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

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. 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.
> [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.
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> …
>
> 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 <u>of Canada</u>". 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

Citation: ☼ R. v. DeSautel
2017 BCPC 84

Date: ☼20170327
File No: 23646
Registry: Nelson

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

RICHARD LEE DESAUTEL

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE L. MROZINSKI

Counsel for the Crown:	G. Thompson, A. Peacock
Counsel for the Defendant:	M. Underhill, E. Penn
Place of Hearing:	Nelson, B.C.
Dates of Hearing:	September 19 - 23, October 3,4,5,6, 7, 11, 12, 13, November 29, 30, December 1, 2016
Date of Judgment:	March 27, 2017

I. INTRODUCTION

[1] At issue in this case is the very existence of an aboriginal right to hunt in British Columbia by the descendants of the Sinixt, a people well known to have lived, travelled, hunted, fished and gathered in these parts for thousands of years.

[2] The defendant, Mr. Richard DeSautel is a member of the Lakes Tribe of the Colville Confederated Tribes ("CCT") and lives on the Colville Indian Reserve in Washington State. On October 1, 2010, acting on the instructions of the Fish and Wildlife Director of the CCT to secure some ceremonial meat, Mr. DeSautel shot one cow-elk near Castlegar, British Columbia. After cutting, packing and storing the meat at a campsite near the Slocan River, Mr. DeSautel reported the hunt to British Columbia conservation officers. They arrived several days later and issued Mr. DeSautel an appearance notice.

[3] Mr. DeSautel now stands charged with hunting without a license contrary to s. 11(1) of the *Wildlife Act*, R.S.B.C. 1996, c. 488 and hunting big game while not being a resident contrary to s. 47(a) of the *Act*. In his defence, Mr. DeSautel maintains he was exercising his aboriginal right to hunt in the traditional territory of his Sinixt ancestors. That territory, in pre-contact times, extended north in the Kootenay region near Revelstoke and as far south in Washington State as Kettle Falls.

[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.

[5] Even so, the Crown submits that Mr. DeSautel was not and could not have been exercising an aboriginal right to hunt in October, 2010, primarily because no Sinixt aboriginal rights ever came into existence in Canada. Specifically, the Crown argues that the Sinixt practice of hunting throughout their traditional territory which straddled what became the boundary line of Canada and the United States under 1846 Oregon Boundary Treaty did not survive that assertion of sovereignty.

[6] Alternatively, the Crown submits that the Sinixt group in Washington State, known as the Lakes Tribe, gradually and voluntarily drifted away from their traditional practice of hunting in the British Columbia portion of Sinixt territory such that the claim of the modern group lacks any continuity with the practices of the pre-contact group. The Crown submits it follows from absence of a Sinixt group in British Columbia that no aboriginal collective exists in Canada capable of exercising the aboriginal right Mr. DeSautel now asserts.

[7] In the further alternative the Crown submits any Sinixt aboriginal right that may have come into existence in British Columbia did not survive the coming into force of an 1896 enactment of the British Columbia legislature, or s. 35(1) of the *Constitution Act*, 1982.

II. ISSUES

[8] The issues in this case are whether a Sinixt aboriginal right to hunt survived the assertion of sovereignty in 1846 and, if so, whether it survived what the Crown alleges to be a further assertion of sovereignty by the passing of an enactment of the British Columbia legislature in 1896 prohibiting the hunting on non-resident Indians in British

Columbia. If so, it must be determined whether the right failed to survive the coming into force of s. 35(1) of the *Constitution Act, 1982*.

[9] Although the Crown's sovereign incompatibility argument is largely a question of law, it is one I find that must still be considered in context. The context in this case is best understood by first deciding the question whether Mr. DeSautel was exercising an aboriginal right when he shot the cow-elk near Castlegar in October, 2010. Moreover, given the facts in this case, it would be unnecessary to decide whether the claimed right survived s. 35(1) if it was found that by 1982 the Sinixt right to hunt in British Columbia, had been "washed away by the tide of history" as Brennan J. put it in *Mabo*.

[10] Assuming the right to hunt is proven to exist, it must then be determined whether that right is infringed by the provisions of the *Wildlife Act* under which Mr. DeSautel is charged. Finally, if an infringement is made out, the court must go on to consider whether that infringement is justified. If it is not, the question of the appropriate remedy pursuant to s. 24(1) arises.

III. A BRIEF HISTORY OF THE SINIXT

[11] Any inquiry into an aboriginal rights claim requires the court to consider the traditions and practices of the pre-contact society. As such, I have begun these reasons with a brief overview of what is known of the Sinixt in what the experts refer to as "aboriginal time". I will also touch on those aspects of the Sinixt experience post-contact that are uncontroversial.

[12] Many lay witnesses were called in this trial who spoke of the Sinixt/Lakes Tribe hunting traditions and practices. Still, for reasons I will touch on later, the pre-contact

history of the Sinixt people was entered into evidence in this trial largely through the reports and testimony of experts. Mr. DeSautel called two experts, Dr. Andrea Laforet and Richard Hart. Dr. Laforet's evidence and opinion dealt exclusively with the question of present day membership in the Sinixt or Lakes Tribe. Mr. Hart's report addresses the history of the Sinixt to the present day and what he opines is their integral practice of hunting in British Columbia from aboriginal time to the present.

[13] Dr. Dorothy Kennedy was called by the Crown to give an opinion on the pre and post-contact history of the Sinixt and the Lakes Tribe (or Sinixt Regional Group as she also calls it). In reply to the report of Dr. Laforet, Dr. Kennedy provided a further opinion regarding the criteria for membership in the Sinixt Regional Group or present day Lakes Tribe. In reply to the report of Mr. Hart, Dr. Kennedy gave an opinion regarding the Sinixt's use of their traditional lands in British Columbia from the post-contact era to the present.

[14] The experts do not disagree, I find, on the pre-contact record. Rather, the rift in the opinion evidence in this case is concerned largely with the content and interpretation of the post-contact record. In the case of Dr. Laforet and Dr. Kennedy there is disagreement as to the interpretation of information obtained by the famed anthropologist, Dr. Verne Ray, regarding membership rules of the Sinixt in aboriginal time. These issues will be addressed later in these reasons but first it is necessary to turn to what is known of the Sinixt in the time before contact.

The Sinixt in the time before contact

[15] In a paper entitled "Archaeology and Ethnohistory in the Arrow Lakes, Southeastern British Columbia", scholar Christopher Turnbull wrote that the recent

history of the Lakes can be divided into three periods: before 1811; 1811 to 1870; and after 1870. All agree in this case that the year 1811 is the time of contact for the purpose of analysing Mr. DeSautel' s aboriginal rights claim as that was the year the explorer David Thompson passed through part of Lakes territory on his way to the Pacific Ocean. Thompson is said to be the first European to have entered this area.

[16] Still, as Mr. Turnbull and Dr. Kennedy both note, contact with Europeans occurred at least indirectly years earlier in the 1780s when smallpox pandemics swept through the area reducing the population though to what extent cannot be known.

[17] Mr. Turnbull wrote that while the actual effects of the epidemic were unknown, "the smallpox pandemics may well have disrupted Lakes society through the decimation of their population."

[18] Both Turnbull and Dr. Kennedy wrestled with the potential effects of the smallpox pandemics in ascertaining the population size of the Sinixt in the time just before contact. In a report entitled "Lakes Indian Ethnography and History", entered as Exhibit 11 in this trial (the "1985 report"), Dr. Kennedy and her co-author, Mr. Randy Bouchard, write that the population estimates of the Sinixt *circa* 1780 varied widely from 2000 by James Teit to 138 by John Work. Dr. Kennedy's 1985 report is similar to Turnbull's in this regard as both write that Mooney's figure of 500 for the aboriginal population seem reasonable though Turnbull adds "especially considering that the smallpox pandemics had reduced the population."

[19] While it is not clear is whether Mr. Turnbull means the population would have been much greater, the fact is, and I find, that the pre-contact population figures of the

Sinixt would not have been large. By all accounts this was a smaller group whose territory was circumscribed on both sides by mountains.

[20] In a report prepared for this trial and entered as Exhibit 63 (the "2015 report"), Dr. Kennedy describes at length the geographic area utilized by the Sinixt in pre-contact time. It is clear that the many explorers, fur traders, mappers, merchants, clergyman, anthropologists, ethnographers and others who visited the area from 1811 almost to the present day do not entirely agree on the boundaries of Sinixt traditional territory. Still the broad outlines are not in dispute in this trial. At page 12 of her 2015 report, Dr. Kennedy describes the Sinixt as the group that "occupied the Arrow Lakes and utilized the area on the Columbia River from approximately the Big Bend, north of Revelstoke, south to Kettle Falls, Washington.

[21] At Appendix 1 of these reasons is a copy of a map found at page 73 of Dr. Kennedy's 2015 report outlining what is in her opinion the Lakes Indian Territory *circa* 1800 and *circa* 1880. At Appendix 2, I have included two further maps. These are Dr. Kennedy's maps of Sinixt traditional territory in the area near Castlegar where Mr. DeSautel hunted the cow-elk and Sinixt traditional territory south of the border.

[22] The Sinixt are referred to interchangeably in the historical record as the Sinixt, or the Lakes or the Arrow Lakes people. Various sources, including Dr. Kennedy, write that the name of the Sinixt appears historically as sn'ayckstx, Senijestee, Snaichkst, Sen-i-jex-tee, Senijextee, Sngaystskstx, or snʔayckstx all of which roughly translate as the "Dolly Varden" people (Dolly Varden being a fish for which the Arrow Lakes region was noted). Shelly Boyd, a Lakes member and Nsyilxcen speaker, testified that the word Sinixt is pronounced "Sinychkt". Ms. Boyd testified that the "sin" is like a place.

"ych" is a spotted fish, and "kt" is people. This fits within Dr. Kennedy's translation of the word sngaystskstx as described in both her 1985 and 2015 reports.

[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. 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.

[24] Prior to contact in 1811 and for some time after, the Sinixt engaged in a seasonal round in their territory hunting, fishing and gathering. They are described by Dr. Kennedy in both her 1985 and 2015 reports as a mobile people that travelled largely by canoe. The Sinixt canoe is striking in design. It is described in the ethnographic record by Dr. Ray (an acknowledged expert on the Lakes and a source used extensively by both Dr. Kennedy and Richard Hart), in his report entitled "Cultural Relations in the Plateau of Northwestern America". There Ray writes that one of the highly distinctive types of canoes found in the Plateau area is the Sinixt's sturgeon-nose canoe made of white pine.

[25] The Sinixt's seasonal round included participation in the Chinook salmon fishery at Kettle Falls located in what is now Washington State. The historic and ethnographic reports all agree that the Sinixt territory extended south at least as far as an Island just above Kettle Falls. Mr. Hart testified that that area is now largely submerged under the Grand Coulee Dam. In aboriginal time there is no doubt that Kettle Falls was a major fishery for the Sinixt and the area an important part of their traditional territory.

[26] The ethnographic record describes the ceremonies surrounding the salmon fishery in aboriginal time at Kettle Falls, including the role of the Salmon Chief. Mr. DeSautel and Mr. Armstrong each describe the role of the Salmon Chief in their testimony. Although they differ slightly in their interpretation of the way in which the Salmon Chief summoned the fish, I am left in no doubt that this tradition remains intact and in the minds of members of the Lakes Tribe.

[27] In her 1985 report, Dr. Kennedy cites James Teit as recording that in aboriginal time the Sinixt also fished in the West Kootenay in the Arrow Lakes, the Slocan region and Trout Lake.

