Regina v. Powley et al.*

[Indexed as: R. v. Powley]

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47 O.R. (3d) 30
[2000] O.J. No. 99
Court File No. 5799/99

Ontario Superior Court of Justice
O'Neill J.
January 19, 2000

*Note: An appeal from the following judgment of O'Neill J. to the Ontario Court of Appeal (Rosenberg J.A.) was granted April 3, 2000. See 49 O.R. (3d) 94.

Native law -- Hunting and fishing rights -- Mtis -- Two members of Mtis community of Sault Ste. Marie charged with unlawfully hunting moose and unlawfully possessing game contrary to ss. 46 and 47(1) of Game and Fish Act -- Members of Mtis community of Sault Ste. Marie having aboriginal right to hunt which is protected under s. 35(1) of Constitution Act -- Sections 46 and 47(1) of Game and Fish Act unjustifiably infringing that right -- Charges dismissed -- Constitution Act, 1982, s. 35(1) -- Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1).

The defendants identified themselves as Mtis and were members of the Ontario Mtis and Aboriginal Association. They were charged with unlawfully hunting moose and unlawfully possessing game contrary to ss. 46 and 47(1) of the Game and Fish Act after killing a bull moose near Sault Ste. Marie when they did not possess valid Ontario outdoor cards or valid licences to hunt moose. The trial judge found that the defendants had an aboriginal right to hunt as Mtis which was protected under s. 35(1) of the Constitution Act, 1982 and that

ss. 46 and 47(1) of the Act were unjustifiable infringements of that right. The charges were dismissed and the Crown appealed.

Held, the appeal should be dismissed.

The trial judge's finding that hunting was, historically, an integral part of Mtis culture was supported by the evidence. Although the community was, until the early 1970s, an invisible entity within the general population as a result of shame, ostracization and prejudice, there is a contemporary Mtis community in Sault Ste. Marie and environs which is in continuity with the historic community,

Any imposition of a cultural means test or a blood quantum rule as a general prerequisite for membership in a Mtis community would be inconsistent with the fundamental purposes of s. 35 of the Constitution Act. A Mtis is a person who has some ancestral family connection (not necessarily genetic); identifies himself or herself as Mtis; and is accepted by the Mtis community or a locally organized community branch, chapter or council of a Mtis association or organization with which that person wishes to be associated. The trial judge correctly found that the defendants were Mtis who had been accepted into contemporary Mtis society at the time that the offences allegedly took place.

There was no justification for the infringement of the defendants' right to hunt for food, especially since Ontario did not consult with the affected Mtis community concerning the provisions of the Act in question.

R. v. Van der Peet, [1996] 2 S.C.R. 507, 23 B.C.L.R. (3d) 1, 137 D.L.R. (4th) 289, 200 N.R. 1, [1996] 9 W.W.R. 1, 109 C.C.C. (3d) 1, 50 C.R. (4th) 1, consd

Other cases referred to

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 66 B.C.L.R. (3d) 285, 153 D.L.R. (4th) 193, 220 N.R. 161, [1999] 10 W.W.R. 34; Metropolitan Toronto (Municipality) v. Bremner

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(No. 1) (1980), 29 O.R. (2d) 531, 114 D.L.R. (3d) 224 (H.C.J.); N.V. Bocimar S.A. v. Century Insurance Co. of Canada, [1987] 1 S.C.R. 1247, 39 D.L.R. (4th) 465, 76 N.R. 212, 17 C.P.C. (2d) 204; Oregon Jack Creek Indian Band Chief v. Canadian National Railway Co., [1989] 2 S.C.R. 1069, 63 D.L.R. (4th) 607, 102 N.R. 76, affg (1989), 34 B.C.L.R. (2d) 344, 56 D.L.R. (4th) 404 (C.A.); Perry v. Ontario (1997), 33 O.R. (3d) 705, 44 C.R.R. (2d) 73 (C.A.); R. v. Adams, [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657, 202 N.R. 89, 110 C.C.C. (3d) 97; R. v. Ct, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385, 202 N.R. 161, 110 C.C.C. (3d) 122; R. v. Gladstone, [1996] 2 S.C.R. 723, 23 B.C.L.R. (3d) 155, 137 D.L.R. (4th) 648, 200 N.R. 189, [1996] 9 W.W.R. 149, 109 C.C.C. (3d) 193, 50 C.R. (4th) 111; R. v. Jones, [1996] 2 S.C.R. 821, 27 O.R. (3d) 95n, 138 D.L.R. (4th) 204, 199 N.R. 321, 109 C.C.C. (3d) 275, 50 C.R. (4th) 216; R. v. Marshall (1999), 179 D.L.R. (4th) 193, 139 C.C.C. (3d) 391 (S.C.C.); R. v. NTC Smokehouse Ltd., [1996] 2 S.C.R. 672, 23 B.C.L.R. (3d) 114, 137 D.L.R. (4th) 528, 200 N.R. 321, [1996] 9 W.W.R. 114, 109 C.C.C. (3d) 129, 50 C.R. (4th) 181; R. v. Sparrow, [1990] 1 S.C.R. 1075, 46 B.C.L.R. (2d) 1, 70 D.L.R. (4th) 385, [1990] 4 W.W.R. 410, 56 C.C.C. (3d) 263; Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385, 228 N.R. 203, 55 C.R.R. (2d) 1; Stein v. Kathy K (The), [1975] 2 S.C.R. 302, 62 D.L.R. (3d) 1; Twinn v. Canada, [1987] 2 F.C. 450, 6 F.T.R. 138

Statutes referred to

Constitution Act, 1982, s. 35(1)
Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1) -- now Fish and Wildlife Conservation Act, 1997, S.O. 1997, c. 41
Indian Act, R.S.C. 1985, c. I-5
Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 116, 121(b), 125

Authorities referred to

Bell, "Mtis Constitutional Rights in Section 35(1)" (1997), 36 Alta. L. Rev. (No. 1) 180
Bell, "Who are the Mtis People in Section 35(2)" (1991), 29 Alta. L. Rev. (No. 2) 351, at p. 380

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Black's Law Dictionary, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990), "community"
Report of the Royal Commission on Aboriginal Peoples, vol. 4, chapter 5, pp. 201, 219, 297-98

APPEAL by the Crown from a judgment dismissing charges under the Game and Fish Act, R.S.O. 1990, c. G.1.

J.T.S. McCabe, Q.C., and P. Lemmond, for appellant.
Jean Teillet, for respondents.

O'NEILL J.: --

I. Introduction

[1] This is an appeal pursuant to s. 116 of the Provincial Offences Act, R.S.O. 1990, c. P.33 ("Provincial Offences Act") from a dismissal of charges against the respondents on December 21, 1998. The respondents were charged with offences under ss. 46 and 47(1) of the Game and Fish Act, R.S.O. 1990, c. G.1 ("Act"): unlawfully hunting moose and unlawfully possessing game, to wit, a bull moose or parts thereof, hunted in contravention of the Act. The learned judge, dismissed the charges on the ground that the respondents have an aboriginal right to hunt as Mtis which is protected under s. 35(1) of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 ("Constitution Act") and that ss. 46 and 47(1) of the Act were unjustifiable infringements of that right.

[2] The offences took place at approximately 9:00 a.m. on October 22, 1993 when Steve Powley and his son, Roddy Charles Powley, killed a bull moose near Old Goulais Bay Road near the City of Sault Ste. Marie. The Powleys did not, at that time, possess valid Ontario outdoor cards or valid licences to hunt moose. Steve and Roddy Powley both admit that they hunted moose without a licence and that they knowingly possessed game (a bull moose).

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[3] Section 121(b) of the Provincial Offences Act, sets out the powers of this court on an appeal from an acquittal:

> 121. Where an appeal is from an acquittal, the court may by order,
>
> . . . . .
>
> (i) order a new trial; or
>
> (ii) enter a finding of guilt with respect to the offence of which, in its opinion, the person who has been accused of the offence should have been found guilty, and pass a sentence that is warranted in law.

[4] Section 125 also provides that:

> 125. Where a court exercises any of the powers conferred by sections 117 to 124, it may make any order, in addition, that justice requires.

II. The Scope of Appellate Review

[5] The burden on the appellant is to persuade this court that the trial judge's findings of fact were based on palpable and overriding error. The test is set out by Ritchie J. in Stein v. Kathy K (The), [1975] 2 S.C.R. 802 at pp. 807-08, 62 D.L.R. (3d) 1 at pp. 3-5, as follows:

> I think that under such circumstances the accepted approach of a Court of appeal is to test the findings made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that Court's view of the balance of probability.
>
> . . . . .
>
> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that

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> they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts.

The rule applies not only where findings are based on credibility but also where findings are made on the basis of conflicting expert testimony: see N.V. Bocimar S.A. v. Century Insurance Co. of Canada, [1987] 1 S.C.R. 1247 at pp. 1249-50, 39 D.L.R. (4th) 465 at p. 468, per Le Dain J.:

> The Court of Appeal took the position that because of the nature of the evidence in this case, which consisted of expert testimony and documentary evidence, the court, to use its own words, was "almost in the position of conducting the trial de novo and making our own assessment of the evidence". I cannot agree. The limits to the scope of appellate review of the findings of fact by a trial court, which were affirmed by this Court in Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802, and other decisions, also apply in my opinion to the review of the findings of a trial court based on expert testimony . . . .

[6] The second stage of the trial judge's analysis -- his determination of the scope of the respondents s. 35(1) rights on the basis of the facts as he found them -- is a determination of a question of law which, as such, mandates no deference from this court: see R. v. Van der Peet, [1996] 2 S.C.R. 507 at p. 566, 137 D.L.R. (4th) 289 ("Van der Peet").

