

Case Name:

Canada v. Vautour

Between

**Her Majesty the Queen in Right of Canada, and
John (Jackie) Vautour and Roy Vautour**

[2010] N.B.J. No. 392

2010 NBPC 39

New Brunswick Provincial Court
Moncton, New Brunswick

P.W. Arseneault A.C.J. Prov. Ct.

Judgment: December 17, 2010.

(86 paras.)

Counsel:

Gerald A. Grant, appearing on behalf of the Attorney General.

Robert L. Rideout appearing on behalf of the Defendants.

P.W. ARSENEAULT A.C.J. PROV. CT.:--

Introduction

1 John (Jackie) Vautour and his son Roy Vautour are charged with offences relating to unauthorized fishing for soft-shelled clams within Kouchibouguac National Park in Kent County, New Brunswick contrary to the provisions of the Canada National Parks Fishing Regulations and the Canada Parks Act. At their joint trial on all charges, the Defendants admitted the facts alleged to constitute the offences but claimed a constitutionally protected right under s. 35 of the *Constitution Act, 1982*, as Métis to fish for food in the area of Kouchibouguac.

2 In a report prepared by Dr. Alexander von Gernet an ethnohistorian and anthropologist who testified at length in the course of this trial, we find the following quotation attributed to Jennifer Brown and Theresa Shenck taken from **Defining 'The Metis people': The hard case of Canadian Aboriginal Law. In *Who are Canada's Aboriginal Peoples? Recognition, Definition and Jurisdiction*, edited by Paul L.A.H. Chartrand, pp. 268-304. Purich, Saskatoon, Saskatchewan.**

"The mixing of so-called races and ethnic groups has been going on since time immemorial. In fact, most of the world's people are of mixed ancestry, and while this sharing of genes has contributed to great variation within the human species, it may or may not give rise to a new ethnic group. Persons of mixed white and aboriginal ancestry do not necessarily form a distinct and separate people. Indeed, it is time to acknowledge the racist origins of such a classification based solely on biological differences." (Gernet, expert report p. 90)

3 The facts of this case provide an example where an over-reliance on genealogy coupled with a period of recent self-identification as 'Métis' have largely served to obscure the true legal issue this court must determine.

4 While the term Métis in Canada is often popularly used to describe a person of mixed aboriginal and European (often French/Acadian) descent this case is not just about whether Jackie and Roy Vautour have genealogical roots in both the Acadian and Mi'kmag or some other aboriginal community. As will be discussed below, aboriginal rights that are entrenched in our Constitution are communal in nature and must be rooted in the existence of a historical and present community (in this case Métis) and may only be exercised by reason of an ancestrally based membership in the present community.

5 In the case at hand, the key question is therefore more properly framed around whether a historical distinctive Métis community ever emerged in Nova Scotia (which at the relevant time included what is now New Brunswick) and if so, whether such a community has continued over time with rights that might be exercised in the area of the Kouchibouguac National Park. I will begin by referring to the wording of s. 35 and thereafter proceed to a review of *R. v. Powley*, [2003] 2 S.C.R. 207 the definitive case in Canada with respect to constitutionally protected Métis rights.

Section 35 and the Powley Test

6 Section 35 of the *Constitution Act, 1982* provides:

"35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada."

7 In *R. v. Powley* the two accused shot and killed a moose in the Sault Ste. Marie area without first having obtained a moose hunting licence. They were charged with hunting moose without a licence and argued that as members of the Métis community of Sault Ste. Marie, they enjoyed a section 35(1) right to hunt for food without a licence. The Supreme Court agreed with the two lower court decisions, upheld the defendants' claim and forged a template by which all future Métis claims would have to be assessed.

Defining the term Métis

8 The first point made by the Supreme Court in *Powley* was to emphasize that the Métis contemplated in s. 35 "did not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life and recognizable group identity separate from their Indian or Inuit and Europeans forbears." (para. 10) While the Court was not in a position to list the various Métis peoples that may exist in Canada, it did state "that 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." (para. 12)

The relevant time frame

9 The analytical framework for determining Métis rights starts with the basic elements of the *Van der Peet* test (*R. v. Van der Peet* [1996] 2 S.C.R. 507) modified to reflect "the distinctive history and post-contact ethnogenesis of the Métis." (*Powley*, para. 14) The Supreme Court concluded that Métis historical practices and traditions must therefore be identified using a pre-control test (as opposed to a pre-contact test in the case of other aboriginal rights) that focuses on the period "after a particular Métis community arose but before it came under the effective control of the European laws and customs." According to the Supreme Court, effective European control refers to a time when "Europeans effectively established political and legal control in a particular area." (*Powley*, para. 37)

Characterizing the Métis right being claimed

10 Moreover, as noted by the Court, the first step on the road to proving the existence of an aboriginal right is to characterize the right being claimed. Applying the *Van der Peet* test, the Supreme Court concluded that like other s. 35 aboriginal rights, Métis rights are contextual and site-specific, meaning (in the circumstances of this case) that the right to fish for food being claimed by the Vautours must be articulated in relation to a specific historical and contemporary Métis community, and to a particular territory. (*Powley*, para. 19)

Proof of a historical rights-bearing community

11 In addition, it is vital for those individuals who assert a Métis right under s. 35 to demonstrate the existence of an identifiable rights-bearing community at the time of effective control by the

Europeans. Furthermore, "in addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights." (para. 23)

Proof of a contemporary rights-bearing community

12 In order to advance a successful s. 35 claim, claimants must also prove the existence of an identifiable contemporary rights-bearing community in the site-specific area with sufficient continuity to the historic rights-bearing community. (para. 24) In *Powley*, it appears that evidence had been led indicating that the Métis community in Sault Ste. Marie had dispersed after the Robinson-Huron Treaty of 1850 was signed. It is worth noting that in spite of this the Court accepted that sufficient continuity had been demonstrated, and that while they took notice "that the Sault Ste. Marie community was to a large extent an 'invisible entity' that did not mean the community ceased to exist or disappeared entirely." The Court concluded there "was never a lapse; the Métis community went underground, so to speak, but it continued." (para. 27)

Proof of membership in the rights-bearing community

13 In addition to demonstrating the existence of a modern-day rights-bearing community, the *Powley* test also requires that individual claimants demonstrate membership in that community. The requirements for membership arguably are quite stringent and call for proof of the following three elements:

(i) Self-identification

This aspect requires that the claimant lead evidence that the he or she has identified as a Métis over a period of time. To guard against "claims that are made belatedly in order to benefit from a s. 35 right," the Court cautioned that self-identification "should not be of recent vintage." (para. 31)

(ii) Ancestral connection

To ensure that beneficiaries of s. 35 rights have a real link to the historical Métis community that holds the right being claimed, the Court imposed a condition that claimants provide evidence of an ancestral connection to a Métis community. The Court refused to require a minimum 'blood quantum' as proof of an ancestral connection and ruled that a connection "by birth, adoption, or other means" was acceptable. It noted however that this objective requirement called for some proof that the claimant's ancestors belonged to the historic Métis community.

