

THE PROVINCIAL COURT OF MANITOBA

BETWEEN:)
)
 Her Majesty the Queen) Heather Leonoff, Q.C. and
) Michael Conner
) for the Crown
 - and -)
)
 WILLIAM NEAL GOODON) Jean Teillet and Jason Madden
 Accused) for the Accused
)
) Reasons for Decision delivered on the
) 8th day of January, 2009, at the City
) of Brandon, in the Province of Manitoba.

2009 CanLII 630 (MB P.C.)

J. Combs, P.J.

Introduction

[1] The accused is charged under s. 19 of the **Wildlife Act** of Manitoba S.M. c. W 130 with possessing wildlife which was killed in contravention of that **Act**. The accused claims that he has a constitutionally protected right as a Metis to hunt for food under s. 35 of the **Constitution Act**, 1982 and therefore s. 19 of the **Wildlife Act** does not apply to him, containing no reasonable accommodation for his constitutionally protected right.

Facts

[2] The facts are not in dispute and have been presented to the Court by a written Agreed Statement of Facts filed as an exhibit in these proceedings.

[3] The facts are that the accused, on October 19, 2004, shot and killed a ringneck duck at or near the Turtle Mountains in southwestern Manitoba. On October 20, 2004, the accused met with a conservation officer with Manitoba Conservation and admitted that he had in his possession a duck that he had harvested under the authority of a harvesting card issued by the Manitoba Metis Federation and that he knew harvesting the duck contravened the **Wildlife Act** of Manitoba. The accused was charged with unlawful possession of wildlife contrary to s. 19 of the **Wildlife Act** S.M. c. W130 as he did not have a licence to hunt as required by that legislation.

[4] The constitutional question to be determined is:

- a) Is s. 19 of the **Wildlife Act** S.M. c. W130 of no force and effect with respect to the accused in these circumstances by reason of his aboriginal (Metis) rights under s. 35 of the **Constitution Act**, 1982?

[5] This Court is not being asked to determine if Metis peoples have special hunting rights as that has already been determined.

[6] The **Constitution Act**, 1982 in s. 35 provides:

- a) s. 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- b) s. 35(2) In this Act “aboriginal peoples of Canada” includes the Indian, Inuit and Metis people of Canada.

[7] The fact that Metis hunting rights are affirmed and protected under this section of our Constitution was confirmed by the Supreme Court of Canada in **R. v. Powley** [2003] 2 S.C.R. 207. The decision clearly determined, however, that a Metis hunting right only exists in circumstances where that individual is a member of an identifiable Metis community that has been continual and stable at a site that can be specifically identified. In addition, as this is a communal right rather than

an individual right, the practice which is to be protected must be a practice important to that community not only today but prior to European control of that community.

[8] Certain principles have been established by the Court in analyzing aboriginal rights and, in particular, the effect of s. 35(1) of the **Constitution Act**. These principles recognize the purpose of constitutionally recognized aboriginal rights as enunciated in **R. v. Van der Peet** [1996] 2 S.C.R. 507 at paragraph 31:

“What s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affected by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies within the sovereignty of the Crown.”

[9] Our Constitution, in s. 35 recognizes the existence of the unique Metis culture and practices that existed prior the control by European settlers and governments and ensures, as much as reasonably possible, that the Metis be allowed to preserve their culture and carry on their practices without unreasonable government interference.

[10] Therefore, in interpreting s. 35(1) the Supreme Court in **R. v. Sparrow** [1990] 1 S.C.R 1074 at paragraph 56, it is suggested that it be done in a “purposive way” with a “generous, liberal interpretation of the words in the constitutional provision”. The provisions must be interpreted and applied in a manner that recognizes and preserves the interests that are being protected. This was described by McLachin, J (as she then was) in **R. v. Van der Peet** (supra) as the right to use the land and adjacent waters as the people had traditionally done for its

subsistence. Any doubt about the interpretation or application of any provisions whether they be in statutes or treaties, should be resolved in favour of the Aboriginal right being claimed.

[11] It is equally clear that any legislation which significantly impairs a Metis person from exercising a right granted under s. 35 will be deemed to be an infringement and, absent reasonable justification, is of no force and effect against that individual. In **R. v. Adams** [1996] 3 S.C.R. 101 at paragraph 54, Chief Justice Lamer on behalf of the Court stated:

“In light of the Crown’s unique fiduciary obligations toward aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulation must outline specific criteria for the granting of discretion which seeks to accommodate the existence of the aboriginal rights.”

