PLAINSPEAK

Hunt for Justice

The Pursuit of Métis Hunting Rights in Alberta

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Background

In 1982, after generations of fighting for justice, the existing aboriginal and treaty rights of Canada's aboriginal peoples received constitutional protection in the *Constitution Act, 1982*.

Section 35 of the *Constitution Act, 1982* promises:

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.

Section 35 was a victory for all aboriginal peoples in Canada. For the Métis, explicit inclusion was viewed as a new beginning after over 100 years of neglect from governments in Canada. In the House of Commons and Senate, it was called a "political watershed" and a "turning point in the status of native peoples in this country".

Unfortunately, since 1982, the promise of s. 35 has gone largely unfulfilled for the Métis. Governments have often refused to negotiate or deal with the Métis. Nowhere was this more clearly seen than in the failure of the governments across Canada to recognize Métis harvesting rights.

In the early 1990s, the Métis Nation began its 'Hunt for Justice', by asserting the Métis constitutional right to hunt for food before the Canadian courts.

The *Powley* case was the first Métis harvesting rights case based on s. 35's protections that reached the Supreme Court of Canada. In the *Powley* case, with the support of the Metis Nation of Ontario, Steve and Roddy Powley successfully defended their right to hunt as members of the Metis community in the Sault Ste. Marie region of Ontario.

In September 2003, in a unanimous decision, the Supreme Court of Canada affirmed that s. 35 of the *Constitution Act, 1982* is a substantive promise to Métis and that it recognizes their distinct existence and protects their existing aboriginal rights. The *Powley* test now determines how s. 35 Métis harvesting rights should be recognized.

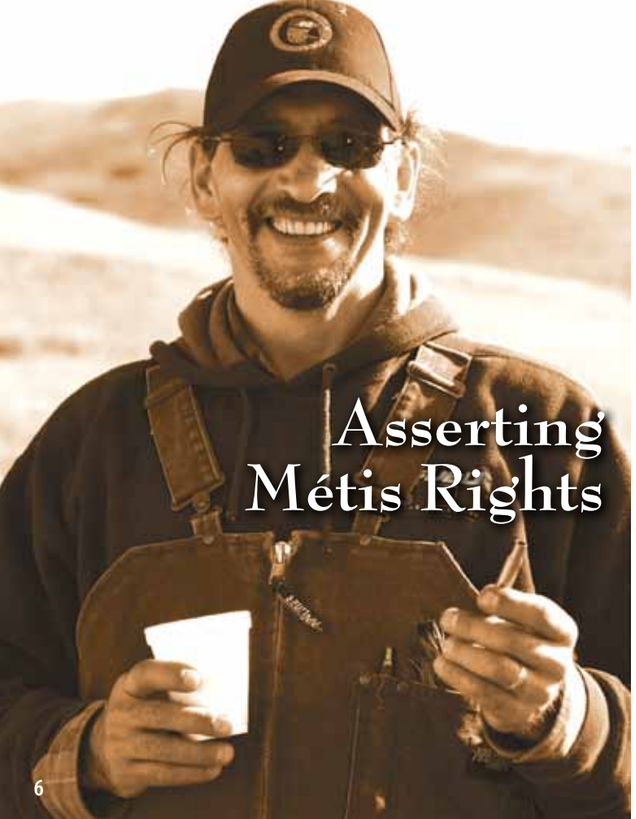
The *Powley* decision marked a new day for the Métis Nation. Following *Powley*, Alberta and the Métis Nation of Alberta (MNA) arrived at a just settlement to implement *Powley* in the province. Specifically, in 2004, Alberta and the MNA entered into the the Interim Métis Harvesting Agreement (IMHA). The IMHA allowed Alberta Métis to exercise their cultural tradition of hunting for food throughout Alberta.

Through the IMHA, real progress was made on fulfilling s. 35's promise to the Métis. Unfortunately, this progress and the IMHA were short lived. In July 2007, Alberta terminated IMHA in favor of a unilateral 'SRD Métis Harvesting Policy' that, among other arbitrary restrictions, excludes Métis harvesting rights in central and southern Alberta. In August 2007, the MNA responded by implementing its own Harvesting Policy and an Action Plan to assert the Métis right to hunt in Alberta.