(iii) Community acceptance

The final component to membership in a Métis community imposes a requirement on the claimant that he or she show acceptance by that community. The court made it clear that verifying membership is crucial "since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community." (para. 34) It also described the core of community acceptance as,

"past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. ... Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant's connection to the community and its culture. The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and others members of the rights-bearing community." (para. 33)

14 The ten-part test identified by the Supreme Court of Canada for Métis aboriginal rights imposes obligations on claimants other than those discussed above. There is a requirement to determine whether the practice in question is one which is integral to the claimant's distinctive culture; a requirement for continuity between the historic practice and the contemporary right asserted; a need to determine whether the right once it is found to have existed was extinguished; if there a right whether the right has been infringed; and if so, whether the infringement is justified. However, because of the procedure adopted in case and the manner in which the case has been presented no further discussion of those requirements is needed.

Position of the Parties

15 The Crown's position is that the Defendants' Métis aboriginal right claim must be dismissed because they have not proven the existence of a culturally distinctive, geographically identifiable Métis community in the area of Kouchibouguac prior to effective European control. As a result, it is suggested that this court need not consider whether they have established the other requirements of their claim as outlined above.

16 The Defendants submit that "it meets the requirements of most all of the ten essential elements set out by the Court [in Powley] and argue that the "site-specific community and 'template' does not apply in the Maritime context due to the particular nature of the Métis society that developed in this area." They further argue that the Métis community that allegedly emerged in the Maritime Provinces was a mobile community, a sort of 'shadow community' that moved throughout the region

during particular seasons. According to the Defendants, this requires that a new perspective apply to the "integration" of Métis aboriginal rights in the Maritime context. (The quotations are from various parts of the Defendants' post-trial brief)

Analysis

17 I propose to begin my analysis with a review of the evidence led during the course of this trial which is relevant to determining the date of effective European control in the area in question and then outline the body evidence which more specifically applies to the existence or (non-existence) of a historic Métis community at the time of effective European control.

Effective European Control

18 Extensive historical evidence was led at trial on the issue of when the Europeans attained effective control over the territory of what was then Nova Scotia/Acadia by Dr. Stephen Patterson, professor emeritus, Department of History at the University of New Brunswick in Fredericton, an expert witness called by the Crown.

19 According to Dr. Patterson's evidence the history of Acadia (Nova Scotia and New Brunswick) can be divided into three parts: the period of first contact 1400-1500s; the French regime from 1604 to 1713; and the British regime from 1713 to 1867. Dr. Patterson described how, as the new colony developed and European settlements increased, so did the layers of control exercised first by the French and then by the British to the point where in his opinion, effective control over the colony occurred in and around 1670.

First contact

20 According to Dr. Patterson, first contact between the Europeans and the Aboriginal people occurred a full hundred years before there was any attempt by a European power to settle in this part of the world. The hundred years of interaction between the Aboriginal people involved several European nations: the French, the Spanish, the Portuguese and the English. All of these countries began fishing off the Grand Banks of Newfoundland and around Nova Scotia in the 15th century, probably even before Columbus.

21 Dr. Patterson explained that this early period in our history is generally defined by the fur trade which developed as the Europeans came in contact with native people along the shores, particularly along the shores of what is now the Gulf of St. Lawrence. From the perspective of this case, Dr. Patterson's testimony about how historians believe that the first Natives to have contact with the Europeans in this part of the world were actually the Mi'kmaq (the Indian forbears that form part of the Vautours' genealogy) is interesting. Dr. Patterson describes a documented example of what took place in 1534, when the well-known French explorer Jacques Cartier, (who kept a journal) saw native people waiving at him as he sailed into the Baie des Chaleurs. According to Dr. Patterson, "they had long poles and they held up furs and they waived them back and forth. They

wanted him to come ashore and trade furs ... and when Cartier eventually sent his men ashore, they all cheered." (transcript of proceedings, May 26, 2009 at p. 25.)

22 According to Dr. Patterson, these kinds of early encounters built around the fur trade represent the origins of the relationship that gradually developed in this part of Canada between the Native peoples and the European powers for one hundred years before there was even any settlement. Could this early form of economic activity have provided the rationale for the emergence of a Métis community in the Maritimes as it had for the Sault Ste. Marie Métis? The answer, discussed in more detail further on, is that it did not.

The French Regime (1604-1713)

23 When the French first began to establish permanent settlements in 1604 they built on the success of the fur trade to add new levels of control over the territory. One of the elements identified by Dr. Patterson as a measure of increased control over the territory is the conscious effort on the part of the French to make allies of the native population. As he puts it, "... they got the natives to help them exercise control ... they got the natives to help them resist the intrusion of any other Europeans who might want to come in, and also to help them exercise control internally." (transcript, May 26, 2009 p. 41) Dr. Patterson believes the French nurtured this association (with the assistance of missionaries who acted as diplomats in a non-religious manner) in order to exert control over Nova Scotia and resist attempts by others to settle the area such as when (in the 1620s) the British briefly attempted to plant some settlers in the area of 'Acadia'. The French would have cultivated this close affiliation all the way through the colonial period to the point where native people actually became military allies during the 1690s when Britain and France were at war and the colonial 'headquarters' of the French regime were moved from Port Royal to what is now Fredericton (Fort Nashwaak) by Governor Villebon.

24 Among the most important indicators of French control in Acadia according to Dr. Patterson is the land granting system. A short digression is perhaps appropriate at this point to recall how in the Sault Ste. Marie area, the absence of a settlement policy before the 1840s played a major role in determining when effective control took place. According to the Supreme Court, the Métis community was allowed to thrive 'largely unaffected by European laws and customs until colonial policy shifted from one of discouraging settlement to one of negotiating treaties and encouraging settlement in the mid-19th century.' (R. v. Powley, supra para. 40) As a result, the Court concluded there really was no effective control over the area until the period just prior to 1850.

