

Ontario Judgments

Ontario Court of Justice

Gore Bay, Ontario

D. Hayden J.P.

Oral judgment: February 9, 2006.

Information No. 05-243

[2006] O.J. No. 1165

Between Ministry of Natural Resources, and Brent Guay

(22 paras.)

Case Summary

Charges: Section 6(1)(a) Fish and Wildlife Conservation Act - Unlawfully Hunt Moose

Counsel

B. Wilkie, Agent for MNR Prosecutor Nicholas Adamson

F. Heath, Counsel for Brent Guay

REASONS FOR DECISION

D. HAYDEN J.P. (orally)

1 Mr. Brent Guay was charged on the 7th of October 2003. Actually the charge was sworn in 2005 March, but Mr. - I think it was March '05. On the 7th of October 2003 it was alleged that at Merritt Township, Mr. Guay did unlawfully hunt moose without a licence contrary to the *Fish and Wildlife Conservation Act* Section 6(1)(a).

2 Evidence at trial on January 17th, 2006 revealed that Mr. Guay had in deed been hunting for moose. Mr. Guay had no game at the time that he encountered Conservation Officer Turcott. He stated to the officer that he hadn't been successful that day. Mr. Guay was wearing hunter orange clothing and he possessed two firearms of appropriate calibre for the wildlife that he intended to harvest. He also had told the officer that day that he was

looking for small game. He readily admitted to the officer when he encountered Conservation officer Turcott on Panage Lake Road in Nairn Township, that he had been at his hunt camp and that he was hunting for moose and the small game.

3 Now Mr. Guay did not have a hunting licence. He instead presented his Ontario Métis Aboriginal Association card and told the officer that he didn't believe that he needed a hunting licence because he is Métis. The court is satisfied based on the evidence that Mr. Guay was hunting for moose and he didn't have a licence that day.

4 Mr. Guay is asserting a constitutional right to hunt without a licence. The *Constitution Act 1982* Section 35 states that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Subsection two states that: "In this act aboriginal peoples of Canada includes the Indian, Inuit and Métis people of Canada."

5 Mr. Guay established through his evidence and that given by his brother, Albert and his father, Edward that his great great grandfather Abbe Aube (ph) was of MicMac decent from New Brunswick. There was no verified genealogy presented by an expert witness, however this is the oral history that the family had gathered.

6 Abbe Aube (ph) had a daughter who married Mr. Guay's great grandfather Guay. Mr. Guay's grandfather was French and he moved to Espanola. To the recollection of the family members and what they had heard through the generations, he moved to Espanola in the late 1800's. It was Mr. Guay's opinion or recollection or knowledge that they came to Espanola mainly for logging and paper, although they exercised their hunting rights at that time as well.

7 There was no oral history provided of his mother's side of the family and there was actually no evidence of any connection of his mother's side of the family to Espanola. Mr. Guay himself learned through the years some uniquely Métis customs from both his mother's side of the family and his father's side of the family. He has extended family in and around Espanola. He is a member of the Ontario Métis Aboriginal Association. He attends Blue Grass Jamborees with a lot of his relatives, although he did say that the Blue Grass Jamborees were not restricted to Métis people or the Métis culture.

8 Growing up Mr. Guay knew that he was Métis but because of the social climate at the time, didn't tell anybody about his Métis status until the 1990's. Mr. Guay established through evidence of Luke Lacroix, an expert in genealogy, that his great great great grandmother was, as Mr. Lacroix put it, an Indian lady, Catherine McClaren who married Jean Baptiste Bernard and he was an Acadian man and therefore the Métis decent. Catherine McClaren was apparently on the rolls in Eastern Ontario, Pontiac Township.

9 That was the evidence that the court considered in Mr. Guay's trial. The court finds based on the evidence that although Mr. Guay established that he's of Métis decent and he does practice various Métis traditions, he hasn't established on the balance of probabilities a Métis constitutional right to hunt without a licence. My reasons for this finding are based mostly on *R. v. Powley* and then a little bit on the other two authorities that were presented to the court.

10 Now *R. v. Powley*, [\[2003\] 2 S.C.R. 207](#) is the binding authority when it comes to Métis hunting rights issues. The *Powley* test that's outlined in that authority contains ten levels or steps or mini tests that must be passed in order for a person to establish that they have a Métis constitutional right to hunt.

11 I found it unnecessary to go through all ten in this decision, however I did go through the first five. As I've already stated, I may be repeating myself in places because I didn't have time to fine tune my decision in this area, so just bare with me if I do sound a little repetitive.

12 Number one of the *Powley* test states that: "Aboriginal hunting rights, including Métis rights, are contextual and

site-specific." The right being claimed by Mr. Guay is the right to hunt for food in the area of Espanola, Merritt Township and then there was another little place there, I think it was Black Creek.

