

**IN THE PROVINCIAL COURT OF SASKATCHEWAN
AT MEADOW LAKE, SASKATCHEWAN**

Between:

HER MAJESTY THE QUEEN

-and-

RON LAVIOLETTE

P. Mitch McAdam
Clement Chartier, Q.C., Jean Teillet and Jason Madden

Counsel for the Crown
Counsel for the Accused

July 15, 2005

E. Kalenith, P.C.J.

JUDGMENT

INTRODUCTION

[1] On April 6, 2001, Ron Laviolette, a Metis person, was fishing through a hole in the ice on Green Lake, Saskatchewan, on a date where the fishing season is closed on Green Lake. He was with two others, who are both Treaty Indians, and who were also fishing. They were not charged because of their Treaty right to fish for food. Another Metis person was also fishing on

the lake that morning but he was not charged because he was born and raised in Green Lake and was considered to fit within the policy of the Department of the Environment, which recognizes an aboriginal right to hunt and fish for food if certain criteria are met. As Mr. Laviolette was residing at Flying Dust First Nation near Meadow Lake, he was considered not to fit the criteria and he was therefore charged with unlawfully angling during a closed time contrary to section 13(1) of *The Fisheries Regulations* made pursuant to *The Fisheries Act (Saskatchewan), 1994*.

[2] This case raises the following issues:

- (a) Does the Accused, as a Metis person, possess an aboriginal right to fish within the meaning of section 35(1) of the *Constitution Act, 1982* thereby providing him with an exemption from complying with section 13(1) of *The Fisheries Regulations*?
- (b) Is the Accused, as a Metis person, an “Indian” within the meaning of the *Royal Proclamation, 1763*, clause 14 of the *1870 Rupert’s Land and North-Western Territory Order*, and paragraph 12 of the *Saskatchewan Natural Resources Transfer Agreement (Constitution Act, 1930)*?
- (c) Is section 13(1) of *The Fisheries Regulations* applicable to the Accused by virtue of his aboriginal right to fish within the meaning of paragraph 12 of the *Saskatchewan Natural Resources Transfer Agreement*?
- (d) Does the doctrine of interjurisdictional immunity make section 13(1) of *The Fisheries Regulations* inapplicable to the Accused’s section 35 right to fish because, as a Metis person, he is an “Indian” within the meaning of section 91(24) of the *Constitution Act, 1867*?
- (e) Does section 13(1) of *The Fisheries Regulations* give equal benefit of the law to the Accused, as a Metis person? If not, does it violate section 15 of the *Canadian Charter of Rights and Freedoms*?

[3] I find that the Accused does have an aboriginal right to fish and that therefore section 13(1) of *The Fisheries Regulations* is not applicable to him. Given this finding, I find it unnecessary to rule on the other issues. My reasons for this finding follow.

FACTS

[4] There is no dispute about proof of the substantive offence. Ron Laviolette identifies as Metis and lives in Meadow Lake, Saskatchewan on the Flying Dust Indian Reserve with his wife Shirley Durocher and their three children. Ms. Durocher is a Bill C-31 Status Indian and a member of the Flying Dust Indian First Nation.

[5] Meadow Lake is approximately fifty kilometres southwest of Green Lake.

[6] On the morning of April 6, 2001, Ron Laviolette was ice fishing on Green Lake. The lake is within the boundaries of Green Lake, Saskatchewan.

[7] Mr. Laviolette was fishing with Tom Anderson and Robert McCallum, both Treaty Indians who live on the Flying Dust Indian Reserve.

[8] At this time of the year, Green Lake is designated as being closed to fishing. This closed season does not apply to Indians fishing for food on Green Lake. Accordingly, neither Mr. Anderson nor Mr. McCallum was charged.

[9] Chester Lafond, a Metis from Green Lake, and another Treaty Indian from a reserve near Prince Albert were also fishing on the lake that morning. Neither was charged.

[10] Conservation Officer Ken Dillabough, a conservation officer with Saskatchewan Environment (“SE”), observed Mr. Laviolette fishing through the ice. When approached by Officer Dillabough, Mr. Laviolette identified himself and produced a Metis card which indicated that he was a member of Local 31, the Meadow lake Local of the Metis Nation of Saskatchewan (“MNS”). Mr. Laviolette had two fresh fish in his possession.

