Her Majesty the Queen v. Powley et al.*

[Indexed as: R. v. Powley]

53 O.R. (3d) 35
[2001] O.J. No. 607
Docket No. C34065

Court of Appeal for Ontario
McMurtry C.J.O., Abella and Sharpe JJ.A.
February 23, 2001

* Application for extension of time and for leave to cross-appeal to the Supreme Court of Canada was granted March 14, 2002 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28533. S.C.C. Bulletin, 2002, p. 432.

Charter of Rights and Freedoms -- Aboriginal and treaty rights -- Historic Mtis community in and around Sault Ste. Marie has aboriginal right to hunt for food protected by s. 35(1) of Constitution Act, 1982 -- Sections 46 and 47(1) of Game and Fish Act infringe that right -- Infringement not justified -- Dismissal of charges under Game and Fish Act against two Mtis accused who shot and killed moose affirmed -- One year stay of judgment granted -- Constitution Act, 1982, s. 35(1) -- Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1).

The respondents shot and killed a bull moose in the bush near Sault Ste. Marie but did not have a moose hunting licence. They were charged with hunting and possessing a moose without a licence contrary to ss. 46 and 47(1) of the Game and Fish Act (now the Fish and Wildlife Conservation Act, 1997, S.O. 1997, c. 41). The respondents were direct descendents of the Lesage family, members of the historic Mtis community in Sault Ste. Marie. The respondent SP was a registered member of

the Ontario Mtis and Aboriginal Association ("OMAA") and the Mtis Nation of Ontario ("MNO"). The respondent RP did not have an OMAA membership card, but he was listed on SP's application form under the heading: "Identify any children under 18 for whom you wish to apply for Youth Membership".

The respondents claimed that, as members of the historic Mtis community, they had an existing aboriginal right to hunt for food without a licence, protected by s. 35 of the Constitution Act, 1982. They did not have status under the Indian Act, R.S.C. 1985, c. I-5, nor did they enjoy any treaty rights. Status Indians in the Sault Ste. Marie area have a treaty right to hunt for food pursuant to the 1850 Robinson-Huron Treaty. The treaty right to hunt for food is recognized in the 1991 Interim Enforcement Policy issued by the Ministry of Natural Resources under the Game and Fish Act. While the Interim Enforcement Policy provides for negotiations for Mtis hunting rights, there has been no agreement recognizing Mtis rights. The Ontario government has refused to recognize Mtis people as having any special access to natural resources.

The trial judge defined Mtis as "a person of Aboriginal ancestry; who self-identifies as a Mtis; and who is accepted by the Mtis community as a Mtis". He found that the respondents satisfied that test. He further found that there was a visually, culturally and ethnically distinct Mtis community in the area around Sault Ste. Marie that traced its roots to the marriages between French fur traders and indigenous Ojibway women. The trial judge found as a fact that hunting was an integral part of the Mtis culture prior to the assertion of effective control by the Crown. He also held that the Mtis practice of hunting for food had been continuous to the present, and that there is a contemporary Sault Ste. Marie Mtis society that is in continuity with the historic Mtis community. He concluded that the respondents had established the necessary ingredients for an aboriginal right to hunt for food within the meaning of s. 35(1) of the Constitution Act, 1982 and that this right was infringed by ss. 46 and 47(1) of the Game and Fish Act. He found that the appellant had failed to justify the infringement of the s. 35 right. Accordingly, the charges were dismissed.

The Superior Court upheld the trial judge's decision and the appellant appealed.

Held, the appeal should be dismissed.

The appellant's motion for leave to introduce fresh evidence on appeal in support of its justification argument was dismissed. The evidence did not meet the due diligence test or could not affect the result.

The constitution formally recognizes the existence of distinct "Mtis peoples", who, like the Indian and Inuit, are a distinct and equal subset of the larger class of "aboriginal peoples of Canada". The separate identity of the Mtis people must be respected and the recognition of their constitutional rights must be generously interpreted. The rights of one people should not be subsumed under the rights of another. To make Mtis rights entirely derivative of and dependent upon the precise pre-contact activities of their Indian ancestors would ignore the distinctive history and culture of the Mtis and the explicit recognition of distinct "Mtis peoples".

The trial judge did not err in characterizing the right claimed by the respondents as a right to hunt for food, rather than as a game-specific right. To characterize the right in the game-specific terms suggested by the appellant would give undue emphasis to the regulatory concerns of today and pay insufficient attention to the aboriginal perspective. The right to hunt moose was at issue in this case because the regulation of moose hunting was the focus of the statutory prohibition. To insist that the traditional aboriginal practice grounding the modern right must conform precisely to the terms of the modern regulatory regime risked ignoring the aboriginal perspective. There was expert evidence, accepted by the trial judge, that from the aboriginal perspective, the activity was simply hunting.

There was evidence to support the trial judge's findings of fact that the historic Mtis community at Sault Ste. Marie engaged in the practice of hunting, and that hunting was an

integral part of the Mtis culture prior to the assertion of effective control by the European authorities. There may be gaps in continuity of a practice that are not fatal to the establishment of an aboriginal right. Accordingly, there was no basis for interfering with the trial judge's conclusion that the right claimed was a practice exercised by the historic Mtis community at Sault Ste. Marie and was integral to the distinct culture of that community.

The trial judge did not err in finding that there exists today a Mtis community in continuity with the historic Mtis community that continues to exercise the practice grounding the right, and that the respondents are accepted as members of that community. It was open to the trial judge to reject the appellant's assertion that the Mtis community merged into Indian bands. The continuity test should be applied with sufficient flexibility to take into account the vulnerability and historic disadvantage of the Mtis. The trial judge was entitled to conclude that the Sault Ste. Marie Mtis community had suffered as a result of what was at best governmental indifference, and to take the historically disadvantaged situation of the Mtis into account when assessing the continuity of their community.

There was evidence to support the trial judge's finding that hunting has continued to be an important aspect of Mtis life.

It would be wrong to expect the same type of evidence one might expect in a case asserting the rights of an established Indian band. Mtis communities do not have a formal legal structure or organization. They are not recognized under the Indian Act and they have no bodies analogous to band councils that are recognized or funded by the government. They are communities based on history, kinship and shared practices. Proof of membership in such a community is bound to be to a large extent expressionistic. There was evidence of membership in the local Sault Ste. Marie community which was capable of supporting the trial judge's finding that the respondents were accepted as members of the local Mtis community.

The appellant led evidence to show that the moose population

in the wildlife management unit in which the respondents shot a moose was below what was considered to be a satisfactory level. The respondents did not dispute that conservation is an important objective capable of justifying a limit on s. 35 rights. However, the appellant failed to establish that the right was limited in a manner in keeping with the fiduciary duty of the Crown. The fact that the regulatory scheme failed to accord any recognition or priority to the Mtis right was fatal to the contention that the limitation was in keeping with the Crown's trust-like relationship with the Mtis people. In relation to other holders of aboriginal rights -- Indians who enjoy a treaty right to hunt -- the current scheme placed Mtis rights holders at an obvious disadvantage. The legislative objective of conservation cannot justify this blatant disparity in treatment between the two rights-holders. Moreover, in relation to non-aboriginal hunters, Mtis rights holders are given no priority. The failure to attach any weight whatsoever to the aboriginal right flies in the face of the principle that aboriginal food hunting rights are to be accorded priority.

The appellant relied on a secondary objective, described as "the social and economic benefit to the people of Ontario derived through a combination of recreational hunting and non-hunting recreation". This was at a level of such generality that the appellant failed to establish this as a valid legislative objective for the purposes of limiting the s. 35 right.

In argument before the Court of Appeal, the appellant sought to establish the "equitable sharing of resources" as a secondary legislative objective. Assuming, without deciding, that it was open to the appellant to advance this objective at this stage of the proceedings, it should be rejected on two grounds. First, an appeal to equitable sharing, without more, cannot amount to a valid legislative objective if, in fact, what is left of the resource after conservation measures is insufficient to satisfy the aboriginal right to harvest for food. Even if "equitable sharing" does amount to a valid legislative objective, the present scheme cannot be justified as being consistent with the Crown's trust-like duty. It

accords no recognition to the Mtis right, in stark contrast to the blanket exemption given status Indians. A scheme that creates such an obvious imbalance between rights holders, and gives the Mtis no priority over those who have no constitutional right to hunt, cannot be described as "equitable" or in keeping with the Crown's trust-like duty. The trial judge did not err in finding that the Game and Fish Act was not a justified limit on the respondents' s. 35 right to hunt for food.

A stay of this judgment for a period of one year should be granted to allow the appellant to consult with stakeholders and develop a new moose-hunting regime that is consistent with s. 35 of the Constitution Act, 1982.

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; 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, apld

Other cases referred to

Edwards Books & Art Ltd. v. R., [1986] 2 S.C.R. 713, 58 O.R. (2d) 442, 19 O.A.C. 239, 35 D.L.R. (4th) 1, 71 N.R. 161, 28 C.R.R. 1, 30 C.C.C. (3d) 385, 87 C.L.L.C. 14,001, 55 C.R. (3d) 193 (sub nom. R. v. Longo Brothers Fruit Markets Ltd., Magder v. R., R. v. Videoflicks, R. v. Videoflicks Ltd.); Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, 19 Q.A.C. 69, 54 D.L.R. (4th) 577, 90 N.R. 84, 36 C.R.R. 1 (sub nom. Chaussure Brown's Inc. v. Qubec (Procureur Gnral)); Guerin v. R., [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, [1984] 6 W.W.R. 481, 55 N.R. 161, 59 B.C.L.R. 301, 36 R.P.R. 1, 20 E.T.R. 6; Jack v. R., [1980] 1 S.C.R. 294, 100 D.L.R. (3d) 193, 28 N.R. 162, [1979] 5 W.W.R. 364, 48 C.C.C. (2d) 246; Perry v. Ontario (1997), 33 O.R. (3d) 705, 44 C.R.R. (2d) 73 (C.A.) [Leave to appeal to S.C.C. refused with costs (1997), 226 N.R. 317n, 48 C.R.R. (2d) 376n]; Public School Boards' Assn. (Alberta) v. Alberta (Attorney General), [2000] 1 S.C.R. 44, 82 Alta. L.R. (3d) 211, 182 D.L.R. (4th) 561, 251 N.R. 1,

[2000] 10 W.W.R. 187; 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. Blais (1996), [1997] 3 C.N.L.R. 109 (Man. Prov. Ct.), affd 130 Man. R. (2d) 114, [1998] 4 C.N.L.R. 103 (Q.B.), leave to appeal granted (1998), [1999] 2 W.W.R. 445 (Man. C.A.); R. v. C. (R.) (1989), 47 C.C.C. (3d) 84 (Ont. C.A.); 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. Desjarlais, [1996] 1 C.N.L.R. 148 (Alta. Prov. Ct.), revd in part [1996] 3 C.N.L.R. 113 (Alta. Q.B.); R. v. Feeney, [1997] 2 S.C.R. 13, 146 D.L.R. (4th) 609, 212 N.R. 83, [1997] 6 W.W.R. 634, 44 C.R.R. (2d) 1, 115 C.C.C. (3d) 129, 7 C.R. (5th) 101; R. v. Ferguson, [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct.), affd [1994] 1 C.N.L.R. 117 (Alta. Q.B.); R. v. Glads tone, [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. Marshall, [1999] 3 S.C.R. 456, 178 N.S.R. (2d) 201, 177 D.L.R. (4th) 513, 246 N.R. 83, 549 A.P.R. 201, 138 C.C.C. (3d) 97; R. v. Marshall, [1999] 3 S.C.R. 533, 179 N.S.R. (2d) 1, 179 D.L.R. (4th) 193, 247 N.R. 306, 553 A.P.R. 1, 139 C.C.C. (3d) 391; R. v. McPherson (1994), 90 Man. R. (2d) 290, 111 D.L.R. (4th) 278 (Q.B.), revg (1992), 82 Man. R. (2d) 86, [1993] 1 W.W.R. 415 (Prov. Ct.); R. v. Morin (1997), 159 Sask. R. 161, [1998] 2 W.W.R. 18 (Q.B.), affg [1996] 3 C.N.L.R. 157 (Sask. Prov. Ct.); R. v. N.T.C. 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. Nikal, [1996] 1 S.C.R. 1013, 19 B.C.L.R. (3d) 201, 133 D.L.R. (4th) 658, 196 N.R. 1, [1996] 5 W.W.R. 305, 35 C.R.R. (2d) 189, 105 to C.C.C. (3d) 481 (sub nom. Canada v. Nikal); R. v. Palmer, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212, 30 N.R. 181, 50 C.C.C. (2d) 193, 14 C.R. (3d) 22 (sub nom. Palmer and Palmer v. R.); R. v. Palmer, [2000] O.J. No. 2787 (C.A.); R. v. Pamajewon, [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 (sub nom. R. v. Jones); R. v. Seo (1986), 54 O.R. (2d) 293, 13 O.A.C. 359, 27 D.L.R. (4th) 496, 20 C.R.R. 241, 25 C.C.C. (3d) 385, 51 C.R. (3d) 1, 38 M.V.R. 161 (C.A.); R. v. Sioui, [1990] 1 S.C.R. 1025, 30 Q.A.C. 280, 70 D.L.R. (4th) 427, 109 N.R. 22, 56 C.C.C. (3d) 225; R. v. Sundown, [1999] 1 S.C.R. 393, 177 Sask. R. 1, 170 D.L.R. (4th) 385, 236 N.R.

