

Case Name:

R v. Hirsekorn

Between

**Her Majesty the Queen, and
Garry Hirsekorn and Ron Jones**

[2010] A.J. No. 1389

2010 ABPC 385

Dockets: A01061852Y-25(1) WA, A01061863Y-55(1) WA,

A01062040Y-25(1) WA, A01062036Y-55(1) WA

Registry: Medicine Hat

Alberta Provincial Court

F.C. Fisher Prov. Ct. J.

Heard: May 4-8, 11-12, September 14-17, October 26-30,
November 23-27, November 30 - December 4, 2009, January 11-13,
January 18-22, January 27, May 11-12, June 22-24, 2010.

Judgment: December 1, 2010.

(158 paras.)

Aboriginal law -- Hunting, fishing and logging rights -- Hunting, fishing or trapping -- Purpose -- Constitutional issues -- Defendants convicted of shooting wildlife outside regular season and possession of wildlife without permit -- Defendants were Métis who shot two animals in conjunction with political and legal action plan to test Métis rights in order to force negotiation of new Métis harvesting agreement -- Defendants challenged constitutionality of offence provisions -- Challenge failed, as animals were shot for political purpose rather than ceremonial or subsistence purpose -- In any event, defendants failed to establish historic rights-bearing Métis community specific to site where killings occurred, and by extension, failed to establish contemporary rights-bearing Métis community -- Constitution Act, 1982, s. 35 -- Wildlife Act, ss. 25(1), 55(1).

Aboriginal law -- Communities and governance -- Status of community -- Types -- Métis

settlements -- Defendant convicted of shooting wildlife outside regular season and possession of wildlife without permit -- Defendants were Métis who shot two animals in conjunction with political and legal action plan to test Métis rights in order to force negotiation of new Métis harvesting agreement -- Defendants challenged constitutionality of offence provisions -- Challenge failed, as animals were shot for political purpose rather than ceremonial or subsistence purpose -- In any event, defendants failed to establish historic rights-bearing Métis community specific to site where killings occurred, and by extension, failed to establish contemporary rights-bearing Métis community -- Constitution Act, 1982, s. 35 -- Wildlife Act, ss. 25(1), 55(1).

Constitutional law -- Canadian constitution -- Aboriginal peoples -- Division of powers -- Federal jurisdiction -- Federal powers -- Aboriginals and reserves -- Provincial jurisdiction -- Provincial offences -- Defendant convicted of shooting wildlife outside regular season and possession of wildlife without permit -- Defendants were Métis who shot two animals in conjunction with political and legal action plan to test Métis rights in order to force negotiation of new Métis harvesting agreement -- Defendants challenged constitutionality of offence provisions -- Challenge failed, as animals were shot for political purpose rather than ceremonial or subsistence purpose -- In any event, defendants failed to establish historic rights-bearing Métis community specific to site where killings occurred, and by extension, failed to establish contemporary rights-bearing Métis community -- Constitution Act, 1982, s. 35 -- Wildlife Act, ss. 25(1), 55(1).

Natural resources law -- Hunting and trapping -- Offences and penalties -- Hunting or trapping during closed season -- Illegal possession or sale of wildlife -- Defendant convicted of shooting wildlife outside regular season and possession of wildlife without permit -- Defendants were Métis who shot two animals in conjunction with political and legal action plan to test Métis rights in order to force negotiation of new Métis harvesting agreement -- Defendants challenged constitutionality of offence provisions -- Challenge failed, as animals were shot for political purpose rather than ceremonial or subsistence purpose -- In any event, defendants failed to establish historic rights-bearing Métis community specific to site where killings occurred, and by extension, failed to establish contemporary rights-bearing Métis community -- Constitution Act, 1982, s. 35 -- Wildlife Act, ss. 25(1), 55(1).

Trial of the defendants, Hirsekorn and Jones, for shooting wildlife outside of regular season and possession of wildlife without a permit. The defendants were Métis. They pleaded guilty to the predicate charges and filed constitutional notices claiming exemption from ss. 25(1) and 55(1) of the Wildlife Act on the basis that the provisions infringed their aboriginal right to hunt for food in Alberta. The charges arose in conjunction with a planned communal hunt intended to serve as a legal test case, and a political action plan by the Métis Nation of Alberta to force the Province into negotiating a new Métis harvesting agreement. Pre-hunt meetings were held with wildlife enforcement officers in respect of the plan. The defendants shot a deer and an antelope. Enforcement officers were invited to attend the kill sites and the defendants were charged accordingly. The defendants submitted that both animals were harvested for use as food or

subsistence. Jones passed away following the conclusion of trial but prior to the rendering of judgment.

HELD: Hirsekorn was convicted. As a preliminary matter following the hearing of evidence, the defendants were not permitted to expand their constitutional notice to assert that the historic rights-bearing Métis community was the Métis of the Northwest as opposed to the Alberta Métis Community. The constitutional challenge was dismissed on the grounds that neither defendant hunted for subsistence, nor did they hunt for ceremonial purposes, as the hunt was organized and conducted for a political purpose. In addition, it was inappropriate for the defendants to launch a collateral attack on the Wildlife Act by intentionally breaking the law to commence criminal proceedings. Instead, the proper procedure was a direct constitutional challenge commenced under the civil process in the Court of Queen's Bench. In any event, the defendants failed to establish historic patterns of use or occupation that were, to some degree, site-specific to where the killing of the deer and antelope occurred in southern Alberta. As there was no historic rights-bearing Métis community in southern Alberta prior to the arrival of the North West Mounted Police in 1874, the date of effective European control of the region, it followed that the modern Métis community in Medicine Hat was not the equivalent of a contemporary rights-bearing community. Therefore, neither of the defendants qualified as individuals to exercise the aboriginal rights claimed.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 35

Dominion Lands Act,

Manitoba Land Act,

Wildlife Act, RSA 2000, c. W-10, s. 25(1), s. 55(1)

Counsel:

Mr. Thomas Rothwell, Ms. Angela Edgington, for the Crown.

Ms. Jean Teillet, Mr. Jason Madden, for the Accused.

Reasons for Judgment

F.C. FISHER PROV. CT. J.:--

Introduction

1 The defendants, Gary Ivan Hirsekorn and Ronald Jones, were charged with shooting wildlife outside a regular season pursuant to s.25(1) of the *Wildlife Act*, R.S.A. 2000 c. W-10, and being in possession of wildlife without a valid wildlife permit, pursuant to s.55(1) of the *Wildlife Act*.

2 Mr. Hirsekorn and Mr. Jones filed admissions with the consent of the Crown (Exhibit 1 and 3) which included guilty pleas to the above described charges. They also filed amended Constitutional Notices claiming that they are exempt from the *Wildlife Act* sections under which they were charged, on the grounds that the sections infringe the unextinguished Aboriginal right to hunt for food in Alberta, recognized in s.35 of the *Constitution Act, 1982*.

3 Mr. Jones passed away after the conclusion of trial but before the giving of judgment. Accordingly, there is no finding on the charges against him.

4 The onus is on the defendants to establish an Aboriginal right exists under s.35 of the *Constitution Act, 1982: R. v. Sparrow* [1990] 1 S.C.R. 1075.