[11] Mr. Laviolette indicated that he normally fishes at Flotten Lake under his wife's treaty number, and advised that he lives at Flying Dust First Nation, just outside Meadow Lake.

[12] The two Treaty Indians who were with Mr. Laviolette, Tom Anderson and Robert McCallum, who were also fishing, were not charged with an offence because of their Treaty Right to fish for food.

[13] SE recognizes that some Metis people have similar rights to hunt and fish for food. At that time, a Metis person would be recognized as having these rights if he or she met four criteria:

- (a) they must identify themselves as Metis;
- (b) they must live within the Northern Administration District;
- (c) they must have a long-standing connection to the community;
- (d) they must live a traditional lifestyle.

[14] Officer Dillabough did not believe that Mr. Laviolette satisfied these four criteria because he was not living within the Northern Administration District.

[15] Mr. Lafond was not charged because Officer Dillabough thought that he came under SE's policy. He knew that Mr. Lafond was Metis and that he had been born and raised at Green Lake.

ANALYSIS

[16] In *R. v. Powley*, [2003] 2 S.C.R. 207, the Supreme Court of Canada set out a test for determining when Metis Aboriginal Rights exist. Applying the test requires me to answer the following questions:

- (a) what is the right in issue?
- (b) what is the meaning of the word "community" in the context of Metis Aboriginal Rights?

- (c) at the time of effective control, was there an historic Metis community either in the area where Mr. Laviolette was fishing, or in some wider area I find to be relevant for these purposes?
- (d) does any right to fish in the relevant area have geographical limitations and, if so, what are those limitations?
- (e) does a Metis “community” exist in the relevant area today?
- (f) what is the relevant time frame (the date of European effective control)?
- (g) was fishing for food integral to Metis life in the relevant area?
- (h) has there been sufficient continuity from the date of European effective control until today between any historic community and any community which I find exists today?
- (i) is Mr. Laviolette a rights-bearing member of any such community?
- (j) was the right extinguished?
- (k) was there an infringement of the right?
- (l) was the infringement justified?

The Right in Issue

[17] Both Crown and defence agree that the right is the right to fish for food.

The Meaning of Community

[18] The Crown argues that the word community should be defined according to the common understanding of the word and should focus on specific villages, towns or cities and their surrounding areas. The Crown argues that this interpretation is supported by the following:

- (a) In *Powley* the Supreme Court indicated that Metis Aboriginal Rights, like other Aboriginal Rights, are site specific;
- (b) In *R. v. Morin and Daigneault* [1996] 3 C.N.L.R. 157 (Sask. Prov. Ct.), Judge Meagher held that there was a geographical limit on the Metis Aboriginal Right to fish

which he found to exist for Metis people living at Turnor Lake- that the judgment applied to “the area loosely known as Treaty 10 or perhaps a little larger”;

(c) In *R. v. Blais* [2001] 3 C.N.L.R. 187 (Man. C.A.), the Manitoba Court of Appeal held that hunting rights were not rights at large and must be tied to specific lands;

(d) In *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, the Supreme Court of Canada spoke hunting rights as being tied to specific geographical areas.

[19] In defining community, I am guided by the following principles from *Powley*:

- (a) a Metis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life;
- (b) in determining whether particular claimants comprise a Metis community, it is not necessary to decide whether that community forms part of a larger Métis people that extends over a wider area.

[20] Where the evidence supports it, Courts have held that community may include more than one town or village:

(a) in *Powley*, the trial judge held at [1999] 1 C.N.L.R. 171 that the concept of a Metis community should not be limited to Sault Ste. Marie proper but that it should include the surrounding environs (seven communities and areas, some as far away as 100 kilometres and extending into Northern Michigan);

(b) in *R. v. Willison* [2005] B.C.J. No. 924 (B.C. Prov. Ct.) (Q.L.), the trial judge held that Metis hunting in the immediate vicinity of Falkland could only be understood could only be understood contextually in its relation to the Brigade Trail of the fur trade. He held that a defining characteristic of the Metis in British Columbia prior to “control” was their close association to the fur trade and the nomadic lifestyle it required. He accepted evidence that while some Metis were employed and stayed at Hudson’s Bay Company posts, most of them were relatively constantly on the move and had a nomadic lifestyle. He concluded that the “environs” of Falkland for the purpose of understanding metis life in B.C. prior to control, but specifically in relation to Falkland, B.C., should be

understood to include the environs of the Brigade Trail commencing at Fort Kamloops moving south through the Falkland area itself and then the Okanagan Valley, and continuing south to what is today the U.S. border en route to Fort Okanagan (a total distance of at least 300 kilometres).

