Interpretation of Principle 3 (Criterion 3.1)  

Report of the Ad-Hoc Standards Interpretation Committee  
August 31st, 2011

A. Background

In January 2011, the Ministère de Ressources Naturelles et de la Faune (MRNF) filed a Standard Interpretation Request with FSC Canada regarding the position of FSC’s National Boreal Standard (2004) with regards to Métis communities. In accordance with FSC Canada’s Standards Interpretation Policy (2006), the Board of Directors of FSC Canada appointed a four-member Ad-Hoc Interpretations Committee consisting of the following people:

- Larry Joseph, Aboriginal Peoples Chamber
- Michel Lessard, Economic Chamber (Committee Chair)
- Louis Bélanger, Environmental Chamber
- Jean Teillet, Social Chamber

The Standard Interpretation Request asks the following question concerning the interpretation of Principle 3, and more specifically Criterion 3.1 in the National Boreal Standard (2004).

**QUESTION posed by MRNF in Standard Interpretation Request (Principle 3, Criterion 3.1) – [translation from French]:** “To date, no formal demonstration has been made of the presence of historical Métis communities of the territory of Quebec who meet, in an impecunious manner, the criteria of the Powley decision (2003). In this context, does FSC Canada recognize communities that have self-identified as Métis on the same basis as legally recognized Aboriginal communities?”

In order to properly respond to this question, there are a number of factual corrections and clarifications that the Committee felt were necessary. The Committee therefore clarifies the question as follows, and has provided in this document its response to this question:

**QUESTION: Does the FSC National Boreal Standard (Principle 3) recognize Métis communities in Quebec, and is this recognition the same as that afforded to legally recognized Aboriginal Peoples?**


The following references from the National Boreal Standard (2004) relate directly to the interpretation of the question posed above. The complete standard is available at [www.fsc加拿da.org/borealstandard.htm](http://www.fsc加拿da.org/borealstandard.htm).

**Principle #3: Indigenous Peoples’ Rights**

The legal and customary rights of Indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.
Intent 3 [excerpts]:
• “Indigenous rights are collectively held rights, therefore most of the language referring to Indigenous rights in this standard refers to ‘Indigenous Peoples’ or communities as a whole, and not to individuals.”
• “The term ‘Indigenous Peoples’ in Canada means ‘Aboriginal Peoples’ as defined in the Constitution Act, 1982 to include “Indians, Inuit and Métis.””
  o Please note, the Committee offers the following factual clarification on this statement: s. 35(2) of the Constitution Act, 1982 does not include “Indians, Inuit and Métis”. It includes the “Indian, Inuit and Métis peoples of Canada”.
• “Métis” are recognized in Canada, although identity and membership criteria are vague bordering on ‘self-identification’ rather than genealogy for Métis individuals. The courts of Canada have recognized the ‘Métis’ as having some limited ‘Aboriginal rights’ to ‘site specific’ activities such as hunting rights. The legal framework related to Indigenous peoples in Canada is constantly evolving.”
  o Please note, the Committee offers the following factual clarification on this statement: Métis are recognized in the Constitution Act of 1982. The criteria for identification of a Métis community are described by the Supreme Court of Canada in Powley¹ as a group of Métis living together in the same geographic area and sharing a common way of life. Individual members of the contemporary Métis community must demonstrate that they are ancestrally connected to the historic Métis community. The contemporary Métis community must also be in continuity with a historic community. The Supreme Court of Canada in Powley also confirmed that Métis hunting rights are similar to those of First Nations.
• “Consultation processes with Indigenous Peoples as described in Principle 3 apply not only to standard elements under Principle 3, but also to elements in other Principles and Criteria.”

Criterion 3.1: Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.

