community resident in a foreign jurisdiction, namely the Lakes Tribe of the CCT, could be considered an "aboriginal peoples of Canada";

(c) by failing to appropriately consider the text and purposes of s. 35 in concluding that "aboriginal peoples of Canada" include non-resident aboriginal communities or collectives, such as the Lakes Tribe of the CCT;

(d) by failing to fully consider and disregarding issues of sovereign incompatibility, in particular by (1) failing to distinguish between sovereign incompatibility and extinguishment; and (2) defining the right claimed by the Respondent as excluding a mobility right;

(e) by determining that *An Act to Amend the Game Protection Act*, *1895,* S.B.C. 1896, Vict. 59, c. 22, was *ultra vires* provincial jurisdiction in its application to aboriginal people resident outside Canada; and

(f) by applying a remedy pursuant to s. 24(1) of the *Constitution Act, 1982.*

[23] In argument, the Crown abandoned its appeal against the trial judge's finding that *An Act to Amend the Game Protection Act* was *ultra vires*.

[24] It is common ground that s. 24(1) of the *Charter* does not apply to this case. However, it is also clear that the trial judge had the power to find that the relevant provisions of the *Wildlife Act* did not apply to Mr. Desautel: *R. v. Lloyd*, 2016 SCC 13 at para. 15.

[25] As a preliminary matter, I note that the first ground of appeal misapprehends the effect of s. 35. Section 35 does not create aboriginal rights and it is therefore inaccurate to state that Mr. Desautel was exercising an aboriginal right to hunt pursuant to it. Section 35 provides constitutional protection for aboriginal rights and limits the power of government to infringe those rights through legislation, regulation or otherwise.

[26] The grounds of appeal set out in paragraph 22 (a)-(d) raise two essential points. The first is whether an aboriginal group that does not reside in Canada is entitled to the constitutional protections provided by s. 35. The second is whether the right asserted by Mr. Desautel is incompatible with the sovereignty of Canada.

Are the Sinixt an aboriginal people of Canada

[27] This issue raises the question of whether the constitutional protection of aboriginal rights contained in s. 35 applies to an aboriginal group that does not reside within the boundaries of Canada.

[28] Sections 35 and 35.1 provide as follows:

> RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA
>
> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.
>
> 35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the “*Constitution Act, 1867*”, to section 25 of this Act or to this Part,
>
> (*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
>
> (*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

[29] The Crown made the following arguments on this issue:

1. That the plain meaning of s. 35 restricts its application to aboriginal peoples living in Canada.

2. That s. 35.1 contemplates the involvement of representatives of the aboriginal peoples of Canada in any conference held to discuss amendments to the Constitution, and it is not reasonable to find that aboriginal peoples who are neither resident in nor citizens of Canada should participate in such a conference. The Crown says that this fact informs the interpretation of s. 35, and indicates that it should not be interpreted to include foreign aboriginal groups.

3. That recognizing the Lakes Tribe as an aboriginal people of Canada would be contrary to the purpose of the *Constitution Act* of 1982, which was to erase foreign authority from the Canadian constitutional

framework, because recognizing rights in a foreign aboriginal group would be inconsistent with that purpose.

4. That comments made before the *Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada* prior to the enactment of s. 35 contain no suggestion that aboriginal rights could be possessed by a foreign group.

5. That the trial judge erred in interpreting s. *35* in accordance with the generosity principles set out in *Nowegijick v. the Queen*, [1983] 1 S.C.R. 29, rather than purposively, and failed to recognize that the purpose of s. 35 is reconciliation, which does not include generosity.

6. That numerous decisions of the Supreme Court, including *Van der Peet*, have assumed or described aboriginal peoples as citizens or residents of Canada.

7. That because the underlying purpose of s. 35 is reconciliation of aboriginal peoples with the assertion of sovereignty over them by the state, it must of necessity apply only to indigenous peoples resident in Canada. This is because all the mechanisms through which reconciliation can be achieved require the presence of the affected indigenous group in Canada.

8. That including foreign groups as aboriginal peoples would not further the objective of reconciliation because it would undermine the rights of all Canadians and would potentially reduce the amount of resources available to resident indigenous groups and other Canadians. In addition, recognizing a right to hunt implies that the group holding that right may also have a land claim would also potentially affect the ability of the Crown to reconcile with other groups.

9. That the trial judge erred in her application of the honour of the Crown because the honour of the Crown arises from the assertion of

sovereignty over aboriginal peoples. The Crown says that the honour of the Crown does not arise with respect to the Lakes Tribe because the Crown has not sought to assert sovereignty over it.

10. Because the drafters of the Constitution distinguished between the *Charter* rights of "everyone", "citizens of Canada" and "any member of the public in Canada" in the *Charter*, but applied s. 35 only to aboriginal peoples of Canada, it can be inferred that they did not intend to provide constitutional protection to non-resident aboriginal groups.

11. That the decision of the Supreme Court in *Frank v. The Queen*, [1978] 1 S.C.R. 95, supports an interpretation of s. 35 that restricts aboriginal people of Canada to aboriginal peoples resident in Canada.

[30] Mr. Desautel submits that the Crown is in effect attacking the findings of fact of the trial judge and is seeking to add a residency requirement to the *Van der Peet* test that cannot be justified. He submits that the trial judge made no error in concluding that the Sinixt are an aboriginal group that had established a right to hunt within their traditional territory. Mr. Desautel submits that it is incontestable that he was hunting in the traditional territory of the Sinixt people and that the trial judge made a finding of fact that hunting was central to the culture and identity of the Sinixt.

