R v. Steve Powley and Roddy Powley (No. 2)

ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)

B E T W E E N:	)	
	)	**Bruce Long and Elizabeth Christie**
	)	**for the Crown**
HER MAJESTY THE QUEEN	)	
	)	**Jean Teillet and Clayton C. Ruby**
-and-	)	**for the Accused**
	)	
Steve Powley and Roddy Powley	)	**Heard: April 27-30; May 1, 4-8; July 14-15; and September 8-9, 1998**

VAILLANCOURT, CHARLES H., Provincial Division Judge

REASONS FOR JUDGMENT

The accused persons entered pleas of not guilty to the charges that they (1) on or about the 22nd day of October 1993, in the Township of Pennefather in the Northeast Region being then and there together, were party to the offence of unlawfully hunt moose contrary to section 47(1) of the *Game and Fish Act, R.S.O. 1990, Chapter G-1* as amended and further that they (2) on or about the 22nd day of October 1993 at Boston Avenue in the City of Sault Ste Marie in the Northeast Region, did commit the offence of being then and there together, were parties to the offence of unlawfully, knowingly possess game, to wit: a bull moose or parts thereof, hunted in contravention of the *Game and Fish Act, R.S.O. 1990, Chapter G-1* as amended.

THE FACTS

The facts relating to the specific charges in the case at bar are not in dispute. With the

consent of the Crown and defence, an agreed statement of facts was filed as Exhibit #1.

Steve Powley and his son, Roddy, shot a bull moose on October 22, 1993 at approximately 9 a.m. near Old Goulais Bay Road which is located north of Sault Ste Marie. The Powleys transported the moose to their residence in Sault Ste Marie. Later in the afternoon on October 22, two conservation officers arrived at the Powley's home. The officers were advised by the Powleys that they had shot the moose in their possession earlier in the day. Neither Powley had a valid Ontario Outdoor Card or valid hunting licence to hunt moose.

After the moose had been killed, Steve Powley had affixed a tag to the ear of the moose. It was a hand written document detailing the date, time, and location of the kill. There was also a statement indicating that the animal was meat for the winter. Steve Powley signed the tag and included his Metis card number 4-088-1-0460.

At the time the charge was laid, Steve Powley was in possession of his Ontario Metis and Aboriginal Association card. This card indicated that he claimed aboriginal rights under the Robinson-Huron Treaty. Steve Powley's nationality was listed as Metis. Mr. Steve Powley's OMAA Application Form dated April 20, 1990 claimed fishing, hunting, trapping, wild rice harvesting, and timber rights. The reason listed for claiming the aforementioned rights was "to preserve my aboriginal heritage and the right to harvest natural resources that my family has done since time immemorial".

Section 46 of the *Game and Fish Act* (supra) reads as follows:

> No person shall knowingly possess any game hunted in contravention of this Act or regulations.

Section 47(1) of the *Game and Fish Act* (supra) reads as follows:

> 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.

NOTICE OF CONSTITUTIONAL QUESTION AS AMENDED DATED MAY 5, 1998

The defendants question :

i) the constitutionality , both generally and in their application to

these Defendants, of s. 46 and s. 47(1) of the *Game and Fish Act, R.S.O. 1990, c. G-1* and,

ii) the constitutionality, both generally and in its application to these Defendants, of the Ontario of Natural Resources' *Interim Enforcement Policy, May 28, 1991 enacted pursuant to the Game and Fish Act, R.S.O., 1990, c. G-1.*

Counsel for the Powleys relies on the following material facts that give rise to the constitutional questions:

1) These Defendants are charged with unlawfully hunting moose contrary to s. 46 and unlawful possession of moose meat contrary to s. 47(1) of the *Game and Fish Act, R.S.O., 1990, c. G-1.*

2) These Defendants are Metis within the meaning of s. 35(2) of the *Constitution Act*, 1982 and support themselves *inter alia* through exercising their aboriginal or treaty right to hunt. These Defendants were exercising their aboriginal or treaty rights by hunting within their traditional territory or treaty area when they were apprehended on or about October 22, 1993. They were subsequently charged on or about October 29, 1993.

3) The Ontario Ministry of Natural Resources' *Interim Enforcement Policy, May 28, 1991* protects an aboriginal or treaty right to hunt and has the effect of providing an exemption for status-Indians from the application of s. 46 and s. 47(1) of the *Game and Fish Act, R.S.O., 1990, c. G-1. The Interim Enforcement Policy, May 28, 1991* does not provide an equal exemption for Metis, thereby maintaining the application of the *Game and Fish Act, R.S.O., 1990, c. G-1* to the Defendants. Therefore these Defendants were charged without consideration of their aboriginal or treaty right to hunt.

Counsel for the Powleys relies on the following legal basis for the constitutional questions:

These Defendants are Metis and therefore claim an aboriginal or treaty right to hunt. The Defendants submit that:

1) ss. 46 and 47(1) of the *Game and Fish Act, R.S.O., 1990, c. G-1* are of no force and effect with respect to them by virtue of s. 52 of the *Constitution Act, 1982*; and

2) the Ontario Ministry of Natural Resources' *Interim Enforcement Policy, May 28, 1991* does

not recognize or affirm Metis aboriginal or treaty rights and is therefore inconsistent with s. 35 of the *Constitution Act*, 1982, and/or it does not give equal benefit of the law to Metis and therefore violates s. 15 of the *Charter of Rights and Freedoms*.

s. 35 of the *Constitution Act, 1982* reads as follows:

> (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 Metis peoples of Canada.

s. 52(1) of the *Constitution Act, 1982* reads as follows:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

s. 15(1) of the *Canadian Charter of Rights and Freedoms* reads as follows:

> Every individual is equal before and under the law and has a right to the equal protection and equal benefit of the law without discrimination and , in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

When Mr. Ruby commenced his oral argument, he noted that the Powleys' primary position was that (1) they were Metis within s. 35 of the *Constitution Act* (2) they have an existing Aboriginal right to hunt or in the alternative, a treaty right to hunt and (3) the *Game and Fish Act* is not applicable to them because it violates s. 52 of the *Constitution Act* and therefore they do not need a constitutional exemption. In the alternative, constitutional exemption is sought.

Mr. Ruby then advised the court that they were not relying on any arguments based on the equality rights of s. 15 of the *Charter*.

BURDEN OF PROOF

In this case, the Crown must prove the offences beyond a reasonable doubt and the Powleys must establish their defence of aboriginal right on a balance of probabilities.

In *R. v. Morin (B.A.)* et al. (1997), 159 Sask. R. 161 at para. 37, Laing J. stated that:

> " . . . With respect to the offence(s) alleged, the burden of proof is on the prosecution. With respect to the constitutional defence of aboriginal right, the burden is on the accused to establish that the right claimed was an integral practice, custom, or tradition of central significance to the aboriginal society in question. (Vide: *R. v. Van der Peet* [1996] 2 S.C.R. 507, at p. 553)."

In the case of *Attorney-General for Ontario v. Bear Island Foundation et al.* (1984), 49 O.R. (2d) 353, the Court noted that:

> " Hence, the onus is on the defendants to adduce evidence to prove on a balance of probabilities:
> (1) the nature of the aboriginal rights enjoyed at the relevant dates (1763 or the coming of settlement);
> (2) the existence of an organized social organization and the fact that it exercised exclusive occupation of the Land Claim Area, thereby exercising its aboriginal rights. Included would be proof that there was an organized system of landholding and a system of social rules and customs distinct to the band;
> (3) the continuity of the exclusive occupation to the date of the commencement of the action.

The *Bear Island* (supra) case deals with aboriginal land claims and accordingly the specific list of criteria outlined by the Court must be considered in light of the particular right being claimed in that case. The issues specific to the Powleys' aboriginal right to hunt will be examined in the course of this judgment.

The agreed statement of facts (Exhibit #1) addresses the Crown's onus with respect to proving the offences beyond a reasonable doubt. The issue for the court to decide is whether the Powleys have established their aboriginal claim on a balance of probabilities.

ISSUES AND THE LAW

Counsel for the Powleys filed a Memorandum of Law (Exhibit 67). I shall discuss the various issues that are before the court using the aforementioned Memorandum as a framework. The areas to be examined are:

(1) The interpretive principles to be applied when dealing with s. 35 of the *Constitution Act*, 1982.

(2) The process for determining a Metis right to hunt:

(a) Are the Powleys Metis within the meaning of s. 35(2) of the *Constitution Act* 1982?

(i) The use of the term Metis

(ii) Historic government recognition of Metis

(iii) Objective test for determining who is a Metis are for the purpose of s. 35(2)

(iv) Was there an historical Metis society at Sault Ste Marie?