[28] While it is clear the Sinixt had a robust fishery, Dr. Kennedy also wrote at page 61 of her 1985 report that "meat was the most important component of the *sngaystskstx* diet." This comment is echoed by Richard Hart who testified that despite having worked with a number of Tribes on the Plateau and elsewhere, he had not worked with a Tribe for whom hunting was as central as to the Sinixt both in the past and in the present day.

[29] In an article entitled "Aboriginal Economy and Polity of the Lakes (Sentjextee) Indians," Dr. Ray described in some detail the hunting techniques of the Sinixt in their traditional territory. It is clear that the Sinixt utilized the geography of the area to their advantage. As an example, Dr. Ray described deer being herded over cliff edges or into lakes and rivers at regular deer crossings. Bears, which were prized game, were trapped in deadfalls or driven out of their hibernating holes by poles or hooks. The Sinixt used many means of dispatching their game including hunting with bows and arrows. One witness testified to understanding the name Arrow Lakes may have come

from one lake's proximity to a bluff where the Sinixt clearly practiced their archery skills over the millennia.

[30] Dr. Ray also wrote that group hunting activities were closely regulated or supervised by a hunting leader *albeit* one selected by the group. That person would choose the hunting area, and allocate portions of the area to individual hunters. The hunt leader would have been chosen because of his special skill in finding and dispatching game. Women accompanied the hunters if they were to be absent for more than two or three days. While Dr. Ray was silent on their role, it is clear from the various taboos described that women were present at the longer hunts to provide whatever labour was needed. Various ceremonies attached to the hunt including bathing and sweats and, as noted, certain taboos were observed.

[31] In this same article, Dr. Ray wrote that in general, deer were the most important game animal for the Sinixt. Of secondary importance, he wrote, the Sinixt extensively utilized caribou, elk, moose and the brown bear. Later in the same article, Dr. Ray also wrote that elk were quite scarce but sometimes wandered into Sinixt territory.

[32] In testimony before the Indian Claims Commission in October, 1954, Dr. Ray told Commissioners that the "Lakes area was one in which there was practically no part of the territory that was not deer and elk hunting territory." Overall, Dr. Ray's various descriptions of Sinixt hunting in aboriginal times indicate the Sinixt hunted extensively throughout their traditional territory for deer, caribou, elk, moose, bear, mountain goat, mountain sheep, rabbits, ground hog, beaver, geese, ducks and, when possible, swans. The Sinixt were clearly and obviously prolific hunters in aboriginal times.

Sinixt in the post-contact era

[33] Explorer David Thompson is reported to have met a number of people gathered at Kettle Falls in June 1811 as he ascended the Columbia River. Some of the people would have been sxweyi7lhp (now Colville) and some could well have been Sinixt attending Kettle Falls for the salmon run. Dr. Kennedy surmised that Thompson may have met a Sinixt family at their village near Revelstoke in October, 1811. Still Thompson adds little to the Sinixt historical record. While his presence connotes a watershed moment in Sinixt legal history because it is now "the time of contact", meaningful contact is said to have occurred some years later culminating in the establishment of a Hudson's Bay Fort and trading post in Colville in 1825.

[34] There seems little doubt that the Fort held an attraction for many of the Plateau people and the Sinixt were no exception. Dr. Kennedy writes in her 2015 report that Hudson's Bay employees first reported an incident in 1930 of the Sinixt wintering near the Kettle Falls fishery and not returning to their northern territory.

[35] Mary Marchand, a member of the Lakes Tribe of the CCT, gave an interview in 1986 to Joanne Signor (one of several 1986 interviews which I will touch on later in these reasons) consisting of some of her recollections of Sinixt life in the post-contact era. The interview was recorded and entered into evidence in its full form at trial as Exhibit 20. Mrs. Marchand's comments are not easy to understand. The narrative is not linear and the interviewer does little to assist in its organization. It is also not clear that this is the source of Dr. Kennedy's comment at page 145 of her 2015 report. Still, Mrs. Marchand relates a story of her grandparents deciding to live at the Fort after seeing how the soldiers planted a garden and had lots of potatoes and corn. According

to Mrs. Marchand, later in life her grandmother preferred to tend the garden near her home to travelling one assumes around the traditional territory.

[36] Mary Marchand gives a vivid description of Sinixt hunting and gathering in the post-contact era sometime after 1825. Pointing to what must have been a map of the area before her, Mrs. Marchand spoke of the Sinixt boundary from the Island at Kettle Falls up to the Arrowhead Lake. She is then recorded as saying:

> …And our boundary was at the end of that lake and that's where these Indians here, in the summer they go up there to hunt and pick berries, course there was everything up there, everything plenty. And that's where they get fish, deer all kinds of meat, like they had sheep and elk, moose all kinds of bear, grizzlie (sic) any kind they want and plenty of it.

[37] The precise time being described by Mrs. Marchand is difficult to ascertain but Dr. Kennedy puts in *circa* 1830. In any event, there is no dispute in the evidence that from the time of contact to around 1870, even despite a gradual lingering in the southern portion of their territory by many of the Sinixt, the Sinixt continued with their seasonal round in the northern portion of their territory.

[38] The extent to which settlement in the northern portion, being above the 49th parallel after the Oregon Boundary Treaty of 1846, affected the Sinixt's ability to peaceably utilize all of their territory is controversial. What is conceded, particularly by Dr. Kennedy, is that there are numerous instances in the historical record where the Sinixt are recorded as asserting their rights in the Canadian portion of their territory well after 1846. Parenthetically, the Sinixt and the other Plateau Tribes were simultaneously asserting their rights in their territory south of the border.

[39] In 1982, Dr. Kennedy and her co-author, Mr. Randy Bouchard, published a report entitled "First Nation's Ethnography and Ethnohistory in British Columbia's Lower Kootenay/Columbia Hydropower Region" (the "Hydropower Report"). At page 56 of the Hydropower Report, the authors state that the gradual movement of the Lakes people away from their traditional territories toward the south is recorded in the ethno historic literature. To be fair, I think it more accurate and I expect Dr. Kennedy would agree, to say that the historic record has captured if anything a preference by the Sinixt for remaining for longer periods of time in their southern territory than was the case in aboriginal times. This is evident in my view by Dr. Kennedy's statement on the same page of this report that "…despite the migration, the Lakes did not willingly relinquish what they considered to be their traditional rights in the Arrow Lakes area."

[40] In both the Hydropower Report and her 2015 report, Dr. Kennedy describes various instances in the post-contact era where the Sinixt are observed to be spending time both above and below the 49th parallel. Dr. Kennedy cited the following passage from a report written in 1861 by Lt. Col. J.S. Hawkins of the Northwest Boundary Commission at p. 57 of the Hydropower Report:

> "…the valley of the Columbia north of the Boundary is represented to be very sterile; and it is certain that it has no inhabitants north of the "Lake Indians" who seem to live as much south as north of the 49th parallel, and who share in the proceeds of the Salmon fishery at the Kettle falls near Colville, so that they must be considered as much American as British subjects. They do not appear to be in the habit of going far above the parallel, excepting for the purposes of hunting."

[41] There are, as Dr. Kennedy writes, numerous instances in the historical record where officials on both sides of the boundary express confusion, consternation or just

notice of the fact the Sinixt seemed to pay little heed to the border and continued to travel in their northern territory as if it had no application to them.

[42] Still, the Lakes, and their Chief at this period, Chief Gregoire, understood enough to know it was to their advantage to treat with the U.S. government. Unfortunately, by the 1870s there appeared to be little appetite on the part of the federal government of the United States to treat with the Lakes or any of the other Tribes in Washington State. Instead, in April 1872 by U.S. Executive Order, the U.S. federal government set aside reserve lands for the Tribes that now make up the CCT. That Order was quickly amended by a second Executive Order dated July 2, 1872 removing reserve lands on the east side of the Columbia River. The Sinixt, or Lakes people as they had then become known, were included in this reserve (the Colville Indian Reservation) though it was many years before the bulk of Lakes people living in both Canada and on the east side of the Columbia River took up residence there.

[43] The reason for the move by the majority of the Lakes people to the Colville reserve *circa* 1880 and 1890 is controversial. For the purpose of this initial summary, it is important to note that by the end of the 19th century only a few members of the Lakes Tribe remained living in the Sinixt's traditional territory north of the 49th parallel. Still, it is clear in the historic record that even then Lakes members continued to come north to hunt in their traditional territory so much so that in 1896 the Government of British Columbia passed "*An Act to Amend the Game Protection Act, 1895"*, 1896 SBC c. 22 ("the 1896 *Act*"). Section 6 of that *Act* provides as follows:

> It shall be unlawful for Indians not resident of this Province to kill game at any time of the year.

[44] By 1902, census records indicate that only 21 Sinixt remained living in their traditional territory in Canada. A reserve was set aside for what the federal government called “the Arrow Lakes Band”, comprised of some Sinixt members as well as some members of the Ktunaxa and Secwepemc First Nations at Oatscott along the west side of the Upper Arrow Lake.

[45] Other Sinixt members remaining in Canada at this time included Baptiste Christian and his family. Their story as passed down through the years is acknowledged by all as tragic. Mr. Christian resisted removal to the Oatscott Reserve on the grounds that it was not his home. Rather, Mr. Christian protested that his home at the mouth of the Kootenay River had been occupied by his people from time immemorial. In 1914, Mr. Christian was able to state he had been born into the Tribe living at the mouth of the Kootenay River; that his parents and grandparents had been born there and his ancestors from as far back as he could trace. Subsequent farming on this disputed land resulted in the turning up of many graves of the people who had lived in the area.

[46] Despite his persistence, and the able assistance of James Teit and others, no land was ever reserved for Baptiste Christian at or near the place where his ancestors had for so long been present on the land. At one point Mr. Christian was told there was no more land left to give. Ultimately, as Dr. Kennedy writes, Mr. Christian and his family were removed to the Colville reserve where they were granted an allotment. Baptiste Christian died in Colville in 1916.

[47] Dr. Kennedy writes in her 2015 report of the swift decline of the Arrow Lake Band population in the first part of the 20th century. In 1903, the Band recorded a population of 23; by 1929, it numbered 3.

[48] By 1930, only Annie Klome Joseph remained on the rolls of the Arrow Lakes Band. Around that time, Ms. Joseph was recorded as living in Enderby and then in Vernon. The record indicates that almost no one lived on the reserve full time after 1916 but did occupy it seasonally. When Mrs. Joseph died in 1956, the federal government declared the Band extinct and the reserve lands reverted to the provincial Crown pursuant to the 1912 McKenna-McBride Agreement. At that time, as Dr. Kennedy writes at page 158 of the 1985 report, records show the Lakes Tribe in Colville had 257 enrolled members.

[49] The record of Lakes members of the CCT utilizing their traditional territory north of the 49th parallel also thins out considerably by the 1930's, the opinion of Richard Hart notwithstanding. I will address this issue and its legal implications shortly, but it is I find a fact that after the 1930s the Lakes people do not appear to have really travelled to or hunted in the northern part of their traditional territory. Still, Dr. Kennedy reports that in November, 1972, Charlie Quintasket, "a Lakes Indian from the Colville reservation" walked into her office and told her he was interested in finding out why the Lakes people had no Indian Reserves in Canada.

[50] Whether or not the Sinixt, or Lakes Tribe as they are now known, utilized their traditional territory north of the 49th parallel after the 1930s, I am left with no doubt that the land was not forgotten, that the traditions were not forgotten and that the connection to the land is ever present in the minds of the members of the Lakes Tribe of the CCT.

