HER MAJESTY THE QUEEN v. JACK JOHN McPHERSON and HENRY McLEOD CHRISTIE

[Indexed as: **R. v. McPherson**]

Manitoba Provincial Court, Gregoire J., September 4, 1992

B. Wilford, for the Crown
L.R.R. Chartrand, for the accused

The two accused were charged with hunting a moose out-of-season contrary to s.26 of the *Wildlife Act*, R.S.M. 1987, c.W130, and regulations made pursuant thereto. Both had killed a moose on unoccupied Crown land for food. They were Metis who lived in areas adjacent to remote Indian reserves and both were dependent on hunting for sustenance. They argued that they had a common law Aboriginal right to hunt and that this right was guaranteed by s.35 of the *Constitution Act, 1982*.

Held: The court found an infringement of s.35 rights; a temporary suspension on a declaration of invalidity was declared; accused guilty as charged.

1. Applying the test for Aboriginal title, it is difficult to see how Metis could have Aboriginal land rights which would include usufructuary rights such as hunting rights. The Metis did not possess the land for a substantial period, there is lack of evidence to show that they were an organized group of people and there is lack of evidence that they possessed land exclusively.

2. However, notwithstanding these deficiencies the accused did have an Aboriginal right to hunt for moose for food purposes. The accused have to a significant extent maintained a close connection to the land and the traditional lifestyles associated with hunting, fishing and gathering and there has been an unbroken chain of such use of the land extending to their forefathers, both immediate ancestors and as far back as could reasonably be recalled. The direction from the Supreme Court of Canada in *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 is that the courts must be sensitive to the Aboriginal perspective on the meaning of the Aboriginal rights at stake. The accused made it clear that it was the perspective of the Metis people that it was their right to hunt moose for food purposes and that they continued to do so notwithstanding regulations to the contrary.

3. Having concluded that the accused had an Aboriginal right, one must apply the tests in *Sparrow*: Is the limitation unreasonable? Does it impose undue hardship; Does it deny to the holders the right of their preferred means of exercising that right? For both traditional reasons as well as management reasons it is necessary to have a closed season which could be provided for by way of regulation as set out in s.26 of the *Wildlife Act*. The limitation on hunting moose out-of-season is not unreasonable and provided that it is properly regulated it would not impose an undue hardship on their preferred means of exercising that right.

4. However the regulation enacted pursuant to s.26 was an adverse restriction upon the exercise of the accused's existing Aboriginal rights to hunt conferred by s.35 of the *Constitution Act.* The justification of conservation and resource management was, however, a valid legislative objective in the regulation prohibiting moose hunting out-of-season. The Crown, however, did not discharge its onus to consult the Metis who are entitled to Aboriginal rights (those who have continued the essential contact with nature and relied upon subsistence hunting as a way of life) before the allocation of quotas and the setting of the season dates in the hunting year. The season dates were set without consideration being given to the priority of Aboriginal rights of the Metis. The Crown failed to justify the restriction placed on the accused thus resulting in an infringement of their s.35(1) rights.

5. The court declared a temporary suspension on the declaration of invalidity, because to do otherwise would have the effect of allowing open hunting to everyone and this would have an irreversible detrimental impact upon the wildlife population. It is necessary to determine the number of Metis people in Manitoba who may be entitled to Aboriginal rights and to enact the appropriate regulations which would have the effect of complying with the government's obligations to Aboriginal persons and at the same time properly managing,

maintaining and enhancing big game populations. During the time reasonably required to enact the proper regulations the suspension is to be observed.

6. Having declared a temporary suspension on the declaration of invalidity, the court concluded that the accused were guilty as charged.

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Editor's Note: The Crown is appealing this decision to the Court of Queen's Bench.

GREGOIRE J.: The accused Henry Christie and Jack McPherson are charged with having killed a moose out-of-season. There is no dispute as to the circumstances surrounding the offence.

Both of the accused have Aboriginal blood coursing through their veins but are not and nor are they eligible for treaty Indian status. They call themselves Metis and allege that because of that ancestry they have a common law Aboriginal right to hunt. They further allege that the provisions of the *Wildlife Act,* R.S.M. 1987, c.W 130 in question are not applicable to them.

The principle issue in question is therefore, whether or not the accused have a common law Aboriginal right to hunt moose out of season, which right could be one guaranteed pursuant to s.35 of the *Constitution Act, 1982.*

The Facts

The Crown and defence jointly tendered into evidence an agreed Statement of Facts. It discloses that the accused are Metis persons, both being of North American Indian ancestry and that near Wanless, Manitoba on January 6, 1990, which was a period of time closed to the hunting of moose, by regulation, Christie and McPherson killed a moose on unoccupied Crown land for food purposes.

As admittedly this constituted a prima facie case for the Grown it was therefore incumbent upon the defendants to establish their alleged constitutional right and evidence was led by them for this purpose and subsequently by the Crown in reply.