(v) Is there a contemporary Metis society at Sault Ste Marie?

(b) What is the relevant time/date for determining the existence of the right claimed?

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

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

(e) Is the right claimed integral to the distinctive Metis society?

(f) Do the Metis continue to exercise the practice, custom or tradition?

(g) Has the right been extinguished?

(h) Does the regulatory scheme infringe the preferred method of exercising the practice, custom or tradition? If so, is the infringement minimal and has it been justified?

(1) *Interpretive Principles to be applied when dealing with s. 35 of the Constitution Act, 1982*

In *R. v. Sparrow*, [1990] C.N.L.R. 160 (S.C.C.) at pp. 160-1, the following observations are noteworthy:

> " The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself.
>
> . . .
>
> The nature of s. 35(1) itself suggests that it is to be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, **it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded."** (My emphasis)

Courts have applied a purposive analysis in combination with several general principles when dealing with the legal relationship between the Crown and Aboriginal peoples. These principles include (a) a court must give a generous and liberal interpretation when analyzing the

purposes underlying s. 35(1), all treaties, s. 35 itself, and other statutory and constitutional provisions protecting the interests of Aboriginal peoples; (b) the nature of the relationship between the Crown and Aboriginal peoples is fiduciary thereby placing the honour of the Crown at stake; (c) any doubt or ambiguity must be resolved in favour of the Aboriginal peoples; (d) courts must be sensitive to the Aboriginal perspective with respect to the rights at stake and (e) since 1982, rights cannot be extinguished but can only be regulated or infringed with the justificatory test as laid out by the Supreme Court in *Sparrow* and subsequent cases. (See: *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 at 192-193; *R. v. Sparrow* (supra) at 179 and 182; *Simon v. The Queen* [1986] 1 C.N.L.R. at 153 and 167; *Nowegijick v. The Queen*, [1982] 2 C.N.L.R. 89 and 94; and *R. v. Sutherland* [1980] 3 C.N.L.R. 71 at 80.)

Chief Justice Lamer in *Van der Peet* (supra) at p. 200 expressed the dual purpose of s. 35 as follows:

> " . . . the Aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive Aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of Aboriginal rights must be directed at fulfilling both of these purposes; . . . "

Aboriginal rights are collective rights although each member of the group has a personal right to exercise them. In *Sparrow* (supra), it was held that Aboriginal hunting rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of the group. (See: *Pasco v. C.N.R. Co.* (1989), 56 D.L.R. (4th) 404 at 410 (B.C.C.A.); *Twinn v. Canada*, [1987] 2 F.C. 450 at 462 (F.C.T.D.); and *Sparrow* (supra) at 182.)

Metis have been recognized as an Aboriginal people under the *Constitution Act*, 1982.

(2) *The Process for Determining an Existing Metis Right to Hunt*

Prior to the commencement of dealing with the various components of this section, it is important to deal with the expert evidence called by both the Crown and the defence regarding the historical roots of a Metis population in the Sault Ste Marie area. Mr. Long, on behalf of the

Crown, made extensive submissions as to the weight that should be given to one of the defence's expert witnesses.

Ms. Teillet called two experts regarding the historical aspects of this case and the Crown called one witness in reply. At the outset, let me make it clear that from an objective point of view, all three witnesses were not that far apart on most of the key issues. Obviously, each expert approached the questions from their particular field of academic interest.

Dr. A. Ray, a professor of history at the University of British Columbia, was the first witness called by Ms. Teillet. The evidence given by Dr. Ray was presented in a most informative and interesting manner. Dr. Ray's extensive research, as evidenced in his report (Exhibit 30) and his supporting documentation, illustrated a well researched and thoughtful consideration of the historical issues of this case.

The second expert called by Ms. Teillet, although well qualified, did not present his material in such a way as to inspire confidence. If this witness was the only one called by the defence, I would have been hard pressed to place great reliance on it. The following aspects of his evidence were troublesome:

(a) The accuracy in reference to his source material was less than one would expect from an expert with his qualifications. When the witness was directed to one such example of literary licence, his response was "Well, if I were to do it over again, I would break it out and I'd have separate quotes for each. I grouped it together. Gibbard's Report is all over the place and he talks about Metis people in different sections and I was trying to put them altogether and cite only one document for [convenience], but I agree that I've done something there that is hard to follow and I would . . . I would break them out individually and put page numbers on them. That's something that I've done inadvertently."

(b) When Ms. Christie questioned the witness on his unusual approach regarding quotations from source documents, he agreed that this was not the approach one would use in academic work. However, he seemed to justify his format by stating that " he [had not] intend[ed] this to be an academic work." I would hope that an expert witness would approach his duty and obligation as a witness under oath in a quasi-criminal proceeding to be on a par with the need for accuracy in an academic paper.

(c) The witness then went through certain mental gymnastics to explain how his report was merely a guide for his evidence and but one component of the overall package.

(d) Another inaccurate piece of information demonstrated how the wrong factual starting point could impact on the subsequent conclusions of the witness. When the witness used January as a reference date, he then concluded that John Robertson wintered at a specific location and therefore hunted there. Unfortunately, the correct time reference should have read September. This error undermined the subsequent scenario as presented in evidence.

(e) Another error that cannot be characterized as an oversight of little weight, is the evidence surrounding the burning of a bible. The report of this incident by the expert is substantially revised through Ms. Christie's thorough cross-examination to the point where the witness indicated that he would rewrite this incident. The revised version depicts a significantly different snapshot than the original evidence. The expert had difficulty agreeing that his evidence presented " a very different proposition" but he did concede that " I don't . . . it's not very different. It is ... it's ... it's more faithful to this document, yes."

(f) The witness gave evidence regarding a plan by Anderson to influence Charles Oakes Ermantinger to make the Metis move away from the area. Cross-examination regarding this evidence resulted in a couple of interesting responses from the expert witness. The first answer of note was: " I agree. I've misquoted this particular document." The second statement was: " It was in error yes, and I would totally revise this paragraph and rewrite it according to contents of the letter and I apologize that in the haste of preparing the report, I may have made errors and this is one of those cases, so the paragraph would be . . . substantially revised."

(g) The following exchange between counsel and the witness certainly taints an expert's reliability:

Q. And you spoke yesterday about people who belong to the Orange Lodge recruiting people to fight at Red River and that they considered the Metis to be the enemy.

A. Yes, I think I remember saying something like that.

Q. Are there any documents that support the proposition that the Orange Lodge or anybody considered the Metis to be the enemy in your document set?

A. Well, my mother-in-law is a family historian of Cookstown, which is a largely Protestant,

Irish town in Southern Ontario and I may have been getting my information from talking to her. There's a problem in Orange Lodge in that community . . .

Q. I see.

A. . . . and it may be oral tradition.

(h) The following additional excerpts from the testimony of this particular witness have the cumulative effect of undermining his testimony: " It was one of those things of expediency." "I had limited time to prepare this." " I didn't have time to obtain a copy and bring it with me." I didn't include it in the binder because of space and time and transportability of the documents." " I didn't intend this to be an academic work. It's not something that's published."

It is unnecessary to further dissect the evidence of the second expert called by Ms. Teillet. Suffice it to say that the excuse of time pressures is not an excuse for the number of errors by this witness in this case. He was presented as an expert who had prepared a report for the court's consideration. This trial has been outstanding for years and the witness was retained in ample time to prepare a proper report. The witness did not preface his testimony by explaining to the court that there might be a few errors due to time constraints. It was only after counsel in cross-examination highlighted omitted documents, changed evidence, and errors that the 'reasons' for the shortcomings were put forward.

Under normal circumstances, the evidence of a witness with the aforementioned frailties would be of little or no value. However, in the case at bar, much of the evidence given by witness number two was not markedly different from Dr. Ray and Ms. Gwynneth C. D. Jones in its general support of a Metis presence in the Sault Ste Marie area.

Ms. Gwynneth C. D. Jones was called by the Crown. Her evidence did not undermine Dr. Ray's evidence and in fact was rather consistent with it.

(a) *Are the Powleys Metis for the purposes of s.35(2) of the Constitution Act, 1982?*

(i) *The use of the term Metis.*

Section 35(2) of the *Constitution Act*, 1982 makes reference to a group of people referred to as Metis. Regrettably, the *Act* does not provide any definition of Metis to assist in

determining exactly who might be included in this group.

The historians and contemporary Metis society tend to agree that throughout history, references to a distinct group of people known today as the Metis were referred to as half-breed, chicot, and bois-brule. However, a universally accepted definition of who is a Metis is not to be found.

In spite of the definition void or definition conflict that graces the land, counsel want this court to provide the definition of Metis so that it can be applied objectively in order to determine whether a particular individual is or is not a Metis.