Issues

5 The main issue in these proceedings is the interpretation and application of s.35 of the *Constitution Act, 1982*, and its application to Metis claims for constitutional protection of Metis culture, tradition, or practice. As a considerable amount of evidence was heard regarding this general issue, it is incumbent upon the Court to deal with all the evidence and how it relates to the principles in *R. v. Powley*, [2003] 2 S.C.R. 207.

6 The relevant portions of section 35 of the *Constitution Act, 1982*, state:

- (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.

7 The specific issues in these proceedings are as follows:

1. Whether Mr. Hirsekorn and Mr. Jones should be allowed to alter their Constitutional Notice to now characterize the community as the "Metis of the Northwest" instead of the Alberta Metis Community.
2. Whether Mr. Hirsekorn and Mr. Jones were exercising the right to hunt for food or the right to hunt for a ceremonial purpose.
3. Whether Mr. Hirsekorn and Mr. Jones should have proceeded in the Provincial Court of Alberta by way of a collateral attack against the *Wildlife Act*.

4. What the historic rights-bearing community is in the context of this case.
5. What is the relevant time frame when the Europeans established effective political and legal control of southern Alberta.
6. Whether there exists a contemporary rights-bearing community in southern Alberta.
7. Whether Mr. Hirsekorn and Mr. Jones are members of the relevant contemporary Metis community.
8. Whether the practice of hunting for food, subsistence hunting, is an integral part of the distinctive culture of the Metis.
9. Whether there has been continuity between the historic Metis practice and the contemporary Metis practice.
10. Whether the right to hunt for food has been extinguished.

11

Whether there has been an infringement of the Metis right and whether the infringement is justified.

Issue 1 - Whether the Defendants should be allowed to alter their Constitutional Notice

8 Mr. Hirsekorn and Mr. Jones filed amended Constitutional Notices in these proceedings (Exhibit 4 and Exhibit 6). The amended Constitutional Notices assert that the historic rights-bearing Metis community was within Alberta, including central and southern Alberta.

9 At the conclusion of the hearing of the evidence, counsel for Mr. Hirsekorn and Mr. Jones argued that the rights-bearing community was now the "Metis of the Northwest". The "Northwest" was generally described in the evidence as the area north and west of central Canada.

10 This argument was made after the Court heard a considerable amount of evidence from a number of witnesses who were examined and cross-examined. Both the Court and the Crown were of the understanding that the argument that was to be put forth by Mr. Hirsekorn and Mr. Jones would relate to the amended Constitutional Notices, and it was a surprise to the Court and the Crown when the argument was expanded to include the Northwest.

11 In general an accused who intends on raising a *Charter* challenge should give the Crown reasonable notice of such proceeding. The reason for this procedure is to make sure that the trial process is fair and that the trial proceeds in an efficient manner. There should be filed a formal notice of the application which indicates the nature and the grounds of the challenge. Again this is required so that the Crown knows the case it has to meet with respect to the *Charter* challenge. Although the *Charter* is the supreme law of the land and must be applied and given the most liberal and free interpretation, it must do so within the existing trial system. Trial courts are not to follow extraordinary procedures just because there is a *Charter* challenge.

12 There is of course a right to amend a *Charter* notice, but the proper procedure must be followed. The procedure must be accomplished in a timely manner and brought before the trial judge so that the other party/parties to the action have the opportunity to prepare and provide the Court with representations regarding the amendment. Failing the following of the proper procedure, the trial judge has the discretion to refuse the application to assert a *Charter* remedy.

13 In the case at bar, Mr. Hirsekorn and Mr. Jones attempted to expand upon their filed amended Constitutional Notices without bringing an application before the Court. In addition, the Crown structured its questioning of the experts to elicit evidence on the Metis in Alberta, not the Metis of the Northwest, and, the Crown objected to the amendment.

14 Fairness is one of the cornerstones of our trial process, and it is most important that the process be fair to all the parties involved. The Court did hear volumes of evidence and a fair amount of that evidence did pertain to the Northwest, but the Court did not hear evidence about all of the Metis of the Northwest.

15 I am not prepared to allow Mr. Hirsekorn and Mr. Jones to amend their amended Constitutional Notices to have the rights-bearing community described as the "Metis of the Northwest". The rights-bearing community will continue to be described as Alberta, including the area of central and southern Alberta.

Issue 2 - Whether the Defendants were exercising the right to hunt for food or the right to hunt for a ceremonial purpose

Facts

16 Mr. Hirsekorn and Mr. Jones both self-identify as Metis.

17 The Metis Nation of Alberta held a Metis assembly at St. Paul, Alberta, on August 19th, 2007. At the assembly, a four-part action plan was developed. Part one was to exercise the Nation's Metis rights by organizing hunts at which animals would be harvested and the Metis hunters would be charged by the enforcement officers of Alberta Fish and Wildlife. The second part of the plan was to defend Metis rights by challenging the charges in court, and the third part was one of political action through Alberta representatives. The fourth part was to educate the public.

18 Mr. Jones testified that he was present at the assembly, and that he voted in favour of the action plan. Mr. Hirsekorn also agreed with and voted in favour of the action plan.

19 A significant degree of planning went into the hunts. Pre-hunt meetings were held with Alberta Fish and Wildlife enforcement officers. Contact with the media was made, and Edmonton Journal newspaper reporters were invited to the Suffield hunt to increase the profile and to write an article.

20 Mr. Hirsekorn shot a mule deer on October 20th, 2007, on the South West 1/4 Section 28, Township 7, Range 3, West of the 4th Meridian, which is located near Elkwater, Alberta. Mr. Jones shot an antelope on January 26th, 2008, on the North East 1/4 Section 36, Township 14, Range 9, West of the 4th Meridian, which is located near Suffield, Alberta. Both Mr. Hirsekorn and Mr. Jones testified that these two hunts were part of the action plan established at the Metis assembly.

21 Mr. Jones also testified that the Alberta Government had ripped up Metis rights and the Metis had no recourse but to go out and break the law, even though they did not think they were breaking the law, and get into court so everyone could see who had rights and who did not. Mr. Jones did not think it was just about hunting rights, but about all rights Metis enjoy as Aboriginal people.

22 Mr. Jones, who was the leader of the January 26th, 2008, hunt, testified that it was to be the last communal hunt. As leader, he thought it was only proper that he shoot the antelope, as he could not expect other people to be harvesting animals and getting charged.

23 Upon the killing of the two animals, the Fish and Wildlife enforcement officers were called to attend at the two kill sites. The two animals were left where they were shot, although it appears they were field dressed.

24 The newspaper article written by the Edmonton Journal reporters, dated February 16th, 2008, was entered as evidence. Consistent with the testimony of Mr. Jones and Mr. Hirsekorn, the article states that the hunts were set up by the Metis Nation of Alberta as part of the action plan to force the Province of Alberta into negotiating a new harvesting agreement.

25 In the article, Audrey Poitras, President of the Metis Nation of Alberta, is quoted as saying, "the aim of the campaign, which has now been suspended, is to get the issue of Metis hunting rights before the courts and force the Alberta Government to resume negotiations on a new Metis Harvesting agreement." Later she is also quoted as saying, "It is more than just about hunting. It's about the recognition of the rights of a people".