Both of the accused testified and described their lifestyle and their roots as best they could ascertain. From testimony it became evident that they can both be described as what is sometimes referred to as "fringe" Metis, i.e., people of mixed blood who live in areas adjacent to remote Indian reserves and who in large measure have retained a traditional lifestyle close to the land with their income supplemented by sporadic or temporary employment together with Unemployment Insurance Commission (U.I.C.) or welfare.

The living conditions of the accused, especially during their earlier years, can only be described as one of abject poverty. Having heard and seen the accused testify, I am convinced as to the veracity of what they related. This was further corroborated in Christie's instance by the Crown witness Robert James Huck, the regional superintendent of conservation officers of the northwest region of Manitoba who knew Mr. Christie's grandfather and who, in a very sympathetic manner, confirmed what Christie had said.

John Jack McPherson's father originated from York Factory which history tells us was Manitoba's oldest European settlement on Hudson Bay. He was described as a half-breed on his death certificate and met the accused's mother in The Pas on his way back from serving in World War II. The enlistment form described him as a Scottish half-breed. Mr. McPherson senior, drowned in the Saskatchewan River while tending to his fishing nets in 1952 when the accused was two years of age and thereafter John Jack McPherson was raised by his maternal grandparents, Julius Cameron and Alice Cook. His grandfather was considered a Metis and resided at Big Eddy Settlement, a "fringe" community adjacent to the The Pas Indian Reserve about five miles from The Pas, Manitoba. Jack McPherson has basically continued to live at Big Eddy all of his life. He describes living with his grandparents in a log cabin as a squatter and of being forced to move when a gravel pit was opened. He advised that at age fourteen, both of his grandparents died, his mother's whereabouts was unknown and he was left mostly on his own to survive. During his formative years he remembers the vegetable plot by the river where potatoes and other vegetables were gown; he recalls fishing in the river and smoking fish afterwards. He advises that it was "mostly fishing" but that each spring for two or three weeks there would be muskrat trapping.

He also describes hunting ducks and geese in the fall and moose hunt during the rut, i.e., by calling it out and during the winter by tracking. He advised that a moose would feed a family of five from four to six weeks and that they would go out before Christmas, or whenever they needed fresh meat on the table.

After the death of his grandparents, McPherson obtained employment with the Canadian National Railway (C.N.R.) Extra Gang every summer but he appears to have supplemented his food needs by hunting and fishing. Indeed at the time of the offence, the accused had run out of U.I. payments.

Dealing with issues such as education, he was taught with the treaty children, but without the benefits of treaty status he had to resort to the use of broken pencils and scraps of paper leftover by the treaty children. He spoke Cree as a first language and had to learn English at school. He mixed with the treaty children and basically they shared the same culture; in fact, his grandparents never did learn the English language. The accused, however, did learn English and went on to obtain some training in carpentry at the Keewatin Community College (K.C.C.) and did rise to the rank of a Vice-President of the Manitoba Metis Federation (M.M.F.).

He advises that he never bought fishing or bird hunting licences and doesn't recall obtaining a moose licence. He had been stopped by Natural Resources officers in the past and had paid a fine for his children fishing out of season. I was left with the impression that he had hunted with treaty Indians in the past and the he may have avoided detection for killing moose out of season previously in this manner.

The defendant, Henry Christie, as a child lived in even greater poverty and even closer to the land. He was raised at Root Lake near the railway track with maternal grandparents; they were forced to leave their rudimentary home in 1977. The Metis there, really one extended family, lived mostly off the land, were very, very poor and often went hungry, existing on partridges, lynx, muskrat and the occasional moose which the accused's uncle might kill with a .22 calibre rifle. The moose hunting and trapping was conducted on foot usually through swampy country. He was first taught the use of a .22 rifle when age seven and their first canoe was one made from old canvas and tar salvaged from the highway. He started accompanying his uncle on moose hunts when he was small and then continued on his own. He went to school till Grade 8 but as his grandfather was ill at Root Lake, he went to work at a sawmill for minimal pay at age sixteen. He then obtained seasonal work for the C.N.R. Extra Gang and in the interim would live at Root Lake with his cousins and other relatives and share their welfare cheques and what could be obtained from the hunt. He describes their house as being burned down by the authorities and of building another one, of living in a tent in the interim and of eating off of the land supplemented by sugar, flour and bannock.

He also is now living at Big Eddy and has the responsibility for six children to whom he has passed on the traditional hunting skills. He proudly stated that it is his son that won the Junior Moose Calling competition at last year's Trapper's Festival.

He testified to killing one or two moose a year, ... "if I got lucky" ... and to complete utilization of the animals. He also spoke Cree at home and he stated that he lived the same way as the treaty kids. "I grew up with most of those guys; I lived pretty well the same way; we ate the same, talked the same, told the same jokes."