III. The Issues on Appeal

[7] At trial, the respondents' defence was a claim of aboriginal rights constitutionally protected under s. 35(1) of the Constitution Act, 1982, which provides:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[8] The Supreme Court of Canada has very explicitly set out the four steps which all courts must take in assessing a claim

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under s. 35(1) as follows: In R. v. Sparrow, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, Dickson C.J.C. and La Forest J., writing for a unanimous court, held that an analysis of a claim under s. 35(1) has four steps; first, the court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right; second, a court must determine whether that right was extinguished prior to the enactment of s. 35(1) of the Constitution Act, 1982; third, a court must determine whether that right has been infringed; finally, a court must determine whether that infringement was justified: see R. v. Gladstone, [1996] 2 S.C.R. 723 at p. 742, para. 20, 137 D.L.R. (4th) 648. The Crown has accepted that if the respondents were acting pursuant to an aboriginal right it was not extinguished and it was infringed by ss. 46 and 47(1) of the Act. Accordingly, there are two basic issues in this appeal:

(1) Did the learned judge err in finding that the respondents had an aboriginal right as Mtis to hunt for food?

(2) If the respondents had such a right, did the learned judge err in finding that its infringement by ss. 46 and 47(1) of the Act was not justified?

[9] In assessing a claim to an aboriginal right a court must engage in a two-stage process. It must first identify the nature of the right claimed. (In so doing it must consider the nature of the action claimed to have been done pursuant to an aboriginal right; the nature of the governmental regulation, statute or action being impugned; and the practice, custom or tradition relied on to establish the right.) At the second stage it must determine whether the practice, custom or tradition claimed to be an aboriginal right was, prior to a specific point in the past, an integral part of the distinctive culture of the local aboriginal community in question, in the sense of being one of the community's defining features, and has remained an integral part of the culture of the community in that sense: Van der Peet, supra, at pp. 551-55 and 563-64, paras. 51-54 and 76-80; R. v. NTC Smokehouse Ltd., [1996] 2 S.C.R. 672 at pp. 685 and 688, paras. 14 and 22, 137 D.L.R. (4th) 528; G ladstone, supra, at pp. 743-744, paras. 23-25; R. v. Pamajewon, [1996] 2 S.C.R. 821 at pp. 833-35 paras.

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25-28, 138 D.L.R. (4th) 204; R. v. Adams, [1996] 3 S.C.R. 101 at pp. 122-23, paras. 35-37,138 D.L.R. (4th) 657; R. v. Ct, [1996] 3 S.C.R. 139 at pp. 176-77, paras. 55-58, 138 D.L.R. (4th) 385.

[10] In considering the first issue on appeal, that is, whether the learned judge erred in finding that the respondents had an aboriginal right as Mtis to hunt for food, the appellant asserts that the learned trial judge erred in four respects, when applying the legal principles at the second stage of the assessment, which errors the appellant described as follows:

(1) failure to address the issue of the purposes underlying the inclusion of the Mtis peoples in s. 35(1) of the Constitution Act, 1982;

(2) error in finding that hunting was a practice, custom or tradition integral to the distinctive culture of the local Mtis community at Sault Ste. Marie prior to the period 1815 to 1850;

(3) error in finding that there is today an existing local Mtis community, in continuity with the historical Mtis community of the City of Sault Ste. Marie, with a distinctive culture in which hunting for food is integral;

(4) error in finding that the respondents are members of an existing local Mtis community in continuity with the historic Mtis community of the City of Sault Ste. Marie.

[11] I will address each of these in turn.

(i) The issue of the purposes underlying the inclusion of the Mtis peoples in s. 35(1) of the Constitution Act, 1982

[11a] The Supreme Court has expressly held that, "[u]ntil it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible": see Van der Peet, supra, at p. 527, para. 3; p. 535,

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para 21.

[11b] The Supreme Court has also held that:

> . . . the history of the Mtis, and the reasons underlying their inclusion and the protection given by s. 35 are quite distinct from those of the other aboriginal peoples of Canada.

See Van der Peet, supra, at pp. 557-58, paras. 66-67.

[12] The Supreme Court in Van der Peet, supra, recognized that the aboriginal rights of Mtis people should be treated differently than those of First Nations people [at p. 558, para. 67]:

> Although s. 35 includes the Mtis within its definition of "aboriginal peoples of Canada", and thus seems to link their claims to those of other aboriginal peoples under the general heading of "aboriginal rights", the history of the Mtis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal people are defined is not necessarily determinative of the manner in which the aboriginal rights of the Mtis are defined. At the time when this Court is presented with a Mtis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Mtis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Mtis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Mtis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, traditions and customs of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Mtis are determined on the basis of the pre-contact practices, traditions and customs of their aboriginal ancestors; whether that is so must await determination in a case in which the

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issue arises.

[13] One of the reasons the Van der Peet, supra, test should not be applied to the aboriginal rights of Mtis people is because of the pre-contact period of time the court relies on. Clearly, this time period cannot be applied to Mtis people because they did not exist as a people prior to contact with Europeans.

[14] The Crown submits that, in light of the history of the Mtis people of Canada and the relevant principles of law articulated by the Supreme Court, the understanding of Canadian history, and the purposive analysis of the Court that informed and gave rise to the principles, the purposes underlying the inclusion of the Mtis people in s. 35(1) are:

> To provide, first, the means by which the Constitution recognizes that within a relatively short time after the arrival of Europeans in North America distinctive local communities of persons of mixed aboriginal and European descent, having distinctive cultures, came into existence at certain localities that were centres of fur trade activity or strategically located in the fur trade between Indians and Europeans, and, second, to provide the means by which the existence of those local non-Indian aboriginal communities, prior to the establishment of effective control by the Crown over the localities, is reconciled with the assertion of Crown sovereignty over Canadian territory.

[15] The respondents submit that the purposive analysis of s. 35 in Van der Peet, supra, as applied to the Mtis is properly reformulated as follows:

> . . . the Aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to [the assertion of effective control by the Crown in North America] the land was already occupied by distinctive Aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of Aboriginal rights must be

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directed at fulfilling both of these purposes.

[16] The purposes underlying the aboriginal rights recognized and affirmed by s. 35(1) of the Constitution Act, 1982 relate to both prior occupation, and reconciliation. What, however, are the reasons underlying the protection that s. 35(1) gives, and what is the basis for the special protection that aboriginal peoples generally, and Mtis people specifically, have within Canadian society? Surely, at the heart of s. 35(1), lies a recognition that aboriginal rights are a matter of fundamental justice protecting the survival of aboriginal people, as a people, on their lands. The Mtis have aboriginal rights, as people, based on their prior use and occupation as a people. It is a matter of fairness and fundamental justice that the aboriginal rights of the Mtis which flow from this prior use and occupation, be recognized and affirmed by s. 35(1) of the Constitution Act, 1982.

[17] Did the learned trial judge fail to engage the necessary and foundational issue of the purposes underlying the inclusion of Mtis people in s. 35(1)? A review of the trial judge's reasons reveals the following. First, the trial judge considered at length the interpretive principles to be applied when dealing with s. 35 of the Constitution Act, 1982. He considered at para. 21, the dual purpose of s. 35 as outlined in Van der Peet, supra. At paras. 48 to 57, he outlined the historic government recognition of the Mtis, and at para. 72, he referenced the following statement from Chief Justice Lamer (as he then was) in the Van der Peet, supra, decision [at pp. 538-39, paras. 30-31]:

> 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.

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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.

[18] At para. 75, the trial judge stated:

In the mid 17th Century, Jesuits and French fur traders appeared in the Upper Great Lakes region. The arrival of the French fur traders soon led to marriages between the Ojibway women in the area with the traders. The resultant family groups of mixed-blood families evolved into a new group of Aboriginal people, now known as the Mtis. Although the Mtis shared many customs, practices and traditions of the Ojibway, they were distinctive and separate from the Ojibway.

[19] Finally, under the heading "What is the relevant time/ date for determining the existence of the right claimed?", his reasons are reflected in the following statements:

The pre-contact concept must be applied with enough flexibility to give effect to the purpose of preserving the culture of Aboriginal peoples. There is obviously going to be a time of transition when a society evolves in response to a more dominant societal group. Accordingly, one must view the practices, customs and traditions of a society before they were replaced or at least significantly altered by European influences.

When one is examining the Upper Great Lakes area, it is necessary to carefully examine the concepts of "contact" and "effective control" as it relates to the original Indian society and the subsequent Mtis community.

The unique Mtis society was established and recognized for

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its distinctiveness. That being the case, one must determine whether hunting for food was a practice that was integral to the Mtis society at the time when effective control of the area was taken over by the European based culture.

[20] In my view, the learned trial judge's reasons reflect both a review of, and a consideration for, the purposes underlying the inclusion of Mtis people in s. 35(1). While the trial judge may not have summarized the purposes underlying the inclusion of Mtis people in s. 35(1) in as concise a manner as suggested by the appellant and the respondents, it cannot be said that the manner by which the trial, judge addressed the underlying purposes, by and in itself led to or contributed to any alleged errors in law concerning the three additional issues raised by the Crown with respect to this aspect of the appeal.

