R. v. Willison

British Columbia Judgments

British Columbia Supreme Court

Salmon Arm, British Columbia

Williamson J.

Heard: April 18 - 20, 2006 (Vernon).

Judgment: June 26, 2006.

Salmon Arm Registry No. 15482-3 SC

[2006] B.C.J. No. 1505 | *2006 BCSC 985* | *[2006] 4 C.N.L.R. 253*

Between Regina, appellant, and Gregory Kenneth Harold Willison, respondent

(64 paras.)

Case Summary

Aboriginal law — Aboriginal rights — Constitution Act, 1982, recognition of existing aboriginal and treaty rights — Metis — Appeal by the Crown from the accused's acquittal for hunting out of season and possession of dead wildlife allowed — The trial judge erred in finding an historical metis community in the Falkland area of BC — The acquittal on grounds of an existing right to hunt for food was quashed and a new trial ordered — Constitution Act, 1982, s. 35.

Aboriginal law — Hunting rights — Offences — Appeal by the Crown from the accused's acquittal for hunting out of season and possession of dead wildlife allowed — The trial judge erred in finding an historical metis community in the Falkland area of BC — The acquittal on grounds of an existing right to hunt for food was quashed and a new trial ordered — Constitution Act, 1982, s. 35.

Appeal by the Crown from the accused Willison's acquittal for hunting deer out of season and possession of dead wildlife -- The accused was arrested when a conservation officer found him in possession of a mule deer carcass near Falkland, BC -- The accused did not have a hunting licence -- The accused claimed an existing right to hunt for food as a result of his status as a member of an historical metis community -- He was found not guilty on the grounds of an existing constitutional right to hunt for food -- The Crown argued that there was no historical or current metis community in the Falkland area -- HELD: Appeal allowed -- The trial judge had erred in finding that a metis community existed in the Falkland area sufficient to support hunting and fishing rights under s. 35 -- Any metis community which did exist historically was minimal and very mobile -- The evidence did not support the existence of a historical or current community -- The verdict was quashed and a new trial ordered.

Statutes, Regulations and Rules Cited:

Constitution Act, 1982, s. 35(1), s. 35(2)

Wildlife Act, *R.S.B.C. 1996, c. 488*,

Counsel

Counsel for the Appellant: Paul J. Pearlman, Q.C.

Counsel for the Respondent: Jean Teillet

Counsel for the Intervenor, Okanagan Nation Alliance: Louise Mandell, Q.C., Tim Howard

Counsel for the Intervenor, Nation of British Columbia: Jason Madden

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WILLIAMSON J.

Introduction

1 On November 26, 2000, near Falkland in British Columbia, the respondent, Gregory Willison, was found by a conservation officer in possession of a deer carcass. He admitted that he had shot the animal out of season and that he did not have a hunting licence. However, he claimed that as a Métis he had a constitutionally protected aboriginal right to hunt deer out of season for food.

2 Charged with hunting antlered mule deer out of season, and possession of dead wildlife contrary to two sections of the ***Wildlife Act***, *R.S.B.C. 1996, c. 488*, he was tried and acquitted May 2, 2005. The learned trial judge found that Mr. Willison had satisfied the onus upon him to demonstrate that he possessed an aboriginal right to hunt for food: see ***R. v. Willison***, *[2005] B.C.J. No. 924*, *2005 BCPC 131*. The Crown has appealed.

Summary of the Law

3 Subsections 35(1) and (2) of the ***Constitution Act, 1982***, being Schedule B to the ***Canada Act 1982*** (U.K.), 1982, c. 11 state:

> 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.

4 The definitive Supreme Court of Canada case setting out the requirements for establishing a Métis constitutional right is ***R. v. Powley***, *[2003] 2 S.C.R. 207*, *230 D.L.R. (4th) 1*, *177 C.C.C. (3d) 193*, *2003 SCC 43*. At para. 10, the Court defined the term "Métis" as it is used in s. 35, finding that while the term does not include all individuals with mixed Indian and European heritage, it does refer to:

> ... distinctive people who, in addition to their mixed ancestry, developed their own customs, way of life, and a recognizable group identity separate from their Indian or Inuit and European forebears.

