In the Court of Appeal of Alberta

Citation: R v Hirsekorn, 2013 ABCA 242

Date: 20130704
Docket: 1101-0297-A
Registry: Calgary

Between:

Her Majesty the Queen

Respondent

- and -

Garry Ivan Hirsekorn

Appellant

- and -

Blood Tribe, Siksika Nation,
Métis National Council

Interveners

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Mr. Justice Alan Macleod

Reasons for Judgment Reserved of The Honourable Madam Justice Paperny
Concurred in by The Honourable Mr. Justice McDonald
Concurred in by The Honourable Mr. Justice Macleod

Appeal from the Decision by
The Honourable Chief Justice Neil Wittmann
Dated the 4th day of November, 2011
(2011 ABQB 682, Docket: 101553758S1)

Reasons for Judgment Reserved of
The Honourable Madam Justice Paperny

Introduction

[1] On October 20, 2007, the appellant, Garry Hirsekorn, shot a mule deer near Elkwater, a community on the western edge of the Cypress Hills in southeastern Alberta. The appellant was charged with hunting wildlife outside an open season and being in possession of wildlife without a valid wildlife permit, contrary to ss 25(1) and 55(1) of the *Wildlife Act*, RSA 2000, c W-10.

[2] The appellant is Métis. He defended the charges on the ground that, as a Métis person within the meaning of s 35(2) of the *Constitution Act*, he has an aboriginal right to hunt for food and that the *Wildlife Act* unjustifiably infringes that right. The trial judge did not accept his constitutional argument and on that basis, among others, he found the appellant guilty as charged: *R v Hirsekorn*, 2010 ABPC 385, 42 Alta LR (5th) 346.

[3] The appellant appealed his conviction to the Court of Queen's Bench. The main issue before the summary conviction appeal judge was the appellant's constitutional challenge. The appeal judge applied the test set out by the Supreme Court of Canada in *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207. He concluded that the trial judge's findings did not support the existence of a Métis group for whom hunting for food in the area of the Cypress Hills was integral to their culture before the assertion of effective European control and dismissed the appeal: *R v Hirsekorn*, 2011 ABQB 682, 520 AR 60. The appellant appeals.

[4] This appeal raises issues regarding the application of several aspects of the *Powley* test, including the proper characterization of the hunting right claimed by the appellant, the definition of the historical Métis community in Alberta, the relevant time frame for the establishment of effective European control in the area, and the appropriate analysis to assess whether the right asserted here was integral to the distinctive culture of the Métis people prior to European control.

[5] Factually, the appeal raises a deceptively simple issue: to what extent did the Métis hunt in the environs of the Cypress Hills in southern Alberta prior to the date of effective control?

[6] After briefly describing the decisions of the courts below, these reasons will address the context in which the asserted right is alleged to have arisen, including a review of some of the historical evidence adduced at trial. As is often the case with aboriginal rights claims, the historical context is essential to the analysis of the appellant's asserted right.

[7] The reasons will then turn to the application of the *Powley* test. I have not found it necessary to address all aspects of that test, given my conclusions with respect to some of its branches. The reasons therefore deal mainly with the four aspects of the test mentioned above. In particular, I have

considered the analytical approach to the question of whether the right to hunt in a particular area is integral to the distinctive culture of the plains Métis, a largely nomadic people.

[8] The reasons conclude that the right asserted was properly characterized as being the right to hunt for food in the Cypress Hills and environs. The evidence supports the conclusion that no Métis community, however defined, had sufficient presence in that area leading up to the time of effective control. Thus the question as to how to define the "historic community", or which of several regional Métis communities had those rights, cannot logically be answered. The evidence also supports the conclusion that effective control for the purpose of the *Powley* test occurred in 1874. A purposive approach to deciding whether a practice is integral to a distinctive culture poses the question: did the historic Métis community include the particular area within its ancestral lands or traditional hunting territory? In this case, the answer is no.

Decisions Below

Provincial Court trial decision: *R v Hirsekorn*, 2010 ABPC 385

[9] The crux of the trial judge's decision is his conclusion that the appellant failed to prove the existence of a historic rights-bearing Métis community in southern Alberta prior to the time of European control (which he identified as the arrival in southern Alberta of the North West Mounted Police between 1874 and 1878). He found that there was a contemporary Métis community in the City of Medicine Hat (which is in close proximity to the Cypress Hills), but concluded that the contemporary Métis community became established after, and as a result of, the establishment of control over southern Alberta by the North West Mounted Police.

[10] The trial judge identified historic Métis settlements in northern Alberta (in and around present day Edmonton), and around the Red River. He concluded that neither of these communities extended into southern Alberta prior to European control for two reasons (set out at para 134):

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

[11] The trial judge's review of the evidence led him to conclude that there was little to no Métis presence in southern Alberta prior to the 1870s, although he did find some Métis presence in the area just before effective control. For example, at para 93 of his reasons, the trial judge stated that, "[t]he Métis activity in southern Alberta, and specifically in the Cypress Hills area, increased dramatically after the arrival of the North West Mounted Police." (emphasis added). However, the trial judge was of the view that a much greater degree of presence, including evidence of settlements, was required to establish an aboriginal right to hunt in the area.

[12] The trial judge dismissed the appellant's constitutional argument and found him guilty under the *Wildlife Act*.

Court of Queen's Bench appeal decision: 2011 ABQB 682

[13] On November 4, 2011, the summary conviction appeal judge released his reasons for upholding the appellant's summary conviction. The appeal judge overturned many of the trial judge's conclusions, particularly on preliminary issues that are not relevant to this appeal, but ultimately he too concluded that the appellant failed to establish an aboriginal harvesting right.

[14] The appeal judge's reasons consist largely of an application of the ten-part *Powley* test, beginning with the characterization of the right being claimed. The appeal judge had no difficulty in concluding that the appellant was claiming the right to hunt for food, but was more troubled by the need to place a geographical limit on that right, so as to make the right sufficiently "site-specific". He described the key issue before him at para 96 of his reasons:

> The evidence is clear that prior to effective control, the Métis were known as hunters and that hunting buffalo was such a significant practice that it constituted a way of life that made the Métis distinctive. As I will address below, the issue in this appeal is not whether hunting was integral to the Métis way of life, but rather whether the appellant can claim a right to hunt with respect to a large area such as the plains or central and southern Alberta and whether hunting at the location where the appellant was hunting was part of a geographic area where the activity was exercised before European control.

[15] The appeal judge considered the appellant's position that the right should be characterized broadly, as the right to hunt on the plains including southern Alberta, to take account of the historic land use pattern of the largely nomadic Métis. After reviewing the authorities, the appeal judge concluded that the appellant's preferred characterization was not sufficiently site-specific. He characterized the right at issue as "the right to hunt for food in the Cypress Hills area, which includes the area where the appellant hunted", concluding at para 114:

> This characterization is appropriate because it is supported by the evidence and takes into account the perspective of the Métis people claiming the right; reflects the actual pattern of exercise of Métis hunting prior to effective control; characterizes the practice in accordance with the highly mobile way of life of these Métis buffalo hunters; and gives constitutional meaning to the Métis people's traditional relationship to the land they lived on, used and occupied.