(ii) The issue of whether hunting was a practice, custom or tradition integral to the distinctive culture of the local Mtis community at Sault Ste. Marie prior to the period 1815 to 1850

[20a] The appellant argues that the culture and social practices of the historic Mtis community which evolved at Sault Ste. Marie during the 18th and early 19th centuries centred upon Mtis participation in the fur trade economy as wage earning labourers, independent traders, and skilled tradesmen. Their participation in the fur trade economy also involved reliance on the local fishery, and some small-scale farming. The appellant further states that hunting was merely "marginal" to this historic lakeside Sault Ste. Marie "half-breed" community, and that it is apparent from the evidence that hunting was a secondary and incidental aspect of the distinctive culture of the historic Mtis community in question, and was of marginal significance.

[21] The trial judge considered this issue by framing the following three questions, which he then went on to analyze and consider in his reasons:

(i) What is the correct characterization of the right?

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(ii) Is the right claimed a practice, custom or tradition which was exercised by the Mtis?

(iii) Is the right claimed integral to the distinctive Mtis society?

[22] If the Crown's argument on these points is correct, the aboriginal rights of different communities of aboriginal peoples might be so narrowed such that only a single defining or central activity would be protected under s. 35(1) to the exclusion of others. Yet we know from Sparrow, supra, that in considering aboriginal rights, the court should keep in mind the following principles:

(1) the fiduciary duty owed by the Crown to aboriginal peoples,

(2) the rejection of the "frozen rights" theory of aboriginal rights, and

(3) the importance of the aboriginal perspective on those rights.

[23] Any test for Mtis rights in s. 35 must be in the context of a large and liberal interpretation that fulfils the purpose of the rights recognized and affirmed by that provision.

[24] The trial judge found as a fact that hunting was an integral part of the Mtis culture prior to the assertion of the effective control. His reasons reflect the following:

> The evidence indicated that the Ojibway and Mtis had always hunted and that this activity was a integral part of their culture prior to the intervention of European control. Mr. Long stressed the fact that moose were scarce if not non-existent between 1820 and 1880 thereby creating a scenario whereby at the time of effective control of the area passing from the Aboriginal people moose hunting would not be a part of their culture. I find that to take this approach one must suspend common sense. I take the position that just because a

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particular species is in short supply or temporarily in a state of great depletion that does not eliminate that particular animal as a hunted species by the Aboriginal group.

The right to hunt is not one that is game specific. The evidence makes it clear that prior to the 1820s that moose would have been part of the Ojibway and Mtis diet. In fact, it would appear that the Aboriginal societies in the Sault Ste. Marie area were opportunistic when it came to hunting animals for their food or otherwise.

Evidence given by the Ministry of Natural Resources indicates that Indians are allowed to hunt moose under the Robinson-Huron Treaty without sanctions. If the narrow view of pre-existing activity were to be applied equally, it could be argued that at the time the Ojibway signed their treaties, they were not hunting moose because they were not in the area at the time of the agreement.

Dr. Ray testified that the economy of the Mtis people in Sault Ste. Marie historically was similar to the Ojibway economy. He pointed out that the relative importance of fishing or hunting or trapping or collecting would depend on a number of factors in any given year. Game cycles, fish cycles and fur cycles would impact on their activities.

Similarly, with respect to the case at bar, one must ask oneself whether hunting was an integral part of the original Mtis community. The evidence presented at trial would support the conclusion that hunting was an integral part of the Mtis culture prior to the assertion of effective control by the European authorities.

[25] The evidence at trial indicates that the Mtis lived off the land for subsistence purposes, and as well, they were involved, in some respects, in a wage economy. The expert witness called by the defence at trial, Dr. Ray, described the importance of living off the land for the Mtis as follows:

I think the better way to think about it is that these people

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had a livelihood based on living off the land and they also had the attitude that you took what the land offered . . .

. . . throughout the period from the 1820's through to the Robinson Treaty period is a time when game is . . . game is quite scarce. Furs are scarce. Beaver is not abundant for most of these areas . . . One of the results of the period of high competition, that is the period say 1780's, '90's to 1821 lead to short-term depletion of fur and game in the region and one of the results of that is the Native economies, that would be Ojibway and Mtis, were forced to change over from, or, let's put it this way, the relative significance of large game in the economy diminished in this period and fish and small game were relatively more important simply because that's what was primarily available . . . so that it's not to say large game hunting stops.

. . . there are reports, periodic reports of outright starvation in this area during this period of the '20's and '30's, so it's a hard time . . .

. . . It's clearly a low point in the fur and game cycle. It also points out, again a point I was trying to make yesterday, I'll go back and highlight what he says here, the scarcity makes it "out of the power of the best hunter to provide a sufficiency to maintain himself & a family". That is out of hunting and trapping alone, so again, it's the diversified economy of the Indian and Mtis. Indians and Mtis here which was the key to their survival.

. . . . .

Q. One must question, Dr. Ray, can you say that hunting is integral to the Mtis society here?

A. It certain was . . . at that time it was an integral part of it and I would say that . . . the trouble I have with a question like that is it segments the economy which is a . . . which is a distortion of the reality. The economy was based on the right to live off the land, whether it meant hunting, fishing, trapping and the relative importance of any

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one of those activities in any year over a period of years would depend on the game cycles, economic conditions and so on, so that that was . . . to me the hunting right is bundled into those rights. I don't think they could have understood, I'm certain . . . neither the Mtis or the Ojibway would have probably found it hard to imagine that, how can we be allowed to do one and not the other . . . and so, yes, I would say as a bundle of livelihood rights, it would have been a part of it and I don't imagine they would have considered it separated out.

[26] A careful review of the evidence of trial demonstrates it supported the contention that hunting was of central significance to the Mtis, and integral to their distinctive society. The trial judge's findings in this regard do not demonstrate palpable or overriding error, and ought not to be disturbed.

(iii) The issue of whether there is today a local Mtis community, in continuity with the historic Mtis community of Sault Ste. Marie, with a distinctive culture in which hunting for food is integral

[27] The trial judge considered this issue by asking himself these three questions:

(i) Is there a contemporary Mtis society at Sault Ste. Marie?

(ii) Is the right claimed integral to the distinctive Mtis society?

(iii) Do the Mtis continue to exercise the practice, custom or tradition?

[28] As to the geographical location of the Mtis society, the trial judge reached the following conclusions:

The Crown has gone to great pains to narrow the issues in this trial to Sault Ste. Marie proper. I find that such a limited regional focus does not provide a reasonable frame of reference when considering the concept of a Mtis community

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> at Sault Ste. Marie. A more realistic interpretation of Sault Ste. Marie for the purposes of considering the Mtis identity and existence should encompass the surrounding environs of the town site proper.
>
> I agree with the general principle that Aboriginal rights are very, much site-specific. This principle is addressed in the next heading of this judgment.
>
> The lifestyle of the Mtis more closely resembled the Indians that occupied this area and it would seem more reasonable to find the existence of the Mtis on the fringes of the geographical boundaries of Sault Ste. Marie. Many of the witnesses made reference to communities and areas surrounding Sault Ste. Marie including Batchewana, Goulais Bay, Garden River, Bruce Mines, Desbarates, Bar River, St. Joseph's Island, Sugar Island and into Northern Michigan.
>
> It is not surprising considering the lifestyle of the modem Mtis to find them as more visible entities in the more rural and outlying communities surrounding Sault Ste. Marie. Their existence in the aforementioned area would be consistent with their original affiliation with the local native population.

[29] The issue of a local Mtis community, and the respondents' membership or affiliation with the community was vigorously debated and canvassed at the appeal hearing. It is not so easy to package up and describe a Mtis community, as in this case, by comparison with, for example, a recognized Indian band occupying recognized reserve lands as defined under the Indian Act, R.S.C. 1985, c. I-5. Given governments' treatment of Mtis people, it may seldom be the case that Mtis rights will be found where there is a flourishing Mtis community, as opposed to one that is only now beginning to put back together aspects of its culture. This is recognized by the federal government, which admitted in its statement of reconciliation in 1998 that Mtis people suffered at the hands of government policy:

> As Aboriginal and non-Aboriginal Canadians seek to move forward together in a process of renewal, it is essential

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> that we deal with the legacies of the past affecting the Aboriginal peoples of Canada, including the First Nations, Inuit and Mtis. Our purpose is not to rewrite history but, rather, to learn from our past and to find ways to deal with the negative impacts that certain historical decisions continue to have in our society today.
>
> The ancestors of First Nations, Inuit and Mtis peoples lived on this continent long before explorers from other continents first came to North America. For thousands of years before this country was founded, they enjoyed their own forms of government. Diverse, vibrant Aboriginal nations had ways of life rooted in fundamental values concerning their relationships to the Creator, the environment and each other, in the role of Elders as the living memory of their ancestors, and in their responsibilities as custodians of the lands, waters and resources of their homelands. . . .
>
> Sadly, our history with respect to the treatment of Aboriginal people is not something in which we can take pride. Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices. We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed by the dispossession of traditional territory, by the relocation of Aboriginal people, and by some provisions of the Indian Act. We must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.

[30] To deny people access to their constitutional rights because a community may now only be beginning to put together aspects of its identity and culture is to reward the very practices that the Statement of Reconciliation admits were wrong.

[31] The Crown has argued that the dispersion of the historic Mtis community centered in Sault Ste. Marie during the decade

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following the opening of Sault Ste. Marie and area to settlement under Crown patent in 1850 resulted in the disappearance of a distinct Mtis culture in this area. Further, the Crown argued on appeal that individuals of mixed heritage living in Sault Ste. Marie appear to have begun to identify as Mtis only during the last decade, and that this revival of a Mtis culture and identity was closely linked to the arrival of the political and service organizations that claim persons of mixed aboriginal and European ancestry as their constituency. In addition, the Crown has submitted that the existence of both the Ontario Mtis and Aboriginal Association ("OMAA") and the Mtis Nation of Ontario ("MNO") currently operating in and about the Sault Ste. Marie area, do not establish the existence of a distinct contemporary Mtis culture and society in Sault Ste. Marie and area, for the purpose of identifying rights protected under s. 35(1) of the Constitution Act, 1982.