5 The Court adapted its analysis for determining aboriginal rights (set out primarily in ***R. v. Sparrow***, *[1990] 1 S.C.R. 1075*, *70 D.L.R. (4th) 385*, *56 C.C.C. (3d) 263*, *46 B.C.L.R. (2d) 1* and ***R. v. Van der Peet***, *[1996] 2 S.C.R. 507*, *137 D.L.R. (4th) 289*, *109 C.C.C. (3d) 1*, *23 B.C.L.R. (3d) 1*) to account for the fact that Métis culture, unlike those of the other aboriginal peoples of Canada, arose post-European contact. In ***Powley***, the Court also set out a ten part framework for determining if a s. 35 Métis right exists.

The Parties' Submissions

a) The Crown

6 The appellant Crown, referring to ***Powley***, submits that the learned trial judge erred with respect to four aspects of the ten part test set out in that case:

(1) in finding an historic rights bearing Métis community in the Falkland area,

(2) in finding a contemporary Métis community,

(3) in finding a continuity between the historic practice and the contemporary right asserted, and

(4) in finding the respondent was a member of the alleged contemporary Métis community (in particular, in concluding that Mr. Willison had a sufficient ancestral connection to an historic Métis community in the area).

b) The Okanagan Nation Alliance

7 The intervenor, Okanagan Nation Alliance ("ONA"), is an alliance of first nations communities in the relevant area. It did not, of course, participate in Mr. Willison's trial. It argues the learned trial judge erred for the reasons submitted by the Crown and submits the appropriate order is that there be a new trial coupled with a direction that the ONA be permitted to make submissions at that trial concerning aboriginal title claims to the relevant area and the proper relationship between the claims of its members and any possible Métis rights.

c) Mr. Willison

8 Mr. Willison submits the trial judge correctly considered and applied ***Powley***, that there is no error of law in his reasoning, let alone a palpable overriding error, and that the appeal should be dismissed.

d) The Métis Nation of British Columbia

9 Finally, the intervenor Métis Nation of British Columbia also submits that the learned trial judge did not err and that the appeal should be dismissed.

The Standard of Review

10 The issues here involve questions of mixed fact and law. It is not disputed that the onus upon the appellant is to show a palpable and overriding error: see ***Housen v. Nikolaisen***, *[2002] 2 S.C.R. 235*, *211 D.L.R. (4th) 577*, *10 C.C.L.T. (3d) 157*, *2002 SCC 33*.

Analysis

a) An Historic Métis Community

11 The Crown's first ground of appeal is that the learned trial judge erred in finding that an historic Métis community existed in the environs of Falkland.

12 In ***Powley*** at para. 12, 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." At para. 23, the Court went on to say:

> In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim ....

13 The trial judge in this case defined the relevant area (the environs of Falkland) as encompassing the route of the fur brigade trail, which historic documents show commenced at what is now Kamloops, went south through the Falkland area to the Okanagan Valley and then continued further south to Fort Okanagan in what is now the state of Washington. It was in this area, then, that it would be necessary to find the existence of an historic rights bearing Métis community prior to the assertion of European control, as well as continuity between that community and a contemporary Métis community.

14 The learned trial judge concluded upon the evidence that effective European control in the area occurred somewhere between 1858, which was the beginning of the Cariboo gold rush,

and 1864. He went on to conclude there was an historic Métis community in the relevant area before 1858.

15 In his reasons for judgment at para. 79, the learned trial judge said:

> Our current understanding of what constitutes an ethnic "community" is an appropriate reference point having regard to the Supreme Court's assertion that "the purpose and promise of section 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of Métis culture".

