

# R. v. Powley (2003) - Métis Rights

The Supreme Court of Canada's 2003 decision in [R. v. Powley](#) is significant because it provided the legal test for determining the aboriginal rights of the Métis people. Section 35 of the *Constitution Act, 1982* recognizes and affirms the aboriginal rights of the Indian, Inuit, and Métis peoples of Canada. The Court had already established the test for aboriginal rights in the 1996 decision in [R. v. Van der Peet](#), but the test needed to be adjusted to fit the distinct origins of Métis people.

The term "Métis" has a broad meaning that encompasses any Canadian of mixed aboriginal and European ancestry, but for the purposes of section 35 "Métis" has a much narrower definition. In addition to mixed ancestry, it includes a recognizable group identity, customs and way of life.<sup>[1]</sup> Not every individual with "mixed blood" may claim rights under section 35. A Métis person who invokes section 35 rights must establish that he or she belongs to a community "with a distinct collective identity, living together in the same geographic area and sharing a common way of life."<sup>[2]</sup> Steve Powley and Roddy Powley were members of the Métis community of Sault Ste. Marie, Ontario. In 1993, they shot and killed a moose without the required hunting permit. They tagged the moose with a homemade tag which included their names and the time, date and location of the kill. The tag also said that the animal was killed as food for winter.<sup>[3]</sup> They were charged for hunting without a licence. They took the matter to court claiming that the hunting regulations denied their aboriginal right as Métis to hunt for food. At all three levels of court, this aboriginal right was recognized and affirmed.<sup>[4]</sup> The Supreme Court's decision sets out the modified *Van der Peet* test, which is now established as the *Powley* test. **The Powley Test** The first step in determining if an asserted right is a Métis right under section 35 is to characterize the right. What is being claimed must be clearly identified. In this case it is not the right to hunt moose in general. Rather, it is the right to hunt for food in a very specific area.<sup>[5]</sup> The second step is to identify the historic rights-bearing community. A court must look to historical records, such as records of the Hudson's Bay Company, as evidence of a historical Métis community.<sup>[6]</sup> In addition to proof of a historic community, there must be "some degree of continuity and stability in order to support a site-specific aboriginal rights claim."<sup>[7]</sup> The third step is to identify the contemporary rights-bearing community. There must be some continuity between the historical community and the contemporary community that is claiming rights. In this case, there was a period of "invisibility" of the Métis community in and around Sault Ste. Marie. In the mid-nineteenth century there was under-reporting of the Métis population in censuses for various reasons. For instance, negative public opinion of Métis people after the Red River Rebellion compelled many Métis to not identify as such. The Court concluded that that the Métis community was continuous even though it had periods when it lacked visibility.<sup>[8]</sup> The fourth step is to verify that the claimant is a member of the relevant contemporary community. Many Métis communities are not formally organized, so is more difficult to ascertain a person's membership in a Métis community than in an Indian band. Therefore, the Court considered a case-by-case analysis more useful than attempting to establish as comprehensive definition of who has

Métis rights under section 35.<sup>[9]</sup> The Court identified three factors which indicate Métis identity. There must be self-identification as Métis; it cannot be an identity that the individual has recently adopted for the sake of convenience.<sup>[10]</sup> There must be evidence of an ancestral connection to a historic Métis community; no minimum “blood quantum” is required.<sup>[11]</sup> The claimant must also demonstrate acceptance from the modern Métis community.<sup>[12]</sup> The fifth step is to identify the relevant time frame for the origin of customs and practices that will be protected as rights. The fundamental difference between the *Van der Peet* test for aboriginal rights in general and the *Powley* test for Métis rights is the relevant time frame. Indian rights extend from practices that originated prior to European contact. This time frame makes no sense for Métis rights, since Métis ancestry, by definition, includes European ancestry. Thus, the test for Métis rights is “post-contact but pre-control.”<sup>[13]</sup> A Métis right protected by section 35 must be rooted in practices before European laws and customs effectively governed the community. The sixth step is to determine whether the practice is integral to the claimants’ distinctive culture. In this case, the Court was satisfied with evidence that hunting and fishing for subsistence is a “key feature” of the Métis community and “integral to the Métis way of life.”<sup>[14]</sup> The seventh step is to establish continuity between the historic practice and the contemporary right asserted. There may be some evolution in the ways an aboriginal custom is carried out, but so long as it is there is a connection between the historic activity and its modern equivalent, it will be protected.<sup>[15]</sup> The eighth step is to determine whether the right was extinguished.<sup>[16]</sup> Treaties between aboriginal groups and the Canadian government may possibly extinguish a traditional right. No such treaty applied in this case. If there is a right, the ninth step is to determine whether there is an infringement.<sup>[17]</sup> Because Ontario did not recognize any Métis right to hunt food, their right to do so was infringed. The tenth and final step is to determine whether the infringement is justified.<sup>[18]</sup> While it may be possible to present compelling reasons, such as conservation, to limit the right to hunt for food, the government failed to present compelling evidence of any such justification.<sup>[19]</sup>

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<sup>[1]</sup> *R v Powley*, [2003] 2 S.C.R. 2007, 2003 SCC 43 at para 10. <sup>[2]</sup> *Ibid* at para 12. <sup>[3]</sup> *Ibid* at para 4. <sup>[4]</sup> *Ibid* at para 7. <sup>[5]</sup> *Ibid* at paras 19-20. <sup>[6]</sup> *Ibid* at para 21. <sup>[7]</sup> *Ibid* at para 23. <sup>[8]</sup> *Ibid* at paras 24-28. <sup>[9]</sup> *Ibid* at paras 29-30. <sup>[10]</sup> *Ibid* at para 31. <sup>[11]</sup> *Ibid* at para 32. <sup>[12]</sup> *Ibid* at para 33. <sup>[13]</sup> *Ibid* at para 37. <sup>[14]</sup> *Ibid* at paras 41-44. <sup>[15]</sup> *Ibid* at para 45. <sup>[16]</sup> *Ibid* at para 46. <sup>[17]</sup> *Ibid* at para 47. <sup>[18]</sup> *Ibid* at para 48. <sup>[19]</sup> *Ibid*.