[16] The appeal judge then moved on to a consideration of the relevant historic rights-bearing community. He did not find it necessary to define that historic community in this case as, in his view, the appellant's claim failed on a subsequent branch of the *Powley* test. Nevertheless, the appeal judge was troubled by the trial judge's approach to the question, saying, at para 124:

> But, if the trial judge meant that the members of the community needed to live in southern Alberta, he erred when he found that the Appellant needed to show that a Métis group had a sufficient degree of use, occupation, stability, or continuity in the area to support a site-specific constitutional right. I disagree that an aboriginal community needs to show a sufficient degree of use, occupation, stability, or continuity in the area where a practice was exercised to support a site-specific constitutional right. For instance, the evidence presented at trial in this case shows that the Métis who hunted the buffalo had to travel farther and farther away from where their settlement or village was situated. The contrary interpretation would mean that aboriginal people who have a highly mobile way of life would never be able to establish a right because they did not live around where they exercised their activity. This would be an unacceptable interpretation of s. 35.

[17] Relying on the decisions of the Supreme Court of Canada in *R v Adams*, [1996] 3 SCR 101 and *R v Côté*, [1996] 3 SCR 139, which make it clear that aboriginal rights can exist independently of aboriginal title, the appeal judge concluded that the *Powley* test does not require a claimant to show that hunting took place around, or close to, the location of historical settlements or villages: para 132.

[18] The appeal judge agreed with the trial judge's conclusion as to the relevant time frame, or the point in time at which Europeans effectively established political and legal control over the Cypress Hills area. He held that the evidence supported the trial judge's conclusion that the arrival of the North West Mounted Police in 1874 had an almost immediate effect on the inhabitants in and around southern Alberta, including the Métis: paras 145-146.

[19] A key part of the appeal judge's analysis is his application of that branch of the *Powley* test that considers whether the practice underlying the asserted right was "integral to the distinctive culture" of the aboriginal people. He approached this analysis by asking whether hunting for food in the site-specific area in question, i.e. the Cypress Hills area, was integral to the distinctive culture of the plains Métis prior to the time of effective control. The appeal judge expressed the legal test as follows at para 161:

> In order to determine whether a right to hunt exists in a specific area, it is not sufficient to show that a Métis group was in proximity to the area. It must also be shown the practice at and/or around that site was integral to the distinctive culture of the Métis.

[20] The appeal judge referred to the trial judge's summary of the evidence in concluding that, prior to the date of effective control, hunting in the Cypress Hills area was not integral to Métis culture. He also relied on the opinion of the Crown expert, historian Dr. Clint Evans (whose views in this regard were also accepted by the trial judge), that the Cypress Hills area did not become a favoured wintering location for the Métis until after the arrival of the North West Mounted Police

brought a "measure of safety and security to the area". Until that time, according to Dr. Evans, the Cypress Hills was a "notoriously dangerous" place because of the hostile presence of the Blackfoot confederacy, and was generally avoided.

[21] For these reasons, the appeal judge concluded that, although the practices of hunting and harvesting for food were in and of themselves integral to Métis culture, hunting in the Cypress Hills area did not become integral until after the establishment of European control.

The Métis in Alberta

[22] Section 35 of the *Constitution Act, 1982* protects aboriginal rights in these terms:

> 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.

[23] In *Powley*, the Supreme Court of Canada considered the meaning of the term Métis as used in s 35(2), saying at para 10 that it:

> ... 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.

[24] The Court quoted the following description of Métis culture from the Royal Commission on Aboriginal Peoples, at para 10:

> 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.

[25] The factual context in *Powley* focused on the Métis community at Sault Ste. Marie. The trial judge in that case found that a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century, peaked around 1850, and continued to exist to the present day. The appellants claimed the right to hunt for food in the environs of Sault Ste. Marie; there was no

question regarding the site specificity of that right, as there is in this case. The community and the settlement were centred on Sault Ste. Marie, the hunting in question occurred there, and the analysis of the right was focused on that location.

[26] As was noted by the trial judge in *R v Goodon*, 2008 MBPC 59, 234 Man R (2d) 278, the Métis communities of Western Canada have their own distinctive identity. He described that identity at para 46:

> As the Métis of this region were a creature of the fur trade and as they were compelled to be mobile in order to maintain their collective livelihood, the Métis "community" was more extensive than, for instance, the Métis community described at Sault Ste. Marie in *Powley*. The Métis created a large inter-related community that included numerous settlements located in present-day southwestern Manitoba, into Saskatchewan and including the northern Midwest United States.

[27] The Métis community (or communities) at issue in this case were similarly wide-ranging and mobile.

[28] Dr. Arthur Ray, who was called as an expert witness on behalf of the appellant, described the formation of Métis settlements in central and western interior Canada and the economies of those settlements. According to Dr. Ray, it is generally accepted that the roots of the western Métis can be traced, in part, to the Great Lakes area and was largely dependent on the fur trade. The expansion of the fur trade into different zones led to the development of distinct regional Métis economies between 1820 and 1870. He concluded that, by 1870, there were at least two variants of Métis economic communities. One consisted of the Métis of the Upper Great Lakes and Southern Boreal regions, where fishing was a mainstay. The other community variant, which Dr. Ray described as "more spatially extensive", were the buffalo hunters of the Parkland-Grassland region. [Report of Arthur Ray, p 152]. It is the latter with which I am primarily interested, although Dr. Ray opined that in some areas, most notably present-day central Alberta, the two types overlapped.

[29] The trial judge noted the existence of large Métis settlements on the plains, particularly at Red River and in the North Saskatchewan region of Alberta, near Fort Edmonton. Buffalo hunting was a central activity, and many of the Métis hunters rarely if ever returned to the settlements, preferring to remain on the plains. The report of Gwynneth Jones, an historian who testified as an expert for the appellant, includes the following quotation from the writings of H.Y. Hind, who observed in 1857-58 that some of the Red River hunters scarcely returned to the settlement:

> As the buffalo diminish and go farther away towards the Rocky Mountains, the half-breeds are compelled to travel much greater distances in search of them, and consume more time in the hunt; ...

> There are several hundred half-breeds who, like their ancestors, pass their lives on the prairies, visiting the settlements occasionally, according as they may be in want of ammunition or clothing.

[30] The appeal judge noted the largely nomadic nature of the Métis buffalo hunters at this time, citing several examples from the expert evidence at paras 98-100 of his reasons. That historical evidence makes clear that many of the plains Métis spent most of their time hunting on the prairies, with little connection to permanent settlements.

[31] The evidence indicates that, as early as the late 1850s, and certainly during the 1870s, the rapid collapse of the buffalo herds meant that the Métis hunters found it necessary to roam further afield to follow the herds. Dr. Ray noted that many journal entries from the early 1870s refer to the hunters leaving "for the plains", although he recognized that the term was not well defined. In his opinion, "the plains", or bison ranges, were further afield in 1871 than they had been in the 1820s. [Report of Arthur Ray, pp 125-129]. He stated that the buffalo hunting of the Red River Métis increasingly shifted westward toward the Cypress Hills area. At the same time, the buffalo-hunting spheres of the Ft. Qu'Appelle and North Saskatchewan Métis communities extended into the same area. [Report of Arthur Ray, p 154].