I am satisfied on a balance of probabilities that both of the accused, especially during their early years relied to a significant extent upon their hunting, fishing, and gathering skills or those of their extended family for their survival. I am also satisfied that they continued in the same practices to a significant extent in order to supplement the income they earned either through employment, U.I.C. or welfare to the time of the commission of the offence and that they are the progeny of ancestors who also relied on these skills and the hunt for the subsistence.

The Crown, in rebuttal, led evidence to show that the moose population in general in the province of Manitoba and in Area 5 in particular, the area where the cow moose in question was killed, is in serious jeopardy. The evidence established that in recent times with the advent of more modern methods of transportation and extended access to what was once remote areas because of the extensive logging and mining in the area that the moose, without extensive management by way of controlled hunting, are imperilled.

Dr. Vincent Creighton, who has a Ph.D. in wildlife biology, was called to testify. He has extensive experience in big game management in the province of Manitoba and is clearly one of the few

acknowledged experts in the field. It was his opinion that a few years ago the moose in Manitoba had fallen to as few as 21,000 animals and that through careful management had increased to 27,000 and that the province should sustain a minimum of 30,000 animals. He hoped to increase the population to 35,000 animals by 1995.

He shuddered at the possibility of having 4,300 to 8,600 extra uncontrolled Metis hunters.

He described a situation in Area 16, a prime moose area with a potential carrying capacity of 1,200 moose which was closed to licensed hunters in 1973 having only an estimated 56 moose. Unfortunately, because of poaching combined with uncontrolled hunting by people with Aboriginal rights, the population has not increased. He described the effects of killing a cow moose on future populations; the animal killed in this instance was in fact a pregnant cow moose. The effect was dramatic, even in a relatively short period of time. These scenarios were presented to demonstrate the effects of uncontrolled hunting and are accepted by the court.

The court also accepts Dr. Creighton's evidence that the moose population in Area 5 is about 180 moose; a density of 0.5 moose per square mile and that the carrying capacity is I moose or more per square mile. The court also takes judicial notice of the fact that for the 1992 hunting season, all hunting of moose in the area has been banned by regulation and that this move is being supported by representatives of the local treaty Indian communities who agreed to voluntarily respect the closure of moose hunting in the area. This was in accordance with the testimony heard from Robert Uchtmann the experienced big game wildlife technician.

The evidence established that on average only 15 percent to 20 percent of licenced hunters are successful and that those closest to the land appear to be the successful hunters and that it would take a good hunter to kill 1 or 2 moose a year on average.

The court also accepts the evidence of Regional Superintendent Huck of the Department of Natural Resources when he stated that "we're having problems now managing the moose with the unrestricted right of treaty people. The only way is co-management of all northern people." He further testified that he was hopeful that in time the various user groups "could get their act together" but he was truly worried about the short term "and that we could kill the egg before it hatches as far as the moose goes." I found Mr. Huck to be a sincere and honest witness who demonstrated a great deal of grass roots knowledge combined with a sensitivity toward the Metis way of life. It was his opinion that because of the present difficulty in the management of uncontrolled hunting and the increase in the number of treaty hunters because of Bill C-31, i.e. 32,000 new treaty people, that adding an as yet undefined number of Metis hunters could cause real problems. He did concede however that if the number of Metis hunters was restricted to those who truly lived off of the land and who had continuously exercised that right to date, that the impact may be acceptable. He further cautioned that the economics of hunting are now quite reduced but that if moose are in proximity, a moose hunt could augment the standard of living. This he felt was further argument in support of increasing the number of moose in adjacent moose carrying habitat.

Evidence was also presented in regards to the alleged Metis common law rights to hunt. Although for the purposes of this case, there was an admission that the two accused were Metis, considerable evidence was presented on the collateral issue of who is a Metis, presumably in order to ascertain the number of Metis and the impact on the moose population in the event the court found that all Metis had an Aboriginal right to hunt.

The defence tendered expert evidence on this issue in the person of Professor Lussier, a Metis academic with substantial experience in the teaching of Native Studies. Professor Lussier's publication, *The Question of Identity and the Constitution of the Metis of Canada* in 1984, was filed as Exhibit #8. A Metis elder, Edward Head, named a senator by the M.M.F. also assisted the court on this issue. James Gallo, the manager of Land Entitlement and Claims was called by the Crown.

It appears that the term Metis has been used since the earliest history of the region now known as Manitoba but that during various times it referred to different people. During the earlier part of the 1800s, it referred to persons of mixed Aboriginal North American blood and European blood usually, French Canadian blood and having a Roman Catholic background.