[31] Mr. Desautel points out that the Crown has introduced a new term to describe the Sinixt living in Washington State, a foreign aboriginal group. He submits that there is no authority for characterizing the Sinixt as a foreign aboriginal group.

What is the Relevant Aboriginal Collective?

[32] In order to address these arguments it is necessary to ascertain the identity of the aboriginal collective that the trial judge found to exist.

[33] The parties do not agree on the trial judge's actual finding with respect to nature of the modern collective. The Crown submits that she found that the Lakes Tribe is the modern collective. Mr. Desautel submits that she found that the Sinixt

continue to exist and that the group called the Lakes Tribe are part of the Sinixt people. He submits that the persons designated as the Lakes Tribe consider themselves to be Sinixt and their designation as the Lakes Tribe by the United States government does not change their identity.

[34] Identification of the relevant modern day collective is a question of fact. The trial judge's decision on that issue is therefore entitled to deference and can only be overturned for palpable and overriding error. However, the difficulty in this case is to determine what the trial judge's finding was on this issue.

[35] The trial judge did not explicitly define the various terms she used to describe the relevant aboriginal collective. In some places in her reasons she referred to it as the Lakes Tribe. However, on reviewing her reasons as a whole, I conclude that she considered the Sinixt people to be the relevant collective. I find that when she referred to the Lakes Tribe, she did so as a convenient means of describing that portion of the Sinixt that live on the Colville Reserve and that have been designated by that name. At the outset of her reasons she found that the Sinixt continue to exist:

> [4] There is no dispute that Mr. DeSautel was hunting well within the traditional territory of the Sinixt. There is also no serious dispute that wherever else Sinixt members may now live, they exist today as a group known as the Lakes Tribe of the CCT, and of course, Mr. DeSautel is a member of the Lakes Tribe.

[36] I conclude that the trial judge made a finding that the members of the Lakes Tribe are Sinixt people and entitled to assert any aboriginal rights held by the Sinixt. This is made clear in paras. 67 and 68 of her reasons:

> [67] The common law requires proof of a modern day collective capable of holding an aboriginal right, the latter being defined as an activity that is an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.
>
> [68] The overwhelming historical evidence is that the Sinixt continue to exist today as a group. As Dr. Kennedy put it at page 132 of her 2015 report, the Sinixt Regional group is located in Washington State. I need not go further for the purpose of this case and decide whether there is a regional group in British Columbia even accepting that Richard Armstrong may well be a member of the Sinixt or Lakes Tribe. The Lakes Tribe of the CCT certainly

> qualify as a successor group to the Sinixt people living in British Columbia at the time of contact.

[37] In this regard, I also rely on the trial judge’s analysis, which focused on the Sinixt people and their pre-contact practices.

The Intervenor’s Submissions

[38] This is a convenient place to address the submission of the intervenor, the Okanagan Nation Alliance (the “ONA”). The ONA submits that I should not make any finding that the Sinixt have ceased to exist in Canada, that Sinixt peoples living in British Columbia are ineligible to hold or exercise aboriginal rights protected by s. 35 or that the members of the Lakes Tribe represent all of the descendants of the Sinixt people who were living in what is now British Columbia at the time of first contact.

[39] As will be apparent from my reasons, I am of the view that the trial judge expressly declined to make a finding that the Lakes Tribe represents all of the descendants of the Sinixt who lived in British Columbia prior to first contact. Nothing in these reasons should be taken as making a contrary finding. Similarly, these reasons are focused on the issue of whether Mr. Desautel was exercising a protected aboriginal right on October 1, 2010. Because Mr. Desautel was a member of the Lakes Tribe, the trial judge had to decide whether that group had the aboriginal right in issue. The question of whether other persons or communities have a similar right did not arise before the trial judge or on this appeal.

[40] I now turn to a discussion of the parties’ submissions.

Discussion of Crown’s Submissions

[41] I do not find the Crown’s arguments to be persuasive.

[42] In my view, the meaning of s. 35 is not plain and obvious with respect to the issue I must address. The section does not expressly limit the constitutional protection of aboriginal rights to persons residing in Canada or to aboriginal peoples who are Canadian citizens, nor does it expressly include aboriginal people who are neither.

[43] Section 35 must be interpreted purposively: *Van der Peet* at paras. 21-22; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1106. I will address the proper construction later in these reasons. At this point it is sufficient to say that a purposive interpretation requires that the words be interpreted in light of the interests the right was meant to protect.

[44] The Crown asserts that a non-resident aboriginal group cannot be an aboriginal people of Canada because that would entitle it to participate in the constitutional conferences contemplated by s. 35.1. It says this would be illogical for two reasons.

[45] First, non-resident aboriginal groups are not participants in Canadian democracy. It would therefore be contrary to the organizing constitutional principle of democracy to allow them to participate in Canadian democracy by way of the constitutional conferences required by s. 35.1(b): *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. The Crown's basis for the statement that a non-resident aboriginal group is not a participant in Canadian democracy appears to be the Supreme Court of Canada's statement that it "has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters … and as candidates": *Secession Reference* at para. 65, citing *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876.

