

[R. v. Belhumeur](#)

Saskatchewan Judgments

Saskatchewan Provincial Court

Fort Qu'Appelle, Saskatchewan

D.I. Morris Prov. Ct. J.

October 18, 2007.

[2007] S.J. No. 549 | [2007 SKPC 114](#) | [301 Sask.R. 292](#) | [\[2008\] 2 C.N.L.R. 311](#) | [76 W.C.B. \(2d\) 68](#)

Between Her Majesty the Queen, and Donald Joseph Belhumeur

(209 paras.)

Case Summary

Aboriginal law — Aboriginal rights — Constitution Act, 1982, s. 35, recognition of existing aboriginal and treaty rights — Metis — Trial of the accused for angling without a valid fishing licence — Accused was found not guilty — He proved he was a Metis and had an aboriginal right to fish for food and did not require a licence.

Aboriginal law — Fishing rights — Regulation of — Licences — Trial of the accused for angling without a valid fishing licence — Accused was found not guilty — He proved he was a Metis and had an aboriginal right to fish for food and did not require a licence.

Criminal law — Fishing and hunting offences — Fishing without a licence — Trial of the accused for angling without a valid fishing licence — Accused was found not guilty — He proved he was a Metis and had an aboriginal right to fish for food and did not require a licence.

Natural resources law — Fishing — Fishing offences — Aboriginal fishing rights — Trial of the accused for angling without a valid fishing licence — Accused was found not guilty — He proved he was a Metis and had an aboriginal right to fish for food and did not require a licence.

Trial of the accused Belhumeur for angling without a valid licence which was an offence under the Fisheries Act -- Belhumeur claimed he was a Metis and had an aboriginal right to fish for food, which was recognized and affirmed by s. 35(1) of the Constitution Act, 1982 -- He therefore did not require a licence -- HELD: Belhumeur was found not guilty -- Belhumeur proved that he was of Metis ancestry and was a member of the contemporary Metis community - - Fishing was integral to the Metis culture in the area where the offence occurred -- Belhumeur established he was connected to the Metis historic and contemporary community where the

offence occurred -- He therefore had the right to fish for food pursuant to s. 35(1).

Counsel

Mitch McAdam: For the Crown.

Clement Chartier, Q.C., Michelle Leclair Harding, Jason Madden: For the Accused.

JUDGMENT

D.I. MORRIS PROV. CT. J.

1 Donald Joseph Belhumeur stands charged that on the 13th day of March, 2002 at Katepwa Lake in the Province of Saskatchewan he did commit an offence contrary to section 11(1) of *The Fisheries Regulations, 1995*, R.R.S. 2000, c. F-16.1, Reg. 1, passed pursuant to *The Fisheries Act (Saskatchewan), 1994*, [S.S. 1994, c. F-16.1](#), that being, angling without a valid licence.

2 The following issues were raised by the Defence:

- i) Does this Defendant, who asserts that he is Metis within the meaning of s. 35(2) of the *Constitution Act, 1982*, have an Aboriginal right to fish for food, which is recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*? If so, does s. 11(1) of the *Fisheries Regulations*, if applicable, unjustifiably infringe that s. 35(1) right?
- ii) Subject to a determination of issue (iv) below, is s. 11(1) of the *Fisheries Regulations* made pursuant to the *Fisheries Act (Saskatchewan), 1994*, applicable to this Defendant by virtue of his Aboriginal right to fish for food, *qua* Metis, within the meaning of s. 35(1) of the *Constitution Act, 1982*?
- iii) Is this Defendant, *qua* Metis, an "Indian" within the meaning of the *Royal Proclamation, 1763*; s. 91(24) of the *Constitutional Act, 1867* and clause 14 of the *1870 Rupert's Land and North-Western Territory Order*?
- iv) Does the doctrine of interjurisdictional immunity make s. 11(1) of the *Fisheries Regulations* inapplicable to this Defendant's s. 35(1) Aboriginal right to fish because *qua* Metis, he is an "Indian" within the meaning of s. 91(24) of the *Constitution Act, 1867*?

Crown Evidence

3 Conservation Officer, Bruce McLarty testified that one of his duties is to enforce fish and game laws in the Province of Saskatchewan. On March 13, 2002 at approximately 1:25 p.m., he encountered Mr. Belhumeur on the ice at the west end of Katepwa Lake.

4 Katepwa Lake is east of Fort Qu'Appelle and Lebret and approximately 55 miles northeast of Regina, Saskatchewan.

5 Officer McLarty observed an individual sitting in a truck and Mr. Belhumeur in a tent. Mr. Belhumeur was actively angling through the ice. He had a stick with some fishing line on it and he was jigging, i.e. trying to catch a fish.

6 Officer McLarty asked Mr. Belhumeur if he was fishing and Mr. Belhumeur replied that he was. Officer McLarty asked for his angling licence. Mr. Belhumeur produced a Metis Nation of Saskatchewan membership card and said he didn't require an angling licence to fish. He just needed the card.