The Metis people prompted by the North West Company, the adversary of the Hudson Bay Company, developed an identity and began to view themselves as a nation subsequent to the battle of Seven Oaks in 1816 during which period a flag, a national song and folklore was developed. The culture of the Metis at this time was one of close dependence upon the buffalo

hunt which proceeded in quite a regimented and nearly militaristic fashion. It should be noted that the hunt was as much if not more of a commercial venture, supplying pemmican for the fur trade and later buffalo robes as one of supplying food for the hunter and his family. In fact it was this commerce which prompted the challenge to the Hudson Bay Company's monopoly of the trade. Professor Lussier testified that the challenge to the Hudson Bay Company's authority came to a head during the Sayer trial; it was his version that no verdict was reached and that Sayer was released. James Gallo testified that Sayer was acquitted by the jury. Morton, in the text *History of Manitoba* published in 1957, states that Sayer was convicted but that no penalty was imposed. This confusion points out that a lot of the history surrounding the Metis is imprecise and folkloric. In any event, by 1849, the Metis were by far the majority of the population of the Red River and they also controlled the majority of the important positions. This continued until the advent of agriculture and increased population, which coupled with the disappearance of the buffalo hunt ended the traditional Metis way of life in southern Manitoba.

During this time period, the Scottish half-breed fanner did not consider himself a Metis.

James Gallo testified that the definition of an Indian in the 1868 *Indian Act* was to the effect that it was a person of Indian blood and any person of mixed blood who follows the Indian way of life and any person who intermarries with the tribe. The treaty commissioners of the day would state that people of mixed blood who wanted to be an Indian could be. Professor Lussier quoting from F.R. Fillmore, stated that "in order to obtain scrip (a certificate entitling the holder to 160 acres of land in satisfaction of the extinguishment of the Indian title) a Metis had to prove that he had European blood."

It was Edward Head's position that Metis people know who they are; that it is being the first sons of Canada and he appeared to support the self declaration principle.

Professor Lussier indicated that in the 1982 census, 93,000 people in Western Canada self-declared themselves as Metis but he felt the number was 300,000 people who actually are Metis. He further testified that, "We cannot come to an agreement as to who is and who is not a Metis."

It appears that today's Metis could be someone with some North American Aboriginal blood who holds himself out as such.

The court has to ask itself if all of these persons have an Aboriginal right to hunt in an unregulated manner. Some of the Metis ancestors arguably may have had their "Indian Title" extinguished by the acceptance of script. The answer as to which Metis and how this could be efficiently determined was not provided to the court.

On the issue of whether hunting rights existed for Metis, the evidence seems clear that the province of Manitoba historically has never recognized any such right. The evidence is that Metis people, including the witness Senator Head, have been charged in the past with hunting out of season. The evidence also seems clear that some Metis people, at least in northern Manitoba, have continued to hunt as they please. I accept Edward Head's testimony to the effect that Metis people are good at hunting and good at hiding what they did.

I also accept his notion that in the past, "conservation officers stood tall and looked above the heads of the Metis hunter."

This was confirmed by Regional Superintendent Huck of the Department of Natural Resources who testified that there never was a policy that Metis people not be charged but Metis people living off of the land were treated with discretion. There appears to have been in the past an unspoken convention between the law enforcement officers and the Metis living off of the land. Mr. Huck testified that when he visited Mr. Christie's grandfather and he smelled muskrat (a legal quarry) cooking, he came in. If he smelled grouse out of season, he didn't stay for dinner and a lid was put on the pot.

Senator Head acknowledged that even when he had been charged he was treated leniently by the court.

Have the Metis people of Big Eddy historically been exposed to a harsh life and treated with less kindness by the political powers than their treaty neighbors? The answer is clearly yes, but does that in effect permit the court to declare that they have common law hunting rights constitutionally enshrined? Tempting as it may be for the court to resort to such a measure to temper perceived past injustices, it would be improper for it to do so.

When can the Court Declare that Aboriginal Rights Exist?

Although in the written submissions presented on behalf of the accused there is much discussion in respect to the Natural Resources Transfer Agreement, counsel for the Crown pointed out that notice of this argument hadn't been provided to the federal Crown which may have had an interest should it have been made aware of same. The court suggested that an adjournment might be in order for this purpose but the accused chose, instead, to abandon that line of argument and to rely solely on what they alleged to be a common law right to hunt.

They refer to s.35 of the *Constitution Act, 1982* which reads as follows:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and M6tis of Canada.

The defense argues that as Metis are now clearly and constitutionally defined as Aboriginal peoples of Canada that they must be possessed of the basic right to hunt for food otherwise the section would appear meaningless for the Metis.

The court, to assist it in determining when Aboriginal rights exist, referred to the comprehensive article written by Brian Slattery, "Understanding Aboriginal Rights," (1987) 66 Canadian Bar Review 727 and in particular at pages 756 *et seq.* Professor Slattery's initial comments about the acquisition of Aboriginal rights are well founded and worth noting:

> The topic is, at present, an undeveloped one, and awaits authoritative judicial treatment. So, we are venturing into relatively uncharted territory.

This comment is of particular significance when it is applied to the alleged right of the Metis.

Slattery suggests four criteria must be satisfied and are essential features of Aboriginal title:

> 1) The parties asserting aboriginal title must constitute an organized group of native people.
> 2) The group must possess the lands claimed.
> 3) The group must have possessed the lands for a substantial period.
> 4) The lands must form part of the Indian Territories.