[32] The report of Dr. Clint Evans, who testified as an expert for the Crown, contains similar information. He noted that by the end of the 1860s, American and Red River Métis were settling in an hivernement (or temporary winter settlement) at Wood Mountain, approximately 416 miles west of the Red River and 180 kilometres east of the Cypress Hills. This movement west by the Red River Métis was said to be necessitated by the migration of the buffalo, which were moving westward. In fact, by the fall of 1873, according to Dr. Evans, Wood Mountain itself was too far east to be a convenient base for plains buffalo hunters. In the words of Boundary Commission geologist George Mercer Dawson, Wood Mountain was then "four days' travel" from the remaining herds and its prosperous days were already over. [Report of Clint Evans, pp 80-83].

[33] The Crown did not dispute that hunting buffalo on the prairies or plains was an integral part of the Métis lifestyle. The real dispute at trial, and on the summary conviction appeal, was the extent to which that hunting extended into southern Alberta and, in particular, into the environs of the Cypress Hills in southeastern Alberta, prior to the date of effective control.

[34] Dr. Evans expressed the view, accepted by both the trial judge and the appeal judge, that the Cypress Hills, while conveniently close to the remaining herds of buffalo in the late 1860s and early 1870s, were not frequented for hunting because they were "notoriously dangerous". Dr. Evans quoted the following comment by Isaac Cowie:

> ... for as far back as the memory and traditions of the Crees then living extended, these Cypress Hills ... had been a neutral ground between many different warring tribes, south of the now marked international boundary, as well as the Crees and the Blackfeet and their friends. No Indian for hunting purposes ever set foot on the hills,

> whose wooded coulees and ravines became the undisturbed haunt of all kinds of game .... Only wary and watchful war parties of any tribe ever visited the hills, and so dangerous was it to camp in them that it was customary for such parties to put up barricades about the spots on which they stayed over night. [Report of Clint Evans, p. 84; also quoted in Report of Arthur Ray, pp 104-105].

[35] The trial judge made several findings of fact regarding this view of the Cypress Hills and of Blackfoot Territory generally as "notoriously dangerous". For instance, he made the following findings with respect to the nature of southern Alberta prior to 1870:

> [49] ... "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.
> ...
> [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 1830s 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.
> ...
> [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 1870s.
> ...
> [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 1850s to the 1870s the Métis traveled the Carlton Trail from the Red River area to Fort Edmonton and the surrounding area. Up until the 1870s, there was very little evidence of travel into southern Alberta by the Métis.
>
> [67] In the late 1850s, 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, Métis, European traders and missionaries.

> [68] In 1857, Palliser reached the elbow of the South Saskatchewan River. The Métis traveling with the expedition would not travel any further south because they were afraid of the Blackfoot confederacy.
> ...
> [70] During his expedition Palliser did not document the presence of Métis settlements in southern Alberta.

[36] There was some evidence of Métis presence moving further south in Alberta beginning in the 1870s. A large number of Métis from the North Saskatchewan settlements wintered at Buffalo Lake (near Red Deer in central Alberta) in 1870-71 and 1872-73: reasons of the trial judge at para 82. This wintering camp was abandoned in 1878 because the buffalo were no longer accessible from that area.

[37] Dr. Evans speaks of a Métis hivernants camp established by Cowie on the eastern edge of the Cypress Hills (near present day East End, Saskatchewan) in the winter of 1871 for the purpose of opening negotiations with the Blackfoot on behalf of the Hudson's Bay Company (described by the trial judge at para 84 of his reasons). According to Dr. Evans, this camp came to an end in the early spring of 1872, "when the Blackfoot got wind of their presence. Faced with a steadily increasing number of Blackfoot 'prowlers', the Métis who had wintered with Cowie quickly 'broke camp and made their way east'". [Report of Clint Evans, p 85]. Cowie did not return to the Cypress Hills the following winter.

[38] The infamous Cypress Hills Massacre (involving the slaughtering of a band of Assiniboine by a drunken party of American wolf hunters) occurred in 1873, and was said to have occurred "within earshot" of a group of Métis who were wintering in the hills with a band of Cree [Report of Clint Evans, p 86]. Dr. Evans' report confirms that there were some Métis in the Cypress Hills area at that time, although he states that the number of Métis in the area did not increase significantly until after the arrival of the North West Mounted Police in the fall of 1874. In the opinion of Dr. Evans, accepted by both the trial and appeal judges, most Métis "considered it prudent to avoid wintering in the Cypress Hills", and the area did not become a "favoured Métis wintering location" until the winters of 1874-75 or 1875-76, after the arrival of the North West Mounted Police: [Report of Clint Evans, pp 87-88, cited at para 161 of the appeal reasons].

[39] Dr. Evans also describes a Métis hunter's camp encountered by the Boundary Commission on the plains in July 1874 (shortly before the arrival of the North West Mounted Police in the fall of that year), located just outside the southwestern corner of the Treaty 7 area, approximately sixty kilometers southwest of the western end of the Cypress Hills.

[40] The North West Mounted Police arrived in southern Alberta in the fall of 1874, a development that was generally received with approval by the Blackfoot confederacy and other Indian groups because of the problems caused by American whiskey traders. The trial judge found that 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".

[41] The trial judge also made findings regarding the effect that the arrival of the North West Mounted Police had on the presence of the Métis in southern Alberta:

> [94] As the Northwest Mounted Police established posts, the Métis established villages around posts. This occurred at Fort Saskatchewan, Fort Walsh, Fort Calgary and Fort Macleod. In 1875 when the Northwest Mounted Police established Fort Calgary, Métis established cabins on both sides of the Elbow River, forming a small settlement. The Métis freighted for the Northwest Mounted Police between Fort Macleod and Fort Calgary.
>
> [95] During the years 1874-1876, Métis 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 Métis 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 Métis. The Blackfoot confederacy continued to have concerns about other Indian tribes and the Métis accessing their hunting grounds. But after 1874, rather than use violence, the Blackfoot confederacy called upon the Northwest Mounted Police to provide help with the Indians and Métis who were encroaching upon their hunting grounds.

[42] Dr. Evans describes a "dramatic surge" in Métis wintering activity in the Cypress Hills after the arrival of the North West Mounted Police. Métis births at Cypress Hills jumped from one or two every second year, to under 20 per year between 1872 and 1874, to more than 60 per year by 1877. By the summer of 1875, the Cypress Hills were "eclipsing" Wood Mountain and the Frenchman River as the favoured wintering site for Red River and American Métis. [Report of Clint Evans, pp 124-125]. During the same time period, Dr. Evans reports that the North Saskatchewan Métis moved south and began wintering in Blackfoot country shortly after the arrival of the North West Mounted Police. [Report of Clint Evans, pp 130].