[12] With this backdrop, the Supreme Court in **Powley** developed a ten-part test to determine where a constitutionally protected Metis right has been unreasonably infringed. That test is as follows:

- (1) Characterization of the Right
- (2) Identification of the Historic Rights-Bearing Community
- (3) Identification of the Relevant Time Frame
- (4) Identification of the Contemporary Rights-Bearing Community
- (5) Verification of the Claimant’s Membership in the Relevant Contemporary Community

(6) Determination of Whether the Practice is Integral to the Claimant's Distinctive Culture

(7) Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted

(8) Determination of Whether or Not the Right was Extinguished

(9) If there is a Right, Determination of Whether There is Infringement

(10) Determination of Whether the Infringement is Justified

[13] I will apply this test to the facts and circumstances of this case.

Characterization of this Right; Identification of the Historic Rights-Bearing Community

[14] The first step is to characterize the right being claimed which has to be clearly set out and needs to be site specific.

[15] The nature of the right being claimed is not in dispute. The accused harvested a duck in the Turtle Mountain region of Southwestern Manitoba and it is accepted that the purpose of the harvesting was for food. The issue in dispute is how the site or area where the right is claimed should be defined.

[16] At this point, it is important to note and distinguish between two site specific elements of the **Powley** test. Firstly, the right being claimed has to be site specific. Secondly, in identifying the historic rights-bearing community, the geographic extent of that community will have to be identified. These are two different components of the **Powley** test and may result in two different geographic areas. For instance, the site of the right being claimed may be within the historic rights-bearing community but may not include the entire area. The right being claimed in

this case is hunting and the “site” specific “requirement of the test is where the hunting actually occurred.”

[17] At the commencement of this trial, the accused asserted that right being asserted by him was the right to hunt in the environs of the Turtle Mountains.

[18] The Turtle Mountains or Mountain is more accurately described as a hill that rises to a maximum of approximately one thousand feet above the surrounding prairie. It is located partially in southwestern Manitoba and straddles the Canadian-United States border. The “mountain” covers an area of about ten miles north-to-south on each side of the border and approximately thirty five miles east-to-west. The environs of the Turtle Mountains on the Canadian side of the border would include an area encompassing the communities of Deloraine, Boissevain, and Killarney, all in Manitoba.

[19] At the conclusion of the evidence, the accused suggested that the appropriate site for the hunting right claimed should be much more extensive and should include an area described as the Northwest. Evidence was presented that the Northwest is the term that was used by the fur traders and voyageurs to describe the area north and west of central Canada and includes almost all of the provinces of Manitoba, Saskatchewan, and Alberta, the southern Canadian territories and northwestern Ontario. Dr. Frank Tough, an expert in history, who gave evidence on behalf of the Defence described the Northwest as:

“The Northwest here is similar to what used to be referred to as The Northern Department of the Hudson’s Bay Company, which was made up of a number of regional Hudson’s Bay Company districts. Today it would include the west, the western sub-Arctic of the northern plains; it would include the southern area of the Mackenzie District, or the Northwest Territories as we know it today, north of 60, Alberta, Saskatchewan and Manitoba, and northwestern Ontario.

Northwest is a perspective, a geographical perspective really sort of from Montreal or Toronto or Ottawa, because they were looking in that direction and that's what they're referring to. People here don't see themselves as being northwest per se, and it's here where they are, so it's a view that comes out of the fur trade, the Montreal fur trade, the voyageurs, that they're heading off to the "Northwest." So it's that region that's north and west of Central Canada."

(Trial Transcripts – June 21, 2007 pg 33-34)

[20] I am not prepared to accept this position for two reasons. Firstly, the evidence has been presented and witnesses examined on the understanding that the right being claimed is the right to hunt at Turtle Mountain. Much of the evidence presented was based on the history, customs and practices of Turtle Mountain. While I accept that the interpretation and application of questions and issues related to aboriginal law are to be done liberally and, where reasonable, to the benefit of the claimant, it would be unfair to dramatically change the site of the right being sought at the conclusion of the evidence. The Crown would be unfairly prejudiced if I were to do so.