Under the Action Plan, the MNA organized Métis hunts throughout Alberta, which subsequently led to more than 30 individuals being charged under Alberta's *Wildlife Act*. In October 2007, Garry Hirsekorn was one of the individuals charged. In his defence, he asserted his constitutional right under s. 35 to hunt for his food as a member of the Métis Nation.

Key Dates

April 1982	Constitutional protection of Métis rights in section 35 of the Constitution Act, 1982.
September 2003	In R v. Powley, the Supreme Court of Canada handed down its first decision confirming that Métis hunting rights are protected under s. 35
September 2004	Alberta Government led by Ralph Klein entered into the IMHA with the MNA – an agreement that recognized Métis harvesting rights throughout Alberta
2004-2006	Ted Morton and the Alberta Fish and Game Association launch a misinformation campaign against the IMHA
March 2006	MLA Committee on Métis Harvesting recommends the IMHA as the foundation for a longer-term agreement
May 2007	MNA and Alberta's Minister for Aboriginal Affairs reach Points of Agreement for a longer-term Métis harvesting agreement
July 2007	Ted Morton, now Alberta's Minister of Sustainable Resource Development (SRD) rejects the Points of Agreement, and the Alberta Government terminates the IMHA.
August 2007	MNA Assembly rejects Alberta's unilateral policy and passes its own Harvesting Policy and Action Plan.
October 2007	Garry Hirsekorn is charged by SRD officers under Alberta's Wildlife Act
May 2009	Hirsekorn trial begins in Medicine Hat
December 2010	Provincial Court of Alberta convicts Mr. Hirsekorn holding that there was no historic Métis community in southern Alberta and therefore no contemporary hunting rights in that part of the province. The court recognized historic Métis communities in central Alberta.
December 2010	Notice of Appeal filed with the Alberta Court of Queen's Bench
June 2011	Hirsekorn appeal argued in Medicine Hat



Asserting Métis Rights

On October 20th, 2007, Garry Hirsekorn shot a mule deer near Elkwater, Alberta in the Cypress Hills as a part of the Action Plan, and consistent with the MNA's Harvesting Policy. Mr. Hirsekorn was charged under Alberta's *Wildlife Act*, and asserted his constitutional right under s. 35 to hunt for food as a member of a rights bearing Métis community.

On December 1st, 2010, the trial judge dismissed this constitutional challenge and convicted Mr. Hirsekorn on the grounds that Mr. Hirsekorn shot the deer for political purposes and not for food; that he had no right to raise his Métis rights as a defence to a hunting charge; that Mr. Hirsekorn did not have a Métis right to hunt in southern Alberta because he was born in Manitoba; and that no rights-bearing Métis community exists or has ever existed in southern Alberta. Mr. Hirsekorn appealed the trial judge's decision, and his first level of appeal was heard in June of 2011.

While Mr. Hirsekorn is one of many defendants currently supported by the MNA, his case was identified as a test case by the MNA because it raised many of the legal issues that are important to Alberta Métis. Appealing this initial decision is a continuation of the ongoing "Hunt for Justice" for Métis rights across the Métis Nation Homeland. This appeal will impact Métis everywhere because it deals with the fundamental legal questions about Métis identity, mobility and the definition of community.

The fundamental legal questions are about Métis identity, mobility and the definition of community.

