| Court of Appeal for Saskatchewan | Citation: *R v Boyer*, 2022 SKCA 62<br>Date: 2022-05-31 |
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**Docket: CACR3352**
Between:

**Warren Boyer**

*Appellant*

And

**Her Majesty the Queen**

*Respondent*

And

**Métis National Council and**
**Manitoba Métis Federation Inc.**

*Intervenors*

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**Docket: CACR3351**
Between:

**Oliver Poitras**

*Appellant*

And

**Her Majesty the Queen**

*Respondent*

And

**Métis National Council and**
**Manitoba Métis Federation Inc.**

*Intervenors*

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| Before: | Jackson, Whitmore and Kalmakoff JJ.A. |
| Disposition: | Leave to appeal granted, appeal allowed |
| Written reasons by: | The Honourable Madam Justice Jackson |
| In concurrence: | The Honourable Mr. Justice Whitmore<br>The Honourable Mr. Justice Kalmakoff |
| On appeal from: | CRM 5 of 2019 and CRM 6 of 2019 (QB), Battleford |
| Appeal heard: | May 3, 2021 |
| Counsel: | Kathy Hodgson-Smith and Clément Chariter, Q.C., for the Appellants<br>James Fyfe for the Respondent<br>Audrey Mayrand and Ronald Stevenson for the Intervenors |

## Jackson J.A.

## I. Introduction

[1] These appeals present the Court with its first opportunity to consider the extent to which the Métis can claim a right to hunt and fish for food under s. 35(1) of the *Constitution Act, 1982*. The Court's decision will have significant implications for the Métis peoples of Saskatchewan.

[2] The immediate background to the appeals may be briefly stated. Billy Myette, Warren Boyer and Oliver Poitras, who are all Métis, were charged with unlawfully hunting or fishing for food, i.e., harvesting, contrary to wildlife and fisheries regulations. They were harvesting near land that had been previously described as constituting the historic "Métis community of Northwest Saskatchewan" or HMCONWS: *R v Laviolette*, 2005 SKPC 70 at para 57, 267 Sask R 291 [*Laviolette*].

[3] By way of a defence, the three accused, who were tried jointly, served notices of constitutional question upon the Crown. The notices asserted that they had an existing Aboriginal right to hunt and fish for food and that this right is protected by s. 35(1) of the *Constitution Act, 1982*. As part of their assertion, they claimed that the HMCONWS encompasses considerably more land than what *Laviolette* describes and, indeed, includes a right to hunt and fish for food in vast tracts of the province, which could extend to the whole of it.

[4] The basis of their claim is that, when European control was first exerted over the territory that is now Saskatchewan, the Métis were a migratory people, hunting and fishing according to their needs wherever they found themselves, and that this right continues. They sought to prove that the wildlife and fisheries regulations, under which they were charged, are unconstitutional as against them as being contrary to the Aboriginal rights preserved for them by s. 35(1).

[5] Partway through the trial, the Crown brought an application to strike the notices of constitutional question. In its motion, the Crown submitted that Aboriginal rights can be claimed under s. 35 on a site-specific basis only – and not on a large geographical or province-wide basis. In support, the Crown relied on *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 [*Powley*]. Messrs. Myette, Boyer and Poitras argued that the Crown's interpretation of *Powley* should not be adopted.

[6] The trial judge accepted the Crown's submissions regarding *Powley*. He held that Métis harvesting rights are to be considered on a site-specific basis, using a regional approach. Accordingly, he narrowed the s. 35(1) defence to the areas of the province where the accused had been hunting and fishing on the day they were charged: *R v Boyer* (25 April 2016) Prince Albert, 7457911 (Sask PC) [*Mid-Trial Ruling*].

[7] The effect of the *Mid-Trial Ruling* was to prevent the consideration of evidence and argument directed to the question of whether the migratory and nomadic nature of the Métis peoples would permit a harvesting claim over the whole of the province or a large segment of it, even as a defence to the particular charge of harvesting where the accused had been hunting and fishing.

[8] In his trial decision, the trial judge acquitted Mr. Myette and convicted Mr. Boyer and Mr. Poitras: *R v Boyer*, 2018 SKPC 70 [*Trial Decision*]. The trial judge found that the area where Mr. Myette was hunting was indistinguishable from what had previously been declared to constitute the HMCONWS in *Laviolette*, but that the HMCONWS did not include the land where Mr. Boyer and Mr. Poitras had been harvesting.

[9] Mr. Boyer and Mr. Poitras appealed their convictions to the Court of Queen's Bench. Their appeals were dismissed: *R v Boyer* (10 February 2020) Battleford, CRM 6 of 2019 and CRM 5 of 2019 (Sask QB) [*QB Decision*].

[10] Mr. Boyer and Mr. Poitras now apply for leave to appeal the *QB Decision* and appeal to this Court. Among other grounds, Mr. Boyer and Mr. Poitras appeal on the basis that the summary conviction appeal judge erred by not finding that the trial judge misinterpreted *Powley*; and, as a result, his *Mid-Trial Ruling* denied them the right to make full answer and defence. The Crown concedes that the appeal raises questions of law of sufficient importance such that leave should be granted.

[11] In an earlier ruling, the Métis National Council and the Manitoba Métis Federation Inc. [intervenors] were granted intervenor status: *R v Poitras* (30 April 2021) Regina, CACR3352 and CACR3351 (Sask CA).

[12] I have concluded that the appeals must be allowed and a new trial ordered. As an overarching consideration, the claim before the Court is for a broad territorial right based on the nomadic nature of the Métis peoples. The claim before the Court is not resolvable by narrowing it to the actual sites where harvesting had occurred. Mr. Boyer's and Mr. Poitras's assertion of a s. 35 right must be addressed on its terms. To do otherwise would ignore their right to make full answer and defence.

[13] The fundamental basis of my reasoning is that I do not interpret *Powley*, and the related jurisprudence, as precluding Mr. Boyer and Mr. Poitras from attempting to prove an Aboriginal harvesting claim that would encompass a large tract of the province or indeed the whole of it as the basis of a defence to the charges against them. This Court, however, is not in a position to make the findings of fact necessary to determine the validity of such a claim, which means a new trial must be ordered.

## II. *Laviolette*

### A. The importance of *Laviolette*

[14] It is unusual to begin the background to a decision by examining an earlier one. However, *Laviolette* is important to the Court's analysis on this occasion for four reasons.

[15] First, the trial judge in *Laviolette* was also the judge in the within trial. He agreed to admit all of the historical evidence from the *Laviolette* trial as evidence in the trial of Messrs. Myette, Boyer and Poitras.

[16] Second, *Laviolette* is the first decision in this province to recognize formally within the boundaries of Saskatchewan the existence of a historic Métis community in what was known, prior to the creation of the provinces of Saskatchewan and Alberta, as the Northwest.

[17] Third, the HMCONWS, acknowledged in *Laviolette*, formed the starting point of the s. 35(1) claim of Messrs. Myette, Boyer and Poitras. Their position at trial was that the HMCONWS does not represent the whole of the traditional territory of the Métis.

[18] Fourth, the area of Saskatchewan where Messrs. Myette, Boyer and Poitras were harvesting is near where Ron Laviolette was fishing for food, which means *Laviolette* provides important context for the present appeals.

[19] In *Laviolette*, Mr. Laviolette had been ice fishing out of season on Green Lake, Saskatchewan. He was charged with unlawfully angling during a closed time contrary to s. 13(1) of *The Fisheries Regulations*, RRS c F-16.1 Reg 1. He claimed as his defence an Aboriginal right that was protected by s. 35(1) of the *Constitution Act, 1982*, to fish for food.

[20] The Crown conceded that a "historic Métis community existed at Green Lake by 1870" (*Laviolette* at para 38). However, Mr. Laviolette did not live at Green Lake. He resided at Flying Dust First Nation near Meadow Lake. Thus, the issue was whether the historic Métis community "includes a larger area and, in particular, Meadow Lake" (at para 21). The trial judge found that such a community existed and continues to the present and that Mr. Laviolette is a member of it. The trial judge acquitted Mr. Laviolette on the basis that his s. 35(1) right to fish for food was infringed by being prevented from fishing out of season without justification. The Crown did not appeal.

[21] In this section, I will review those aspects of the reasons in *Laviolette* that have particular significance to the appeals presently before the Court.