[21] Secondly, the right being sought is to relate to a specific tract of land where the practice has occurred; re: where the hunting occurred. In this instance, while much evidence was presented concerning traditional Metis territory and the fact that the Metis peoples are traditionally hunters, the evidence discloses that the Turtle Mountain and surrounding area is a distinct geographic area used by Metis people for certain traditional practices, including hunting. The hunting occurred at the Turtle Mountains and the appropriate site to be considered is the environs of the Turtle Mountains.

[22] The right being claimed by the accused is the right to hunt for food at the Turtle Mountains and its environs.

[23] In order for a present-day Metis hunting right to exist, the accused is compelled to demonstrate that a rights-bearing community of Metis existed at the site in issue at the time of effective European control. This involves a resolution of three separate questions:

- a) What is a rights-bearing community?
- b) What are the geographic limits of that community?
- c) When was the effective date of European control and did the community exist at that time?

[24] Determining the rights-bearing community is essential as the right claimed is collective and is site-specific. Community as it relates to Metis people has been defined by the Supreme Court in **Powley**, at paragraph 12 as follows:

“A Metis community can be defined as a group of Metis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life.”

[25] The Metis of southern Manitoba were a creation of the Canadian fur trade. In the eighteenth century both the Hudson Bay Company and the Northwest Company created a series of trading posts for the purpose of enhanced trading with the Native bands. Inevitably, there were marital or common law unions between the European traders and Native women resulting in a distinct Metis culture. We heard from Gwyneth Jones, an expert presented by the accused, that this mixed ancestry group started to be described in approximately 1816 as a group distinct from the Europeans and from the Natives. They began to be considered as a group that was interconnected with both aboriginal and European societies but separate and distinct from both. Ms. Jones quotes William McGillvray as Northwest Company Partner as stating in 1815:

“...the Half Breed Indians, a daring and now numerous race sprung from the intercourse of the Canadian Voyageurs who consider themselves the Possessors or the Country and Lords of the soil.”

(Jones Report Footnote 67)

[26] Ms. Jones opined that this group:

“had an agenda of their own, that they had interests of their own that they would be willing to defend but they would not be put out of their way to defend somebody else’s interests if they didn’t really see the purpose of it.”

(Trial Transcript – Nov 17, 2006 p 112 line 3-7)

[27] The accused also presented evidence from Dr. A.J. Ray who was accepted as an expert in the economic history of aboriginal and Metis people. He described the Metis people as:

“Culturally distinct from both the First Nations and the Europeans. They were not – they were interconnected with both but they were seen as separate from.

...these are people that have a self-identity, and cultural practices that other people see, setting them apart.”

(Trial Transcript Oct 26, 2006 pg 65 and pg 74)

[28] Dr. Ray, in his report, has given a brief description of the economic patterns of the Metis prior to European control which I will summarize.

[29] The Metis were historically employed by both companies engaged in the fur trading industry, being the Hudson’s Bay Company and the Northwest Company and by the early nineteenth century became the major component of the work force of both companies. The Metis also became extensively involved in the buffalo hunt at about the same time. The Metis, however, established a clear identity within the work force as they became diversified economically; living off the land in Aboriginal fashion combined

with other economic pursuits such as labourers, entrepreneurs and also as small scale farmers. (Ray Report – pg. 35)

[30] In 1821 the Hudson’s Bay Company and the Northwest Company merged and, as a result, many former employees were without work. Many of the Metis found other work such as becoming independent traders or “freemen” or working with the Plains First Nations as suppliers of provisions for the Hudson’s Bay Co. employees and those who settled near the Red River at the Selkirk Settlement. Many of the inhabitants at the Selkirk Settlement were Metis who had retired from the fur trade.

[31] During the early nineteenth century the Metis of the Red River were also engaged in the annual buffalo hunts. The hunts occurred to the southwest of the Red River settlement and, as the herds declined and retreated, the distance travelled to the hunts increased. In the mid nineteenth century, the Metis became involved in the robe and hide trades which was an increasingly popular product of the buffalo hunt. The best hides for these purposes were harvested in the winter.

[32] As a result, therefore, of the retreating herds of buffalo and the increase in the robe and hide trade, the Metis hunters and traders established winter encampments in sheltered areas of the grasslands.

