

 **R. v. Gagnon, [2006] O.J. No. 4738**

Ontario Judgments

Ontario Court of Justice

Sturgeon Falls, Ontario

G. Lecouteur J.P.

Oral judgment: November 15, 2006.

Court File Nos. 04-294, 04-295, 04-296 and 104915

[2006] O.J. No. 4738

Between Her Majesty the Queen, and Stephne Gagnon, Jamie Violette, Jeff Violette and John Larabie

(52 paras.)

Case Summary

Charges: S. 4(1)(a) Ontario Fishery Regulations (x3) — S. 18(1) Ontario Fishery Regulations

Counsel

N. Adamson Counsel for the Crown, Ministry of Natural Resources

J. Larabie On His Own Behalf, Agent for S. Gagnon, Jeff Violette, Jamie Violette

REASONS FOR JUDGMENT

G. LECOUTEUR J.P. (orally)

1 The matters before this Court arose out of two separate incidents. The first incident deals with the defendants, Jamie Violette, Jeff Violette and John Larabie where Conservation Officer Clark testified that on February 13 of 2002, while on snowmobile patrol, he came upon a group of fishermen on the south shore of Lake Nipissing, just north of the mouth of the French River.

2 He found Bobby Violette, his sons Jamie Violette and Jeff Violette, and John Larabie engaged in fishing through the ice. Officer Clark further testified that he found that they were fishing with a total of ten lines. John Larabie claimed five of the lines. Jamie and Jeff Violette each claimed two lines and Bobby Violette, who is not charged, claimed one line.

3 This group of fishermen had caught a total of seven fish. At this point, Conservation Officer Clark further testified that he asked the four men to produce their fishing licences. He was advised by Jamie Violette, Jeff Violette and

John Larabie that they did not have fishing licences and that they were fishing pursuant to their Ontario Metis Aboriginal Association cards. Each then provided the officer with OMAA cards. I am not going into the numbers on each card, however, it is clear that each provided OMAA cards to the Conservation Officer. Bobby Violette provided a valid fishing licence.

4 As a result, Conservation Officer Clark subsequently charged Jamie Violette, Jeff Violette and John Larabie with angling without a licence, contrary to Section 4(1)(a) of the Ontario Fishery Regulations. He further charged John Larabie with angling through the ice with more than two lines, contrary to Section 18(1) of the Ontario Fisheries Regulations.

5 The second incident deals with the defendant, Stephane Gagnon, which is alleged to have occurred on January 18 of 2003. This incident involved Conservation Officer Reg Devost who testified that, on the morning of January 18th of 2003, he was conducting snowmobile patrol to check anglers on Lake Nipissing. While on patrol, he came upon Stephane Gagnon who was engaged in angling through the ice with two lines.

6 Mr. Gagnon was asked to produce a fishing licence. Initially, he told Officer Devost that he had forgotten his fishing licence at home. But later, he produced an Ontario Outdoor card which had an expired angling sticker attached to it. Officer Devost then charged Mr. Gagnon with angling through the ice without a licence, contrary to s. 4(1)(a) of the Ontario Fishery Regulations.

7 Even though Mr. Gagnon had his OMAA card on his person on that particular day of January 18, 2003, it was not provided to Officer Devost until March 20 of 2003 at his first appearance in court. Mr. Gagnon, at that time, provided his OMAA card, number 0413607681.

8 It should be noted at this point that, even though we are dealing with two separate incidents, one having occurred on February 13, 2002 and the other incident having occurred on January 10 (sic) of 2003, the issues raised in both of these trials are similar in that none of the defendants are disputing the facts giving rise to the charges, or the actions of the individual Conservation Officers that dealt with their respective incidents.

9 The only real issue that needs to be decided by this Court is whether or not the defendants demonstrated that they have a Metis right under Section 35 of the Constitution Act, 1982 to fish for food in the vicinity of Lake Nipissing.

10 The burden of proving an Aboriginal right lies with the person claiming the right. In this case, all defendants claimed a right as Metis under OMAA of which each felt that, as members of OMAA, they have the right to engage in the activity of fishing without a licence.

11 Section 35(2) of the Constitution Act states that, "In this Act, Aboriginal people of Canada includes the Indians, Inuit and Metis people of Canada."

12 In support of the defendants' claim, defence counsel relied on various case law and also on the testimony of each defendant. The case law that was provided was that of the case of *R. v. Powley*, [\[2003\] 2 S.C.R. 207](#); *R. v. Sparrow*, [\[1990\] 1 S.C.R. 1075](#); *R. v. Van der Peet*, [\[1996\] 2 S.C.R. 507](#); *R. v. Adams*, [\[1996\] 3 S.C.R. 101](#).

13 Each defendant gave testimony outlining their individual background and family heritage. Also, Genealogist, Mr. Lacroix, who was sworn in as an expert, gave testimony on behalf of each defendant to establish his family history.