[46] There are a number of problems with this argument. To begin with, it assumes away what it seeks to disprove. It is self-evident that a non-resident aboriginal group does not vote or run for office, nor do its members who are not Canadian citizens. But the statement that non-resident aboriginal groups do not participate in Canadian democracy is only true if it is found that they cannot participate by way of s. 35.1 constitutional conferences. That is precisely what is at issue. Even interpreted more generously, the fact that one mode of democratic participation is not available is not a compelling reason to find that it was intended that a group never be permitted to participate.

[47] Further, this argument essentially seeks to read into s. 35 the terminology used in s. 3 of the *Charter*: "citizens". That is what the cases cited in the *Secession Reference* are concerned with. But "citizens" is not the term used by s. 35.

[48] More fundamentally, aboriginal rights are different from *Charter* rights. They "cannot…be defined on the basis of the philosophical precepts of the liberal enlightenment": *Van der Peet* at para. 19. It is worth adding to this, in my view, that they are not grounded in European concepts like citizenship. Rather, aboriginal rights are grounded in prior occupation of the land before contact. To read into s. 35.1 (and therefore s. 35) a strictly interpreted concept of participatory democracy defined exclusively by voting and running for office by citizens would be to ignore this unique basis. Rather, s. 35.1 clearly contemplates a mode of democratic participation that goes beyond these activities.

[49] Given that the purpose of s. 35.1 is to ensure that the views of indigenous peoples are taken into account in the relevant circumstances I can see nothing in s. 35.1 that supports the Crown's argument.

[50] The second argument is that one of the purposes of the patriation of the Constitution was to eliminate foreign influence over Canadian government. Allowing a non-resident group to participate in a constitutional conference would be contrary to this purpose.

[51] This argument ignores the fact that the constitutional recognition of any aboriginal right places some limitation on the power of government. The question is whether the protection of that limitation should be restricted to residents only. The nature and extent of aboriginal rights will continue to be governed by Canadian law whether or not aboriginal persons who are American citizens are found to have such rights.

[52] It is also my view that this argument fails to take into account the aboriginal perspective by focusing on Canadian citizenship and residence. The jurisprudence with respect to s. 35 recognizes that a key aspect of nationhood and citizenship in a first nation is its connection to its traditional territory. While the Sinixt people who are

also members of the Lakes Tribe are not citizens or resident in Canada, the trial judge found that they continue to have a deep connection with that part of their traditional territory that is in Canada.

[53] In addition, the Crown's approach imposes non-aboriginal concepts such as citizenship and permanent residence on the proper interpretation of the degree of connection between an aboriginal group and Canada necessary for them to be considered aboriginal peoples of Canada.

[54] The comments made in the course of the Joint Committee hearings are non-specific and do not address the issue raised in this case. They therefore are of no assistance to the Crown. In fact, most of the comments made by indigenous representatives set out in the Crown's argument stress the importance of preserving aboriginal rights rather than restricting them.

[55] With respect to the criticism that the trial judge interpreted s. 35 generously rather than purposively, the Supreme Court has referred to the generosity principle in interpreting statutes and treaties involving aboriginal rights.

[56] In *Sparrow*, the Court expressly addressed the manner in which s. 35 should be interpreted at p. 1106:

> The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of "recognized and affirmed" that, in our opinion, gives appropriate weight to the constitutional nature of these words.
>
> In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court said the following about the perspective to be adopted when interpreting a constitution, at p. 745:
>
>> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

> The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.

This passage indicates that a purposive interpretation of s. 35 mandates that it should be interpreted in a generous manner towards aboriginal peoples.

[57] The real question on a purposive interpretation is whether the objectives of affirmation and reconciliation are better accomplished by presumptively excluding a group like the Sinixt at the outset of the aboriginal rights analysis because they are no longer resident in Canada, or whether the issue of residence should be addressed as a factor in the *Van der Peet* analysis.

[58] I do not accept the Crown's argument that recognizing the Sinixt of the Lakes Tribe as an aboriginal people of Canada would hinder the government's ability to accommodate other resident aboriginal groups. It seems to me that recognizing the rights of any group might adversely affect another group. That is, however, not a valid reason to deny a right to the group found to be entitled to it. In addition, this argument assumes that the members of the Lakes Tribe are not aboriginal peoples of Canada. This also assumes away the very issue that must be decided.

[59] I also reject the Crown argument that Canada has not asserted any jurisdiction over the Lakes Tribe. This argument is premised on the Lakes Tribe being a distinct entity from the Sinixt people. This is contrary to the findings of the trial judge, who found that they were a successor to the Sinixt. Canada has quite clearly asserted sovereignty over a great majority of the traditional territory of the Sinixt. In my view, the very act of preventing Mr. Desautel from hunting in the traditional territory is an assertion of sovereignty.

[60] I do not accept that the distinctions made among the rights of different groups in the *Charter* have any relevance to the issues raised in this appeal. The drafters of the *Charter* made some distinctions about what rights applied to various categories of persons in Canada. However, it did so by clearly defining the persons to whom

those rights applied. In contrast, the drafters of s. 35 made no distinctions among the rights assured to the aboriginal peoples of Canada.

[61] Similarly, the issue in *Frank* was the interpretation of the provisions of the *Alberta Natural Resources Transfer Agreement 1930* (the "*Agreement*"). The *Agreement* used the terms "Indians of the Province" and "Indians within the boundaries thereof". The Crown argued that an "Indian" from Saskatchewan was deprived of the right to hunt because the two terms had the same meaning. The Supreme Court ultimately held that the two terms used had different meanings because the *Agreement* used different terms. It also found that if the provision was interpreted as contended by the Crown, it would have deprived indigenous people resident in Saskatchewan from exercising previously agreed treaty rights over lands in Alberta. However, in this case s. 35 uses only one term: "aboriginal peoples of Canada".