251, 199 W.A.C. 1, [1999] 6 W.W.R. 278, 132 C.C.C. (3d) 353; R. v. Warsing, [1998] 3 S.C.R. 579, 59 B.C.L.R. (3d) 47, 233 N.R. 319, [1999] 6 W.W.R. 372, 130 C.C.C. (3d) 259, 21 C.R. (5th) 75; Stein v. "Kathy K" (The) (1975), [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1 (sub nom. "Storm Point" (The) v. Stein); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (U.S.S.C. 1832)

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 15
Constitution Act, 1982, ss. 35, 35(1), 35(2)
Game and Fish Act, R.S.O. 1990, c. G.1, ss. 3, 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, s. 116

Treaties referred to

Jay Treaty, 1797
Robinson-Huron Treaty, 1850
Treaty of Paris, 1763

Authorities referred to

Bell, C., "Mtis Constitutional Rights in Section 35(1)" (1997), 36 Alta. L. Rev. (No. 1) 180
Flanagan, T., "Mtis Aboriginal Rights: Some Historic and Contemporary Problems," in M. Boldt and A.J. Long, The Quest for Justice: Aboriginal People and Aboriginal Rights (Toronto: University of Toronto Press, 1985)
Gibson, D., "General Sources of Mtis Rights" in Report of the Royal Commission on Aboriginal Peoples, vol. 4, Appendix 5A (Ottawa: Royal Commission on Aboriginal Peoples, 1996)
Hogg, P.W., Constitutional Law of Canada, looseleaf (Scarborough, Ont.: Carswell, 1992)
Interim Enforcement Policy (Ministry of Natural Resources, 1991)
Report of the Royal Commission on Aboriginal Peoples, vol. 4 (Ottawa: Royal Commission on Aboriginal Peoples, 1996)

Report of the Royal Commission on Aboriginal Peoples, vol. 4, c. 5 (Ottawa: Royal Commission on Aboriginal Peoples, 1996)
Roach, K., Constitutional Remedies in Canada, looseleaf (Aurora, Ont.: Canada Law Book, 2000)
Schwartz, B., First Principles, Second Thoughts: Constitutional Reform with respect to the Aboriginal Peoples of Canada, 1982-84 (Kingston: Institute of Intergovernmental Relations, 1985)

APPEAL from the judgment of O'Neill J. (2000), 47 O.R. (3d) 30 dismissing a Crown appeal from a judgment of Vaillancourt J. (1998), 58 C.R.R. (2d) 149 dismissing charges under the Game and Fish Act, R.S.O. 1990, c. G.1.

Lori Sterling, Peter Landmann and Peter Lemmond, for moving party, Her Majesty the Queen.
Jean Teillet and Arthur Pape, for respondents.
Brian Eyolfson, for Aboriginal Legal Services of Toronto.
Robert MacRae, for the Ontario Mtis Aboriginal Association.
Joseph Magnet, for the Congress of Aboriginal Peoples.
Clem Chartier, for the Mtis National Council.

The judgment of the court was delivered by

SHARPE J.A.:--

OVERVIEW

[1] Steve Powley and his son Roddy (the "respondents") are of Mtis descent. In October 1993, they shot and killed a bull moose in the bush near Sault Ste. Marie. They did not have a moose hunting licence. They claim that they are members of the historic Mtis community and that they have a right, protected by the Constitution Act, 1982, s. 35 to hunt for food without a licence.

[2] The respondents were charged with hunting and possessing a moose without a licence contrary to ss. 46 and 47(1) of the

Game and Fish Act, R.S.O. 1990, c. G.1. They admitted hunting the moose, but asserted that the Act infringed their constitutional right. The trial judge, Vaillancourt J. of the Ontario Court of Justice (Provincial Division), found that a s. 35 right was established and that the infringement of the right was not justified. He dismissed the charges. O'Neill J. dismissed the Crown's appeal to the Superior Court of Justice.

[3] The Crown (the "appellant") appeals, with leave ((2000), 49 O.R. (3d) 94) to this court. The appellant submits that the respondents do not have an aboriginal right to hunt for food under s. 35 of the Constitution Act, 1982. The appellant also argues that if the respondents do establish a right to hunt for food, any infringement of their right is justified in the name of conservation, equitable sharing of a scarce resource and social and economic benefit. In the event that the appeal is dismissed, the appellant asks that the effect of the judgment be stayed for a period of one year.

[4] Four groups, representing various aboriginal interests, were given leave to intervene in this appeal. Aboriginal Services of Toronto provides legal advice to aboriginals. The Congress of Aboriginal Peoples is a national organization representing Mtis and off-reserve Indian [See Note 1 at end of document] peoples, composed of 12 provincial and territorial affiliates. The Mtis National Council was established in 1983 to represent the Mtis Nation within Canada. It has participated in several First Ministers Conferences involving aboriginal issues and represented the Mtis Nation during the Charlottetown constitutional sessions held in 1992. It is comprised of provincial member organizations, including the Mtis Nation of Ontario ("MNO"). The Ontario Mtis and Aboriginal Association ("OMAA") is a representative organization for non-status aboriginal people as well as Mtis people in Ontario.

FACTS

(a) The Offence

[5] The respondents did not dispute the essential facts

giving rise to the charges. That aspect of the trial proceeded on an Agreed Statement of Facts. It was agreed that at approximately 9:00 a.m., on October 22, 1993, the respondents shot and killed a bull moose in the immediate vacinity of Sault Ste. Marie. They took the moose to their residence in Sault Ste. Marie. The respondents did not have Ontario "Outdoor Cards" available to all hunters for a fee, nor did they possess a licence to hunt moose. Moose licences are limited in number and are allocated by lottery to those who apply. In place of the legally required tag, Steve Powley affixed a hand written tag to the ear of the moose stating the precise date, time and place of the kill and indicating the ammunition used. He also stated "meat for the winter, my # is 4-088-1-0460" and signed his name. The number referred to Steve Powley's OMAA membership card.

[6] Later the same day, two conservation officers went to the respondents' residence to investigate. The respondents freely admitted what had occurred. The officers seized Steve Powley's gun and other items used for hunting, his OMAA card and the moose carcass. One week later the respondents were charged with unlawfully hunting moose without a licence and unlawful possession of a moose.

(b) Legislation and Regulatory Regime

[7] The respondents were charged under the Game and Fish Act, R.S.O. 1990, c. G.1 (now the Fish and Wildlife Conservation Act, 1997, S.O. 1997, c. 41):

> 46. No person shall knowingly possess any game hunted in contravention of this Act or the regulations.
>
> 47. (1) Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt black bear, polar bear, caribou, deer, elk or moose.

[8] The respondents rested their defence on the claim that as members of the Sault Ste. Marie Mtis community, they had

an "existing aboriginal" right to hunt, guaranteed by s. 35 of the Constitution Act, 1982:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Mtis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

. . . . .

[9] The respondents do not have status under the Indian Act, R.S.C. 1985, c. I-5 nor do they enjoy any treaty rights. Status Indians in the Sault Ste. Marie area have a treaty right to hunt for food pursuant to the 1850 Robinson-Huron Treaty. The treaty right to hunt for food is recognized in the 1991 Interim Enforcement Policy issued by the Ministry of Natural Resources under the Game and Fish Act, pursuant to which those who enjoy treaty rights are not prosecuted for what would otherwise amount to violations of the Act.

[10] While the Interim Enforcement Policy provides for negotiations for Mtis hunting rights, there has been no agreement recognizing Mtis rights. Representatives of the MNO have attempted to negotiate an agreement. A draft agreement was reached in 1994 between the MNO and officials in the Ministry of Natural Resources, but that agreement was not accepted by the then Minister, Howard Hampton. The major stumbling block from the Minister's perspective was that not all Mtis belong to the MNO and, in the Minister's view, "it is difficult to develop an allocation for Mtis harvest of large game while the issue of Mtis representation in Ontario remains unresolved."

[11] The MNO has implemented its own provisional harvesting policy to organize and regulate a traditional Mtis hunt under

"Captains of the Hunt". The policy identifies conservation as a main objective. In September 1996, the Deputy Minister of Natural Resources informed Tony Belcourt, President of the MNO, that the Game and Fish Act would be enforced against Mtis hunters as the government had not been provided with adequate historical evidence from Mtis communities to determine the existence, nature and scope of their claims. Uncertainty as to who qualifies as "Mtis" for the purposes of s. 35 and the issue of representation of Mtis interests has frequently been mentioned by federal and provincial officials in response to Mtis demands. It is clear that the Ontario government has, to date, refused to recognize Mtis people as having any special access to natural resources.

(c) The Respondents

[12] The respondents are direct descendents of the Lesage family, members of the historic Mtis community in Sault Ste. Marie. Steve Powley is a registered member of OMAA and MNO. Roddy Powley does not have an OMAA membership card, but he was listed on Steve Powley's application form under the heading: "Identify any children under 18 for whom you wish to apply for Youth Membership."

(d) Background Historical Facts

[13] As the essential elements of the offence were admitted, the evidence led at the trial related to the respondents' claim of a s. 35 aboriginal right and the appellant's contention that any infringement of the right was justified. The evidence consisted of expert testimony relating to the history, culture and practices of the Mtis people. Evidence was also led as to the contemporary situation of the Mtis community in Sault Ste. Marie and the activities of OMAA and the MNO.

[14] Extensive historical evidence was led at trial with respect to the historic Mtis community at Sault Ste. Marie. Dr. Arthur Ray, Professor of History at the University of British Columbia, an expert witness called by the respondents whose evidence was accepted by the trial judge, divided the

history of the Sault Ste. Marie Mtis into three parts: the "pre-European contact" period; the "formative period" from the 1640s to the 1790s; the "establishment period" from 1790-1850; and the "post-treaty" period, from 1850 forward.

[15] The first Europeans visited the site of what is presently Sault Ste. Marie in the early 1600s when the area was occupied by Ojibway Indians. The way of life of the local Ojibway was based on a seasonal cycle of fishing from lakeside settlements during the "open water" season, and hunting and trapping in the interior during the winter.

[16] By the 1640s, French traders and missionaries began to travel regularly through the Upper Great Lakes, establishing a post at Sault Ste. Marie by 1650. Some of the French traders took on native spouses in "mariages la faon du pays", with whom they had children of mixed European and native ancestry.

[17] The Mtis presence in Sault Ste. Marie fluctuated in the 1700s. There is no record of a Mtis community in the early years of the century. The Treaty of Paris in 1763 ended French- British hostility in this area and marked the formal transfer of New France to British sovereignty. With the signing of this treaty, the British started to move into the area, and the French and many of the Mtis began to move west. Unions between Scottish employees of the Hudson's Bay Company and native women produced another strain of Mtis children. By 1777, the settlement at Sault Ste. Marie had grown but still only consisted of approximately ten houses. In 1797, the Jay Treaty confirmed that the St. Mary's River would serve as the border between the United States and British North America. The fur trade expanded at a rapid pace with intense competition between the Hudson's Bay Company and the North West Company.

[18] In the late 1700s, the mixed-blood families began to evolve into a new and distinct aboriginal people through a process known as ethnogenesis. The high-water mark for the Great Lakes Mtis at Sault Ste. Marie was the first half of the 19th century. During this period, the majority of the inhabitants of Sault Ste. Marie were of mixed ancestry,

commonly referred to at the time as "half-breeds". Sault Ste. Marie is mentioned in the Report of the Royal Commission on Aboriginal Peoples (Ottawa, Royal Commission on Aboriginal Peoples, 1996) (the "RCAP Report") vol. 4, p. 220, along with Red River and White Plains in Manitoba, Batoche in Saskatchewan, and St. Albert in Alberta as one of "the better known" Mtis settlements. Sault Ste. Marie was an important focal point for the Mtis culture during this era. According to the RCAP Report, vol. 4 at p. 260, "[t]he Mtis community at Sault Ste. Marie, a hub of early fur-trade activity, has a particularly long and eventful history. It would appear, in fact, that the area was largely under Mtis control from the late seventeenth to the mid-nineteenth century." The historic Mtis community of Sault Ste. Marie is considered by the Mtis National Council, and was accepted by the RCAP Report, as being part of the Mtis Nation, the historic collective of Mtis people who lived and still live in the "Mtis Homeland" of north-central North America.

[19] The Mtis continued the subsistence hunting and fishing practices of their Ojibway ancestors, but at the same time occupied a distinctive niche in the fur trade economy as wage-earning labourers, independent traders, skilled tradespeople and small-scale farmers. They evolved into a distinct aboriginal culture with its own community structures, musical tradition, mode of dress, and language -- Michif -- a blending of French, English and aboriginal sources.

[20] The RCAP Report, vol. 4 at p. 199-200 described the economic contribution of the Mtis as follows:

> The special qualities and skills of the Mtis population made them indispensable members of Aboriginal/non-Aboriginal economic partnerships, and that association contributed to the shaping of their cultures. Using their knowledge of European and Aboriginal languages, their family connections and their wilderness skills, they helped to extend non-Aboriginal contacts deep into the North American interior. As interpreters, diplomats, guides, couriers, freighters, traders and suppliers, the early Mtis people contributed massively to European penetration of North America.

[21] Towards 1850, aboriginal dominance in the Sault Ste. Marie area began to wane under the pressures of European settlers. The village at Sault Ste. Marie was first surveyed in 1846. In 1849, a group of Indians and Mtis from Sault Ste. Marie, dissatisfied with mining development on the Canadian side of Lake Superior, occupied a mining camp at Mica Bay. The incident prompted the Government of Canada to dispatch William Benjamin Robinson in 1850 to negotiate treaties. Robinson was instructed to "endeavour to negotiate for the extinction of the Indian title to the whole territory on the North and North Eastern coasts of Lake Huron and Superior."

[22] Robinson concluded the important Robinson-Huron Treaty of 1850. He refused to deal directly with the "half-breeds" but told the Ojibway chiefs they could share their treaty entitlements with the "half-breeds" if they wished.

[23] The government did, however, respond to one Mtis demand. In 1852, the Crown made lands available for sale to the Mtis inhabitants of Sault Ste. Marie at a favourable price. Many of the original Sault Ste. Marie Mtis families, however, subsequently sold their lands and moved from the original town site. During the 1860s, Sault Ste. Marie was increasingly settled by Europeans and Americans. Between 1800 and 1885, some Sault Ste. Marie Mtis migrated to the Red River area. Others moved to the United States. However, it is clear that the descendants of the original Mtis families did not disappear from the Sault Ste. Marie area. Some remained in the town and others moved to smaller communities in the immediate area of Sault Ste. Marie. A significant number of families joined the local Ojibway bands on the nearby Batchewana and Garden River reserves. By 1890, 191 of 285 Batchewana band members were Mtis, as were 199 of 412 Garden River band members.

