CAP Review & Analysis of a Federal Powley Policy Paper

This document is a review and analysis of an interim Federal policy paper on the implementation of the Supreme Court of Canada's (SCC) Powley decision of September 19, 2003. The policy has been circulated to all federal departments involved in the management of federal Crown land and resources in or on which the Aboriginal harvesting rights of Métis peoples in Canada might be practiced. It was circulated to the Congress of Aboriginal Peoples (CAP) in mid-March, 2005.

Although very welcome as a source of information as to how the federal government plans to approach implementation of Métis harvesting rights, it is also disappointing and disturbing in terms of its narrow view and proposed applications.

In summary, and from the perspective of the CAP Métis constituency, the paper is essentially a pre-emptive strike into the Métis rights arena designed to control, if not usurp those rights as they may be practiced on Federal Crown land. Not only does the policy refuse to recognize the right upheld by the SCC, (See pages 2, 6 and 10) but proposes to unilaterally impose restrictions on the practice of the right that go beyond those criteria established by the SCC decision. (See pages 6 and 7) To add insult to injury, the policy all but invites provincial and territorial governments to do the same. (See pages 2 and 7)

In effect the policy creates a mega-licensing system by forcing Métis harvesters and/or organizations to have or issue government-approved "harvesting cards" only to those Métis who can prove their ancestry to centuries-old pre-colonial Métis communities that still survive today. (See pages 7 and 8) Given the expense of such a process to the individual harvester, we can only imagine the uproar it would create if such criteria were applied to non-Aboriginal harvesters.

The policy, while "balancing the interests of all Canadians *against* the practices of Aboriginal groups who may hold these [federally unrecognized] rights," (See page 5) procedes to insert "existing federal harvesting policies" into the SCC decision. The SCC text actually held that government legislation has "no force or effect" when it interferes with the constiutionally recognized Aboriginal right of Métis to hunt for food.

The catch 22 created by the policy is whether compliance with it indicates acceptance by Métis harvesters of federal "management practices" which clearly infringe on the right, and overtly deny recognition of the right in three different statements.

The "damage-control" character of the proposals in the policy blatantly attempts to assert the very jurisdiction over Métis harvesting for food that the SCC decision has struck down in Ontario. Released only a few weeks before results of a year-long Powley research project are to be submitted to government by participating Métis organizations, we can only hope that the policy really is "interim" in nature and that further consultation with federal, provincial and territorial jursidictions will succeed in modifying the document along more accommodating lines.

For the sake of readability, the federal paper is displayed in the left column of each page and the corresponding CAP analysis in the right column. Some phrases and sentences are highlighted in red (or light gray if the document is copied) to indicate significant elements in the document and/or analysis.

Martin F. Dunn

Federal Powley Policy Text

Interim Federal Guidelines Approach to the Identification of Métis for the purposes of Federal Aboriginal Harvesting Policies

March 2005

Preamble:

While the provincial and territorial governments are primarily responsible for the management and regulation of most natural resources within their boundaries, **the Government of Canada is responsible for the management and regulation of those natural resources under its control.** These areas include the use and access of federal Crown lands (*e.g.*, National Parks and other federal protected areas, military bases and ranges), as well as migratory birds and coastal fish species.

As such, the federal government has many Acts, regulations and policies that apply at a national level, in order to ensure consistent and respons–ible management of these resources across the country. These Acts, regulations and policies are enforced by the appropriate federal department, with the support of other federal departments and agencies, as well as by provincial governments.

Key federal departments and agencies that manage or regulate federal Crown lands and resources include: Fisheries and Oceans, Environment Canada - Canadian Wildlife Service; Parks Canada Agency; National Defense; Natural Resources Canada; and the Royal Canadian Mounted Police.

Many of these **departments have policies in place to accommodate Aboriginal harvesting, where harvesting is permitted.** This is because Aboriginal peoples of Canada have a special relationship to the land and its resources.

Policy Text Analysis

Although a preamble if often thought of as a symbolic or even inconsequential introduction to a document, such is not the case in this preamble.