[32] These arguments raise several questions respecting how one defines a community and what evidence is required to prove continuity of that community from historical times to the present. The expert witness, Dr. Ray, touched on this in his evidence at trial, when he stated:

> . . . the idea of communities is a difficult one because there are two kinds of communities . . . when we talk about community and I know there's a tendency and we'll actually do a little bit of it. You look at maps and you look for little clusters of settlements and say, ah, there's a community, now who's living in it? But the reality is also there's a larger community, it's a community of related families and individuals who are moving around a lot . . . you have some coalescing of people together into small communities taking place but it would be also wrong to suppose that that is the only place the Mtis live because, for example . . . as we'll see here in the case of Sault Ste. Marie, Sault Ste. Marie was regarded, was the home base for some of these families, but members of the family could be spread across the country for years and years before they came back . . . .

[33] In his reasons, the trial judge made reference to

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evidence called on behalf of the respondents as to whether it supported the contention that Sault Ste. Marie and the "surrounding environs" have a Mtis community. Although he found that at least up until the early 1970s, "this community had continued to be an invisible entity within the general population", and that "the Mtis quietly became the 'forgotten people'", his reasons and the evidence nonetheless disclose that a community existed as at the date of the offences for which the respondents were charged.

[34] Mr. Art Bennett, from Bruce Mines, Ontario, a community located approximately 40 miles east of Sault Ste. Marie, gave evidence on behalf of the respondents. A review of his evidence discloses, among other things, the following:

> A. Okay, well, as I say identify . . . I don't consider myself Indian. Some people have said to me, well, you're Indian, I say, no I'm not and I don't consider myself White either. I'm in between. I'm both. I'm Mtis. I have white blood in me and I have Indian blood in me and my definition of Mtis is Half-breed and it's just a polite word for Half-breed, that's . . . you know, it's a French word, but I believe that's what society has chosen to call us Half-breeds and I've always considered myself that even as a child. I was proud of the fact that it probably got me in more than one scrape, but I am a Half-breed, I'm a Mtis person.
>
> Q. And do you think your parents identified that way?
>
> A. My mother certainly did and my father I believe he was very receptive to the fact that my mother was Half-breed and I think he tried to honour her traditional ways and way of living.
>
> Q. Now, do the people in this area, did the people in your town, in Bruce Mines, do they think of you as . . . as a Mtis person?
>
> A. I believe most of them probably do, ones that know me.
>
> Q. Ah hm. And, now Mr. Bennett, is there a . . . do you

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believe that there's a Mtis community, here in this area?

A. Yes, I do.

Q. And how . . . how do you know that there's a Mtis community here?

A. Well. just look around this court room and I see Mtis faces and that tells me that there's a Mtis community. I know that. It's not hard . . . for me, it's not hard to know that. I . . . I don't know how to describe it, but I know it's . . .

. . . . .

Q. Now in your . . . in your opinion, let's just ask it straight out. Did O.M.A.A. create the Mtis community?

A. No. no. the Mtis community I believe was always here. That was . . . we were . . . we were here, just not recognized or not organized and but I do think O.M.A.A. brought us together politically.

. . . . .

A. It's been a long time but I do remember my family talking about like the family get togethers and even as a child I remember my aunts and uncles would come down. Our house seemed to be kind of the central meeting place, that's where most of the partying and stuff took place and lots of singing, lot of guitar playing and everybody . . . a lot of people attribute fiddle music with a Mtis culture. Unfortunately, we didn't have any fiddle players in the family, but we sure had guitar players and banjo players and we did a lot of dancing and had a lot of good happy times and I can remember getting together and going and picking blueberries. Families would get together and we'd go on blueberry picking excursions and strawberry picking and even in the Fall, hunting with my uncles and things like that.

Q. And do you know of any . . . do you associate the Mtis

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community here with a particular place, like say, Sault Ste. Marie or any of the little communities here or is it just kind of, you think generic around the area?

A. I think I'd have to say it's generic, because there's little families, like communities and different areas, like you know, in Echo Bay there's Mtis families, back in Bruce Mines we have Mtis families, and north of the Sault, so I think it's probably in the area not concentrated in one spot.

Q. So they're family clusterings, is that the way you would think of them?

A. Ya, that would be a good way to describe it.

[35] William Bouchard, who grew up in Nestorville, a small village located approximately 45 miles east of Sault Ste. Marie, was also called on behalf of the respondents. He stated, in part, as follows:

Q. Now, do your brothers and sisters, the ten who are surviving, do they identify as Mtis?

A. Yes.

Q. And do your children identify as Mtis?

A. Yes.

. . . . .

Q. Now, do you consider there to be a Mtis community in this area?

A. Yes.

Q. And is that community just in Sault Ste. Marie or do you think it's in other parts of the . . . or other parts of this region?

A. There's Mtis communities in other parts of this region,

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yes.

Q. Can you name some of those modern day ones?

A. Yes, there's . . . well, there's Sault Ste. Marie. There's Bar River Native Voice, St. Joe Island, Bruce Mines, Thessalon and Chapleau has about forty Mtis people in it also.

Q. Are you aware of any . . . now are you pointing to ones in a particular region, Mr. Bouchard?

A. Most of the ones I just said are recognized by the Mtis Nation of Ontario. They have charters with Mtis Nation of Ontario. They're established Mtis communities, but there are some in the area that are too small to establish, like maybe they only got four or five Mtis people, so they can't really establish a community, so they come, they join, they go towards the biggest community.

Q. Mr. Bouchard, do you . . . do you define the Mtis here by those who join up?

A. No. No, there's lots, there's so much discrimination against the Mtis and Aboriginal people that they won't come out of the woodwork, so they're not . . . there's lots more besides belonging to the MNO or OMAA Apparently, according to the consensus of '96 there's supposedly 900, over 900 Mtis in Sault Ste. Marie alone that identified as Mtis.

[36] Finally, Mr. Olaf Bjornaa, who also self-identifies as a Mtis, and who was raised partly at Goulais Bay Mission, and partly at Batchewana Bay, both located west of Sault Ste. Marie, gave evidence at trial, where he stated in part, as follows:

Q. And do you know whether her family identifies as Mtis?

A. Yes, at the time when we got married, my wife, I always considered as a Mtis and that's what she always considers herself as. We all brought our children up as Mtis.

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Q. Do your brothers and sisters identify or how do your brothers and sisters identify?

A. They always identified themselves as Mtis because when we were kids, like any fishing and hunting, our mother is the one that raised us into the fishing and hunting and stuff like this, you know, and that's where we learned our culture, from our Mtis culture.

. . . . .

Q. Now, Mr. Bjornaa, is there a Mtis community here?

A. Yes, at Sault Ste. Marie, there's definitely a Mtis community, within Goulais Bay is a Mtis community. Within Batchewana there's a Mtis community. I feel that out at Gros Cap is a Mtis community. In my line of work when I started commercial fishing, as I fished right from Gros Cap right through to Marathon, I've found all along those areas there was Mtis communities.

Q. When . . . when you speak about the Mtis community, do you . . . do you think of them as separate or do you think of them as one large community?

A. No, I feel that Mtis community is pretty well off, most of them by themselves in small areas. At one time in the Sault, the Sault was a big Mtis community and as progress come in, they kept pushing them back, pushing them back . . . . .

. . . . .

Q. As you understand it, Mr. Bjornaa, are those people still here?

A. Yes, a great number are still here. They'll always be here.

. . . . .

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A. . . . Took what they needed. Same as to people who lived on Lizard Islands and Michipicoten Island and on Otterhead, they took what they needed and they were a good chunk of Mtis people travelling in them areas. That was from the Sault, from Goulais Bay, Gros Cap, Batchewana, they were a good percent of Mtis people going up there.

[37] In my view, the trial judge correctly found, as a fact, that there is a contemporary Mtis community in Sault Ste. Marie, and surrounding environs area.

[38] As to whether that community is in continuity with the historic Mtis community of Sault Ste. Marie, with a distinctive culture in which hunting for food is integral, as I have already indicated, the trial judge found as a fact that the contemporary Mtis community had always existed, except that it was, until the early 1970's, an invisible entity within the general population, an invisibility (to outsiders) caused by shame, ostracization, and prejudice. At pp. 179-80 of his reasons, the trial judge made the following findings with respect to the custom, practice or tradition of hunting by members of the Mtis community:

Hunting was carried on though the years by the Mtis. The census of Canada 1861, 1881, and 1891 shows several Mtis listed as hunters. Ms. Jones, the Crown's historical expert, referred to the Sessional Papers (Exhibit #57) which listed hunting infractions in the Sault Ste Marie made in 1897. A Mr. Collins was charged with moose hunting. Ms. Jones testified that Collins was a well known Mtis family, in Sault Ste Marie.

Mr. Bjornaa and Mr. Bennett indicated that hunting continues to be an important aspect of Mtis life. I prefer to use their direct evidence to illustrate this fact.

". . . Like Lizard Island, you take people from Gros Cap, Goulais Bay, Batchewana, all moved up to those island, spent the summers there, took their families. They were all Mtis families. I mean the foundations and the buildings are still

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there. When they went up there, they took their families up, they spent the summer, they commercial fished, they harvested their meat and stuff off the mainland, they went over to Blueberry Island and picked berries for the year to put away and these people migrated back and forth. When I was a kid, I remember. I remember being up to those islands and places.