Intent 3.1 [excerpts]:
• “Indigenous lands and territories in Canada have been defined legally as: 1) those areas where Aboriginal title still exists, that is where no treaties are in place; and 2) those areas subject to historical (pre-Confederation and post-Confederation) or modern-day treaties.”
  o Please note, the Committee offers the following factual clarification on this statement: Indigenous lands and territories in Canada are those areas where Aboriginal title and resource rights continue to exist. These existing rights and title are not dependent on treaties or modern land claims agreements.
• “Treaties do not delegate control and do not mean that Indigenous communities no longer have an interest in managing their lands and territories.”
  o Please note, the Committee offers the following factual clarification on this statement: Many modern land claims agreements do in fact delegate control, in various aspects and to different degrees, over Indigenous land and territories.
• “The onus is on the applicant to make best efforts to obtain informed consent, understanding that there may be exceptional circumstances that may influence whether or how consent is achieved given that circumstances vary from Indigenous community to Indigenous community.”
• “FSC requires from all certificate holders to comply with ILO Conventions including ILO Convention 169 on Indigenous and Tribal Peoples[...].”

Criterion 3.2: Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of Indigenous Peoples.

Intent 3.2:
“The existence of a Treaty does not mean that Indigenous communities have given up their tenure and use rights. In the absence of a treaty, Aboriginal rights exist. Applicants do not interpret treaties or Aboriginal rights. Their responsibility is to address the impact of forest operations on those tenure and use rights. These use rights apply at a broader scale (for example forest conditions over time which may affect fishing, hunting, trapping, and gathering), as opposed to site-specific issues addressed under 3.3.”
  o Please note, the Committee offers the following factual clarification on this statement: Issues such as fishing, hunting, trapping, and gathering are in fact site-specific issues.
B. Consideration by the Ad-Hoc Standards Interpretation Committee

In the context where:

i. A Métis community is described by the Supreme Court of Canada in Powley\(^1\) as a group of Métis living together in the same geographic area and sharing a common way of life. The contemporary Métis community must be in continuity with a historic community.

ii. The community does not usually equate to a settlement (eg: a town, village or city). Métis communities typically are regional entities. The geographic area may be quite large (eg: in Goodon\(^2\) the geographic area was approximately 45,000 sq. km.).

iii. Métis harvesting rights may have a geographic territory that is larger than the community. For example, the court in R. v. Morin & Daigneault\(^3\) identified the harvesting area as most of northwestern Saskatchewan (equivalent to Treaty 10).

iv. The contemporary Métis community does not have to look exactly like the historic community in size, location or way of life. The community may have dispersed or relocated.

v. A Métis community is not just a few individuals who have done their genealogies, discovered their ever-so-great Indian grandmothers and then recently created a society. A Métis community is not just one family.

vi. A Métis community is not simply a group of individuals but involves a distinct history, culture and shared kinship connections. If an individual’s history, culture and shared kinship connections are to a First Nation, then that individual is not Métis.

vii. A Métis community may exist within another community. For example, the present city of Winnipeg grew up around an old historic Métis community. Today, the Métis community continues to exist – largely located in St. Boniface, St. Vital and St. Norbert – but is subsumed within the modern day city of Winnipeg.

viii. There must be continuity from the contemporary Métis community to an historic Métis community. The continuity requirement is not simply a genealogical tracing of one individual. The chain of evidence can have gaps, but must continue.

ix. Historic Métis communities can be identified in the historic records. If the Métis community cannot be readily found today or historically, it is likely that the Métis community either: (a) never existed in the first place; or (b) that the individual members of the community merged into the greater Quebec society; or (c) that the members moved – likely west to join other Métis communities there.

x. The courts have imposed a time requirement on a claim for aboriginal rights protected under s. 35 of the Constitution Act, 1982. For Métis, the court looks for the period of “effective control”. For Indians, the court looks for the date of “contact”. Effective control entails searching for the time period when the incoming settlers become so predominant that there is a significant change in the lifestyle of the Métis. Effective control is usually a period of time, not a specific date. (eg: 1815-1850 in the Upper Great Lakes). The purpose of the time is to understand the lifestyle of the aboriginal group so that its traditional practices, customs and traditions are protected. Effective control is a fact and is achieved at different times in each part of the province. The date in the southeastern parts of Quebec will likely be much earlier than in the northern or western parts of the Province.

xi. The Supreme Court of Canada has said that the claim must not be of recent vintage, meaning that there will be no support for Métis claims that have only recently been made.