The request for a definition of a Metis is not a simple task.

In *Re Lovelace et al. and The Queen in the Right of Ontario et al. (Indexed as Ardoch Algonquin First Nation v. Ontario)* (1997), 148 D.L.R. (4th) 126 (Ont. C.A.) at p. 153, para. 85 The Court stated that:

> " On matters of identification and accountability, the Bands stand on a different footing from the applicant groups. Band members are easily identifiable because they are registered under Band lists. In contrast, no consensus exists on an appropriate definition of Metis or non-status Indians, making their identification extremely difficult. The motion judge dismissed this problem on the ground that it was " not as complex as alleged by the respondents" and because he had already ordered the parties in Perry to negotiate a formula for identifying these groups. His order in Perry at least recognizes the existence of the problem, but ignores the undisputed evidence that a consensus definition has eluded not only many federal government, provincial government and Aboriginal group discussions, but also the applicants themselves, each of whom has different membership requirements for its organization or community."

Judge Swail of the Manitoba Provincial Court in *R. v. Blais*, [1997] 3 C.N.L.R. 109 (Man. Prov. Ct.) wrote on the issue of "Who are the Metis?" commencing at p. 114. However, since the Crown had conceded that the accused were Metis, Judge Swail concluded that he did not have to decide who was or was not a Metis. His observations regarding the definition of a Metis are nonetheless illustrative of the difficulties surrounding this issue.

> " The question of exactly who is a Metis within the meaning of this section of the *Constitution Act* is a difficult one. It is complicated by the fact that the term Metis has been used in different ways at different times. Even today there is dispute as to the correct meaning of the term at any given period of history. It is further complicated by the fact that there are at least two distinct cultural backgrounds for the mixed blood people known as Metis. There are the descendants of British (English and Scottish)

"half-breeds" as they were originally known, who where the children of Hudson Bay Company employees; and there were the original French Metis who, for the greater part, were the children of North West Company employees, from Quebec.
Another complicating factor is the evolution in the use of [the] term "Metis", which saw the Government of Canada adopt a protocol by at least 1870 whereby all mixed blood descendants of European and Indian people were referred to in official documents in English as "half-breeds", and in official documents in French as "Metis". Beyond this, the question of who is or is not a Metis has been highly politicized by some fairly disparate organizations claiming to speak for the Metis of today.
A further, final complicating factor has been the change by the Government of Canada of the criteria for status as an Indian under the *Indian Act* 1985. This apparently has resulted in a substantial number of people, who might otherwise have claimed status as a Metis, now taking status as Indians.

. . .

I recognize that Mr. Blais, in his evidence, said that this case was intended to settle the issue of who is a Metis. If I were to deal with this issue, I am inclined to think that the starting point would be in the definition of "Metis" set out in paragraph 1(a) of the "*Metis Nation Accord*" (filed herein as exhibit #9). It reads:
For the purposes of the Metis nation and this Accord:
(a) Metis means an aboriginal person who self-identifies as Metis who is distinct from Indian and Innuit and is a descendant of those Metis who received or were entitled to receive land grants and/or Script under the provisions of the *Manitoba Act 1870* or the *Dominion Lands Act* as enacted from time to time.
Insofar as this "accord" represents a political answer (by representatives of the Government of Canada, the Provinces, and a national Metis organization) to what is essentially a political question, it must be given serious consideration by the courts.
The *Metis Nation Accord* fell with the failed Charlottetown Accord and is of course, not legally binding in any sense. Nevertheless, it may well be a valid guide to an appropriate definition of Metis.
In any event, it is clear in light of the Crown's perception that the accused in this case are indeed Metis, that the issue of who are, and who are not, Metis isn't one that need to be decided in this case. Accordingly, I decline to go further than to find that the accused, in this case, are Metis within the meaning of s. 35 of the *Constitution Act*."

The *Blais* decision suggests that the definition debate has a significant political component linked to it. I would agree with this characterization. The *Constitution Act 1982* is an expression of Canada's political essence. Accordingly, when s. 35 refers to a group identified as Metis, it would seem appropriate that the elected representatives of this nation dialogue with the key participants in the arena and arrive at a workable definition of who is a Metis.

Once a definition has been put in place, resources should be provided to deal with

individual applicants who are interested in achieving official Metis status. The current practice of individuals financing independent ancestral searches is both cumbersome and expensive. A central registry system could facilitate the determination of official status.

A different vehicle to define who is a Metis was suggested in the *Report of the Royal Commission on Aboriginal Peoples*, Volume 4 (Exhibit #21). At p. 208, the *Report* reads as follows:

> " The legal definition of Metis cannot be resolved without a Supreme Court of Canada ruling."

I am of the view that a court is not the ideal forum to deal with political matters. The definition question would best be addressed through negotiation and consensus building rather than an adversarial process.

The *Commission* also recommended a definition as to Metis identity at p. 203 of the *Report*.

> " Every person who
> (a) identifies himself or herself as Metis and
> (b) is accepted as such by the nation of Metis people with which that person wishes to be associated, on the basis of criteria and procedures determined by that nation
> be recognized as a member of that nation for the purposes of nation - to - nation negotiations and as Metis for that purpose."

The *Metis Nation of Ontario* 1997 By-Laws defines a Metis as:

> "Anyone of Aboriginal ancestry who self-identifies as Metis; is distinct from Indian or Inuit; has at least one grandparent who is Aboriginal; and who is accepted by the Metis Nation of Ontario."

An overview of the evidence adduced at trial and an examination of the case law demonstrate that there are several factors that impact on the identification issue. Historically, there were distinct circumstances across Canada that resulted in different communities developing from the mixing of European and Indian groups. Government intervention such as the *Indian Act* have defined some individuals as Indians who might normally be classified as Metis. The political differences between groups representing the Metis landscape and claiming to represent the "real Metis" have created a divided approach to a complicated identity issue.

As long as the divisiveness remains a reality in the Metis equation, the question as to

who is a Metis will remain unanswered. Without an identifiable group, government can continue to pose the question who is a Metis.

Dr. Ray also noted that " Metis people tend to be invisible or unidentifiable in official records in other primary sources upon which historians rely to construct the history of Aboriginal groups in Canada. As such, it is very difficult to provide a continuous, well documented and authoritative history of their communities." As time marches on, the task of tracing Aboriginal ancestry will only become more difficult.

Questions regarding blood ratios might be another area that has to be addressed within the context of definition. In the case at bar, Mr. Steve Powley has 1/64 Aboriginal blood and his son, Roddy has 1/128. Should there be a minimum percentage to qualify a person to claim Metis status?

Without a universally accepted definition of Metis to be found, I shall attempt to distil a basic, workable definition of who is a Metis. Accordingly, I find that a Metis is a person of Aboriginal ancestry; who self identifies as a Metis; and who is accepted by the Metis community as a Metis.

(ii) *Historic government recognition of the Metis*

Prior to 1830, the British treated the Metis similarly to other Aboriginal persons when they continued the French practice of providing them with annual presents to cement their alliance.

From 1824 to 1857, the American government identified and included the Metis of the Upper Great Lakes as beneficiaries of land and/or annuities in at least fifteen different treaties in what is now Michigan, Wisconsin and Minnesota.

As a general rule, after 1830, government attempted to separate the Metis population from the Indian population. Financial considerations seemed to motivate this reassessment. The Report of the Royal Commission for Aboriginal Peoples observed that in 1846, the *Bagot Commission* recommended the following:

> " Crown financial obligations were to be reduced by taking a census of all Indians living in Upper Canada. This would enable officials to prepare band lists. No Indian could be added to a band list without official approval, and only persons listed as band members

would be entitled to treaty payments. It was recommended that the following classes of persons be ineligible to receive these payments; all persons of mixed Indian and non-Indian blood who had not been adopted by the band; all Indian women who married non-Indian men and their children . . . "

The *Pennefather Commission of 1858* and the *Borron Reports* of the 1890's continued the fiscal restraints and recognized that savings would be realized if the Metis were cut out off of the treaty lists.

Notwithstanding this general rule, the federal government in 1875 recognized Metis rights in Ontario in the *Addendum to Treaty Three by the Half Breeds of Rainy Lake/Rainy River*. The *Treaty* reads in part:

" Whereas the Half-breeds above described, by virtue of their Indian blood, claim a certain interest or title in the lands or territories in the vicinity of Rainy Lake and Rainy River, for the commutation or surrender of which claim they ask compensation from the Government.
And whereas, having fully and deliberately discussed and considered the matter, the said Half-breeds have elected to join the treaty made between the Indians and Her Majesty at the North West Angle of the Lake of the Woods, on the third of October, 1873 and have expressed a desire thereto, and to become subject to the terms and conditions thereof in all respects saving as hereafter set forth."