It therefore would be preferable that the same criteria be established by the Metis of Big Eddy Settlement in this case, to establish their usufructuary Aboriginal right to hunt moose in the area where it was shot.

1) The Parties Asserting Aboriginal Title must Constitute an Organized Group of People

This therefore causes the court to question whether or not the ancestors of Christie and McPherson at Big Eddy in fact constituted an organized group of Native people. The first issue in this sub-heading is whether or not they are, in fact, Native people. Although there may have been some controversy over this point in the past, clearly pursuant to s.35(2) of the *Constitution Act, 1982,* Metis are now recognized as one of the Aboriginal peoples of Canada and therefore as Native people. As previously discussed there is some difficulty in ascertaining in fact, who the Metis of today are. Clearly, initially, the Metis were those persons of mixed Native and European blood for the most part who resided and were the principal occupants of the Red River Settlement. Those Metis, it is clear, had what could commonly be referred to as an organized society and as disclosed by the evidence, one has only to look to the buffalo hunt as an indication as to what extent their society was, in fact organized in a semi-militaristic fashion. They had set patterns of hunting in the spring and the fall, of subsistence farming during the summer months and of returning to Red River in the winter to sit out the cold spell. Some of these Metis would also be the Hudson Bay boatmen of the rivers and lakes collecting furs and trucking them to York Factory; others the cart brigade members in the early trade with St. Paul.

The two accused at Bar have not provided the court with any evidence linking them as descendents of the French Canadian Catholic Metis of the Red River Settlement. Rather the evidence seems to indicate that their ancestors, at least in the recent past have emanated from

northern Manitoba and Saskatchewan in places such as Cumberland House and York Factory. They are also of Scottish descent. Insofar as their specific organization, there is little evidence to show that they were more than a small group of families living in the same general location, i.e. Big Eddy. There was no evidence led as to any type of organized society. Rather it seemed they fell between the cracks. At times they were part of the white society, for instance Mr. McPherson's grandfather was a scaler in the logging industry. At other times they were part of the Indian culture, attending school with the Indian kids, playing with them and sharing the social life with them. The picture that came into focus from the evidence was that they were a small group of individuals of mixed blood who lived a lifestyle very similar to that of the treaty Indians next door. However, they appear neither to totally have fitted in with the treaty community nor with the white community. Their lifestyle was one essentially of poverty and of trying to survive as best they could by sporadic employment supplemented with some hunting and fishing. There was no evidence led that they had, in fact, an organized type of society other than some indication of sharing of big game, meat and fish when it was acquired.

It is true that today the Manitoba Metis Federation has taken an active political role in promoting the rights of those people they classify as Metis and that there is a structure to that particular organization.

There is a paucity of evidence to demonstrate that the Big Eddy Metis were, in fact, an organized group of people and really do not fit in the same mold as traditional Indian bands who clearly have an organized structure through their chief and counsel now elected and in the past hereditary or traditionally accepted in some other fashion. The best that can be said is that they were loosely organized for the purpose of survival in a society that didn't know where to fit them in.

2) The Group must Possess the Lands Claimed

The evidence involving the two accused is that they, in fact, did not possess the land that is being claimed. In particular, it was Mr. McPherson's evidence that his grandparents' house was displaced for a gravel pit and that he was a squatter. Mr. Christie also indicated that they were told to leave the Root Lake area and were dispossessed as well. They seem to have a fixed pattern of hunting and fishing in certain general locations at certain times of the year, however, the evidence also seems to indicate these practices were also shared by the Indians living adjacent to them who also hunted and fished in the same general areas. There is, however, the evidence of Senator Head which seems to indicate that there may have been certain conventions adopted whereby clearly certain Metis people hunted in certain areas to the exclusion of the treaty Indian population and that these boundaries were respected by convention. This seems to have been the case around the Sherridon area where he was brought up and where he continues to reside today.

The general evidence concerning Metis was that they in fact followed the game wherever it was located and that they would move to follow the animals they were hunting. Senator Head describes one such family on Kississing Lake. The historical evidence suggests that the Metis of Red River followed the buffalo herd and that the hunts became farther and farther afield as the buffalo population diminished eventually to the point of near extinction. There is also historical evidence to suggest that the Metis of the buffalo hunt often encroached upon other Indian territories and in particular had violent disputes with the Sioux and others over these hunting grounds.

Slattery in his article suggests that in determining whether a group can possess certain lands one must take into account the group size, manner of life, material resources and technological abilities and the character of the lands claimed. He further suggests that it would be unrealistic to expect a group of hunters to possess their hunting grounds in the same way a farmer occupies his fields or that the lands be used to their full capacity using the best of technology. Bearing this caution in mind the court can find in the case at Bar that there was at best, some form of joint possession of the land with other Aboriginal groups in the area for the purposes of hunting. It should be noted that the evidence also disclosed that possession to a greater extent existed, at least so far as Mr. Christie is concerned when dealing with the muskrat trapping in the Root Lake area. This is consistent with the provincial management scheme of the time which allocated trap lines and fur blocks and the like. There appears to be a lack of exclusivity of possession for the purposes of moose hunting, however.

