A Guide to R. v. Kipp Kelley

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What is the Kelley Case?

In December 2004, Kipp Kelley, member of the Métis Nation of Alberta ("MNA"), was teaching his children how to trap squirrels in the tradition of his Métis culture. Mr. Kelley was harvesting just outside Hinton, Alberta, which is located on the eastern edge of Jasper National Park (280 km west of Edmonton). Mr. Kelley was charged for hunting without a license under s. 24(1) of the *Wildlife Act.*

At trial, before Judge Norheim of the Alberta Provincial Court, Mr. Kelley presented two separate defences to the charges. First, he claimed that he had a right to harvest that was protected by s. 35 of the *Constitution Act, 1982*. Second, he claimed that his harvesting was protected by the *Interim Métis Harvesting Agreement* (the "IMHA").

Judge Norheim found that the Mr. Kelley self-identified as Métis, had Métis ancestry and was accepted by the Métis community in and around Hinton. The evidence also showed that Mr. Kelley's family had trapped for at least three generations, that trapping was integral to his Métis culture, and that he was teaching his children how to trap as a part of their Métis culture. Based on these findings of fact, the trial judge found that Mr. Kelley was an eligible Métis harvester under the IMHA and that his trapping was within the terms of the IMHA.

With respect to Mr. Kelley's first defence, the trial judge found that he had provided the court with insufficient evidence to establish a Métis right to harvest protected by s. 35 of the *Constitution Act, 1982*, consistent with the test set out by the Supreme Court of Canada in *R. v. Powley*. The trial judge held that while Mr. Kelley had proved that he was Métis, he did not provide enough historical evidence to establish that he was exercising a constitutionally protected Métis right to trap.

With respect to the second defence, the judge found that Mr. Kelley was harvesting within the terms of the IMHA. However, he went on to say that the IMHA could not operate as a defence to his charge under the *Wildlife Act*. To the extent that the IMHA conflicted with or attempted to extend rights that had been granted under the *Constitution Act, 1982*, the IMHA, according to the trial judge, had no effect.

While the trial judge found that Mr. Kelley was harvesting within the terms of the IMHA, he went on to convict Mr. Kelley because he concluded that the IMHA was not legally enforceable. The essence of his finding was that the IMHA was simply an agreement between the Alberta Government and the MNA. Such an agreement, the judge held, could not be used to shield a group of people from the law. Unless the government made the IMHA a regulation, it was not law, and therefore, Mr. Kelley and other Alberta Métis could not claim its protection and could not use it as a defence in court.

What is the IMHA?

In 2003, in *R. v. Powley*, the Supreme Court of Canada confirmed, that Métis people have harvesting rights that are protected by s. 35 or the *Constitution Act, 1982*. In September 2004, in order to accommodate Métis harvesting practices in Alberta, the IMHA was negotiated and signed by the Métis Nation of Alberta and three Alberta Ministers. The IMHA states that Métis can hunt, fish and trap for subsistence purposes on unoccupied Crown lands throughout the Province of Alberta to which they have a right of access ("Harvesting Lands"), subject to safety and conservation rules and regulations. A copy of the IMHA is available at www.albertametis.com.

Mr. Kelley, supported by the MNA, appealed Judge Norheim's decision. On appeal, before Justice Verville, of the Alberta Court of Queen's Bench, Mr. Kelley did not dispute the trial judge's finding that he had not proven that he had a s. 35 right to harvest based on the *Powley* test. The central issue in the appeal was whether Métis harvesters, like Mr. Kelley, can rely on the IMHA as a defense against harvesting charges.

What did the Alberta Court of Queen's Bench Say?

It is not the role of an appeal court to retry a case. The role of the appeal court is to determine if the trial judge made any errors. The Queen's Bench appeal judge found that the trial judge did not commit an error in determining that Mr. Kelley is Métis and his trapping came within the IMHA. He also found that the right to harvest for subsistence includes the incidental right to teach the younger generation to harvest.

"In my view, where the Crown has knowledge of the potential existence of Aboriginal rights and where it contemplates state conduct - such as charges and prosecutions in relation to the licensing requirements of the Act - that might adversely affect those rights, it has a duty to take action toward addressing the problem."