7 Officer McLarty stated that his department does not accept the card as a valid substitute for an angling licence. Officer McLarty laid a charge and seized a wooden stick with fishing line and hook.

8 Officer McLarty was asked about enforcement practices of his department regarding Metis people and hunting and fishing.

9 He replied that some Metis people have Aboriginal hunting and fishing rights. Normally, officers would collect evidence of an incident, lay a charge and then ask the accused to provide information about his connection to a Metis community.

10 If the officer determines that the accused does have hunting and fishing rights, then the charge would be withdrawn. This practice was adopted after the *Norton and Samuelson*¹ incidents and was not in place in March, 2002.

11 Officer McLarty testified that the other individual with Mr. Belhumeur that day was John Belhumeur who produced a valid angling licence. It was a senior's licence.

12 In cross-examination, Officer McLarty was asked about the pamphlet entitled "A Guide to Metis Hunting and Fishing Rights in Saskatchewan". He stated that this pamphlet is available at his office. He said that it is not clear which Metis have hunting and fishing rights in this area.

13 A form was devised after the *Laviolette* case in Meadow Lake. It was used to provide information about a person's Metis status. If the person qualified as having rights, he was given a letter authorizing him to exercise his rights. That was the practice in Meadow Lake. It is not the practice in the Fort Qu'Appelle area. After a charge is laid, the person is asked to provide proof that he does have an Aboriginal right to hunt or fish.

14 That was the case for the Crown.

Defence Evidence

15 Charles Frederick Belhumeur, born November 24, 1958 at Moosomin, Saskatchewan is a brother to Donald Belhumeur.

16 He lives in Regina at present.

17 He lived with his family around St. Marthe, Saskatchewan and St. Lazare, Manitoba. His father was Charles Frederick Belhumeur and his mother was Louise Roubillard. He had three sisters, Myrna, Marilyn and Mary.

18 His mother grew up and lived in Lebret, Saskatchewan until age 30. His father grew up in St. Marthe and St. Lazare and lived around there until about age 40.

19 Charles Belhumeur identifies as Metis as did his father and mother.

20 He speaks some French, some Cree and Michif. His parents also spoke Michif.

21 His father was a Metis hunter, gatherer as well as being employed as a truck driver and in construction. His father was engaged in commercial trapping as well. This was done in the Qu'Appelle Valley and around Moosomin Lake and also in Craven.

22 The family ate quite a lot of fish, rabbits and game birds.

23 The father would hunt and fish wherever he was working in the province. In the 1970's, he did some spear fishing on Lebret Lake for large Pike and he set up shacks for winter fishing on the lake for years and years.

24 The father and family also gathered saskatoon berries and chokecherries in places including the Qu'Appelle Valley.

25 The father was involved in traditional activities such as square dancing, fiddling and jigging.

26 Mr. Belhumeur was asked about his family's reliance on wildlife or fish for food. He stated that one third to one half of the family's income came from hunting, fishing and trapping. He said that has been the traditional Metis way of life for hundreds of years.

27 Mr. Belhumeur was asked about whether he participated in the traditional lifestyle. He replied that he often went with his father to hunt, fish or trap. He still hunts and fishes for food. He does these activities in the Qu'Appelle Valley around the Fort Qu'Appelle area and around Craven.

28 Mr. Belhumeur stated he and his brother do not hunt for sport or trophy. They hunt for food and only take as much as they can use.

29 In cross-examination, Mr. Belhumeur told Crown counsel that it is not fair that the Metis in

the northern half of the province have Aboriginal hunting and fishing rights but Metis in the southern half do not.

30 Louise Belhumeur, born August 12, 1929 near Balcarres, Saskatchewan is the mother of Donald Belhumeur. She lives in Regina at present.

31 At age six, she and her family moved to Lebret. She lived around that area for several years. She met her husband at the San near Fort Qu'Appelle and they married at the Lebret Catholic Church on July 17, 1954. They moved to her husband's home area, St. Marthe. He was involved in the construction industry and the family moved around with him ending up in Regina. Her husband died in 1979 and is buried in the Lebret Cemetery.

32 The father of Louise Belhumeur was Jean Baptiste Roubillard, the mother was Mary Elizabeth Ross.

33 Louise Belhumeur identifies herself as Metis.

34 She stated that her father was engaged in trapping and fishing activities. The family did a lot of fishing for food at Echo Lake, Katepwa Lake and Regina Beach.

35 The accused, Donald Joseph Belhumeur, gave evidence. He was born September 7, 1960 at Moosomin, Saskatchewan. He currently lives in Regina.

36 Other places he has lived include the St. Marthe area, Moosomin and Craven. He moved to Regina at age nine. He is presently unemployed and when employed, he does construction, carpentry or janitorial work. He is married and has two children.