[43] Shortly thereafter, the buffalo herds continued to decline and move south. The Métis living in the Cypress Hills in 1878 signed a petition requesting the establishment of a reserve, because they were dependant on the buffalo which were moving east and south, and no longer frequenting the area. By 1879, the buffalo were gone from Canada and the Métis and Indians who remained on the plains were facing serious food shortages.

Standard of Review

[44] The appeal judge concluded that the trial judge applied the wrong test in relation to the historic rights-bearing community branch of the *Powley* test, in that the trial judge was looking for evidence of Métis settlements in southern Alberta, or evidence that Métis community members lived in southern Alberta. The appellant says that, having identified this error, the appeal judge should have gone back to the trial judge's summary of the expert evidence and separated out the true findings of fact (i.e. facts taken directly from the expert reports/testimony) from the trial judge's conclusions (i.e. statements that amount to the trial judge's own assessment of the evidence in relation to the wrong test).

[45] According to the appellant, the appeal judge needed to perform this task (the separation of fact from conclusion) in order to avoid tainting his own conclusions with the trial judge's application of the wrong legal test for historical Métis presence in the Cypress Hills area. But, the appellant says, the appeal judge failed to do this, and instead relied on several of the trial judge's conclusions as the basis for his own conclusion that hunting in the Cypress Hills was not an integral part of the distinctive culture of any Métis community prior to European control. The appellant notes, for example, that at para 161 of the appeal judge's reasons, he cites 11 paragraphs from the trial reasons as support for his conclusion. As the appellant points out, some of the cited paragraphs do more than make factual findings based on the expert evidence. They incorporate conclusions.

[46] As the Supreme Court noted in *Côté* at para 59, the role of an appellate court in cases of this nature is to "rely on the findings of fact made by the trial judge and to assess whether those findings of fact were both reasonable and support the claim that an activity is an aspect of a practice, custom or tradition integral to the distinctive culture of the aboriginal community or group in question". To the extent that the trial judge applied the correct test to findings of fact supported by the evidence, there is no ground upon which this court can properly interfere with his conclusions: *R v Marshall*, 2005 SCC 43, [2005] 2 SCR 220 at para 35. If the trial judge, or the appeal judge, applied an incorrect test in assessing his findings of fact, then his conclusions must be reviewed with that in mind. Our task is to apply the correct test to the facts as found by the trial judge, and to review those findings through the lens of the appropriate test.

Aboriginal Rights and the *Powley* Test

[47] The approach to aboriginal rights claims was set out by the Supreme Court of Canada in *R v Van der Peet*, [1996] 2 SCR 507. Courts must take a purposive approach to the interpretation and application of s 35(1), giving the constitutional provision a "generous, liberal interpretation", and analyzing it in light of the interests it was meant to protect. This means reconciling the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, with the sovereignty of the Crown: *Van der Peet* at para 31. The aboriginal perspective must be taken into account in defining and analyzing the rights claimed. The aboriginal rights protected under s 35(1) must be "interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives": *Van der Peet* at para 145, per L'Heureux-Dubé J (in dissent).

[48] The Court in *Van der Peet* developed a test for identifying those aboriginal rights that are recognized and affirmed by s 35(1) - courts must identify the practices, traditions and customs integral to the aboriginal societies that existed in North America prior to contact with the Europeans: *Van der Peet* at para 44. Several factors are to be considered in applying that test: for instance, the aboriginal perspective must be taken into account; the nature of the claim being made must be identified precisely; the practice, custom or tradition must be of central significance to the aboriginal society; and there must be continuity with those practices that existed prior to contact.

[49] That a Métis right to hunt is also protected by s 35 of the *Constitution Act* was established by the Supreme Court's decision in *Powley*. The Supreme Court confirmed that the same considerations would apply to an assessment of Métis rights as to aboriginal rights generally, with some adjustment for the unique history and situation of Métis people. A ten-part test was devised:

1. Characterization of the right.
2. Identification of the historic rights-bearing community.
3. Identification of the relevant time frame.
4. Identification of the contemporary rights-bearing community.
5. Verification of the claimant's membership in the relevant contemporary community.
6. Determination of whether the practice is integral to the claimant's distinctive culture.
7. Establishment of continuity between the historic practice and the contemporary right asserted.
8. Determination of whether or not the right was extinguished.
9. If there is a right, determination of whether there is infringement.
10. Determination of whether the infringement is justified.

The Application of the *Powley* Test in the Context of the Plains Métis

[50] The parties agree that *Powley* must be applied to determine if the appellant has established an aboriginal right to hunt. No one disputes that the way of life of the appellant's Métis ancestors centred around the hunting of the buffalo, and that hunting for food on the prairies was an integral part of their distinctive culture. The key areas of controversy all emanate from the geographic location in which that hunting took place, and the potential implications on the appellant's ability to establish a right. The appeal comes down to an assessment of the appeal judge's characterization of the right being claimed and his conclusions regarding whether the practice giving rise to that right was integral to the culture of the plains Métis. These and other aspects of the *Powley* test are discussed in detail below.

[51] My focus for purposes of this appeal is on (1) the characterization of the right, (2) the historic rights bearing community, (3) the relevant time frame, and (4) whether the practice is integral to the distinctive culture of the plains Métis.

1) <u>Characterization of the right</u>

[52] The appeal judge characterized the right being claimed by the appellant as the right "to hunt for food in the environs of the Cypress Hills". The appeal judge chose that location because that is where the appellant was actually hunting.

[53] The appellant argues that this characterization of the right does not take proper account of the Métis perspective, and focuses too heavily on the specific site where the alleged offence took place. He says that the right ought to have been characterized as a right to hunt for food in central and southern Alberta, or more broadly, on the plains, because this would better reflect the mobile lifestyle of his ancestors.

[54] The Crown agrees with the appellant, and the appeal judge, that there does not need to be a Métis village or settlement in southern Alberta to ground a right to hunt in the area. But, the Crown says, there must be some pattern of use and presence in the area. The Crown also agrees with the appellant that the area within which an aboriginal collective can exercise its rights may be geographically expansive; at the same time, however, the Crown takes the position that characterizing the right to hunt as being on "the plains", or the prairies of the northwest, is too broad a characterization. For their part, the Blood Tribe and the Siksika Nation (both part of the Blackfoot confederacy and signatories to Treaty 7, and both intevenors on the appeal), submit that their claims and rights in the area must also be considered when assessing the appellant's claim to a s. 35 right to hunt in southern Alberta.

[55] As the appeal judge noted, in *Powley* the Court at para 19 described aboriginal hunting rights, including Métis rights, as "contextual and site-specific". The right being claimed in that case was described as the right to hunt for food in the environs of Sault Ste. Marie, the area where the Powleys actually hunted.

[56] This is a common formulation of the characterization of aboriginal hunting rights. Several authorities have held that land based aboriginal rights, like hunting and fishing, should be described with some degree of geographical specificity. They are not abstract rights that are exercisable anywhere: *Adams* at para 30; *R v Sappier; R v Gray*, 2006 SCC 54, [2006] 2 SCR 686 at paras 50-51; *Mitchell v Minister of National Revenue*, 2001 SCC 33, [2001] 1 SCR 911 at para 56-59.

