



## IN THE PROVINCIAL COURT OF SASKATCHEWAN

Citation: 2018 SKPC 070

Date: December 5, 2018  
Information: 7457911, 7408038 & 7458507  
Location: Meadow Lake

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Between:

Her Majesty the Queen

- and -

Warren Boyer, Billy Myette & Oliver Poitras

Appearing:

Mr. James Fyfe	For the Crown
Mr. Clement Chartier Q.C.	
Ms. Kathy Hodgson-Smith	
Mr. Dwayne Roth	For the Defendants

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**DECISION**

**E. KALENITH, J**

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### **INTRODUCTION**

[1] Warren Boyer is charged with unlawfully fishing after being found fishing for food at Chitek Lake.

[2] Billy Myette is charged with hunting without a valid licence after being found hunting for food at Rush Lake.

[3] Oliver Poitras is charged with unlawfully hunting after he was found hunting for food at

Alcott Creek.

[4] Each of them claim to have Métis harvesting rights in their respective area and that they have harvesting rights as "Indians" under paragraph 12 of the Natural Resources Transfer Agreement 1930 (NRTA).

[5] This case raises the following issues:

- a. Are the Métis included in the term "Indians" in the NRTA?
- b. Do the claimants have Métis rights to hunt or fish in the areas where they were harvesting? This requires applying the test set out by the Supreme Court of Canada in *R v Powley*, 2003 SCC 43 [*Powley*], and answering these questions:
  - (i) what is the right in issue?
  - (ii) what is the historic rights-bearing community?
  - (iii) what is the present Métis community?
  - (iv) is the claimant a member of the present community?
  - (v) what is the relevant time frame (the date of effective control)?
  - (vi) is the practice integral to Métis life in the area?
  - (vii) has there been sufficient continuity between the historic practice and the present right asserted?

[6] After a Crown motion seeking to strike out the Notice of Constitutional Question filed on behalf of each defendant, I made a ruling that the following issues were to be addressed in advancement of the rights claims:

- a. Was the Chitek Lake area part of the historic Métis community of northwest Saskatchewan (HMCONWS), is Mr. Boyer a member of that community, and does he have a right to fish in the Chitek Lake area?
- b. Was the area in which Mr. Myette was hunting, south of Green Lake on or near the Rush Lake Fire Guard road, part of HMCONWS, and is Mr. Myette part of that community?
- c. Was the Jackfish Lake/Cochin area part of HMCONWS, is Mr. Poitras a member of that community, and does he have a right

to hunt south of Meadow Lake in the area of the Sundance Fire Guard Road?

[7] While the Crown has raised the issue of whether Devil’s Lake is a part of HMCONWS, as this was not the subject of a charge and not raised as an issue by the Court, I find it inappropriate to rule on this issue in this case.

## **FACTS**

[8] On March 27, 2014, Warren Boyer, a Métis person from the hamlet of Chitek Lake, Saskatchewan, was fishing for food on Chitek Lake located about 60 km southeast of Meadow Lake and approximately 24-30 kilometers directly south of the most southerly end of Green Lake, which lake and hamlet lie adjacent to the historic Carlton – Green Lake Trail within the province of Saskatchewan. Mr. Boyer was charged with unlawfully fishing contrary to section 11(1) of *The Fisheries Regulations*, RRS c. F-16.1, Reg. 1, as amended. Warren Boyer at the time of his detention by Conservation Officers invoked his Aboriginal right to fish for food pursuant to section 35(1) of the *Constitution Act, 1982*.

[9] On November 30, 2013, Billy Myette, a Métis person, was hunting for food on or near what is known as the “Rush Lake Fireguard Road”, approximately 1 km west of the south end of Green Lake, Saskatchewan, without a valid hunting licence. He asserted he was within his traditional territory which falls within the regional historic rights-bearing Métis community of northwest Saskatchewan. The location where he was hunting is not considered to fit within the policy of the Department of the Environment, which recognizes an Aboriginal right to hunt and fish for food within certain Métis Harvesting Zones. Mr. Myette was hunting immediately south of the Zone and was subsequently charged with unlawfully hunting contrary to section 25(1)(b) of *The Wildlife Act, 1998*, SS 1998 c. W-13.12, as amended.

