

R. v. Powley, [2003] 2 S.C.R. 207, 2003 SCC 43

Her Majesty The Queen

Appellant/respondent on cross-appeal

v.

Steve Powley and Roddy Charles Powley *Respondents/appellants on cross-appeal*

and

**Attorney General of Canada, Attorney General of Quebec,
Attorney General of New Brunswick, Attorney General of Manitoba,
Attorney General of British Columbia, Attorney General for Saskatchewan,
Attorney General of Alberta, Attorney General of Newfoundland
and Labrador, Labrador Métis Nation, a body corporate, Congress of
Aboriginal Peoples, Métis National Council (“MNC”), Métis Nation
of Ontario (“MNO”), B.C. Fisheries Survival Coalition, Aboriginal Legal
Services of Toronto Inc. (“ALST”), Ontario Métis and Aboriginal
Association (“OMAA”), Ontario Federation of Anglers and
Hunters (“OFAH”), Métis Chief Roy E. J. DeLaRonde, on behalf
of the Red Sky Métis Independent Nation, and North Slave Métis
Alliance**

Interveners

Indexed as: R. v. Powley

Neutral citation: 2003 SCC 43.

File No.: 28533.

2003: March 17; 2003: September 19.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour,
LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

Constitutional law — Aboriginal rights — Métis — Two members of a Métis community near Sault Ste. Marie charged with hunting contrary to provincial statute — Whether members of this Métis community have constitutional aboriginal right to hunt for food in environs of Sault Ste. Marie — If so, whether infringement justifiable — Constitution Act, 1982, s. 35 — Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1).

The respondents, who are members of a Métis community near Sault Ste. Marie, were acquitted of unlawfully hunting a moose without a hunting licence and with knowingly possessing game hunted in contravention of ss. 46 and 47(1) of Ontario's *Game and Fish Act*. The trial judge found that the members of the Métis community in and around Sault Ste. Marie have, under s. 35(1) of the *Constitution Act, 1982*, an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting legislation. The Superior Court of Justice and the Court of Appeal upheld the acquittals.

Held: The appeal and cross-appeal should be dismissed.

The term "Métis" in s. 35 of the *Constitution Act, 1982* does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life. The purpose of s. 35 is to protect practices that were historically

important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture. In applying the *Van der Peet* test to determine the Métis' s. 35 entitlements, the pre-contact aspect of the test must be adjusted to take into account the post-contact ethnogenesis and evolution of the Métis. A pre-control test establishing when Europeans achieved political and legal control in an area and focusing on the period after a particular Métis community arose and before it came under the control of European laws and customs is necessary to accommodate this history.

Aboriginal rights are communal, grounded in the existence of a historic and present community, and exercisable by virtue of an individual's ancestrally based membership in the present community. The aboriginal right claimed in this case is the right to hunt for food in the environs of Sault Ste. Marie. To support a site-specific aboriginal rights claim, an identifiable Métis community with some degree of continuity and stability must be established through evidence of shared customs, traditions, and collective identity, as well as demographic evidence. The trial judge's findings of a historic Métis community and of a contemporary Métis community in and around Sault Ste. Marie are supported by the record and must be upheld.

The verification of a claimant's membership in the relevant contemporary community is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community. Self-identification, ancestral connection, and community acceptance are factors which define Métis identity for the purpose of claiming Métis rights under s. 35. Absent formal identification, courts will have to ascertain Métis identity on a case-by-case basis taking into account the value of community self-definition, the need for the process of identification to be objectively verifiable and the purpose of the

constitutional guarantee. Here, the trial judge correctly found that the respondents are members of the Métis community that arose and still exists in and around Sault Ste. Marie. Residency on a reserve for a period of time by the respondents' ancestors did not, in the circumstances of this case, negate their Métis identity. An individual decision by a Métis person's ancestors to take treaty benefits does not necessarily extinguish that person's claim to Métis rights, absent collective adhesion by the Métis community to the treaty.

The view that Métis rights must find their origin in the pre-contact practices of their aboriginal ancestors must be rejected. This view in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). The historical record fully supports the trial judge's finding that the period just prior to 1850 is the appropriate date for finding effective European control in the Sault Ste. Marie area. The evidence also supports his finding that hunting for food was integral to the Métis way of life at Sault Ste. Marie in the period just prior to 1850. This practice has been continuous to the present.