The *Indian Act* of 1876 declared that Indians were to be determined according to their father's heritage. This impacted significantly on the Metis since for the most part they were descendants of Indian women.

The Metis have been consistently identified as a group that inhabited the areas immediately surrounding Sault Ste Marie. They were recognized by the Ojibway and it is clear that the Ojibway attempted to have them included in the annual gifts and in the Robinson Treaties. It is equally clear that although Robinson recognized the distinctive Metis group he restricted his dealings with the Indians. Robinson noted that:

" **As the half-breeds of Sault Ste Marie and other places may seek to be recognized by the Government in future payments,** it may be well that I state here the answer that I gave to their demands on the present occasion. I told them that I came to treat with the chiefs who were present, that the money would be paid to them - that their receipt was sufficient for me - that when in their possession they might give as much or little to **that class of claimants** as they pleased." (My emphasis)

The text of the *Robinson Huron Treaty* contains the following passage:

> " When at Sault Ste Marie last May (1850) I took measures for ascertaining, as nearly as possible, the number of Indians inhabiting the North shores of the two lakes; and was fortunate enough to get a very correct census, particularly of Lake Superior. The number on that Lake including **eighty-four half breeds** is only twelve hundred and forty, and on Lake Huron about fourteen hundred and twenty two, including probably two **hundred half breeds.**" (My emphasis)

It is clear from the totality of the historical documentation and evidence in connection thereto that the Metis people were a recognizable group that was closely associated with the local Indians. The Metis had created a distinctive lifestyle that was recognized by others.

The visibility of the Metis as a group may have waxed and waned over the years but they were a distinct group in the early development of Canada and have continued to exist throughout Canada's development. The characterization of the Metis as a forgotten people is an apt one. The *Constitution Act, 1982*, once again, officially recognized the existence of the Metis as an aboriginal group with certain rights.

(iii) Objective test for determining who the Metis are within the meaning of s. 35(2)

How does the court determine whether or not the Powleys are Metis for the purposes of s. 35(2) of the *Constitution Act*, 1982? The " Who is a Metis?" question looms large. Unlike cases involving Indian rights, an identifying tribe or band is not available to those claiming Metis status. The generic term Metis forces individuals to not only self identify but they must also piece together the existence of a definable Metis existence from location to location.

Indian tribes have been identified over time as to region and governments have developed registration lists to identify Indians for purposes of benefits and claims. A similar procedure has not been put in place for those of Metis descent.

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

Even given the resources to compile a proper genealogical history, there are still difficulties to overcome. The initial mixing of the Indians and European fur traders in the Sault Ste Marie which eventually resulted in the Metis identity was not particularly well documented. Innovative spellings of names, spotty record keeping, lost documents and the mobility of the Metis are but a few of the challenges that face either individuals or organizations in developing an accurate census of the Metis population.

A helpful tool in the determination of a person's genealogy would be the oral history from the individual. Evidence of this nature is not only useful to support the historical roots of a party but more importantly, oral evidence by the Powleys would have allowed the court a better opportunity to assess how the Powleys interact within the Metis community of the Sault Ste Marie area. This point was well demonstrated during the evidence of Mr. Bennett and Mr. Bjornaa. During their testimony, the court was given a first hand account to support their genealogy and the personal roles that each of these men played in the local community life of today's Metis population.

Although I agree with Mr. Long that this oversight is a very significant omission, it is not in itself fatal to the overall position taken by the Powleys.

One must also consider the personal expense in this search and balance that cost against the rights and benefits that may flow to the individual from the designation of Metis status.

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

The second part of the process for the Powleys is to demonstrate that there is a genealogical connection between themselves and the historically identified Metis society. This undertaking was completed by Ms. Armstrong and is contained in her report, Exhibit 48. Ms.

Armstrong's evidence was not without certain weaknesses but I am satisfied that the accused before the court have demonstrated on a balance of probabilities that they have aboriginal roots.

The Crown called Ms. Gwynneth C.D. Jones. It is of particular note the following excerpt from her evidence:

A. . . . Without looking at every one of those individuals, I can't say there were exactly this many families of this descent in this area. We know that the probability was that most of them were of mixed Aboriginal and non-Aboriginal ancestry.

Q. **Were any of these families direct ancestors of Steven Powley?**

A. **Yes.** (My emphasis)

The Crown has gone to great pains to narrow the issues in this trial to Sault Ste Marie proper. I find that such a limited regional focus does not provide a reasonable frame of reference when considering the concept of a Metis community at Sault Ste Marie. A more realistic interpretation of Sault Ste Marie for the purposes of considering the Metis identity and existence should encompass the surrounding environs of the town site proper.

I agree with the general principle that Aboriginal rights are very much site specific. This principle is addressed in the next heading of this judgment.

The lifestyle of the Metis more closely resembled the Indians that occupied this area and it would seem more reasonable to find the existence of the Metis on the fringes of the geographical boundaries of Sault Ste Marie. Many of the witnesses made reference to communities and areas surrounding Sault Ste Marie including Batchewana, Goulais Bay, Garden River, Bruce Mines, Desbarates, Bar River, St Joseph's Island, Sugar Island and into Northern Michigan.

It is not surprising considering the lifestyle of the modern Metis to find them as more visible entities in the more rural and outlying communities surrounding Sault Ste Marie. Their existence in the aforementioned area would be consistent with their original affiliation with the local native population.

(iv) There was an historic Metis society at Sault Ste Marie

The Supreme Court in *Van der Peet* (supra) held that Aboriginal rights inherent in pre-existing Aboriginal societies. At p. 193, Chief Justice Lamer expressed himself as follows:

"In my view, the doctrine of Aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact : when Europeans arrived in North America Aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal and constitutional, status. More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that Aboriginal lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown."

In *R. v. Adams* [1996] 4 C.N.L.R. 1 at p.11 para. 26, the Supreme Court of Canada makes it clear that Aboriginal peoples do not have to prove Aboriginal title in order to claim harvesting rights. Lamer C.J. writes that:

" In Van der Peet, at para. 43, Aboriginal rights were said to be best understood as, *. . . first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive Aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.*
From this basis the Court went on to hold, at para. 46, that Aboriginal rights are identified through the following test:
. . . in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right
What this test, along with the conceptual basis which underlies it, indicates, is that while claims to Aboriginal title fall within the conceptional framework of Aboriginal rights, Aboriginal rights do not exist solely where a claim to Aboriginal title has been made out. Where an aboriginal group has shown that a particular activity , custom or tradition taking place on the land was integral to the distinctive culture of that group then, *even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land*, they will have demonstrated that they have an Aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities which were integral to the distinctive culture of the Aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to Aboriginal title to the land. *Van der Peet* establishes that s. 35 recognizes and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an Aboriginal

group's relationship with the land is of a kind sufficient to establish title to the land."

The evidence adduced at trial shows that the Ojibway people lived in the Sault Ste Marie area before contact with Europeans. The Ojibway moved from their woodland territory on the shores of Lake Superior and Lake Huron to the sub-Arctic areas on a seasonal basis. The Ojibway had a broad based economy which included hunting, fishing, agriculture and harvesting maple sugar. They had established an extensive fur trading system well in advance of the arrival of Europeans.

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

The evidence shows that the Metis were visually, culturally and ethnically distinct. This point is well illustrated in Exhibit #31, Dr. Ray's Supporting Documents Vol. 3, Tab 7, *Many Roads to Red River* by Jacqueline Peterson, at p. 41, where Peterson observes that:

> " These people [referring to the Metis] were neither adjunct relative-members of tribal villages nor the standard bearers of European civilization in the wilderness. Increasingly, they stood apart or, more precisely, in between. By the end of the last struggle for empire in 1815, their towns which were visually, ethnically and culturally distinct from neighbouring Indian villages and "white towns" along the eastern seaboard, stretched from Detroit and Michilimackinac at the east to the Red River at the northwest. . . . such towns grew as a result of and were increasingly dominated by the offspring of Canadian trade employees and Indian women who, having reached their majority, were intermarrying among themselves and rearing successive generations of [M]etis . . . these communities did not represent an extension of French, and later British colonial culture, but rather " adaption[s] to the Upper Great Lakes environment."

The *Report of the Royal Commission for Aboriginal Peoples* (Exhibit #21) at pages 259-260 has recognized that the Aboriginal population at Sault Ste Marie included a distinct Metis people.

> " It is indisputable that the distinct Metis communities of Ontario - in locations as widespread as Burleigh Falls (near Peterborough), Moose Factory (on James Bay), Sault

> Ste Marie and Rainy River (in the north and west of Thunder Bay) - have long and unique histories, as well as indisputable claims to recognition of their Aboriginal origins and entitlements. The Metis 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 Metis control from the late seventeenth to the mid-nineteenth century."