In effect, what this preamble attempts to establish is federal jurisdiction and control, when they are exercised on Federal Crown lands, over the Métis harvesting rights recognized by the Supreme Court of Canada (SCC) in the Powley decision. The inclusion of provincial and territorial governments invites them to do the same.

The next paragraph asserts that Federal Acts, regulations and policies -- in the name of "consistent and responsible mangement" -- will be the paramount mechanism by which Métis harvesting rights will be "managed."

This assertion could be interpreted as flying in the face of the Conclusion of the SCC decision text:-

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> 55. The constitutional question is answered as follows:
>
> Are ss.46 and 47(1) of the Game and Fish Act, R.S.O. 1990 c. G1, as they read on October 22, 1993, of no force or effect with respect to the respondents, being Métis, in the circumstances of this case, by reason of their Aboriginal rights under s. 35 of the Constitution Act. 1982?
>
> Answer: Yes.

The decision clearly establishes that "Ontario's lack of recognition of any Métis right to hunt for food and the application of the challenged provision infringes the Métis aboriginal right."

Surely the same logic would apply to Federal "provisions," -- especialy since this policy, specifically denies recognition of a Métis right to harvest for food. (See pages 5 and 6)

Federal Powley Policy Text

Many live a traditional lifestyle, and continue to rely upon harvesting as a way of life with wild game as primary or supplementary source for their diet.

- The Department of Fisheries and Oceans policy for _coastal fisheries_ allows Aborig–inal groups who meet the criteria of the Aboriginal Fisheries Strategy to access food, social, ceremonial and commercial fisheries by way of providing them a communal fishing licence.
- The Canadian Wildlife Services policy allows an Aboriginal person to harvest _migratory birds_ without a permit, in or out of season, for food, social and ceremonial purpose.
- There is no hunting allowed within _Department of National Defence properties_, _migratory bird sanctuaries_, or in most _National Parks_.

Harvesters who claim they are an Aboriginal person for the purposes of these policies, must identify and prove themselves as such to the federal resource and enforcement officers on the-ground. With respect to First Nations and Inuit harvesters, and Métis harvesters north of 60[1], federal resource and enforcement officers may rely upon a variety of government issued or recognized cards, such as Indian Act registration cards, land claim beneficiary cards and general hunting licences (north of 60). There is no similar identification tool for federal resource and enforcement officers to identify an individual who claims to be Métis south of the territorial borders.

Policy Text Analysis

While admitting the need for policies to "accommo-date Aboriginal harvesting where harvesting is permitted," the federal text deftly avoids admission of a legal and inherent Aboriginal right to this har-vesting by deferring to "a special relationship to the land" and "a traditional lifestyle" and "harvesting as a way of life," "for their diet."

The following listing of accommodations that various Federal Departments "allow" Aboriginal people to undertake again avoids the legal fact that various SCC decisions have established that governments have no legal jursidiction to prevent them. These policies were only adopted after federal and SCC court decisions forced them to "allow" Aboriginal people to exercise their inherent Aboriginal rights.

At the same time, unfortunately, many of these decisions also introduced criteria which enabled governments to impose requirements of "proof" before the right could be exercised by a given individual.

While admitting the existence of several "pratical" licensing regimes developed for registered Indians, Inuit, and claims benefiiaries, the policy bemoans the lack of "a similar identification tool" for those who "claim to be Métis" south of 60. Which begs the question .... and whose fault is that?

Federal Powley Policy Text

Purpose:

The purpose of these interim guidelines is to:

- provide immediate guidance to federal departments and their resource and enforcement officers on **how to identify an individual harvester as Métis, in a consistent manner across the country, on a principled basis,** for the purposes of existing federal Aboriginal harvesting policies.
- contribute towards a consistent federal approach in respect of Métis harvesting, which takes into account provincial arrangements for identification of Métis harvesters and current forms of Métis self-organization.
- ensure stable management of land, water and other natural resources under federal jurisdiction (federal resources) while accommodating Métis access to these resources for the purpose of harvesting.