26 Audrey Poitras also testified that the Metis Nation of Alberta developed a Harvesting Policy. It states as follows:

"Metis harvest" or **"Metis harvesting"** means the taking, catching, fishing (with rod and reel or net) or gathering of renewable resources for reasonable personal or community use by MNA members. Such harvesting includes plants, berries, fish, wildlife, wood and water, taken for subsistence, food, medicinal, social or ceremonial purposes and includes donations, gifts and exchange with other members of the Metis community. For greater certainty, for the purposes of the MNA Harvesting Policy, the Metis harvest is for reasonable personal or community use only and does not include harvesting for commercial purposes or trophy harvesting.

27 Wayne Hadley, another hunter quoted in the Edmonton Journal article, shot a moose during another hunt near Cochrane, Alberta. He too was charged, and stated, "I guess I owed it to [the Metis] to keep on with the rebellion -- at least until we win something."

Application of the Law to the Facts

28 Counsel for Mr. Hirsekorn and Mr. Jones asserted that both animals were harvested for the purpose of being used for food, or subsistence. *Webster's Third New International Dictionary*, 17th ed., 1976, describes "subsistence" as follows:

...2: means of subsisting: as **a**: the irreducible minimum (as of food and shelter) necessary to support life <a barren land providing no more than ... > **b**: a mode of obtaining or a source of the necessities of life ... **c**: a source or supply of food...

29 The definition of "subsistence" must be considered in conjunction with the relevant Metis right, which is the right to hunt for food in a designated territory: *Powley*.

30 The action plan of the Metis Nation of Alberta is a political action plan, and the hunts were organized pursuant to the plan for a political purpose. The killing of the two animals was part of the action plan to shoot animals, get charged, have the matters brought into the Provincial Court of Alberta, and force the Alberta Government to negotiate a new harvesting agreement. There was no possibility that either Mr. Hirsekorn nor Mr. Jones would be able to keep the animals for food purposes. Mr. Hirsekorn did not testify that the mule deer he shot was for food for himself or his family.

31 No one has the right to keep the proceeds of a crime, and it is no different in this case. Neither Mr. Jones nor Mr. Hirsekorn would be able to keep the animal they shot and benefit from the commission of *Wildlife Act* offences.

32 Neither of the two hunters, Mr. Hirsekorn or Mr. Jones, were hunting for subsistence, nor were they hunting for ceremonial purposes. Therefore, the Constitutional argument before the Court fails.

Issue 3 - Whether the Defendants should have proceeded in the Provincial Court of Alberta by way of a collateral attack against the *Wildlife Act*

Facts

33 As is common in cases where Aboriginal hunting rights are concerned, this case involves a collateral attack on the validity of Sections 25(1) and 55(1) of the *Wildlife Act*. In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, the Supreme Court stated at 599: "a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or

nullification of the order or judgment." The specific object of these criminal proceedings was to determine if the accused hunters had shot wildlife outside a regular hunting season, and had possessed wildlife without a valid wildlife permit, but via the process of collateral attack, the entire focus of the proceedings has now shifted to the applicability of provisions in the *Wildlife Act* to Metis hunting in central and southern Alberta.

34 The Crown argued that the Metis Nation of Alberta should have proceeded civilly rather than have a number of individuals break the law in order to have the matters heard in criminal court. The Crown felt forced to address the Constitutional issues in these criminal proceedings once the participants in the action plan broke the law and were charged.

35 As previously discussed, these hunts occurred as part of an action plan passed by the Metis Nation of Alberta, the overall goal of which was to force the Alberta government to address Metis harvesting rights. There is no evidence on why the organization did not simply avoid the argument against collateral attack altogether by bringing a direct challenge in the Court of Queen's Bench to the applicability of the *Wildlife Act* requirements based on s.35 Aboriginal hunting rights.

36 The use of the civil process would have meant one level of court was eliminated, and that all the cases could have been effectively heard in one court proceeding, not individually in successive criminal proceedings.

37 As stated in *R. v. Lefthand*, (2007), 77 Alta. L.R. (4th) 203, 2007 ABCA 206, one of the factors for determining whether a collateral attack is appropriate is the unfairness that would fall upon the Defendants if they were not able to attack the laws collaterally. There was no evidence on this from the Defendants. Also, neither defendant provided evidence of hardship that abiding by the law would have imposed upon them, other than the monetary cost associated with a licence. Neither individual testified that this monetary cost was a hardship.

The Law

38 Pending their challenge, there is a presumption that statutes are valid, and they must be obeyed: *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57, at paragraph 9.

39 While the individual's right to mount a collateral attack has previously been accepted by courts in this country, in *Lefthand*, the Alberta Court of Appeal stated that "the time [had] come for the courts to examine whether the collateral attack of game regulations that allegedly breach Aboriginal hunting rights [was] appropriate": para. 34. This need arose because collateral attacks in situations such as these criminal proceedings were seen to create a "most unsatisfactory situation": para. 20. *Lefthand* sets out many reasons for this:

1. Unlike a collateral attack, a direct challenge to the legislation, in this case, the *Wildlife Act*, would allow a court to structure a remedy that is just for all concerned: para. 22.

2. A collateral attack converts what should be one civil case into a number of criminal cases, carried out with inappropriate procedures and evidentiary rules. A civil case would bring other parties before the court that are legitimately interested in these issues: para. 25.
3. Criminal trials are not appropriate vehicles for assessing community rights because the net result is a selection from one of two choices. The remedy or burden falls on one person only and all the rest is obiter: para. 25.
4. The ambush that might occur in the criminal situation; the burden of proof being beyond a reasonable doubt; the fact that a number of these cases must be sent back for further evidence on the scope of right; and the fact that very different considerations apply when one is attempting to define the scope and extent of constitutionally protected civil rights, all make the criminal procedure inappropriate for deciding Aboriginal rights: paras. 26 and 27.
5. The direct attack against the legislation should be mounted by the Aboriginal community as it is the community that owns the right, not the individual member of that community: para. 24

Conclusion

40 Because statutes are presumed valid pending a challenge, an Aboriginal hunter may not just ignore apparently valid hunting laws because he has subjectively decided that they breach a constitutional right, nor because that hunter is part of a bigger action plan conceived by the Metis Nation of Alberta to force the Alberta Government into negotiating a new agreement.

41 All the concerns with the collateral attack process, as set out in *Lefthand*, are present in this hearing. *Lefthand* is subsequent to the Supreme Court case of *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, and therefore, it is now necessary to consider whether a collateral attack is appropriate before deciding the validity of the collateral attack itself.

42 As I consider the factors in *Lefthand*, it is my view this collateral attack, under these circumstances and given what the Metis Nation of Alberta is trying to accomplish, is inappropriate. The matter would be better handled by a direct attack in a civil court.