The evidence at trial suggests that the visibility of the Metis at Sault Ste Marie waned after the treaty in 1850 and moved into the surrounding areas. The events at Red River in 1870 signalled a time when claiming Metis status was not advantageous. The Metis quietly became the "forgotten people".

(v) Is there a contemporary Metis society at Sault Ste Marie?

The evidence called on behalf of the Powleys support the contention that Sault Ste Marie has a Metis community today. There are groups of Metis persons located in the smaller communities surrounding Sault Ste Marie. Mr. Olaf Bjornaa and Mr. Art Bennett provide interesting personal knowledge of the community as well as information as to the current status of the local Metis population.

This community had continued to be an invisible entity within the general population. It was only in the early 1970's that individuals became more public as to their heritage. The Ontario Metis Aboriginal Society provided a more organized structure with a higher profile. Subsequently, another organization, the Metis Nation of Ontario has also become a voice for Metis concerns.

The invisible nature of the local Metis people can best be garnered from the evidence of Mr. Bennett and Mr. Bjornaa.

The following excerpts from Volume One of the transcripts illustrate Mr. Bennett's poignant observations:

P. 282: ". . . shame is just something that's inflicted upon you as you grow up as a child and I think a lot of Native people grow up with shame because they're made to feel this way about White society. I know as a child myself in Bruce Mines growing up, it was a battle. We were picked on because we were half Indian, considered half Indian. I can remember being called Squaw man and things being said about my mother because she was a little darker than the rest of the white people in the community. So you grow up. Even my own paternal grandmother

referred to my mother as a squaw that married her son and I knew there was tension between my mother and my grandmother and I felt that I was . . . wasn't a good thing to be, you know.

P. 285: Q. Now, you say that . . . that your mom married, that your mother's mother, I'm sorry, married a white man and what happened to her as a result of that marriage?

A. She was ostracized by her own people for a long time because she married a white man and I know she was asked to leave the reserve cause back in those days, the Native woman could not marry a white man and maintain their status so she had to leave the reserve . . .

P. 290: Q. Do your brothers and sisters identify as Metis?

A. Some do and some don't.

Q. Can you tell us why that is?

A. I think my oldest sister, she was very close to my father's mother, my maternal grandmother and I think she's embarrassed with the fact that she's Indian. That's she . . . actually, she doesn't even want to admit that she's part Indian. Myself, I'm quite proud of the fact that there's Indian blood coursing through my veins and I think some of the other family members are too and some are indifferent. They don't care one way or the other, so . . .

Q. Now, what about some . . . do you have cousins who identify as Metis? I'm trying to get the rest of the family.

A. Yes, I do.

Q. Yes? And are the Powleys one of those?

Q. Yes they are."

Mr. Bjornaa's comments can be found in Volume IV of the Transcripts as follows?

Pp. 181-2: "Q. And how long did you go to school?

A. Well, I didn't go very long. When I first started there was two schools within Batchewana Bay. There was . . . was for the Natives at the village and down the Bay was for the non-Natives. When me and my sister first started, we started down the Bay at the white school. We were told we were Natives. We couldn't . . . we didn't belong there. Then we went up to the other school and we were told we were non-Natives. We didn't belong there and my mother said this is the problem with being Metis. You're almost a displaced person in your own homeland.

P. 184: Q. . . . how did your mother identify?

A. As a Metis.

Q. And did she use that actual word?

A. Yes. She . . . she always explained to us that with our culture, we don't belong to the white society or the Treaty side. We are Metis and we were raised as Metis.

Pp. 184-5 Q. Now, your . . . your mother's mother, Julie, did . . . did she . . . how did she identify?

A. She identified us . . . us children as Metis. When she got married, she lost her status, she was what you call a red ticket holder and she brought us up as grandchildren to say that you know, she was almost like a castout with her own Band, so she said us people, us kids would never belong there either, so if we were Metis, this is what she's always . . . our Gramma told us."

(b) What is the relevant time/date for determining the existence of the right claimed?

The Supreme Court in *Van der Peet* (supra) held that the time period that a court should consider in identifying whether the specific right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. (See: *Van der Peet* at p. 205, para. 60-61)

This period of contact was determined in the *Adams* case (supra) as 1603. This case demonstrates that the court is to examine when there was **effective control** by the European power when ascertaining the period of time prior to contact. (My emphasis) At p. 18, the court observed that:

> " . . . The arrival of Samuel de Champlain in 1603, and the consequent establishment of effective control by the French over what would become New France, is the time which can most accurately [be] identified as "contact" for the purposes of the Van der Peet test."

If the first test of *Van der Peet* were to be strictly applied to the Metis, there would be no need to proceed any further since the Metis formed as a result of the merging of the Indian and European people into a distinct aboriginal society. The Supreme Court recognized that the strict application of the "contact test" would have to be subject to modification as it applied to the Metis at p. 206, para. 67.

> " Although s. 35 includes the Metis within its definition of " aboriginal peoples of Canada", and thus seems to link their claim to those of other Aboriginal peoples under

> the general heading of "aboriginal rights", the history of the Metis, 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 is not necessarily determinative of the manner in which the Aboriginal rights of the Metis are defined. At the time when this Court is presented with a Metis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Metis claim, be able to explore the question of the purposes underlying s. 35's protection of the Aboriginal rights of the Metis people, and answer the question of the kind of claims which fall within s. 35(1)'s scope when the claimants are Metis. 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 Metis are determined on the basis of the pre-contact practices, traditions and customs of their Aboriginal ancestors; whether that is so must await determination in a case in which the issue arises."

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

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

The unique Metis 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 Metis society at the time when effective control of the area was taken over by the European based culture.

(c) What is the correct characterization of the right claimed?

The right claimed by the Powleys is the right to hunt for food. Steve Powley clearly expressed this intention. He attached a tag to the moose that had been shot indicating that the meat was to be used as food for the winter.

The evidence indicated that the Ojibway and Metis had always hunted and that this activity was a integral part of their culture prior to the intervention of European control. Mr. Long stressed the fact that moose were scarce if not non-existent between 1820 and 1880 thereby creating a scenario whereby at the time of effective control of the area passing from the Aboriginal people moose hunting would not be a part of their culture. I find that to take this approach one must suspend common sense. I take the position that just because a 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 Metis diet. In fact, it would appear that the Aboriginal societies in the Sault Ste Marie area were opportunistic when it came to hunting animals for their food or otherwise.

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

There was no evidence called to suggest that the moose killed by the Powleys was to be used for anything but food.

In addition to the aboriginal claim to hunt, counsel for the Powleys also maintain that

they have a right to hunt under the *Robinson Huron Treaty*. Although the Powleys are not now and never have been registered as Indians under the *Indian Act* or any Indian Band, the evidence shows that the Powleys have roots back to the Lesage family, one of the signatories to he *Robinson Huron Treaty of 1850*.

The courts in *R. v. Fowler* [1993] 3 C.N.L.R. 178 and *R. v. Chevrier* [1989] 1 C.N.L.R. 128 have ruled that treaty rights are inherited and are not determined by whether or not an individual Aboriginal person is listed as an Indian under the *Indian Act*. The Powleys rely on the fact that they are direct descendants of beneficiaries of the *Robinson Huron Treaty* and claim its protection for their hunting rights.

The *Robinson Huron Treaty of 1850* (Exhibit #43) reads in part:

> " . . . and further, to allow the said Chiefs and their tribes the full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof, as they have heretofor been in the habit of doing, saving and excepting such portions of the said territory as may from time to time be sold or leased to individuals or companies of individuals and occupied by them with the consent of the Provincial Government."

I find that any claims made by the Powleys under the *Robinson Treaty* have not been established. As I understand the evidence regarding the *Robinson Huron Treaty 1850*, Robinson made it very clear that he did not want the Metis included as part of the *Treaty*. I have already referred to the prevailing attitude toward the Metis exclusion at p.15 of this judgment.

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

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

(e) Is the right claimed integral to a distinctive Metis society?

In *Van der Peet*, the Supreme Court, stated at p.204 that:

> " The claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other

> words that the practice, tradition or custom 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.*"

In *Adams*, the Supreme Court applied the "integral to their distinct society test" when they were considering the importance of fishing within the Mohawk tradition.

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

(f) Do the Metis continue to exercise the practice, custom or tradition?

