

## CASE COMMENT

### *Who are the “Aboriginal Peoples of Canada”? Case Comment on R. v. Desautel, 2021 SCC 17*

---

BRUCE MCIVOR\*

IN THE SPRING OF 1811 a party of four Hudson’s Bay Company employees led by David Thompson slid a roughly made cedar canoe into the most northern tributary of the Columbia River and drifted southward in search of the Pacific Ocean. After two months of travelling they met a group of *Nsyilxcen* speaking Indigenous people at Kettle Falls in current day Washington State. Thompson reached the mouth of the Columbia later that summer and then retraced his steps upriver where he again encountered *Nsyilxcen* speaking Indigenous people north of Kettle Falls near current day Revelstoke, British Columbia.

One hundred and ninety nine years later and fifty miles north of Kettle Falls, on the Canadian side of the Canada/U.S. border, Rick Desautel shot an elk. Desautel is an American citizen and a member of the Lakes Tribe of the Colville Confederated Tribes. After informing local conservation officers of his success, Desautel was charged with hunting without a licence and hunting big game while not being a resident of British Columbia. Desautel’s defence was that he had a right to hunt protected under section 35(1) of the Canadian constitution because he was a descendant of the Indigenous people Thompson met in 1811 on the upper Columbia River.

For ten years the case worked its way through the Canadian courts, with Desautel winning at every level. In the fall of 2020 it reached the Supreme Court of Canada. There the Court was called on to decide whether or not an Indigenous group whose members are neither Canadian citizens or residents of Canada can be included in the “Aboriginal Peoples of Canada” within the meaning of s. 35(1) of the Canadian constitution.

---

\* This Case Comment was first published on the First Peoples Law website at <https://www.firstpeopleslaw.com/public-education/blog/who-are-the-aboriginal-peoples-of-canada-case-comment-on-r-v-desautel-2021-scc-17>. This and more than forty other essays will be included in Bruce McIvor’s forthcoming book *Standoff: Why Reconciliation Fails Indigenous People and How to Fix It* (Harbour Publishing).



Figure 1. The Supreme Court of Canada. Alex Guibord image licensed under CC BY-ND 2.0.

#### WHAT THE COURT SAID

The Court concluded the reference to “Aboriginal peoples of Canada” in the Canadian constitution means the modern-day successors of Indigenous societies who, at the time of contact with Europeans, occupied lands that later became part of “Canada.”

The Court held Desautel had been exercising an Aboriginal right protected under s. 35 of the Canadian constitution, despite being an American citizen, because the Lakes Tribe was a modern-day successor group of the *Nsyilxcen* speaking Indigenous people Thompson encountered in 1811.

The Court explained that modern-day successor groups located outside Canada are part of the “Aboriginal peoples of Canada” because to exclude them would repudiate the purpose of s. 35 of the constitution: the recognition of Indigenous Peoples’ occupation of their lands prior to the arrival of Europeans and the necessity of reconciling this fact with the assertion of Crown sovereignty.

To facilitate this clarification on who the “Aboriginal peoples of Canada” are, the Court created a new threshold requirement for Aboriginal rights claims. Before considering the question of whether an

Aboriginal right exists, a court must satisfy itself that the Indigenous group claiming the right is part of the “Aboriginal peoples of Canada.” In most cases, this threshold question will not arise because the answer is obvious, e.g. a First Nation whose members are Canadian citizens.

If there is uncertainty as to whether an Indigenous group is a modern-day successor of an Indigenous People who occupied lands that later became part of Canada, the Court identified factors to be considered by lower courts in making a determination, including: did the historical Indigenous collective split over time, did two groups merge into one, is there evidence of a shared ancestry, language, culture, laws, political institutions and territory?

Importantly, while the Court confirmed the trial judge’s finding that the Lakes Tribe was a successor group to the *Nsyilxcen* speaking Indigenous people encountered by David Thompson, the Court reiterated there may be other Indigenous modern-day successor groups. In Canada, *Nsyilxcen* is the language of the *Syilx* Okanagan Nation. Many *Syilx* Okanagan Nation members trace their ancestry to the Indigenous people Thompson met on the upper Columbia River in 1811.

The Court emphasized that under Canadian law Indigenous groups located outside Canada who are part of the “Aboriginal peoples of Canada” may not necessarily be on an equal footing with Indigenous groups located within Canada. In the context of the duty to consult and accommodate, absent historical interactions with an American group that would have given the Crown knowledge of their claim, there is no freestanding duty to seek them out to give them notice.

Similarly, because the duty to consult arises from the need to deal fairly and reconcile pre-existing Indigenous interests with the assertion of Crown sovereignty, the scope of the duty to consult owed Indigenous groups outside Canada may differ from what is owed Indigenous groups within Canada.