25 According to Dr. Patterson's testimony this is in contrast to Nova Scotia where settlement began as a French policy as early as 1604 with the arrival of Champlain in Port Royal and the establishment of the first permanent settlement. In the words of Dr. Patterson, the French '... were interested in acquiring land, territory, and eventually bringing in settlers who would be permanent from generation to generation, who would live on that land, exploit that land and do so in the interest of France.' (transcript, May 26, 2009 p. 57)

26 Dr. Patterson also discussed how France initially entrusted the settlement of French settlers and the exploitation of its resources to businessmen and did not actually send a royally-appointed governor until 1670. Instead, the King would grant commissions to entrepreneurs whose job it was to develop and exploit the natural resources of the colony. For example, Nicholas Denys, a well-known historical figure in this area benefited from such a commission and is reputed to have come to 'Kent County' looking for large trees for use by the French navy.

27 In the opinion of Dr. Patterson "... in the period up to 1670 ... the French Crown, from its viewpoint, had a kind of hands-off relationship with the colony -- the colonies that were being developed. They were being developed by 'gentlemen adventurers', as they sometimes called them, or risk-takers." but in 1670 the level of control changed markedly as, "... the French royalized Acadia and appointed the first royal governor to Acadia ... [who] did the bidding of the King of France, and also reported to him on a regular basis ..." (transcript, May 26, 2009 pp. 61-62)

28 Dr. Patterson also explained how this settlement policy had evolved from 1604 such that by the 1640s and 1650 settlers were arriving who had an interest in things other than trade. They were French farmers who settled along the Annapolis River and around Minas Basin and who had an interest in land they could farm. This coincides with the beginnings of Acadian settlement and the genesis of a distinctive Acadian culture. As a result, a new distinctive economy emerged based upon agriculture and deep-sea fishing that is separate from the native economy built around the fur trade.

29 In time, this organized form of settlement led to a system where laws had to be established that governed how land was granted. According to Dr. Patterson the system in Acadia (the seigneurial system which begins from the earliest part of the 17th century) was the same as it was in Quebec although perhaps not quite as elaborate. Under that system of land-granting a seigneur was given a large grant of land and he could do pretty much as he wished such as bringing out tenants who would pay him rent or even grant portions of that land to someone else. The seigneur himself was the giver of the law and he became the arbiter of disputes among his tenants.

30 According to Dr. Patterson's evidence the seigneuries began to develop in the 1620s and continued throughout the whole of the 17th century. Perhaps of some interest to the case at hand is the example he provided of the grant in the 'Richibucto District' in 1684 to one Louis d'Amours, also known as the 'Sieur de Chauffours' involving a large tract of land along the Northumberland Strait. It provides evidence of land grants being made by the French Crown in proximity of the area with which we are concerned more than three centuries ago.

31 It is obvious from Dr. Patterson's description of the seigneurial system that this method of land granting now provided the legal framework for settlement, land ownership and land transfer and is evidence of yet another layer of effective imperial control by the French Crown over the new colony. According to Dr. Patterson it becomes clear that with the arrival of the seigneurial system, by 1670 the French now exercised effective control over the territory. He sums it up in these words:

"In my mind, 1670 is a date that we can take as a date when the French have

sufficient control over territory that their sovereignty is supported by an internal structure that we would call 'control'. Its administrative control is a governor, and he's helped by others. There is a land-granting system -- it's the seigneurial system. There are settlers -- settlers on the land who owe allegiance to France, practice Catholicism, welcome the priest, talk to a French official when he comes to count them in the census -- all of those, I think, are aspects of the exercise of control and you see all of those things taking place in Acadia, in -- in various places, beginning by the middle of the 17th century. So I think, effectively, the French have control over their territory by 1670 and they are administering French law to the extent that any law is -- is exercised in a relatively frontier environment." (transcript, May 26, 2009 p. 80)

The British Regime (1713-1867)

32 According to my understanding of Dr. Patterson's evidence, the significance of that period to this case is primarily to demonstrate that even after the French ceded Acadia to Britain in 1713 with the signing of the Treaty of Utrecht, the British Crown made it a royal colony and never relinquished the control over the territory that the French Crown previously exercised. Instead, as discussed by Dr. Patterson in some detail in his expert report at pages 15-30 (Ex. C-4), the British continued to add more layers to the existing measures. I propose to limit my comments by referring to his conclusions only which appear at p. 30.

"What we find in Acadia and Nova Scotia, from 1670 on, is a clear intent, on the part of European nations, to settle Europeans on the land, the granting of land to make permanent settlement possible, limited but persistent administrative action on the part of the state, cultural outreach through priests who also served the state, reliance on allies (whether native or New England governments) to help defend territory, and the development of sedentary agriculture as part of a wider plan to benefit economically from the region's resources. All of these are aspects of 'control.' The British, for their part, passed laws, administered justice, actively sought treaties with native communities, and (for years) worked with Acadians whose population grew and prospered from intercolonial trade. Fairly understood in its proper context, this is the kind of 'control' that was exercised in all European colonies, French or English, in the seventeenth and eighteenth centuries. The military factor enters largely as an instrument of imperial competition and expansion, and as an instrument for protecting sovereignty. Historically, military power became an important factor in transferring control of certain territories from one imperial power to another, that is, from the French to the British Crown, rather than as a means of effecting internal control over land or people. In my opinion, first France and then Britain exercised continuous control over Acadia/Nova Scotia from 1670 on."

33 It must be noted that the only historical evidence tendered in this case about when effective control was exercised by the Europeans was through Dr. Patterson. In their post-trial brief the defendants have not presented any convincing arguments to suggest his opinion should be disregarded. Nonetheless, the weight to be given to any expert testimony has to be critically examined in the context of the evidence as a whole and the fact the defendants have not articulated any persuasive arguments does not in and of itself compel a court to accept that testimony. However, expert opinion evidence which stands uncontradicted should not be disregarded lightly particularly when the expert witness is highly qualified by reason of his education and substantial experience.

34 In the instant case, Dr. Patterson is a noted historian who has studied North American colonial history over several years with a particular interest in Aboriginal-European encounter from 1500 to the present. As we have seen, his opinion about 1670 being the date of effective European control is based on detailed reasons grounded in many instances on primary historical records and on established historical facts. There is compelling evidence that by 1670 the French had effectively established administrative, military and political control in 'Acadia'. While each succeeding decade may provide evidence of increased control as more settlers arrive and the British take over in 1713 (they passed laws, administered justice and signed treaties with the natives for example) I am satisfied on the basis of Dr. Patterson's evidence that by 1670 effective political and legal control over the new colony as understood in *R. v. Powley*, *supra* had been attained.