[24] The status of the Sault Ste. Marie Mtis community following 1850 is a contested issue, and I will return to it in greater detail later. The presence of a distinct Mtis community in the Sault Ste. Marie area was considerably less visible from the later years of the 19th century until the

1970s when Mtis organizations were formed and the Mtis people of the region began to assume a more visible profile. The constitutional debates of the 1980s and 90s brought about a strong assertion of Mtis identity and Mtis rights nationally, culminating in the inclusion of the Mtis peoples in the Constitution Act, 1982, s. 35 and the draft Mtis National Accord that formed part of the Charlottetown Accord in 1992.

[25] I propose to deal with the facts directly pertinent to the contentious issues in greater detail in my review of the trial judge's findings and in my analysis on an issue by issue basis. In broad outline, the respondents led evidence to the effect that there is a Mtis community in Sault Ste. Marie, both historic and contemporary, that has had and continues to have a distinctive identity and culture, and that hunting for food has always been an integral part of that culture. The appellant's case was essentially that the historic Sault Ste. Marie Mtis community dispersed in the mid- to late-19th century, resulting in a break in continuity that is fatal to the claim of an aboriginal right. The appellants also argued that the right at issue was game specific and that during crucial periods, moose were virtually non-existent in the area, and that, as there was no Mtis moose hunting, there was no established aboriginal practice, integral to Mtis culture, capable of supporting the right claimed. As an alternative, the appellant submitted that any limitation of aboriginal right was justified in the name of conservation, equitable sharing of the resource with others and social and economic benefits.

(e) Factual Issues

[26] Several issues raised by the appellant concern findings of fact made by the trial judge and upheld by the Superior Court judge on appeal. Given their importance, I have set out the trial judge's findings at some length. The reasons of the trial judge [at 58 C.R.R. (2d) 149] indicate that he gave the evidence careful and thorough consideration. The reasons of the Superior Court judge on appeal indicate that he also carefully considered the record and that he could find no

basis upon which to interfere with the trial judge's factual findings.

[27] It is plainly not the role of this court to retry the case, particularly where the case has already gone through one level of appeal. It is well established that an appellate court will treat a trial judge's findings of fact with deference and will not interfere "unless it can be established that the trial judge made some palpable and overriding error which affected his assessment of the facts". Stein v. "Kathy K" (The), [1976] 2 S.C.R. 802 at p. 808, 62 D.L.R. (3d) 1. This deferential standard of appellate review has been consistently applied to factual findings in cases dealing with aboriginal rights: in R. v. Van der Peet, [1996] 2 S.C.R. 507 at pp. 564-66, 23 B.C.L.R. (3d) 1. In R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672 at p. 689, 23 B.C.L.R. (3d) 114, Lamer C.J. stated "the findings of fact made by the trial judge should not, absent a palpable and overriding error, be overturned on appeal." Similarly in R. v. Adams, [1996] 3 S.C.R. 101 at pp. 123-24, 138 D.L.R. (4th) 657, the Supreme Court held that deference to the trial judge's findings was appropriate unless they were "made as a result of a clear and palpable error". In R. v. Ct, [1996] 3 S.C.R. 139 at p. 178, 138 D.L.R. (4th) 385, the court described its role on factual issues as follows:

> . . . the role of this Court is to rely on the findings of fact made by the trial judge and to assess whether those findings of fact were both reasonable and support the claim that an activity is an aspect of a practice, custom or tradition integral to the distinctive culture of the aboriginal community or group in question.

Accordingly, the trial judge's factual findings are entitled to considerable deference before this court.

JUDGMENTS BELOW

(a) Provincial Court (Vaillancourt J.)

[28] The first issue addressed by the trial judge was

whether the respondents were Mtis for the purposes of s. 35(2) of the Constitution Act, 1982. The trial judge reviewed various definitions of Mtis and concluded that while no definition has gained universal acceptance, the following [at p. 163 C.R.R.] was appropriate:

> Without a universally accepted definition of Mtis to be found, I shall attempt to distill a basic, workable definition of who is a Mtis. Accordingly, 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.

Applying this definition, and interpreting "aboriginal ancestry" to require proof of a genealogical link to the historic Sault Ste. Marie Mtis community, the trial judge found that the respondents satisfied the test. They proved their descent from the historic Sault Ste. Marie Mtis community and 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".

[29] The trial judge proceeded to assess the respondent's claim to a s. 35 aboriginal right in terms of the test established by the Supreme Court of Canada in Van der Peet at p. 549 and R. v. Adams at p. 117, holding that the right claimed must be an activity that is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."

[30] The trial judge found [at p. 165 C.R.R.] that there was a visually, culturally and ethnically distinct Mtis community in the area in and around Sault Ste. Marie that traced its roots to the marriages between early French fur traders and indigenous Ojibway women:

> It is clear from the totality of the historical documentation and evidence in connection thereto that the Mtis people were a recognizable group that was closely associated with the local Indians. The Mtis had created a

distinctive lifestyle that was recognized by others.

[31] The trial judge found that the relevant time period for determining the existence of the Mtis right to hunt was between 1815 and 1850, when the Europeans took "effective control" of the Great Lakes region. While the cases dealing with non-Mtis aboriginal claims speak in terms of the period preceding contact with the Europeans, the trial judge found [at pp. 172-73 C.R.R.] that approach had to be modified in the case of the Mtis who trace their origins to the post-contact period.

> 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.
>
> First contact at Sault Ste. Marie between the Indians and the Europeans occurred when the French Jesuits established missions around 1615. As time passed, French traders frequented the area and in 1750, the Hudson Bay Company established its first fur trading post. Dr. Ray advised that the Ojibway may have actually met Europeans as much as a century before there was an actual meeting of the two cultures at Sault Ste. Marie. This would have occurred as a result of the Ojibway's extensive trading practices.
>
> Although there may have been contact, Dr. Ray's evidence would suggest that the Upper Great Lakes area was under almost exclusive tribal domination until at least 1815-1820. Sometime between 1815 and 1850, the area evolved into one where effective control passed from the Aboriginal peoples of the area (Ojibway and Mtis) to European control.
>
> The unique Mtis society was established and recognized for 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.

[32] The trial judge found [at p. 173 C.R.R.] as a fact that hunting was an integral part of the Mtis culture prior to the assertion of effective control by the Crown.

> The evidence indicated that the Ojibway and Mtis had always hunted and that this activity was an integral part of their culture prior to the intervention of European control. . . . The evidence makes it clear that prior to the 1820's 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.

[33] The appellant led evidence to show that from approximately 1820, moose were very scarce in the Sault Ste. Marie area. It was the appellant's position that as there were no moose to hunt during a crucial period when the Mtis society was flourishing, hunting moose should not be regarded as a distinctive part of the Mtis culture. However, the trial judge rejected the appellant's contention that the respondents had to establish a game-specific right to hunt moose. The trial judge accepted the evidence of the respondents' expert, Dr. Ray, that the Mtis economy was similar to the Ojibway economy and that the relative importance of fishing, hunting, trapping and collecting would depend on a number of factors in any given year. Cycles in the availability of fish and game had an impact on the activities in which they engaged. The trial judge found [at p. 173 C.R.R.] that one would have to "suspend common sense" to accept the appellant's proposition that the scarcity of moose during the period [of] 1820-1890 eliminated moose hunting as part of the aboriginal culture.

> I take the position that just because a 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 1820's 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.

[34] Relying on the evidence of census reports from the late 19th century and the evidence of several witnesses who testified as to past and current Mtis practices and the importance of moose hunting, the trial judge found [at p. 177 C.R.R.] that the Mtis practice of hunting for food had been continuous to the present.

> The Mtis' right to hunt is derived from their customs, traditions and practices. Hunting, including the hunting of moose, was and continues to be an integral part of their culture.

[35] The trial judge found that there is a contemporary Sault Ste. Marie Mtis society that is in continuity with the historic Mtis community. The trial judge noted that the visibility of the Mtis at Sault Ste. Marie waned after the Robinson-Huron Treaty in 1850 when many Mtis families moved on to reserves and into the surrounding areas. However, he rejected the contention that there had been a fatal break with the past. The trial judge accepted the evidence that discrimination and consequent shame had created a situation in which the local Mtis people became "an invisible entity within the general population" and that it was only in the early 1970s "that individuals became more public as to their heritage". He rejected the contention that the community had disappeared. The trial judge found that it was not reasonable to limit the Mtis community to the Sault Ste. Marie town site proper and that a more realistic interpretation for the purposes of considering the Metis identity and existence should encompass the surrounding environs, including the local Indian reserves.

[36] The trial judge concluded [at p. 177 C.R.R.] that the respondents had established the necessary ingredients for an aboriginal right to hunt for food within the meaning of s. 35(1) of the Constitution Act, 1982 and that this right was infringed by ss. 46 and 47(1) of the Game and Fish Act:

> In the case at bar, I find that the Mtis aboriginal right to hunt moose and other game is interfered with by the regulatory scheme currently in place in Ontario. . . . The Mtis' right to hunt is derived from their customs, traditions and practices. Hunting, including the hunting of moose, was and continues to be an integral part of their culture.

[37] The trial judge found that the appellant had failed to justify the infringement of the s. 35 right. In the first place, he held [at p. 178 C.R.R.] that there was no evidence to warrant the disparity in treatment of status Indians, who were exempt from prosecution, and the Mtis, who were accorded no recognition:

> The current regulatory scheme harms the Mtis hunters as compared to the Indian hunters. Whereas the Indians may hunt outside officially sanctioned seasons, the Mtis are prohibited. Shorter seasons have negative impact on the Mtis' ability to harvest sufficient provisions for their families. . . . If the Mtis are charged under the Game and Fish Act for hunting without a licence they may incur the expenses associated with defending themselves in court.
>
> . . . . .
>
> If the Mtis exercise their Aboriginal rights without the benefit of a licence, they are not only putting themselves at risk of legislative sanctions but they are forced to skulk through the forests like criminals as opposed to hunters exercising their constitutional rights.

[38] The trial judge also found that the denial of the Mtis right was not minimal nor was the infringement justified by the social and economic and other benefits of recreational hunting.

[39] The trial judge concluded, accordingly, that the respondents had established that their aboriginal right under s. 35 of the Constitution Act, 1982, had been infringed, and that the charges against them should therefore be dismissed.

(b) Superior Court (O'Neill J. (2000), 47 O.R. (3d) 30)

[40] The appellant appealed the dismissal of the charges to the Superior Court pursuant to the Provincial Offences Act, R.S.O. 1990, c. P.33, s. 116. The Superior Court judge upheld the trial judge's crucial factual findings, rejected the contention that the trial judge had erred in law, and dismissed the appeal.

[41] The Superior Court judge rejected [at pp. 37-38 O.R.] the appellant's contention that the trial judge had given s. 35 of the Constitution Act, 1982 an overly generous interpretation:

> 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.
>
> . . . . .
>
> 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).

[42] The Superior Court judge found that there was evidence to support the findings of the trial judge "that hunting was of central significance to the Mtis, and integral to their distinctive society" and that, accordingly, there was no basis for disturbing those findings.

[43] The Superior Court judge also affirmed [at p. 42 O.R.] the trial judge's finding that there is today a local Mtis community in continuity with the historic Mtis community of Sault Ste. Marie:

> 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.

[44] The Superior Court judge referred [at p. 43 O.R.] to the federal government's 1998 Statement of Reconciliation acknowledging that "attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values" and that past actions had eroded "the political, economic and social systems of Aboriginal people and nations".

> 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.

[45] After reviewing the testimony of the expert witnesses and several Mtis witnesses, the Superior Court judge upheld the finding of the trial judge that there is a contemporary Mtis community in Sault Ste. Marie that is in continuity with the historic Mtis community of Sault Ste. Marie. The Superior Court judge [at p. 53 O.R.] also upheld the trial judge's finding that the respondents were part of that Mtis community:

> 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.

[46] However, the appeal court judge varied the trial judge's definition of Mtis, removing the requirement that a person be of "genetic" aboriginal ancestry on the basis that such a requirement imposes an onerous genealogical research burden and because a community is defined by more than a person's blood- ties. He provided [at p. 56 O.R.] a more relaxed test for Mtis identity:

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.

[47] The Superior Court judge agreed [at pp. 57-59 O.R.] with the trial judge's finding that the appellant had failed to justify the infringement of the respondents' s. 35 rights:

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, 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). . . . [T]he enhancement of sports fishing accords with neither of the purposes underlying the protection of aboriginal rights, and cannot justify the infringement of those rights.

. . . . .

> 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 . . . this portion of the appeal.

[48] The Superior Court judge concluded his reasons [at p. 65 O.R.] by agreeing with the trial judge that it was imperative that immediate recognition be accorded to the constitutionally protected rights of the Mtis people.

> [I]n 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.

ISSUES

[49] In view of the positions taken by the parties to this appeal, the issues to be decided are the following:

1. Should the appellant be permitted to introduce fresh evidence and to include certain material in its Books of Authorities?

2. What is the appropriate analysis for Mtis aboriginal rights under s. 35 of the Constitution Act, 1982?

3. Did the trial judge and the Superior Court judge on appeal err in finding that the right is properly characterized as the right to hunt for food?

4. Did the trial judge and the Superior Court judge on appeal err in finding that the right claimed was a practice exercised by the historic Mtis community at Sault Ste. Marie and was integral to the distinct culture of that community?

5. Did the trial judge and the Superior Court judge on appeal err in finding that there exists today a Mtis community in continuity with the historic Mtis community that continues to exercise the practice grounding the right and that the respondents are accepted as members of that community?

6. If the aboriginal right was established, did the trial judge and the Superior Court judge on appeal err in finding that the Game and Fish Act was not a justified limit on that right?

7. If the aboriginal right is established and the Game and Fish Act is not a justified limit on that right, should this court stay the operation of its order for a period of one year to allow the appellant to consult and develop a new moose-hunting regime that is consistent with the Constitution Act, 1982, s. 35?

ANALYSIS

Issue 1: Should the appellant be permitted to introduce fresh evidence and to include certain material in its books of authorities?