Mr. Desautel's Submission

[62] I do not agree with Mr. Desautel's submission that the Crown is in effect seeking to undermine the trial judge's findings of fact. I am satisfied that the issues raised by the Crown are questions of law that must be reviewed on a correctness standard.

Construction of s. 35

[63] As I have already stated in dealing with the Crown's arguments, s. 35 must be interpreted purposively.

[64] The purposive approach to interpretation is based upon delving into the fundamental and underlying reason for a law or constitutional guarantee.

[65] The purposive approach was explained, in the context of the *Charter*, in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295:

> 116. This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a

> purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. [Emphasis in original.]

[66] As set out in *Sparrow* and *Van der Peet*, the purpose of s. 35 is the affirmation of aboriginal rights and the reconciliation of the prior occupation of aboriginal peoples with the sovereignty of the Crown. To that end, a generous, liberal interpretation of the words used is required.

[67] I think there are two possible interpretations of the term aboriginal people of Canada as used in s. 35.

[68] The first is that contended for by the Crown, that is, aboriginal peoples living in Canada.

[69] The second is those peoples who occupied what became Canada prior to contact.

[70] Under the second interpretation, aboriginal peoples who had a right at first contact, which has not otherwise been extinguished or abandoned, would be entitled to the protection of s. 35. Such right would of course be limited to a right that was exercised and is sought to be exercised in that part of North America that was eventually incorporated into Canada.

[71] One purpose of s. 35 is to reconcile the prior occupation of territory which became Canada by aboriginal peoples with the Crown's assertion of sovereignty over that territory. As Lamer C.J. put it in *Van der Peet* at paras. 30-31:

> 30. In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> 31. More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in

> distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.
>
> [Emphasis in original.]

[72] As this passage makes clear, it is the pre-contact occupation of the land by indigenous peoples that gives rise to the rights protected by s. 35. It is the assertion of sovereignty over the peoples who possess those rights that gives rise to the need for reconciliation: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73:

> 25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.
>
> …
>
> 32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" [Emphasis added by McLachlin C.J.C.].

[73] Two authorities have considered the application of s. 35 to non-resident aboriginal peoples.

[74] In *R. v. Campbell*, 2000 BCSC 956, Justice Pitfield was faced with this issue on a summary conviction appeal from a decision of the Provincial Court.

Mr. Campbell was charged with crossing the border other than at a port of entry and failing to appear before an immigration officer as required by s. 12 of the *Immigration Act,* R.S.C. 1985, c. I-2.

[75] Mr. Campbell was a member of what was described in the reasons as the Siniaxt Tribe registered with the Coeur d'Alene Indian reservation in Idaho. Mr. Campbell asserted that he had an aboriginal right to cross the international border freely for the purpose of carrying out ceremonial practices and for the purpose of cultural networking.

[76] The trial judge found that the aboriginal right that Mr. Campbell asserted had not been made out in accordance with the *Van der Peet* test and therefore he had not shown he was exercising an aboriginal right when he crossed the border. However, in the course of his reasons, the trial judge addressed the question of whether a group residing in the United States could qualify as an aboriginal group of Canada. That portion of his reasons was quoted by Justice Pitfield at para. 12 of his reasons:

> [12] In his reasons for judgment, the trial judge wrote as follows in relation to s. 35:
>
>> S. 35 of the *Constitution Act* refers to aboriginal peoples of Canada. The Crown has taken the position that Mr. Campbell has no standing to claim the benefits of the *Constitution Act* as he does not fall within that group of persons referred to as aboriginal peoples of Canada. There is no issue as to Mr. Campbell being an aboriginal person, the Crown, however, says that to give any meaning to the phrase "of Canada", Mr. Campbell should have some of residence, domicile or legal status within this country. Mr. Campbell does not reside in Canada, was not born in Canada, is not recognized as an Indian under the *Indian Act*, is both a citizen of the United States and a member of a Band in the United States. The Crown submits he has no standing as one of a group of persons falling within the phrase "aboriginal people of Canada". Neither counsel was able to provide judicial interpretation of this phrase. In my view, a more liberal interpretation than that given by the Crown should be given to the words in issue. Just as a person may be a citizen of Canada without having been born here or without residing in this country, so also may an aboriginal person fall within the phrase in question despite lacking residency or domicile in this country. The *Constitution Act* refers to aboriginal peoples. The aboriginal people in the context of this particular case is the Lake People or the Okanagan People.

> Traditionally their territory existed on both sides of the international boundary. The *Constitution Act* is intended to be inclusive rather than exclusive and nothing in the Act or its interpretation suggests that you must be exclusively a people in Canada. There is no reason why such as in this case, the one people, namely the Okanagan Nation cannot exist in more than one legal jurisdiction. Just as in some circumstances a citizen of Canada can also be a citizen of the United States, so also in some circumstances an aboriginal people may be an aboriginal people both of Canada and of another jurisdiction.