37 His father is Charles Frederick Belhumeur and his mother is Louise Ann Belhumeur.

38 His grandparents on his father's side were Anable Belhumeur and Eugenia Belhumeur (nee Pelletier).

39 His grandparents on his mother's side were Jean Baptiste Roubillard and Elizabeth Roubillard (nee Ross).

40 His sister, Marilyn has provided him with the family's genealogy chart.

41 Mr. Belhumeur identifies himself as a Metis person, Michif. His father identified himself as a Metis and spoke a lot of Michif. Michif is a mixture of the Cree and French languages.

42 His father was a road builder, a truck driver and a worker on the CN railroad. He engaged in hunting ducks and geese, trapping beavers, mink and weasels mostly in the Qu'Appelle Valley. He did a lot of fishing for food. This was done on Katepwa Lake, Echo Lake and Lebret Lake, also known as Mission Lake, all of which are in the Qu'Appelle Valley. He picked berries as well in the Craven District and around St. Lazare and St. Marthe.

- 43** The family relied on wildlife or fish for 50% of their food.
- 44** Mr. Belhumeur helped his father trap and fish starting at age 11 or 12. In winter, they used a hand auger to dig a hole in the ice. Katepwa Lake was where most of the winter fishing was done.
- 45** Mr. Belhumeur stated that he still fishes at the fishing lakes in the Qu'Appelle Valley including Katepwa Lake, Mission Lake and Echo Lake.
- 46** He continues to hunt in the Qu'Appelle Valley system.
- 47** When he carries out these activities, he does not buy a licence. He stopped buying a licence when certain rulings were made in 1997 or 1998.
- 48** Mr. Belhumeur was asked about social activities when he was growing up. He remembers gatherings of Metis people and the fiddle and guitar music that was played.
- 49** Mr. Belhumeur was asked about relatives in Fort Qu'Appelle or Lebret. He has one uncle, Lawrence Roubillard, who lives in Fort Qu'Appelle.
- 50** Mr. Belhumeur is a member of Local 33, a Metis Association. He was sponsored by a non-status, Indian/Metis Association when he attended Regina Plains Community College.
- 51** Mr. Belhumeur was asked about the incident in question and why he produced his Local 33 membership card to the conservation officer when asked to produce an angling licence. He stated that the card proved he was Metis.
- 52** He stated that he believed he had a right to fish.
- 53** In cross-examination, Mr. Belhumeur was asked why he calls himself a Metis person. He stated that it is because he was born and raised as a Metis.
- 54** He was asked if he had held any office in the Metis organization. He said, "no". He goes to meetings on an occasional basis. He does not attend cultural activities. He has never lived in Fort Qu'Appelle or Lebret nor has he been a member of a Metis Local in either place.
- 55** Mr. Belhumeur stated that his uncle, John Belhumeur, with whom he was fishing on March 13, 2002, did have a fishing licence.
- 56** Mr. Belhumeur stated that the Jay Treaty of the Constitution of Canada gave him, as a Metis, the same rights as an Aboriginal treaty.
- 57** His membership card, issued by the Metis Nation of Saskatchewan, gave him the right to fish he stated.

58 Beverly Worsley, born September 5, 1946 at Wolseley, Saskatchewan gave evidence. She lives now in Lebret but lived most of her life in Sintaluta which is not far from Fort Qu'Appelle. All of her family is connected to the Qu'Appelle Valley. Her grandmother was born in the File Hills District near the Valley.

59 She and her family would go to the Valley for weddings, social events and church. The Valley is a gathering place for Metis people. She stated that there were numerous Metis settlements throughout the Qu'Appelle Valley. Some of the names were Fayant, Cline, Amyotte, Racette. These families live in various places throughout Saskatchewan, i.e. Lebret, Abernethy, Fort Qu'Appelle, Sintaluta, Indian Head.

60 Ms. Worsley identifies herself as Metis, her mother identified as Michif as did her mother's parents. She was asked if her mother practiced any Metis traditions. She said they went berry picking; they picked herbs for medicinal purposes. They had a lot of wild meat ... prairie chicken, geese, ducks.

61 Her grandmother was artistic. She sewed and did beadwork. She went to Batoche in the 1970's where she sang the Voyageurs Song and performed traditional dance.

62 The Metis people took part in hunting and fishing. They went to the Valley to put up nets to catch fish in the spring.

63 Ms. Worsley said she grew up with a lot of oral storytelling. Her grandmother told her about Edward Beupre, who was a relative.

64 Ms. Worsley describes herself as one of Riel's people. She has worked within the Metis community to make people aware of their Aboriginal rights. She was President of the Metis Local in Sintaluta and is a Regional Director for the Metis Nation of Saskatchewan for a region which includes Fort Qu'Appelle and Lebret. This region goes to Lestock and Punnichy to the United States border.

65 Ms. Worsley stated that the Belhumeur family is related to her through the Fayant family.

66 She stated that there are a large number of Metis families in the area of Fort Qu'Appelle. Her data indicates 66 head of family in Fort Qu'Appelle alone.

67 Some of her ancestors were born in North Dakota, File Hills and Lebret. She has relatives spread out all over ... Willow Bunch, Welwyn, Moosomin, Source River, Estevan, Weyburn and St. Rose du Lac, Manitoba.

