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R. v. Powley

A Summary of the Supreme Court of Canada Reasons for Judgment

This *Powley Summary* was written and prepared by Jean Teillet. Ms. Teillet is an Aboriginal rights lawyer with the law firm of Pape & Salter. She is also the great grand niece of Louis Riel.

Jean Teillet was legal counsel for the Powleys at all levels of court. Co-counsel at trial was Clayton Ruby. Co-counsel at the Ontario Court of Appeal and at the Supreme Court of Canada was Arthur Pape.

In Brief– what the Court said

In a unanimous decision, the Supreme Court of Canada confirmed the constitutional protection for the harvesting rights of the Métis.

The Court set out a general test for determining Métis rights within s. 35 of the *Constitution Act, 1982*. In this decision the Court applied that test to the Sault Ste Marie Métis community and to the Powleys. However, this does not mean that the case is limited in its application only to the Sault Ste Marie Métis community. The test applies to Métis communities across Canada.

The Court said that the Métis were included as one of the "aboriginal peoples of Canada" in s. 35 to recognize them, to value distinctive Métis cultures, and to enhance their survival.

The Court also spoke about the urgent need to develop more systematic methods to identify Métis rights-holders. In answer to government claims about the identification problems, the Court said that it was not an insurmountable problem and that the difficulties must not be exaggerated in order to defeat Métis claims.

The Powley Story

On October 22, 1993, Steve and Roddy Powley killed a bull moose just outside Sault Ste Marie, Ontario. They tagged their catch with a Métis card and a note that read "harvesting my meat for winter". The Powleys were charged with hunting moose without a license and unlawful possession of moose.

In 1998, the trial judge ruled that the Powleys have a Métis right to hunt that is protected by s. 35 of the *Constitution Act, 1982*. The charges were dismissed, but the Crown appealed the decision. In January 2000, the Ontario Superior Court of Justice confirmed the trial decision and dismissed the Crown's appeal. The Crown appealed the decision to the Ontario Court of Appeal. On February 23, 2001 the Court of Appeal unanimously upheld the earlier decisions and confirmed that the Powleys have an Aboriginal right to hunt as Métis. The Crown then appealed to the Supreme Court of Canada.

On September 19, 2003 the Supreme Court of Canada, in a unanimous judgment, said that the Powleys as members of the Sault Ste Marie Métis community, can exercise a Métis right to hunt that is protected by s. 35 of the constitution.

The Text of s. 35 of the *Constitution Act, 1982*

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.

The Purpose for Including Métis in s. 35

The Métis were included in s. 35 because Canada made a commitment to recognize and value the Métis and to enhance their survival as distinctive communities.

The purpose and the promise of s. 35 is to protect as "rights" practices that were historically important to the Métis, and which have continued to be important in modern Métis communities. The Court describes these practices as "integral" to the Métis.

The Court said that the framers of the *Constitution Act, 1982* recognized that Métis communities must be protected along with other Aboriginal communities.

Who are the Métis in s. 35?

"The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities."

This question was discussed at length before the Court. Many of the Crown lawyers argued that there were no Métis "peoples" and that there were only individuals with mixed Indian and European heritage.

The Court made a distinction between Métis identity (eg: for citizenship, cultural purposes, etc.) and Métis rights-holders. The decision only relates to Métis rights-holders.

The Court did not set out a comprehensive definition of Métis. Instead, the Court set out who the Métis are for the purposes of s. 35. The Court said that the term "Métis" in s. 35 refers to distinctive Métis peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and group identity – separate from their Indian, Inuit or European forebears.

The Court said that the term "Métis" in s. 35 does not include all individuals with mixed Indian and European heritage.

The Powley Test - the New Test to Define s. 35 Métis Rights

The Supreme Court said that the appropriate way to define Métis rights in s. 35 is to modify the test used to define the Aboriginal rights of Indians (the *Van der Peet* test). This Métis test will now be called the *Powley* test.

The test is set out in ten parts:

1. ***Characterization of the right*** – for a harvesting right, the term "characterization" refers to the ultimate use of the harvest. Is it for food, exchange or commercial purposes? The Court said that the Métis right to hunt is not limited to moose just because that is what the Powleys were hunting. Métis don't have to separately prove a right to hunt every species of wildlife or fish they depend on. The right to hunt is not species-specific. It is a general right to hunt for food in the traditional hunting grounds of the Métis community.

2. ***Identification of the historic rights bearing community*** - An historic Métis community was a group of Métis with a distinctive collective identity, who lived together in the same geographic area and shared a common way of life. The historic Métis community must be shown to have existed as an identifiable Métis community prior to the time when Europeans effectively established political and legal control in a particular area.

