

CANADA / JUDGMENT

R. v. DeSautel

2018 BCCA 131

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 131 R. v. DeSautel

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. DeSautel,

2018 BCCA 131

Date: 20180404

Docket: CA45055

Between:

Regina

Applicant

(Appellant)

And

Richard Lee DeSautel

Respondent

Before:

The Honourable Mr. Justice Hunter

(In Chambers)

On appeal from: an order of the Supreme Court of British Columbia, dated

December 28, 2017 (R. v. DeSautel, 2017 BCSC 2389, Nelson Registry No. 23646)

Oral Reasons for Judgment

Counsel for the Appellant:

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Counsel for the Respondent:

M.G. Underhill

K.R. Phipps

Place and Date of Hearing:

Vancouver, British Columbia

March 27, 2018

Place and Date of Judgment:

Vancouver, British Columbia

April 4, 2018

Summary:

The Crown applies for leave to appeal the acquittal of the respondent, who is a citizen and resident of the United States, for offences under the Wildlife Act. The trial judge held and the summary conviction appeal judge affirmed that the respondent was exercising an Aboriginal right to hunt protected by s. 35 of the Constitution Act, 1982. The Crown wishes to appeal on three grounds which are said to involve questions of law alone. The respondent does not oppose leave being granted on grounds one and three, but submits that ground two does not raise a question of law alone, and even if it does, the Crown does not have an arguable appeal on that ground. Held: Application granted. All three grounds involve questions of law alone and the legal argument the Crown wishes to advance is at least arguable.

- [1] HUNTER J.A.: The Crown applies for leave to appeal the acquittal of the respondent from charges of hunting without a licence 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 of British Columbia, contrary to s. 47(a) of the Act.
- [2] To appeal an acquittal from a summary conviction offence, the Crown requires leave pursuant to s. 839 of the Criminal Code, R.S.C. 1985, c. C-46. Leave can only be given on grounds that involve questions of law alone. The Crown has proposed three grounds for the appeal. Mr. DeSautel agrees that the first and third of these grounds involve questions of law alone and does not oppose leave being given on those grounds. However, he takes the view that the second proposed ground does not raise a question of law, and submits that leave to appeal cannot be given on that ground.

- [3] For purposes of this application, the background to the criminal charges can be stated relatively simply. Mr. DeSautel is a member of the Lakes Tribe of the Colville Confederated Tribes ("CCT") and lives on the Colville Indian Reserve in Washington State. The Lakes Tribe is a successor group to the Sinixt people, whose traditional territory included an area in what is now British Columbia. Mr. DeSautel takes the view that as a descendant of the Sinixt people, he has an Aboriginal right protected by s. 35 of the Constitution Act, 1982 to hunt in the traditional territory of the Sinixt people.
- [4] In October of 2010, Mr. DeSautel shot a cow-elk near Castlegar, British Columbia. He reported the kill to conservation officers, and a few days later, he was charged with hunting without a licence and hunting big game while not being a resident of British Columbia. At the subsequent trial in the Provincial Court of British Columbia, Mr. DeSautel asserted an Aboriginal right to hunt as his defence to the charges. The trial judge described the case as a test case.
- [5] The principal position of the Crown at trial was that as Mr. DeSautel is a citizen and resident of the United States, he could not claim the protection of s. 35 which applies only to the Aboriginal peoples of Canada. The trial judge did not give effect to this argument. She concluded that the Lakes Tribe were the modern day descendants of the Sinixt people, and Mr. DeSautel as a member of the Lakes Tribe was entitled to exercise such Aboriginal rights as the Sinixt people could exercise. She considered the test for Aboriginal rights as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 and concluded that the Sinixt people had an Aboriginal right to hunt in their traditional territory in British Columbia for food, social and ceremonial purposes. Since Mr. DeSautel was entitled to exercise this right, he could not be convicted of the offences with which he had been charged.
- [6] The Crown appealed to the Supreme Court of British Columbia. Justice Sewell, presiding as summary conviction appeal judge, framed the questions on appeal at para. 26 as "whether an aboriginal group that does not reside in Canada is entitled to the constitutional protections provided by s. 35 [of the Constitution Act, 1982] and whether the right asserted by Mr. DeSautel is incompatible with the sovereignty of Canada."
- [7] The summary conviction appeal judge rejected the Crown's argument that s. 35 limits constitutional protection of Aboriginal rights to Aboriginal people who are Canadian citizens or who reside in Canada. He also rejected the Crown's argument that Mr. DeSautel's Aboriginal right to hunt in Canada is incompatible with Canada's sovereignty. While there was some authority for the Crown's argument that the right to hunt would necessarily imply a right to access the traditional territory, the mobility rights issue did not arise in this case and the record was not sufficient to permit that issue to be decided, as Mr. DeSautel had not been charged with coming into Canada unlawfully, nor was there evidence that he had been denied entry.