68 Robert James Laroque, born June 11, 1921 in Winnipeg, Manitoba gave evidence. He currently lives in Fort Qu'Appelle. Besides serving in the army and working in Drumheller, he has spent most of his life in the Valley.

69 He along with others formed a Metis Co-op Fishing Association. He is involved in collecting

artifacts and Metis history. He helped write a history of Lebret in 1989 and started a museum in Lebret in 2002.

70 His father was Joseph Zephren LaRocque, born November 26, 1881. His mother was Mary Theresa Salamon. His grandparents on his father's side were Antoine LaRocque and Rosalee LaPlante.

71 His father lived most of his life in Lebret but also worked as a policeman in Meadow Lake and Turtleford.

72 Mr. Laroque identifies as a Metis. His father was Metis, his mother Czechoslovakian. His grandfather identified as mixed blood, half breed or Metis. His grandmother came from around Lebret and was living in Red River when she got married.

73 His father was involved in picking buffalo bones on the southern part of the prairies near Estevan.

74 His grandmother did beadwork using sinew and was an expert at dying quills.

75 His father was President of the Metis Society in the 1940's and he was involved in Metis cultural activities.

76 Norman Fleury, born March 21, 1949 at St. Lazare, Manitoba gave evidence. He now lives near Virden, Manitoba.

77 He is Metis or Michif.

78 St. Lazare was a mission started by Father de Corby who came from France. Mr. Fleury's great-grandfather on his maternal side helped develop the community of St. Lazare. After the Riel resistance in 1869 and 1870, the Metis relocated to Fort Ellice and St. Lazare, places within a mile or so of each other. Fort Ellice employed a lot of Metis people.

79 Mr. Fleury's family were Michif speakers. They were people of the land ... hunting, picking berries, digging seneca root. They travelled around to find the root to Moosomin, Wapella, Carlyle. They set fish traps.

80 Mr. Fleury works at the Manitoba Metis Federation. He is helping to develop a dictionary of the Michif language, a unique language which uses French nouns and Cree verbs.

81 Mr. Fleury remembers the Belhumeur name. They lived around St. Lazare, their roots go back to the Red River and to the United States. The Fleurys are related to the Belhumeurs.

82 Robert Belhumeur, born August 6, 1925 in Fort Ellice District, gave evidence. He now lives in Welwyn, Saskatchewan. He is an uncle to Donald Belhumeur. His father is Anable Belhumeur. His mother is Eugenia Marie Pelletier. They were Metis. Mr. Belhumeur identifies as Metis.

83 He went hunting and fishing with his father and uncles and grandpa. He also fished with his nephew, Donald Belhumeur in the Qu'Appelle Valley near St. Marthe.

84 Mr. Fleury was asked how many generations his family has been Metis. He wasn't sure but said that his grandfather's sister married Louis Riel.

85 Lawrence Belhumeur, born January 22, 1940 in St. Lazare, Manitoba gave evidence. He currently lives in Birtle, Manitoba. Donald Belhumeur is his first cousin's son.

86 His father is Napoleon Belhumeur. His mother is Eva Houle. His grandfather was Jeremiah Belhumeur. His grandmother was Elizabeth Desjarlais.

87 Mr. Belhumeur identifies as Metis as did his mother and father. He speaks French, Metis and Cree, as well as English.

88 He states that his family relied on wildlife and fish for food. He has caught fish all of his life. The fishing took place in the Qu'Appelle River.

89 Clifford LaRoque, born May 14, 1939 in Lebret, Saskatchewan gave evidence. He currently lives in Regina.

90 His father is John J. LaRoque. His mother is Mary Dolores LaRoque (nee Sherret). Grandparents were John LaRoque and Theresa Roubillard.

91 Mr. LaRoque identifies as Metis as did his parents and grandparents.

92 Growing up, his family relied on wildlife and fish for food. He continued to hunt and fish in the Valley after he moved to Regina.

93 Mr. LaRoque is involved in Metis politics. He is the President of the Riel Metis Council of Regina Inc. He knew J.Z. LaRoque, who was his father's uncle.

94 There are many Metis people who now live in Regina who originated from the area around Lebret.

95 Many Metis are involved in social activities, such as the Riel Reelers who perform throughout the province. They sometimes go to Lebret Farmland Days.

96 Mr. LaRoque's wife is Rita Pelletier. She was born and raised on the Metis Farm in Lebret.

97 He knows Donald Belhumeur and knew his parents. He knows J.Z. LaRoque, known as Jimmy. He says that Jimmy is heavily involved in preserving Metis heritage and has done a good job in Lebret.

98 In cross-examination, Mr. LaRoque was asked about Donald Belhumeur's involvement in the Regina Metis community. Mr. LaRoque stated that Mr. Belhumeur has attended meetings.