IV. PROOF OF ABORIGINAL RIGHT

[51] With this background in mind, I turn to address the first issue in case which is whether Mr. DeSautel was exercising an aboriginal right to hunt on October 1, 2010.

[52] Mr. DeSautel bears the onus of proving the existence of an aboriginal right to hunt in British Columbia and he must also demonstrate a *prima facie* infringement of the right: *R. v. Sparrow* [1990] 1 S.C.R. 1075. The test for proof of an aboriginal right is set out at para 46 of *R. v. Van der Peet*, [1996] 2 S.C.R. 507. To be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

[53] This case is not just about the right to hunt, but rather the right to hunt in that portion of Sinixt traditional territory that lies in British Columbia in the Kootenay region. As such, the defendant must demonstrate that the exercise of this right in this specific area is integral to the distinctive culture of the Sinixt: *R. v. Cote*, [1996] 3 S.C.R. 129; *Mitchell v. Canada*, [2001] 1 S.C.R. 911.

[54] Still, before turning to these issues, it is necessary to deal with the Crown's much more fundamental objection to Mr. DeSautel's claim of an aboriginal right to hunt in British Columbia and that is the Crown's assertion that no aboriginal collective capable of exercising such a right exists in British Columbia.

The Modern Day Collective

[55] It has long been established that an aboriginal right, as that term is known in the common law, is a collective right. In *R. v. Powley*, [2003] 2 S.C.R. 207, para 24, the court put it this way:

> Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community.

[56] An aboriginal rights claim then also requires proof of an aboriginal rights-bearing community. The Crown submits that this is fatal to Mr. DeSautel's defence as it argues that Mr. DeSautel is "not a member of a collective capable of holding the aboriginal right contended for." In turn, Mr. DeSautel put it this way in his closing submission: "given that this claim raises an issue about the existence of a modern day rights-bearing community, it is appropriate … to use the modified framework for Metis rights set out in *R. v. Powley*…"

[57] One aspect of the *Powley* test, summarized at para 49 of *R. v. Hirsekorn*, 2013 ABCA 242, requires the identification of the contemporary rights bearing community. That is the issue before me though I do not agree, for the reasons that I will state, that there is an issue in this case about the *existence* of a modern day rights-bearing community. Rather I find that the question is whether the modern day rights-bearing community that I find does exist has made out the case for an aboriginal right to hunt in the Sinixt's traditional territory in Canada.

[58] Viewing this case, however, as raising the issue of the very existence of a present day rights-bearing community, Mr. DeSautel produced the expert report of Dr. Andrea Laforet, entered in this trial as Exhibit 31. Dr. Laforet's report is a masterful review of the Oblate and Jesuit sacramental records made between 1838 and 1841 and 1845 to the early 1890s. These include records of baptisms, marriages and deaths. Using these records, many of which were written in French or Latin, and cross

referencing them with U.S. and Canadian census data, Dr. Laforet was able to trace the modern day descendants of 21 Sinixt families living in British Columbia prior to 1830.

[59] Dr. Laforet concluded that most of the descendants of these 21 families live in the United States, primarily in Washington State. Others live in British Columbia, primarily but not exclusively in the Okanagan First Nation communities.

[60] Dr. Laforet traced Mr. DeSautel's genealogy back to two families: Ntsoxtiken and his wife, Agagupits, each of whom were baptized by the Jesuits as Henricus and Henrica in 1849; and the Silimuhlxeltsin/Christian family through Josephine, the younger daughter of Henricus and Henrica.

[61] Dr. Laforet made a similar finding connecting Richard Armstrong, among others, to one or more of these Sinixt families living in British Columbia in the early 19th century.

[62] The effect of this evidence, as I understand its import, is that there are people living today in both Canada and the United States that are ancestrally connected to the Sinixt living in British Columbia likely at the time of contact. In the case of Richard Armstrong, using just one example, the defendant goes further and notes that Mr. Armstrong, a member of the Penticton Indian Band and the Okanagan Nation, also identifies as a Sinixt. Moreover, it is clear that Mr. Armstrong is accepted as a member of the Sinixt or the Lakes Tribe, though there is no evidence Mr. Armstrong has been issued a membership card for the Lakes Tribe by the CCT.

[63] Even accepting that Mr. Armstrong is ancestrally related to the Sinixt living above the 49th parallel in the mid-19th century, that he identifies as a Sinixt and is accepted as a Sinixt by the Lakes Tribe, I do not see how this assists Mr. DeSautel's defence.

[64] For its part, the Crown submits this evidence is of absolutely no moment as Dr. Kennedy has given the opinion that even a person ancestrally related to the Sinixt ceases being a Sinixt citizen if they join another Band. For reasons which will become obvious, I find that I do not need to resolve the debate in this case between Dr. Kennedy and Dr. Laforet on how to define ethnicity. However, I will note at this juncture that Dr. Kennedy did resile in cross-examination from her written opinion that Sinixt citizenship was contingent upon residency in Sinixt territory. I will discuss the significance of that point shortly.

[65] First though, during closing submissions as the matter of Sinixt membership was being discussed, Mr. DeSautel submitted that this court need not decide whether Mr. Armstrong is a member of the Sinixt; rather, he urged the court not to find that Mr. Armstrong was not a member. What I take from this submission, and what I find, is that it is not necessary to decide the question of Mr. Armstrong's membership in the Sinixt or Lakes Tribe because this case is not about Mr. Armstrong hunting in Sinixt traditional territory and claiming an aboriginal right to do so. This is also not a case where Mr. DeSautel has hunted in Sinixt traditional territory in Canada with the permission of the Sinixt group here.

[66] In this case, I am asked to decide whether Mr. DeSautel, a non-resident U.S. citizen acting on the instructions of the CCT, was exercising an aboriginal right to hunt while here in Canada in what is without doubt Sinixt traditional territory.

[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.

[69] Though it effectively concedes this point, the Crown maintains that the Lakes are not capable of holding aboriginal rights in Canada. More specifically, the Crown submits variously that no Sinixt rights-bearing community exists in Canada, or the Sinixt (Lakes Tribe) is not an entity capable of holding an aboriginal right in Canada.

[70] The Crown posits two reasons for this: first, it submits that there is a lack of continuity between the Sinixt's hunting practices and the hunting practices of the Lakes today; and, secondly, that the Sinixt's practice of a seasonal round did not survive the Crown's assertion of sovereignty either in 1846, 1896 or 1982. Either argument, if accepted, would be fatal to Mr. DeSautel's defence. Still I intend to deal with the question of continuity first as it provides in my view important context for all of the Crown's submissions.

[71] Before turning to continuity I must address an opinion given by Dr. Kennedy, *albeit* in the heat of cross-examination, regarding the implications of Sinixt residency. In response to Dr. Laforet's opinion that members of the Sinixt collective or community

lived in British Columbia, Dr. Kennedy provided a written opinion that pre-contact Sinixt membership depended on residency in the territory, having an allegiance to the Sinixt leadership and an investment of labour. Under cross-examination, Dr. Kennedy entirely resiled from this opinion in my view.

[72] As to who is not a member, or who ceases to be a member of the Sinixt, Dr. Kennedy gave the opinion that citizenship in the Sinixt ceases once a person joins another tribe. This opinion, which Dr. Kennedy did not resile from, was based on work done by Dr. Ray and Dr. Kennedy's own views as to how resources on the Plateau were managed. In her view, people rather than resources were managed so that if a person left and joined another group, their access to resources would be managed by that group, presumably in that group's area. They would not, in Dr. Kennedy's opinion, take the rights of the previous group with them as that would be inconsistent with the resource management structure.

[73] As I have noted, near the end of her cross-examination Dr. Kennedy gave the opinion that if an entire group moved from an area they would lose their rights in the old area and would exercise their rights and privileges in the new area.

[74] With the greatest of respect, I find no support for that opinion in any of the evidence entered in this trial. Nowhere was there an example in the evidence of a Plateau group moving *en masse* to a new area, nor are there any observations of Dr. Ray or anyone else to support this theory. Moreover, this opinion does not fit with Dr. Kennedy's own views of Plateau resource management. What new rights or privileges would the group have? What about the rights and privileges of an existing group? The

evidence speaks at most of individuals moving from regional group to regional group; it says nothing about entire groups most likely because this did not happen.

[75] If Dr. Kennedy's point is that the Lakes lost their right to hunt in their traditional territory simply because they remained in the southern portion of their territory before moving onto the Colville reserve and for no other reason, I do not accept it.

Continuity of the Right

[76] For the reasons I have given, I find that the appropriate test for determining Mr. DeSautel's claim to an aboriginal right is not the test laid out in *R. v. Powley* for membership in a group, but rather the test for proof of an aboriginal right set out in *R. v. Van der Peet*. In this section of my reasons I will address the Crown's submission that Mr. DeSautel's claim must fail due to a lack of continuity between the practice of the present day group and the pre-contact practice of the Sinixt. I will start, as the court instructs in *Van der Peet*, by identifying the right being claimed, considering its significance in the pre-contact world, and, finally, by considering the question of continuity into the present day.

[77] The right being asserted is, I find, an aboriginal right to hunt for food, social and ceremonial purposes in Sinixt traditional territory in Canada. The act Mr. DeSautel claims was done pursuant to an aboriginal right was the act of hunting in his ancestors traditional territory; the *Wildlife Act* made that act an offence. The tradition or custom being relied on was the Sinixt's long tradition and practice of hunting for game in the northern part of their territory.

[78] *Van der Peet* provides that once the right is defined, the court must be satisfied that the practice, custom or tradition was a central and significant part of the culture of the pre-contact society. The SCC put it as follows at paras 55 and 56 of *Van der Peet*:

> **55** To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.
>
> **56** This aspect of the integral to a distinctive culture test arises from fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question…

[79] In making this determination, a court must take into account the perspective of the aboriginal people claiming the right yet at the same time "do so in terms that are cognizable to the non-aboriginal legal system." Additionally, the time period that has to be considered in determining whether the right claimed is integral is the pre-contact period and that is why it has been important in this case to ascertain the traditions, customs and practices of the Sinixt prior to 1811.

[80] I have discussed the pre-contact period in some detail, particularly in regard to the Sinixt hunting practices as well as some of their customs and traditions associated

with hunting. There is no dispute in the evidence or among the experts who testified in this trial that hunting was a central and significant part of the Sinixt culture in the pre-contact period. Richard Hart gave the following account in his testimony in direct:

> A I've worked with a lot of tribes on the Plateau and elsewhere, and I have never worked with a tribe that -- for whom hunting was as central as hunting was to this tribe. They ate game every meal. And many people eat game every meal today. Hunting was central. I mean, every anthropologist that worked with them, including Dr. Kennedy -- or that studied them, had the same conclusion that hunting was really central to their culture. They have a profound connection to their territory. The -- Ray talks a little bit -- I have a couple of the maps that are included in the Ray document. Relate to what we would -- what anthropologists call vision quest. So people at a certain age will go into the mountains usually to a specific peak or a specific place and fast and seek a connection with ancestors to find out certain things about themselves and their relationship to animals and the natural world. And the Sinixt people are very, I would say, profoundly connected to their Aboriginal territory. And hunting is one aspect of that. There is a sacred social relationship that accompanies virtually all of their traditional lives. They -- their songs, their stories, relate to their territory. And the question here is whether hunting for game -- hunting game for food, social and ceremonial purposes was integral to the community at the time

of contact.

Q Yes.

A And that -- the answer is a very strong yes.
There's no conflicting evidence, I don't think.