"I felt that . . . that there was a body of Mtis people because we had to be together. We wanted something, we had to stick together at it. Like, I know at one time, people going hunting, if they shot a moose it was shared. There was a gathering, like there was people as a group. One family didn't take all the moose. The moose went to numbers of families there. The elders were looked after and stuff, so I really felt there was in a way there was a political bond."

[39] Mr. Art Bennett also testified about the importance of contemporary hunting and as to why it is integral to a distinctive Mtis culture:

Q. Now, Mr. Bennett, when you were a kid growing up and hunting with your uncles, what would you . . . could you give us an estimate of what percentage of your diet, I guess the protein of your diet, or basically your diet came from what we might call bush foods or from your . . . the animals you hunted and fished?

A. As a child or now?

Q. Well, like both actually.

A. Okay, when I was kid. probably the meat and fish we ate, I bet you 90% of what we ate come out of the bush. Now, I'd say probably around 75, 80%. I actually prefer the taste of moose, even venison, I even prefer venison over moose. If anybody's a connoisseur of wild game, I'm . . . venison tastes better than moose, but ya, probably 75 to 80% of the meat we consume now is wild game, including fish.

. . . . .

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Q. Do you think that Mtis people are out on the land a lot, Mr. Bennett?

A. Yes, we are.

Q. Do you think they're out on the land just as much or more than M.N.R. officers are?

A. Cause we live on it, they don't. They're just there visiting.

[40] In my view, the trial judge's findings, and the inferences which he drew from these findings, in relation to this issue, were fully supported by the evidence, and ought not to be disturbed.

(iv) The issue of whether the respondents are members of an existing local Mtis community in continuity with the historic Mtis community of Sault Ste. Marie

[41] The trial judge, in his reasons at p. 168, held: "I find that a Mtis is a person of aboriginal ancestry; who self-identifies as a Mtis; and who is accepted by the Mtis community as a Mtis." The trial judge went on to make the following determinations at paras. 65-66 of his reasons:

The first part of the process involves the self identification of the Powleys as Mtis and the acceptance of them into contemporary Mtis society. I am satisfied that Steve Powley has identified as a Mtis and has been accepted by two organizations which represent contemporary Mtis society, namely, the Ontario Mtis Aboriginal Association and the Mtis Nation of Ontario. Steve Powley openly placed his Mtis status in issue when he shot the moose on October 22, 1993, when he attached his Mtis number on the moose and when he declared that the meat was for the winter.

The second part of the process for the Powleys is to demonstrate that there is a genealogical connection between themselves and the historically identified Mtis society. This undertaking was completed by Ms. Armstrong and is

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> contained in her report, Exhibit 48. Ms. Armstrong's evidence was not without certain weaknesses, but I am satisfied that the accused before the court have demonstrated on a balance of probabilities that they have Aboriginal roots.

[42] The Crown has argued that the legal principles that must inform the determination of whether a claimant can exercise aboriginal rights make plain that the trial judge's formulation is deficient, particularly because it ignores or repudiates the legal principle that aboriginal rights arise from the distinctive culture of the aboriginal community in question, and because, in any event, joining OMAA or the MNO cannot constitute acceptance "by the Mtis" for the purposes of the test. The Crown submits that any acceptance "by the Mtis" as an element in the establishment of Mtis identity for purposes of aboriginal rights must be by a local Mtis community in continuity with an historic Mtis community, not be voluntary political and service organizations like OMAA and the MNO. In addition, the Crown argues, a fourth element, objectively determinable cultural ties of the claimant to the local Mtis community must be added to the three element test propounded by the trial judge. I w ill deal with each of these points in turn.

[43] The trial judge recognized some of these difficulties, in his reasons, where at paras. 58-60, he stated:

> How does the court determine whether or not the Powleys are Mtis for the purposes of s. 35(2) of the Constitution Act, 1982? The "Who is a Mtis?" question looms large. Unlike cases involving Indian rights, an identifying tribe or band is not available to those claiming Mtis status. The generic term Mtis forces individuals to not only self identify but they must also piece together the existence of a definable Mtis existence from location to location.
>
> Indian tribes have identified over time as to region and governments have developed registration lists, to identify Indians for purposes of benefits and claims. A similar procedure has not been put in place for those of Mtis descent.

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Mr. W. Bouchard gave evidence that it cost him $4,000.00 to have his mother's line traced to its Indian roots. This expenditure would act as a very real deterrent for many individuals who might be interested in ascertaining whether they are of Mtis ancestry. Government tracing would provide economics of scale and help resolve the issue as to who may or may not claim Mtis status.

[44] Chapter 5 of vol. 4 of the Report of the Royal Commission on Aboriginal Peoples was filed as an exhibit at the trial. At p. 201, the authors state, in part, as follows:

Ancestry is only one component of Mtis identity. Cultural factors are significant; a people exists because of a common culture. When someone thinks of themselves as Mtis, it is because they identify with the culture of a Mtis people; and when a Mtis people accepts someone as a member, it is because that person is considered to share in its culture. A comment to the Commission from Delbert Majer makes the point:

> I'll say I'm Mtis or other young people that I know that are Mtis have been confronted with the same question: 'Oh, I didn't think you were Mtis. You don't look it.' You know, it's not a biological issue. It's a cultural, historical issue and it's a way of life issue; and it's not what you look like on the outside, it's how you carry yourself around on the inside that is important, both in your mind and your soul and your heart.
>
> Delbert Mejer
>
> Saskatchewan Mtis Addictions Council
>
> Regina, Saskatchewan, 10 May 1993'

When the subject of Aboriginal identity is discussed, reference is sometimes made to rational connections and objective criteria, such as place of residence, languages spoken, family links and community involvement. These are matters of evidence. They are guides to helping people decide

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whether someone who claims association has a genuine connection with the people. No one objective factor can ever be conclusive by itself; even when weighted for value, objective measures cannot be applied mechanically. In the end it comes down to two key elements -- ancestry and culture -- and their acceptance by both the individual and the people.

[45] The Commission at pp. 297-98, puts it this way:

How is membership in an Aboriginal people determined? Although various tests have been employed over the years, for various purposes in various jurisdictions (degrees of consanguinity, bureaucratic discretion, family status, individual choice and so on), the method that has won widest acceptance in recent years is a modified self-determination approach, consisting of three elements:

> some ancestral family connection (not necessarily genetic) with the particularly Aboriginal people;
>
> self-identification of the individual with the particular Aboriginal people; and
>
> community acceptance of the individual by the particular Aboriginal people.

It is sometimes suggested that a fourth element is also required: a rational connection, consisting of sufficient objectively determinable points of contact between the individual and the particular Aboriginal people, including residence, past and present family connections, cultural ties, language, religion and so on, to ensure that the association is genuine and justified. The more common view, however, appears to be that while these criteria can be used to determine whether an individual should be accepted as a member, they are not primary components of the test.

The Commission, in its report, makes the following recommendation (4.5.2) with respect to Mtis identity:

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4.5.2

Every person who

(a) identifies himself or herself as Mtis and

(b) is accepted as such by the nation of Mtis people with which that person wishes to be associated, on the basis of criteria and procedures determined by that nation

be recognized as a member of that nation for purposes of nation-to-nation negotiations and as Mtis for that purpose.

[46] As was found by the trial judge, and as evidenced in the agreed statement of facts filed as ex. 1 at the trial, the respondent Steve Powley was a card carrying member of the Ontario Mtis and Aboriginal Association on October 22, 1993, the date of the alleged offence. He applied on April 20, 1990, for membership in the local known as Bruce Mines OMAA Native Voice, on his own behalf, and on behalf of two of his children, including the respondent Roddy Charles Powley. His application was approved by the local president and board and signed off by his first cousin, Mr. Art Bennett, who as the trial evidence demonstrated, also self-identified as a Mtis and who gave evidence as to the existence of a Mtis community around the Sault Ste. Marie area. Mr. Bennett gave the following evidence at the trial relating to OMAA and the local Mtis community:

Q. So, Mr. Bennett, were the people organized at all? You say there's a Mtis community here. Were they organized in any way at all before OMAA came along?

A. Not that I know of.

Q. Now in your . . . in your opinion, let's just ask it straight out. Did OMAA create the Mtis community?

A. No, no, the Mtis community I believe was always here. That was . . . we were . . . we were here. just not recognized or not organized and but I do think OMAA brought

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us together politically.

[47] The membership card issued to Steve Powley dated October 18, 1990, was signed by Olaf Bjornaa, and it identified this respondent as a member of the "Bar River Local". Furthermore, as demonstrated by the extracts of evidence from William Bouchard, Bar River Native Voice was identified as a Mtis community or as an organized local or council of Mtis people in the Sault Ste. Marie area:

Q. Now, do you consider there to be a Mtis community in this area?

A. Yes.

Q. And is that community just in Sault Ste. Marie or do you think it's in other parts of the . . . or other parts of this region?

A. There's Mtis communities in other parts of this region, yes.

Q. Can you name some of those modern day ones?

A. Yes, there's . . . well, there's Sault Ste. Marie. There's Bar River Native Voice, St. Joe Island, Bruce Mines, Thessalon and Chapleau has about forty Mtis people in it also.