## B. Trial reasoning in *Laviolette*

### 1. A historic rights-bearing community existed in northwest Saskatchewan

[22] In *Laviolette*, the trial judge found that a historic rights-bearing community, "generally defined as the triangle of the fixed communities of Green Lake, Île à la Crosse and Lac La Biche and includes all of the settlements within and around the triangle including Meadow Lake", existed in northwest Saskatchewan (at para 30). More particularly, the trial judge in *Laviolette* described the HMCONWS as follows:

> [27] The evidence showed a <u>regional network of relationships in the triangle created in and around the fixed settlements of Lac La Biche, Île à la Crosse and Green Lake</u>. It also showed that there were <u>strong kinship ties between these three fixed settlements</u> and that the Métis intermarried and moved between these settlements over time. In addition to the fixed settlements, there were <u>many other settlements within and around the three fixed</u>

> settlements and along the transportation routes that connected them together. The transportation corridor, with its southeasterly hub at Green Lake, was important because it was the access route into the Mackenzie District, a storehouse of plenty and rich in furs. (Thornton – Transcript, pp. 982–985 and Exhibit D-17 at p. 5; Tough – Exhibits D-22 and D-26).
>
> [28] The evidence showed that while these fixed settlements were important historic Métis settlements, the Métis were highly mobile. They moved often and travelled far and wide for food, trapping and work. They moved frequently between the fixed settlements and between the settlements within a given region.
>
> [29] The evidence showed that Meadow Lake is also an historic Métis settlement and that it was begun by Cyprien Morin, a Métis from Green Lake. (Tough – Transcript, pp. 1412–1413, 1425 and 1435). The evidence showed there are substantial and continuing family connections between the Métis living in the settlement of Green Lake and those living in the settlement at Meadow Lake (Tough – Transcript at pp. 1413 – 1425 and Exhibit D-32).
>
> [30] I find that the evidence led at this trial contains sufficient demographic information, proof of shared customs, traditions and collective identity to support the existence of a regional historic rights-bearing Métis community, which regional community is generally defined as the triangle of the fixed communities of Green Lake, Île à la Crosse and Lac La Biche and includes all of the settlements within and around the triangle including Meadow Lake.
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> (Emphasis added)

### 2. A contemporary rights-bearing community continues to exist

[23] The trial judge in *Laviolette* also found that a contemporary rights-bearing community with far-reaching links to other parts of Saskatchewan and to other provinces continues to exist:

> [35] I conclude that the evidence shows that the "community" has continued to exist up to and including the time of the offence. Evidence showed that Métis lived in Green Lake since approximately 1786, that there was a Métis settlement at the Green Lake Post by at least 1820 and that they have always been connected to other Métis settlements in the area I have found to be the "community". Evidence also showed the continuing contemporary connections between Meadow Lake and Green Lake, including family connections between the two settlements, and that the area between the two settlements is populated by Métis (Exhibit D-32).
>
> [36] The evidence showed that Métis families moved between Meadow Lake and Green Lake and other Métis settlements in the "community", that significant Métis populations continue to exist at Green Lake and Meadow Lake and other settlements within the "community", and that extensive kinship connections exist between Île à la Crosse, Buffalo Narrows, Beauval, Jackfish Lake, Jans Bay, Pinehouse, Patuanak, Turnor Lake, Victoire, St. George's Hill, Michel Village, Duck Lake, La Loche, Keeley Lake, Canoe Lake, Smooth Stone, Kikino (Alberta), Dore Lake, Lac La Biche (Alberta), and Red River Settlement (Manitoba).
>
> [37] Given the extensive connections between the various communities that presently exist, and have continued to exist, I find that the contemporary rights-bearing community is best described as the Métis community that now lives and uses northwestern Saskatchewan and includes the settlements of Green Lake and Meadow Lake.

#### 3. Date of effective control is set at 1912 in *Laviolette*

[24] The trial judge in *Laviolette* described what is meant by effective control for the purposes of determining the existence of Métis rights in these terms:

> [39] In *Powley*, the Supreme Court of Canada held that the test looks to the time when Europeans effectively established political and legal control in a particular area. I agree with the argument advanced on behalf of Mr. Laviolette that effective control takes place when the Crown's activity has the effect of changing the traditional lifestyle and the economy of the Métis in a given area.

[25] The defence called Dr. Frank Tough and Mr. John Thornton to give evidence regarding the date of effective control; the Crown did not lead any expert evidence on that point but did concede that a Métis community was present in the HMCONWS by 1870. It was the Crown's position that the "date of effective control was 1870, being the date when Rupert's Land became part of Canada" (at para 38). The trial judge did not accept this date.

[26] Relying on the defence experts, he determined that no real change in lifestyle took place in the area until 1912, "when the Department of the Interior established townships and set aside two on either side of Green Lake" (at para 41). This was also when the Métis "registered their land claims under the new land system" (at para 41). With these two findings as the factual underpinning, the trial judge held that the date of effective control was 1912.

#### 4. Acquittal of Mr. Laviolette

[27] In acquitting Mr. Laviolette, the trial judge stated, "Having concluded that Mr. Laviolette has a Métis Aboriginal Right to fish for food, I declare that Mr. Laviolette, as a Métis member of the Métis community of northwest Saskatchewan, which includes Green Lake and Meadow Lake, has a right to fish for food within that Métis community's traditional territory" (at para 57).

## III. Background to the trial of Messrs. Myette, Boyer and Poitras

### A. The charges

[28] On November 30, 2013, Mr. Myette was charged with hunting for food near Rush Lake Fireguard Road, which is approximately 1 km west of the south end of Green Lake. He asserted that he was hunting within his traditional territory. Mr. Myette was charged under s. 25(1)(b) of *The Wildlife Act, 1998*, SS 1998, c W-13.12 [*The Wildlife Act*].

[29] Approximately four months later, Mr. Boyer, who is also Métis, was fishing for food on Chitek Lake, which is located approximately 60 km southeast of Meadow Lake, Saskatchewan. He was charged on March 27, 2014, with unlawfully fishing, contrary to s. 11(1) of *The Fisheries Regulations*.

[30] On November 16, 2012, Mr. Poitras, who is Métis, was hunting for food near Sundance Fireguard Road, in an area referred to as Jackfish Lake and Alcott Road, which is approximately 37 km south of Meadow Lake, Saskatchewan. He was charged with unlawfully hunting contrary to s. 25(1)(b) of *The Wildlife Act*.

[31] The parties agreed, in a statement of facts filed for that purpose, that Messrs. Myette, Boyer and Poitras were harvesting just outside the boundaries of what had previously been declared in *Laviolette* to be the HMCONWS.

### B. Notices of constitutional question

[32] As the proceedings progressed, the three accused each served individual notices of constitutional question upon the Crown, asserting as part of their defence an Aboriginal right to hunt and fish for food, as protected by s. 35(1) of the *Constitution Act, 1982*:

| | |
|---|---|
| **PART II**<br>**Rights of the Aboriginal Peoples of Canada**<br>**Recognition of existing aboriginal and treaty rights** | **PARTIE II**<br>**Droits des peuples autochtones du Canada**<br>**Confirmation des droits existants des peuples autochtones** |
| **35(1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. | **35(1)** Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés. |
| **Definition of aboriginal peoples of Canada** | **Définition de peuples autochtones du Canada** |
| **(2)** In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada. | **(2)** Dans la présente loi, ***peuples autochtones du Canada*** s'entend notamment des Indiens, des Inuit et des Métis du Canada. |

[33] The notices of constitutional questions were amended three times, resulting in what is referred to in the record as the "Amended Amended Notices of Constitutional Question", which I will refer to as simply "notices of constitutional question".

[34] In the final notices of constitutional question, each of Messrs. Myette, Boyer and Poitras raised similar questions: "Is section 11(1) of *The Fisheries Regulations*, R.R.S., c. F-16.1, Reg. 1, as amended, applicable to the Defendant, by virtue of s. 52 of the *Constitution Act, 1982*, and his Aboriginal right to hunt within s. 35(1) of the *Constitution Act, 1982*, as invoked by the Defendant?".

[35] As part of their notices of constitutional question, they each described the nature of their defence. As all accused raised the same rights in the same terms, I will quote from Mr. Boyer's notice only. He asserted the following as the material facts underlying his claim:

> **The Material Facts Giving Rise to the Constitutional Issues to be Raised at Trial:**
>
> 1. The Métis Nation is one of the "aboriginal peoples of Canada" within the meaning of s. 35(2) of the *Constitution Act, 1982*. The people of the Métis Nation live in, use and occupy a territory that spans the three Prairie Provinces (Manitoba, Saskatchewan and Alberta) and extends into a contiguous part of British Columbia, Ontario, the Northwest Territories and the northern United States.
>
> 2. The Métis historically were a highly mobile people engaging in the fur trade, the buffalo hunts and freighting through the many cart trails and waterways across the Métis homeland.
>
> 3. The Métis Nation – Saskatchewan ("MNS") represents the citizens of the Métis Nation living in, using and occupying Saskatchewan. The Defendant is a member of the contemporary rights-bearing Métis community that lives in, uses, and occupies what is now known as Saskatchewan, and includes, north, central, and southern Saskatchewan. This rights-bearing Métis community has always harvested and continues to harvest throughout its traditional territory, which includes the area in, around and between Green Lake and Morin Lake (Victoire), as well as northeast Alberta and southern Manitoba. This contemporary Métis rights-bearing community continues to be a highly mobile community.
>
> 4. The Defendant self-identifies as Métis, is ancestrally connected to the historic rights-bearing Métis community in Saskatchewan, which includes north, central, and southern Saskatchewan, as well as northeast Alberta and southern Manitoba and has been accepted as a member of that Métis community. This Defendant asserts that he is a Métis within s. 35(2) of the *Constitution Act, 1982*.
>
> 5. This Defendant participates in his Métis culture, by among other things, exercising his Aboriginal right to harvest for food, social and ceremonial purposes. On March 27, 2014, this Defendant, while exercising his Métis harvesting right when fishing on Chitek Lake, located about 60 km southeast of Meadow Lake and approximately 25–30 km 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 SK, was charged with unlawfully fishing contrary to section 11(1) of *The Fisheries Regulations*, R.R.S., c. F-16.1, Reg. 1, as amended.

