



Indian Law Newsletter



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Word from the Chair

By Diana Bob

Greetings to Section Members:

I have been happily busy in the role as Chair of the Indian Law Section (the ILS). Here is an update on the work of the ILS for the first six months of 2017. The ILS has a great group of volunteer attorneys who have spent considerable time on these matters. My hands are raised to all who have contributed to this body of work.

State Legislative Session: January 2017 was the start of a new legislative session in Olympia. The WSBA employs a few people to track and communicate to Section leadership when potentially relevant legislation is proposed. The Legislature dipped its toes into several areas potentially affecting Indian law and Indian people. The ILS provided feedback and information to the WSBA Legislative Affairs Staff on legislation relating to tribal judicial authority to solemnize marriages, state and local governmental authority to declare specific areas as arts districts, state ability to pass through dental funding to tribal dental clinics, and procedural issues related to Native children in dependency cases. The Section also reviewed several other pieces of general legislation that were appropriately inclusive of tribal governments. This legislative session reflects an increased awareness of tribal governments within the state law-making process and suggests the ILS should be better prepared to address all the needs for legislative review. I propose we form a small group of volunteers to review future legislation in order to avoid our [successful but time-pressured] ad hoc approach. If you have interest in volunteering for legislative review on behalf of the ILS please send me an email and stand by for the next legislative session.¹ In order for the Section to submit formal comments to any legislation, the WSBA Legislation and

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Indian Lawyers In the News



Brooke Pinkham (Nez Perce) has joined the *Center for Indian Law and Policy* at Seattle University School of Law as the new staff director. Pinkham joins Seattle University School of Law after spending nine years as a staff attorney with the Northwest Justice Project.

Section Chair Diana Bob, an enrolled Lummi tribal member, has started her own law firm, Native Law PLLC. She will continue to focus on environmental and natural resources, land use and water rights and federal regulations as they intersect with the Indian law and tribal lands.



Bree Black Horse (Seminole, OK) has been named to the "40 Under 40" list of emerging American Indian leaders, by the National Center for American Indian Economic Development (NCAIED).

Court Rule Comment Policy requires at least 75 percent of the Executive Committee be supportive of such comments. This truly does require group work and sustained engagement for a few intense weeks.

WSBA Management of Sections: In 2015, the WSBA started an evaluative process of all WSBA Sections. This evaluation morphed into a select "Sections Policy Workgroup" that lacked any section leadership in its member-

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ship. On December 30, 2015, the Section Policy Workgroup issued a set of proposals that were strongly opposed by the ILS with comprehensive written comments submitted on January 22, 2016. The ILS comments contained specific comments relating to proposed WSBA policy that would have permitted the WSBA to seize Section reserve funds, place those in a pooled fund and unilaterally determine which of all WSBA sections would receive funds from the collected treasury (or whether the funds should be used to offset WSBA general expenses). The ILS was part of a coordinated effort by other sections to put that and other problematic proposals aside.

In addition to the gravely problematic proposals previously addressed, the WSBA presented a “bylaw alignment” goal.² For ILS purposes, the bylaw alignment refers to the WSBA perspective that there are many different sections with many different bylaws and operating practices. The WSBA seeks to align all Section bylaws to the recently amended WSBA Bylaws.³ As an Indian law attorney, you should be thinking of this as a modern administrative approach to the Indian Reorganization Act constitutions we’ve all come across in our practice; a mandated form of government that just doesn’t always fit.

The “bylaw alignment” would result in concrete changes for the ILS. First, the mandated bylaws would require that we have our elections on a calendar set by the WSBA that would prevent our annual elections at the September Indian Law Symposium event. Further, elections must be conducted via an electronic ballot—no more face-to-face engagement with each other regarding Section management. Also, the “aligned” bylaws prescribe terms for service and succession requirements for our Executive Committee. That means services as a Section Trustee would become an automatic path/commitment to service for up to three years in a successive series of roles including treasurer and chair—even if you have no personal desire to commit that amount of time or develop your budgeting skills.

