

# Aboriginal Bulletin

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## ***R v. Willison*: British Columbia Supreme Court Clarifies Requirements to Prove Métis Rights Under Test in *Powley***

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On June 26, 2006, the British Columbia Supreme Court released its decision in *R v. Willison*, 2006 BCSC 985. This decision overturned a Provincial Court finding, 2005 BCPC 0131, that Mr. Willison had satisfied the onus upon him to demonstrate that he possessed a Métis right to hunt for food. The case has important implications for the determination of the existence of Métis rights of a community protected by s. 35 of the Constitution Act, 1982.

### **Facts**

Mr. Willison was found by a conservation officer near Falkland, British Columbia, to be in possession of a deer carcass. He admitted that he shot the deer out of season and that he did not have a hunting licence. However, he claimed he was Métis and had a constitutionally protected aboriginal right to hunt deer for food. He was charged with hunting antlered mule deer out of season in violation of two sections of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

Mr. Willison was tried and acquitted on May 2, 2005. The Crown's appeal of this acquittal was successful.

### **Arguments**

The Crown argued that the Provincial Court's finding was not in accordance with the Supreme Court of Canada's decision on Métis rights in *R v. Powley*, 2003 SCC 43 ("*Powley*"). In particular, the Crown argued that the trial judge erred with respect to the following four aspects of the test set out in *Powley*:

1. in finding a historic rights bearing Métis community in the Falkland area;
2. in finding a contemporary Métis community;
3. in finding a continuity between the historic practice and the contemporary right asserted; and
4. in finding Mr. Willison was a member of the alleged contemporary Métis community.

### **Decision**

The Court accepted the Crown's first submission. Although the Court was persuaded by Mr. Willison's submission that a Métis community may be mobile and not have a particular

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“settlement” in a given area, it went onto find that there must still be evidence of a community “on the land” (para. 24). On the whole of the evidence, the Court held that “there were a small number of Métis present in the area for a relatively short period of time” and only as a result of their affiliation with the Hudson Bay Company (para. 24). Therefore, the Court held there was no evidence of a “community” as envisioned under *Powley* (paras. 32 & 44). The case was distinguished from the facts of *Powley* on the basis that the Métis from Sault Ste. Marie in *Powley* kept their connection with, and in many instances returned to, the community of Sault Ste. Marie for many generations (para. 34). The Court also distinguished the Provincial Court of Saskatchewan’s decision in *R. v. Laviolette*, 2005 SKPC 70, where the evidence demonstrated “strong kinship ties between [the] three fixed settlements and the Métis intermarried and moved between [the] settlements over time” (para. 36).

Given its finding with respect to the Crown’s first submission, the Court held that it was not strictly necessary to examine the Crown’s final three submissions. However, the Court still addressed each briefly. In regards to the Crown’s second submission, the Court found that the trial judge erred in finding that a “geographically wide, loosely affiliated group of people of mixed ancestry” constituted the definition of community found in *Powley*. Again, *Powley* was distinguished on the basis that it entailed “a group with a distinctive, collective identity, living together in the same geographic area and sharing a common way of life” (para. 48).

With respect to the Crown’s third submission, the Court found that there was not evidence of sufficient continuity between the historic community and a contemporary Métis community in the relevant area (para. 49). To meet this onus, the Court held that “a claimant must proffer evidence demonstrating a sufficient continuity of practice, custom and tradition with the specific identified historic

community” (para. 50). The Court further held that the trial judge erred by concentrating on the community itself, rather than the practices of its members (para. 51).

Finally, in relation to the Crown’s last submission, the Court accepted that Mr. Willison was Métis but found that there was no evidence to support a community in the Falkland area with which he could connect (para. 57).

In its disposition, the Court in *obiter* also addressed a submission from one of the Intervenors, the Okanagan Nation Alliance (“ONA”), in passing. The ONA had requested that the Court allow the appeal and have the matter remitted to trial for evidence on the position of the ONA on hunting rights in the area. The Court observed that a first instance trial of a person, claiming to be Métis, for the offence of hunting out of season was not the place for other interest groups to have status to intervene (para. 61). Where a group such as the ONA possessed information relevant to whether the accused person had a s. 35 constitutional right, it would fall upon the Crown to call that evidence (para. 61). The Court further added that a finding that an individual was exercising a Métis right did not have the same impact as a finding of aboriginal title, which might attract submissions from interested parties (para. 63).

In summary, as opposed to returning the case to trial, the Court substituted Mr. Willison’s acquittal for a conviction and remitted the case to the trial court for sentencing (para. 64).

## Conclusion

This decision demonstrates that positive evidence relating to the test set out in *Powley* is necessary for a finding of an aboriginal right to hunt. Firstly, in regards to proving the existence of a historic Métis community, it is necessary to demonstrate a sizeable group of people in a geographic area over a number

of generations. Secondly, with respect to proving a modern Métis community, a court will require more than a loose affiliation to the land by a small number of individuals. Instead, this case shows that it is necessary to adduce evidence of “a group with a distinctive, collective identity, living together in the same geographic area and sharing a common way of life”. Thirdly, a court will not simply accept the existence of a continuity of practice, custom and tradition without positive evidence being adduced to support it. Finally, even where a court accepts that an individual is Métis, that individual must still be

able to trace his or her connection back to the relevant Métis community (if any).

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