3. ***Identification of the contemporary rights bearing community*** - Métis community identification requires two things. First, the community must self-identify as a Metis community. Second, there must be proof that the contemporary Métis community is a continuation of the historic Métis community.

4. ***Verification of membership in the contemporary Metis community*** – There must be an "objectively verifiable process" to identify members of the community. This means a process that is based on reasonable principles and historical fact that can be documented. The Court did not set out a comprehensive definition of Métis for all purposes. However, it set out three components to guide the identification of Métis rights-holders: self-identification, ancestral connection to the historic Métis community, and community acceptance. Difficulty in determining membership in the Métis community does not mean that Métis people do not have rights.

5. ***Identification of the relevant time*** – In order to identify whether a practice was "integral" to the historic Aboriginal community, the Court looks for a relevant time. Ideally, this is a time when the practice can be identified and before it is forever changed by European influence. For Indians, the Court looks to a "pre-contact" time. The Court modified this test for Métis in recognition of the fact that Métis arose as an Aboriginal people after contact with Europeans. The Court called the appropriate time test for Métis the "post contact but pre-control" test and said that the focus should be on the period after a particular Métis community arose and before it came under the effective control and influence of European laws and customs.

The Court made no decision, and said it was not necessary for it to decide if a specific Métis community is also a Métis "people" or whether it forms part of a larger Métis people that extends over a wider area.

"… the test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land."

"We reject the appellant's argument that Métis rights must find their origin in the pre-contact practices of the Métis' Aboriginal ancestors. This theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1)."

6. ***Was the practice integral to the claimant's distinctive culture*** - The Court asks whether the practice - subsistence hunting - is an important aspect of Métis life and a defining feature of their special relationship to the land. The Court specifically noted that the availability of a particular species over time is not relevant. So even though the case may be about moose hunting, as it was with the Powleys, the issue is really about the right to hunt generally. The Court found that, for the historic Sault Ste Marie Métis community, hunting for food was an important and defining feature of their special relationship with the land.

7. ***Continuity between the historic practice and the contemporary right*** - There must be some evidence to support the claim that the contemporary practice is in continuity with the historic practice. Aboriginal practices can evolve and develop over time. The Court found that the Sault Ste Marie Métis community had shown sufficient evidence to prove that hunting for food continues to be an integral practice.

8. ***Extinguishment*** - The doctrine of extinguishment applies equally to Métis and First Nation claims. Extinguishment means that the Crown has eliminated the Aboriginal right. Before 1982 this could be done by the constitution, legislation or by agreement with the Aboriginal people. In the case of the Sault Ste Marie Métis community, there was no evidence of extinguishment by any of these means. The *Robinson Huron Treaty* did not extinguish the Aboriginal rights of the Métis because they were, as a collective, explicitly excluded from the treaty. A Métis individual, who is ancestrally connected to the historic Métis community, can claim Métis identity or rights even if he or she had ancestors who took treaty benefits in the past.

9. ***Infringement*** – No rights are absolute and this is as true for Métis rights as for any other rights. This means that Métis rights can be limited (infringed) for various reasons. If the infringement is found to have happened, then the government may be able to justify (excuse) its action. The Court said here that the total failure to recognize any Métis right to hunt for food or any special access rights to natural resources was an infringement of the Métis Aboriginal right.

10. ***Justification*** – Conservation, health and safety are all reasons that government can use to justify infringing an Aboriginal right. But they have to prove that there is a real threat. Here there was no evidence that the moose population was under threat. Even if it was, the Court said that the Métis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria set out in *Sparrow*. Ontario's blanket denial of any Métis right to hunt for food could not be justified.

Métis Identification

The Court did not set out a comprehensive definition of Métis for all purposes. It did, however, set out the basic means to identify Métis rights-holders. The Court identified three broad factors: self-identification, ancestral connection to the historic Métis community, and community acceptance.

Self-identification – the individual must self-identify as a member of a Métis community. It is not enough to self-identify as Metis, that identification must have an ongoing connection to an historic Metis community.

Ancestral Connection – There is no minimum "blood quantum" requirement, but Métis rights-holders must have some proof of ancestral connection to the historic Métis community whose collective rights they are exercising. The Court said the "ancestral connection" is by birth, adoption or other means. "Other means" of connection to the historic Métis community did not arise with the Powleys and will have to be determined in another case.