16 The learned trial judge went on to find, at paras. 85 to 87, that for 40 to 50 years the Métis where "indispensable" to the aboriginal-European economic partnership and that there existed a community of Métis persons during the years the fur brigade trail operated which "fairly can be equated to the Métis community in Sault Ste. Marie[as discussed in ***Powley***] as disclosing the characteristics of an historic rights-bearing community".

17 The Crown submits that this infusing of the test for finding an historic rights bearing community with the values of 21st century multiculturalism is an error. In this regard, the Crown refers to ***Van der Peet***, in which the Court stated that aboriginal rights cannot "be defined on the basis of the philosophical precepts of the liberal enlightenment". I agree with this submission as it applies to the historic community.

18 The Crown relies on the oft quoted statement in ***Van der Peet*** at para. 30, in which Lamer C.J.C., who was speaking for the majority, said:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by section 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

19 As I understand the Crown's position, two difficulties arise for Mr. Willison as a result of the above quotation. First, aboriginal peoples are separated from all other minority groups in contemporary Canadian society because of their pre-European contact status. Applying modern values of multiculturalism to peoples or communities in that era is inappropriate. Second, part of the "one simple fact" set out by the Chief Justice is a reference to communities "on the land, and participating in distinctive cultures, as they had done for centuries".

20 The Crown says there is no evidence in this trial of a community "on the land", nor is there evidence that the Métis people in the relevant area had been participating in a distinctive culture and had done so for centuries.

21 The Crown concedes that in ***Powley***, the Supreme Court of Canada modified the ***Van der Peet*** test because of the distinctive genesis of the Métis. However, the Crown says that on the

evidence in this case Mr. Willison did not demonstrate the existence of an identifiable Métis community with a degree of continuity and stability sufficient to support a site specific aboriginal right.

22 The Crown says that the evidence merely discloses persons identified as Métis were in the area as transients, and that there is no evidence of a community. Indeed, the Crown says the evidence is sparse and equivocal.

23 Mr. Willison counters that the learned trial judge was sensitive to the unique circumstances of Métis peoples and took a purposive approach to the question. His counsel submits mobility was a characteristic of Métis peoples, and the concept of "community" must be considered in that light.

24 I am persuaded, as submitted by Mr. Willison, that the finding of a Métis community does not require evidence of a "settlement" in the given area. However, there must be evidence of a community "on the land". The evidence in this case, including the evidence of the expert called by the defence, is that there were a small number of Métis people in the area of the fur brigade trail as defined above, who were employees of the Hudson's Bay Company. As the Crown has pointed out, had they not been employed by the Hudson's Bay Company, they would not have been there.

25 There was also a small number of Métis women who were married to European employees of the Hudson's Bay Company. But there is no evidence that these women lived in a community practicing the distinctive and identifiable lifestyle or culture of a Métis people. For example, the evidence disclosed that Mr. Willison's ancestor, Jane Klyne, a Métis woman who married an Hudson's Bay Company officer, became:

> ... the epitome of a respectable Victorian matron ... and when McDonald [her husband] retired to St. Andrews near Montreal in 1849, his wife adapted to her new role with skill and dignity.

26 While there is some demographic evidence, the distinguishing features of the Métis found by the learned trial judge were not "site specific" to the fur brigade trail. Rather, as is set out at para. 74 of the trial judgment, these were things characteristic of Métis throughout the Pacific Northwest.

27 In considering this question, one must be conscious of the compelling argument made by counsel for Mr. Willison that it is essential to be careful when defining "community" as it pertains to a people who, as she put it, are "mobile". Indeed, she submitted that mobility is one of the key characteristics of a Métis community.

28 Section 35 must be interpreted in light of its purpose. If the Métis are characterized by mobility, a requirement that one find a Métis settlement before an aboriginal right to hunt can be established is to put a significant obstacle in the way of any finding of a Métis right. It is difficult to conclude that the framers of the Constitution intended that mobility, which is a key

characteristic of Métis people, should at the same time be a bar to them exercising their s. 35 rights.