The WSBA staff has kindly developed a red-line version of our Section bylaws in order to meet the “alignment” standards. I can email that to you upon request.⁴ The Section has been told to submit the revised bylaws for Board of Governor approval at either the April or June 2017 meeting. The Section did not submit amended by-laws for the April meeting. The WSBA is hosting “Drop in by-law alignment conference calls,” with remaining dates of June 2 and 23.⁵

Annual Indian Law CLE: The Annual Indian Law CLE was held on June 15 at the University of Washington School of Law. This year the ILS partnered with the law firm of Miller Nash Graham and Dunn LLP (MNGD). The ILS leadership made this partnership decision for economic purposes. The WSBA levies a 45 percent of total profit fee for performance of administrative and marketing tasks relating to CLE production. Given that the CLE agenda is coordinated by our volunteer attorneys and the materials



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are produced by our volunteer speakers the 45 percent fee seemed large relative to the amount of assistance required for the CLE. MNGD graciously offered their administrative support and CLE department time to the Section at no cost. The Section, MNGD and the WSBA entered into a sponsorship agreement to approve this arrangement.

Our Section membership has consistently provided feedback regarding CLE location (and snacks). If you’ve been a member for any period of time, you’ve likely attended this event at several locations. Some of our “Native” spaces are lovely but lack A/V needs, require outside catering, are far from transit, or cannot accommodate a group our size. We have consistently heard that the WSBA Downtown Conference Center is disfavored due to traffic headaches, parking expenses, etc. The UW Law School offered space, A/V, parking, transit and nearby lunch options so we are hopeful this was a pleasant event to both travel to and experience.

The substance of the CLE was provided by our stellar and exceedingly competent and inspired volunteer speakers. This year included an engaging agenda highlighting national policy issues, recent litigation of interest, and an

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A Border Not Their Own: The Provincial Court of British Columbia Holds in *Regina v. DeSautel* that Colville-Enrolled Sinixt Members Maintain Constitutional Right to Hunt Amongst the Arrow Lakes



By Jeremy Wood¹

As the Columbia River flows from Castlegar to Revelstoke in British Columbia, it widens into the Arrow Lakes. The Sinixt Nation has lived and hunted around these lakes since time immemorial, their territory stretching from northern Revelstoke down to Kettle Falls, Washington. It is for these lakes that they are known in English as the Lakes People. Around the lakeshores, the Sinixt hunted deer, bear, swans, and, when found wandering into their territory, elk. The Sinixt would migrate seasonally throughout their vast territory, even after they made initial contact with Euro-Americans in 1811.

But in the mid-19th century, the governments of those Euro-Americans agreed to set a border that cut through the Sinixt's hunting grounds. In 1854, the United States and Canada signed the Oregon Boundary Treaty, demarcating that boundary at the 49th parallel between the colony of British Columbia and territorial Washington. Although the Sinixt continued to assert the right to hunt above that foreign line, some tribal members began to remain longer and longer in the Washington Territory. The borderline solidified further in 1872, when President Ulysses S. Grant

"THE RIGHT THAT WAS IDENTIFIED WAS A RIGHT TO HUNT IN THE SINIXT'S TRADITIONAL TERRITORY IN CANADA FOR SUSTENANCE AS WELL AS FOR SOCIAL AND CEREMONIAL PURPOSES."

ordered the establishment of the Colville Indian Reservation for 12 confederated tribes, including the Sinixt, and in 1902, when Canadian officials set aside a comparably multi-tribal reserve for the "Arrow Lakes Band." American allotment and a rapid population decline of the so-named "Arrow Lakes Band" exacerbated the separation between United States Sinixt and their northern hunting grounds. After 1930, those Sinixt living on the Colville Reservation all but ceased hunting around the Arrow Lakes.

Richard DeSautel is Sinixt, enrolled Colville, and an American citizen. He grew up in the Sinixt community on the Colville Reservation. When he was 10 years old, his brother took him to hunt deer for the first time. As he grew older, his community singled him out for his special ability to hunt. He became acknowledged as a ceremonial hunter.

In late 2010, the Colville Fish and Wildlife Director instructed DeSautel to secure some ceremonial meat. So he and his wife traveled up to Castlegar, British Columbia and shot a cow-elk. After packing and storing the meat, he reported the kill to British Columbia conservation officers who charged him for hunting without a license and as a nonresident without a guide.

At trial in the Provincial Court of British Columbia, DeSautel maintained that he was exercising his aboriginal hunting right and, thus, the charging statutes should not apply to him.

The court examined this defense by addressing whether DeSautel had hunted pursuant to an aboriginal right, cognizable under Canadian common law. To meet his burden, DeSautel had to prove that hunting elk in British Columbia was an "element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."²

But the Crown contended at the threshold that the right could not exist because there was no rights-bearing aboriginal collective currently based in British Columbia to exercise it. The court disagreed, concluding the Sinixt members enrolled in the Colville Tribes constituted a successor group to the Sinixt living in British Columbia at the 1811 point of contact.