4,08,00(a) Fresh evidence

[50] The appellant moves for leave to introduce the following items of fresh evidence on appeal:

1. An affidavit sworn by Linda Maguire, who is employed as Acting Big Game Draw Administrator in the Fish and Wildlife Branch of the Ontario Ministry of Natural Resources ("OMNR"), addressing the current availability and demand for adult mouse in the vicinity of Sault Ste. Marie.

This evidence is led in support of the appellant's justification argument, particularly in light of the expanded definition of Mtis given by the Superior Court judge on

appeal.

2. An affidavit of Peter Lemmond, one of the appellant's counsel on this appeal, attaching a 1996 census table compiled by Statistics Canada addressing aboriginal origin information.

This evidence is also submitted with respect to the justification argument in light of the Superior Court judge's expansive definition of Mtis.

3. A letter from M.M. MacDonald, the Registrar, Indian and Northern Affairs Canada, dated July 27, 2000 confirming that membership in the Batchewana band remains under the control of the Department of Indian and Northern Affairs and is governed by the registration procedures of the Indian Act.

This evidence is led to "clarify" the record with respect to rules of Band membership.

4. An affidavit sworn by Linda Gravelines, a Senior Economist employed by the Analysis and Planning Section of the Land Use Planning Section of the OMNR addressing the economic dimensions of moose hunting.

This evidence is also led in support of the appellant's justification argument.

[51] In R. v. Palmer, [1980] 1 S.C.R. 759 at p. 775, 106 D.L.R. (3d) 212, the Supreme Court of Canada set out the preconditions for the exercise of the discretionary power to admit fresh evidence on appeal:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see McMartin v. The Queen, [1964] S.C.R. 484.

(2) The evidence must be relevant in the sense that it

bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

This test was recently affirmed as applicable to constitutional cases in Public School Boards' Assn. (Alberta) v. Alberta (Attorney General), [2000] 1 S.C.R. 44, 82 Alta. L.R. (3d) 211.

[52] It was held in R. v. Warsing, [1998] 3 S.C.R. 579 at pp. 609-10, 59 B.C.L.R. (3d) 47, that the first requirement, that of due diligence, may be "overborne by the interests of justice" and as Carthy J.A. stated in R. v. C. (R.) (1989), 47 C.C.C. (3d) 84 at p. 87 (Ont. C.A.), a failure to meet the due diligence requirement should not "override accomplishing a just result".

[53] With respect to the due diligence requirement, it should be noted, however, that the appellant was given an unusual indulgence at trial. After the respondents had led their evidence in support of a s. 35 right, the appellant asked for and was given a two-month adjournment to prepare its case.

[54] In my view, even on the most relaxed view of the due diligence requirement, item 4 should not be admitted. The economic benefits of moose hunting were clearly part of the appellant's case at trial. I am not satisfied that the failure to lead this evidence at trial has been adequately explained. In any event, given the nature of the regulatory scheme and the appellant's justification argument, which I will consider in detail later, this evidence could not affect the outcome of the case.

[55] I would also dismiss the motion to admit items 1 and 2.

First, I am not satisfied that the evidence is in an admissible form. Neither Ms. Maguire nor Mr. Lemmond claim to have the necessary expertise to explain the data attached to their affidavits: see Public School Boards' Assn. (Alberta), at pp. 47-48. Second, and more importantly, this evidence could not affect the result. The appellant's justification argument is based primarily on conservation. Other aboriginal hunters who enjoy treaty rights are allowed unrestricted hunting rights, and conservation concerns have not reached the stage where non- aboriginal hunters are forbidden access to the resource. The number of potential Mtis hunters might have a bearing on the justifiability of a scheme that gave some recognition to Mtis hunting rights, but limited them in the name of conservation. However, that is not the scheme at issue here. In these circumstances, I do not accept the submission that this evidence could affect the result.

[56] I would also dismiss the application to admit item 3. The letter from Mr. MacDonald is not sworn. Second, the evidence is not relevant to any issue before the court. The respondents do not claim status under the Indian Act and the appellant does not suggest that they have status. The rules for membership in the Batchewana band have no bearing on the result in this appeal.

(b) Material in Appellant's Factum and Books of Authorities

[57] The respondent objects to certain material referred to in the appellant's factum and included in the books of authorities. The material falls into the following categories:

1. Academic articles;

2. Statements of defence filed by the federal crown in a number of cases; and

3. Information taken from the websites of the Department of Indian and Northern Affairs and OMAA.

[58] The appellant submits that this material should be

admitted as evidence of "legislative facts", or in the alternative, as fresh evidence.

[59] Dean Peter Hogg, Constitutional Law of Canada, looseleaf (Scarborough, Ont.: Carswell, 1992) at p. 57-10 provides the following helpful discussion of the proof of facts in constitutional cases:

> The general rule is that a court may make findings of fact based on either sworn evidence or judicial notice. Judicial notice may be taken only of "facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy". Because the requirements of judicial notice are so restrictive, any dispute about facts must be resolved by a court on the basis of sworn evidence, using the rules regarding the burden and standard of proof to deal with gaps or conflicts in evidence.
>
> In principle, the general rules regarding the proof of facts in litigation ought to apply to constitutional cases no less than to non-constitutional cases, and they ought to apply to both "adjudicative facts" and "legislative facts". Adjudicative facts (sometimes called "historical facts") are facts about the immediate parties to the litigation: who did what, where, when, how, and with what motive or intent? Legislative facts (sometimes called "social facts") are the facts of the social sciences, concerned with the causes and effects of social and economic phenomena. Legislative facts are rarely in issue in most kinds of litigation, but they are often in issue in constitutional litigation ...
>
> Legislative facts obviously cannot be proved by the testimony of eyewitnesses, but they can be proved by the opinion testimony of persons expert in the relevant field of knowledge. Like other witnesses, experts are subject to cross-examination, and their testimony may be contradicted by the testimony of other experts. These

> safeguards provide some assurance of the reliability for factual findings of controverted legislative facts .... A finding of legislative fact is not normally as dependent on assessments of credibility of witnesses, and, at least in some cases, the appellate court may be in as good a position as the trial judge to weigh competing social-science evidence.

[60] In Public School Board's Assn. of Alberta, at 47, Binnie J. addressed the distinction between a legislative fact and an adjudicative fact and the test for judicial notice:

> Adjudicative facts are those that concern the immediate parties and disclose who did what, where, when, how and with what motive and intent. Legislative facts are direct to the validity or purpose of a legislative scheme under which relief is being sought. Such background material was originally put before the courts of the United States in constitutional litigation through what became known as the Brandeis brief. As Sopinka J. pointed out in Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086 at p. 1099:
>
> > Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements ...

[61] There can be little doubt that in constitutional cases, appellate courts have in some cases allowed considerable latitude for the admission of new materials relating to legislative facts: see for example R. v. Parker, (2000) 49 O.R. (3d) 481 (C.A.); Ford v. Quebec (A.G.), [1988] 2 S.C.R. 712; R. v. Edwards Books and Art, [1986] 2 S.C.R. 713, R. v. Seo (1986), 54 O.R. (2d) 293 (C.A.). It has become common practice for parties to include in factums and books of authorities a wide range of published scholarly writing providing background and analysis of social, economic and other policies relevant to the legislative and regulatory scheme at issue. This material is often of great assistance,

but does not, of course, relieve the parties of the obligation to prove controversial facts in the usual way. As Binnie J. remarked in Public School Board's Assn. of Alberta, at 47:

> The usual vehicle for reception of legislative fact is judicial notice, which requires that the "facts" be so notorious or uncontroversial that evidence of their existence is unnecessary. Legislative fact may also be adduced through witnesses. The concept of "legislative fact" does not, however, provide an excuse to put before the court controversial evidence to the prejudice of the opposing party without providing a proper opportunity for its truth to be tested.

(i) Academic articles

[62] The appellant should be allowed to refer to academic articles dealing with the purpose and interpretation of the Constitution Act, 1982, s. 35. No doubt many such articles may make controversial factual assertions. That appears to be the case here. Plainly, such assertions do not become evidence, especially where they concern facts that are disputed and that were the subject of consideration on the evidence at trial. A party cannot escape the obligation to prove controversial facts at trial by filing academic writings as "authorities" on appeal. With that caveat as to the use that may be made of the articles, I would allow the appellant to include in its book of authorities two articles to which objection was taken by the respondents, namely Thomas Flanagan "Mtis Aboriginal Rights: Some Historical and Contemporary Problems", in Boldt, Menno and Long, Anthony J., The Quest for Justice: Aboriginal People and Aboriginal Rights (Toronto: University of Toronto Press, 1985) and Brian Schwartz, First Principles, Second Thoughts: Constitutional Reform with respect to the Aboriginal Peoples of Canada, 1982-84 (Kingston: Institute of Intergovernmental Relations, 1985).

[63] The appellant also seeks to include a number of articles by historians relating to the history of the Mtis. In many cases, material of this nature would be unobjectionable and would provide the court with useful

background information relating to matters of uncontroversial historical fact. However, in this case, the history of the Mtis is very much at issue. Indeed, in this case, the history of the Mtis is a more a matter of adjudicative than legislative fact. At trial the appellant put the respondents to strict proof of the historical facts needed to support their s. 35 claim. The respondents led detailed evidence on Mtis history in the form of expert evidence. That evidence was tested and challenged by the appellant by way of cross-examination. The appellant called some historical evidence of its own, but essentially took the position at trial that the respondents failed to prove certain vital facts.

[64] In my view, the appellant should not now be permitted, under the guise of including articles in a book of authorities, to adduce evidence to supplement the record it was prepared to rest on at trial. These articles would not help this court to understand the purpose and social context of the legislation at issue nor do they involve uncontroversial legislative facts. The articles relate to the specific issues that were litigated at trial and should not be admitted here.

[65] To some extent, the weakness in the appellant's position is revealed by its alternative position that if not included in the book of authorities, the articles should be admitted as fresh evidence. On that point, I find that the appellant has failed to satisfy the due diligence test. Further, the material is not in a form that would make it admissible, particularly as the respondents would be deprived of the right to challenge it by cross-examination in the way that the appellant challenged their experts.

(ii) Statements of defence filed by the Federal Crown in a number of cases

[66] The appellant seeks to introduce pleadings filed by the Federal Crown in four separate court cases. The appellant submits that the pleadings are provided as there are no final court decisions setting out the federal position and that they

are necessary so that this court can be made aware of interests and positions of the parties not represented. It is submitted that three of the pleadings satisfy the due diligence requirement. These pleadings were dated in 1999, and as such were not available at trial.

[67] In my view, the pleadings should not be admitted. To the extent they are offered as proof of facts, pleadings are inherently controversial in nature and of no evidentiary value. To the extent they are submitted as an invitation to the court to divine the position the Federal Crown might have taken had it intervened, they should not be admitted. The Federal Crown had notice and declined to participate in this appeal. I agree with the respondents that in those circumstances, it is not appropriate for the Provincial Crown to attempt to put forward a position on behalf of the Federal Crown.

(v) Information taken from the websites of the Department of Indian and Northern Affairs and OMAA

[68] The appellant seeks to introduce materials obtained from websites to establish the membership rules of the Batchewana and Garden River bands, and the names of the current chief and councillors of those bands. The appellant also seeks to introduce information with respect to the number of Aboriginal people the OMAA purports to represent, the advice that OMAA provides to its members with respect to harvesting rights, OMAA's definitions of Mtis, and evidence as to the certificates that OMAA issues to its members with respect to harvesting.

[69] The appellant submits that this material comes from federal, public documents and that the facts are notorious and uncontroversial. The appellant says that as the material has been updated since the trial it satisfies the due diligence requirement of the fresh evidence test.

[70] In my view, the material related to the Batchewana and Gardern River Bands is not in an admissible form, is irrelevant to the issues before the court and should not be

admitted.

[71] The OMAA website material does not qualify as uncontroversial legislative fact of which judicial notice might be taken. It directly relates to the parties and issues existence of a Mtis community in Sault Ste. Marie and the extent to which OMAA represents that community. This was a live issue at trial. A witness familiar with OMAA rules and policies was called by the respondents and cross-examined by the appellant. The appellant had every opportunity to deal with these matters at trial, but for whatever reason, chose not to.

[72] Moreover, the fact that the websites have been updated is not sufficient to satisfy the due diligence requirement. As Binnie J. stated at 51 of Public School Board's Assn. of Alberta:

> The post trial "up-dated" statistics do not provide a bootstrap to get into the record other statistical evidence which, with due diligence, might have been led at trial. Lack of due diligence is fatal to this aspect of the application.

[73] Accordingly, I would dismiss the appellant's motion to introduce fresh evidence on appeal and allow only the two articles dealing with the interpretation of s. 35 to be included in the appellant's books of authorities.

Issue 2 What is the appropriate analysis for Mtis aboriginal rights under s. 35 of the Constitution Act, 1982?

(a) The Constitution Act, 1982, s. 35

[74] Aboriginal rights are guaranteed by s. 35 of the Constitution Act, 1982. It is clear from the text of s. 35 that the Mtis peoples of Canada had, as of the date of the enactment of the section, "existing" rights, and that those rights have now acquired constitutional protection. There is little jurisprudence dealing directly with the nature of the

rights of the Mtis peoples guaranteed by s. 35. [See Note 2 at end of document] Mtis claimants have succeeded in establishing claims at the trial level in a number of cases in Manitoba, Saskatchewan and Alberta: R. v. McPherson (1992), 82 Man. L.R. (2d) 86 (Prov. Ct.), reversed (1994), 111 D.L.R. (4th) 278 (Man. Q.B.); R. v. Morin and Daigneault, [1996] 3 C.N.L.R. 157 (Sask. Prov. Ct.), affirmed (1997), 159 Sask. R. 161 (Q.B.); R. v. Ferguson, [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct.), affirmed [1994] 1 C.N.L.R. 117 (Alta. Q.B.); R. v. Desjarlais, [1996] 1 C.N.L.R. 148 (Alta. Prov. Ct.) 113; Compare R. v. Blais, [1996] 3 C.N.L.R. 109 (Prov. Ct.); affirmed [1998] 4 C.N.L.R. 103; leave to appeal granted [1999] 2 W.W.R. 445 (Man. C.A.). However, this is the first case on the subject to be decided by an appellate court.