Community Acceptance – there must be proof of acceptance by the modern community. Membership in a Métis political organization may be relevant but the membership requirements of the organization and its role in the Métis community must also be put into evidence. The evidence must be "objectively verifiable." That means that there must be documented proof and a fair process for community acceptance.

The Court said that the core of community acceptance is about past and ongoing participation in a shared culture, in the customs and traditions that reveal a Métis community's identity. Other evidence might include participation in community activities and testimony from other community members about a person's connection to the community and its culture. There must be proof of a "solid bond of past and present mutual identification" between the person and the other members of the Métis community.

What can be understood from this community acceptance requirement is that in order to claim s. 35 rights it is not enough to prove a genealogical connection to a historic Métis community and then join a Métis organization. One must have a "past and ongoing" relationship to the Métis community.

"The development of a more systematic method of identifying Métis rights-holders…is an urgent priority."

"The difficulty in identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada."

FAQs – frequently asked questions

I have a provincial Métis Nation card – can I hunt?

Yes, if you can also provide proof of an ancestral and ongoing connection to an historic Métis community in the territory where you are hunting.

What does "ancestral connection" to the historic Métis community mean?

This means that one of your ancestors was a member of the historic Métis community.

Are Métis harvesting rights the same as Indian harvesting rights?

In general, yes. Métis and Indians are to get the same priority allocations of the harvest. However, in some places Indian harvesting rights have been extinguished or are now set out in a treaty. In such cases, Métis may have harvesting rights that are different. On the Prairie Provinces, Indians have two layers of constitutional protection – s. 35 and the *Natural Resources Transfer Agreement* (NRTA). Métis, as a result of the recent Supreme Court of Canada decision in *Blais,* cannot claim the additional protection of the NRTA. This does not mean that Métis do not have constitutional protection for their harvesting rights in the Prairies, it simply means that Métis harvesting on the Prairies has only one layer of constitutional protection - s. 35.

The Court said these rights are "site-specific" – what does that mean?

This does not mean an individual lake or camp. It refers to the general region that should equate to the traditional hunting territory of the Métis community. Métis "site-specific" harvesting rights may be exercised in that geographic area.

How do we define a Métis community?

A community could be defined in many ways. It could be a town, city or village. It could include outlying areas. It could be a regional community or a community of interests. The Court did not decide whether the Sault Ste Marie Métis community was itself an "Aboriginal people" or part of a larger regional people or an even larger body.

Does this case apply only to Sault Ste Marie?

No. The Court set out a test that applies to all Métis across the country.

What happened to the stay application by the Ontario Crown?

The Court of Appeal granted a one-year stay (suspension) of its judgment. The Crown, before the Supreme Court of Canada, asked for another stay. The Supreme Court affirmed the Appeal Court's jurisdiction to grant the stay, but declined to grant another. The Court noted that more than a year had elapsed since the expiry of the stay and "chaos does not appear to have ensued". The court saw no compelling reason to issue an additional stay.

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A general overview of Métis law can be found in the *Métis Law Summary – 2003,* written and updated annually by Jean Teillet.

An electronic version of the *Métis Law Summary-2003* can be found on the website of the Métis Nation of Ontario at www.metisnation.org or on the website of the Métis National Council at www.metisnation.ca

Directions from the Court

The Court gave several specific directions with respect to Métis.

The first is that the identification of Métis rights holders is an "urgent priority". Both the provincial and federal governments have been saying that they could not recognize Métis rights because they were uncertain as to who the Métis were. The Court said that it is not an "insurmountable task" to identify Métis rights-holders and that the difficulties are not to be exaggerated in order to deny Métis constitutional rights.

The Court also said that regulatory regimes that do not recognize and affirm Métis rights and afford them a priority allocation equal to First Nations are unjustifiable infringements of Métis rights.

The Court said that membership requirements in Métis organizations must become more standardized.

While the Court did not order negotiations, it gave clear directions that it expects a combination of negotiation and judicial settlement to more clearly define the contours of the Métis right to hunt.

About this Powley Summary

This *Powley Summary* has been prepared by the law firm of Pape & Salter. It is intended to be an easy to read guide to the Supreme Court of Canada's decision in *R. v. Powley*. It should not be used as a legal opinion.

About Pape & Salter

Pape & Salter is a small law firm based in Toronto and Vancouver. We specialize in Aboriginal rights law. For over twenty years our firm has been involved in Aboriginal rights litigation at all levels of court for First Nations and for Métis. We have also acted as legal counsel in land claims negotiations in the Yukon, NWT and British Columbia.

We were honored to represent the Powleys at all levels of court and to be part of the legal team for the Métis National Council in its interventions in *Blais*.