Ontario's lack of recognition of any Métis right to hunt for food and the application of the challenged provisions infringes the Métis aboriginal right and conservation concerns did not justify the infringement. Even if the moose population in that part of Ontario were under threat, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs. Further, the difficulty of identifying members of the Métis community should not be exaggerated so as to defeat constitutional rights. In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and

priority allocations. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt.

While the Court of Appeal had jurisdiction to issue a stay of its decision, which has now expired, no compelling reason existed for issuing an additional stay.

Cases Cited

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1).

Authors Cited

Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4. Ottawa: The Commission, 1996.

Lytwyn, Victor P. “Historical Report on the Métis Community at Sault Ste. Marie”, March 27, 1998.

Morrison, James. “The Robinson Treaties of 1850: A Case Study”. Study prepared by the Royal Commission on Aboriginal Peoples.

Ontario. Ministry of Natural Resources. *Interim Enforcement Policy on Aboriginal Right to Hunt and Fish for Food*. Toronto: The Ministry, 1991.

Peterson, Jacqueline. “Many roads to Red River: Métis genesis in the Great Lakes region, 1680-1815”. In Jacqueline Peterson and Jennifer S. H. Brown, eds., *The*

New Peoples: Being and Becoming Métis in North America. Winnipeg: University of Manitoba Press, 1985, 37.

Ray, Arthur J. “An Economic History of the Robinson Treaties Area Before 1860”, March 17, 1998.

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (2001), 53 O.R. (3d) 35, 196 D.L.R. (4th) 221, 141 O.A.C. 121, 152 C.C.C. (3d) 97, [2001] 2 C.N.L.R. 291, 40 C.R. (5th) 221, 80 C.R.R. (2d) 1, [2001] O.J. No. 607 (QL), affirming a decision of the Superior Court of Justice (2000), 47 O.R. (3d) 30, [2000] 1 C.N.L.R. 233, upholding a judgment of the Ontario Court (Provincial Division), [1999] 1 C.N.L.R. 153, 58 C.R.R. (2d) 149, [1998] O.J. No. 5310 (QL). Appeal and cross-appeal dismissed.

Lori R. Sterling and Peter Lemmond, for the appellant/respondent on cross-appeal.

Jean Teillet and Arthur Pape, for the respondents/appellants on cross-appeal.

Ivan G. Whitehall, Q.C., Michael H. Morris and Barbara Ritzen, for the intervener the Attorney General of Canada.

René Morin, for the intervener the Attorney General of Quebec.

Gabriel Bourgeois, Q.C., and Pierre Castonguay, for the intervener the Attorney General of New Brunswick.

Deborah L. Carlson and *Holly D. Penner*, for the intervener the Attorney General of Manitoba.

Darlene A. Leavitt, for the intervener the Attorney General of British Columbia.

Written submissions only by *P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

Margaret Unsworth and *Kurt Sandstrom*, for the intervener the Attorney General of Alberta.

Donald H. Burrage, Q.C., for the intervener the Attorney General of Newfoundland and Labrador.

D. Bruce Clarke, for the intervener the Labrador Métis Nation.

Joseph Eliot Magnet, for the intervener the Congress of Aboriginal Peoples.

Clem Chartier and *Jason Madden*, for the interveners the Métis National Council and the Métis Nation of Ontario.

Written submissions only by *J. Keith Lowes*, for the intervener the B.C. Fisheries Survival Coalition.

Written submissions only by *Brian Eyolfson*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Robert MacRae, for the intervener the Ontario Métis and Aboriginal Association.

Written submissions only by *Timothy S. B. Danson*, for the intervener the Ontario Federation of Anglers and Hunters.

Alan Pratt and *Carla M. McGrath*, for the intervener the Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation.

Written submissions only by *Janet L. Hutchison* and *Stuart C. B. Gilby*, for the intervener the North Slave Métis Alliance.

The following is the judgment delivered by

THE COURT —

I. Introduction

1 This case raises the issue of whether members of the Métis community in and around Sault Ste. Marie enjoy a constitutionally protected right to hunt for food under s. 35 of the *Constitution Act, 1982*. We conclude that they do.