Was there a Métis community?

35 Having determined that the time of effective European occurred in 1670, the next question that must be answered by this court is whether it has been proven that a Métis community with a distinctive cultural identity existed in the area in question at that time.

36 There are three expert witnesses whose testimony dealt with that issue: Dr. Patterson, and Dr. Alexander von Gernet who testified for the Crown and Mr. Stephen J. Augustine who was called as a witness by the defendants. I will now direct my attention to their evidence beginning with Mr. Augustine.

37 Mr. Stephen Augustine is a hereditary Chief on the Mi'kmaq Grand Council. He is employed as a curator at the Canadian Museum of Civilization and as an ethnologist, specializes in Eastern Maritime ethnology. His general work involves managing and looking after about one thousand artifacts that are now at the Canadian Museum of Civilization representing Eastern Maritimes tribal groups including the Mi'kmaq.

38 Chief Augustine was accepted by the court as an expert in ethnohistory and allowed to give expert evidence in that field which, in his words involves:

"the study of humans who have no written record, and the ethnohistorian has to rely on archival documentation, written documents prepared by historians or

ethnologists or early chroniclers like the Jesuits, ... as well as oral traditions and oral history. 'Oral traditions' encompasses the ceremonies, the stories, the songs the dances and activities prophesies and traditions of the Mi'kmaq people. And 'oral history' encompasses the stories of an individual in that individual's lifetime what they, what they have heard and what they have seen ..." (transcript, May 28, 2007, pp. 7-8)

39 The methodology he employed in reaching his conclusions was described as follows: "I was basically guided ... when I was engaged in my Master's degree in Canadian Studies, I was informed by Toby Morin, (sic) who drew a lot of permanent information from Bruce Trigger as the methodology that she (sic) preferred and -- and she enlarged upon, and Trigger was -- was guided by Alfred Jean Bailey who was a New Brunswick historian ... and his methodology was -- was to look at oral traditions and explore the written documentation from historians or all of these other chroniclers as well as the archaeological records of the area." (transcript, May 28, 2007, p. 9)

40 In the opinion of Chief Augustine, "John (Jackie) Vautour and Roy Vautour have provided sufficient documentation to show Aboriginal ancestry, confirming they are Métis Acadian-Mi'kmaq. They have lived in Claire Fontaine all their lives, as descendants from Mi'kmaq and Acadian intermarriages. In continuing to extract their livelihood from the land -- fishing, hunting and gathering -- like their parents and grandparents, they have simply exercised their Aboriginal rights, as recognized under s. 35(1) of the Canadian Constitution, 1982. They have also practiced Acadian lifestyles by gardening and raising livestock at times for their subsistence." (expert report, p. 22)

41 As can be seen, Chief Augustine's opinion that the Vautours have aboriginal rights protected under s. 35 (arguably a legal opinion) relies heavily on the Vautours' genealogy, a recurring theme in the Augustine expert report. (see for instance pp. 4-6, 16-17 and 21-22) His seeming reliance on a genealogical approach to determine Métis rights is also reflected in the author's understanding and use of the term 'Métis'. For instance, at pages 158 to 160 of the transcript (May 28, 2007) there is an exchange between Mr. Augustine and Crown counsel which clearly suggests he is referring to the popular use of the word and not to the more restrictive meaning found in *R. v. Powley*. Here is an excerpt of that exchange:

- Q. Yes, they considered themselves Métis, but are you using the term 'Métis in the term of simply someone's mixed ancestry or someone living in a separate community with distinctive culture?
- A. I'm referring to those people that were the offspring of Mi'kmaq and Acadian people as Métis people.

42 In fairness, Mr. Augustine's report also contains certain remarks that point to things other than ancestry. For instance, at p. 21 he speaks of some of the Vautours' ancestors having "lived in the Kouchibouguac area with Mi'kmaq and Acadian relatives for the last one hundred and fifty years exercising and practicing their customs, and traditions partly Mi'kmaq and partly Acadian but

distinct of the (sic) Métis culture." Other practices referred to at p. 22 of his report include hunting, fishing trapping and sustenance gathering since the early parts of the 1900s. Aside from the fact that no evidence or source is offered for this conclusion the kinds of practices referred to are practices that Indians and Acadians alike undoubtedly also engaged in. This really begs the question about the uniqueness of the Vautour ancestors' culture as Métis Acadian-Mi'kmaq.

43 The conclusion that the Vautours are 'Métis' (presumably as people with a mixed heritage) must be contrasted with another more germane conclusion arrived at by Chief. Augustine that,

"Because of historical circumstances, there is no defined Métis community as described in the Powley case, hence there is no ancient established Métis community which would constitute a recognized, finite place where the practices, customs and traditions would have been handed down to the 'current Métis community'. There are Acadian communities (Pointe Sapin, Claire Fontaine, Kouchibouguac, St. Louis, Richibucto, Buctouche and Cocagne) and Mi'kmaq reserves (Burnt Church, Elsipogtog-Big cove, Indian Island and Buctouche) from which the Vautour ancestors have derived their practices, customs and traditions." (Augustine expert report p. 22)

44 According to Mr. Augustine, the biggest factor which prevented the Métis Acadian-Mi'kmaq from establishing their own communities separate and apart from the Acadians or the Mi'kmaq is fear; a 'fear' that resulted from our collective history of conflict culminating in the 'Grand Dérangement' and the expulsion of the Acadians in 1755. According to him, 'whoever was left .. they stayed in hiding and slowly came back by the 1880s, 1890s. (transcript, May 30, 2007 p. 122)

45 In Chief Augustine's view what we have "... all along is a **shadow community** of Métis people living among the Acadian and Mi'kmaq peoples." (expert report, p. 22 -- my underlining) His testimony at pp. 67-69 of the transcript sheds some light on what he means:

Q. -- food, the harvestry and that? And -- but you describe this as being in the shadows. Now, what do you mean by being in the shadows in the sense that the community isn't as visible?