- *Kelley*, para. 64

"Alberta was under a constitutional imperative … This means that where a course of action results in an accommodation (even a temporary one), the Aboriginals in question must be able to rely on the accommodation. If not, the constitutional imperative has not been adequately fulfilled."

- *Kelley*, para. 66

Since 1990, courts have consistently urged governments and Aboriginal peoples to negotiate, rather than litigate. Instead of time consuming, adversarial and costly litigation, the courts have recommended negotiated accommodations as the preferred means of reconciling Aboriginal and non-Aboriginal interests.

The appeal judge affirmed that s. 35 and the honour of the Crown combine to create a *constitutional imperative* on governments to determine, recognize and respect Aboriginal rights. This imperative is achieved through a process of reconciliation that includes, ongoing consultation, negotiations and accommodations as the Crown and Aboriginal peoples move towards final settlements. This imperative applies to provincial governments with respect to Métis rights generally and Métis harvesting rights specifically.

The appeal judge noted that the IMHA was entered into by Alberta in an attempt to fulfill its *constitutional imperative* after the *Powley* decision. The accommodation – the IMHA – arrived at between Alberta and the MNA is a part of the mandated reconciliation process.

The IMHA and accommodations like the IMHA do not depend on first proving a constitutionally protected Aboriginal right. Métis did not have to establish Métis harvesting rights across all of Alberta prior to Alberta entering into an accommodation with them. Accommodations are workable arrangements that achieve the *constitutional imperative*, outside the adversarial process and without the cost of litigation. Accommodations have benefits for all involved.

The IMHA, a province-wide accommodation, is not inconsistent with or contrary to the existing case law on Métis harvesting rights. Negotiated agreements such as the IMHA do not have to exactly mirror the result if Métis rights were litigated with respect to each hectare of Alberta.

Alberta argued that there was no duty on government to negotiate or consult in a quasi-criminal context, such as proceeding with the prosecution of a Métis harvester. The appeal judge said that, whether or not that is true, the fact is that in this case Alberta did consult and negotiate in advance of and in contemplation of this case. The IMHA is the result of these consultations and negotiations. The honour of the Crown is implicated throughout these negotiations and in the implementation of the resulting agreement.

The honour of the Crown demands that the Crown follow through on the commitments it makes in these non-prosecutorial agreements, whether with Aboriginal or non-Aboriginal peoples. Further, in a situation like this where the non-prosecutorial agreement is negotiated between the Crown and an Aboriginal people in fulfillment of a constitutional imperative, the honour of the Crown demands that the Aboriginal peoples who negotiated and entered into the accommodation, be able to rely upon it.

Accommodation agreements like the IMHA must be reconcilable with the rule of law. The appeal judge found that the IMHA was meant to provide an exemption from Alberta's fish and wildlife regulatory regime to eligible Métis harvesters. However, in its current form, the IMHA's exemption is not authorized under Alberta's own statutes and regulations. The appeal judge pointed out that this is a legal defect that could be easily corrected. In this regard, the appeal judge noted that Alberta's Governor in Council has the authority to authorize the IMHA's exemption pursuant to s. 104(1)(c) of the *Wildlife Act*, but it had not done this.

"If it was not the intent of the Government to authorize the act in question, then the IMHA itself is so misleading that a conviction for an offence relating to activity described in article 6 can only be characterized as abusive. In my view, to hold otherwise would reflect very poorly on the administration of justice in this Province, regardless of the status of the IMHA."

- *Kelley*, para. 78

Alberta argued (contrary to the express words of the IMHA) that the IMHA only protects those Métis who can establish s. 35 rights and that because the IMHA was not incorporated into Alberta's statutes and regulations, Métis could not rely on it as a defence to charges. Justice Verville noted that the Crown appeared to want to "have their cake, and eat it, too" with this argument. Even though Justice Verville found the IMHA to be "legally unenforceable" in its current form, he recognized that Mr. Kelley and others like him have relied on the IMHA. The Court held that Mr. Kelley would be severely prejudiced if the Crown was able to proceed with charges against him even though the Alberta Government signed a formal agreement which clearly authorized the harvesting activity he undertook.