[10] On November 16, 2012, Oliver Poitras, a Métis person from Meadow Lake, was hunting for food at or near what is known as the “Sundance Fire Guard Road”, approximately 37 km

south of Meadow Lake, Saskatchewan. Mr. Poitras was charged with unlawfully hunting contrary to section 25(1)(a) of *The Wildlife Act, 1998*. Oliver Poitras invoked his right to hunt for food pursuant to his Aboriginal right to do so within his traditional territory which falls within the regional historic rights-bearing Métis community of northwest Saskatchewan. The defendant has kinship connections to other Métis members of the regional historic rights-bearing Métis community and is a member of the contemporary rights bearing Métis regional community.

[11] The defendants each acknowledge that their offence is proven. They are being tried together given the similarity of issues raised.

### **NATURAL RESOURCES TRANSFER AGREEMENT 1930**

[12] I find that the Métis are not included in the term “Indians” in paragraph 12 of the NRTA entered into between the province of Saskatchewan and the federal government for the following reasons:

- a. In *R v Blais*, 2003 SCC 44, [*Blais*], the Supreme Court of Canada held that the Métis in Manitoba were not included in the term “Indians” in the identical provision of the NRTA entered into between Manitoba and the federal government;
- b. While in *Daniels v Canada*, 2016 SCC 12, [*Daniels*], the Supreme Court of Canada held that the Métis are “Indians” for purposes of s. 91(24) of the *Constitution Act, 1867*, it also held that a completely different interpretive exercise is involved under the NRTA;
- c. While in *R v Grumbo*, [1999] 1 WWR 9, the Saskatchewan Court of Appeal held that this decision involves determining whether the Métis had pre-existing Aboriginal rights, this approach was overruled in *Blais*;
- d. The change in wording from the 1926 Draft NRTA (a lengthy term referencing Treaty Indians change to "Indians of the Province") does not establish an intention to extend the NRTA's benefits beyond Treaty Indians given the lack of evidence explaining the change and no evidence of a common intention to

change those covered. I find this to be supported by the fact that Paragraph 12 is under the heading "Indian Reserves" with paragraphs 10 and 11 (these two paragraphs covering Canada's Treaty obligation to create and administer Indian reserves);

e. The 1933 letter from the Canadian Deputy Minister of Justice to the Alberta government, in which the opinion that there is nothing in paragraph 12's "context" or "any other part of the agreement" that limits its scope to Treaty Indians does not lead me to a different conclusion. There was no evidence that the provinces accepted this opinion. The consistent Federal position of opposing the Métis being included as Indians, before *Daniels*, puts into doubt the idea that this opinion was the Federal position;

f. Nor do I find that the failure to include the Métis in Paragraph 12 constitutes a breach of Canada's fiduciary duty to the Metis. While the Supreme Court's decision in *Manitoba Metis Federation v Canada*, 2013 SCC 14, refers to fiduciary duty, it held Canada did not owe a fiduciary duty in Canada's express constitutional obligation under s. 31 of the *Manitoba Act, 1870* to provide lands for the benefit of the Métis children in that Province. I agree with the Crown that Canada had no express constitutional obligation to the Métis in Saskatchewan from which a fiduciary or any related legal obligation could arise and no power to include the Métis in the NRTA, a negotiated agreement, without Saskatchewan's agreement.

### **DATE OF EFFECTIVE CONTROL**

[13] In *R v Laviolette*, 2005 SKPC 70, [*Laviolette*], I found that the date of effective European control was 1912. This was based on the establishment of townships at Green Lake then. I applied the test of when Crown activity changed the traditional lifestyle and the economy of the Metis in the area.