2 On the morning of October 22, 1993, Steve Powley and his son, Roddy, set out hunting. They headed north from their residence in Sault Ste. Marie, and at about 9 a.m., they shot and killed a bull moose near Old Goulais Bay Road.

3 Moose hunting in Ontario is subject to strict regulation. The Ministry of Natural Resources (“MNR”) issues Outdoor Cards and validation stickers authorizing the bearer to harvest calf moose during open season. People wishing to harvest adult moose must enter a lottery to obtain a validation tag authorizing them to hunt either a bull or a cow in a particular area, as specified on the tag. The number of tags issued for a given season depends on the calculations of MNR biologists, who estimate the current adult moose population and the replacement rate for animals removed from the population. The validation tag requirement and seasonal restrictions are not enforced against Status Indians, and the MNR does not record Status Indians’ annual harvest. (See *MNR Interim Enforcement Policy on Aboriginal Right to Hunt and Fish for Food* (1991).)

4 After shooting the bull moose near Old Goulais Bay Road, Steve and Roddy Powley transported it to their residence in Sault Ste. Marie. Neither of them had a valid Outdoor Card, a valid hunting licence to hunt moose, or a validation tag issued by the MNR. In lieu of these documents, Steve Powley affixed a handwritten tag to the ear of the moose. The tag indicated the date, time, and location of the kill, as required by the hunting regulations. It stated that the animal was to provide meat for the winter. Steve Powley signed the tag, and wrote his Ontario Métis and Aboriginal Association membership number on it.

5 Later that day, two conservation officers arrived at the Powleys’ residence. The Powleys told the officers they had shot the moose. One week later, the Powleys

were charged with unlawfully hunting moose and knowingly possessing game hunted in contravention of the *Game and Fish Act*, R.S.O. 1990, c. G-1. They both entered pleas of not guilty.

6 The facts are not in dispute. The Powleys freely admit that they shot, killed, and took possession of a bull moose without a hunting licence. However, they argue that, as Métis, they have an aboriginal right to hunt for food in the Sault Ste. Marie area that cannot be infringed by the Ontario government without proper justification. Because the Ontario government denies the existence of any special Métis right to hunt for food, the Powleys argue that subjecting them to the moose hunting provisions of the *Game and Fish Act* violates their rights under s. 35(1) of the *Constitution Act, 1982*, and cannot be justified.

7 The trial court, Superior Court, and Court of Appeal agreed with the Powleys. They found that the members of the Métis community in and around Sault Ste. Marie have an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting regulations. Steve and Roddy Powley were therefore acquitted of unlawfully hunting and possessing the bull moose. Ontario appeals from these acquittals.

8 The question before us is whether ss. 46 and 47(1) of the *Game and Fish Act*, which prohibit hunting moose without a licence, unconstitutionally infringe the respondents' aboriginal right to hunt for food, as recognized in s. 35(1) of the *Constitution Act, 1982*.

II. Analysis

9 Section 35 of the *Constitution Act, 1982* provides:

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

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

10 The term “Métis” in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears. Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent. The Royal Commission on Aboriginal Peoples describes this evolution as follows:

Intermarriage between First Nations and Inuit women and European fur traders and fishermen produced children, but the birth of new Aboriginal cultures took longer. At first, the children of mixed unions were brought up in the traditions of their mothers or (less often) their fathers. Gradually, however, distinct Métis cultures emerged, combining European and First Nations or Inuit heritages in unique ways. Economics played a major role in this process. The special qualities and skills of the Métis population made them indispensable members of Aboriginal/non-Aboriginal economic partnerships, and that association contributed to the shaping of their cultures. . . . As interpreters, diplomats, guides, couriers, freighters, traders and suppliers, the early Métis people contributed massively to European penetration of North America.

The French referred to the fur trade Métis as *coureurs de bois* (forest runners) and *bois brulés* (burnt-wood people) in recognition of their wilderness occupations and their dark complexions. The Labrador Métis (whose culture had early roots) were originally called “livyers” or “settlers”, those who remained in the fishing settlements year-round rather than returning periodically to Europe or Newfoundland. The Cree people expressed the Métis character in the term *Otepayemsuak*, meaning the “independent ones”.

(Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, vol. 4, at pp. 199-200 (“RCAP Report”))

The Métis developed separate and distinct identities, not reducible to the mere fact of their mixed ancestry: “What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis” (*RCAP Report*, vol. 4, at p. 202).

11 The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots. This enables us to speak in general terms of “the Métis”. However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis “peoples”, a possibility left open by the language of s. 35(2), which speaks of the “Indian, Inuit and Métis peoples of Canada”.

12 We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary for our purposes to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie. It is not necessary for us to decide, and we did not receive submissions on, whether this community is also a Métis “people”, or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes.

13 Our evaluation of the respondents' claim takes place against this historical and cultural backdrop. The overarching interpretive principle for our legal analysis is a purposive reading of s. 35. The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.

14 For the reasons elaborated below, we uphold the basic elements of the *Van der Peet* test (*R. v. Van der Peet*, [1996] 2 S.C.R. 507) and apply these to the respondents' claim. However, we modify certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims.

A. *The Van der Peet Test*

15 The core question in *Van der Peet* was: "How should the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* be defined?" (para. 15, *per* Lamer C.J.). Lamer C.J. wrote for the majority, at para. 31:

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

16 The emphasis on prior occupation as the primary justification for the special protection accorded aboriginal rights led the majority in *Van der Peet* to endorse a pre-contact test for identifying which customs, practices or traditions were integral to a particular aboriginal culture, and therefore entitled to constitutional protection. However, the majority recognized that the pre-contact test might prove inadequate to capture the range of Métis customs, practices or traditions that are entitled to protection, since Métis cultures by definition post-date European contact. For this reason, Lamer C.J. explicitly reserved the question of how to define Métis aboriginal rights for another day. He wrote at para. 67:

[T]he history of the Métis, 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 Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question.

17 As indicated above, the inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to

colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.

18 With this in mind, we proceed to the issue of the correct test to determine the entitlements of the Métis under s. 35 of the *Constitution Act, 1982*. The appropriate test must then be applied to the findings of fact of the trial judge. We accept *Van der Peet* as the template for this discussion. However, we modify the pre-contact focus of the *Van der Peet* test when the claimants are Métis to account for the important differences between Indian and Métis claims. Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.

(1) Characterization of the Right

19 The first step is to characterize the right being claimed: *Van der Peet, supra*, at para. 76. Aboriginal hunting rights, including Métis rights, are contextual and site-specific. The respondents shot a bull moose near Old Goulais Bay Road, in the environs of Sault Ste. Marie, within the traditional hunting grounds of that Métis community. They made a point of documenting that the moose was intended to provide meat for the winter. The trial judge determined that they were hunting for food, and there is no reason to overturn this finding. The right being claimed can therefore be characterized as the right to hunt for food in the environs of Sault Ste. Marie.

20 We agree with the trial judge that the periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt moose but to hunt for food in the designated territory.

(2) Identification of the Historic Rights-Bearing Community

21 The trial judge found that a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century, and peaked around 1850. We find no reviewable error in the trial judge's findings on this matter, which were confirmed by the Court of Appeal. The record indicates the following: In the mid-17th century, the Jesuits established a mission at Sainte-Marie-du-Sault, in an area characterized by heavy competition among fur traders. In 1750, the French established a fixed trading post on the south bank of the Saint Mary's River. The Sault Ste. Marie post attracted settlement by Métis — the children of unions between European traders and Indian women, and their descendants (A. J. Ray, "An Economic History of the Robinson Treaties Area Before 1860" (1998) ("Ray Report"), at p. 17). According to Dr. Ray, by the early 19th century, "[t]he settlement at Sault Ste. Marie was one of the oldest and most important [Métis settlements] in the upper lakes area" (Ray Report, at p. 47). The Hudson Bay Company operated the Sault Ste. Marie's post primarily as a depot from 1821 onwards (Ray Report, at p. 51). Although Dr. Ray characterized the Company's records for this post as "scanty" (Ray Report, at p. 51), he was able to piece together a portrait of the community from existing records, including the 1824-25 and 1827-28 post journals of HBC Chief Factor Bethune, and the 1846 report of a government surveyor, Alexander Vidal (Ray Report, at pp. 52-53).

