Ontario (Natural Resources) v. Blais, [2015] 4 C.N.L.R. 282

Canadian Native Law Reporter

Ontario Court of Justice

Kwolek J.

March 11, 2015.

Dockets: Sault Ste. Marie 0213/08, 0214/08, 0216/08, 0217/08,

0218/08, 0267/09

[2015] 4 C.N.L.R. 282

Her Majesty the Queen as represented by the Ontario Ministry of Natural Resources (Respondent) and Michel Blais, Matthew Blais and Tracy Blais (Appellants)

Case Summary

Asserting Métis Aboriginal rights to log commercially, the appellants appealed from convictions for unlawfully harvesting forest resources in a Crown forest without the authority of a forest resource license. MB had logged in the Algoma Forest on three occasions between December 2007 and January 2009, and his son and daughter were convicted of logging with him on one occasion. MB was also convicted of failing to comply with a stop work order.

On consent, just before the release of the Justice of the Peace's decision, MB filed a genealogy that confirmed his Aboriginal heritage. His wife had recently been registered as a member of the Sagamok First Nation. MB moved to the Sault Ste. Marie area as a child with his father. MB and his children considered themselves Métis. Evidence led at trial showed that MB belonged to the Métis Nation of Ontario and had belonged to other Métis organizations. He lived a Métis lifestyle, as did his children, and attended Métis dances and community hunts. In 2006, the Historic Sault Ste. Marie Métis Council considered and supported his request for adoption by the local council. The charges against the appellants followed several years of negotiations between the Ministry of Natural Resources, a forestry company and a local Métis organization representing Métis loggers in the area regarding logging opportunities.

The area near Sault Ste. Marie where the offences took place, the appellants alleged, were lands that the Batchewana First Nation (BFN) claims as treaty lands. Members of the BFN also face similar logging-related charges. Those charges were laid at about the same time as the charges against the Blais family, but they had not yet progressed to trial. In a pre-trial application, the appellants asked for an adjournment of the trial so that the BFN proceedings (*R. v. Sayers*), in which constitutional and Aboriginal rights issues were also raised, could be decided first. That application was denied. An application for joinder by one of the defendants in the BFN proceedings was denied, as was an application by the BFN to intervene in the appellants' case.

The appellants admitted the facts that constituted the essential elements of the offences. They appealed from the decision denying the stay application and from their convictions and sentences. They sought an adjournment of the appeal until the *Sayers* case was heard and decided; an order for a new trial; an order that the trial take place after the *Sayers* trial; and that the sentence be set aside and sent back to the trial court to hear evidence and further submissions with respect to sentence.

The court considered the standard of review; whether the accused were members of the historical Sault Ste. Marie Métis community within the definition set out in *R. v. Powley*, *[2003] 4 C.N.L.R. 321* (S.C.C.); whether that community had a constitutionally protected historic Métis right to commercially harvest timber in the Algoma Forest; whether the decision should have awaited the decision in the Sayers case; and whether, if the lands were

treaty lands, the *Crown Forest Sustainability Act* applied to the lands. The court also considered whether there was an obligation on the Crown to provide the appellants with reasonable logging opportunities outside the section 35 analysis.

Held: Appeals allowed in part: appeals from convictions dismissed; appeals from sentences allowed; sentences set aside and further submissions invited on the fitness of the sentences and the jurisdiction of the court to remit the issue to the Justice of the Peace.

1. The Justice of the Peace erred in law in finding that MB was not a member of the Sault Ste. Marie Métis community. The Supreme Court in *R. v. Powley* did not purport to set down a comprehensive definition as to who is Métis, but held that membership must be determined on a case by case basis. Although MB did not have a blood tie to the historical Sault Ste. Marie Métis community, based on the peculiar and unique circumstances in this case and the evidence led at trial, the court found that the link could be established "by other means". It was not disputed that all three Blais family members identified as members of the Sault Ste. Marie Métis community. They practised a Métis lifestyle including fishing, hunting, trapping and gathering resources from the land and were involved in the local Sault Ste. Marie Métis community. Nor was it disputed that all three were of mixed European and First Nation ancestry, and that Sault Ste. Marie was the only Métis community that they identified with. MB and his family had been welcomed and accepted by the local Métis community members. MB's acceptance was evidenced by approval at a meeting of the Sault Ste. Marie Métis Historic Council. All members of the community who testified at trial recognized MB and his family as members of the local Métis community. This assessment was based on community self-definition and other objectively verifiable evidence.
2. The defendants had not been able to establish that a communal Sault Ste. Marie Métis section 35 right to commercially harvest timber in the Algoma forest existed. There was simply insufficient evidence to establish that logging was an integral part of the distinctive culture of the local Métis community in Sault Ste. Marie at the time of European control, which, in this case, was the time of the Robinson Treaties of 1850. Even if the assertions in the pleadings were accepted as evidence, they were not sufficient to establish the existence of timber harvesting by the Métis community of Sault Ste. Marie as being integral to the distinctive culture of the historic community at the time of European control.
3. The court upheld the findings of the Justice of the Peace that the *Crown Forest Sustainability Act* applied to the defendants. The defendants failed to prove that they possessed site-specific Métis logging rights in the Sault Ste. Marie area, and the *Act*, a law of general application, applied. No section 35 Aboriginal right was being restricted by the legislation. The assertion that the lands where the logging took place were BFN treaty lands did not prevent the continued application of the Act.
4. The Blais family did not have standing to raise the issue of collective Aboriginal rights. The local Métis community did not officially authorize the illegal logging actions taken by the Blais family members nor was there any evidence that they assigned them authority to raise a s. 35 Aboriginal claim on behalf of the community. In these circumstances, the Blais family had not proven unique circumstances that would grant them standing to question the constitutional validity of the legislation.
5. The court was not satisfied that the defendants had proven that the lands on which they logged were part of lands claimed by the BFN. Even if these lands were, in fact, lands where BFN was claiming it held treaty land rights, the relevant provincial legislation applied to those lands. The obligation of the Crown was limited to a duty to consult and accommodate the potential interests of BFN and not the historic Sault Ste. Marie Métis community. As the Justice of the Peace found, the constitutional challenge failed.
6. Although the Crown conceded the substantial expense in raising a constitutional s. 35 argument, the *Sayers* case was not a land claim but a similar case of a prosecution based on illegal logging

pursuant to the Act. It was not a legal proceeding that could alter the Crown's ownership of land where the appellants harvested timber. Even if a land claim were being argued in another proceeding, the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*, [2014] 3 C.N.L.R. 362 (S.C.C.) indicated that provincial forestry legislation continues to apply in the area of the claim until such time as a Court makes a finding of Aboriginal title. There was not enough of an evidentiary and legal foundation led to necessitate an adjournment of this case until a decision was reached in *Sayers*. The appellants were able to make full answer and defence without waiting for *Sayers* to proceed.

7. The fact that no agreement whatsoever was reached for sharing the benefits of the forest after years of negotiations with the local Métis organization did not provide a defence to the charges in question or justify a violation of the law by the defendants. It was not the nature of this case to evaluate the complexities of the management of the Algoma Forest. The court affirmed the convictions and denied the appellants' request for a new trial.

8. The basis for remitting the issue of sentencing back to the Justice of the Peace was unclear from the appellants' factum, but the evidence appeared to point to financial difficulty faced by MB. No specific evidence was led at the trial or at the sentencing hearing that the Justice of the Peace could rely upon to determine the ability of the defendants to pay a fine. Under the circumstances, the Justice of the Peace committed an error in not further inquiring into the defendants' ability to pay a fine. The sentence appeal was granted.

9. Neither section 122 nor subsection 120(3) of the *Provincial Offences Act* directs the appeal court to remit the issue of sentence to the Justice of the Peace. The court invited further submissions on sentence and on the jurisdiction of the court.

B. Wilkie, for the prosecution.

M. Bennett, for the defendants.

* * * * * *

KWOLEK J.