[14] In this case, the Crown argues that the date of effective control was between 1876 and 1881.

[15] In *Powley*, the Supreme Court of Canada held that the test is to determine when

Europeans established political and legal control in the area.

[16] In *R v Langan*, 2013 SKQB 256, the test was confirmed as being when colonial policy shifted from one of discouraging settlements to one of negotiating treaties and encouraging settlement.

[17] The Crown argues that the following justifies finding that the earlier date of effective control exists here:

a. this area is south of Green Lake and was not covered by *Laviolette*;

b. evidence was led through Dr. Clint Evans, an expert qualified in western Canadian history, with particular knowledge of Aboriginal and Métis history from Ontario westward. The Crown relies on the following as establishing this date of effective control:

i.1876: Battleford becomes the seat of government for the North-West Territories. It has a NWMP detachment, which is the headquarters for “E” Division with a complement of 33 officers and men. A settlement survey is completed and five hundred people live at Battleford by 1877;

ii.1876: Treaty No. 6 is signed, the area of which extended north to Green Lake and ran west from there (and included what later became the community of Meadow Lake);

iii.1877: Prince Albert has a NWMP post. Prince Albert is surveyed and has approximately 500 inhabitants, two general stores, a number of mills, a mission and school, and was the diocesan seat of an Anglican bishop;

iv.1878: Mistawasis and Ahtahkakoop Indian reserves are surveyed;

v.1881: Green Lake is included in the Government of Canada census of that year;

vi.1881: Treaty annuity payments are made at Green Lake by the NWMP;

vii.1881: Flying Dust Reserve is surveyed (adjacent to what later became the community of Meadow Lake);

viii.1881: a Department of Indian Affairs Farm Instructor is running an agency farm between Mistawasis and Ahtahkakoop Indian reserves;

ix.1881: Dominion Land Surveyor, George Simpson, and Government of Canada geologist, Robert Bell, are working in the area;

x.1881: the Governor General of Canada takes an extended tour of the prairies and meets with Treaty No. 6 Chiefs, including Mistawasis and Ahtahkakoop, at Fort Carlton;

xi.1885: the transcontinental railway is completed; the Canadian army is in the Territories and puts down a Metis rebellion; various HBC posts in the northwest are pillaged by the Cree, including Green Lake; a contingent of 130 NWMP sweep the northwest, including Green Lake, in search of Chief Big Bear; the NWMP camp at Pelican Lake and arrest one of “Big Bear’s Indians”; Metis leader, Louis Riel, is tried and hanged in Regina;

xii.1885: scrip commissions take place at locations across the Territories, including at Prince Albert and Battleford and

xiii.1887: a scrip commission is held at Green Lake.

[18] While it is arguable whether this changed the traditional lifestyle and economy of the Métis it clearly showed a change to treaty negotiation and encouraging settlement.

[19] I thus find 1876 to 1881 to be the effective date of control.

**WARREN BOYER**

[20] Warren Boyer's claim is for his Aboriginal right to fish for food as a Métis. This was, and is, an undisputed practice integral to Métis life.

[21] Evidence established, and the Crown acknowledges, that Mr. Boyer has an ancestral connection to HMCONWS. I find that the evidence also establishes that he is a present member of the Métis community of northwest Saskatchewan.

[22] The Crown disputes that fishing at Chitek Lake was integral to HMCONWS.

[23] Dr. Brenda Macdougall gave evidence as an expert in the social, cultural, kinship and genealogical history of Métis in Saskatchewan.

[24] Dr. Macdougall stated that Pelican Lake was part of HMCONWS because it was depicted on the Moberly map, Exhibit D-99 and 100, as part of the English River District.

[25] Dr. Evans testified that prior to 1892 the Pelican Hudson Bay Company (HBC) outpost was administered by the HBC's Saskatchewan District to the south at Fort Carlton. His evidence was that people fishing at Pelican (Chitek) Lake were members of the Pelican Lake Band and that he found no evidence of anyone else fishing or living at the lake.