Issues 4-11; Findings of Fact with Respect to the *Powley* Test

43 Four experts were called to give evidence about the creation and evolution of the Metis and their culture. Dr. Clint Evans, the Crown witness, was qualified as an historian to give an opinion on Western Canadian history, with particular knowledge of Aboriginal and Metis history from Ontario westward. The other three historical experts were called by the defence. They were:

1. Dr. Arthur J. Ray. He was qualified as an historical geographer with expertise in the fur trade and the economic history of Aboriginal peoples of

- the Northwest, including the Metis.
2. Gwynneth C.D. Jones. She was qualified as an historian with expertise in the documentary history of Aboriginals including the Metis, with a focus on the general area of Ontario west and the northern United States.
 3. Dr. Frank Tough. He was qualified to give an opinion with respect to the geography and resource use of Aboriginal peoples including Metis. This opinion includes evidence on hunting, fishing, trapping and gathering from Ontario westward, and on the Metis land grant and scrip process pursuant to the *Manitoba Land Act* and *Dominion Lands Act* as it relates to the Northwest.

44 These experts were called to provide evidence of the history of the Metis in Alberta. Their historical evidence was generally all very similar; it is on the conclusions to be drawn from this evidence that their opinions differ. I have therefore summarized all the experts into the following general finding of facts, and will discuss the conclusions to be drawn from these facts under the appropriate issues. Where more specific findings of fact are needed, they will be added to the separate discussion under each issue as necessary.

45 In this "findings of fact" section, "Metis" is interchangeably used to refer simply to people of mixed European/Indian ancestry, and also to refer to a 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.

46 Hudson's Bay Company established York Fort at the mouth of the Nelson River in 1684. By 1795 the Hudson's Bay Company and the Northwest Company had established trading posts near the present day Edmonton. In October of 1799, Hudson's Bay Company began to build a post called Acton House near Rocky Mountain House alongside a Northwest Company post.

47 In 1821 the Hudson's Bay Company and the Northwest Company amalgamated, leaving the Hudson's Bay Company as the buyer of furs and supplier of European goods. A number of Metis involved in the fur trade lost their employment at the trading posts after the amalgamation of 1821. Despite this, from the 1820's to the 1850's, the Metis were a major component of the seasonal and full time labour force involved in the fur trade and maintaining the fur trade posts, and from the 1820's to the 1870's, life in the Northwest was coloured by the effects of the fur trade.

48 In approximately 1800-1817 the Hudson's Bay Company established and maintained a fur trading post called Chesterfield House at the junction of the Red Deer and South Saskatchewan River.

49 "Blackfoot" refers to the Indian tribes described as the Blackfoot, Peigan, Blood and Athapascam speaking Sarcee, and may also refer to what is called the Blackfoot confederacy. "Blackfoot Territory" is a general description of the area in Alberta, lying south of the North Saskatchewan River, east of the Rocky Mountains, west of the Cypress Hills, but also included land

in the northern United States lying north of the Missouri River. This is similar to "Treaty 7 and area", which is a general description of the area encompassing southern Alberta including the area bounded by the Red Deer River to the north, west of Medicine Hat, north of the United States border and the land lying east of the Rocky Mountains.

50 In the 1820's buffalo hunts were staged on the Stony Plains west of what is now Edmonton.

51 Hudson's Bay Company established the Bow River Expeditions, which left York Factory in July 1822. A winter camp was established below the junction of the Bow and Red Deer Rivers. The camp remained under the constant threat of Indians. Two parties left the camp to determine the availability of beavers and whether the rivers were navigable.

52 The Bow River and the Red Deer River were determined to be unnavigable and there were few signs of beaver. There was also little wood and little game available for post provisions. The expedition was characterized as a complete failure.

53 In 1825, Rowland, a Hudson's Bay employee, wrote that the area between the Peigan lands and the Flathead/Smoke lands was not a safe place to be unless the group travelled in significant numbers and had Peigan protection.

54 The Hudson's Bay Company, European traders, missionaries and travellers were convinced to stay away from most of the Bow River, Red Deer River and Belly/Oldman River territories. Central and southern Alberta were very unattractive for the purpose of the fur trade because of the risk of being caught in tribal warfare, lack of good habitat for high-value fur bearing animals, and the absence of good water transportation.

55 Hudson's Bay Company reopened Rocky Mountain House trading post in 1825-1826. The post was visited by Blood, Blackfoot, Cree and Assiniboine Indians along with some "half breeds" in 1836-1837.

56 Hugh Munro, who married a Peigan Blackfoot woman, was interviewed in 1882. He stated that the Blackfoot confederacy in the 1820's was a powerful and war like confederacy occupying the country west of the South Saskatchewan River to the Rocky Mountains. At this time, the Blackfoot confederacy would not allow white men, half breeds, or other European traders into their territory. This even included Hugh Munro, who had married into the confederacy.

57 In the 1820's the Metis were part of the large buffalo hunts that occurred in the Red River District and they were the suppliers of pemican for the fur trade. The pemican moved from Red River to York Factory and Fort Carlton House, and also from the Stony Plains to Lac La Biche and Isle a la Crosse.

58 Chesterfield House #2 was established by the Hudson's Bay Company in 1822 at the junction of the Red Deer and South Saskatchewan Rivers. This post was abandoned in 1823 because of the

danger posed by the Blackfoot confederacy.

59 By the end of the 1830's the southern part of Alberta, extending south into the United States, was a very dangerous place unless the group entering the area was large and very well armed.

60 United States fur traders did not attempt to move into southern Alberta until 1830 because of the Blackfoot confederacy, specifically the conflict of 1823, where a party was forced back into the United States by the Confederacy.

61 The Hudson's Bay Company established Old Bow Fort or the Peigan Post on the Bow River in 1832. It was to entice the trading of the Blackfoot tribes back from the American fur traders. The post was abandoned in January 1834 because it was uneconomical, provided few furs, and required a large contingent of men to man it because of the danger posed by the Blackfoot confederacy. After it was abandoned, it was burned by the Blackfoot confederacy.

62 When the Hudson's Bay Company closed old Bow Fort in 1834, the Metis labourers retreated to the North Saskatchewan River.

63 The area which later was part of Treaty 7 was called "terra incognita", meaning "earth unknown", from 1800-1859 by George Simpson, governor of the Hudson's Bay Company. Prior to 1860, the Blackfoot confederacy maintained undisputed dominion over the Treaty 7 area and continued to assert their exclusive presence through this area until the 1870's.

64 From 1822-1850 the Metis were occasionally located at the following posts or areas:

- a. Fort Vermillion
- b. Chain of Lakes
- c. Butte a Noire
- d. Egg Lake
- e. Fort Edmonton
- f. Lac St. Anne
- g. Bear Hills
- h. Battle River
 - i. Gull Lake
- j. Red Deer River near the Medicine River

k. Rocky Mountain House

l. Old Bow Fort

65 Before 1870, there was very little travel to the area of the Cypress Hills because of the presence of the Blackfoot confederacy.

66 From the 1850's to the 1870's the Metis travelled the Carlton Trail from the Red River area to Fort Edmonton and the surrounding area. Up until the 1870's, there was very little evidence of travel into southern Alberta by the Metis.

67 In the late 1850's, the Colonel Palliser expedition was sent by London to expand the British geographical knowledge of the "border" country, extending as far west as British Columbia. The southern portion of Alberta was unknown because of the limited travel by white men, Metis, European traders and missionaries.