SUMMARY OF CHARGES

1 This is an appeal from the decisions of Justice of the Peace James Bubba, in the Ontario Court of Justice, Provincial Offences Division, dated May 2, 2013. The appellants appealed from the decision denying their earlier request for a stay application and from the convictions and sentences. In addition, the appellants raised constitutional issues at the hearing of their appeal.

2 The Justice of the Peace found that Michel Blais on or about December 13, 2007, at Hodgins Township, District of Algoma, did unlawfully harvest forest resources in a Crown forest without the authority of a forest resource license contrary to the *Crown Forest Sustainability Act*, section 64 (1)(a). The Justice of the Peace also found Michel Blais guilty of similar charges relating to removal of forest resources on March 4, 2008 and January 21, 2009. In addition, the said Michel Blais was also found guilty that on or about March 4, 2008 and on January 21, 2009, at Hodgins Township, District of Algoma, he did fail to comply with an order made under clause 55(1)(a) , to wit: a stop work order contrary to the *Crown Forest Sustainability Act*, section 64(1)(d). Michel Blais was assessed fines of $10,000 for each count of unlawfully harvesting forest resources, and $5,000 on each count of failure to

comply with the stop orders. He was therefore assessed total fines of $40,000 plus victim fine surcharges and costs.

3 Matthew Blais was found guilty that on or about March 4, 2008 he did unlawfully harvest forest resources in a Crown forest without the authority of forest resource license contrary to the *Crown Forest Sustainability Act*, as described above and was fined the sum of $1000. Tracy Blais was found guilty of a similar offence and was also fined $1000. All parties were required to pay victim fine surcharges and costs. Matthew Blais and Tracy Blais are the adult children of the accused Michel Blais.

4 Justice Bubba rejected all constitutional issues raised by the defence and rejected a request for a stay of the proceedings.

SUMMARY OF COURT PROCEEDINGS

5 The accused brought a pretrial application to adjourn the trial. The accused appellants wished their trial to be adjourned until issues raised by the appellants were decided in parallel proceedings against four members of the Batchawana First Nation (BFN) where similar constitutional and Aboriginal rights issues were raised.

6 At various times, prior to the trial proceedings, the appellants sought to join these proceedings with the charges brought against the members of Batchawana First Nation. An application for joinder was brought by Clinton Robinson, one of the defendants in the Batchawana case, together with the three defendants in this prosecution. The application for joinder was opposed by the other charged members of the BFN and the Crown. An application to intervene in the Blais action, was brought by the Batchawana First Nation. Both applications were unsuccessful.

7 In addition, the appellants sought to adjourn this appeal until the similar issues were dealt with in the related BFN matter. A formal application to adjourn the appeal was rejected by Justice Dunn. In the Batchawana First Nation action, the MNR brought similar charges of unlawfully harvesting forest resources against BFN members on lands subject to native land claims raised by the Batchewana First Nation. In this case, the appellants claim that the lands on which they harvested timber resources are within the territory over which the Batchawana First Nation claims are rightfully theirs.

8 An earlier request to adjourn this trial until after the trial of *Sayers et al* was initially denied by Justice of the Peace Roberson, which decision was quashed on an application for mandamus by Justice Tranmer who was concerned about the Justice not addressing the issue of Mr. Blais' ability to make full answer and defence. The motion to adjourn was sent back to Justice of the Peace Roberson who found that given the circumstances in these cases requiring the Blais matters to proceed first would not impair Mr. Blais' ability to make full answer and defence.

9 The accused in these proceedings, allege that the onus was therefore placed on the appellants to establish the territorial and constitutional claims of prosecuted members of the Batchawana First Nation. Trial dates have not yet been set in the BFN prosecutions although the charges were laid at roughly the same time as the charges in this case.

10 The appellants brought an application to stay proceedings as an abuse of process and raised constitutional issues and principles particularized in the pleadings and proceedings.

11 The trial proceeded in two phases. In the first phase the Crown led evidence to prove the elements of the offences and subsequently written submissions were provided to argue the application for stay and to raise the constitutional issues.

FACTS OF THE CASE

The Offences

12 The facts that constituted the essential elements of these offences were admitted by the appellants. Michel Blais was found harvesting timber from Crown land on three occasions between December 2007 and January 2009.

13 On two of those occasions he was logging after he had received a stop work order from the Ministry of Natural Resources prohibiting him from logging on crown land. The logging occurred in Hodgins and Gaudette Townships near Searchmont. The defendants allege that the lands on which they were harvesting timber were lands that Batchawana First Nation claim are their treaty lands.

14 Matthew and Tracy Blais were logging with their father on one of those occasions.

15 Between December 7, 2007 and March 8, 2008, funds totaling $66,000 were received by Michel Blais for such timber harvested by Métis Selective Logging. Métis Selective Logging was a partnership owned by Michel Blais and his wife Louise Blais. The defendants did not seek out nor obtain the permission of BFN prior to logging the said lands.

16 These charges followed several years of negotiations between the Ministry, Clergue Forest Management Inc. and a local Metis organization representing Metis loggers in the area regarding logging opportunities in the Algoma Forest.

17 In addition, at about the same time, the BFN asserted Treaty land rights over an area of the Algoma Forest not recognized by the Crown. Logging by BFN members took place on disputed lands, located some distance away from the lands logged by the Defendants in this case, and some BFN members were charged with unlawfully harvesting forest resources in a Crown forest.

18 Prior to the formal release of the decision of Justice Bubba, on consent there was an application to reopen the case to allow Mr. Blais' genealogy to be filed. This genealogy was ultimately filed as Exhibit Number 23. That genealogy confirmed Michel Blais's Aboriginal heritage which dated back to 1659 in Acadia where his ancestor, Jean-Claude Landry was a Mi'Kmaq Indian. In addition, he is married to Louise Blais who has ties to the Sagamok First Nation located approximately 200 kilometres east of Sault Ste. Marie. During the course of these proceedings, Louise Blais applied for, and obtained, registration as a member of Sagamok First Nation.

Orders Sought on Appeal

19 In their factum, the appellants sought the following relief from this court:

1) An adjournment of the hearing of the appeal until the case of *Sayers et al* has been heard and decided;
2) In the alternative, an order for a new trial and an order that the trial take place following the trial of *Sayers et al*;
3) In the further alternative that the sentence be set aside and the matter of sentence be brought back before the trial court to hear evidence and further submissions with respect to sentence;
4) It also appears that the appellants appeal from the decision denying the stay application and from convictions and sentence.(see applicants' factum paragraphs 4, 5 and 48 and Notice of Appeal.)

Issues Raised on Appeal

20 The most logical manner in dealing with the various questions on the appeal would be to answer the following questions:

1. Standard of appellate review?
2. Were the accused, members of the historical Sault Ste. Marie Metis community, within the definition set out in the Supreme Court of Canada decision in Powley?
3. If they were members of the Metis community did there exist a constitutionally protected historical Metis right, pursuant to section 35 of the *Constitution Act*, 1982 for the Metis Community in Sault Ste. Marie to commercially harvest timber in the Algoma forest?
4. Given the expense in providing the necessary evidentiary framework for establishing whether or not there existed a historical basis for making such a claim on behalf of the Metis community, should this decision await the outcome of the *R. v. Sayers et al* decision before this court renders a decision on this appeal? Can this case be adjudicated fairly in advance of the decision in the case of *Sayers et al*?
5. If such a historical section 35 Metis right did or did not exist, did the provisions of the *Crown Forest Sustainability Act* apply to restrict the Metis rights to harvest such resources?
6. Were the lands from which the timber was harvested, Crown lands or lands claimed by the Batchawana First Nation to be their treaty lands as set out in the Huron-Robinson Treaty of 1850, and if they were in fact claimed treaty lands, was the *Crown Forest Sustainability Act* applicable to such lands?
7. Did the Crown have an obligation to deal with the appellants and provide them with reasonable logging opportunities outside of the section 35 analysis?
8. If this court upholds the convictions, should this court remit the matter of sentencing back to the Justice of the Peace who rendered the original decision, to allow for more fulsome argument on the matter of sentencing?