> 6. Numerous documents to be presented at trial through expert witnesses address the fact that Métis were included within the term "Indian" or "Indians" from at least the Royal Proclamation of 1763 to the mid-1900s, including s. 91(24) of the *Constitution Act, 1867*, the 1870 Rupertsland [*sic*] Order and paragraph 12 of the *NRTA* 1930 entered into between the federal government and the Province of Saskatchewan.

[36] He described the legal basis of his claim thusly:

> **The Legal Basis for the Constitutional Question**
>
> 1. The Saskatchewan Métis community, which includes north, central and southern Saskatchewan, is represented by the Métis Nation – Saskatchewan (MNS), which in turn is part of the Métis Nation. The Métis Nation is one of the "aboriginal peoples of Canada" within the meaning of s. 35(2) of the *Constitution Act, 1982*.
>
> 2. Aboriginal rights are collective rights. The Saskatchewan Métis community which includes north, central and southern Saskatchewan has Aboriginal harvesting rights within its traditional territory that are recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.
>
> 3. The Aboriginal harvesting rights of the rights-bearing Métis community in Saskatchewan which includes north, central and southern Saskatchewan have never been extinguished and are therefore existing Aboriginal rights within the meaning of s. 35(1) of the *Constitution Act, 1982*. … Fishing for food was and continues to be an integral part of the distinct culture of the Métis.
>
> …
>
> 6. It is the Defendant's position that he has historic and on-going connections within the area described as northwest Saskatchewan in *Laviolette*, and in any event, that his hunting activity falls within the protections provided by virtue of s. 35(1) of the *Constitution Act 1982*. It is the Defendant's further position that he has mobility rights within the traditional homeland.
>
> 7. The MNS is the democratically elected political body that represents the Métis Nation in Saskatchewan. As the representative body for the Saskatchewan Métis, the MNS is mandated to ensure the Métis harvest is conducted in an orderly manner that respects safety and conservation principles.

[37] In short, as members of the Métis nation of Saskatchewan, the three accused claimed the right to harvest for food throughout the whole of Saskatchewan, as a defence to the charges against them. Specifically, they claimed an ancestral connection with "the historic rights-bearing Métis community in Saskatchewan, which includes north, central, and southern Saskatchewan, as well as northeast Alberta and southern Manitoba". If successful, this would extend the HMCONWS to the whole of the province or potentially significant tracts of it.

[38] As part of their notices of constitutional question, the three accused also defended the summary conviction charges against them on the basis that they have a right to hunt and fish for food as *Indians* under paragraph 12 of the *Natural Resources Transfer Agreement*, being Schedule 3 to the *Constitution Act, 1930* (UK), 20-21 Geo V, c 26, reprinted in RSC 1985, App II, No 26 [*NRTA*]. Paragraph 12 affirms the authority of the province to regulate hunting for conservation purposes but permits harvesting by Indians on unoccupied Crown lands and lands where they have a right of access: *R v Blais*, 2003 SCC 44 at para 13, [2003] 2 SCR 236 [*Blais*].

### C. The trial and the Crown's motion to strike the notices of constitutional question

[39] As mentioned, the Crown and the defence agreed that all of the historical evidence from the *Laviolette* trial would be admitted in the trial of Messrs. Myette, Boyer and Poitras. This included the testimony of 19 Métis community witnesses, who detailed their genealogies and harvesting practices, and the testimony of two defence expert historians and a genealogist. The Court also received other voluminous documentary evidence from *Laviolette*.

[40] The Crown called one expert historian, Dr. Clint Evans, and two government officials. The facts of the offences were essentially uncontested. All three accused had been hunting and fishing contrary to the legislation and regulations previously identified.

[41] After hearing from the Crown witnesses, the defence called 41 witnesses – these were in addition to those called in *Laviolette*. Some of these witnesses were family members and other Métis people from northwest Saskatchewan. Eighteen witnesses were residents of British Columbia, Alberta, Manitoba and southern Saskatchewan. The defence also called a genealogist, Dr. Brenda Macdougall, who provided her general observations on familial connections between Métis people in Saskatchewan.

[42] After the trial judge had heard from the 41st witness, the Crown filed a notice of motion asking for an order striking, in whole or in part, the notices of constitutional question on the following principal bases:

> 2. The Notices characterize the rights at issue and the alleged Métis community contrary to the test articulated by the Supreme Court of Canada in *R v Powley* [2003] 2 SCR 207. In particular,

a. The Respondents characterize the community at issue as spanning western Canada from Ontario to British Columbia. This one-Nation theory is contrary to the Supreme Court's decision in *R v Powley*, *supra*, and subsequent case law; and,

b. The Respondents characterize the rights at issue as being exercisable throughout Saskatchewan, northeastern Alberta and southern Manitoba, which is contrary to the site-specific nature of Aboriginal rights stated by the Supreme Court in *R v Adams* [1996] 3 SCR 101, *R v Cote* [1996] 3 SCR 139, *R v Sappier and Gray* [2006] 2 SCR 686 and reaffirmed in *Powley*, *supra*, and subsequent case law;

3. The Respondents' characterization of both the community and the rights at issue has been specifically rejected in a number of court decisions, including the Queen's Bench decision in *R v Langan* 2013 SKQB 256, which is binding on this Court, as well as other decisions including but not limited to: *R v Belhumeur* 2007 SKPC 114; *R v Langan et al* (23 November 2006) SKPC [unreported]; *R v Goodon* 2008 MBPC 59; and recently by the Alberta Court of Appeal in *R v Hirsekorn* 2013 ABQB 242 at para 57;

4. The Respondents' attempt to re-litigate these issues in light of the above-noted case law is also an abuse of the Court's process;

5. The Respondents raise constitutional questions of whether Aboriginal rights-bearing communities exist outside of Saskatchewan (in Alberta and Manitoba), and whether the Respondents have Aboriginal rights exercisable outside of Saskatchewan, the determination of which is beyond this Court's jurisdiction;

6. The said questions are otherwise hypothetical and unripe for determination since none of the Respondents were harvesting in those other jurisdictions, or in other areas of Saskatchewan, nor did they give evidence that either they, or members of their families or communities harvest in those other jurisdictions or areas of Saskatchewan … .

[43] The trial judge received detailed written and oral submissions with respect to this application.

### D. The *Mid-Trial Ruling* in response to the motion to strike

[44] In the *Mid-Trial Ruling*, the trial judge said the following:

The issue I am deciding today is whether or not the amended amended notice of constitutional question should be struck as an abuse of process or because it has no chance of success. In applying the Supreme Court's decision in *Powley*, and the cases that have been decided after it, that Métis harvesting rights are to be considered on a site-specific basis using a regional approach, I find that there is an issue regarding the amended amended notices. That is, it's my determination that the Supreme Court, and the cases subsequent to it, make it a point that the notices, such as had been filed here, claiming rights as part of the Métis nation comprising all of Saskatchewan and parts of Manitoba and Alberta is inconsistent with this approach, and insofar as it would make findings that are beyond the Province of Saskatchewan or beyond the jurisdiction that I possess as a provincial court judge.

In applying the decision of *Powley*, and the cases that have been decided subsequent to it, I find that relating to the accused that are at trial before me, that I can appropriately decide the following issues. … In respect of Mr. Myette, I find that the issue to be decided is whether Mr. Myette is a part of the historical community of Métis community of northwest

> Saskatchewan, which includes Green Lake and Meadow Lake, and <u>whether, then, in hunting near the Rush Lake Fire Guard Road which runs parallel to the south end of Green Lake, whether that is within -- whether that is part of the historic community</u> -- whether Mr. Myette is part of that historic community and is therefore exercising his right.
>
> In respect of Mr. Boyer, I find that <u>the issue is whether or not at Chitek Lake and the area around Chitek Lake is part of the historic Métis community of northwest Saskatchewan</u>, whether he is a member of that community, and whether that area, then, being within northwest Saskatchewan is an area that he's permitted as a member of that community to fish.
>
> In respect of Mr. Poitras, I find that the issue is <u>whether or not Jackfish Lake and the Cochin areas are part of the community -- historic Métis community of northwest Saskatchewan</u>, whether he is a member of that community, and whether or not as a result, he has a right to hunt in the area that it was indicated that he was hunting.
>
> (Emphasis added)

[45] Thus, the accused's claim of a constitutional right was reduced to whether the areas where they were hunting and fishing were part of the HMCONWS as previously found in *Laviolette*.

[46] Following the *Mid-Trial Ruling*, the defence then called another genealogist and an additional expert historian. The Crown called no rebuttal evidence.