Proposed Grounds of Appeal

- [8] The Crown has expressed the grounds it wishes to raise on appeal in the form of three questions said to be questions of law. These questions are as follows:
1. Does the constitutional protection of Aboriginal rights contained in s. 35 of the Constitution Act, 1982 extend to an Aboriginal group that does not reside in Canada, and whose member claiming to exercise an Aboriginal right is neither a resident nor citizen of Canada?
 2. Is it a requirement of the test for proving an Aboriginal right protected by s. 35 of the Constitution Act, 1982 that there be a present day community in the geographic area where the claimed right was exercised?
 3. Is it necessary to consider Mr. DeSautel's incidental mobility right and the compatibility of that right with Canadian sovereignty [in order to determine whether he had an Aboriginal right to hunt in British Columbia]?
- [9] Mr. DeSautel agrees that grounds one and three involve important questions of law and does not oppose leave being granted. I agree that these grounds involve questions of law alone, that the issues are important, and that the Crown has at least an arguable appeal on each of the grounds. In my formal order I will propose a slight elaboration of the wording of the third question, which I understand is acceptable to the parties. As I will grant leave on these grounds, I do not propose to say anything more about the issues raised in these grounds.
- [10] It is the second ground that is at issue. Mr. DeSautel submits that the Crown mischaracterizes the trial judge's conclusions concerning the existence of a modern day collective of Sinixt people, and that the Crown's argument is in substance a challenge to the trial judge's findings of fact regarding the existence of a modern day Sinixt Collective, as confirmed by the summary conviction appeal judge. Mr. DeSautel says further that even if this ground can be characterized as raising a question of law alone, the Crown does not have an arguable appeal on this question.

Test for Granting Leave

- [11] The parties agree that the test for granting leave under s. 839 is set out in *R. v. Winfield*, 2009 YKCA 9, and *R. v. Swaby*, 2018 BCCA 35 (in Chambers). The ground of appeal must involve a question of law alone; the issue must be one of importance; and there must be a reasonable prospect of success, although where issues are of significance to the administration of justice beyond the specific case at bar, an arguable case will suffice for the merits test.
- [12] The principal issue in relation to the second proposed ground is whether it involves a question of law alone, or of necessity will require an assessment of the trial judge's findings of fact.

Does the Second Ground Involve a Question of Law Alone?

- [13] Mr. DeSautel argues that the issue whether the test for Aboriginal rights requires that an Aboriginal community must exist in Canada is simply another way of expressing the first ground, that persons who are not Canadian citizens or residents cannot be Aboriginal peoples of Canada. He says further that unlike the first ground, which is a pure question of law, the question whether there is an existing community of Sinixt people in British Columbia inevitably involves a question of mixed fact and law, which cannot form the basis of an appeal to this Court.
- [14] The position of the Crown is that while there may be some overlap in these issues, they engage different legal questions. The first requires an interpretation of s. 35 of the Constitution Act, 1982. Does it apply only to Aboriginal people who are citizens or residents of Canada? The second, on the other hand, is said to involve a consideration of the test for establishing Aboriginal rights set out in *Van der Peet*. Does it require that the rights-holders be members of an existing modern day Aboriginal community in Canada who are descendants of the Aboriginal people whose pre-contact practices give rise to the right in question?
- [15] The issue was addressed in this way by the trial judge:
- [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.
- [16] The two arguments referred to in para. 69 of the trial judgment track the two issues the Crown wishes to raise on appeal in grounds one and two.
- [17] In essence, the Crown wishes to challenge the statement by the trial judge that "I need not go further for the purpose of this case and decide whether there is a regional group in British Columbia". The Crown argues that this was an error of law, because the trial judge did need to go further to decide whether there was a regional group or collective in British Columbia.
- [18] The summary conviction appeal judge addressed this issue as well and commented on the difficulty in identifying the finding of fact made by the trial judge on this point:

