Métis Rights

Section 35(2) of the *Constitution Act, 1982* includes Métis people in its definition of the "[A]boriginal peoples of Canada."[1] In 2003, the Supreme Court of Canada defined the "Métis" as "distinctive peoples who, in addition to their mixed [Aboriginal and European] ancestry, developed their own customs, way of life, and recognizable group identity."[2]

However, the test for identifying Aboriginal rights under section 35 — the *Van der Peet* test — looks to practices, customs, or traditions that existed *before European contact*. The Métis would therefore fail to meet the *Van der Peet* test for an Aboriginal right because they only came into existence after European contact. For this reason, the Supreme Court of Canada in *R v Powley* modified the *Van der Peet* test to account for the unique nature of the Métis peoples.

The *Powley* Test for Métis Rights

Like the *Van der Peet* test for identifying Aboriginal rights, the test for Métis rights focuses "on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land."[3] The test has eight steps:

- Characterize the nature of the claimed right. This is no different from the *Van der Peet* test, which identifies the nature of the right being claimed by considering the nature of the complainant's action, the nature of the impugned Crown action, and the practice, custom, or tradition that gives rise to the right being claimed.[4]
- An identifiable Métis community must exist and must have "shared customs, traditions and a collective identity" which are tied to a specific site.[5]
- The present-day Métis community must perpetuate their ancestral community's distinctive practices.[6]
- The claimant must show that they are part of the contemporary Métis community that holds the claimed right.[7] This is a three-part test: (a) they must self-identify as a member of the Métis community; (b) there must be evidence of an ancestral connection to the historic Métis community (by birth, adoption, or otherwise); and (c) they must be accepted by the modern Métis community.[8]
- The practice, custom, or tradition that gives rise to the claimed right must have arisen before the community "came under the effective control of European laws and customs."[9] The relevant time period is thus "post-contact but pre-control."[10]

- The practice, custom, or tradition must have been "integral" to the "distinctive culture" of the Métis community.[11]
- There must be "[c]ontinuity [b]etween the [h]istoric [p]ractice and the [c]ontemporary [r]ight [a]sserted,"[12] although there is flexibility to allow for the evolution of that Aboriginal practice over time.[13]
- The right must be an "existing" right and cannot have been extinguished.[14]

Once a Métis right is established, the court must determine whether that right was infringed, and, if so, the Crown may attempt to justify the infringement according to the test set out in the Supreme Court's *Sparrow* judgment.[15]

[1] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35(2).

[2] *R v Powley*, 2003 SCC 42 (CanLII) at para 10 .

[3] *Ibid* at para 37.

[4] *Ibid* at para 19 (citing *R v Van der Peet*, 1996 CanLII 216 (SCC) at para 53).

[5] *Ibid* at para 23.

[6] *Ibid* at paras 24 and 27.

[7] *Ibid* at para 29.

[8] *Ibid* at paras 31-33.

[9] *Ibid* at para 37.

[10] *Ibid*.

[11] *Ibid* at paras 41 and 44.

[12] *Ibid* at para 45.

[13] *Ibid*.

[14] *Ibid* at para 46.

[15] *Ibid* at para 10.