## E. Trial Decision

### 1. *NRTA*

[47] The trial judge began his analysis by considering whether the Métis are "included in the term 'Indians' in the *NRTA*" (at para 5). He reviewed *Blais*, *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99 [*Daniels*], and *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 [*Manitoba Métis*]. He observed that *Daniels* held that the Métis are Indians for the purposes of s. 91(24) of the *Constitution Act, 1867* (UK), but that this was a "completely different interpretive exercise" than what "is involved under the *NRTA*" (*Trial Decision* at para 12). He noted that *Manitoba Métis* found that Canada did not owe a fiduciary obligation to the Métis as had been argued in that case. These findings having been made, the trial judge held 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" (at para 12(f)). In the result, he concluded that that "the Métis are not included in the term 'Indians' in paragraph 12 of the *NRTA*" (at para 12).

### 2. Date of effective control is set at 1876 to 1881

[48] In *Laviolette*, the defence had called Dr. Tough and Mr. Thornton to give evidence regarding the date of effective control; the Crown did not lead any expert evidence on that point but did agree that a Métis community was present in the HMCONWS by 1870. Based on Dr. Tough's and Mr. Thornton's evidence, the trial judge fixed the date of effective control for the HMCONWS at 1912.

[49] In this case, unlike in *Laviolette*, the Crown called its own expert, Dr. Evans, who testified to an earlier date of effective control. It appears that the trial judge preferred the latter's evidence over that of Dr. Tough and Mr. Thornton. He found that "[w]hile it is arguable whether [the evidence of government activity in the area] changed the traditional lifestyle and economy of the Métis it clearly showed a change to treaty negotiation and encouraging settlement" (*Trial Decision* at para 18). Nonetheless, the trial judge determined that the effective date of control fell between 1876 and 1881.

### 3. Mr. Myette

[50] With respect to all three accused, the trial judge held that they had an ancestral connection to, and are presently members of, the HMCONWS. The central issue for all three was whether the area where they were hunting was part of that land mass.

[51] After reviewing the evidence concerning the geographic indistinguishability of the location where Mr. Myette was hunting from Green Lake, which he had found to be part of the HMCONWS in *Laviolette*, the trial judge acquitted Mr. Myette.

### 4. Mr. Boyer

[52] In reviewing the case against Mr. Boyer, the trial judge considered the evidence of the Crown expert, Dr. Evans, and the defence expert, Dr. Macdougall. Dr. Evans testified that he did not find any evidence of anyone other than members of the Pelican Lake Band "fishing or living at the lake" (*Trial Decision* at para 25). The Pelican Lake First Nation is situated on the shores of Chitek Lake, where Mr. Boyer was fishing.

[53] Dr. Macdougall opined that, geographically, Chitek Lake was part of the HMCONWS because it was shown on the Moberly Map, an archival sketch map, as being "part of the English River District" (at para 24). (The Moberly Map was prepared by Henry Moberly, a fur trader who worked in the English River District in 1895 – the English River was another name for the Churchill River.) In addition, the defence submitted Métis scrip applications "as evidence that families were residing at Pelican Lake [*sic*] between 1878 and 1884 …" (at para 26).[1]

[54] The trial judge concluded, however, that "[w]hile this [scrip] shows some time spent at [Chitek] Lake it does not establish that a Métis community existed there prior to European effective control or was part of HMCONWS" (at para 27). As a result, Mr. Boyer was convicted.

**5. Mr. Poitras**

[55] To reiterate, the issue with respect to Mr. Poitras was whether "the Jackfish Lake/Cochin area [was] part of HMCONWS" (at para 6). The trial judge determined that Mr. Poitras was hunting on the Sundance Fireguard Road by Alcott Creek, "a place where he said his father trapped" (at para 39).

[56] In convicting Mr. Poitras, the trial judge found "no evidence of historical hunting in this area by members of HMCONWS" (at para 40). The building blocks of his reasoning process included his findings that (a) "Dr. Macdougall gave no evidence that these areas were part of HMCONWS" and (b) "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" (at para 40).

**6. Summary of the Trial Decision**

[57] In short, the trial judge held that the location where Mr. Myette was harvesting was "geographically indistinguishable from Green Lake and … a part of HMCONWS" (at para 32), but that the locations some 37 and 60 km away from the HMCONWS, where Mr. Boyer and Mr. Poitras were harvesting, were not part of it.

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[1] Pelican Lake (SK059) is northwest of Moose Jaw. Chitek Lake, where the Pelican Lake First Nation is located, is southeast of Meadow Lake, which is where the harvesting took place. According to Crown-Indigenous Relations and Northern Affairs Canada, Chitek Lake 191 is an Indian reserve and Pelican Lake First Nation is listed as the only First Nation on the reserve.

### F. On appeal to the Court of Queen's Bench

[58] The appeal to the Court of Queen's Bench was essentially an appeal from the *Mid-Trial Ruling*, which narrowed the notices of constitutional question to a consideration of the land immediately south of the HMCONWS. The summary conviction appeal judge interpreted the appeal as being "whether each of [the accused] had a Métis Aboriginal right to fish or hunt for food in their community …" (*QB Decision* at para 6). In answering this question, the summary conviction appeal judge wrote as follows:

> [14] The defence argued that the *Powley* decision was meant to deal with who the "people" are that have the specific rights. They argued that the courts are confusing the concept of "people" with "settlement". If they were allowed to deal with the concept of "people", then they would have led evidence respecting the occupation of almost all of the Province of Saskatchewan. Part of the argument was that the Métis were highly mobile and to look at a specific regional location is inappropriate in the context of their lifestyle. They argued that the issue of fishing is the core issue to examine, not fishing at a particular location. The judge rejected this approach. I think he was correct in so doing. The expert evidence identified that the Métis of northwest Saskatchewan were a distinct community and that they were based on settlement as opposed to a nomadic lifestyle that was followed by the Métis further south.

[59] Applying a standard of review derived from *R v Biniaris*, 2000 SCC 15, [2000] 1 SCR 381, and *R v Yebes*, [1987] 2 SCR 168, to the trial judge's other findings, the summary conviction appeal judge could see no basis to intervene.

[60] With respect to the claim under the *NRTA*, the summary conviction appeal judge agreed with the trial judge. He found no basis to reach a different conclusion than that *Blais* remained the controlling authority. In short, the word *Indians* in paragraph 12 did not include the *Métis*.

[61] Mr. Boyer and Mr. Poitras now apply for leave to appeal and appeal the *QB Decision*. From here on in, I will refer to Mr. Boyer and Mr. Poitras as the appellants. As I have indicated, Crown counsel concedes that leave should be granted, such that I will not address that issue further.

## IV. Issues

[62] The appellants raise numerous grounds of appeal. In my view, the issues that must be addressed coalesce around these broad questions:

(a) Did the summary conviction appeal judge err by not finding that the trial judge erred in his approach to determining whether the appellants can assert as a defence the constitutional right to harvest in the north, central and southern parts of the province?

(b) Did the summary conviction appeal judge err by not finding that the trial judge erred by interpreting *Powley* as preventing a claim to a harvesting right to harvest in the north, central and southern parts of the province?

(c) Did the summary conviction appeal judge err by not finding that the trial judge erred by denying the appellants their right to make full answer and defence? This question includes a subissue: Did the summary conviction appeal judge err by not finding that the trial judge erred by concluding he did not have the jurisdiction to make findings beyond the Province of Saskatchewan?

(d) Did the summary conviction appeal judge err by not finding that the trial judge erred by fixing the date of effective European control at 1876 to 1881?

(e) If error is found, what is the appropriate remedy?

[63] It should be noted that the appellants do not appeal that aspect of the *QB Decision* which holds that *Indians* in paragraph 12 of the *NRTA* does not include the Métis.

## V. Analysis

### A. Approach to assessing the appellants' assertion of a constitutional right to harvest

[64] The resolution of the appellants' claim of an Aboriginal right to harvest under s. 35 of the *Constitution Act, 1982*, cannot be divorced from the significant body of Supreme Court jurisprudence that has continued to develop and affirm the place of the Métis within the constitution of Canada: *Powley*, *Blais*, *Manitoba Métis*, *Daniels* and *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 [*Cunningham*]. In my respectful view, neither the trial judge nor the summary conviction appeal judge approached the issues with this case law in mind. In making this comment, it also must be understood that the issues and argument in this Court are, as is often the case, more refined than they were before those courts.

[65] *Powley* and *Blais* were released by the Supreme Court on the same day. Instead of reading these decisions expansively, they have come to be read restrictively, as if they have foreclosed the continuing development of Métis rights. *Powley* and *Blais* are starting, rather than ending, points.

[66] With the enactment of s. 35 of the *Constitution Act, 1982*, the Métis were recognized for the first time as one of the Indigenous peoples of Canada, along with Indians and the Inuit: "In this Act, **aboriginal peoples of Canada** includes the Indian, Inuit and Métis peoples of Canada" (emphasis in original, s. 35(2)). In *Powley*, the Supreme Court affirmed that "[t]he inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities" (at para 13). I agree with the appellants and the intervenors that there is no suggestion that the requirements to establish rights for the Métis were intended to be more onerous than for other Indigenous peoples recognized in s. 35. As I discuss later, instead of setting a base line for a proper consideration of existing Métis harvesting rights, *Powley* has come to be taken as being fixed in time.