3) The Group must have Possessed the Land for a Substantial Period

Courts have generally held that the substantial period of time to recognize such a claim is time immemorial. It has also been indicated that it would mean in the case of North American Aboriginal

title, prior to the advent of the European. Truly it can be seen that the Metis has some difficulty in meeting this old test as by definition the Metis is someone with Aboriginal and European blood. The evidence also establishes that Metis did not rally together and consider themselves as a nation until around the time of the Battle of Seven Oaks, and as such did not exist as a separate entity until after that time. The people who consider themselves as a separate nation were the Metis of Red River who at the time were opposed to the incursion into their territory by the Selkirk Settlers and to the Hudson Bay Company's monopoly on trade. It is clear that the Metis in themselves do not meet the requirement of having Possessed the lands for a substantial period. It is also obvious, however, that some of their antecedents, that being the Indian ancestors, in fact, had occupied some of the territories in question from time immemorial.

Even using the suggestion at page 761 of the article by Slattery, that a Native group need only show that it had possessed the lands claimed for a period of time sufficient to establish a stable relationship with them and to defeat the claim of previous Native occupants, it remains difficult for the court to come to the conclusion that the Big Eddy Metis in fact met that criteria.

4) Lands must From Part of the Indian Territories

Insofar as the fourth criteria is concerned, previous decisions such as *Simon v. The Queen,* [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390, 23 C.C.C. (3d) 238, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366 and *Calder v. A.G. of British Columbia,* [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 both decisions of the Supreme Court of Canada make it clear that the onus of proving extinguishment of Indian title lies with the party alleging extinguishment. In this case, little if any evidence was called as to the issue of extinguishment. There was some evidence called but it was restricted to the issue of script which was issued to some Metis, mostly of southern Manitoba to extinguish any Aboriginal right that they may have had to land. There is also some evidence led on the fact that the land in question has been the subject of treaties which could have the effect of taking it out of Indian Territories and placing it into general lands. However, as indicated by the Supreme Court of Canada, that it is for the party submitting that lands have been converted to general to establish that fact and as no evidence was led by the Crown on this point, the court may presume that the land in question may still be considered as part of the Indian Territories at the time the Big Eddy Metis allegedly acquired their rights to the land in question.

As can be deduced from the foregoing, it is difficult to see how a Metis person using the old common law notions of Aboriginal land rights could ever be recognized as having common law Aboriginal rights to land which would include the usufructuary rights. It is interesting to note, however, that Metis have not in the past advanced the common law light to hunt in any of the cases which set out the guiding principles to determine Aboriginal lights. The common law is an evolving body of law and as such can be altered where the circumstances and justice may require it.

In the case at Bar the court concludes that the two accused are in fact acknowledged Metis, that to a significant extent they have maintained a close connection to the land and the traditional lifestyles associated with hunting, fishing and gathering and that there is an unbroken chain of such use of the land extending to their forefathers, both immediate ancestors and as far back as can reasonably be recalled.

The Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) 385, 56 C.C.C. (3d) 263, 46 B.C.L.R. (2d) 1, Il 1 N.R. 241 has recently provided the Court with much needed guidance on the issue of Aboriginal rights. Clearly the *Sparrow* decision indicated that the first question to be asked was whether the legislation in question has the effect of interfering with an existing Aboriginal right. The Court further commented that courts must be careful to avoid the application of traditional common law concepts of property as they develop their understanding of the *sui generis* nature of Aboriginal rights. It further went on to say that while it was impossible to give an easy definition of fishing rights, it is crucial to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake. The same comments would be pertinent to moose hunting rights.

The evidence adduced at trial by the accused made it clear that it was the perspective of the Metis people that it was their right to hunt for moose for food purposes and that they continued to do so notwithstanding regulations to the contrary. Given this caution by the Supreme Court of Canada and the facts of the situation which existed in regards to the accused persons at Big Eddy, I am prepared to hold that the accused persons in fact did have an Aboriginal right notwithstanding the deficiencies which appear apparent in the classical analysis of their Aboriginal rights. I arrive at

this conclusion on the basis that there was at least a minimal degree of compliance with the old criteria, and that the rights claimed in this case are the minimal usufructuary rights. I find that in such circumstances, if the Metis defendants can establish an unbroken chain of such use of the land by their ancestors for a reasonable period of time then that is sufficient for the right to exist.

Following the analysis in *Sparrow* the court must then ask itself whether or not those moose hunting rights have been interfered with such as to constitute a prima facie infringement of s.35(1). The questions to be asked to determine this are the following:

> 1) Is the limitation unreasonable?
>
> 2) Does the regulation impose undue hardship; does the regulation deny to the holders the right of their preferred means of exercising that right?

The onus of proving this *prima facie* infringement of the law is on the accused in this particular case.