The Historic Rights-Bearing Community

[21] The Crown concedes that a historic Metis community existed at Green Lake. The issue here is whether it includes a larger area and, in particular, Meadow Lake.

[22] Dr. Frank Tough was qualified to give expert evidence on Metis history, on historical Aboriginal resource use and lifestyle, on the terminology used in describing the Metis, on the fur trade and on the history of the application of conservation policies to Aboriginal peoples in Canada. John Thornton was qualified to give expert evidence on Metis history generally and on the history of Green Lake in particular.

[23] Dr. Tough's evidence was that problems would arise if one attempted to define a Metis community as a particular focussed settlement. He testified that the Metis had a sense of community that would transcend the geographical distance (Trial Transcript , p.1273). The evidence of both experts was that the Metis had a regional consciousness and that they were highly mobile.

[24] Dr. Tough thought that the first generation of Metis people was between 1790 and 1800 (Transcript, pp. 1326-1328). Mr. Thornton thought the Metis people were in place by 1816 and their institutions were developed by 1850. They developed a regional unity and institutions of trade and class by 1850. These institutions included the northern boat brigades, the Red River cart trails and the buffalo hunts in the south (Transcript, pp. 1266, 1321-1323, and 1017-1022).

[25] Both experts gave evidence showing that the regional unity was a highly established

network based on trade and family connections. While the importance of a particular settlement fluctuated at different times, certain settlements remain fixed. Mr. Thornton testified that “it’s very difficult to isolate Green Lake out of this and look at it as a separate little community. You’ve got to recognize this as part of a much larger network and a much larger sense of what is becoming a national identity” (of the Metis people). (Transcript, pp. 1013-1016).

[26] Within the larger network, certain fixed settlements developed as trade and transportation hubs. Dr. Tough described these fixed settlements as “nodes as part of a network where you have the need for extensive sort of operations of resources, collecting resources”. (Transcript, pp. 1286-1287). The fixed settlements were connected by a transportation system of river routes, cart trails and portages. Constant movement between the fixed settlements allowed the Metis in the area to develop and maintain significant trade and kinship connections throughout the region and with the larger network of Metis people.

[27] The evidence showed a regional network of relationships in the triangle created in and around the fixed settlements of Lac la Biche, Ile a la Crosse and Green Lake. It also showed that there were strong kinship ties between these three fixed settlements and that the Metis intermarried and moved between these settlements over time. In addition to the fixed settlements, there were many other settlements within and around the three fixed settlements and along the transportation routes that connected them together. The transportation corridor, with its southeasterly hub at Green Lake, was important because it was the access route into the Mackenzie District, a storehouse of plenty and rich in furs. (Thornton - Transcript, pp. 982-985 and Exhibit D-17 at p.5; Tough - Exhibits D-22 and D-26).

[28] The evidence showed that while these fixed settlements were important historic Metis settlements, the Metis were highly mobile. They moved often and travelled far and wide for food, trapping and work. They moved frequently between the fixed settlements and between the settlements within a given region.

[29] The evidence showed that Meadow Lake is also an historic Metis settlement and that it was begun by Cyprien Morin, a Metis from Green Lake. (Tough - Transcript, pp.1412 -1413, 1425 and 1435). The evidence showed there are substantial and continuing family connections between the Metis living in the settlement of Green Lake and those living in the settlement at Meadow Lake (Tough - Transcript at pp. 1413-1425 and Exhibit D-32).