[67] Similarly, *Blais* has come to reflect an attitude that the Métis cannot be entitled to broad harvesting rights such as are recognized for Indians because they were not mentioned in paragraph 12 of the *NRTA*. Instead of acting as a ceiling, *Blais* must be read as clearing the way for the proper resolution of Métis rights according to the constitution.

[68] In *Blais*, Ernest Lionel Joseph Blais asserted a right to harvest under the *NRTA* only. The Supreme Court made it very clear that it was making "no findings with respect to the existence of a Métis right to hunt for food in Manitoba under s. 35 of the *Constitution Act, 1982*, since the appellant chose not to pursue this defence" (at para 6). After reiterating its conclusion that the word Indians in the *NRTA* does not include the Métis, the Supreme Court stated, "We do not preclude the possibility that future Métis defendants could argue for site-specific hunting rights in various areas of Manitoba under s. 35 of the *Constitution Act, 1982*, subject to the evidentiary requirements set forth in *Powley*" (at para 42).

[69] Importantly, *Blais* cannot be interpreted as holding that the Métis cannot successfully assert a broad harvesting claim because only those persons recognized in the *NRTA* have that right. In my view, the central focus of *Blais* is the Supreme Court's observation that other "constitutional and statutory provisions are better suited, and were actually intended, to fulfill this more wide-

ranging purpose" of providing a "source of the Crown's or the province's obligations towards Aboriginal peoples" (at para 26).

[70] In *Cunningham*, the Supreme Court upheld the authority of the Alberta Métis to determine who is part of its membership under the Alberta–Métis Settlements Accord. In reaching that decision, the Court recognized the "Métis as a unique and distinct people" (at para 70). In the same paragraph, the Court also acknowledged that the "Métis have struggled for more than two centuries for recognition of their own unique identity, culture and governance".

[71] *Cunningham* is the clear precursor to *Manitoba Métis* and *Daniels*.

[72] In *Manitoba Métis*, a majority of the Supreme Court held significantly that (a) the honour of the Crown applies to its obligations to the Métis, (b) the ultimate goal of the honour of the Crown is reconciliation, (c) the "unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import" (at para 140), (d) "the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation" (at para 77), and (e) "the honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests" (at para 78). *Manitoba Métis* held that limitations periods and the equitable doctrine of laches did not apply to the Métis request for a declaration.

[73] In *Daniels*, in what has been labelled as a historic victory for the Métis, a unanimous Supreme Court ruled that the term *Indians* in s. 91(24) of the *Constitution Act, 1867*, includes Métis and non-status Indians. The effect of this ruling is that the federal government has a constitutional responsibility for these additional peoples in equal measure with all Indigenous peoples.

[74] The pentalogy of *Powley*, *Blais*, *Cunningham*, *Manitoba Métis* and *Daniels* finds support and is bolstered by the Supreme Court's consistent approach to the resolution of Indigenous rights generally. Of these decisions, two categories of cases must be mentioned: those that describe and provide content to the meaning of the phrase "the honour of the Crown" and those that emphasize the need to consider the Indigenous perspective.

[75] The first group of authorities holds that the interpretation of s. 35 engages the honour of the Crown: *R v Van der Peet*, [1996] 2 SCR 507 at paras 24–25 [*Van der Peet*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24, [2004] 3 SCR 550; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 25, [2004] 3 SCR 511 [*Haida Nation*]; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 22 and 44, [2018] 2 SCR 765 [*Mikisew*]; and *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 22, 443 DLR (4th) 1 [*Uashaunnuat*].

[76] The second category of Supreme Court decisions places particular emphasis on the need to give weight to the Indigenous perspective: *Van der Peet* at para 49, *R v Marshall; R v Bernard*, 2005 SCC 43 at para 45, [2005] 2 SCR 220 [*Marshall*], and *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 32–35, [2014] 2 SCR 256 [*Tsilhqot'in*]. These are not all of the reported cases that could be cited for these propositions.

[77] This significant body of jurisprudence forms the basis for the analysis of *Powley* that follows in my reasons and, in my respectful view, should have informed how the various issues before the trial judge were resolved. With much respect, the trial judge and the summary conviction appeal judge did not follow this approach to the resolution of the issues before them. In a trial of some significance to the Métis, there is no mention of the honour of the Crown, the proper approach to how Indigenous claims are to be assessed, or the need to consider reconciliation.

[78] The first issue that both judges decided was whether the Métis can assert the same rights as Indians under the *NRTA*. While they were correct in holding as they did (i.e., the *NRTA* does not apply to the Métis people), the resolution of harvesting rights under the *NRTA* does not properly determine and cannot be used to inform whether the Métis can assert a similar province-wide claim or a claim to the north, central and southern parts of the province under s. 35. As I have indicated, all *Blais* decided was to place the resolution of Métis harvesting right in s. 35 as opposed to the *NRTA*.

[79] Similarly, contrary to what the trial judge indicated, *Daniels* is significant because it now solidly positions the Métis within the constitution of Canada. *Daniels* does not change the result in *Blais*, but it does demonstrate the evolution in the courts' thinking about the status of the Métis.

[80] In a like vein, while the trial judge recognized that *Manitoba Métis* did not find that the Crown owed a fiduciary duty, that decision holds, for the first time, that the principle of the honour of the Crown applies to the resolution of Métis entitlements.

[81] With that approach to Métis harvesting rights in mind, I will now consider *Powley* in greater depth.

### B. *Powley* does not put forward a narrow test, frozen in time

[82] As I have observed, *Powley*, and its proper interpretation is central to the resolution of this appeal.

#### 1. Introduction to *Powley*

[83] The issue is whether *Powley*, and subsequent authority, required the trial judge to modify the appellants' notices of constitutional question, which claimed an Aboriginal right to harvest in the province that "includes north, central and southern Saskatchewan".

[84] The Crown seeks to sustain the trial judge's conclusion on two bases. First, it argues that *Powley* and prior and subsequent Supreme Court authority incorporated a site-specific test for proving Métis rights. Second, the Crown submits that trial courts have properly recognized that the Métis are comprised of distinct communities and have consistently narrowed broad territorial claims to resolve harvesting cases.

[85] With respect, the Crown has taken an unnecessarily narrow view of *Powley*. Supreme Court jurisprudence, including *Powley*, has left open the possibility that s. 35 rights may develop differently for nomadic Indigenous peoples than for those who identify with a site-specific territory or a specific land area. Further, most trial court decisions in Saskatchewan, which have followed a site-specific approach to Métis harvesting rights, can be differentiated or distinguished and, in any event, are not binding on this Court.

### 2. *Powley* interpreted and applied

[86] *Powley* presented the Supreme Court with an opportunity to resolve how *Van der Peet*, which dealt with the rights of First Nations persons, applied to Métis peoples. In *Van der Peet*, the majority of the Supreme Court stated the issue as follows: "How are the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* to be defined?" (at para 1). In answering this question, the majority put forward a simple test: "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right" (at para 46). The majority labelled this the *integral to a distinctive culture* test.

[87] By way of guidance to courts, the majority went on to provide a list of factors, presented as headings, to be considered in applying the integral to a distinctive culture test. Significant to this appeal, the majority in *Van der Peet* mentioned, among others, these factors (at paras 49–74):

(a) "Courts must take into account the perspective of aboriginal peoples themselves";

(b) "Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right";

(c) "Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims";

(d) "Claims to aboriginal rights must be adjudicated on a specific rather than general basis"; and

(e) "Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples".

[88] In expanding and elaborating on this test, the majority in *Van der Peet* recognized and left open the question of how to define Métis rights within the meaning of s. 35. Chief Justice Lamer wrote as follows:

> [67] … the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question.
>
> (Emphasis added)

[89] In *Powley*, after referring to the above quote in *Van der Peet*, the Supreme Court took up the question of the place of Métis peoples in s. 35 of the *Constitution Act, 1982*, with the following:

> [17] … the inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.
>
> [18] With this in mind, we proceed to the issue of the correct test to determine the entitlements of the Métis under s. 35 of the *Constitution Act, 1982*. The appropriate test must then be applied to the findings of fact of the trial judge. We accept *Van der Peet* as the template for this discussion. However, we modify the pre-contact focus of the *Van der Peet* test when the claimants are Métis to account for the important differences between Indian and Métis claims. Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.
>
> (Emphasis added)

[90] The majority then proceeded to list those aspects of the *Van der Peet* test that it wished to emphasize in the context it was deciding. Again, for our purposes, the factors that are most important are as follows: (a) characterization of the right being claimed, and (b) identification of the historic rights-bearing community.

[91] In its analysis of the characterization of the right being claimed, the Supreme Court in *Powley* wrote, “Aboriginal hunting rights, including Métis rights, are contextual and site-specific” (at para 19).