68 In 1857, Palliser reached the elbow of the South Saskatchewan River. The Metis travelling with the expedition would not travel any further south because they were afraid of the Blackfoot confederacy.

69 In 1858 the expedition went to explore the passes that existed in the Rocky Mountains, and in 1859, it travelled into southern Alberta and eventually explored the Cypress Hills area. This was despite the fact that Palliser's guide, Felix Munro, tried to deliberately lead the expedition away from the Cypress Hills because of the dangers of the country.

70 During his expedition Palliser did not document the presence of Metis settlements in southern Alberta.

71 Palliser determined that it was not economical to set up fur trading posts in southern Alberta because there were low numbers of fur bearing animals; there was the threat of the Blackfoot confederacy; and there were non-navigable rivers.

72 Palliser did not document the presence of cart trails on the Treaty 7 area or the area around the Cypress Hills. He did not put cart trails on his map in the areas he called the "plains" or "great plains". The areas Palliser marked as "plains" or "great plains" are within the current southern Alberta and border onto the parklands.

73 The Metis guides with Palliser, including Paul Cayen, did not want to go further south than the Hand Hills. He said, "It is all very well for those who do not know the country to be brave about it, but speak to any of the old ones who know, and who have experienced the country ... the country is too dangerous".

74 Henry Yule Hind, who was commissioned by Canada east and west (Quebec and Ontario), wrote much about the hunters and Metis when he wrote about his travels of 1857-58. However, he

did not travel into the area of the forks of the North and South Saskatchewan River, and may have been writing about an area located in present day Saskatchewan. The description of the area where the Metis from the Red River were supposed to be hunting is very difficult to ascertain and cannot be pinpointed to be in southern Alberta.

75 During the late 1850's it cannot be confirmed that the Metis buffalo hunters were spending winters as far west as the present day headwaters of the South Saskatchewan River. However, it can be said that by the 1860's, the buffalo herds began to move in a southwesterly direction, and this increased the tension between the Indians and Metis.

76 A missionary named George McDougall wrote in 1865 that there were no cart trails in or out of Pigeon Lake country, which is west of Wetaskiwin.

77 By 1868, the Hudson's Bay Company had decided to sell Rupert's Land to the new Canadian Government.

78 Isaac Cowie, a clerk for the Hudson's Bay Company from 1868 to 1873, described a large group of Metis and Indians encamped in an area located in the Big Sandy Hills in 1868.

79 In 1869 the American whiskey traders moved into southern Alberta and traded whiskey for buffalo robes. The introduction of whiskey to the Blackfoot confederacy caused social break down. A further breakdown in the cohesiveness of the Blackfoot confederacy occurred when it was hit by a smallpox epidemic in 1870-71.

80 In 1868-69 there was a large influx of Metis into the Saskatchewan District. They came from the Red River.

81 There was a proliferation of fur trading posts near the end of the 1870's, particularly in the Lac-La-Plue, Swan River District, near present day Edmonton, and to the north and west of the present day Edmonton.

82 In 1870-71, a large number of Metis from the North Saskatchewan Metis settlements wintered at Buffalo Lake. In 1872-1873 the Metis spent their second winter in the Buffalo Lake area. This wintering camp was abandoned in 1878 because the buffalo were not accessible from that area.

83 The Metis became hivernants winterers and established those winter quarters on the edge of the parkland or in sheltered locations on the plains. This way of life offered access to the declining and rotating buffalo herds. A "hivernant" is a village.

84 In the fall of 1871, Isaac Cowie built a camp at the eastern edge of the Cypress Hills, near the present day town of East End, Saskatchewan. He went into this region for the primary purpose of opening negotiations with the Blackfoot in order to determine whether they would allow the Hudson's Bay Company to establish a post on the upper Saskatchewan River. Cowie left the area in

the spring of 1872. The Blackfoot were lurking around the area during the winter, and as soon as Cowie left, the camp was burned and a number of Assiniboine Indians, who were picking up bullets and meat that had been left behind, were killed. The Blackfoot wanted to make sure there was not continued possession of these lands.

85 Cowie's camp was the first wintering camp set up by the Metis in the Cypress Hills area. The Cypress Hills were a contested area between the Blackfoot, Assiniboine and Cree, and were not hunted continuously.

86 During the period of 1870-1885 the Metis communities of Fort Qu'Appelle and Fort Ellice flourished but remained within the orbit of the Red River Metis.

87 The Boundary commission of 1873-1874 did not document the presence of cart trails in the area between Wood Mountain and the Cypress Hills. Also in 1874, the North West Mounted Police did not make mention of cart trails during their trek, nor did they mention the presence of cart trails between Fort Macleod and the present day Calgary.

88 In 1873-1874 the Boundary Commission had difficulty hiring Metis to return with the Commission to southern Alberta because of the rumours of Indian hostility west of the eastern edge of the Cypress Hills.

89 In August 1874 the North West Mounted Police met a group of Metis buffalo hunters from Winnipeg. The Metis had been in conflict with the Blackfoot. The North West Mounted Police did not come across anymore Metis encampments in southern Alberta.

90 The North West Mounted Police arrived in Southern Alberta in the fall of 1874. A group of Metis from Manitoba and North Dakota accompanied the North West Mounted Police, who also hired Jerry Potts and Hugh Munro to assist them.

91 The Blackfoot confederacy was happy to see the North West Mounted Police because of the trouble caused by the American whiskey traders. The North West Mounted Police also facilitated the travel of Indian groups who in the past could not travel or camp together.

92 The North West Mounted Police started bringing law and order to the Saskatchewan District in 1874. The lawlessness decreased dramatically by 1875, and the whiskey traders were forced to retreat back to the United States.

93 The Metis activity in southern Alberta, and specifically in the Cypress Hills area, increased dramatically after the arrival of the North West Mounted Police. At least initially, the North West Mounted Police Metis guides were unfamiliar with the area west of the Cypress Hills. The increase in activity is also borne out by the records of vital events, a term referring mainly to births. Vital events in the Cypress Hills area were minimal prior to 1875, and increased dramatically between 1875 to 1878.

94 As the Northwest Mounted Police established posts, the Metis established villages around the posts. This occurred at Fort Saskatchewan, Fort Walsh, Fort Calgary and Fort Macleod. In 1875 when the Northwest Mounted Police established Fort Calgary, Metis established cabins on both sides of the Elbow River, forming a small settlement. The Metis freighted for the North West Mounted Police between Fort Macleod and Fort Calgary.

95 During the years 1874-1876, Metis buffalo hunters spent most of the year hunting the declining and retreating buffalo herds. The hunters wintered at Buffalo Lake, Cypress Hills, Milk River and the northern United States. The Red River Metis hunted as far west as the Cypress Hills. However, before 1874, no settlements, either permanent or semi permanent winter settlements, appeared in southern Alberta.

96 In 1876, the Cree, Saulteaux and Assiniboine Indians signed Treaty 4. The Blackfoot confederacy was not invited to sign that Treaty, but in 1877, they signed Treaty 7. The Blackfoot were concerned with the hunting of the declining buffalo by the Metis. The Blackfoot confederacy continued to have concerns about other Indian tribes and the Metis accessing their hunting grounds. But after 1874, rather than use violence, the Blackfoot confederacy called upon the North West Mounted Police to provide help with the Indians and Metis who were encroaching upon their hunting grounds.