The Court also pointed out that if Alberta was able to proceed with charges, the Alberta Métis community would, in effect, be in a worse position than if there had been no negotiations or accommodation with the province. Clearly, this was not what courts have contemplated by encouraging governments and Aboriginal peoples to negotiate accommodations.

The Court concluded that since Alberta negotiated and signed an agreement that expressly accommodated Métis harvesting rights, it would be "egregious" and "shock the conscience of the community" for a conviction to ensue when the activity was contemplated and authorized by such agreement. Moreover, it would be extremely unjust for an individual Métis harvester, who relied on the Crown's commitments within the IMHA, to have to solely shoulder the consequences of the IMHA's technical legal defect. Because, in this situation, it would be an abuse of process for charges to result based on Métis relying on the IMHA, Justice Verville set aside the lower court's conviction and granted a stay.

"Whether or not the agreement constitutes part of Alberta's regulatory regime, or was otherwise properly given legal effect, the Alberta Métis community was entitled to assume it was binding on the Crown."

- *Kelley*, para. 78

In addition, the Court recognized that this was a "test case" and that the remedy granted (i.e. a stay based on reliance on the IMHA) may not be open to all Métis harvesters in the future, if, for example, Alberta publicly clarifies its interpretation of the IMHA, cancels the IMHA or the IMHA is replaced by a longer term harvesting agreement. The Court acknowledges that in the future Alberta could choose another course of action in order to fulfill its constitutional duties.

However, the Court was clear that even if the IMHA was cancelled, the Alberta Government would still be under a *constitutional imperative* to accommodate Métis harvesting practices in Alberta, "given its knowledge that the Act [the Wildlife Act] breaches certain as yet unascertained rights of non-Settlement Métis in Alberta."

Frequently Asked Questions

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It was prepared at the request of the Métis Nation of Alberta as an easy-to-read guide on the Kipp Kelley appeal.

The full decision of the Alberta Court of Queen's Bench and additional information on the Kelley appeal are available at www.albertametis.com.

I am an eligible Métis harvester under the IMHA, can I harvest without fear of being charged?

Until Alberta expressly states that Métis cannot rely on the IMHA, terminates the IMHA, or replaces it, Métis harvesters can continue to rely on the IMHA. This does not mean that Alberta will not charge Métis harvesters, it just means that the courts have said that Alberta should not be charging Métis harvesters or, if Alberta does lay charges, the courts will hold Alberta to its commitments within the IMHA.

How can the IMHA be 'legally unenforceable', but also be able to be relied upon by Métis harvesters as a defence against charges?

The Court has sent a message – Alberta was wrong not to take the appropriate legal steps to make the IMHA a part of the regulatory regime (i.e. make it legally enforceable). As such, the Métis, who have relied on Alberta's commitments within the IMHA, should not be charged by Alberta because of this technical defect. The courts are willing to uphold the IMHA based on the honour of the Crown. This is how the IMHA can be 'legally unenforceable', but be able to be relied upon by Métis harvesters at the same time.

Why is the Kelley case important?

Kelley is a test case. It provides greater confidence for Alberta Métis harvesters who are relying on IMHA. It affirms that governments are under a constitutional imperative to accommodate Métis harvesting rights and that agreements negotiated and entered into between the Crown and Aboriginal peoples will be upheld by the courts. It also provides legal guidance for future accommodation agreements since it is now clear that governments must incorporate these agreements into their regulatory regimes or they are vulnerable to legal challenge.

What happens next?

Alberta has 30 days (from January 23rd, 2007) to appeal the *Kelley* case to the Alberta Court of Appeal. The MNA has written to the Alberta Government requesting that the IMHA be deemed a regulation within Alberta's fish and wildlife regulatory regime in order to correct the legal deficiency pointed out by the Court. As of yet, the MNA has not received a response from the Alberta Government. Negotiations between the MNA and Alberta on a longer term harvesting agreement continue.