14 Mr. Lacroix's testimony, however, was limited to genealogy and did not extend to history, sociology or demographics. It was certainly established through the testimony of Mr. Lacroix that each defendant's genealogy confirmed some Aboriginal ancestry at some point in time.

15 In the case of Stephane Gagnon, ancestry was traced back to the 17th century some 12 generations back.

Through genealogy, Mr. Lacroix was able to trace Mr. Gagnon's ancestors from Trois Rivieres through the 1657 marriage of Pierre Couc/Lafleur and Marie Mite 8 ameg (8 L 8 e), Mitconninqui. From there, it was traced to Detroit in the early 1700's and back to Quebec from the mid-1700's until a move to Sudbury at some point between 1878 and 1900.

16 Dealing with the Violette genealogy, Mr. Lacroix identified three ancestors of Metis heritage while tracing back 13 generations to the 17th century. The Violettes ancestors first appear in the Sturgeon Falls area between 1881 and 1916. The Violettes' great-great grandparents, Alex Baudet and Josephine Belanger, were married in Lotbiniere in 1881. Their great-grandparents, Eddy Baudet and Rose-Alba Lepage, were married in Verner 1916.

17 Dealing now, with the genealogy of John Larabie, Mr. Lacroix traced back 12 generations to the 17th century. Ancestors of Mr. Larabie first appear in the Sturgeon Falls area at some point between 1917 and 1940. Mr. Larabie's grandparents, Theophile Labelle and Delphine Paquette, were married in Gracefield, Quebec in 1917. His parents, Ludger Larabie and Claire Labelle, were married in Markstay, Ontario in 1940. From this, we can conclude that the family of John Larabie must have moved from Gracefield to Markstay at some point between 1917 and 1940.

18 Mr. Lacroix further testified that Mr. Larabie is the direct descendent of the renowned explorer, Jean Nicolet, who apparently spent some time in the vicinity of Lake Nipissing in the mid-1600's before returning to Quebec. Mr. Lacroix further testified that, during his time, that is, Jean Nicolet's time, he married a Nipissing Indian woman and the offspring of that marriage, Madelaine Euphosine Nicolet is Mr. Larabie's ancestor through 11 generations removed.

19 Mr. Lacroix also testified and identified Madelaine Euphosine Nicolet as Metis. Mr. Lacroix, however, admitted in cross-examination that even using the term "Metis" in regards to Madelaine Euphosine Nicolet, it was only to indicate a mixed Aboriginal and non-Aboriginal heritage and not to indicate membership in a distinctive Metis community.

20 Defence also provided testimony of Henry Anishnabe in support of the defendants' claims. Mr. Anishnabe is an elder of the Nipissing First Nations from Garden Village Reservation. His testimony was of little assistance to this Court, with all due respect to Mr. Anishnabe. Mr. Anishnabe is a status Indian and not a Metis and his testimony revealed that he did not know the defendants personally and that he had only met them the day before the trial. He said that he had been contacted by Mr. Larabie recently to see if he could help him. So, technically, his testimony was of very little assistance.

21 In reviewing each individual defendant's testimony, it was clear that each defendant identified themselves as Metis through their enrolment with the Ontario Metis Aboriginal Association, their presentation the membership card with the Ontario Metis Aboriginal Association, and through their belief of ancestral heritage supported by the genealogy reports submitted.

22 Each defendant also has established that, socially, they sometimes attend Pow-wows, participate in activities such as picking berries, gathering of plants, hunting, fishing, or attending OMAA meetings. Mr. Larabie, on his own behalf, established that he is the President of Zone 4 of OMAA, known as the Woodland Metis Community and has been a member of OMAA since 1970.

23 The book of authorities which was provided was carefully reviewed. In this particular book it is certainly established that:

"Metis rights are Aboriginal rights enshrined in S. 35 of the Constitution Act, 1982. Like all Aboriginal rights, the flow from historical traditions and practices of Aboriginal communities. Like all Aboriginal rights, Metis rights are communal and site specific. The first decision on Aboriginal rights from the Supreme Court, *R. v. Sparrow*, affirmed the communal nature of Aboriginal rights.

In 1996, the Supreme Court of Canada released two decisions that are relevant to this particular case, as well. The first, *R. v. Van der Peet*, affirmed the communal nature of the Aboriginal rights in the clearest of terms. Rights flow only from the 'traditions, customs, and practices of the particular Aboriginal community claiming the right.' Later that year the court released its decision in *R. v. Adams*, affirming the site specific nature of Aboriginal hunting and fishing rights.

In *R. v. Powley*, the Supreme Court confirmed that Metis rights, like all other Aboriginal rights, are community based rather than individual and that they are site specific. The Supreme Court emphasized that the term 'Metis' refers to distinctive communities, not to all individuals who happen to have mixed Indian and European heritage."