Q. Are you aware of any . . . now are you pointing to ones in a particular region, Mr. Bouchard?

A. Most of the ones I just said are recognized by the Mtis Nation of Ontario. They have charters with Mtis Nation of Ontario. They're established Mtis communities, but there are some in the area that are too small to establish, like maybe they only got four or five Mtis people, so they can't really establish a community, so they come, they join, they go towards the biggest community.

[48] The evidence discloses that after the date of the

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offence "Mr. Powley" joined MNO and was issued a harvester's certificate in 1997.

[49] Mr. Tony Belcourt gave evidence on behalf of the respondents. He was, during the time of the trial proceeding, the president of the Mtis Nation of Ontario. As is reflected in ex. 8 filed at trial, "a person is entitled to be registered as a citizen of the Mtis Nation who a) is alive, b) self-identifies as Mtis (that is considers themselves to be an aboriginal person) . . . d) is distinct from Indian or Inuit (that is, a person who is not registered on any band list), e) has genealogical ties to aboriginal ancestry, f) who is accepted by the Mtis Nation".

[50] As to community acceptance, Mr. Belcourt stated as follows:

> A. We are a people. It's not a matter of individuals. There's a difference between an individual saying I'm Mtis and the Mtis Nation identifying who the Mtis are or verifying who the Mtis are.
>
> Q. I think some of the problem comes that we're using the word for two different things.
>
> A. Oh, definitely. Some people are using it . . . well, I don't want to . . . I don't want to . . . I don't know what's behind the reasoning of some people other than those who come to the Mtis Nation and wish to register and identify as a Mtis and the rest of the community, accepting them.

[51] Mr. Belcourt indicated at trial that the Mtis Nation of Ontario "represents the Mtis who are registered in the Mtis Nation of Ontario", and then stated:

> We have regions, we have nine regions and we have counsellors for each of the nine regions and within each of those regions, the communities themselves establish local community councils so they administer the affairs and govern at the local level.

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[52] The Algoma area is identified as Region 4, and approximately 350 Mtis are registered with the MNO for or within this region. Mr. Belcourt went on further to explain what he meant by the term "community acceptance", as this related to membership in the MNO:

> A. It's always been our intention to . . . to put into practice what is recognized internationally as a norm for recognition of peoples and that is self-identification and community acceptance. Community acceptance for us means that we must give the community the opportunity to accept the people who have been registered. We have, therefore, decided that because we were just starting the Registry in particular for our first fifteen months of operation we didn't have any funding, they worked at the resources to be able to do the kind of diligent observations or research to confirm the Aboriginal ancestry or to make sure everybody had all of their documents in at the very outset and so we issued temporary reg . . . temporary memberships. Some of our people who are longstanding, well-known Mtis people in this Province, at that time are older and didn't have the resources themselves to get some of these documents in. so, we all have what's called a temporary card. This year, in fact right now, we are advert ising for a Deputy Registrar, a Genealogical Officer and a Clerk to take over management now of the Registry office to move us into the next phase of permanent Registry process. We must, at the community level, define a group, a commission that would examine the applications and then make recommendations to the community for the acceptance, formally and finally of the applicants. And we will be, we're defining our process for that right now, but generally, we will be appointing to these commissions, not unlike enrolment committees of First Nations or enrolment committees of the Algonquin First Nation, for example. People who are acknowledged far and wide and being Mtis, who are accepted and appointed by the Mtis National Council, recognized without question, who would be our enrolment or Registry Commissions at the community level. And when I say community I don't know if we're talking about each specific community having its own commission or whether within one region, we might have a committee. We have to

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> work those details out. The intention then is that every file would be submitted to those relevant communities and committees and they would then review them, finalize them, ensure that every piece of documentation is there and then move the name forward to the community for adoption.

[53] Black's Law Dictionary, 6th ed. (St. Paul, Minn: West Publishing Co., 1990), describes "community" as:

> Neighborhood; vicinity; synonymous with locality. . . . People who reside in a locality in more or less proximity. A society or body of people living in the same place, under the same laws and regulations, who have common rights, privileges, or interests. . . . It connotes a congeries of common interests arising from associations -- social, business, religious, governmental, scholastic, recreational.

[54] In my view, the learned trial judge was correct, when he found, on all of the evidence, that the respondents were Mtis who had been accepted into "contemporary Mtis society", at the time that the offences were alleged to have taken place. This is especially so, given that Art Bennett, a member of the local Mtis community, in essence accepted Steve Powley and Roddy Charles Powley as members of a local community Mtis organization. Furthermore, Steve Powley's membership card identified him as a member of the Bar River Local which in fact, as established through the evidence of William Bouchard, was a locally recognized Mtis community.

[55] I would, nevertheless, vary the trial judge's definition of Mtis having regard to several factors. Firstly, the Report of the Royal Commission on Aboriginal Peoples, supra, stresses that ancestral links may also be non-genetic, and as deeply cherished as blood connections. Its recommended definition does not impose any blood quantum requirements, but rather requires acceptance by the relevant Mtis nation on the basis of criteria and procedures that the Mtis nation itself determines.

[56] Blood quantum requirements for Mtis people should be

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rejected because they reveal little about how an individual defines his or her own identity in relation to a Mtis community. Requiring proof of a genealogical tie to the original Mtis inhabitants of the relevant Mtis community places, in my view, too heavy a burden on Mtis applicants and too easily leads to the extinguishment of Mtis rights through attenuated blood lines.

[57] Requiring that a person's grandparent be Mtis runs a real risk of extinguishing the Mtis rights of subsequent generations by both stealth and fiat. This is something that must be avoided if s. 35 is to receive a generous and purposive interpretation: see Catherine Bell, "Who are the Mtis People in Section 35(2)" (1991), 29 Alta. L. Rev. (No. 2) 351; and Catherine Bell, "Mtis Constitutional Rights in Section 35(1)" (1997), 36 Alta. L. Rev. (No. 1) 180.

[58] Secondly, the Royal Commission Report references the Draft International Declaration on the Rights of Indigenous Peoples, portions of which read as follows:

> Article 3. Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;
>
> . . . . .
>
> Article 8. Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such;
>
> . . . . .
>
> Article 25. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands . . . which they have traditionally owned or otherwise occupied or used . . . .

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[59] Underlying these Articles is a recognition of a right of self-determination and self-identification for aboriginal peoples who by definition in s. 35(2), include Mtis people.

[60] As to the appellants argument that a fourth element -- objectively determinable ties of a claimant to a local Mtis community -- must be added to the trial judge's test of who is a Mtis, in my view, this fourth element must be rejected (as it was by the trial judge), for two reasons: Firstly, it runs counter to the way the Supreme Court envisaged aboriginal rights to be interpreted and exercised. In Sparrow, supra, the court stipulated that s. 35(1) is to be interpreted in a purposive way and that a generous liberal interpretation, resolving doubt in favour of aboriginal peoples, is demanded given the purpose of the provision to affirm aboriginal rights. And as stated by Catherine Bell, in "Who are the Mtis People in Section 35(2)", supra, at p. 380:

> Given that the purposes for including s. 35(2) were to clarify the scope of potential claimants under s. 35(1) and to satisfy the claims of self-identifying Mtis to recognition as an aboriginal people, the section should be interpreted to the benefit of aboriginal peoples in light of these objectives.

Secondly, it places an unrealistic burden on applicants claiming Mtis rights that are not placed on applicants claiming other aboriginal rights. Aboriginal rights are collective rights although each member of the collectivity has a personal right to exercise them. They are rights held by a collective and are in keeping with the culture and existence of that group. The aboriginal rights claimant must be a member of that aboriginal community, but each individual within that community does not have to meet an individual cultural means test. Such a test would be arbitrary and inconsistent with a purposive analysis of an aboriginal right protected within the meaning of s. 35: see Pasco v. C.N.R. Co. (1989), 56 D.L.R. (4th) 404 at p. 410, 34 B.C.L.R. (2d) 344 (C.A.); Twinn v. Canada. [1987] 2 F.C. 450 (T.D.) at p. 462; Sparrow, supra, at p. 1106.

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[61] In my view, any imposition of a cultural means test or a blood quantum rule, as a general prerequisite for membership in a Mtis community, would be inconsistent with the fundamental purposes of s. 35.

[62] While Mtis communities and collectivities doubtlessly consist of a population of persons of mixed aboriginal and non-aboriginal ancestry who self-identify as Mtis, it would be wrong in my view, for the reasons stated herein, to require that in defining who a Mtis person is, the individual be required to be of necessarily genetic "aboriginal ancestry".

[63] I find merit in portions of the proposed definition of Mtis identity put forward by one of the two intervenors on this appeal, Aboriginal Legal Services of Toronto, which definition consists of a modification to the definition of Mtis identity set out in the Royal Commission Report. As the definition provided by the Royal Commission was developed for the purposes of identifying Mtis people in the context of self-government arrangements and negotiations, given that this appeal is concerned with site-specific aboriginal rights, the definition of Mtis must include or be referenced to the concept of a local community, branch, council, chapter or organization to satisfy the test for identity for the purposes of asserting s. 35(1) rights. To insist, however, that Mtis identity can only be tied to an existing and flourishing local Mtis community, but without regard to any recognized Mtis association having a locally organized community branch, council or chapter is to ignore the historic reality of Mtis peoples, as described at p. 219 of the Royal Commission Report:

> While prejudice has affected many aspects of their lives, the worst and least excusable form it has taken has been discriminatory governmental policies, especially on the part of the government of Canada . . . Except in the northern territories, Mtis people often have been deprived of post-secondary educational assistance and benefits ranging from health care to economic development and cultural support programs . . . .