[33] One of the earliest wintering sites for the Metis of the Red River and St. Francois Xavier (upstream on the Assiniboine River from Red River) was the Turtle Mountains. There is evidence of Metis joining First Nations people at Turtle Mountains as early as 1820. Trading posts were established on the American side of the Turtle Mountains and Metis settled permanently in the area in the 1840’s. (Ray Report – pg. 74) In the 1850’s and 1860’s many Metis from Red River and Pembina (on the Red River at the US

border) centered their economic life around wintering sites such as Turtle Mountain, organizing summer buffalo hunts, practicing small scale agriculture, receiving education and religious services from Roman Catholic Priests, and engaging in the winter buffalo robe trade. It is also clear that during this time period there is no evidence of any permanent settlement either in the Turtle Mountains or adjacent to the Canadian side of the Mountains.

[34] It is clear that the history experts presented by the defence describe the Metis as generally a transient people with a community that would be described as regional. Dr. Ray at page 18 of his report opines as follows:

“A local Metis community could be present at more than one settlement in a particular region. In other words, the Metis regional community was not defined by the boundaries of a single settlement.”

[35] Dr. Gwyneth Jones describes the Metis as “frequenter of the plains” led a nomadic life going to summer and winter hunts and from one place to another on the prairies. The Metis often established temporary shelters, usually located in river beds or wooded elevated areas where game was plentiful and allowed them to survive the winter. Often these people would return to established settlements such as Pembina and Red River during summer to solemnize their marriages, baptize their children, or bury their dead. (Gwyneth Jones testimony – Nov 15/06)

[36] As the Metis were transient people, they also gravitated between numerous small pockets of settlement that may or may not have remained permanent. Examples in southern Manitoba were Pembina, Fort Ellice, Fort Brandon, and Oak Lake, with numerous other examples just across the border in the United States. It is clear that the same families periodically inhabited many of these locations and the interaction between the

communities was constant. In the opinion of Dr. Jones this interrelated group occupied much of southern Manitoba west and south of the Red River Settlement down into the United States and to the west over the present Saskatchewan border, obviously including Turtle Mountain. (Gwyneth Jones Testimony – May 5/07 pg 63) Dr. Ray agreed with this description of what he called the Metis regional community.

(Dr. Ray Testimony – Oct 19/06 pg34-35)

[37] The Crown points out rightfully that there is little evidence presented establishing a consistent Metis presence in the Turtle Mountain area between 1850 and the late 1870's. The buffalo hunt had petered out so the need for wintering sites was lessened. The Northwest Boundary Commission travelled directly through Turtle Mountain and spent approximately a year there in 1873. The expedition found no evidence of a Metis settlement and the reports do not refer to any contact with Metis people. It was pointed by Dr. Clint Evans, an expert called by the Crown, that there was no evidence of a "settlement" at Turtle Mountain prior to 1870. Dr. Evans gave the opinion that while there is evidence that Turtle Mountain was used extensively as a wintering site between the 1820's and the 1850's there is no evidence of an enduring settlement prior to 1870. (Evans Report – pg 71)

[38] Evidence before the Court included Metis scrip applications mostly dated between 1894 and 1900. When applying for scrip, people who identified themselves as Metis would often describe where they presently resided and had previously resided, where they were born and where their children were born. These documents disclose only four births in Turtle Mountain during the decade of 1860's. This finding could lead to numerous conclusions as follows:

a) Turtle Mountain was only a place that people travelled through and not often;

b) The fact that any births occurred there shows it was a place people travelled often;

c) It is likely that many more births occurred in Turtle Mountain to Metis who did not disclose such on their scrip applications or did not or were not able to make such applications in 1885 or 1900.

[39] The scrip application also disclosed that by 1885 thirty one Metis families describe their residence as being at Turtle Mountain.

[40] Gwenyth Jones also refers to the 1881 Canadian Census in which 17 family heads are described as residing at Turtle Mountain. (Jones Reply Report – pg 2)

[41] This information suggests to me that there was Metis settlement in existence at Turtle Mountain at least in the early 1880's and I am prepared to infer that such a census result would suggest it was likely that such settlement existed for some years prior to the census.

[42] Having received opinions that the Metis community encompassed most of what is now southern Manitoba west of the Red River, one has to determine whether the community is consistent with the Supreme Court definition in **Powley**. Did the Metis population in this community have a “distinctive collective identity” and “share a common way of life?”

[43] We have referred to and heard much evidence about the mobility of the Metis people within the region and also the fact that much of the Metis population was interrelated. We have also received evidence that as early as 1815 and increasingly so thereafter, the Metis are described as being distinct

from First Nations people and from Europeans with their own way of life and their own culture.