What the Provincial Court of Alberta Said

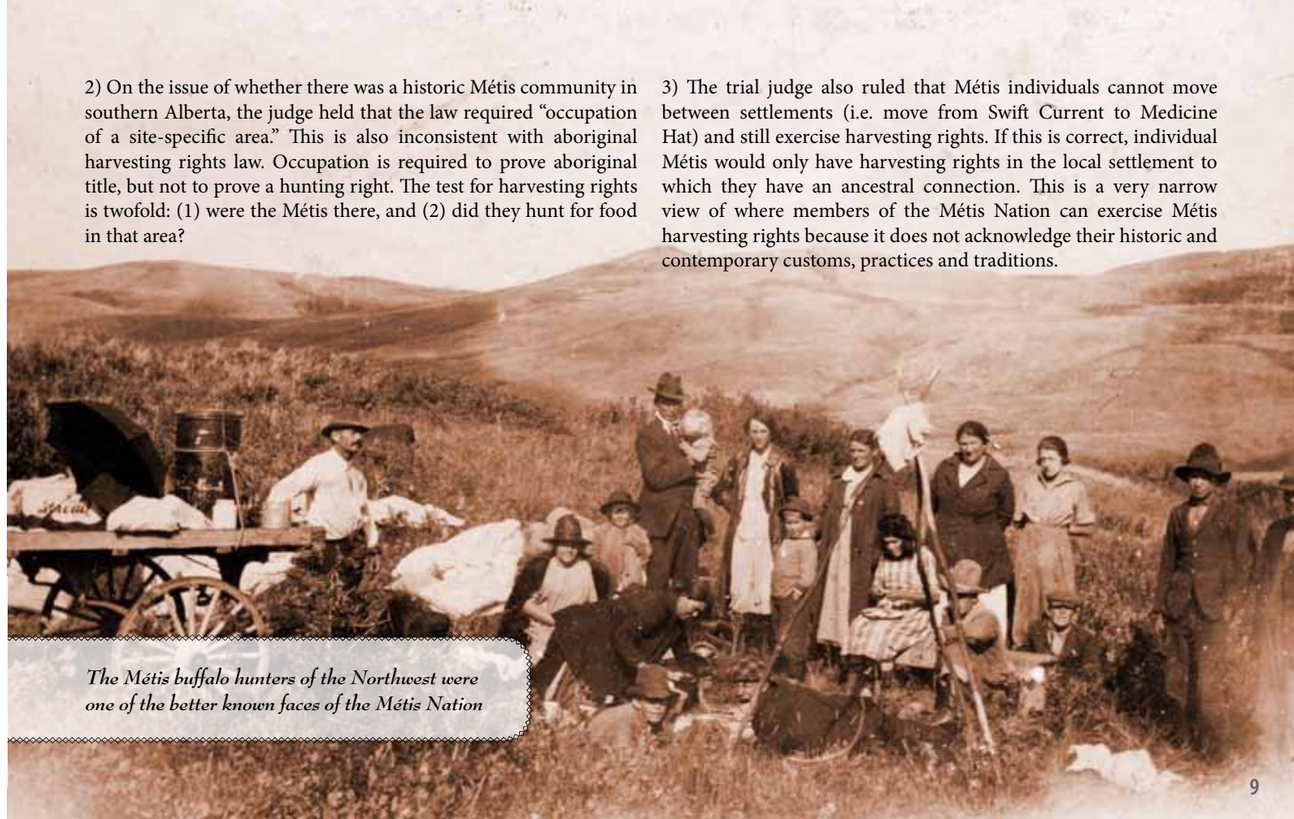
It is noteworthy that in the *Hirsekorn* case, there were some important victories. Notably, the trial judge recognized the existence of a historic Métis community throughout much of central Alberta. This Métis community spanned the North Saskatchewan River system and includes a large regional territory made up of inter-connected settlements and locations such as Rocky Mountain House, St. Albert, Fort Victoria, the Battle River and Lac La Biche. This finding, combined with the SRD Métis Harvesting Policy (which recognizes Métis harvesting rights in much of northern Alberta), means Métis harvesting rights should now be recognized in close to three quarters (approximately 75%) of the province. This is a significant achievement for Alberta Métis.

However, the trial judge also made several problematic findings in *Hirsekorn*. These are:

1) The trial judge dismissed the constitutional challenge on two grounds. First, he said that it was not permissible to use a Métis rights defence against a hunting charge. Second, the trial judge characterized the hunting as being, not for food, but for political purposes. Both of these findings are inconsistent with aboriginal rights law. It is quite common, not just with aboriginal rights, but with many rights assertions, to challenge the law, get charged and raise a constitutional defence.

2) On the issue of whether there was a historic Métis community in southern Alberta, the judge held that the law required "occupation of a site-specific area." This is also inconsistent with aboriginal harvesting rights law. Occupation is required to prove aboriginal title, but not to prove a hunting right. The test for harvesting rights is twofold: (1) were the Métis there, and (2) did they hunt for food in that area?

3) The trial judge also ruled that Métis individuals cannot move between settlements (i.e. move from Swift Current to Medicine Hat) and still exercise harvesting rights. If this is correct, individual Métis would only have harvesting rights in the local settlement to which they have an ancestral connection. This is a very narrow view of where members of the Métis Nation can exercise Métis harvesting rights because it does not acknowledge their historic and contemporary customs, practices and traditions.