99 Christine Blondeau-Perry, born December 17, 1929 near Estevan, Saskatchewan gave evidence.

100 She identifies as Metis.

101 Her father was Alexandre Blondeau, born in the Estevan area and her mother was Marie Beatrix Desjarlais, born in Lebret. Both were Metis.

102 On her mother's side were Simon Desjarlais and Clement Fisher. On her father's side were Louis Blondeau and Marie Roubillard.

103 A chart of Ms. Blondeau-Perry's family tree was entered as Exhibit D-15. It illustrates a long line of Metis ancestors ... seven generations of Blondeau's spanning a 219 year history and eight generations of Desjarlais' spanning a 225 year history.

104 A small scale version of a map showing the history and movement of the Metis people was introduced as Exhibit D-16.

105 Ms. Blondeau-Perry said there was a strong linkage of families that moved down to the Souris River Settlement with families from the Qu'Appelle Valley, especially Fort Qu'Appelle and Lebret.

106 Ms. Blondeau-Perry has presented this map to school children, social workers and government people.

107 Joanna Potyondi, nee Blondeau, gave evidence. She was born September 14, 1939 in Estevan, Saskatchewan.

108 Her father was James Blondeau. Her mother was Josephine Blondeau, both from the Estevan area.

109 Her grandfather was Alfred Blondeau, born at Fort Ellice/St. Lazare in 1873. Her grandmother was a Gardipy from the Willow Bunch area. They were Metis.

110 Ms. Potyondi knew how to track mink. She skinned a beaver at age seven. Her sons and daughter are fishermen and hunters.

111 She learned how to sew and now makes Hudson Bay coats for museums.

112 Oliver Boulette gave evidence. He lives in Winnipeg and works for the Manitoba Metis Federation. He is Metis as were his parents.

113 He talked about fiddle music being part of Metis culture and about the uniqueness of Metis fiddle music in terms of the number of beats to the music. The best known tune for the Metis is the Red River jig.

114 Mr. Boulette played the Red River jig. He said this music is played all across the Metis homeland.

115 Laura Hanowski gave evidence. She was qualified as an expert in genealogy.

116 Ms. Hanowski had prepared a chart regarding the genealogy of Donald Joseph Belhumeur extending back for six generations. The conclusion of Ms. Hanowski's research is that Donald Joseph Belhumeur is Metis.

117 David Chartrand gave evidence. He was born January 23, 1960 at Duck Bay, Manitoba and now lives in Winnipeg, Manitoba. He is Metis as were his parents. He is President of the Manitoba Metis Federation.

118 He has been active in negotiating with the Manitoba Government regarding Metis harvesting rights.

119 Helene Johnson, born March 15, 1955, in Big River, Saskatchewan gave evidence. She is Metis as were her father and mother.

120 She is a member of the Metis Nation of Saskatchewan. She stated that the Constitution of the Metis Nation of Saskatchewan was formulated on December 3, 1973, declaring the Metis nation as a self-governing body.

121 The legislature of Metis passed "*The Metis Wildlife Conservation Act*", the primary purpose of which is to provide laws for members regarding hunting and fishing.

122 Mr. Lawrence Heinemann gave evidence.

123 He did research on what Aboriginal rights the Metis people were claiming and made a report to the Association of Metis and Non-Status Indians (AMNSIS). Several interviews had been done, nine of which were placed into evidence as Exhibit D-26.

124 Some of the interviewees talked about scrip.

125 Mr. Heinemann stated that scrip was a response by the government to deal with claims that the Metis were making in regard to their land rights. Scrip was to have been an extinguishment of land rights.

126 There were two kinds of scrip, i.e. money scrip and land scrip. Money scrip could be exchanged for open Dominion land in the amount specified on the face of the scrip note. If it said \$160.00, that meant it could be exchanged for 160 acres. In the case of land scrip, it could

only be applied on actual land. The majority of the money scrip ended up in the hands of speculators.

127 Professor Arthur Ray was qualified as an expert in the area of Native Studies which includes Metis studies, historical traditional Aboriginal economic practices and lifestyle, the terminology used to describe the Metis and the economic impact of the fur trade on Metis people.

128 Professor Ray was asked where the Metis people came from. He replied it was from the intermarrying of European newcomers and local Native people. This began in the early 17th century in eastern Canada and on the prairies by the middle of the 18th century. The Metis people developed their own customs and traditions.

129 He stated that most of the activities that the Metis were engaged in required movement, i.e. hunting, trapping, brigading, berry picking, fishing.

130 Professor Ray stated that there was regular traffic back and forth between Fort Qu'Appelle and Fort Ellice because there were brigades going up and down the valley.

131 He was asked whether the settlements of Metis at Regina and Fort Qu'Appelle could be considered parts of the same community. He answered in the affirmative. He stated the settlements spread out and communities overlap.

132 Dr. Frank Tough was qualified as an expert in five areas, i.e. Native studies including Metis studies, historical Aboriginal resources, lifestyle and terminology used in describing the Metis, the fur trade and the application of conservation policies to the Aboriginal peoples in Canada.