[77] Because he agreed with the trial judge that Mr. Campbell had not established that travelling across the border was a right protected under the *Vander der Peet* test, it was unnecessary for Justice Pitfield to express a final view on the trial judge's conclusions about whether Mr. Campbell could be an aboriginal person of Canada. He did, however, express considerable doubt about the proposition that someone who was neither resident in nor a citizen of Canada could be an aboriginal person of Canada:

> [13] Without the benefit of argument and submissions, I am not prepared to concur in the view that an individual can assert an aboriginal right when that individual was born in and is a citizen and resident of the United States, is neither a citizen nor resident of Canada, and is the child of a father and mother who have or had no connection with Canada by citizenship or residence. It is not obvious that Campbell can claim to be a person who is a member of a class described as "the aboriginal peoples of Canada" within the meaning of s. 35 of the *Constitution Act* just because his maternal grandmother may have been a Canadian citizen or resident and a member of an aboriginal group that had ties to the geographical area called Canada at the time of contact.
>
> [14] Nothing in these reasons should be taken to indicate agreement with the learned trial judge's conclusion in that regard.

[78] In *Watt v. Liebelt*, [1999] 2 F.C. 455 (C.A.), the Federal Court of Appeal was called upon to consider whether an American citizen, who was also a member of the Lakes people, could exercise an aboriginal right to remain in Canada. Because of the nature of the proceeding before it, the Court concluded that it could not answer that question. However, the Court did find that the adjudicator who ordered Mr. Watt deported from Canada by virtue of his conviction for cultivating marijuana, wrongly refused to consider whether such an order infringed the aboriginal right to remain in Canada asserted by him. The Court thereby implicitly rejected the argument that a

foreign national could never be regarded as having aboriginal rights. I will return to this case later in these reasons when I consider the Crown's sovereign incompatibility argument.

[79] Neither of these cases makes any definite determination of this issue. They therefore are of limited usefulness in considering it. However, I do note that neither case rejected the possibility that a non-resident could possess aboriginal rights. As I read Justice Pitfield's comments in *Campbell*, the record before him did not establish the degree of connection to Canada that the trial judge found to exist in this case.

[80] In *Van der Peet*, there was no dispute that the persons asserting the right in question were aboriginal peoples of Canada. The question before the Court was whether the right in question was an aboriginal right entitled to the protection of s. 35. *Van der Peet* therefore addresses the nature of aboriginal rights protected by s. 35 rather than the identity of the persons asserting the right. However, it is of some value to re-state briefly the requirements of the *Van der Peet* test to provide context to the issue before me.

[81] To establish an aboriginal right to a practice, custom or tradition, the claimant must establish that the practice, custom or tradition in question was a defining feature of the culture of the group to which he or she belongs (para. 59).

[82] In considering this question, the relevant time period is the period prior to contact between aboriginal and European societies (para. 60).

[83] The reasons for this are explained in para. 61:

> 61. The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown. [Emphasis in original.]

[84] In my view, this passage is relevant to a purposive interpretation of s. 35. It makes it clear that the practices being given constitutional protection are those that existed pre-contact and which continued to exist at the time of the adoption of the *Constitution Act, 1982*. In this case the trial judge found that the practice Mr. Desautel was following predated contact, continued to exist in 1982 and continues to the present time. The Crown does not challenge these findings.

[85] In this case, the Boundary Treaty of 1846 split the traditional territory of the Sinixt people into two pieces. By far the larger piece was north of the 49th parallel, in what was eventually to become Canada. A smaller portion became part of the United States. Despite this, the trial judge made unchallenged findings that hunting in the traditional territory that is now in Canada was carried on in pre-contact times, was integral to the Sinixt aboriginal culture and that there has been no breach of continuity in the practice.

[86] As a result of the actions of non-aboriginal authorities, the Sinixt people who make up the Lakes Tribe can only continue to exercise that activity by crossing an international boundary, but subject to the Crown's sovereign immunity argument, I do not see how that necessity brings them outside of the protection of s. 35.

[87] I therefore conclude that the fact that the Sinixt people in issue in this case are now resident in the United States does not preclude them from being considered to be an aboriginal people of Canada.

[88] I find that recognizing that the Sinixt are aboriginal people of Canada under s. 35 is entirely consistent with the objective of reconciliation established in the jurisprudence. In my view, it would be inconsistent with that objective to deny a right to a group that occupied the land in question in pre-contact times and continued to actively use the territory for some years after the imposition of the international boundary on them.

[89] I conclude that the term aboriginal peoples of Canada as used in s. 35 means those peoples who occupied a part of what became Canada prior to first contact,

and the rights referred to are those that are established in accordance with the *Van der Peet* test and sought to be exercised in Canada.

[90] I find that the trial judge made no error in applying the *Van der Peet* test to determine the issue before her because the Sinixt, of whom Mr. Desautel is a member are an aboriginal people of Canada. Her findings of fact confirm the deep connection between the Sinixt and their traditional territory in Canada. The right asserted is based entirely on the use and practices carried out by the Sinixt prior to first contact on lands that are now incorporated into Canada, and the continuity of the Lakes Tribe's practices with those of their ancestors.

[91] I therefore do not accept this ground of appeal.

Sovereign Incompatibility

[92] The Crown's second argument is that the right asserted by Mr. Desautel is incompatible with the sovereignty of Canada.

[93] The Crown submits that the trial judge erred by failing to address the issue of sovereign incompatibility and in particular, by failing to distinguish between sovereign incompatibility and extinguishment.