The Métis buffalo hunters of the Northwest were one of the better known faces of the Métis Nation

The Métis People at Issue in the Case

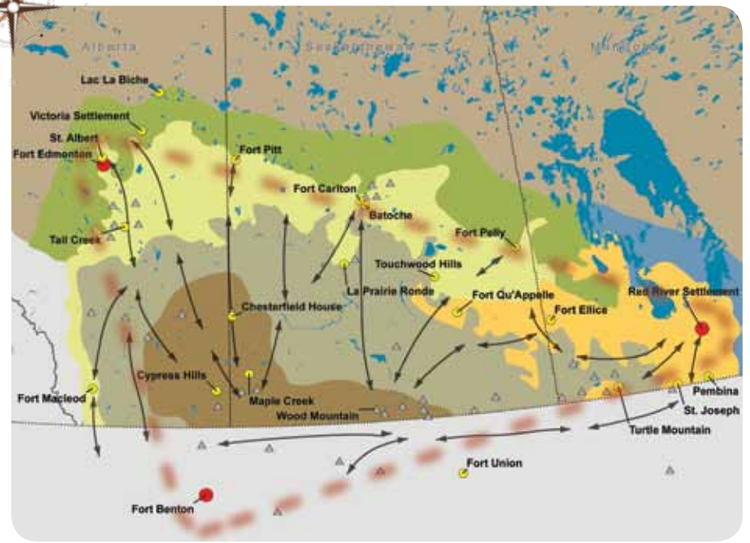
The Métis Buffalo Hunters of the Plains

At its core, this case is about the aboriginal people called the Métis Nation (also referred to as the "Métis of the Northwest"). The Métis had their own distinct identity, language, culture and way of life. Their territory spanned the Prairie Provinces and extended into parts of Ontario, British Columbia, the Northwest Territories and the northern United States (i.e., Montana, North Dakota, etc.). The Métis had well-established settlements in the Northwest in places such as Red River, Fort Edmonton, Fort Pelly, Fort Carleton and Fort Pitt.

The settlements of Red River, Fort Edmonton and Fort Benton formed a regional triangle on the outskirts of the Plains and acted as centers of gravity for the Métis. Within this large triangle, the Métis of the Northwest had a common pursuit – they followed the buffalo.

The Métis buffalo hunters of the Northwest were one of the better-known groups within the Métis Nation. With their families, these hunters travelled for months, or even years following the buffalo. They travelled in large groups, often numbered in the thousands. In order to survive the winter on the Plains, they built temporary homes (called "wintering sites" or "hivernants") in places such as Turtle Mountain, Qu'Appelle, Wood Mountain and Cypress Hills.

The Geography of Métis Buffalo Hunters of the Plains



Relevant General and Specific Locations
General Area Used by Métis Buffalo Hunters
Métis Wintering Site
Métis Movement
Water Bodies
Provincial Boundaries

Vegetation

Aspen Grove
Aspen-oak Grove
Manitoba Lowlands Forest
Mixed Grass Prairie
Mixed Wood Forest
Northern Forest - Densely Wooded
Northern Forest - Not Densely Wooded
Short-grass Prairie

Based on Gerhard Ens' map, "Métis Wintering Sites 1840s to 1870s" in his book *Homeland to Hinterland, (1996)* at p. 79.Vegetation data based on F.B. Watts' map, "The Natural Vegetation of the Southern Great Plains of Canada" from the periodical *Geographical Bulletin, No 14, (1960)* at p. 25. Areas outside the Southern Plains from the *National Atlas of Canada, 1st Edition, (1906)* at p.8. All boundaries are approximate. Basemapping from Natural Resources Canada.

SRD Métis Harvesting Rights in Alberta

- Métis "Communities" Currently Recognized in SRD Métis Harvesting Policy.
  Note: Alberta Government's identification of site-specific locations as Métis communities is inconsistent with R. v. Hirsekorn

★ Locations Recognized in R. v. Hirsekorn as being a part of a Regional Rights-Bearing Métis Community (North Saskatchewan Métis Community)