13 This right to hunt according to *Powley* is based on the existence of a historic rights bearing community and then how the present day community is associated with or stemmed from the rights bearing community. So number two, "The Historic Rights Bearing Community." This court can't find based on the evidence, any historic community of Métis in the area of Espanola, that being Black Creek or Merritt Township. The only evidence of Métis population in Espanola in that area was that Mr. Guay's ancestors settled there in the late 1800's. There was no evidence from an expert or otherwise that they joined a community that had predated European control of the Espanola area. The court finds that the European control of the Espanola area would have been around the same time as that found in *Powley* and therefore around or just before the 1850's based on the finding in *Powley*. There was no indication that there were any Métis settlements in and around Espanola in the 1850's.

14 Now the *Powley* decision interestingly refers to work done by Dr. A.J. Ray, citing that the settlement of Sault Ste. Marie was "One of the oldest and most important Métis settlements in the Upper Lakes area." It fails to identify Espanola as being perhaps one of the other Métis settlements in the Upper Great Lakes area. So the court can't really find that Espanola had any relationship with Sault Ste. Marie or was settled as a Métis settlement before 1850.

15 Now, number three in the *Powley* test was the "Identification of the Contemporary Rights Bearing Community." The court, in *Powley* stated that aboriginal rights are communal rights and they are only exercised by virtue of an individual's ancestrally based membership in the present community. The defence made submissions in the case before the court, Mr. Guay's case, that the word community should be interpreted in a more broad sense. For example, and these are my words, that the Sault Ste. Marie area community could also be community to Mr. Guay. The court finds that that is not possible in the circumstances of this case. Espanola is too geographically distant from Sault Ste. Marie for Mr. Guay to be kind of lumped into the Sault Ste. Marie community.

16 In citing that possibility from defence, defence presented two different cases, *R. v. Laviolette* and *R. v. Willison*. *R. v. Laviolette* was [\[2005\] S.J. No. 454](#). In that case, paragraph twenty-seven stated:

"The evidence showed there are substantial and continuing family connections between the Métis living in the settlement of Green Lake and those living in the settlement at Meadow Lake."

17 Therefore the court found out of that, that both settlements were part of one community. I can't make a same or the similar finding because this court has no evidence that the Métis that may have been living around Espanola went back and forth between families and had ancestral connections to the Métis that had been established in Sault Ste. Marie prior to the 1850's.

18 Again in *R. v. Willison*, [\[2005\] B.C.J. No. 924](#), the accused deduced expert evidence to support his assertion that Métis people had a small historic presence in the area in which he was claiming a constitutional right to hunt, which was outside of his home area. There's no such evidence presented in *R. v. Guay*.

19 Okay. Now to talk a little bit more about the contemporary rights bearing community; Mr. Guay as I've stated has always known he was Métis He wasn't able to admit it publicly until the 1990's and that seems to be a theme that comes out in Métis cases. That the heritage or the identities of Métis people in Métis communities are somewhat buried in the early 1900's until about 1990 or so.

20 That leads into number four of the *Powley* decision: "Verification of the Claimant's Membership in the Relevant Contemporary Community." In paragraph thirty-one in *Powley* it states that the claimant must self-identify. Well Mr. Guay certainly self-identifies as a Métis person. He did so to the officer when he met the officer on Penage Lake road. He attends OMAA meetings. He joined the OMAA and he also attends some social functions and has established through his evidence that there is evidence of a somewhat limited and developing contemporary

community in Espanola. The claimant must present evidence of ancestral connection to a historic Métis community. Mr. Guay has presented evidence of ancestral connections to Métis but as I've said I haven't been able to find that there is a historic Métis community in Espanola. So, I'm unable to make a finding that Mr. Guay actually has an ancestral connection to a historic Métis community that dates back to 1850 in Espanola. Number three, the claimant must demonstrate that he is accepted by the modern community. There was no evidence presented of otherwise. It seems that in the developing contemporary community in and around the Espanola area, Mr. Guay belongs to a Political Métis association or organization. He also belongs to and is a member of a group of extended family and others who share leisure activities that could be considered somewhat uniquely Métis oriented.

21 Finally, number five, "Identification of a Relevant Time Frame." Here I am repeating myself again. There is no evidence that Mr. Guay's ancestors joined a Métis community in Espanola that pre-dated the imposition of European laws and customs in the area. *Powley*, paragraph forty, states that the period that we are dealing with is just prior to the 1850. It is the appropriate date for finding effective European control in the Upper Great Lakes area.

22 Therefore, based on the findings before the court and the fact that I have already identified that Mr. Guay has not established a constitutionally based Métis right to hunt for food that would be infringed without justification by the Ontario Hunting Regulations, the court finds Mr. Guay guilty of hunting without a licence. A conviction is registered. Mr. Guay requires a hunting licence in order to hunt in the Espanola area. That completes my decision.