[92] For the Crown, this statement should be dispositive of this appeal. Relying on *Powley*, *R v Adams*, [1996] 3 SCR 101 at para 36 [*Adams*], *R v Côté*, [1996] 3 SCR 139 at paras 31, 56 and 57 [*Côté*], and *R v Sappier; R v Gray*, 2006 SCC 54 at paras 50 and 51, [2006] 2 SCR 686 [*Sappier*], the Crown asserts further that the Supreme Court has never abandoned the site-specific nature of Aboriginal rights mentioned in *Powley*. The Crown also refers to several trial decisions in support of a narrow approach to Métis rights: *Laviolette*; *R v Belhumeur*, 2007 SKPC 114, 301 Sask R 292 [*Belhumeur*]; *R v Goodon*, 2008 MBPC 59, 234 Man R (2d) 278 [*Goodon*]; and *R v Langan*, 2013 SKQB 256, 425 Sask R 42 [*Langan*]. It follows from the Crown’s submissions that a site could never be a province as a whole or a part of a province that might be described as the northern or the central or the southern part of it, as the appellants claim.

[93] Clearly, there are references in Supreme Court authority predating and succeeding *Powley* that discuss the site-specific nature of Aboriginal harvesting rights. The strongest endorsement of that proposition comes from *Sappier*:

> [50] This Court has imposed <u>a site-specific requirement on the aboriginal hunting and fishing rights</u> it recognized in *Adams*, *Côté*, *Mitchell* [2001 SCC 33], and *Powley*. Lamer C.J. explained in *Adams*, at para. 30, that
>
>> if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. <u>A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the *tract of land in question*</u>.
>
> (Italic emphasis in original, underline emphasis added)

[94] Notwithstanding the above-quoted statement, *Sappier* does not foreclose the assertion of a broad territorial claim for two reasons. First, in *Adams*, *Côté*, *Mitchell v M.N.R.*, 2001 SCC 33, [2001] 1 SCR 911 [*Mitchell*], and *Powley*, upon which *Sappier* relies, the party asserting the s. 35 right had already narrowed the claim to a specific site:

(a) in *Adams*, the claim was the “for the right to fish for food in Lake St. Francis” in Quebec (at para 36);

(b) in *Côté*, the Supreme Court characterized the right as “whether the appellants enjoyed an unextinguished aboriginal right or treaty right to fish within the [zone d’exploitation contrôlée] deserving of constitutional protection under s. 35(1) of the *Constitution Act, 1982* …” in Quebec (at para 31; also see paras 56 and 57);

(c) in *Mitchell*, the claim was in respect to a “specific geographical region in which it is alleged to have been exercised (i.e., north of the St. Lawrence River) …” (at para 40; also see para 41); and

(d) in *Powley*, the issue was “whether members of the Métis community in and around Sault Ste. Marie enjoy a constitutionally protected right to hunt for food under s. 35 of the *Constitution Act, 1982*” (at para 1).

In each of these decisions, the site was specific because the claimant had made it so.

[95] There is a second reason why *Sappier* is not an impediment to the appellants’ broad assertion of a constitutional right to harvest; it falls into that category of case where the Court was able to narrow the claim in order to permit a proper assessment of it, which has usually led to an acquittal. Justice Binnie described this phenomenon in *Lax Kw’alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, [2011] 3 SCR 535 [*Lax Kw’alaams Indian Band*].

[96] In *Lax Kw’alaams Indian Band*, Binnie J. distinguished *Sappier* as belonging to that group of decisions where “it was necessary for the Court to re-characterize and narrow the claimed right to satisfy the forensic needs of the defence without risking self-destruction of the defence by reason of overclaiming” (at para 44).

[97] Most importantly, the Supreme Court in *Sappier*, *Adams*, *Côté*, *Mitchell* and *Powley* was not confronted with a case such as this one. Here, the appellants claim to be a migratory or nomadic peoples whose traditional territory allegedly covered either large tracts or the whole of the province. They assert, as an Aboriginal right under s. 35, the right to harvest because of their way of life, which, according to them, knew nothing of the municipal or provincial boundaries that exist today.

[98] The Supreme Court in *Powley* was very clear not to decide more than necessary to determine whether Mr. Powley's acquittal should be sustained. It left open the possibility for a claim over a broader area of land than "in and around Sault Ste. Marie", as is apparent in the following quotation:

> [12] We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary for our purposes to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie. It is not necessary for us to decide, and we did not receive submissions on, whether this community is also a Métis "people", or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes.
>
> (Emphasis added)

[99] Further, *Powley* points to an ongoing evolution, growth and continuing interpretive exercise for the courts regarding the Métis peoples' right to hunt for food:

> [50] While our finding of a Métis right to hunt for food is not species-specific, the evidence on justification related primarily to the Ontario moose population. The justification of other hunting regulations will require adducing evidence relating to the particular species affected. In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where threatened species may be involved. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land.
>
> (Emphasis added)

[100] In my respectful view, a reading of *Powley* that *requires* the assertion of a Métis harvesting right over what must always be a smaller site size is not justified. It has given rise to what the appellants in oral argument called the Pac-Man approach to the resolution of Métis harvesting rights.

[101] According to the appellants, a Métis person would put forward a claim over a large part of the province. On the application of the Crown, or on its own initiative, a court would narrow the claim to a specific site, leaving the claimants to test the issue of a more comprehensive rights claim in yet another piece of litigation, with the result that the broader issue the Métis are attempting to resolve is never addressed.

[102] While many cases could be cited for this piecemeal approach, it is sufficient to mention *R v Morin*, [1996] 3 CNLR 157 (Sask PC) [*Morin-PC*], aff'd (1997), 159 Sask R 161 (QB) [*Morin-QB*], *Belhumeur* and *Goodon*. A review of these decisions shows that since at least *Morin-PC*, on the basis of charges that arose in 1993, the Métis peoples have been attempting to assert a comprehensive resolution of their right to harvest for food.

[103] In *Morin-QB*, the final iteration of the constitutional question was this: "Do the Métis of northwestern Saskatchewan have an existing Aboriginal right to fish?" (at para 26). Notwithstanding the breadth of the question, over the course of the trial, the issue came to be confined to "the area loosely known as Treaty 10 or perhaps a little larger" (*Morin-PC* at para 19). This is so even though the trial judge made a finding that he was "satisfied that the Métis people, in particular the ancestors of both of the accused, were well established in the area of [Turnor] Lake and generally in northwest Saskatchewan well before 1870" (at para 46). In the result, which was an acquittal, the trial judge found, after considering all of the evidence, that "people in the area of Turnor Lake are currently living as a community and basically off the land as they have since the early 1800's" (at para 47). *Morin-QB* has subsequently been interpreted as applying variously to the Treaty 10 area only: see, for example, *Laviolette* at para 18 and *R v Maurice*, [2002] 2 CNLR 244 at para 5 (Sask PC).

[104] In *Belhumeur*, the claim was for a right to harvest, which encompassed "all of south and central Manitoba, Alberta and Saskatchewan" (at para 200). In acquitting the accused, the trial judge narrowed the claim to a regional community: "the Qu'Appelle Valley and environs which extend to the City of Regina" (at para 206). The accused was hunting within this area and, therefore, was acquitted.

[105] In *Goodon*, the accused attempted to argue (at para 19) that

> the appropriate site for the hunting right claimed should be much more extensive and should include an area described as the Northwest. Evidence was presented that the Northwest is the term that was used by the fur traders and voyageurs to describe the area north and west of central Canada and includes almost all of the provinces of Manitoba, Saskatchewan, and Alberta, the southern Canadian territories and northwestern Ontario.
>
> (Emphasis added)

However, the trial judge fixed the site at what he believed the evidence showed: a "historic rights-bearing community [which] includes all of the area within the present boundaries of southern Manitoba from the present day City of Winnipeg and extending south to the United States and northwest to the Province of Saskatchewan including the area of present day Russell, Manitoba" (at para 48). Since the accused was hunting within this territory, the trial judge acquitted him.

[106] In my respectful view, in the within case, the trial judge erred by narrowing the appellants' constitutional question to whether they had the right to harvest where they had been hunting and fishing, without considering if that right could be grounded in a claim that they are part of a group that was migratory and who harvested throughout the *Northwest*. If there is some prospect of such a claim being made out, as noted above, it can only be narrowed in the circumstances mentioned in *Lax Kw'alaams Indian Band*: "to re-characterize and narrow the claimed right to satisfy the forensic needs of the defence without risking self-destruction of the defence by reason of overclaiming" (at para 44).

[107] This approach would have been appropriate if, after the defence had closed its case, the trial judge had concluded that a consideration of a much larger site was not necessary to give effect to the constitutional right that had been claimed. Here, however, the Crown asked the trial judge to narrow the constitutional question *before* the defence rested.

[108] Thus I conclude that the trial judge erred in law with respect to his interpretation of *Powley*. His narrowing of the constitutional question on the basis that *Powley* compelled him to do so, and then going on to convict the appellants, raises the issue of whether there has been a denial of the right to make full answer and defence. I will now turn to that specific question.

## C. The right to make full answer and defence

[109] Beyond the question of the interpretation of *Powley*, the Crown seeks to sustain the trial judge's decision to limit the notices of constitutional question on two bases. First, the Crown asserts the trial judge was properly concerned about receiving evidence beyond the boundaries of the province. Second, the Crown argues that the *Mid-Trial Ruling* did not limit the right to make full answer and defence because it was a necessary decision dictated by good trial management.