- [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.
- [19] The summary conviction appeal judge concluded 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" (at para. 36), and accepted that it was not necessary for the trial judge to go further and determine whether there was an Aboriginal community in British Columbia capable of exercising Aboriginal rights exercised by the Sinixt people at the time of contact:
- [39] 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.
- [20] Thus, both the trial judge and the summary conviction appeal judge concluded that it was not necessary to consider whether there is an existing Aboriginal community of Sinixt people in British Columbia, in order to determine whether the Van der Peet test for Aboriginal rights was made out. This is the legal question the Crown wishes to challenge.
- [21] The question the Crown wishes to pose is whether it is a requirement of the test for proving an Aboriginal right protected by s. 35 of the Constitution Act, 1982 that there be a present day community in the geographic area where the claimed right was exercised.
- [22] Questions about the correct legal test are questions of law: *St.-Jean v. Mercier*, 2002 SCC 15 at para. 33. The question as put by the Crown can be answered as a matter of law, without the necessity of challenging any factual decision made at trial. If the answer to the question is No, the trial judge and summary conviction appeal judge were correct in declining to consider whether there is a present day community of Sinixt people in British Columbia. But if the answer to the legal question is Yes, an argument can be made that the trial judge was in error.
- [23] In my opinion, the second ground does involve a question of law alone.

Is the Question of Law Raised by the Second Ground Arguable?

- [24] For purposes of this application, the Crown relies primarily upon two decisions, *R. v. Powley*, 2003 SCC 43 and *R. v. Bernard*, 2017 NBCA 48. In *Powley*, the Supreme Court of Canada reviewed the Van de Peet test for defining Aboriginal rights under a series of headings. Under the third heading, "Identification of the Contemporary Rights-Bearing Community", the Court made these comments:

[24] 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. The trial judge found that a Métis community has persisted in and around Sault Ste. Marie despite its decrease in visibility after the signing of the Robinson-Huron Treaty in 1850.

[Emphasis added by Crown on this application.]

[25] While Powley concerned the Aboriginal rights of the Métis people, the New Brunswick Court of Appeal has rejected the argument that the analysis in Powley is confined to the Métis people, commenting that "the Supreme Court was elaborating principles applicable to Aboriginal rights in general" (Bernard at para. 48).

[26] In my opinion, the legal argument the Crown wishes to advance on this ground is at least arguable.

Conclusion

[27] For the reasons set out above, the test for leave under s. 839 of the Criminal Code is met for all three grounds, and I would grant leave to appeal on the following three questions of law:

1. Does the constitutional protection of Aboriginal rights contained in s. 35 of the Constitution Act, 1982 extend to an Aboriginal group that does not reside in Canada, and whose member claiming to exercise an Aboriginal right is neither a resident nor citizen of Canada?
2. Is it a requirement of the test for proving an Aboriginal right protected by s. 35 of the Constitution Act, 1982 that there be a present day community in the geographic area where the claimed right was exercised?
3. In order to determine whether an Aboriginal person who is not a citizen or resident of Canada has an Aboriginal right to hunt in British Columbia, is it necessary to consider the incidental mobility right of the individual and the compatibility of that right with Canadian sovereignty?

"The Honourable Mr. Justice Hunter"

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