[30] I find that the evidence led at this trial contains sufficient demographic information, proof of shared customs, traditions and collective identity to support the existence of a regional historic rights-bearing Metis community, which regional community is generally defined as the triangle of the fixed communities of Green Lake, Ile a la Crosse and Lac la Biche and includes all of the settlements within and around the triangle including Meadow Lake.

The Contemporary Rights-Bearing Community

[31] In *Powley*, the Supreme Court of Canada held that Metis Aboriginal Rights are to be grounded in the existence of a historic and present community and they may only be exercised by virtue of an individual's ancestrally based membership in the present community.

[32] The Crown acknowledges in this case that a contemporary Metis community exists at Green Lake and that Mr. Laviolette has an ancestral connection to the historic Metis community at Green Lake.

[33] In *Powley*, the Supreme Court held that the Metis community of Sault Ste. Marie included those in the vicinity and that neither the dispersal of Metis into the region, nor the ancestral relocation to the nearby reserve had the effect of disentiing members of the changed and widely dispersed Metis community from claiming Metis Aboriginal Rights.

[34] In this case, evidence showed that Mr. Laviolette's parents moved from Green Lake, a recognized historic Metis settlement, and relocated to other settlements within the region I have

found to be the historic rights-bearing community. The evidence also shows that Mr. Laviolette himself moved in and out of the “community” for work, but always returned. He now lives, with his family, on the Flying Dust First Nation, an Indian Reserve within the boundaries of the “community”.

[35] I conclude that the evidence shows that the “community” has continued to exist up to and including the time of the offence. Evidence showed that Metis lived in Green Lake since approximately 1786, that there was a Metis settlement at the Green Lake Post by at least 1820 and that they have always been connected to other Metis settlements in the area I have found to be the “community”. Evidence also showed the continuing contemporary connections between Meadow Lake and Green Lake, including family connections between the two settlements, and that the area between the two settlements is populated by Metis (Exhibit D-32).

[36] The evidence showed that Metis families moved between Meadow Lake and Green Lake and other Metis settlements in the “community”, that significant Metis populations continue to exist at Green Lake and Meadow Lake and other settlements within the “community”, and that extensive kinship connections exist between Ile a la Crosse, Buffalo Narrows, Beauval, Jackfish Lake, Jans Bay, Pinehouse, Patuanak, Turnor Lake, Victoire, St. George’s Hill, Michel Village, Duck Lake, La Loche, Keeley Lake, Canoe Lake, Smooth Stone, Kikino (Alberta), Dore Lake, Lac La Biche (Alberta), and Red River Settlement (Manitoba).

[37] Given the extensive connections between the various communities that presently exist, and have continued to exist, I find that the contemporary rights-bearing community is best described as the Metis community that now lives and uses Northwestern Saskatchewan and includes the settlements of Green Lake and Meadow Lake.

The Date of Effective Control

[38] The Crown submits that the date of effective control is 1870, being the date when

Rupert's Land became part of Canada. It also concedes that an historic Metis community existed at Green Lake by 1870.

[39] In *Powley*, the Supreme Court of Canada held that the test looks to the time when Europeans effectively established political and legal control in a particular area. I agree with the argument advanced on behalf of Mr. Laviolette that effective control takes place when the Crown's activity has the effect of changing the traditional lifestyle and the economy of the Metis in a given area.

[40] The experts gave evidence that no development or settlement by non-aboriginal peoples began in the region until at least 1903 when forestry leases were granted in an area near Green Lake. Even then, there is no evidence of changes to Metis life in the region.

[41] I find that no real change in lifestyle in the area took place until 1912 when the Department of the Interior established townships and set aside two on either side of Green Lake. At this time the Metis also registered their land claims under the new land system. Accordingly, I find the date of effective control to be 1912.

The Importance of Fishing for Food

[42] The Crown admitted that fishing for food was an integral part of the distinct culture of the historic Metis community at Green Lake in 1870 and later years.

[43] The evidence showed that Metis throughout the Northwest relied on fish to survive and that it figured into modern economic planning. The report of Dr. Tough entitled, *Importance of Freshwater Fish to the Metis of Western Canada* (Exhibit D-34), clearly shows that fishing for food was an integral part of life in the area I have found to be the relevant "community" generally and in Green Lake and Meadow Lake specifically at 1912, the date of effective control.