24 The case of *Powley* appears to provide the framework that has been adopted when dealing with cases such as the ones before this Court. There must be evidence of: An historic Metis community living in a distinctive Metis lifestyle as of the time of the effective European control. That, the Metis community remained in place from the time of European control. That, he or she self-identifies as a member of the modern Metis community and is accepted as a member by the modern community. That, he or she has an ancestral connection to the historic community. That, the fishing practice was integral to the distinctive culture of the Metis community at or near the location where the fishing took place.

25 *R. v. Powley* also indicates that:

"Membership in a Metis political organization such as the one here, OMAA, by itself, is not sufficient to establish membership and acceptance in a modern Metis community ... the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundations for the right being claimed. Membership in a Metis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Metis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Metis community's identity and distinguish it from other groups."

26 After considering the testimony of each defendant, the testimony of the genealogist, Mr. Lacroix, and applying the formula as laid out in the Supreme Court of Canada case of *R. v. Powley*, I can only conclude that none of the defendants provided this Court with evidence to establish that any historic Metis community existed in the area of Sturgeon Falls prior to the time of European control or, that such a community was in place from the time of European control.

27 Evidence provided by the defendants clearly indicated that their ancestors only moved in the area of Sturgeon Falls after effective European control. While there is no evidence before the Court of the date of effective European control in the area of Sturgeon Falls or Lake Nipissing, in the *Powley* case the Supreme Court placed a date in Sault Ste. Marie at 1850 when the Robinson-Huron Treaty was signed. And, in accordance with the Robinson-Huron Treaty, apparently Lake Nipissing was covered by that particular treaty. Therefore, it could be assumed that the date of effective European control in the vicinity of Lake Nipissing cannot have been later than 1850.

28 According to the evidence of Mr. Lacroix, the ancestors of all the defendants moved to the area after 1850. With regards to Stephane Gagnon, it appears that his ancestors would have moved to the Sudbury area at some point between 1978 and 1900.

29 With respect to Jamie and Jeff Violette, it appears that their ancestors would have moved to the Sturgeon Falls area between 1881 and 1916.

30 With regards to Mr. Larabie, it appears that his ancestors first appeared in the Sturgeon Falls area between 1917 and 1940, save and except the mention of the renowned Jean Nicolet. However, on the connection to Jean

Nicolet and Mr. Larabie, no clear testimony was ever provided that the offspring of Jean Nicolet ever belonged to an organized or an historic Metis community within the District of Nipissing or within the area of Sturgeon Falls.

31 Therefore, this Court concludes that the failure to provide any evidence of any historic Metis community existing in the area of Sturgeon Falls just prior to effective European control is fatal to the defendants' claims. This Court finds that the defendants have not succeeded in providing the required standard of evidence to substantiate the existence of an historic Metis community in the vicinity of Sturgeon Falls.

32 The Court, therefore, denies the defendants' application for relief under Section 35 of the Constitution Act, 1982 and convictions will be registered against all defendants on each count as charged.

33 Now, having dealt with the decision, Mr. Adamson, I would ask you to make submissions that you wish to make in regards to penalty that needs to be applied to each count.

SUBMISSIONS BY COUNSEL AND AGENT

34 G. LECOUTEUR J.P.: So, in regards to Stephane Gagnon, the fine will be \$50, \$5 for court costs plus the applicable surcharge at time of payment. Mr. Gagnon, how much time do you need to pay your fine, sir?

35 MR. GAGNON: Thirty days.

36 THE COURT: You will be accorded 30 days to pay your fine. With regards to Jeff and Jamie Violette for fishing without a licence, is there anyone here for Jamie and Jeff Violette?

37 MR. VIOLETTE: We're both here.

38 THE COURT: You're both here?

39 MR. VIOLETTE: Yes.

40 THE COURT: Okay. At the beginning I asked if everyone was here and nobody said he was here.

41 MR. VIOLETTE: Sorry.

42 THE COURT: All right. So, you understood everything that took place then?

43 MR. VIOLETTE: Yes. Yes.

44 THE COURT: All right. Your fines will also be \$50 each, \$5 for court costs plus the applicable victim fine surcharge at the time of payment. Jamie, how much time do you need to pay your fine?

45 MR. JAMIE VIOLETTE: Tomorrow.

46 THE COURT: All right. I'll endorse it 15 days for payment to allow the procedure to take place. Jeff ...

47 MR. JEFF VIOLETTE: Same.

48 THE COURT: All right, 15 days for payment. Mr. Larabie, stand up. In regards to your charge for fishing without a licence you will pay the fine of \$50, \$5 for court costs plus the applicable surcharge at time to payment. How much time do you need to pay your fine, sir?

49 MR. LARABIE: Fifteen days.

50 THE COURT: Fifteen days to pay. And, in regards to fishing with too many lines, you will pay a fine of \$100, \$5 for court costs plus the applicable victim fine surcharge at the time payment. How much time do you need to pay this fine, sir?

51 MR. LARABIE: The same.

52 THE COURT: The same, 15 days to pay.

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