[57] In light of these authorities, I conclude that it was not an error to characterize the right claimed by the appellant as "the right to hunt for food in the environs of the Cypress Hills". This was the area where the appellant actually hunted and the evidence led at trial focused on the history of the Métis in this area. Characterizing the right as the right to hunt in central and southern Alberta or, even more broadly, as the right to hunt on "the plains", would present practical problems. What would be the geographical limits of such a right? It would, as the Supreme Court has noted, be inappropriate to grant a constitutional right to hunt that is abstract and exercisable anywhere.

[58] I am alive to the appellant's concerns that characterizing the right claimed in a geographically narrow way fails to take into account the very mobile nature of the plains Métis culture, and the broad territory over which Métis hunters traditionally ranged. This aboriginal perspective - the nature

of the culture of the plains Métis and the nature of the Métis practice underlying the claimed right, that is hunting by following a migratory herd - is better taken into account in assessing whether the practice underlying the claimed right was integral to Métis culture. This will be discussed in more detail under that branch of the *Powley* test.

2) Historic rights-bearing community

[59] In *Powley*, the Supreme Court held that the claimant must be able to demonstrate the existence of a Métis community with "shared customs, traditions, and a collective identity": *Powley* at para 23. Without enumerating the various Métis people that may exist, the court defined a Métis community as "a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life": *Powley* at para 12.

[60] The appellant agrees with the appeal judge's conclusion that there is no requirement to prove a Métis settlement in southern Alberta to ground a right to hunt in the area. He says, however, that the appeal judge erred by failing to identify which historic Métis group was capable of holding that right.

[61] The appellant urges this Court to find that a regionally defined community, described as the Métis Nation or the Métis of the Northwest, is the historic rights-bearing community for the purposes of the *Powley* test. He says that, despite an element of diversity within this community, its members shared a distinctive collective identity and way of life, they lived in the same geographic area (throughout the prairie provinces), and they exhibited a sufficient degree of presence in the site-specific area prior to effective control to ground an aboriginal harvesting right. He says that the broadly defined community "Métis of the Northwest" would include Métis with a presence in central and southern Alberta. In particular, he argues that it is inappropriate to require him to demonstrate an ancestral connection to a discrete settlement in southern Alberta.

[62] There is support for the proposition that the historic rights-bearing community in this case should be defined on a regional basis, rather than as a discrete settlement. Given the mobile nature of the plains Métis, as clearly established by the historical evidence, it would be inappropriate to describe the historic rights-bearing community in terms of "settlements". Dr. Ray, in his report, refers to "regional communities" that would include "habitation sites" or settlements. The evidence in this respect is similar to that presented regarding the Manitoba Métis in *Goodon*, where the trial judge concluded at para 46 that "the Métis created a large, inter-related community that included numerous settlements".

[63] What is not clear on the evidence of this case, however, is whether there was essentially one regional Métis community across the prairies at this point in history (characterized by the appellant as the Métis of the Northwest), or more than one community encompassing slightly smaller regions. For instance, the reports of the experts in this case speak of groups of Métis termed the "Red River Métis", the "North Saskatchewan Métis" and the "American Métis", although their evidence at trial shows some reluctance to classify these groups as different peoples. I conclude that the historical

rights bearing communities of the plains Métis are best considered as regional in nature, as opposed to settlement-based.

[64] As the appellant notes, neither the trial judge nor the appeal judge made findings as to which Métis made up the historical rights-bearing community relevant to this case, because both concluded that *no* Métis community had a sufficient presence in the Cypress Hills area to ground the asserted right to hunt there. I have reached effectively the same conclusion (although, as will be seen, for slightly different reasons). In the absence of clear findings regarding the nature of the historical Métis community in the time leading up to control, and in light of my conclusion on the next branches of the *Powley* test, I decline to make a determination with respect to whether there was only one, prairie-wide Métis community during the relevant time period. For purposes of these reasons, I will continue to refer to the Métis people relevant to this case as Métis or the plains Métis.

3) Identification of the relevant time frame

[65] In *Powley*, the Court adopted a "pre-control" test for the establishment of Métis rights, saying that the focus is on the "period after a particular Métis community arose and before it came under the effective control of European laws and customs." This approach allows the court to identify those practices, customs and traditions which predate the imposition of European laws and customs on the Métis people: *Powley* at para 37.

[66] The appellant argues that the arrival of the North West Mounted Police in southern Alberta did not amount to effective control because it did not change the Métis lifestyle and economy forever. He says that, up until 1879, the Métis continued to follow the buffalo and their lifestyle looked much the same after the arrival of the North West Mounted Police. He says that effective control did not take place until the period between 1879 and the early 1880s, when a convergence of events occurred —the collapse of the buffalo, the surveying of lands in the region and the arrival of the Canadian Pacific Railway in Alberta in 1882.

[67] The trial judge found that the establishment of European control occurred with the arrival of the North West Mounted Police in 1874. He summarized his conclusions at para 138 of his reasons:

> 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. Métis settlements closely followed the building of North West Mounted Police posts in southern Alberta. By 1879 Métis 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.

[68] After referring to the above findings, the appeal judge concluded that the trial judge did not err in his choice of the relevant time frame. Citing Dr. Evans' report at pp 100-101, the appeal judge held that, "[a]lthough, as pointed out by the appellant, the Métis economy changed later on towards the end of the 1870's, some evidence presented before the trial judge made it clear that the NWMP took control rapidly": para 146.

[69] Like the appeal judge, I see no error in the trial judge's choice of relevant time frame. There was ample evidence before him on which he could conclude that "effective control of European laws and customs" occurred upon, or shortly after, the arrival of the North West Mounted Police in late 1874.

4) Is the practice integral to the distinctive culture of the plains Métis?

[70] The core question on this appeal is whether the asserted right, characterized as hunting for food in the environs of the Cypress Hills, was integral to the distinctive culture of the plains Métis. The appeal judge approached this question by focusing on the site where the practice was carried out. He stated that an aboriginal rights claimant must show not only that a particular practice (e.g. hunting) was integral to the distinctive culture of his or her ancestors, but that conducting that practice on a particular site was integral to the distinctive culture of his or her ancestors. He relied on the decision of the Supreme Court in *Mitchell*, quoting from the decision at length at para 154 of his reasons:

> [55] The importance of trade in and of itself to Mohawk culture is not determinative of the issue. It is necessary on the facts of this case to demonstrate the integrality of this practice to the Mohawk in the specific geographical region in which it is alleged to have been exercised (i.e., north of the St. Lawrence River), rather than in the abstract. This Court has frequently considered the geographical reach of a claimed