Issue #1 - Standard of appellate review

21 It is trite law to state that appeal courts do not rehear or retry cases. Rather it is the job of an appellate court to review for error. (see *H.L. v. Canada (Attorney General)* [2005] 1 S.C.R. 401 (SCC).

22 Questions of fact are reviewed on the basis of palpable and overriding error, while errors in law are reviewed on the basis of a "standard of correctness". A trial judge's finding of questions of mixed fact and law are entitled to deference. (see *Housen v. Nikolaisen* [2002] 2 S.C.R. 235 (SCC).)

23 Since the proceedings in the Provincial Offences Court were commenced by information, Sections 116(1) and following of the *Provincial Offences Act*, apply."

Issue #2 Were the accused, members of the historical Sault Ste. Marie Metis community, as recognized by the Supreme Court of Canada in *R. v. Powley*? [2003] 2 S.C.R. 207 [[2003] 4 C.N.L.R. 321] (SCC)

24 That determination is important to the appellants' case. If they are members of the community they are entitled to the protection of the Aboriginal rights as set out in section 35 of the *Constitution Act*, 1982. (See Tab 19, Vol. 2 of the applicants' factum). Aboriginal peoples of Canada are defined in section 35 (2) to include Indian, Inuit and Metis peoples of Canada. Section 35(1) recognizes and affirms Aboriginal and treaty rights.

25 In the trial court decision of *R. v. Powley*, [1998] O.J. No. 5310 [[1999] 1 C.N.L.R. 153], at paragraph 5, Steve Powley listed his nationality as Métis. He also claimed fishing, hunting, trapping, wild rice harvesting, and timber rights. The basis for the claim was to preserve his Aboriginal heritage and the historical right to harvest natural resources. The MNR policy at the time provided an exemption for status Indians from complying with the regulations dealing with hunting and fishing. There was no such equivalent exemption for Métis people. In that case, Steve Powley had 1/64 Aboriginal blood and his son had 1/128 Aboriginal blood.

26 Justice Vaillancourt found as a workable definition that the Métis is a person of Aboriginal ancestry; who self identifies as a Métis; and who is accepted by the Métis community as a Métis. (See paragraph 47, supra above)

27 In Justice Stephen O'Neill's decision on appeal from Justice Vaillancourt's decision in *Powley*, (see tab 1b of volume 1 of Appellant's Brief of Authorities) at paragraphs 55 and 56, Justice O'Neill stated:

> "Firstly, the report of the Royal Commission on Aboriginal Peoples, supra, stresses that ancestral links may also be non-genetic, and as deeply cherished as blood connections. Its recommended definition does not impose any blood quantum requirements, but rather requires acceptance by the relevant Métis nation on the basis of criteria and procedures that the Métis nation itself determines.
>
> Blood quantum requirements for Métis people should be rejected because they reveal little about how an individual defines his or her own identity in relation to a Métis community. Requiring proof of a genealogical tie to the original Métis inhabitants of the relevant Métis community places, in my view, too heavy a burden on Métis applicants and too easily leads to the extinguishment of Métis rights through attenuated bloodlines."

28 In the Supreme Court of Canada decision in *R. v. Powley*, *[2003] 2 S.C.R. 207*, *2003 SCC 43* [*[2003] 4 C.N.L.R. 321*], the court stated the following at paragraph 12:

> "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 comnon way of life."

29 The Supreme Court further asserted in paragraphs 30-34, that the court did not purport to set down a comprehensive definition as to who is a Metis for the purpose of asserting a claim under section 35. As a general matter in paragraph 30 , the court endorsed the guidelines proposed by Justice Vaillancourt and Justice 0'Neill. The court also stated that they would look to three broad factors as indicia of Metis identity: 1) self-identification; 2) ancestral connection; 3) community acceptance.

30 On the issue of ancestral connection, the court stated at paragraph 32:

> "We would not require a minimum "blood quantum", but we would require some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption or other means."

31 The court further stated at paragraph 34:

> "It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a section 35 right. 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."

32 Comments by the Supreme Court of Canada were obiter on this issue in Powley, as, once the Metis community in Sault Ste. Marie was established, it was not disputed that Steve Powley qualified as a member of that community by virtue of his ancestral heritage.

33 Justice of the Peace Bubba, reviewed the history and the basis of the defendant's claim for membership in the relevant contemporary Metis community. There appears to have been some confusion with respect to the ancestral claim of mixed Aboriginal heritage of Michel Blais as proof through a genealogical chart was not provided until late in the proceedings, on consent, that in fact Michel Blais did have Mi'kmaq ancentry. (See Exhibit Number 23). In fact, it appears that such exhibit was not formally entered as an exhibit until May 2, 2013, the date that he rendered his decision. At the very least it must be conceded that Michel Blais is of mixed native and European ancestry although he does not have a blood tie to the historical Sault Ste. Marie Metis Community.

34 It is also not disputed that Michel Blais moved to the Sault Ste. Marie area in 1970, at the age of ten with his father. He learned log harvesting while assisting his father. He continued to harvest lumber in various capacities until the charges were laid.

35 Michel Blais confirmed that he was a member of the Metis Nation of Ontario and previously was a member of the Ontario Metis and Aboriginal Association (OMAA).He attended meetings of the local Metis Sault Ste. Marie Historic Council from approximately 2003 or 2004.

36 Michel Blais was involved in dancing at local Metis dances, participated in several community hunts where the meat was shared with members of the community and offered his home as the gathering place for the hunts.

37 Michel Blais testified that he participated in educational programmes for students at Fort St. Joseph on St. Joseph Island wearing his Metis shirt, pants, and sash. He lived the Metis lifestyle of planting gardens, harvesting meat, trapping, and logging in the winter. The testimony at trial by Brent McHale, Roddy Powley, Paul Powley and Steven Leffler confirmed Michel Blais' participation in the communal Aboriginal hunt and his acceptance and adoption into the local Metis community.

38 At a local meeting of the Historic Sault Ste. Marie Metis Council, and by later dated June 10, 2006, the council considered Michel Blais' request for adoption by the local council and by way of motion supported "Mr. Blais' position in regards to adoption."

39 Tracy Blais, the daughter of- Michel Blais and Louise Blais traces her Aboriginal heritage through both parents. Her mother received her status card recently as a result of an interpretation change as to who would qualify as an "Indian" under the *Indian Act* but previously had been identifying as a Metis. Tracy Blais identified herself as a member of the local Sault Ste. Marie Metis community. Tracy learned to hunt, fish and trap from her father and holds an MNO (Metis Nation of Ontario) card since 2003. She holds an expired harvesting card which expired in 2004.

40 Matthew Blais testified that he learned logging through his dad and wears the Metis sash to show respect. He has always identified as a Metis with Aboriginal ancestry on both his mother's and father's side. He testified as to his activities which included hunting and trapping and harvesting logs for his residence. He holds an MNO card which says he has been a member since 2006. He does not hold a harvester's card. All family members have participated in local Metis social events.

41 With respect to Tracy and Matthew Blais' ability to be members of the Metis community, they both are of mixed ancestry, have resided in this area since birth and lead a lifestyle identified as a Metis lifestyle living off the land and participating in metis social events and appear to have been accepted as members of the local Metis community. Tracy Blais was even granted a Metis harvester's card which has now, admittedly expired. They do not have an ancestral connection to the Sault Ste. Marie Metis community except as may be traced through their parents and through their birth in the area.