(Richard Hart, September 19, p. 39, ll. 10 - 41)

[81] Mr. Hart also discussed the Sinixt's seasonal round in which they moved throughout their territory during the entire year hunting, fishing and gathering. He gave the opinion that the Sinixt not only hunted in the Vallican and Castlegar area, but that this was a central part of Sinixt territory. Mr. Hart also concluded, based on his review of the various reports and studies on the Sinixt, that while hunting was important to the Sinixt, elk in particular was very important to the Sinixt at the time of first contact.

[82] Dr. Kennedy, who has long written of the Sinixt hunting practices in aboriginal times, agreed during her cross-examination that hunting was important to the Sinixt in aboriginal times. When pressed, Dr. Kennedy also agreed that hunting was important, even integral, to the members of the Lakes Tribe of the CCT.

Q But we are -- I want to keep talking about hunting for the time being and make sure I first have your evidence on hunting. As I said, Mr. Thompson didn't take you through this section. So I think what we've established so far, it's your opinion that, and I'll try to be mindful of the discussion we've just had, for Lakes people during Aboriginal times hunting was important to their culture; correct?

A That's correct.

Q For Lakes people, and I appreciate we are going to have a discussion about who Lakes people are,

today hunting remains important to them; correct?

A Yes.

Q And you want to qualify that by saying the members of the Lakes Tribe of the Colville Confederated Tribes? Hunting remains important to them at least?

A I think as a group, if we are talking about the group, then my answer is -- the resident group on the Colville Reservation, the answer is yes, hunting remains important.

Q Quite important, you would say?

A Integral.

Q So then I understand your evidence to be essentially that it's just that those Lakes people, and I'll use that term generically for now, are just not hunting anymore in the Arrow Lakes; is that right?

A That's correct.

Q But you are not suggesting that was a voluntary choice, that it's something they gave up voluntarily, are you? You don't go that far?

A I pretty well do.

(Dr. Kennedy - Day 11, page 29, ll. 9 -42)

[83] The only issue separating these two experts on the question of Sinixt hunting in aboriginal time is the significance of the elk hunt. Were elk a particularly important game animal for the Sinixt just before contact as Mr. Hart opines or, as Dr. Kennedy writes, an animal that occasionally wandered into Sinixt territory? I find it unnecessary to resolve this debate. Clearly, to whatever degree, the Sinixt hunted elk in their territory in aboriginal time. Additionally, I find there is nothing to the submission of the

Crown that the Sinixt right to hunt is somehow site specific such that Mr. DeSautel has not proven he was exercising a right recognizable as an aboriginal right when he shot the cow-elk near Castlegar: *R. v. Adams*, [1996] 3 S.C.R. 101, at para 30. The Sinixt hunted over the whole of their territory; including the area near Castlegar where Mr. DeSautel hunted in October, 2010.

Continuity

[84] There is clear and cogent proof in this trial that the practice of hunting in what is now British Columbia was a central and significant part of the Sinixt's distinctive culture in pre-contact times. When David Thompson arrived in Sinixt territory in 1811 he found a people engaged in a seasonal round of hunting, fishing and gathering throughout the whole of their territory.

[85] Still, I find on the evidence that for much of the 20th century after most of its members moved onto the Colville reserve, the Sinixt or the Lakes Tribe of the CCT rarely hunted north of the 49th parallel. As the passage from Dr. Kennedy's testimony reproduced above evidences, her view is that the move was voluntary. Dr. Kennedy opines that the Sinixt preferred to live and farm and even hunt in Washington state, if not in, at least near the southern portion of their traditional territory. Mr. Hart gives the opinion that the Sinixt were forced by various social and legal means to stay in Washington State but even so that hunting above the 49th parallel was and is integral to the Lakes culture.

[86] Members of the Lakes Tribe of the CCT who testified stated that they have always hunted; that they have maintained and not forgotten many of their Sinixt ancestors' hunting traditions; that they continue to try to foster those conditions even

against the headwinds of the modern world; and that they want to hunt in Sinixt traditional territory in British Columbia.

[87] I am asked to find that there has either been no break in the Lakes use of Sinixt traditional territory in British Columbia or, if there has, that it has been through no fault of the Lakes who say they have never given up their claim over their traditional territory despite a brief absence relative to the many thousands of years their ancestors lived in this land. On the other hand, the Crown argues the Sinixt's removal to Washington State is fatal, if not by reason of the assertion of sovereignty in 1846, then by voluntarily ceasing to observe the practice of hunting in their traditional territory in British Columbia after 1930. This, the Crown says, is sufficient to break the chain of continuity necessary for proof of an aboriginal right under the *Van der Peet* test.

[88] The fact that the Lakes have continued the tradition of hunting even in Washington State coupled with the testimony of the members of the Lakes Tribe, including Richard DeSautel, satisfies me that there has been no breach of continuity such that the Sinixt's aboriginal rights have ceased to exist in Canada. Still, I will first address the conflict in the opinion evidence between Dr. Kennedy and Mr. Hart regarding the reasons for the Sinixt residency in Washington State and their lack of use of their traditional territory north of the 49th parallel which began sometime in the early 20th century.

Sinixt Residency in Washington State

[89] While the reasons for Sinixt residency in Washington State, and more particularly, now on the Colville Indian Reservation are a matter of controversy among

the experts, there is little debate regarding the chronology of the gradual shift of the bulk of the Sinixt to their southern territory and then onto the Colville Reserve.

[90] Dr. Kennedy has recorded remarks made in the Hudson's Bay company journals from Fort Colville of the Sinixt varying from their traditional seasonal round pattern by remaining at the Fort over the winter rather than going north to hunt. These observations begin in the winter of 1830 and continue so that by 1852, one Hudson Bay official recommended constructing a Fort somewhere on the Arrow Lakes "with a view to accustoming the Indians to trade there".

[91] From 1811 to *circa* 1850 there is little in the historical record entered as evidence in this trial to support much in the way of settler activity in either the southern or northern parts of Sinixt territory. Still, it would be wrong to suppose the Sinixt's traditional way of life was not affected or that they were unaware of the forces of history broiling up around them. For one thing, their way of life was altered inexorably with the signing of the Oregon Boundary Treaty in 1846. The record seems to indicate the Sinixt ignored the border, which in any event was not entirely surveyed, as Mr. Hart testified, until approximately 1865.

[92] Dr. Kennedy wrote that one result of the 1846 boundary treaty that had a direct and profound effect on the Lakes traditional way of life was a sharp increase in the number of immigrants into the Columbia District. I have no doubt that Dr. Kennedy is referring to the district known by this name in Washington State.

[93] In cross-examination, Mr. Hart agreed, though I find not without a little reluctance, that from the 1850s through to the 1870s there were numerous instances of tensions between settlers and miners and the Lakes in Washington State. Mr. Hart

agreed that settlers encroached on Sinixt lands in Colville; that the territorial legislature was intent on encouraging emigration to the Colville valley; that tensions with the gold miners, in particular, caused military officials to press the federal government to treat with the north-eastern Tribes, including the Lakes; that the land was being surveyed for settlement despite there being no treaties; and that ultimately the north-eastern Tribes' aboriginal title was extinguished not by treaty but by Executive Order creating, among others, the Colville Indian Reservation in 1872.

[94] Mr. Hart gave the opinion, almost entirely in reply to Dr. Kennedy's expert report, that the Sinixt's shift to their southern territory during the latter half of the 19th century was caused by an oppressive reserve policy on the part of the government of the Colony of British Columbia coupled with oppression on the part of non-Indians, particularly gold miners.

[95] Regretfully, I find the bulk of Mr. Hart's opinion on this point unpersuasive. His theory concerning the various gold rushes on the Sinixt was entirely dismantled under cross examination. I do not disagree with Mr. Hart's discussion of William Trutch's reserve policy. His opinion in this regard faithfully tracks the often cited article by Cole Harris entitled "Making Native Space: Colonialism, Resistance, and Reserves in British Columbia" and Robin Fisher's work entitled "Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890. These authors are well respected and no issue was taken with their conclusions in this trial.

[96] The difficulty is that although these two authors are writing about the reserve creation process in British Columbia, Mr. Hart could make no connection between their general critique of government policy and its impact on the Sinixt. Still, Mr. Hart gave

the opinion that by the 1870s it was apparent to the Lakes and their friends that there was to be no immediate recognition of their territory or rights by the "Province of British Columbia". As such, they moved as a group to Washington State.

[97] By the creation of the Colville Reserve in 1872, a number of members of the Sinixt were already living for the most part in Washington State. If the reason for this had to do with reserve policy north of the 49th parallel, it would have been the reserve policy of the Colony of British Columbia. But how would the Sinixt, in what Mr. Hart agrees was their remote territory, have arrived at such an understanding of the reserve policy of this Colony? When asked this on cross-examination, he testified there was considerable evidence that the priests were communicating about government policy to all of the Tribes on the Plateau. That in turn begs the question as to what, if anything, the priests in Washington State knew of colonial reserve policy in British Columbia at the time.

[98] With respect, this theory holds no water. At best, it is pure speculation. I cannot find, as a fact, that the Sinixt relocated to Washington State because of a colonial reserve policy that may or may not have been communicated to them by Jesuit priests who may or may not have known the details of the policy described a century later by Dr. Harris and Dr. Fisher. More importantly, even if the Sinixt had the understanding of William Trutch's reserve policy as Dr. Cole and Dr. Fisher discuss in their articles, they were, I find, facing not dissimilar pressures in Washington State. As Dr. Kennedy notes, by 1855 the Lakes were hoping to treat with the U.S. federal government; by 1872, their title to their lands south of the 49th parallel was extinguished by Executive Order.

[99] By the 1870s, the Sinixt and all of the north-eastern Tribes had faced decades of pressure by settlers and miners and government officials on their lands. I accept that there were tensions on both sides of the 49th parallel. In what is now British Columbia, there were numerous documented instances of clashes between the Lakes, the settlers and the miners. One infamous incident involved the fatal shooting of a Lakes man, named in the historical record at least, as "Cultus Jim", by a white settler who was intruding on Lakes territory. In other instances, officials such as Gold Commissioner Cox had to settle matters between the Lakes and miners pushing up creeks into their traditional territory. Similar incidents between the north-eastern Tribes, including the Lakes, occurred in the U.S.

[100] Some of the Lakes people today recall this period as a time when the Sinixt were forced to relocate to the U.S. to seek refuge from persecution. As an example, Richard Hart quotes Ramona Lasarte, a member of the Lakes Tribe of the CCT as stating the Sinixt were forced out of Canada. She is said to have been told by elders that that the Sinixt were forced out of Canada by gunpoint. Others have similar stories.

[101] I cannot simply disregard these memories or these views. Still, as *Van der Peet* provides, I must take into account the perspective of the Lakes members today in terms that are cognizable to the non-aboriginal legal system. I do not discount that Sinixt people felt unwelcome in what is now British Columbia in the last decades of the 19th century. There are instances, such as the one involving "Cultus Jim", where disagreements led to gun violence and in that case death. Also, as Dr. Kennedy agreed, not every instance of violence or tension between the Lakes and the settlers

would have been recorded. Still, if the Lakes were forced out of Canada by gunpoint, I am convinced a record of the event would have survived.

[102] I take these recollections by the Lakes people today of the move in the late 19th century not as literal memories but as reflections of a general view that I accept; viz., that the forces of history operating in the latter half of the 19th century left the Sinixt stranded in the southern portion of their territory but that they have not as a collective forgotten their northern territory nor given up their claim to it.