A. Well --

Q. I know you've related that --

A. -- in -- in Big Cove, in my own community, we know people that -- that are not originally Mi'kmaq people and we have terminologies and -- and names for them -- and some of them are, you know, Leo Wennouch (ph) for one; Leo, the French person, whose -- whose mother was Annie Thibodeau -- and I'm not sure if he was adopted by Annie or whether he was a direct child of -- of Annie, I -- I wasn't --

Q. But --

A. -- but it was in the early 1920s or mid-20s that -- that he was -- he was born and brought into the community. But there was other -- some of the fishermen that were fishing at Escuminac and Pointe-Sapin, Mi'kmaq fishermen from Big Cove, brought back French women from Pointe-Sapin and they lived in Big Cove and were identified as -- as French women -- and there was a Mrs. Isaac --

Q. But --

A. -- she was originally from Bathurst, of Acadian descent --

Q. -- but the -- the term or the concept shadow implies that they were hiding? What --

A. No, it implies that -- that they were known by Acadian people and they were known by Mi'kmaq people, and these people interspersed themselves -- like, it's two cultures kind of intermarrying and -- and there is no break in between these two cultures and society; they'd go back and forth. They lived with their grandmother, if their husband died or if their grandmother is sick, well they would go to the reserve and -- and --

Q. Would these Métis people viewed the same way as the Acadians were in 1755?

A. Huh, they -- they would have been viewed almost - they would view themselves as Acadians because of family being expelled from -- from their traditional territory -- and now, they were hiding in the woods literally and the river 'cause you don't -- you don't see any big farms or fields in -- in Claire Fontaine. And that's where the culture and the society --

THE COURT: Where is Claire Fontaine?

A. Claire Fontaine is within Kouchibouguac National Park, and on the northern aspect of it -- if you look at the Park itself, you cut it in half, and it's about three quarters of the way to the top of the line, I guess, of what they call today Kouchibouguac Park. It's in Kent County. (underlining is mine)

46 It is to this shadow community that the Vautours point as proof of the existence of a historic Métis community and upon which their claim under s. 35 is partly rooted. One of the difficulties the concept of a shadow community brings to the fore is that, if one is to identify it, the community

must of necessity have had some visibility at some point in time. It cannot always have remained invisible, and I can find no solid historical indicators in Chief Augustine's report or in his testimony that point to its existence. There are remarks in the above excerpt of his testimony about Métis people in a biological sense living either among the Acadian and Mi'kmaq people but that hardly signifies the formation of a separate community.

47 As we have seen in an earlier part of these reasons, the Supreme Court accepted in *R. v. Powley* that a community may lose visibility and be forced to go 'underground' for a period of time but that presupposes an initial period of existence. An example may be found by referring to the Acadian community that was forced into exile in 1755 during the deportation. Obviously the Acadian community had lost much of its visibility in the years after 1755 but eventually, many Acadians returned and then openly continued to express their unique identity. The community may have been less visible but it never lapsed. I would agree with Dr. von Gernet that "... there must be a visible ethnicity at both ends of the period of invisibility". (report at p. 97)

48 Chief Augustine did allude in his report and in his testimony to the existence of one possible 'visible' historical Métis community in New Brunswick, located in the Caraquet region. He bases this conclusion on a report prepared by the Chignecto Consulting Group Inc. in 2005 for Justice Canada entitled: *The possibility of a European-Indian Mixed-Ancestry Community in Northeastern New Brunswick -- A historical Profile* (Ex. D-12)

49 But even there, Chief Augustine had to acknowledge (during his cross-examination) that the results of this study were inconclusive and that while it was shown that a number of mixed marriages took place in the Bas-Caraquet area, the authors were unable to determine whether or not that led to the emergence of specific communities of mixed ancestry who had unique cultural customs in comparison to their Acadian and Canadian neighbours.

50 Finally, some brief comments are required to address other portions of Chief Augustine's expert report. Part of his study deals with archaeological evidence of use and occupancy in Kouchibouguac National Park by indigenous groups of people in pre-historic times (p. 8). While such evidence might be useful in assessing a First Nations Aboriginal rights claim, its relevance to the case at hand has not been demonstrated.

51 Similarly, the extensive description he provided in his report and while testifying about the Mi'kmaq Creation Story (as told by to him by Chief Augustine's grandmother) which accounts for the close relationship of the Mi'kmaq people with the land and which has "given us the basic principles behind our world view, our philosophy" (report, p. 14) is also, with the utmost respect for Chief Augustine's beliefs, of dubious relevance to the existence of any historical Métis community in Kouchibouguac.

52 The next expert witness whose evidence I propose to deal with is Dr. Von Gernet an anthropologist and ethnohistorian who had taught in the Department of Anthropology, University of Toronto for over 18 years at the time of his testimony. He described ethnohistory as combining "the

skills of the anthropologist with those of the historian." (report, Ex. C-11 p. 4) In his words, "... how one goes about identifying a historic 'métis community' with a distinctive collective identity -- are of the type that an anthropologist familiar with ethnohistorical methodology is qualified to address." (C-11 p. 8)

53 Dr. von Gernet's report and his testimony address the question of whether there is evidence of the presence of a historic Métis community in New Brunswick, particularly in the area of Kouchibouguac. His conclusions appear as follows at page 107 of his report: "At the end of the day, having examined the primary and secondary sources, as well as the expert opinions, I was unable to confirm the existence of an historic métis community with a distinctive collective identity in eastern New Brunswick or elsewhere in the Maritimes."

54 Dr. von Gernet's analysis begins with a discussion of Métis identity and how ethnicity works generally. The witness goes to some length to demonstrate how the whole matter of identifying oneself in terms of one's ancestors becomes a very complicated matter. He argues that individuals will choose how they identify from a number of different potential options through a process of identity negotiation from the continuum of potential choices. In Dr. Gernet's view the existence of several potential options suggests the inappropriateness of an *a priori* assumption that any given mixed marriage leads to the 'negotiation of an identity' reflecting the parental mixture. (report, p. 87) The following Maritimes example illustrates the point quite well:

"A. ... and a good example of that I gave in my report, is the case -- a modern case of Bonita Lawrence, and I -- I talk about her case on page 12 to 13 of my report. Here's a -- a woman who wrote a -- her own Ph.D. dissertation and she describes how she grew up in--in the south shore of Montreal and she belonged to a family in which her father described himself as British, and so the family described itself as -- as expatriate British. Her mother was the offspring of a mixed marriage. She had lived most of her life outside of the Maritimes as an Acadian. She referred to herself as a -- as an Acadian woman who was part Indian which probably meant Mi'kmaq. So what did Bonita do, the daughter? Well, she -- she talks about this at great length in her Ph.D. thesis, which was devoted to the subject of -- of -- of how people like herself identify themselves. And she basically had several different choices. She could have identified herself as British, after her father. She could have identified herself as Acadian, the way her mother identified herself. Well, Bonita, after 30 years, decided one day that she would identify herself as Mi'kmaq because her mother was part Mi'kmaq. Now that's a -- an identity choice that follows one particular trail in her genealogy. It's one of many choices she could have made. My point here is that both in the 17th century case of La Tour, and in the modern case of Bonita Lawrence, you have a situation where an individual is not automatically inclined to call themselves "Métis" just because they have mixed parents. Métisness is not the consequence of a mixed marriage."