97 The Metis hunters considered the Blackfoot a constant threat, and they always travelled in large, well armed groups to secure their safety. They did not spend extended periods of time within the southern Alberta area. While there were a handful of Metis families who had ties to the Blackfoot, there was not a substantial Metis presence in the Treaty 7 area and the Treaty 4 area (Alberta portion) until the latter part of the 1870's. Metis did not establish permanent wintering settlements in the Treaty 7 area until 1879.

98 A Metis group established the Head of the Mountain hivernant village approximately twenty miles west of the present day Fort Walsh in 1876.

99 The Metis living in the Cypress Hills in 1878 signed a petition (250 names) requesting the establishment of a "reserve" because they were dependant upon the buffalo which were moving east and south, and no longer frequenting the area. They requested the reserve be established in Manitoba.

100 Some Metis continued to hunt and remained nomadic until the buffalo herds were gone from Canada. By 1879 the buffalo had moved south into the United States, and the Metis and the Indians in Treaty areas 4, 6 and 7 were facing food shortages. As the summer progressed, more Metis and Indians attended at posts as their condition was extremely desperate; "All on the plains were starving".

101 In February 1879 a group of Metis located in the Cypress Hills moved back to Wood Mountain because of a lack of food. Approximately 15 families were left behind.

102 By 1880 the Plains were described by Father Hugonnard as, "La Prairie est decidement fine", meaning, "the prairie is decidedly thin". In the early 1880's, the buffalo were to the point of extinction.

103 In 1885 and 1886 the Scrip Commission arrived in Edmonton and provided scrip to the Metis who resided in the North West Territories as of the 15th of July 1870. Most Metis who received scrip did not take the land, but sold their scrip for cash.

104 In 1891 the North West Mounted Police around Pincher Creek were forced to supply rations to starving Metis. Matters became worse in 1897 when 200 Metis in Alberta had to be provided with rations. The Metis living on the plains were starving because the buffalo had retreated to the east and south.

105 The 1891 census showed a number of Metis families around Medicine Hat as being hunters. In 1900-1901 the Metis population in this area was making a living by fishing, trapping muskrats, cutting timber for posts, and hunting wolves.

106 The 1891 census recorded Metis family occupations as "freighter", "hunter", "farmer", "trapper", or some combination of these for those at Battle River. The land records for Duhamel and the townships of Battle River, Red Deer River and Tail Creek show these areas were settled by Metis, some of whom filed for patent and many who did not file but remained on the land.

107 In 1895 the N.W.M.P. took a census of the N.W.T. The Alberta population was recorded as 26,185 white people, and 2,598 half breeds. Indians were not enumerated.

108 In particular, the scrip records show the following:

1. Between 1891-1894 all the applications for Lethbridge were from Metis born elsewhere than in Lethbridge.
2. During the 1900-1901 commissions some Metis were born in Lethbridge but a number of applicants were from the North Saskatchewan District, Saskatchewan and a small number from the Red River.
3. Between 1885-1901 there were a significant number of Metis births in Fort Macleod and also a number of applications from Metis born in the North Saskatchewan District.
4. In the time frame 1900-1905, the majority of scrip applications in Calgary were from residents born in Calgary.
5. In Medicine Hat during the 1900-1901 commissions a very small number were born in Medicine Hat. Most applicants were from the District of Saskatchewan.

109 The Dominion census in 1901 identified several Metis families living in the Calgary west subdivision. Metis at Duhamel were identified as farmers. At Tail Creek, half of the Metis

population were Alberta born and were classified as ranchers.

Issue 4 - What is the Historic Rights-Bearing Community in the Context of this Case

Position of the Parties

110 Mr. Hirsekorn and Mr. Jones have argued for the community to be characterized as the Metis of the Northwest. I have previously ruled that I am not going to allow the expansion of the amended Constitutional Notice, and they are limited to their filed Notice which claims the historic and modern communities are Alberta, including central and southern Alberta.

111 The Crown argues that the Supreme Court has established that the rights are site specific, so Mr. Hirsekorn and Mr. Jones must establish historic patterns of use or occupation, of some degree, where the killing of the deer and antelope occurred, and they have failed to do so.

Law

112 The Supreme Court of Canada in *Powley* decided that:

1. Not all people of mixed ancestry will have s. 35 rights, as the term "Metis" does not encompass all individuals with mixed Indian and European heritage: para. 10.
2. A Metis community is a group of Metis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life: para. 12.
3. Metis rights are contextual and site specific: para. 19.
4. The community must have shared traditions and customs: para. 23.
5. The community must be identifiable with some degree of continuity and stability: para. 23.
6. Aboriginal rights are communal, and must be grounded in the existence of a historic and present community: para. 24.

113 A constitutional right protected in s.35 but not equating to Aboriginal title must be established upon the consistent and frequent pattern of usage and occupation of a site specific area: *R. v. Laviolette*, [2005] 3 C.N.L.R. 202, 2005 SKPC 70; *R. v. Cote* [1996] 3 S.C.R. 139; *R. v. Willison*, [2006] 4 C.N.L.R. 253, 2006 BCSC 985.

Applying the Law to the Facts

114 Until after the North West Mounted Police arrived in southern Alberta in 1874, there was no consistent pattern of use or occupation of southern Alberta by Metis hunters. It was actually the presence of the North West Mounted Police that allowed the Metis to encroach upon the Blackfoot hunting grounds. This is because upon the arrival of the North West Mounted Police, the Blackfoot

discontinued the use of violence and made requests of the North West Mounted Police to help prevent the incursion of other Indians and Metis into their hunting territory.

115 The evidence has shown that an historical Metis community existed in the region of what is present day Edmonton and district. This group of North Saskatchewan Metis included the settlements of Fort Edmonton, St. Albert, Lac St. Anne, Victoria, Lac La Biche, and Rocky Mountain House. The Metis people in this region had a distinctive collective identity, lived together in the same geographical area and shared a common way of life.

116 Based on his review of the evidence, Dr. Ray could not assertively state that by the 1870's, the North Saskatchewan Metis had been granted subsistence hunting rights by the Blackfoot. The best he could say is that there was a symbiotic and long-standing relationship between the North Saskatchewan Metis and the plains First Nations they traded with, which developed through trading and inter-marriages.

117 Dr. Ray's opinion is consistent with the other evidence, in which it is clear and unequivocal that movement of the North Saskatchewan Metis into southern Alberta was very sporadic, irregular, and infrequent. While the North Saskatchewan Metis eventually began to move in a southerly direction, they did not penetrate into southern Alberta until after the North West Mounted Police arrived in 1874.

118 I cannot find that the area used by the North Saskatchewan Metis community extended into southern Alberta because there was no regular, consistent use by this Metis community prior to 1874.

119 The same can also be said of the Red River Metis; they did not travel consistently into southern Alberta until after the North West Mounted Police arrived.