42 However, based on the comments of Justice O'Neill in *Powley* and on the comments of the Supreme Court of Canada decision in *Powley* (supra), which confirms that membership must be determined on a case by case basis, I would find that all three Blais family members are members of the local Sault Ste. Marie Metis community. That membership is not based on an ancestral link to the historical Metis community in Sault Ste. Marie but on the peculiar and unique circumstances in this case. This court would also find that this adoption would be by "other means" as suggested by the Supreme Court in *R. v. Powley* (supra, paragraph 32), and as suggested by the lower court decisions of Justice Vaillancourt and Justice O'Neill in Powley. If that link can be established by "other means", surely the evidence at trial lead on behalf of the Blais' would fall into that category. In that respect, I would disagree with the findings of Justice of the Peace Bubba. I find that this decision and analysis by Justice Bubba as to whether or not these individuals are members of the Sault Ste. Marie Metis community to be a question of law and the proper standard of appellate review to be one of correctness. I find that Justice Bubba erred in law in

finding that Michel Blais was not a member of the Sault Ste. Marie Metis community relying on the lack of an ancestral link by the defendants to the community.

43 The court's finding that the Blais' are members of the Sault Ste. Marie Metis community is therefore based on the following factors:

1) It is not disputed that all three Blais family members identify as members of the Sault Ste. Marie Metis community; they practice a Metis lifestyle which includes fishing, hunting, trapping and gathering resources from the land and are involved in the local Sault Ste. Marie Metis community;

2) It is not disputed that all three Blais family members are of mixed European and First Nation ancestry; Tracy and Matthew can trace first nation roots through both of their parents -- Sagamok through their mother and Mi'gmaq through their father; Michel Blais has resided in this area since he has been ten years of age and Tracy and Matthew since birth. Sault Ste. Marie is the only Metis community that these individuals identify with. They have all received membership or citizenship cards from the Metis Nation of Ontario. Michel Blais' father met Michel Blais' mother in the Sault Ste. Marie area in 1951 and returned to this area in 1970.

3) Michel Blais and his family have been welcomed and accepted by the local Metis community members as testified by some of those members at trial. In addition, that adoption was formalised at a local meeting. Michel Blais' acceptance was evidenced by approval at a meeting of the Historic Sault Ste. Marie Metis Council as set out in a letter dated June 10, 2006. (see Exhibit Number 11). Exhibit Number 11 also recognizes that "Mr. Blais and his family have been outstanding and active citizens in our community." Michel's children would then be capable of being members of the Metis community based on their ancestry of mixed European and aboriginal heritage; their birth in this area and ties to the local community; their living the Metis way of life; their acceptance into the community by the local ancestral Sault Ste. Marie Metis community; and tracing their connection through their father who has been accepted and adopted into the community through objective and identifiable evidence (see Exhibit Number 11). All members of the community who testified at trial recognized him and his family as members of the local Metis Community.

44 I have based this decision on the Supreme Court's view in *Powley* at paragraph 29, that courts will have to ascertain Metis claims on a case by case basis. In this case, my assessment in law was based on community self-definition and other objectively verifiable evidence. On the issue of whether or not the defendants belong to the local Metis community, I disagree with the view taken by Justice of the Peace Bubba that the evidence falls far short of establishing a commitment to the Metis community. Justice of the Peace Bubba's finding that the defendant Michel Blais' motives for becoming actively involved in the community and Metis Selective Logging to further his own economic interests does not, with all due respect, detract from the evidence that lead to this court finding that he is a member of that community.

Issue #3 -Did the Metis community of Sault Ste. Marie have a historically significant right to log commercially on the said lands in the region, which attracted section 35 protection

45 In *R. v. Sparrow* [*[1990] 1 S.C.R. 1075*] [*[1990] 3 C.N.L.R. 160*] the court held that an analysis under section 35(1) had four steps:

1) was the applicant acting pursuant to an aboriginal right;

2) was the right extinguished prior to the enactment of section 35(1);

3) was that right infringed;

4) was the infringement justified.

46 According to Sparrow, when the court considers Aboriginal rights, it must consider the following principles:

1) the fiduciary duty owed by the Crown to aboriginal peoples,
2) the rejection of the frozen rights theory of aboriginal rights;
3) according to Sparrow when we consider aboriginal rights, the court should keep in mind the importance of the aboriginal perspective on those rights.

47 The test as further elaborated in the decision of *R. v. Van der Peet*, *[1996] 2 S.C.R.507* [*[1996] 4 C.N.L.R. 177*] (SCC), not only required proof of evidence of that practice, but proof that *"the practice claimed was an integral part of the distinctive culture of the local aboriginal community."*

48 The defendants have simply not been able to establish that such a communal Metis Sault Ste. Marie right existed and therefore their claim for such a site specific Aboriginal right as a defence to these charges must fail.

49 Based on the evidence at trial, I must agree with Justice Bubba that there is simply insufficient evidence to establish that logging was an integral part of the distinctive culture of the local Metis community in Sault Ste. Marie, at the time of European control, in this case being the time of the Robinson Treaties of 1850.

50 Justice Bubba examined the evidence lead in great detail. At page 32 of his reasons he concluded, based on his review of the evidence:

> "It is stated that all of the witnesses who know Blais and who are established residents in the Metis community with proven ancestral connections to the historical Metis community, the witnesses being McHale, Leffler, and Powley, none of them said one word regarding any tradition or practice of the Metis community and not one word regarding timber harvesting on a commercial scale as a tradition that met the Van der Peet test for section 35 Aboriginal rights."

51 Anne Trudel, a witness called on behalf of the defendants, when questioned about whether or not the Metis Nation of Ontario or any local Metis organization was asserting an Aboriginal right in the forest, she replied "no".

52 "Evidence" that I could find relating to the existence of an ancestral Metis right to log is set out in Exhibit Number 20. Since the document is simply a pleading, normally the allegations stated therein would have to be otherwise proven in evidence unless they are otherwise conceded by the Crown which it does not appear was done in this case. Exhibits 19 and 20, being two "Notice of Applications and Constitutional questions were filed, it appears, to assist the court in rendering a decision on the motions to stay. Exhibit 18 was a document brief that was filed in the words of Crown counsel Wilkie:

> "... not as an agreed statement of facts or anything. There's still opportunity for the Crown and the defence to make submissions with respect to the weight and relevance of the material."

53 At paragraph 14 of Exhibit 20, it appears asserted that circa 1832:

> "that the Roman Catholic French Canadians and 'mixed bloods' were providing timber for the church on the American side in return for visitations and services of the American Roman Catholic priest; ... that by 1838, certain of the French Canadians [not Metis] were cutting timber to sell it to the Americans, by permission of the British magistrate; that Shingwaukconce again disputed the attempted usurpation of his authority to then governor, Sir Francis Bond Head, and asserted ownership of the land and control of the logging;".

54 Further Exhibit Number 20, in the attached "Notice of Constitutional Question" filed on behalf of Dean Sayers et al, under historical context paragraph 6:

> "As early as 1838 protests were made ... that white people were constantly cutting and taking away large quantities of pine and other timber off their lands and selling it to the Americans."

55 Note that this last reference was to white people and not Metis or "mixed breeds".

56 Further at paragraph 7 of the same document:

> "After the 1850 Robinson Treaty, as before, the Batchawana First Nation utilized resources from its traditional territory to sustain the community by, inter alia, harvesting timber for the manufacture of canoes, construction of fish traps, fish nets, snowshoes, bark for handicrafts, building and other construction activities, and wood for firewood fuel for the many steamers that had begun to ply the Great Lakes."

57 Finally at paragraph 12, In August 1853, William H. Palmer, a resident of Sault Ste. Marie, Michigan complained to the British Indian Department that members of the Batchawana and Garden River Bands were cutting timber on the British side of the St. Mary's River and selling it to contractors for the ship canal then being built on the American side."

58 The source of these assertions are not further described and even if accepted as "evidence", at their highest they are not sufficient to establish the existence of timber harvesting on a commercial scale by the Metis community of Sault Ste. Marie as being integral to the distinctive culture of the historic community at the time of European control. If anything such assertions point to a European practice of commercial logging that was sometimes also accessed by the Aboriginal peoples.