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

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

> " . . . Like Lizard Island, you take people from Gros Cap, Goulais Bay, Batchewana, all moved up to those islands, spent the summers there, took their families. They were all Metis families. I mean the foundations and the buildings are still there. When they went up there, they took their families up, they spent the summer, they commércial fished, they harvested their meat and stuff off the mainland, they went over to Blueberry Island and picked berries for the year to put away and these people migrated back and forth. When I was a kid, I remember. I remember being up to those islands and places." (Transcript, Volume IV, p. 189 - Bjornaa)

> " I felt that . . . that there was a body of Metis people because we had to be together. We wanted something, we had to stick together at it. Like, I know at one time, people going hunting, if they shot a moose it was shared. There was a gathering, like there was people as a group. One family didn't take all the moose. The moose went to numbers of families there. The elders were looked after and stuff, so I really felt there was in a way there was a political bond." (Transcript, IV, p. 191 - Bjornaa)

> " OK, when I was a kid, probably the meat and fish we ate, I bet you 90% of what we ate

> come out of the bush. Now, I'd say probably around 75, 80%. I actually prefer the taste of moose, even venison, I prefer venison over moose. If anybody's a connoisseur of wild game, I'm . . . venison tastes better than moose, but ya, probably 75 to 80% of the meat we consume now is wild game, including fish." (Transcript, Vol. I, pp. 302-3)

The foregoing evidence that the Metis continue their hunting tradition is bolstered by Steve Powley's clear declaration on the tag he had affixed to the carcass which included a declaration that the animal was for his winter food.

(g) Has the right been extinguished?

There was no evidence adduced at trial to suggest that the hunting rights of the Metis have been extinguished. Section 35(1) protects existing Aboriginal rights and *Sparrow* (supra) at p. 174 makes it clear that extensive regulatory control by government does not imply extinguishment. The Crown then concluded that if the Powleys are basing their claim on the *Robinson Huron Treaty 1850* then the payments to the Metis through the Indian chiefs resulted in the extinguishment of their Aboriginal rights. I dismiss this contention on the basis that the Powleys are not beneficiaries of the *Treaty*.

(h) Does the regulatory scheme infringe the preferred method of exercising the practice, custom or tradition? If so, is the infringement minimal and has it been justified?

Although Aboriginal rights may not have been extinguished, it must also be recognized that those rights may be infringed by both the federal and provincial governments through legislation. However, any infringement must be justified. (See: *Delgamuukw v. B.C.* [1998] 1 C.N.L.R. 14 at p. 75)

The evidence at trial demonstrates that the government of Ontario has not recognized or affirmed the aboriginal hunting rights of the Metis in Ontario under the *Game or Fish Act* or the *Interim Enforcement Policy 1991(IEP)* (Exhibit 15).

IEP, s. 5

Metis and Non-Status People

The Game and Fish Act, the Fisheries Act, and the Migratory Birds Convention Act and the regulations enacted pursuant to those Acts, will continue to apply in respect of harvest of

wildlife and fish by Metis and non-status Indians unless or until agreements have been entered into with the Metis and non-status Indian communities providing for such harvest. Where the Provincial Government has entered into negotiations concerning harvest of wildlife and fish for personal consumption with Metis and non-status Indian communities where such harvest is integral to the lifestyle of the community, written permission of the Deputy Minister of Natural Resources will be required before planned enforcement procedures regarding the harvest of wildlife and fish by members of that community will be taken.

Although the preamble for the *IEP* expresses the wish of the Provincial government to minimize the number of instances where aboriginal people are in conflict with harvesting legislation, the fact remains that no concrete progress seems to have evolved.

In a letter date stamped December 21, 1995, (Exhibit 17), the then Minister of Natural Resources, the Honourable Chris Hodgson wrote that:

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

Likewise, Mr. S. Jones, a forest ecologist with the Forest Evaluation and Standards Section, Forest Management Branch of the Ontario Ministry of Natural Resources, indicated that the applicability of the Interim Enforcement Policy is directed towards First Nations Aboriginal people. He agreed with counsel for the Powleys that " It's not for the Metis". (Transcript , Vol. 5 at p. 191- Note that the original transcript omits the word not. However, the court reporter confirmed that not should have appeared in the transcript. Mr. Long, for the Crown, also conceded that not should be included in the response by the witness.)

When the Supreme Court of Canada considered section 35(1) and the regulation of the fisheries in *Sparrow,* it observed at p. 182 that:

> " The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement of s 35(1).

In the case at bar, I find that the Metis' aboriginal right to hunt moose and other game is interfered with by the regulatory scheme currently in place in Ontario. There is no corresponding **right** to hunt by non-Aboriginal people but rather those individuals have a privilege to hunt in accordance with licensing provisions. (My emphasis) The Metis' 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.

The British Columbia Court of Appeal in *R. v. Alphonse* [1993] 4 C.N.L.R. 19 at p. 60, addresses the consequences between an Aboriginal person being prevented from exercising an Aboriginal hunting right as opposed to a non-Aboriginal having his statutory privilege to hunt curtailed in the following passage:

> " But the situation is entirely different when the right that an Indian is being prevented from exercising is either an incident of Aboriginal title to the exclusive possession , occupation, use and enjoyment of land and its resources, or an Aboriginal hunting right. In either case, the right is derived from the customs, traditions and practices of the Indian people in question, and has been nurtured and protected as an integral part of their distinctive culture since before British sovereignty was first asserted, and has been incorporated into the common law and protected by the common law ever since. When an Indian is prevented from exercising such a fundamental right, a right that is now constitutionally recognized, affirmed and guaranteed by s. 35 of the Constitution Act, 1982, he is suffering a qualitatively different consequence than the consequence that is visited on both Indians and non-Indians when their statutory hunting privilege is not extended to the closed season."

Has this right to hunt been infringed? The onus of proving whether there has been an infringement rests with the party challenging the legislation. Again, in *Sparrow*, the questions to be determined to see if a right has been interfered with have been set out at p. 182 as follows:

> " First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?"

Let us examine each of these questions in order to determine whether the regulatory scheme infringes the s. 35 rights of the Metis to hunt.

Is the limitation reasonable?

Although the Province of Ontario recognizes that status Indians have s. 35(1) rights to hunt and fish, the Metis have not been accorded similar status. It might very well happen that a Metis person could be denied the right to hunt for food in the interests of conservation while treaty Indians could continue to hunt. There is no evidence before this court to warrant this disparity as between the two Aboriginal groups.

What undue hardship befalls the Metis?

The current regulatory scheme harms the Metis hunters as compared to the Indian hunters. Whereas the Indians may hunt outside officially sanctioned seasons, the Metis are prohibited. Shorter seasons have negative impact on the Metis' ability to harvest sufficient provisions for their families. Currently, Metis hunters are subject to a lottery for a set number of adult moose tags. This restricts their hunting opportunities. Confiscation of animals not bearing appropriate tags result in lost provisions for their families. If the Metis are charged under the *Game and Fish Act* for hunting without a licence they may incur the expenses associated with defending themselves in court.

Does the regulation deny the holders of the right their preferred means of exercising that right?

If the Metis exercise their Aboriginal rights without the benefit of a licence, they are not only putting themselves at risk of legislative sanctions but they have are forced to skulk through the forests like criminals as opposed to hunters exercising their constitutional rights. It was apparent from the evidence that was called in this trial that many Metis hunters are reluctant to chance being charged and having their game and weapons seized by the Ministry of Natural Resources. Therefore, the Metis are denied their preferred means of exercising their Aboriginal rights.

I also conclude that the regulations are not minimal. Having reached that conclusion, one must then decide whether the regulatory scheme can be justified under all of the circumstances.

Scott Jones made it clear that the policy relating to moose hunting is conservation. Conservation has been long recognized as a legitimate objective which can justify the infringement of Aboriginal rights. In *Jack v. The Queen* [1980] 1 S.C.R. 294 at 313, the Supreme Court expressed this opinion as follows:

> " Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught."

Likewise, the Supreme Court in *Sparrow* observed at p. 184 that

> " The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern

> fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries."

Does the conservation rational hold up to scrutiny when you consider the policies in place for First Nation Aboriginal as compared to Metis Aboriginal? What justification is there to exclude the Metis from the Aboriginal allocation? I can find no compelling reason to justify such an exclusion.

I was left with the impression from Mr. Scott that the current moose population is healthy. This conclusion is supported by the fact that approximately 35,000 adult moose tags are given out each year.

There continues to be ongoing monitoring and assessment of the moose population. There are models and target populations that the Ministry is attempting to achieve. These activities are intended to maintain the moose population.

Mr. Scott also expressed a secondary justification for the current regulatory scheme that is in place with respect to hunting in Ontario. This justification is based on the social and economic benefit to the people of Ontario derived through a combination of recreational hunting and non-hunting recreation. Chief Justice Lamer in his reasons in *R. v. Adams* (supra) addressed similar concerns at p. 23 as follows:

> " I have some difficulty in accepting, in the circumstances of this case, that the enhancement of sports fishing per se is a compelling and substantive objective for the purposes of s. 35(1). While sports fishing is an important economic activity in some parts of the country, in this instance, there is no evidence that the sports fishing that this scheme sought to promote had a meaningful economic dimension to it. On its own, without that 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.