[75] I begin with a cautionary note. At such an early stage of development in this area, a provincial appellate court must approach its task with due regard to the importance and complexity of aboriginal rights. It is impossible to define the rights of an entire people within the confines of one case. As the record in this case so amply demonstrates, claims of aboriginal rights are intensely fact specific, and involve a close, careful and detailed scrutiny of events long past. Recognition of a right on one set of facts does not necessarily mean that the right will be made out on the next set of facts. We must guard against the temptation to pronounce broadly upon all possible aspects of the rights of the Mtis people and should instead confine ourselves to what is necessary for the resolution of the case before us. While the parties and the intervenors invited us to pronounce upon many issues of fundamental importance, we are here to decide this case. A full articulation of the shape and subtle contours of constitutionally protected Mtis rights will undoubtedly unfold over time in the usual incremental fashion of the common law. Accordingly, I have confined my reasons to what I conceive to be necessary and appropriate for a proper legal resolution of the case before us, deliberately leaving to another day some of the interesting propositions that were advanced by the parties and the intervenors.

[76] As the appellant pointed out, it would be literally

possible to interpret s. 35 narrowly and limit the rights of the Mtis peoples to treaty rights. However, the appellant concedes that the constitutionally protected rights of the Mtis peoples are not restricted to rights acquired by way of treaty. The appellant does not, however, concede that the respondents have made out a relevant constitutionally protected aboriginal right, and submits that the respondents' claim cannot withstand scrutiny under a proper application of the principles developed for non-Mtis aboriginal rights.

[77] As with all constitutional rights, the interpretation of aboriginal rights calls for a purposive approach. Two fundamental purposes for the constitutional protection of aboriginal rights have been identified. The first purpose is the recognition and respect for the prior occupation of the land by distinctive aboriginal societies. As Dickson C.J. and La Forest J. explained in R. v. Sparrow, [1990] 1 S.C.R. 1075 and as was held in Guerin v. R., [1984] 2 S.C.R. 335 at 376, aboriginal rights are "derived from the Indians' historic occupation and possession of their tribal lands". In R. v. Sioui, [1990] 1 S.C.R. 1025 at 1054, Lamer C.J. stated that recognition of the legal significance of prior occupation is deeply rooted in our common law tradition and was reflected in the policy of the British crown from the earliest days of European settlement. Lamer C.J. referred to the judgment of Marshall C.J. in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (U.S.S.C.) at 548-9, stating that Great Britain considered these indigenous societies "as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged." In Van der Peet at 538-9, Lamer C.J. reiterated that the fundamental rationale for aboriginal rights is the simple fact that aboriginal people were here first, "living in communities on the land, and participating in distinctive cultures, as they had done for centuries."

[78] It is apparent that when analyzing Mtis claims, the implications of their distinctive feature as the post-contact descendants of both the Indians and the early European visitors has to be considered. I will return to the question

of a distinctive purposive interpretation for Mtis rights after outlining the other aspects of the approach taken by the Supreme Court of Canada with respect to aboriginal claims generally.

[79] The second fundamental underlying purpose of s. 35 aboriginal rights, as expressed by Lamer C.J. in Van der Peet at 539, is that the provision provides "the constitutional framework through which the fact that aboriginals live on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown." Section 35 provides the bridge that facilitates the recognition and respect for prior occupation by the aboriginal peoples on the one hand and the reality of Crown sovereignty on the other.

[80] In addition to these two fundamental purposes for s. 35, it has been held that "a generous, liberal interpretation of the words in the constitutional provision is demanded" (Sparrow at 1106, Van der Peet at 536). Dickson C.J. and La Forest J. described s. 35 in Sparrow at 1108 as "a solemn commitment that must be given meaningful content ... The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship." As has been so often stated in relation to legislation, treaties and constitutional provisions defining aboriginal rights, a generous and liberal interpretation is called for as the honour of the Crown is at stake.

[81] As I have mentioned, this is the first case to reach the appellate level dealing with the rights of the Mtis peoples under s. 35. There is, of course, an extensive and well-developed body of jurisprudence on the nature and extent of non-Mtis aboriginal harvesting rights and of the extent of their constitutional protection under s. 35. It is essentially to that body of jurisprudence that the parties have turned for guidance on this important issue. I propose to outline the approach taken with respect to aboriginal harvesting rights, to identify the specific issues that have

to be addressed in this case, and to consider how the approach has to be modified or adapted to deal with the claims of the Mtis.

(b) The Test for s. 35 Harvesting Rights.

[82] In a series of cases, starting with Sparrow and continuing with many others, principally R. v. Van der Peet, and its companion cases, R. v. Gladstone, [1996] 2 S.C.R. 723 and R. v. N.T.C. Smokehouse Ltd., the Supreme Court of Canada established a test for the assessment of s. 35 aboriginal harvesting rights.

(i) The Sparrow Test

[83] Sparrow establishes four steps, only two of which are in dispute in this appeal.

[84] First, the applicant must demonstrate that he or she was acting pursuant to an aboriginal right. I will have much more to say about this first step, the discrete elements of which were elaborated in Van der Peet and which is plainly in dispute here.

[85] Second, the court must determine whether the right was extinguished prior to the enactment of s. 35. It is not part of the appellant's case that any right of the respondents has been extinguished and accordingly, it will not be necessary for me to consider this step.

[86] Third, the court must determine whether the right has been infringed. It is conceded by the appellant that if the respondents have a right to hunt for food, that right is infringed by the law at issue here, and it follows that I need not consider this step any further.

[87] Fourth, the court must determine whether the Crown can justify the infringement. As I have noted, in the event that a right is established, the appellant relies on the defense of justification and accordingly, I will have to consider the fourth step of Sparrow.

(ii) The Van der Peet Test

[88] The fundamental issue in this appeal is whether the trial judge and the Superior Court judge on appeal erred in finding that the respondents were acting pursuant to an aboriginal right. The parties agree that the starting point for determining the respondents' claim of constitutionally protected rights is the general test for s. 35 harvesting rights laid down by the Supreme Court of Canada in Van der Peet at 549, where the Court held that the determination of an aboriginal right is to proceed in two stages. The first (at 551) is to "identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right." The appellant attacks the trial judge's characterization of the claim as the right to hunt and asserts that it should be characterized more specifically as the right to hunt moose. This issue is potentially determinative of the appeal and I will consider it in detail.

[89] The second stage (at 549) is to determine whether the applicant can show that the claim is based upon "a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right." To satisfy this stage of the test, the applicant must prove that the practice was that of an existing aboriginal community prior to European contact. The parties agree that this stage must be modified to take into account the distinctive history of the Mtis peoples, but they disagree precisely how. The appellant concedes that allowance has to be made for the fact that Mtis communities obviously emerged post-contact, but argues that any Mtis claim of aboriginal right must be based on the pre-contact practices of the Mtis' Indian ancestors. The respondents argue that so long as the practice of the Mtis community was established before the assertion of effective European control, it qualifies for consideration as the basis of a s. 35 right.

[90] An important aspect of the Van der Peet test for aboriginal rights under s. 35 is that the rights are communal

in nature: Van der Peet, at 540; Sparrow, at 1111-2; R. v. Sundown, [1999] 1 S.C.R. 393 at 412. Aboriginal rights do not belong to individuals but are community-based, and accordingly, can only be exercised by those individuals who are members of the rights bearing community. A significant corollary of the communal nature of aboriginal rights, as explained in Van der Peet, at 559, is that the rights specific to the site and the history of each particular community are "not general and universal; the scope and content must be determined on a case-by-case basis. The existence of the right will be specific to each aboriginal community." The claimant must show continuity of the contemporary community and its practice with the historic community and its practices: Van der Peet, at 556; Gladstone at 747; Ct, at 183.

[91] The communal nature of the right gives rise to several issues here, namely whether the practice was "integral" to Mtis culture, whether there is sufficient continuity from the historic Mtis community to the contemporary one and whether the respondents are in fact members of the relevant community.

(c) Applying the Van der Peet test to Mtis Claims

[92] All aboriginal rights are rooted in a common source and they must be determined by common legal principles. However, rights based upon prior occupation are bound to vary from one community to the next. In their specific content and realization, the rights of Canada's aboriginal peoples are as varied as the rich histories, cultures and practices of the many distinctive aboriginal communities across the land: see Gladstone at 769.

[93] A diversity in the specific content of aboriginal rights is also to be expected from the recognition in s. 35 of three distinct "aboriginal peoples", the Indian, the Inuit and the Mtis. It seems inevitable that although they are rooted in a common principle, the specific rights of distinctive peoples will reflect their distinctiveness.

[94] The Mtis peoples were not here before contact between

the Indian or Inuit peoples and the Europeans. The very concept of prior occupation that lies at the heart of aboriginal rights necessarily requires modification to deal with the distinctive history of the Mtis. The Supreme Court of Canada adverted to this in Van der Peet when enunciating the test for s. 35 aboriginal claims. Van der Peet dealt with a claim by one of Canada's "Indian" peoples whose rights derive from historic occupation and use prior to the coming of the Europeans. Lamer C.J., at 558, explicitly recognized that the test for Indian rights was not necessarily determinative of Mtis rights and warned that the test must be read carefully in relation to the claims of Mtis people whose origins, history and culture is both indigenous and European:

> Although s. 35 includes the Mtis within its definition of `aboriginal peoples of Canada'... 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 peoples are defined are 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, customs and traditions of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.

[95] The appellant agrees that the requirement in Van der

Peet that there be an existing aboriginal community prior to European contact must be modified to deal with Mtis claims. The appellant accepts that a period of time must be allowed post-contact to enable Mtis communities to come into existence. It was found by the trial judge, and it is more or less common ground between the parties, that the Mtis society flourished in the Sault Ste. Marie area from the early years of the 19th century until 1850 and the signing of the Robinson-Huron Treaty. The appellant submits that the cut-off date for the assessment of Mtis practices should be the date of effective Crown sovereignty and for the purpose of the appeal is content to have that date fixed at 1850.

[96] The respondents accept that there must be a cut-off date but say that it should be determined by the date of "effective control" by the European settlers, 1850. As the parties agree on the date, in the present case nothing turns on this difference, if any, between the assertion of sovereignty and effective control.

[97] It was submitted by one of the intervenors, the Congress of Aboriginal Peoples, that the date to assess the existence of the community and the practice at issue is the date of Confederation, July 1, 1867. In my view, postponing the date to a point well after the assertion of sovereignty and effective control is supported neither by the case law nor by any discernable relevant principle and I would reject it.

[98] There is, however, a fundamental difference between the parties with respect to the application of the Van der Peet pre-contact practice, custom or tradition requirement. The appellant argues that the fundamental purpose of recognizing and respecting the historic pre-contact occupation of aboriginal communities must be the governing factor, even with respect to the rights of the Mtis peoples. The appellant says that recognition of prior occupation is the central and indispensable rationale for the protection of aboriginal rights. Without it, there can be no basis for an aboriginal right. The appellant submits, accordingly, that to establish an aboriginal right, a Mtis claimant must show that the right claimed is founded on a practice carried on by the claimant's

pre-contact Indian ancestors. It is the appellant's position that while the Mtis community and its practices should be assessed as of 1850, only practices that were also practices of the Mtis' pre-contact Indian ancestors are capable of supporting a s. 35 right. The result, if the appellant's submission is accepted, is that Mtis claims are, in effect, derivative of and entirely dependant upon the claims of their aboriginal ancestors.

[99] The respondents submit that Mtis rights are not derivative of the practices of their pre-contact Indian ancestors, and that it is the practices of the Mtis peoples themselves that were integral to the Mtis way of life before the time of effective European control that provides the source for Mtis rights. This argument was adopted by the intervenors and finds support in Catherine Bell, "Mtis Constitutional Rights in s. 35(1)" (1997), 36 Alta. L.R. 180. In oral argument, counsel referred to a "golden moment" when a "snap shot" would be taken prior to effective European control to capture the practices integral to the Mtis culture. That "snap shot" would determine the rights protected by s. 35.

[100] On the facts of the present case, it is not necessary to decide this question. It is conceded by the appellant that the Ojibway ancestors of the Sault Ste. Marie Mtis did engage in the practice of moose hunting and accordingly, even if the Mtis right depends upon a pre-contact practice, the issue will not be determinative of this case. On the other hand, this issue goes to the heart of the nature of Mtis rights protected by s. 35 and to some extent, informs the entire interpretive and analytic exercise.

[101] For the purposes of this case, the following observations will suffice. The constitution formally recognizes the existence of distinct "Mtis peoples", who, like the Indian and Inuit, are a discrete and equal subset of the larger class of "aboriginal peoples of Canada." It seems to me that, in keeping with the interpretive principles to which I have already referred, we must fully respect the separate identity of the Mtis peoples and generously interpret the recognition of their constitutional rights. The

rights of one people should not be subsumed under the rights of another. To make Mtis rights entirely derivative of and dependant upon the precise pre-contact activities of their Indian ancestors would, in my view, ignore the distinctive history and culture of the Mtis and the explicit recognition of distinct "Mtis peoples" in s. 35. As explained by the RCAP Report vol. 4 at p. 220, the culture of the Mtis was

> derived from the lifestyles of the Aboriginal and non-Aboriginal peoples from whom the modern Mtis trace their beginnings, yet the culture they created was no cut-and-paste affair. The product of the Aboriginal-European synthesis was more than the sum of its elements; it was an entirely distinct culture.

[102] I agree with Dale Gibson, "General Sources of Mtis Rights", RCAP Report, vol. 4, Appendix 5A at 281, that while Mtis rights "spring from the same source as First Nation Aboriginal Rights" they should not be seen as "subordinate to those rights". The Van der Peet judgment explicitly reserved for future consideration the purposive interpretation of Mtis rights, and we should not slavishly into existence post-contact.

[103] Of course, one cannot ignore that s. 35 protects "aboriginal" rights and that is the aboriginality of the Mtis that is constitutionally protected. As Dale Gibson observed, supra at 281, it seems difficult to justify "an entirely distinct second order of Aboriginal rights held by new social entities that did not exist when the European-based order first asserted jurisdiction."