The Crown may also have to discuss with Indigenous groups located within Canada how they should consult with Indigenous groups located outside Canada. Importantly, the Court reiterated that ultimately it is for Indigenous Peoples to define themselves and decide how to make decisions according to their own laws, customs and practices.

Finally, if an American Indigenous group can exercise an Aboriginal right protected by s. 35 of the constitution, the Crown’s requirements to justify an infringement of the right may not be the same as the obligations owed to Indigenous groups within Canada.



Figure 2. Screenshot of Supreme Court of Canada bench, taken on 19 October 2020.

### WHAT THE COURT DIDN'T SAY

The Court left many questions unanswered. For example, it did not decide whether an American citizen who is not a resident of Canada has the right to cross the international border to exercise a constitutionally protected right.

The Court was silent on other issues as well, including on how the new threshold requirement might be modified in the case of rights claimed by the Métis and what the decision means for a possible Aboriginal title claim by an Indigenous group residing outside of Canada. The Court declined to address these issues because they did not arise on the facts of the case and because a case based on an individual's Aboriginal right defence to charges laid by the Crown is ill-suited for the determination of complex legal issues affecting an entire Indigenous collective.

### WHY IT MATTERS

Indigenous Peoples with lands and families along both sides of the Canada/U.S. border continue to exist despite the bifurcation of their territories by the international boundary and the devastating effect colonization has had on their lands, languages, laws, cultures, political systems and families – they have survived.

Decolonization is a messy business – that's why it is a road, not a moment in time. The assertion of Crown sovereignty, rooted in the discredited Doctrine of Discovery, puts the heavy burden of reconciliation on the Crown. Instead of shouldering this responsibility, British Columbia and other provinces participating in the *Desautel* appeal relied on the insidious effects of the imposition of the international boundary

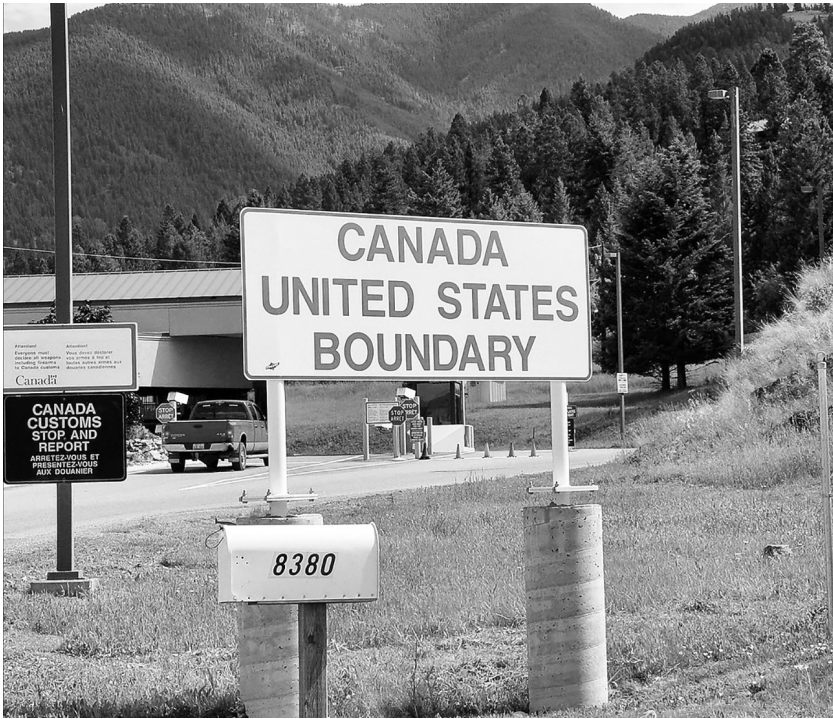


Figure 3. 18324 Montana Canada Border Sign. Raymond Hitchcock image licensed under CC BY-SA 2.0.

– the ultimate expression of colonization – to argue that they should not now have to help resolve the messy, unjust history and current reality of colonization.

Fortunately, the Supreme Court affirmed s. 35 as a bulwark against the ultimate success of colonization. It upheld the promise of s. 35 and refused to become the instrument of completing Canada's colonization project.

*Bruce McIvor and Kate Gunn represented the Indigenous Bar Association in Canada at the Supreme Court in Desautel. A video of their submissions is available at <https://www.firstpeopleslaw.com/public-education/blog/who-are-the-aboriginal-peoples-of-canada>. Bruce is also legal counsel to the Okanagan Nation Alliance on title and rights issues.*