29 Métis working for the Hudson's Bay Company along the fur brigade trail undoubtedly hunted for food as did other employees of the company. That others did what the Métis did in the circumstances does not, in my respectful view, derogate from the evidence that the Métis hunted for food in the relevant area.

30 To return to the quote above from ***Van der Peet***, while there may not have been a community "on the land, participating in a distinctive culture for centuries", it is necessary on the basis of ***Powley***, to modify this quotation to "on the land, participating in a distinctive culture for generations".

31 In the present case, we are not dealing with centuries. Rather, the appellant submits there was neither the time nor the numbers of Métis present to create a distinctive community. The Crown points to the fact that Mr. Willison's expert testified that there was no evidence of fur traders putting down roots at either Fort Kamloops or Fort Okanagan (as they did at Sault Ste. Marie, as discussed in ***Powley***). Further, it points to evidence that even before the definition of the 49th parallel as the border between American and British territory in 1846, the fur trade was in serious decline. The Crown submits the evidence is that most of the Métis who were employees of the Hudson's Bay Company left the area at the end of their careers.

32 The evidence demonstrates, then, that there were a small number of Métis present in the area for a relatively short period of time. This must be seen in light of the admonition in ***Mitchell v. Canada (Minister of National Revenue)***, *[2001] 1 S.C.R. 911* at para. 51, *199 D.L.R. (4th) 385*, *83 C.R.R. (2d) 1*, *2001 SCC 33*, that "[s]parse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim."

33 Nevertheless, the learned trial judge found that the evidence supported a finding of an established, if mobile, community along the fur brigade trail in the relevant time period.

34 I am unable to agree with that finding. It is difficult to conclude that the evidence supported the establishment of a "community", as I understand it, envisioned by ***Powley***. As noted above, Sault Ste. Marie was a hub for many generations of activity. The Métis from that area were mobile and travelled widely, but kept their connection with, and in many instances returned to, the community of Sault Ste. Marie. There was found to be an established community on the site and in the environs of that settlement.

35 Mr. Willison also relies upon ***R. v. Laviolette***, *267 Sask.R. 291*, *2005 SKPC 70*, in which the Court found Métis rights in 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" (para. 25). I find that case distinguishable. The Crown conceded that an historic Métis community existed at Green Lake. The issue was whether the rights extended to a larger area. It turned upon evidence of "a highly established network based on trade and family connections" (para. 23).

36 The evidence demonstrated "strong kinship ties between these three fixed settlements and

that the Métis intermarried and moved between these settlements over time" (para. 25). This, I conclude, is far stronger evidence of a group of people with a distinctive collective identity living together and sharing a common way of life than in the case at bar.

37 While I am satisfied the learned trial judge correctly reviewed ***Powley*** and subsequent cases, and that he asked the appropriate questions, after a close reading of the judgment, I am unable to find persuasive evidence of such a community, or, in the words of ***Powley*** at para. 22, "clear evidence of a distinct and cohesive Métis community" in the environs of the fur brigade trial.

38 First, I note that the expert who testified on behalf of Mr. Willison, Dr. Michael Angel, was found competent to give opinion evidence regarding "Métis culture in the Pacific Northwest" rather than in the narrower geographic area defined as the fur brigade trail. Much of his testimony concerned the Pacific Northwest generally and therefore must be treated with caution when applying it to the Kamloops-Okanagan area.

39 Second, in attempting to discern distinguishing characteristics of the Métis in the relevant area, the learned trial judge pointed to Dr. Angel's testimony that the Métis in the area functioned "... as go-betweens' and guides and interpreters". He went on to observe that their "practical functions" helped to "solidify the culture as something more than the presence of several racially-mixed families" (para. 57). There is no evidence that these characteristics were not also shared by non-Métis persons, nor can these characteristics, which describe a type of employment, be said to establish a community.