[26] The defence points to scrip applications as evidence that families were residing at Pelican Lake between 1878 and 1884, including Pierre Durocher being described as being of Green Lake.

[27] While this shows some time spent at Pelican Lake it does not establish that a Métis community existed there prior to European effective control or was part of HMCONWS.

[28] Mr. Boyer's claim is thus denied and he is found guilty of the offence charged.

### **BILLY MYETTE**

[29] Billy Myette's claim is for his Aboriginal right to hunt for food as a Métis. This was, and is, an undisputed practice integral to Métis life.

[30] Evidence established, and the Crown acknowledges, that Mr. Myette has an ancestral connection to HMCONWS. I find that the evidence also establishes that he is a present member of the Métis community of northwest Saskatchewan.

[31] The Crown argues that Rush Lake did not emerge as a community until 1940 or 1941 when Billy Myette's mother moved there as a child with her family from Green Lake. As this was well after the date of effective control, the Crown argues that this is not a part of HMCONWS.

[32] Mr. Myette was hunting on the Rush Lake Fireguard Road, an area just south and west of the most southern tip of Green Lake. This road was built by the Government of Saskatchewan decades ago as part of its firefighting strategy. The community of Rush Lake where he was raised as an infant is located approximately 24 kilometers east of Meadow Lake. Given the proximity of Rush Lake to Green Lake, and the evidence that hunting and fishing happened in and around identified historic Métis communities, I find this area to be geographically indistinguishable from Green Lake and to be a part of HMCONWS.

[33] I thus find that Mr. Myette is not guilty of his charge.

### **OLIVER POITRAS**

[34] Oliver Poitras' claim is for his Aboriginal right to hunt for food as a Métis. This was, and

is, an undisputed practice integral to Métis life.

[35] Evidence established that Mr. Poitras is a member of the contemporary Métis community. He has identified as Métis at least since the 1960's, he holds a Métis Nation – Saskatchewan (MNS) membership card and held elected office in the Meadow Lake Local of MNS.

[36] The Crown disputes that Mr. Poitras has an ancestral connection to HMCONWS.

[37] Laura Hanowski, a genealogist, gave evidence of Mr. Poitras' family history. She identified documents showing Mr. Poitras' great-grandfather, Pierre Malboeuf, a Métis, was born in Ile a la Crosse on or about 1858 and that he lived and worked through the northwest. Her evidence was that Marie Rose Malboeuf, Mr. Poitras' grandmother and a daughter of Pierre, married Zacharie Poitras and for a time settled at the small Métis village of Delphine in southern Saskatchewan. Mr. Poitras' father, Norman, was born there in 1909. Around 1922, the family relocated to Meadow Lake and homesteaded. Mr. Poitras' parents married in Meadow Lake in 1934. His mother was born near Jackfish Lake in 1916.

[38] While Ms. Hanowski acknowledged the need for caution in accepting everything written on scrip documents, such as Pierre Malboeuf's identification as Métis, I find that her evidence establishes that Mr. Poitras' family was Métis and that he has an ancestral connection to HMCONWS.

[39] Mr. Poitras was hunting on the Sundance Fireguard Road by Alcott Creek, approximately 37 kilometres south of Meadow Lake, a place where he said his father trapped.

[40] There was no evidence of historical hunting in this area by members of HMCONWS. The same is true of Jackfish Lake and Cochin. Dr. Macdougall gave no evidence that these areas were part of HMCONWS. Dr. Evans testified that a Métis community emerged at Jackfish Lake by the late 1880's / early 1890's, made up of Métis from Duck Lake near Fort Carlton.

[41] I thus find that Alcott Creek, and Jackfish Lake/Cochin, were not part of HMCONWS.

[42] Mr. Poitras is found guilty of the offence charged.

Dated this 5<sup>th</sup> day of December, A.D. 2018, at the City of Meadow Lake, in the Province of Saskatchewan.

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E. KALENITH, J