[104] As the Mtis culture was not a mere "cut and paste" affair, it may well be difficult in some cases to determine whether a Mtis practice, custom or tradition was inherently aboriginal in nature. There is, however, a discernable conception of aboriginal rights arising from the distinctive relationship the aboriginal peoples have with the lands and waters of their traditional territories, and one would expect the nature of Mtis rights to correspond in broad outline with those of Canada's other aboriginal peoples.

[105] In the light of this framework for the interpretation of the s. 35 rights of the Mtis peoples, I will now proceed to consider the specific elements of the Van der Peet test and whether they are met on the facts of the present case.

> Issue 3 Did the trial judge and the Superior Court judge on appeal err in finding that the right is properly characterized as the right to hunt for food?

[106] The appellant submits that the respondents' claim for an aboriginal right must be characterized specifically as the right to hunt moose and that the lower courts erred in characterizing the right in terms that are not game-specific. The respondents submit that the trial judge and the Superior Court judge on appeal correctly characterized the right in more general terms as the right to hunt for food.

[107] The correct characterization of the right could determine the result of this appeal given the evidentiary record and the findings of the trial judge. The Ojibway ancestors of the Mtis did hunt moose, as did the Sault Ste. Marie Mtis in the late 1700s and early 1800s. However, it was precisely during the crucial early part of the 19th century, when the Mtis community flourished, that moose and most other big game was in short supply. The evidence led at trial established that by the 1820s until well after 1850, the moose population in the area was in serious decline as a result of the frenetic activities of the fur trade. Deer were also scarce. The only big game available for hunting was bear. It follows that on this record, if the respondents can only succeed by showing that the pre-1850 Mtis community engaged in moose hunting and that moose hunting was an integral aspect if Mtis culture, they would have the difficult task of overcoming the fact that precisely at the point when the community was flourishing, there were few if any moose to hunt. On the other hand, the trial judge found that subsistence hunting remained an important activity and that the hunting practices of the Mtis have to be seen as an element of a flexible subsistence economy capable of adapting to cyclical changes in the availability of fish and game. If

the right is classified as non-game specific hunting, the claim may be more readily made.

[108] In Van der Peet at 551-553, Lamer C.J. addressed the issue of how the claim of a right is to be characterized. As Lamer C.J. observed, and as the situation in the present case so clearly shows, the correct characterization of the claim is important as it defines the issue to which the evidence must be directed. Lamer C.J. at 552 described the factors to be taken into account in the following manner;

> To characterize an appellant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right.

Lamer C.J. went on to observe at 553 that the characterization of the claim

> ... must be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly.

[109] In a later case, R. v. Pamajewon, [1996] 2 S.C.R. 821 at 834, it was said that the right has to be characterized "at the appropriate level of specificity" so as to avoid "excessive generality".

[110] Characterization of the right must be approached in manner that accords with the Supreme Court's general direction that the aboriginal perspective must be taken into account in cases involving claims of aboriginal rights: see Van der Peet at 550 per Lamer C.J.: "In assessing a claim for the

existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right"; Sparrow at 1112 per Dickson C.J. and La Forest J.: "[It is] crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

[111] In my view, to characterize the right in the game specific terms suggested by the appellant would give undue emphasis to the regulatory concerns of today and pay insufficient attention to the aboriginal perspective. The right to hunt moose is at issue here because the regulation of moose hunting is the focus of the statutory prohibition. To insist that the traditional aboriginal practice grounding the modern right must conform precisely to the terms of the modern regulatory regime risks ignoring the aboriginal perspective. A traditional aboriginal practice may involve what is, from the aboriginal perspective, a single identifiable activity that has a particular meaning or significance to the aboriginal community. From a modern regulatory perspective, that same activity may be viewed as a collection of discrete practices that are accorded disparate treatment. We should not characterize the right solely from the modern regulatory perspective.

[112] There was expert evidence, accepted by the trial judge, that from the aboriginal perspective, the activity was simply hunting. The trial judge found that the Mtis and their Ojibway ancestors hunted moose when there were moose to be hunted but as he put it, they were "opportunistic" when it came to hunting. They took the animals the land had to offer. If the respondents can demonstrate that the activity of "opportunistic" hunting was an integral part of the Mtis culture, an issue to which I will next turn, that practice is sufficient to ground the right asserted in this case.

[113] The approach taken by the trial judge and upheld on appeal by the Superior Court judge comports with the direction indicated in Van der Peet. The game-specific approach advocated by the appellant would require claims of aboriginal right to be determined exclusively through the lens of modern regulatory concerns and without regard to the aboriginal

perspective. Clearly, the governmental statute or regulation is one factor, but equally, it cannot be the only factor.

[114] While it would appear that little explicit attention has been paid to this issue in the decided cases beyond the general principles set out above from Van der Peet, the case law supports the approach taken by the trial judge. In Pamajewon, the characterization found to be excessively general was a broad and general right to use and manage traditional aboriginal lands. This was found unacceptable in a case asserting a right to run a casino. By contrast, the Supreme Court of Canada has with striking regularity characterized claims as the right to hunt or fish for food, without reference to a specific species. In Van der Peet itself, at 563, the court described the right claimed as "an aboriginal right to exchange fish for money or for other goods." In Adams, at 122 Lamer C.J. stated "the appellant's claim is best characterized as a claim for the right to fish for food in Lake St. Francis." Similarly, in Ct, at 176, Lamer C.J. characterized the claim as "an aboriginal right to fish for food within the lakes and rivers" of the relevant territory. In Sparrow, at 1101, Dickson C.J. described the right at issue as "the existing aboriginal right to fish for food and social and ceremonial purposes." In Gladstone, at 744 the claim was more specifically characterized as "the exchange of herring spawn on kelp for money or other goods" but the practice itself was so unusual and specific that it is difficult to know how else it could be described. In treaties and treaty cases, the right is commonly characterized as to the right to hunt or fish for food: see R. v. Marshall, [1999] 3 S.C.R. 456 at 466.

[115] I conclude that the trial judge and the Superior Court judge on appeal did not err in law by characterizing the right at issue in this case as the right to hunt for food without reference to a specific species.

> Issue 4 Did the trial judge and the Superior Court judge on appeal err in finding that the right claimed was a practice exercised by the historic Mtis community at Sault Ste. Marie and was integral to the distinct culture

of that community?

(a) Hunting by the Historic Mtis Community

[116] The trial judge made clear findings of fact that the historic Mtis community at Sault Ste. Marie engaged in the practice of hunting. The Superior Court judge on appeal found that the trial judge had made this finding after a careful review of the evidence and that the finding was supportable. I agree. There was evidence before the trial judge to support these findings. In particular, I refer here to the evidence of Dr. Ray who based his report and testimony on archival and other contemporary sources. The trial judge accepted Dr. Ray's evidence that the Mtis economy was similar to the Ojibway economy and that the Mtis essentially carried on the subsistence hunting and gathering activities of the Ojibway. As Dr. Ray explained, both cultures took what the land had to offer. The scarcity of large game did not mean that as a society, the Mtis abandoned hunting. In the period when moose and deer were scarce, they continued to hunt small game and to some extent bear. When game was scarce, they turned to fishing. The Mtis, like the Ojibway, simply modified their hunting and fishing activities as required by cycles in the availability of game. Both societies had diversified economies that were "the key to their survival ... To live off the land, you had to have flexibility. You had to shift your hunting and fishing strategies as the resource cycles shifted." Dr. Ray testified that the scarcity of moose did not eliminate the importance of hunting to the Mtis. When pressed on the point in cross-examination he was clear: "I will not accept the proposition that a whole generation went by without game hunting." As Dr. Ray explained, and as the trial judge found, "You can't hunt what's not there." Indeed, the evidence shows that when the moose population increased later in the 19th century and in the 20th century, the Mtis hunted moose.

(b) Hunting as Integral to Mtis Culture

[117] The trial judge also made a clear finding that "hunting was an integral part of the Mtis culture prior to

the assertion of effective control by the European authorities." In answer to the direct question whether hunting was integral to the Mtis society, Dr. Ray gave an affirmative answer:

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

[118] The appellant attacks the trial judge's finding that hunting was integral to the Mtis culture on two grounds. First, the appellant submits that the trial judge failed to distinguish between the culture and practices of the Ojibway and the Mtis. It is the appellant's contention that while the evidence may have established that moose hunting was integral to the Ojibway culture, it did not survive as a practice integral to the Mtis. Second, the appellant argues that the trial judge erred by applying too lax a test of "integral". The appellant's position is that during the crucial years of the first half of the 19th century, moose hunting was virtually non-existent and hunting generally was at best a "marginal" activity. The appellant says that the trial judge simply set the bar too low in concluding that hunting played a sufficiently significant aspect of the Mtis

culture to satisfy the integral test.

[119] In my view, the trial judge did not err by placing some weight on the pre-contact Ojibway practice when considering the importance of hunting to their Mtis descendants. On a purely factual level, the evidence supports the trial judge's finding that there was a connection and continuity in the practices of the two communities. In the early years of the 19th century, when the Mtis community of Sault Ste. Marie was emerging, the Mtis continued the practice of their Ojibway predecessors of hunting moose. The only change was the scarcity of moose from the 1820s forward.

[120] While the Mtis are recognized in s. 35 as distinct "peoples", they are peoples with bicultural origins. No culture, however distinctive, is free from the influences of those who came before. The distinctive Mtis culture necessarily drew heavily upon the aboriginal ancestors of the Mtis. When one is attempting to identify the "aboriginal" rights that are protected by s. 35, I find it difficult to see why one should be precluded from taking into account the traditional practices of the "aboriginal" ancestors in assessing their significance to the later culture. Indeed, the appellant has submitted that a practice will qualify for s. 35 purposes only if it was a practice of the aboriginal ancestors of the Mtis. I do not accept that proposition, and neither do I agree with the somewhat contradictory submission that pre-contact practices have no relevance.

[121] The "integral" requirement was explained in Van der Peet, at 553-554 in the following terms:

> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of

> the society distinctive -- that it was one of the things that truly made the society what it was.
>
> This aspect of the integral to a distinctive culture test arises from the fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1). [emphasis in original]

[122] The appellant places particular emphasis on the following passage from Van der Peet, at 560 stating that the practice, custom or tradition relied on as the foundation of an aboriginal right must have been a "defining feature" of the culture of the particular aboriginal community and not have been merely incidental:

> In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal

> right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

[123] The appellant also places heavy reliance on the fact that Dr. Ray agreed that in the period just before 1850, hunting was a "marginal" activity. This admission, it is submitted, is fatal to the claim of an aboriginal right under the Van der Peet test requiring that the practice be "integral" to qualify for s. 35 protection.

[124] Dr. Ray's characterization of hunting as "marginal" must be read in proper context. He explained that for most of the 19th century, game was scarce and that indeed, in the period just before 1850, some Ojibway and Mtis were literally starving. As a result, the aboriginal peoples in the area, both Ojibway and Mtis, relied more heavily on fishing. Hunting was marginal, not because it ceased to have importance for the Mtis culture, but rather because there was very little game to hunt. When Dr. Ray stated that hunting was a marginal activity at this time, he was simply acknowledging that fishing was the resource relied on because big game was scarce. He testified that this was so for both the Ojibway and the Mtis:

> You had to shift your hunting and fishing strategies as the resource cycles shifted in response to game population cycles. ... it's clear that hunting pressures caused part of this trouble, but it's also a known fact that all game species go through cyclical population fluctuations irregardless of whether or not they're being hunted or trapped. ... flexibility is the key and in the interior area this meant, among other things, that they had to depend on things other than the large game in the hunting economy.

[125] Demonstrated reliance on a practice for subsistence purposes has been held to be sufficient to meet the "integral to their distinct society" test. In Adams, at 128 the Supreme

Court of Canada recognized that while fish were not significant to the Mohawks for spiritual or cultural reasons, fish "were an important and significant source of subsistence for the Mohawks. This conclusion is sufficient to satisfy the Van der Peet test." I would also note that the Supreme Court of Canada has recognized that there may be gaps in continuity of a practice that are not fatal to the establishment of an aboriginal right. In Van der Peet at 557, it was noted that "the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions which existed prior to contact." Trial judges were directed to adopt "flexibility regarding the establishment of continuity."

[126] In my view, on this record, there is evidence capable of supporting the trial judge's finding that hunting was integral to the culture of the Mtis. In the early years of the century, the Mtis essentially continued the practices of the Ojibway and hunted moose. In the mid-19th century when game was scarce, the Mtis, like their Ojibway cousins, turned to fishing for sustenance, but they did not abandon hunting. A hallmark of both societies was the ability to adapt in the face of scarcity in order to avoid starvation. The temporary scarcity of moose and other big game did not eradicate the hunting habits that the Mtis had inherited from their Ojibway ancestors. It merely put moose hunting in suspension until the cycle turned and the big game returned.

[127] Accordingly, I am of the view that there is no basis for this court to interfere with the conclusion of the trial judge and the Superior Court judge on appeal that the right claimed was a practice exercised by the historic Mtis community at Sault Ste. Marie and was integral to the distinct culture of that community.

> Issue 5 Did the trial judge and the Superior Court judge on appeal err in finding that there exists today a Mtis community in continuity with the historic Mtis community that continues to exercise the practice grounding the right and that the respondents are accepted as members of that community?

(a) Continuity with the Historic Mtis Community

[128] The appellant attacks the finding of the trial judge that there exists today a Mtis community in continuity with the historic Mtis community. There seems little doubt that by 1900 the Mtis no longer comprised a visible community within the town of Sault Ste. Marie. However, it is equally clear that the Mtis did not simply disappear from the Sault Ste. Marie area. There remained a significant Mtis presence, especially on the nearby reserves and to some extent in the area surrounding the town.

[129] The issue is whether this significant change in the nature of the Mtis presence in the area after 1850 represented a dispersal of the community that is fatal to the respondents' assertion of an aboriginal right to hunt. In concluding that it did not, the trial judge made two critical findings, both of which are attacked by the appellant. First, the trial judge found that it was appropriate to consider Mtis presence in the area immediately surrounding Sault Ste. Marie, especially the neighbouring Indian reserves, and not to restrict the inquiry to the town site of Sault Ste. Marie proper. Second, the trial judge took into consideration certain social and political factors that discouraged a visible Mtis presence and impeded the growth or development of an independent and distinctive Mtis community.