[103] I find that the bulk of Mr. Hart's reply opinion regarding the reasons for the Sinixt "move south" failed to stand up particularly under cross-examination. In general, I find Mr. Hart overstated the case for oppression in the Sinixt's northern territory and understated it in the south. Still, I do not, for the reasons I will now give, accept Dr. Kennedy's opinion that the Sinixt voluntarily moved to their territory in the south and "embraced farming and ranching enthusiastically."

[104] In her 2015 report, Dr. Kennedy wrote that she drew this conclusion from a series of interviews undertaken in 1986 and a number of affidavits from Lakes elders sworn in 2009. In cross-examination Dr. Kennedy added she also based the opinion on the annual reports of the Commissioner of Indian Affairs "who talk about a reconnaissance up the Columbia River and counting the number of farms and naming the people who owned the farms." These were, for the most part, Lakes people.

[105] As is apparent from Dr. Kennedy's testimony under cross-examination, the evidence for this opinion is, by her own admission, very weak. Apart from some mention of farming or gardening in the interview transcripts and occasional affidavit, there is nothing in any of the materials directly supporting the proposition that the Lakes

"enthusiastically" took up ranching and farming. There is virtually no evidence of ranching: the evidence of farming dissolved at one point into a debate whether a garden with a few cows could constitute a subsistence farm. Dr. Kennedy thought it could.

[106] When asked what support exactly the 1986 interviews and 2009 affidavits gave to the proposition that the Lakes voluntarily took up farming and enthusiastically embraced it, Dr. Kennedy offered the following testimony:

> A I think they provide support for the Lakes people engaged in farming and it being an enjoyable lifestyle. I don't think they say anything about having been forced to do it, or even that it was -- well, I think that Mary Marchand's talk about the gardens is voluntary, voluntary switch to gardening and how her grandmother decided to stay home and tend the garden with the children.
>
> *(Dr. Kennedy, Day 12, p. 7, ll. 36 - 43)*

[107] Dr. Kennedy ultimately testified that the 1986 interviews and the 2009 affidavits provided support for her proposition that the Lakes enthusiastically embraced farming and ranching, but added "I don't think it's the best support". Dr. Kennedy was then asked whether the reports of the Commissioner of Indian Affairs really said anything about the Lakes farming enthusiastically. In response, Dr. Kennedy testified as follows:

> A I think you have to look for that in requests for -- well, I mean, there is the one report where the farmer talks to -- oh, gosh, is it Pierre, one of the ranchers along the river, and he has got, you know, so many acres under cultivation, and the man said, I'd like to do more; however, you know,

> we need another plow. So that indicates that he would like to do more. That shows some enthusiasm. I also think that when we see an increase in production, that suggests that there's an interest in a lifestyle. Asking for agricultural equipment from the Indian agent I also believe is evidence from an interest in that lifestyle.
>
> *(Dr. Kennedy, Day 12, p. 13, ll. 16 - 29)*

[108] With respect, I find too little support in the evidence to accept on balance the opinion that the Sinixt or the Lakes voluntarily gave up exercising a seasonal round in their northern territory in exchange for the ranching/farming life in Washington State.

[109] That is not to say the Lakes did not farm; they did. The record is clear and there is no disagreement among the experts that for a time, approximately 20 years at best, the Lakes, first under Chief Arapahkin and then James Bernard, farmed in the Kelly Hill area of Washington State. Even still, settler interest in this land on the east side of the Columbia and subsequent interest in the north half of the Colville reserve ultimately saw the Lakes living on allotments within the boundaries of the Colville Indian reserve as we know it today by the end of the 19th century. Though Dr. Kennedy wrote that the Lakes obtained some advantage from their allotments, she agreed on cross-examination that the participation of the Lakes in the creation of the Colville Reserve was the best choice among a number of bad options.

[110] I agree with Dr. Kennedy that it was a constellation of factors that led to the Sinixt's gradual shift from moving continuously throughout the whole of their traditional territory with the seasons to more or less full time residence in or near their southern

traditional territory. I do not know, in light of the historical record entered into evidence in this trial, how that move could be said to be "voluntary" if what is meant by that is that in doing so the Lakes gave up their claim to their traditional territory in the north. Certainly, in the period pre-dating 1930, the evidence is clear; no matter that most of their members lived on the Colville Reserve, Lakes members continued to hunt in British Columbia. This, despite the 1896 *Act* which made it unlawful to do so.

The Lakes' perspective

[111] Inchelium on the Colville Indian Reservation in Washington State where most of the members of the Lake Tribe of the CCT reside at present is largely wooded. It is not farm land. Today, members of the Lakes Tribe of the CCT, most of whom live in Inchelium, do not farm. They do, however, hunt. I do not go as far as to say that the Lakes people are hunters, I do not have to for these purposes nor do I think it would reflect the reality of the culture. Lakes people today live in the modern world but always with, as Dr. Kennedy put it at page 5 in her 1985 report, a continued sense of their identity as Lakes Indians.

[112] This sense will not have been easy to maintain particularly given the evidence of a diminishment of the Lakes collective memory. As Dr. Kennedy also notes in her 1985 report, even when Dr. Ray was working with the Lakes, his sources were limited. While much of the pre-contact Sinixt knowledge such as exact village sites and place names is probably lost for all time, I do not doubt that present day members of the Lakes Tribe of the CCT have an overall understanding of the boundaries of their traditional territory, and the customs, practices and traditions of their ancestors.

[113] Ramona Lasarte, Richard DeSautel and Michael Marchand (whose paternal grandmother was Mary Aurapahkin-Marchand - a descendant of Chief Aurapahkin), all spoke of or about the generations of Lakes members who attended residential schools. Richard DeSautel gave the following testimony regarding his grandmother's reluctance to speak of their traditional ways:

> A It was pretty hard to get stuff out of my grandmother. She didn't volunteer information really readily. She was raised in Catholic schools. She was taken from her family at the age of 6 and wasn't allowed to return home until she was 16. At that point in time in the schools and such, they -- I think Canada had the same thing going on up here. But she wasn't allowed to speak her Native language and this here, that there. It wasn't until she got back at the age of 16 that she got back into more of a Native-type lifestyle . . .
>
> *(Richard DeSautel, Day 3, pp. 90-91, ll. 41-4)*

[114] Canadian courts have recognized and acknowledged in *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, [2012] 1 S.C.R. 433, the impacts residential schools have had on First Nations cultural practices and traditions and memories here in Canada. There is, I find, no reason to suspect the impact would be much different for those in Washington State who too were taken from their homes to live out their childhoods in residential schools and, as Ramona Lasarte testified, punished for speaking their language. It is, I find, unsurprising and through no fault of the Lakes Tribe members that some of their traditional knowledge is now lost.

[115] Still, and even bearing in mind these constraints, I find the defendant has shown that the Lakes Tribe has continued a tradition of hunting in a manner that is to a large degree faithful to the traditions of the Sinixt in the pre-contact era. I will address the issue of hunting in the Sinixt traditional territory in British Columbia but first I want to deal with the evidence of the practice and traditions of hunting in the modern day.

[116] Lakes members who testified in this trial spoke of hunting being an activity young boys are encouraged to engage in as a rite of passage. Richard DeSautel described going on his first deer hunt at the age of 10 or 11. He testified that Lakes' hunting traditions are typically passed down from father to son, though in his case his elder brother took on the role as his father had passed away. In accordance with the practice, the young Mr. DeSautel followed the older hunters as an observer until it was determined he was ready to hunt at which point he was given a .22 calibre rifle. Once Mr. DeSautel shot his first deer, a celebration of sorts occurred with the acknowledgement that Mr. DeSautel was now a hunter and known as such in the community. This is clearly important in the Lakes culture of today.

[117] Mr. Richard DeSautel went on from that first hunt to become acknowledged in the community as a ceremonial hunter; one of his tasks in this role is to provide ceremonial meat for funerals, celebrations and weddings. What I find notable about this evidence is the similarity to the practice described by Dr. Ray exercised by the Sinixt in aboriginal time of one person being singled out for his special ability to hunt. The comparison is, obviously, not exact but the thread I find that runs through this community from aboriginal time to the present day is not just the continued importance

of hunting in the culture, but of the elevation in status within the community of persons who are particularly adept at the practice.

[118] Moreover, Mr. DeSautel was delegated by authorities in the Tribe to undertake the hunt. As in times long past, Mr. DeSautel's wife joined him and without a doubt contributed her share of labour to the hunt.

[119] There is no disagreement, I find, in this trial among the experts of the importance or significance of hunting in the present day Lakes community in Washington State. It is important, it is integral, and the practice has continuity with the pre-contact practices of the Sinixt with one possible exception; that is that the Lakes today do not, as their ancestors did in aboriginal times, exercise a robust seasonal round in all of their traditional territory including those lands now in British Columbia. The Crown says this is fatal to Mr. DeSautel's aboriginal rights defence: that this absence from their traditional territory irrevocably breaks the chain of continuity.

[120] Richard Hart has given the opinion that hunting for game in British Columbia remains absolutely integral to Sinixt culture in the present day. I find that the sources relied on by Mr. Hart to reach this opinion do not support hunting activity by the Lakes in British Columbia today, or for some time. I do not say for that reason the practice is not integral as that term is intended in *Van der Peet*; rather, I prefer to deal with the question of the significance of hunting in British Columbia today in the context of the continuity analysis.

[121] It was put to Mr. Hart in cross-examination that at least one of his sources not only did not support his claim that hunting in British Columbia was integral to the Sinixt in the modern day, but that same source supported the Crown's theory that the

Sinixt/Lakes Tribes simply stopped wanting to go up to British Columbia for any reason (other than perhaps to shop). This is the 1986 interview of Mary Marchand done when Mrs. Marchand was approximately 81 years old. As Mr. Hart described it, the 1986 interviews were conducted at the behest of Father Pat Conroy, now the chaplain of the U.S. House of Representatives, out of a concern that information regarding the Lakes history might be lost. Present at the interview was Father Conroy's assistant, Joan Signor, and the interview itself was conducted by Sheila Cleveland, a member of the Lakes Tribe.

[122] Ms. Cleveland asked Mrs. Marchand why the Lakes people quit going into Canada to do their hunting and berry picking on Queen's highway (the road outside Rossland). Mrs. Marchand's response to the question is long and focuses largely on the history of the allotments. I see nothing in this interview to support a finding that the Sinixt/Lakes people simply stopped wanting to hunt in Canada. As I will discuss in more detail now, the uncontested evidence at this trial is that they have not stopped wanting to hunt in British Columbia.

[123] For whatever time and to whatever extent the Lakes have been physically absent from the land here in British Columbia after 1930, I find that they have not lost their connection to the land. All of the Lakes members who testified spoke of their connection to the land their ancestors hunted here in British Columbia.

[124] Mr. Richard DeSautel was asked what it meant to him to hunt in the Arrow Lakes area. His evidence is as follows:

> A Hunting in this area here when I learned that I was a Twin Lakes Indian. When I learned I was a

> Lakes Indian, and in '88 when I came up here and observed the pit houses and started learning more history of this country here. Back down home I hunted the country that my father hunted and his father hunted and whatnot, and I walk in their footsteps down there and learn the path and the things that they did when they was hunting. When I come up here, I'm walking with the ancestors, and, god, I just think about times that they was going up this mountain like this here. And they might have the bow and arrow and the different things that they did and whatnot, and I'm following in their footsteps. And it just runs chills up and down me that I can be where my ancestors were at one time and do the things that they did. And it was mostly just -- I just do it, yeah. I can't tell you ...
>
> *(Richard DeSautel, Day 3, pp. 100-101, ll. 35 to 6)*

[125] Michael Marchand gave the following evidence on the importance of hunting in the Arrow Lakes:

> A I think a lot of it just goes back to I felt it was important to my ancestors that I knew, and it was an important dream to them and a place, and I know our ancestors are buried here. That's important to Indians. Or at least our Indians. Ancestors are very important. And so even though I'm in a big business-type world, we make decisions -- we actually have all our chiefs in the council chamber from 12 tribes, and every time we vote on something, I think, how would these guys think about this. There's a Lakes chief.

