Right to hunt in Canada

R v Powley [2003] 2 SCR 207

McLachlin CJ, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ, 19 September 2003

Issue

The issue raised in this Canadian case was whether a particular Métis community enjoyed a constitutionally protected right to hunt for food under s. 35 of the *Constitution Act 1982* that overrode the licensing and other hunting restrictions of the *Canadian Game and Fish Act RSO 1990*.

Background

The matter came before the Supreme Court of Canada on appeal from the Court of Appeal for Ontario, which had upheld a decision of the trial judge to acquit the respondents (who were Métis) of a charge of unlawfully hunting a moose. The Métis are 'distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognisable group identity separate from their Indian or Inuit and European forebears'. The court considered it only necessary for the purposes of this case to verify that the claimants belonged to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right—at [10] and [12].

The respondents relied upon s. 35(1) of the Canadian Constitution Act 1982, which recognises and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, including the Métis peoples. This was interpreted in a purposive manner by the court as indicating a commitment to recognise the Métis and enhance their survival as distinctive communities. Practices that were historically important features of these distinctive communities were to be protected—at [13].

In deciding how the Aboriginal rights recognised and affirmed by s. 35(1) should be defined, the court modified its approach to reflect the distinctive history of the Métis and consequent differences between Indian and Métis claims. The significant constitutional feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control—at [16] to [18] and [37].

It was noted that, in dealing with a matter of this kind, the court must:

- characterise the relevant right. In this case, the respondents shot bull-moose within traditional hunting grounds for the purpose of providing meat for winter. The relevant right was therefore characterised not as a right to hunt moose but a right to hunt for food within a designated territory;
- identify the historic rights-bearing community. The evidence supported the trial judge's finding of a historic Métis community at Sault Ste. Marie;

- identify the contemporary rights-bearing community. It was said that, because aboriginal rights are communal rights, they must be grounded in a historic and present community and must be exercised by virtue of an individual's ancestrally-based membership in the present community;
- verify the claimant's membership of the relevant contemporary community—at [19] to [24]

The court saw this last point as crucial and, noting the need for clearly identified membership standards for Métis communities, indicated the important criteria for a future definition of who is Métis for the purpose of asserting a claim under s. 35:
- self-identification (and not merely for the purpose of claiming Constitutional rights);
- ancestral connection (by birth, adoption or other means) with demonstrable ancestral connection being crucial to verifying membership;
- acceptance by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed, as demonstrated by past and ongoing participation in a shared culture and distinct customs and traditions—at [29] to [34].

The court was also required to:
- identify the relevant time frame. In this case, it was found that the Métis emerged in the time between first contact and effective European control. Therefore, pre-*contact* test in relation to practices, customs and traditions was not appropriate. Rather, a pre-*control* test should be applied in relation to the Métis, given the constitutional imperative of s. 35 to recognise and affirm their aboriginal rights;
- determine whether the practice in question (in relation to hunting) was integral to the claimants' distinctive culture. The evidence established that the practice of subsistence hunting and fishing was a historical constant in the Métis community. It was an important aspect of life and a defining feature of their special relationship with the land in the period immediately prior to European control;
- establish continuity between the historic practice and the contemporary right asserted. The court acknowledged that a certain margin for flexibility might be required to ensure that aboriginal practices can evolve and develop over time;
- determine whether or not the right was extinguished. No evidence of extinguishment was forthcoming in this case;
- determine whether an aboriginal right was being infringed. It was held that Ontario's lack of recognition of any Métis right to hunt for food, and the consequent application of the challenged provisions of the *Game and Fish Act*, infringed the right of the respondents to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community;
- determine whether the infringement was justified. The court was of the view that the Crown's justification of conservation may make out a case for regulation but not denial of the aboriginal right to hunt moose for food. Interestingly, the Métis were entitled to a priority allocation to satisfy their subsistence needs, even if the moose population of the region was under threat—at [37] to [50] and see *R v Sparrow* [1990] 1 SCR 1075.

Invisibility no bar

The court found that the fact that the Sault Ste. Marie Métis community was, to a large extent, an 'invisible entity' from the mid-19th century to the 1970s did not mean it had ceased to exist or disappeared entirely. The advent of effective European control over the area interfered with, but did not eliminate, the Sault Ste. Marie Métis community and its traditional practices. 'There never was a lapse; the Métis community went underground, so to speak, but it continued'—at [27].

Decision

The court dismissed the appeal, finding that:

- members of the Métis community in and around Sault Ste. Marie had an aboriginal right to hunt for food under s. 35(1) of the *Constitution Act 1982*;
- section 46 and s. 47(1) of the *Game and Fish Act, R.S.O. 1990*, c. G.1, as they read at the relevant time, were of no force or effect with respect to the respondents, being Métis, in the circumstances of this case by reason of their Aboriginal rights under s. 35 of the Constitution Act, 1982—at [53] and [55].

Comment

This case highlights some important differences between Australian and Canadian law, namely that:

- there is a constitutional basis for the recognition or protection of site-specific aboriginal rights in Canada but not in Australia;
- there is no recognition of a group such as the Métis, with its origins post-contact but pre-'effective control', under the *Native Title Act 1993* (Cwlth) (NTA), despite the fact that, prior to the assertion of sovereignty in some areas of Australia, a similar population existed;
- the Supreme Court of Canada adopts a more systematic approach to determination of membership of the requisite group than has been the case in Australian native title decisions;
- the apparent disappearance of a group for a time (going 'underground' or being 'invisible') is no bar to showing continuity. This issue has not been raised in Australia;
- although, superficially, the outcome of this case seemed similar to that in *Yanner v Eaton* (1999) 201 CLR 351; [1999] HCA 53, there are key points of distinction. Regulation, even to the point of extinguishment, does not have to be justified under Australian law. Absent statutory intervention, there is only the requirement to show an inconsistency between the sovereign act and the native title right—see *Western Australian v Ward* [2002] HCA 28 at [82], summarised in *Native Title Hot Spots* Issue 1;
- the subsistence hunting rights of the Métis were accorded priority over the Province's regulatory scheme. Priority for native title rights generally under Australian law is still to be addressed, although the NTA does address this in part—see, for example, ss. 23G(1)(a), 44H and 238.