> Furthermore, the scheme does not meet the second leg of the test for justification, because it fails to provide the requisite priority to the Aboriginal right to fish for food, a requirement laid down by this Court in *Sparrow*. As we explained in *Gladstone*, the precise meaning of priority for Aboriginal fishing rights is in part a function of the nature of the right claimed. The right to fish for food, as opposed to the right to fish commercially, is a right which should be given first priority after conservation concerns are met."

I find that there is no justifiable reason to justify the different approaches taken towards the two Aboriginal communities (Indians and Metis) in the Sault Ste Marie area.

CONCLUSIONS

In summary, I find the following:

(1) On the agreed statement of facts, there can be no question that the Crown has met its burden of proof regarding the offences.

(2) I am also satisfied that the defence has met its onus to establish its of aboriginal right pursuant to s. 35 of the *Constitution Act, 1982* and accordingly the charges against both accused are dismissed.

OBSERVATIONS

Even though the quasi-criminal charges against the Powleys have been dismissed for the reasons given, this case illustrates that there are many important issues that must be decided in the future regarding Metis rights. The criminal process is not a particularly effective or efficient tool to arrive at the required solutions. It is a blunt instrument. It is also an expensive, time consuming, and cumbersome process.

The issues raised have significant political components that are best addressed in the political arena.

I have attempted to provide a workable definition of Metis to meet the needs of the case before me. However, the definition game of who is a Metis can be continued on an issue to issue basis and site to site basis and an individual to individual basis.

Section 35 of the *Constitution Act*, 1982 did not have to acknowledge the aboriginal

rights of a group of people referred to as Metis. However, the Parliament of Canada has clearly proclaimed the Metis existence. It has been twenty-five years since the *Constitution Act* has been in force. Is it not time to find answers regarding the issues affecting the Metis?

COSTS AND SECTION 11(B) OF THE CHARTER

At the conclusion of this matter on September 9, 1998, counsel for the defendants requested an award of costs on a solicitor on his own client scale pursuant to section 24(1)of the *Canadian Charter of Rights and Freedoms (The Charter)* on the basis that the defendants had been denied their right to be tried within a reasonable time as guaranteed under s. 11(b) of *the Charter*.

The Crown opposes such a request on two fronts. Firstly, Mr. Long contends that the court lacks the jurisdiction to make such an order. Alternatively, the Crown contends that the award of costs for an infringement of a *Charter* right is an exceptional remedy and only should be awarded in extraordinary circumstances. Mr. Long suggests that the various reasons for the delays experienced in the case at bar fall very short of extraordinary circumstances.

I shall have certain observations as to the availability of a s. 11(b) motion by the accused for a stay in this matter later in this judgment. At this stage, I would only like to observe that the context in which s. 11(b) was raised by the defence was only in its request for costs.

Summary of Events leading up to the trial of this matter:

(1) Powleys shot a bull moose without a licence on October 22, 1993.

(2) Powleys charged with hunting without a licence and possession of moose contrary to Game and Fish Act on October 29, 1993.

(3) First court appearance was on December 1, 1993. The accused were represented by Mr. G. Acton. The matters were put to January 5, 1994 to set a trial date.

(4) On January 5, 1994, the accused were remanded to January 26, 1994 to set a trial date.

(5) On January 26, 1994, the trial was selected to commence on April 14, 1994.

(6) On April 14, 1994 the matter was adjourned at the request of the defence and with the Crown's consent because of a change in defence counsel's schedule. There was some suggestion that a negotiated settlement might be possible. Accordingly, the matter was adjourned to May 10, 1994 for the setting of a new trial date.

(7) On May 10, 1994, the trial was scheduled to commence on June 27. 1994.

(8) On June 22, 1994, counsel for the accused requested an adjournment due to an inadvertent scheduling conflict with a planned family holiday. The Crown consented to this adjournment. The matters were put over to July 27, 1994 in order to select a new trial date.

(9) On July 27, 1994, a trial date was selected to commence on November 28, 1994.

(10) On November 25, 1994, yet another trial date was selected. The trial date had a commencement of April 24, 1995.

(11) On April 6, 1995, counsel for the accused served a Notice of Constitutional Question upon the Attorney Generals of Ontario and Canada.

(12) Counsel for the Powley's also informed the Crown's office that Ms. Teillet would be applying for intervenor status on behalf of the Metis Nation of Ontario and that her timetable would not permit her to attend the scheduled trial commencing April 24, 1995.

(13) Mr. Acton requested another adjournment on April 19, 1995 in order to allow for Ms. Teillet's participation in the proceedings. The Crown consented to this adjournment. The information indicates that the next trial date was to commence on July 10, 1995 and that it was marked preemptory.

(14) On June 26, 1995, Mr. Acton advised the Crown's office that there were apparent difficulties in obtaining a Justice of the Peace to hear the trial. It became apparent that yet another trial date had to be found.

(15) On July 10, 1995, the charges were adjourned to July 19, 1995 and then to July 26, 1995 and then to September 6, 1995 and then to September 27, 1995 and finally to October 16, 1995 before a judge of the Provincial Court of Justice (Provincial Division). At that time, the court scheduled two weeks of trial time commencing on February 26, 1996.

(16) During the July-September 1995 period, Mr. Acton was no longer acting for the accused and that Ms. Teillet and Mr. Addario were now counsel.

(17) On February 13, 1996, a Crown's request for an adjournment was adjourned to February 16, 1996. The adjournment was granted on February 16, 1996 and the February 26, 1995 trial date was vacated and the matters were scheduled to return on March 4, 1996. This adjournment had been necessitated by a scheduling conflict on behalf of the then acting Crown.

(18) On March 4, 1996, the matters were put over to March 5, 1996.

(19) On March 5, 1996, the court assigned a trial date for September 30, 1996.

(20) Counsel served a Notice of Constitutional Question on August 29, 1996.

(21) On September 24, 1996, the then Crown counsel argued for an adjournment of this case pending the Ontario Court of Appeal's decision in *Perry v. Ontario*. Judge J.D. Greco granted the Crown's request. His Honour also observed that although counsel for the accused objected to the adjournment request and used the four points in *Askov* (1990), 59 C.C.C. (3d) 449 relating to an application for a stay, they did not request a stay. The court adjourned the matters until January 10, 1997 for the *Perry* decision.

(22) Due to delays in the release of the *Perry* decision, the Powley matters were subsequently adjourned from January 10, 1997 to March 27, 1997 to May 20, 1997 to May 29, 1997 to September 23, 1997 to September 30, 1997 and finally to October 7, 1997. At that time, the trial date of April 27, 1998 was selected.

(23) The Perry decision was released on June 5, 1997.

(24) Mr. Long and Ms. Christie assumed carriage of this case on behalf of the Crown in September of 1997.

(25) The trial finally was started on April 27, 1998.

(26) When the Crown requested an adjournment in order to respond to the expert witnesses tendered by the defence, Ms. Teillet again objected to this request. However, it was not in the context of a stay application but rather a request to deny the adjournment and force the Crown to complete its case.

Section 11(b) of the *Charter* directs that: " Any person charged with an offence has the right to be tried within a reasonable time." One cannot examine the chronology of events in this case and not be cognizant that delay was a live issue. Interestingly enough, and despite Judge Greco's observations on September 26, 1996 and my comments during this trial as to the issue,

an application to stay the proceedings pursuant to s. 11(b) of the *Charter* was never placed before the court for its determination. I am not to be taken as suggesting that counsel for the accused were unaware of the availability of a stay application. On the contrary, defence counsel are very experienced litigators and took great pains to have this case decided on its merits instead of having it stayed thereby allowing the issues raised by the Powleys to be dealt with by appellate division courts.

Counsel were kind enough to draw to the court's attention that the issues in this trial were destined for the Supreme Court of Canada. Consequently, a great deal of research and resources were invested by both the Crown and defence. Since the determination of this case on the merits might very well have a significant impact regarding the clarification of Aboriginal rights of the Metis, I was prepared to curb my concerns regarding the possible remedy open to the Powleys under s. 11(b) of the *Charter*.

As it has turned out, I dismissed the charges against the Powleys for the reasons contained in this judgment. This result in one sense makes the stay issue rather academic. However, I want it clearly understood that under normal circumstances, I would have expected an application to be made for a stay in factual situations similar to the case at bar.