Background:

Supreme Court of Canada decisions over the past thirty years have affirmed that First Nations and Inuit people have a special relationship to the land and its resources, and that they can and do hold Aboriginal rights to harvest for food. Until recently, the Supreme Court of Canada has not addressed the existence of Métis Aboriginal rights to harvest.

On September 19, 2003, for the first time, the Supreme Court of Canada recognized and affirmed that the Métis community in and around Sault Ste. Marie held a constitutionally protected Aboriginal right to harvest for food (*R. v. Powley*). **More importantly, the Supreme Court set out a test for establishing Métis Aboriginal rights** that has application across the country.

Policy Text Analysis

While rationalizing their Powley policy on the grounds of a "consistent and principled approach," the text actually exposes the dog's breakfast that federal harvesting policy represents. Having admitted that different approaches are necessary to accommodate Indians, Inuit and claim beneficiaries, the policy now asserts the difficulty of developing an accommodation for Métis harvesters.

The reference to "recongized and affirmed" is not actually part of the wording of the SCC Powley decision (except when quoting Section 35) and begs the question of why it is being used here.The fact that this text considers "the test for establishing Métis Aboriginal rights" a more important part of the SCC decision than the recognition of the right itself is indicative of the position the federal government has decided to take on the right itself. (See pages 5 and 6).

Federal Powley Policy Text

Aboriginal harvesting rights, including Métis rights, are **contextual and site-specific**. Aboriginal rights are **communal rights**, they must be grounded in the **existence of a historic and present day community**, and they may only be exercised by virtue of an individual's **ancestrally-based membership** in the present community.

It is up to the **Aboriginal collective to provide the proof of an Aboriginal right,** if they so assert one. However, at the same time, governments must continue to manage lands and natural resources in a responsible manner, balancing the interests of all Canadians **against** the practices of Aboriginal groups who may hold these rights.

This means that all federal Acts, regulations and policies take steps to accommodate the **possible existence of Aboriginal rights to harvest**, to ensure that such a right is not unjustifiably infringed upon. However, **such accommoda–tions are not a recognition of the existence of the Aboriginal rights of any specific Aboriginal group.** While these Acts, regulations and policies were found to be broadly written to **accommodate Aboriginal harvesting practices**, it was determined that there were little to no tools to identify a Métis individual on-the-ground for the purposes of implementing these regulatory mechanisms.

As a result, it was determined that **there needed to be a set of principled criteria established for the determination of who could claim to be a Métis harvester for the purposes of implementing existing federal Aboriginal harvesting policies.** These guidelines do not override the other elements of the existing federal harvesting policies, their criteria must still be met (*e.g.*, the Aboriginal Fisheries Strategy requires that there is an accepted Aboriginal community and sets out the criteria for that determination).

Policy Text Analysis

The emphasis here on the "the existence of a historic and present day community" ignores the specific expression of the SCC decision which emphasizes that the "continuity requirement puts the focus on the continuing practices of members of the community, rather than, more generally, on the community itself ..." (SCC text para. 27)

The introduction of an undefined "Aboriginal collective" which must provide proof of an Aboriginal right in a context in which Aboriginal/Métis individuals are facing charges is disturbing, as is the admission that governments must manage (read defend) "all Canadians against the practices of Aboriginal groups..."

In spite of the clear and unambiguous recognition of the Métis Aboriginal right to hunt for food in the SCC decision itself, the policy text only admits " the possible existence of Aboriginal rights to harvest."

It then goes even further and situplates that existing "accommodations" are "not a recognition of the existence of the Aboriginal rights of any specific Aboriginal group."

It would be more accurate to say these Acts, regulations, and policies were designed to restrict rather than accommodate Aboriginal harvesting. The use of the word "practices" seems relatively innocuous, until later in the text. (See page 6) And once again the lack of "identification tools" for Métis is specified.

Whatever the phrase "principled criteria" might mean, (see page 6) they are evidently only going to be used "for the purposes of implementing existing federal Aboriginal policies."