22 Dr. Ray's report indicates that the individuals named in the post journals "were overwhelmingly Métis", and that Vidal's report "provide[s] a crude indication

of the rate of growth of the community and highlights the continuing dominance of Métis in it” (Ray Report, at p. 53). Dr. Victor P. Lytwyn characterized the Vidal report and accompanying map as “clear evidence of a distinct and cohesive Métis community at Sault Ste. Marie” (V. P. Lytwyn, “Historical Report on the Métis Community at Sault Ste. Marie” (1998) (“Lytwyn Report”), at p. 2) while Dr. Ray elaborated: “By the time of Vidal’s visit to the Sault Ste. Marie area, the people of mixed ancestry living there had developed a distinctive sense of identity and Indians and Whites recognized them as being a separate people” (Ray Report, at p. 56).

23 In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members’ self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim. Here, we find no basis for overturning the trial judge’s finding of a historic Métis community at Sault Ste. Marie. This finding is supported by the record and must be upheld.

(3) Identification of the Contemporary Rights-Bearing Community

24 Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual’s ancestrally based membership in the present community. The trial judge found that a Métis community has persisted in and around Sault Ste. Marie despite its decrease in visibility after the signing of the Robinson-Huron Treaty in 1850. While we take note of the trial judge’s determination that the Sault Ste. Marie

Métis community was to a large extent an “invisible entity” ([1999] 1 C.N.L.R. 153, at para. 80) from the mid-19th century to the 1970s, we do not take this to mean that the community ceased to exist or disappeared entirely.

25 Dr. Lytwyn describes the continued existence of a Métis community in and around Sault Ste. Marie despite the displacement of many of the community’s members in the aftermath of the 1850 treaties:

[T]he Métis continued to live in the Sault Ste. Marie region. Some drifted into the Indian Reserves which had been set apart by the 1850 Treaty. Others lived in areas outside of the town, or in back concessions. The Métis continued to live in much the same manner as they had in the past — fishing, hunting, trapping and harvesting other resources for their livelihood.

(Lytwyn Report, at p. 31 (emphasis added); see also J. Morrison, “The Robinson Treaties of 1850: A Case Study”, at p. 201.)

26 The advent of European control over this area thus interfered with, but did not eliminate, the Sault Ste. Marie Métis community and its traditional practices, as evidenced by census data from the 1860s through the 1890s. Dr. Lytwyn concluded from this census data that “[a]lthough the Métis lost much of their traditional land base at Sault Ste. Marie, they continued to live in the region and gain their livelihood from the resources of the land and waters” (Lytwyn Report, at p. 32). He also noted a tendency for underreporting and lack of information about the Métis during this period because of their “removal to the peripheries of the town”, and “their own disinclination to be identified as Métis” in the wake of the Riel rebellions and the turning of Ontario public opinion against Métis rights through government actions and the media (Lytwyn Report, at p. 33).

27 We conclude that the evidence supports the trial judge’s finding that the community’s lack of visibility was explained and does not negate the existence of the contemporary community. There was never a lapse; the Métis community went underground, so to speak, but it continued. Moreover, as indicated below, the “continuity” requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself, as indicated below.

28 The trial judge’s finding of a contemporary Métis community in and around Sault Ste. Marie is supported by the evidence and must be upheld.

(4) Verification of the Claimant’s Membership in the Relevant Contemporary Community

29 While determining membership in the Métis community might not be as simple as verifying membership in, for example, an Indian band, this does not detract from the status of Métis people as full-fledged rights-bearers. As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified. In the meantime, courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. The inquiry must take into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable. In addition, the criteria for Métis identity under s. 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of the Métis held by virtue of their direct relationship to this country’s original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors. This is not an insurmountable task.

30 We emphasize that we have not been asked, and we do not purport, to set down a comprehensive definition of who is Métis for the purpose of asserting a claim under s. 35. We therefore limit ourselves to indicating the important components of a future definition, while affirming that the creation of appropriate membership tests before disputes arise is an urgent priority. As a general matter, we would endorse the guidelines proposed by Vaillancourt Prov. J. and O’Neill J. in the courts below. In particular, we would look to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance.