[44] Although the Metis were economically diverse people, they are defined by two consistent and evident characteristics; they are hunters and they are mobile. While the Europeans engaged in agriculture and related activities, the Metis were always described by historians as hunters. In 1868, Bishop Tache of Red River noted in 1868 that, “The greatest social crime of our French half-breeds is that they are hunters”. (Gwyneth Jones Testimony – Nov 18,06 pg 44)

[45] Dr. Ray in his evidence pointed out that Metis economic life depended on migration and mobility. “Movement was a central feature of Metis culture”. (Ray Report – pg 80)

[46] The Metis community of Western Canada has its own distinctive identity. As the Metis of this region were a creature of the fur trade and as they were compelled to be mobile in order to maintain their collective livelihood, the Metis “community” was more extensive than, for instance, the Metis community described at Sault Ste. Marie in **Powley**. The Metis created a large inter-related community that included numerous settlements located in present-day southwestern Manitoba, into Saskatchewan and including the northern Midwest United States.

[47] This area was one community as the same people and their families used this entire territory as their homes, living off the land, and only periodically settling at a distinct location when it met their purposes.

[48] Within the Province of Manitoba this historic rights-bearing community includes all of the area within the present boundaries of southern Manitoba from the present day City of Winnipeg and extending south to the

United States and northwest to the Province of Saskatchewan including the area of present day Russell, Manitoba. This community also includes the Turtle Mountain area of southwestern Manitoba even though there is no evidence of permanent settlement prior to 1880. I conclude that Turtle Mountain was, throughout much of the nineteenth century, an important part of the large Metis regional community.

Identification of the Contemporary Rights-Bearing Community

[49] Metis rights are communal and are grounded in the existence of an historic and present day community and the claimant must prove his “ancestrally based membership in the present community”.

[50] In **Powley** it was recognized that, as a result of European control, the Metis community was changed and interfered with but not eliminated. The Metis at Sault Ste Marie generally moved away from the community itself and generally settled onto nearby Indian Reserves or further into the regions. The Metis were more spread out but continued their traditional practices of hunting, fishing, trapping and harvesting of resources. Even though the nature of the community had changed, the practices of the members continued and supported the notion that the “community” existence was continuous.

[51] In this case, most of the evidence presented by Mr. Goodon centered around the community at Turtle Mountain and its surrounding area. However, much evidence was also presented about the Metis community in southwestern Manitoba generally.

[52] The Metis community today in Manitoba is a well organized and vibrant community. Evidence was presented that the governing body of Metis people in Manitoba, the Manitoba Metis Federation, has a

membership of approximately 40,000, most of which reside in southwestern Manitoba.

[53] Evidence was presented that the nature of the Metis community has changed since European control. While the Metis continue to have a dominant presence in such communities as Russell, St. Lazare, St. Laurent, St. Eustache, St. Francois Xavier, and Turtle Mountain, other communities have become larger centers and the Metis population has proportionally decreased. When Manitoba became a province in 1870, its population was primarily Metis. That is no longer the case.

[54] The Defence presented numerous community witnesses who identified themselves as Metis. While most of these witnesses were residents or had ties to Turtle Mountain, many were residents of other areas of southwestern Manitoba and described the strength of the Metis community in their area. Evidence was presented that locals of the Manitoba Metis Federation are scattered throughout southwestern Manitoba. To be a member of the Manitoba Metis Federation, individuals have to declare themselves to be Metis, prove their Metis genealogy, and be supported by at least ten current members of the Federation.

[55] In particular, we heard about the Turtle Mountain local of the Manitoba Metis Federation. At present there are 110 – 115 members and the local is very active. A new meeting hall has just been built and the organization is growing.

[56] While the Metis community has changed, much of its traditions continue. All community witnesses gave evidence of their involvement with aspects of a distinct Metis culture. In particular we heard descriptions of Metis dress, music, dance, oral history and storytelling, and food. We also

heard about the attempts to preserve and emphasize the importance of the Metis language, being Michif. A community witness Norman Fleury, described his knowledge of the Michif language and the personal attempts he is making to teach the language to Metis people. We heard that he is giving Michif language lessons at Turtle Mountain.

[57] A universal theme of virtually all the Metis witnesses was their continued relationship with the land and the importance of hunting in their lives. In particular, those community witnesses who still live in Turtle Mountain generally depend to a great extent on the harvesting of the land by hunting, fishing, trapping or gathering to provide their food. The Metis tradition of hunting, was emphasized as an important part of the lives of many of the Metis witnesses.