[64] Surely an aboriginal people who reside in a community or

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locality in more or less proximity to one another, who share the same culture and interests, but who are not in any way formally recognized by government, can collectively organize and form a local association, branch or chapter for the purposes of crystallizing and shaping their community. Accordingly. where the Mtis right being asserted is site-specific, I would vary the trial judge's identity of a Mtis person, so as to provide as follows:

A Mtis is a person who,

(a) has some ancestral family connection (not necessarily genetic),

(b) identifies himself or herself as Mtis and

(c) is accepted by the Mtis community or a locally-organized community branch, chapter or council of a Mtis association or organization with which that person wishes to be associated.

(v) Is the appellant's infringement of the respondents' aboriginal right to hunt for food justified?

[65] The second basic issue on appeal, namely, whether the learned judge erred in finding that the infringement by ss. 46 and 47(1) of the Act of the respondents' aboriginal right to hunt for food was not justified, makes necessary, a consideration of the justification test as first outlined in Sparrow, supra [at pp. 1113-14 and 1119]:

> If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addressed the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective?
>
> . . . . .
>
> If a valid legislative objective is found, the analysis

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> proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretative principle derived from Taylor and Williams and Guerin, supra. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis--vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
>
> . . . . .
>
> We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts, and indeed all Canadians.

[66] The learned trial judge concluded in examining the justificatory issue that having regard to the objective of conservation, there was no justification "to exclude the Mtis from the aboriginal allocation . . .". Nor did he find that "based on the social and economic benefit to the people of Ontario derived through a combination of recreational hunting and non hunting recreation", was there a legitimate secondary justification for the current regulatory scheme.

[67] As acknowledged by the appellant, Ontario did not consult with OMAA or the MNO concerning the provisions of the Act in question. The learned judge also found, at para. 112 of his reasons, that:

> . . . at the present time, the Ontario Government does not recognize Mtis people as having any special access rights to natural resources.

[68] How, one might ask, can the appellant justify the infringement of the respondents' aboriginal right to hunt for food, when the affected local Mtis community has not been consulted, and when, even having regard for the valid legislative objective of conservation, hunting for recreation,

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sport and for food by others who are not aboriginal peoples as defined in s. 35(2) is currently permitted? As was stated by Chief Justice Lamer (as he then was) in R. v. Adams, supra, at pp. 134-35:

> I have some difficulty in accepting, in the circumstances of this case, that the enhancement of sports fishing per se is a compelling and substantial objective for the purposes of s. 35(1). While sports fishing is an important economic activity in some parts of the country, in this instance, there is no evidence that the sports fishing that this scheme sought to promote had a meaningful economic dimension to it. On its own, without this sort of evidence, the enhancement of sports fishing accords with neither of the purposes underlying the protection of aboriginal rights, and cannot justify the infringement of those rights. It is not aimed at the recognition of distinct aboriginal cultures. Nor is it aimed at the reconciliation of aboriginal societies with the rest of Canadian society, since sports fishing, without evidence of a meaningful economic dimension, is not "of such overwhelming importance to Canadian society as a whole" (Gladstone, at para. 74) to warrant the limitation of aboriginal rights.
>
> Furthermore, the scheme does not meet the second leg of the test for justification, because it fails to provide the requisite priority to the aboriginal right to fish for food; a requirement laid down by this Court in Sparrow. As we explained in Gladstone, the precise meaning of priority for aboriginal fishing rights is in part a function of the nature of the right claimed. The right to fish for food, as opposed to the right to fish commercially, is a right which should be given first priority after conservation concerns are met.

[69] The importance in the justification context of consultations with aboriginal peoples was again dealt with in R. v. Marshall, [1999] S.C.J. No. 66, 179 D.L.R. (4th) 193, where at para. 43, it is stated:

> (d) Aboriginal people are entitled to be consulted about limitations on the exercise of treaty and aboriginal rights.

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The Court has emphasized the importance in the justification context of consultations with aboriginal peoples. Reference has already been made to the rule in Sparrow, supra, at p. 1114, repeated in Badger, supra, at para. 97 that:

> The special trust relationship and the responsibility of the government vis--vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

The special trust relationship includes the right of the treaty beneficiaries to be consulted about restrictions on their rights, although, as stated in Delgamuukw, supra, at para. 168:

> The nature and scope of the duty of consultation will vary with the circumstances.

This variation may reflect such factors as the seriousness and duration of the proposed restriction, and whether or not the Minister is required to act in response to unforeseen or urgent circumstances. As stated, if the consultation does not produce an agreement, the adequacy of the justification of the government's initiative will have to be litigated in the courts.

[70] In addition, the appellant's concern that the recognition by the learned judge of the site-specific Mtis right to hunt for food in the circumstances of this case will be incapable of internal or any limitation is not borne out having regard to the variation of the trial judge's definition of Mtis identity (for the purposes of exercising site-specific aboriginal rights) herein provided.

[71] Furthermore, and in any event, the appellant in this case, if necessary, has the power to regulate the Mtis right to hunt for food through the imposition of closed seasons. As was stated in Marshall, supra, at para. 29:

> The regulatory device of a closed season is at least in part directed at conservation of the resource. Conservation

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> has always been recognized to be a justification of paramount importance to limit the exercise of treaty and aboriginal rights in the decisions of this Court cited in the majority decision of September 17, 1999, including Sparrow, supra, and Badger, supra. As acknowledged by the Native Council of Nova Scotia in opposition to the Coalition's motion, "Conservation is clearly a first priority and the Aboriginal peoples accept this". Conservation, where necessary, may require the complete shutdown of a hunt or a fishery for aboriginal and non-aboriginal alike.

[72] For these reasons, I conclude that the learned trial judge was correct in finding that the infringement of the respondents' aboriginal right to hunt for food by ss. 46 and 47(1) of the Act was not justified, and accordingly, I would dismiss, as well, this portion of the appeal.

IV. Justice Delayed is Justice Denied

[73] The learned trial judge, at paras. 131, 132 and 134, made the following observations with respect to issues involving Mtis rights:

> Even though the quasi-criminal charges against the Powleys have been dismissed for the reasons given, this case illustrates that there are many important issues that must be decided in the future regarding Mtis rights. The criminal process is not a particularly effective or efficient tool to arrive at the required solutions. It is a blunt instrument. It is also an expensive, time consuming, and cumbersome process.
>
> The issues raised have significant political components that are best addressed in the political arena.
>
> Section 35 of the Constitution Act, 1982 did not have to acknowledge the Aboriginal rights of a group of people referred to as Mtis. However, the Parliament of Canada has clearly proclaimed the Mtis existence. It has been twenty-five years since the Constitution Act has been in force. Is it not time to find answers regarding the issues affecting

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the Mtis?

In addition, at paras. 37 and 38, he stated:

> The Blais decision suggests that the definition debate has a significant political component linked to it. I would agree with this characterization. The Constitution Act, 1982 is an expression of Canada's political essence. Accordingly, when s. 35 refers to a group identified as Mtis, it would seem appropriate that the elected representatives of this nation dialogue with the key participants in the arena and arrive at a workable definition of who is a Mtis.
>
> Once a definition has been put in place, resources should be provided to deal with individual applicants who are interested in achieving official Mtis status. The current practice of individuals financing independent ancestral searches is both cumbersome and expensive. A central registry system could facilitate the determination of official status.

[74] In Sparrow, supra, the Supreme Court wrote about the significance and effect of s. 35(1) of the Constitution Act, 1982, at pp. 1105-06, as follows:

> It is clear, then, that s. 35(1) of the Constitution Act, 1982 represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35 possible and it is important to note that the provision applies to the Indians, the Inuit and the Mtis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations, can take place. We are, of course, aware that this would, in any event, flow from the Guerin case . . . .
>
> In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitution Interpretation" (1988), 26 Osgoode Hall L.J. 95, says the following about s. 35(1), at p. 100:

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> . . . the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples.

(Emphasis added)

[75] There is a difference between achieving or reaching a settlement of s. 35 rights, as compared to a just settlement of s. 35 rights. Access to justice is fundamental to achieving justice. When access is delayed, justice will be denied. In Metropolitan Toronto (Municipality) v. Brenner (No. 1) (1980), 29 O.R. (2d) 531, 114 D.L.R. (3d) 224 (H.C.J.), O'Driscoll J. stated at p. 550:

> We all live under the rule of law. Abraham Lincoln, I think it was, said: "No one is above the law, and no one is beneath the law." We are all familiar with the legal maxims: "Justice delayed is justice denied;" ". . . a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done: R. v. Sussex Justices, [1924] 1 K.B. 256 at p. 259. There is no sense mouthing those skeletal words; flesh must be put onto the skeleton.

[76] It is clear from the trial evidence that the Mtis, as aboriginal people in Ontario, have continued the long struggle for a just settlement respecting their s. 35(1) rights, since 1982, but without result or success. As noted in Sparrow, supra, this search for justice since 1982, is in addition to "the long and difficult struggle" before 1982, over a period measured in decades, for the constitutional recognition of aboriginal rights. While many segments of, and persons in, our society understandably are concerned about a delay in accessing or securing justice, measured over a period of years, these concerns become all the more serious and alarming when the struggle for justice is measured over decades or generations. Tony Belcourt touched on these failures to make progress with governments in defining and affirming existing aboriginal

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rights, in the following words:

Q. And what are the other Provincial Governments responses to the Mtis?

A. Generally, the Provincial Government responses, there haven't been any pieces of legislation concerning the Mtis and most Provincial Governments take the position, we've been political footballs ever since I've been involved in lobbying at the federal level for some 28 years now. We are . . . we are a political football. The Federal Government says we don't have the responsibility for you, the Provinces do and the Provinces take the opposite position. We don't have the responsibility, the Federal Government does.