[130] I note at the outset that the appellant does not say that the Mtis people simply disappeared from the Sault Ste. Marie area. In its factum (at paragraph 135) the appellant puts it as follows:

> by the later half of the 19th century, the Batchewana and Garden River bands had become the new home for many who had formerly lived in the historic Mtis community. The bands carried on certain aspects of the Mtis culture and traditional practices, blended with Ojibway culture and practices. Today, many well-known names from the historic Sault Ste. Marie community are carried on by members of both of these bands, including both chiefs and

several counsellors.

[131] The appellant's own expert witness at trial, Gwenneth Jones, described the situation as follows:

> There are many of these families who appear on the nearby Indian Reserves after 1850. Some of them moved to outlying areas such as Bruce Mines or the townships that are immediately outside of Sault Ste. Marie.

In her written report, Dr. Jones stated:

> Although the families in the town of Sault Ste. Marie became somewhat more diffused through the city as the nineteenth century went on, recognizable clusters of mixed-blood descendants were still present in the 1901 census. Other Aboriginal and non-Aboriginal residents of areas such as St. Joseph's Island and Garden River were also able to identify readily a "half-breed" and "Indian" population. While this evidence is not conclusive, it is suggestive of a separate community of Mtis families persisting in the vicinity of Sault Ste. Marie at least into the twentieth century. (emphasis added)

[132] The appellant argues that the shift in focus of the Sault Ste. Marie Mtis community from the town before 1850 to the nearby Indian reserves after the signing of the Robinson-Huron treaty in 1850 represented a fatal rupture with the past. In my view, it was open to the trial judge on this record to reject the contention of the appellant that the Mtis community merged into the bands. First, not all Mtis moved to the reserves. Even the report of the appellant's expert witness Dr. Jones makes this clear: "judging from ... entries in the 1901 census, several hundred people of mixed Aboriginal/non-Aboriginal ancestry continued to reside at the Sault at this time, both on and off the Indian Reserves." Second, there was evidence that even those who did move to the reserves tended to be viewed as Mtis, both by the Ojibway Band members and by government officials. As noted by the RCAP Report vol. 4 at 261, after 1875, the government "made a major effort to eliminate Mtis people from the rolls."

[133] The respondents called lay witnesses who testified as to the continuing Mtis community in the 20th century. On the whole, the evidence indicates that while to some extent, the focal point for the Mtis became the Batchewana and Garden River reserves, the Mtis and their distinctive culture were not completely assimilated within the reserves and that a local Mtis community persisted in the Sault Ste. Marie area, albeit with a significantly diminished profile.

[134] In assessing whether the Sault Ste. Marie Mtis community maintained sufficient existence and continuity with the past to qualify for recognition for rights purposes, the trial judge took into account certain social and political forces antithetical to the Mtis. Among these were the explosive and dramatic events concerning the Mtis in Western Canada in 1870 at Red River and 1885 in Saskatchewan. There was evidence that the Mtis were at times rejected as full members of both aboriginal and non-aboriginal societies. The respondents led the evidence of Olaf Bjornaa who testified that he and his sister were denied access to the reserve school because they were not "Indian" but were also rejected by the town school because they were too "Indian". There was considerable evidence from lay and expert witnesses that the Mtis people have been the victims of discrimination, ostracism and overt hostility from the 19th century forward. That sorry history is fully documented by the RCAP Report vol. 4, Chapter 5.

[135] I do not accept the appellant's submission that the trial judge erred in taking these historical factors into account in his assessment of whether the Mtis community survived. I agree that the fact of discrimination does not excuse aboriginal claimants from demonstrating the existence of a modern-day community in continuity with the historic community. However, I do not accept that as a fair characterization of the trial judge's reasoning. The trial judge had to assess historical evidence concerning a specific community and to decide whether or not that community had perished. In making that assessment, he was surely entitled to take into account the relevant historical context. On the

basis of the historical evidence, he found that the Mtis were the "forgotten people" and that although their community became "invisible" it did not disappear. The "invisibility" or relative lack of profile of the Mtis community was explained not by its disappearance, but by the fact that powerful social and political factors discouraged visibility and that the community reacted accordingly. It is simply not possible to assess the resilience of the Mtis community without taking into account the historical context in which it existed and the pressures to which it was subjected. As the RCAP Report concluded, vol. 4 at 227:

> Some Canadians think that Mtis Nation's history ended on the Batoche battlefield or the Regina gallows. The bitterness of those experiences did cause the Mtis to avoid the spotlight for many years, but they continued to practice and preserve Mtis culture and to do everything that was possible to pass it on to future generations.

[136] Not only was the trial judge entitled to take into account the evidence of the severe prejudice and discrimination inflicted upon the Mtis: it is my view that it would have been quite wrong for him to ignore it. The constitutional recognition of the existence of the Mtis as one of Canada's aboriginal peoples may not be capable of redressing all the wrongs of the past, but it cannot be that when interpreting the constitution, a court should ignore those wrongs. As noted by Dickson C.J. and La Forest J. in Sparrow, at 1103, "[f]or many years, the rights of the Indians to their aboriginal lands - certainly as legal rights - were virtually ignored." It is undeniable that past practices, including those of government, have weakened the identity of aboriginal peoples by suppressing languages, cultures and visibility. It would be completely contrary to the spirit of s. 35 to ignore these historical facts when interpreting the constitutional guarantee. For this reason, the continuity test should be applied with sufficient flexibility to take into account the vulnerability and historic disadvantage of the Mtis. The trial judge was entitled to conclude that the Sault Ste. Marie Mtis community had suffered as a result of what was at best governmental indifference, and to take the

historically disadvantaged situation of the Mtis into account when assessing the continuity of their community.

[137] Accordingly, I agree with the Superior Court judge on appeal that it was open on the record for the trial judge to conclude that there was a continuing Mtis presence in the Sault Ste. Marie area, and that to an extent sufficient for the purposes of s. 35, the Mtis maintained their distinctive community in continuity with the past.

(b) The Effect of "Taking Treaty"

[138] The respondents' ancestors were among those who moved to the reserve. They accepted the benefits of the treaty and acquired status as band members. The respondents' Mtis ancestor, Eustache Lesage, left Sault Ste. Marie with many other Mtis in the 1850s and joined the Batchewana Band, with the result that his descendants' membership in the band community was thereafter controlled by the Indian Act. In 1918, Steve Powley's grandmother Eva Lesage lost her band membership by marrying a non-Indian, with the result that her descendants are not band members and the respondents cannot benefit from the band's communal rights.

[139] According to the appellant, the move of the respondents' ancestors to the Band ruptured their necessary continuity with the historic Mtis community. The appellant submits that as the respondents' Mtis ancestors accepted the benefits of the treaty, they lost any rights they may have had as Mtis. I do not understand the appellant to suggest that by "taking treaty", the Mtis formally or legally surrendered their aboriginal rights. Nor does the appellant say the Mtis rights were legally extinguished. Such a proposition would, in any event, be contrary to the historical record. Robinson, the treaty commissioner, refused to deal with the Mtis as a group. He told the Mtis that individuals could "take treaty" if the Ojibway Chiefs agreed, but it was never suggested that a consequence of taking treaty would be the extinguishment of their Mtis identity. There is also no evidence that Mtis individuals were advised that they needed to make an election either to stay Mtis or take treaty. Indeed, E.B. Borron,

commissioned in 1891 by the province to report on annuity payments to the Mtis, was of the view that Mtis who had taken treaty benefits remained Mtis and he recommended that they be removed from the treaty annuity lists. In my view, it was legally open to the Mtis to accept treaty benefits without thereby surrendering their aboriginal rights. If those aboriginal rights are otherwise maintainable, I fail to see how those rights were lost by the move to the reserves.

(c) Continuity of the Practice of Hunting

[140] I also find that there was evidence to support the trial judge's finding that hunting has continued to be an important aspect of Mtis life. Census records from the late 19th century show some Mtis as "hunters". Lay witnesses testified as to the importance to the Mtis of harvesting activities, including the food hunt. There was evidence of contemporary practices, including communal hunting, that Mtis families prefer the food they get from the hunt, that they rely to a large degree upon their hunting for food, and that they share the product of the hunt. There was also evidence of the efforts of contemporary Mtis organizations to organize hunting under local "Captains of the Hunt." It is my view that there is evidence in the record to support the trial judge's very clear factual finding that hunting continues to this day to be an important aspect of the life of the Sault Ste. Marie Mtis community.

[141] I note finally on this point that the respondents were hunting in the immediate vicinity of Sault Ste. Marie. It was not disputed by the appellant that if the respondents do enjoy a constitutionally protected right, they were within the territorial limit for hunting by members of the Sault Ste. Marie Mtis community.

(d) Community acceptance

[142] The appellant submits that the trial judge erred in finding that there was adequate proof that the respondents were accepted as members of the local Mtis community. It is the appellant's submission that the trial judge's finding on

this point was based exclusively upon Steve Powley's OMAA and MNO membership, and that membership in these associations falls short of what is required.

[143] The respondents did not testify at trial. They were not, of course, required to do so. However, this was not a case where the respondents stood on their right to silence. They admitted the essential facts of the offence by way of an Agreed Statement of Facts. They asserted a constitutional right and had the onus of proving that right. While I recognize that an accused person has the right not to testify and that the decision to call or not to call an accused will often involve difficult tactical considerations for counsel, where a defense is based on the assertion of an aboriginal right, it remains an essential element of the defense to establish the claimant of the right is a member of the aboriginal community.

[144] I agree with the submission of the appellant that, without more, membership in OMAA and/or MNO does not establish membership in the specific local aboriginal community for the purposes of establishing a s. 35 right. Neither OMAA nor the MNO constitute the sort of discrete, historic and site-specific community contemplated by Van der Peet capable of holding a constitutionally protected aboriginal right.

[145] On the other hand, it seems to me that membership in these organizations provides at least some evidence of community acceptance. It would be wrong to expect the same type of evidence one might expect in a case asserting the rights of an established Indian band. Mtis communities do not have a formal legal structure or organization. They are not recognized under the Indian Act and they have no bodies analogous to band councils that are recognized or funded by the government. They are communities based on history, kinship and shared practices. They are clearly looser in structure than Indian bands that enjoy treaty and other s. 35 rights. Proof of membership in such a community is bound to be to a large extent impressionistic.

[146] While in his reasons, the trial judge made reference

only to Steve Powley's formal OMAA and MNO membership as proof of community acceptance, there was other evidence in the record capable of supporting the finding. There was evidence from witnesses active in Mtis affairs of the existence of a Mtis community at Sault Ste. Marie. The evidence of Art Bennett, Steve Powley's first cousin, is of particular significance on the issue of community acceptance. Bennett was active in OMAA in the early 1990s and was President of Zone 4, the area of the province that includes Sault Ste. Marie. He explained the relationship between the Mtis community and OMAA. Bennett did not claim that OMAA itself was the community. He testified that the Mtis community "was always here ... just not organized" and that OMAA "brought us together politically." Bennett described his Mtis family roots as well as the history of the Mtis community and its practices.

[147] It is against this background evidence from a family member active in Mtis affairs and a leader in the local Mtis community, that Steve Powley's membership in OMAA must be considered. In his capacity as President of Zone 4, Bennett approved Steve Powley's application for membership in OMAA. On the application, Powley gave his reason for claiming aboriginal rights "to preserve my aboriginal heritage and the right to harvest natural resources that my family has done since time immemorial." In approving the application, Bennett wrote that Powley was "a first cousin" and "direct descendant of Leonard Lesage."

[148] In my view, this evidence goes beyond proof of a formal membership in a province-wide association that includes status, and non-status Indians as well as non-aboriginal members. It provides some evidence of membership in the local Sault Ste. Marie Mtis community and is capable of supporting the trial judge's finding that Steve Powley was accepted as a member of the local Mtis community. As for Roddy Powley, the OMAA application form completed by Powley included a space to "Identify any children under 18 for whom you wish to apply for Youth membership" and Steve Powley entered his son's name.

[149] While it might have been preferable to have direct

evidence from the respondents as to their membership in and acceptance by the local Mtis community, I cannot say on this record that there was "palpable and overriding error" in the trial judge's factual finding of community acceptance.

(e) Who is a Mtis for Purposes of s. 35?

[150] It is common ground among the parties and the intervenors that at a minimum, self-identification and community acceptance are required attributes of community membership for purposes of asserting a s. 35 right. The more difficult issue is whether it is necessary to establish a direct genealogical link to the historic Mtis community that is the source for the s. 35 right.

[151] There is no uniformly accepted definition of who is a Mtis and certainly no precise test for Mtis status for the purposes of s. 35. As the evidence in this case shows and as noted by the RCAP Report, there are many individuals, including some in the Sault Ste. Marie area, who identify as Mtis but who do not have a genealogical connection to an historic Mtis community.

[152] One reason for competing definitions of Mtis is undoubtedly that different definitions may well be appropriate for different purposes. The RCAP Report's recommended definition was intended primarily to define membership for purposes of nation to nation negotiations. That definition may or may not be appropriate for s. 35. I agree with the submission of the Mtis National Council that the test of who can exercise s. 35 harvesting rights may not define who the Mtis Nation and its members are for all other purposes.

[153] The appellant asks this court to adopt the test enunciated by the trial judge, requiring proof of ancestral connection. The appellant, however, does not dispute the trial judge's finding that the respondents did establish genealogical descent from the historic Sault Ste. Marie Mtis community. The respondents take the position that it is not necessary for this court to determine the issue and that it should leave the issue to be decided in another case where the

specific fact situation arises. That position is supported by the Mtis National Council.

[154] Aboriginal Legal Services of Toronto, Congress of Aboriginal Peoples and OMAA ask that we accept the broader definition accepted by the Superior Court judge on appeal. In its submission, Congress of Aboriginal Peoples emphasized the need for a clear definition to facilitate government action on Mtis rights.