> right in assessing its centrality to the aboriginal culture claiming it. For example, in recognizing a constitutionally protected Mohawk fishing right in Adams, supra, the majority of this Court framed the *Van der Peet* test as follows (at para 34) [...].
>
> [56] Thus, geographical considerations are clearly relevant to the determination of whether an activity is integral in at least some cases, most notably where the activity is intrinsically linked to specific tracts of land. However, as Lamer C.J. observed in *Delgamuukw*, "aboriginal rights ... fall along a spectrum with respect to their degree of connection with the land" (para. 138). In this regard, I note that the relevance of geography is much clearer in hunting and fishing cases such as *Adams* and *Côté*, which involve activities inherently tied to the land, than it is in relation to more free ranging rights, such as a general right to trade, which fall on the opposite end of the spectrum. General trading rights lack an inherent connection to a specific tract of land. Thus, geography was not a relevant factor in the aboriginal rights trilogy of *Van der Peet*, *supra*, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *Gladstone*, *supra*, all cases involving claimed rights of exchange or trade. [...]
>
> . . .
>
> [59] Ultimately, the characterization of the claimed right in this case, as in *Adams* and *Côté*, imports a necessary geographical element, and its integrality to the Mohawk culture should be assessed on this basis. By contrast, geographical considerations were irrelevant to the framing of the claimed trading right in the aboriginal rights trilogy, and were therefore equally irrelevant to whether the claimed trade constituted a defining feature of the cultures in question and the scope of the right if successfully established. In this manner, the *Van der Peet* approach to characterizing the claimed right will generally determine when and to what extent geographical considerations are relevant to the claim.

[71] The appellant argues that since the release of *Mitchell*, the Supreme Court has loosened the "integral to distinctive culture" test in an effort to give more meaning to aboriginal rights. In particular, he pointed to the Supreme Court's more recent decision in *R v Sappier; R v Gray*.

[72] What does it mean for a practice to be integral to the culture of the plains Métis? In *Van der Peet*, Lamer CJ spoke of an integral practice as being one that is a central, significant or defining feature of a society. In *Mitchell*, the Court spoke at paras 59-60 of the "defining feature" being part of the core identity of the culture, such that the culture would be "fundamentally altered" without it. That approach was later tempered in *Sappier*, where Bastarache J noted that the use of the terms "core identity" and "defining feature" in the case law may have unintentionally resulted in a heightened threshold for establishing an aboriginal right. He said that for a practice, custom or tradition to be "integral" to a culture it is not necessary to show that the culture would be "fundamentally altered" without it: *Sappier* at para 41. The use of such terms has, according to Justice Bastarache, served to "create artificial barriers to the recognition and affirmation of aboriginal rights".

[73] I have already concluded that the appeal judge's characterization of the right claimed as "the right to hunt for food in the environs of the Cypress Hills" was appropriate. I must now consider whether that practice was integral to the distinctive culture of the historic Métis community. No one disputes that hunting the buffalo on the plains, and hunting for food generally, was integral to the Métis culture. But the appeal judge asked himself whether hunting *in the environs of the Cypress Hills* was integral. Based on the evidence, he concluded it was not.

[74] As noted earlier, the Supreme Court in *Van der Peet* emphasized the need to approach the issue from the aboriginal perspective. Context is essential. In *Marshall*, McLachlin CJ put it this way: to determine aboriginal entitlement, one looks to aboriginal practices rather than imposing a European template. So, for example, in assessing a claim for aboriginal title, courts must take into account "the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": *Marshall* at para 49, quoting *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 per Lamer CJ at para 149. McLachlin CJ went on to state at para 50:

> The aboriginal perspective grounds the analysis and imbues its every step. It must be considered in evaluating the practice at issue, and a generous approach must be taken in matching it to the appropriate modern right.

[75] These comments are equally apposite to the consideration of other aboriginal rights as they are to aboriginal title cases.

[76] Bearing in mind the overarching requirement to consider the aboriginal perspective, and the factual context in this case, what does it mean for hunting to be integral to the distinctive culture of the Métis?

[77] There has not, as yet, been much consideration of Métis hunting rights on the plains. *Powley* itself dealt with a different context - a historic Métis community at Sault Ste. Marie which remained relatively stable. Hunters may have ranged over their traditional hunting territory, but they returned to the settlement. The right being claimed in *Powley* was the right to hunt in the environs of that settlement. Here, we have somewhat the reverse of *Powley*. The plains Métis lived a more nomadic lifestyle, sometimes rarely or never returning to an established settlement. In that context, over what geographical area can the descendants of those people claim the right to hunt?

[78] As described in *R v Sparrow*, [1990] 1 SCR 1075 and *Van der Peet*, the core test for identifying an aboriginal right protected by s 35(1) is that it is an integral part of the distinctive culture of the aboriginal group. As Lamer CJ emphasized in *Van der Peet* at para 55, the claimant must demonstrate that "the *practice, custom or tradition* was a central and significant part of the society's distinctive culture" (emphasis added). He also cautioned, at para 62, against defining aboriginal rights in such a fashion as to preclude in practice any successful claim for the existence of such a right. To do so would be "contrary to the spirit and intent of s 35(1)". And of particular relevance to this appeal, he cautioned against over-emphasizing the relationship of aboriginal peoples to the land. He said at para 74:

> The relationship between aboriginal title and aboriginal rights must not ... confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society.

[79] The Court made a similar point in *Adams* at para 26:

> Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects *activities* which were integral to the distinctive culture of the aboriginal group claiming the right, it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land.
>
> [emphasis added]

[80] This is not to suggest that the site at which a claimed right has been exercised is unimportant. This point was also made clear in *Adams* at para 30:

> The recognition that aboriginal title is simply one manifestation of the doctrine of aboriginal rights should not, however, create the impression that the fact that some aboriginal rights are linked to land use or occupation is unimportant. Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. ... *A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question.*
>
> [emphasis added]

[81] But it is equally clear that the requirement that a claimant establish the historical use of or connection with the site is not to be raised to the point where it renders the aboriginal right meaningless. As was noted in *Adams*, the connection to the land required to make out a claim for a land-based right (like hunting) is something less than the level of connection required to make out a claim for title to the land on which the practice occurred. McLachlin CJ noted the distinction at para 70 of *Marshall*:

> *... exclusive possession in the sense of intention or capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources*: *Delgamuukw* at para 149. *Less intensive uses may give rise to different rights.* The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law: *Delgamuukw* at para 156. These principles apply to nomadic and semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes.
>
> [emphasis added]

[82] More recently, the British Columbia Court of Appeal interpreted and applied these principles in *William v British Columbia,* 2012 BCCA 285, 324 BCAC 214 (leave to appeal granted, 2012 SCCA No 399). In dealing with an aboriginal title claim by the Tsilhqot'in, a semi-nomadic people, to a large tract of undifferentiated land, Groberman JA concluded that *aboriginal title* can only be proven on a site-specific basis, by way of evidence of occupation of the land or evidence that definite tracts of land were the subject of intensive use: para 230. On the subject of other aboriginal rights, however, he went on to say:

> [232] I do not doubt that the culture and traditions of a semi-nomadic group, like the Tsilhqot'in, depend on rights to use lands that extend well beyond the definite tracts that may be found to be subject to Aboriginal title. The Tsilhqot'in must be able to continue hunting and fishing throughout their traditional territory, and to have the right to pass and re-pass over the trails that they have used for hundreds of years.
>
> . . .
>
> [238] The result for semi-nomadic First Nations like the Tsilhqot'in is not a patchwork of unconnected "postage stamp" areas of title, but rather a network of specific sites over which title can be proven, connected by broad areas in which various identifiable Aboriginal rights can be exercised. This is entirely consistent with their traditional culture and with the objectives of s 35.