Apparently existing criteria for federal harvesting policies must still be met regardless of the Powley decision's stipulation that such government "provisions" clearly infringe the right in circumstances where the government "does not recognize any Métis right to hunt for food." (Powley SCC decision para 47 and 48) -- a circumstance specifically confirmed as a principle of this policy. (See page 6)

Federal Powley Policy Text

Rather, they are intended to complement the existing policies, allowing a consistent application across the country when accommodating Métis access to federal lands and resources for the purpose of harvesting, where such harvesting is permitted.

Scope:

These guidelines for the identification of Métis apply to all federal departments that manage or regulate federal Crown lands and natural resources, where they have Aboriginal harvesting policies in place, or where they permit access by Aboriginal people to federal lands and natural resources for the purposes of harvesting.

In all cases, if the action of the harvester raises a conservation or public safety issue, or is in an area where harvesting is not permitted, the federal resource and enforcement officer will lay relevant charges, and may seize equipment and goods.

Principles:

- ***This approach does not recognize Métis Aboriginal rights: it does not either confirm nor deny the existence of Métis Aboriginal rights.***
- This approach is based on the premise that harvesting may occur, where permitted, for the purpose of food, social and ceremonial requirements but **not for commercial purposes.**
- This approach seeks to ensure the continuance of culturally appropriate harvesting practices within the boundaries of public health and safety, conservation.

Policy Text Analysis

Apparently there is no need to change existing policies to accommodate Métis harvesting "where such harvesting is permitted" and, we add, where Métis have been excluded for decades. The policy opts for "a consistent application across the country" despite the later inclusion (see page 7) of scrip -- which was only distributed in the prarie provinces -- as a valid element for Métis identification.

Following the principle that the more things change the more they stay the same.

An unambiguous statement of "principle" that clearly contradicts the Powley decsion by refusing recognition of Métis Aboriginal rights upheld in the decision while precariously perching on a confirm or deny fence. The SCC decision stipulates that "Ontario's blanket denial of any Métis rights to hunt for food canot be justified." (SCC Text para 47)

Although the Powley decision was applied specifically to the right hunt for food, the SCC did not pronouce one way or the other on hunting for commercial purposes.

Again the emphasis on "culturally appropriate practices," as distinct from Aboriginal rights. Presumsably the resource officers determine the boundaries of public health and conservation.

Federal Powley Policy Text

- This approach is founded on the goal of ensuring conservation and good management of the species being harvested and allows for monitoring of the use of the resource(s).
- **This approach parallels the federal policy approaches for identification and harvesting access that are made for First Nations and Inuit.**
- This approach seeks appropriate harmonization with provincial operational and regulation guidelines (*e.g.*, regarding residency).

Interim Identification Criteria to determine who is a Métis for purposes of Harvesting:

The following are inclusive and **must be demonstrated by the individual:**

- Person declares themselves to be: **Métis, or a member of a Métis community.**
- **Ancestral connection to a historic Métis community** as evidenced by:
  - Family **scrip** records, census, archival, church or other historical records (with genealogical connection demonstrated) to demonstrate ancestry; or,
- **Certain Métis membership cards** where:
  - the organizationhas a genealogy requirement
  - the organization is undertaking work to ensure their **membership or harvester identification system is objectively verifiable;** and,
  - the government[2] may audit the membership or harvester system to ensure that it is objectively verifiable and have confidence that it may be relied upon for its purposes of applying its harvesting policies.

·Residency within the province or territory in question.

Policy Text Analysis

Again the indivdual practicing the right is is placed at the mercy of the opinion of a MNR official.

The policy may parallel the criteria established for First Nations and Inuit, but the infrastructure and resources to provide the tools of identification are provided by the federal government in those cases and not in the case of Métis.

It is safe to presume that what is appropriate is determined by the governments (federal and provincial) involved.

It is here the "parallel" federal policy for Métis takes off on a very different track, especially if "inclusive" means each Métis harvester must satisfy all of these criteria simutaneously at the time of contact with MNR officials during the harvest, or risk arrest and/or confiscation of property.

An interesting distinction here that follows the SCC stipulation that a person can be a member of a Métis community without identifying as a Métis.