> There's an Eniat chief. There's a Nez Perce chief. They are all called chiefs, and they are all looking at us, and I'm thinking like, how would they view this. And so we bounce -- that is how I think anyway. And so your ancestors are real important. And we come at it -- we are not all traditional either, though. I think it's kind of like a bell curve. We have some modern Indians and some super traditional Indians. And some kinds in the middle.
> I'm probably like more in the middle probably, but to me, the past is good. Traditions are good. The history is good. Our people were good. And we try -- even though we can't go back in history and exactly duplicate those things today, we can try to go back to the best parts of our traditions and bring those into the future.
> So Arrow Lakes lands is one of those things. And so I just think that as part of our creation stories and -- maybe it's kind of silly, but when I was a young boy I seen the movie Exodus, and I seen that movie, and it's about the Jews going back to Israel, and I was thinking, that's just like us. It was like we are deported to a place, often at gunpoint, instead of in our homeland, and someday we are going to get back here. I don't know when, but that's our goal.
>
> *(Michael Marchand, Day 8, pp.86-87, ll. 23 - 13)*

[126] In describing her connection to the Arrow Lakes area, Shelly Boyd testified as follows:

> A [Nsyilxcen spoken]. This land is so sacred. This

> is -- this is -- when I say we come from this land, I mean we come from this land. We come from the animals of this land. We come from the water of this land. We come from this place. And it doesn't matter what people say. This is -- the truth is this is where we are from. And I think about Ricky, and, you know, we haven't had a conversation about this, but whatever deer he got here, whatever animals he got here, I know without having a conversation with him that he fed the people with that. And I know without having a conversation with him that they felt so blessed. He told them where that meat came from, and it was sacred to them because of this. And I can't even explain it. I can't even explain it. It's, like, people talk about, like, never having gone to Ireland, and then they go and it changes their life. And for us, it's like we know. We know. And, like, my friend Nsnklik [phonetic] Virgil would say is, like, we never left this river. We never left this water. Even being part of that Confederation of Tribes. We are Sinixt first. And all I can say is this is sacred, and it hurts. . . .
>
> *(Shelly Boyd, Day 9, p. 6, ll. 17 - 41)*

[127] Finally, Cody DeSautel, director of the CCT Natural Resources Department, spoke of his connection to the land as follows:

> And again, places are very crucial to tribes in general, and especially -- well, I'm not calling -- Lakes aren't unique to that. Culture is tied to place. Tradition is tied to place. So

> to truly be a Lakes Band member in my opinion, I think it's critical that you practise your culture in the place that you are from, to be there where your ancestors were, to be there where your grandfathers were, to practise, participate, harvest animals where the tribe would have originally done that.
>
> *(Cody DeSautel, Day 4, p. 9, ll. 9 - 19)*

[128] This evidence, as well as the evidence of the Lakes modern day hunting traditions and practices, went in entirely unchallenged. I found each of these witnesses to have given this evidence sincerely and I was left in no doubt as to the veracity of their belief. I am convinced on the evidence overall that historical forces led to the drift by the Sinixt to the southern portion of their territory. The Sinixt did not voluntarily and enthusiastically choose allotments and farming over their traditional life; it was a matter of making the best choice out of a number of bad choices. Nothing in the evidence supports a finding that in doing so the Sinixt gave up their claim to their traditional territory. The interval between 1930 and 2010 when hunting in British Columbia either ceased or was conducted under the radar, so to speak, does not serve, in my view, when the reasons of *Van der Peet* are taken into account, to sever the continuity between the hunting practices of the pre-contact group and the present day Lakes Tribe or make it any less integral to the Lakes culture.

[129] As for continuity, I am not convinced that the concept as discussed at paras 63 through 65 of *Van der Peet* requires in all circumstances an actual physical presence on the land. If I am wrong, I would note, as the court does at para 65 of *Van der Peet*, that "the concept of continuity does not require aboriginal groups to provide evidence of an

unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact."

[130] As the court goes on to note, there may well be instances where an aboriginal group ceases to engage in a practice or custom or tradition but then resumes contact at a later date. In those cases, *Van der Peet* instructs trial judges to approach the matter with the same flexibility they are to adopt with respect to the establishment of the pre-contact practice itself.

[131] Here there is a dearth of direct evidence as to why the Lakes stopped practicing their seasonal round in British Columbia sometime around 1930 if not slightly before. I find the evidence falls short of establishing a voluntary discontinuance as a fact though I should not be taken by saying this to have shifted the onus onto the Crown to prove the right. It is simply that there is insufficient evidence to find on balance, as the Crown submits, that the Lakes voluntarily stopped using their traditional territory here in British Columbia.

[132] The fact that the Lakes continued to engage in a seasonal round up to 1930 would indicate the border was not primarily to blame for their absence but nor can it be discounted as a barrier. Moreover, as Cody DeSautel testified, the fact that it is illegal for Lakes Tribe members to exercise an aboriginal hunt in British Columbia without a guide or license does serve as a deterrent. For however long the 1896 *Act* remained in force, it was strictly illegal for the Lakes to hunt in British Columbia (leaving aside for the moment the *vires* of this legislation). It cannot be known precisely what effect this had on the Lakes at the turn of the 20th century. It is clear, however, that they were not welcome to hunt in their former traditional territory in British Columbia.

[133] Dr. Kennedy testified that in 1972, Charlie Quintasket, a member of the Lakes Tribe of the CCT, walked into her office and asked why the Lakes had no Indian reservations in Canada. Granted, it took the Lakes until 2010 to launch this test case but if there was a period of real dormancy, it was somewhere between 1930 and 1972. In between, like all North Americans, the Lakes would have lived through the Great Depression and the Second World War. Unlike non-native North Americans, the Lakes also lived through and continue to experience the perils and effects of the residential school system.

[134] Taking all of these various factors and the evidence generally into consideration, and bearing in mind the direction at para 65 of *Van der Peet*, I find that the chain of continuity in this case is not broken even though the Lakes did not exercise a seasonal round in their traditional territory in British Columbia after 1930 as they had in the time before contact.

[135] I find Mr. DeSautel has proven an aboriginal right to hunt in British Columbia pursuant to the test in *R. v. Van der Peet*.

IV. SOVEREIGN (IN)COMPATIBILITY

[136] Mr. DeSautel sought to prove his case for an aboriginal rights defence on the facts. The Crown submits he has not proven all of the elements of the *Van der Peet* test. In the alternative, the Crown submits the facts are largely irrelevant as no Sinixt aboriginal right to hunt in British Columbia ever came into existence. This is based on the argument that the Sinixt's practice of a seasonal round did not survive the Crown's assertion of sovereignty in 1846, 1896 or 1982. I will address each of these time periods separately as each raise distinct issues.

The 1846 Oregon Boundary Treaty

[137] The Oregon Boundary Treaty entered into by the British Crown and the government of the United States determined, among other things, the international boundary line between what was then the Colony of British Columbia and what became Washington State. While many aboriginal inhabitants on both sides of this boundary also exercised seasonal rounds throughout their territory and have continued to do so unaffected by the border, the Lakes were not as fortunate. The boundary established in 1846 cut through the lower, southern portion of their traditional territory leaving the great bulk of Sinixt territory in Canada. The lesser portion of their traditional territory, *albeit* the part including the important Kettle Falls fishery, became U.S. territory.

[138] It is a fact that the border was not surveyed for many years after the 1846 Treaty came into force, and it is also the case that the border was porous, at least in Sinixt traditional territory, into the first part of the 20th century. Still, these facts are of no moment as the question is whether the Sinixt's practice of travelling and hunting at will throughout the whole of their territory was legally incompatible with the assertion of sovereignty in 1846.

[139] In support of its submissions, the Crown relies on the reasons of Binnie J. in *Mitchell v. Canada*. With Major J. concurring, Justice Binnie held that Mr. Mitchell's claim to a right to cross the U.S./Canada border as an heir of the Mohawk regime that existed prior to the arrival of the Europeans was incompatible with Canadian sovereignty. The majority of the court, in reasons written by the Chief Justice, held that an aboriginal right had not been proven in the case under the *Van der Peet* test and declined to rule on the sovereignty question.

[140] Still, central to the reasons of both the majority and minority in *Mitchell* was the definition of the right claimed. The whole court agreed that the right claimed was properly defined as a right to bring goods across the St. Lawrence River for the purposes of trade.

[141] In *Mitchell* at para 22, McLachlin CJ wrote that as a proven aboriginal right generally encompassed other rights necessary for its meaningful exercise, it followed from the facts in *Mitchell* that any finding of a trading right would also confirm a mobility right. Justice Binnie agreed that the right claimed could only be conceptualized as a restriction on mobility.

[142] Justice Binnie concluded that a right to mobility across the international boundary separating Canada from the United States was incompatible with sovereignty as "a fundamental attribute of sovereignty is and always has been control over the mobility of persons and goods into the country." Though he determined the claimed right did not survive the assertion of sovereignty by the Treaty of Paris of 1763, Justice Binnie also found his conclusion was not inconsistent with the s. 35 purpose of reconciliation as all Canadians, including the Mohawk, had a common national interest in this attribute of sovereignty.

[143] Following Justice Binnie's reasoning in *Mitchell*, the Crown submits that the Sinixt's right to hunt in the whole of its traditional territory including in British Columbia did not survive sovereignty: the conclusion being that after the assertion of sovereignty in 1846, the Sinixt no longer had a right to come to what was then the Colony of British Columbia to hunt and so no longer had a right to hunt.

[144] I will address the difficulties I have with this argument given the facts in this case in a moment, but first I find it necessary to address the definition of the right in this case. I have found the right claimed to be an aboriginal right to hunt in Sinixt traditional territory in British Columbia. On its face, this is not a claim to a right to enter British Columbia to exercise that right. I am not satisfied that this is a case like *Mitchell* where the claimed right cannot be conceptualized as anything other than a mobility claim.

[145] At para 154 of *Mitchell,* Justice Binnie writes that while the sovereign incompatibility argument has survived s. 35, it must still be used sparingly. He adds that "[f]or 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."

[146] I do not find it necessary in this case to define Mr. DeSautel's claim as including a mobility right. The right as I find it ought to be defined is not, in my view, incompatible with sovereignty. That being said, I do not in any way discount the significance of border control as an incident of sovereignty. I find, however, that this important fact can be addressed without at the same time erasing the memory and existence of the Sinixt from the Canadian historical landscape. I find support for this in the reasons of Strayer J. at para 17 of *Watt v. Liebelt*, [1999] 2 F.C. 455 where it was noted that proper control of the border may well be a justification for Canada to control or limit in some way the exercise of relevant and unextinguished Aboriginal rights. Naturally, this assumes the right is protected by s. 35(1), a matter I will address shortly.

[147] The other concern I have with accepting the Crown's submission that the Sinixt right to hunt in British Columbia did not survive the assertion of sovereignty in 1846 is

that members of what were obviously the Sinixt collective continued to live in British Columbia well into the early part of the 20th century. Up until the death of Annie Klome Joseph, the federal government recognized the Arrow Lakes Band. It cannot at the same time be the case that the Band's aboriginal right to hunt in its traditional territory had not survived sovereignty. Moreover, I cannot accept that Baptist Christian, for example, would not have been exercising an aboriginal right to hunt in Sinixt traditional territory in the area near Castlegar where he lived, as a consequence of the 1846 Treaty.