133 Dr. Tough talked about how the Metis came into existence. Fundamentally, they came about as a result of intermarriage between Indian people and Europeans who came to the New World.

134 The process of intermarriage was reinforced by the needs of the fur trade. The Metis population got larger and larger, marrying within itself seeing itself as separate occupying certain economic roles, extending their influences over certain territories and taking on a political dimension later on in terms of expressing their collective interests sometimes in conflict with the Hudson's Bay Company and later from time to time in an antagonistic relationship with the Canadian Government.

135 Dr. Tough spoke of the importance of fish to Aboriginal livelihoods. His report entitled "The Importance of Freshwater Fish to the Metis of Western Canada" is exhibited as D-48.

136 That was the case for the Defence.

Narrow Issue

137 The narrow issue in this case is whether the accused has established that he is entitled to

exercise an Aboriginal right to fish for food at Katepwa Lake within the meaning of section 35(1) of the *Constitution Act, 1982* and according to the test laid down by the Supreme Court of Canada in *R. v. Powley*, [\[2003\] 2 S.C.R. 207](#).

138 The Crown has acknowledged that it will not argue that the *Fisheries Act (Saskatchewan)*, 1994, [S.S. 1994, c. F-16.1](#) nor the *Fisheries Regulations*, R.R.S. 2000, c. F-16-1, Reg. 1 constitute a justifiable infringement of any rights found to exist.

139 I find it unnecessary to rule on the other issues.

Analysis

140 In *R. v. Powley*, the Supreme Court of Canada set out a test for determining when Metis Aboriginal rights exist.

141 The following factors must be considered:

- a) Characterization of the Right
 - b) Identification of the Historic Rights-Bearing Community
 - c) Identification of the Contemporary Rights-Bearing Community
 - d) Verifying Membership in the Relevant Contemporary Community
 - e) Identification of the Relevant Time Frame
 - f) Is the Practice Integral to the Claimants' Distinctive Culture
 - g) Continuity Between the Historic Practice and the Contemporary Right Asserted
 - h) Was the Right Extinguished
 - i) If There Is a Right, Was there Infringement
 - j) Was the Infringement Justified
- a) Characterization of the Right**

142 Both Crown and Defence agree that the right at issue is the right to fish for food.

b) Identification of the Historic Rights-Bearing Community

143 Claimants must establish the existence of a rights-bearing Metis community of which they are a member.

144 The Supreme Court held that a Metis community can be defined as a group of Metis with a distinctive identity, living together in the same geographic area and sharing a common way of life (*Powley* at para. 12).

145 In determining whether particular claimants comprise a Metis community, it is not

necessary to decide whether that community forms part of a larger Metis community that extends over a wider area.

146 In *Powley*, the two claimants were Metis men from Sault Ste. Marie, Ontario. They shot and killed a moose near their home. They did not have a licence and were therefore charged with an offence. They claimed as their defence, an existing Aboriginal right to hunt for food. They were acquitted at trial and the acquittals were upheld by the Supreme Court.

147 The trial judge had held in *Powley*, [\[1999\] 1 C.N.L.R. 153](#) that the concept of a Metis community should not be limited to Sault Ste. Marie proper but that it should also include the surrounding environs (seven communities and areas, some as far away as 100 kilometres and extending into northern Michigan).

148 In *R. v. Laviolette*, Kalenith J. of the Saskatchewan Provincial Court recognized that the rights-bearing Metis community he identified in northwest Saskatchewan had a "regional consciousness" and was part of a larger Metis people [*R. v. Laviolette*, [\[2004\] S.J. No. 566](#) (Sask. Prov. Ct.) at paras. 23-24].

149 The accused, a Metis person was fishing on Green Lake, Saskatchewan. He was a resident of Flying Dust First Nation near Meadow Lake approximately 50 kilometres southwest of Green Lake.

150 Judge Kalenith found that Mr. Laviolette was a member of the contemporary Metis community of northwest Saskatchewan which included Meadow Lake. Mr. Laviolette was acquitted.

151 In *Laviolette*, Kalenith J. recognized that the Metis were "highly mobile" and had "extensive kinship connections" from the Red River Settlement in Manitoba to northern Alberta:

The evidence showed that while these fixed settlements were important 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. (*Laviolette* at para. 26.)

152 In his expert report, Dr. Ray explained the difference between his use of "settlement" versus "community":

I use the term, "community" to refer to a group of people who were interdependent, interacted socially on a regular basis and usually were close kin. I use the term, "settlement" in reference to physical sites that are defined in terms of their built-up and cleared areas ...

It is also clear that a local Metis community could be present at more than one settlement in a particular region. In other words, the Metis regional community was not defined by the boundaries of a single settlement. (Exhibit D-19: Metis Economic Communities and Settlements in the 19th Century, Dr. Ray at p. 18.)

153 Both experts, Dr. Tough and Dr. Ray, described the Metis as a people who were born through a process called "ethno genesis". Dr. Ray testified that it began in the Great Lakes area in eastern Canada beginning in the mid-17th century and on the prairies by the middle of the 18th century.