120 I am aware that Ms. Jones states the following in her report:

... However, according to Hind and the *Nor'Wester*, by 1860 the large Red River hunting and trading parties, on good terms with the Cree and Assiniboine, wintered between the North and South Saskatchewan as far west as the sources of the South Saskatchewan.

121 Ms. Jones expanded on this in direct examination, and was also extensively cross-examined on this conclusion. In cross-examination, she confirmed that her opinion that large parties of Metis were hunting in the area of Treaty 7 was in reliance upon the statements by the explorer Hind and in the *Nor'Wester*, a newspaper. While there were many later references to such hunting, she agreed that Hind and the *Nor'Wester* were the earliest.

122 In cross-examination, it became clear that Hind personally never travelled into Alberta, and that his description of the Metis hunters placed them in either present-day Alberta or Saskatchewan.

As for the *Nor'Wester* report, the description was also shown to be similarly equivocal. Ms. Jones' opinion that the Red River Metis were hunting in large parties into southern Alberta by the 1860's is therefore without adequate foundation.

123 In order to establish Metis use or occupation of central and southern Alberta, Dr. Ray and Ms. Jones also spent a great deal of time discussing the travels of Metis onto "the plains". However, "the plains" is a general term without specifics before this Court, and their evidence regarding what constitutes "the plains" is not sufficient to meet the site specific requirements of *Powley* and other authorities.

124 Dr. Ray noted that he found the use of the term "the plains" very frustrating because the area was rarely, if ever, identified. He stated that while the Hudson's Bay Company records often referred to people on their way to or from "the plains" or hunts at "the plains", a geographic location was rarely, if ever, given. The best definition Dr. Ray felt able to provide was that "the plains" was a shifting geographical reference to the grasslands area where the buffalo were located. As the years progressed and the pemmican came from farther and farther away, he believed the geographical area referred to by "the plains" was further to the south, and as far as he was able to tell, in a southeasterly direction.

125 Ms. Jones acknowledged that the area west of the Red River to the Rocky Mountains, northwest to the North Saskatchewan, and south into Montana is a very large area. However, even accounting for the fact that there may be some locations within it that were not used or were not used very often by Metis, she was still of the opinion that it is proper to characterize the entire region "as being a kind of use area if not in all cases a long term occupancy area" for the Metis.

126 Clearly, these descriptions are not site-specific.

127 This evidence is also not consistent with the type of evidence in other cases that has been used to prove a region is a part of an historic community. For example, in *Laviolette*, there was proof of a regional network of relationships supporting constant movement among fixed settlements, connected by a transportation system of river routes, cart trails and portages.

128 In direct contrast to *Laviolette*, the evidence here, which Ms. Jones agreed with, was that Palliser documented no cart trails in the area west of the Cypress Hills and in the Treaty 7 area; that the boundary commission noted no trail between Wood Mountain and the Cypress Hills; and that the North West Mounted Police didn't find a trail between present-day Fort Macleod and Calgary. She also agreed that in the course of her study, she came across no documents that noted the existence of trails in the areas of Pallier's map marked "plains" and "great plains". Conversely, the boundary commission noted some hunting trails along the 49th parallel, and by the late 1870's, cart trails between Benton and Macleod and Benton in the direction of Fort Edmonton were being recorded.

129 Therefore, even if there were Metis hunters and travellers of Metis origin into southern

Alberta before the mid 1870's, these trips were for very short periods of time, the travellers did not stay, and there was no stability, no contextual community, and nothing related to a site specific element.

130 In addition to this lack of stability and continuity, I find that the groups who did occasionally and sporadically travel and hunt into southern Alberta were not identifiable as a distinct Metis community, and did not necessarily live together except during their travel times.

131 The large groups of mixed ancestry people and mixed ancestry-Indian groups that infrequently travelled and hunted in southern Alberta, cannot be said, on a balance of probabilities, to have only practised customs and traditions that were distinctive to the Metis culture. These groups may well have been of mixed ancestry, but may have followed the practises, traditions and culture of the Indians they travelled with.

132 For example, some mixed ancestry groups were associated with the Blackfoot Confederacy and Cree tribes by marriage. It has not been shown that these families were distinctly Metis and only practised those customs and traditions associated with the Metis culture, recognizable as a separate entity from their Indian forebears. They may have practised the customs and traditions of the Blackfoot and Cree.

133 In closing argument, the Court indicated that one of the questions was how people of mixed ancestry were living when they were on the plains; were they distinctly Metis? Were they living and hunting with the Blackfoot, as part of the Indian practice? Was there some other type of interaction? Counsel for the defendants simply responded, "We don't know".

Conclusion

134 As the Supreme Court said in *Mitchell* at para. 39, "Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities." I do not find the evidence that there was an historic Metis community meeting the test of *Powley* and other authorities persuasive. To summarize, there are two reasons why the defendants have failed to prove the existence of an historic community in southern Alberta:

1. It is clearly evident that prior to the arrival of the North West Mounted Police no Metis group had a sufficient degree of use, occupation, stability, or continuity in the area to support a site-specific constitutional right.
2. The evidence has not established a Metis group in southern Alberta with customs, traditions and a distinct collective identity from Indians.

Issue 5 - What is the relevant time frame when the European established effective political and legal control of Southern Alberta

135 The position of the Defendants is that effective control was achieved over a relatively short

period of time in central and southern Alberta and was due to the collapse of the buffalo, the surveying of the lands and the arrival of the CPR in Alberta in 1882. The period in which the lifestyle and economy of the Metis was changed forever was between 1879-1882.

136 The Crown argues that the date of effective control in southern Alberta was 1874 when the North West Mounted Police arrived. Prior to this time there was no Metis community in southern Alberta nor was there a consistent pattern of usage or occupation of the area by the Metis. The arrival of the North West Mounted Police allowed the Metis and other groups to enter the Blackfoot territory.

137 The Supreme Court of Canada stated in *Powley* that the pre-contact aspect of the *Van der Peet* test (*R. v. Van der Peet*, [1996] 2 S.C.R. 507) had to be adjusted to take into account the post-contact ethnogenesis of the Metis and the purpose of s.35 in protecting the historically important customs and traditions of distinctive peoples. Therefore, the focus when ascertaining Metis practices is to be on the period after a particular Metis community arose and before it came under the effective control of European laws and customs, which is effectively when the Europeans established political and legal control in a particular area.

138 While I am aware of *Powley's* statement that one is to look at the practices of the Metis community *prior* to the time of European control, in this case, such a determination is impossible, for I find that it was the establishment of European control that enabled persons of mixed ancestry to enter and eventually create a distinct Metis community in southern Alberta. This establishment of European control occurred with the arrival of the North West Mounted Police. In particular:

1. Prime Minister Mackenzie admitted in 1873 that there was no law and order in the North West Territories but he was of the view that the North West Mounted Police would be successful in asserting and upholding authority in the area.
2. The arrival of the North West Mounted Police did cause southern Alberta to become a much safer place due to the fact the whiskey traders went back to the United States and the Indian hostilities came to an end. This social control came hand in hand with legal control.
3. Rather than using violence, the Indians, particularly the Blackfoot confederacy, turned to the North West Mounted Police to resolve disputes, and also engaged in the use of petitions, not violence, to improve their plight.
4. As the police moved further into southern Alberta people of mixed ancestry also moved further and in larger numbers into southern Alberta. First, their activities increased, and then, they actually began to settle the area.
5. Metis settlements closely followed the building of North West Mounted Police posts in southern Alberta. By 1879 Metis settlements began to

develop around Calgary and Fort Macleod.