[148] Without deciding the point, I am prepared to accept the 1846 Treaty had an impact on the Sinixt's prior practice of moving about their territory at will. The Treaty had the effect of imposing a boundary that the Sinixt had and have to acknowledge and live with. It does not follow that this assertion of sovereignty cannot co-exist with their right to hunt in their traditional territory north of the 49th parallel.

The 1896 *Act*

[149] In 1896, the legislature of British Columbia passed the 1896 *Act* making it unlawful for Indians not resident in the province to kill game at any time of the year. The Province argues that the 1896 *Act* is an exercise of Canadian sovereignty and one which is incompatible with the practice of non-Canadian residents hunting in British Columbia.

[150] I find I cannot agree that the 1896 *Act* constitutes an exercise of Canadian sovereignty. It is, I find, an attempt by the provincial government of the day to specifically regulate Indians *qua* Indians to the exclusion of any other persons. At a minimum, an act of sovereignty must be a legal act. The 1896 *Act* is so clearly *ultra*

vires the provincial legislature that this fact alone must end the argument: R. v. *Kruger,* [1978] 1 S.C.R. 104.

[151] Even assuming that s. 6 of the 1896 *Act* is valid provincial legislation, I do not see how provincial legislation could constitute an act of sovereignty. If this were possible, it would result in a patchwork of approaches to sovereignty across Canadian provinces and territories, in addition to expressions of sovereignty of the federal government. That is inconsistent with the nature of our confederation.

[152] As for the effect of the 1896 *Act* on Sinixt hunting rights, as Chief Justice Lamer explained in *Delgamuukw v. British Columbia*, [1997] 2 S.C.R. 1010, at para 30, there is a distinction between laws that regulate aboriginal rights and those that extinguish them. If the argument is that the 1896 *Act* regulated aboriginal rights in such a way that the exercise of the claimed right by a non-resident Sinixt was inconsistent with it; that is one thing. The right continues to exist, subject to regulation. If it is submitted that the 1896 *Act* extinguished the right, I find it did not and it could not. The 1896 *Act* is either not sufficiently plain or clear enough to extinguish the right or, if it is, it is *ultra vires*: *Delgamuukw*, para 178; *R. v. Sparrow*, [1988] 2 S.C.R. 495, paras 37 and 38.

Section 35(1) of the Constitution Act, 1982

[153] Like the 1846 Oregon Boundary Treaty, s. 35(1) of the *Constitution Act*, 1982 is an act or an expression of sovereignty: *Mitchell v. Canada*, para 172. Section 35(1) provides as follows:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[154] The parties each argue that Mr. DeSautel is advancing an s. 35 aboriginal right to hunt in Sinixt traditional territory in British Columbia. The Crown submits that as a U.S. citizen, Mr. DeSautel cannot possibly have such a right because he is not among the aboriginal peoples of Canada. It submits in its written argument that "it is beyond reasoning to conclude that the drafters of s. 35(1) intended to include the Sinixt" in the *Constitution*.

[155] The aboriginal right claimed by Mr. DeSautel is not an s. 35 right claim if what is meant by that is that the right came into existence by reason of s. 35. It is clear that s. 35 did not create aboriginal rights. Aboriginal rights existed and were recognized by the common law long before the coming into force of s. 35: *Calder v. Attorney General of British Columbia,* [1973] S.C.R. 313; *R. v. Van der Peet*, para 28.

[156] As the Chief Justice described it in *Mitchell* at paras 9 through 11:

> **9** Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the Royal Proclamation of 1763, R.S.C. 1985, App. II, No. 1, and R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1103. At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: Sparrow, supra. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in Guerin v. The Queen, [1984] 2 S.C.R. 335.
>
> **10** Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were

> presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada: see Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313, and Mabo v. Queensland (1992), 175 C.L.R. 1, at p. 57 (per Brennan J.), pp. 81-82 (per Deane and Gaudron JJ.), and pp. 182-83 (per Toohey J.).
>
> **11** The common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment, and thus they were "dependent upon the good will of the Sovereign": see St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.), at p. 54. This situation changed in 1982, when Canada's constitution was amended to entrench existing aboriginal and treaty rights: Constitution Act, 1982, s. 35(1). The enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status (although, it is important to note, the protection offered by s. 35(1) also extends beyond the aboriginal rights recognized at common law: Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at para. 136). Henceforward, aboriginal rights falling within the constitutional protection of s. 35(1) could not be unilaterally abrogated by the government. However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives: see R. v. Gladstone, [1996] 2 S.C.R. 723, and Delgamuukw, supra.

[157] What distinguishes aboriginal rights recognized at common law and those recognized and affirmed by s. 35(1) is that the latter cannot be extinguished, and can only be regulated or infringed in accordance with the test for justification in *R. v. Sparrow*. *R. v. Van der Peet*, para 28.

[158] The Crown's argument that the Sinixt aboriginal right to hunt in its traditional territory in British Columbia did not survive the coming into force of s. 35(1) must rest on the assumption the right existed in the moments before the section came into force. As such, and given what I find to be the effect of s. 35(1), the only question can be whether the right is protected by s. 35(1).

[159] I find the argument that the right did not survive s. 35(1) because Lakes members such as Mr. DeSautel are U.S. citizens to be an extinguishment argument rather than a question of sovereign incompatibility. The Crown pointedly argued the drafters could not have intended to include the Sinixt as aboriginal peoples of Canada under s. 35(1). That can only mean the drafters intended to exclude them. If the effect of s. 35(1) is, as the Crown contends, one under which only those rights that are recognized and affirmed survive, the argument must be that s. 35(1) extinguished those rights that were not recognized and affirmed. That would include the rights of the Sinixt.

[160] I find that s. 35(1) is not sufficiently plain and clear as to evidence an intent by the Parliament of Canada to extinguish any aboriginal rights.

[161] Notwithstanding the Crown's forceful submissions on this point, I am also not persuaded that s. 35(1) can only be read as excluding the Sinixt from its protection on the grounds of nationhood. It is certainly not clear that this is the intention.

[162] *Nowegiijick v. The Queen*, [1983] 1 S.C.R. 29 at p. 36, holds that courts must construe treaties and statutes relating to Indians liberally. Where there is ambiguity or doubtful expressions, those should be resolved in favour of the Indians. This is how s. 35 must be interpreted. It must be given a fair, large and liberal interpretation as best reflects the honour of the Crown.

[163] To determine what is meant by the drafters of s. 35(1), its purpose must be borne in mind. That was the approach taken in both *Sparrow* and *Van der Peet* where the purpose of s. 35(1) in particular was discussed at length. In *Van der Peet*, Chief Justice Lamer wrote that the purpose of s. 35(1) lies in its recognition of the prior occupation of North America by aboriginal peoples. At para 30 he put it this way:

> …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.

[164] In *Mitchell*, at para 164, Justice Binnie reiterated that s. 35(1) is intended to reconcile the interests of aboriginal peoples with Crown sovereignty. As such, it must be determined whether a finding that the Sinixt hunting right is inconsistent with the expression of Crown sovereignty through s. 35(1) is consistent with the section's purpose. A similar question was asked, but not answered, in *Mitchell* because of the finding the claimed right to mobility and trade did not survive the Crown's assertion of sovereignty by the Treaty of Paris of 1763.

[165] I do not read s. 35(1) as necessarily excluding the Sinixt aboriginal right to hunt in British Columbia from constitutional protection. I do not see that the purpose of s. 35(1) demands its exclusion. To the contrary, I find that to read s. 35(1) as intending to apply only to aboriginal peoples holding Canadian citizenship would work an unintended hardship on those other non-citizen aboriginal peoples like the Lakes Tribe who also had unextinguished aboriginal rights in 1982. There is nothing in s. 35(1) to indicate that Parliament intended to make such a distinction when it promised to reconcile the existence of aboriginal peoples on the land when the Europeans arrived with Crown sovereignty.

[166] In further support of its argument that the Sinixt's right to hunt could not have survived s. 35(1), the Crown pointed to various practical issues such as the feasibility of consulting with non-citizens, or even determining with whom to consult. In that regard, I

would echo the comments by Groberman J.A. at para 151 of *Tsilhqot'in Nation v. British Columbia*, 2012 BCCA 285: without underestimating the challenges involved, such practical difficulties cannot be allowed to preclude recognition of aboriginal rights that are proven.

[167] I find the Sinixt aboriginal right to hunt in British Columbia exists to this day and is protected from extinguishment and unjustified infringement by s. 35(1) of the *Constitution Act*, 1982. Having found the right exists, it remains to be determined if its exercise is infringed by the impugned provisions of the *Wildlife Act* and, if so, whether the infringement is justified.

V. INFRINGEMENT

[168] Mr. DeSautel is charged under ss. 11(1) and 47(a) of the *Wildlife Act*. Section 11(1) prohibits hunting without a license, while s. 47(a) prohibits hunting in British Columbia unless the hunter is a resident.

[169] Having proven an aboriginal right to hunt in Sinixt traditional territory in British Columbia, Mr. DeSautel bears the onus of proving that either or both of these provisions constitute a *prima facie* infringement of his aboriginal right: *R. v. Sparrow*, para 70.

[170] Since the ruling in *Sparrow*, many courts have grappled with what constitutes a *prima facie* infringement. These decisions are helpfully summarized by our Court of Appeal in *Tsilhqot'in* at paras 291 to 293. In the end, as the court there concluded, a *prima facie* infringement requires proof of a meaningful diminution of a right, which includes "anything but an insignificant interference with that right": *R. v. Morris*, 2006 SCC 59. Mr. DeSautel submits that both ss. 11(1) and s. 47(a) of the *Wildlife Act*

constitute much more than an insignificant interference with his aboriginal right to hunt in British Columbia.

[171] Section 11(1) of the *Wildlife Act* prohibits all persons from hunting without a license except, pursuant to s. 11(9), an Indian residing within British Columbia. The word "Indian" is defined in s. 1 of the *Act* as meaning a person defined as an Indian under the *Indian Act* (Canada).

[172] As a consequence of these provisions of the *Wildlife Act*, Mr. DeSautel is entirely precluded from exercising an aboriginal right to hunt in British Columbia without a license.

[173] In *R. v. Cote* the court found that a blanket prohibition on fishing absent a license satisfied the test for a *prima facie* infringement: *Cote*, para 76. For the same reasons, the court found an infringement in *R. v. Adams*, [1996] 2 S.C.R. 101, para 52. In both instances, the court found the blanket prohibition imposed an undue hardship and interfered with the right holder's preferred means of exercising his right.

[174] In the case at bar, I am satisfied that the blanket prohibition on hunting without a license, at a minimum, imposes an undue hardship on Mr. DeSautel; clearly it interferes with the preferred means of exercising his right. Mr. DeSautel has proven that s. 11(1) of the *Wildlife Act* constitutes a *prima facie* infringement of his aboriginal right to hunt.

[175] Section 47(1) of the *Act* prohibits persons who are non-resident in British Columbia from hunting in British Columbia, though such persons could hunt here with a guide. Clearly, this provision also imposes an undue hardship and substantially

interferes with the preferred means by which Mr. DeSautel wishes to exercise his aboriginal right to hunt here in British Columbia.

[176] Having found the impugned provisions of the *Wildlife Act* constitute a *prima facie* infringement of the aboriginal right I have found in this case, I now turn to consider the Crown's submission that the infringement is justified in the broader public interest.

