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The Territorial Basis of Métis Hunting Rights

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Case commented on:

R v Hirsekorn, [2013 ABCA 242](#).

There is something special about the Cypress Hills area of southeast Alberta and southwest Saskatchewan. I remember my first visit to this beautiful area some twenty years ago and although I have not been back more than a handful of times since, the region still resonates vividly in my memory of landscapes and seascapes. The special nature of this region was also recognized by the aboriginal peoples of the plains long before colonial settlement although it was clearly contested territory as between Blackfoot peoples to the west and Cree peoples to the east. Indeed, as the record in this case amply demonstrates, the Cypress Hills was a place for visits and for forays but not a place to stay for a long time. And if this was true for the Blackfoot and Cree it was even more so for the Métis who could not safely stay in the area before the North West Mounted Police established a presence there in 1874.

It is therefore perhaps particularly appropriate that the Cypress Hills serves as the canvass upon which the Court of Appeal, in a reserved judgement authored by Justice Marina Paperny (Justices Bruce McDonald and Alan Macleod concurring), has established the criteria for considering the legal basis of Métis hunting rights in the province and in particular the necessary connection to territory that Métis must be able to establish as part of the foundation of such a right.

Garry Hirsekorn was charged with hunting wildlife (a mule deer) outside an open season and being in possession of wildlife without a valid wildlife permit contrary to sections 25(1) and 55(1) of the *Wildlife Act*, [RSA 2000, c. W-10](#). The alleged offence occurred near Elkwater on the western edge of the Cypress Hills. Hirsekorn defended the charge on the basis that he was a Métis person and that he was exercising an aboriginal right to hunt that was protected by section 35 of the *Constitution Act, 1982*. In doing so the defendant sought to rely on the leading case of the Supreme Court of Canada dealing with Métis rights, *R v Powley*, [2003 SCC 43](#). The trial judge ([2010 ABPC 385](#)) rejected Hirsekorn's constitutional defence principally on the basis that there was no evidence of a Métis settlement in southern Alberta before the assertion of effective European control. On appeal, Chief Justice Wittmann of the Court of Queen's Bench concluded that the test that the trial judge had established and applied (i.e. existence of a community prior to effective control) effectively rendered constitutional protection meaningless given the nomadic nature of the Métis people and their way of life (at paras 16 and 81 – all references are to the ABCA judgement). Nevertheless, Chief Justice Wittmann still concluded that Hirsekorn's constitutional defence failed on the grounds that the right to hunt for food must still be geographically connected and to establish constitutional protection for the right to hunt for food (at para 19) "it is not sufficient to show that a Métis group was in proximity to the area." In his

view in order to succeed the defendant needed to show that (at para 19) “the practice at and/or around that site was integral to the distinctive culture of the Métis.” Wittmann CJ concluded (at para 20) that the evidence did not show this degree of connection since “the Cypress Hills area did not become a favoured wintering location for the Métis until after the arrival of the North West Mounted Police brought a 'measure of safety and security to the area'.”

The issues on appeal (at para 51) were: (1) the characterization of the right, (2) the historic rights bearing community, (3) the relevant time frame, and (4) whether the practice is integral to the distinctive culture of the plains Métis.

The characterization of the right

At trial the defendant had tried to characterize the right as the right to hunt on the plains. All three levels of court rejected this characterization as being too broad. Chief Justice Wittmann preferred to characterize the right as "the right to hunt for food in the environs of the Cypress Hills". The Court of Appeal agreed with this assessment (at para 56), noting that the authorities supported the view that "land based aboriginal rights, like hunting and fishing, should be described with some degree of geographical specificity. They are not abstract rights that are exercisable anywhere: *Adams* at para 30; *R v Sappier*; *R v Gray*, [2006 SCC 54](#) at paras 50- 51; *Mitchell v Minister of National Revenue*, [2001 SCC 33](#) at para 56-59."

The historic rights bearing community

The appellant / defendant preferred to characterize the historic rights bearing community "as the Métis Nation or the Métis of the Northwest". While all parties seemingly agreed that it was inappropriate to define the rights bearing community in terms of a discrete settlement (at paras 54 and 61 - 62) and that the community might be defined on a regional basis, the Court found it both not possible and not necessary to reach a determination as to the nature of the regional community (at paras 63 - 64) in this case.