59 I agree with Justice of the Peace Bubba's findings (See page 32 of his reasons) that based on the evidence before him:

> "... the defendants have not, on the balance of probabilities, established that the practice of timber harvest for commercial purposes was a site specific activity or practice or tradition that is integral to the distinctive culture of the Metis in the Sault Ste. Marie area, and deserving of protection under section 35 as an aboriginal right."

Issue #4 -- Did the *Crown Sustainability Act apply to restrict the Metis right to harvest timber in the Algoma Forest*

60 Given the court's findings regarding Issue #3 above, I accept as correct, Justice of the Peace Bubba's findings, in general, that the *Crown Sustainability Act*, on its face, did apply to the defendants as they failed to prove that they possessed site specific Metis logging rights in the Sault Ste. Marie area. Since the law was a law of general application, it would apply. There was no successful section 35 Aboriginal right proven which was being restricted by this legislation, and the legislation would therefor apply pursuant to section 92 paragraph 5 of the *Constitution Act*, 1867:

> 92. In each province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-
>
> 5. The management and sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

61 The evidence of Anne Trudel a witness called on behalf of the defendants also confirmed that neither the provincial nor the local Metis community, to her knowledge, were asserting a section 35 Aboriginal right in the Crown forest.

62 There was no evidentiary foundation laid for the assertion that the legislation, notably the *Crown Forest*

Sustainability Act unduly restricted integral practice or traditions that were integral to the distinctive culture of the Metis in the Sault Ste. Marie area.

63 The assertion that these lands where the logging took place were BFN Treaty lands do not prevent the continued application of the *Crown Sustainability Act* to regulate timber rights in areas where treaty lands were claimed but were not yet proven. BFN would have the right to demand consultation and accommodation with respect to timber licences granted to other parties to log on such land but this claim would not otherwise restrict the operation of the legislation as it applies to the management of the forest. *Tsihqot'in v. British Columbia*, *[2014] S.C.J. No. 44* [*[2014] 3 C.N.L.R. 362*].

64 In addition, the Crown cited the Supreme Court of Canada decision of *Moulton Contracting Ltd. v. Behn*, *[2013] S.C.J. No. 26* [*[2013] 3 C.N.L.R. 125*] for the proposition that individual members of an Aboriginal community, in this case the Blais', do not have standing to raise the issue of collective Aboriginal rights.

65 This court does not accept the view that *Moulton*, (supra) stands for the proposition that Aboriginal treaty rights can never be raised by individuals. At paragraph 33 of *Moulton*, Supreme Court Justice Lebel wrote as follows:

> "Individual members of a community may have a vested interest in the protection of these rights.[Aboriginal and Treaty Rights]. It may well be that, in appropriate circumstances, individual members can assert Aboriginal or Treaty Rights, as some of the interveners have proposed."

In *Moulton*, (supra) the Supreme Court found an abuse of process when individual band members brought an application to stop logging when they had an earlier opportunity to object to the logging licences granted.

66 In this case, the defendants initially sought to negotiate within the parameters of the terms of the Clergue licence. However, the local Metis community did not officially authorize the illegal logging actions taken by the Blais' nor is there any evidence that they assigned the Blais' authority to raise a s. 35 Aboriginal claim on behalf of the community. Relying on *Moulton Contracting Ltd. v. Behn* (supra), in the circumstances of this case, the defendants have not proven unique circumstances that would grant them standing to question the constitutional validity of the legislation.

Issue # 5 -- Were the lands on which the timber was harvested, Crown lands or treaty lands belonging to the BFN, and if they were in fact treaty lands was the *Crown Forest Sustainability Act* applicable to such lands in so far as the current defendants are concerned?

67 The parties filed an agreed statement of facts which dealt with the issue of land claims or potential land claims of the BFN. The agreed statement of facts was filed as Exhibit Number 1 in the proceedings.

68 Paragraphs 2,3, and 4 of those agreed facts reads as follows:

> "2. In the following agreed facts, all references to the Crown forest mean Crown forest as defined in the *Crown Forest Sustainability Act*. (sic) and all references to "Crown forest" herein are references to "Crown forest" so defined.
>
> 3. The Defendants assert that Hodgins Township and Gaudette Township are within the territory over which it is claimed the rights of the Batchawana First Nation, namely those lands reserved to the Batchawana First Nation by the Robinson Treaty of 1850.
>
> 4. On December 13, 2007, Michel Blais harvested trees from a Crown forest south of his property on the Silver creek Road. The harvest occurred in Hodgins Township. Trees that were cut from that location were hauled, using a skidder, to a landing on his private property."

69 I have reviewed the evidence in this case and there is very little evidence dealing with the issue of the claim that these lands were in fact BFN treaty lands. The evidence of the BFN land claim is based on calling into question the

Pennefather Treaty of 1859 which was the successor to the Superior Robinson Treaty of 1850. The Pennefather Treaty greatly reduced the lands reserved to BFN in the earlier Superior Robinson Treaty of 1850.

70 The BFN claim apparently also asserted an alleged error in the original Superior Robinson Treaty of 1850, which treaty set out distances in miles when the correct calculation, it is alleged, should have been in leagues. The bald allegation that the defendants assert that these lands are in fact BFN treaty lands, without other evidence, was insufficient to justify any such land claim existed. As stated in paragraph 16 of the factum of the Crown: "There is nothing on the face of the *R. v Sayers Notice of Constitutional Question*, and no evidence was lead at trial, suggesting the Batchawana First Nation "claim" covers the Searchmont area where the appellants were harvesting."

71 At Exhibit Number 19, Notice of Application and Constitutional Issue, paragraphs 3 and 4 it is alleged that BFN asserts its land claims extends to : "the boundary of the lands ceded by the Chiefs of Lake Superior, and inland 10 leagues [about 25 miles] throughout the whole distance ... 4.that Hodgins Township is within the territory over which the rights of the Batchawana First Nation is asserted." No evidence was led as to the distance that Hodgins Township is from the boundary of Lake Superior.

72 The evidence at trial also confirmed that the defendants did not seek out the permission of the BFN prior to logging on those lands and they did not have explicit consent of the BFN to log on the said lands. In fact, the Blais' did not have the support of the local Metis community in their decision to log in contravention of the legislation. During sentencing, it was suggested by counsel for the defendants that stumpage fees were paid by the Blais' to BFN even though at trial Michel Blais testified that no stumpage fees were paid. (see Michel Blais re-examination; Proceedings at trial pages 282 and 283)

73 However, even if the lands on which the Blais' logged in Hodgins Township were in fact on lands where BFN was claiming it held treaty land rights, that would not assist the defendants in this case. *Tsilhqot'in Nation v. British Columbia* [2014] S.C.C. 44 [*[2014] 3 C.N.L.R. 362*] dealt with the granting of timber licences by British Columbia in areas where Aboriginal title was unproven. The Supreme Court of Canada at paragraph 80 described the obligation of the Crown as follows:

> "Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest."

74 The Supreme Court further in *Tsilqot'in* described what is to happen during periods of time when title to lands and Aboriginal claims remain uncertain in paragraph 113:

> "During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land use. At this stage the Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims."

75 At paragraph 124, the Supreme Court continues:

> "The issuance of timber licences on Aboriginal title land for example -- a direct transfer of Aboriginal property rights to a third party -- will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement which must be justified in cases where it is done without Aboriginal consent."

76 The extent of the constitutional duty to consult in light of the land claims of BFN would seem to be constitutionally limited to a duty to consult and accommodate the potential interests of BFN and not the Historic Sault Ste. Marie Metis community based on the lack of such a claim being formally raised by the community.

77 Justice of the Peace Bubba dealt with the constitutional argument at great length at pages 44-54 of his Reasons

as to whether or not the *Crown Sustainability Act* would apply to the defendants. Given the finding at trial, confirmed on this appeal, that the defendants have failed to establish proof of a section 35 historical Metis logging right in the Algoma Forest, and at best, that the locations where the logging occurred were not BFN title lands but on lands that may possibly be subject to BFN land claims, and based on the comments in *Tsilhqot'in*, this court finds that the *Crown Sustainability Act* does in fact apply in the circumstances of this case to the named defendants. The constitutional claim that the legislation did not apply to the circumstances of this case was not proven on a balance of probabilities by the defendants and their defence on this basis must fail, as found by Justice of the Peace Bubba.