VI. JUSTIFICATION

[177] All parties agree the test for justification is found in *R. v. Sparrow*. To find justification for an infringement, the court must first be satisfied that the government is acting in accordance with a valid legislative objective. Even still, government's actions must be consistent with the Crown's fiduciary obligation to aboriginal peoples. The court must be satisfied that the right is limited as little as possible to achieve the legislative objective and that the aboriginal group in question was consulted with respect to the conservation measures.

[178] In *Tsilcot'in Nation v. British Columbia*, 2014 SCC 44, the court put it this way at para 77:

> To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group…

[179] The Crown did not consult with the Lakes Tribe regarding the impugned provisions of the *Wildlife Act*, though the evidence is clear the Lakes tried to consult with conservation officers in British Columbia before October 1, 2010. The Crown's refusal to consult is understandable given its position in this trial that no Sinixt aboriginal rights

exist in Canada today. Still, consultation is a requirement in the justification analysis. Without it, the Crown can never hope to meet its onus to prove a justification of the infringement in this case. Despite this, the Crown advanced a justification defence in this trial which I will address however briefly.

[180] With regard to s. 11(1) of the *Wildlife Act*, I am left in no doubt that the purpose or the objective of the licensing requirement is to assist in the management and conservation of wildlife. It was conceded in this trial that at the time of Mr. DeSautel's hunt, there were no conservation concerns regarding elk. That is obviously not the end of the matter however the import of this evidence I find is that the Lakes knew there were no conservation issues. That is because Mr. DeSautel and others reconnoitred the area before the hunt and satisfied themselves there were sufficient elk in the area such that a hunt was sustainable.

[181] Conservation concerns are addressed through licensing. Whatever the numbers of game available, licensing requirements do constitute a valid legislative objective for the purposes of the first part of the *Sparrow* test for justification. Still, even if the legislative objective is valid, any allocation after conservation measures have been implemented must give top priority to - in this case - an aboriginal right to hunt for food, social and ceremonial purposes. No such priority exists in this case: rather, the legislation specifically excludes the Lakes people from any opportunity to hunt by limiting the aboriginal right to hunt to persons defined as Indians under the *Indian Act*.

[182] The requirement under s. 47(a) of the *Wildlife Act* that the hunt be conducted by a resident, or alternatively in the company of a resident or a guide if the hunter is a non-resident, is not strictly speaking a conservation related measure. As Stephen MacIver

testified for the Crown, the residency requirement ensures there is sufficient game to sustain the resident aboriginal hunt, non-aboriginal resident hunting and game outfitter hunting. Mr. MacIver was frank when he stated in direct testimony that:

> …the gist there is that the pie is only so big. Any animal that would be taken by a non-licensed, non-resident alien would come off the share that would go to a resident or a hunter or guide outfitter. A net loss in economy essentially for each animal that was taken.
>
> *(Stephen MacIver, Day 13, p. 26, ll. 31-37)*

[183] The resident requirement of the *Wildlife Act* directly feeds into not only conservation of game, but conservation so that game can be allocated to, among others, guide outfitters and non-aboriginal hunters. The revenues generated by these hunters are substantial. On the other hand, I find this revenue-generating scheme does arbitrarily burden the Lakes' aboriginal right to hunt in their traditional territory in British Columbia.

[184] Without deciding whether s. 47(a) constitutes a valid legislative objective to infringe an aboriginal right, I find it fails the second part of the *Sparrow* test for justification in that this allocation which excludes the Lakes people, does not accord with the honour of the Crown.

[185] For all these reasons, I find the Crown has not shown that the infringement in this case is justified.

VII. CONCLUSION

[186] I have found in this case that when Mr. DeSautel hunted the cow-elk near Castlegar, British Columbia on October 1, 2010, he was exercising an aboriginal right; that is the aboriginal right of the Sinixt/Lakes people to hunt in their traditional territory

here in what is now British Columbia as they had done for several thousand years before contact. Sections 11(1) and 47(a) of the *Wildlife Act* unjustifiably infringe this right. I find, pursuant to s. 24(1) of the *Charter*, that the appropriate remedy is to find these provisions inapplicable in this case.

[187] As the legislative provisions under which you have been charged are not applicable in your case Mr. DeSautel, I hereby acquit you of these charges.

L. Mrozinski
Provincial Court Judge

APPENDIX 1

Expert Report: R. v. Desautel: The Sinixt People's Territory, Affiliation and History

September 14, 2015

Figure 33: "Lakes Indian Territory, *circa* 1800 [and] *circa* 1880]." Source: Bouchard and Kennedy 1985a:22a. Map includes the Slocan within traditional Lakes (Sinixt) territory. The solid-line boundary *c.* 1800 is based on analysis of historical and ethnographic documents; the dotted-line boundary *c.* 1880 is based on document analysis as well as interviews with Native consultants in the 1970s-1980s

APPENDIX 2

Expert Report: R. v. Desautel: The Sinixt People's Territory, Affiliation and History

September 14, 2015

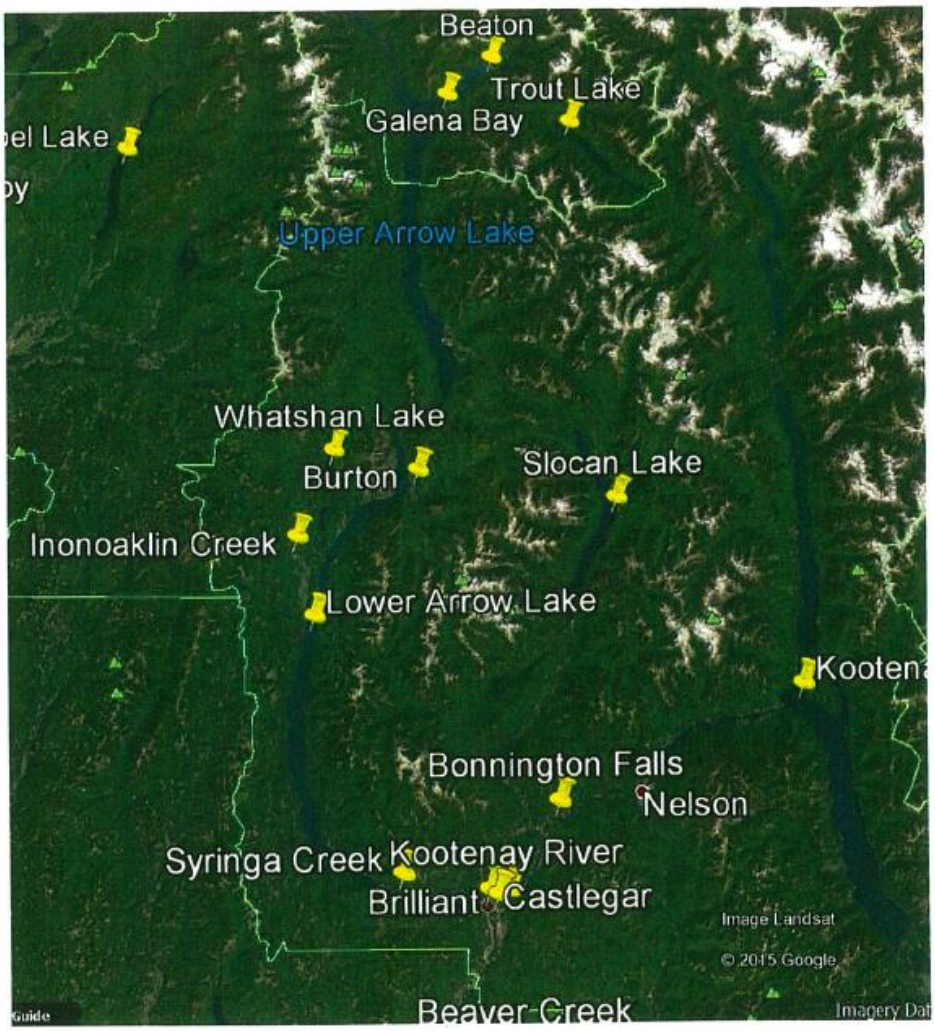

Figure 3: Section of Sinixt Territory from Galena Bay south to Castlegar area. Map #2 of 3.

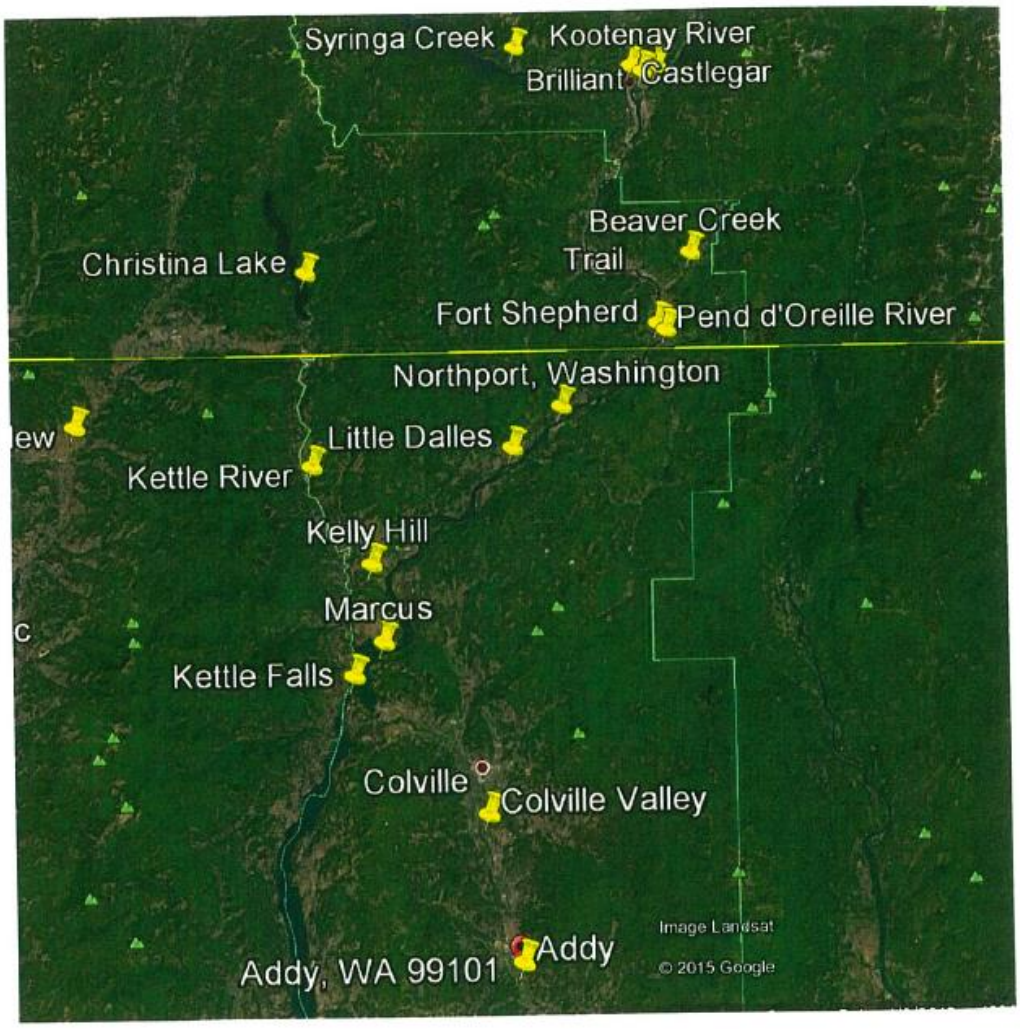

Figure 4: Southernmost section of Sinixt Territory, from Castlegar to Addy, Washington. Map #3 of 3.