[58] I conclude that there remains a contemporary community in southwest Manitoba that continues many of the traditional practices and customs of the Metis people.

Verification of Membership in the Relevant Contemporary Community

[59] In **Powley**, the Supreme Court confirmed that an individual has to establish that he or she is part of a contemporary rights-bearing community. The Court suggested that Metis are organizing themselves and establishing standardized criteria for membership and that memberships in that organization may be sufficient.

[60] There are three components to membership in the contemporary community: self-identification, ancestral connection, and community acceptance. The claimant must self-identify as Metis and this self-identification should be shown to be persistent and not just conveniently asserted to claim a hunting right. The claimant must present ancestral

connection to the rights-bearing community. While it is clear the claimant must prove an ancestral connection to the community, it is uncertain whether this ancestral link has to predate European control. The claimant must also demonstrate acceptance by the historic community. This can be demonstrated by ongoing participation in the “shared culture, in the customs and traditions that constitute a Metis community’s identity”.

[61] In the case of Mr. Goodon he gave evidence and confirmed that he self-identifies as Metis. He has chosen to join the Manitoba Metis Federation and has been active in the organization since 1994. His assertion that he is Metis is sincere and not recent.

[62] Mr. Goodon has presented genealogical evidence that disclose six generations of Metis ancestry showing a connection to Manitoba Metis prior to the establishment of the Province of Manitoba. The claimant is a descendant of Cuthbert Grant Sr., a historical Metis leader. There is no doubt that Mr. Goodon has an ancestral connection to the historic and contemporary Metis community.

[63] Mr. Goodon has been accepted by the contemporary rights bearing community. His application to become a member of the Manitoba Metis Federation in 1994 required the support of ten current members of the organization. Mr. Goodon has remained active in the Manitoba Metis Federation and continues to be accepted by its members as Metis.

[64] Even though Mr. Goodon now resides in Brandon he still considers himself to be from the bush (Turtle Mountain) and still hunts on a regular basis. He continues to engage in other cultural practices and activities that identify him as Metis.

[65] It is clear that Mr. Goodon has historic ancestral ties to the rights bearing community which pre-date European control. It is equally clear that he self-identifies as Metis and continues to be an active member of the contemporary Metis community.

Identification of the Relevant Time Frame

[66] As set out above, the protection of aboriginal rights is premised in a determination of pre-existing practices that have been impacted by “the sovereignty of the Crown”. As Metis people did not exist prior to contact with native people, the relevant time frame for determining whether a custom or practice is constitutionally protected is the date of effective European control. At what point did European laws and customs exert effective control over traditional Metis practices, customs, and traditions?

[67] In **Powley**, European control was determined to be the period when settlement was encouraged and treaties were negotiated to allow the development of the region. In that case the Court determined that “effective control” of the area had passed from the Aboriginal peoples to European control in the period between 1815 and 1870. Obviously the Court determined that a relatively lengthy period of time can be identified as the relevant time period.

[68] Settlement occurred at Red River perhaps as early as 1810 with the establishment of Fort Gibraltar, a Northwest Company Post. The settlement expanded gradually and certain events occurred in which Europeans imposed or attempted to impose control over the territory primarily inhabited by the Metis and already identified as the rights-bearing community.

[69] Some of those events were as follows:

a) In 1811 Lord Selkirk purchased 116,000 acres of territory from HBC in the Red and Assiniboine River basins to establish a settlement for Scottish settlers. They arrived at the Forks (junction of the Red and Assiniboine Rivers) in 1813 and river lots were surveyed and a fort was constructed. This is a significant event as the settlement was not established as a fur trading post but was intended to be a permanent settlement.

b) The new settlement tried unsuccessfully to impede Metis hunting rights by restricting the hunting of buffalo on horseback. With the backing of the North West Company, the Metis, under the leadership of Cuthbert Grant, resisted the imposition of any control by the new settlement. In 1816, the Metis, under Cuthbert Grant captured Ford Brandon, a Hudson Bay Company post and then drove the settlers from the Forks after the Battle of Seven Oaks on June 19, 1816.

c) Lord Selkirk returned to the Forks in 1817 and re-established the settlement. He was able to maintain peace with the Metis population and no further evacuations were necessary. The Metis were content to have the settlement exist as it offered a market for their goods as long as the settlers did not interfere with their practices and customs.