Issue #6 -- Given the expense in providing the necessary evidentiary framework for establishing whether or not there existed a historical basis for making such a claim on behalf of the Metis community, should this decision await the outcome of the *R. v Sayers et al* decision before this court renders a decision on this appeal?

78 The Crown in this case conceded the substantial expense in raising a constitutional section 35 argument. The only evidence relating to the expense of pursuing such a claim is somewhat tangentially set out in Exhibit 22, in the affidavit of Steven A. Whitla, paragraph 6 in which it is alleged that BFN is seeking funds of approximately $1,400,000 to pay for the defence of their prosecutions.

79 Counsel for the defendants in this case is also counsel for one of the defendants in the *Sayers et al* case, namely Clinton Robinson. If there was evidence available in that case, this court would have expected either leave being sought in this appeal to adduce such further evidence or some further information being provided to this court to justify the evidentiary basis for granting a stay in this proceeding until a decision in that case was rendered.

80 In addition, the *Sayers et al* case has not yet proceeded to trial and it is likely, if the matter does proceed to trial, that the case may very well be appealed. It is not a land claim but a similar case of a prosecution based on illegal logging pursuant to the *Crown Forest Sustainability Act*. There is no current legal proceeding that has been identified that could alter the Crown's ownership of land where the appellants harvested timber. The logging by BFN did not occur in the vicinity of the lands logged by the defendants in this case and ultimately the provincial courts do not have jurisdiction to make a binding ruling on First Nation Land claims.

81 Furthermore, even if there is a land claim being argued in another proceeding, the Supreme Court of Canada, in *Tsilhqot'in*, indicated that provincial forestry legislation continues to apply in the area of the claim until such time as a Court makes a finding of Aboriginal title. Therefore, at the relevant time that these charges were laid as against the defendants, the lands in question were subject to the provincial regulatory scheme to manage the forests. Even if subsequently it was determined that the lands in question were in fact BFN treaty lands, such a finding would not, in and of itself provide a defence for these defendants to the charges.

82 This court cannot speculate that more or better evidence could be lead that might assist the defendants. There was simply not enough of an evidentiary and legal foundation lead to necessitate an adjournment of this case. I was not convinced based on the record that evidence was available but the defendants simply lacked the sufficient resources to properly defend their case.

83 On a motion before Justice Dunn as to whether this appeal should wait for *R. v. Sayers* to proceed, Justice Dunn stated as follows:

> "This matter ought not to be adjourned into perpetuity awaiting the decision in the Batchawana case not even yet set for trial, then await to see if one side might appeal any ultimate decision and thereafter await the case to make its way through the appellate court."

84 Given the factual and constitutional arguments presented, this court agrees that the evidence has not established that this appeal should be adjourned until a decision is reached in the *Sayers et al* prosecution.

Issue #7 -- Did the Crown have an obligation to provide the Appellants with reasonable logging opportunities within the Algoma Forest?

85 It appears in *Tsilhqot'in* that if, in the section 35 analysis, it is determined that the provincial law does not infringe an Aboriginal right, the provincial law applies. In the circumstances of this case, it is clear that the initial basis for the discussions between the Historic Sault Ste. Marie Metis community and the MNR was not strictly speaking based on the establishment of a section 35 commercially based right to log. As the Crown has indicated in their factum and as accepted by Justice of the Peace Bubba, there has, to date, been no successful section 35 Aboriginal claim for commercial logging. (See *R. v. Bernard and Marshall* [2005] S.C.J. 44 [[2005] 3 C.N.L.R. 214]; *R v. Sappier and Grey* [2006] S.C.J. 54 [[2007] 1 C.N.L.R. 359]; *R. v. Francis* [2008] N.B.J. 293 (Q.B); *R. v. Castonguay* [2006] N.B.J. 183 (C.A.)). The decision of *R. v. Sappier and Grey* did, however, uphold acquittals of the accused based on their ancestral and treaty right to harvest timber for personal use.

86 The MNR did have an obligation to consult based on documentation filed as Exhibit 13 at trial. That exhibit was an excerpt from the Timber Class Environmental Assessment, Term and Condition 34 which in part reads as follows:

> "During the term of this approval, MNR District Managers shall conduct negotiations at the local level with Aboriginal peoples whose communities are situated in a management unit. in order to identify ways of achieving a more equal [sic] participation by Aboriginal peoples in the benefits provided through forest management planning. These negotiations will include but are not limited to the following matters:
>
> (a) Providing job opportunities and income associated with forest and mill operations in the vicinity of Aboriginal communities;
>
> (b) Facilitation of Aboriginal third party licence negotiations with existing licensees where opportunities exist;"

87 That obligation to work cooperatively with Aboriginal communities was also an obligation set out in clause 20.1 of the Sustainable Forest Licence approved by Order-in-Council as a term of the management agreement with Clergue Forest Management Inc. filed at Exhibit 18, Tab 2 (Clergue Forest Management Inc. was a private company, owned by certain companies with an interest in logging the forest who were delegated the responsibility to allocate forest resources and the right to log in the Algoma Forest) in these proceedings which reads as follows:

> "The Company shall work co-operatively with the Crown and local Aboriginal communities in order to identify and implement ways of achieving a more equal participation by Aboriginal communities in the benefits provided through forest management planning."

88 The two above named documents appear to provide a positive obligation on behalf of the Government to seek out and facilitate job opportunities for the Aboriginal communities in the Algoma Forest. It does not seem to be premised on any existing section 35 right for commercial logging.

89 At Exhibit 18, Tab 4 is an affidavit of Brent McHale dated July 2, 2010 which confirms the efforts of the local Metis community to develop opportunities in the local forest resources industry. At paragraph 3 of that affidavit Brent McHale states as follows:

> "I consider sustainable logging by Metis loggers to be vital to the health of the local Metis community. For that reason, the Algoma Metis Loggers Co-Op was incorporated as Algoma Metis Loggers Inc. [AMLI] with myself as president and CEO."

90 Attached to that letter was some correspondence between Mr. McHale and Trevor Woods of the Ministry of Natural resources. In his letter dated January 18, 2005 Brent McHale confirms his support of Algoma Metis Loggers Co-Op indicating that on November 8, 2004 "the council once again voted unanimously to support the logger's

endeavors" and that the Soo council offered Mr. Blais office staff and office space. He wrote further :

> "The creation of jobs is something the Metis people truly need at this point in time. Many of our people, loggers included are struggling to make ends meet and are on the verge of financial disaster."

91 Attached as Exhibit "B" to Brent McHale's affidavit dated July 2, 2010 was a letter to him dated November 18, 2005 from Trevor Woods acknowledging delay but still agreeing to proceed with discussions.

92 Not all of the correspondence between McHale and Woods was produced at trial. Some of the letters filed refer to other correspondence that was not produced at trial. Brent McHale spoke of a binder of correspondence between himself and Ministry officials but minimal correspondence was presented to the court. In his reasons, Justice of the Peace Bubba makes reference to this lack of information. Brent McHale did, however, testify at great length about the negotiations with the Ministry and with Clergue. He described frustration with the process which did not result in any licences being granted to the Metis group of loggers that he was supporting.

93 It is within that context and frustration with the government process that Brent McHale sent a letter, this time on Algoma Metis Loggers Inc. letterhead to Trevor Woods indicating that a press conference would be held as well as a media release for November 30, 2005. (see Exhibit 18, Tab 4, Exhibit C).