- Athabasca River
- Battle River
- North Saskatchewan River

Treaty Territories

- Treaty 4
- Treaty 6
- Treaty 7
- Treaty 8
- Treaty 10

DISCLAIMER: The map has been created to provide a visual representation of some of the trial judge's conclusions in R. v. Hirsekorn as well as the "Métis Communities" currently identified in the SRD Métis Harvesting Policy. The creation of this map does not indicate that the MNA agrees with the limited recognition of Métis harvesting rights that currently exists in Alberta. The MNA is supporting the appeal of R. v. Hirsekorn in order to challenge the SRD Métis Harvesting Policy and to address Métis harvesting rights in southern Alberta, along with mobility issues relating to Métis harvesting rights.The map was created to assist MNA members to understand where they can exercise their harvesting rights. At the time of publication, the SRD Métis Harvesting Policy had not been changed to include the settlements indicated by yellow stars as recognized Métis communities. This map should not be relied upon for undertaking harvesting activities in Alberta and is not legal advice. For the MNA's recently updated directions and policies on Métis harvesting, please contact the MNA or visit www.albertametis.com.

The Appeal

The MNA and Mr. Hirsekorn strongly disagree with the trial judge's decision and have appealed it to the Alberta Court of Queen's Bench. While the trial judge acknowledged correctly that the *Powley* test was the governing law for the case at bar, he made many errors in his interpretation and application of this legal test.

Key Issues in the Appeal

(1) *Powley* Test: Settlement vs. Community

The trial judge looked for "settlements" that would indicate that the Métis "occupied" southern Alberta. However, occupation is a requirement for proving aboriginal title, not an aboriginal hunting right. In other cases in Manitoba (*R. v. Goodon*) and Saskatchewan (*R. v. Belhumeur*) where the courts also dealt with the Métis buffalo hunters, it was recognized that Métis communities are large and mobile. Those courts described Métis communities as regional entities and rejected the suggestion that they were limited to a single settlement.

(2) *Powley* Test: Site-Specific

Courts have said that aboriginal harvesting rights are often associated with a specific site. However, they have usually balanced that with an acknowledgement that the harvesting right is to be understood with reference to the traditional practices of the people claiming the right.

In this case, the Métis were known far and wide as buffalo hunters. Because they hunted a migratory species, they were also highly mobile. Quite simply – they went where the buffalo went.

Since the buffalo were on the Plains, that is also where the Métis were, and where they hunted. The "plains" is a large geographic area and the buffalo used different parts of the plains at different times. One expert at trial called it a "shifting geographic reference". The trial judge held that hunting buffalo on the "plains" was too general to claim a 'site-specific' s. 35 hunting right in southern Alberta.

Since the buffalo were on the Plains, that is also where the Métis were and where they hunted

(3) *Powley* Test: Métis Settled in Southern Alberta Too Late

The trial judge made two findings of fact. First, he said that the Métis did not establish settlements in southern Alberta until after the North West Mounted Police arrived in the Fall of 1874. Second, he said that the Métis were not in southern Alberta in sufficient numbers before 1874 to prove that there was an historic Métis community there. At trial, there was un-contradicted evidence that the Métis were hunting in southern Alberta in large numbers prior to the arrival of the North West Mounted Police. Scrip records show Métis vital events (births, marriages, etc.) in southern Alberta since the early 1800s. One of the unique pieces of evidence at trial was a photograph *(opposite)* that showed a large Metis hunting camp with over a thousand people in southern Alberta (just 36 kms from where Garry Hirsekorn was hunting) before the North West Mounted Police arrived. This may be the only aboriginal harvesting case that has photographic evidence of hunting in the site-specific area.

(4) *Powley* Test: Ancestral Connection

The trial judge ruled that Mr. Hirsekorn had no ancestral connection to southern Alberta because there was no historic Métis community there and because his direct Métis ancestors were from other parts of the Métis Nation, including, Lac La Biche, southern Saskatchewan and Manitoba. The position taken by the MNA on appeal was that an individual only has to prove an ancestral connection to the Métis Nation, which was presented as the historic rights-bearing Métis community, not to the local settlement close to where the hunting took place.