Continuity

[44] The Crown also admits that fishing for food continues to have this significance for members of the contemporary Metis community at Green Lake today and has had this significance continuously since prior to 1870.

[45] The evidence of the elders who testified at this trial clearly showed that the importance of fishing for food to the Metis way of life also continued in both Northwest Saskatchewan generally and in Meadow Lake and Green Lake specifically.

Membership in the Contemporary Community

[46] In *Powley*, the Supreme Court of Canada held that for an individual to exercise the community's Aboriginal rights he or she must:

- (a) self-identify as Metis;
- (b) have an ancestral connection to the relevant historic Metis community, and
- (c) be accepted by the modern community.

[47] The Crown admits that Mr. Laviolette self-identifies as a Metis person.

[48] The Crown also admits that Mr. Laviolette has an ancestral connection to the historic Metis community at Green Lake, part of the relevant historic Metis community.

[49] The Crown argues that Mr. Laviolette is not a member of the contemporary Metis community at Green Lake. The Crown takes this position for the following reasons:

- (a) Mr. Laviolette is not a member of the Metis local at Green Lake but is a member of the Metis local at Meadow Lake;
- (b) He does not reside at Green Lake and never has;

(c) He did not assert that he is a member of the Metis community at Green Lake but instead described himself as a member of the First Nations community on the Flying Dust Indian Reserve;

(d) He is not known or is only vaguely known by many of the people from Green Lake who testified at trial;

(e) There was no evidence that he participated in any Metis cultural events either at Green Lake or otherwise except for hunting and fishing.

[50] If the relevant Metis community was limited to Green Lake, I would agree with the Crown despite the defence arguments that Mr. Laviolette has been known locally as Metis for years, as a child he spent summers in Green Lake with his grandparents and family relations and has remained connected to family members who reside at Green Lake, and throughout his life he continued to visit with his grandparents regularly and harvested with family from Green Lake.

[51] In *Powley*, the Supreme Court of Canada held that the core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Metis community's identity and distinguish it from other groups. Other indicia include participation in community activities and testimony about the claimant's connection to the community and its' culture. Membership in a political organization is not in and of itself sufficient to show community acceptance.

[52] While Mr. Laviolette has been a member of the Metis local at Meadow Lake, has returned to Green Lake occasionally and has fished there for food, he is little known to the local Green Lake community and I conclude that he is not a member of it.

[53] Having found, however, that the relevant contemporary Metis community is that of Northwest Saskatchewan, which includes Meadow Lake, I conclude that he is a member of this community. While his ten-year membership in the Metis local at Meadow Lake does not show community acceptance, it is a relevant factor. The evidence showed that he is known as Metis

by members of the Meadow Lake Metis settlement and by members of the Green Lake Metis settlement. He has shown past and ongoing participation in Metis culture by his involvement in hunting and fishing with his uncle Stan Roy, a lifelong resident of Green Lake, and with his grandfather and family members as a boy. His continued practice of hunting and fishing for food to provide for his family shows that he continues to be involved in Metis culture. I do not agree with the Crown's submission that something more than involvement in the traditional and ongoing Metis cultural activities fishing and hunting for food, such as involvement in Metis dances, singing, or other cultural activities, is necessary to have sufficient involvement in Metis culture. I am satisfied that Mr. Laviolette's involvement in hunting and fishing for food show his involvement in Metis cultural activities sufficient to meet the test in *Powley*.

Extinguishment

[54] The Crown acknowledges that there has been no extinguishment of Mr. Laviolette's right to fish for food.

Infringement

[55] The Crown acknowledges that any right to fish for food possessed by Mr. Laviolette has been infringed.

Justification

[56] The Crown did not provide any proof that its regulatory scheme, which infringes Mr. Laviolette's Metis right to fish for food, is justifiable.

Conclusion

[57] Having concluded that Mr. Laviolette has a Metis Aboriginal Right to fish for food, I

declare that Mr. Laviolette, as a Metis member of the Metis community of Northwest Saskatchewan, which includes Green Lake and Meadow Lake, has a right to fish for food within that Metis community's traditional territory.

E.Kalenith, P.C.J..