154 Dr. Ray stated that the first step in the process of ethno genesis was intermarriage, usually meaning European men marrying Native women. The children of those first unions start marrying amongst themselves and eventually a group of people develops an identity that is neither First Nation nor European. The descendants developed very distinctive lifestyles of their own.

155 Dr. Tough testified that in the beginning of the 1800's, the Metis saw themselves as distinct from their European and Indian relations. This Metis identity grew stronger through every generation. The Metis developed their own language (Michif), customs, music, dress and way of life.

156 Dr. Ray testified that a regional Metis network with fixed settlements developed in the parkland and grassland areas, around the buffalo hunts and Red River cart trails.

157 Dr. Tough testified that buffalo hunts involved Metis leaving the parklands to go out on the grasslands resulting in constant movement and use of these two geographical areas by the Metis.

158 Dr. Tough testified about Metis wintering sites that were established to provide protection against the harsh winters on the Plains. These included Turtle Mountain, Moose Mountain, Cypress Hills, Qu'Appelle Valley, Dirt Hills, Wood Mountain and the Souris River.

159 Dr. Ray testified about the cart trails which the Metis established throughout the parkland and grassland regions to support the buffalo hunts and facilitate transportation between the fixed settlements.

160 A series of cart trails connected the Qu'Appelle Valley with locations throughout southern Saskatchewan (e.g. Regina, Willow Bunch, Souris River, etc.).

161 Dr. Ray testified that the nature of the fur trade and the nature of the Metis economy involved a great deal of mobility. A key component of their economy was hunting, trapping, fishing, working for the trading companies. He stated that these are all spatially extensive activities. He stated that the Metis community's regional network included wintering sites, trading posts, areas close to cart trails and gathering places that allowed the historic parklands/grassland Metis community to develop a regional cohesion and maintain significant trade and kinship connections throughout the region.

162 Dr. Ray testified that by the 1870's the buffalo hunt was on its last leg. As the buffalo hunts faded, the Metis who had participated in the annual hunts began to increasingly remain in the

well-established fixed settlements that they had always lived in and with which they had familiarity and kinship connections.

163 Dr. Tough testified that the documents created through the Metis scrip system also provided evidence on the historic mobility, kinship connections and land use of the Metis community.

164 For example, he stated that in his review of Metis scrip applications from 1885 to 1902, he found that Metis who were residing in Fort Qu'Appelle listed the following as some of their birthplaces: Red River, St. Francis Xavier, St. Boniface, Winnipeg, Baie St. Paul, St. Joseph, Fort Ellice, Fort Qu'Appelle, Lebret, Regina, etc.

165 Dr. Tough testified that the Metis have had a long standing presence throughout the Qu'Appelle Valley and environs since at least the early 1800's. He stated that Hudson Bay account books for the area (1820's to 1860 period) document the presence of well known Metis surnames in the area. Some names are Allary, Amiotte, Desjarlais, Lavallee, etc.

166 Dr. Ray testified that the records of Fort Ellice demonstrated long standing connections with the Qu'Appelle Valley.

167 I find that the evidence shows that there is a regional historic rights bearing community within the Qu'Appelle Valley and environs.

168 There has been sufficient demographic information, proof of shared customs, tradition and collective identity to support this finding.

c) Identification of the Contemporary Rights-Bearing Community

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

170 Witnesses testified with respect to the ongoing existence of a distinct Metis culture and Metis traditions in contemporary times in the Qu'Appelle Valley and environs through the Metis language (Michif), song storytelling music, foods, dress, beadwork and governance structures.

171 Well recognized Metis family names documented in the historic record continue to be seen in the Qu'Appelle Valley area. These include Amyotte, Fisher, Belhumeur, Robillard, Blondeau, Desjarlais, to name a few.

172 It is submitted by Defence that the site of Katepwa Lake is now and has historically been known as a prominent fishing location.

173 I find that there exists a contemporary rights-bearing community in the Qu'Appelle Valley

and environs.

d) Verifying Membership in the Relevant Contemporary Community

174 The Supreme Court of Canada set out the test to verify a claimant's membership in the contemporary Metis community as follows: First, the claimant must self-identify as a member of a Metis community; second, the claimant must present evidence of an ancestral connection to an historic Metis community; third, the claimant must demonstrate acceptance by the modern community, whose continuity with the historic community, provides the legal foundation for the right being claimed.

175 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.

176 Mr. Belhumeur self-identifies as Metis. His mother, Louise Belhumeur and brother, Charles Belhumeur testified that their family was always known as Metis. Cliff Laroque, President of the MNS Regina Local #33 testified that Mr. Belhumeur had been a member of the MNS and the Regina Local for a number of years.

177 It has been shown that Mr. Belhumeur is ancestrally connected to the Metis settlements of Lebret and St. Lazare.

178 The genealogist, Laura Hanowski testified that Mr. Belhumeur comes from a long line of Metis ancestry, i.e. six generations with connections to the Metis settlement at Lebret.