Q. Now, Mr. Belcourt, does anybody . . . does the Government accept the registration lists, I guess maybe I should start before that and say, have you ever informed the Government about your registry system?

A. Yes, many times.

Q. Which times?

A. And in fact, I've invited a representatives of both the Federal and the Provincial Government to attend our offices and . . . and examine our Registry process and the Registry itself.

Q. Have you ever asked or spoken to anyone from the Ministry of Natural Resources about the Registry system?

A. I have, yes. The Minister, the Deputy Minister and Senior officials in the Enforcement Policy Branch.

Q. And what's the response?

A. They've . . . they've never come to our offices.

Q. Do . . . do they accept your list of Mtis people?

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A. No. They've never . . . well, they accept it in the sense that if I give it to them, they accept the fact that I'm giving them a list, but they don't accept our Registry as being the Registry of the Mtis in the Province. They don't recognize our list.

Q. Do you . . . what's your understanding of why they don't?

A. The . . . they, the Government of Ontario at various times in various ways has said to us that they don't know who the Mtis are because the Government of Canada hasn't told them who they are, so they are somehow waiting for the Government to present, provide a list. That's one of the responses I get. Another response that I get is that you don't represent all of the Mtis in the Province of Ontario, so, therefore, we're not going to recognize Mtis harvesting agreements because of that, because you don't represent all of the Mtis. I . . . we did have an agreement at one time. We negotiated a harvesting agreement which was approved by the entire Senior categories of the Ministry of Natural Resources including the Deputy Minister, but the Minister in the end cancelled the deal and his response to me was that they did not . . . the Mtis Nation of Ontario did not represent all of the Mtis, which is just an excuse. It certainly makes no sense. We weren't negotiating for anybody but the people on our list.

[77] Mr. William Bouchard expressed his frustration in making progress towards a just and timely settlement in relation to s. 35(1) rights, when he said:

Q. And do you have some experience with Government on this issue of who the Mtis are, Mr. Bouchard?

A. Yes, I was President of Bar River Native Voice and we wrote letters to the Government of Ontario to try and get them to recognize Bar River Native Voice as a Mtis community so we could start some negotiations for harvesting rights with the M.N.R. and every time we got a letter back, it pretty well said well, we don't know who represents the Mtis and who they are and . . . .

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[78] If, as the Supreme Court of Canada has stated, s. 35(1) calls for a just (and therefore timely) settlement for aboriginal peoples, the clear delays in establishing processes, protocols and parameters to identify s. 35(1) Mtis rights in the Province of Ontario represent a denial of justice. The Constitution of Canada is the supreme law of the land. In my view, respect for all laws declines, and our justice system is undermined, when unacceptable and lengthy delays occur in relation to achieving a just settlement with respect to these constitutional legal rights, no matter what reason or excuse is given.

V. The Need, and Requirement for, Negotiations

[79] In Reference re Secession of Quebec, [1998] 2 S.C.R. 217, the Supreme Court of Canada identified "four fundamental and organizing principles of the constitution" -- federalism, democracy, constitutionalism and the rule of law, and respect for minorities. At p. 248, the court stated:

> These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does one principle trump or exclude the operation of the other.
>
> . . . . .
>
> The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our constitution as a "living tree" . . . .

[80] In describing two of these principles, namely constitutionalism and the rule of law, and protection of minorities, the court stated at pp. 257-58 and 262-63, as follows:

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> As we noted in the Patriation Reference, supra, at pp. 805-6, "the 'rule of law' is a highly textured expression . . . conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority." At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.
>
> . . . the rule of law provides that the law is supreme over the acts of both government and private persons. . . . "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order".
>
> . . . . .
>
> Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the Constitution Act, 1982 included in s. 35 explicit protection for existing aboriginal and treaty rights. . . . The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

[81] In examining the value of the democracy principle in the constitutional law and political culture of Canada, the court at p. 256 stated:

> Finally, we highlight that a functioning democracy requires a continuous process of discussion. . . . At both the federal and provincial levels, by its very nature, the need to build majorities necessitates compromise, negotiation and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top.

[82] In dealing with the operation of these constitutional principles in the secession context, the court at pp. 266 and

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268-69 stated:

> The conduct of the parties in such negotiations would be governed by these same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.
>
> . . . . .
>
> Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

[83] In Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 ("Delgamuukw") Chief Justice Lamer (as he then was), at pp. 1123-24, drew the important connection between negotiations, and the achieving of a basic purpose of s. 35(1):

> Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in Sparrow, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this court, that we will achieve what I stated in Van der Peet, supra, at para.

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31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

[84] Twenty-seven days following the release of Delgarnuukw, the Minister of Indian Affairs, in an address on the occasion of the unveiling of "Gathering Strength -- Canada's Aboriginal Action Plan", January 7, 1998, outlined the Government of Canada's statement of reconciliation. Following the signing of this statement, the Minister, on behalf of the Government of Canada, also drew and recognized the connection between negotiations, and the constructing of a relationship between aboriginal and non-aboriginal people, characterized by mutual respect and recognition, responsibility and sharing. Recognition of the need, and requirement for, negotiations, was outlined in the following commitment:

> In this context, and particularly with respect to the working relationship, our commitment to partnership is:
>
> * to work out solutions together beforehand, instead of picking up the pieces after the fact;
>
> * a commitment to negotiate rather than litigate;
>
> * a commitment to communication;
>
> * a commitment to meaningful consultation; and
>
> * a commitment to prompt action to address concerns before positions get too polarized to move.

[85] Given that:

(i) "[section] 35(1) is a solemn commitment that must be given meaningful content": Sparrow, supra, at p. 1108;

(ii) "[t]he relationship between the Government and aboriginals is trust-like, rather than adversarial and contemporary recognition and affirmation of aboriginal rights must be

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defined in light of this historic relationship": Sparrow, supra, at p. 1108;

(iii) ". . . a functioning democracy requires a continuous process of discussion . . .": Reference re Secession of Quebec, supra, at p. 256;

(iv) ". . . observance of and respect for these [constitutional] principles is essential to the ongoing process of constitutional development and evolution of our constitution as a 'living tree' ": Reference re Secession of Quebec, supra, at p. 248;

(v) ". . . the rule of law requires the creation and maintenance of an actual order of positive laws . . .": Reference re Secession of Quebec, supra, at p. 258;

(vi) "[n]o one has a monopoly on truth . . .": Reference re Secession of Quebec, supra, at p. 256;

(vii) ". . . the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately it is through negotiated settlements, with the good faith and give and take on all sides . . . that we will achieve . . . a basic purpose of s. 35(1) . . .": Delgamuukw, supra, at pp. 1123-24;

(viii)"[t]here is a need "to contribute to the maintenance and promotion of an environment in which the rule of law may flourish": Reference re Secession of Quebec, supra, at p. 269;

(ix) "[t]hose who . . . insist upon the importance of upholding the rule of law . . . [must] do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish": Reference re Secession of Quebec, supra, at pp. 268-69 and

(x) "[s]ection 35 calls for a just settlement for aboriginal peoples": Sparrow, supra, at p. 1106;

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in my view, negotiation or mediation, processes, protocols and parameters must be established without any further delay, in order to identify, for the purpose of affirming and protecting, the s. 35(1) rights, in this case, of Ontario's Mtis people.

[86] In Perry v. Ontario (1997) 33 O.R. (3d) 705, 44 C.R.R. (2d) 73 (C.A.) ("Perry"), the court concluded that "while practicality may dictate that the parties negotiate, the constitution does not," and later that "the scope of this fiduciary obligation, as it has so far been developed, does not include a legal duty to negotiate with aboriginal communities." It is important, however, to note that Perry was decided before Delgamuukw or Reference re Seccession of Quebec were handed down. The conclusions reached therein with respect to any requirement for negotiations and steps to be taken to secure a just settlement of s. 35 rights, must now be reconsidered in light of these Supreme Court decisions.

[87] Furthermore, I consider that meaningful content cannot be given to s. 35(1), nor can the rule of law flourish, in an environment where, given the trust-like relationship between aboriginal peoples and the government, and given the many other complex and competing interests at stake, both public and private, the aboriginal peoples are required, absent a failure of negotiations or mediations entered into and conducted in good faith, to defend themselves against the blunt instrument of the criminal or quasi-criminal process, or to litigate against the Crown through every level of court, in a multitude of cases involving a multitude of issues. If the search for justice and settlements in Ontario has led us to court-connected mediation, surely by the same measure, and for the additional reasons herein given, the search for a just settlement of the s. 35 rights of the aboriginal peoples of this province, must lead us to a process of good faith negotiations, and in applicable circumstances, mediation.

[88] In this respect, I adopt fully the learned trial judge's exhortation, stated rhetorically at para. 134 of his reasons: "Is it not time to find answers regarding the issues affecting the Mtis?"

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VI. Disposition

[89] For all of these reasons, I would dismiss the appellant's appeal, varying only as stated, the trial judge's definition of Mtis for the purposes of identifying and affirming site-specific aboriginal rights. Although, in accordance with s. 125 of the Provincial Offences Act, supra, this court "may make any order, in addition, that justice requires", while I have expressed my view as to the need, and requirement for, negotiations, given my disposition of the within appeal, it is not necessary that an order to this effect be made in this case.

Appeal dismissed.

WDPH

2000 CanLII 22327 (ON SC)