94 An article appeared in the local newspaper, the Sault Star on November 24, 2006, where McHale seemed to be advocating a protest logging event. That article, which of course has little evidentiary value, but does provide a historical context relating to these charges, in part, reads as follows:

> "Early the next month the Metis group will ask its community for the go-ahead to stage a small harvesting protest on Crown land, he said. "If it means some of our people being charged, then so be it," said McHale. ...
>
> "The illegal harvest would be a public statement rather than a move to "cut the forest down," but harvesting on an ongoing basis could be considered if no other solution is reached."...
>
> "McHale a provincial councillor for this area with the Metis Nation of Ontario, said the protest is a last resort." The reason that aboriginal people have to go the extra mile, like in Oka or Ipperwash or Caledonia, is because the government does not listen to them... " (see Exhibit 18, Tab 4, Exhibit D to affidavit of Brent McHale dated the 2nd day of July 2010).

95 The initial charges against Michel Blais related to illegal harvesting on Crown land that occurred on December 13, 2007 approximately one year after this article appeared in the Sault Star.

96 Brent McHale's testimony at trial similarly described at great length the difficulty in negotiating an agreement with his loggers on behalf of the local Metis community, in accordance with the government's own directive and in accordance with the condition set out in the Clergue licence.

97 In cross-examination at page 140, he confirmed that he was not making a claim for an Aboriginal or Metis right to log but :

> "... we are Metis people looking for an opportunity. ... I do not recall saying that we have any aboriginal right and forcing our will on them, no."

98 In addition, at page 138 and 139, in cross-examination, it was admitted that from time to time offers were made of certain wood available to Algoma Metis Loggers but according to McHale these offers were not economically feasible.

99 The issue of whether or not the negotiations with McHale on behalf of the loggers and the Metis community of the Sault Ste. Marie area were done in good faith or in accordance with the "honour of the Crown" was not the

focus of the hearing as to the guilt or innocence of the accused. It was a discussion which could more properly be argued as a circumstance relating to the appropriate disposition of the charges or in another forum.

100 Commencing at page 33 of his reasons, Justice of the Peace Bubba analysed the extent of the Crown's duty to consult and negotiate with the local Metis community regarding opportunities in the local forest industry. He cited the applicable provisions of the *Crown Forest Sustainability Act* and the *Ontario Timber Class Environmental Condition 34.*

101 Since this court has found that the Blais' are in fact members of the local Metis community, I must disagree with Justice of the Peace Bubba's conclusion that the Crown had no obligation to negotiate with the Metis organization represented by McHale and acting on behalf of Blais and potentially others. That claim does not arise from a proven section 35(1) Aboriginal right, but outside the section 35 analysis as set out in the provincial government's own documentation and legislation.

Based on the evidence lead at trial and documentation filed at trial, and recognizing that this proceeding was not focused on negotiations between Clergue, the MNR and the Metis group, this court still comes to the conclusion, on a balance of probabilities, that the Crown did not deal fairly with the Metis group spearheaded by Brent McHale and including the Blais', in accordance with their own directive to:

> "... identify and implement ways of achieving a more equal participation by Aboriginal peoples in the benefits provided through forest management planning."

102 In the evidence, there was no allegation of "bad faith dealing" on behalf of the Metis group in attempting to obtain logging opportunities. At the same time the Crown alleges that they fulfilled their obligations under the provisions of the Timber Class Environmental Assessment, condition 34, and argued in any event that this is a collateral attack and not relevant to the issue of the guilt or innocence of the Appellants. The fact that no agreement whatsoever was reached in sharing in the benefits of the forest after years of negotiations with the local Metis organization confirms there was no "equal sharing of forest resources" with the Metis Aboriginal group.

103 Such a proven lack of sharing in the benefits of logging in the forest does not provide a defence to the charges in question. The above conclusion alone would not be a justification for a violation of the law by the defendants. As the Crown argues in paragraph 34 of their factum:

> "If the local community was unhappy with the government's response there were options available to challenge the response directly. The appellants do not have standing to make that challenge and, in any event, cannot conduct a collateral attack in this proceeding."

104 *It was not the nature of this case to evaluate the complexities* of the management of the Algoma Forest either at trial or on this appeal but there was no evidence lead to indicate a problem with the availability of product in the forest. Yet, Michel Blais and the Metis group were not able to log and share in those resources. The requirement of the sharing of the benefits of the Algoma Forest with the Aboriginal peoples reflects the importance of the forest to the Aboriginal and Metis lifestyle as described by Michel Blais in his evidence. He relies totally on the forest for his survival and sustenance, whether that livelihood would be based on trapping, hunting, fishing, gathering berries and other foods or logging. His lifestyle he described as a traditional Metis lifestyle similar to the lifestyle of other Aboriginal peoples.

105 Substantial unregulated logging in the Algoma Forest could be substantially harmful to other Aboriginal related activity in the forest. The sharing of the resources of the forest is a recognition of the importance of the forest to the Aboriginal lifestyle. Sharing of forest resources also recognizes the economic situation of many of Canada's Aboriginal peoples who are living in substandard conditions and suffering from a reduced standard of living. The sharing of resources from the forest and on other traditional lands is a way of addressing that inequality.

106 There was no evidence placed before this court that any meaningful negotiations have occurred in sharing the resources of the forest after these proceedings were commenced.

107 The unfortunate effect of wilful violations of the legislation by the Blais' and subsequent prosecutions of their violations often distract the parties from their mutual obligation to negotiate in good faith. Their obligations are to continue to negotiate an equitable share of the forests in a manner that maintains the forest for future generations for the benefit of Aboriginal and non-Aboriginal communities.

Issue #8 -- If all other relief is denied should this court remit the issue of sentencing to the Justice of the Peace who sentenced at first instance.

108 In the factum filed by the appellants, there is no mention of the basis for remitting the issue of sentencing back to the Justice of the Peace who heard the initial trial. The Notice of Appeal filed by the appellants under "relief sought" simply seeks a reduction in the amount of the fines.

109 In the volume provided to me entitled: "Proceedings at Trial" once the decision was provided to counsel, the Justice of the Peace requested that counsel address the issue of penalty.

110 Michael Bennett indicated that he was agent for Matthew Blais who was not present and asked for some additional time to digest the decision (see pages 315 and 316 of Proceedings at Trial). The Reasons of Justice of the Peace Bubba are extensive and are 64 pages long.

111 Counsel for the defendants appeared to be requesting an adjournment of sentencing. Some discussion ensued and after counsel was asked to return at 2 p.m. that same day to address the issue of sentencing, Mr. Bennett counsel for the Blais' did not renew his request for an adjournment but advised at page 321:

> "Well, I understand that Mr. Wilkie and the court wish to proceed today and I will respond to Mr. Wilkie's sentencing submissions."

112 Counsel for the Crown advised that he would be seeking a substantial monetary penalty and he asked the court to address specific and general deterrence and also advised the court of the maximum penalties in the legislation for such crimes. For the charges of harvesting without a licence the maximum penalty was $100,000 and for disobeying an order, the maximum fine was $1,000,000. The total fines sought by the crown totalled $90,000 against Michel Blais and $10,000 against Matthew Blais and $5,000 against Tracy Blais.

113 Counsel for the Blais' suggested a "global sentence" of $20,000 for all the Blais'. Counsel suggested that Mr. Blais was not a thief but his actions in light of the circumstances, had an air of righteousness about them. On the issue of whether or not Mr. Blais "made a lot of money" advised : "Mr. Blais is present and can speak as to what his income has been from logging" and referred to the evidence of Mr. McHale that Mr. Blais had been scavenging for scrap metal. Counsel confirmed that he did not have income tax returns for the last few years for Mr. Blais (see pages 338 and 339).

114 Justice of the Peace Bubba after a short recess returned and gave his decision orally. He assessed fines totalling $40,000 against Michel Blais and $1,000 each against Tracy and Matthew Blais.

115 Justice of the Peace Bubba stated at page 347:

> "The defendant's financial circumstances have not been revealed to the court but the evidence has been that he has certain forest property available that he owns, that he has logging equipment and monies from the sale of those logs from the Crown forest that he sold...."