### 1. Making findings beyond the Province of Saskatchewan

[110] The trial judge appears to have justified his decision to narrow the appellants' notices of constitutional question because their claim extended beyond the borders of Saskatchewan. He said that such a claim was beyond his jurisdiction (*Mid-Trial Ruling*):

> That is, it's my determination that the Supreme Court, and the cases subsequent to it, make it a point that the notices, such as had been filed here, claiming rights as part of the Métis nation comprising all of Saskatchewan and parts of Manitoba and Alberta is inconsistent with this approach, and <u>insofar as it would make findings that are beyond the Province of Saskatchewan or beyond the jurisdiction that I possess as a provincial court judge</u>.
>
> (Emphasis added)

[111] Relying on *Uashaunnuat* and *R v Desautel*, 2021 SCC 17, 456 DLR (4th) 1 [*Desautel*], the appellants and the intervenors challenge this conclusion. In brief terms, they argued that the trial judge erred by narrowing the claim before him on the basis it asserted rights to a larger territory extending beyond the borders of the province.

[112] I agree with the appellants and intervenors on this point. Borders were not an impediment to asserting an Aboriginal right in either *Uashaunnuat* or *Desautel*. In *Uashaunnuat*, the majority of the Supreme Court stated plainly, "We do not accept that the later establishment of provincial boundaries should be permitted to deprive or impede the right of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights" (at para 49). In *Desautel*, the Supreme Court determined that the accused had protected rights under s. 35, even though he was not a Canadian citizen. All four levels of court hearing his case decided that Mr. Desautel had s. 35 rights because of his Canadian-based, Indigenous ancestry.

[113] Further, it appears that the trial judge misconstrued what the appellants were seeking. The trial judge was not being asked to make findings that would be binding on the provinces of Alberta and Manitoba. Rather, he was being asked to consider a pattern of Métis living that was said to have covered much of the prairies as a means of proving a claim *within* the boundaries of Saskatchewan. In that regard, this case is similar to what the Métis parties asserted in *Goodon*.

[114] Responding to a claim covering much of western Canada, the Manitoba Provincial Court in *Goodon* limited the action to what was known as the Turtle Mountain region. In commenting on the broad nature of the claim before it, that Court held as follows:

> [46] The Métis community of western Canada has its own distinctive identity. As the Métis of this region were a creature of the fur trade and as they were compelled to be mobile in order to maintain their collective livelihood, the Métis "community" was more extensive than, for instance, the Métis community described at Sault Ste. Marie in *Powley*. The Métis created a large inter-related community that included numerous settlements located in present-day southwestern Manitoba, into Saskatchewan and including the northern Midwest United States.
>
> [47] This area was one community as the same people and their families used this entire territory as their homes, living off the land, and only periodically settling at a distinct location when it met their purposes.
>
> [48] Within the Province of Manitoba this historic rights-bearing community includes all of the area within the present boundaries of southern Manitoba from the present day City of Winnipeg and extending south to the United States and northwest to the Province of Saskatchewan including the area of present day Russell, Manitoba. This community also includes the Turtle Mountain area of southwestern Manitoba even though there is no evidence of permanent settlement prior to 1880. I conclude that Turtle Mountain was, throughout much of the nineteenth century, an important part of the large Métis regional community.
>
> (Emphasis added)

[115] Similarly, in *Langan*, while the trial judge did not allow the claimant to pursue a claim that covered the whole of Manitoba and Saskatchewan, the claimant was permitted to use evidence of a right to harvest in Manitoba to attempt to ground such a right in Saskatchewan.

[116] Thus, I find that the trial judge erred when he limited the appellants' defence on the basis of its extra-territoriality. *Uashaunnuat* and *Desautel* confirm that provincial and even international borders do not preclude Indigenous persons from asserting their s. 35 rights.

### 2. Narrowing the defence for trial management purposes

[117] The Crown correctly asserts that the curtailment of defence evidence may be justified in order to manage an unwieldy trial. However, in my view, what the trial judge did here went beyond good trial management.

[118] The Supreme Court has recently canvassed the competing interests between proper trial management and the right to make full answer and defence: *R v Samaniego*, 2022 SCC 9, 466 DLR (4th) 581. While the majority and the minority divided on the result, the Supreme Court agreed on the principles at stake, which are helpfully summarized in the dissenting reasons of Côté and Rowe JJ.:

> [142] Parties are entitled to present all relevant and material evidence to the trier of fact, absent a clear ground for exclusion: *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, at para. 68; C.A. Wright, "The Law of Evidence: Present and Future" (1942), 20 *Can. Bar Rev.* 714, at p. 715; S.N. Lederman, A.W. Bryant and M.K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (5th ed. 2018), at §1.1. A decision that restricts the trier of fact from considering relevant and material evidence in the absence of a clear ground of policy or law justifying exclusion jeopardizes the accused's constitutional right to make full answer and defence. It also undercuts society's interest in getting at the truth: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 609; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at paras. 47–48.
>
> (Emphasis added)

[119] The appellants defended the charges against them on the basis that *The Wildlife Act* and *The Fisheries Regulations* are unconstitutional as being contrary to the *Constitution Act, 1982*: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (s. 35(1)). By virtue of their defence, they claimed that their rights as Aboriginal peoples extend to harvesting for food throughout the north, central and southern parts of the province. To prove their constitutional claim, they sought to adduce evidence to show that they followed a highly mobile way of life that saw individuals move from one settlement to another and to harvest in the places in between.

[120] As I have indicated, on the Crown's application to strike the notices of constitutional question on the basis that they were an abuse of process or had no possibility of success, the trial judge decided that he could nonetheless hear the matter by narrowing the issues as follows (*Trial Decision*):

> [6] … 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 the 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?

[121] In seeking to support the trial judge's decision, the Crown submits that the *Mid-Trial Ruling* was simply a "re-characterization of the issues" to make the trial manageable. After many days of testimony, and with no clear end in sight, Crown counsel says the trial judge took steps to avoid the criticism leveled by Binnie J., writing in *Lax Kw'alaams Indian Band*, that the "trial of an action should not resemble a voyage on the Flying Dutchman with a crew condemned to roam the seas interminably with no set destination and no end in sight" (at para 41).

[122] This is undoubtedly true, but the problem is that the re-characterization of the issues and the consequent narrowing of the defence on this occasion did not result in an acquittal. The appellants had been attempting to resolve a long-standing dispute about whether they have the same rights to harvest as the Indian peoples of Saskatchewan. The tool that they chose to pursue their claim to a broad Métis harvesting right was the summary conviction process. Surely, the right to make full answer and defence in the Indigenous context extends to hearing the evidence that supports their claim to a recognition of existing Aboriginal rights under s. 35.

[123] I recognize that the Supreme Court has stated on numerous occasions that charges under penal statutes are not necessarily the best vehicle for determining a constitutional issue: *Desautel* at para 90, *Marshall* at para 142, and *R v Sparrow*, [1990] 1 SCR 1075 at 1095. The concerns about the process for litigating Indigenous rights and land claims, which were identified first in *Sparrow*, persist today. A criminal trial does not have the same reach as a reference or declaratory action. Instead, the claims process becomes a highly adversarial competition of rights and interests rather than a process informed by reconciliation. Nonetheless, for reasons unknown to the Court, a broad resolution of Métis rights claims has not occurred in this province and the method that has been chosen by the appellants is the summary conviction trial process. While I agree that the summary conviction process is not the ideal vehicle to assert such a claim, it is the one that is presently before the court.

[124] Here, however, it is not so much that the appellants were prevented from *presenting* relevant and material evidence. After all, they had called some 41 witnesses before the *Mid-Trial Ruling* and two after. The issue is better understood as being two-fold: (a) whether they had submitted relevant and material evidence that the trial judge did not assess because he had limited the issues as he did, and (b) whether the appellants had further evidence to submit.

[125] In order to determine if testimony is relevant and material, it is necessary to understand the issue to which the evidence was directed. As I interpret the appellants' case, they were attempting to prove that they had a right to harvest in the areas identified because of the historic, mobile nature of the Métis peoples' lifestyle, which extends to the modern context. The appellants assert that the Northwest is, and always has been, recognized in their culture as land upon which they are permitted to harvest, having regard for their connections to the southern, eastern and western Métis groups from which they derive. The pivotal question concerns the narrowing of the appellants' defence to the specific areas immediately south of the HMCONWS, without considering whether the Aboriginal right at issue could be grounded in a claim that extended throughout the province and beyond.

[126] In precise terms, the appellants want to obtain, at the very least, a ruling that would determine how far south the Métis community of the Northwest extends. They do not accept that the creation of the HMCONWS was the end of their claim. In particular, they sought to adduce evidence to prove that the Métis rights-bearing community of Northwest Saskatchewan extended south of Meadow Lake. To prove that claim, they planned to adduce evidence to show that theirs was a highly mobile way of life, which saw individuals move from one settlement to another and to harvest in the places in between. According to their position, if the Métis peoples were migratory, it would be impossible to think of them as being confined to the territory described by the triangle of the HMCONWS. They assert that no matter how large that area is, the Métis people would be travelling to and from it as they plied their various trades. For them, the issue is the assertion that the Métis people, occupying substantial parts of Saskatchewan, Alberta and Manitoba in 1870, belonged to the same collective or, at the very least, possessed enough cultural similarities that they would be entitled to exercise s. 35 rights in the north, central and southern parts of the province.