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\(^2\) R. v. Goodon [2009] 2 CNLR 278, the geographic area was approximately 45,000 sq. km

C. Response by the Ad-Hoc Standard Interpretation Committee

Within the context provided above, the Ad-Hoc Standards Interpretation Committee confirms that YES, FSC Canada and the National Boreal Standard (2004) recognize Métis communities, as long as these communities credibly demonstrate that they meet the Powley Criteria.

The Committee addressed the question posed by the MRNF by considering firstly whether Principle 3 of the National Boreal Standard (2004) applies to Métis communities; secondly, how Métis communities are identified; and thirdly, who is responsible for verifying whether a Métis community has met the identification criteria. Based on this analysis:

1. The Committee confirms that Principle 3 of the National Boreal Standard (2004) applies to Métis communities. This is stated explicitly in Intent 3 of the standard, as referenced above.

2. The Committee confirms that the criteria for identifying Métis communities established by the Supreme Court of Canada in the Powley decision are the appropriate means for identifying a Métis community in the National Boreal Standard. The requirements for a community to be identified as a Métis community that would qualify under Principle 3 are therefore as follows:
   2.1 Historic Métis community: The community must demonstrate that it is a historic Métis community. This requires documentary evidence of a group of Métis in a region of Quebec (or elsewhere) that saw itself, and was seen by others, as distinct from Indians and non-aboriginal people. The historic Métis community had to exist prior to effective control. Since Métis history does not predate recorded history it will exist in the documentary record (e.g. fur trade records, church records, census data, colonial records, government documents) and from other primary sources.
   2.2 Continuity: The contemporary community must demonstrate that it has continuity and still exists as a distinct culture. This requires documentary evidence that the historic community persisted, despite the fact that it may have changed from historic times. Gaps in the evidence chain (e.g. genealogical records) are acceptable if they are not of too long a duration.
   2.3 Contemporary Métis community: The community must demonstrate that it is a contemporary Métis community. This requires evidence that the descendants of the historic community remain in the area today. Some members may be dispersed in the region and some may live in settlements. The search is not for a community that lives in a tightly bounded area.

3. The Committee confirms that the applicant for FSC Forest Management (FM) certification (‘the Applicant’) is responsible for verifying whether a Métis community meets the verification criteria (2.1, 2.2, and 2.3). This may be accomplished by either of the following methods, or a combination of these:
   3.1 Court decision: A court decision that has confirmed the existence, or not, of a specific Métis community is considered sufficient demonstration of whether a Métis community exists and is eligible under Principle 3. Please note:
      3.1.1. In the absence of a court case regarding the existence of a particular Métis community, the Applicant must consider Documentary Evidence as described in 3.2 below.
      3.1.2. In the case of on-going court cases, the Applicant must consider Documentary Evidence as described in 3.2 below. If the courts reach a decision regarding the

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4 Please refer to Section B (x.) above for a definition of ‘effective control’.
existence of a Métis community that is different from the Applicant’s, it is the court’s decision that has precedence.

3.2. Documentary Evidence:
3.2.1. The Métis community is responsible for providing the Applicant with documentary evidence that credibly meets the Powley criteria, as listed above (2.1, 2.2, and 2.3).
3.2.2. The Applicant is responsible for determining if the documentary evidence provided by the Métis community meets the criteria listed above (2.1, 2.2, and 2.3), and therefore whether the community is eligible under Principle 3.
3.2.3. In order for the Applicant to meet item 3.2.2 above, the Applicant must engage an independent expert to evaluate and verify whether the documentary evidence provided by the Métis community meets the Powley criteria. An independent expert shall be an expert who:
   3.2.3.1. Does not have a vested interest in the Applicant or Métis community and is therefore independent.
   3.2.3.2. Has expertise in the area of Canadian history, and preferably in Aboriginal history and is therefore a credible expert. Examples of the type of experience and skills that a qualified, credible expert would exhibit include, but are not limited to:
      - Masters or PhD in Canadian History or Aboriginal Peoples’ History;
      - Published, peer-reviewed articles on Aboriginal Peoples, Métis communities or related topic;
      - Worked as a court-appointed expert on Aboriginal and Métis issues; and
      - Experience teaching Aboriginal and/or Métis studies at a recognized academic institution.
   3.2.3.3 It is the role of the Certification Body conducting the FSC certification audit to verify that the expert engaged through 3.2.3 is independent and credible.