I understand counsels' enthusiasm to expand the legal landscape. However, a the desire to create new jurisprudence should take second place to the best interests of the accused. This comment must be tempered in this particular case by the fact that, in my opinion, the Powleys were willing participants in the quest for a ruling on the merits.

If I had arrived at a different conclusion than I have in the case at bar, I would have seriously looked at the issues surrounding the granting of a stay under all the circumstances.

In spite of the fact that counsel have been mute on the issue of a stay of proceedings based on s. 11 (b) considerations, Mr. Ruby's invitation for the court to consider awarding costs to the defendants on a solicitor and his own client basis remains to be determined.

Before the question regarding costs is addressed, I should examine the circumstances of this case and decide whether I would have been inclined to make an affirmative finding as to a s. 11(b) application.

The basic factors that a court should consider when deciding the applicability of s. 11(b)

include: (1) the length of the delay (b) the reasons for the delay (c) waiver of the delay and (d) prejudice to the accused. See: *Mills v. The Queen* (1986), 26 C.C.C. (3d) 481 and *R. v. Rahey* (1987), 33 C.C.C. (3d))

The length of the delay

It took approximately four and one-half years from the time of the offence and the charges being laid for this matter to get to trial. A summary conviction charge under the *Game and Fish Act* should not take anywhere near this length of time to reach a hearing. In fact, no criminal or quasi-criminal charge should be in the judicial system for over four years before a trial is commenced. Therefore, the first factor has meet more than adequately addressed.

Reasons for the delay and waiver

From October 1993 to September 1996, several contributing factors were at work. These included: change of counsel, scheduling conflicts of counsel, preparation required to prepare for the many issues that were to be argued, and court availability. Consent to the various delays were the order of the day.

Six days prior to the commencement of the trial on September 30, 1996, the Crown brought a motion to adjourn the trial in order to obtain the decision from the Ontario Court of Appeal in *Perry*. This motion was opposed by the defence. Judge Greco granted the adjournment but sounded the warning regarding a possible *Askov* application. Subsequent court appearances were made pending the release of the *Perry* decision. It would be another year before the April 27, 1998 trial date was selected. This time cannot be considered neutral. The Crown must shoulder responsibility for it.

Likewise, I find the Crown responsible for the time that elapsed between the completion of the defence's case and the eventual completion of the evidence. The Crown had ample time to have appropriate expert evidence in place for the April-May time slot. A change of trial tactics is a decision for counsel to make. However, the time that passes in order to allow for such change must be borne by the party making the request. Counsel for the Powleys strenuously opposed the Crown's application.

Prejudice to the accused

I am prepared to find that the cumulative effect of the delays in this case resulted in

prejudice to the Powleys. The stress of any criminal or quasi-criminal allegation must be recognized. Obviously, the charges facing the Powleys are not in the same category as a *Criminal Code* offence but, nevertheless, there is an anxiety factor.

Unlike most Provincial Offence cases, the Powleys have had a great deal of media attention. Therefore the usual anonymity of the *Game and Fish Act* has been replaced by public attention and notoriety.

I find that there has been an unreasonable delay contrary to s. 11(b) of the *Charter*. In fact, I would have granted a stay of proceedings if such a remedy had been asked of me.

Are costs appropriate relief in the circumstances of this case?

The first question that must be answered in deciding whether to award costs is whether I have jurisdiction under the *Provincial Offences Act* to do so. In written submissions under the cover of a letter dated December 1, 1998, Mr. Long relied on the decision of McRae J. in the case of *Ontario v. 974649 Ontario Inc. (1995)*, 25 O.R. (3d) 420 (Ont. Ct. - Gen. Div.) wherein the Court held that the Provincial Division Court lacked the jurisdiction to order costs. At p. 429 of the judgment, McRae observed that:

> " . . . he [the Justice of the Peace] had no jurisdiction, independently of the *Charter*, to grant the remedy sought, that is, an award of legal costs. Although the P.O.A. provides that a justice of the peace may award costs on behalf of a witness, this power is limited by both the statute and the regulations. Furthermore, as stated above, there is no inherent jurisdiction which extends the power of the Provincial Offences Court to permit the award of legal costs. Section 24(1) does not give the Provincial Offences Court or any statutory court new power or authority."

However, Justice McRae's decision was appealed to the Ontario Court of Appeal and that Court rendered its decision on November 13, 1998. The case is cited as *R. v. 974649 Ontario Inc. (c.o.b. Dunedin Construction (1992)*) [1998] O.J. No. 4735.

O'Connor J.A., writing for the Court, reviewed and agreed with the decisions of *R. v. Pang* (1994), 95 C.C.C. (3d) 60 (Alta. C.A.) and *R. v. Jedynack* (1994), 16 O.R. (3d) 612 (Ont. Gen. Div.) and then observed at para. 70 that:

> "Although the jurisdiction of the Provincial Court under the *Criminal Code* to order costs against the Crown which was the basis of the decisions in *Pang* and *Jedynack* is arguably broader than the jurisdiction of the provincial offences court under s. 90(2) of the *POA*, it is nevertheless a very limited and specific statutory jurisdiction. For purposes of s, 24(1),

> I see no reason to distinguish the two situations. I am therefore of the view that s. 90(2) of the *POA* is a sufficient authority upon which to found jurisdiction under s. 24(1) of the *Charter* to order payment of costs by the Crown."

Although I am satisfied that I now have the jurisdiction to award costs, I must satisfy myself that costs are appropriate in the case at bar. In *R. v. Pawlowski* (1993), 12 O.R. (3d) 709, Galligan J.A., in the majority decision noted at p. 713 that:

> ". . . It is evident, therefore, that the decision of Chadwick J. in this case stands as precedent for the award of costs under s. 24(1) of the *Charter*, against the Crown in a criminal proceeding only **in a rare case** that is unique and where it is questionable whether there will ever be a similar prosecution." (My emphasis)

Goodearle J. provided guidance as to when it would be appropriate to award costs in connection with a *Charter* breach in *R. v. Jedynack* (1994), 16 O.R. (3d) 612 (Ont. Ct. (Gen. Div.)) at p. 619-620 as follows:

> " In the meantime it would be my view that such an order should only be made in circumstances where:
> (1) The acts, or failures to act, collectively amount to something well beyond inadvertent or careless failure to discharge a duty;
> (2) Rather the conduct would have to fall within the realm of recklessness, conscious indifference to duty, or whether conscious or otherwise, a marked and unacceptable departure from usual and reasonable standards of prosecution;
> (3) Such conduct must be seen to have resulted in an indisputable and clearly measurable infringement or denial of a right;
> (4) Where the costs order is intended to ensure compliance with an order or show disapproval for conduct which resulted in serious prejudice to the accused it should, as well, be founded in circumstances of clear and obvious compensatory need."

The following instructions at p. 620 in *Jedynack* (supra) also should be kept in mind when the issue of costs is being considered:

> " Nothing even close to a standard of perfection should be imposed on prosecutors who, in this day and age, are overburdened with work and, as was the case here, often largely dependent upon outside resources over which they have little daily control in the development of their cases, which many times impact on the discharge or the manner in which they are able to discharge their duties.
> It would be very much contrary to the best interests of law-abiding society, to allow a policy to develop that in effect allowed costs awards on a routine basis. For such a policy, if ever allowed to blossom, could terribly fetter, even cripple, an orderly and generally competent prosecution process."

I find that the circumstances in the case at bar do not even begin to approach the threshold of conduct as contemplated in *R. v. Jedynack*.

Accordingly, there will be no order as to costs.

DATED AT THE CITY OF SAULT STE MARIE IN THE NORTH EAST REGION THIS TWENTY-FIRST DAY OF DECEMBER 1998.

Charles H. Vaillancourt

Charles H. Vaillancourt

R v. Steve Powley and Roddy Powley (No.3)

ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)

B E T W E E N:	)	
	)	**Bruce W. Long**
	)	**for the Crown**
HER MAJESTY THE QUEEN	)	
	)	**Jean Teillet and C. Clayton Ruby**
-and-	)	**for the Accused**
	)	
Steve Powley and Roddy Powley	)	**Heard: See Powley No. 2**

VAILLANCOURT, CHARLES H., Provincial Division Judge

ADDENDUM TO JUDGMENT

Subsequent to the preparation and reproduction of the judgment *(R. v. Powley and Powley No.2)* and prior to delivery of same, Mr. Long notified defence counsel and myself of the Ontario Court of Appeal's decision with respect to *Ontario v. 974649 Ontario Inc.* (1995), 25 O.R. (3d) 420 (Ont. Ct. (Gen. Div.)). Although I was aware of this decision when I prepared my judgment, I appreciate Mr. Long's integrity in updating his submissions as soon as he became aware of the result of the appeal.

C.H.V.