In the case at Bar, it is not the regulation itself setting the season limits which is being questioned but the actual s.26 of the *Wildlife Act* which reads:

> No person shall hunt, trap, take or kill, or attempt to trap, take, or kill a wild animal during a period of the year when the hunting, trapping, taking or killing of that species or type of wild animal is either prohibited or not permitted by the regulations.

As previously noted the open season for Area 5, being the area where the moose in question was shot provided that the hunting of bull moose could occur between September 23 and October 19 and again between December 2 and December 14. This was an open season open to all residents within the province of Manitoba including the Metis. Again by referring to the *Sparrow* decision, I must caution myself that the issue does not really require looking at whether the hunting season has been so reduced as to be below that needed for reasonable food and ceremonial needs. Rather the test involves asking whether either the purpose or the effect of the restriction on the season lengths unnecessarily infringes on the interest protected by the hunting right. From the evidence adduced from all parties, it can readily be gleaned that moose require protection from hunting at certain times of the year. In particular, it was acknowledged by Senator Head as well as others that one ought not to kill animals during a time when they are either carrying or raising their young.

The evidence further discloses that at certain times of the year it is very difficult to differentiate male moose from the cow moose thereby making hunting of animals of one sex or the other impractical. There is also considerable evidence presented to show that extensive management practices were required in order to maintain a reasonable moose population. Therefore for both traditional reasons as well as management reasons it would appear to be necessary to have a closed season which could be provided for by way of regulation as set out in s.26. As such, the limitation provided for pursuant to s.26, is not unreasonable and provided it was properly regulated, it would not impose undue hardship, nor would it deny to the Metis people their right or their preferred means of exercising the moose hunting right.

This would in essence appear to conclude the matter given the question which was placed before the court, however, the manner in which the case was presented and the argument which ensued allows the court to consider a further and ancillary question which ought to have been posed but which unfortunately was neglected by counsel for the defendants in his written notice. Given the Crown's position throughout, it would not be unfair for the court to, in fact, consider what it considers to be this ancillary question which ought to have been posed. That question is: "Whether or not the regulation enacted pursuant to s.26 of the *Wildlife Act* for the 1989-1990 hunting season was so restrictive as amounting to being of no force or effect by reasons of the existing Aboriginal rights to hunt conferred by s.35 of the *Constitution Act* upon the accused being Metis persons?"

When framed in this way and noting that in some areas of the province of Manitoba the hunting of moose was, in fact, legal at the time of the year it was killed, it is probable that unless the regulation was specifically justified, that there would be a *prima facie* infringement. The evidence was such that there were three hunts traditionally by the Metis people for moose; the first being a late summer hunt, second being a hunt during the time when the moose are calling or during the rut, and the third being the winter hunt. This particular hunt would fall within what was once the traditionally accepted time for the hunting of moose. As such this would appear to be an adverse

restriction upon the exercise of the accused's right to hunt for moose. That being the case, the court must now consider an analysis of the issue of justification.

The first step is to determine whether or not there is a valid legislative objective. The only issue which was raised by the Crown in justification was the issue of conservation and resource management. The Supreme Court of Canada has held that this particular issue is uncontroversial and is a valid legislative objective. The scientific evidence called, brings the court to the conclusion that the moose in Area 5 were far below the carrying capacity of the area and were in fact, in a precarious position. Careful management was required in order not only to maintain the same population but to build it up to a sufficient degree and that for that purpose, the harvest had to be closely regulated. Unrestricted and unmanaged hunting by any significant group of persons could have serious long-lasting if not permanent deleterious impact upon the moose population.

Having decided that there was a valid legislative objective in the regulation in question, the analysis must therefore proceed to the second part of the justification issue, that being the honor of the Crown in dealing with Aboriginal peoples. *Guerin v. The Queen,* [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120, [1984] 6 W.W.R. 481, 13 D.L.R. (4th) 321, 55 N.R. 161 has clearly established that there is a special trust relationship and a responsibility of the government vis-a-vis Aboriginal people and that those Aboriginal people which have Aboriginal rights must be the first consideration in determining whether the legislation or action in question can be justified. Succinctly put, there must be a link between the question of justification and the allocation of priorities in this particular hunt.

To assist it in determining its trust relationship, the province of Manitoba is entitled to direction from the court as to which persons of Metis ancestry have, in fact, an Aboriginal right to hunt. This is, in fact, a most complex and perplexing issue as even the Metis people themselves have had difficulty in determining in fact who is a Metis. Further some Metis historically may have given up their Aboriginal rights by the acceptance of script and their families and descendants may be bound by that decision of their ancestor. Other individuals, who consider themselves Metis people may have lost their Aboriginal right to hunt by reason of the fact that for an extended period of time, they have no longer participated actively in the traditional hunting, fishing and gathering way of life but rather have become molded into the mainstream lifestyle. The evidence was that hunting should be firstly reserved for those who truly require hunting as a means of subsistence. Given the scarcity of the game animal being sought in this case, the moose, the court agrees with that proposition. Clearly, with a population of 27,000 moose and an estimate of Metis people which could exceed 90,000 persons in Manitoba the moose population cannot sustain an unregulated hunt by all those who could call themselves persons of Metis ancestry.