[155] I agree with the respondents that this is not the appropriate case to determine whether or not proof of ancestry is necessary. As it is undisputed that the respondents are able to trace their ancestry to the historic Sault Ste. Marie Mtis community, they satisfy the most demanding test. Consequently, this issue was not fully canvassed at trial, nor indeed, was it dealt with to any significant extent before this court. The issue is one of obvious importance to the full definition and scope of Mtis rights protected by s. 35 and in my view, its resolution should await a case where the issue is germane to the result and is fully argued by the parties.

[156] Accordingly, I am of the view that there is no basis for this court to interfere with the conclusion of the trial judge and the Superior Court judge on appeal that there exists today a Mtis community in continuity with the historic Mtis community that continues to exercise the practice and that the respondents are accepted as members of that community.

> Issue 6 If the aboriginal right was established, did the trial judge and the Superior Court judge on appeal err in finding that that the Game and Fish Act was not a justified limit on that right?

[157] It is well established that s. 35 rights, like other rights protected by the constitution, are not absolute. Aboriginal rights are not subject to s. 1 of the Charter, but they may be limited if the limitation satisfies the test of justification established in Sparrow. As the respondents have established their s. 35 right, and as the appellant does not

deny that if a right is established, the Game and Fish Act infringed that right, the onus shifts to the appellant to justify the infringement.

[158] The regulatory regime governing moose hunting may be described as follows. Under the Act and Regulations, the province is divided into wildlife management units. The moose population is monitored in each unit and target populations are established. Entitlement to hunt moose is determined by the establishment of hunting seasons and a licensing and tag allocation system. Any hunter subject to the Act who wishes to hunt moose may purchase an "Outdoor Card" with a moose hunting validation sticker. This entitles the holder to harvest a calf moose in any management unit in the province where there is an open season. There is no limit on the number of "Outdoor Cards" issued. The rationale for not limiting the number of moose calves harvested is that they are difficult to locate, they form the largest demographic segment of the moose population, and they experience a very high natural mortality rate. If a hunter wishes to harvest an adult bull or cow moose, he or she must also obtain a tag that is gender and management unit specific. The Ministry determines the number of tags that will be available on the basis of its assessment of the moose population in each wildlife management unit. The demand for adult moose tags greatly exceeds the number available. They are allocated through an annual draw. As already noted, there is in place an Interim Enforcement Policy that exempts status Indians who enjoy treaty hunting rights. The Ministry does not know how many moose are harvested by status Indians.

[159] In Sparrow, at 1113-4, the Supreme Court of Canada enunciated the applicable legal test where the Crown seeks to justify limits on an aboriginal right to hunt wildlife or fish:

> First, is there a valid legislative objective .... The objective of the department in setting out the particular regulations would be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also

> valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.
>
> ...
>
> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here ... the guiding interpretive principle ... is [that] 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.

[160] This test has been consistently applied in the post Van der Peet harvesting rights cases: R. v. Nikal, [1996] 1 S.C.R. 1013 at 1064, 1065; Gladstone, at 762; Adams, at 133; Ct, at 189.

[161] The principle objective relied on by the appellant as justifying the limitation on the aboriginal right is conservation. The objective of the Game and Fish Act is stated in s. 3:

> to provide for the management, perpetuation and rehabilitation of the wildlife resources in Ontario, and to establish and maintain a maximum wildlife population consistent with all other proper uses of lands and waters.

[162] The appellant led evidence to show that the moose population in the wildlife management unit in which the respondents shot a moose is below what is considered to be a satisfactory level. There was also evidence that the demand for moose in the area greatly exceeds what government biologists consider to be available for harvest. Conservation has been found to be a valid legislative objective: see eg. Sparrow, at 1113; Gladstone, at 775. I do not understand the

respondents to dispute that conservation is an important objective capable of justifying a limit on s. 35 rights.

[163] Accordingly, I pass to the second stage and consider whether the right has been limited in a manner in keeping with the fiduciary duty of the Crown. In Sparrow at 1115, Dickson C.J. and La Forest J. considered the allocation of a right to harvest for food where conservation is the legislative objective. They adopted the scheme of priority originally stated in Jack v. R., [1980] 1 S.C.R. 294 at 313, namely, that while conservation has priority over the aboriginal right, "the burden of conservation measures should not fall primarily upon the Indian fishery .... With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen."

[164] I agree with the findings of the trial judge and the Superior Court judge on appeal that the appellant failed to satisfy the second branch of the justification test. The regulatory scheme fails to accord any recognition or priority to the Mtis right. In my view, this is fatal to the contention that the limitation is in keeping with the Crown's trust-like relationship with the Mtis people. First, in relation to other holders of aboriginal rights - Indians who enjoy a treaty right to hunt - the current scheme places Mtis rights holders at an obvious disadvantage. Indian hunting rights are given full recognition while those of the Mtis are completely ignored. While I accept that conservation may justify some restriction on the protected right, I fail to see how the legislative objective of conservation can justify this blatant disparity in treatment between the two rights-holders.

[165] Second, in relation to non-aboriginal hunters, Mtis rights holders are given no priority. The failure to attach any weight whatsoever to the aboriginal right flies in the face of the principle that aboriginal food hunting rights are to be accorded priority.

[166] While the Interim Enforcement Policy contemplates negotiations with the Mtis community, I fail to see how a bald promise that has not been acted on can justify limiting a

constitutional right. As I have already noted, efforts to negotiate an agreement have been sporadic at best. I do not accept that uncertainty about identifying those entitled to assert Mtis rights can be accepted as a justification for denying the right. The appellant has led no evidence to show that it has made a serious effort to deal with the question of Mtis rights. The basic position of the government seems to have been simply to deny that these rights exist, absent a decision from the courts to the contrary. While I do not doubt that there has been considerable uncertainty about the nature and scope of Mtis rights, this is hardly a reason to deny their existence. There is an element of uncertainty about most broadly worded constitutional rights. The government cannot simply sit on its hands and then defend its inaction because the nature of the right or the identity of the bearers of the right is uncertain. The appellant failed to satisfy the trial judge, the Superior Court judge on appeal, and has failed to satisfy me that it has made any serious effort to come to grips with the question of Mtis hunting rights.

[167] The appellant also relied on a secondary objective, described by the trial judge as "the social and economic benefit to the people of Ontario derived through a combination or recreational hunting and non-hunting recreation." The trial judge rejected this objective, referring to Adams, at 134 where Lamer C.J. rejected the enhancement of sports fishing per se as a sufficiently compelling objective. Lamer C.J. found at 134 that it was not shown that sports fishing had a sufficiently meaningful dimension to warrant overriding a protected right:

> 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,

supra at para 74) to warrant the limitation of aboriginal rights.

[168] In my view, "the social and economic benefit to the people of Ontario derived through a combination of recreational hunting and non-hunting recreation" is at a level of such generality as to be virtually incapable of constituting a valid legislative objective for the purposes of limiting a s. 35 right. It amounts to little more that an assertion that the government considers its regulatory scheme to be in the general public interest. I agree with the trial judge that the appellant has failed to establish this as a valid legislative objective for purposes of limiting the s. 35 right. In any event, for the reasons I have already explained in relation to conservation, the failure to give any priority to Mtis hunting is fatal to the assertion that the right has been limited in a manner consistent with the fiduciary duty of the Crown.

[169] In argument before this court, the appellant sought to establish the "equitable sharing of the resource" as a secondary legislative objective. Assuming, without deciding, that it is open to the appellant to advance this objective at this stage of the proceedings, I find that it should be rejected on two grounds. First, I am not persuaded that without more, an appeal to "equitable sharing" can amount to a valid legislative objective if, in fact, what is left of the resource after conservation measures is insufficient to satisfy the aboriginal right to harvest for food. As noted by Lamer C.J. in Gladstone at 764, it may well be that where commercial harvesting rights are at stake, the objective of sharing the resource with non-aboriginal commercial interests may be accepted as there is no inherent limit with respect to the exercise of commercial rights. However, this case involves the right to hunt for food and does contain an inherent limit. In any event, even if "equitable sharing" does amount to a valid legislative objective, the present scheme cannot be justified as being consistent with the Crown's trust-like duty. It accords no recognition to the Mtis right, in stark contrast to the blanket exemption given status Indians. I fail to see how a scheme that creates such

an obvious imbalance between rights holders, and gives the Mtis no priority over those who have no constitutional right to hunt can possibly be described as "equitable" or in keeping with the crown's trust-like duty.

[170] For these reasons, I conclude that the trial judge and the Superior Court judge on appeal did not err in finding that that the Game and Fish Act was not a justified limit on the respondents' s. 35 right to hunt for food.

> Issue 7 If the aboriginal right is established and the Game and Fish Act is not a justified limit on that right, should this Court stay the operation of its order for a period of one year to allow the appellant to consult and develop a new moose-hunting regime that is consistent with the Constitution Act, 1982, s. 35?

[171] The appellant concedes that if the respondents are successful, their convictions must be set aside and acquittals entered. However, the appellant asks this court to stay the operation of its order for a period of one year to allow the appellant to consult with the Mtis communities and other aboriginal interests and to develop a new moose hunting regime that is consistent with the Constitution Act, 1982, s. 35.

[172] In my view, this court has jurisdiction to stay the operation of its order for a stated period. In R. v. Feeney, [1997] 2 S.C.R. 13, the Supreme Court of Canada found that a warrant was required to effect an arrest in a dwelling. The failure to obtain a warrant was held to have violated the appellant's Charter rights, resulting in his conviction being set aside. On an application for a rehearing, [1997] 2 S.C.R. 117, the Court maintained the effect of its judgment with respect to the appellant, but found that there should be "a transition period", and "that the operation of that aspect of the judgment herein relating to the requirement for a warrant to effect an arrest in a dwelling is stayed for a period of six months ..." The period of the stay was later extended: [1997] 3 S.C.R. 1008. I note as well that although the Supreme Court did not decide the issue in R. v. Marshall, [1999] 3 S.C.R. 533, at 540 it clearly left open the question

of its jurisdiction to grant a stay in cases concerning aboriginal harvesting rights.

[173] In my view, in the circumstances of this case, a stay is appropriate. I reach that conclusion for the following reasons. At issue here is the conservation and allocation of a scarce natural resource. As is clear from the discussion of the justification issue, this is not a situation where the constitutional right inevitably prevails over all other considerations. Sparrow and the cases that follow make clear that conservation of a scarce natural resource is of paramount concern. In the appropriate circumstances, conservation may trump the aboriginal right. Indeed, the very existence of the aboriginal right may depend upon conservation measures being taken. The demand for the scarce natural resource may exceed what nature can supply.

[174] There are a number of important factors bearing upon the allocation of this scarce natural resource that cannot be determined by this court in the context of this specific case. It is not possible for this court to determine what impact the recognition of s. 35 Mtis rights will have on demand for this scarce natural resource. I have found that the respondents are entitled to exercise a s. 35 right to hunt for food, but it is not possible to determine, on the record before us, how many others qualify for this right. As I have already explained, aboriginal rights are specific to each particular community and to each particular site. These rights are rooted in history and they can only be determined after a detailed assessment of the history and practices of the specific community.

[175] The design of an appropriate regulatory regime must take a number of factors into account. In addition to conservation, the s. 35 rights of the Mtis have to be reconciled with the rights of other aboriginal groups. While aboriginal food hunting rights must be given priority, the interests of recreational hunters and the tourism industry are also entitled to consideration. In short, s. 35 Mtis rights are an important factor that the government of Ontario must respect in designing an appropriate regulatory regime, but

they are not the only factor. The courts have an important role in assessing the balance struck by the government in the design of its regulatory scheme, but courts cannot design the regulatory scheme.

[176] Recognition of Mtis hunting rights adds a significant element that must be factored into the regulatory scheme, and now that Mtis rights have been recognized, the government must proceed with immediate dispatch to establish a scheme that accords due respect and recognition to those rights.

[177] A stay should facilitate consultation and negotiation between the government and the aboriginal community. Both the trial judge and the Superior Court judge urged the government and representatives of the Mtis peoples to enter good faith negotiations with a view to resolving s. 35 claims. I endorse their suggestion. It is my hope that this judgment in favour of the respondents, together with the stay requested by the appellant, will together serve as an incentive to the parties to embark upon negotiations. Professor Kent Roach, Constitutional Remedies in Canada, looseleaf (Aurora: Canada Law Book, 2000) at 15.80 suggests that courts should have negotiation in mind when designing remedies and that in certain circumstances a stay may be justified to that end:

> In the first instance, courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests. The aim of this negotiation process should be consensual decision-making or treaty making.

Professor Roach further states at 15.70:

> ... a temporary transition period would allow the difficult and interconnected problems of devising a new relationship between the parties to be achieved through negotiation, a process that is much more flexible than adjudication. Governments would be given reasonable opportunities to comply with court's constitutional rulings. More importantly, First Nations would participate in the formulation of the remedy, something

that is consistent with the purpose of aboriginal rights.

[178] While I recognize that the Mtis peoples may well have already waited far too long for recognition of their rights, I am of the opinion that in the interests of conservation, consultation, and an orderly transition to a regime that respects Mtis rights, a further brief delay is justified.

CONCLUSION

[179] I have concluded that the respondents have demonstrated that they have a significant link with the historic Mtis community of Sault Ste. Marie, that they are members of that community, and that they are thereby entitled to exercise an aboriginal right to hunt for food within the hunting territory of that community. I would accordingly dismiss the appeal from the judgment of the Superior Court judge affirming their acquittal by the trial judge. The respondents are entitled to acquittals. However, I would grant the appellant's request for a stay of this judgment for a period of one year to allow the appellant to consult with stakeholders and develop a new moose-hunting regime that is consistent with the Constitution Act, 1982, s. 35.

Appeal dismissed.

Notes

Note 1: In this judgment, I will use the word "Indian" in the same way it is used to describe one of the "aboriginal peoples of Canada" in the Constitution Act, 1982, s. 35(2).

Note 2: The decision of this court in Perry v. Ontario (1997), 33 O.R. (3d) 705, 44 C.R.R. (2d) 73 (C.A.) dealt with the claim that exclusion of Mtis from the Interim Enforcement Policy amounted to a denial of s. 15 equality rights but did not deal with s. 35.