40 Dr. Angel testified that Fort Kamloops at the relevant time was "not particularly large", and that archaeological work "has not generated very much concrete evidence of where Métis families that were living near Fort Kamloops actually stayed ..." (para. 59).

41 Dr. Angel also testified that Métis in the Pacific Northwest wore clothing "similar to the type of clothing worn by the Red River Métis" and that they held to distinctive forms of song and dance which were taken "... in part from the Ojibway" (para. 74). I find this sparse evidence of community.

42 A second expert, Ronald Nunn, testified that the purpose of Métis hunting in the area was to provide sustenance for the other employees of the Hudson's Bay Company as well as to feed Métis families. When asked by the Court what about Métis sustenance hunting made it culturally distinct (as opposed to an aspect of survival), the witness testified about the culture and structure of buffalo hunts (para. 70). There was no explanation of how such hunts might define a culturally distinct people in the environs of Falkland.

43 The Métis involved along the fur brigade trail were employees of the Hudson's Bay Company and were generally only there for so long as that company required them. Once the 49th was established as a boundary and fur trade activity diminished, many of them went elsewhere. With the gold rush of 1858, the fur trade all but disappeared.

44 In the result, I find that the learned trial judge was in error in concluding that the evidence

could support the existence of an historic Métis community as that concept is articulated in ***Powley***.

b) A Contemporary Métis Community

45 The Crown also submits that the learned trial judge erred in finding a contemporary Métis community in the Falkland area. Given the finding above with respect to the historic community, it is not necessary to consider this point. However, I make the following brief observations.

46 A reading of ***Powley*** discloses that a "community", in the context of s. 35 rights, should demonstrate a people with a distinctive collective identity, sharing a common way of life, and living together in the same geographic area.

47 The learned trial judge found that there was such a contemporary rights bearing community in this case. His Honour stated at paras. 111 and 112:

> Having regard to what I have said already as to what constitutes a "community", I have no hesitation in finding that there exists a Métis "community" in the Okanagan Thompson area. It is palpably clear to me that Mr. Willison, Mr. Nunn, Ms. Kozak, and others seek each other out in exactly the manner I described earlier regarding members of ethnic communities who may constitute a relatively small minority of persons within a wider community. It is just as apparent to me that their purpose in seeking each other out is to enhance their survival as a distinct community and to protect practices that were historically important features of Métis communities.
>
> I do not perceive it to be necessary to undertake an exhaustive analysis of which of the persons on the Salmon Arm local phone list continue to reside in the immediate geographic area, or indeed are persons who can meet all of the criteria of self-identification, ancestral connection, and community acceptance ... .

48 I agree with the Crown that in effect the learned trial judge expanded the definition of community found in ***Powley*** to include a geographically wide, loosely affiliated group of people of mixed ancestry rather than a group with a distinctive, collective identity, living together in the same geographic area and sharing a common way of life. I respectfully find this to be an error.

c) Continuity between the Historic and Contemporary Communities

49 Nor can it be said, if there was an historic Métis community, that there is evidence of sufficient continuity between that historic community and a contemporary Métis community in the relevant area.

50 To meet this onus, a claimant must proffer evidence demonstrating a sufficient continuity of practice, custom and tradition with the specific identified historic community. In ***Powley*** at para. 27, the Court said:

> "... the continuity' requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself ..."

51 In the Court below, the learned trial judge, in discussing continuity, appears to have concentrated, rather than upon the practices of members, upon the community itself. Although at para. 131 he found that sufficient continuity had been demonstrated, among other reasons, because of this focus on continuing practices of members of the community, the analysis leading up to that conclusion omits any discussion of members of the community continuing identifiable Métis practices over the period of time from the assertion of European control to the present. The evidence discussed concerns the phenomenon of the Métis community "going underground", and the impact of the waning of the fur trade. Given the analysis in ***Powley***, such evidence cannot sustain a finding of the essential continuity.