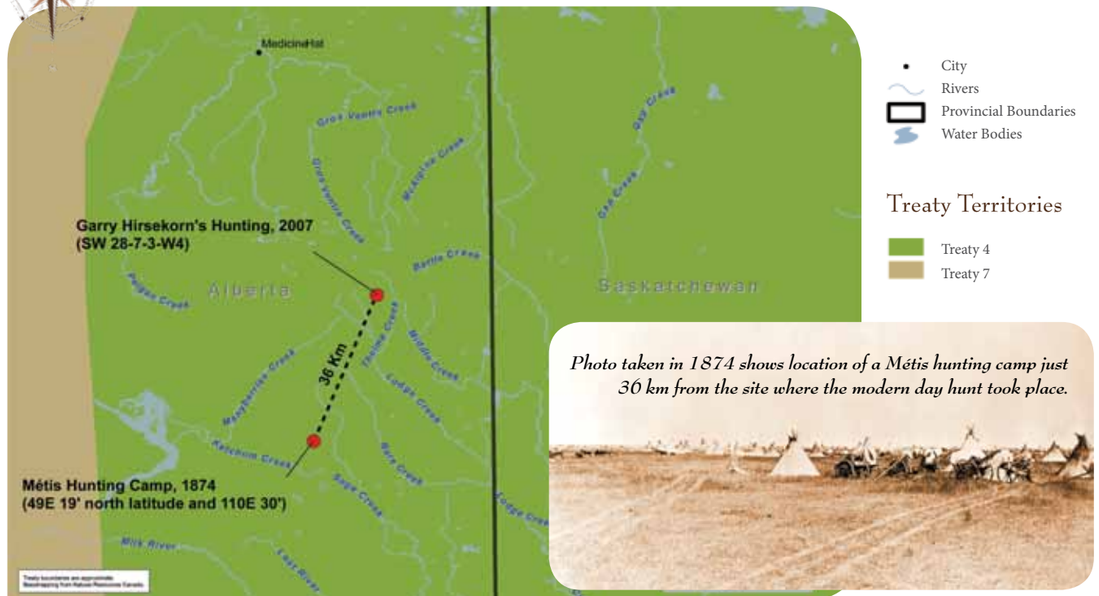
Relocating from one town or province to another should not bar an individual who is ancestrally connected to the Métis Nation from exercising harvesting rights. This is a legal question that has not been at issue in previous Métis harvesting rights cases, and is of fundamental importance to many Métis whose ancestors were mobile and who continue to be mobile today.

(5) *Powley* Test: Characterization of the Right

The trial judge characterized Mr. Hirsekorn's hunt as for 'political purposes', and on that basis denied that the hunting was for food. The position taken on appeal was that the right should be properly characterized as the right to hunt for food because the ultimate purpose of the MNA's organized hunts was to have the Métis right to hunt for food in Alberta recognized. The Supreme Court of Canada has often dealt with aboriginal rights and other rights claims that arose as a result of highly publicized challenges to the law. The highest court in the land has never dismissed a case on this basis.

These are the main appeal points in the *Hirsekorn* appeal. The aim is to establish language in the law that recognizes the Métis historic rights-bearing community as the large highly mobile entity that it historically was. This will have a direct affect on how Métis harvesting rights will be recognized in the future for the Métis Nation. Doing so, for the purpose of proving Métis harvesting rights, has become a central issue in the courts in Métis cases, and will be the central issue in this appeal.

Location of Garry Hirsekorn's Hunting Site



Frequently Asked Questions

What did the judge say about the political purpose of the MNA hunt?

Because of the MNA Action Plan, the trial judge said the hunt was for political purposes only, as opposed to hunting for food. This is an error because he failed to distinguish between the fact that the hunt was highly publicized and the purpose of the hunt, which was to have the Métis right to hunt for food recognized.

Why did the judge dismiss this test case for Métis harvesting rights?

The judge dismissed the case because he wrongly interpreted and applied the *Powley* test. Basically, he said that there was a requirement to prove prior occupation and frequent and consistent use of the area. Neither of those requirements are in the *Powley* test or in any of the case law for First Nation harvesting rights. Further, courts in both Manitoba and Saskatchewan have rejected the idea that the historic Métis community equates to a Métis 'settlement'.

At trial, it was argued that what the *Powley* test really requires is for the court to look at the customs, practices and traditions of the historic Métis community, and where those practices were exercised. But in the *Hirsekorn* case the trial judge wrongly focused on settlement, rather than the historic hunting practices of the Métis community. As a result, he wrongly concluded there are no Métis harvesting rights in southern Alberta.

Were there any victories in the case?