[94] It also submits that the trial judge erred by defining the right claimed by Mr. Desautel as excluding a mobility right. It argues by so doing, the trial judge erred by permitting Mr. Desautel to tailor the right asserted to fit the desired result. The Crown submits that given that the members of the Lakes Tribe are neither citizens nor residents of Canada, a right to hunt in Canada would be meaningless without a concurrent mobility right to enter Canada to exercise it.

[95] The Crown argues that by failing to recognize that the right asserted by Mr. Desautel necessarily included a right to cross the international border, the trial judge failed to appreciate the incompatibility of the right with Canadian sovereignty over its borders.

[96] The Crown says the distinction between extinguishment and sovereign incompatibility is procedurally important because the onus is on the Crown to prove extinguishment of a right but it is relieved of that burden when the claimed right is incompatible with sovereignty.

[97] Mr. Desautel submits that sovereign incompatibility is not a stand-alone doctrine and is a factor to be taken into account at the justification stage of assessing the ability to exercise an aboriginal right.

[98] I accept the Crown's argument that there is a distinction between extinguishment and sovereign incompatibility. However, I question whether any issue of sovereign incompatibility arises in this case.

[99] The Crown relies on cases that have established that the right to fish or hunt in an area necessarily includes a right to access that area. This point was addressed by Chief Justice McLachlin in *Mitchell v. M.N.R.*, 2001 SCC 33 at para. 22:

> 22 In another attempt at limitation, Chief Mitchell denies that his claim entails the right to pass freely over the border, i.e., mobility rights. Perhaps recognizing that mobility has become a contentious issue in recent cases (e.g., *Watt v. Liebelt*, [1999] 2 F.C. 455 (C.A.); *R. v. Campbell* (2000), 6 Imm. L.R. (3d) 1 (B.C.S.C.)), he answers that his claim is contingent on his existing right to enter Canada pursuant to the *Canadian Charter of Rights and Freedoms* and the *Immigration Act*, R.S.C. 1985, c. I-2. He does not seek a right to enter Canada because he does not require such a right. Again, however, narrowing the claim cannot narrow the aboriginal practice that defines the claimed right. An aboriginal right, once established, generally encompasses other rights necessary to its meaningful exercise. In *R. v. Côté*, [1996] 3 S.C.R. 139, for example, it was held that the right to fish for food in a specified territory necessarily encompassed a right of physical access to that territory. The evidence in the present case showed that trade involved travel. It follows that any finding of a trading right would also confirm a mobility right.

[100] This passage provides support for the Crown's argument that the right to hunt asserted by Mr. Desautel necessarily implies a right to access the traditional territory in which the hunting is carried on. However, I agree with the trial judge that a mobility right issue does not arise in this case. In addition, in my view, the record in this case did not permit that issue to be decided.

[101] In the cases relied upon by the Crown in which an implied incidental aboriginal right was found to exist, it was the incidental right itself that was alleged to have been infringed by a Crown action.

[102] In *R. v. Simon*, [1985] 2 S.C.R. 387, the accused indigenous person was charged with illegal possession of a firearm. He had the firearm in his possession to pursue an aboriginal right to hunt. The Court ruled that the right to hunt necessarily included the right to possess the means necessary to do so. The government could not therefore justifiably prohibit possession of the instruments of hunting.

[103] In *R. v. Sundown*, [1999] 1 S.C.R. 393, the accused was charged with constructing a structure, a hunting shelter, on park land. The Court again held that the provision of such a structure was a necessary part of the act of hunting and therefore was a protected activity.

[104] In *R. v. Côté*, referred to in the paragraph from *Mitchell* quoted above, the right involved was the requirement to pay a fee to use motor vehicles to access a fishing site. The Court found that there was an aboriginal right to fish at the site. The government had imposed a fee on the use of motor vehicles on the roads that accessed the site. This raised the issue of whether that fee infringed the aboriginal right to fish.

[105] In the result, the Supreme Court held that the fee did not infringe the right to fish. In assessing that issue, the Court had the benefit of an adequate record as to the nature of the right asserted and the extent of the impact of the alleged infringement on the underlying right to fish.

[106] In this case, Mr. Desautel has not been charged with coming into Canada unlawfully, nor is there any evidence that he was denied entry. Therefore, there is no evidentiary record on which to assess the nature and extent of his right to cross the border to pursue his asserted right to hunt.

[107] Accordingly, I find that the trial judge did not err in her characterization of the issue before her. That issue was whether Mr. Desautel was exercising an aboriginal

right to hunt when he shot the elk. Mr. Desautel's right to cross the border was not being challenged. The trial judge cannot be criticized for failing to address an issue that did not arise before her.

[108] The trial judge did not ignore the importance of Canadian sovereignty in defining the right in this case. At para. 146 of her reasons, she acknowledged that control of the border is an incident of sovereignty. However, in my view, she correctly found that the government's right to control its borders was not fatal to the aboriginal right of the Sinixt to hunt on their traditional territory because border control could be a justification for limiting the right of access without eliminating the right to hunt.

[109] The Crown's argument on this issue is primarily based on the concurring reasons of Justice Binnie in *Mitchell.* In *Mitchell,* the respondent was a member of the Mohawk nation who was served with a claim for unpaid customs duties on goods that he had brought across the Canada /United States border without declaring them. He asserted that he had an aboriginal right to bring the goods into Canada without paying duty. He was successful in that assertion in the Federal Court Trial Division and Court of Appeal. However, the Supreme Court held that he was required to pay the duties.