6. Compared to the time period prior to 1875, vital events increased in the Cypress Hills area and other regions in southern Alberta after the arrival of the North West Mounted Police, specifically spiking from 1875 to 1878.

139 Effective political and legal control of the area known as southern Alberta began with the arrival of the North West Mounted Police, and in the opinion of the Court occurred between the years of 1874 to 1878.

Issue 6 - Whether there exists a Contemporary Rights-Bearing Community in Southern Alberta

Additional Facts

140 The community witnesses that testified on behalf of the defendants continue to practice the shared customs and traditions of their Metis ancestors. In general, they all practice the traditions of harvesting by hunting, trapping, fishing, and gathering medicines, herbs and berries. They generally all participate in Metis culture by dancing, singing, fiddling, doing beadwork, storytelling and participating in other Metis social activities. They continue to teach Michif, the Metis language, to other Metis. They also participate in the political association of Alberta Metis peoples by being members of the Metis Nation of Alberta or local Metis associations. They are to be considered members of distinct and contemporary Metis communities.

141 Mary Jane Norris was called as an expert witness by the defence. She was qualified as a demographer with expertise in Canadian census data on mobility and migration, including Aboriginal demographics. She reviewed the 2006 census and provided evidence on the geographic distribution and mobility of the Alberta Metis population. Two points of interest emerge from her evidence. The first is the geographic distribution of Metis in Alberta:

1. Northern Alberta 29%
2. Central Alberta 45%
3. Southern Alberta 25%

142 The second point is that she found Metis had much higher migration rates as opposed to the general population, and that migration of Alberta Metis, or even specific groups of Alberta Metis as compared to other Alberta groups, was also very high. With respect to this evidence, she could offer no reasons for these rates, and I therefore did not find this evidence useful.

Application of the Law to the Facts

143 I have no difficulty finding that as the North West Mounted Police established control over

southern Alberta, families of mixed ancestry became established and even flourished. As the families of mixed ancestry established their communities within larger communities such as Medicine Hat, they developed shared customs and traditions, and became distinct, stable Metis communities.

144 I find there is a contemporary Metis community in the City of Medicine Hat which lies in close proximity to the Cypress Hills and Suffield.

145 However, the Supreme Court of Canada in *Powley* stated that the contemporary community must be a continuation of the historic rights-bearing community. *Willison* expanded upon this, stating that a claimant must provide evidence that the contemporary Metis community has a "sufficient continuity of practice, custom and tradition with the specific identified historic community": para. 50.

146 As there was no historic rights-bearing Metis community in southern Alberta prior to the arrival of the North West Mounted Police, the modern Metis community in Medicine Hat is not the equivalent of a contemporary rights-bearing community.

Issue 7 - Whether the Defendants are members of the relevant contemporary Metis community

147 *Powley* states that to find the individual defendants are able to assert the Metis right, they must prove three things:

1. that they self-identify as a member of a Metis community: para. 31;
2. that they have an ancestral connection to the historic community whose practices ground the right being claimed: para 32;
3. that they are accepted by a modern community which has continuity with the historic one: para. 33.

148 Both defendants self-identify as Metis. They both also have Metis ancestry: There is sufficient evidence to show that Mr. Jones has an ancestral connection to a historic Metis community, being the White Horse Plains of Manitoba and the Torchwood Hills of Saskatchewan. Mr. Hirsekorn's genealogy links him to Fort Ellice N.W.T., Parish of St. Paul, Manitoba, Lac La Biche and Bai St. Paul.

149 However, *Powley* makes it clear that being of Metis ancestry does not qualify an individual to exercise a right; the ancestral connection must be to the historic community that grounds the right. This requirement ensures that the beneficiaries of s.35 rights have a real link to the historic community whose practises ground the right being claimed. I have found no historic community in southern Alberta, where the defendants were hunting. In addition, the evidence has not satisfied me that either of Mr. Jones' or Mr. Hirsekorn's Metis ancestors belonged to an historic community whose practices included hunting in the area today known as southern Alberta. Therefore, neither

defendant has satisfied the second part of the *Powley* test.

150 The third part of the test is also not satisfied because of the lack of existence of both historic and modern communities.

151 Both Mr. Hirsekorn and Mr. Jones are members of the Metis Nation of Alberta, and their counsel requested that the Court comment on its registration system. For the purposes of the registration of Albertans of mixed ancestry who wish to self-identify as part of a modern, distinct Metis culture, the system may very well be acceptable. However, as I understand *Powley* and have articulated it in these reasons, registration as a member of the Metis Nation of Alberta does not qualify the member to exercise s.35 hunting rights throughout Alberta.

152 The Provincial Court of Alberta does not have the jurisdiction to make an order directed at either the Government of Alberta or the Government of Canada, but it certainly would be useful for there to be a discussion between the Metis Nation of Alberta, the Alberta Provincial Government and the Federal Government for the purpose of establishing a joint management agreement.

Issue 8 - Whether the practice of hunting for food is an integral part of the Metis Culture

153 The Crown does not take issue with the fact that hunting for food (subsistence hunting) is an integral part of the Metis culture.

Issue 9 - Whether there has been Continuity between the Historic and Contemporary Metis Practice

154 As I have previously found there is no historic Metis community in southern Alberta and no continuing modern Metis community, it is not necessary for me to consider this issue.

155 However, while the Supreme Court of Canada stated in *Powley* that the right to hunt for food is not species specific, the unconverted fact is that as the buffalo retreated from Canada and were hunted to the point of extinction, the nomadic practice of following and surviving off the herds died. Continuing the same practice without the existence of the buffalo was impossible, as is demonstrated by the need to distribute food rations to starving Indians and peoples of mixed ancestry in the latter part of the 1800's.

156 Therefore, even if I am wrong in my conclusion that there was no historic Metis community in southern Alberta, another problem is that any such historic community, based upon the practice of roaming lands to hunt animals which sustained families, perished with the collapse of the buffalo herds. It is therefore impossible to prove any continuity between a historic community with this nomadic practice of survival, and any modern community.

Issues 10 and 11 - Whether the Right to Hunt for Food has been Extinguished and Whether there has been Infringement of the Metis Right, and if so, Whether it is Justified

157 Under the circumstances of this case the Court does not have to answer these two questions.

Conclusion

158 I conclude that:

1. The Constitutional argument of Mr. Hirsekorn and Mr. Jones is dismissed.
2. Mr. Hirsekorn and Mr. Jones should not have proceeded in the Provincial Court of Alberta with a collateral attack against the *Wildlife Act*.
3. Mr. Hirsekorn and Mr. Jones were not hunting for food (subsistence hunting) or hunting for a ceremonial purpose.
4. Mr. Hirsekorn is guilty of the charges before this Court.

F.C. FISHER PROV. CT. J.

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