[127] While I find that the testimony of the witnesses was not always focussed on these issues, the general tenor of their evidence was directed to the central issue: whether the Métis peoples of Saskatchewan or of the Northwest were a migratory people such that their right to harvest extended to the areas where the appellants were harvesting.

[128] However, I also conclude that a court need not make a ruling regarding the whole of an Indigenous collective's asserted traditional territory in order to resolve the question of whether a particular individual was exercising s. 35 rights. To use the language of *Powley*, where Métis harvesting rights are asserted, it falls to the claimant to establish that they "belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right", with the relevant community being "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 12). The need, in this analysis, to determine the geographic area occupied by a particular community means that often a court will not be able to assess whether an accused had an Aboriginal right in the location where they harvested without considering the broader evidence of the people's traditional territory, including portions of the traditional territory in a neighbouring province, if such evidence is relevant.

[129] *Laviolette* is one example of this principle. The trial judge there (the same trial judge as here) considered evidence of the Métis travelling from Île à la Crosse to Lac La Biche in Alberta to determine the perimeter of the HMCONWS.

[130] Another example is *R v Hirsekorn*, 2013 ABCA 242, [2013] 8 WWR 677, leave to appeal to SCC refused, 2014 CanLII 2421 [*Hirsekorn*]. The accused had defended the charge of hunting without a licence by claiming "a right to hunt for food in central and southern Alberta, or more broadly, on the plains, because this would better reflect the mobile lifestyle" of the Métis (at para 53; see also para 15). Given the breadth of the claim, it is similar to the appellants' claim.

[131] The Alberta Court of Appeal concluded "that given the nomadic nature of the plains Métis culture, it was inappropriate to require that the hunting right being claimed must have occurred around or close to a Métis village or settlement" (at para 84). At trial, the accused had been convicted on the basis he had not proven that any Métis community had "a sufficient presence in the Cypress Hills area to ground the asserted right to hunt there" (at para 64). While the appellate court dismissed the appeal, it declined "to make a determination with respect to whether there was only one, prairie-wide Métis community during the relevant time period" in the absence of "clear findings regarding the nature of the historical Métis community in the time leading up to control" (at para 64). Thus, for Alberta, the broad issue that the appellants identify remains open.

[132] The court's approach in *Hirsekorn* is consistent with the court's approach in *William v British Columbia*, 2012 BCCA 285, [2012] 10 WWR 639, rev'd 2014 SCC 44, [2014] 2 SCR 257, where the appeal court wrote the following (albeit in the context of a specific First Nations land claim, rather than a Métis right to harvest for food):

> [232] I do not doubt that the culture and traditions of a semi-nomadic group, like the Tsilhqot'in, depend on rights to use lands that extend well beyond the definite tracts that may be found to be subject to Aboriginal title. The Tsilhqot'in must be able to continue hunting and fishing throughout their traditional territory, and to have the right to pass and re-pass over the trails that they have used for hundreds of years.
>
> …
>
> [238] The result for semi-nomadic First Nations like the Tsilhqot'in is not a patchwork of unconnected "postage stamp" areas of title, but rather a network of specific sites over which title can be proven, connected by broad areas in which various identifiable Aboriginal rights can be exercised. This is entirely consistent with their traditional culture and with the objectives of s. 35.

[133] It is also relevant, as the intervenors assert, to acknowledge that s. 35 jurisprudence is evolving as Canadian courts grapple with the challenges of reconciliation and seek to give greater voice to the perspectives of Indigenous peoples. The courts must, accordingly, enable Indigenous peoples to present evidence and arguments that may be novel or grounded in Indigenous perspectives, where they are relevant and material to establishing the guilt or innocence of the accused, and which can be appropriately and reasonably handled within the trial process.

[134] Having regard for the seeming relevance and materiality of the appellants' evidence, the trial judge was required to receive it and to assess it to determine whether the claim under s. 35 was made out. On this point, I highlight *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577. In *Seaboyer*, McLachlin J., as she then was, commented for the majority on the time-hallowed principle of making full answer and defence to avoid the conviction of the innocent (at 611–612):

> Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that <u>the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law</u>.
>
> These principles and procedures are familiar to all who practise in our criminal courts. They are common sense rules based on basic notions of fairness, and as such properly lie at the heart of our trial process. In short, they form part of the principles of fundamental justice enshrined in s. 7 of the *Charter*. <u>They may be circumscribed in some cases by other rules of evidence, but as will be discussed in more detail below, the circumstances where truly relevant and reliable evidence is excluded are few, particularly where the evidence</u>

> goes to the defence. In most cases, the exclusion of relevant evidence can be justified on the ground that the potential prejudice to the trial process of admitting the evidence clearly outweighs its value.
>
> (Emphasis added)

[135] By restating the issues as he did, the trial judge limited the evidence that he could consider. He narrowed the appellants' defence to determining not just whether the appellants had a right to harvest where they were hunting and fishing, but whether the community that had been previously labelled the HMCONWS extended to those areas. The trial judge's decision in that regard was the antithesis of the appellants' defence, which was not based on a community or a settlement but on a nomadic right to harvest.

[136] Notwithstanding the challenges with the approach the parties have taken in seeking to resolve complex constitutional claims through a criminal trial, I conclude that the summary conviction appeal judge erred by not finding an error in the trial judge's decision. He ought to have concluded that the trial judge had erred by not considering all of the evidence tendered by the appellants going to the question of whether the mobility of the Métis peoples could ground a right to harvest in the areas identified. As my earlier analysis indicates, *Powley* did not require the trial judge to come to that conclusion; and, upon my review of the evidence, at least some of it is directed to the broader issues that the appellants raise.

[137] The words of McLachlin C.J.C. in *Cunningham* must be repeated: "the history of the Métis is one of struggle for recognition of their unique identity as the mixed race descendants of Europeans and Indians" (at para 70). At some point, the Métis of Saskatchewan should be able to put forward their claim to a broad harvesting right in the north, central and southern part of the province. In short, the trial judge erred in law when he decided to narrow the appellants' defence on the basis that "claiming rights as part of the Métis nation comprising all of Saskatchewan and parts of Manitoba and Alberta is inconsistent" with *Powley* (*Mid-Trial Ruling*). The appellants were denied the right to make full answer and defence. The summary conviction appeal judge erred by sustaining that conclusion.

### D. The date of effective European control

[138] In the new trial, it will be necessary to determine an effective date of control based on the right claimed by the appellants and the evidence that is adduced at the time. Since the evidence may change and may be viewed from a different perspective, it is neither necessary nor desirable for the Court to determine if the trial judge erred by fixing a date of control as of 1876 to 1881.

[139] It is sufficient to note two issues, argued by the appellants, that the Court should not be taken as having decided.

[140] In the first issue, the appellants argue that it was not open to the Crown to assert a different date of control in their trial than what the trial judge had found in *Laviolette*. As I have indicated previously, the Crown in *Laviolette* asserted that the date of effective control should be 1870, being the year when Canada acquired Rupert's Land from the Hudson Bay Company. But the Crown called no evidence in *Laviolette* to support this proposition and, indeed, admitted that the Métis were present in 1870. Based on the defence expert evidence, the trial judge held that the date of effective control was 1912. As mentioned, the Crown did not appeal *Laviolette.*

[141] With respect to the second issue, the appellants argue that the evidence relied upon by the Crown in the within trial was directed to the treaty process in which they were not a part. As such, they say the trial judge made a legal error by basing his finding of a date of effective control on irrelevant evidence. They say further that the trial judge made no finding as to whether the Métis way of life changed as a result of European control, and the effect such a ruling might have on fixing the date of effective control.

[142] To be clear, the Court in the present appeals has decided neither issue.

### E. The remedy

[143] The appellants ask that the appeals be allowed and their convictions be overturned "based on the finding that the Appellants possess s. 35 rights exercisable" in the areas where they were harvesting.

[144] This would require the Court to make two significant findings of fact, notably whether the Métis have a right to harvest in the north, central and southern parts of the province or the whole of it based on the mobile nature of these peoples and if that right continues. Such decisions are beyond the purview of an appellate court. Moreover, it is possible that the appellants have other evidence to adduce in support of their defence.

[145] As such, there must be a new trial. If at all practical, the matter could be returned to the trial judge, whose understanding of the material is clearly demonstrated by *Laviolette* and this trial. In any event, efforts should be made to determine whether the historical evidence from both trials can be used as evidence in the next trial.

## VI. Conclusion

[146] The appeals are allowed and a new trial is ordered.

"Jackson J.A."
Jackson J.A.

I concur. "Whitmore J.A."
Whitmore J.A.

I concur. "Kalmakoff J.A."
Kalmakoff J.A.