Having determined that the Colville Sinixt were a relevant rights-bearing group, the court had to identify the particular right claimed, assess its pre-contact significance, and gauge the strength of its continuity into the present day.

The right that was identified was a right to hunt in the Sinixt's traditional territory in Canada for sustenance as well as for social and ceremonial purposes.

In considering the right's pre-contact significance, the court had to balance the Sinixt's perspective on the nature of the right but do so in "terms that are cognizable to the non-aboriginal legal system."³ To answer this question, the

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ethics panel to guide you on any activist items on your to-do list.⁶

1 dbob@nativefirm.com.

2 See *Word from the Chair*, Lauren King, Indian Law Newsletter, Summer 2016, Vol. 24.

3 If you have not yet reviewed the new WSBA bylaws, affecting the entire function of the WSBA, you can find that information at: <http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Bylaws-Work-Group>.

4 dbob@nativefirm.com.

5 Again, if you email me, I will provide the conference call numbers and times.

6 Full agenda and registration is here: <http://www.millernash.com/hot-topics-in-indian-law-the-29th-annual-indian-law-section-seminar-06-15-2017>.

court reviewed certain expert testimony. One expert explained that he had “never worked with a tribe – for whom hunting was as central as hunting was to this tribe.”⁴ For this expert, hunting was an aspect of the Sinixt’s profound connection to their traditional territory. With this, alongside similar testimony, the court concluded that the right was sufficiently significant to pre-contact Sinixt people.

Turning to continuity, however, the court had to grapple with the notable fact that Sinixt hunting practices in British Columbia vanished from the historical record after 1930. The Crown challenged continuity, arguing that the Sinixt had voluntarily abandoned their practice of hunting in British Columbia.

The court could not fully adopt the position put forward by DeSautel’s expert that the Sinixt had been forced to abandon these northern rights by aggressive settlement policies in British Columbia. The same policies had equally held sway in the Washington territory.

Nevertheless, the court determined that there was continuity in the Sinixt’s preservation of the memory of their claim upon the northern territory, a memory which endured despite economic challenges and cultural oppression. The court found that, following 1930, the Sinixt endured, like non-natives, the Great Depression and the Second World War. But unlike non-natives, they also suffered the culturally genocidal effect of boarding schools, which ravaged their collective memory. Despite these challenges, the court determined that the Sinixt’s people maintained the memory of their traditional boundaries and the importance of the hunt therein.

Thus, if the chain of continuity was strained, it was through no fault of the Sinixt. They had never ceased in their desire to hunt in British Columbia. DeSautel himself explained that it was in hunting throughout the Arrow Lakes that he learned to be Sinixt. He testified that he felt “chills up and down me that I can be where my ancestors were at one time and do the things that they did.”⁵

Faced with such a preserved connection to northern hunting, the court also declined to adopt the position of the Crown’s expert that the Sinixt had voluntarily abandoned migratory hunting in order to farm on their Washington allotments. That turn was, at most, “the best choice among a number of bad options.”⁶ The historical forces of colonialism, and not the Sinixt’s voluntary enthusiasm, led them to stop hunting in British Columbia.

The court next examined whether the chain of continuity had been broken by the Crown’s assertions of sovereignty in the 1842 Oregon Boundary Treaty, an 1896 British Columbia hunting statute, or the 1982 Constitution Act. In each instance, the court inquired whether the

relevant act was a valid expression of sovereignty and whether it was incompatible with the preservation of the Sinixt’s hunting right.

Regarding the Oregon Boundary Treaty, the Crown submitted that the right of nonresidents to hunt in British Columbia was inconsistent with the treaty’s establishment of the border because the nonresident hunting right implied a right of mobility and the Act’s creation of a border implied a restriction on mobility. The court agreed that the sovereign could properly establish a border and control mobility across it. It was something the Sinixt had

to “live with.”⁷ But the court rejected the Crown’s assertion that the hunting right was incompatible with the establishment of the border. First, some Sinixt remained resident above the 49th paral-

lel; establishment of the border could not be said to have infringed upon their hunting right. Second, Sinixt hunters in the United States could, consistent with the treaty, be required to comply with standard border crossing requirements in order to exercise their right to hunt in their Arrow Lakes hunting grounds. Thus, the Boundary Treaty was not inconsistent with the exercise of DeSautel’s traditional hunting right.