[110] The majority decision of the Court held that Mitchell had failed to establish the aboriginal right he asserted. In concurring reasons, Justice Binnie also found that the right asserted could not qualify as an aboriginal right because it was incompatible with the sovereignty of Canada:

> 76 The importance of the Crown's argument is that even if the respondent's claim could be said to be distinctive and integral to Mohawk culture, it would still not give rise to an aboriginal right. The Crown says it fails the basic requirement of compatibility with the sovereignty of the legal regimes that came afterwards. The question also arises, as noted, whether acceptance of it would advance or undermine the s. 35(1) objective of reconciliation.

[111] Justice Binnie explained how he interpreted the claim being advanced by Chief Mitchell:

> 125 For the reasons already mentioned, the respondent's claim, despite the concessions made in argument, is not just about physical movement of people or goods in and about Akwesasne. It is about pushing the envelope of Mohawk autonomy within the Canadian Constitution. It is about the Mohawks' aspiration to live as if the international boundary did not exist. Whatever financial benefit accrues from the ability to move goods across the border without payment of duty is clearly incidental to this larger vision.
>
> 126 It is true that in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, the Court warned, at para. 27, against casting the Court's aboriginal rights inquiry "at a level of excessive generality". Yet when the claim, as here, can only properly be construed as an international trading and mobility right, it has to be addressed at that level.

[112] It is apparent from the above quoted passages that Justice Binnie considered that the aboriginal right being advanced was about the Mohawk's desire to live as if the international border did not exist. At para. 148 he reiterates his view of the nature of the right being claimed:

> 148 I am far from suggesting that the key to s. 35(1) reconciliation is to be found in the legal archives of the British Empire. The root of the respondent's argument nevertheless is that the Mohawks of Akwesasne acquired under the legal regimes of 18th century North America, a positive legal right as a group to continue to come and go across any subsequent international border dividing their traditional homelands with whatever goods they wished, just as they had in pre-contact times. In other words, Mohawk autonomy in this respect was continued but not as a mere custom or practice. It emerged in the new European-based constitutional order as a *legal* trading and mobility *right*. By s. 35(1) of the *Constitution Act, 1982*, it became a constitutionally protected right. That is the respondent's argument. [Emphasis in original.]

[113] In later portions of his reasons, Justice Binnie goes on to find that such a right is incompatible with Canadian sovereignty:

> 163 Similar views were expressed by scholars writing before the Canada-United States border was ever established. E. de Vattel, whose treatise *The Law of Nations* was first published in 1758, said this:
>
>> The sovereign may forbid the entrance of his territory either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this that does not flow from the rights of domain and sovereignty : every one is obliged to pay respect to the prohibition ; and whoever dares to violate it, incurs the penalty decreed to render it effectual.
>>
>> (*The Law of Nations* (Chitty ed. 1834), Book II, at pp. 169-70)
>
> To the same effect is Blackstone, *supra*, at p. 259:

> Upon exactly the same reason stands the prerogative of granting safe-conducts, without which by the law of nations no member of one society has a right to intrude into another.
>
> In my view, therefore, the international trading/mobility right claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy is incompatible with the historical attributes of Canadian sovereignty.

[114] In my view, the factual basis of Justice Binnie's conclusion is distinguishable from the facts of this case.

[115] In *Mitchell*, as Justice Binnie pointed out, Chief Mitchell was asserting that the Mohawks of Akwesasne had an unrestricted right to cross the international boundary with whatever goods they wished. In his view this represented a direct challenge to the sovereignty of Canada to control its borders. No such issue arose before the trial judge in this case. Mr. Desautel makes no claim to any special status or right to cross the international border. Equally importantly, no one has suggested that he is a person who would be denied entry.

[116] The majority judgment in *Mitchell* found that Chief Mitchell had not established the right he asserted because he had not met the requirements of the *Van der Peet* test. It was therefore unnecessary to decide the sovereign incompatibility issue. Nevertheless, the majority judgment does lend some support to the view that an international boundary is not an insuperable obstacle to the existence of an aboriginal right. Chief Justice McLachlin characterized the issue before her as follows:

> 24 Manitoba also argues that the right should not be construed as a right to cross the border. Technically this argument is correct, as the border is a construction of newcomers. Aboriginal rights are based on aboriginal practices, customs and traditions, not those of newcomers. This objection can be dealt with simply: the right claimed should be to bring goods across the St. Lawrence River (which always existed) rather than across the border. In modern terms, the two are equivalent.
>
> 25 Properly characterized, then, the right claimed in this case is the right to bring goods across the St. Lawrence River for the purposes of trade.

[117] Having characterized the issue as above, Chief Justice McLachlin proceeded to analyze the issue by applying the *Van der Peet* test.