The relevant time frame

The relevant time frame for establishing that a practice deserves constitutional protection varies depending on the nature of the claim for which constitutional protection is sought. Thus the relevant date for the purposes of a non-Métis aboriginal rights claim is the time of contact (*R v Van der Peet*, [\[1996\] 2 SCR 507](#)); the relevant date for an aboriginal title claim is the (likely later) date of the acquisition of sovereignty, or at least the date at which other states cease to contest the Crown's claims to sovereignty (*Delgamuukw v British Columbia*, [\[1997\] 3 SCR 1010](#)), and the relevant date for establishing a Métis rights claim is the period after contact and before the region comes under the effective control of European laws and customs (*R v Powley*, *supra*). In the present context the Court concluded (at para 69) that there was no error in the trial judge's finding that “effective control of European laws and customs' occurred upon, or shortly after, the arrival of the North West Mounted Police in late 1874.”

Whether the practice is integral to the distinctive culture of the plains Métis?

There can be no doubt that hunting, and particularly hunting for buffalo, was integral to the distinctive culture of the plains Métis (at para 73), but it was still important to connect this practice to a particular geographical location (at para 85):

I agree generally with the appeal judge's conclusion that the authorities mandate the incorporation of a geographical element into the test for establishing a constitutional aboriginal right, at least with respect to a land-based right like the right to hunt. Such rights should not be granted "at large", and are not exercisable anywhere.

In developing and applying this test however Justice Paperny noted that it was important to be cognizant of the aboriginal perspective. This led her to prefer a "territorial" rather than a "tract" approach to establishing the necessary connection. She ultimately formulated the relevant test as follows (at para 95):

... did the historic Métis community include the disputed area within its ancestral lands or traditional hunting territory? In other words, did they frequent the area for the purpose of carrying out a practice that was integral to their traditional way of life? That threshold, in my view, better captures the territorial nature of the practices and traditions of a nomadic people than the concept of a "consistent and frequent pattern of usage" on a specific piece of land.

Justice Paperny also offered a non-exhaustive list of factors that might be considered in making a determination as to whether a geographic area is within a group's traditional territory (at para. 97):

.... whether the area is reasonably capable of definition; the frequency with which the community traveled into or used the area; the temporal duration of the presence; the number of people who lived on, used, or traveled through the area; the ability of the community to use the area free of challenge from other groups; and whether the area is subject to competing claims by other aboriginal groups. The requisite intensity and duration of use, and the relative weight to be placed on various factors, will vary from case to case.

Applying this test and these factors to the evidence the Court of Appeal still concluded (at para. 98) that the appellant / defendant fell short of meeting this lower threshold (i.e. a threshold lower than that established both at trial and by Chief Justice Wittmann.) In particular (at para 104) "the evidence here shows that the Métis did not travel to the Cypress Hills much, if at all, until shortly before the North West Mounted Police arrived, at least in part because it was a dangerous area. Whatever the extent of their use of that area of land, it was not of long duration." In sum (at para 105):

The evidence before the trial judge showed that there was no real Métis presence in the Cypress Hills area prior to 1870; southern Alberta was not, at that time, part of the traditional territory of the Métis. With the retreating of the buffalo herds in the 1870s came attempts to move into the area, some thwarted and others more successful. At most, one could characterize these forays as the beginning of the Métis asserting a presence in the region, but they fall short of establishing the region as part of the Métis traditional territory. Shortly thereafter, the North West Mounted Police arrived and the area was opened up to the Métis.

Commentary

This decision is important to the Métis community in Alberta and across the prairies but it is also important for First Nations (interveners in the case included the Blood Tribe and Siksika Nation, both Treaty 7 First Nations) and indeed all Albertans. I think that it is a sensitive judgement that balances the need for some connection between the practice and the right and a particular geography, without demanding an unattainable degree of specificity. The decision also recognizes that logically the territorial connection test should be less demanding for a non-exclusive rights claim than for an exclusive title claim. I think that the judgment also recognizes that while it may be necessary in some cases to adjust tests for recognizing the aboriginal rights of Métis peoples (e.g. an adjustment to the critical date) it also recognizes that where there is no logical need to adopt a distinct test then the courts should strive to maintain a level of consistency in the treatment of the different communities. In this case the Court adapts the territorial approach of the non-Métis cases (especially *R v Côté*, [1996] 3 SCR 139 and *R v Adams*, [1996] 3 SCR 101) to the distinct situation of the Métis. In doing so the Court relaxes the more demanding tests used by the lower courts and went, I think, about as far as it could without abandoning the need for some sort of grounded geographical nexus between the right and particular territory. The one puzzle for me is why the Court chose to address the issue of geographical nexus under the heading of "integral to the distinctive culture". I think that it might have been better to address this issue as a discrete matter; it seems very forced to deal with geography as part of an integral to distinctive culture analysis.

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