55 Accordingly, Dr. Garnet suggests that if the term 'Métis' is to have any meaning beyond a 'short-hand noun for the product of *métissage*' it must be defined in terms other than the universe of individuals with a mixed heritage. (report, p. 99) Accordingly the anthropological approach that focuses on collectivities such as ethnic groups or communities (which effectively is the Powley approach) is therefore more helpful than a genealogical inquiry that centres on individuals and family histories.

56 Dr. von Gernet offers examples where in other parts of Canada, anthropologists have identified mixed-blood families that had evolved over time into new and distinctive aboriginal communities through a process known as ethnogenesis. Perhaps the best-known are the Métis communities of the 'old Northwest' that emerged in the late 18th and early 19th century. The name of Louis Riel comes to mind as one of the most well-known members of such a community. These were very visible communities, easily recognizable with a large documentary record going back centuries long before the Constitution Act of 1982. While the Sault Ste. Marie community may not have enjoyed the same high level of consistent visibility it provides another example of how ethnohistorical research was able to point to its existence. Anthropologically, all those historic communities could be connected to some of the modern Métis communities that exist today in parts of what are now Northern Ontario, Manitoba, Saskatchewan and Alberta.

57 According to Dr. von Gernet our historical experience with mixed marriages is quite different. In the Maritime region there are two communities of which much has been said in this case whose long-term historical existence as separate communities with a distinct identity seems indisputable: The Mi'kmaq and the Acadian. The question which Dr. von Gernet turned to is whether intermarriages between these two ethnic groups ever led to the creation of a third 'Métis community' with its own particular culture and identity. The short answer is no.

58 When one goes through the evidence of Dr. von Gernet it becomes obvious that from his perspective the overwhelming conclusion derived from the body of expert literature which deals with the issue is that contrary to other regions, in this part of Canada the intermarriages did not lead to the emergence of a separate Métis community. While "both the Acadian communities and the Mi'kmaq communities had significant numbers of mixed-blood individuals ... they were not prone to an ethnogenesis that would lead to a third category." (transcript, May 28, 2009 pp. 77-78) Instead the offspring of such unions would identify with one or the other of their ethnic background. They did not see themselves as a distinct society.

59 A major component of Dr. von Gernet's testimony was directed at some of Chief Augustine's conclusions and the methodology he used to reach those conclusions. While he agrees with Chief Augustine's statement that one must employ a multi-disciplinary approach in the pursuit of answers to whether a Métis community existed in the geographic area at issue (using archaeological evidence, written materials and oral traditions) he is critical of the genealogical approach so prevalent in Chief Augustine's report.

60 In Dr. von Garnet's view, Chief Augustine's reliance on the genealogical evidence led in this case as proof of a Métis community contains a major flaw which has to do "with the arbitrariness with which the genealogy is reduced to a single line of ancestry" by what Dr. von Gernet calls 'genealogical reductionism' that is, 'weaving through a paternal and a maternal line' over several generations to a particular aboriginal ancestor who was the product of *métissage*. (The quotes are taken from different portions of pp. 104 and 105 of the transcript, May 28, 2009) The difficulty with genealogical reductionism according to Dr. von Gernet is that it does nothing to inform us about how the ancestor identified and is therefore not in and of itself evidence that the person was part of a Métis community.

61 The defendants' genealogy as laid out in great detail by Donald J. Morrison a trained genealogist who testified for the defendants can be used to illustrate the point Dr. von Gernet was attempting to make.

62 In the case of the defendant Jackie Vautour Mr. Morrison was able to identify six ancestral lines that lead to an ancestor with mixed Indian and European blood. For his son Roy Vautour he found an additional one on his mother's side for a total of seven. I have chosen one of those, the 'Saint-Castin' line which is graphically depicted below (see von Gernet report, p. 84) to demonstrate the point being made.

Joseph Roy Vautour

John Leonard Dit Jackie Vautour -- father

Joseph-Eusèbe Vautour -- grandfather

Eusèbe Marie Vautour -- great-grandfather

Anastasie Doucet -- great-great-grandmother

Germain Doucet -- great-great-great-grandfather

Joseph Doucet -- great-great-great-great-grandfather

Ursule Roy -- great-great-great-great-great-grandmother

Marie-Anne D'amours De Chauffour --
great-great-great-great-great-great-grandmother

Ursuline D'abbadie De Saint-Castin --
great-great-great-great-great-great-great-grandmother

*Matilde Padicwanmiskwe-Abénaquis --
great-great-great-great-great-great-great-grandm other*

Madokawand'o Abénaquis

63 From this, it is argued that both Jackie and Roy Vautour descend from Ursuline D'Abbadie De St. Castin, an ancestor with mixed Indian and European heritage. There is nothing in the evidential record to suggest that the genealogies are incorrect. However, while they do tell us something about the Vautours' ancestors they are not evidence of a Métis community.

64 To illustrate, each of us has two parents, four grandparents, eight grandparents and so on. By doubling the number of grandparents with each ascending generation one can mathematically compute the total number of ancestors in any particular genealogical line. By the time you get to ten generations one is dealing with 1024 ancestors. For eleven, the number doubles to 2048 and so forth. In the case of the St. Castin line one has to weave throughout a multitude of lineages, through male and female sides before one gets to the Aboriginal ancestor known as Matilde Padicwanmiskwe who is known to have married the French adventurer Jean-Vincent D'Abbadie de Saint-Castin. While their offspring were the product of a mixed marriage and in a popular sense Métis, there is no evidence to indicate how they identified or for that matter how and with whom they lived and associated.

65 The genealogical evidence and a simple mathematical computation demonstrate that Jackie Vautour has only six aboriginal ancestors in over one thousand. From a genealogical point of view, one could conclude that his ancestry is overwhelmingly of Acadian descent and therein lies the flaw in attempting to ground a claim to Métis status with constitutionally protected rights on the basis of one's ancestry.

66 Moreover, if this approach was followed what is to prevent the literally thousands of modern Acadians who live in proximity to First Nations people and whose genealogies could just as surely be traced to some aboriginal ancestor from enjoying constitutionally protected aboriginal rights?