d) The merger of the Hudson's Bay Company and the North West Company in 1821 had a significant effect on the lives of the Metis. As a result of the merger many employees lost their jobs and many trading posts were closed. Many Metis settled near the Forks and Cuthbert Grant himself settled at St. Francois Xavier, just west of the Forks on the Assiniboine River. Grant was given a licence by George Simpson, the appointed HBC Governor, to hunt over an extensive territory including the Turtle Mountains.

e) In 1821, in conjunction with the merging of the two fur-trading companies, the British Parliament passed an Act for regulating the Fur Trade and establishing a Criminal and Civil Jurisdiction within certain parts of North America. This provided for the imposition of the laws of England in the “Indian Territories” and gave the Courts of Upper Canada Jurisdiction. In the 1830’s laws were passed at the Red River settlement effecting hunting and fishing and reported Court judgments from the settlement started in the 1840’s. It is not clear that any of these laws and regulations had much impact on life outside of the Red River settlement. The Metis continued with their pattern of engaging in the buffalo hunt and would be gone from the settlements much of the year. As the buffalo herds decreased they also moved further away from the settlements near the Red River. By the 1830’s the buffalo were gone from the Fort Brandon area and by the 1860’s were no longer near Fort Ellice. At this time the Metis were travelling to the northern United States and Saskatchewan to find buffalo to hunt. The Turtle Mountains remained an important site for the Metis to establish wintering camps and hunt for other wildlife and game while engaged in the hunt.

f) The Metis continued through the mid 19th century to resist the imposition of European control. In 1849 a Metis named William Sayer was tried for illegally trading furs in Rupert’s Land. A large group of Metis surrounded the Court building and, while Sayer was convicted, he received no punishment. The Metis treated this as a victory and continued to trade freely, ignoring any law prohibiting such action. All indications are that the Metis population considered themselves immune to European control. In 1856 HBC governor Simpson wrote:

“To a man the rising generation of Half-breeds may be set down as opposed to the Company’s rule,

which they consider adverse to their best interests...feeling that the soil, the trade and the Government of the country are their birth rights. These visions, we believe, are instilled in their minds not only by the American traders but by the Clergy of both persuasions, and have led to a state of things which occasions us serious uneasiness as to our capability of maintaining the peace of the country while it paralyzes the action of the authorities, who have no hope of carrying out any mission, however necessary for the welfare of the colony, except by so modifying them as to make them profitable to the people... (Simpson to Committee of Hudson's Bay Company) pg 734 (Doc #231)

It is clear that although the Europeans had control over their European settlers, their control over the Metis was entirely subject to their acquiescence. In other words, they had no effective control.

g) In 1869 it was rumored that Rupert's Land was going to be sold by the Hudson's Bay Company to the Canadian Government. The Government sent out a group of surveyors to start surveying the to-be-acquired territory. The surveyors were met at a location now part of present-day Winnipeg and told they were not going to survey land which was "the property of French half-breeds." Shortly thereafter, Louis Riel formed a provisional government which included the settlement at Red River and negotiated with the Government of Canada the creation of the Province of Manitoba.

h) On July 15, 1870, the Government of Canada created the Province of Manitoba which provided for the transfer of 1,400,000 acres to the unmarried children of "half breed families." This new province included only a small part of present day Manitoba and did not include the area around Turtle Mountain. It has become to be known as the "postage stamp"

province. Manitoba census of 1870 showed that the population of 12,228 consisted of 9,840 Metis or about 82%. After 1870 settlement of the area proceeded rapidly and the dominance of the Metis population decreased rapidly.

i) After 1870, treaties between the Government of Canada and Indian tribes resulted in the rest of what is now southern Manitoba being available for settlement. The Dominion Lands Act was passed in 1872 which provided for the surveying of this new territory and settlement of the area occurred by the early 1880's. At this point the traditional Metis practices and customs were impacted by the influx of European settlers. The evidence therefore discloses that, although attempts were made to control the customs, practices, and economic life of the Metis prior to 1870, these attempts were largely ineffective. Effective European control did not occur in the "postage stamp" Province of Manitoba until it actually became a province in 1870 and the remainder of what is now southern Manitoba thereafter with effective control in place by around 1880.

Determination of Whether the Practice is Integral to the Claimant's Distinctive Culture

[70] In order for an aboriginal or Metis right to be constitutionally protected, it must be a practice that was integral to the rights bearing community prior to European control.