[118] Both the majority and the concurring opinions recognized that sovereign incompatibility will only arise in rare cases. Chief Justice McLachlin commented as follows:

> 63 This Court has not expressly invoked the doctrine of "sovereign incompatibility" in defining the rights protected under s. 35(1). In the *Van der Peet* trilogy, this Court identified the aboriginal rights protected under s. 35(1) as those practices, customs and traditions integral to the distinctive cultures of aboriginal societies: *Van der Peet*, *supra*, at para. 46. Subsequent cases affirmed this approach to identifying aboriginal rights falling within the aegis of s. 35(1) (*Pamajewon*, *supra*, at paras. 23-25; *Adams*, *supra*, at para. 33; *Côté*, *supra*, at para. 54; see also: Woodward, *supra*, at p. 75) and have affirmed the doctrines of extinguishment, infringement and justification as the appropriate framework for resolving conflicts between aboriginal rights and competing claims, including claims based on Crown sovereignty.
>
> 64 The Crown now contends that "sovereign incompatibility" is an implicit element of the *Van der Peet* test for identifying protected aboriginal rights, or at least a necessary addition. In view of my conclusion that Chief Mitchell has not established that the Mohawks traditionally transported goods for trade across the present Canada-U.S. border, and hence has not proven his claim to an aboriginal right, I need not consider the merits of this submission. Rather, I would prefer to refrain from comment on the extent, if any, to which colonial laws of sovereign succession are relevant to the definition of aboriginal rights under s. 35(1) until such time as it is necessary for the Court to resolve this issue.

[119] Justice Binnie stated:

> 154 In my opinion, sovereign incompatibility continues to be an element in the s. 35(1) analysis, albeit a limitation that will be sparingly applied. For the most part, the protection of practices, traditions and customs that are distinctive to aboriginal cultures in Canada does not raise legitimate sovereignty issues at the definitional stage.

[120] I have already indicated that the record before the trial judge was insufficient to permit her to decide the issue of Mr. Desautel's mobility rights. In addition, to the extent that the Crown argues that the doctrine of sovereign incompatibility is a complete bar to the existence of the right the trial judge identified, I find that the jurisprudence does not support it.

[121] In this regard I respectfully agree with the comments of Justice Strayer in *Watt*:

> 15 There is one issue of law with which we can deal. The respondent contends that the existence of a sovereign state is inconsistent with any fetters on the power of that state to control which non-citizens may remain in the country. Suffice it to say that while there is ample authority in international and common law for that proposition, a sovereign state may fetter itself as to the means by which, the circumstances in which, and the agencies of government by which, such power of control may be exercised. Canada has by its Constitution limited the exercise of governmental powers which may be inherent as a sovereign state. For example, the *Canadian Charter of Rights and Freedoms* prohibits any actions by any agencies of government which might otherwise be within the authority of a sovereign state such as the power to control the content of the press or the power to carry out unlimited searches and seizures of those within its territory. In the same vein, section 35 of the *Constitution Act, 1982* now guarantees existing Aboriginal rights not previously extinguished, and this carries the corollary that no agency of the state can, after 1982, extinguish those rights. As long as the Constitution remains unamended, Canadian authorities are subject to this limitation on what would otherwise be an incident of sovereign power. In fact, in adopting section 35, Canada has exercised its sovereignty by establishing a hierarchy of rights exercisable in Canada: a hierarchy which can only be alterered by another exercise of sovereign power, namely the amendment of the Constitution.

[122] I also note that control of the border and the right to enter Canada are matters of federal jurisdiction. The Attorney General of Canada was served with a notice of constitutional question in this case but has elected not to appear or make submissions. This is a further reason why I consider it unnecessary and inappropriate to consider the nature and extent of an aboriginal right to cross the international boundary on this appeal.

[123] I therefore find that the trial judge made no error in finding that no issue of sovereign incompatibility arose before her.

Disposition

[124] Accordingly, the appeal is dismissed except to the extent that the trial judge relied on s. 24(1) of the *Charter*. There will therefore be a finding that ss. 11(1) and 47(a) of the *Wildlife Act* do not apply to Mr. Desautel in this case.

"Sewell J."

SCHEDULE A

Date	Event
1811	David Thompson ascends the Columbia River (first contact with Sinixt)
1825	The Hudson's Bay Company establishes Fort Colville near Kettle Falls, Washington.
1830	The Sinixt/Lakes people overwinter in southern portion of territory.
1846	Oregon Treaty establishes boundary between United States and British possessions west of the Rocky Mountains along the 49th parallel
1858	Creation of Crown Colony of British Columbia
1859	US Superintendent of Indian Affairs met with a delegation of various tribes, which likely included the Sinixt/Lakes, to encourage the tribes to sign treaties with the US government and settle on American Indian reservations.
1872	U.S. government establishes the Colville Indian Reservation by way of Executive Order made by President U.S. Grant
1870s-1890	Majority of Sinixt move on to the Colville Indian Reservation
1890	U.S. government takes steps to negotiate with the tribes on the Colville Reservation to cede the north half of the Reservation. 1.5 million acres of the “north half” was opened to non-Indian settlement and development and those living on the north half, including the Lakes, as of 1 July 1892, were eligible for an allotment of 80 acres of land.
1902	Canadian federal government sets aside reserve at Oatscott on the west side of Upper Arrow Lake for Arrow Lakes Band with a population of 22
1929	Arrow Lakes Band population is recorded as 3
1938	Colville Business Council is established which governs the constituent tribes of the Colville Confederated Tribes and is elected at large from the entire membership of the Colville Confederated Tribes
1952	Mr. Desautel born in United States, member of the Lakes Tribe, Confederated Tribes of the Colville Reservation
1956	Arrow Lake Band declared extinct and Oatscott reserve reverts to Crown
1982	Section 35 of the *Constitution Act, 1982* comes into effect
October 1, 2010	Mr. Desautel conducts hunt of cow elk near Castlegar
March 27, 2017	Provincial Court Reasons for Judgment