67 The concept of 'Métis' under the Constitution Act, 1982 is not something which is reducible to the mere fact of one's mixed heritage. As the Supreme Court noted in very precise language, "the inclusion of Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture." (Powley supra, para. 13)

68 Now in fairness to the defendants, their counsel in his post-trial brief does recognize that under the Powley test a person of mixed ancestry does not automatically acquire a constitutionally protected right as a Métis merely by proving his ancestry and that there are other factors at play which must be met.

69 The point I have attempted to illustrate about ancestry was simply being made to address portions of Chief Augustine's opinion and his apparent reliance on ancestry as representative of the defendants' status as Métis. I have selected the following references as indicative of his approach to genealogy: "Intermarriage with Mi'kmaq and Penobscot Indians certainly puts them in the category of Métis". (report, p. 6); or that "by virtue of their relationship with the Mi'kmaq the Vautours have aboriginal rights as Métis recognized under s. 35(1) ..." (report, p. 6); or his statement about the genealogical documentation which is sufficient to "show Aboriginal ancestry confirming they [the Vautours] are Métis Acadian-Mi'kmaq. (report, p.22); and finally, the following comment offered in reference to the membership criteria of the Métis 'shadow community', "you would have to establish a link to an aboriginal ancestor in the past [to qualify]". (transcript, May 30, 2007 p. 106)

70 As to Chief Augustine's reliance on secondary sources which analyzed primary documents that are in archives, Dr. von Garnet offers the following comments:

"If there was an historic métis community in eastern New Brunswick or elsewhere, these sources presumably would provide the evidence. As it turns out, the sources were not used to answer the specific questions posed at the beginning of his report. I carefully examined all these sources and found that none of them suggest the existence of an historic métis community with a distinctive collective identity." (report, p. 105 underlining is mine)

71 When it was suggested to Dr. von Garnet in cross-examination that the lack of any meaningful scholarly research accounts for the absence of any reference in the literature to the presence of Métis communities his response was unequivocal: "You have a voluminous literature; it's just that Métis don't show up as distinct communities in that literature ... it's simply an absence of a Métis record within that history." (transcript, May 29, 2009 p. 69)

72 Dr. Patterson also offered his opinion about the presence of any historical evidence that might point to the presence of Métis communities. His conclusions align themselves with those of Dr. von Garnet. According to the expert historian,

"... the historical record does not provide any obvious evidence of such a community in Nova Scotia in the seventeenth or eighteenth centuries or subsequently in New Brunswick. That there were people of mixed racial origin, that is, persons born of a union between a European and a Native person, is not disputed. Several historians mention such unions, and they also repeat what is almost a consensus view that that the offspring of these unions easily fit into either the Mi'kmaq or Acadian communities, where they were accepted as one or the other. Clear evidence that a third culture, or defined community, emerged anywhere in Acadia, Nova Scotia or New Brunswick is not something I have ever found in primary sources or in the opinion of most scholars as expressed in the secondary literature." (Patterson report, p. 30)

73 Nor, According to Dr. Patterson, is the existence of Métis communities anywhere in Acadia something the official French censuses in the area of Port Royal, La Have, Cape Sable and communities along the South shore ever recorded. He believes there were eight from the 1650s through to about 1710. After looking at those censuses and the kind of detailed information being recorded at the time, such as the count for 'Indians' and for Europeans broken down into various categories (men, women, boys and girls of different ages) Dr. Patterson saw no third category of Métis. In my view it is not unreasonable to expect that if such communities existed as separate identities one would have found some mention of them in the censuses of the day.

74 Could a Métis community have formed in other parts of 'Nova Scotia' specifically along the east coast of New Brunswick? The answer remains the same: The historical evidence provided through Dr. Patterson suggests there was none.

75 The evidence shows that before the mid 1750s the east coast of New Brunswick was home to the Shediac, Richibucto, Miramichi and Pokemouche bands of the Mi'kmaq and that there were no significant French or Acadian settlements despite the fact that France (as discussed elsewhere in these reasons) had granted seigneurial rights to lands along the coast. The genealogy of the Vautours is offered as an example by Dr. Patterson that most of the Acadian population of the region came to it as a consequence of the disruptions of the 1750s and 60s with the expulsion of the Acadians and the resulting 'grand dérangement'. As to the presence of a Métis community in the area of Kouchibouguac, if one existed, "it's one that has not been historically discussed or described. I can't go through traditional sources and find reference to it" according to Dr. Patterson. (transcript, May 26, 2009 p. 169)

76 Another argument put forth by Dr. Patterson to support his view that Métis communities never appeared in this region of Canada is the absence of any economic justification for it. Recall how the economic activity built around the fur trade was seen as instrumental to the formation of the Métis community in the area of Sault Ste Marie. In the Maritimes, the history of the fur trade followed a different path. As explained by Dr. Patterson,

Simply put, there was no economic rationale for a Métis community of middle-men in Acadia/Nova Scotia as there was in the Great Lakes region. The fur trade thrived in the latter for something approaching two hundred years. In Acadia, the best hundred years occurred before any European settlement whatever, during which the Mi'kmaq, especially, learned everything they needed to know to emerge as effective middlemen in the trade, and the patterns of direct trade between aboriginal traders and Europeans became fixed. After French settlement began in 1604, and really in earnest in the 1640s, the nature of the economy shifted. The need for fur trade middlemen declined even more, at the very time when we begin to see a few -- really very few -- unions between Acadian settlers and Mi'kmaq individuals. The historical context alone suggests the unlikelihood that a separate Métis community would emerge here. There

simply was no economic need for it. (Patterson report, p. 6 underlining is mine)

77 When confronted on cross-examination about the presence of an invisible shadow community of Métis people, Dr. Patterson's response is unqualified: "What you're suggesting to me is that there maybe is an undocumented, unreported in history, invisible Métis community that neighbours didn't comment on, that nobody commented on but might have existed. I find that very hypothetical ... That's not the kind of speculation that I usually make." (transcript, May 27, 2009 p. 84)

78 According to Dr. Patterson, the main story of the encounter in the Maritime Provinces between the Natives and Europeans is not the emergence of a new Métis community but the considerable cultural transfer that took place with each side borrowing from the other. The following excerpt of Dr. Patterson's testimony taken from the transcript of the proceedings on May 26, 2009 at pages 191-195, illustrates how this occurred:

My belief is that while there was no Métis community, there was considerable cultural transfer between Europeans and natives. I think that's the main story of the encounter in the Maritime Provinces. Native people learned from Europeans and adopted a lot of European ideas. They did it willingly. It wasn't pushed on them. They wanted to do it. They did it. And so they changed their lives because of the presence of Europeans. That's the natives. The original French settlers at Port Royal, who learned a lot about just staying alive at Port Royal. They learned where the fish runs where. They learned something about the climate. They learned about how to combat certain diseases and it was reciprocal. To learn those things, they passed on to the natives certain things that were European which means we're getting acculturation, but it's not one group that's acculturating the others' culture. It's both. They're moving towards a -- a -- a -- new culture that represents the culture of this new world, the culture of Acadia that, in rural areas especially, is a blend. You've got English speaking settlers in the Annapolis Valley who fish and hunt on a regular basis, the same way their native neighbours do. They may use snowshoes in the winter, which are a -- a Mi'kmaq invention. They may use birch bark canoes or any other kind of canoe, which are an invention of the native people of this region. They have borrowed those things and incorporated them into their way of life, into their lifestyle. They're part of their culture. Acadians did the very same thing. But so, too, did the native people. Way in -- in the time of Nicolas Denys, who was here for 40 years, from 1630s till the 1670s -- he was here for over 40 years, and then went home to France and wrote about his experience, so we'd all know what it was about. He witnessed the beginning of Aboriginal use of firearms. He said in the olden days, they used bows and arrows, and this is how they hunted the moose. Nowadays, of course, they take a gun and they shoot'em (ph).

So what does that mean? It means that the way of life of the native people of this region has assimilated certain European ideas and customs based upon technology -- the adoption of European technology. How many Mi'kmaq in 1776 were still using bows and arrows to hunt? Not many. They were using guns. And they were getting them from Europeans. At the same time, I'm saying here that they're borrowing from each other. You find in the graveyards of New Brunswick and Nova Scotia -- the same graveyards, Mi'kmaq people who are buried side by side people of European background. They're worshipping in the same churches. They're professing the same religious beliefs. But I'm saying here that there has been a very substantial acculturation of both peoples. They borrowed from one another, they've learned from one another. Now, try to move into that milieu -- into rural New Brunswick or Nova Scotia anywhere where there is a mix of cultures and try to define something that is distinctively neither European or native, but which is a Métis blend -- my point is, it's pretty to define a Métis group in that context because entire cultures have adapted to the presence of the other. And even native people who have no European blood, and Europeans who have no native blood had adopted things from the other. So there's been cultural transfer, and that's the very very difficult kind of milieu in which certain people, I think, today are trying to find a Métis heritage. I don't think it's there historically. At least, I cannot, as a professional historian, say that I've seen clear evidence that such a culture exists that is distinctive and different and called "Métis".

Conclusions

79 The evidentiary record overwhelmingly compels me to conclude to the absence of any historic Métis community in the area of Kouchibouguac National park at the relevant time. Indeed that much appears to be conceded by the defendant's own expert witness who, by his own admission, was unable to find evidence of a defined historic Métis community as described in the Powley case. And with respect, Chief Augustine's opinion about the presence of a 'shadow community' has no evidentiary foundation and cannot be accepted. Simply stated, a constitutionally protected aboriginal right cannot be rooted in a community that never had any visibility.

80 Moreover, the evidence of the various lay witnesses who testified about their 'aboriginal' way of life (including the defendants) is evidence of a recent identification as Métis and does not enlighten us about whether such practices can be linked to historical Métis communities.

81 That there were marriages between Europeans/Acadians and Mi'kmaq men and women is an incontrovertible part of our history in this region. So is the considerable cultural exchange that took place between the two ethnic groups who co-existed in proximity to one another. But, in keeping with the evidence in this case, this process of cultural transfer did not lead to the emergence of a third group of Métis with its own separate identity and culture. Because the Mi'kmaq and the Acadians possessed a strong culture of their own they were able to absorb the offspring of these

unions in one or the other of these ethnic groups.

82 In portions of his post-trial brief defence counsel has proposed that the "usual perspective" used in assessing indigenous rights is too restrictive and that presumably by some form of judicial activism, this court ought to apply a new outlook to the interpretation of Métis rights in the Maritime Provinces. The argument goes that "the whole aspect of community, as it relates to the Maritime context and the Defendants is far different than the community situation and the test applied in the Sault Ste. Marie case." (post-trial brief, p. 17) The defendants' argument appears to be constructed around an academic article published in the Canadian Bar Review in 2008 (vol. 87) entitled *Prisons of Culture: Judicial Constructions of Indigenous Rights in Australia, Canada and New Zealand* by Michael Murphy (Canada Research Chair in Comparative Indigenous-State Relations, University of British Columbia).

83 From my understanding of that article, the author proposes an alternative approach to the 'doctrine of cultural continuity' which, by virtue of the Supreme Court of Canada decision in *R. v. Van der Peet* supra, requires that the aboriginal right being claimed be linked with some reasonable degree of continuity with the laws, customs or practices of the aboriginal group's traditional, pre-contact indigenous culture. Under that test modern activities (for example, running high-stakes gambling operations without a licence as in *R. v. Pamajewon*, [1996] 2 S.C.R. 821) deemed incompatible with the nature of the aboriginal group's historic occupation of its territory are prohibited.

84 According to the author, "the continuity requirement seems almost custom-designed to frustrate the judicial objective ... of facilitating the evolution of indigenous rights" (p. 377) For those seeking an alternative approach, the author suggests one which focuses on "the prior status and authority of those [indigenous] societies as independent and self-governing political communities" in a sense allowing them to choose their own pathways towards development. (p. 380)

85 The first point to be made is that the author of that article is dealing with the legal requirement of cultural continuity between past and present practices and not with the need to establish the existence of the native community at a relevant time and place as is the case here. But beyond that, this court is bound to follow the well-articulated principles that the Supreme Court has outlined in *R. v. Powley*, supra and it cannot subscribe to a position that runs counter to what is obviously a binding decision on this court. While the circumstances that may give rise to distinct Métis communities are bound to vary from case to case, the requirement of proof of such a community is not a matter of discretion.

86 After considering the evidence, this court finds that the defendants have failed to establish the presence of a historic Métis community in the area of Kouchibouguac a prerequisite under the *Powley* test. In fact the evidence would overwhelmingly suggest that none ever existed. The defendants' claim to a constitutionally protected right to fish for food in the area of Kouchibouguac

National Park is therefore dismissed. As noted at the outset the defendants have admitted to the *actus reus* of the offences before this Court and the only defence raised was their s. 35 constitutionally protected right to fish for food which this court has dismissed. A conviction will therefore be entered against both defendants on all charges.

P.W. ARSENEAULT A.C.J. PROV. CT.

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