

ESTABLISHING A METIS RIGHT - THE POWLEY TEST

The Supreme Court said that the appropriate way to define Métis rights in s. 35 is to modify the test used to define the Aboriginal rights of Indians (the *Van der Peet* test). This Métis test will now be called the *Powley* test. The test is set out in ten parts:

1. **CHARACTERIZATION OF THE RIGHT** - For a harvesting right, the term “characterization” refers to the ultimate use of the harvest. Is it for food, exchange or commercial purposes? The Court said that the Métis right to hunt is not limited to moose just because that is what the Powleys were hunting. Métis don’t have to separately prove a right to hunt every species of wildlife or fish they depend on. The right to hunt is not species-specific. It is a general right to hunt for food in the traditional hunting grounds of the Métis community.
2. **IDENTIFICATION OF THE HISTORIC RIGHTS BEARING COMMUNITY** - A historic Métis community was a group of Métis with a distinctive collective identity, who lived together in the same geographic area and shared a common way of life. The historic Métis community must be shown to have existed as an identifiable Métis community prior to the time when Europeans effectively established political and legal control in a particular area.
3. **IDENTIFICATION OF THE CONTEMPORARY RIGHTS BEARING COMMUNITY** - Métis community identification requires two things. First, the community must self-identify as a Métis community. Second, there must be proof that the contemporary Métis community is a continuation of the historic Métis community.
4. **VERIFICATION OF MEMBERSHIP IN THE CONTEMPORARY MÉTIS COMMUNITY** - There must be an “objectively verifiable process” to identify members of the community. This means a process that is based on reasonable principles and historical fact that can be documented. The Court did not set out a comprehensive definition of Métis for all purposes. However, it set out three components to guide the identification of Métis rights-holders: self-identification, ancestral connection to the historic Métis community, and community acceptance. Difficulty in determining membership in the Métis community does not mean that Métis people do not have rights.
5. **IDENTIFICATION OF THE RELEVANT TIME** - In order to identify whether a practice was “integral” to the historic Aboriginal community, the Court looks for a relevant time. Ideally, this is a time when the practice can be identified and before it is forever changed by European influence. For Indians, the Court

looks to a “pre-contact” time. The Court modified this test for Métis in recognition of the fact that Métis arose as an Aboriginal people after contact with Europeans. The Court called the appropriate time test for Métis the “post contact but pre-control” test and said that the focus should be on the period after a particular Métis community arose and before it came under the effective control and influence of European laws and customs.

6. **WAS THE PRACTICE INTEGRAL TO THE CLAIMANT’S DISTINCTIVE CULTURE** - The Court asks whether the practice - subsistence hunting - is an important aspect of Métis life and a defining feature of their special relationship to the land. The Court specifically noted that the availability of a particular species over time is not relevant. So even though the case may be about moose hunting, as it was with the Powleys, the issue is really about the right to hunt generally. The Court found that, for the historic Sault Ste Marie Métis community, hunting for food was an important and defining feature of their special relationship with the land.

7. **CONTINUITY BETWEEN THE HISTORIC PRACTICE AND THE CONTEMPORARY RIGHT** - There must be some evidence to support the claim that the contemporary practice is in continuity with the historic practice. Aboriginal practices can evolve and develop over time. The Court found that the Sault Ste Marie Métis community had shown sufficient evidence to prove that hunting for food continues to be an integral practice.

8. **EXTINGUISHMENT** - The doctrine of extinguishment applies equally to Métis and First Nation claims. Extinguishment means that the Crown has eliminated the Aboriginal right. Before 1982, this could be done by the constitution, legislation or by agreement with the Aboriginal people. In the case of the Sault Ste Marie Métis community, there was no evidence of extinguishment by any of these means. The Robinson Huron Treaty did not extinguish the Aboriginal rights of the Métis because they were, as a collective, explicitly excluded from the treaty. A Métis individual, who is ancestrally connected to the historic Métis community, can claim Métis identity or rights even if he or she had ancestors who took treaty benefits in the past.

9. **INFRINGEMENT** - No rights are absolute and this is as true for Métis rights as for any other rights. This means that Métis rights can be limited (infringed) for various reasons. If the infringement is found to have happened, then the government may be able to justify (excuse) its action. The Court said here that the total failure to recognize any Métis right to hunt for food or any special access rights to natural resources was an infringement of the Métis right to hunt.

10. **JUSTIFICATION** - Conservation, health and safety are all reasons that government can use to justify infringing an Aboriginal right. But they have to prove that there is a real threat. Here there was no evidence that the moose population was under threat. Even if it was, the Court said that the Métis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria set out by the Supreme Court in *R. v. Sparrow*. Ontario's blanket denial of any Métis right to hunt for food could not be justified.