31 First, the claimant must self-identify as a member of a Métis community. This self-identification should not be of recent vintage: While an individual’s self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement.

32 Second, the claimant must present evidence of an ancestral connection to a historic Métis community. This objective requirement ensures that beneficiaries of s. 35 rights have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum “blood quantum”, but we would require some proof that the claimant’s ancestors belonged to the historic Métis community by birth, adoption, or other means. Like the trial judge, we would abstain from further defining this requirement in the absence of more extensive argument by the parties in a case where this issue is determinative. In this case, the Powleys’ Métis ancestry is not disputed.

33 Third, the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. This is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant's connection to the community and its culture. The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.

34 It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community.

35 In this case, there is no reason to overturn the trial judge's finding that the Powleys are members of the Métis community that arose and still exists in and around Sault Ste. Marie. We agree with the Court of Appeal that, in the circumstances of this case, the fact that the Powleys' ancestors lived on an Indian reserve for a period of time does not negate the Powleys' Métis identity. As the Court of Appeal indicated,

“E.B. Borron, commissioned in 1891 by the province to report on annuity payments to the Métis, was of the view that Métis who had taken treaty benefits remained Métis and he recommended that they be removed from the treaty annuity lists” ((2001), 53 O.R. (3d) 35, at para. 139, *per* Sharpe J.A.). We emphasize that the individual decision by a Métis person’s ancestors to take treaty benefits does not necessarily extinguish that person’s claim to Métis rights. It will depend, in part, on whether there was a collective adhesion by the Métis community to the treaty. Based on the record, it was open to the trial judge to conclude that the rights of the Powleys’ ancestors did not merge into those of the Indian band.

(5) Identification of the Relevant Time Frame

36 As indicated above, the pre-contact aspect of the *Van der Peet* test requires adjustment in order to take account of the post-contact ethnogenesis of the Métis and the purpose of s. 35 in protecting the historically important customs and traditions of these distinctive peoples. While the fact of prior occupation grounds aboriginal rights claims for the Inuit and the Indians, the recognition of Métis rights in s. 35 is not reducible to the Métis’ Indian ancestry. The unique status of the Métis as an Aboriginal people with post-contact origins requires an adaptation of the pre-contact approach to meet the distinctive historical circumstances surrounding the evolution of Métis communities.

37 The pre-contact test in *Van der Peet* is based on the constitutional affirmation that aboriginal communities are entitled to continue those practices, customs and traditions that are integral to their distinctive existence or relationship to the land. By analogy, the test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community’s distinctive

existence and relationship to the land. This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis.

38 We reject the appellant's argument that Métis rights must find their origin in the pre-contact practices of the Métis' aboriginal ancestors. This theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). The right claimed here was a practice of both the Ojibway and the Métis. However, as long as the practice grounding the right is distinctive and integral to the pre-control Métis community, it will satisfy this prong of the test. This result flows from the constitutional imperative that we recognize and affirm the aboriginal rights of the Métis, who appeared after the time of first contact.

39 The pre-control test requires us to review the trial judge's findings on the imposition of European control in the Sault Ste. Marie area. Although Europeans were clearly present in the Upper Great Lakes area from the early days of exploration, they actually discouraged settlement of this region. J. Peterson explains:

With the exception of Detroit, Kaskaskia and Cahokia, the French colonial administration established no farming communities in the Great Lakes region. After 1763, only partly in response to the regionwide resistance movement known as Pontiac's Rebellion, the British likewise discouraged settlement west of Lake Ontario. Desire to keep the peace and to monopolize the profits of the Great Lakes Indian trade were the overriding considerations favouring this policy. To have simultaneously encouraged

an influx of white farmers would have upset both the diplomatic alliance with the native inhabitants inherited from the French and the ratio between humans and animals on the ground, straining the fur-bearing capacities of the region.