[83] With these comments in mind, I must review the approach taken by the lower courts in this case in assessing the appellant's claim. The trial judge required at para 113 that the appellant show a "consistent and frequent pattern of usage and occupation of a site-specific area" in order to establish a constitutional right to hunt. He also required proof that a historic Métis community existed in or around the site where the hunting right was claimed, as is apparent from his conclusions that "no Métis group had a sufficient degree of use, occupation, stability, or continuity in the area to support a site-specific constitutional right" and that there was no Métis group "in southern Alberta with customs, traditions and distinct collective identity from Indians": para 134.

[84] The appeal judge concluded, correctly in my view, that given the nomadic nature of the plains Métis culture, it was inappropriate to require that the hunting right being claimed must have occurred around or close to a Métis village or settlement. Nevertheless, the appeal judge also imposed a site-

specific requirement and seems to have imposed a threshold requirement similar to the trial judge's "consistent and frequent pattern of use". The appeal judge said at para 161:

> In order to determine whether a right to hunt exists in a specific area, it is not sufficient to show that a Métis group was in proximity to the area. It must also be shown the practice *at and/or around that site* was integral to the distinctive culture of the Métis.
>
> [emphasis added]

[85] I agree generally with the appeal judge's conclusion that the authorities mandate the incorporation of a geographical element into the test for establishing a constitutional aboriginal right, at least with respect to a land-based right like the right to hunt. Such rights should not be granted "at large", and are not exercisable anywhere.

[86] However, in imposing a geographical limit on the right, the court must be cognizant of the aboriginal perspective and the context in which the right was exercised historically. The "site-specific" nature of a hunting or fishing right will look quite different for an aboriginal group whose ancestors fished in a particular lake near their settlement than for a primarily nomadic people whose distinctive culture involved hunting across an expansive territory.

[87] Defining the question as whether hunting in a particular place was integral to the culture of the aboriginal group runs the risk of shifting the emphasis from the practice, where it belongs, to the place or location of the practice. In the context of a nomadic people whose culture entailed following a migratory herd (and whose history indicates a need to move the location of their practice from place to place in response to the movement of the herd), over-emphasizing the importance of "place", in the form of a specific tract of land, risks rendering illusory the rights guaranteed to the nomadic peoples by s 35(1).

[88] In this case, requiring the appellant to establish not only that the practice of hunting on the prairies was of central significance to the culture of the plains Métis (which it was), but also that hunting on a particular tract of land was of central significance, runs this risk. There is a danger of creating an artificial barrier to the recognition of the rights of nomadic people whose ancestral lands are vast if they always have to prove that hunting on a particular tract of land was of central significance to their culture. I prefer a modified approach that takes into account the aboriginal perspective and the distinctive way of life of the plains Métis.

[89] In this regard, the approach of the British Columbia Court of Appeal in *William* is instructive. The court recognized that, for nomadic or semi-nomadic people, hunting and fishing rights are territorial in nature, and the recognition of the rights must permit the group to continue hunting and fishing throughout their traditional territory.

[90] A more "territorial" approach is also consistent with earlier comments made by the Supreme Court in *Côté* and *Adams.* In *Côté*, the Court assessed a claim for fishing rights within a wilderness

zone (called the Z.E.C.) located in the Outaouais region of Quebec and outside the reserve area of the Desert River Band. The claimants were Algonquin Indians, whose ancestors were described by the Court as "moderately nomadic people", with "itinerant hunting patterns" and a "thin population". The trial judge had concluded that the appellants failed to demonstrate that the Algonquins exercised real and exclusive possession over the disputed territories so as to found a claim for title. The Supreme Court, however, reviewed his findings to determine if the appellants had demonstrated sufficient "presence" in the territory to establish a claim for fishing rights. Lamer CJ concluded that they had, saying at para 67:

> ... I conclude that Frenette J. made a finding of fact that the Algonquins did frequent the Z.E.C. as part of their traditional lands at the time of contact. This finding was not contradicted by any of the findings of the Provincial Court, or for that matter, the Court of Appeal. Frenette J.'s finding is supported and elaborated by the expert evidence of Dr. Parent presented at trial. According to Dr. Parent, at the time of contact, the ancestral lands of the Algonquins lay at the heart of the Ottawa River basin. These ancestral lands included the territory demarked by the Z.E.C. Bras-Coupe-Desert. The Algonquins, as a socially organized but nomadic people, moved frequently within these lands.

[91] Key to the Chief Justice's conclusions were findings that the Algonquins did "frequent the territory" in question at the relevant time, that they "exerted a presence" in the disputed territory at the time of contact, that the territory "fell well within these traditional grounds of the Algonquins" and that fishing within "these traditional lands" represented an important mode of survival and was a "significant part of the life" of the Algonquins.

[92] The Supreme Court's decision in *Adams* is also helpful. Adams was a Mohawk who claimed an aboriginal right to fish in Lake St. Francis. The trial judge found that the Mohawks did not settle exclusively in one location. Lamer CJ noted that "wherever they were settled before or after contact, prior to contact the Mohawks engaged in practices, customs or traditions on the land which were integral to their distinctive culture". As in *Côté*, Lamer CJ again emphasized that it is the "practice, custom or tradition" that must be integral to the distinctive culture of the aboriginal group; it is not necessary for the group to establish that the "piece of land" on which the activity was taking place was of central significance: *Adams* at 26.

[93] The evidence of the extent to which the Mohawk people fished in Lake St Francis was somewhat contradictory, but Lamer CJ was able to draw the following conclusions from it at para 44:

> During this period [1603-1650s] the Mohawks clearly fished for food in the St. Lawrence River, either because the Mohawks exercised military control over the region and adopted the territory as fishing and hunting grounds, or because the Mohawks conducted military campaigns in the region during which they were

required to rely on the fish in the St. Lawrence River and Lake St. Francis for sustenance.

[94] He continued at paras 45-46:

> Either because reliance on the fish in the St. Lawrence River for food was a necessary part of their campaigns of war, or because the lands of this area constituted Mohawk hunting and fishing grounds, the evidence presented at trial demonstrates that fishing for food in the St. Lawrence River and, in particular, in Lake St. Francis, was a significant part of the life of the Mohawks from a time dating from at least 1603 and the arrival of Samuel de Champlain in the area. ...
>
> This conclusion is sufficient to satisfy the *Van der Peet* test.
>
> [emphasis omitted]

[95] These descriptions, applied to this case, suggest the following threshold question: did the historic Métis community include the disputed area within its ancestral lands or traditional hunting territory? In other words, did they frequent the area for the purpose of carrying out a practice that was integral to their traditional way of life? That threshold, in my view, better captures the territorial nature of the practices and traditions of a nomadic people than the concept of a "consistent and frequent pattern of usage" on a specific piece of land.

[96] The shift in focus, from asking whether the "place" is integral to a culture, to asking whether an integral practice was carried out in the place, may make a material difference to a nomadic people who may find it next to impossible to gather evidence of frequent and consistent use of a specific tract of land.