The evidence of Dr. Lussier was that those persons who have continued the essential contact with nature and relied upon subsistence hunting as a way of life total between 500 and 700 persons. It is these persons of which Mr. Christie and Mr. McPherson are members that are entitled to Aboriginal hunting rights.

It is the rights of persons such as the accused that must be taken into account by the authorities who manage the moose population when considering that special trust relationship.

In the case at Bar there appears to have been a lack of consultation with the type of Metis persons who are entitled to Aboriginal rights prior to the allocation of quotas and the setting of season dates in the 1989-90 hunting season year.

In fact it would be difficult for the province to ascertain who those Metis are who would come under the criteria as set out herein, and a process must be developed whereby Metis persons who fall under the criteria and wish to participate in their Aboriginal right to hunt could in fact make themselves known by way of registration to receive permits for the number of moose which would reasonably be required to feed their family. The permits could be for a specific sex of animal to be shot within a reasonable time, keeping into account and balancing good wildlife management practices and techniques and the traditional Metis way of life. This type of registration practice could be at the same time a valuable exercise in the gaining of knowledge insofar as actual populations are concerned from those experienced Metis persons who could provide valuable information based upon their knowledge of the area.

It is apparent from the evidence which was received by the court that there was no consideration given to the Aboriginal right of those Metis who in fact are entitled to the same and that the season dates in 1989-90 were set without the consideration of this priority. Because of that reason, I hold that the Crown has not discharged its burden of proof, the onus being upon it to justify the

restriction placed upon Mr. McPherson and Mr. Christies and that there has, in fact, been an infringement of their s.35(l) rights.

That being the case, I must now consider s.52(1) of the *Constitution Act, 1982*. Section 52(1) provides as follows:

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is to the extent of the inconsistency of no force or effect.

On July 9, 1992, the Supreme Court of Canada handed down the decision of *Schachter v. Canada* being File No.: 21889 of the Supreme Court of Canada. *Schachter* closely analyzes the various options open to the Court in cases where there has been a constitutional infringement. The case at Bar is clearly a case of a statutory omission in that it fails to provide for the special Aboriginal rights of certain Metis people. I must, therefore, determine whether I will deal with the inconsistency by way of reading in or striking down the legislative regulation in its entirety.

As previously indicated, much work has to be done by the regulators in order to answer the complex questions which have been raised by this particular case. I am mindful of the caution set out in *Schachter* to the effect that in cases where the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis, the legislature and not the courts must fill in the gaps. This is clearly a case where it would be inappropriate for the courts to read in the specifics of regulations as it would or could entail such an intrusion into the sphere as to change the nature of the regulatory scheme in question and this is clearly inappropriate.

The court is also mindful of the fact that the type of regulation in question is one that changes from year to year and that in all likelihood this particular regulation dealing with season dates from 1989 to 1990 has probably been repealed. The court is also mindful of the fact however, that this type of regulation is enacted on an annual basis with each new hunting season.

The Supreme Court of Canada in *Schachter* has recently provided the courts with a possible temporary suspension of any declaration of invalidity. The Supreme Court was careful to point out that delayed declarations are appropriate in some cases but that they are not a panacea for the problem of interference with the institution of the legislature under s.52 of the *Constitution Act.* The Court also clearly pointed out that delayed declaration is a serious matter from the point of view of the enforcement of constitutional rights and that reading in may be preferable where it is appropriate since it immediately reconciles the regulation in question with the requirements of the Constitution.

I hold that clearly, in the case at Bar, to nullify the season dates would have the effect of allowing open hunting to everyone and this would have an almost irreversible detrimental impact upon wildlife populations. For that reason I am unable to enter a Declaration of Nullity at this time. The court has also chosen for the reasons stated not to read in those portions which could make the regulations acceptable.

The court does not wish this decision to be implemented insofar as future regulations are concerned until there has been a reasonable period of time to enter into the consultations necessary to determine the number of Metis persons in Manitoba who may be entitled to the Aboriginal rights as set out herein, and to enact appropriate regulations which would have the effect of complying with the government's fiduciary duty to Aboriginal persons and at the same time to properly manage, maintain and hopefully enhance big game populations. The court therefore declares a temporary suspension on the declaration of invalidity. The court invites the parties to provide it with such further argument and evidence as they may deem appropriate in order to allow the court to make a proper assessment as to the time required for the enactment of the proper regulations, which would observe the period of suspension.

As the court is declaring a suspension on the declaration of invalidity I must come to the conclusion that the accused herein are guilty as charged.

However, given the fact that there has been a finding of a constitutional breach I am inclined to treat the defendants leniently. I invite submissions on this point from counsel at this time.