179 Mr. Belhumeur has been accepted by the modern Metis community. He is a member of the Metis Nation of Saskatchewan, Local #33 at Regina. Several witnesses who are Metis said they knew him or knew of him.

180 Mr. Belhumeur shares the culture, customs and traditions of the Metis. He is involved in hunting and fishing for food.

181 I am satisfied that Mr. Belhumeur is a member of the contemporary community.

e) Identification of the Relevant Time Frame

182 In *Powley*, it was held that one must look at the period after a particular Metis community arose and before it came under the political and legal control of the Europeans.

183 Effective control takes place when the Crown's activity has the effect of changing the land tenure, lifestyle and economy of the Metis in a given region.

184 In *Powley*, effective control was described as a period between 1815 and 1850 when the Crown began to issue mining leases in the region.

185 In *Lavolette*, Kalenith J. held that the date of effective control for the regional Metis community at issue was 1912. That was the date when the land tenure system in northwest Saskatchewan began to change due to surveys and the establishment of townships.

186 It is submitted that in the case at bar, the "effective-control" period is from 1882 to the early 1990's.

187 Dr. Tough testified that the first Dominion Land Office was established in the Qu'Appelle Valley area in 1882.

188 Metis Scrip Commissions are established in 1885, 1886, 1887 and 1899 in an attempt to address Metis land claims. The Scrip Commissions visited Fort Qu'Appelle in each of those years.

189 There was evidence that the Metis continued to hunt and fish as they always had through the late 1800's to the early 1900's.

190 The Court concludes that the "effective-control" period in this case is from 1882 to the early 1900's.

f) Was the Practice Integral to the Claimant's Distinctive Culture?

191 Both experts, Dr. Tough and Dr. Ray testified that the Metis have always had an integrated economy and have always sustained their existence and obtained their livelihood from hunting, fishing, gathering and trapping.

192 Dr. Tough's testimony and report entitled "Importance of Freshwater Fish to the Metis of Western Canada" (Exhibit D-48) clearly show that fishing for food was an integral part of life.

193 In particular, the Qu'Appelle Lake and River were well known to the Metis as good fishing areas the report states.

194 One then concludes that fishing was integral to the Metis culture in the Qu'Appelle Valley and environs.

g) Continuity Between the Historic Practice and the Contemporary Right Asserted

195 Several witnesses testified that through the generations, harvesting and fishing for food have continued to be an important way of life for the Metis.

h) Was the Right Extinguished?

i) If There is a Right, Was There an Infringement?

j) Was the Infringement Justified?

196 It is agreed by Crown and Defence that the above factors need not be explored.

Conclusion

197 The Defence submits that the Metis rights at issue in this case are the Metis rights of the whole Metis nation. The territory of the Metis Nation spans from Ontario to British Columbia, encompasses parts of the northern United States as well as parts of the Northwest Territories.

198 The Defence submits that the regional community at issue is the historic parklands/grasslands Metis community.

199 The Crown argues that Defence takes too broad an approach to defining "community" for the purposes of the *Powley* test.

200 The Crown submits that the accused's claim to Aboriginal rights is, in effect, being made as a member of the Metis Nation, not as a member of any regional community. The boundaries of the alleged historic and contemporary Metis communities relied on by the accused embrace all of south and central Manitoba, Alberta and Saskatchewan. It is argued that these boundaries are far more extensive than the boundaries of the regional community recognized in *Lavolette* or the community recognized in *Powley*.

201 The Crown submits that the Supreme Court clearly contemplated that Metis rights are possessed by individual Metis communities which make up the Metis Nation or the Metis people, not the Nation or the people themselves.

202 The Crown accepts the regional approach to defining Metis communities as adopted by Kalenith J. in *Lavolette*.

203 I agree with the position of the Crown. *Powley* makes it clear that rights are possessed by "*individual*" (my emphasis) communities that may make up a nation.

204 The Court is not prepared to take the sweeping approach that Defence urges, that is to declare that the whole area of the parklands/grasslands area constitute a Metis community.

205 The Court, however, is prepared to adopt the regional approach in defining "community" that Kalenith J. took in *Lavolette*.

206 I am satisfied that the evidence shows that the "regional community" is the Qu'Appelle Valley and environs which extend to the City of Regina.

207 Mr. Belhumeur, a Metis person living in Regina who has established that connections with the Qu'Appelle Valley Metis historic and contemporary community exist, has the right to fish for food pursuant to s. 35(1) of the *Constitution Act, 1982*.

208 Accordingly, I find Mr. Belhumeur not guilty of the charge herein.

209 Dated at the Town of Fort Qu'Appelle in the Province of Saskatchewan this 18th day of October, A.D. 2007.

D.I. MORRIS PROV. CT. J.

1 Reference to *R. v. Norton and Samuelson*, [\[2005\] S.J. No. 261](#) (Sask. Prov. Ct.).

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