116 At page 349 and 350 Justice of the Peace Bubba continued:

> "However, I am concerned that the Court has never really been given a financial picture of Mr. Blais other than what I have already commented on in my judgment. On a matter as important as this I would have expected there to be some additional candor in terms of informing the Court of the Defendant's financial position him knowing and counsel knowing what the defendant is facing. So I am left with a situation where I have the appearance that a substantial profit was made by the defendant and conversely an individual who gave evidence that he lives off the land."

117 Limited evidence was lead at trial as to the financial circumstances of Michel Blais and his family and what was presented was vague. Brent McHale testified at trial as set out at page 129 of the volume "Proceedings at trial" relating to the financial circumstances of Michel Blais:

> "I-I seen him out collecting steel and stuff like that from around the neighbourhood to -- to make ends meet and I knew that he was in dire financial straits."

118 Michel Blais testified at trial in general terms relating to his financial situation at pages 271 and 272:

> "They [the logs] sat for a week, know what I mean, and then we had a meeting with my family, and my daughter, my son and I were struggling to make ends meet and we're -- we need to make a living. We need to make money and for us to allow those logs to sit there and end up rotting it just didn't make sense to us, know what I mean. We needed money so we had to. We were put between a rock and a hard place. ...
>
> We didn't -- we had no choice....
>
> There was a concern that logs will rot there. But there it escalated where we needed money, know what I mean. Not only we want-need to move those logs, we need money. We need to make a living.

Michel Blais further testified at page 279:

> "The -- the reason we harvested it, because the provincial government did not give us an equal opportunity. We had no choice but to go and harvest to try to make a living. Didn't matter how hard we tried, like I said it was always nothing. ... Like it was wanting to make a living, that's what it was. We want- we want to make money so we could pay our bills."

119 The evidence at trial described above appeared to point to financial difficulty faced by the defendant, Michel Blais. However, other than the vague comments made at trial there was no specific evidence led at the trial or at the sentencing hearing that the Justice of the Peace could rely upon to determine the ability of the defendants to pay a fine. The sentencing judge did have the benefit of exhibits 16 and 17 which indicated that the defendant Michel Blais received approximately $66,000 from Dec. 7, 2007 (one receipt for $5512 preceeding by several days the charge on Dec. 13, 2007) to March 9, 2008 which receipts Michel Blais admitted were for timber harvested from "traditional lands" or Crown lands as found by the court. There was no evidence as to the costs of hauling the logs or the actual profit made by the defendants.

120 An appeal against sentence is governed by s. 122 of the *Provincial Offences Act* which reads as follows:

> 122.(1) Where an appeal is taken against sentence, the court shall consider the fitness of the sentence appealed from and may upon such evidence, if any, as it thinks fit to require or receive, by order,
>
> (a) dismiss the appeal; or
>
> (b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,

and, in making any order under clause (b), the court may take into account any time spent in custody by the defendant as a result of the offence.

(2) A judgment of a court that varies a sentence has the same force and effect as if it were a sentence passed by the trial court.

121 Section 120 (3) deals with an appeal against conviction. That section reads as follows:

120.(3) Where the court dismisses an appeal under clause (1)(b), it may substitute the decision that in its opinion should have been made and affirm the sentence passed by the trial court or impose a sentence that is warranted in law.

122 In addition, s. 117, also describes the power of the court on appeal to require additional evidence to be produced.

117.(1) The court may, where it considers it to be in the interests of justice,

(a) order the production of any writing, exhibit or other thing relevant to the appeal;

(a.1) amend the information, unless it is of the opinion that the defendant has been misled or prejudiced in his or her defence or appeal;

(b) order any witness who would have been a compellable witness at the trial, whether or not he or she was called at the trial,

(i) to attend and be examined before the court, or

(ii) to be examined in the manner provided by the rules of court before a judge of the court, or before any officer of the court or justice of the peace or other person appointed by the court for the purpose;

(c) admit, as evidence, an examination that is taken under subclause (b)(ii);

(d) receive the evidence, if tendered, of any witness;

(e) order that any question arising on the appeal, that,

(i) involves prolonged examination of writings or accounts, or scientific examination, and

(ii) cannot in the opinion of the court conveniently be inquired into before the court,

be referred for inquiry and report, in the manner provided by the rules of court, to a special commissioner appointed by the court; and

(f) act upon the report of a commissioner who is appointed under clause (e) in so far as the court thinks fit to do so.

(g) Where the court exercises a power under this section, the parties or their representatives are entitled to examine or cross-examine witnesses, and, in an inquiry under clause (1)(e), are entitled to be present during the inquiry and to adduce evidence and to be heard.

123 Justice of the Peace Bubba himself felt troubled by the lack of information before him. Counsel for the defendants advised that Michel Blais was available for questioning should the judge wish further information from him before he passed sentence. The justice of the peace declined to do so. A justice of the peace is not required to ask an accused person if he wishes to address the court before passing sentence where an accused is represented. A justice of the peace is required to make inquiries of ability to pay a fine. Admittedly at page 350 of *Proceedings at Trial* the justice of the peace did ask counsel for the defendants if they required time to pay the fine and one year was requested.

124 It is the Crown's position that I should rely on *R. v. Proulx*, *[2000] S.C.J. No. 6*, (S.C.C.) and give deference to the sentencing judge and not alter the sentence unless I find that the sentence is demonstrably unfit.

125 Failure to consider a relevant factor in sentencing has been held to justify an appeal of sentence in *R. v. Shropshire*, *[1995] 4 S.C.R.227* (SCC). In addition, in *Czumak v. Etobicoke (City)*, (Ont. Ct. Prov. Div.), this court has held that it is an error in principle to impose a fine without an investigation into the defendant's ability to pay it, or to impose a fine which he or she lacks the means to pay within a reasonable time.

126 Under the circumstances, I find that the Justice of the Peace committed an error in not further inquiring into the defendants' ability to pay a fine and, as a result, I will grant the appeal against sentence.

127 The further question to be determined is the procedure to be followed on the appeal of the sentence. As described in section 122 and 120(3), of the Provincial Offences Act, this court may receive additional evidence and vary the sentence imposed.

128 Neither of those two sections direct the appeal court to remit the issue of the appropriate sentence to the Justice of the Peace who heard the trial. Rather, the statutory language would seem to require, or at the very least allow, this court to receive more evidence or invite submissions in order to determine the proper sentence to be imposed.

SUMMARY OF APPELLATE FINDINGS

129 Essentially, this court, sitting as an appellate court, has upheld the convictions of the defendants as found by Justice of the Peace Bubba.

130 However, this court has found that the Blais' were indeed members of the Sault Ste. Marie Metis community and did find that the Crown did have an obligation to negotiate sharing of forest resources with the local Metis Community. It has, however, declined to impose a stay.

131 This court has found that the defendants did not prove that the Sault Ste. Marie Metis community had a section 35 right to commercially harvest timber in the Algoma forest.

132 The court has also affirmed the lower court decision that the *Crown Forest Sustainability Act* does in fact apply and the constitutional challenge to such legislation fails.

133 The court was satisfied that based on the current case law and the facts of this case, the defendants were able to make full answer and defence without waiting for the *Sayers et al* case to proceed. Although there are some similarities in the defences raised in both cases, there are significant differences in the two cases. As a result the request to adjourn the hearing of this appeal until the case of Sayers has been heard and decided is dismissed

134 This court was not satisfied that the defendants had proven that the lands on which they logged were even part of lands claimed to be BFN treaty lands. Even if such lands were in fact claimed to be within BFN treaty lands, the court was satisfied that the relevant provincial legislation did in fact apply to such lands.

135 As a result, this court also denies the defendants their request for a new trial to take place following the trial of *Sayers et al*.

136 However, the request that the sentence imposed on the defendants be set aside is granted, and this court invites further submissions on the fitness of sentence, and the jurisdiction that this court has to remit the issue of sentencing to the justice of the peace. Counsel are to notify the OCJ trial coordinator within 15 days of the release of these Reasons for a date before me for further submissions.

Appeal allowed in part; convictions upheld, sentences set aside.

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