52 In so concluding, I do so aware of the idea that historically Métis communities tended to "become invisible" partly because of discriminatory attitudes towards "half-breeds". However, that invisibility could be dispelled with admissible evidence, whether by way of oral history or otherwise. If it were dispelled, there would remain the necessity of calling sufficient evidence of a continuation of the relevant practices of members of that community from the time of the historic community to the present.

53 I conclude that in this case, as in ***R. v. Nunn,*** *2003 CarswellBC 3680* (B.C.P.C.) (WLeC) at para. 33, the evidence:

> ... does not support the conclusion that the hunting practices of the Métis associated with providing for the expansion of the fur trade continued in the non-fur bearing Okanagan ...

d) Mr. Willison's Métis Ancestral Connection

54 The Crown also says that the learned trial judge erred in concluding Mr. Willison had a sufficient ancestral connection to the relevant historic Métis community. I have already concluded that the evidence did not support the conclusion that there was such a community in the Falkland area.

55 In ***Powley*** at para. 29, the Court found that until membership requirements in Métis communities become more standardized, courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. At paras. 30-33, the Court suggested "three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection and community acceptance." In discussing the ancestral connection factor at para. 32, the Court stated:

> This objective requirement ensures that beneficiaries of s. 35 rights have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum "blood quantum", but we would require some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means.

56 I note that at trial, the Crown conceded that Mr. Willison is Métis, and that he:

> ... has an ancestral connection to the Okanagan Thompson area through Jane Klyne, the sister of his 4th generation great grandfather ... as well as through other relatives ..." (para. 14)

57 While it might be said the genealogical evidence before the learned trial judge was tenuous, I am unable to conclude he erred in law in finding Mr. Willison is descended from, or has an appropriate ancestral connection with, Métis people who were living in the Falklands area in the 19th century. As I have noted above, however, to say he is descended from a Métis woman who was in the area in the 1840s is not to say there was an historic Métis community in the area in the ***Powley*** sense.

Disposition

58 As can be seen from the above, I have found that some of the critical findings of the learned trial judge are unsupported by the evidence. In ***L.(H.) v. Canada (Attorney General)***, *[2005] 1 S.C.R. 401*, 251 D.L.R,. (4th) 604, *24 Admin L.R. (4th) 1*, *2005 SCC 25*, Fish J., speaking for the majority, stated in para. 56

> In my respectful view, the test[of palpable and overriding error] is met as well where the trial judge's findings of fact can properly be characterized as ... "unsupported by the evidence" ...

59 In the result, I conclude that the appeal should be allowed.

60 The material discloses Mr. Willison conceded the *actus reus* of the offences. The only defence raised was his s. 35 constitutionally protected right to hunt for food. Having concluded the learned trial judge was wrong to give effect to that defence, I see no reason to return this case to the trial court for a new trial. Rather, a conviction will be substituted, and the case will be remitted to the trial court for sentencing.

61 Finally, I observe the ONA requested that the appeal be allowed, and the matter be remitted to the trial court for evidence on the position of the ONA on hunting rights in the Okanagan area. A first instance trial of a person, claiming to be Métis, for the offence of hunting out of season is not the place for other interest groups to have status to intervene. If a group such as the ONA possessed information that was relevant to whether the accused person had a s. 35 constitutional right, it would open to the Crown to call that evidence. Such groups would not have standing as a "party" to the proceeding.

62 That is demonstrated by asking: if a member of the ONA faced such a summary charge in Provincial Court, would the Métis Nation of British Columbia, or an association of hunters, have such a right? I think it unlikely. That one Métis individual may have a constitutionally protected right to hunt cannot supersede a first nation member's constitutionally protected right to hunt.

63 I add that a finding that an individual was exercising a Métis right does not have the same impact as a finding of aboriginal title, a potential finding that might attract submissions from interested parties.

64 The appeal is allowed. The matter will be remitted to the trial court for sentencing.

WILLIAMSON J.