Since Halfbreed scrip was issued only in the prairie provinces and to "halfbreeds" of any mixture of Indian and European blood, this section would appear to contradict the policies goal of "national consistency" in that it provides an advantage to prairie mixed bloods which is not available to others in other parts of the country.

In effect, this section dictates much of the criteria for harvester identification and/or membership cards in Métis organizations. It is likely the requirement that membership system be "objectively verifiable" would eliminate more traditional identification systems such as the verbal testimony of elders and sworn statements of applicants.

Again, contrary to the consistency principle declared in the policy, those Métis harvesters who do not choose to belong to an organization -- or where no organization is available -- are placed at a distinct disadvantage to those who obtain membership or harvester cards. It also fosters an organizational division between members who do not qualify as harvesters and those who do.

The SCC decision does not deal with the question of residency -- except on reserve. The clause clearly pre-empts discussion on the mobility of Métis rights.

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Procedures when Interim Identification Criteria are not met (and there are no health, public safety or conservation issues):

When a person is claiming a Métis Aboriginal right to harvest, but cannot provide the appropriate documentation as specified above, federal resource and enforcement officers who are aware of the potential (alleged) violation will record, investigate the situation and take action appropriate to the potential impact on the resources. **In general, the initial enforcement response will be Observe, Record, Report (ORR) only.**

The federal resource and enforcement officers shall use their discretion to the situation at hand, and on a case-by-case basis consider the following:

- Was any harvest taken for personal or commercial use?
- Did the method or quantity of any harvest have a significant impact on the resource?
- Is the species being harvested threatened or endangered?
- Is the activity being conducted in an area where harvesting access is prohibited?

Types of information that the federal resource and enforcement officer may record and submit to their appropriate authorities could include (in keeping with departmental practices):

- name of individuals and/or groups involved;
- method of identification
- did they self-identify as Métis?

Policy Text Analysis

The procedures in this section are a clear improvement over charge, arrest and seizure, but still places the individual MNR officer as the sole arbiter in any on-the-ground situation.

The fuzzy language of this section at least implies that "enforcement" will only be triggered if the "violation" has a negative impact on the resource involved.

The following section, however , lists no less than 10 questions or isssues which an officer can apply at "their discretion" to any given situation. Many of these issues and questions were not specfically addressed by the SCC decsion and appear to be a kind of trojan moose introduced to reinforce the status quo in terms of legilsated "infringement" of the right.

The SCC decision does not directly address the issue of commercial use.

The SCC decision does not address the method or quantity of harvesting.

The SCC proviso on Métis entitlement to a "priority allocation" is not addressed by this policy.

The fact that any "prohibition" involved may not be a legal or valid infringment of constitutional Métis right is ignored in the policy.

What the "departmental practices" might be are uncertain, since the policy is rationalized on the premise that such practices, prior to this policy, did not yet exist for Métis harvesters. (See page 3).

Group harvesting is not addressed in the SCC decision.

The SCC decision provides the possibility of just identifying as a member of a Métis community "by birth, adoption or other means" (SCC Text para 32.)

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- did they claim affiliation with a particular Métis community or organization?
- nature of activity;
- nature of potential violation;
- type and quantity of the species taken;
- whether the harvesting occurred in or out of season
- decision taken and justification (see criteria above which federal resource and enforcement officers should consider on a case-by-case basis); and
- location of harvesting activity and residence of individual.

Federal resource and enforcement officers also will request that the person claiming a Métis Aboriginal right to harvest to provide, within a set period of time, documentation or other relevant information to demonstrate her/his Métis identification of affiliation, and where relevant any authorization under any relevant programs, such as the Aboriginal Fisheries Strategy.

If possible, the individuals involved should be advised that they are conducting harvesting activities which may be illegal and warned of the potential implications, including the possibility that charges may be laid if the unauthorized activity continues.

An assessment will be made by the federal resource and enforcement officers in consultation with appropriate authorities based on departmental procedures (*e.g.*, Crown prosecutors, supervisors, resource departments) regarding the possible need for further

Policy Text Analysis

Again the SCC decision, although it refers to "membership" does not refer to residency as a requirement to exercie Métis harvesting rights.