(J. Peterson, “Many roads to Red River: Métis genesis in the Great Lakes region, 1680-1815”, in *The New Peoples: Being and Becoming Métis in North America* (1985), 37, at p. 40)

This policy changed in the mid-19th century, as British economic needs and plans evolved. The British sent William B. Robinson to negotiate treaties with the Indian tribes in the regions of Lake Huron and Lake Superior. One of his objectives as Treaty Commissioner was to obtain land in order to allow mining, timber and other development, including the development of a town at Sault Ste. Marie (Lytwyn Report, *supra*, at p. 29).

40 The historical record indicates that the Sault Ste. Marie Métis community thrived largely unaffected by European laws and customs until colonial policy shifted from one of discouraging settlement to one of negotiating treaties and encouraging settlement in the mid-19th century. The trial judge found, and the parties agreed in their pleadings before the lower courts, that “effective control [of the Upper Great Lakes area] passed from the Aboriginal peoples of the area (Ojibway and Metis) to European control” in the period between 1815 and 1850 (para. 90). The record fully supports the finding that the period just prior to 1850 is the appropriate date for finding effective control in this geographic area, which the Crown agreed was the critical date in its pleadings below.

(6) Determination of Whether the Practice is Integral to the Claimants’ Distinctive Culture

41 The practice of subsistence hunting and fishing was a constant in the Métis community, even though the availability of particular species might have waxed and waned. The evidence indicates that subsistence hunting was an important aspect of Métis life and a defining feature of their special relationship to the land (Peterson, *supra*, at p. 41; Lytwyn Report, *supra*, at p. 6). A major part of subsistence was the practice at issue here, hunting for food.

42 Peterson describes the Great Lakes Métis communities as follows at p. 41:

These people 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.

...

. . . [R]esidents [of these trading communities] . . . drew upon a local subsistence base rather than on European imports . . . [S]uch 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 métis. In both instances, these communities did not represent an extension of French, and later British colonial culture, but were rather “adaptation[s] to the Upper Great Lakes environment.” [Emphasis added.]

43 Dr. Ray emphasized in his report that a key feature of Métis communities was that “their members earned a substantial part of their livelihood off of the land” (Ray Report, *supra*, at p. 56 (emphasis deleted)). Dr. Lytwyn concurred: “The Métis of Sault Ste. Marie lived off the resources of the land. They obtained their livelihood from hunting, fishing, gathering and cultivating” (Lytwyn Report, at p. 2). He reported that “[w]hile Métis fishing was prominent in the written accounts, hunting was also an important part of their livelihood”, and that “[a] traditional winter hunting

area for the Sault Métis was the Goulais Bay area” (Lytwyn Report, at pp. 4-5). He elaborated at p. 6:

In the mid-19th century, the Métis way of life incorporated many resource harvesting activities. These activities, especially hunting and trapping, were done within traditional territories located within the hinterland of Sault Ste. Marie. The Métis engaged in these activities for generations and, on the eve of the 1850 treaties, hunting, fishing, trapping and gathering were integral activities to the Métis community at Sault Ste. Marie.

44 This evidence supports the trial judge’s finding that hunting for food was integral to the Métis way of life at Sault Ste. Marie in the period just prior to 1850.

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

45 Although s. 35 protects “existing” rights, it is more than a mere codification of the common law. Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities. A certain margin of flexibility might be required to ensure that aboriginal practices can evolve and develop over time, but it is not necessary to define or to rely on that margin in this case. Hunting for food was an important feature of the Sault Ste. Marie Métis community, and the practice has been continuous to the present. Steve and Roddy Powley claim a Métis aboriginal right to hunt for food. The right claimed by the Powleys falls squarely within the bounds of the historical practice grounding the right.

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

46 The doctrine of extinguishment applies equally to Métis and to First Nations claims. There is no evidence of extinguishment here, as determined by the trial judge. The Crown's argument for extinguishment is based largely on the Robinson-Huron Treaty of 1850, from which the Métis as a group were explicitly excluded.

(9) If There Is a Right, Determination of Whether There Is an Infringement

47 Ontario currently does not recognize any Métis right to hunt for food, or any "special access rights to natural resources" for the Métis whatsoever (appellant's record, at p. 1029). This lack of recognition, and the consequent application of the challenged provisions to the Powleys, infringe their aboriginal right to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community.