The 1896 statute, promulgated by the British Columbian legislature, had made it unlawful for natives who were not residents of British Columbia to hunt in the province. The court rejected the Crown’s argument that this broke the chain of continuity for two reasons. First, the statute was unlawful because it discriminated against natives, and was therefore not a valid exercise of sovereignty. Second, the nature of the Canadian confederation laid sovereignty exclusively in the federal Crown. As such, the action of a provincial legislature was not an expression of sovereignty sufficient to extinguish DeSautel’s aboriginal right.

The 1982 Constitution Act provided, in section 35(1), that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” The Crown argued that the Washington-based Sinixt could have no rights protected under this section because they were not an aboriginal people of Canada. It reasoned that the drafters of that section could not have intended to include them.

The court held it irrelevant whether the drafters contemplated the Sinixt because section 35(1) did not create aboriginal rights. Those rights existed since time immemorial and had been long recognized by the common law. The drafters of section 35(1) intended to include any aboriginal right cognizable under the common law. Section 35(1)’s innovation was to constitutionalize such rights, insulat-

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“WITHOUT DISPUTE, THE CROWN HAD REFUSED TO CONSULT WITH THE SINIXT, ALTHOUGH THE SINIXT HAD MADE OVERTURES TO THIS EFFECT.”

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ing them from unilateral abrogation by the Crown. The Crown could henceforth only infringe upon such rights by regulations that were justified and minimally intrusive.

Finally, the court turned to the last substantive issue: whether the charging statutes infringed upon DeSautel's right and whether that infringement was justified. It answered the first question swiftly. One of the charging statutes prohibited all persons from hunting without a license except for persons with Indian status under Canadian law. The other prohibited non-residents from hunting without a guide. The court determined that both statutes imposed an undue hardship on DeSautel, infringing upon his right.

In considering whether this infringement was justified, the court had to determine whether the government had appropriately consulted with the aboriginal group and sought to accommodate its right, whether its action was backed by a "compelling and substantial objective," and whether that action was consistent with the Crown's fiduciary obligation to aboriginal people.⁸

Without dispute, the Crown had refused to consult with the Sinixt, although the Sinixt had made overtures to this effect.

Regarding the sufficiency of the Crown's objective, the court expressed skepticism whether the charging statutes' conservation purpose was necessary when both British Columbia and Sinixt authorities knew no conservation concerns existed regarding the elk.

But even if the objective was valid, the court held that its application was inconsistent with the "honor of the Crown."⁹ The Crown had a fiduciary obligation to prioritize aboriginal needs when allocating resources. It had breached this obligation. The statute requiring licenses for all but Canadian-status Indians reflected no mechanism to prioritize allocation to people like DeSautel. And, more blatantly, the statute requiring that nonresidents hunt with guides threatened to allocate resources away from rights-bearing nonresident natives to guide outfitters and guided nonnative hunters.

Because the Crown had failed to consult with the Sinixt and because the charging statutes included no mechanism to prioritize allocation to rights-bearing native hunters, the court concluded that any infringement that the statutes imposed upon DeSautel's rights was unjustified. It acquitted him accordingly.

DeSautel provides a new model to protect the resource rights of native peoples whose traditional territories and practices transcended the United States-Canadian borders. The court's bold conclusions inspire, holding that the Sinixt could hold and maintain their rights across a border imposed by foreigners and could maintain their legal rights despite colonial violence upon memory and practice.

But the court's reasoning also highlights fundamental distinctions between the underlying Canadian jurisprudence and our own. Provincial sovereignty is dismissed in a breath, in contrast to our federalism and the legacy of PL 280. And aboriginal rights, whether or not recognized in treaty, are constitutionally protected from unilateral abrogation by the federal legislature.¹⁰

Thus, *DeSautel's* primary import for American tribes lies not in what they can argue in our courts, but what they can reclaim in the Canadian stretches of their traditional territories.

1 Jeremy, originally Canadian himself, is a law clerk on the Washington State Court of Appeals, Co-Chair of the Seattle Human Rights Commission, and a former Vice-President of the University of Washington NALSA chapter. He can be reached at jeremywood10@gmail.com. Any opinions in this casenote are his own.

2 *R. v. DeSautel*, 2017 BCPC 84, para. 52 (Can. B.C.).

3 *Id.* at para. 101.

4 *Id.* at para. 80.

5 *Id.* at para. 124.

6 *Id.* at para. 109.

7 *Id.* at para. 148.

8 *Id.* at para. 178 (quoting *Tsilcot'in v. British Columbia*, 2014 SCC 44, para. 77).

9 *Id.* at para. 184.

10 *Cf. Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 75 S. Ct. 313 (1955) (holding that the United States may take land without compensation, if it has not recognized the tribal claim to title).



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