[97] I have reviewed the evidence and the findings of fact of the trial judge through this lens to assess whether the plains Métis "frequented" the area in question, and whether it was part of their "ancestral lands" or "traditional territory" for hunting. I have taken into account several factors that may be considered indicia that a geographic area is within a group's traditional territory, although the list is certainly not exhaustive: whether the area is reasonably capable of definition; the frequency with which the community traveled into or used the area; the temporal duration of the presence; the number of people who lived on, used, or traveled through the area; the ability of the community to use the area free of challenge from other groups; and whether the area is subject to competing claims by other aboriginal groups. The requisite intensity and duration of use, and the relative weight to be placed on various factors, will vary from case to case. In *William*, the British Columbia Court of Appeal referred at para 232 to evidence of trails that had been used "for hundreds of years". For a people with less established use patterns or a more nomadic lifestyle, something less may suffice. The assessment is, of necessity, heavily dependent on the historical context.

[98] Having reviewed the evidence and fact findings in this case with this test and these indicia in mind, I conclude that it falls short of meeting this lower threshold to establish a right to hunt in the environs of the Cypress Hills.

[99] The evidence shows that the plains Métis had a territory, broadly speaking, within which they traveled while following the migratory herds of buffalo. That territory shifted as the buffalo herds moved, and by the 1870s encompassed a broad range of the ill-defined area known generally as "the plains". Throughout most of Métis history, however, that territory did not include the Cypress Hills and environs. For instance, Dr. Evans states that the Palliser expedition in 1859 recorded no evidence that Métis groups visited the Treaty 7 area. The trial judge found that Palliser did not document the presence of cart trails, which would be an indication of such travel, when he explored the Cypress Hills area (para 72). Nor was there any evidence of the presence of cart trails in the early 1870s in the area between Wood Mountain and the Cypress Hills, or between Fort Macleod and present day Calgary (para 87).

[100] There was evidence before the trial judge, which he accepted, that the Cypress Hills were generally considered a dangerous place and were avoided by the Métis and others: see, for example, the report of Dr. Evans at pp. 86 to 88, relied upon by the appeal judge at para 161.

[101] All the experts agreed that, beginning in the 1870s (just before the arrival of the North West Mounted Police in southern Alberta), there is evidence of some forays by the Métis into southern Alberta and the Cypress Hills as a result of the retreating buffalo herds. Specifically, the evidence shows the existence of:

1. a winter settlement at Buffalo Lake, in central Alberta and not particularly close to the Cypress Hills, in 1870-71 and 1872-73.
2. a camp established by Cowie on the eastern edge of the Cypress Hills, in present day Saskatchewan, in the winter of 1871. According to Dr. Evans, the camp broke up in the spring of 1872 when the Blackfoot asserted their presence, and was not re-established the following year.

3. a significant camp of Métis hunters sixty kilometers southwest of the western end of the Cypress Hills in the summer of 1874.

[102] There was also evidence of Métis births in the Cypress Hills area (just under 20 per year) between 1872 and 1874, and there may have been Métis wintering in the Cypress Hills at the time of the 1873 massacre: [Report of Clint Evans at p 86].

[103] The appellant takes the position that the evidence shows the Métis had a presence on the land in southern Alberta and were hunting there prior to the arrival of the North West Mounted Police in 1874. In oral argument, the appellant urged us to compare the evidence in this case to the circumstances in *Adams*. He argues that in *Adams*, fishing rights were established by evidence that the Mohawks fished in Lake St Francis only while on their way to conduct campaigns of war; that they were essentially "passing through" the area. He argues that the degree of presence exercised by the Mohawks near Lake St. Francis prior to contact with Europeans was similar (if not less, perhaps),

than the degree of presence exercised by the Métis in southern Alberta and the Cypress Hills area prior to the date of effective control. He also argues that, in *Adams*, there was no evidence that the Mohawks had used the lake for any significant period of time.

[104] I do not read Lamer CJ's reasons as accepting evidence that the Mohawks were merely passing through the lands and fishing as they went. Rather, he accepted that for some period of time prior to contact, the Mohawks were, at the least, conducting campaigns of war in the area and fishing in the area as a necessary part of those campaigns, if not actually using the lands as hunting and fishing grounds. As the appellant points out, there was no evidence of how long before contact (dated at 1603 with the arrival of Champlain) the Mohawks had been using the fishing grounds. However, it was clear that they used the area extensively from at least 1603 to the 1650s, and the Chief Justice was prepared to draw an inference that the practice was a significant part of Mohawk culture prior to contact, noting that "no aboriginal group will ever be able to provide conclusive evidence of what took place prior to contact": *Adams* at para 46. No such inference is available on the facts of this case. To the contrary, the evidence here shows that the Métis did not travel to the Cypress Hills much, if at all, until shortly before the North West Mounted Police arrived, at least in part because it was a dangerous area. Whatever the extent of their use of that area of land, it was not of long duration.

[105] The evidence before the trial judge showed that there was no real Métis presence in the Cypress Hills area prior to 1870; southern Alberta was not, at that time, part of the traditional territory of the Métis. With the retreating of the buffalo herds in the 1870s came attempts to move into the area, some thwarted and others more successful. At most, one could characterize these forays as the beginning of the Métis asserting a presence in the region, but they fall short of establishing the region as part of the Métis traditional territory. Shortly thereafter, the North West Mounted Police arrived and the area was opened up to the Métis.

[106] It is possible that the movement of Métis into the area for hunting purposes may have continued even without the presence of the North West Mounted Police. But that would be a speculative conclusion to draw, particularly in the context of this highly contested region. It is just as possible, on the evidence, that the presence of Blackfoot in the area would have put an end to the Métis presence, as occurred with the Cowie camp in 1871. The conclusion drawn by the trial judge was that it was the presence of the North West Mounted Police that permitted the Métis to continue to enter the contested area in greater numbers, and that conclusion was supported by the evidence.

[107] Moreover, the test mandated by *Powley* does not permit us to speculate what may have happened in the absence of European control. I must look at the situation as it existed before the establishment of control between 1874 and 1878. At that point in Métis history, the Cypress Hills were not part of the traditional territory of the historic community, however defined.

Other aspects of the *Powley* test

[108] Given my conclusions on the other aspects of the *Powley* test, it is unnecessary to address the questions of continuity, whether the right has been extinguished, whether it has been infringed, and whether the infringement is justified.

Conclusion

[109] For these reasons, the appeal is dismissed.

Appeal heard on February 07, 2013

Reasons filed at Calgary, Alberta
this 4th day of July, 2013

Paperny J.A.

I concur:

Authorized to sign for: McDonald J.A.

I concur:

Authorized to sign for: Macleod J.

Appearances:

T.G. Rothwell
A.L. Edgington
for the Respondent

J. Teillet
J.T. Madden
for the Appellant

G.A. Befus
B.J. Kormos
for the Blood Tribe

D.M. LaFond
C.D. Leonard
for the Siksika Nation

K.L. Hodgson-Smith
for the Métis National Council