(10) Determination of Whether the Infringement Is Justified

48 The main justification advanced by the appellant is that of conservation. Although conservation is clearly a very important concern, we agree with the trial judge that the record here does not support this justification. If the moose population in this part of Ontario were under threat, and there was no evidence that it is, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. While preventative measures might be required for conservation purposes in the future, we have not been presented with evidence to support such measures here. The Ontario authorities can make out a case for regulation of the aboriginal right to hunt moose for food if and when the need arises. On the available evidence and given the current

licensing system, Ontario's blanket denial of any Métis right to hunt for food cannot be justified.

49 The appellant advances a subsidiary argument for justification based on the alleged difficulty of identifying who is Métis. As discussed, the Métis identity of a particular claimant should be determined on proof of self-identification, ancestral connection, and community acceptance. The development of a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations is an urgent priority. That said, the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.

50 While our finding of a Métis right to hunt for food is not species-specific, the evidence on justification related primarily to the Ontario moose population. The justification of other hunting regulations will require adducing evidence relating to the particular species affected. In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where threatened species may be involved. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land.

B. *The Request for a Stay*

51 With respect to the cross-appeal, we affirm that the Court of Appeal had jurisdiction to issue a stay of its decision in these circumstances. This power should continue to be used only in exceptional situations in which a court of general

jurisdiction deems that giving immediate effect to an order will undermine the very purpose of that order or otherwise threaten the rule of law: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. We note that the Powleys' acquittal would have remained valid notwithstanding the stay. It was, however, within the Court of Appeal's discretion to suspend the application of its ruling to other members of the Métis community in order to foster cooperative solutions and ensure that the resource in question was not depleted in the interim, thereby negating the value of the right.

52 The initial stay expired on February 23, 2002, and more than a year has passed since that time. The Court of Appeal's decision has been the law of Ontario in the interim, and chaos does not appear to have ensued. We see no compelling reason to issue an additional stay. We also note that it is particularly important to have a clear justification for a stay where the effect of that stay would be to suspend the recognition of a right that provides a defence to a criminal charge, as it would here.

III. Conclusion

53 Members of the Métis community in and around Sault Ste. Marie have an aboriginal right to hunt for food under s. 35(1). This is determined by their fulfillment of the requirements set out in *Van der Peet*, modified to fit the distinctive purpose of s. 35 in protecting the Métis.

54 The appeal is dismissed with costs to the respondents. The cross-appeal is dismissed.

55 The constitutional question is answered as follows:

Are ss. 46 and 47(1) of the *Game and Fish Act*, R.S.O. 1990, c. G.1, as they read on October 22, 1993, of no force or effect with respect to the respondents, being Métis, in the circumstances of this case, by reason of their aboriginal rights under s. 35 of the *Constitution Act, 1982*?

Answer: Yes.

APPENDIX

Relevant Constitutional and Statutory Provisions

Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46 and 47(1)

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

47. (1) Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt black bear, polar bear, caribou, deer, elk or moose.

Constitution Act, 1982

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

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

Appeal dismissed with costs. Cross-appeal dismissed.

Solicitor for the appellant/respondent on cross-appeal: Ministry of the Attorney General of Ontario, Toronto.

Solicitors for the respondents/appellants on cross-appeal: Pape & Salter, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the intervener the Labrador Métis Nation: Burchell Green Hayman Parish, Halifax.

Solicitor for the intervener the Congress of Aboriginal Peoples: Joseph Eliot Magnet, Ottawa.

Solicitor for the interveners the Métis National Council and Métis Nation of Ontario: Métis National Council, Ottawa.

Solicitor for the intervener the B.C. Fisheries Survival Coalition: J. Keith Lowes, Vancouver.

Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto.

Solicitor for the intervener the Ontario Métis and Aboriginal Association: Robert MacRae, Sault Ste. Marie.

Solicitors for the intervener the Ontario Federation of Anglers and Hunters: Danson, Recht & Voudouris, Toronto.

Solicitor for the intervener the Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation: Alan Pratt, Dunrobin, Ontario.

Solicitors for the intervener the North Slave Métis Alliance: Chamberlain Hutchison, Edmonton; Burchell Green Hayman Parish, Halifax.