[71] All of the experts, who gave evidence in these proceedings, including the Crown expert, confirmed that hunting and harvesting for food was integral to the Metis culture in southwestern Manitoba. Much evidence was presented concerning the Metis practice of embarking upon the hunt for buffalo for up to three times annually and returning to sell their bounty to the

employees of the fur trade and later to the settlers. These practices continued to the time of European control and were an integral part of the life of the Metis.

Continuity Between the Historic Practice and the Contemporary Right Asserted

[72] The Supreme Court in **Powley** confirmed that s. 35 in a “commitment to protecting practices that were historically important features of particular aboriginal communities.” The right should only be protected if it continues to be an important practice of the present day community.

[73] Much of the evidence presented by the accused related to the present day and historical hunting and harvesting practices at Turtle Mountain. Many community witnesses (some related to the accused) gave evidence about their ancestors hunting at the Turtle Mountains from the 1800’s to the present day. We also heard that hunting, fishing, trapping and harvesting of resources from the land have been important practices for the Metis throughout southwestern Manitoba. The accused’s grandfather started hunting in the Turtle Mountains in the early 1900’s. His father has hunted in this area for seventy years and the accused has done so for most of his life. Even though he now lives near Brandon, he still returns regularly to Turtle Mountain to hunt.

[74] Hunting for food was at the time of European control an important practice of the Metis community of southwestern Manitoba and, in particular, Turtle Mountain and continues to be to the present.

Determination as to Whether or Not the Right was Extinguished

[75] I have determined that the rights-bearing community is an area of southwestern Manitoba that includes the City of Winnipeg south to the U.S. border and west to the Saskatchewan border. This area includes the Turtle Mountains and its environs.

[76] The Crown argues that Metis hunting rights have been extinguished within the “postage stamp” Province of Manitoba by the **Manitoba Act** of 1870. The Crown further submits that if part of the rights-bearing community rests within the “postage stamp” province, the rights of the entire community are extinguished. I disagree.

[77] The hunting in question occurred at Turtle Mountain and the question before the Court is whether the accused has a constitutionally protected right to hunt at Turtle Mountain. The hunting here occurred outside of the “postage stamp” province and the **Manitoba Act** has no application to any territory outside of the original Province of Manitoba. The **Manitoba Act** did not and does not have any effect on any activities that occur at Turtle Mountain.

[78] The Crown concedes that the onus is on it to prove extinguishment and, as there has been no evidence presented regarding the extinguishment of Metis hunting rights at Turtle Mountain or its environs, the Crown has not met its onus and extinguishment is not proven.

If there is a Right, A Determination as to Whether there is an Infringement

[79] The issue for determination is whether compelling the accused to obtain a provincially generated licence to hunt is an infringement of his constitutional rights.

[80] The Supreme Court of Canada in **Sparrow** suggests there has been infringement if the right has been interfered with and three questions have to be asked to determine that issue. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders their preferred way of exercising that right?

[81] The limitation is *prima facie* unreasonable as it makes no accommodation for the Metis hunter. The **Wildlife Act** contains no reference to Metis people and makes no attempt to accommodate a constitutionally enshrined right. The Metis population is subject to the same regulations as others which means their hunting season is restricted, the quantity of food they can harvest is restricted without any consideration of their needs, and they must pay the same fees for hunting privileges. Metis people, like others, are properly subject to reasonable restrictions concerning safety and conservation, but the legislative regime has to reasonably accommodate their protected right. Here there is no attempt to do so which makes the regulations of the **Wildlife Act** concerning licencing to hunt unreasonable.

[82] For the same reasons I would find that the legislation imposes undue hardship and denies the Metis their preferred way of exercising the right to hunt.

Determination of Whether the Infringement is Justified

[83] The Crown has presented no evidence justifying any infringement of Metis hunting rights in the Province of Manitoba and, in particular, at Turtle Mountains.

[84] As indicated earlier restrictions on hunting can be justified for conservation and safety reasons. In this case the Crown has not attempted to provide that justification.

Conclusion

[85] I conclude as follows:

- a) The accused is a Metis person within s. 35(2) of the **Constitution Act** and has an aboriginal right to hunt for food.
- b) That s. 19 of the **Wildlife Act**, as it read on October 19, 2004, is of no force and effect with respect to the accused, in the circumstances of this case, by reason of his rights under s. 35 of the **Constitution Act**.
- c) The charge against the accused is dismissed.

DATED at the City of Brandon, in Manitoba, this day of , 2008.

_____, **P.J**