This overt threat of prosecution ignores the SCC admonishment that "... the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Consitution of Canada." (SCC text para 49)
This proposal, in effect, gives federal officers defacto control over what is authorized and what is pronounced illegal in the exercise of the right.

At best this inevitably time consuming process could delay exercise of harvesting rights long beyond the period where the food involved would be required.

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enforcement actions, up to and including the laying of charges. Each situation will have to be evaluated based on the specific circumstances involved. ***Factors to be considered include the quantity harvested, the potential for violence and the likelihood that a lack of enforcement action will lead to an increased level of unauthorized harvesting activity. If, based on the best available information, there is a significant risk of an escalation of unauthorized harvesting activity or of conflicts/ confrontations involving other groups (e.g., commercial harvesters, or members of First Nations) more direct enforcement action, such as gear seizures, may be required.***

Practical Application:

No changes are required to accommodate Métis harvesters who reside in the territories.

In certain provinces, work by the Métis leadership is ongoing to identify Métis harvesters and to develop more objectively verifiable membership systems. This work may lead to ***the development of a memorandum of understanding (MOU) between the Government of Canada and the Métis organization***. As a result of such an MOU, the federal resource and enforcement officers may rely upon the membership or harvester cards of the organization to identify the individual as Métis for the purposes of applying the federal Aboriginal harvesting policies. Use of these cards is an aid for the federal resource and enforcement officers to apply the appropriate federal Aboriginal harvesting policies, **and their use does not constitute a recognition of Aboriginal rights.**

Federal resource and enforcement officers will continue record information to assist with the management and conservation of the resources, unless there is a reporting back element in the

Policy Text Analysis

At this point the policy not only reaches far beyond the SCC test framework, but actually requires the signing of a document, without which, it may well be impossible to exercise harvesting rights without being prosecuted.

Since most Métis in Canada do not belong to any Métis organization, it places members of those communities who are not organized on that basis at an extreme disadvantage. The only process stipulated in the policy to accommodate these harvesters is the hopelessly expensive requirement to present objectively verifiable proof of ancestry etc. within a time frame set by natural resource officers. (See page 9)

For the third time in this document (See pages 4 & 6) recognition of Aboriginal rights is denied.

Federal Powley Policy Text

MOU (where the Métis organization will report to government on the harvest by their harvesters). Information gathered may include: name of individuals and/or groups involved; method of identification; nature of activity; nature of potential violation; type and quantity of the species taken; whether the harvesting occurred in or out of season; location of harvesting activity; and residence of individual.

Where the individual is not in possession of a objectively verifiable membership or harvester's cards, the federal resource and enforcement officers will rely upon a variety of enforcement measures, beginning with the recording of information mentioned above. ***The federal government retains the right to lay charges in the future if sufficient information is not provided.***

If the action of the harvester raises a conservation or public safety issue, or is in an area where harvesting is not permitted, the federal resource and enforcement officers may lay relevant charges, and may seize equipment and goods.

(Footnotes)

[1] In the Northwest Territories (and Nunavut) existing legislation and regulations accommodates Métis harvesting in the same manner as for Inuit and Dene – through the issuance of General Hunting Licences (GHL), registered trap lines, and domestic fishing licences (allows the use of nets). Land claim beneficiary cards may also be used.

[2] ***This will be demonstrated through a memorandum of understanding between the Government of Canada and the organization in question. The memorandum of understanding will address the key terms for the use of the membership or harvesting cards, such as the principles for the audit requirement to ensure an objectively verifiable system and reporting back on the harvesting activities requirements.***

Policy Text Analysis

Here we find the crux of the federal policy. The only right recongized in the policy is the right of the federal government to lay charges where "sufficient information is not provided."

This arrangement ensures the maintenance of the status quo -- i.e. federal control of the harvesting right through existing legislation etc.

These MOU's not only ensure federal government approval of membership/harvester criteria, but impose an audit and reporting system that could be used to prevent harvesting under any other circumstance.