Yes, the trial judge recognized that there was a historic Métis community in the region along the North Saskatchewan River system (i.e. much of central Alberta). Specifically, the trial judge recognized that there was a historic "North Saskatchewan Métis Community" that included settlements and locations such as Fort Edmonton, St. Albert, Lac St. Anne, Victoria, Lac La Biche, Rocky Mountain House, etc.

This can be considered a victory for Alberta Métis because the current SRD Métis Harvesting Policy does not recognize that Métis harvesting rights extended as far south as Edmonton and Rocky Mountain House. Based on this case and the current SRD Métis Harvesting Policy, Métis harvesting rights should now be recognized in close to three quarters (75%) of the province.

How do we define a Métis community?

In *Powley,* the Supreme Court of Canada said that, "a Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life." Community can be defined at many levels – as a local, regional or national body. Many Métis now live in settlements from Ontario westward. Those settlements are often described as a Métis community. A regional entity can also be the Métis community (e.g., Northwest Saskatchewan).

While it is not "wrong" today to describe a settlement or a region as the Métis community, it is not helpful when trying to understand the historic community of the Métis buffalo hunters, which is a group that is much larger than a localized concept. Ultimately, because the Métis were highly mobile, the historic Métis community is best defined geographically as the Métis of the Northwest and this group usually describes themselves, and was sometimes described by others, as the Métis Nation.

What is the MNA doing about the decision?

The MNA strongly disagrees with the trial judge's decision and appealed it to the Alberta Court of Queen's Bench. The appeal was argued in Medicine Hat on June 21-24, 2011.

The appeal sought to establish the harvesting rights of a Métis community based on having a distinct culture and relationship to the land that was relied on historically. The MNA appealed the trial judge's ruling that in order to exercise harvesting rights, Métis people are required to prove prior occupation in a specific settlement near where the hunting took place.

These issues have direct consequences on how a historically mobile, rights-bearing aboriginal community is identified, and this appeal will impact the way Métis rights are recognized in any Canadian court of law.

What should Métis harvesters keep in mind while the appeal is ongoing?

Until the MNA gets a decision on its appeal, MNA is asking its members to follow its new directions on Métis harvesting that are posted on the MNA's website at www.albertametis.com.

The MNA is continuing to provide legal representation for all the cases that are being held in the adjournment "parking lot" and for harvesting charges laid against MNA members that arose from harvesting undertaken prior to January 28th, 2011.

Why is the MNA investing so much in this case?

By supporting *Hirsekorn*, Alberta Métis are asserting a rights-based relationship with Canadian governments for today and generations to come. The MNA now has direct experience with the fact that policies and negotiated agreements can be terminated if the political winds change. Constitutionally protected Métis rights are irrevocable, unlike a policy or negotiated agreement.

This appeal is an investment in the future of Alberta Métis because it will allow Métis people to practice their rights with certainty and to stay connected to the land. The appeal deals with the fundamental question of whether Métis harvesters; their children; or their grandchildren – will lose harvesting rights when they move within the Métis Nation. As an aboriginal people who are known for mobility, the Métis of Alberta will continue to stand up and defend their customs, practices and traditions.

How can I help in the MNA's 'Hunt for Justice'?

Contributions to the Métis Harvesters Legal Defense Fund can be made via the MNA's website at www.albertametis.com or by mailing a cheque made out the Métis Harvesters Defense Fund to the MNA Head Office. All contributions will go towards legal costs associated with the *Hirsekorn* appeal.

About This Plainspeak

This Plainspeak was produced for the MNA by Plainspeak Cultural Awareness with the assistance of the MNA's legal counsel Jean Teillet and Jason Madden.

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Resource List

More information on Métis rights and the *Powley* test can be found at *www.albertametis.com*.

The MNA has also released several memorandums on Métis harvesting. These can be obtained by contacting the MNA through a regional council. Contact information is available at *www.albertametis.com*.

The complete Reasons for Judgment in R. v. Hirsekorn 2011 ABQB 156 (CanLII) can be obtained free of charge at *www.canlii.org/en/ab/abqb/doc/2011/2011abqb156/2011abqb156.html*

A general overview of Métis law can be found in Métis Law in Canada, written and updated annually by Jean Teillet, also available free of charge at *www.pstlaw.ca/resources*

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The above images have been altered to add sepia tone.

Page 9: Miywasin Centre and Pat Maxwell

Contemporary photographs courtesy of the Métis Nation of Alberta.

www.albertametis.com